STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Appellate Case No. 2019-000693

Lower Court Case No. 2015-ALJ-21-0124-AP

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.

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT STATEMENTS USED TO ESTABLISH PETITIONER'S ALLEGED INABILITY TO SUBMIT TO A BREATH TEST WERE NOT HEARSAY?

II. DID THE COURT OF APPEALS ERR IN AFFIRMING THE DECISION THAT THE ARRESTING OFFICER PRESENTED A *PRIMA FACIE* CASE THAT THE INDIVIDUAL WHO DETERMINED PETITIONER 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, Petitioner, 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 (App. p. 25). Petitioner was transported to Lexington Medical Center for medical care (App. p. 25). Petitioner was allegedly physically unable to submit to a breath test (App. p. 25). The arresting officer advised Petitioner of his implied consent rights and requested that Petitioner submit to a blood test in order to determine his blood alcohol concentration. Petitioner refused to submit to a blood test.

Petitioner 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 (App. pp. 71 - 72). 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 (App. pp. 38 – 44). The suspension was sustained by order filed February 13, 2015 (App. pp. 38 – 44).

At the hearing before the OMVH hearing officer, over the hearsay objection of counsel for Petitioner, Officer Desrochers testified that he ". . . was told that he [Petitioner] 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. . . ." (App. p. 51, lines 18 – 25 – p. 52, lines 1 - 8). Officer Desrochers went on to testify that ". . . what I was told was that he [Petitioner] would not be able to get out in a timely manner in order to provide that breath sample." (App. p. 55, 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 Petitioner was unable submit to a breath test due to any reason deemed acceptable by licensed medical personnel. The document does not specify the reason Petitioner was unable to submit to a breath test (App. p. 73). Counsel for Petitioner 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 Petitioner 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 Petitioner 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 (App. p. 52, lines 9 – 25 – p. 55, lines 1 – 9; p. 56, lines 18 - 23).

In reliance on statements made to him by Ms. Albright, Officers Desrochers requested that Petitioner submit a blood sample. Petitioner refused. Officer Desrochers informed Petitioner 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) (App. p. 55, lines 10 – 23).

The OMVH hearing officer 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. He 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 of S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) (App. pp. 38 – 44; App. pp. 25 – 30).

The OMVH hearing officer's decision was appealed to the South Carolina Administrative Law Court on March 3, 2015 (App. pp. 45 – 46). By Order filed January 20, 2016, the Honorable S. Phillip Lenski affirmed the order of the OMVH hearing officer (R. pp. 31 – 36). The Honorable S. Phillip Lenski issued an Amended Final Order on January 27, 2016 (App. pp. 25 – 30).

Petitioner filed a timely appeal to the Court of Appeals. The Court of Appeals affirmed the decision of the lower courts in Published Opinion No. 5620 (S.C. Ct. App. filed January 30, 2019) (App. pp. 1 – 10). Petitioner filed a timely Petition for Rehearing on February 6, 2019 (App. pp. 11 – 14). Respondent filed a Return to the Petition for Rehearing on February 15, 2019 (App. pp 15 – 20). The Petition for Rehearing was denied by Order filed March 27, 2019 (App. pp. 22 -23). Petitioner filed a Petition for a Writ of Certiorari on April 25, 2019 and Respondent filed a timely response. This Court granted the Petition for a Writ of Certiorari to review the decision of the Court of Appeals on June 28, 2019.

STANDARD OF REVIEW

"In an appeal from an ALC decision, the Administrative Procedures Act (APA) provides the appropriate standard of review. S.C. Code Ann. § 1-23-610 (Supp. 2012). This Court will only reverse the decision of the ALC if that 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.

The [C]ourt may not substitute its judgment for the judgment of the [ALC] as to the weight of the evidence on questions of fact." *Barton v. South Carolina Dep't of Probation Parole and Pardon Services*, 404 S.C. 395, 401, 745 S.E.2d 110, 113 (2013).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT STATEMENTS USED TO ESTABLISH PETITIONER'S ALLEGED INABILITY TO SUBMIT TO A BREATH TEST WERE NOT HEARSAY.

The Court of Appeals 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 Petitioner'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 Petitioner 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.

(App. pp. 43 – 44, ¶ 11). On appeal to the Administrative Law Court, 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.

(App. p. 28). Likewise, the Court of Appeals found the statements not to be hearsay:

> 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. . . .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 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.

(App. pp. 6 – 7). For the reasons more fully set forth below, the aforementioned evidence constitutes inadmissible hearsay, and the decision of the Court of Appeals should be reversed by this Court.

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. . . . Blood . . . samples must be obtained by physicians licensed by the State Board of Medical Examiners, registered nurses licensed by the State Board of Nursing, and other medical personnel trained to obtain the samples in a licensed medical facility.

Pursuant to this statute, the 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. This 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. As more fully discussed below, Respondents failed to introduce any testimony of this nature.

The Court of Appeals 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.

The Court of Appeals 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, the Court of Appeals 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.

The Court of Appeals yet again made clear its intention that licensed medical personnel make the valid 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. The Court of Appeals, 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, the Court of Appeals 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 [Petitioner] 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." (App. p. 51, lines 18 – 19; p. 52, lines 17 – 22; and p. 55, lines 6 – 9). Counsel for Petitioner noted timely objections to this hearsay testimony as well as the admission of the SLED Urine/Blood Collection Report (App. p. 51, lines 20 – 22; and p. 52, lines 23 – 25 – p. 53, lines 1 - 24). Angela Albright was not presented as a witness in the proceeding.

The same type of evidence was not deemed sufficient by the Court of Appeals 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 Court of Appeals 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 Court of Appeal's reasoning that the testimony was not hearsay.

