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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Common Pleas Case No. 2018-CP-40-04429

**RECEIVED**  
JUN 08 2019  
SC Court of Appeals

U.S. Bank National Association as Indenture Trustee for CIM  
Trust 2015-4AG Mortgage-Backed Notes,  
Series 2015-4-AG,.....Respondent,

v.

Bobbie J. Fraser aka Bobbie Jean Fraser, OneMain Financial, Inc.,  
The South Carolina Department of Revenue,.....Defendants,

Of whom Bobbie J. Fraser is the..... Appellant.

AND

Shahzad Muhammad,.....Respondent.

MOTION TO ALLOW LOWER COURT  
TO HEAR AND RULE UPON MOTION TO RECONSIDER

Appellant hereby moves pursuant to Rule 205, SCACR, and McDonald v. Palmetto Theaters, 196 S.C. 38, 11 S.E.2d 444, 449 (1941), for an order modifying the jurisdictional shift between the lower court and this court occasioned by the service of the notice of appeal in this case, in order for the lower court to hear and rule upon Appellant's timely and pending motion below pursuant to Rule 59, SCRCF. This appeal was brought before that motion was decided because the lower court had issued a writ of assistance directing the removal of Appellant from her home but had not

addressed Appellant's motion to reconsider, Appellant's motion to stay, or Appellant's inquiries about those matters. With June 3, 2019, at 10:00 a.m. being the time given in the writ of assistance for the sheriff to put Appellant and her personalty out of the subject property, Appellant, with her back against the wall, served a notice of appeal with only 15 minutes to spare. As a result, the lower court's writ of assistance is automatically stayed. (It is the undersigned's understanding that it is possible that the lower court may have taken some action on its own to direct the sheriff not to enforce the writ of assistance at least temporarily, but imprecise secondhand information is that is all the undersigned knows about that.)

Appellant's motion to reconsider, however, needs to get heard. As the lower court based its orders subject of this appeal on the erroneous belief that an overnight houseguest is a co-resident of a dwelling for service of process purposes, Appellant believes there is a strong possibility that her motion to reconsider will be granted, which would obviate the need for this appeal. As the Supreme Court discussed in McDonald v. Palmetto Theaters, 196 S.C. 38, 11 S.E.2d 444, 449 (1941), the appellate court may grant the lower court leave to rule on a matter, modifying the exclusive jurisdiction of the appellate court. See Rule 205, SCACR.

The court here should issue an order vesting the lower court with jurisdiction to hear and rule upon the motion to reconsider. For purposes of judicial economy, this court's order should permit Appellant to file a supplemental notice of appeal in this same appeal in the event that she is aggrieved by the lower court's ruling on her motion to reconsider. If the lower court rules in Appellant's favor on her motion to reconsider, Appellant will seek the dismissal of this appeal.

WHEREFORE Appellant prays for an order vesting the lower court with jurisdiction to hear and rule upon Appellant's motion to reconsider and that permits Appellant to file a supplemental notice of appeal in this same appeal in the event that she is aggrieved by the lower court's ruling on her motion to reconsider, so that an order denying her motion to reconsider, if one issues, may be appealed in this same appeal.

Respectfully submitted,



Andrew S. Radeker  
S.C. Bar No. 73743  
Harrison, Radeker & Smith, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250  
(803) 779-2211  
Attorney for Appellant

June 3, 2019

Exhibit A

Writ of Assistance

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

U.S. Bank National Association as Indenture  
Trustee for CIM Trust 2015-4AG Mortgage-  
Backed Notes, Series 2015-4-AG

Plaintiff,

v.

Bobbie J. Fraser aka Bobbie Jean Fraser, OneMain  
Financial, Inc., The South Carolina Department of  
Revenue

Defendant(s).

IN THE COURT OF COMMON PLEAS

DOCKET NO. 2018-CP-40-04429

**WRIT OF ASSISTANCE**

3138.0001

**THIS WRIT OF ASSISTANCE APPLIES TO ALL OCCUPANTS AND OTHERS (Including their possessions) WITH RESPECT TO THE PROPERTY DESCRIBED BELOW.**

This matter came before me upon a Motion for Writ of Assistance requiring the above-named occupants to show cause why the Writ of Assistance should not be issued by this Court to the Sheriff of Richland County, South Carolina, to remove, peaceably or forcibly, the said Defendant(s) and all personal property located within or on the subject property described in the Motion of the above 3<sup>rd</sup> party bidder.

The undersigned has jurisdiction over this matter pursuant to that certain Judgment more fully described in the Motion.

Upon examining the Motion, it appears that the 3<sup>rd</sup> party bidder, Shahzad Muhammad, was the successful bidder at the public sale of the subject property on February 4, 2019, is entitled to possession of the subject property,

NOW, THEREFORE, upon Motion of Attorney for 3<sup>rd</sup> party bidder.

