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S.C. SUPREME COURT

**STATE OF SOUTH CAROLINA
In The Supreme Court**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Opinion No. 5620

Appellate Case No. 2019-000693

Bradley Sanders.....Petitioner,

v.

**South Carolina Department of Motor Vehicles
and Columbia Police Department..... Respondents below,**

Of whom South Carolina Department of Motor Vehicles is the Respondent.

APPENDIX

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Bradley Sanders, Appellant,

v.

South Carolina Department of Motor Vehicles and
Columbia Police Department, Respondents below,

Of whom South Carolina Department of Motor Vehicles
is the Respondent.

Appellate Case No. 2016-000228

Appeal From The Administrative Law Court
S. Phillip Lenski, Administrative Law Judge

Opinion No. 5620
Submitted September 1, 2017 – Filed January 30, 2019

AFFIRMED

Heath P. Taylor, of Taylor Law Firm, LLC, of West
Columbia, for Appellant.

Frank L. Valenta, Jr., Philip S. Porter, Brandy A.
Duncan, all of Blythewood, for Respondent.

LOCKEMY, J.: Bradley Sanders appeals the suspension of his driver's license by the Department of Motor Vehicles (DMV). The Office of Motor Vehicles Hearings (OMVH) sustained the suspension and the Administrative Law Court (ALC) affirmed. On appeal, Sanders argues the ALC erred in affirming (1) the admission of hearsay evidence to establish his inability to submit to a breath test,

and (2) the finding that Officer Scott Desrochers presented a prima facie case that the individual who determined Sanders was unable to submit to a breath test was a licensed medical professional pursuant to section 56-5-2950(A) of the South Carolina Code (2018). We affirm.

FACTS/PROCEDURAL BACKGROUND

On November 21, 2012, at approximately 4:00 a.m., Officer Desrochers of the Columbia Police Department was dispatched to the scene of a single-car accident on Whaley Street in the City of Columbia. Officer Desrochers found Sanders standing nearby, bleeding from the head and smelling strongly of alcohol. Officer Desrochers verified the personal belongings in the vehicle belonged to Sanders. Sanders denied being in an accident and could not explain how he injured his head. Officer Desrochers claimed Sanders' speech was slurred and Sanders seemed both mentally and physically "off-balance." Sanders was transported by ambulance to Lexington Medical Center.

At a hearing before the OMVH, Officer Desrochers testified that at the hospital he was told by Nurse Albright that Sanders would not be able to provide a breath sample. Sanders objected based on hearsay. The OMVH hearing officer found the testimony was not offered to prove Sanders was unable to provide a breath sample. The DMV offered a South Carolina Law Enforcement Division (SLED) urine/blood collection report signed by Nurse Albright, stating Sanders was unable to leave the hospital for medical reasons in order to take a breath test.¹ Sanders again objected based on hearsay, arguing the report should not be submitted because (1) there was no proof that Nurse Albright was a nurse and (2) he was unable to cross-examine Nurse Albright regarding her credentials and the medical reason he was unable to provide a breath sample. The hearing officer concluded the report was admissible "not for the fact that [Albright] was a licensed nurse . . . , but that [Officer Desrochers] relied upon what she said." Officer Desrochers stated that after Nurse Albright informed him that Sanders would not be able to provide a breath sample, he read Sanders his Miranda warnings and his notice of implied consent. Officer Desrochers claimed he also provided Sanders a written copy of the implied consent notice, which stated his license would be suspended if he did not provide a blood sample. Officer Desrochers testified Sanders refused to provide a blood sample; accordingly, Sanders was arrested, his license was suspended, and he was transported to jail. Officer Desrochers believed Nurse Albright was a nurse

¹ The report did not specify the medical reason why Sanders was unable to leave in order to provide a breath sample.

because her name tag stated she was a nurse; however, on cross-examination, he admitted he did not know for sure.

On February 13, 2015, the hearing officer issued an order affirming the suspension of Sanders' driver's license. The hearing officer concluded Officer Desrochers' testimony was not hearsay because it was not admitted to prove that Sanders was actually unable to leave the hospital, only that the blood sample was warranted because licensed medical personnel determined Sanders was unable to provide a breath sample. Further, the hearing officer found the DMV presented a prima facie case that Albright was a licensed medical professional because she was in the hospital treating patients, represented herself as a nurse, and wore a name tag that indicated she was a registered nurse. Sanders appealed to the ALC, and by amended order filed January 27, 2016, the ALC affirmed the hearing officer's order, sustaining the suspension of Sanders' driver's license. This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act (APA)² governs appellate review of ALC decisions. S.C. Code Ann. § 1-23-610(A) (Supp. 2018). The APA provides:

The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

² S.C. Code Ann. §§ 1-23-310 through -400 (2005 & Supp. 2018).

- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B) (Supp. 2018). Accordingly, the ALC's decision "should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008).

"Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence." *Id.* at 605, 670 S.E.2d at 676.

LAW/ANALYSIS

Under South Carolina law, a motorist arrested for driving under the influence implicitly consents to a chemical test of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs. S.C. Code Ann. § 56-5-2950(A) (2018).

At the direction of the arresting officer, the [motorist] first must be offered a breath test to determine the person's alcohol concentration. If the [motorist] is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken.

Id. If a motorist refuses to submit to a test conducted pursuant to section 56-5-2950(A), the motorist's license must be immediately suspended. S.C. Code Ann. § 56-5-2951(A) (2018).

Here, Officer Desrochers did not offer Sanders a breath test. Consequently, unless one of the exceptions provided in section 56-5-2950(A) applies, Office Desrochers cannot request a blood sample from Sanders. We examine the exceptions below.

Section 56-5-2950(A) provides a blood sample may be requested by an officer if "the [motorist] is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead. . . ." Thankfully, Sanders was not dead and there is no evidence he had an injured mouth or was unconscious.

The next clause in the statute provides the focus of this case. It states an officer may request a blood sample "for any other reason considered acceptable by . . . licensed medical personnel." S.C. Code Ann. § 56-5-2950(A) (2018). Officer Desrochers requested a blood sample after Nurse Albright informed him Sanders was physically unable to provide a breath sample.

In *City of Columbia v. Moore*, 318 S.C. 292, 295, 457 S.E.2d 346, 347 (Ct. App. 1995), this court held an officer who was informed by "someone" at the hospital that a motorist suspected of driving under the influence could be in the hospital all night, was not authorized to request a blood sample in lieu of a breath sample. The court reasoned the officer's decision to order a blood sample was not based upon a reason found acceptable by licensed medical personnel as required by the statute. *Id.* at 294, 457 S.E.2d at 347. Over a decade later, this court examined this issue again in *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). Writing for the court, Judge Ralph King Anderson provided, in his illustrious and scholarly style, a comprehensive history of this court's opinions on section 56-5-2950(A). Judge Anderson noted times where this court "explicated," "inculcated," and "elucidated" its thoughts on the requirements of the statute. *Id.* at 601, 654 S.E.2d at 290-91. The *Peake* court determined the suspension of a motorist's license was improper because it was based "only on the unsubstantiated reason considered acceptable" by the arresting officer. *Id.* at 603, 654 S.E.2d at 292. Thus, it is established law that the opinion that a motorist is incapable of giving a breath sample, which opens the door to a blood sample request, cannot come from some mysterious "someone" in a medical facility or from the arresting officer but must be rendered by licensed medical personnel.

This leads to the first key challenge posed by Sanders: Did Officer Desrochers receive information from licensed medical personnel that Sanders was physically unable to provide a breath sample? Sanders argues the ALC erred in finding Officer Desrochers presented a prima facie case that Nurse Albright was licensed medical personnel. Utilizing our standard of review, we find the ALC did not err. Nurse Albright signed a medical collection report indicating she was a registered nurse and wore a nametag that identified her as a nurse. Officer Desrochers also observed Nurse Albright performing medical tasks and treating patients. These activities can only be done by an individual licensed in the medical field. Substantial evidence was presented to support the determination that Nurse Albright was, indeed, licensed medical personnel.

Sanders next argues the ALC erred by admitting hearsay evidence to establish his inability to submit to a breath test. Hearsay is a "statement, other than one made

by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Sanders argues Nurse Albright's statements made to Officer Desrochers regarding his inability to submit to a breath test were hearsay and required her presence in court. We disagree. Nurse Albright's statements and the blood collection report did not constitute hearsay because they were not offered to prove the truth of the matter asserted, i.e., that Sanders was unable to submit to a breath test.

The dissent is a well-reasoned opinion but places a "troublemaking associate" role on the main player in this story. Hearsay is not involved in our story. The lead role and key words belong to "the truth of the matter asserted." As the arresting officer, Officer Desrochers had the authority to request a blood sample from Sanders as long as one of the exceptions provided in section 56-5-2950(A) applied. Officer Desrochers testified he requested a blood sample in lieu of a breath sample in this case because Nurse Albright, a licensed medical professional, had determined Sanders could not provide a breath sample. Officer Desrochers' testimony regarding Nurse Albright's finding and the blood collection report she signed were not offered to prove Sanders was in fact physically unable to provide a breath sample, rather they were introduced to show Officer Desrochers received this information from a licensed medical professional and subsequently made the decision to request a blood sample.

Sanders, as well as the dissent, would require Nurse Albright to appear at the hearing and testify as to her reasons for finding Sanders was not a candidate for a breath test. If this were the standard, Sanders would likely present well-known experts in many medical fields at the hearing in an effort to refute the opinion of Nurse Albright as hastily rendered and unfounded.

To require Nurse Albright to appear and defend her reasoning as to why a motorist could not provide a breath sample exceeds the requirements of section 56-5-2950(A). The statute by its very wording anticipates an officer receiving the opinion of a medical professional. The statute does not require the arresting officer to question the medical professional's opinion or to get a second opinion. Rather, the statute provides an officer is entitled to request a blood sample if medical personnel find that for *any reason* the motorist cannot take a breath test. Thus, whether there was truth in the matter Nurse Albright asserted is not relevant in this administrative procedure. Officer Desrochers' testimony that he received information from licensed medical personnel was not to prove Nurse Albright was correct in her assessment that Sanders could not take a breath test. Rather, Officer Desrochers only sought to establish, pursuant to the statute, that he received

medical information regarding Sanders' inability to give a breath sample. Nurse Albright's statement, whether true or not, is not hearsay and is admissible to consider whether Officer Desrochers complied with the statute before requesting a blood sample from Sanders.

Accordingly, we find the ALC did not err in upholding the suspension of Sanders' driver's license. Therefore, the decision of the ALC is

AFFIRMED.³

HUFF, J. concurs.

HILL, J., dissenting.

HILL, J.: Recognizing the simple word "hearsay" and its troublemaking associate "truth of the matter asserted" can spark reasonable disagreements among reasonable people, I respectfully depart from the view of my friends in the majority.

The majority finds the officer's testimony about what Nurse Albright told him and what she stated on a report were not hearsay because they were "not offered to prove the truth of the matter asserted, i.e. that Sanders was unable to submit to a breath test." The majority explains further that Albright's out-of-court statements "were not offered to prove Sanders was in fact physically unable to provide a breath sample," but merely to show the officer "received this information from a licensed medical professional and subsequently made the decision to request a blood sample."

The DMV bears the burden of proving Sanders was physically incapable of providing an acceptable breath sample. S.C. Code Ann. § 56-5-2951(F) (2018) (noting DMV and the arresting officer bear burden of proof in contested case hearings). It may meet its burden of proving physical inability by showing the driver (1) had an injured mouth, (2) was unconscious or dead, or (3) had been deemed physically unable to provide an acceptable breath sample "for any other reason considered acceptable by the licensed medical personnel." § 56-5-2950(A). These are the only three statutory exceptions that allow the arresting officer to order a blood test without first offering a breath test, and we have interpreted them mindful of the physically invasive nature of a blood test. *State v. Kimbrell*, 326

³ We decide this case without oral argument pursuant to Rule 215, SCACR.

S.C. 344, 348, 481 S.E.2d 456, 459 (Ct. App. 1997) ("By enacting the implied consent statute, the legislature clearly intended to protect against this invasion where it is used simply as a convenience to the arresting officer . . .").

To prove any of these three exceptions, the DMV must offer competent evidence. No one would suggest, for instance, that an officer could testify as to another person's observation that a driver was unconscious or had an injured mouth. Such testimony would be rank hearsay. But the result of the majority's approach is to allow an out-of-court statement to prove the third exception. Contrary to the majority's interpretation, Nurse Albright's statement is being offered to prove the truth of the matter asserted, which is that Sanders was physically unable to give a breath sample due to a reason considered acceptable to Albright. *See* 2 McCormick on Evid. § 246 (Broun ed., 7th ed. 2016) (The word "assert," as used in defining hearsay, "simply means *to say that something is so*, e.g., that an event happened or that a condition existed." (emphasis in original)). I agree with the majority that Albright's reason does not have to be correct or true, but what does have to be true is that she, a licensed medical professional, deemed Sanders physically unable to provide a breath sample for a reason she found acceptable. The DMV, however, would rewrite the statute to allow the arresting officer to request a blood sample "if the arresting officer is told by the licensed medical personnel that the person is physically unable to provide an acceptable breath sample." I cannot agree that the DMV can satisfy its burden of proving the third form of physical inability through an out-of-court statement immune from cross-examination.

Our previous constructions of § 56-5-2950 have uniformly required a valid determination of physical inability to give a breath sample. *See State v. Stacy*, 315 S.C. 105, 106–07, 431 S.E.2d 640, 640–41 (Ct. App. 1993) (affirming the trial court's admission of a driver's blood test when the State presented live testimony from trained medical personnel that Stacy was unable to give a breath sample due to his injuries, and holding "that the statute requires a licensed physician, licensed registered nurse, or other medical personnel trained to take blood samples in a licensed medical facility, who is directed by an officer to take a blood sample, to determine whether an acceptable reason exists for finding that a person is unable to provide an acceptable breath sample"); *City of Columbia v. Moore*, 318 S.C. 292, 293–95, 457 S.E.2d 346, 347–48 (Ct. App. 1995) (holding an arresting officer's testimony that "someone at the hospital told him Moore could possibly be at the hospital all night for observation" insufficient to meet the requirements of § 56-5-2950 because the testimony was not by a medical professional: "To allow the arresting officer to make the determination that a person is physically unable to

give an acceptable breath sample, absent an injured mouth, unconsciousness, or death, is a relaxation of the plain requirement of the statute, and would allow the substitution of the officer's judgement for that of licensed medical personnel"); *Kimbrell*, 326 S.C. at 346–47, 348–49, 481 S.E.2d at 457–59 (holding arresting officer's testimony that Kimbrell had "a little blood in her teeth" insufficient to support a finding that she was physically unable to give a breath sample under § 56-5-2950: "We conclude the plain meaning of the statute requires the arresting officer to offer a breath test, absent a valid determination that the defendant is physically unable to give an acceptable breath sample"); *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 599, 654 S.E.2d 284, 290 (Ct. App. 2007) (in case where driver did not have injured mouth and was conscious, DMV was "required under the implied consent statute to show [driver] was physically unable to give an acceptable breath sample for a reason found acceptable by licensed medical personnel"). None of these precedents hold or even suggest that the "valid determination" of a driver's physical inability to provide a breath sample can be proven by hearsay.⁴

The majority's conclusion presents a paradox: it entails a finding that the truth of Nurse Albright's statements is irrelevant, while also implicitly finding that the trier of fact can use the statements to conclude the DMV has met its burden of proving Sanders was physically unable to provide an acceptable breath sample.

Looked at another way, if the majority's reading is right, the Hearing Officer is free to admit the Nurse's out-of-court statements as nonhearsay because they are not being offered for their truth, and in the next breath decree the statements credible and weighty enough to tip the scales in DMV's favor on the pivotal factual determination in the case.

A statement cannot be used as the truth but not offered for its truth. Such a use falsifies the hypothesis upon which the evidence was admitted. If that were to stand, then the frontier of legal fiction has warped beyond the boundaries of the rules of evidence. *See* 2 McCormick on Evid. § 246 n. 6 (Broun ed., 7th ed. 2016)

⁴ Nor do they, as the majority seems to state, prohibit the arresting officer from testifying a motorist is physically unable to give a breath sample due to being unconscious, dead, or having an injured mouth. As I read the statute and the cases interpreting it, it is only the third exception to § 56-5-2950(a) that requires the opinion of licensed medical personnel. Nevertheless, the majority's acknowledgment that the statute requires an opinion proves my point that Nurse Albright's testimony was offered for its truth.

("An argument that a statement is not offered for its truth is not tenable, however, if it is relevant only if true."); *see also United States v. Detrich*, 865 F.2d 17, 20 (2d Cir. 1988) ("Whether . . . a statement is hearsay depends upon what use the offeror intends the fact-finder to make of it.").

To be sure, there are times when out-of-court statements may be admitted for something other than their truth. *See, e.g., Player v. Thompson*, 259 S.C. 600, 610, 193 S.E.2d 531, 535 (1972) (notice). Just as surely, there are times when the familiar refrain of "it's not being offered for the truth" is the courtroom equivalent of "it's not about the money."

Both the majority and DMV focus on the effect the nurse's statements had on the officer, to prove his later actions were justified and reasonable. An out-of-court statement is of course admissible if the purpose of offering it "is not to prove the truth of the statement but merely to prove the fact that it was made" *Sams v. McCaskill*, 282 S.C. 481, 485, 319 S.E.2d 344, 347 (Ct. App. 1984). This focus is misplaced here, however, because neither the officer's state of mind nor his reasonableness can prove Sanders was physically unable to give a breath sample. *Moore*, 318 S.C. at 295, 457 S.E.2d at 347 (Ct. App. 1995) (reasonableness of officer's inference that driver would be unable to leave hospital to give breath sample not sufficient proof of physical inability to give sample: "However reasonable these conclusions may be under the circumstances, they are legally insufficient.").

One way to check the real purpose for which evidence is offered is to ask what other evidence proves the fact the tendered evidence is purportedly not being offered to prove (by lawyerly custom, this fact is often coincidentally the most crucial fact the party has to prove to win its case). Here, we can ask what evidence other than Nurse Albright's statements proved Sanders' physical inability. The record tells us the answer: none.

Which is why I must respectfully disagree with the majority. In my opinion, Nurse Albright's out-of-court statements were hearsay, offered for the truth of the matter asserted: that Sanders was physically unable to give a breath sample. I would reverse Sanders' suspension for the harmful error of law that occurred when Nurse Albright's statements were admitted and relied upon for their truth to resolve the dispositive issue at the hearing.

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SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Docket No. 15-ALJ-21-0124-AP

Appellate Case No. 2016-000228

Bradley Sanders.....Appellant,

v.

**South Carolina Department of Motor Vehicles
and Columbia Police Department..... Respondents below,**

Of whom South Carolina Department of Motor Vehicles is the Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellant hereby respectfully petitions the Court for a rehearing of its opinion in this matter filed January 30, 2019. The Court affirmed the decision of the lower court holding that statements from an alleged registered nurse, whether true or not, are not hearsay and were admissible to consider whether the arresting officer complied with S.C. Code Ann. § 56-5-2950 (A) (2018) before requesting a blood sample from Appellant.

In the opinion, the Court failed to address or acknowledge Appellant's argument concerning

this Court's decision in *State v. Frey*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2004). The evidence presented in the lower court woefully failed to comply with the standard set forth in *Frey* in which a member of the present panel concurred. The *Frey* court stated:

The plain language of section 56-5-2950 further requires that we reject the State's suggestion that the mere appearance of Scott Darragh in the emergency room is sufficient, for the statute mandates that the blood sample "must" be obtained by a trained medical professional. One's mere appearance in a hospital wearing generic hospital attire is not evidence of one's medical training. We likewise reject the State's assertion that Darragh's signature on the SLED form in the space labeled "licensed or trained collector" is sufficient to establish compliance with the statute. Simply signing a preprinted form does not provide any indicia that the signatory's qualifications meet the specific licensing or training requirements of section 56-5-2950. To hold otherwise would render the minimal foundational requirement of section 56-5-2950 without any meaningful force or effect. In light of the State's failure to satisfy this basic requirement, we are constrained to find the circuit court erred in finding the foundational requirements of section 56-5-2950 had been satisfied.

Frey, 362 S.C. at 517, 608 S.E.2d at 877 – 878. The Court's holding in the present case simply cannot be reconciled with the *Frey* decision. Appellant urges the Court to reconsider its determination that the statements by the alleged medical professional were not hearsay and that Respondent met its burden to prove that licensed medical personnel determined Appellant could not submit to a breath test.

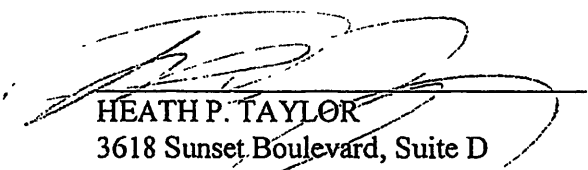
For the forgoing reasons and for all reasons presented in Appellant's brief, Appellant urges this Court to grant its Petition for Rehearing and reconsider the opinion issued in this case.

(This space intentionally left blank.)

Respectfully Submitted,

TAYLOR LAW FIRM LLC

February 6, 2019



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Docket No. 15-ALJ-21-0124-AP

Appellate Case No. 2016-000228

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SC Court of Appeals

Bradley Sanders.....Appellant,

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South Carolina Department of Motor Vehicles
and Columbia Police Department..... Respondents below,

Of whom South Carolina Department of Motor Vehicles is the Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing by causing it to be mailed to its attorneys of record, Frank L. Valenta, Jr., Esquire, Philip S. Porter, Esquire and Brandy A. Duncan, Esquire at their office located at 10311 Wilson Boulevard, Post Office Box 1498, Blythewood, South Carolina 29016-0020 on February 6, 2019.

