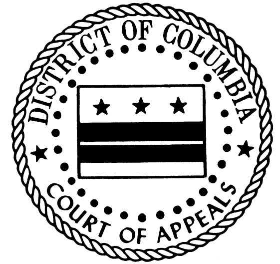

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No. 23-CV-0189

DISTRICT OF COLUMBIA COURT OF APPEALS

LOLILLIAN J. SMITH,

Appellant,

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB D/B/A Christina Trust,
Not in its Individual Capacity but Solely as Owner Trustee of Residential Credit
Opportunities Trust II, *et al.*

Appellees.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

REPLY BRIEF OF APPELLANT LOLILLIAN SMITH

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INTRODUCTION

Appellees Jefferson and Fryar carried out a foreclosure rescue scam that proceeded in two steps. First, they fraudulently acquired Appellant Smith's family home. Second, using her home as collateral, they obtained a $231,000 loan from Appellee Wilmington's predecessor, Visio, with no intention of paying it back.

Visio was far better positioned than Ms. Smith to spot the scam's warning signs and protect itself accordingly. Instead, after ignoring the loan application's many red flags, Visio approved it. Then, even after becoming aware of Ms. Smith's fraud claim, Visio recorded its deed of trust as if nothing was out of the ordinary. For its part, Wilmington waited to protect its interests until Ms. Smith had reclaimed title in Superior Court. Only then did Wilmington seek judicial blessing of its deed of trust, which would saddle Ms. Smith with a massive lien on her family home despite Visio's fault in creating it.

This lien is not only inequitable but invalid, for three independent reasons that Ms. Smith argued below: (1) Jefferson and Fryar never acquired title that they could convey to Visio; (2) even if they did, Visio's actual notice of the fraud before recordation prevented Visio from being a bona fide lender; and (3) even if that actual notice was too late, Visio was on inquiry notice before closing the loan. Wilmington does not dispute that the first two issues were before the trial court or that they would have been dispositive had the court ruled in Ms. Smith's favor.

Yet the Superior Court failed to rule on these issues and then wrongly granted Wilmington summary judgment based on inquiry notice. This failure to rule on contested, dispositive issues was error. The Court should narrowly vacate and remand for the Superior Court to consider in the first instance which type of fraud occurred and, if necessary, when to test Visio's notice.

Wilmington mounts virtually no defense to this failure-to-rule argument, and instead asks the Court to affirm on the merits, thereby placing the full burden of the scam on Ms. Smith. This Court should not do so. But if it reaches the merits, the Court should reverse. First, Jefferson and Fryar committed fraud in the factum when they told Ms. Smith she would retain her home—a crucial fact that Wilmington ignores. Second, recording statutes determine when a deed becomes binding against competing interests—a legal point Wilmington does not contest—and under D.C.'s statute, Visio's deed of trust was not binding against Ms. Smith until recordation, when Visio indisputably was on actual notice of her fraud claim. Finally, before loan closing, Visio was on inquiry notice due to multiple red flags that would have led a lender exercising ordinary prudence to investigate and discover the fraud. Wilmington ignores much of Ms. Smith's opening brief, and its few responses fall flat. Thus, whichever issue the Court reaches, the result should be the same: overturning the erroneous entry of summary judgment.[1]

[1] Ms. Smith does not take a position on Appellee Selene Finance's brief.

ARGUMENT

I. The Superior Court's Failures to Rule Require Vacatur and Remand.

When a party "adequately present[s]" an argument for the superior court's consideration, it is error for the court to "simply fail[] to rule on it." *Greene v. United States*, 279 A.3d 363, 370 (D.C. 2022). Here, the Superior Court erred twice under this standard by failing to rule on (1) whether Ms. Smith's defrauders committed fraud in the factum or fraud in the inducement, and, if the latter, (2) when to test Visio's notice for purposes of the bona fide lender analysis. Wilmington does not dispute that failure to rule requires vacatur, and its cursory responses to Ms. Smith's arguments lack merit. The Court should vacate the Superior Court's entry of summary judgment and remand for the Superior Court to rule on these issues in the first instance.

