

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2014CP4602349

Neal A Nessmiller	Rock Hill City of
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: **ORDER**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

s/ Lee S. Alford

Circuit Court Judge

2113

Judge Code

12/10/2014

Date

Handwritten notes:
 12/10/14
 2113

For Clerk of Court Office Use Only

This judgment was entered on **December 11, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **December 11, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Michael Langford Brown Jr. PO Box 1025 Rock Hill, SC
29731

Paula Knox Brown 201 E. Main Street Third Floor Rock
Hill, SC 29730

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
)
 NEAL A. NESSMILLER,)
)
) Appellant,)
)
 vs.)
)
 CITY OF ROCK HILL ,)
)
) Respondent.)

IN THE COURT OF COMMON PLEAS
 THE SIXTEENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-46-2349

ORDER

FILED-RECEIVED
 2014 DEC 11 PM 4:44
 DAVID HAMILTON
 C.C.C.P. & GS
 YORK COUNTY, SC

This matter comes before the Court on appeal from the Rock Hill Municipal Court of the conviction and sentence imposed by the Honorable Peter Lenzi on June 24, 2014.

The grounds set forth in the appeal are as follows:

- I. "The lower Court erred in failing to dismiss the charge against the defendant; the error being that the incident site video tape does not record all of the field sobriety test administered as required by Section 56-5-2953 of the South Carolina Code of Laws."
- II. "The lower Court erred in failing to dismiss the charge against the defendant; the error being that the video tape did not show the Defendant being advised of all his Miranda rights as required by Section 56-5-2953 of the South Carolina Code of Laws."
- III. "The lower Court erred in failing to dismiss the charge against the defendant; the error being that the actions of the test operator in the breath test site recording cannot be seen as required by Section 56-5-2953 of the South Carolina Code of Laws. "

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 [Handwritten signature]

- I. *The Lower Court erred in failing to dismiss the charge against the Defendant; the error being that the incident site video tape does not record all of the field sobriety test administered as required by Section 56-5-2953 of the South Carolina Code of Laws.*

The defense asserts that you could not see the entire face, including the eyes of the Appellant, during the Horizontal-Gaze Nystagmus (HGN) field sobriety test. The video shows the entire body of the investigating officer and the Appellant. The officer and the Appellant are facing each other in a proper position for the test. The test is given at night, but you can clearly see the test being administered by the officer, including his arm and hand moving across the front of the eyes of Appellant. This Court finds the HGN test was administered to Appellant in compliance with S.C. Code Ann. 56-5-2953.

It should be noted that only the HGN test was administered to Mr. Nessmiller because his left leg had been previously amputated at the knee and he now walks with a prosthetic.

- II. *The Lower Court erred in failing to dismiss the charge against the Defendant; the error being that the video tape did not show the Defendant being advised of all his Miranda rights as required by Section 56-5-2953 of the South Carolina Code of Laws.*

The defense next asserts that Appellant was not properly advised of his Miranda rights. S.C. Code Ann. 56-5-2953(A)(1)(iii) states:

"The video recording at the incident site must...show the person being advised of his Miranda rights."

In this case, the officer brought the Appellant from the position in the parking lot, where he performed his field sobriety test, to the front of his patrol car. Upon arriving at the front of his patrol car, the Appellant stood with his back to the camera while the officer,

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who was in complete view of the camera, clearly read him his Miranda rights. A couple of times, the Appellant's left shoulder and part of his head swayed out of the filmed scene due to Appellant's voluntary movement while the officer was reading. This Court finds that the Appellant was both audibly and clearly advised of his Miranda rights in compliance with the Statute.

III. *The Lower Court erred in failing to dismiss the charge against the Defendant; the error being that the actions of the test operator in the breath test site recording cannot be seen as required by Section 56-5-2953 of the South Carolina Code of Laws.*

The defense finally asserts that breath test operator's actions in the breath test room cannot be seen as required by Statute. S.C. Code Ann. 56-5-2953(A)(2) states,

*"That the video recording at the breath test site must include: (a) the entire breath test procedure, the person being informed that he is being video recorded, and that he has the right to refuse the test; (b) include the person taking or refusing the breath test **and the actions of the breath test operator while conducting the test**; and (c) also include the person's conduct during the required twenty-minute pre-test waiting period, unless the officer submits a sworn affidavit certifying that it was physically impossible to video record this waiting period."*

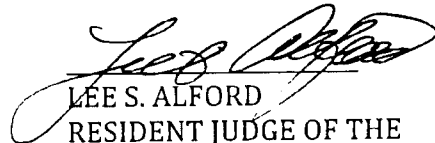
In this case, the camera is positioned on the ceiling pointing at the officer and Appellant, who are sitting on the opposite wall. The camera is approximately ten feet in the air pointing downward at every action the officer and appellant make. The video clearly shows the Appellant's conduct and face during the twenty minute waiting period. Also, the Appellant is clearly advised of his right to refuse the test and read his informed consent. While the officer does have his back to the camera during half of the recording, due to the height and angle of the camera, you can clearly see over his shoulder as he fills out his paper work and readies the breath test machine. Throughout the entire process, this Court

finds that the video recording was in compliance with Section 586-5-2953(A)(2) of the S.C. Code, as Amended.

The within Appeal and many more are being filed from lower courts based on the opinions in State v. Sawyer, 409 S.C. 475, 763 S.E.2d 183 (2014), and Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007). Some clarification by the Appellate Courts might be helpful in establishing something close to a bright line of guidance for the lower courts. If some guidance is not given, it should be expected that the barrage of appeals will continue on the issue of what must be shown in a videotape recording.

The grounds on Appeal in this case are without merit. The decision by the Lower Court is affirmed. The Appeal is dismissed.

IT IS SO ORDERED.


LEE S. ALFORD
RESIDENT JUDGE OF THE
SIXTEENTH JUDICIAL CIRCUIT

December 10, 2014
York, South Carolina

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PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Lee S. Alford, Circuit Court Judge

Case No. 2014-CP-46-2349

RECEIVED
JAN 15 2015
SC Court of Appeals

The State,

Respondent,

v.

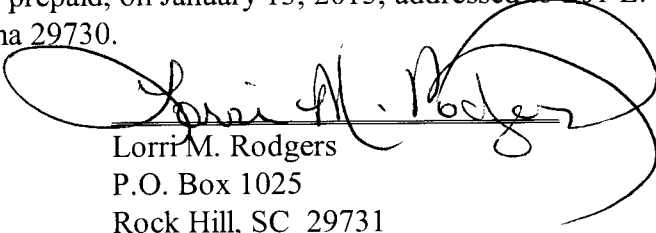
Neal A. Nessmiller,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Paula Knox Brown by depositing a copy of it in the United States Mail, postage prepaid, on January 13, 2015, addressed to 201 E. Main St., 3rd Floor, Rock Hill, South Carolina 29730.

January 13, 2015


Lorri M. Rodgers

P.O. Box 1025

Rock Hill, SC 29731

(803) 328-8822

Paralegal to Michael L. Brown, Jr.