THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Case No. 2019-000693

Bradley Sanders..Petitioner,

v.

South Carolina Department of Motor Vehicles and
Columbia Police Department..Respondent,

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

RESPONDENT SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES' BRIEF

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TABLE OF CONTENTS

Table of Contents ii

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 2

Standard of Review 3

Argument 6

1. Did the Hearing Officer, Administrative Law Court, and Court of Appeals correctly rule that Nurse Albright's statements to Officer Desrochers regarding her determination that Petitioner was unable to submit to a breath test and Nurse Albright's written statement that she is an "RN" were not hearsay in an implied consent hearing? 9

2. Did the Hearing Officer, Administrative Law Court, and Court of Appeals correctly rule that Officer Desrochers presented a *prima facie* case that Nurse Albright was licensed medical personnel pursuant to S.C. Code §56-5-2950(A)? 23

Conclusion 27

TABLE OF AUTHORITIES

CASES

Alexander William Cann v. South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety, 2013 WL 1703702 (SCALC 2013). 11

Arrington v. E. R. Williams, Inc., 490 Fed.Appx. 540 (4th Cir. 2012) 14

Baber v. Greenville County, 327 S.C. 31 (1997) 14

Butler v. Gamma Nu Chapter of Sigma Chi, 314 S.C. 477 (Ct. App. 1994) 14

Chemical Leaman Tank Lines v. South Carolina Public Service Commission, 258 S.C. 518, 189 S.E.2d 296 (1972) 5

City of Columbia v. Moore, 318 S.C. 292, 457 S.E.2d 346 (Ct. App. 1995) 15

Cloaninger ex rel. Estate of Cloaninger v. McDevitt, 555 F.3d 324 (4th Cir. 2009) . 14

Consolo v. Federal Maritime Commission, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966) 4

Dickinson-Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 329 A.2d 18, 25 . . 4

Dorman v. DHEC, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002) 5

Fast Stops, Inc. v. Ingram, 276 S.C. 593, 281 S.E.2d 18 (1981) 4

Felder v. Johnson, 127 S. C. 215, 217, 121 S. E. 54, 54 (1924) 20

Fields v. Regional Medical Center Orangeburg, 354 S.C. 445 (Ct. App. 2003). . . . 14

Floyd v. Floyd, 365 S.C. 56 (Ct. App. 2005) 14

Fowler v. Lewis, 260 S.C. 54, 194 S.E.2d 191 (1973) 5

Hamm v. American Telephone & Telegraph Co., 302 S.C. 211, 394 S.E.2d 842 (1990) 4, 5

Hamm v. South Carolina Public Service Commission, 294 S.C. 320, 364 S.E.2d 455 (1988) 5

Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc., 311 S.C. 295, 422 S.E.2d 118 (1992) 5

Hatfield v. Van Epps, 358 S.C. 185, 192, 594 S.E.2d 526, 530 (Ct. App. 2004) . . 13

Heuton v. Commissioner of Public Safety, 541 N.W.2d 361
(Minn. Ct. App. 1995) 18, 19, 20

In re Cliquot's Champagne, 70 U.S. 114 (1865) 13

Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) 4, 5, 27

Lyons Partnership, L.P. v. Morris Costumes, Inc., 243 F.3d 789 (4th Cir. 2001). . . 14

Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589 (Ct. App. 2007) 9, 17

R & G Const., Inc. v. Lowcountry Regional Transp. Authority,
343 S.C. 424 (Ct. App. 2000) 14

Sams v. McCaskill, 282 S.C. 481, 485, 319 S.E.2d 344, 347 (Ct. App. 1984) 13

Schudel v. South Carolina Alcoholic Beverage Control Commission,
276 S.C. 138, 276 S.E.2d 308 (1981) 4