A. The Superior Court Did Not Rule on Whether the Defrauders Committed Fraud in the Factum or in the Inducement.

This appeal can be resolved by remanding for the Superior Court to answer a threshold, dispositive question: when Jefferson and Fryar fraudulently obtained Ms. Smith's home, did they commit fraud in the factum or fraud in the inducement? This question is dispositive because fraud in the factum renders a deed void such that even a bona fide purchaser takes nothing.

The Superior Court never decided which type of fraud occurred here. To the contrary, at the 2021 hearing on Wilmington's motion to reconsider, the Superior

Court expressly left this issue open: "We need to figure out whether that was fraud in factum or fraud [in] inducement. . . . So I do agree with [Ms. Smith's pro bono trial counsel] that there needs to be additional information exchanged regarding the nature of the fraud here." App. 160–61. For this reason, the court granted Ms. Smith's motion to permit discovery before it ruled on summary judgment. App. 161. And all parties, including Wilmington, contemporaneously understood this ruling as leaving open which type of fraud occurred; indeed, in its post-discovery motion for summary judgment, Wilmington's first argument was that the defrauders committed fraud in the inducement rather than fraud in the factum. Wilmington Memorandum, Feb. 10, 2022, at 9–13.

Contrary to the Superior Court's words and actions, Wilmington now asserts that the court had already ruled at the 2021 hearing that Ms. Smith's deed was merely voidable, effectively deciding the fraud issue before the 2022 summary judgment hearing. Wilmington Br. 2. It is true that at the 2021 hearing, the court said it was treating Wilmington's motion to reconsider as one to amend its prior judgment finding that the quitclaim deed was void to one finding that the deed was voidable. App. 160. But by using the label "voidable," the court did not rule which type of fraud occurred here; otherwise, the court's 2021 rulings would be illogical because the court immediately followed this ruling by granting Ms. Smith's motion for discovery and stating "[w]e need to figure out whether this

was fraud in factum or fraud [in] inducement." App. 160. Therefore, the fairest reading of the court's statements at the 2021 hearing is that it did not rule on which type of fraud occurred, but was instead keeping that issue open for discovery, summary judgment, and trial.

Wilmington hardly contests this point, arguing that "discovery resulted in no evidence that the Quitclaim Deed was the result of fraud in the factum." Wilmington Br. 13–14. But that argument makes no sense: whatever happened *after* the 2021 hearing has no bearing on the content of the court's rulings *during* that hearing. The court and the parties all understood that the court needed to rule on this threshold, dispositive issue. But when the time to rule on summary judgment came, the court failed to do so.

B. The Superior Court Did Not Rule on When to Test Visio's Notice.

After skipping the threshold issue of fraud, the Superior Court granted Wilmington summary judgment on inquiry notice. But in so doing, the court skipped yet another threshold, potentially dispositive issue: when to test Visio's notice for the bona fide purchaser analysis. It is undisputed that Visio recorded its deed of trust despite having actual knowledge of Ms. Smith's fraud claim, so if recordation is the proper date to test notice, Wilmington has no interest in her home. Wilmington does not contest that both parties briefed this issue for the trial court on summary judgment, that the court failed to rule on it, or that the remedy

for such a failure is vacatur. Presented with no basis for affirming, the Court should vacate and remand so the Superior Court can make this threshold ruling.

II. The Superior Court Could Not Have Entered Summary Judgment If It Had Properly Considered Ms. Smith's Fraud-in-the Factum Claim.

Unable to muster any substantive rebuttal to Ms. Smith's argument that the Superior Court failed to rule which type of fraud occurred, Wilmington falls back on repeating its summary judgment briefing, arguing that no reasonable jury could have found that the fraudulent deed was void. Wilmington Br. 21. Wilmington is incorrect. On remand, the facts will support Ms. Smith's fraud-in-the-factum claim, precluding summary judgment in Wilmington's favor.

