

**FORM 4**

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

**JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2013CP4603828**

Cynthia Elizabeth Cobb	Rock Hill City Of
<b>PLAINTIFF(S)</b>	<b>DEFENDANT(S)</b>

<b>Submitted by:</b>	<b>Attorney for:</b> <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 the appeal in Circuit Court  
 does not end the case.

Additional Information for the Clerk: **ORDER OF REMAND**

**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/ John C. Hayes, III.*

**Circuit Court Judge**

**2049**

**Judge Code**

**9/11/2014**

**Date**

**For Clerk of Court Office Use Only**

This judgment was entered on **September 12, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **September 12, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

**James W. Boyd** 1544 Ebenezer Rd. PO Box 36425 Rock Hill,  
SC 29732

**Christopher Edward Barton** 201 East Main Street 3Rd 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.

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STATE OF SOUTH CAROLINA )  
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COUNTY OF YORK )  
 )  
City of Rock Hill, )  
 )  
Respondent, )  
 )  
v. )  
 )  
Cynthia E. Cobb, )  
 )  
Appellant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT  
CASE NO: 2013-CP-46-03828

ORDER OF REMAND

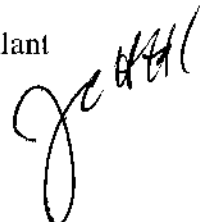
2014 SEP 12 AM 8:58  
CLERK OF COURT  
YORK COUNTY, SC

Appearance for Respondent: James W. Boyd  
Appearance for Appellant: Christopher E. Barton  
Trial Judge: Honorable Ray Long, Magistrate

This matter came before this Court pursuant to an appeal by Cynthia E. Cobb ("Appellant") from her conviction of Driving Under the Influence First Offense ("DUI 1<sup>st</sup> "). The trial judge, the Honorable Ray Long, convicted the Appellant on December 16, 2013. This Court heard this appeal on September 3, 2014. After review of the Appellant's appeal, the Respondent's brief, and the argument of counsel I find the following:

FACTS

On July 25, 2013, the Appellant was arrested for a DUI 1<sup>st</sup>. The Appellant filed a Motion to Dismiss on grounds that the video of the incident site did not comply with Section 56-5-2953(A)(1)(a)(ii) of the South Carolina Code of Laws, as amended in 2009, in that the video did not record all field sobriety test administered. Particularly, the Appellant alleged that the video camera was positioned in such a manner that the Appellant's heels were not visible as they touched or did not touch her toes. The Motion was heard pre-trial and on November 12, 2013, the Honorable Peter J. Lenzi, issued a written Order denying the Appellant's Motion to Dismiss. The case was called for a bench trial on December 16, 2013. At that time, the Appellant



renewed her Motion to Dismiss which motion was denied. The Appellant alleges that the Court erred in denying the Motion to Dismiss.

### LEGAL ANALYSIS

1. The provisions of South Carolina Code Ann. § 56-5-2953(A), as amended in 2009, states in pertinent part that a person charged with driving under the influence must have their conduct recorded at the incident site as follows:

(A) A person who violated Section 56-5-930, 56-5-2933, or 56-5-2945 must have his conduct at the incident site and breath test site recorded.

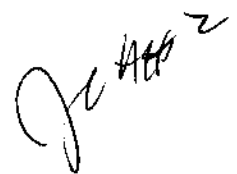
(1)(a) The video recording at the incident site must:

- (i) not begin later than the activation of the officer's blue lights;
- (ii) include any field sobriety test administered; and
- (iii) include the arrest of a person for a violation Section 56-5-2930 or 56-5-2933, or a probable cause determination in that the person violated Section 56-5-2945, and to show the person being advised of his *Miranda*<sup>1</sup> rights.

In construing the terms of a statute, the primary rule of statutory construction is that a statute should be construed to give effect to the intent of the Legislature. *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013); *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Cl. App 2001). A Court should not attempt to derive the intent of the Legislature when the statutory language is clear and unambiguous. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011). Thus, in interpreting a statute, a Court should give words their plain and ordinary meaning, and

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).



not resort to forced construction that would limit or expand the statute in question. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001).