February 6, 2019


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Case No. 2016-000228

Bradley Sanders Appellant,
v.

South Carolina Department of Motor Vehicles and
Columbia Police Department Respondents.

Of Whom the South Carolina Department of Motor Vehicles is Respondent.

RETURN TO APPELLANT'S PETITION FOR REHEARING

Pursuant to Rules 240 and 221(a), SCACR, the Respondent South Carolina Department of Motor Vehicles (SCDMV) hereby files the following Return to Appellant's Petition for Rehearing of this matter. The grounds for this Return are:

- 1) ALTHOUGH THIS COURT'S OPINION DID NOT SPECIFICALLY CITE *STATE V. FREY*, THE OPINION DID ADDRESS THE SUBSTANTIVE ISSUES RAISED BY APPELLANT WITH REGARD TO *STATE V. FREY*.

Appellant's Petition for Rehearing raises only one issue: an assertion that this Court's Opinion failed to address the case *State v. Frey*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2004). While it is true that this Court's Opinion did not specifically cite the *Frey* case, it is clear that this Court's Opinion did discuss the substantive issues raised by Appellant with regard to the *Frey* case. Specifically, this Court's Opinion discussed the

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substantive issues raised by Appellant with regard to the *Frey* case in the following section:

The next clause in the statute provides the focus of this case. It states an officer may request a blood sample "for any other reason considered acceptable by . . . licensed medical personnel." S.C. Code Ann. § 56-5-2950(A) (2018). Officer Desrochers requested a blood sample after Nurse Albright informed him Sanders was physically unable to provide a breath sample.

In *City of Columbia v. Moore*, 318 S.C. 292, 295, 457 S.E.2d 346, 347 (Ct. App. 1995), this court held an officer who was informed by "someone" at the hospital that a motorist suspected of driving under the influence could be in the hospital all night, was not authorized to request a blood sample in lieu of a breath sample. The court reasoned the officer's decision to order a blood sample was not based upon a reason found acceptable by licensed medical personnel as required by the statute. *Id.* at 294, 457 S.E.2d at 347. Over a decade later, this court examined this issue again in *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). Writing for the court, Judge Ralph King Anderson provided, in his illustrious and scholarly style, a comprehensive history of this court's opinions on section 56-5-2950(A). Judge Anderson noted times where this court "explicated," "inculcated," and "elucidated" its thoughts on the requirements of the statute. *Id.* at 601, 654 S.E.2d at 290-91. The *Peake* court determined the suspension of a motorist's license was improper because it was based "only on the unsubstantiated reason considered acceptable" by the arresting officer. *Id.* at 603, 654 S.E.2d at 292. Thus, it is established law that the opinion that a motorist is incapable of giving a breath sample, which opens the door to a blood sample request, cannot come from some mysterious "someone" in a medical facility or from the arresting officer but must be rendered by licensed medical personnel.

This leads to the first key challenge posed by Sanders: Did Officer Desrochers receive information from licensed medical personnel that Sanders was physically unable to provide a breath sample? Sanders argues the ALC erred in finding Officer Desrochers presented a prima facie case that Nurse Albright was licensed medical personnel. Utilizing our standard of review, we find the ALC did not err. Nurse Albright signed a medical collection report indicating she was a registered nurse and wore a nametag that identified her as a nurse. Officer Desrochers also observed Nurse Albright performing medical tasks and treating patients. These activities can only be done by an individual licensed in the medical field. Substantial evidence was presented to support the determination that Nurse Albright was, indeed, licensed medical personnel.

It is clear from the analysis performed in the quoted section that this Court was discussing the substantive issues raised in the *Frey* case and raised in Appellant's Final Brief to this Court. The first paragraph of the section quoted above sets the stage for the discussion by introducing the reader to S.C. Code §56-5-2950(A) and the actions taken by Officer Derochers under that code section. The second paragraph quoted above discusses two of the major cases that set forth the law that a licensed medical personnel is the only type of person that can opine that a motorist is incapable of providing a breath sample. The third paragraph then applies those two cases to Appellant's case and discusses the evidence presented that demonstrated that Nurse Albright was a licensed medical personnel on the date of these events.

In the *Frey* case the Court noted that the only evidence presented regarding whether "Scott Darragh" was a licensed medical personnel was:

- 1) the signed SLED Blood Collection Report form (which did not contain any information regarding what kind of medical personnel license Mr. Darragh held); and
- 2) Mr. Darragh appearing in the emergency room wearing "hospital like scrubs."

In other words, in the *Frey* case, "Scott Darragh" could have been any hospital staff member that happened to be wearing scrubs and he was not necessarily a licensed medical personnel.¹ Conversely, this Court's Opinion specifically noted the following evidence presented regarding Nurse Albright's medical personnel licensure:

¹ Interestingly, this possibility was even noted by Officer Desrochers during his testimony at the hearing for this case. Officer Desrochers testified, "I understand that in hospitals, even receptionists wear scrubs... [Nurse Albright] did have a name badge indicating she was an RN." R. p. 31, lines 21-25.

- 1) Nurse Albright signed a medical collection report;
- 2) Nurse Albright indicated on this medical collection report that she is a registered nurse;
- 3) Nurse Albright wore a nametag that identified her as a registered nurse; and
- 4) Officer Desrochers observed Nurse Albright performing medical tasks and treating patients at Lexington Medical Center.²

In addition to the evidence noted in this Court's Opinion, the Administrative Law Court's *Amended Final Order* also noted that Nurse Albright was wearing scrubs. Thus, in this case, in addition to the similar evidence presented in the *Frey* case, the following evidence exists that Nurse Albright is a licensed medical personnel:

- 1) Nurse Albright identifies herself as a registered nurse (via her indication on the medical collection report and via her name tag³ that lists her name and identifies her as a registered nurse);⁴ and
- 2) Officer Desrochers observed Nurse Albright performing medical tasks and treating patients in Lexington Medical Center.

These four additional pieces of evidence are very significant in terms of demonstrating

² Lexington Medical Center is one of the main, large hospitals located in the Columbia area and has an Emergency Room Department.

³ S.C. Code §40-33-39 requires licensed nurses to wear a name tag or other adornment that contains their name and type of nursing license held. This name tag or adornment must be legible and at least 1 inch by 3 inches in size.

⁴ S.C. Code §40-33-30 sets out who may identify themselves as a "nurse" or "RN" in South Carolina and makes it unlawful for anyone that is not properly licensed as a nurse in South Carolina to practice nursing in South Carolina. Further, this code section and makes it unlawful for anyone that is not licensed as a nurse in South Carolina to identify themselves as a nurse or RN. Finally, S.C. Code §40-33-200 sets out the criminal penalty for the unauthorized practice of nursing in this State as imprisonment of up to one year or a fine of \$50,000.00 for each violation of practicing nursing in violation of Chapter 33 of Title 40.

that Nurse Albright was a licensed medical personnel on the date of these events. Further, these four additional pieces of evidence are what strongly distinguish this case from the *Frey* case in terms of determining whether Officer Desrochers presented a *prima facie* case that Nurse Albright was a licensed medical personnel on the date of these events.

For these reasons, SCDMV believes this Court's Opinion addresses the substantive issues raised by Appellant with regard to the *Frey* case and rehearing should be denied.



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February 15, 2019
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2016-000228

Bradley Sanders Appellant,

v.

South Carolina Department of Motor Vehicles and
Columbia Police Department Respondents.

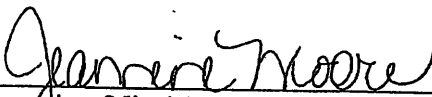
Of Whom the South Carolina Department of Motor Vehicles is the Respondent

PROOF OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, February 15, 2019,
I served a copy of the Respondent's Return to Appellant's Petition for Rehearing by
depositing with the United States Postal Service, correct postage prepaid, to Counsel for
the Appellant at the address indicated below:

Heath P. Taylor, Esquire
Taylor Law Firm LLC
3618 Sunset Boulevard, Suite D
West Columbia, South Carolina 29169

Blythewood, South Carolina



Jeanine (Nina) Moore, Paralegal
Office of General Counsel

The South Carolina Court of Appeals

Bradley Sanders, Appellant,

v.

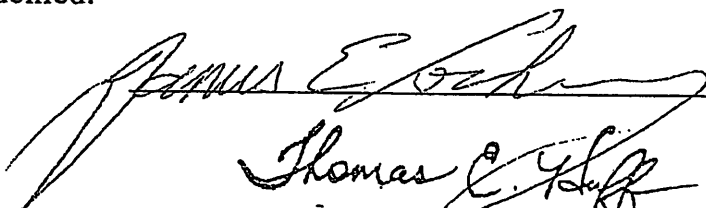
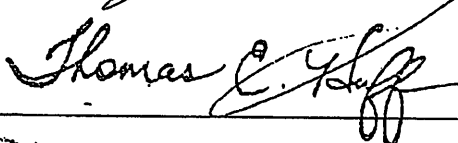
South Carolina Department of Motor Vehicles and
Columbia Police Department, Respondents below,

Of whom South Carolina Department of Motor Vehicles
is the Respondent.

Appellate Case No. 2016-000228

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.

I would grant rehearing.

 J.

Columbia, South Carolina

FILED

March 07, 2019

cc:

Heath Preston Taylor, Esquire

Frank L. Valenta, Jr., Esquire

Philip S. Porter, Esquire

Brandy Anne Duncan, Esquire

RECEIVED

MAR 29 2019

BY: _____

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

DOCKET NO. 15-ALJ-21-0124-AP

Bradley Sanders.....Appellant,

v.

South Carolina Department of Motor Vehicles
and Columbia Police Department..... Respondents below,

Of whom South Carolina Department of Motor Vehicles is the Respondent.

RECORD ON APPEAL

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**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Bradley Sanders,

Appellant,

vs.

South Carolina Department of Motor
Vehicles and Columbia Police Department,

Respondents.

Docket No. 15-ALJ-21-0124-AP

AMENDED FINAL ORDER

STATEMENT OF THE CASE

This is an appeal by Bradley Sanders (Appellant) from a Final Order and Decision of the South Carolina Office of Motor Vehicle Hearings (OMVH). A hearing was held at the OMVH on March 5, 2013. On February 13, 2015, the OMVH issued a Final Order and Decision sustaining the decision of the South Carolina Department of Motor Vehicles (Department or DMV) revoking Appellant's driver's license and driving privileges. The Administrative Law Court (ALC or court) has jurisdiction to review this matter pursuant to South Carolina Code Section 1-23-660. Upon review of this matter, the OMVH's Final Order and Decision is affirmed.

BACKGROUND

On November 21, 2012, Officer S. B. Desrochers of the Columbia Police Department was dispatched to the scene of a single-car collision. Officer Desrochers found the Appellant standing nearby, bleeding from the head and smelling strongly of alcohol. The Appellant, according to the officer, also spoke with slurred speech and seemed both mentally and physically "off-balance." The Appellant was transported to Lexington Medical Center, where Officer Desrochers was informed by Angela Albright, who held herself out as a registered nurse that the Appellant was physically unable to submit to a breath test. Officer Desrochers arrested the Appellant, read the Appellant his *Miranda* rights, and advised him of his Implied Consent Rights, both in writing and verbally. The Appellant refused to submit to a blood test and was given a Notice of Suspension of his driver's license.

FILED

JAN 27 2016

ADMIN. LAW COURT

002

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660 (Supp. 2014). Appeals from the OMVH, which is an "agency" by statutory definition, are brought before the ALC. See S.C. Code Ann. §§ 1-23-310(2) and 1-23-660(D) (2005 & Supp. 2014). The standard used to review appeals of agency decisions is provided by S.C. Code Ann. § 1-23-380(5). See S.C. Code Ann. § 1-23-600(E) (Supp. 2014).

(5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Under this statute, the court's review is essentially "limited to determining whether the findings [of the OMVH] were supported by substantial evidence or were controlled by an error of law." *Hill v. S.C. Dept. of Health & Environmental Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 617 (2010) (citation omitted).

ISSUES ON APPEAL

1. Did the OMVH hearing officer err in admitting evidence showing that the arresting officer lawfully sought a blood sample?
2. Did the OMVH hearing officer err in ruling that the arresting officer established a prima facie case that the individual who signed the SLED Urine/Blood Collection Report was a licensed medical professional?

DISCUSSION¹

Under South Carolina law, a motorist arrested for driving under the influence is considered to have given consent to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol or drugs, or both. S.C. Code Ann. § 56-5-2950 (Supp. 2014). If a motorist refuses to submit to such a test, the motorist's license must be immediately suspended. S.C. Code Ann. § 56-5-2951(A) (Supp. 2014). If such a suspension is issued, the motorist may request an administrative hearing to review, in relevant part, whether the arrestee refused to submit to a test pursuant to Section 56-5-2950. *See* S.C. Ann § 56-5-2951(F)(3) (Supp. 2014).

In such a hearing, the Department and the arresting officer have the burden of proof. S.C. Code Ann § 56-5-2951(F) (Supp. 2014). The burden is met by a preponderance of the evidence. S.C. Ann. § 1-23-600(A)(5) (Supp. 2014); OMVH Rule 15(B). The South Carolina Rules of Evidence apply to proceedings before the OMVH. S.C. Code Ann. § 1-23-330(1) (2005); OMVH Rule 14. The question before a hearing officer is not whether the state proved guilt, but whether the motorist violated the implied consent law. *See S.C. Dept. of Motor Vehicles v. Nelson*, 364 S.C. 514, 525–26, 613 S.E.2d 544, 549 (Ct. App. 2005) (citation omitted).

The implied consent statute requires that the arresting officer first offer the subject a breath test, unless the subject is unable to provide a breath test “for any other reason considered acceptable by the license medical personnel....” If this occurs, then the officer “may request a blood sample be taken” from the subject. Specifically, the statute provides:

At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because the person has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken.

S.C. Code Ann. § 56-5-2950 (Supp. 2014).

The Appellant argues that in determining whether the Appellant violated the implied consent law, the OMVH hearing officer improperly admitted hearsay evidence. Specifically, the Appellant contends that the hearing officer improperly relied upon hearsay statements of Angela

¹ The court appreciates counsel for Appellant's cite to this court's previous opinion which is contrary to the Appellant's position in this matter.

Albright and a SLED Urine/Blood Collection Report,² signed by Albright, because they were offered for the truth of the matter asserted.

Rule 801(c), SCRE defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." It is well settled that a statement introduced not for the truth of the matter asserted should not be excluded as hearsay. *Hatfield v. Van Epps*, 358 S.C. 185, 192, 594 S.E.2d 526, 530 (Ct. App. 2004) (citation omitted). *See also Sams v. McCaskill*, 282 S.C. 481, 485, 319 S.E.2d 344, 347 (Ct. App. 1984). Furthermore, an appellate court will not reverse an evidence ruling absent an abuse of discretion amounting to an error of law. *R & G Const., Inc. v. Lowcountry Regl. Transp. Auth.*, 343 S.C. 424, 439 S.E.2d 113, 121 (Ct. App. 2000).

In this case, the arresting officer's testimony concerned how he arrived at the conclusion that the Appellant was unable to take a breath test. He testified that the nurse signed the SLED Urine/Blood Collection Report, and also indicated on that form that she was a registered nurse when she listed her title on that report. Under the facts of this case, the officer's testimony on this point was not hearsay, because it was not offered to prove that the Appellant was, in fact, medically unable to provide a breath test at the time, but rather, to show that the officer had reasonable grounds to request that the Appellant submit to a blood test.

In short, the circumstances of this case are very similar to those in *Cann v. S.C. Dep't of Motor Vehicles and S.C. Dep't of Public Safety*, 12-ALJ-21-0465-AP, in which this court previously held that the arresting officer's testimony was not offered to prove that the Appellant was actually unable to take a breath test, but was offered to show the officer's action, in offering the Appellant an opportunity to submit to a blood test, was warranted.

Likewise, under the facts of this case, the arresting officer relied on information he received from a person he reasonably believed was qualified to opine that the Appellant was unable to take a breath test under the provisions of Section 56-5-2950(A). The officer then, as required under the statute, offered the Appellant the opportunity to submit to a blood test, to which he refused. *See* Rule 801, SCRE; *see also* S.C. Code Ann. § 56-5-2950(A) (Supp. 2014). This court agrees with

² The court notes that this report, which was admitted at the hearing and relied upon by the hearing officer in his decision, was not originally contained in the Record on Appeal, though it had been present at the hearing. This court issued an Order to Supplement the Record, on December 11, 2015, and the Department supplemented the record with the report (the SLED Report was dated November 21, 2012) on December 18, 2015. The court finds that there is no prejudice to the Appellant, since substantial evidence on the whole record supports the hearing officer's decision. *See Sweat v. Crawford*, 292 S.C. 324, 327, 356 S.E.2d 147, 149 (Ct. App. 1987).

the hearing officer's conclusion that the evidence was not offered for the truth of the matter asserted, but rather to show that a blood test was warranted under the statute. Thus, the hearing officer did not err in admitting Albright's statement into evidence.

The Appellant further argues that the hearing officer erred in ruling that the Officer established a prima facie case that Albright was a licensed medical professional. The Appellant cites to a criminal case in which a purported "trained, qualified medical personnel" actually collected a blood-alcohol sample from the defendant. See *State v. Frey*, 362 S.C. 511, 516, 608 S.E.2d 874, 877 (Ct. App. 2005).³ In *Frey*, the defendant argued that the court erred in admitting the blood-alcohol test results, and argued that there was no proof that the person who collected his blood sample was a licensed "medical personnel trained to obtain the samples in a licensed medical facility," as required by the statute.

The Appellant's case is easily distinguishable. *Frey* involved a criminal proceeding in which the state sought to introduce a blood sample that the statute mandates must only be collected by licensed physicians or licensed registered nurses or "other medical personnel trained to obtain samples in a licensed medical facility." In this case, the Appellant was appearing before the OMVH hearing officer because he refused to submit to a blood test. In this case, the officer complied with the requirements of the implied consent statute, and reasonably relied on the statement of a hospital nurse that the Appellant was unable to take a breath test. The Appellant also cites to a case where no attempt to consult licensed medical personnel appeared in the record. See generally *Peake v. S.C. Dept. of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007).

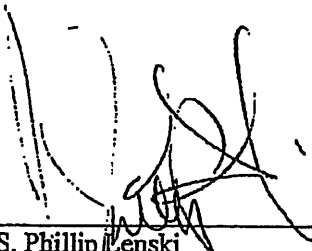
In this case, evidence was presented to establish Albright's status as licensed medical personnel. Officer Desrochers testified that he saw Albright in the hospital wearing a nametag and hospital scrubs that reasonably indicated she was a registered nurse. The Appellant offered no rebuttal of this prima facie evidence. The court notes that the standard of proof in an OMVH hearing is a preponderance of the evidence, unlike in a criminal case. See S.C. Ann. § 1-23-600(A)(5) (Supp. 2014); OMVH Rule 15(B). Additionally, in this instance, no blood sample was collected. Therefore, the court finds that the hearing officer did not err in ruling that Officer Desrochers established a prima facie case the Albright was a registered nurse.

³ The court cites to the opinion substituted and refiled January 25, 2005, not the earlier opinion contained in the record.

ORDER

IT IS HEREBY ORDERED, for the foregoing reasons, that the hearing officer's Final Order and Decision is **AFFIRMED** and the Department's suspension of Appellant's driver's license is upheld.

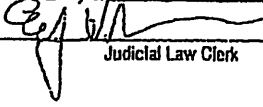
AND IT IS SO ORDERED.



S. Phillip Lenski
Administrative Law Judge

January 27, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 27th day of JAN 2016
By: 

Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Bradley Sanders,

Appellant,

vs.

South Carolina Department of Motor
Vehicles and Columbia Police Department,

Respondents.

Docket No. 15-ALJ-21-0124-AP

ORDER

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BACKGROUND

On November 21, 2012, Officer S. B. Desrochers of the Columbia Police Department was dispatched to the scene of a single-car collision. Officer Desrochers found the Appellant standing nearby, bleeding from the head and smelling strongly of alcohol. The Appellant, according to the officer, also spoke with slurred speech and seemed both mentally and physically "off-balance." The Appellant was transported to Lexington Medical Center, where Officer Desrochers was informed by Angela Albright, who held herself out as a registered nurse that the Appellant was physically unable to submit to a breath test. Officer Desrochers arrested the Appellant, read the Appellant his *Miranda* rights, and advised him of his Implied Consent Rights, both in writing and verbally. The Appellant refused to submit to a blood test and was given a Notice of Suspension of his driver's license.

The Appellant requested an administrative hearing challenging the suspension of this driving privileges. After notice

FILED

JAN 20 2016

ADMIN LAW COURT 008

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. See S.C. Code Ann. § 1-23-660 (Supp. 2014). Appeals from the OMVH, which is an "agency" by statutory definition, are brought before the ALC. See S.C. Code Ann. §§ 1-23-310(2) and 1-23-660(D) (2005 & Supp. 2014). The standard used to review appeals of agency decisions is provided by S.C. Code Ann. § 1-23-380(5). See S.C. Code Ann. § 1-23-600(E) (Supp. 2014).