IT IS ORDERED that the 3<sup>rd</sup> party bidder is entitled to possession of the property described as follows:

All that certain piece, parcel or tract of land, with any improvements thereon, in the City of Columbia, County of Richland, State of South Carolina, which is shown on a Plat prepared for George Wiggins and Louise Wiggins on July 24, 1980, by Civil Engineering of Columbia which plat is recorded in the Office of the Register of Mesne Conveyances for Richland County, said Lot is bounded on the Northeast by the right-of-way of Colonial Drive, on the Southeast by land now or formerly of Loretta Jones, on the Southwest by lands now or formerly of Mary P. Freeman on the Northwest by lands now or formerly of John E. Spigner, said Lot has courses, distances as are shown on said plat. Said Lot is also designated as Lot 6, Block 10, on a Plat of property of F.H. Hyatt prepared by J.C. Covington, surveyor, March 1913, which is recorded in Plat Book C, Pages 104 and 105; and being known as 4511 Colonial Drive. Also

being more particularly shown on plat prepared for Bobbie J. Fraser by Donald G. Platt, RLS, dated April 30, 1995, recorded May 16, 1995 in Plat Book 55 at page 7571.

This being the same property conveyed to Bobbie J. Fraser by Deed of City of Columbia, dated April 26, 1995, recorded May 1, 1995 in Deed Book 1254 at page 349 in the Office of the Register of Deeds for Richland County.

TMS No. R11603-14-08

Property Address: 4511 Colonial Drive, Columbia, SC 29203

IT IS FURTHER ORDERED that the Defendants shall have until 10:00 a.m. on Monday, June 3, 2019, to vacate the subject property.

IT IS FURTHER ORDERED that after service of a copy of this Order, the Sheriff of Richland County, South Carolina or his authorized deputies, be, and they are hereby directed and authorized to enter upon the aforescribed property, by force if the same be necessary on the 3rd day of June 2019, at 10:00 o'clock a.m., or as soon thereafter as practical, and seize the said property and to remove therefrom the Defendant(s) and all persons who may be occupying the same, together with all personal property, and to put the Plaintiff in full, peaceful and quiet possession of the property without delay, and thereafter, make immediate Return to the undersigned, showing how this Order has been executed.

If personal service cannot be reasonably achieved, then service of this Writ of Assistance may be accomplished by personal service on an occupant or by posting this document upon the door of the dwelling or some other prominent place on the property by the Sheriff.

---

Joseph M. Strickland  
Master in Equity for Richland County

Columbia, South Carolina

Dated: \_\_\_\_\_



Richland Common Pleas

**Case Caption:** Us Bank National Association , plaintiff, et al vs Bobbie J Fraser ,  
defendant, et al  
**Case Number:** 2018CP4004429  
**Type:** Order/Writ Of Assistance

It is so Ordered

s/Joseph M. Strickland, 3055

## Exhibit B

Order Denying Motion to Set Aside  
Judgment, Sale, etc.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

DOCKET NO. 2018-CP-40-04429

U.S. Bank National Association as Indenture  
Trustee for CIM Trust 2015-4AG Mortgage-  
Backed Notes, Series 2015-4-AG

Plaintiff,

**ORDER**

v.

Bobbie J. Fraser aka Bobbie Jean Fraser, OneMain  
Financial, Inc., The South Carolina Department of  
Revenue

Defendant(s).

3138.0001

The above matter came before me on Friday, March 29, 2019, pursuant to the Motion to Set Aside Judgment and Sale by Defendant Bobbie J. Fraser and the Rule To Show Cause for a Writ of Assistance scheduled for March 29, 2019 and served on the Defendant on March 21, 2019. Present were Andrew S. Radeker, attorney for the Defendant Bobbie J. Fraser; Theodore von Keller, attorney for Shahzad Muhammad, the grantee of the Master's Deed and Damon C. Wlodarczyk, the attorney for U.S. Bank National Association. After consideration of the filings of the parties, the Court file and the arguments of counsel, the Court denies the Motion to Set Aside Judgment and Sale.

The Court finds that Affidavit of Service of the Summons and Complaint in the above foreclosure matter was served on Gregory Macon at 4511 Colonial Dr., Columbia, SC 29203 on August 23, 2018. The affidavit identifies Mr. Macon as a co-resident.

In the affidavit of Bobbie J. Fraser she avers that, "Gregory Macon was staying overnight in August 2018." Rule 4 (D) (1), SCRCF provides that service may be accomplished "by leaving copies thereof at his dwelling house or usual place of abode was some person of suitable age and discretion then *residing* therein (emphasis added).

The South Carolina Court of Appeals in the case of the Estate of Nicholson ex rel Nicholson v. South Carolina Department of Health and Human Services, 377 S. C. 590, 660 S. E. 2d 303 (Ct. App 2008 ), held as follows: "[h]owever, in the legal field, the term (reside) has been defined as to "live, dwell, abide, sojourn, stay, remain[or] lodge." citing Black's Law Dictionary 1176 (5<sup>th</sup> ed. 1979).

The court finds therefore based on the defendant Bobbie J. Fraser's own affidavit that the service of process in this case met the requirements of Rule 4 (D) (1) SCRCF.

Furthermore, "an officer's return of process creates a legal presumption of proper service and cannot be impeached by the mere denial of service by the Defendant." Delta Apparel, Inc. v. Farina, 406 S. C. 257, 750 S. E. 2d 615 (S. C. App. 2013) and, "a presumption of proper service exists when the rules governing service are followed." BB&T v Taylor, 369 S. C. 548, 633 S. E. 2d 501, (S. C. 2006). The court finds that service was proper.

