South Carolina Access to Justice Commission
Executive Director

The South Carolina Access to Justice Commission was established by the Supreme Court of South Carolina in 2007. The Commission is part of a national effort, led by the American Bar Association and state supreme courts all over the country, to expand access to civil legal justice for low-income and disadvantaged people.

The Commission's priorities are to: assess essential civil legal needs of South Carolinians with low incomes and modest means; foster collaboration and coordination among legal services providers; promote education and outreach on the gap in civil legal services; encourage greater pro bono participation by members of the bar; support increased funding to expand access to civil justice; support programs and resources to assist self-represented litigants; and recommend new initiatives and technology to expand access to civil justice.

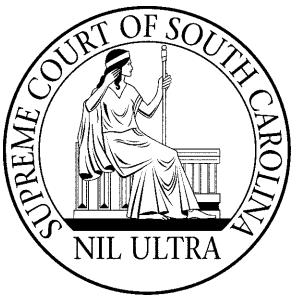
Position Responsibilities:

The Executive Director is responsible for:

(1) Primary staff for the organization and for ensuring the strategic plans, projects, and directions of the Commission are accomplished;
(2) Identifying impediments to access to civil justice and strategies to overcome them;
(3) Developing close, collaborative relationships with other legal services agencies;
(4) Planning Commission meetings, including sending notice of meetings to Commission members, preparing meeting Agendas, compiling and providing requested information and presentations, and recording meeting minutes;
(5) Developing and consistently updating the Commission's website and social media accounts;
(6) Identifying and writing grants for projects and partners; and
(7) Keeping records of invoices, receipts and all monies spent by the Commission.

Position Requirements:

The candidate should have a law degree and substantial legal experience.
Interested persons should submit a resume to Alexis Reynolds at areynolds@sccourts.org.



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 5
January 30, 2019
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Daniel Martinez Herrera, Petitioner.

Appellate Case No. 2016-002523

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Laurens County
Eugene C. Griffith Jr., Circuit Court Judge

Opinion No. 27861
Heard October 17, 2018 – Filed January 30, 2019

REVERSED AND REMANDED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan M. Wilson and Assistant Attorney General Jonathan Scott Matthews, both of Columbia; and Solicitor David M. Stumbo, of Greenwood, all for Respondent.

JUSTICE KITTREDGE: This is a case about the amount or weight of an illegal drug. For self-evident reasons, the possession of an illegal drug carries increased penalties as the amount of the drug in the possession of the offender increases. In this case, Petitioner Daniel Herrera was convicted of "trafficking in"—meaning, possessing—between ten and 100 pounds of marijuana, which carries a substantial term of imprisonment. The penalty for possessing fewer than ten pounds of marijuana is less severe. Moreover, drug trafficking is classified as a violent and serious crime, affecting Herrera's parole eligibility now and in the future.[1]

At trial, Herrera contended that he did not knowingly possess any marijuana. Moreover, Herrera disputed the weight of the marijuana—allegedly, ten pounds, 2.78 ounces—by challenging (1) the qualifications of the State's marijuana expert, police officer Jared Hunnicutt, and (2) the accuracy of the purported weight of the marijuana.

Ultimately, Herrera's challenges were unsuccessful, and following his trafficking conviction, the court of appeals affirmed the admission of Hunnicutt's testimony regarding the weight of the marijuana in a summary unpublished opinion. *State v. Herrera*, Op. No. 2016-UP-424 (S.C. Ct. App. filed Oct. 12, 2016). We granted Herrera's petition for a writ of certiorari, and we now reverse, for under the circumstances presented it was an abuse of discretion to permit Hunnicutt to testify to the weight of the marijuana. Accordingly, we reverse the court of appeals and remand to the trial court for a new trial.

I.

Herrera was arrested when he appeared at a post office to claim a package that law enforcement had intercepted. The package contained six bags of suspected marijuana. Herrera was indicted for trafficking in marijuana over ten pounds and less than 100 pounds. At trial, the State attempted to qualify Detective Hunnicutt

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[1] *See* S.C. Code Ann. § 16-1-60 (Supp. 2018) (listing drug trafficking under section 44-53-370(e) as a violent crime); *id.* § 24-21-610 (2007) (requiring those convicted of a violent crime to serve one-third of their sentence as opposed to serving one-fourth); *id.* § 17-25-45(B), (C)(2) (2014 & Supp. 2018) (listing drug trafficking under section 44-53-370(e) as a serious offense and requiring the imposition of a sentence of life without parole if that individual has two or more previous convictions for serious offenses).

of the Laurens Police Department as an expert in marijuana analysis. The basis for his alleged expertise came from his experience as a police officer, as well as attending a single course sponsored by the South Carolina Law Enforcement Division. Hunnicutt had never been qualified as a marijuana analyst in General Sessions court prior to his testimony here.

II.

"The appellate court reviews [the] trial [court's] ruling on admissibility of evidence pursuant to an abuse of discretion standard. . . ." *State v. Torres*, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). Similarly, "[t]he trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Douglas*, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006).

Rule 702 of the South Carolina Rules of Evidence governs the admissibility of expert testimony and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Although Hunnicutt's qualifications as an expert present a close question, under our deferential standard of review, we find no abuse of discretion in qualifying him as an expert in marijuana identification. We do, however, find an abuse of discretion in the admission of Hunnicutt's actual testimony, which almost immediately morphed into areas far beyond the mere identification of marijuana, including a purported expertise in marijuana analysis as well as the weight of the drug.

III.

A.

A review of the trial court proceedings leading to Hunnicutt's qualification as an expert is revealing. The trial court diligently vetted Hunnicutt's qualifications as an

expert. After allowing the State to proffer the testimony and present its argument, the trial court noted it was "uncomfortable" qualifying Hunnicutt "as an expert for several reasons." The trial court explained its reasoning. This ruling should have ended the matter, but the State would not take "no" for an answer and continued to push the issue. The State contended Hunnicutt's expert qualification could be limited to:

> Identification, I think that would be, identification, that is the sole question. In [his] opinion[,] is this marijuana or a bag of lettuce[?] I think he is qualified to do that, I think he is more qualified certainly than the trier of fact in this case. He can help them to understand that this is not oregano in those bags.