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In such a hearing, the Department and the arresting officer have the burden of proof. S.C. Code Ann § 56-5-2951(F) (Supp. 2014). The burden is met by a preponderance of the evidence. S.C. Ann. § 1-23-600(A)(5) (Supp. 2014); OMVH Rule 15(B). The South Carolina Rules of Evidence apply to proceedings before the OMVH. S.C. Code Ann. § 1-23-330(1) (2005); OMVH Rule 14. The question before a hearing officer is not whether the state proved guilt, but whether the motorist violated the implied consent law. *See S.C. Dept. of Motor Vehicles v. Nelson*, 364 S.C. 514, 525–26, 613 S.E.2d 544, 549 (Ct. App. 2005) (citation omitted).

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S.C. Code Ann. § 56-5-2950 (Supp. 2014).

The Appellant argues that in determining whether the Appellant violated the implied consent law, the OMVH hearing officer improperly admitted hearsay evidence. Specifically, the Appellant contends that the hearing officer improperly relied upon hearsay statements of Angela

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In short, the circumstances of this case are very similar to those in *Cann v. S.C. Dep't of Motor Vehicles and S.C. Dep't of Public Safety*, 12-ALJ-21-0465-AP, in which this court previously held that the arresting officer's testimony was not offered to prove that the Appellant was actually unable to take a breath test, but was offered to show the officer's action, in offering the Appellant an opportunity to submit to a blood test, was warranted.

Likewise, under the facts of this case, the arresting officer relied on information he received from a person he reasonably believed was qualified to opine that the Appellant was unable to take a breath test under the provisions of Section 56-5-2950(A). The officer then, as required under the statute, offered the Appellant the opportunity to submit to a blood test, to which he refused. *See* Rule 801, SCRE; *see also* S.C. Code Ann. § 56-5-2950(A) (Supp. 2014). This court agrees with

² The court notes that this report, which was admitted at the hearing and relied upon by the hearing officer in his decision, was not originally contained in the Record on Appeal, though it had been present at the hearing. This court issued an Order to Supplement the Record, on December 11, 2015, and the Department supplemented the record with the report (the SLED Report was dated November 21, 2012) on December 18, 2015. The court finds that there is no prejudice to the Appellant, since substantial evidence on the whole record supports the hearing officer's decision. *See Sweat v. Crawford*, 292 S.C. 324, 327, 356 S.E.2d 147, 149 (Ct. App. 1987).

the hearing officer's conclusion that the evidence was not offered for the truth of the matter asserted, but rather to show that a blood test was warranted under the statute. Thus, the hearing officer did not err in admitting Albright's statement into evidence.

The Appellant further argues that the hearing officer erred in ruling that the Officer established a prima facie case that Albright was a licensed medical professional. The Appellant cites to a criminal case in which a purported "trained, qualified medical personnel" actually collected a blood-alcohol sample from the defendant. *See State v. Frey*, 362 S.C. 511, 516, 608 S.E.2d 874, 877 (Ct. App. 2005).³ In *Frey*, the defendant argued that the court erred in admitting the blood-alcohol test results, and argued that there was no proof that the person who collected his blood sample was a licensed "medical personnel trained to obtain the samples in a licensed medical facility," as required by the statute.

The Appellant's case is easily distinguishable. *Frey* involved a criminal proceeding in which the state sought to introduce a blood sample that the statute mandates must only be collected by licensed physicians or licensed registered nurses or "other medical personnel trained to obtain samples in a licensed medical facility." In this case, the Appellant was appearing before the OMVH hearing officer because he refused to submit to a blood test. In this case, the officer complied with the requirements of the implied consent statute, and reasonably relied on the statement of a hospital nurse that the Appellant was unable to take a breath test. The Appellant also cites to a case where no attempt to consult licensed medical personnel appeared in the record. *See generally Peake v. S.C. Dept. of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007).

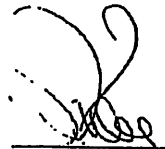
In this case, evidence was presented to establish Albright's status as licensed medical personnel. Officer Desrochers testified that he saw Albright in the hospital wearing a nametag and hospital scrubs that reasonably indicated she was a registered nurse. The Appellant offered no rebuttal of this prima facie evidence. The court notes that the standard of proof in an OMVH hearing is a preponderance of the evidence, unlike in a criminal case. *See* S.C. Ann. § 1-23-600(A)(5) (Supp. 2014); OMVH Rule 15(B). Additionally, in this instance, no blood sample was collected. Therefore, the court finds that the hearing officer did not err in ruling that Officer Desrochers established a prima facie case the Albright was a registered nurse.

³ The court cites to the opinion substituted and refiled January 25, 2005, not the earlier opinion contained in the record.

ORDER

IT IS HEREBY ORDERED, for the foregoing reasons, that the hearing officer's Final Order and Decision is **AFFIRMED** and the Department's suspension of Appellant's driver's license is upheld.

AND IT IS SO ORDERED.

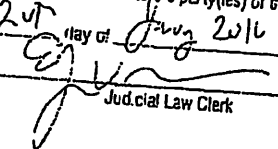


S. Philip Lenski
Administrative Law Judge

January 20, 2016
Columbia, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy thereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 20th day of July 2016
By _____
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Bradley Sanders,

Appellant,

vs.

South Carolina Department of Motor
Vehicles and Columbia Police Department,

Respondents.

Docket No. 15-ALJ-21-0124-AP

ORDER TO SUPPLEMENT THE
RECORD ON APPEAL

STATEMENT OF THE CASE

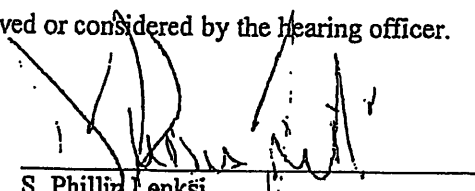
This matter is on appeal by Bradley Sanders (Appellant) from the South Carolina Office of Motor Vehicle Hearings (OMVH). A hearing was held at the OMVH on March 5, 2013. On February 13, 2015, the OMVH issued a Final Order and Decision sustaining the decision of the South Carolina Department of Motor Vehicles revoking Appellant's driver's license and driving privileges.

The Record on Appeal in this case was filed May 1, 2015. Upon review, it appears that certain evidence admitted at the hearing was inadvertently left out of the Record on Appeal. The SLED Urine/Blood Collection Report offered into evidence on page 10 of the Record on Appeal does not appear in the Record, despite being referenced in the hearing officer's Final Order. Therefore, the Court orders that the Record on Appeal be supplemented to include all evidence received or considered, so that the Record complies with ALC Rule 36(B).

ORDER

IT IS HEREBY ORDERED, for the foregoing reasons, that the Record on Appeal be supplemented to include all evidence received or considered by the hearing officer.

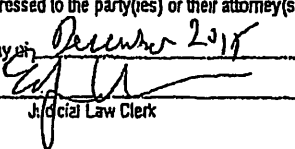
AND IT IS SO ORDERED.


S. Phillip Lenksi

Administrative Law Judge

December 11, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date
served this order in the above entitled action upon all
parties to this cause by depositing a copy hereto,
in the United States mail, postage paid, or in the Interagency
Mail Service addressed to the party(ies) or their attorney(s).

This 11th day of December 2015
By: 
Judicial Law Clerk

FILED

DEC 11 2015

ADMIN. LAW COURT

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**Columbia Police Department and South
Carolina Department of Motor Vehicles,**

Petitioners,

y.

Bradley Sanders,

Respondent.

For the Petitioners: Officer S.B. Desrochers, Columbia PD

[Refusal to take chemical test(s)]

This matter is before the South Carolina Office of Motor Vehicle Hearings (OMVH) upon request by Respondent, Bradley Sanders, for a hearing. Respondent was arrested on November 21, 2012, for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. Upon refusal to submit to a breath, blood or urine test, Respondent was charged with a violation of S.C. Code Ann. §56-5-2950. As a result of the refusal, the primary investigating officer issued a written notice of suspension to Respondent suspending his driver's license or driving privilege.

Pursuant to written notice to the parties, a hearing was held before me on March 5, 2013, at the Edgar A. Brown Building in Columbia, South Carolina. After reviewing the entire record and considering all the evidence, I find that the suspension of Respondent's driver's license or driving privilege must be sustained.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion by the parties, I make the following findings of fact by a preponderance of the evidence:

1. Notice of the date, time, place and subject matter of the hearing was timely given to the parties..
2. On November 21, 2012, at approximately 4:10 a.m., Officer Desrochers responded to the scene of a single car collision on Whaley Street in Columbia. When he arrived on the scene, he saw a vehicle that had run off the road and hit a tree. He saw the Respondent standing at the Kangaroo gas station. He was bleeding from the head. He spoke with the Respondent, but he did not know what had happened. He stated he did not know how he hurt his head. The Respondent's personal effects were found in the vehicle and also blood was found in the vehicle.
3. Officer Desrochers smelled a strong odor of an alcoholic beverage coming from the Respondent. The Respondent appeared to be intoxicated. He seemed off balance both physically and mentally. His speech was slurred.
4. The Respondent was transported to the Lexington Medical Center by ambulance.
5. At the hospital, Officer Desrochers was informed by Angela Albright who held herself out to be a nurse, who treated patients at the hospital, and who wore a name badge stating she was a registered nurse, that the Respondent was physically unable to submit to a breath test.
6. The Respondent suffered a head injury in the wreck.
7. The Respondent was told that he was under arrest for driving under the influence and was given his Miranda rights. He was also given the Advisement of Implied Consent Rights (Advisement) both verbally and in writing.
8. Respondent refused to submit to the blood test.
9. On November 21, 2012, Respondent was given a written Notice of Suspension of his driver's license for refusing to submit to a blood test.

10. The Respondent testified that he remembers very little about that night and nothing about the accident. He stated that he had been up all night the night before studying for an exam. He did go to a bar the night of the accident and had two drinks and perhaps part of a third.
11. Respondent was charged with a violation of S.C. Code Ann. §56-5-2950 for refusing to submit to a blood test of his blood alcohol concentration.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude as a matter of law the following:

General

1. In S. C. Code Ann. §1-23-660 (Supp. 2011), the General Assembly provided for the creation of the South Carolina Department of Motor Vehicle Hearings (DMVH). Effective January 1, 2006, the DMVH was authorized to employ Hearing Officers to preside over contested case hearings involving suspensions, cancellations, or revocations of drivers licenses. Effective October 1, 2008, the General Assembly changed the name to the Office of Motor Vehicle Hearings (OMVH).
2. All hearings presided over by Hearing Officers of OMVH must be conducted in accordance with the Administrative Procedures Act (APA) and the rules of procedure of the South Carolina Office of Motor Vehicle Hearing (SCOMVH).
3. Petitioner is an administrative agency of the State of South Carolina which is charged with administering its motor vehicle laws and delivering accurate and secure credentials and transaction documents to the citizens of this state. S. C. Code Ann. §56-1-5 (2006)
4. Basic administrative law principles establish that an agency bears the burden of proof in an enforcement action. *See Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991); Randy R. Lowell and Stephen P. Bates, South Carolina Administrative Practice and Procedure, 200-201 (2004). Since Petitioner asserts the affirmative of an issue, i.e., the enforcement of a driver's license suspension, and since it will be subject to an adverse ruling if no evidence is introduced, Petitioner bears the burden of proof in this enforcement action. *See Alex Sanders*

and John S. Nichols, Trial Handbook for South Carolina Lawyers, Second Edition, 2001, § 9:3, p. 366.

Unlawful to drive while under the influence-

5. Pursuant to S. C. Code Ann. §56-5-2930, it is unlawful for a person to drive a motor vehicle within this State while:

- a. under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciable impaired;
- b. under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciable impaired; or
- c. under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive are materially and appreciable impaired.

Implied consent to submit to testing

6. S.C. Code Ann. § 56-5-2950(A)(Supp.2011) provides:

A person who drives a motor vehicle in this State is considered to have given consent to chemical tests of his breath, blood, or urine for the purpose of determining the presence of alcohol or drugs or the combination of alcohol and drugs if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of the law enforcement officer who arrested [the] person....

At the direction of the arresting officer, the person must first be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken.

Furthermore, the breath test must be administered by a person trained and certified by the South Carolina Department of Public Safety (SCDPS), pursuant to State Law Enforcement Division (SLED) policies. See S.C. Code Ann. § 56-5-2950(A)(Supp.2011).

7. S.C. Code Ann. § 56-5-2950(B) (Supp. 2011) further provides:

No tests may be administered or samples obtained unless upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

- (1) he does not have to take the test or give the samples, but that his privilege to drive must be suspended or denied for at least six months if he refuses to submit to the test and that his refusal may be used against him in court;
- (2) his privilege to drive must be suspended for at least one month if he takes the tests or gives the samples and has an alcohol concentration of fifteen one-hundredths of one percent or more;
- (3) he has the right to have a qualified person of his own choosing conduct additional independent tests at his expense;
- (4) he has the right to request an administrative hearing within thirty days of the issuance of the notice of suspension; and
- (5) if he does not request an administrative hearing or if his suspension is upheld at the administrative hearing, he must enroll in an Alcohol and Drug Safety Action Program.

8. Upon motion by any party, the OMVH Hearing Officer may review the application of the policies, procedures, and regulations promulgated by SLED. If the Hearing Officer finds that the failure to follow any of the policies, procedures, regulations or other provisions of S.C. Code Ann. § 56-5-2950 materially affected the accuracy or reliability of the test results or the fairness of the testing procedure, the test results shall be excluded from evidence. The hearing officer must rule specifically as to the manner in which the failure materially affected the accuracy or reliability of the test results or the fairness of the procedure, See S.C. Code Ann. § 56-5-2950(J)(Supp.2011).

9. If a person drives a motor vehicle and has an alcohol concentration of fifteen one-hundredths of one percent or more, Petitioner must suspend the person's driver's license, permit or nonresident operating privilege or deny the issuance of a license or permit to that individual. The arresting officer issues a notice of suspension which is effective beginning on the date of the alleged violation. See S.C. Code Ann. § 56-5-2951(A) (Supp. 2011)

10. A person may request an administrative hearing within thirty (30) days of the issuance of the notice of suspension. S.C. Code Ann. § 56-5-2951(B) (Supp.2011). Section 56-5-2951(F) requires that the scope of the hearing be limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950;

- (3) refused to submit to a test pursuant to Section 56-5-2950; or
- (4) consented to taking a test pursuant to Section 56-5-2950, and the:
 - (a) reported alcohol concentration at the time of testing was fifteen one-hundredths of one percent or more;
 - (b) individual who administered the test or took samples was qualified pursuant to Section 56-5-2950;
 - (c) tests administered and samples obtained were conducted pursuant to Section 56-5-2950; and
 - (d) the machine was working properly.

Nothing in this section prohibits the introduction of evidence at the administrative hearing on the issue of the accuracy of the breath test result.

11. After review of the facts in this case and the applicable law, I find and conclude that the Respondent was lawfully arrested for driving under the influence. The officer responded to a collision and observed that a vehicle had collided with a tree. He located the Respondent nearby who was bleeding from the head. The Respondent stated that he had no memory of what had happened. The Respondent had a strong odor of an alcoholic beverage about his person. He seems intoxicated and had slurred speech. He seemed off balance, both physically and mentally.

The Respondent was advised verbally and in writing of his Advisement of Implied Consent Rights for blood and he refused to submit a blood sample as requested by the officer. The officer was informed by licensed medical personnel that the Respondent was physically unable to submit to a breath test. The license medical person signed the SLED (State Law Enforcement Division) Urine/Blood Collection Report indicating such. Further, the issue stated in Section 6 above is whether the Respondent was physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious, dead, or for any other reason considered acceptable by the licensed medical personnel. According to the evidence, the Respondent was not unconscious and there was no evidence that he had an injured mouth. Therefore, I find that the officer was advised by a registered nurse (licensed medical personnel) that the Respondent was physically unable to submit to a breath test. The Respondent argued that this is hearsay. He stated that there is no way to know that the person who signed it was actually a registered nurse and that he did not have the opportunity to question her. I conclude that the testimony was not hearsay because it was not admitted to prove that the Respondent was actually unable to leave, only that the blood test was warranted because

licensed medical personnel determined he was unable to provide a breath sample. See Cann v. S.C. Dep't. of Motor Vehicles and S.C. Dep't. of Public Safety, Docket No. 12-ALJ-21-0465-AP. Further, I conclude that Officer Desrochers presented a prima facie case that the person who told him and signed the form was licensed medical personnel – she was in the hospital, treating patients, represented herself as a nurse, and wore a name tag that indicated she was a registered nurse. The Respondent offered no evidence to refute the assertion.

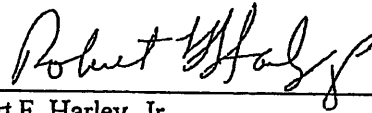
I conclude as a matter of law that the Petitioner met its burden of proof. Accordingly, the relief requested by the Respondent must be denied.

ORDER

Based upon the above findings of facts and conclusions of law, it is hereby:

ORDERED that the suspension of the Respondent's driver's license or driving privilege be sustained.

AND IT IS SO ORDERED.



Robert F. Harley, Jr.
OMVH Senior Hearing Officer

February 13, 2015
Columbia, South Carolina

FILED

FEB 13 2015

SCOMVH

Bradley Sanders,
Appellant,
v.
Columbia Police Department and South
Carolina Department of Motor Vehicles,
Respondents.

1. The OMVH hearing officer erred in permitting hearsay testimony to establish Appellant's alleged inability to submit to a breath test;
2. The OMVH hearing officer erred in admitting hearsay testimony and a document signed by a person alleged to be a licensed medical professional concerning Appellant's alleged inability to submit to a breath test;
3. The OMVH hearing officer erred in ruling that the arresting officer presented a prima facie case that the individual who stated the aforementioned hearsay statements and signed the aforementioned document was a licensed medical professional; and
4. Any and all other properly preserved issues as permitted by SCALC Rules 33 and 37.

045

Respectfully Submitted,

TAYLOR LAW FIRM LLC



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Attorney for Appellant

This 5 day of March, 2015

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Columbia Police Department,)
Petitioner,)
vs.)
Bradley Sanders,)
Respondent.)
-----)

HEARING

March 5, 2013



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1 HEARING OFFICER: My name is Robert Harley. I have
2 been appointed by the South Carolina Office of
3 Motor Vehicle Hearings to preside at this
4 implied consent hearing scheduled for the 5th of
5 March, 2013, at the Edgar A. Brown Building,
6 Suite 325, Columbia, South Carolina. For the
7 record, the petitioner in this matter is the
8 Columbia Police Department. Their witness, the
9 investigating officer, is present. Respondent,
10 Mr. Bradley Sanders, is present and represented
11 by Attorney Lee Leventis. At this time, we'll
12 swear in the petitioner's witness. State your
13 full name, sir.

14 OFFICER DeROCHA: Officer Scott DeRocha, Columbia
15 Police Department.

16 THE COURT: All right. Please raise your right
17 hand. Do you solemnly swear the testimony in
18 this matter will be the truth, the whole truth,
19 and nothing but the truth?

20 OFFICER DeROCHA: It will.

21 THE COURT: All right, sir. All right. At this
22 time, we'll have testimony. Do you have a
23 witness?

24 MR. LEVENTIS: He might testify.

25 THE COURT: Okay. If he does, we'll swear him in at



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1 this time.

2 MR. LEVENTIS: Raise your hand.

3 THE COURT: State your full name.

4 MR. SANDERS: Bradley Gordon Sanders.

5 THE COURT: All right. Solemnly swear the testimony
6 you offer in this matter will be the truth, the
7 whole truth, and nothing but the truth?

8 MR. SANDERS: It will.

9 THE COURT: All right, sir. All right. At this
10 time, we'll move forward with testimony with
11 petitioner's witness, Officer DeRocha.

12 OFFICER DeROCHA - DIRECT TESTIMONY:

13 OFFICER DeROCHA: The incident occurred approximately
14 four -- about 4:10 a.m. on November 21st, 2012,
15 at the 1200 block of Whaley Street, which is in
16 the City Limits of Columbia. On that day and
17 time I was dispatched to the scene of a single
18 car collision which the subject vehicle had ran
19 off the road and struck a tree. I arrived on
20 scene and found Mr. Sanders standing over by
21 the Kangaroo gas station. He was bleeding from
22 his head. Witnesses pointed him out to me.
23 They're not here, so I can't testify to what
24 they said. But he was pointed out as the
25 subject. I did independently verify that his



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1. personal belongings were in the vehicle as was
2 blood that indicated that he was in the
3 vehicle, as well. When asked about it, he kept
4 saying he didn't know what we were talking
5 about; he wasn't in a wreck. When I asked how
6 he hurt his head, he couldn't give any kind of
7 straight answer for it. He seemed very
8 intoxicated, had a strong odor of alcoholic
9 beverage about his breath and person. Seemed
10 a little off balance -- not just physically off
11 balance, but mentally not there. We did ask if
12 he had lost consciousness or anything to the --
13 to the witnesses. They stated that he did not.
14 When we were speaking with him, he was speaking
15 with slurred speech. He was taken to Lexington
16 Medical Center for treatment. I did follow the
17 vehicles up -- the ambulance up there. Once we
18 were there, I was told that he would not be
19 able to provide a breath sample -- would not --
20 MR. LEVENTIS: I'm going to object to that since
21 that -- that's hearsay, Mr. Harley, and there's
22 nobody here to -- I can't cross-examine that.
23 THE COURT: All right. Since you already said it,
24 we'll let it go in, but not for the truth of
25 the matter asserted, just that you was told



1 that.

2 MR. LEVENTIS: And I would -- I would respectfully
3 request that anything -- any hearsay testimony
4 be precluded from this. Officer DeRocha's the
5 only one here and I would think that he has to
6 testify without the benefit of any testimony
7 from people who aren't here.

8 THE COURT: All right. I'll note it for the record.

9 OFFICER DeROCHA: Okay. What about written
10 documentation with signatures from the nurse
11 that said he couldn't leave within that two-
12 hour span of time, would that be considered
13 hearsay, as well?