First, Wilmington fails to apply the governing standard for fraud in the factum in the District of Columbia. Wilmington relies on the inaccurate notion that only forgery can void a deed. Wilmington Br. 17 (citing *Scotch Bonnett Realty Corp. v. Matthews*, 11 A.3d 801 (Md. 2011)). But Ms. Smith need not prove forgery to prevail here. This Court has long recognized that fraud in the factum is broader than common law forgery and renders a conveyance void even in the absence of forgery per se. *See* Opening Br. 24–25; *Moore v. Deutsche Bank Nat'l Tr. Co.*, 124 A.3d 605, 609 (D.C. 2015); *Columbia Fed. Sav. & Loan Ass'n v. Jackson*, 131 A.2d 404, 407–08 (D.C. 1957). The District of Columbia, consistent with established common law across the nation, thus recognizes fraud in the factum where the defrauded party signs an instrument "without knowledge of its

true nature or contents." *Moore*, 124 A.3d at 609; *cf.* 17A C.J.S. CONTRACTS § 218 (citing multiple jurisdictions).

Second, properly applying D.C. law here, the record supports Ms. Smith's fraud-in-the-factum claim. As Ms. Smith argued in her opening brief, summary judgment in Wilmington's favor is inappropriate because, viewed in the light most favorable to her, the record contains evidence from which a reasonable jury could find that (1) she executed the deed because of her defrauders' misrepresentations and (2) that she had no knowledge of the deed's character or essential terms, without Wilmington (3) estopping her by proving that she failed to read the conveyance documents. Opening Br. 29–34.

Wilmington's arguments to the contrary are unpersuasive. As an initial matter, Wilmington's reliance on Maryland case *Scotch Bonnet* is misplaced. *Scotch Bonnet* held that a transaction with a company with forged corporate articles was not void, but only voidable because the transaction itself was not a forgery. 11 A.3d at 809. That opinion was not based on fraud in the factum as construed by this Court, but instead on Maryland's "common law forgery rule," which is in turn based on two principles inapposite to D.C. law: (1) Maryland has "limited [its] rulings regarding voidness to circumstances that go to the face of the deed, *e.g.*, forgery," and (2) "because of the close relationship between Maryland common law forgery and the forgery that voids a conveyance, we should be

extremely reluctant to expand the crime of forgery." *Id.* at 810–11 (internal quotation marks and citations omitted). Those principles have no bearing here because (1) D.C. recognizes fraud in the factum beyond forgery, and (2) forgery is a statutory crime in D.C., meaning there is no concern that broadening civil, common law fraud-in-the-factum claims would expand criminal liability. *Scotch Bonnet* is therefore inapposite.

Moreover, in attempting to distinguish *Archie v. U.S. Bank, N. Am.*, 255 A.3d 1005 (D.C. 2021), Wilmington misstates the law and the record. Although *Archie* states that being "defrauded about the content and significance of the loan documents" can demonstrate fraud in the factum, Wilmington argues this principle does not apply here because "there was no evidence of whether Smith was financially literate or not before the Trial Court." *See Archie*, 255 A.3d at 1018; Wilmington Br. 20. That statement is wrong twice.

On the law, Ms. Smith's literacy goes only to whether she can be estopped from asserting fraud in the factum for failing to read the documents. *See Archie*, 255 A.3d at 1017–18 (quoting *Moore*, 124 A.3d at 609). *Archie*'s highly analogous fact pattern undoubtedly supports Ms. Smith's prima facie fraud-in-the-factum case; if not, this Court in *Archie* could not have reversed.