Defendant's motion is denied and the Court shall issue its Writ of Assistance ordering the Defendant to vacate the property at 4511 Colonial Drive, Columbia, SC by June 3, 2019.

AND IT IS SO ORDERED.

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Joseph M. Strickland  
Master in Equity for Richland County

Columbia, South Carolina

Dated: \_\_\_\_\_



Richland Common Pleas

**Case Caption:** Us Bank National Association , plaintiff, et al vs Bobbie J Fraser ,  
defendant, et al  
**Case Number:** 2018CP4004429  
**Type:** Master/Order/Other

It is so Ordered

s/Joseph M. Strickland, 3055

# Exhibit C

## Motion to Reconsider

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

U.S. Bank National Association as  
Indenture Trustee for CIM Trust 2015-  
4AG Mortgage-Backed Notes, Series  
2015-4-AG,

Plaintiff,

vs.

Bobbie J. Fraser aka Bobbie Jean Fraser,  
OneMain Financial, Inc., The South  
Carolina Department of Revenue,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO. 2018-CP-40-04429

MOTION TO RECONSIDER

YOU WILL PLEASE TAKE NOTICE that Defendant Bobbie J. Fraser (hereinafter “the Defendant”) moves before this court pursuant to Rule 59, SCRPC, as well as pursuant to any and all other applicable law, in the above-captioned action for an order that reconsiders, alters, amends, or otherwise undoes the orders filed in this action on April 11, 2019<sup>1</sup>, those orders being 1) the order denying the Defendant’s motion to set aside the judgment, sale, and master’s deed and 2) the writ of assistance.

Grounds for this motion include the following, briefed below:

1. Respectfully, the Defendant must note that the court’s decision to deny the Defendant’s motion to set aside the judgment, sale, and master’s deed and to issue the writ of assistance are grounded in an error of law. The court determined that the judgment, sale, and deed were valid because the court concluded that Gregory Macon, the person to whom the summons and complaint was handed in this case,

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<sup>1</sup> As yesterday, April 21, 2019, was a Sunday, this motion is timely. Rule 6(a), SCRPC.

was residing at the Defendant's residence for purposes of Rule 4(d)(1), SCRCP, because Mr. Macon was the Defendant's overnight guest at the time.

2. The court incorrectly concluded that service on the Defendant occurred under Rule 4(d)(1), SCRCP. Rule 4(d)(1), SCRCP, provides for what is commonly termed substitute service upon a defendant "by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion *then residing therein.*" (Emphasis added.)
3. Estate of Nicholson ex rel. Nicholson v. S.C. Dept. of Health & Human Servs., 377 S.C. 590, 660 S.E.2d 303 (Ct. App. 2008), the case upon which the court based its decision to deny the Defendant's motion, does not stand for the proposition that an overnight guest in a defendant's home is a person "then residing therein" under Rule 4(d)(1), SCRCP.
4. Nicholson is a case about the definition of the phrase "actually residing" under two provisions of a South Carolina Medicaid statute, S.C. Code Ann. § 43-7-460(C)(1) & (C)(2)(b). Nicholson, 660 S.E.2d at 305, 306. The following quoted language from Nicholson illustrates that the Court of Appeals' opinion in that case does not support the conclusion that delivery of a summons and complaint to an overnight guest constitutes service under Rule 4(d)(1), SCRCP.

The Department may seek recovery of medical assistance paid under Medicaid from the estate of an individual who, at the age of fifty-five or older, received medical assistance consisting of nursing facility services or home and community-based services. S.C. Code Ann. § 43-7-460(A)(2) (Supp. 2007). The Department must waive recovery, however, upon proof of undue hardship asserted by an heir or devisee of the decedent. S.C. Code Ann. § 43-7-460(C) (Supp. 2007).

An undue hardship exists if the surviving child of the decedent lived in the home of the decedent for at least two years immediately prior to the decedent's institutionalization. Section 43-7-460(C)(1)(d). The child claiming this hardship, however, must have been "*actually residing* in the [decedent's] home at the time the hardship [was] claimed." Section 43-7-460(C)(1) (emphasis added). Another situation allowing for an undue hardship waiver is when the claimant has been living in the decedent's home two years prior to the decedent's death, owns no real property, and earns below a certain income level. Section 43-7-460(C)(2)(a), (c), (d). As in the previous example, however, the claimant must have been "*actually residing* in the [decedent's] home at the time the hardship [was] claimed." Section 43-7-460(C)(2)(b) (emphasis added). The statute fails to define the phrase "actually residing."

...

"Reside" has been defined as (1) to dwell permanently or continuously; (2) to have a settled abode for a time; or (3) to have one's residence or domicile. Webster's Third New International Dictionary 1931 (1986). However, in the legal field, the term "reside" has been defined as to "[l]ive, dwell, abide, so-journ, stay, remain, [or] lodge." BLACK'S LAW DICTIONARY 1176 (5th ed. 1979). Additionally, the term "residence" has been defined as "[t]he place where one actually lives, as distinguished from a domicile . . ." BLACK'S LAW DICTIONARY 1050 (7th ed. 2000). "Domicile" has been defined as "[t]he place at which a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." Id. at 396.