14 MR. LEVENTIS: That's not what she said.

15 THE COURT: You have to offer it in evidence and let
16 him object to it at that point in time.

17 OFFICER DeROCHA: I would offer up the SLED blood
18 and urine collection report signed by Angela
19 Albright, which is an RN, stating checkmarked
20 that he could not leave because of medical
21 reasons to take the breath sample. Do you have
22 any objections to that?

23 MR. LEVENTIS: I'm going to object to that, Mr.
24 Harley, for several reasons. One is we don't
25 know if Angela Albright is actually a



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1 registered nurse. You know, we don't know who
2 -- there's a case on point, State v. Frye, that
3 -- that I give to Officer DeRocha. Well, I
4 give Officer DeRocha one and I'll provide the
5 hearing officer with one, that basically says
6 that -- that anybody can have hospital garb on,
7 but -- but that particular person -- that
8 defense needs to be able to cross-examine that
9 particular person on his or her credentials.
10 Secondly, this Affidavit that Officer DeRocha
11 intends to -- to try to submit doesn't say he
12 wasn't able to leave the hospital. It says for
13 some reason deemed acceptable by licensed
14 medical personnel. We have a right to ask that
15 licensed medical personnel what that reason
16 was. And we can't ask that person that reason
17 without that person being here and we're not
18 sure, again, she may well be a registered
19 nurse, but we don't know that for sure and we
20 don't have a right to cross-examine her
21 credentials, so I would respectfully request
22 that any of that testimony be excluded, as well
23 as objection to the introduction of that
24 report.

25 THE COURT: I tell you what now, I'm going to let it



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1 come in, Attorney Leventis, not for the fact
2 that she was a licensed nurse practitioner, but
3 that he relied upon what she said. (Inaudible)
4 I can read the case and study it in more
5 detail. If I found out that -- I understand
6 the argument that basically this case would
7 support excluding it, it will be struck from
8 the record. But it's better included than not
9 to have it and want it, but the case supporting
10 Attorney Leventis' motion, I will exclude the
11 document from the record.

12 MR. LEVENTIS: I'm going to also provide you with
13 another case --

14 THE COURT: Okay.

15 MR. LEVENTIS: -- to review as well in that regard,
16 Peak v. South Carolina Department of Motor
17 Vehicles, and I'll give Officer DeRocha a copy
18 of it, as well. I think I can give you that in
19 conjunction with each other.

20 THE COURT: Okay.

21 OFFICER DeROCHA: And along with Mr. Leventis'
22 motion, I understand that in hospitals, even
23 receptionists wear scrubs, and that's where
24 that's coming from. She did have a name badge
25 indicating she was an RN. I can't testify that



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1 I witnessed that at least -- of course, I can't
2 specifically say that she did good in school.

3 I was not with her in school --

4 MR. LEVENTIS: Right, right.

5 OFFICER DeROCHA: -- but she did have the name badge
6 that I indicated that she was. So I will say
7 that beyond that with what I was told was that
8 he would not be able to get out in a timely
9 manner in order to provide that breath sample.
10 I did ask him if he would be willing to submit
11 a blood sample with the hospital staff so that
12 I could take it for testing. He declined doing
13 that. He was -- before I even asked him, I'm
14 sorry, let me back up, I got sidetracked here.
15 Before I asked him all this, he was read
16 Miranda, advised that he was under arrest; he
17 was read the notice of implied consent with all
18 that in mind knowing that his license would be
19 suspended had he not provided the blood sample
20 at that point. He still refused to ... He also
21 had his own copy of the implied consent form,
22 as well. But all that, he still declined that;
23 he was arrested; his license was suspended; and
24 he ended up being transported that night to
25 Alvin S. Glenn. On the record, I'm a member at



1 -- I'm a member at the Columbia Police
2 Department Traffic Safety Unit, certified
3 through the South Carolina Criminal Justice
4 Academy as a standardized field sobriety test
5 practitioner and roadside advanced -- roadside
6 impaired driving enforcement officer.
7 Datamaster wasn't -- wasn't used on this one.
8 I believe I have everything.

9 THE COURT: All right. Thank you, sir. Please
10 answer any questions Attorney Leventis may
11 have.

12 OFFICER DeROCHA - CROSS-EXAMINATION BY MR. LEVENTIS:

13 Q: (Inaudible) did you take him to jail right
14 after he refused the blood draw?

15 A: He was taken to jail once the medical staff
16 released him. It was quite a while after --
17 after he refused. We were up there for a while.

18 Q: And do you know -- do you know for sure that
19 Angela Albright is a registered nurse?

20 A: I know what the name badge says, but -- but no,
21 I was -- I did not go to school with her. I
22 don't know that she graduated from any specific
23 programs.

24 Q: All right. Now, this -- this collision with
25 the tree was a pretty significant collision,



1 was it not?

2 A: That's correct. I -- I believe that the
3 vehicle probably would have been totaled and I
4 believe (inaudible) earlier had said it was --
5 I'm sorry, Mr. Sanders earlier had said the car
6 was totaled, so it was fairly significant.

7 Q: And you said that he didn't know -- what was
8 the first question you said you asked him,
9 Officer DeRocha? If he was driving the car?

10 A: Yeah, I don't -- recall the specific question,
11 but probably just asked him what happened, you
12 know --

13 Q: And he said --

14 A: -- that kind of thing. He -- he denied knowing
15 anything about a wreck at all at first even
16 though like I said we had his personal
17 belongings in the driver's seat and blood in
18 the driver's seat.

19 Q: Let me give you a copy and (inaudible) two page
20 from Lexington Medical Center of his diagnosis
21 and read to me what's highlighted. The first
22 four lines up there on the left-hand side, what
23 does it show? Says symptoms, what does it
24 show?

25 A: Under diagnosis?



1 Q: Under -- yeah, under diagnosis.

2 A: Right here.

3 Q: I'm sorry.

4 A: Scalp contusions, scalp laceration, cervical
5 strain, and closed head injury.

6 Q: Okay. And then on the second page, let me see
7 if I can find it here, let's see, the second
8 page. Read what it says under head injury.

9 A: He suffered a head injury. Common symptoms
10 include headache, nausea, vomiting once or
11 twice, slight dizziness or sleepiness. Head
12 injury can cause slow bleeding or other
13 problems inside the head that may not be
14 detected at this time. You are being allowed
15 to go home, but a relative or a friend should
16 stay with you and read the following
17 instructions.

18 Q: All right. So does it sound like he may have
19 had a concussion and was out of it?

20 A: I'm not a medical personnel. I don't know and
21 along with my document from my RN, I would say
22 that this seems just as much hearsay as that
23 one does, so if Mr. Harley decides to allow
24 that one in, then this one should go in, as
25 well --



1 Q: Well, my client -- my client will be able to
2 testify to it. I'm just asking. And I'll --
3 I will let him testify to that. Okay.

4 MR. LEVENTIS: I don't have any further questions.
5 I am going to let my client testify, Mr.
6 Harley.

7 THE COURT: All right. Anything further, officer?

8 OFFICER DeROCHA: I have nothing further, Your
9 Honor.

10 THE COURT: Okay. At this time, the State's closed
11 their case of testimony and evidence. Mr.
12 Sanders, please answer any questions Attorney
13 Leventis has.

14 MR. SANDERS - DIRECT EXAMINATION BY MR. LEVENTIS:

15 Q: All right. Brad, you were in a wreck and --
16 you've since found out you were in a wreck at
17 4:00 in the morning that morning, correct?

18 A: Yes, sir.

19 Q: All right. Do you remember when Officer
20 DeRocha asked you what happened that you talked
21 -- I mean, you didn't know what happened, did
22 you?

23 A: No, I had no clue.

24 Q: Okay.

25 A: I was very disoriented.



1 Q: Okay. Well, let me show you what you received
2 from the doctor's office and let's see if this
3 is -- what is -- whose -- whose name is that at
4 the top?

5 A: That's my name.

6 Q: Correct. Which is?

7 A: Bradley Sanders.

8 Q: Okay. And it's from the Lexington Medical
9 Center Emergency Department?

10 A: Yes, sir.

11 Q: Okay. And under -- well, let me say this. All
12 right. I've given you a copy of that, Brad?

13 A: I believe I have a copy of that.

14 MR. LEVENTIS: I'm going to move to introduce this,
15 Mr. Harley, as being Brad's medical diagnosis.

16 THE COURT: All right, sir.

17 MR. LEVENTIS: And I've got an extra copy so you can
18 -- so that you can follow what I'm talking
19 about here.

20 Q: All right, Brad, that -- read the diagnosis
21 from MVA, which is motor vehicle accident.
22 What does it say?

23 A: Scalp contusions, scalp lacerations, cervical
24 strain, and closed head injury.

25 Q: And to the right, again the highlighted areas,



1 what does it say that you had?

2 A: Head injury and neck strain.

3 Q: Turn to the second page, and under the head
4 injury, what Officer DeRocha read a minute ago
5 -- go ahead and read this one to yourself.

6 A: Suffered a head injury, common symptoms include
7 headache, nausea, vomiting once or twice, and
8 select dizziness or sleepiness. There may be
9 some swelling and pain. A head injury can
10 cause slow bleeding or other problems inside
11 that may not be detected at this time. You are
12 being allowed to go home, but a relative or
13 friend should stay with you and read the
14 following instructions.

15 Q: Okay. Go down to where it says contact your
16 doctor or return to the Emergency Department.
17 Read the two highlighted -- the first two
18 highlighted bullet points.

19 A: Contact your doctor or return to the Emergency
20 Department immediately if any of the following
21 occurs: persistent nausea or vomiting,
22 confusion, unusual drowsiness, personality
23 changes, or loss of memory.

24 Q: And -- okay. Good. Now, do you recall much --
25 what do you recall that night?



1 A: Well, I -- I had stayed up the previous night
2 all night because I had a chemistry exam the
3 next morning. So I woke up that day; I took
4 that exam. I was kind of elated with how I
5 felt I did on it, so I, you know, immediately
6 lost all my fatigue and was kind of running on
7 fumes the rest of the day, but I was happy so
8 I didn't really get tired. Then I went out
9 with a couple friends that night and I went --
10 after I left the Five Points area, I drove to
11 go to Sonic on Assembly Street to get some
12 food, that's why I was coming down Whaley
13 towards the tree that I hit. And that's the
14 last thing I remember. The rest of it -- the
15 rest of the evening's really fuzzy until I woke
16 up the next morning in jail.

17 Q: Okay. Do you recall the specifics of any
18 requests that were made of you by Officer
19 DeRocha or anybody else that night?

20 A: No.

21 Q: And do you remember -- do you remember being
22 requested by anybody to do -- for draw blood;
23 do you remember Miranda warnings; do you
24 remember any of those things?

25 A: No. I don't really -- I don't really remember



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1 much about being in the hospital or going into
2 the hospital or being in front of the gas
3 station or any of that that you said that I
4 was.

5 Q: Okay.

6 A: It's just all really foggy. My -- all I
7 remember is waking up in jail and my -- the
8 back of my head was -- and clothes were so
9 crusty with blood because they wouldn't like
10 let me -- because they wouldn't even wash the
11 blood off my head when I got to jail. They
12 just threw me in the cell and I woke up with
13 crusted blood and stitches stuck -- the hair
14 stuck all in my stitches when I -- when I woke
15 up.

16 Q: All right. Answer any questions Officer
17 DeRocha has for you, Brad.

18 MR. SANDERS - CROSS-EXAMINATION BY OFFICER DEROGHA:

19 Q: Now, you're saying -- what were you doing prior
20 to the wreck earlier that evening?

21 A: Like went out with some friends to Five Points.

22 Q: Okay. Where at in Five Points?

23 A: Went to the Salty Nut Café.

24 Q: Okay. About -- ballpark, about what time was
25 that?



- 1 A: Well, we didn't go out until -- until later
2 that night. I -- I hadn't really planned on it
3 and then a couple of my friends that were in
4 town -- because it was the Tuesday before
5 Thanksgiving, so a couple of my friends had
6 come into town and wanted to -- wanted to go
7 out. So we didn't even leave to go until
8 probably 1:00 or so. It was -- it was late.
9 I was already very tired before I -- before I
10 went anywhere just from being so tired from
11 staying up the night before for my exams.
- 12 Q: And you said -- now, you had left there to go
13 to Sonic, you said to get something to eat?
- 14 A: Yes, sir.
- 15 Q: So you left the Salty Nut to go to Sonic?
- 16 A: Yes, sir.
- 17 Q: Okay. What route did you take to get there?
- 18 A: I went down I think it's Barnwell. I parked my
19 car right beside the Salty Nut Café on the road
20 that is perpendicular to Greene Street and
21 Blossom in between -- I think it's Sumter
22 Street maybe -- or no, not Sumter. I think
23 it's Barnwell Street.
- 24 Q: Right beside the Salty Nut? Beside the
25 railroad tracks?



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1 A: Correct.

2 Q: I believe that's Laurens Street.

3 A: Laurens, okay.

4 Q: Yes.

5 A: Laurens Street. And I was facing towards
6 Blossom, so I proceeded down Laurens Street,
7 took a right onto Blossom Street, and there's
8 -- to avoid taking -- I've been a student at
9 USC for a long time, so I know all the
10 shortcuts to miss stop lights, so I took a --
11 I took a left turn at a green light on Blossom
12 Street up -- I think that's Barnwell or
13 Henderson and then took a right onto Whaley so
14 that I could take a right onto Assembly and I
15 wouldn't have to wait at the stop light on the
16 corner of Blossom and Assembly Street.

17 Q: Got you. And --

18 A: That's a big four-way intersection.

19 Q: Did you say your friends were with you or just
20 you driving?

21 A: Just me driving.

22 Q: Okay. So you were driving down there by
23 yourself. Now, before you left, how many
24 drinks had you had that night?

25 A: I probably had two, maybe part of a third. I



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1 can't really recall, just because the whole
2 evening's pretty fuzzy from my head injury, but
3 --

4 Q: Got you. Just --

5 A: But my -- one of my friends walked -- one of my
6 friends was parked directly beside me and he
7 actually walked to the car with me and he was
8 with me the whole night and -- and he also
9 agrees that we -- that I, you know, wasn't
10 intoxicated and hadn't -- hadn't been drinking
11 very much at all.

12 Q: Got you. How many did he have to drink, do you
13 remember him?

14 A: I have no clue. I don't -- I don't monitor my
15 friends' alcohol intake whenever we go places.

16 Q: Got you. But you think that he monitored
17 yours?

18 A: Well, I mean, we had -- the time frame that we
19 had been out, I didn't really have time just
20 from the crowd, I wouldn't have even had time
21 to have many drinks.

22 Q: Your collision -- we have the collision time at
23 about four -- about 4:00, the dispatch time was
24 4:13, so just call it 4:00. You said you went
25 out about 1:00, 1:30, something in that time



1 frame?

2 A: Yeah.

3 Q: So you had about three hours -- two and a half,
4 three hours or so to drink. You said you had
5 two to three beers, something in that --

6 MR. LEVENTIS: Mr. Harley, I've let this line of
7 questioning go for a while. I mean, we're not
8 questioning the fact that he was arrested for
9 DUI. What we're questioning, the fact is he
10 one, that the hearsay on everything involved
11 with the nurse or the alleged nurse; and
12 secondly, just his ability to understand what
13 was going on and the fact that he had the head
14 injury.

15 OFFICER DeROCHA: Well, it did seem like we were
16 questioning the fact that he had a head injury
17 versus DUI, so I was just wanting to establish
18 that he had also been drinking and he admits to
19 drinking --

20 MR. LEVENTIS: He says he had two or three -- two or
21 three --

22 OFFICER DeROCHA: -- and (inaudible) time. That's
23 right.

24 A: I had consumed an alcoholic beverage that
25 night, yes.



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1 THE COURT: He admitted that.

2 A: I'm (inaudible)

3 THE COURT: He admitted that now.

4 OFFICER DeROCHA: Okay.

5 Q: You don't feel that alcohol had anything to do
6 with your wreck whatsoever?

7 A: Absolutely not. I think it had to do with me
8 being tired and hungry. I hadn't eaten very
9 much that day at all. And I don't know, I fell
10 asleep at the wheel. The next thing I remember
11 is --

12 Q: You had about two to three beers on an empty
13 stomach late at night while you were tired?

14 A: Yeah, yeah, right about two beers.

15 Q: Okay. That's fine.

16 MR. LEVENTIS: Go ahead.

17 THE COURT: Anything else?

18 OFFICER DeROCHA: No, I don't have any other
19 questions.

20 THE COURT: (Inaudible) finished.

21 OFFICER DeROCHA: Yeah.

22 THE COURT: Okay. That concludes all testimony and
23 evidence. At this time we'll hear closing
24 remark statements. We'll let Officer DeRocha
25 go first.



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1 CLOSING STATEMENTS:

2 OFFICER: I'm fine.

3 THE COURT: All right. Mr. Leventis?

4 MR. LEVENTIS: Just basically I just renew my motion
5 (inaudible) would respectfully request that you
6 review the (inaudible) which I think will
7 confirm the objections which I made. But if it
8 doesn't, I would still submit to you that with
9 the basis of his injuries, that he had
10 absolutely no knowledge of what was going on.
11 He had a significant head injury, had a
12 concussion. He doesn't remember anything until
13 he woke up in jail the next morning. And he
14 did -- and he did have blood all over the back
15 of his head.

16 THE COURT: All right.

17 MR. LEVENTIS: That would do it. Sorry.

18 THE COURT: Okay, gentlemen. This hearing is now
19 closed.

20 (There being nothing further, the hearing was
21 concluded.)
22
23
24
25



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CERTIFICATE

This is to certify the transcript of the hearing consists of twenty-three (23) pages. This transcript was prepared by me without the benefit of my being present during the hearing. Additionally, this transcript was prepared from a audio recording provided to me.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this April 28, 2015.

Carenn N. Moore
Carenn N. Moore
Notary Public for South Carolina
My Commission Expires: 3/24/2019



South Carolina Department of Motor Vehicles
NOTICE OF SUSPENSION

11-622
(Rev. 8/12)

Driver's Name Sanders, Bradley Tharham

BP/DL State and Number

Date of Birth

Address on Driver's License: Street address, Apt. No., City, State, Zip Code

Special mailing address for notices (if different from driver's license address): Street address, Apt. No., City, State, Zip Code

Vehicle License Plate State and No. SC Vehicle Type: Commercial ☐ Yes ☒ No Hazardous Material ☐ Yes ☒ No

YOUR PRIVILEGE TO DRIVE IN SOUTH CAROLINA IS SUSPENDED IMMEDIATELY FOR THE FOLLOWING:
(CHECK ONLY ONE BOX)

UNDER THE AGE OF TWENTY-ONE (21)
AND NOT UNDER ARREST FOR DUI*

- ☐ Registering an alcohol concentration of .02 or greater*
☐ Refusing to submit to a breath, blood or urine test*
Date of Test/Refusal

ANY AGE UNDER ARREST FOR DUI

- ☐ Registering an alcohol concentration of .15 or greater
☒ Refusing to submit to a breath, blood or urine test
11 21 2012 Date of Test/Refusal

*A person who is taken for testing under 56-1-286 cannot be prosecuted under 20-7-8920, 20-7-8925, 56-5-2930 or 56-5-2933. Everyone who receives this Notice of Suspension can request a hearing to challenge the suspension. A request for a hearing must be filed with the SC Office of Motor Vehicle Hearings within thirty days of the issuance of the Notice of Suspension. There is a \$200.00 filing fee. (Personal checks are not accepted.) See the back of this form for more information on how to ask for a hearing.

If a hearing is scheduled, you may be able to get a temporary alcohol restricted license. The temporary alcohol restricted license costs \$100.00 and allows you to drive without restrictions until the hearing results are mailed to you. See the back of this form for instructions on how to obtain a temporary alcohol restricted license.

If you do not obtain a temporary alcohol restricted license, your suspension continues. You cannot drive until you either obtain a route-restricted license or your suspension period ends and you: 1) enroll in ADSAP [if you do not complete ADSAP, your driver's license will again be suspended]; 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you do obtain a temporary alcohol restricted license and the hearing officer rules against you after your hearing, your suspension will go back into effect. If you were suspended after having been arrested for DUI, you may be eligible for a route-restricted license to allow you to drive for the remainder of the suspension. There are instructions on the back of this form to explain how to obtain a route-restricted license. If you do not obtain a route-restricted license or if you are under the age of twenty-one (21) and were not arrested for DUI, you cannot drive until your suspension period ends and you: 1) enroll in ADSAP (if you do not complete ADSAP, your driver's license will again be suspended); 2) pay a \$100.00 reinstatement fee; and 3) have a license issued to you.

If you do obtain a temporary alcohol restricted license and the hearing officer rules in your favor, the suspension will be cancelled. Your driving privileges will be reinstated. However, you must go to a Department of Motor Vehicles office to have a regular license issued.

If you were suspended after having been arrested for DUI, you may be entitled to have a route-restricted license during your suspension period. You do not have to request a hearing to be eligible for a route-restricted license. The route-restricted license costs \$100.00 and allows you to drive only to and from work, college, ADSAP classes, and a court-ordered drug program, plus during the course of your employment or college. However, you must enroll in ADSAP before a route-restricted license will be issued. See the back of this form for instructions on how to obtain a route-restricted license.

I understand that I cannot drive until a license has been issued to me.