On the record, the facts in the light most favorable to Ms. Smith do not support estopping her as a matter of law. Ms. Smith testified that she read the

quitclaim deed, but Mr. Jefferson would not let her review SJ&F Builders' articles of incorporation. App. 67, 83. In lieu of the articles, she therefore demanded a deed addendum, which Mr. Jefferson signed, guaranteeing that she would retain ownership of her home. App. 83, 444. Ms. Smith therefore did not fail to read the deed; she took reasonable steps to ensure that the transaction matched her understanding; and the fraud only occurred because Mr. Jefferson prevented her from reviewing SJ&F's articles of incorporation. A reasonable jury could find from these facts alone that Ms. Smith did not fail to read the relevant instrument and, as to the articles of incorporation, that she "lacked understanding in financial matters."[2] *Archie*, 255 A.3d at 1018. Moreover, the record also reflects Ms. Smith's mental illness, which a reasonable jury could find relevant to her view of the transaction. App. 77 ("sometime[s] I have mood swings and anxiety").

The Superior Court therefore prejudiced Ms. Smith by failing to rule on her fraud argument. The Court should remand for the Superior Court to either rule on Ms. Smith's fraud-in-the-factum claims or permit them to go to trial.[3]

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[2] Wilmington argues that Ms. Smith will be estopped by citing a 1999 job readiness certificate. Wilmington Br. 20. But that is not in the record on appeal, and in any case the Court cannot resolve disputed facts on summary judgment.

[3] Wilmington also cites *Chen v. Bell-Smith*, 768 F. Supp. 2d 121 (D.D.C. 2011) and *EMC Mortgage Corp. v. Patton*, 64 A.3d 182 (D.C. 2012), but neither is apt. By Wilmington's own analysis, *Chen* turned on the court's reasoning that plaintiffs "did not read the deed they signed but relied on the representations of defendants." Wilmington Br. 15; *see also* Opening Br. 31. Ms. Smith did read the deed, so

III. Visio is Not a Bona Fide Purchaser Because It Had Actual Notice of Ms. Smith's Fraud Claim Before Recording its Deed of Trust.

It is undisputed that Visio recorded its deed of trust despite having actual knowledge of Ms. Smith's fraud claim. App. 214, 216, 437, 440. Assuming the Court reaches this issue, it should rule that this actual notice prevented Visio from becoming a bona fide lender. And this issue is dispositive: if notice in these circumstances must be tested at recordation, then Wilmington has no interest in Ms. Smith's home. The trial court's failure to rule on this issue therefore prejudiced Ms. Smith, and Wilmington's responses on the merits fall flat.

First, and most importantly, Wilmington does not acknowledge—let alone address—Ms. Smith's argument based on the following principle: (1) determining when a purported bona fide lender acquires a property interest turns on when its deed of trust becomes effective against parties with competing interests, and (2) determining that date depends on applicable recording statutes. *See* Opening Br. 38–41. As applied here, under D.C. Code § 42-401, Visio's deed had to be recorded before it became effective against competing interests like Ms. Smith's, meaning Visio's notice of her fraud claim must be tested at recordation. Opening Br. 39–41. This principle is illustrated not only in the Maryland case cited in

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Chen is distinguishable. In *Patton*, this Court did not reach the merits of whether the mortgage documents were void, "viewing them as more appropriately resolved by the trial court on remand." 64 A.3d at 190 n.11. There is no opinion explaining what occurred on remand.

Ms. Smith's opening brief,[4] but also in cases[5] applying earlier D.C. statutes with substantially the same language as D.C. Code § 42-401.[6]

Second, instead of responding to Ms. Smith's appellant brief, Wilmington misapplies the *ejusdem generis* canon in interpreting D.C. Code § 42-401. This statute provides that Visio's deed of trust was effective only from the date of recordation as to "creditors and subsequent bona fide purchasers and mortgagees without notice of said deed, and others interested in the property." Wilmington treats the catchall—"others interested in the property"—as referring to subsequent bona fide purchasers. But this would render the catchall superfluous: "subsequent bona fide purchasers" is already in the statutory list, so the catchall must refer to a different category. *See Clement v. D.C. Dep't of Emp. Servs.*, 126 A.3d 1137,

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[4] *Wash. Mut. Bank v. Homan*, 186 Md. App. 372 (2009); *see* Opening Br. 38–39.