S.C. Dept. of Motor Vehicles v. McCarson, 391 S.C. 136 (2011) 16

SCDMV v. Nelson, 364 S.C. 514, 613 S.E.2d 544 (2005) 8

S. C. Nat'l. Bank v. Florence Sporting Goods, Inc., 241 S. C. 110, 115-16,
1267 S. E. 2d 199, 202 (1962) 20

State v. Anger, 105 Hawai'i 423, 98 P.3d 630 (Hawai'i 2004) 19, 20

State v. Bacote, 331 S.C. 328, 333, 503 S.E.2d 161, 164 (1998) 7

State v. Blurton, 342 S.C. 500, 510, 537 S.E.2d 291, 296 (Ct. App. 2000) 13

State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015) 20, 22

State v. Brown, 317 S.C. 55, 63, 451 S.E. 2d 888, 894 (1994) 12

State v. Burroughs, 328 S.C. 489, 492, S.E.2d 408 (Ct. App. 1997) 23

State v. Frey, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2004) 24, 25

State v. Kimbrell, 326 S.C. 344, 481 S.E.2d 456 (Ct. App. 1997) 16, 17

State v. Kirby, 325 S.C. 390, 481 S.E.2d 150 (Ct. App. 1996) 13

State v. Lewis, 293 S.C. 107, 110-111, 359 S.E.2d 66, 68 (1987) 13

State v. Miller, 197 N.C.App. 78, 676 S.E.2d 546 (NC.App. 2009) 14, 22

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) 12

State v. Stacy, 315 S.C. 105, 431 S.E.2d 640 (Ct. App. 1993) 14, 26

State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003) 12, 13

State v. Vick, 384 S.C. 189 (Ct. App. 2009) 14

Taylor v. Molesky, 63 Fed.Appx 126 (4th Cir. 2003) 14

Thomas v. Dootson, 377 S.C. 293 (Ct. App. 2008) 14

U.S. v. Cain, 586 Fed.Appx. 104 (4th Cir. 2014) 14

U.S. v. Edelen, 561 Fed.Appx. 226 (4th Cir. 2014) 14

U.S. v. Hassan, 742 F.3d 104 (4th Cir. 2014) 14

U.S. v. Hodge, 295 Fed.Appx. 597 (4th Cir. 2008) 14

U.S. v. Ibisevic, 675 F.3d 342 (4th Cir. 2012) 14

U.S. v. Rodriquez, 94 Fed.Appx. 139 (4th Cir. 2004) 14

U.S. v. Silva, 380 F.3d 1018, 65 Fed. R. Evid. Serv. 162 (7th Cir. 2004) 22

Watson v. Wall, 239 S.C. 109 (1961) 13

STATUTES

S.C. Code Section 1-23-380 . . . . 3, 4

S.C. Code §40-33-30. 24

S.C. Code §40-33-39 23

S.C. Code §40-33-200. 24

S.C. Code § 56-5-2950 . . . . 1, 3, 7, 8, 9, 10, 11, 17, 23, 24

S.C. Code Ann. § 56-5-2951 . . . . 3, 8, 19, 21, 22

OTHER AUTHORITIES

Rule 801(c), SCRE 11, 12

Rule 803(4), SCRE 22, 23

Rule 12(A), OMVH Rules 8

73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983) 5

STATEMENT OF ISSUES ON APPEAL

1. Did the Hearing Officer, Administrative Law Court, and Court of Appeals correctly rule that Nurse Albright's statements to Officer Desrochers regarding her determination that Petitioner was unable to submit to a breath test and Nurse Albright's written statement that she is an "RN" were not hearsay in an implied consent hearing?

2. Did the Hearing Officer, Administrative Law Court, and Court of Appeals correctly rule that Officer Desrochers presented a *prima facie* case that Nurse Albright was licensed medical personnel pursuant to S.C. Code §56-5-2950(A)?

STATEMENT OF THE CASE

This matter comes before the Supreme Court pursuant to the Petition for a Writ of Certiorari of Bradley Sanders (hereinafter, "Petitioner"), who seeks review of the South Carolina Court of Appeals January 30, 2019, published opinion in this case. That opinion held that testimony regarding "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" and that Officer Desrochers presented substantial evidence that Nurse Albright was licensed medical personnel. SCDMV believes the Court of Appeals' published opinion in this case correctly ruled on the questions presented and seeks to have the Court of Appeal's opinion affirmed.

On November 21, 2012, Officer Desrochers of the Columbia Police Department was dispatched to the scene of a single-car collision (A. p. 50, lines 13-19). Officer Desrochers found the Petitioner, Bradley Sanders, standing nearby, bleeding from the head and smelling strongly of alcohol (A. p. 50, line 19 – p. 51, line 9). The Petitioner spoke with slurred speech and seemed both mentally and physically "off-balance." (A. p. 51, lines 9-15). The Petitioner was transported to Lexington Medical Center,[1] where Nurse Angela Albright informed Officer Desrochers that Petitioner was unable to submit to a breath test (A. p. 51, lines 15-19; p. 52, lines 9-22; and p. 55, lines 6-9). Officer Desrochers arrested Petitioner 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 (A. p. 55, line 16). Officer Desrochers read Petitioner his Miranda rights, and advised Petitioner of his Implied Consent Rights, both in writing and verbally (A. p. 55, lines 15-22). Then, due to Petitioner's inability to

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

provide a breath sample, Officer Desrochers asked Petitioner to submit to a blood sample (A. p. 55, lines 6-13 and lines 20-23). Petitioner refused to provide a blood sample (A. p. 55, lines 12-13 and lines 20-23). Upon refusal to submit to a blood sample, Petitioner 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 (A. p. 55, line 23 and p. 71-72).