In light of these definitions, "residence" is a somewhat general and fluid term. When read alone, the word "residence" is susceptible to varying interpretations. Phillips v. S.C. Tax Comm'n, 195 S.C. 472, 476, 12 S.E.2d 13, 15 (1940). It may have a restricted or enlarged meaning, and therefore, the precise meaning of the term is dependent upon the explanatory context. Id. at 476-77, 12 S.E.2d at 15-16.

The context in which "actually residing" is used in Section 43-7-460 indicates the phrase has a restricted meaning of physical presence, rather than a broader meaning of domicile.

...

Finding the phrase “actually residing” requires physical presence in the decedent’s home, Son must have been currently living in Mother’s home when the hardship waiver application was made. Son was incarcerated at the South Carolina Department of Corrections when the PR requested the undue hardship waiver, and thus, he was not physically present in Mother’s home when the hardship waiver application was made. Therefore, Son did not meet the requirements for an undue hardship waiver, and the waiver was properly denied.

Nicholson, 660 S.E.2d at 305, 306.

5. The undersigned must respectfully note that the court, at the Plaintiff’s urging, took Nicholson’s quotation from Black’s Law Dictionary out of context. When presented in context, Nicholson is shown to be a case about the meaning of the phrase “actually residing” under a South Carolina Medicaid statute, a case that decided that a person, during time he was incarcerated, did not actually reside in someone’s home that was outside prison walls. Id.
6. Nicholson did not decide, and did not purport to decide, anything about what constitutes residence for service of process purposes. Id.
7. There does not appear to be any South Carolina case law that is on point, i.e., that determines what exactly defines who is a person residing at a defendant’s dwelling house or usual place of abode for purposes of Rule 4(d)(1), SCRCPP. There is authority to the effect that an overnight houseguest, such as Mr. Macon, is not a resident of that house, though. Legal encyclopedias, similar works, and authority from other jurisdictions that have addressed the issue show that there is general agreement that an overnight houseguest is not a resident for purposes of substitute service of process. Also, indirect South Carolina authority that examines the

meaning of the term *residence* in other contexts (including the Nicholson case) supports the conclusion that our Supreme Court would hold that an overnight houseguest is not a resident for purposes of Rule 4(d)(1), SCRCP.

8. American Jurisprudence pointedly states that “a short-term houseguest is not a person residing in the usual place of abode of the person to be served.” 62B Am. Jur. 2d Process § 193 (2019).
9. Per Wright and Miller, interpreting federal rule language identical to South Carolina’s, the recipient of a summons and complaint “must be actually living in the same place as the defendant who is to be served” in order for valid substitute service to occur. 4A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1096 (4th ed. 2015).
10. Corpus Juris Secundum sums up the law in this area by stating that “the mere presence of a person in the defendant’s home or possession of the premises, alone, such as a person looking after the defendant’s home in the defendant’s absence, is insufficient to satisfy the residency requirement for a substitute service of process statute.” 72 C.J.S. Process § 75 (2018).
11. In Salts v. Estes, the Supreme Court of Washington, interpreting Washington’s substitute service statute that is materially identical to South Carolina’s, observed that “[w]hen the Legislature required in RCW 4.28.080(15) that service be on a person who is ‘then resident’ in the defendant’s usual abode, it meant something more than fleeting occupancy.” 133 Wash. 2d 160, 168, 943 P.2d 275, 279 (1997). The court held that, for substitute service purposes, “‘resident’ must be given its ordinary meaning – a person is resident if the person is actually living in the

particular home.” Id. at 170. In doing so, the court quoted a Michigan federal district court in summing up the law in this area, as follows:

It appears the common theme in the case is not only whether the defendant is reasonably likely to receive the papers served, but whether the person to whom they are handed is a full-time resident of the defendant’s dwelling house or usual place of abode. See 2 MOORE’S FEDERAL PRACTICE p 4.11(3) at 4-126. As 4 CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1096 at 368-69, note:

“Residing therein” has long been held to require the recipient of the papers to be actually living in the same place as defendant.

Id. at 169 (quoting Franklin America, Inc. v. Franklin Cast Prods., Inc., 94 F.R.D. 645, 647 (E.D. Mich. 1982)).

12. Under Florida law – which, coincidentally, is probably more like South Carolina’s with regard to mortgage foreclosure than is the law of any other state – “[a] short-term houseguest is not a person residing in the usual place of abode of the person to be served.” Baker v. Stearns Bank, N.A., 84 So.2d 1122, 1126 (Fla. Ct. App. 2d. Dist. 2012). This true even if the houseguest spends the night. Id. (citing cases concluding that days-long stays did not qualify someone as a resident).
13. Fairly recently, the Supreme Court of Minnesota, interpreting a substitute service civil procedure rule that is identical in every material respect to South Carolina’s, held that “the individual who accepts substitute service must have lived at the named recipient’s abode permanently or for an extended period for the service to be effective.” Jaeger v. Palladium Holdings, LLC, 884 N.W.2d 601, 606 (Minn. 2016). The Jaeger court reasoned out quite thoroughly why someone who is in a home temporarily does not reside there for substitute service purposes:

The plain and ordinary meaning of the word “reside,” of which “residing” is a form, is “[t]o live in a place permanently or for an extended period.” The American Heritage Dictionary of the English Language 1493 (5th ed.2011); see also 4A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1096 (4th ed. 2015) (stating that the recipient of substitute service “must be actually living in the same place as the defendant who is to be served”). The word “then,” which precedes the word “residing,” requires that the analysis of residency occur at the point in time when the process server attempts service. See The American Heritage Dictionary of the English Language 1804 (defining “then” as “[a]t that time”); Webster’s Third New International Dictionary 2370 (2002) (same). Finally, the word “therein” provides the object of analysis by referring back to the named recipient’s “usual place of abode.” See The American Heritage Dictionary of the English Language 1806 (defining “therein” as “[i]n that place, time, or thing”); Webster’s Third New International Dictionary 2372 (defining “therein” as “in or into that place”).