[5] *See Dulany v. Morse*, 39 App. D.C. 523, 526–27 (D.C. Cir. 1913) (in D.C., against creditors without notice, purchaser's interest is only effective upon recordation); *accord Staples v. Warren*, 46 App. D.C. 363, 371 (D.C. Cir. 1917); *see also Mayers v. Ridley*, 465 F.2d 630, 644 (D.C. Cir. 1972) (in D.C., "the recording of the deed has definite legal consequences, inasmuch as it is statutorily required to protect the grantee's title against creditors, subsequent bona fide purchasers and mortgagees without notice of the deed, and others interested in the property"). This Court is bound by decisions of the U.S. Court of Appeals for the D.C. Circuit before February 1, 1971, and its decisions thereafter are "entitled to great respect." *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

[6] In D.C., since 1901, recordation has provided deeds' effective dates against creditors and subsequent bona fide purchasers without notice, and others interested in the property. *Compare* 31 Stat. 1268, ch. 854, § 499 (March 3, 1901) (adding to the list "others interested in *said* property") *with* D.C. Code § 42-401 ("others interested in *the* property") (emphasis added).

1140 (D.C. 2015). Nor is Wilmington's atextual gloss on the catchall as applying only to *subsequent* interests persuasive because the statute applies that qualifier only to "bona fide purchasers," not "creditors." *See Staples*, 46 App. D.C. at 370–71 ("creditors" covers existing or future creditors, under prior,[7] materially equivalent version of what is now § 42-401). Likewise, "others interested in the property" applies to both existing and future interests.

Properly applying the *ejusdem generis* canon, the catchall covers Ms. Smith. The catchall must include the same type of people as creditors and subsequent bona fide purchasers. *See Sydnor v. United States*, 129 A.3d 909, 912–13 (D.C. 2016). Moreover, common sense should guide the Court, *id.* at 913, which need not precisely define the catchall category's scope here. It suffices to observe that creditors and subsequent bona fide purchasers both have a meaningful stake in a property. Ms. Smith, too, has a meaningful stake in her home. She is therefore one of the "others interested in" it under Section 42-401.

Third, Wilmington misses the mark by asserting that "none of the cases interpreting D.C. Code § 42-401 held that persons in [Ms.] Smith's shoes constituted bona fide purchasers for value without notice." Wilmington Br. 33. Ms. Smith does not claim to be a bona fide purchaser. She argues Visio never

[7] D.C. Code § 42-401 was previously codified at § 45-501 (1973) and § 45-801 (1981).

became one because she is "interested in the property" under Section 42-401. None of the cases cited by Wilmington in this context interprets Section 42-401's catchall language, nor are any of these cases analogous to the facts and issue here.[8]

Fourth, Wilmington invokes certain purposes of recordation, specifically the idea that recordation provides constructive notice to subsequent, would-be bona fide purchasers. *See* Wilmington Br. 33–34. But, as noted above, in D.C., recordation also renders a purchaser's deed effective against existing, competing interests. *See Dulany*, 39 App. D.C. at 527; *Staples*, 46 App. D.C. at 371.[9]

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[8] *See Fitzgerald v. Wynne*, 1 App. D.C. 107, 120–22 (D.C. Cir. 1893) (holding that an unrecorded deed was effective against the grantor, and not involving any third party analogous to Ms. Smith); *Smart v. Nevins*, 298 A.2d 217, 219 (D.C. 1972) (same holding as *Fitzgerald*, and a third party—grantor's heir—was not similarly situated to Ms. Smith); *Young v. Howard*, 120 F.2d 712, 713 (D.C. Cir. 1941) (holding that recording the release of a deed of trust was not constructive notice to the bank holding the deed); *SMS Assocs. v. Clay*, 868 F. Supp. 337, 342 (D.D.C. 1994) (invoking the basic principle that a buyer cannot be a bona fide purchaser if it had actual, pre-purchase notice of other, unrecorded interests).