Petitioner timely requested a contested case hearing (A. p. 71-72). After reviewing the record and considering all the evidence, the Hearing Officer issued an order affirming the suspension of the Petitioner's driver license (A. p. 38-44).

An appeal was timely filed in the Administrative Law Court (hereinafter, "ALC") on March 3, 2015 (A. p. 45-46). By *Amended Final Order* filed January 27, 2016, the ALC ordered that the Office of Motor Vehicle Hearings (hereinafter, "OMVH") *Final Order and Decision* be affirmed (A. p. 25-30).

An appeal was then timely filed in the Court of Appeals. The Court of Appeals upheld the decisions of the Hearing Officer and the ALC (A. p. 1-10 and 21-22). A Petition for Writ of Certiorari followed. Certiorari was granted on June 28, 2019.

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

The Petitioner seeks a ruling from this Court that testimony from licensed medical personnel is mandatory at implied consent hearings any time licensed medical personnel determines a person is unable to provide a breath sample and, as a result, a law enforcement officer requests a blood sample from the driver. In other words, Petitioner seeks to have doctors, nurses, and other licensed medical personnel appear and testify in implied consent hearings regarding their training, experience, medical licensure, and the reasons they determined a particular driver could not provide a breath sample. The Petitioner states his goal with sentences like:

1) "The document does not specify the reason Petitioner was unable to submit to a breath test." *Brief of Petitioner*, p. 2.

2) "... in attempting to establish Petitioner's alleged inability to submit to a breath test." *Id.*, p. 5.

3) "...the arresting officer is required to present the testimony of licensed medical personnel indicating... that the person could not take a breath test." *Id.*, p. 6.

4) "The statements attributed to [Nurse] 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*." *Id.*, p. 10.

5) "The statements of [Nurse] Albright presented by Officer Desrochers were undeniably introduced to satisfy the threshold question of whether or not Petitioner could submit to a breath test." *Id.*, p. 13.

6) "To what issue, other than the fact that Petitioner could not leave the hospital, might the testimony have been relevant?" *Id.*, p. 15.

7) "The fact that Petitioner could not leave was the sole reason the officer requested the blood test and had [Nurse] Albright sign the SLED Urine/Blood Collection Report." *Id.*

8) "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." *Id.*

9) "The Court of Appeals appears to suggest that whether [Nurse] Albright's statements are true is unimportant. However, if [Nurse] Albright's statements are false, Officer Desrochers has no basis for requesting a blood test." *Id.*

10) "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." *Id.*, p. 15-16.

11) "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." *Id.*, p. 16.

The result of such a ruling, of course, would be to turn implied consent hearings into a battle of the experts. Since these hearings are supposed to be relatively minor hearings that can be held in a quick manner and also ruled on quickly, such a ruling would vastly expand the scope of the hearing and blow some hearings into hours long or potentially days long affairs. *State v. Bacote*, 331 S.C. 328, 333, 503 S.E.2d 161, 164 (1998) ("The net effect would be to slow down what should be a summary administrative proceeding designed to handle license revocation matters quickly"). Further, such a ruling would expand the scope of the hearing to whether the licensed medical personnel made the <u>correct</u> decision about whether a person could submit to a breath test. Such expansion of the scope of these hearings is inherently prohibited by the language of the statute itself. S.C. Code §56-5-2950(A) states that the licensed medical person can base his decision about whether a person can submit to a breath test on "any other reason considered acceptable by the licensed medical personnel." Thus, there can never be a question about whether the licensed medical personnel was correct or not because the decision can be based on any reason acceptable to that licensed medical personnel. Additionally, on the practical side of things, since licensed medical personnel are not automatically notified of these hearings (they are not parties to the hearings), such a ruling would require law enforcement officers to subpoena licensed medical personnel from their jobs of treating patients to come to these hearings and

testify.[2] This is particularly troubling since these cases are almost exclusively "prosecuted" by only the arresting officer and/or the breath testing officer.[3]

In his effort to broadly expand the scope of these hearings, the Petitioner continues to misconstrue 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."). The scope of the hearing is what must be proven by the State in these cases to have the suspensions sustained. That is the items listed as the scope of the hearing are the matters to be proven at these hearings. Despite this, Petitioner repeatedly attempts to confuse the legal issues in this case by arguing that the lower courts relied on hearsay evidence that the Petitioner was unable to submit to a breath test and hearsay evidence that this determination came from licensed medical personnel as required by S.C. Code §56-5-2950(A). Petitioner's arguments fail to recognize that the statements made by Nurse Albright to Officer

[2] Requiring the law enforcement officers to issue the subpoenas would increase the work load on the OMVH because parties that are not attorneys must complete the subpoena form and return it to the OMVH for signature before the subpoena can be served. Rule 12(A), OMVH Rules.