Reassembling the component terms, the phrase “then residing therein” in Rule 4.03(a) means that, for substitute service to be effective, the person accepting the service must have lived in the named recipient’s place of abode permanently or for an extended period at the time when the process server attempts service.

Jaeger, 884 N.W.2d at 605.

14. Turning to South Carolina law, even the Nicholson decision provides support for an overnight houseguest not being a resident of a home for the purpose of substitute service. See Nicholson, 660 S.E.2d at 305, 306. The Nicholson court cited the South Carolina Supreme Court’s decision in Phillips v. South Carolina Tax Commission, 195 S.C. at 476. Nicholson, 660 S.E.2d at 306. In Phillips, a 1940 case about residency for state tax purposes, the Court, reprinting the trial judge’s order as its opinion, concluded “that the word ‘residing’ as used in the income tax acts refers to *legal residence* in this State which is equivalent to domicile[.]” Phillips, 12 S.E.2d at 19 (emphasis in original). The Court there quoted 61 C.J.

511-12 in describing “domicile” as “a place of abode as distinguished from a temporary sojourn[.]” Phillips, 12 S.E.2d at 16. Though neither Nicholson nor Phillips dealt with service of process, under the logic of neither opinion would one come to the conclusion that an overnight houseguest is a resident of the house where he stays overnight.

15. Unlike what the process server’s affidavit of service stated, Mr. Macon was not a person who resided at the Defendant’s residence on the purported date of service. An affidavit of service is “prima facie evidence of service which may be impeached by extrinsic evidence.” Richardson Construction Co., Inc. v. Meek Engineering and Construction Inc., 274 S.C. 307, 311, 262 S.E.2d 913 (1980). As in Richardson Construction, the following is true here:

The proof [of service] by affidavit in this case is insufficient when confronted with the other facts and circumstances attending it. When these factors are coupled with [a] counter affidavit denying service, the cumulative effect entitled [the Defendant] to relief from judgment as a matter of right[.]

Id. (internal citation omitted).

16. Once an affidavit of service is impeached, as it was here by the Defendant’s detailed affidavit, it is incumbent upon the party claiming service was proper to come forward with evidence showing that. See id. Here, the Plaintiff did not come forward with any such evidence. The Defendant rebutted the presumption, and no one offered any evidence to the contrary.
17. The court did, however, overrule the Defendant’s objections to improper argument made by counsel for the Plaintiff and for the foreclosure sale purchaser. These lawyers made contentions of fact to the court that were not supported by anything

in the record. (Were the things they alluded to actually in the record, those things would have constituted inadmissible hearsay the court could not have considered in any event.) Arguments of counsel are not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v. MUSC, 326 S.C. 592, 599 S.E.2d 269, 272 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986). The court erred in permitting counsel for the Plaintiff and for the foreclosure sale purchaser to make such improper statements.

18. "A court generally obtains personal jurisdiction by the service of a summons." BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501 (2006). That never occurred here; thus, jurisdiction over the Defendant was never obtained, and the foreclosure judgment, foreclosure sale, and master's deed are all void.
19. From the court's comments at the hearing, it appeared that the court was concerned with whether the Defendant had a meritorious defense in this case. As shown from her affidavit and as discussed at the hearing, she does – violation of the attorney preference statute. That only matters, though, with regard to her Rule 60(b)(1), SCRCF, ground for relief from the judgment. (That ground can be summed up by noting that the Defendant was not actually aware of this action and, as she is blind, could not read any notices, etc., that were mailed to her that might have alerted her to the case's pendency.) If a judgment is void, relief from the judgment must be granted regardless of whether a movant for relief from that judgment has a

meritorious defense; if a judgment is determined to be void, it is a nullity, and there is no need for further analysis. Taylor, 369 S.C. at 552 n. 1.

20. Further, the court should have granted the continuance requested at the hearing. Had the court done so, Mr. Macon could have provided testimony. As shown by his recently filed affidavit in this case, his testimony would have shown that he lived in North Carolina at the supposed time of service.
21. Mr. Macon lives in North Carolina with his wife, as he would have testified. “In the case of a married person, the usual place of abode is presumed to be with the family. Thus, the house wherein a married man’s wife resides is prima facie his usual place of abode.” Fassett v. Evans, 364 S.C. 42, 47, 610 S.e.2d 841 (Ct. App. 2005).
22. This court should reconsider its decision to issue the writ of assistance in this case. Not only was issuance of the writ incorrect for the reasons noted above related to the propriety of relief from the judgment, our state Supreme Court has noted the following concerning writs of assistance:

A writ of assistance is undoubtedly an appropriate process to issue from a court of equity to place a purchaser of mortgaged premises under its decree in possession after he has received the commissioner’s or master’s deed . . . *It is a rule as old as the law that no man shall be condemned in his rights of property, as well as in his rights of person, without his day in Court – that is, without being duly cited to answer respecting them, and being heard or having an opportunity of being heard thereon.*

James v. Graham, 114 S.C. 107, 78 S.E. 82 (1912) (emphasis and ellipsis added, internal citations and quotation marks omitted).