The trial court's lingering doubt as to Hunnicutt's qualifications continued, as it told the State, "I don't think you [get] there . . . . I think some of this I have helped you with and I am [un]comfortable helping you with your proving the case. . . . I can't qualify him. . . . He is not qualified. . . . So, my ruling is I can't qualify him as an expert in the field of marijuana analysis and identification."

While the trial court never wavered from its unwillingness to qualify Hunnicutt broadly, it relented on the State's fallback request to limit Hunnicutt's qualification to identification only. The State asked, "Are you going to allow me to attempt to qualify him in identification of marijuana?" The trial court responded, "Yes, I can do that." While a close question is presented, as noted, in granting wide discretion to the trial court, we find no abuse of discretion in the qualification of Hunnicutt as an expert in marijuana identification. After all, it does not appear that Herrera disputes that the bags contained some marijuana.

The State, however, was not content to limit its questioning of Hunnicutt in line with the trial court's narrow grant of "identification" testimony. More to the point, the State asked Hunnicutt about matters that were beyond the proffered expertise of identification. Hunnicutt was asked whether he "tested" the material and where he performed the "analysis." Herrera, through counsel, repeated his objections and specifically reminded the trial court that Hunnicutt "is an expert in identification only. I don't know why he is talking about testing." The trial court correctly sustained the objection.

Yet the State persisted and elicited testimony of Hunnicutt's analysis of the substance, including its weight, which was performed at the Greenwood County

Sheriff's Office. Again, Herrera objected, stressing that his "objection [wa]s this witness [wa]s not qualified to testify to anything regarding testing the marijuana or the weight, he was qualified for identification purposes only." The trial court overruled the objection, which was error.

In essence, the State was permitted to introduce testimony from Hunnicutt that ventured well beyond the "identification" limitation. The State ended up with what it wanted all along, which the trial court properly excluded in its initial ruling.

B.

While there may be situations where non-expert testimony may be admissible on the weight of drugs, the circumstances here demonstrate the need for precision in the exact weight of the drug. *See State v. Cain*, 133 A.3d 619, 620 (N.J. 2016) (finding expert testimony is common in drug cases because it "provides necessary insight into matters that are not commonly understood by the average juror, such as the significance of drug packaging and weight").

There are two related concerns with Hunnicutt's testimony concerning weight. First, he admitted he did not know if the scales of the other agency were calibrated, simply remarking, "that wasn't my scale." *See State v. Wallace*, 910 P.2d 695, 719 (Haw. 1996) ("[T]he weight of the [drugs] derived from expert testimony that relied upon scientific measurements obtained from calibrated weighing instruments for its accuracy."). Hunnicutt testified he believed the evidence technician at the Greenwood County Sheriff's Office calibrated the scales, but gave no basis for that belief, such as personal knowledge that the evidence technician regularly or recently calibrated the scales so as to make the scale's representation of the weight an accurate calculation. *See State v. Manewa*, 167 P.3d 336, 346–50 (Haw. 2007) (finding the State laid an inadequate foundation to prove the weight measured was accurate where the expert was not qualified in the calibration of the analytical balance; he did not know how to calibrate the balance; and he had never calibrated the balance); *State v. Richardson*, 830 N.W.2d 183, 189–90 (Neb. 2013) (finding that a more precise foundation regarding the accuracy of the scale was required where the expert did not provide testimony regarding the procedures used to perform a calibration). Similar to these jurisdictions, we find the State laid an inadequate foundation as to the accuracy of the scale, given there was no evidence the scale was properly calibrated. As a result, there was mere speculation in assessing the reliability of the scale, which is patently insufficient under the circumstances presented.

Second, the marijuana was packaged and weighed in six different bags, yet Hunnicutt only weighed one empty bag, and *not even one of the bags actually containing the alleged drug*. Rather, Hunnicutt chose to weigh a bag he found at the Greenwood County Sheriff's Office which appeared to him to be of similar size and assumed the six actual bags were close to the same weight. This relaxed approach may not be prejudicial in every circumstance, but the prejudice is glaring here. The charge against Herrera was trafficking marijuana ten pounds or more. Even under the State's evidence, the weight of the alleged marijuana was less than three ounces over the ten-pound minimum threshold. *See State v. Diaz*, 365 S.E.2d 7, 9 (N.C. Ct. App. 1988) (explaining the weight element becomes more critical if the State's evidence approaches the minimum weight charged, but that it was a non-issue in the case because the weight exceeded the minimum statutory weight by more than 30,000 pounds (citation omitted)). We believe Hunnicutt's method of weighing a single baggie he viewed as similar to the actual bags containing the marijuana was an unreliable means for weighing the marijuana where, as in this case, the charged weight was barely over the ten-pound minimum threshold.

IV.

We hold the court of appeals erred in affirming the trial court's admission of Hunnicutt's testimony beyond the narrow parameters of identification of marijuana. Herrera's objection to the testimony concerning weight should have been sustained. As a result, we reverse Herrera's conviction and sentence for trafficking in marijuana and remand for a new trial.

REVERSED AND REMANDED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Atiya Shawtel Johnson, Respondent

Appellate Case No. 2019-000101

ORDER

Respondent, a municipal court judge in Hardeeville and Ridgeland and a ministerial recorder/clerk of court in Hardeeville, was indicted by a Federal Grand Jury on four counts of violating 18 U.S.C. § 1001(a)(2) (making any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States). The Office of Disciplinary Counsel has filed a petition asking the Court to place Respondent on interim suspension pursuant to Rule 17(a), RJDE, Rule 502, SCACR.