It is arguable that the statutory language is ambiguous because the statute does not specifically state or define what is required in the recording of the field sobriety test. To the extent there is any ambiguity in the statute, the Court looks to any evidence of the Legislature's intent in enacting the statute. Prior to the 2009 amendments, Section 56-5-2953(A)(1), with respect to the recording of any field sobriety testing, only required that the "conduct" of the suspect-driver be recorded at the incident site. Under the former provisions of Section 56-5-2953(A)(1), the Court of Appeals held, in *Murphy v. State*, 392 S.C.628, 709 S.E. 2d 685 (Ct. App. 2011), that although a suspect-driver's feet could not be seen during the "walk and turn" test, the video recording requirements complied with 56-5-2953. In *Murphy*, the video recording at the incident site only showed the suspect-driver doing the "walk and turn" test from the knees or waistline upwards. *Id.* The Court explained:

While certainly an individual's performance on such tests would be part and parcel of his or her "conduct" at the incident site, as mentioned, an unbroken recording of the tests is not necessary to capture conduct. Therefore, the recording need not display all field sobriety tests provided it captures the accused conduct.<sup>4</sup>

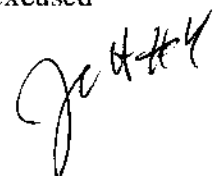
However, footnote 4 provides as follows:

As amended in 2009, the current version of Section 56-5-2953 expressly requires the recording of field sobriety tests. See S.C. Code Ann. §56-5-2953(A)(1)(a)(ii) (sup. 2010). (The video recording at the incident site must...include any field sobriety test administered."). We note that the Legislature's amendment of the plain language of the statute to require the recording of field sobriety tests further bolsters our position that the plain language of the prior versions, in effect at the time of this action, did not require recording of all tests.

*DeH#7*

The obvious importance of the above quote from *Murphy* is that if the complete recording of a person's *performance* of any field sobriety test was not required under the former statute, it is now required under the amended statute. The Respondent argued that, pursuant to *Murphy*, entire roadside encounter did not have to be recorded to comply with Section 56-5-2953(A). However, the 2009 amendment specifically provides for the recording of any field sobriety test, which goes beyond the former requirement of merely recording a person's conduct. Had the Legislature only intended that there be a recording of a person doing a field sobriety test, without there being any way to determine the person's performance on the test, as in *Murphy*, there would have been no need to amend the statute. The Legislature enacted the 2009 amendments, and it must be presumed that the Legislature did not intend for the amendments to be futile or meaningless. *State v. Long*, 363 S.C. 360, 610 S.E. 2d 809 (2005); *State v. Sweat*, 379 S.C. 367, 665 S.E. 2d 645 (Ct. App 2008). The South Carolina Court of Appeals explains that "because of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless." *State v. Gordon*, 408 S.C. 536, 543, 759 S.E.2d 755, 758 (Ct. App. 2014).

2. The video recording of South Carolina Code Ann. § 56-5-2953(a) are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). When a prosecuting agency fails to comply with video recording provisions of S.C. Code Ann. § 56-5-2953(A), the appropriate remedy is the dismissal of the case against the Defendant. *City of Rock Hill v. Suchenski* 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson* 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). In *Town of Mt. Pleasant*, the South Carolina Supreme Court returned to the *Suchenski* decision and reiterated that the un-excused

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noncompliance with the South Carolina Code Ann. § 56-5-2953 mandates the dismissal of DUI charge. In *Town of Mt. Pleasant* the Court states:

As evidenced by this Court's decision in *Suchenski*, the Legislature clearly intended for a *per se* dismissal in the event a law enforcement agency violates the mandatory provision of Section 56-5-2953. Notably, the Legislature specifically provided for dismissal of a DUI charge unless the law enforcement agency can justify its failure to produce a videotape of a DUI arrest. *Id.* Section 56-5-2953(B) ("Failure by the arresting officer to produce the videotapes required by this section is not alone grounds for dismissal of any charge made pursuant to Section 56-5-2953...if (certain exceptions are met). The term "dismissal" is significant as it explicitly designated a sanction for an agency's failure to adhere to the requirements of Section 56-5-2953.

Furthermore, it is instructive that the Legislature has not mandated videotaping in any other criminal contest. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provision of Section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.

Thus, we hold that dismissal is the appropriate sanction in the instant case as this was clearly intended by the Legislature and previously decided by this Court in *Suchenski*.