Signature of Driver [Signature] Date Signed

Driver's license or permit surrendered (yes or no) no (If yes, license must be attached to yellow copy of this form)

Date Signed 11 21 2012
Signature of Arresting Officer [Signature]
Agency Name Columbia Police Dept. Agency Code 700100
Date Signed 11 21 2012
Signature of DataMaster Operator [Signature]
Agency Name Columbia Police Dept. Agency Code 700100

Printed Name of Arresting Officer S. B. Desrosiers
(803) 545-3500
Agency Telephone Number
Printed Name of DataMaster Operator S. B. Desrosiers
(803) 545-3500
Agency Telephone Number

Blue Copy - Driver Yellow Copy - DMV/Driver Records Green Copy - Officer White Copy - Officer's Agency

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SOUTH CAROLINA LAW ENFORCEMENT DIVISION - URINE/BLOOD COLLECTION REPORT

Subject: Sanders Bradley Thorben Richland
 Last Name First Name Middle Name County of Arrest

Subject's Address: [REDACTED]
 Driver's License Number: [REDACTED] State: SC DOB: [REDACTED] Sex: M Race: W
 Arresting Officer: S. B. Desrosiers Agency: Clinton Police Dept
 Date of Arrest: 11 21 2012 Time of Arrest: 0128 AM/PM Traffic Ticket Number: SP734 JH
 Date of Test: _____ Time of Test: _____ AM/PM Location of Collection: _____

CHECK THE FOLLOWING (CHECK BOTH IF APPLICABLE)

- ☒ Subject is under arrest for Section 56-5-2930, 56-5-2933, 56-5-2945, 56-1-2120, 50-21-112, 50-21-113 or 23-31-415; or is in violation of Section 56-5-2945, 50-21-113 or 56-1-286 of the 1976 South Carolina Code of Laws as amended.
- ☒ Subject has been advised in writing of his/her Implied Consent Rights.

CHECK THE CORRECT ONE (ONLY ONE CAN APPLY)

- ☐ Officer has reasonable suspicion that the subject is under the influence of drug(s) other than alcohol and a urine sample is requested.
- ☐ Subject is unconscious or otherwise incapable of refusal and is considered informed, therefore, a blood sample is requested.
- ☒ A blood sample is requested by the arresting officer because a licensed medical person has informed the officer that the subject is unable to take a breath test at this time due to any reason deemed acceptable by that licensed medical person.
- ☐ Subject is under arrest for, or in violation of, Section 56-5-2945 or 50-21-113, and, pursuant to Section 56-5-2946 or 50-21-116, a blood sample or a blood and urine sample is/are requested.
- ☐ A blood sample is requested by the subject for his/her own independent test.

Name and Title of Licensed Medical Personnel: Angela Albright RN
 (Please Print)

Signature of Licensed Medical Personnel: [Signature]

THIS SECTION TO BE CHECKED BY SAMPLE COLLECTOR

- ☐ Using a non-ethanol prep, a blood sample was collected into an unused, uncontaminated vial and given directly to the arresting officer (or to the subject requesting sample for his/her independent test) after collection.
- ☐ A urine sample was collected into an unused, uncontaminated container and given directly to the arresting officer after collection.

Name of Licensed or Trained Collector: _____
 (Please Print)

Signature of Licensed or Trained Collector: _____

FINAL CHECKS FOR LAW ENFORCEMENT OFFICER

- ☐ Sample collection was under my direct supervision.
- ☐ Sample container is properly labeled with the subject's name and time of collection.
- ☐ Sample is properly sealed and ready for transport.

Signature of Officer: [Signature] Date: 11 21 2012

I, [Signature] received a copy of this report on 11 21 2012
 (Subject's Signature) Date

Copy to: Subject, Hospital, SLED

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SLED Forensics Form # TOX 001, February 2009

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
OFFICE OF MOTOR VEHICLE HEARINGS

RALPH K. ANDERSON, III
Director



(803) 734-3201
FAX (803) 734-3200
WWW.SCOMVH.NET

December 15, 2015

The Honorable S. Phillip Lenski
South Carolina Administrative Law Judge
1205 Pendleton Street, Suite 224
Columbia, SC 29201

Dear Judge Lenski,

The OMVH is in receipt of your Order to Supplement the Record on Appeal. Your order has been presented to the hearing officer. The OMVH is unable to supplement the Record on Appeal because the document you requested is not in our office. Please see the attached affidavit from the hearing officer for further explanation.

Please let us know if there is anything you would like us to do to try to rectify the situation.

Sincerely,

Yolanda P. Williams
Administrative Coordinator
SC OMVH

Cc: Frank L. Valenta, Esquire
Office of General Counsel
SC Department of Motor Vehicles

Heath P. Taylor, Esquire
3618 Sunset Blvd., (Hwy. 378) Suite D
West Columbia, SC 29169

DEC 18 2015

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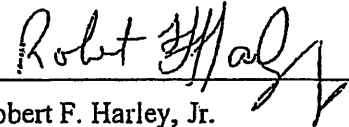
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074

6. At the time I prepared the order, I had the other exhibits offered in the case and my notes, but I did not have the report.
7. Because I had possession of all other document involved in the case, it is my belief that I never took possession of the SLED Blood/Urine Collection Report. It is the usual practice that when evidence is admitted, it remains on the party's table for his/her use until the end of the case. Then, the evidence is given to me. It is my belief that, by mistake, this document did not come into my possession and I did not realize it at the time.
8. Therefore, I cannot assist the Office of Motor Vehicle Hearings in complying with the Order to Supplement the Record on Appeal.

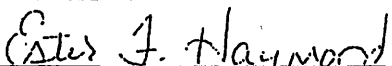
FURTHER, AFFIANT SAYETH NOT.

I certify that the statements contained in this Affidavit are true and correct to the best of my knowledge and belief.


Robert F. Harley, Jr.

Sworn to and Subscribed to before

me this 15th day of December, 2015.


Notary Public for South Carolina
My commission Expires 4-20-2019

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

May 17, 2016

TAYLOR LAW FIRM LLC

A handwritten signature in black ink, appearing to read "Heath P. Taylor", is written over a horizontal line.

HEATH P. TAYLOR

3618 Sunset Boulevard; Suite D
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Telephone: (803) 926-2205
Attorney for Appellant

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

DOCKET NO. 15-ALJ-21-0124-AP

Bradley Sanders.....Appellant,

v.

South Carolina Department of Motor Vehicles
and Columbia Police Department..... Respondents below,

Of whom South Carolina Department of Motor Vehicles is the Respondent.

FINAL BRIEF OF APPELLANT

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S.C. Bar No. 15517
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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW JUDGE ERR IN AFFIRMING THE DECISION OF THE OMVH HEARING OFFICER PERMITTING HEARSAY EVIDENCE TO ESTABLISH APPELLANT'S ALLEGED INABILITY TO SUBMIT TO A BREATH TEST?
- II. DID THE ADMINISTRATIVE LAW JUDGE ERR IN AFFIRMING THE OMVH HEARING OFFICER'S DECISION THAT THE ARRESTING OFFICER PRESENTED A *PRIMA FACIE* CASE THAT THE INDIVIDUAL WHO DETERMINED APPELLANT WAS UNABLE TO SUBMIT TO A BREATH TEST WAS LICENSED MEDICAL PERSONNEL AS REQUIRED BY S.C. CODE ANN. § 56-5-2950 (A) (SUPP. 2012)?

STATEMENT OF THE CASE

Following a single car collision, Appellant, Bradley Sanders, was arrested on November 21, 2012, for Driving Under the Influence (DUI), first offense, by Officer S.B. Desrochers of the Columbia Police Department (R. p. 2). Appellant was transported to Lexington Medical Center for medical care (R. p. 2). Appellant was allegedly physically unable to submit to a breath test (R. p. 2). The arresting officer advised Appellant of his implied consent rights and requested that Appellant submit to a blood test in order to determine his blood alcohol concentration. Appellant refused to submit to a blood test. Officer Desrochers informed Appellant that his privilege to drive in South Carolina was immediately suspended and issued a notice of suspension pursuant to S.C. Code Ann. §56-5-2951 (Supp. 2012) (R. p. 32, lines 10 – 23).

Appellant timely requested an administrative hearing pursuant to S.C. Code Ann. §56-5-2951 (Supp. 2012) in order to challenge the propriety of the suspension (R. pp. 48 - 49). On March 5, 2013, a hearing was held before the South Carolina Office of Motor

Vehicle Hearings (OMVH). Hearing officer Robert F. Harley, Jr. presided (R. pp. 15 – 21).

The suspension was sustained by order filed February 13, 2015 (R. pp. 15 – 21).

The OMVH hearing officer's decision was appealed to the South Carolina Administrative Law Court on March 3, 2015 (R. pp. 22 – 23). By Order filed January 20, 2016, the Honorable S. Phillip Lenski affirmed the order of the OMVH hearing officer (R. pp. 8 – 13). The Honorable S. Phillip Lenski issued an Amended Final Order on January 27, 2016 (R. pp. 2 – 7). This appeal followed.

FACTS

On November 21, 2012, Officer S.B. Desrochers, of the Columbia Police Department, was dispatched to the scene of a single car collision. Officer Desrochers arrived at the scene and found Appellant standing near a gas station. Appellant was identified by witnesses on the scene and was bleeding from his head. Officer Desrochers located Appellant's personal belongings in the vehicle and noticed blood in the vehicle. Appellant denied being in a collision. Officer Desrochers observed a strong odor of alcoholic beverage about Appellant's breath and person. Based upon the testimony of Officer Desrochers, Appellant "[s]eemed a little off balance – not just physically off balance, but mentally not there." Appellant was transported by ambulance to Lexington Medical Center for treatment (R. p. 27, lines 13 – 25 – p. 28, lines 1 - 16).

At the hearing before the OMVH hearing officer, over the hearsay objection of counsel for Appellant, Officer Desrochers testified that he "... was told that he [Appellant] would not be able to provide a breath sample." The objection was noted for the record and the OMVH hearing officer admitted the statement "... but not for the truth of the matter

asserted. . . .” (R. p. 28, lines 18 – 25 – p. 29, lines 1 - 8). Officer Desrochers went on to testify that “. . . what I was told was that he [Appellant] would not be able to get out in a timely manner in order to provide that breath sample.” (R. p. 32, lines 6 - 9).

Officer Desrochers then offered a SLED Urine/Blood Collection Report signed by Angela Albright, who was alleged to be a registered nurse, stating that Appellant was unable to take a breath test due to any reason deemed acceptable by that licensed medical person. The document does not specify the reason Appellant was unable to submit to a breath test (R. p. 50). Counsel for Appellant noted a timely objection to the report and its contents. The report was admitted by the OMVH hearing officer. In arguing his objection to the report, counsel for Appellant questioned whether or not Ms. Albright was actually a registered nurse or otherwise licensed medical personnel eligible to sign the report and to determine whether Appellant was unable to submit to a breath test. Officer Desrochers testified that Ms. Albright had a name badge that indicated she was a registered nurse. He offered no testimony with regard to her attire and acknowledged that he had no information with regard to her education and training (R. p. 29, lines 9 – 25 – p. 32, lines 1 – 9; p. 33, lines 18 - 23).

In reliance on statements made to him by Ms. Albright, Officers Desrochers requested that Appellant submit a blood sample. Appellant refused. Both the OMVH hearing officer and the administrative law judge refused to rescind the suspension finding that the statements made by Ms. Albright and the SLED Urine/Blood Collection Report were not hearsay and therefore, sufficient to warrant a blood test. They further held that Ms. Albright’s presence in the hospital, along with her name badge, constituted sufficient evidence that Ms. Albright was licensed medical personnel for purposes S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012)

(R. pp. 15 – 21; R. pp. 2 – 7).

STANDARD OF REVIEW

“The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- a) in violation of constitutional or statutory provisions;
- b) in excess of the statutory authority of the agency;
- c) made upon unlawful procedures;
- d) affected by other error of law;
- e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

S.C. Code Ann. § 1-23-610 (Supp. 2012).

ARGUMENT

I. THE ADMINISTRATIVE LAW JUDGE ERRED IN AFFIRMING THE DECISION OF THE OMOVH HEARING OFFICER PERMITTING HEARSAY EVIDENCE TO ESTABLISH APPELLANT'S ALLEGED INABILITY TO SUBMIT TO A BREATH TEST.

The Administrative Law Judge erred in ruling that testimony from the arresting officer with regard to statements made to him by an individual at the hospital and the SLED Urine/Blood Collection Report were not hearsay. Specifically, Officer Desrochers presented hearsay testimony from Angela Albright, alleged to be a registered nurse, in attempting to establish Appellant's alleged inability to submit to a breath test. In addition to these hearsay statements, Officer Desrochers presented a SLED Urine/Blood Collection Report, alleged to have been signed by Ms. Albright, indicating Appellant was unable to submit to a breath test for a reason deemed acceptable to licensed medical personnel which also amounts to hearsay evidence. Over the objections of counsel, the hearing officer admitted the evidence. In doing so, the hearing officer concluded:

... the testimony was not hearsay because it was not admitted to prove that the Respondent was actually unable to leave, only that the blood test was warranted because licensed medical personnel determined he was unable to provide a breath sample.

(R. pp. 20 – 21, ¶ 11). The Administrative Law Judge agreed but with slightly different reasoning:

Under the facts of this case, the officer's testimony on this point was not hearsay, because it was not offered to prove that Appellant was, in fact, medically unable to provide a breath test at the time, but rather to show that the officer had reasonable grounds to request that the Appellant submit to a breath test.

(R. p. 5). For the reasons more fully set forth below, the aforementioned evidence constitutes inadmissible hearsay, and the decision of the Hearing Officer should be reversed.

S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) states:

. . . At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is physically unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample to be taken. . . .

Pursuant to this statute, arresting officer may only request a blood test, if the arrested person had an injured mouth, was unconscious or dead. Absent these conditions, the arresting officer is required to present the testimony of licensed medical personnel indicating any reason considered acceptable by the licensed medical personnel that the person could not take a breath test.

Our courts have ruled on this issue on multiple occasions. In *State v. Stacy*, 315 S.C. 105, 431 S.E.2d 640 (1993), the defendant led law enforcement officers on a high speed car chase which ended in a wreck. He suffered injuries requiring hospital treatment. Stacy contended the blood results were erroneously admitted into evidence because the State failed to comply with S.C. Code Ann. § 56-5-2950 (a) (1991). The pertinent passage of S.C. Code Ann. § 56-5-2950 (a) analyzed by the *Stacy* court is virtually identical to the portion applicable in the present case. At trial, the State presented the testimony of Staci York who drew Stacy's blood sample. York testified that she was trained to take blood samples and that it was not possible for law enforcement to take Stacy to a breath testing site because he had not been treated for his injuries. The court determined that the need for additional

medical treatment was an acceptable reason for York to determine Stacy could not give an acceptable breath sample and affirmed the lower court's ruling.

This Court addressed a similar issue in *City of Columbia v. Moore*, 318 S.C. 292, 457 S.E.2d 346 (Ct. App. 1995). Moore was involved in an automobile accident and complained of chest pains at the scene. At his request, Moore was transported via ambulance to the hospital. As in the present case, the arresting officer testified that “. . . someone at the hospital told him Moore could possibly be in the hospital all night for observation.” *Moore*, 318 S.C. at 294, 457 S.E. 2d at 347. The Court noted that because Moore did not have an injury to his mouth and was conscious at all times, the City was required to present evidence Moore was physically unable to give an acceptable breath sample for a reason found acceptable by licensed medical personnel. The arresting officer's testimony of what someone told him at the hospital did not comply with the statutory requirements necessary to request a blood sample from Moore. The Court affirmed the reversal of Moore's conviction.

This Court again addressed the issue in *State v. Kimbrell*, 326 S.C. 344, 481 S.E.2d 456 (Ct. App. 1997). Kimbrell was injured in an accident and transported to the hospital for treatment. As Kimbrell was leaving the hospital, the state trooper asked her to submit to a blood test and she consented. The trooper's justification for requesting a blood sample was based upon his observation that Kimbrell had blood in her teeth. The circuit court reversed Kimbrell's magistrate court conviction ruling that S.C. Code Ann. § 56-5-2950 (a) required medical personnel, not the arresting officer, determine if Kimbrell could not give an acceptable breath sample. In affirming the circuit court decision, this Court stated:

As we held in *Moore*, the determination that the accused is physically unable to provide an acceptable breath sample due to any reason other than

unconsciousness, death, or injury to the mouth requires the determination of licensed medical personnel. Even where there is an indication of an injury to the mouth, however, the statute still requires a determination that the accused is physically unable to provide an acceptable breath sample. . . .

We conclude the plain meaning of the statute requires the arresting officer to offer a breath test, absent a valid determination that the defendant is physically unable to give an acceptable breath sample. Where the evidence shows a person is dead, unconscious, or physically unable to provide an acceptable breath sample as determined by authorized medical personnel, no breath test need first be offered, and the blood test results are admissible.

Kimbrell, 326 S.C. at 348 – 349, 481 S.E.2d at 458 – 459.

This court again made clear its intention that licensed medical personnel make the determination that an individual is unable to submit to a breath test in *Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). In *Peake*, the motorist was involved in a one car accident and transported to the hospital. The trooper noted the strong smell of alcohol on Peake's breath and slurred speech. Peake was placed under arrest at the hospital and advised of his *Miranda* and implied consent rights. Peake was asked to provide a blood sample. He refused and his license was suspended. At the administrative hearing, the trooper testified that he requested a blood sample because he believed Peake's condition prevented him from providing a breath sample. The hearing officer sustained the suspension and the circuit court affirmed on appeal. This Court, in reversing the circuit court's decision, relied on the cases cited above and noted that “. . . the administrative hearing officer and circuit court relied only on an unsubstantiated reason considered acceptable by Trooper Manly.” *Peake*, 375 S.C. at 603, 654 S.E.2d 292. The Court further noted:

Although this court in *Moore* held the inability to leave a medical facility could form a legally sufficient basis for ordering a blood test, we expounded the record must show this determination is based on the opinion of licensed medical personnel.

Id. Accordingly, this Court remained consistent in its requirement that the arresting officer must comply with the mandates of S.C. Code Ann. § 56-5-2950 prior to requesting a blood sample.

In the present case, the only attempt to comply with this requirement came when the arresting officer introduced hearsay testimony indicating that he “. . . was told that he [Appellant] would not be able to provide a breath sample. . . .”; that the SLED Urine/Blood Collection Report signed by Angela Albright, who is alleged to be a registered nurse, was “. . . checkmarked that he could not leave because of medical reasons to take the breath sample.”; and that the officer was told “. . . he would not be able to get out in a timely manner in order to provide that breath sample.” (R. p. 28, lines 18 – 19; p. 29, lines 17 – 22; and p. 32, lines 6 – 9). Counsel for Appellant noted timely objections to this hearsay testimony as well as the admission of the SLED Urine/Blood Collection Report (R. p. 28, lines 20 – 22; and p. 29, lines 23 – 25 – p. 30, lines 1 - 24). Angela Albright was not presented as a witness in the proceeding.

The same type of evidence was not deemed sufficient by this Court in *Moore*. As noted above, the arresting officer testified that “. . . someone at the hospital told him Moore could possibly be in the hospital all night for observation.” *Moore*, 318 S.C. at 294, 457 S.E. 2d at 347. Although the court did not explicitly address the officer’s testimony from a hearsay perspective, it is clear from the court’s holding that hearsay statements received from a person found within the walls of a medical facility were not enough to warrant compliance with S.C. Code Ann. § 56-5-2950. Certainly, had the court been so inclined, it could have adopted the same reasoning used by the hearing officer and administrative law judge in the

present case. However, the analysis should be the same. Like the officer in *Moore*, Officer Desrochers based his decision to request a blood test on what he was told by someone at hospital. The *Moore* court stated:

The City argues Wadford's belief that Moore would not be released for a long period of time, coupled with the reasonable inferences which can be derived from the circumstances under which he was transported to the hospital, is a sufficient basis to conclude Moore was physically incapable of giving a breath sample. However reasonable these conclusions may be under the circumstances, they are legally insufficient.

Moore, 318 S.C. at 295, 457 S.E.2d at 347. The City of Columbia's argument in *Moore* was similar to the hearing officer's and administrative law judge's reasoning that the testimony was not hearsay.

Both the hearing officer and administrative law judge held that the statements of Ms. Albright were not hearsay because the statements were not used to prove the truth of the matter asserted. "Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" *State v. Brewer*, 411 S.C. 401, 407, 768 S.E.2d 656, 659 (2015) citing *State v. Jennings*, 394 S.C.473, 478, 716 S.E.2d 91, 93 (2011); Rule 801, SCRE. "Hearsay is inadmissible except as provided by statute, the South Carolina Rules of Evidence, or other court rules." *S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. 136, 146, 705 S.E.2d 425, 430 (2011). The South Carolina Rules of Evidence are clearly applicable to administrative hearings of this nature. *Id.*, at 147, 750 S.E.2d at 430.

The administrative law judge ruled that the statements attributed to Ms. Albright were not "... offered to prove that Appellant was, in fact, medically unable to provide a breath test

at the time, but rather, to show that the officer had reasonable grounds to request that the Appellant submit to a blood test.” (R. p. 4). This reasoning is virtually identical to the City of Columbia’s argument this Court rejected in *Moore*. As noted above, the inability to leave a medical facility due to ongoing treatment, if the determination is made by licensed medical personnel, is a valid reason for an officer to request a blood test.