IT IS ORDERED that the petition is granted and Respondent is placed on interim suspension in regard to her judicial positions. Additionally, as the administrative head of the unified judicial system and pursuant to article V, section 4 of the South Carolina Constitution, Respondent is suspended from her position as ministerial recorder/clerk of court. The municipalities of Hardeeville and Ridgeland are under no obligation to pay Respondent her salary during her suspensions. *See In re Ferguson*, 304 S.C. 216, 219, 403 S.E.2d 628, 631(1991) ("[A] public officer who is suspended from office is not entitled to compensation."). Respondent is enjoined from access to any monies, bank accounts, and records related to her judicial and municipal offices. Chief Municipal Judge Nancy Gutierrez is hereby appointed to take charge of all such monies, bank accounts, and records for Hardeeville. Chief Municipal Judge Thomas L. Scoggins is hereby appointed to take charge of all such monies, bank accounts, and records for Ridgeland.

IT IS FURTHER ORDERED that Respondent is prohibited from entering the premises of the municipal courts of Hardeeville and Ridgeland unless escorted by a law enforcement officer after authorization from the Chief Municipal Judges of

Hardeeville or Ridgeland. Finally, Respondent is prohibited from having access to, destroying, or canceling any public records and is prohibited from access to any judicial databases or case management systems. This Order authorizes the appropriate government or law enforcement official to implement any of the prohibitions as stated in this Order.

This Order, when served on any bank or other financial institution maintaining any judicial accounts of Respondent, shall serve as notice to the institution that Respondent is enjoined from having access to or making withdrawals from the accounts.

s/ Donald W. Beatty C.J.
FOR THE COURT

Columbia, South Carolina

January 29, 2019

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Darlington County. Effective February 5, 2019, all filings in all common pleas cases commenced or pending in Darlington County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Aiken	Allendale	Anderson	Bamberg
Barnwell	Beaufort	Berkeley	Calhoun
Cherokee	Chester	Chesterfield	Clarendon
Colleton	Dorchester	Edgefield	Fairfield
Florence	Georgetown	Greenville	Greenwood
Hampton	Horry	Jasper	Kershaw
Lancaster	Laurens	Lee	Lexington
Marion	Marlboro	McCormick	Newberry
Oconee	Orangeburg	Pickens	Richland
Saluda	Spartanburg	Sumter	Union
Williamsburg	York	**Darlington-Effective February 5, 2019**	

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available on the E-Filing Portal page at http://www.sccourts.org/efiling/ to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal page.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
January 23, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bradley Sanders, Appellant,

v.

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

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

Appellate Case No. 2016-000228

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

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

AFFIRMED

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

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

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

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

FACTS/PROCEDURAL BACKGROUND

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

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

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

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

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

STANDARD OF REVIEW

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

> The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

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

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

S.C. Code Ann. § 1-23-610(B) (Supp. 2018). Accordingly, the ALC's decision "should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008). "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the [ALC] and is more than a mere scintilla of evidence." *Id.* at 605, 670 S.E.2d at 676.

LAW/ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AFFIRMED.[3]

HUFF, J. concurs.

HILL, J., dissenting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gary Nestler and Julie Nestler, Appellants,

v.

Joseph E. Fields, Respondent.

Appellate Case No. 2016-001541

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5621
Heard November 8, 2018 – Filed January 30, 2019

AFFIRMED

Andrew Joseph McCumber, of Slotchiver & Slotchiver, LLP, of Mount Pleasant, for Appellants.

Alan Ross Belcher, Jr., of Hall Booth Smith, PC, of Mount Pleasant, and Paul Barry Trainor, of Hall Booth Smith, PC, of Atlanta, Georgia, both for Respondent.

HILL, J.: A jury awarded Gary Nestler[*] $7,117.50 actual damages for personal injuries sustained as a result of a car wreck caused by Joseph Fields. Fields admitted he was at fault in causing the wreck and Nestler's injuries, so the trial concerned only

[*] Julie Nestler withdrew her claim for loss of consortium at trial.

the amount of Nestler's damages. Nestler did not introduce the $7,117.50 amount of his medical bills into evidence, but the trial court overruled his relevance objection when Fields offered them. The trial court also overruled his objection to charging the jury the law regarding mitigation of damages. The trial court denied Nestler's motion for new trial. Nestler appeals, arguing the trial court erred in admitting the amount of his medical bills, charging the jury on mitigation, and denying his new trial motion. We affirm the well-reasoned rulings of the skilled trial judge.

I.

A. Admission of the Amount of Nestler's Medical Bills

Nestler claimed injuries including cervical strain, left elbow contusion, tennis elbow, and a permanent impairment rating of 53% for his left upper extremity, which translated to a 32% impairment rating for the whole person. Nestler testified to his consistent pain, the limited range of motion of his left arm, and loss of his ability to engage in and enjoy life like he had before the wreck. His wife related how his injuries hampered his previously active lifestyle.

Nestler's trial strategy focused on his pain and suffering. In objecting to admission of the amount of his medical bills, he argued the amount was irrelevant to the jury's determination of how much he should be compensated for his loss, and any probative value it had was substantially outweighed by the danger of unfair prejudice. *See* Rules 401, 402, and 403, SCRE. Nestler reasoned his medical expenses bore no relation to the magnitude of his damages, and allowing the jury to learn of the amount of his expenses would mislead them into believing his pain and suffering could not be extensive. *See Corenbaum v. Lampkin*, 156 Cal. Rptr. 3d 347, 365 (Ct. App. 2015) ("[T]he full amount billed is not admissible for the purpose of . . . proving noneconomic damages."); *Martin v. Soblotney*, 466 A.2d 1022, 1025 (Pa. 1983) ("[T]here is no logical or experiential correlation between the monetary value of medical services . . . and the quantum of pain and suffering endured as a result of that injury.").