[9] Although *Dulany* and *Staples* state that recordation is not required as to "persons with notice," 39 App. D.C. at 527, or "those with notice," 46 App. D.C. at 372, respectively, both cases involved creditors and did not construe the statutory catchall, "others interested in said property." But to the extent this Court considers whether Ms. Smith had notice of Visio's deed of trust for purposes of D.C. Code § 42-401, the record does not indicate that she did. While she knew Mr. Jefferson was attempting to get a loan, *e.g.*, App. 9, the record does not show that she was aware of Visio's deed of trust in the period between when Visio and the defrauders executed that deed and when Visio recorded it. Thus, a reasonable jury viewing the record in the light most favorable to Ms. Smith could find that she did not have notice of Visio's deed of trust before Visio recorded it.

More importantly, the purposes underlying bona fide purchaser doctrine weigh heavily against holding that Visio was a bona fide lender in this case. In bona fide purchaser cases, courts rely on "the broad equitable doctrine that where one of two equally innocent persons must suffer, the one whose act enabled the wrongdoer to commit the wrong must be the one to bear the loss." *Miller v. Logan Motor Co.*, 89 A.2d 926, 927 (D.C. 1952). But here, Visio's loan to Jefferson and Fryar was an essential element of their foreclosure rescue scam: it is how they converted the equity in Ms. Smith's home into cash. Moreover, Wilmington has not contested that, compared to Ms. Smith, Visio was far better equipped to recognize a potential foreclosure rescue scam, or that such scams are pervasive and broadly known to institutional players and lenders like Visio. Opening Br. 6–7, 46–47. Finally, it is far from equitable to treat Visio's deed as effective against Ms. Smith when Visio recorded it with the full knowledge of her fraud claim. It flies in the face of the idea that a bona fide purchaser is "innocent" in that it lacked notice of other claims.

Fifth, D.C. Code § 42-401 reflects legislative intent to allocate the risk to purchasers that they might learn of a competing claim before recording their deed. The law thus incentivizes purchasers and lenders to conduct reasonable due diligence to discover any alleged fraud or other competing interests. It also encourages prompt recordation of deeds, which helps protect the interests of bona

fide purchasers, provide certainty, and reduce the potential for disputes. (Indeed, D.C. law already requires recording deeds within thirty days, which Visio did not do. D.C. Code § 47-1431(a).) Finally, parties in Visio's situation still have a recourse—i.e., in this case, pursuing the defrauders based on their loan contract.

IV. Before Closing the Loan with the Defrauders, Visio was on Inquiry Notice of Ms. Smith's Fraud Claim.

Even if Visio's actual, pre-recordation notice did not disqualify it from being a bona fide lender, this Court should reverse and remand because Visio was on inquiry notice of Ms. Smith's fraud claim before it disbursed funds to the defrauders. Wilmington blatantly mischaracterizes the record and Ms. Smith's opening brief by asserting that this case concerns only "events that occurred *after* execution" of Visio's deed of trust. Wilmington Br. 22 (emphasis added). To the contrary, Ms. Smith's opening brief extensively cited *pre-closing* red flags, and Wilmington's appellee brief even addresses some of this evidence. Opening Br. 8–13; Wilmington Br. 23–24, 29–31. If the Court reaches the merits of Ms. Smith's inquiry notice argument, it should hold that a lender exercising ordinary prudence in Visio's shoes would have had sufficient information to warrant an investigation that would have revealed the fraud. And even if the undisputed facts do not establish inquiry notice, the record in the light most favorable to Ms. Smith raises genuine issues of material fact that preclude summary judgment.