23. Our Supreme Court has also stated:

It is commonly declared that the issuance of a writ of assistance rests in the sound discretion of the Court, *and that it is issued only when the right is clear and free from doubt*—when there is no equity or appearance of equity in defendant, and when the decree, and the sale and proceedings thereunder, are beyond suspicion; and *it is certainly not customary to issue the writ where there is a bona fide contest as to the right to the possession of the land under the sale*, or where the occupant claims by a new and independent right or title, or where the rights of the respective parties have not been fully and finally adjudicated in the principal suit.

...

It will never be issued when there is any reasonable prospect that the party in possession may make a successful defense of his possession, either at law or by the aid of a court of equity. And *it will never be exercised in a case of doubt*[.]

Griggs v. Griggs, 205 S.C. 272, 31 S.E.2d 505 (1944) (emphasis added, internal citations and quotation marks omitted).

- 24. The Defendant further notes that there is no support in the record for the statement in the court’s order that the rule to show cause was served on the Defendant on March 21, 2019, or at any other time.
- 25. This court should use a plain-language approach and abandon the illogical interpretation of “residing” that the Plaintiff offered. The Defendant asks that the court consider the implications that would follow if delivery to an overnight houseguest constituted substitute service under Rule 4(d)(1), SCRCF. For example, if that were the law, a defendant who operated a bed-and-breakfast out of his house could be served by delivery to a one-night paying guest who had no personal connection to the defendant at all.
- 26. The Defendant incorporates herein by reference all of her previous argument in this action.

Upon information and belief, consultation with opposing counsel concerning the substance of this motion would not have served any useful purpose.

Respectfully submitted,

/s/ Andrew S. Radeker  
Andrew S. Radeker  
S.C. Bar No. 73743  
HARRISON, RADEKER & SMITH, P.A.  
Post Office Box 50143  
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(803) 779-2211  
drew@harrisonfirm.com (email)  
ATTORNEY FOR DEFENDANT  
BOBBIE J. FRASER

Columbia, South Carolina  
April 22, 2019

## Exhibit D

### Email Correspondence with Muhammad's Counsel

## Drew Radeker

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**From:** Drew Radeker  
**Sent:** Thursday, May 30, 2019 3:11 PM  
**To:** Ted Von Keller  
**Cc:** Rhonda Schaub; Tamra Davis  
**Subject:** RE: Bobbie Fraser

Ted, where are you at with your guy on this?

Thanks.

Drew Radeker



923 Calhoun Street,  
Columbia, South Carolina 29201  
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[www.harrisonfirm.com](http://www.harrisonfirm.com)

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---

**From:** Ted Von Keller  
**Sent:** Wednesday, May 29, 2019 12:50 PM  
**To:** Drew Radeker  
**Cc:** Rhonda Schaub ; Tamra Davis  
**Subject:** Re: Bobbie Fraser

Drew, I am in Charleston today for a hearing and will not be back in Cola. until tomorrow. I will see if I can reach my client but am not sure I can.

*Sent from my Verizon LG Smartphone*

----- Original message-----

**From:** Drew Radeker  
**Date:** Wed, May 29, 2019 11:31 AM  
**To:** Ted Von Keller;  
**Cc:** Rhonda Schaub;  
**Subject:** RE: Bobbie Fraser

Ted, I'm just letting you know that I intend to make a motion about this today or tomorrow morning if we haven't got this issue resolved.

Thanks.

Drew Radeker



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---

**From:** Drew Radeker  
**Sent:** Tuesday, May 28, 2019 12:01 PM  
**To:** Ted Von Keller  
**Cc:** Rhonda Schaub  
**Subject:** RE: Bobbie Fraser

Ted, here's the stuff about restitution when a judgment gets reversed on appeal:

"A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable." Restatement (First) of Restitution § 74 (1937). As one author noted not long ago, South Carolina law is consistent with this. Robert Hill, Supersedeas on a Money Judgment, S.C. Lawyer (S.C. Bar May 2012). In a 1960 case concerning a worker's compensation award, the South Carolina Supreme Court assumed that if money had been paid to the worker per the award that was being reversed, the worker would have been "obligated to make restitution of the amount so received." Case v. Heritage Cotton Mills, 236 S.C. 515, 534, 115 S.E.2d 57, 68 (1960).