We may only reverse a trial court's evidentiary rulings if they constitute an abuse of discretion, meaning they rest on an error of law or inadequate factual support. *Morin v. Innegrity, LLC*, 424 S.C. 559, 575, 819 S.E.2d 131, 140 (Ct. App. 2018). We can find no authority in our state discussing the issue of whether a party seeking actual

damages for personal injury may prevent the introduction of his actual medical bills by the other party. We see no error in the admission of the amount of Nestler's medical bills. Under the specific facts here we cannot say the risk of unfair prejudice substantially outweighed the probative value of the billed amount. Rule 403, SCRE; *United States v. McRae*, 593 F.2d 700, 707 (5th Cir. 1979) ("Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect."). We are confident in the jurors' ability to weigh evidence and must presume they followed their instructions by applying the facts to the law of damages. We see no reason they should be kept ignorant of the cost of Nestler's medical treatment in determining the facts. What they did with that evidence was largely up to them; as the trial court noted, part of the advocate's art is persuading jurors how such evidence should be interpreted. Different cases may warrant different procedural measures, including bifurcation, special verdict forms or limiting instructions.

B. Jury Instruction on Mitigation of Damages

Nestler claims the jury should not have been charged that he had a duty to mitigate his damages because there was no evidence any mitigation would have been successful. To warrant reversal, it must not only have been an error for the judge to have instructed the jury on mitigation, but the error must have prejudiced Nestler. *See Sulton v. HealthSouth Corp.*, 400 S.C. 412, 416, 734 S.E.2d 641, 643 (2012) ("An erroneous jury instruction constitutes grounds for reversal only if the appellant can show prejudice from the erroneous instruction.").

The jury heard evidence that Nestler's treating doctor prescribed extensive physical therapy, a nerve conduction study, and other recommended treatments. It also learned Nestler attended only a fraction of the physical therapy and did not pursue the other options because he believed they would have been futile. Nestler maintains this evidence is not enough to support a mitigation charge because without an expert opinion that his failure to complete the prescribed treatments would have lessened or reduced his pain and suffering and other damages, a mitigation charge licensed the jury to speculate.

We disagree. Most of the mitigation evidence came from Nestler's own doctor. The doctor's testimony about the physical therapy and other treatment he recommended to Nestler was an expert opinion that carried with it the inference Nestler claims was absent, i.e. that the doctor would not have recommended the treatment unless he believed to a reasonable degree of medical certainty it would have helped. Nestler testified his doctor told him he could stop the physical therapy if it was not working. But as the trial court pointed out, the reasonableness of Nestler's choices was up to the jury. *See McClary v. Massey Ferguson, Inc.*, 291 S.C. 506, 510–11, 354 S.E.2d 405, 407–08 (Ct. App. 1987) ("The reasonableness of actions to mitigate damages is ordinarily a question for the jury.").

C. Denial of New Trial

Nestler maintains he is entitled to a new trial because, despite the extensive evidence as to his permanent impairment, pain and suffering, and other non-economic damages, the jury only awarded him the amount of his medical bills. The record reveals Nestler moved for a new trial absolute and a new trial based on the thirteenth juror doctrine, which the trial court denied. The trial court also declined to order a new trial *nisi*.

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *See Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015). "When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to [alter] the verdict by the granting of a new trial *nisi*." *Id*. (emphasis and alteration in original). "However, when the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge and this Court to set aside the verdict absolutely." *Id*.

As we have noted, Nestler's trial strategy was to not seek specific recovery of his actual medical expenses but to focus on the extent of his pain and suffering and the permanency of his injuries. The trial court was persuaded the verdict was not inadequate or otherwise unjust. We agree. The jury had before it evidence that, if

believed, undercut Nestler's credibility. As Fields' counsel brought out on cross, Nestler boasted a semi-photographic memory, but could not recall a prior lawsuit he had brought alleging permanent injuries to his neck and back arising from a different car wreck. Nestler did not disclose the lawsuit in discovery, and the trial court instructed the jury they could infer the information withheld would have been unfavorable to Nestler. Fields also assailed the veracity of Nestler's permanency rating, bringing to light that the doctor's initial 8% impairment rating for the entire person shot up to 32% after Nestler (his good friend) asked him to revisit it in an effort to resolve this case. The jurors' reaction to this inconsistency may have been like hearing the thirteenth stroke of a clock "which not only is itself discredited but casts a shade of doubt over all previous assertions." A.P. Herbert, *Uncommon Law* 28 (new ed. 1969).

Juries do not have to accept even uncontradicted testimony, much less testimony that contradicts itself. *See Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) ("The fact that testimony is not contradicted directly does not render it undisputed. There remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation."). The jury could have found serious credibility gaps in Nestler's damages evidence.

Drawing reasonable inferences from the evidence in the light most favorable to Fields, we find the trial court did not abuse its discretion in denying his motion for a new trial absolute. For the same reasons, we affirm the trial court's denial of Nestler's motion for a new trial under the thirteenth juror doctrine. *Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 551, 593 S.E.2d 504, 507 (Ct. App. 2004) ("[T]hirteenth juror doctrine allows the circuit court judge to grant a new trial absolute when the judge finds the evidence does not justify the verdict."); *see also Howard v. Roberson*, 376 S.C. 143, 156–57, 654 S.E.2d 877, 884 (Ct. App. 2007) ("The thirteenth juror doctrine is not the proper vehicle for ordering a new trial on a singular issue such as damages.").