First, contrary to Wilmington's dismissal of it as "irrelevant," Visio's loan file—together with the other materials available to Visio at the time—shows that Visio pressed to close the defrauders' loan despite numerous red flags that arose along the way. Ms. Smith already analyzed these red flags in detail. Opening Br. 42–47. Briefly once more, Visio knew that: (1) SJ&F acquired Ms. Smith's home for free; (2) SJ&F would net more than $100,000 in cash, representing the equity in her home; (3) Ms. Smith continued living there while a lease identified someone else—Moses Pernell—as the tenant; (4) SJ&F lacked an owner's title policy, which Visio required that all borrowers have; (5) SJ&F filled in a template deed by hand and misidentified itself; (6) Ms. Smith's home was involved in "pending court action"; (7) many lienholders were not informed of the property transfer; and (8) Rushmore asked about obtaining Ms. Smith's authorization.

Considered in their totality, these red flags should have "generate[d] enough uncertainty" about the state of SJ&F's title that ordinary prudence would have led Visio to inquire further. *See Clay Properties, Inc. v. Washington Post Co.*, 604 A.2d 890, 894 (D.C. 1992). Courts have found inquiry notice in cases involving significantly fewer red flags than are involved here. Opening Br. 42 n.16. And this conclusion is all the more reasonable because Visio, as a sophisticated player in the real estate industry, knew or should have known about the nationwide epidemic of foreclosure rescue scams. *See* Opening Br. 6–7, 46–47.

Wilmington does not directly respond to the "red flag" arguments in Ms. Smith's appellant brief. Instead, it repeats its inquiry-notice arguments from trial court nearly verbatim, even citing Ms. Smith's trial court briefs instead of her appellant brief. Ms. Smith's opening brief has already addressed these trial court arguments. Opening Br. 42–45.

Second, if Visio had conducted a "reasonable inquiry," it would have learned that SJ&F had obtained Ms. Smith's home by fraud. *See Clay Properties*, 604 A.2d at 894. Wilmington asserts without justification that "there was no way for [Visio] to know of [Ms.] Smith's allegations against SJ&F or the interest claimed by Smith in the Property before [Visio] made its loan to SJ&F." Wilmington Br. 27. But Wilmington ignores the many reasonable means available to Visio that Ms. Smith has already described—including, for instance, contacting Ms. Smith, seeking her authorization as her lender requested, or scanning the docket of her foreclosure action (which Visio knew existed). Opening Br. 47–48. Starting on August 24, 2018, which was several weeks before Visio's loan closing, text on the face of that docket stated that Ms. Smith was alleging a foreclosure rescue scam. Opening Br. 14–15, 48.

Third, Wilmington's cited cases are of no avail. *Associates Financial Services of America, Inc. v. District of Columbia* did not involve a foreclosure rescue scam and did not apply the inquiry-notice doctrine. 689 A.2d 1217

(D.C. 1997). Instead, the court construed a D.C. Code provision no longer in effect and irrelevant here because it addressed property distributed from an estate.[10]

Smith v. Wells Fargo Bank, which again did not involve a foreclosure rescue scam, is also distinguishable, for several reasons. 991 A.2d 20 (D.C. 2010). For one thing, it addressed the notice of a successor to the original lender. Here, while Wilmington is Visio's successor, the notice arguments below concerned only Visio. In addition, while the *Wells Fargo* court recognized only two potential red flags—nominal consideration and minor deed irregularities—this case involves several. Plus, in *Wells Fargo*, the third parties with potentially competing claims were unknown to the successor lender, whereas here (i) Visio knew about Ms. Smith and (ii) her lender, from whom Visio was seeking a payoff, expressly asked Visio about her authorization for the transfer of her home.

Chen v. Bell-Smith is likewise distinguishable. 768 F. Supp. 2d 121 (D.D.C. 2011). In *Chen*, which did involve a foreclosure rescue scam, the court analyzed and discounted only two potential red flags: the sale price, and the seller's continued possession. The sale price—68% of the appraised value—was not so "grossly inadequate" that it amounted to notice of the alleged fraud. *Id.* at 137.