The Court of Appeals 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 statements attributed to Ms. Albright and used to establish Petitioner's inability to submit to a breath test amount to the same "quintessential" hearsay this Court expressly rejected in *McCarson*.

The Court of Appeals held that the statements attributed to Ms. Albright were not offered ". . . 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." (App. p. 6). This reasoning is virtually identical to the City of Columbia's argument the Court of Appeals 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 conclusion of the Court of Appeals in the present case was based solely on hearsay. The statements of Ms. Albright were used to substantiate the "reason" considered acceptable by licensed medical personnel. Licensed medical personnel considered the blood test acceptable and that Petitioner was unable to provide a breath sample *because* Petitioner was unable to leave the hospital (App. p. 51 lines 17 – 19; p. 52, lines 17 – 22; and p. 55, 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.**

(App. p. 53, line 25 – p. 54, 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.

(App. pp. 28 – 29)(emphasis added). Similarly, the Court of Appeals concluded that ". . . Officer Desrochers only sought to establish, pursuant to the statute, that he received medical information regarding Sanders' **inability to give a breath** sample." (App. pp. 6 – 7)(emphasis added). The statements were clearly used to prove the truth of the matter asserted. The claim that Petitioner could not leave the hospital was the basis for Ms. Albright's opinion that Petitioner could not provide a breath sample. Officer Desrochers relied upon the statements as being the truth. Otherwise, he could not have lawfully requested a blood sample.

At least two courts in other jurisdictions have analyzed nearly identical hearsay issues and reached opposite conclusions to that of the Court of Appeals 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 Petitioner 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.

In *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015), this 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 one applicable in the present case. To what issue, other than the fact that Petitioner could not leave the hospital, might the testimony have been relevant? The answer is none. Would Respondent be willing to stipulate the testimony is not true? If not, the testimony is offered for the truth of the matter asserted. The fact that Petitioner 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 Petitioner 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 Court of Appeals appears to suggest that whether Ms. Albright's statements are true is unimportant. However, if Ms. Albrights statements are false, Officer Desrochers has no basis for requesting a blood test. The statements were unquestionably admitted for the truth unless S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) is interpreted to mean that an officer is permitted to rely on false statements to request a

blood test. The claim that Ms. Albright allegedly stated Petitioner 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 Petitioner released from the hospital in time to reasonably be offered a breath test? Obviously, we cannot know the answer to these questions because Ms. Albright did not testify.

Based upon the foregoing, this Court should reverse the decision of the Court of Appeals. 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 Petitioner's inability to leave the medical facility. 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 opinion of the Court of Appeals.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION THAT THE ARRESTING OFFICER PRESENTED A *PRIMA FACIE* CASE THAT THE INDIVIDUAL WHO DETERMINED PETITIONER 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 Court of Appeals erred in ruling that the arresting officer presented a *prima facie* case that the individual who informed Officer Desrochers that Petitioner was unable to leave the medical facility was licensed medical personnel. The Court of Appeals held:

> 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.

(App. p. 5). This decision, based on hearsay and unsubstantiated assumptions, should be reversed by this Court.

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." (App. p. 54, 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." (App. pp. 25 and 29). He further concluded Officer Desrochers ". . . saw Albright in the hospital wearing a nametag and hospital scrubs that reasonably indicated she was a registered nurse."[1] (App. p. 29). The Court of Appeals held that this evidence constituted "substantial evidence" to support the determination that Nurse Albright was licensed medical personnel.

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[1] The record contains no testimony indicating Ms. Albright was wearing scrubs.

Like the lower courts, the Court of Appeals based its conclusion upon Ms. Albright's alleged signature on the SLED Urine/Blood Collection Report, her alleged performance of medical tasks and treating patients, and her name tag all of which constitute out of court statements used for the truth of the matter asserted. The record in this case is devoid of any admissible evidence establishing that Ms. Albright was a registered nurse licensed by the State Board of Nursing. Based upon the erroneous reliance on hearsay to establish Ms. Albright's credentials as licensed medical personnel, this Court should reverse the decision of the Court of Appeals in this matter.

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 Court of Appeals determined that the arresting officer presented substantial evidence that the person who told him Petitioner would be unable to leave the hospital and signed the SLED Urine/Blood Collection Report was licensed medical personnel. The ruling is based on Ms. Albright's signature on a medical collection report indicating she was a registered nurse, a nametag that identified her as a nurse and observations by the arresting officer of Nurse Albright performing medical tasks and treating patients (App. p. 5). Simply holding oneself out as a medical professional is not sufficient to establish that an individual is a qualified and licensed medical professional. *See*, Associated Press, *Man Pleads Guilty to Treating Hundreds as Fake Doctor*, The State, March 4, 2014 *available at* http://www.thestate.com/news/local/crime/article13840295.html. The decision ignores 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 this Court should reverse.

In *State v. Frey*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2005), the Court of Appeals 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 of Appeals, Justice Kittredge, joined by Justice Hearn, 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 *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.

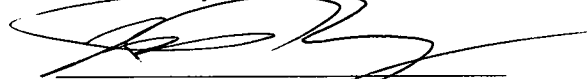
Frey, 362 S.C. at 517, 608 S.E.2d at 877 – 878.

The facts in the present case are strikingly similar. The decision of the Court of Appeals 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. If the decision of the Court of Appeals is not reversed, the foundational requirements of S.C. Code Ann. § 56-5-2950 (A) (Supp. 2012) and the *Frey* decision are meaningless. This Court should reverse the decision of the Court of Appeals.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court reverse the decision of the Court of Appeals.

Respectfully submitted,



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