Finally, the trial court did not abuse its discretion in deciding not to order a new trial *nisi additur*. Although some cases have held a trial court abuses its discretion when it refuses to grant a new trial *nisi additur* when the jury's verdict is less than a party's medical bills, *see, e.g.*, *Patterson v. Reid*, 318 S.C. 183, 186–87, 456 S.E.2d 436, 438 (Ct. App. 1995) (finding the trial court's grant of a new trial *nisi additur* was not

an abuse of discretion when jury awarded $500.54 in actual damages but plaintiff incurred $6,339.40 in medical expenses), or fails to account for pain and suffering, *see Waring v. Johnson*, 341 S.C. 248, 260, 533 S.E.2d 906, 912 (Ct. App. 2000), the trial court here found no compelling reason to impose its will on the parties and invade the jury's domain. We must accord the trial court's decision "great deference," and respect its superior position to gauge credibility and the field of evidence. *Rush v. Blanchard*, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993) ("[G]reat deference is given to the trial judge, especially in the area of intangible elements of damages.").

AFFIRMED.

KONDUROS and MCDONALD, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Benjamin C. Gecy, River City Developers, LLC and River City Real Estate, LLC, Appellants,

v.

Somerset Point at Lady's Island Homeowners Association, Inc., f/k/a Coosaw River Estates Homeowners Association, LLC; Hilton C. Smith, Jr., Coosaw Investments, LLC; Hilton C. Smith Jr., Inc. of South Carolina and Manorhouse Builders of South Carolina, LLC, Defendants,

Of which Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. of South Carolina are Respondents.

Appellate Case No. 2016-001113

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 5622
Heard November 5, 2018 – Filed January 30, 2019

AFFIRMED

William G. Jenkins, Jr., of Jenkins, Esquivel & Fuentes, P.A., of Hilton Head Island, for Appellants.

Morgan S. Templeton, Graham Pollock Powell, William Wharton Watkins Jr., and John Joseph Dodds, IV, all of Wall Templeton & Haldrup, PA, of Charleston; Duke Raleigh Highfield and Jeffrey J. Wiseman, both of Young Clement Rivers, of Charleston; and Ernest Mitchell Griffith and Kelly Dennis Dean, both of Griffith Freeman & Liipfert, LLC, of Beaufort, for Respondents.

WILLIAMS, J.: In this civil case, Benjamin C. Gecy, River City Developers, LLC, and River City Real Estate, LLC (collectively, River City) appeal the circuit court's order granting partial summary judgment to Hilton C. Smith, Jr., Coosaw Investments, LLC, and Hilton C. Smith, Jr., Inc. of South Carolina (collectively, Coosaw) on River City's malicious prosecution claim. On appeal, River City argues the circuit court erred in finding River City was unable to prove the element of favorable termination of proceedings. We affirm.

FACTS/PROCEDURAL HISTORY

River City is a residential construction company owned by Benjamin C. Gecy. Coosaw was the real estate developer of Somerset Point at Lady's Island (Somerset Point), a subdivision in Beaufort, South Carolina. River City built several homes and improvements on lots in Somerset Point. As developer, Coosaw created and controlled the Somerset Point Homeowner's Association (HOA). In 2011, River City allegedly informed the HOA it believed Coosaw, and the construction companies it controlled, deviated from and modified the design and construction standards mandated for the subdivision. River City claims Hilton C. Smith, Jr., as agent for the HOA, responded to these allegations by accusing River City of deviating from new design standards the HOA issued for the subdivision and demanding payment of fees and fines from River City.

As a result of this dispute, River City filed a lawsuit against Coosaw on September 20, 2011 (the 2011 action), which alleged causes of action for breach of fiduciary duty, breach of contract, and unfair trade practices. Coosaw counterclaimed and crossclaimed against River City for violating the HOA's design standards and sought a temporary injunction to block River City from continuing construction in Somerset Point. Coosaw also filed a notice of lis pendens that described a piece of property in Somerset Point—Lot 16—as affected by the litigation.

River City moved to strike the notice of lis pendens on the ground that Coosaw never included any information about Lot 16 in its counterclaim and crossclaim for injunctive relief. The master-in-equity agreed, and struck the notice of lis pendens finding "the [c]ounterclaim and [c]rossclaim do not seek to affect the title to the subject real property in this litigation." Coosaw filed a motion seeking reconsideration of the master's decision, which the master denied, stating, "I find that the harm to River City in granting [Coosaw]'s Motion to Reconsider outweighs the benefit to [Coosaw] if the [notice of] Lis Pendens remains in place." The master further explained, "I find that balancing the equities in this case is appropriate." Coosaw appealed the master's order to this Court, but it ultimately withdrew the appeal after River City's sale of Lot 16 rendered the issue moot.

On October 23, 2014, River City filed the lawsuit at issue in this appeal, alleging causes of action for malicious prosecution and abuse of process based on Coosaw's filing of the notice of lis pendens in the 2011 action. As to its malicious prosecution cause of action, River City asserted in its complaint, "With respect to the unlawful [notice of] Lis Pendens . . . th[ose] proceedings have been terminated in [River City]'s favor." However, all of the causes of action alleged by both parties in the 2011 action remain pending before the circuit court.

Coosaw filed a motion for summary judgment on River City's malicious prosecution claim, arguing there was never a favorable termination of proceedings for River City. At the motion hearing, River City specifically argued it received a favorable termination of proceedings: the master's removal of the notice of lis pendens. Coosaw asserted there was no favorable termination for River City because the master removed the notice of lis pendens on equitable, not substantive grounds. The circuit court granted Coosaw's summary judgment motion on River City's malicious prosecution claim finding, "[River City] is unable to prove the element of termination of [the underlying] proceeding in [River City]'s favor." The circuit court determined the master based his removal of the notice of lis pendens on equitable, not substantive grounds and found there was no favorable termination. River City filed a motion seeking reconsideration, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

I. Will the favorable termination of a notice of lis pendens support an action for malicious prosecution?

II. Must the party who obtains the favorable termination of a notice of lis pendens also obtain favorable termination of the cause of action for which the notice of lis pendens was issued before and in order to bring an action for malicious prosecution?