[3] Implied consent contested case hearings tend to average more than 6,000 cases filed each year with the OMVH, and most jurisdictions simply do not have the funding to have prosecutors assist the law enforcement officers with these cases. SCDMV also is not funded at a level that would support having an SCDMV attorney at every implied consent hearing held before the OMVH.

Desrochers do not constitute hearsay in the context of an implied consent administrative hearing because those statements do not go to the truth of the matter asserted. Rather, in an implied consent case, the only matters asserted are 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.

Any testimony or evidence presented in an implied consent case that does not pertain to one of the three items listed above is not one of the matters asserted and is typically offered to provide explanation or context for what occurred in the case. For example, a law enforcement officer may testify to a call dispatched to him through a 911 center because that testimony explains why the law enforcement officer undertook an investigation at a particular location. Such testimony has repeatedly been held to not be hearsay if it is offered to explain the actions of the law enforcement officer, as discussed in more detail below. Since Officer Desrochers's testimony about Nurse Albright's statements and licensing were offered to explain why Officer Desrochers requested Petitioner submit to a blood test, that testimony was not hearsay.

I. DID THE HEARING OFFICER, ADMINISTRATIVE LAW COURT, AND COURT OF APPEALS CORRECTLY RULE THAT NURSE ALBRIGHT'S STATEMENTS TO OFFICER DESTROCHERS REGARDING HER DETERMINATION THAT PETITIONER WAS UNABLE TO SUBMIT TO A BREATH TEST AND NURSE ALBRIGHT'S WRITTEN STATEMENT THAT SHE IS AN "RN" WERE NOT HEARSAY IN AN IMPLIED CONSENT HEARING?

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 (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 Petitioner would not be able to provide a breath sample (A. p. 51, lines 15-19; p. 52, lines 9-22; and p. 55, lines 6-9). Officer Desrochers further testified that he offered the Petitioner a blood test because it was established that the Petitioner would be unable to get to a DataMaster in time to take a breath test due to his injuries and required treatment (A. p. 55, lines 8-20). The Petitioner refused to submit to a blood test (A. p. 55, lines 12-13 and 20-23). Officer Desrochers also offered into evidence the SLED Blood/Urine Collection Report signed by Nurse Albright, which indicated Petitioner could not submit to a "breath test at this time due to any reason deemed acceptable by that licensed medical person" (A. p. 29, lines 17-21 and p. 73).[4]

Petitioner argues that the lower courts relied on hearsay evidence that the Petitioner was unable to submit to a breath test. Petitioner further argues that "the arresting officer is required to present the testimony of licensed medical personnel indicating... that the person could not take a breath test." *Brief of Petitioner*, p. 6. SCDMV asserts that Officer Desrochers testimony regarding Nurse Albright's statements that Petitioner was not able to submit to a breath test was not hearsay because whether Petitioner was actually able or unable to submit to a breath test was wholly irrelevant for purposes of this hearing. In fact, per the statute, Nurse Albright could make her determination based on "any other reason considered acceptable by the licensed medical

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

personnel." S.C. Code §56-5-2950(A). Thus, if the sole reason Nurse Albright determined Petitioner could not submit to a breath test was because several of the emergency room staff needed to take a break to eat a meal and, as a result, Lexington Medical Center would not be able to treat Petitioner quickly enough to get him to a breath testing room in time to complete a breath test within two hours, then that reason is acceptable under the statute. Similar to 911 calls that trigger investigations in particular areas and result in arrests, this testimony was provided by Officer Desrochers to explain <u>why</u> he requested Petitioner submit a blood test, not for the truth of the statements.

While not binding on this Court, 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 <u>since it was not admitted to prove that Cann was actually unable to leave</u>. *Id.* at 3. The ALC further held in that decision that the testimony was admitted to show that the trooper's request for a blood test was warranted under the statute because licensed medical personnel determined that 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 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 following 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, it does not matter whether the Petitioner was actually able to provide a breath sample. Rather, what does matter is that Nurse Albright determined Petitioner could not submit to a breath test for any reason considered acceptable to her and she communicated that decision to Officer Desrochers. Officer Desrochers then fully relied on Nurse Albright's determination and requested that Petitioner submit a blood sample.