However, the administrative law judge’s conclusion was based solely on hearsay. The statements were used to substantiate the “reason” considered acceptable by licensed medical personnel. Licensed medical personnel considered the blood test acceptable and that Appellant was unable to provide a breath sample *because* Appellant was unable to leave the hospital (R. p. 28 lines 17 – 19; p. 29, lines 17 – 22; and p. 32, lines 6 -9). Officer Desrochers clearly based his decision to request a blood sample on the truth of the statements attributed to Ms. Albright. Although he ultimately ruled differently, the hearing officer agreed:

I tell you what now, I’m going to let it come in, Attorney Leventis, not for the fact that she was a licensed nurse practitioner, but that **he relied upon what she said.**

(R. p. 30, line 25 – p. 31, lines 1 – 3)(emphasis added). The administrative law judge made a similar conclusion:

Likewise, under the facts of this case, the arresting officer **relied** on information he received from a person he reasonably believed was qualified to opine that the Appellant was unable to take a breath test under the provisions of Section 56-5-2950(A). The officer then, as required under the statute, offered the Appellant the opportunity to submit to a blood test, to which he refused. (*citations omitted*). This court agrees with the hearing officer’s conclusion that the evidence was not offered for the truth of the matter asserted, but rather to show that a blood test was warranted under the statute.

(R. pp. 5 – 6)(emphasis added). The statements were clearly used to prove the truth of the matter asserted. The claim that Appellant could not leave the hospital was the basis for Ms. Albright's opinion that Appellant could not provide a breath sample. Officer Desrochers relied upon the statements as being the truth.

At least two courts in other jurisdictions have analyzed nearly identical hearsay issues and reached opposite conclusions to that of the administrative law judge in the present case. In *Heuton v. Commissioner of Public Safety*, 541 N.W.2d 361 (Minn. Ct. App. 1995), the Minnesota Court of Appeals addressed statements from medical professionals and a law enforcement officer's determination that the driver was incapable of refusing a blood test due to incapacity. Heuton was involved in a single car collision and sustained serious injuries. She was semiconscious at the scene. An officer on the scene ordered that a blood test be given to Heuton. Later, a different officer arrived at the hospital with a blood test kit and an implied consent form. The officer was not permitted to see Heuton, but a medical technician obtained a sample of Heuton's blood. The relevant Minnesota statute provided that a person who is unconscious or in a condition making the person incapable of refusing a blood test is deemed not to have withdrawn his or her implied consent to testing and the test may be given. At the administrative hearing, the officer who obtained the blood sample testified that emergency room staff told him that the doctor would not permit him to see Heuton and that a paramedic told him that her injuries were life threatening. Based on these statements, the officer determined that Heuton was incapacitated and he was justified in obtaining a blood sample.

On appeal, Heuton argued that the officer's statements regarding her condition were

hearsay and should not have been considered to determine her capacity to submit to the blood test. While the court affirmed the license suspension on other grounds, it agreed with Heuton's hearsay argument:

They [the statements] are offered to assist the Commissioner in proving by a preponderance of the evidence that Heuton was incapable of refusal.

Neither can we accept the state's argument that the statements of emergency room personnel regarding Heuton's condition were not offered to prove the truth of the matter asserted and that, therefore, the challenged testimony is non-hearsay under the 'state of mind' exception set forth in rule 803(3). The statements of the medical personnel clearly addressed one of the facts that the Commissioner was required to prove by a preponderance of the evidence, to wit, Heuton's incapacity to refuse testing.

Heuton, 514 N.W.2d at 364. The same holds true in the present case. The statements of Ms. Albright presented by Officer Desrochers were undeniably introduced to satisfy the threshold question of whether or not Appellant could submit to a breath test.

In *State v. Anger*, 98 P.3d 630 (Haw. 2004), the Hawaii Supreme Court also addressed out of court statements of medical personnel. Anger was involved in a single car accident that required emergency officials to extract him from his vehicle. He denied being injured but was transported to the hospital. An officer on the scene requested that dispatch send another officer to the hospital to obtain a blood test. Pursuant to Hawaii law, the officer could obtain an involuntary blood sample from Anger if Anger sustained injuries. At the hospital, Anger again denied that he was injured and the arresting officer awaited a diagnosis from a physician to determine whether the involuntary blood draw was warranted. A blood sample was obtained despite Anger's protest. At a hearing to suppress Anger's blood results, the officer present at the hospital testified that a doctor told him that Anger was injured and

therefore, the blood draw was warranted. Counsel for Anger noted a timely hearsay objection and the prosecutor responded that the statement “. . . doesn’t go to the truth of the matter asserted.” *Anger*, 98 P.3d at 634.

The Hawaii Supreme Court disagreed. The court held that the lower court erred in denying Anger’s motion to suppress because the testimony of the officer concerning what the doctor told him amounted to inadmissible hearsay. The court stated:

Nevertheless, Officer Silva’s testimony that an anonymous physician had told him that Anger had sustained injuries was the purported and sole statutory predicate, under HRS § 286-163, for the involuntary draw of Anger’s blood. Therefore, Officer Silva’s testimony was obviously adduced to prove the truth of the matter asserted, inasmuch as the legal justification under HRS § 286-163(c) for such an involuntary draw depended upon proving that Anger had, in fact suffered injury in the motor vehicle accident.

Anger, 98 P.3d at 638. As in *Anger*, the hearsay statements of Ms. Albright were the “sole statutory predicate” for Officer Desrochers decision to request a blood sample and were clearly offered for the truth of the matter asserted.

Recently, in *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015), our Supreme Court reviewed the issue of hearsay statements that the State contended were admissible for purposes of context or for the effect the statements had on the defendant. In *Brewer*, the State introduced an audiotaped interrogation of the defendant. During the interrogation, the investigators repeatedly referenced and quoted alleged eye witnesses. The Court held that hearsay statements of witnesses were “. . . offered for the sole purpose of proving the truth of the matter asserted” and not for the purpose of showing what effect the statements had on Brewer. *Brewer*, 411 S.C. at 406 - 407, 768 S.E.2d at 659. The Court took the time to quote *United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004):

So to what issue *other* than truth might the testimony have been relevant? . . .
Allowing agents to narrate the course of their investigations, and thus spread
before juries *damning information* that is not subject to cross examination,
would go far toward abrogating the defendant's rights under the [S]ixth
[A]mendment and the hearsay rule.

Brewer, 411 S.C at 407, 768 S.E.2d 656. The Court, citing *State v. Miller*, 676 S.E.2d 546,
556 (N.C. Ct. App. 2009) also noted:

. . . [H]owever, caution must be exercised in the admission of such evidence
to ensure that all out-of-court statements are either 'admissible for a valid
nonhearsay purpose or as an exception to the hearsay rule in order to
safeguard against an end-run around the evidentiary and constitutional
proscriptions against the admission of hearsay.'

Brewer, 411 S.C at 407 - 408, 768 S.E.2d 656.

Both passages are particularly applicable in the present case. The question posed in
Silva is the same. To what issue, other than the fact that Appellant could not leave the
hospital, might have the testimony been relevant? The answer is none. The fact that
Appellant could not leave was the sole reason the officer requested the blood test and had
Ms. Albright sign the SLED Urine/Blood Collection Report. The concerns of the *Miller* court
are also the same in the present case. The ruling that the statements were not used to prove
Appellant was unable to leave but to show that a blood test was warranted under the statute
amounts to an attempted "end-run" around the hearsay rule. The nurse that allegedly stated
Appellant was unable to leave the hospital, which formed the basis of her determination that
a blood test was warranted, was not subject to cross examination. It *may* be that the nurse
was not informed of the time limit for a breath test. Could Appellant have been more
expeditiously cared for and discharged had she known? Did the officer ask her to speed up
the process or did the officer simply present a form for her to sign for his own convenience?

Was Appellant released from the hospital in time to reasonably be offered a breath test? Obviously, we cannot know the answer to these questions because the nurse did not testify.

Based upon the foregoing, this Court should reverse the decision of the administrative law judge. The statements from Albright and the SLED Urine/Blood Collection Report amount to hearsay because they serve as the justification for the decision to request a blood test. The determination that a blood test was warranted was premised solely on Appellant's inability to leave. If the alleged statements were false, then the decision to request a blood test is invalid and the arresting officer had no basis to rely on the statements to request the blood test. Consequently, the statements were offered for the truth of the matter asserted and constitute inadmissible hearsay warranting reversal of the administrative law judge's decision.

II. THE ADMINISTRATIVE LAW JUDGE ERRED IN AFFIRMING THE OMVH HEARING OFFICER'S DECISION THAT THE ARRESTING OFFICER PRESENTED A *PRIMA FACIE* CASE THAT THE INDIVIDUAL WHO DETERMINED APPELLANT WAS UNABLE TO SUBMIT TO A BREATH TEST WAS LICENSED MEDICAL PERSONNEL AS REQUIRED BY S.C. CODE ANN. § 56-5-2950 (A) (SUPP. 2012).

The Administrative Law Judge erred in ruling that the arresting officer presented a *prima facie* case that the individual who informed Officer Desrochers that Appellant was unable to leave the medical facility was licensed medical personnel. This ruling, based on hearsay testimony and unsubstantiated assumptions, should be reversed.

A. The determination that Angela Albright was licensed medical personnel as required by S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) was based upon hearsay.

The determination that Angela Albright was a registered nurse was based solely on

the hearsay testimony of the arresting officer. At the hearing, the hearing officer initially stated that he was admitting hearsay testimony with regard to Ms. Albright, over the objection of counsel, “. . . not for the fact that she was a licensed nurse practitioner, but that he relied upon what she said.” (R. p. 31, lines 1 – 3). However, the Final Order and Decision indicates the opposite and the Amended Final Order of the administrative law judge agreed.

The administrative law judge clearly accepted the statements with regard to Ms. Albright’s qualifications for the truth of the matter asserted – that she was a registered nurse. He notes that “. . . Officer Desrochers was informed by Angela Albright, who held herself out as a registered nurse. . .” and made a finding that “. . . the nurse signed the SLED Urine/Blood Collection Report, and also indicated on that form that she was a registered nurse when she listed her title on that report.” (R. pp. 2 and 5). He further concluded Officer Desrochers “. . . saw Albright in the hospital wearing a nametag and hospital scrubs¹ that reasonably indicated she was a registered nurse (R. p. 6).

Therefore, it appears the administrative law judge based his conclusion upon Ms. Albright’s alleged signature on the SLED Urine/Blood Collection Report; her representations to the arresting officer; her hospital scrubs²; and her name tag all of which constitute out of court statements used for the truth of the matter asserted. Based upon the administrative law judge’s erroneous reliance on hearsay statements to establish Ms. Albright’s credentials as licensed medical personnel, this Court should reverse Amended Final Order in this matter.

¹ The record is devoid of any testimony indicating Ms. Albright was wearing scrubs. However, both the hearing officer and administrative law judge made specific findings that she was wearing scrubs.

² See footnote 1.

B. The arresting officer did not present a *prima facie* case that Ms. Albright qualifies as licensed medical personnel pursuant to S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012).

The administrative law judge ruled that the arresting officer presented *prima facie* evidence that the person who told him Appellant would be unable to leave the hospital and signed the SLED Urine/Blood Collection Report was licensed medical personnel. He based the ruling on the testimony of Officer Desrochers who “. . . testified that he saw Albright in the hospital wearing a nametag and scrubs that reasonably indicated she was a registered nurse.” (R. p. 6). This ruling ignored well settled law interpreting S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) with respect to the identification and qualification of licensed medical personnel and should be reversed.

In *State v. Frey*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2005), this Court reviewed the admission of blood test results when the State failed to properly establish that the individual that drew the sample was qualified as required under the implied consent statute. The facts of the present case are similar. In *Frey*, the defendant was injured in an automobile accident and transported to the hospital. The investigating officer met Mr. Frey at the hospital and advised him of all applicable rights. Mr. Frey then consented to a blood test. The trooper prepared the standard SLED Urine/Blood Collection Report which was signed by an individual named Scott Darragh. Mr. Darragh signed the form in the space labeled “licensed or trained collector.” The report did not indicate Mr. Darragh’s position and the State did not offer any evidence of Mr. Darragh’s medical credentials. *Frey*, 362 S.C. at 515, 608 S.E.2d at 876 – 877.

At trial, counsel for Mr. Frey moved to suppress the blood test results based upon the

State's failure to present evidence that the blood test was drawn by a qualified individual as required by the implied consent statute. The motion was denied based upon the circuit court's finding that there was enough "circumstantial evidence" to establish compliance based upon the fact that Darragh appeared in the emergency room wearing "hospital like scrubs." *Frey*, 362 S.C. at 515 – 516, 608 S.E.2d at 877.

In writing for the court, now Justice Kittredge, joined by now Justice Hearn and Judge Huff, made it very clear that one's presence in an emergency room and signature on a SLED form was not sufficient to establish an individual's medical credentials. The court stated:

The plain language of section 56–5–2950 further requires that we reject the State's suggestion that the mere appearance of Scott Darragh in the emergency room is sufficient, for the statute mandates that the blood sample "must" be obtained by a trained medical professional. One's mere appearance in a hospital wearing generic hospital attire is not evidence of one's medical training. We likewise reject the State's assertion that Darragh's signature on the SLED form in the space labeled "licensed or trained collector" is sufficient to establish compliance with the statute. Simply signing a preprinted form does not provide any indicia that the signatory's qualifications meet the specific licensing or training requirements of section 56–5–2950. To hold otherwise would render the minimal foundational requirement of section 56–5–2950 without any meaningful force or effect. In light of the State's failure to satisfy this basic requirement, we are constrained to find the circuit court erred in finding the foundational requirements of section 56–5–2950 had been satisfied.

Frey, 362 S.C. at 517, 608 S.E.2d at 877 – 878.

The facts in the present case are strikingly similar. The administrative law judge's decision that Ms. Albright was qualified to opine that Appellant was unable to submit to a breath test is based on the very same factors rejected by the *Frey* court as insufficient to establish Mr. Darragh's medical credentials. The administrative law judge attempted to

distinguish the present case from *Frey* based upon the fact that *Frey* was a criminal proceeding. In *Frey*, the State was attempting to introduce a blood sample. The present case is a civil administrative proceeding and Appellant refused to provide a blood sample.

First, the construction and application of S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012), is the same regardless of the nature of the proceeding. Our Supreme Court has recognized the significant importance of administrative license suspension hearings:

[A] license-suspension may potentially terminate an important interest of the licensee. . . . Because a license-suspension hearing constitutes a final adjudication of an important interest, we believe the Legislature promulgated section 56-5-2951 in such a way that guards against an automatic or rote elimination of this interest.

S.C. Dep't of Motor Vehicles v. McCarson, 391 S.C. 136, 148, 705 S.E.2d 425, 431 (2011).

Likewise, the United States Supreme Court has recognized that a driver's license is a property interest protected by the Fourteenth Amendment and, once issued, a driver's license may not be taken away without affording a licensee procedural due process. *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589 (1971). Whether this matter involves an administrative license suspension or a criminal proceeding has no bearing the requirements of the statute.

Second, the administrative law judge attempts to distinguish the present case from *Frey* based upon the fact that in *Frey*, the state sought to introduce a blood sample that must be collected by licensed medical personnel as opposed Appellant's refusal to provide a blood sample. However, this premise is simply a distinction without a difference. S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) references licensed medical personnel twice. First, in the event the person arrested does not have an injured mouth, is not dead or unconscious, licensed medical personnel must make the determination that the person cannot submit to a

breath test. Second, in the event the person agrees to submit a blood or urine sample, the sample must be obtained by a licensed physician, a licensed registered nurse or other medical personnel trained to obtain samples in a licensed medical facility. The statute does not distinguish between the licensure requirements for determining if an individual is unable to submit to a breath test versus the licensure requirements for obtaining a blood or urine sample. Under the administrative law judge's reasoning, in a criminal proceeding in which a sample is obtained, the State must provide proof of the medical personnel's licensure. However, in an administrative proceeding, where an individual refuses to provide a sample, he ruled the State need only show that some person wearing scrubs and a name tag placed her signature on a preprinted form and this complied with the statute. This exact reasoning was expressly rejected in *Frey* with regard to the proof necessary to establish the qualifications of licensed medical personnel.

Based upon the *Frey* decision, this Court should reverse the Amended Final Order of the administrative law judge.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that this Court reverse the decision of the administrative law judge and order that the suspension related to this case be rescinded.

June 1, 2016

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable S. Phillip Lensky, Administrative Law Judge

Appellate Case No. 2016-000228

Bradley Sanders

Appellant

v.

South Carolina Department of Motor Vehicles
and Columbia Police Department

Respondents

Of Whom South Carolina Department of Motor Vehicles is the Respondent

FINAL BRIEF OF RESPONDENT
SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

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STATEMENT OF ISSUES ON APPEAL

- I. THE HEARING OFFICER WAS CORRECT IN RULING THAT THE ARRESTING OFFICER LAWFULLY SOUGHT A BLOOD SAMPLE FROM THE APPELLANT UNDER S.C CODE 56-5-2950(a) WHERE HE FOUND THAT A LICENSED MEDICAL PROFESSIONAL MADE A DETERMINATION THAT THE APPELLANT WAS UNABLE TO GIVE A BREATH SAMPLE PRIOR TO THE BLOOD TEST BEING OFFERED BY THE OFFICER.
- II. THE HEARING OFFICER WAS CORRECT IN RULING THAT THE ARRESTING OFFICER ESTABLISHED THAT THE INDIVIDUAL WHO SIGNED THE URINE/BLOOD COLLECTION REPORT WAS A LICENSED MEDICAL PROFESSIONAL.

STATEMENT OF THE CASE

On November 21, 2012, Officer Desrochers of the Columbia Police Department was dispatched to the scene of a single-car collision (R. p. 27, lines 13-19). Officer Desrochers found the Appellant, Bradley Sanders, standing nearby, bleeding from the head and smelling strongly of alcohol (R. p. 27, line 19 – p.28, line 9). The Appellant spoke with slurred speech and seemed both mentally and physically “off-balance.” (R. p. 28, lines 9-15). The Appellant was transported to Lexington Medical Center, where Nurse Angela Albright informed Officer Desrochers that Appellant was physically unable to submit to a breath test (R. p. 28, lines 15-19; p. 29, lines 9-22; and p. 32, lines 6-9). Officer Desrochers arrested Appellant for an offense arising out of an act alleged to have been committed while he was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs (R. p. 32, line 16). Officer Desrochers read Appellant his Miranda rights, and advised Appellant of his Implied Consent Rights, both in writing and verbally (R. p. 32, lines 15-22). Then, due to Appellant’s inability to provide a breath sample, Officer Desrochers asked Appellant to submit to a blood sample (R. p. 32, lines 6-13 and p. 32, lines 20-23). Appellant refused

to provide a blood sample (R. p. 32, lines 12-13 and p. 32, lines 20-23). Upon refusal to submit to a blood sample, Appellant was found to be in violation of S.C. Code Ann. § 56-5-2950, and Officer Desrochers issued a Notice of Suspension form pursuant to S.C. Code Ann. § 56-5-2951 (R. p. 32, line 23 and p. 48-49).

Appellant timely requested a contested case hearing which was held on March 5, 2013 (R. p. 48-49). After reviewing the record and considering all the evidence, the Office of Motor Vehicle Hearings (OMVH) Hearing Officer issued an order affirming the suspension of the Appellant's driver license (R. p. 15-21).

An appeal was timely filed in the Administrative Law Court (ALC) on March 3, 2015 (Notice of Appeal dated February 5, 2016). By Amended Final Order filed January 27, 2016, the Administrative Law Court ordered that the OMVH Final Order and Decision dated February 13, 2015, sustaining the suspension of Appellant's driver's license or driving privilege be affirmed (Amended Final Order filed January 29, 2016).

This appeal followed.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code Section 1-23-380(A)(6).

(A) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....

- (6) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
 - (a) In violation of constitutional or statutory provisions;
 - (b) In excess of the statutory authority of the agency;
 - (c) Made upon unlawful procedure;

- (d) Affected by other error of law;
- (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), our Supreme Court set out the standard of evidentiary review under the South Carolina Administrative Procedure Act:

[Section 1-23-380(g)(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.

We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v. Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

The substantial evidence rule... means that we will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." (Citation omitted.)

See also *Schudel v. South Carolina Alcoholic Beverage Control Commission*, 276 S.C. 138, 276 S.E.2d 308 (1981); *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 281 S.E.2d 18 (1981).

An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc.*, *supra*. In *Lark*, our Supreme Court quoted

Consolo v. Federal Maritime Commission, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966), to define substantial evidence:

We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."... "It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury..." This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.C. at 136, 276 S.E.2d at 311. *See, also, Dorman v. DHEC*, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002); *Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc.*, 311 S.C. 295, 422 S.E.2d 118 (1992).

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. *Dorman v. DHEC*, *supra*; *Hamm v. American Telephone & Telegraph Co.*, *supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis*, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary

support or is arbitrary or capricious as a matter of law. *Hamm v. South Carolina Public Service Commission*, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

Appellant's Brief widely misses the mark with regard to what must be proven to sustain a suspension arising out of a refusal to submit to implied consent testing under S.C. Code §56-5-2950. Pursuant to S.C. Code §56-5-2951(F) the:

...scope of the hearing is limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]
- (3) refused to submit to a test pursuant to Section 56-5-2950;...

S.C. Code §56-5-2951(F). See also *SCDMV v. Nelson*, 364 S.C. 514, 613 S.E.2d 544 (2005) (stating that an administrative hearing is to determine if the person violated the implied consent laws, and "because Nelson did not consent to testing, the scope of the hearing was limited to whether Nelson (1) was lawfully arrested, (2) was advised in writing of his section 56-5-2950 rights, and (3) refused to submit to a test."). Appellant repeatedly attempts to confuse the legal issues before this Court by arguing that the OMVH Hearing Officer relied on hearsay evidence that the Appellant was unable to submit to a breath test and hearsay evidence that this determination came from a licensed medical personnel as required by S.C. Code §56-5-2950(A). Appellant's argument fails to recognize that the statements made by Nurse Albright to Officer Desrochers regarding Appellant's inability to submit to a breath test and Officer Desrochers' testimony regarding Nurse Albright's qualifications as a licensed medical personnel pursuant to S.C. Code §56-5-2950 simply do not constitute hearsay in the context of an implied consent administrative hearing.