III. Was there a favorable termination of the notice of lis pendens in this case?

IV. Should novel questions of law have been decided without the opportunity to develop the facts fully?[1]

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the [circuit] court under Rule 56(c), SCRCP." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "[Summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). "Summary judgment is proper whe[n] plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991). "[The appellate court is] free to decide a question of law with no particular deference to the circuit court." *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

LAW/ANALYSIS

[1] Because River City's first three issues all focus on interpreting the same element of a malicious prosecution action, we address these issues together.

I. Malicious Prosecution - Favorable Termination

River City argues the circuit court erred in finding River City failed to establish the third element—favorable termination of proceedings—required to bring a claim for malicious prosecution.[2] We disagree.

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Law,* 368 S.C. at 435, 629 S.E.2d at 648 (quoting *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965)). "An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including malice and lack of probable cause." *Law*, 368 S.C. at 435, 629 S.E.2d at 648.

A. Ancillary Proceedings

First, River City asserts the master's removal of the notice of lis pendens constituted a favorable termination because (1) the filing of a notice of lis pendens is an ancillary proceeding and (2) a favorable termination of ancillary proceedings will support a malicious prosecution claim. River City quotes Professor Prosser and the Restatement (Second) of Torts as authority to support its argument that a favorable termination of ancillary proceedings can support a malicious prosecution claim.[3]

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[2] Coosaw concedes the filing of a notice of lis pendens can support a malicious prosecution action once the underlying action is terminated provided that the party filing the malicious prosecution action meets all of the elements of the claim.

[3] Restatement (Second) of Torts § 674 (Am. Law Inst. 1977) ("Even though the principal proceedings are properly brought, the ancillary proceedings may be wrongfully initiated. In this case the wrongful procurement and execution of the ancillary process subjects the person procuring it to liability."); *Robert E. Keeton et al.*, *Prosser and Keeton on The Law of Torts* 892 (W. Page Keeton ed., 5th ed. 1984) (discussing the ancillary proceedings exception to the rule requiring proof of favorable termination).

In South Carolina, lis pendens is a statutory doctrine designed to inform prospective purchasers or encumbrancers that a particular piece of property is subject to litigation. *See* S.C. Code Ann. § 15-11-10 (2005); *Shelley Constr. Co., v. Sea Garden Homes, Inc.*, 287 S.C. 24, 30, 336 S.E.2d 488, 491 (Ct. App. 1985). "A properly filed [notice of] lis pendens binds subsequent purchasers or encumbrancers to all proceedings evolving from the litigation." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 16, 567 S.E.2d 881, 889 (Ct. App. 2002) (quoting *S.C. Nat'l Bank v. Cook*, 291 S.C. 530, 532, 354 S.E.2d 562, 562 (1987)). "Generally, the filing of a [notice of] lis pendens places a cloud on title which prevents the owner from freely disposing of the property before the litigation is resolved." *Id.* at 17, 567 S.E.2d at 889.

> The lis pendens mechanism is not designed to aid either side in a dispute between private parties. Rather, [the notice of] lis pendens is designed primarily to protect unidentified third parties by alerting prospective purchasers of property as to what is already on public record, that is, the fact of a suit involving property. Thus, it notifies potential purchasers that there is pending litigation that may affect their title to real property and that the purchaser will take subject to the judgment, without any substantive rights.

Id. (quoting 51 Am. Jur. 2d *Lis Pendens* § 2 (2000)). "Whe[n] no real property is implicated . . . a notice of [lis pendens] need not be filed." *Id.* at 18, 567 S.E.2d at 890. "The jurisdictions are in agreement that the proper action against a maliciously filed [notice of] lis pendens is under abuse of process or malicious prosecution." *Id.* at 31, 567 S.E.2d at 897.

River City contends the filing of a notice of lis pendens should be considered an ancillary proceeding because of its similarity to attachment proceedings. We do not agree with this comparison. "Attachments are statutory proceedings . . . intended to summarily dispossess a party of his property, and to hold it subject to the result of an action in progress." *Wando Phosphate Co. v. Rosenberg*, 31 S.C. 301, 301, 9 S.E. 969, 970 (1889). The notice of lis pendens does not dispossess anyone of property; it is merely another form of pleading that does not provide any substantive right. *See Pond Place*, 351 S.C. at 30, 567 S.E.2d at 896 ("We find a lis pendens filed in conjunction with an action involving the same real estate is

merely another form of pleading."); *see also Adhin v. First Horizon Home Loans*, 44 So.3d 1245, 1251–52 (Fla. Dist. Ct. App. 5th Dist. 2010) ("The filing of a notice of lis pendens does not create an interest in property, nor does it create any superior substantive property rights."). In fact, a notice of lis pendens does not initiate any proceedings, it is simply a notice, typically filed with a complaint, containing the names of the parties, the object of the action, and a description of the property affected by the lawsuit. *See* § 15-11-10.

River City cites an opinion from the Intermediate Court of Appeals of Hawaii on whether the filing of a notice of lis pendens is an ancillary proceeding. *See Isobe v. Sakatani*, 279 P.3d 33 (Haw. Ct. App. 2012). The court in *Isobe* found a notice of lis pendens was an ancillary proceeding due to a concern that a notice of lis pendens could operate as a burden on property separate and apart from the underlying claim. *Id.* at 52. We find a notice of lis pendens differs from ancillary proceedings based on our precedent that a notice of lis pendens "has no existence separate and apart from the litigation of which it gives notice." *Pond Place*, 351 S.C. at 32, 567 S.E.2d at 897. The notice of lis pendens is "designed primarily to *protect* unidentified third parties by alerting prospective purchasers of property as to what is already on public record, that is, the fact of a suit involving property." *Id.* at 17, 567 S.E.2d at 889 (quoting 51 Am.Jur.2d *Lis Pendens* § 2 (2000) (emphasis added)). Although a notice of lis pendens could burden a third party attempting to purchase the affected property, that burden is directly related to the underlying litigation associated with the notice of lis pendens. As this Court has recognized, a notice of lis pendens is merely another form of pleading in the litigation of which it gives notice. *See id.* at 30, 567 S.E.2d at 896. Ancillary proceedings are defined as "[o]ne growing out of or auxiliary to another action or suit, or which is subordinate to or in aid of a primary action, either at law or in equity." *Ancillary Proceeding*, *Black's Law Dictionary* (5th ed. 1979). Because the listing of a notice of lis pendens only acts as a "republication of the proceedings" initiated in the underlying action, we find the filing of a notice of lis pendens is not an ancillary proceeding. *Pond Place*, 351 S.C. at 25, 567 S.E.2d at 894.