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." (A. p. 51, line 23 – p. 29, line 1). In other words, the OMVH Hearing Officer allowed the statements into evidence not to prove that Nurse Albright's determination was correct but to demonstrate that Nurse Albright made and communicated that determination to Officer Desrochers and that because of that communication from Nurse Albright Officer Desrochers then requested Petitioner submit to a blood sample.

This Court has 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) (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 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 the officer's reason for going to the defendant's home).

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 *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); *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."); *Hatfield v. Van Epps*, 358 S.C. 185, 192, 594 S.E.2d 526, 530 (Ct. App. 2004); *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."); *In re Cliquot's Champagne*, 70 U.S. 114 (1865); *State v. Lewis*, 293 S.C. 107, 110-

111, 359 S.E.2d 66, 68 (1987); *Floyd v. Floyd*, 365 S.C. 56 (Ct. App. 2005); *R & G Const., Inc. v. Lowcountry Regional Transp. Authority*, 343 S.C. 424 (Ct. App. 2000); *Butler v. Gamma Nu Chapter of Sigma Chi*, 314 S.C. 477 (Ct. App. 1994); *Cloaninger ex rel. Estate of Cloaninger v. McDevitt*, 555 F.3d 324 (4th Cir. 2009); *Taylor v. Molesky*, 63 Fed.Appx 126 (4th Cir. 2003); *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789 (4th Cir. 2001); *Arrington v. E. R. Williams, Inc.*, 490 Fed.Appx. 540 (4th Cir. 2012); *Thomas v. Dootson*, 377 S.C. 293 (Ct. App. 2008); *Fields v. Regional Medical Center Orangeburg*, 354 S.C. 445 (Ct. App. 2003); *Baber v. Greenville County*, 327 S.C. 31 (1997); *U.S. v. Cain*, 586 Fed.Appx. 104 (4th Cir. 2014); *U.S. v. Edelen*, 561 Fed.Appx. 226 (4th Cir. 2014); *U.S. v. Hassan*, 742 F.3d 104 (4th Cir. 2014); *U.S. v. Ibisevic*, 675 F.3d 342 (4th Cir. 2012); *State v. Vick*, 384 S.C. 189 (Ct. App. 2009); *U.S. v. Hodge*, 295 Fed.Appx. 597 (4th Cir. 2008); *U.S. v. Rodriquez*, 94 Fed.Appx. 139 (4th Cir. 2004); and *State v. Miller*, 197 N.C.App. 78, 676 S.E.2d 546 (NC.App. 2009).

Petitioner 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, Petitioner cites *State v. Stacy*, 315 S.C. 105, 431 S.E.2d 640 (Ct. App. 1993). 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 unable to provide a breath sample to law enforcement. Significantly, the *Stacy* case never dealt with the issue of hearsay. The licensed medical personnel who 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. In other words, the licensed medical personnel in the *Stacy* case testified to lay a proper foundation for the admission of evidence that had to be proven in

the felony driving under the influence trial.[5] So, the *Stacy* case has no relevance to the issues raised by Petitioner in this case.

Next, Petitioner 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 possibly 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 exactly who told Officer Desrochers that Petitioner could not provide a 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." (Emphasis added). Second, Nurse Albright signed the SLED Blood/Urine Collection Report indicating that Petitioner 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, in the *Moore* case, the objectionable testimony was used to lay the foundation for the blood test results to come into evidence. In this case, Petitioner refused to submit to the blood test and the testimony was presented simply to explain why Officer Desrochers requested a blood sample. 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 Petitioner refused to submit to the blood test there are no blood test results. 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

[5] This is similar to the DataMaster DMT operator, if they are different from the arresting officer, being required to testify in an administrative BAC hearing to lay a proper foundation for the introduction of the breath test results.

ordered a blood sample," rather than licensed medical personnel determining Moore was unable to provide a breath sample. That is clearly not the case here. In this case, Nurse Albright, a licensed medical person, determined Petitioner would be unable to provide a breath sample and signed the SLED Blood/Urine Collection Report to indicate the same, not Officer Desrochers. Therefore, the *Moore* case is also of little guidance to the Court on the issue raised by Petitioner in this case.

Petitioner also cites to the case *S.C. Dept. of Motor Vehicles v. McCarson*, 391 S.C. 136 (2011) to argue that the testimony regarding Nurse Albright's statements were the "same 'quintessential' hearsay this Court expressly rejected in *McCarson*." *Brief of Petitioner*, p. 10. Contrary to the position advanced by Petitioner, the *McCarson* case dealt with hearsay testimony regarding the reason for the traffic stop that led to an implied consent violation. As stated previously, one of the explicit elements that must be proven by in these cases is that the driver was lawfully arrested or detained. Thus, testimony regarding the reason for a traffic stop, if presented by someone other than the officer that performed the traffic stop, does constitute hearsay because the reason for the traffic stop is one of the elements to be proven in the case. Since whether the Petitioner could actually provide a breath sample or not is not an element to be proven in the implied consent case, this case is very different than the *McCarson* case.