Likewise, the decisions of the South Carolina Court of Appeals have been consistent with *Suchenski*.<sup>2</sup>

3. In the present case, the State failed to comply with the videotaping requirements in regard to the "walk and turn" test. The Respondent argues that the videotape recorded the field sobriety test given at the incident site. Although the video camera was recording during the

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<sup>2</sup> See *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Cl. App 2001) (officer violated Section 56-5-2953(A)(2), when he failed to capture the administration of the breath test to the Defendant on videotape, when the first breath test machine was not working, and the officer moved the Defendant to another machine in the same room but failed to activate the videotape for a second machine in the same room; although the officer could be seen on the video made from the first machine which was left on the entire time, and the Defendant could be heard, the Defendant himself could not be seen; case should have been dismissed); *Murray v. State*, 392 S.C. 626, 709 S.E. 2d 685 (2011) (the remedy for noncompliance with Section 56-5-2953 is dismissal of the case, not mere suppression of evidence).

*Je H #5*

Appellant's performance of this test, it was positioned in such a manner that the Appellant's toes were not visible as they touched or did not touch her heels. Therefore, the Appellant's performance, an important part of the test, was not recorded.

The arresting officer did not properly recorded the Appellant performing the "walk and turn" test as required by Section 56-5-2953(A)(1)(a)(ii). The recording requirements of Section 56-5-2953 are mandatory. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *City of Rock Hill v. Suchenski*, 374 S.C. 12, 646 S.E. 2d 879 (2007); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001). Absent some other avenue of disposition of an appeal such as remand, the only remedy for noncompliance with the video recording requirements of Section 56-5-2953 is dismissal of the case. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 713 S.E. 2d 278 (2011); *State v. Johnson*, 393 S.C. 182, 720 S.E. 2d 516, 519 (Ct. App 2001).<sup>3</sup> Admittedly, the sanction of dismissal is severe, but as the South Carolina Supreme Court observed in *Town of Mt. Pleasant v. Roberts*, the Legislature has clearly intended strict compliance with the provisions of Section 56-5-2953 and, in turn, promulgated a severe sanction for dismissal for noncompliance.

4. In this case, the video recording was produced and therefore Section 56-5-2953(B) it is not implicated.

5. While *Murphy* holds that a suspect-driver need not remain in full view of the camera at all times, Section 56-5-2953(A)(1)(a)(ii), (as amended after the 2009 revisions) does specifically require that at the time of the administration of the field sobriety test that the suspect-driver be in full view of the camera.

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<sup>3</sup> Procedurally as set forth hereafter, while not a remedy, there is another avenue the Court must follow in this case.

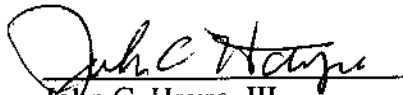
*John H. H.*

In spite of the above, hopefully, thorough analyze of the law applicable to this case, the Court cannot dismiss the charge against the Appellant but rather must remand the case to the Court to make findings of fact. The Municipal Court made no factual finding regarding whether the video recording did or did not show the Appellant's performance during the heel to toe test. The Court below noted Appellant's contention regarding the visibility of the test<sup>4</sup>, but made no factual finding specific to that test, simply finding that Appellant's "conduct has been captured." As observed in *Gordon*, supra, this Court cannot make factual findings on appeal. See *Gordon*, supra.

In this case, the written pre-trial Order of Judge Lenzi only noted Appellant's contention regarding the heel to toe test. As to the heel to toe test, Judge Lenzi made a factual finding that the video showed Appellant's "conduct." Appellant renewed her motion at trial and the trial judge made no factual finding regarding the video as reflected by her "Return to Appeal." The trial judge states she simply "noted and denied" Appellant's pre-trial motion.

IT IS THEREFORE ORDERED, that based upon the above the Court remands this case for further proceedings in the Rock Hill Municipal Court consistent with the findings herein above.

AND IT IS SO ORDERED.

  
John C. Hayes, III  
Presiding Judge #7

September 11<sup>th</sup>, 2014  
York, South Carolina

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<sup>4</sup> The Court has reviewed the incident site video and the view confirms Appellant's contention. But for the *Gordon*, supra, fact finding requirement the Court would grant Appellant's appeal and reverse her conviction based on the analysis set forth in this Order.