A New Jersey court has noted that "[r]estitution on reversal of a judgment is dictated by principles of fairness to the parties and public policy concerns." Bernoskie v. Zarinsky, 394 N.J. Super 421, 425, 927 A.2d 149, 152 (N.J. Super A.D. 2007). That same court, quoting the Restatement, noted that "[a]s a matter of policy, there is a 'need to remedy [a] misapplication of the coercive force of legal process' and to avoid discouraging compliance with lawful orders not stayed pending appeal." Id. at 426. The Supreme Court of Texas has stated that "[r]estitution after reversal has long been the rule in Texas and elsewhere." Miga v. Jensen, 53 Tex. Sup. Ct. J. 49, 299 S.W.3d 98, 101 (2009). The Supreme Court of the United States has recognized such a right to restitution, noting that "[t]he right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established." Baltimore & Ohio R. Co. v. U.S., 279 U.S. 781, 786 (1929); accord Bank of U.S. v. Bank of Wash., 31 U.S. 8, 17 (1832) ("On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost").

Let me know if you will agree not to seek enforcement of the writ of assistance until at least 15 days from an order denying our motion to reconsider (to give us time to appeal and have the Court of Appeals address any supersedeas issues, if needed).

Thanks.

Drew Radeker



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---

**From:** Drew Radeker  
**Sent:** Tuesday, May 21, 2019 10:35 AM  
**To:** Ted Von Keller  
**Cc:** Rhonda Schaub  
**Subject:** RE: Bobbie Fraser

Yes, I think so. Enjoy the vacation.

Thanks.

Drew Radeker



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---

**From:** Ted Von Keller  
**Sent:** Tuesday, May 21, 2019 9:56 AM  
**To:** Drew Radeker  
**Subject:** Re: Bobbie Fraser

Drew, I'm out of town with my family on vacation this week. Is this something that can wait till Tuesday of next week?

*Sent from my Verizon LG Smartphone*

----- Original message-----

**From:** Drew Radeker  
**Date:** Mon, May 20, 2019 8:12 AM  
**To:** Ted Von Keller;  
**Cc:** Rhonda Schaub;  
**Subject:** Bobbie Fraser

Ted, if you don't mind, give me a call when you get in. I'd like to discuss where we are in light of Judge Strickland not having ruled on the motion to reconsider.

Thanks.

Drew Radeker

Sent from my iPhone - please excuse any typos

## Exhibit E

### Email Correspondence with Judge Strickland

## Drew Radeker

---

**From:** Drew Radeker  
**Sent:** Monday, June 3, 2019 9:43 AM  
**To:** 'JOSEPH STRICKLAND'  
**Cc:** 'FRISTELLA CORNELIUS'; 'DELORIS ELLISON'; 'damonw@rplfirm.com'; 'jhunter@rplfirm.com'; Rhonda Schaub; 'Ted Von Keller'  
**Subject:** RE: US Bank v. Fraser, 2018CP4004429

Judge Strickland:

I never heard anything from anyone on Friday after I sent this email and haven't been able to reach Ted von Keller or your office this morning.

I'm just letting everyone know that we are serving and filing a notice of appeal right now. The service of the notice of appeal stays the operation of the writ of assistance. I'm also going to be asking the Court of Appeals to allow Your Honor to hear and rule on the motion to reconsider.

Thank you.

Drew Radeker



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---

**From:** Drew Radeker  
**Sent:** Friday, May 31, 2019 12:48 PM  
**To:** JOSEPH STRICKLAND  
**Cc:** FRISTELLA CORNELIUS ; DELORIS ELLISON ; 'damonw@rplfirm.com' ; jhunter@rplfirm.com; Rhonda Schaub ; Ted Von Keller  
**Subject:** RE: US Bank v. Fraser, 2018CP4004429

Judge Strickland:

I'm about to head to lunch and am planning on being out for the rest of the day, but I am reachable on my cell phone, (803) 920-3115. Just letting everyone know.

Thank you.

Drew Radeker



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---

**From:** Drew Radeker  
**Sent:** Thursday, May 30, 2019 3:59 PM  
**To:** 'JOSEPH STRICKLAND'  
**Cc:** 'FRISTELLA CORNELIUS'; 'ANDRIA DREHER'; 'DELORIS ELLISON'; 'damonw@rplfirm.com'; 'jhunter@rplfirm.com'; Rhonda Schaub; 'Ted Von Keller'  
**Subject:** RE: US Bank v. Fraser, 2018CP4004429  
**Importance:** High

Judge Strickland:

Attached is a motion to stay that I just e-filed along with an order that would grant the motion to stay. This would just preserve the status quo and prevent potential harm to everyone involved while we await your ruling on the motion to reconsider that is pending in this case.

Given that Monday is the date for enforcement of the writ of assistance, this requires immediate attention.

Thank you.

Drew Radeker



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---

**From:** Drew Radeker  
**Sent:** Thursday, April 25, 2019 4:11 PM  
**To:** 'JOSEPH STRICKLAND'  
**Cc:** 'FRISTELLA CORNELIUS'; 'ANDRIA DREHER'; 'DELORIS ELLISON'; 'damonw@rplfirm.com'; 'jhunter@rplfirm.com'; Rhonda Schaub; 'Ted Von Keller'  
**Subject:** RE: US Bank v. Fraser, 2018CP4004429

Judge Strickland:

Please see the attached motion to reconsider we filed in this case. Hearings on motions to reconsider are not required, so I will be happy to prepare a proposed order that would grant the motion if that is how Your Honor is inclined to rule. If You are inclined to deny the motion, a Form 4 order doing so will suffice for purposes of our appeal. If you prefer to hold a hearing on this motion, please have your staff contact us about scheduling the same.