- I. THE HEARING OFFICER WAS CORRECT IN RULING THAT THE ARRESTING OFFICER LAWFULLY SOUGHT A BLOOD SAMPLE FROM THE APPELLANT UNDER S.C CODE 56-5-2950(a) WHERE HE FOUND THAT A LICENSED MEDICAL PROFESSIONAL MADE A DETERMINATION THAT THE APPPELLANT WAS UNABLE TO GIVE A BREATH SAMPLE PRIOR TO THE BLOOD TEST BEING OFFERED BY THE OFFICER.

In an administrative hearing involving a motorist's refusal to provide a blood sample for a blood alcohol test, the State is required to demonstrate that law enforcement properly requested a blood sample from the motorist. *See Peake v. S.C. Dep't of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). S. C. Code §56-5-2950(A) sets forth the circumstances under which a blood sample may properly be requested. It provides in pertinent part:

At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. If the person is unable to provide an acceptable breath sample because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel, the arresting officer may request a blood sample be taken.

S. C. Code §56-5-2950(A) (Emphasis added). In the instant case, the Officer Desrochers testified that he was told by Nurse Albright that the Appellant would not be able to provide a breath sample (R. p. 28, lines 15-19; p. 29, lines 9-22; and p. 32, lines 6-9). Officer Desrochers further testified that he offered the Appellant a blood test because it was established that the Appellant would be unable to get to a Datamaster in time to take a breath test due to his injuries and required treatment (R. p. 32, lines 8-20). The Appellant refused to submit to a blood test (R. p. 32, lines 12-13 and p. 32, lines 20-23). Officer Desrochers also offered into evidence the SLED Blood/Urine Collection Report

signed by Nurse Albright, which indicated Appellant could not submit to a breath test for medical reasons (R. p. 29, lines 17-21).¹

Appellant argues that the OMVH Hearing Officer relied on hearsay evidence that the Appellant was unable to submit to a breath test. SCDMV asserts the OMVH Hearing Officer and ALC Judge correctly found that the testimony presented by Officer Desrochers did not constitute hearsay, Respondent met the burden of proof, the request for a blood sample was lawful, and that the Appellant refused to provide the requested blood sample. SCDMV asserts that Officer Desrochers testimony regarding Nurse Albright's determination that Appellant was physically unable to provide an acceptable breath sample was not hearsay because whether Appellant was actually able or unable to physically provide an acceptable breath sample was wholly irrelevant for purposes of this hearing, i.e. it was not offered to prove the truth of the matter asserted in this case.

This issue has already been address on point in the case *Alexander William Cann v. South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety*, 2013 WL 1703702 (SCALC 2013). In the *Cann* case, the ALC held that a trooper's testimony that a doctor advised him that Cann was unable to leave the hospital was not hearsay since it was not admitted to prove that Cann was actually unable to leave. *Id.* at 3. The ALC further held that the testimony was admitted to show that the trooper's request for a blood test was warranted under the statute because a licensed medical personnel had determined the Cann was unable to provide a breath sample. *Id.* The ALC in the *Cann* case also held that the SLED Urine/Blood Collection Report also did not

¹ Unless otherwise noted, all references to "statements" made by Nurse Albright refer to both the oral statement that Appellant would not be able to provide a breath sample and to the SLED Blood/Urine Collection Report signed by Nurse Albright.

constitute hearsay because it “was not admitted to prove that Cann was unable to take a breath test at the time but rather to show Trooper Turner was justified in requesting a blood sample be taken.” *Id.* The facts in this case are exactly the same and this Court should follow the logic and reasoning of the *Cann* decision.

Backing up the logic and reasoning of the *Cann* decision is Rule 801(c), SCRE which defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Emphasis added. In this case, there is no debate between the parties about whether Appellant was actually able or unable to physically provide an acceptable breath sample. Furthermore, as set forth in S.C. Code §56-5-2951(F) the scope of an implied consent violation hearing:

...is limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]
- (3) refused to submit to a test pursuant to Section 56-5-2950;...

Thus, by statute, the matter asserted in this type of hearing is whether: 1) the driver was lawfully arrested or detained; 2) the driver was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; and 3) the driver refused to submit to a test pursuant to Section 56-5-2950, not whether the driver was actually physically able or unable to submit to provide an acceptable breath sample. Only because a blood test was requested by Officer Desrochers did the OMVH Hearing Officer entertain any testimony regarding why Officer Desrochers requested the blood test. This is because S.C. Code §56-5-2950(A) only allows the arresting officer to request a blood sample “If the person is unable to provide an acceptable breath sample

because he has an injured mouth, is unconscious or dead, or for any other reason considered acceptable by the licensed medical personnel..." S. C. Code §56-5-2950(A) (Emphasis added). In fact, the OMVH Hearing Officer specifically stated that he would allow the statements into evidence, "but not for the truth of the matter asserted, just that you [Officer Desrochers] was told that." (R. p. 28, line 23 – p. 29, line 1).

Similarly, the Department of Revenue does not sanction a liquor store based on an allegation by a citizen that the store was open at 8:00 p.m., nor does law enforcement arrest a person based solely on a report that the person was seen doing a drug deal at a place known to be a drug hangout. Statements such as these would, however, be sufficient to justify the agency or law enforcement officer making further inquiry. Courts of this State have repeatedly held that out-of-court statements are not hearsay if they are offered for the limited purpose of explaining why a government investigation was undertaken. *State v. Brown*, 317 S.C. 55, 63, 451 S.E. 2d 888, 894 (1994) (Evidence is not hearsay unless it is an out of court statement offered to prove the matter asserted and an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken); *State v. Rice*, 375 S.C. 302, 324, 652 S.E. 2d 409, 420 (Ct. App. 2007), *rev'd on other grounds*, 392 S.C. 438, 710 S.E 2d 55 (2011)² (The hearsay rule does not require exclusion of testimony about what an investigating officer learns from his investigation. The purpose of the officer's repetition of the out of court statement was not to prove the matter asserted, but to

² Although wholly unrelated to this case, the undersigned takes this brief moment to note that the body of the victim in the *Rice* case was first discovered by Deputy Tom Lyons, a remarkable law enforcement officer with several decades of law enforcement service throughout the State of South Carolina. Deputy Lyons tragically passed away in March 2016 after a long and painful battle with cancer. Deputy Lyons is greatly missed by his family, friends, coworkers, and the undersigned.

suggest the Defendant's state of mind about surrendering her fingerprints); *State v. Thompson*, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003) (Testimony concerning a statement from a bystander to the police was not hearsay, because it was not offered to prove the matter asserted, but rather to explain and outline the investigation and the officer's reason for going to the defendant's home). In this case, the OMVH Hearing Officer explicitly stated that Nurse Albright's statements would be admitted into evidence, "not for the truth of the matter asserted, just that you [Officer Desrochers] was told that" Appellant would be unable to take a breath test (R. p. 28, line 23 – p. 29, line 1). Thus, the clear implication of this ruling is that the OMVH Hearing Officer was not admitting Nurse Albright's statements to prove that Appellant was actually physically unable to provide an acceptable breath sample, but was admitting her statements to explain why Officer Desrochers requested Appellant submit to a blood test.

Appellant argues Nurse Albright's statements were "used to prove the truth of the matter asserted" by stating the matter asserted in this case was that "Appellant could not leave the hospital," and, therefore, "could not provide a breath sample," and "Officer Desrochers relied upon the statements as being the truth." (Initial Brief of Appellant, p. 12). Again, this argument blindly ignores the statutory limits on the scope of this hearing. As mentioned previously, pursuant to S.C. Code §56-5-2951(F) the:

...scope of the hearing is limited to whether the person:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]
- (3) refused to submit to a test pursuant to Section 56-5-2950;...

S.C. Code §56-5-2951(F). See also *SCDMV v. Nelson*, 364 S.C. 514, 613 S.E.2d 544 (2005) (stating that an administrative hearing is to determine if the person violated the

implied consent laws, and "because Nelson did not consent to testing, the scope of the hearing was limited to whether Nelson (1) was lawfully arrested, (2) was advised in writing of his section 56-5-2950 rights, and (3) refused to submit to a test."). Therefore, the only matters asserted to the OMVH were:

- 1) That Appellant was lawfully arrested or detained;
- 2) That Appellant was given a written copy of and verbally informed of his rights enumerated in Section 56-5-2950; and
- 3) That Appellant refused to submit to a blood test pursuant to Section 56-5-2950.

Many, many cases support testimony regarding out of court statements being testified to by someone other than the declarant so long as the testimony is not offered to prove the truth of the matter asserted in the statement. See *In re Cliquot's Champagne*, 70 U.S. 114 (1865) (In libel action against wine allegedly imported under false invoice of market values in violation of revenue law, a "price-current" obtained by investigator from wine dealer other than exporter was not hearsay); *State v. Lewis*, 293 S.C. 107, 110-111, 359 S.E.2d 66, 68 (1987) ("Bellamy's testimony regarding what third parties told him as to Lewis's alleged threats to kill him was not hearsay as it was not offered to prove that Lewis intended to kill him. Rather it was offered to show Bellamy's state of mind, that is, the reason he bought a gun and had it with him on the night of the murder."); *Watson v. Wall*, 239 S.C. 109 (1961) (Admission of written statement of doctor certifying that grantor was mentally and physical capable of executing any legal papers was not improper, where issue in the case was not the correctness of the doctor's statement, but whether grantee's conduct in transaction was fraudulent); *State v. Blurton*, 342 S.C. 500, 510, 537 S.E.2d 291, 296 (Ct. App. 2000) ("Blurton's counsel did not offer evidence that Mayfield represented himself to be a former Navy SEAL to prove Mayfield actually was one. In fact it is undisputed that Mayfield was never a Navy SEAL. The evidence was

offered, in part, to corroborate Blurton's testimony that Mayfield told him and he believed Mayfield was a former SEAL. Therefore, the evidence should not have been excluded as hearsay."); *Sams v. McCaskill*, 282 S.C. 481, 485, 319 S.E.2d 344, 347 (Ct. App. 1984) ("The hearsay rule does not apply where the purpose of offering an extrajudicial statement is not to prove the truth of the statement but merely to prove the fact that it was made and the circumstances under which it was made...") (Emphasis added); *Hatfield v. Van Epps*, 358 S.C. 185, 192, 594 S.E.2d 526, 530 (Ct. App. 2004) (In malpractice litigation, trial court should have allowed the introduction of twenty affidavits that were submitted by the Defendant as legal representative of the Plaintiff to the Family Court at a temporary hearing to "show the extent of Law Firm's alleged negligence in failing to call any of these witnesses at the final hearing."); *State v. Kirby*, 325 S.C. 390, 481 S.E.2d 150 (Ct. App. 1996) ("We find Lt. McGlocklin's testimony concerning the dispatcher's announcement was not offered for the truth of the matter asserted, but rather, served only to explain the reason for the initiation of police surveillance of the vehicle in question. Therefore, we hold the testimony was not hearsay and was properly admitted."); *Floyd v. Floyd*, 365 S.C. 56 (Ct. App. 2005) (Letters written by attorneys were not hearsay because the letters were introduced into evidence not to prove the truth of the attorneys' statements, but to show trustee was placed on notice of the beneficiary's position); *R & G Const., Inc. v. Lowcountry Regional Transp. Authority*, 343 S.C. 424 (Ct. App. 2000) (Closure letter and soil analysis report were not hearsay as they were not admitted for the truth of the matters asserted within them, but, rather, were offered to show that construction company completed all acts precedent to receiving payment); *Butler v. Gamma Nu Chapter of Sigma Chi*, 314 S.C. 477 (Ct. App.

1994) (Fraternity official's letter to residence hall director recommending that fraternity member be removed from the residence hall on the ground that he was a danger "to other brothers and university property" was not hearsay in action against fraternity by student who was assaulted by that member in a portion of the residence hall under the fraternity's jurisdiction because the letter was not offered to prove the truth of the matter asserted, but was admitted solely to prove notice); *Cloaninger ex rel. Estate of Cloaninger v. McDevitt*, 555 F.3d 324 (4th Cir. 2009) (Deposition testimony and police reports, which indicated that a doctor called 911 and told a dispatcher that detainee had threatened suicide, was not hearsay since content was offered to explain the subsequent conduct of deputies rather than to prove the matter asserted); *Taylor v. Molesky*, 63 Fed.Appx 126 (4th Cir. 2003) (Copies of ex parte order and protective order entered by state court, which detailed charges by former girlfriend against arrestee and which resulted in keeping arrestee away from his son, were not hearsay because they were offered to show their effect on arrestee's emotional state); *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789 (4th Cir. 2001) (In a trademark infringement action brought by a costume rental company, evidence that children who saw costume thought costume depicted popular children's television character and of newspaper clippings in which reporters had erroneously identified costume as a depiction of character were not hearsay because they were offered not to prove truth of the matter asserted, but, rather, were offered to prove that children and newspaper reporters had expressed their believe that costume depicted character); *Arrington v. E. R. Williams, Inc.*, 490 Fed.Appx. 540 (4th Cir. 2012) (Statements from federal contractor's clients and employees, complaining about performance of plaintiff African American employee, were not hearsay in §1981

action alleging that termination of plaintiff's employment was based on race because statements were not offered for their truth, but were offered to explain why contractor believed terminating plaintiff was necessary and appropriate); *Thomas v. Dootson*, 377 S.C. 293 (Ct. App. 2008) (Surgical technician's testimony that doctor had been warned that surgical drill was hot prior to patient's burn injury to his mouth during oral surgery was not hearsay at medical malpractice trial because testimony was not offered to prove surgical drill was hot, but was offered to prove that doctor had notice that drill was hot); *Fields v. Regional Medical Center Orangeburg*, 354 S.C. 445 (Ct. App. 2003) (Medical expert's testimony that he was not board certified in emergency medicine because he was the first president of the Board of Emergency Medicine and that the opinion of legal counsel was that there may be a conflict of interest if he had taken the exam was not hearsay because the statement was not offered to prove that the legal counsel was correct that there would be a conflict of interest, but, rather, was offered to explain why the expert did not take the test and as a result why expert was not board certified); *Baber v. Greenville County*, 327 S.C. 31 (1997) (In former county employee's whistleblower suit, testimony that county had criticized former employee's job performance was not hearsay because the testimony was elicited to prove former employee had notice of poor job performance, not that former employee actually performed poorly); *U.S. v. Cain*, 586 Fed.Appx. 104 (4th Cir. 2014) (Fake prescriptions created by defendant and his co-conspirators were not hearsay in drug prosecution because the government did not offer the prescriptions into evidence to prove the truth of any matter asserted); *U.S. v. Edelen*, 561 Fed.Appx. 226 (4th Cir. 2014) (In prosecution for conspiracy to kidnap, text message received by defendant stating bank manager was not home one day before defendant and

his co-conspirators attempted to hold her son hostage in order to gain access to a vault were not hearsay because the message was not offered to prove manager's physical location, but to form a link between defendant and message's sender and to support the inference that defendant had access to information about manager prior to commission of offense); *U.S. v. Hassan*, 742 F.3d 104 (4th Cir. 2014) (Cooperating witness's testimony about his phone conversation with defendant's father was not hearsay where testimony was introduced to show basis for witness's believe that defendant's father was angry with him and to explain the cessation of witness's relationship with defendant); *U.S. v. Ibisevic*, 675 F.3d 342 (4th Cir. 2012) (In prosecution for bulk cash smuggling, defendant's mother's testimony that defendant, after signing a Customs and Border Protection (CBP) form, told her that CBP officers were asking about insurance value of his checked luggage was not hearsay where the testimony was offered not to prove that defendant actually was asked about the value of his checked luggage, but, rather, to prove that defendant expressed his belief that he was being asked about the value of his checked luggage); *State v. Vick*, 384 S.C. 189 (Ct. App. 2009) (Witness's testimony regarding a telephone conversation she heard between defendant's mother and victim was not offered for the truth of the matter asserted and was, therefore, not hearsay; the conversation simply related that victim did not have time to fix defendant's hair at the request of defendant's mother); *U.S. v. Hodge*, 295 Fed.Appx. 597 (4th Cir. 2008) (Allegations and ordering language in cease and desist order served on mail fraud defendant was not hearsay because the order was not introduced for the truth of the matter asserted but, rather, to establish that defendant was on notice of allegations and ordering language set forth in the cease and desist order, and, nonetheless, continued uninterrupted in her

activities); *U.S. v. Rodriguez*, 94 Fed.Appx. 139 (4th Cir. 2004) (Police sergeant's testimony regarding results of fingerprint report was not hearsay because it was not offered to prove the matter asserted, which was that there were no fingerprints on the weapon, but, rather, for the limited purpose of explaining why the government did not present any fingerprint evidence in the case); and *State v. Miller*, 197 N.C.App. 78, 676 S.E.2d 546 (NC.App. 2009) (In murder trial, questions from detectives to defendant that included statements attributed to nontestifying third parties were not hearsay where they were offered not for the truth of the matter asserted, but so that the jury could understand the circumstances in which the defendant was caught in a lie, changed his story, and made significant admissions of fact).

Appellant cites several cases in support of his argument that Nurse Albright's statements are hearsay. All of these cases are distinguishable from this case for multiple reasons. First, Appellant cites *State v. Stacy*, 315 S.C. 105, 431 S.E.2d 640 (Ct. App. 1993). It is unclear how Appellant believes the *Stacy* case supports his argument that Nurse Albright's statements were inadmissible hearsay. The holding in the *Stacy* case was that the need for additional medical treatment is an acceptable reason for licensed medical personnel to determine a person is physically unable to provide an acceptable breath sample to law enforcement. In fact, the *Stacy* case did not deal with the issue of any alleged hearsay. The licensed medical personnel that determined Stacy could not give a breath sample testified in Stacy's felony driving under the influence trial and the purpose of that testimony was to lay the foundation for the admission of the blood test results coming into evidence, not to explain a refusal to submit to the blood test. So, the *Stacy* case has no relevance to the issues raised by Appellant in this case.

Next, Appellant relies on *City of Columbia v. Moore*, 318 S.C. 292, 457 S.E.2d 346 (Ct. App. 1995) to argue that the arresting officer's testimony that "...someone at the hospital told him Moore could possibility be in the hospital all night for observation" means the testimony in this case was not sufficient to support the OMVH Hearing Officer's findings. This argument fails to recognize multiple, significant differences between this case and the *Moore* case. First, in this case we know who told Officer Desrochers that Appellant could not physically provide an acceptable breath sample: Nurse Albright. In the *Moore* case, the officer merely testified "...someone at the hospital told him Moore could possibly be at the hospital all night for observation." Second, Nurse Albright signed the SLED Blood/Urine Collection Report indicating that Appellant could not provide a breath sample. It appears that only the officer filled out the "Chem 001" form in the *Moore* case. Third, in the *Moore* case a blood sample was actually obtained, tested, and used in Moore's criminal prosecution. So, the objectionable testimony was used to lay the foundation for the blood test results to come into evidence. In this case, Appellant refused to submit to the blood test. Finally, the Court in the *Moore* case stated the "sole issue on appeal is whether the blood sample results were properly admitted into evidence..." In this case, because Appellant refused to submit to the blood test there are no blood test results. So, the very issue in the *Moore* case was the admissibility of the blood test results in Moore's criminal trial, not whether Moore had refused to submit to the blood test. In *Moore*, the Court concluded that the blood test results were not admissible because the officer "concluded Moore was unable to provide an acceptable breath sample and ordered a blood sample," rather than licensed medical personnel determining Moore was unable to provide an acceptable breath

sample. That is clearly not the case here. In this case, Nurse Albright, not Officer Desrochers, determined Appellant would be physically unable to provide an acceptable breath sample and signed the SLED Blood/Urine Collection Report to indicate the same. Therefore, the *Moore* case is also of little guidance to the Court on the issue raised by Appellant in this case.

Appellant then turns to the case *State v. Kimbrell*, 326 S.C. 344, 481 S.E.2d 456 (Ct. App. 1997), yet another criminal prosecution for driving under the influence, rather than an implied consent administrative challenge. With this case, Appellant argues the determination that a person cannot give an acceptable breath sample must be made by medical personnel, not the arresting officer. In the *Kimbrell* case, the officer asked Kimbrell to submit to a blood test because the officer observed blood in Kimbrell's teeth. In *Kimbrell* the Court held that even "where there is an indication of an injury to the mouth, however, the statute still requires a determination that the accused is physically unable to provide an acceptable breath sample." *Id.*, 326 at 348. Further, in the *Kimbrell* case, the Court held that where

the evidence establishes that accused has an obvious injury to the mouth that the arresting officer reasonably believes will interfere with providing an acceptable breath sample, the officer may order a blood test to be taken. Whether or not the officer's belief is reasonable will, of course, depend upon the circumstances of each case.

Because there is no evidence to support the conclusion that Trooper Weaver reasonably believed Kimbrell was physically unable to provide an acceptable breath sample... the blood test should have been suppressed.