B. Removal of the Notice of Lis Pendens

Second, River City argues it proved the favorable termination element because the master's decision to remove the notice of lis pendens was "final, substantive, and

on the merits." River City claims the master made a clear decision to remove the notice of lis pendens based on the applicable law.

South Carolina courts have not specifically addressed the favorable termination element of a malicious prosecution claim arising out of a civil proceeding. In *Cisson v. Pickens Savings & Loan Association*, our supreme court recognized a cause of action for malicious prosecution "founded upon any ordinary civil proceeding." 258 S.C. 37, 43, 186 S.E.2d 822, 825 (1972). Although the *Cisson* court did not specifically address the favorable termination element, the court did state "the action for malicious prosecution of an ordinary civil proceeding is governed by the same general rules and limitations as the action based upon criminal proceedings." *Id*. In criminal proceedings, our supreme court has found a favorable termination of proceedings was established to support a malicious prosecution claim when (1) criminal charges were dismissed;[4] (2) a defendant was charged with commission of a crime and exonerated;[5] and (3) criminal charges were *nolle prossed* for reasons which imply or are consistent with innocence.[6] Conversely, our supreme court found a favorable termination *did not* occur when a defendant voluntarily entered into and successfully completed a pretrial intervention program,[7] or when a defendant entered into a voluntary settlement of criminal charges.[8] In the criminal cases involving a favorable termination, the favorable termination was on the merits of the dispute underlying the malicious prosecution claim.

The *Cisson* court noted "[s]ome of the differences in the application of these principles to [malicious prosecution] actions based upon civil proceedings and those based upon criminal prosecutions are pointed out in *Prosser on Torts*, (3d) Ed., Section 114 . . . and in the comments to Section 674 of the Restatement of the Law of Torts." 258 S.C. at 43, 186 S.E.2d at 825. In their discussion of the favorable termination element, Professors Prosser and Keeton explain some jurisdictions have found, "[T]he termination must not only be favorable to the accused, but must also reflect the merits and not merely a procedural victory." *Prosser and Keeton on The Law of Torts* at 874; *see also* 3 *Dan B. Dobbs et al.,*

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[4] *Jennings v. Clearwater Mfg. Co.*, 171 S.C. 498, 172 S.E. 870 (1934).
[5] *Elletson v. Dixie Home Stores*, 231 S.C. 565, 99 S.E.2d 384 (1957).
[6] *McKenney v. Jack Eckerd Co.*, 304 S.C. 21, 402 S.E.2d 887 (1991).
[7] *Jordan v. Deese*, 317 S.C. 260, 262, 452 S.E.2d 838, 839 (1995).
[8] *Jennings*, 171 S.C. at 498, 172 S.E. at 870.

The Law of Torts 414 (2nd ed. 2011) ("Favorable termination is not necessarily a termination on the merits, but it is usually a termination that tends to reflect on the probable merits."). The requirement that a favorable termination reflect the merits of the underlying action is also found in other secondary sources. *See* 54 C.J.S. *Malicious Prosecution* § 60 (2018) ("For the termination of the underlying action to be deemed favorable to the defendant in the underlying action, as an element of malicious prosecution, the termination must reflect on the merits of the underlying action."); 52 Am. Jur. 2d *Malicious Prosecution* § 29 (2018) ("[A]ll that is required is that the termination reflect on the merits of the [underlying] action."). South Carolina courts have repeatedly cited to these sources when examining malicious prosecution claims. *See Cisson*, 258 S.C. at 42, 186 S.E.2d at 825; *McKenney*, 304 S.C. at 22, 402 S.E.2d at 888; *Elletson*, 231 S.C. at 575, 99 S.E.2d at 389.

From a policy perspective, the requirement that a favorable termination reflect the merits of an action fosters the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (quoting 8 S. Speiser, C. Krause, & A. Gans, *American Law of Torts* § 28:5, p. 24 (1991)). Without the requirement that a termination reflect the merits, a party could obtain a favorable result in a malicious prosecution action while the claim underlying the malicious prosecution action was still pending. This could theoretically result in a party receiving two conflicting decisions arising from the same case: a favorable decision on the malicious prosecution action and an unfavorable decision on the underlying claim.

Based on our review of the sources addressing this element, we interpret the element of favorable termination of proceedings to mean a termination reflective of the merits. *See Prosser and Keeton on The Law of Torts* at 874; 54 C.J.S. *Malicious Prosecution* § 60 (2018); 52 Am. Jur. 2d *Malicious Prosecution* § 29 (2018). This interpretation means a termination consistent with a finding for the defendant on substantive grounds and not based solely on technical or procedural considerations. *See* 52 Am. Jur. 2d *Malicious Prosecution* § 42 (2018); Vitauts M. Gulbis, Annotation, *Nature of termination of civil action required to satisfy element of favorable termination to support action for malicious prosecution*, 30 A.L.R.4th Art. 3 (1984). For example, a case's dismissal based on the statute of limitations would not be a favorable termination because a decision on the statute of limitations does not reflect the merits of the action. *Palmer Dev. Corp. v. Gordon*, 723 A.2d 881, 885 (Me. 1999). We believe this holding is in accordance with the aforementioned criminal cases because the terminations in these criminal

cases reflected on the innocence of the accused. *See Jennings*, 171 S.C. at 498, 172 S.E. at 873 (finding a favorable termination when criminal charges against a defendant were dismissed); *Elletson*, 231 S.C. at 570, 99 S.E.2d at 386 (finding a favorable termination when a defendant was charged with commission of a crime and exonerated); *McKenney*, 304 S.C. at 21, 402 S.E.2d at 888 (finding a favorable termination when criminal charges were *nolle prossed* for reasons which imply or are consistent with innocence). Finally, we caution that our interpretation of this element only applies to a malicious prosecution claim founded upon a civil proceeding.