Thank you. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

Drew Radeker



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---

**From:** Drew Radeker

**Sent:** Monday, March 25, 2019 5:32 PM

**To:** JOSEPH STRICKLAND

**Cc:** FRISTELLA CORNELIUS ; ANDRIA DREHER ; DELORIS ELLISON ; 'jshy@rplfirm.com' ; [jhunter@rplfirm.com](mailto:jhunter@rplfirm.com); Rhonda Schaub

**Subject:** US Bank v. Fraser, 2018CP4004429

Judge Strickland:

Please see the motion to set aside judgment and sale and accompanying affidavit and deed that we filed today in this case. If your staff would let me know when you have available for a hearing on this motion, I would be most appreciative.

Thank you. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

Drew Radeker



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Exhibit F

Motion to Stay

**STATE OF SOUTH CAROLINA**

**COUNTY OF RICHLAND**

**IN THE COURT OF COMMON PLEAS**

**CASE NO. 2018-CP-40-04429**

**U.S. Bank National Association as  
Indenture Trustee for CIM Trust 2015-  
4AG Mortgage-Backed Notes, Series  
2015-4-AG,**

**Plaintiff,**

**vs.**

**Bobbie J. Fraser aka Bobbie Jean Fraser,  
OneMain Financial, Inc., The South  
Carolina Department of Revenue,**

**Defendants.**

**MOTION TO STAY**

YOU WILL PLEASE TAKE NOTICE that Defendant Bobbie J. Fraser (hereinafter “the Defendant”) moves before this court pursuant to Rule 62(b), SCRCF, as well as pursuant to any and all other applicable law, in the above-captioned action for an order that stays the writ of assistance filed in this case until 15 days following any ruling that denies the Defendant’s pending motion to reconsider in this action.

Grounds for this motion include the following, briefed below:

1. Rule 62(b), SCRCF, provides that “the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).”

2. There has been a motion to reconsider pursuant to Rule 59(e), SCRCP, pending in this case for over a month. One of the orders subject of that motion to reconsider is a writ of assistance that directs the Sheriff of Richland County to eject the Defendant from the subject property.
3. If the motion to reconsider is granted, that ruling will undo the writ of assistance.
4. If there were an appeal pending of the writ of assistance, it would be stayed automatically. Rule 241, SCACR. An appeal, however, would be premature, since there is a motion to reconsider pending. A ruling on that motion is needed to preserve Defendant's arguments for appeal, if the court's decision stays the same.
5. The Defendant is a blind woman who was never served with the summons and complaint in the underlying action and lives in the house subject of the writ of assistance.
6. The foreclosure sale purchaser is a real estate speculator who stands to have his bid amount returned to him if the motion to reconsider is granted.
7. No harm will come from preserving the status quo and allowing the Defendant to remain in possession of the subject property while the parties await the court's ruling on the motion to reconsider.
8. Conversely, great harm will come to the Defendant – and liability will accrue against the foreclosure sale purchaser – if the Defendant is removed from her home but ultimately prevails on the issues subject of the motion to reconsider.

The undersigned has consulted with opposing counsel concerning this motion but has not yet reached an agreement concerning the same.

Respectfully submitted,

/s/ Andrew S. Radeker

Andrew S. Radeker

S.C. Bar No. 73743

HARRISON, RADEKER & SMITH, P.A.

Post Office Box 50143

Columbia, South Carolina 29250

(803) 779-2211

drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT

BOBBIE J. FRASER

Columbia, South Carolina  
May 30, 2019

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Common Pleas Case No. 2018-CP-40-04429

**RECEIVED**  
JUN 03 2019  
SC Court of Appeals

U.S. Bank National Association as Indenture Trustee for CIM  
Trust 2015-4AG Mortgage-Backed Notes,  
Series 2015-4-AG,.....Respondent,

v.

Bobbie J. Fraser aka Bobbie Jean Fraser, OneMain Financial, Inc.,  
The South Carolina Department of Revenue,.....Defendants,

Of whom Bobbie J. Fraser is the.....Appellant.

AND

Shahzad Muhammad,.....Respondent.

PROOF OF SERVICE

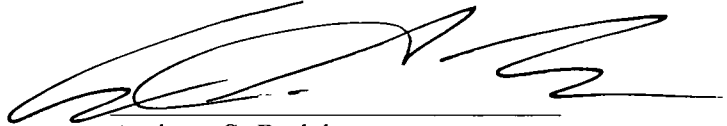
I certify that I served the foregoing motion to allow lower court to hear and rule upon motion to reconsider in this case by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Theodore von Keller, Esq.  
Crawford & von Keller, LLC  
P.O. Box 4216  
Columbia, SC 29240

Jason M. Hunter, Esq.  
Riley Pope & Laney, LLC  
Post Office Box 11412  
Columbia, SC 29211

Kiera C. Dillon, Esq.  
S.C. Department of Revenue  
Post Office Box 12265  
Columbia, South Carolina 29211-9979

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew S. Radeker", written over a horizontal line.

Andrew S. Radeker  
S.C. Bar No. 73743  
Harrison, Radeker & Smith, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250  
(803) 779-2211  
Attorney for Appellant

June 3, 2019