Petitioner then turns to the case *State v. Kimbrell*, 326 S.C. 344, 481 S.E.2d 456 (Ct. App. 1997). With this case, Petitioner argues the determination a person cannot give a breath sample must be made by licensed 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 in an indication of an injury to the mouth… the statute still requires a determination that the accused is physically unable to provide

an acceptable breath sample." *Id.*, 326 at 348. Again, in this case, Nurse Albright, not Officer Desrochers, determined Petitioner 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 Petitioner's mouth. Rather, the testimony was that Nurse Albright determined Petitioner would not be able to leave the hospital to provide a breath sample due to medical reasons (A., p. 52, lines 17-21). Therefore, the *Kimbrell* case is also of little guidance to the Court on the issue raised by Petitioner in this case.

Next, Petitioner turns *Peake v. South Carolina Dept. of Motor Vehicles*, 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007). Petitioner's reliance in the *Peake* case is also 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. Unlike Trooper Manley in the *Peake* case, Officer Desrochers testified Nurse Angela Albright informed him that Petitioner was unable to submit to a breath test (A. p. 51, lines 15-19; p. 52, lines 9-22; and p. 55, lines 6-9). Officer Desrochers further testified that he offered the Petitioner a blood test because

of Nurse Albright's statements to him that the Petitioner would be unable to get to a DataMaster in time to take a breath test due to his injuries and required treatment (A. p. 55, lines 8-20). Additionally, Officer Desrochers offered into evidence the SLED Blood/Urine Collection Report signed by Nurse Albright, which indicated Petitioner could not submit to a breath test for any other reason deemed appropriate by Nurse Albright (A. p. 52, lines 17-21 and p. 73). Thus, this testimony was admitted solely to demonstrate that Nurse Albright made these statements to Officer Desrochers, triggering Officer Desrochers's next steps in his investigation (A. p. 51, line 24 – p. 52, line 1). Since there is no question a licensed medical person is the one that determined Petitioner could not submit to a breath test, SCDMV asserts that Officer Desrochers did exactly what the *Peake* Court requires in cases such as this.

Petitioner then turns to out of state cases. First, Petitioner 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 who had been seriously injured in a collision and was found semiconscious thrown from her vehicle. 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, i.e. what must be proven, is limited to whether Petitioner:

(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). Petitioner argues that because Nurse Albright determined that Petitioner would be unable to provide a breath sample, the scope of this hearing automatically expanded to include the State being required to prove that Petitioner truly would not be able to provide a breath sample ("The statements of [Nurse] Albright presented by Officer Desrochers were undeniably introduced to satisfy the threshold question of whether or not Petitioner could submit to a breath test." [Brief of Petitioner, p. 13]). That is simply not true. In a case such as this, all that needs to be proven is that licensed medical personnel made such a determination, not that the determination was correct. This is why, at the heart of it, Petitioner's argument fails in this case. This is also why the *Heuton* case doesn't support Petitioner's argument in this case. 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 was one of the things the Commissioner had to prove. That is not the case here and for these reasons, Petitioner's reliance on the *Heuton* case is misplaced. [6]

Similarly, Petitioner relies on *State v. Anger*, 105 Hawai'i 423, 98 P.3d 630 (Hawai'i 2004). Petitioner'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 that a physician told him Anger was injured constituted hearsay because injury was one of the elements that had to be proven to justify the blood draw. Again, in a case such as the one before this Court, all that

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[6] 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.

needs to be demonstrated is that licensed medical personnel made a determination that Petitioner was unable to provide a breath sample, not that the determination was necessarily correct.

If this Court were to accept Petitioner's arguments with regard to the *Anger* case and the *Hueton* case, Nurse Albright would have to come testify at this implied consent hearing solely to confirm that she is a licensed medical person and that she informed Officer Desrochers Petitioner was not able to submit to a breath test for any reason deemed acceptable to her. Then she would have to defend her decision that Petitioner could not submit to a breath test for any reason deemed acceptable to her. That argument simply does not make sense and presumes, to a certain extent, law enforcement officers will lie about the information given to them by licensed medical personnel. Such a presumption would be inconsistent with the Court's prior holdings in *S. C. Nat'l. Bank v. Florence Sporting Goods, Inc.*, 241 S. C. 110, 115-16, 1267 S. E. 2d 199, 202 (1962); *Felder v. Johnson*, 127 S. C. 215, 217, 121 S. E. 54, 54 (1924) (In the absence of evidence to the contrary, it is presumed that public officers perform their duties faithfully and regularly).