Id., 326 at 349. Again, in this case, Nurse Albright, not Officer Desrochers, determined Appellant would not be able to provide a breath sample and signed the SLED Blood/Urine Collection Report to indicate the same. Further, there is no indication that

Nurse Albright made her determination related to any injury to Appellant's mouth. Rather, the testimony was that Nurse Albright determined Appellant would not be able to leave the hospital to provide a breath sample due to medical reasons (ALC ROA, p. 10, lines 17-21). Therefore, the *Kimbrell* case is also of little guidance to the Court on the issue raised by Appellant in this case.

Next, Appellant finally turns to a case that dealt with the administrative challenge to an implied consent suspension: *Peake v. South Carolina Dept. of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). Again, however, Appellant's reliance is ill-placed. In *Peake*, the issue was "whether the circuit court erred in finding Trooper Manley properly requested a blood test despite the absence of any opinion by licensed medical personnel that Peake was unable to provide a breath sample as required by the implied consent statute." *Id.* 375 at 595. The Court held "We find no substantial evidence establishing Trooper Manley's compliance with the procedure mandated in section 56-5-2950(a)." *Id.* In *Peake*, Trooper Manley appeared and testified that he requested the blood sample because Peake was "not able to give a breath sample due to his condition" and the record contained no explanation of Peake's condition. *Id.* 375 at 592. In explaining its' ruling the Peake Court stated "Although this court in Moore held the inability to leave a medical facility could form a legally sufficient basis for ordering a blood test, we expounded the record must show this determination is based on the opinion of licensed medical personnel." *Id.* 375 at 603. Emphasis added. Officer Desrochers did exactly what the *Peake* Court asked officers to do in cases like this: provide evidence to the Court that a licensed medical personnel determined the Appellant could not leave a medical facility. Unlike Trooper Manley in the *Peake* case, Officer

Desrochers testified Nurse Angela Albright informed him that Appellant was physically unable to submit to a breath test (R. p. 28, lines 15-19; p. 29, lines 9-22; and p. 32, lines 6-9). Officer Desrochers further testified that he offered the Appellant a blood test because it was established by Nurse Albright's statements to him that the Appellant would be unable to get to a Datamaster in time to take a breath test due to his injuries and required treatment (R. p. 32, lines 8-20). Additionally, Officer Desrochers offered into evidence the SLED Blood/Urine Collection Report signed by Nurse Albright, which indicated Appellant could not submit to a breath test for medical reasons (R. p. 29, lines 17-21). Appellant's Brief even acknowledges this evidence was before the OMVH Hearing Officer and merely notes that Appellant objected to the testimony being admitted because he believed the testimony to be hearsay (Initial Brief of Appellant, p. 9). Despite these objections, the testimony was admitted, not for the truth of the matter asserted, but for the fact that Officer Desrochers was told that by Nurse Albright (R. p. 28, line 24 – p. 29, line 1). For the reasons discussed previously in this Brief, Respondent asserts this testimony was not hearsay and was properly before the OMVH Hearing Officer. So, there is no question a licensed medical personnel is the one that determined Appellant could not submit to a breath test. For these reasons, SCDMV asserts that Officer Desrochers did exactly what the *Peake* Court requires in cases such as this and the *Peake* case in no way supports the issues placed before this Court by Appellant.

Appellant then turns to out of state cases to support his argument that Officer Desrocher's testimony regarding Nurse Albright's determination was hearsay. First, Appellant cites the case *Heuton v. Commissioner of Public Safety*, 541 N.W.2d 361 (Minn. Ct. App. 1995). Heuton dealt with a blood draw for a driver that had been

seriously injured in a collision, was found semiconscious thrown from her vehicle, and when the officer tried see the driver at the hospital the officer was told "the doctor would not allow him to see Heuton, and... a paramedic told [officer] that Heuton's injuries were life threatening." *Id.* 541 at 363. Unlike this case, however, in *Heuton*, part of what the Commissioner had to prove "by a preponderance of the evidence [was] that Heuton was incapable of refusal." *Id.* 541 at 364. That is simply not part of the State's burden of proof in this case. As mentioned many times before, according to state statute the scope of this hearing is limited to whether Appellant:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]
- (3) refused to submit to a test pursuant to Section 56-5-2950;...

S.C. Code §56-5-2951(F). Appellant's argument appears to be that because Nurse Albright determined that Appellant would be physically unable to provide an acceptable breath sample, the scope of this hearing automatically expanded to include the State being required to prove that Appellant truly would not be physically able to provide an acceptable breath sample ("The statements of Ms. [sic] Albright presented by Officer Desrochers were undeniably introduced to satisfy the threshold question of whether or not Appellant could submit to a breath test." [Initial Brief of Appellant, p. 13]). That is simply not true. In a case such as this, all that needs to be proven is that a licensed medical personnel made such a determination, not that the determination was necessarily correct or incorrect. This is why, at the heart of it, Appellant's argument fails in this case. This is also why the *Heuton* case doesn't support Appellant's argument in this case. In *Heuton*, part of what the Commissioner had to prove "by a preponderance of the evidence [was] that Heuton was incapable of refusal," i.e. the Commissioner had to prove

that Heuton truly was incapable of refusal, that the medical determination that Heuton was incapable of refusal was an accurate determination. Therefore, testimony only from the officer about what he had been told by medical personnel about Heuton's condition did constitute hearsay because whether Heuton was incapable of refusal or not was one of the things the Commissioner had to prove. That is not the case here and for these reasons, Appellant's reliance on the *Heuton* case is misplaced.³

Similarly, Appellant relies on *State v. Anger*, 105 Hawai'i 423, 98 P.3d 630 (Hawai'i 2004). Appellant's reliance on the *Anger* case is misplaced for the same reasons it was misplaced in the *Heuton* case. In the *Anger* case, one of the things that was required to be proven by the State was "that Anger had, in fact, suffered an injury in the motor vehicle accident." *Id.* 105 at 432. Therefore, the officer's testimony in the *Anger* case was that a physician told him Anger was injured was hearsay because injury was one of the elements that had to be proven to justify the blood draw. In a case such as the one before this Court, all that needs to be proven is that a licensed medical personnel made such a determination that Appellant was physically unable to provide an acceptable breath sample, not that the determination was necessarily correct or incorrect. This is why Appellant's argument fails in this case and is why the *Anger* case doesn't support Appellant's argument in this case.

Finally, Appellant turns to the case *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015). Appellant argues that the *Brewer* case is applicable here because "To what issue,

³ Interestingly, Heuton's suspension was ultimately upheld based on the fact that medical personnel prevented Officer Clark from gaining the personal knowledge regarding Heuton's medical condition that he sought and Deputy Mulvehill, who had recently personally observed Heuton's condition, did testify regarding that condition. *Id.* 541 at 365. So, it appears that Minnesota allows police officers to determine, without any input from medical professionals, whether a person is incapable of consenting to a blood test.

other than the fact that Appellant could not leave the hospital, might have the testimony [regarding Nurse Albright's determination] been relevant? The answer is none." The *Brewer* case is yet another criminal case, this time involving a person that was convicted of multiple charges in connection with the shooting of two individuals at a nightclub. In *Brewer* the State introduced an audiotaped recording of Brewer's interrogation. This audiotaped recording contained "interrogators' hearsay-laden questions and comments [and] was played for the jury," including statements that "many witnesses observed [Brewer] shoot both victims, which was true only with respect to the shooting of" one victims. Further, this interview contained numerous instances of the investigators telling Brewer he should "prove himself innocent" and Brewer repeatedly asking for the interview to stop. The question for the jury in the *Brewer* case was whether Brewer had shot the two victims. Thus, clearly, playing an audiotaped interview where investigators repeatedly refer to and quote statements (sometimes even false statements that a witness said "X") made by witnesses that did not testify at the trial would constitute hearsay, because the very issue before the jury, whether Brewer shot the two victims, was discussed in these references and quotes. As discussed above, that is simply not the case here. In this case, by statute, the scope of this hearing was limited to whether Appellant:

- (1) was lawfully arrested or detained;
- (2) was given a written copy of and verbally informed of the rights enumerated in Section 56-5-2950; [and]
- (3) refused to submit to a test pursuant to Section 56-5-2950;...

S.C. Code §56-5-2951(F). So, the issue before the factfinder⁴ in this case was not whether Appellant was actually physically unable to provide an acceptable breath sample

⁴ DMV would also point out that unlike criminal cases where the factfinder is typically comprised of a jury, the factfinder in implied consent cases are OMVH hearing officers

or not, but rather whether a licensed medical personnel determined that Appellant was physically unable to provide an acceptable breath sample.⁵ By referring this Court to the *Brewer* case, Appellant is attempting to muddy the waters and expand the scope of implied consent hearings so that when a licensed medical personnel determines someone is physically unable to provide an acceptable breath sample, that licensed medical

that hear contested case hearings, including implied consent cases, as their full time job. Similar to a bench trial before a Circuit Court Judge, more lenience can be granted with regard to what evidence is admitted because, unlike a typical juror, an OMVH hearing officer is better equip, through their experience, to recognize which testimony is less factually reliable and should be taken with a grain of salt.

⁵ During this part of his argument, Appellant asserts that Nurse Albright determined "that a blood test was warranted" (Initial Brief of Appellant, p. 15). This is not an accurate statement. Nurse Albright merely determined that Appellant was physically unable to provide an acceptable breath sample. Officer Desrochers determined that he could request a blood sample from Appellant. Appellant makes the statement that Nurse Albright determined "that a blood test was warranted" because such an interpretation leads to the outcome Appellant seeks in this case, that Nurse Albright (and other similarly situated licensed medical personnel) be required to appear and testify in implied consent cases where a blood test is requested by the arresting officer and the driver refuses to consent to the test. Clearly, such a standard is not required, based on the limited scope of implied consent hearings, and is only pursued in an effort to get into testimony about whether the licensed medical personnel was correct that driver was physically unable to provide an acceptable breath sample or not. This is evidenced by Appellant's argument that Nurse Albright was not subject to cross examination regarding her determination that Appellant was physically unable to provide an acceptable breath sample. For example, Appellant's argument that he could not ask the following questions:

It may be that the nurse was not informed of the time limit for a breath test. Could Appellant have been more expeditiously cared for and discharged had she known? Did the officer ask her to speed up the process or did the officer simply present a form for her to sign for his own convenience? Was Appellant released from the hospital in time to reasonably be offered a breath test?

(Initial Brief of Appellant, pp. 15-16). This is further evidenced by Appellant's statement that if Nurse Albright's "alleged statements were false, then the decision to request a blood test is invalid..." (Initial Brief of Appellant, p. 16). Based on these arguments and statements, it is clear Appellant is trying to expand the scope of the implied consent hearing beyond the bounds that have been set by the Legislature in S.C. Code §56-5-2951(F).

personnel will then have to come testify at the implied consent hearing and prove that their determination was a true and correct determination.⁶ This is simply not required by S.C. Code §56-5-2951(F). For these reasons, Appellant's reliance on the *Brewer* case is misplaced.

Should this Court find that the statements made by Nurse Albright are hearsay, the statements would still be admissible as an exception to the hearsay rule under Rule 803(4), SCRE. Further, the OMVH Hearing Officer could have allowed the statements and SLED Blood/Urine Collection Report for the limited purpose of medical treatment under Rule 803(4), SCRE. Appellant may argue that this rule applies only to words uttered to a medical provider by a patient, not by a medical provider to someone else, for example a law enforcement officer. Such an argument is not supported by the plain language of the rule, which does not limit the rule's use in that manner, and for that reason alone is meritless. See *State v. Burroughs*, 328 S.C. 489, 492, S.E.2d 408 (Ct. App. 1997) ("Certainly, a statement [to nurse or doctor] that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the

⁶ In discussing the *Brewer* case, Appellant also cites to the cases *U.S. v. Silva*, 380 F.3d 1018, 65 Fed. R. Evid. Serv. 162 (7th Cir. 2004) and *State v. Miller*, 197 N.C.App. 78, 676 S.E.2d 546 (2009). In the *Silva* case, like the *Brewer* case, the testimony objected to by Silva went directly to the heart of the issue before the jury, whether Silva sold drugs to a DEA confidential informant through a supplier. Thus, for the same reasons the *Brewer* case is of no assistance to this Court, the *Silva* case is also of no assistance to this Court. Interestingly, Appellant cites to the *Miller* case, which actually held that in a murder trial questions from detectives to defendant, that included statements attributed to nontestifying third parties, were not hearsay because they were offered not for the truth of the matter asserted, but so that the jury could understand the circumstances in which the defendant was caught in a lie, changed his story, and made significant admissions of fact to the investigators. Thus, DMV asserts the *Miller* case actually supports the admission of Nurse Albright's statements.

diagnosis and treatment of the victim” and would, therefore, be admissible under Rule 803(4), SCRE).

Additionally, pursuant to Rule 16(B) and (D), OMVH Rules (available at <http://www.scomvh.net>) the record must contain all evidence received and considered, as well as evidence proffered, whether it is ultimately found objectionable or not. Thus, the OMVH Hearing Officer would have had to allow the statements and SLED Blood/Urine Collection Report into the record if proffered regardless of whether they were later found to be competent evidence.

Moreover, Appellant has offered no proof or argument that the OMVH Hearing Officer gave the statements or SLED Blood/Urine Collection Report any specific weight over other evidence nor any weight at all in the face of the other evidence demonstrating Appellant’s implied consent violation.

In this regard, S.C. Code §1-23-380(A)(6) specifies that an appellate court can only reverse or modify the agency’s determination when “substantial rights of the appellant have been *prejudiced* because the administrative findings, inferences, conclusions or decisions are [erroneous or illegal for various stated reasons].” Emphasis added. Even if the record contains error, the finding is not reversible unless a party was prejudiced. Appellant does not assert or argue that he was prejudiced was by the admission of Nurse Albright’s statements or the SLED Blood/Urine Collection Report and for this reason the OMVH Hearing Officer’s findings should be affirmed.

II. THE HEARING OFFICER WAS CORRECT IN RULING THAT THE ARRESTING OFFICER ESTABLISHED THAT THE INDIVIDUAL WHO SIGNED THE URINE/BLOOD COLLECTION REPORT WAS A LICENSED MEDICAL PROFESSIONAL.

Appellant argues that the Administrative Law Judge “based his conclusion [that Nurse Albright was a registered nurse] upon Ms. [sic] Albright’s alleged signature on the SLED Urine/Blood Collection Report; her representations to the arresting officer; her hospital scrubs⁷; and her name tag all of which constitute out of court statements used for the truth of the matter asserted.” Contrary to this argument, Officer Desrochers’ testimony regarding his observations of Nurse Albright are not hearsay, because they are not statements or they are not statements that go to the matter asserted in this case.⁸ First, Nurse Albright’s name badge and what was written on it, is not a statement in the sense

⁷ Appellant attempts to make an issue of whether Nurse Albright was wearing scrubs or not and whether Officer Desrochers testified Nurse Albright was wearing scrubs. It is clear from the testimony that Officer Desrochers never says whether Nurse Albright was wearing scrubs or not. Scrubs were discussed solely in regard to Appellant’s objection to Officer Desrochers testimony regarding the statements made to him by Nurse Albright, specifically in reference to the holding in the case *State v. Frye*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2004). In *Frye*, a criminal driving under the influence case, the Court held that blood test results could not be admitted into evidence because the State did not have Scott Darragh testify to confirm that he was a licensed physician, registered nurse, or otherwise properly qualified under S.C. Code §56-5-2950 to perform the blood draw at issue. Rather, the State merely had testimony that Mr. Darragh was in the emergency room and wearing “generic hospital attire,” i.e. scrubs. This case further went on to discuss that the “statutory mandate in question is inextricably connected to the accuracy and reliability of the blood test results” and remanded the case back to the trial court “to determine whether ‘such failure materially affected the accuracy or reliability of the test results or the fairness of the testing procedure.’” *Id.* 362 at 518 and 519. (Emphasis added). It appears to the undersigned that the discussion regarding Appellant’s objection under *Frye* is what led to the Administrative Law Judge to erroneously believe that Officer Desrochers testified that Nurse Albright was wearing scrubs. Further, despite Appellant’s assertion that the OMVH Hearing Officer also relied on testimony that Nurse Albright was wearing scrubs, no such notation is found anywhere in the OMVH Hearing Officer’s Final Order and Decision.

⁸ Please see all of the arguments regarding hearsay and statements that “go to the matter asserted” as outlined in detail above.

put forth in Appellant's argument. Officer Desrochers testified to his observations of Nurse Albright, including the fact that she had on a name badge that was consistent with the name tags issued by the hospital, that the name tag identified her as Nurse Albright, and that the name tag stated Nurse Albright was a registered nurse (R. p. 33, lines 18-23).⁹ Certainly, the hospital would not have issued Nurse Albright a name badge indicating she is a registered nurse if Nurse Albright is not a registered nurse. Such an action would risk the closure of the entire hospital, potential criminal charges, and would greatly increase the likelihood of liability to the hospital for any treatment performed under such a false name badge. Further, Officer Desrochers observed Nurse Albright perform duties typically performed by a registered nurse and observed Nurse Albright fill out the SLED Blood/Urine Collection Report line "Name and Title of Licensed Medical Personnel" with "Angela Albright, RN," and signed the SLED Blood/Urine Collection Report with "RN" just after her signature (R. p. 50). Interestingly, the *Frye* case, which was relied on by Appellant in his original objection to Officer Desrochers testimony and in his Brief, specifically stated "Law enforcement officers may generally rely on the implicit and explicit assurances of medical providers regarding the qualifications or personnel who are assigned to assist them in their investigation." *Id.* 362 at 517. Despite this notation, Appellant essentially argues that Officer Desrochers could not rely on the implicit and explicit assurances of Nurse Albright regarding her qualifications. Further, in the *Frey* case, Scott Darragh merely "signed the form in the space labeled 'licensed or trained collector.'" The report did not indicate Mr. Darragh's position and the State did

⁹ Significantly, the testimony regarding the name tag was elicited by Appellant's Counsel and was not objected to by any party. For this reason, DMV asserts that any argument regarding the name tag is not preserved for appeal.

not offer any evidence of Mr. Darragh's medical credential" beyond the testimony that he was wearing scrubs (Initial Brief of Appellant, p. 18). In this case, the OMVH Hearing Officer had quite a bit more evidence of Nurse Albright's credentials than the *Frye* Court had before it. Specifically, Officer Desrocher's observations of Nurse Albright performing duties typically performed by a registered nurse, Nurse Albright's name badge identifying her as a registered nurse, and Nurse Albright's indication that she was an "RN" on the SLED Blood/Urine Collection Report. Thus, even the *Frye* case, when paired with Officer Desrocher's observations, supports Officer Desrocher's reliance on Nurse Albright's determination that Appellant was physically unable to provide an adequate breath sample. As a result, all of these observations taken together provide the OMVH Hearing Officer a reasonable basis for finding that "the officer was advised by a registered nurse (licensed medical personnel) that the [Appellant] was physically unable to submit to a breath test" as Nurse Albright "held herself out to be a nurse, treated patients at the hospital, and... wore a name badge stating she was a registered nurse..." (R., pp. 16 and 20). Further, the OMVH Hearing Officer specifically held,

I conclude that the testimony [regarding Nurse Albright's determination that Appellant was physically unable to submit to a breath test] was not hearsay because it was not admitted to prove that the [Appellant] was actually unable to leave, only that the blood test was warranted because licensed medical personnel determined he was unable to provide a breath sample.

Id. For the purposes of determining whether a blood sample was properly requested, the phrase "licensed medical personnel" means physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to take blood samples in a licensed medical facility. See *State v. Stacy*, 315 S.C. 105, 431 S.E.2d 640 (Ct. App. 1993). Despite Appellant's numerous

objections regarding Nurse Albright's determination that Appellant was physically unable to provide an adequate breath sample and the fact that it was abundantly clear that Appellant was aware that Nurse Albright had made that determination, the Appellant offered no evidence to refute Officer Desrocher's evidence that Nurse Albright was licensed medical personnel. It seems apparent that if the Appellant had any evidence that Nurse Albright was not a nurse, then Appellant would have confronted Officer Desrochers with that evidence. Appellant did not, however, even attempt to present conflicting evidence regarding Nurse Albright's credentials. With no conflicting evidence, the record supports the conclusion that Ms. Albright was a licensed medical professional. Because the record in this matter contains substantial evidence, upon which Officer Desrochers relied (that the determination that Appellant was physically unable to provide an adequate breath sample was made by a licensed medical personnel, i.e. Nurse Albright, and that the person who signed the SLED Blood/Urine Collection report was a licensed medical personnel, i.e. Nurse Albright), the OMVH Hearing Officer and ALC were correct to sustain this implied consent suspension. See *Lark v. Bilo, Inc.*, 276 S.C. 130, 276 S.E.2d 304.

CONCLUSION

For the reasons set forth above, the order of the ALC sustaining the order of the OMVH Hearing Officer should be affirmed.

[SIGNATURE ON THE FOLLOW PAGE]

Respectfully submitted,



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June 3, 2016
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court
The Honorable S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2016-000228

Bradley Sanders Appellant,

v.

South Carolina Department of Motor Vehicles
and Columbia Police Department Respondents.

Of Whom South Carolina Department of Motor Vehicles is the Respondent

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondent's Final Brief complies with
South Carolina Supreme Court Order 2007-08-13-02 Amended by Order 2014-04-15-02,
filed April 15, 2104.



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Blythewood, SC

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CERTIFICATE OF COUNSEL

The Undersigned Counsel certifies that the attached Final Brief is in compliance with
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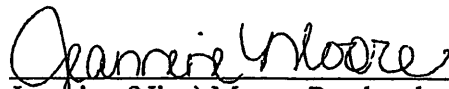
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CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, June 3, 2016,
I served one (1) copy of the Final Brief of Respondent by depositing with the United
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