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[10] This provision (D.C. Code § 20-1104(c) before it was amended in 1995) stated that if estate property is distributed to someone who then sells that property to a purchaser for value, then the purchaser "need not inquire whether a personal representative acted properly in making the distribution in kind" in order to take good title free of any claims of the estate. *Assocs. Fin. Servs.*, 689 A.2d at 1221.

Here, by contrast, the defrauders' zero-dollar upfront payment was indeed "grossly inadequate." As for possession, Ms. Smith's appellant brief already cited cases and authorities showing that her months-long, continued possession of her home was a red flag contributing to Visio's inquiry notice.[11] Opening Br. 43–44.

Fourth, it is undisputed that the defrauders acquired Ms. Smith's home for free—i.e., without paying any money upfront. Despite Wilmington's misleading mention of consideration for the transfer,[12] Wilmington does not contest that, in the Superior Court's words, "it was not consideration in the terms of a dollar sign attached to the front of it." App. 502. Therefore, particularly for a sophisticated lender like Visio, the zero-dollar transaction showed two serious red flags relevant to inquiry notice: Visio knew the defrauders paid nothing upfront, and Visio knew the loan would allow them to strip more than $100,000 in equity out of Ms. Smith's home. These were some of the many red flags that, in their totality, gave rise to Visio's inquiry notice of the foreclosure rescue scam.

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[11] Wilmington also makes arguments about what Ms. Smith knew or what she could have done in terms of contacting Visio. Wilmington Br. 28. But these arguments put the inquiry-notice doctrine on its head. The pertinent questions focus on what the party taking an interest in the property should have known, not what those earlier in the chain of title might have known or done differently.

[12] Wilmington inaccurately asserts that the trial court "rul[ed] that there was consideration for Smith's transfer of the Property to SJ&F (App. 501:24-502:5)." Wilmington Br. 9. This remark by the Superior Court was not a ruling, but instead part of a colloquy testing Ms. Smith's theory. Indeed, the court's follow-up written order says nothing about consideration. App. 510–14.

Fifth and finally, even if these uncontroverted facts taken together do not demonstrate that Visio was on inquiry notice, viewing them in the light most favorable to Ms. Smith, this Court should hold that summary judgment in Wilmington's favor on inquiry notice was inappropriate because triable issues of fact exist. For instance, to what extent, and when, did Visio monitor Ms. Smith's judicial foreclosure action? Did Visio see the Aug. 24, 2018 docket entry in that action stating that Ms. Smith was alleging fraud? Did Visio ever attempt to contact Ms. Smith? And did Visio ever investigate or simply ask whether Moses Pernell was in fact a tenant at Ms. Smith's home? Exploring these and other factual questions could better define the scope of red flags or of Visio's reasonable efforts, if any, to investigate them.

CONCLUSION

The Superior Court's judgment in Wilmington's favor should be **VACATED** and the case **REMANDED** for the Superior Court to rule on threshold, dispositive issues, or summary judgment should be **REVERSED** and the case **REMANDED** for further appropriate proceedings.[13]

[13] A correction to Ms. Smith's Rule 28(a)(2)(A) statement in her opening brief: attorney Matthew Fischer represented Selene's predecessor, Rushmore (not Capital One).

April 8, 2024

Respectfully submitted,

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I certify that a true and correct copy of the foregoing Brief was sent via this court's e-filing system, on April 8, 2024, to:

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

    - An individual's social-security number
    - Taxpayer-identification number
    - Driver's license or non-driver's' license identification card number
    - Birth date
    - The name of an individual known to be a minor
    - Financial account numbers, except that a party or nonparty making the filing may include the following:

      (1) the acronym "SS#" where the individual's social-security number would have been included;
      (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
      (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
      (4) the year of the individual's birth;
      (5) the minor's initials; and
      (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Thomas Landers	23-CV-0189
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