Turning to the present case, we find River City failed to establish the favorable termination element of its malicious prosecution claim because we find a party's successful removal of a notice of lis pendens alone does not constitute a favorable termination to support a malicious prosecution claim. The underlying action on the merits remains pending; thus, this action is premature. River City's success in striking the notice of lis pendens alone does not equate to a finding in its favor on any substantive ground. *See* 52 Am. Jur. 2d *Malicious Prosecution* § 42 (2018). A notice of lis pendens is fundamentally procedural because it merely serves as another form of pleading and does not confer any substantive right. *See Pond Place*, 351 S.C. at 30, 567 S.E.2d at 896 ("We find a lis pendens filed in conjunction with an action involving the same real estate is merely another form of pleading."); *see also Adhin*, 44 So. 3d at 1251–52 ("The filing of a notice of lis pendens does not create . . . any superior substantive property rights."). A notice of lis pendens is typically filed with a complaint, and only contains the names of the parties, the object of the action, and a description of the property affected by the lawsuit. *See* § 15-11-10 (2005). The notice "has no existence separate and apart from the litigation of which it gives notice." *Pond Place*, 351 S.C. at 32, 567 S.E.2d at 897. Therefore, we find River City needs to obtain a favorable termination reflecting the merits of the action associated with the notice of lis pendens before it can assert a malicious prosecution claim founded upon the filing of the notice of lis pendens.

We caution that we do not find a maliciously filed notice of lis pendens can never operate as the primary basis for a malicious prosecution claim. We still agree, as this Court found in *Pond Place*, that "the proper action against a maliciously filed [notice of] lis pendens is under abuse of process or malicious prosecution." *Id.* at 31, 567 S.E.2d at 897. Our finding is that a maliciously filed notice of lis pendens can act as the primary basis for a malicious prosecution claim, provided the party

bringing the claim can establish *a favorable termination reflective of the merits of the underlying action associated with the filing of the notice of lis pendens.*

Other jurisdictions have also required favorable termination of the action underlying the filing of a notice of lis pendens before a defendant can file a malicious prosecution claim founded on the filing of the notice of lis pendens. *See Whyburn v. Norwood*, 267 S.E.2d 374, 377 (N.C. Ct. App. 1980) (finding defendant's cause of action for malicious prosecution based on filing of a notice of lis pendens was premature because there was no termination of the former claim favorable to the defendant); *N. Triphammer Dev. Corp. v. Itacha Assocs.*, 704 F.Supp. 422, 428 (S.D.N.Y. 1989) (finding a cause of action for the malicious filing of a notice of lis pendens first requires a favorable termination of the claim underlying the filing of the notice of lis pendens); *Hewitt v. Rice*, 154 P.3d 408, 412 (Colo. 2007) (en banc) ("We have consistently held that whe[n] a lis pendens forms the basis of a malicious prosecution claim, the lis pendens action must be terminated in favor of the plaintiff."); *Palmer Dev. Corp.*, 723 A.2d at 884 ("[T]here is a requirement in the malicious prosecution action that the proceeding has terminated favorably to the plaintiff, and that the favorable termination be on the merits, or at least reflect the merits, of the action.").

Here, the circuit court's order granting summary judgment to Coosaw explained the master based his removal of the notice of lis pendens on equitable, not substantive grounds. Specifically, the master weighed the benefits and burdens on the parties of keeping the notice of lis pendens in place. Neither the master's order striking the notice of lis pendens nor the master's order denying Coosaw's motion for reconsideration address the merits of the claims in the underlying action. Without a favorable termination reflecting the merits of the underlying action, we find River City's malicious prosecution claim premature. *See Law*, 368 S.C. at 435, 629 S.E.2d at 648 ("An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence."). Therefore, we affirm the circuit court's order granting summary judgment to Coosaw because the removal of a notice of lis pendens does not reflect the merits of the underlying action and thus cannot serve as a favorable termination for the purposes of a malicious prosecution claim.[9]

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[9] Lastly, we note our finding here does not impact River City's cause of action for abuse of process still pending before the circuit court. *See Pond Place*, 351 S.C. at 31, 567 S.E.2d at 897 ("The jurisdictions are in agreement that the proper action

II. Novel Questions of Law

River City contends summary judgment was inappropriate because this case presents novel questions of law and the circuit court should have afforded the parties the opportunity to fully develop the facts. We disagree.

In granting summary judgment, the circuit court considered each party's arguments, memoranda, and exhibits on all of the elements of River City's cause of action for malicious prosecution. The circuit court also reviewed the master's order removing the notice of lis pendens to determine the exact reasons for the master's decision. We find the parties could not have developed any additional facts on the issue of favorable termination of proceedings. *Law*, 368 S.C. at 435, 629 S.E.2d at 648 ("An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence."). Moreover, "[t]he mere fact that a case involves a novel issue does not render summary judgment inappropriate." *Houck v. State Farm Fire & Cas. Ins.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005). We affirm.

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.

HUFF and SHORT, JJ., concur.

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against a maliciously filed lis pendens is under abuse of process or malicious prosecution."). Moreover, "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Food Lion, Inc. v. United Food & Commercial Workers Intern. Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). We find this tort to be the more appropriate action to take against an alleged maliciously filed notice of lis pendens when there has not yet been a favorable termination that reflects the merits of the underlying claim.