Finally, Petitioner turns to the case *State v. Brewer*, 411 S.C. 401, 768 S.E.2d 656 (2015). Petitioner argues that the *Brewer* case is applicable here because "To what issue, other than the fact that Petitioner could not leave the hospital, might have the testimony [regarding Nurse Albright's determination] been relevant? The answer is none." *Brief of Petitioner*, p. 15. The *Brewer* case involved a person who 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 victim. 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. As discussed above, that is simply not the case here. In this case, by statute, the scope of this hearing was limited to whether Petitioner:

(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 factfinder[7] in this case was not whether Petitioner was actually unable to provide a breath sample or not, but rather whether a licensed medical personnel determined that Petitioner was unable to provide a breath sample.[8] By

[7] 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 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 equipped, through their experience, to recognize which testimony is less factually reliable.

[8] During this part of his argument, Petitioner asserts that Nurse Albright determined "that a blood test was warranted" (*Brief of Petitioner*, p. 16). This is not an accurate statement. Nurse Albright merely determined that Petitioner was unable to provide a breath sample. Officer Desrochers determined, based on the information provided to him by Nurse Albright, that he could legally request a blood sample from Petitioner. Petitioner makes the statement that Nurse Albright determined "that a blood test was warranted" because such an interpretation leads to the outcome Petitioner 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 a driver was unable to provide a breath sample or not, creating a battle of the experts

referring this Court to the *Brewer* case, Petitioner is attempting to muddy the waters and expand the scope of implied consent hearings so that when a licensed medical personnel determines someone is unable to provide a breath sample, that licensed medical personnel will then have to come testify at the implied consent hearing and prove that their determination was a true and correct determination.[9] This is simply not required by S.C. Code §56-5-2951(F). For these reasons, Petitioner'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),

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at these hearings. This pursuit is evidenced by Petitioner's argument that Nurse Albright was not subject to cross examination regarding her determination that Petitioner was unable to provide a breath sample. For example, Petitioner'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?

Id. Interestingly, it appears that all of these questions could have been asked of Officer Desrochers on cross examination. Petitioner's true motivation in making his arguments is further evidenced by Petitioner's statement that if Nurse Albright's "alleged statements were false, then the decision to request a blood test is invalid…" (*Id.*). Based on these arguments and statements, it is clear Petitioner 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).

[9] In discussing the *Brewer* case, Petitioner 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, Petitioner 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.

SCRE. Petitioner may argue that this rule applies only to words spoken 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 diagnosis and treatment of the victim" and would, therefore, be admissible under Rule 803(4), SCRE).

II. DID THE HEARING OFFICER, ADMINISTRATIVE LAW COURT, AND COURT OF APPEALS CORRECTLY RULE THAT OFFICER DESROCHERS PRESENTED A *PRIMA FACIE* CASE THAT NURSE ALBRIGHT WAS LICENSED MEDICAL PERSONNEL PURSUANT TO S. C. CODE §56-5-2950(A)?

Petitioner argues that the Court of Appeals reliance on Nurse "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" was an error. *Brief of Petitioner*, p. 18. Contrary to this argument, Officer Desrochers's 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.[10] First, Nurse Albright's name tag and what was written on it, is not a statement in the sense put forth in Petitioner's argument. Officer Desrochers testified to his <u>observations</u>, including the fact that she had on a name tag[11] 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 she was a registered

[10] Please see all of the arguments regarding hearsay and statements that "go to the matter asserted" as outlined in detail above.

[11] 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.

nurse (A. p. 56, lines 18-23).[12] Certainly, Lexington Medical Center would not have issued Nurse Albright a name tag 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,[13] and would greatly increase the likelihood of liability to the hospital for any treatment performed under such falsity. Further, Officer Desrochers observed Nurse Albright perform duties typically performed by a registered nurse, fill out the SLED Blood/Urine Collection Report line "Name and Title of Licensed Medical Personnel" with "Angela Albright, RN," and sign the SLED Blood/Urine Collection Report with "RN" just after her signature (A. p. 73). [14]

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[12] Significantly, the testimony regarding the name tag was elicited by Petitioner'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.

[13] 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.

[14] Petitioner 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 Petitioner'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. Frey*, 362 S.C. 511, 608 S.E.2d 874 (Ct. App. 2004). In *Frey*, a criminal driving under the influence case, the Court held that <u>blood test results</u> 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 <u>blood test results</u>" 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 Petitioner's objection under *Frey* is what led to the Administrative Law Judge to erroneously believe that Officer Desrochers testified that Nurse Albright was wearing scrubs. Further, despite Petitioner's assertion that the Hearing Officer also

Interestingly, the *Frey* case, which was relied on by Petitioner in his original objection to Officer Desrochers's testimony and throughout the appeals of this case, 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 in the *Frey* case, Petitioner 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 or medical licensure and the State did not offer any evidence of Mr. Darragh's medical credential" beyond the testimony that he was wearing scrubs.

In this case, the Hearing Officer had quite a bit more evidence of Nurse Albright's credentials than the *Frey* Court had before it. Specifically, the Hearing Officer had the following evidence: Officer Desrochers's observations of Nurse Albright performing duties typically performed by a registered nurse; Nurse Albright's name tag identifying her as a registered nurse; and Nurse Albright writing that she is an "RN" on the SLED Blood/Urine Collection Report. Thus, even the *Frey* case, when paired with Officer Desrochers's observations, supports Officer Desrochers reliance on Nurse Albright's determination that Petitioner was unable to provide a breath sample. As a result, all of these observations taken together provided the Hearing Officer a reasonable basis for finding that "the officer was advised by a registered nurse (licensed medical personnel) that the [Petitioner] 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

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relied on testimony that Nurse Albright was wearing scrubs, no such notation is found anywhere in the Hearing Officer's Final Order and Decision. *Brief of Petitioner*, p. 17, fn. 1.

name badge stating she was a registered nurse..." (A., p. 39 and 43). Further, the 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 [Petitioner] 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.[15] Despite Petitioner's numerous objections regarding Nurse Albright's determination that Petitioner was unable to provide a breath sample and the fact that it was abundantly clear that Petitioner was aware that Nurse Albright, not Officer Desrochers, had made that determination, the Petitioner offered no evidence to refute Officer Desrochers's evidence that Nurse Albright was licensed medical personnel. It seems apparent that if the Petitioner had any evidence that Nurse Albright was not a nurse, then Petitioner would have confronted Officer Desrochers with that evidence at the hearing of this case.[16] Petitioner did not even attempt to present conflicting evidence regarding Nurse Albright's credentials.[17] With no conflicting evidence, the record supports the conclusion that Ms. Albright was a licensed medical professional.

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[15] 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. <u>See</u> *State v. Stacy,* 315 S.C. 105, 431 S.E.2d 640 (Ct. App. 1993).

[16] Interestingly, Petitioner has for the first time in all of his pleadings in this case, asserted that "Simply holding oneself out as a medical professional is not sufficient to establish that an individual is a qualified and licensed medical professional." To advance this argument Petitioner cites only to a news article titled "Man Pleads Guilty to Treating Hundreds as Fake Doctor." As noted in footnote 13, above, such actions in nursing are also against the law in South Carolina. Therefore, if Petitioner truly believed Nurse Albright was not a licensed nurse at the time of these events, in addition to raising those arguments in his appeals, he could seek criminal charges against Nurse Albright. To the knowledge of the undersigned, no such criminal charges have ever been sought by Petitioner against Nurse Albright.

[17] If Nurse Albright was not a licensed registered nurse in South Carolina, it would have been exceptionally easy for Petitioner to have presented evidence of such a lack of license. The S.C. Department of Labor, Licensing, and Regulation maintains a Nursing Board Member Lookup

Because the record in this matter contains substantial evidence upon which Officer Desrochers relied (that the determination that Petitioner was unable to provide a breath sample was made by a licensed medical personnel), the Hearing Officer and appellate Courts have correctly sustained this implied consent suspension. See *Lark v. Bilo, Inc.*, 276 S.C. 130, 276 S.E.2d 304.

CONCLUSION

For the reasons stated above, the ruling of the Court of Appeals should be affirmed.

Respectfully submitted,

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August 23, 2019
Blythewood, South Carolina

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online at https://verify.llronline.com/LicLookup/Nurse/Nurse.aspx?div=17. At this link anyone can simply enter the name of someone they believe to be a nurse and the site will confirm or deny that the person is a nurse. If the person is a nurse, the site will report their First and Last names, middle initial, city and state, the type of nursing license they hold (LPN, RN, etc...), and their license number. If the person is not a nurse, the site will report "0 record(s)" as the result.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable S. Phillip Lenski, Administrative Law Judge

Case No. 2019-000693

Bradley Sanders...Petitioner,

v.

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

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

CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, August 23, 2019, I served one (1) copy of the Respondent's Brief by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Respondent at the address indicated below:

Heath P. Taylor, Esquire
Taylor Law Firm, LLC
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Brandy A. Duncan, Asst. General Counsel

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