

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable Joe M. Crosby, Master-In-Equity

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Case No. 2011-CP-22-0180  
Appellate Case No. 2015-001125

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Kennedy Funding, Inc. as predecessor-in-interest, and Respondents,  
BNP Paribas,.....

v.

Pawleys Island North, LLC, Will Darwin Wheeler,  
Peggy Wheeler-Cribb, and J. Mars Sapp, Defendants,  
Of Whom Pawleys Island North, LLC, Will Darwin  
Wheeler and Peggy Wheeler-Cribb are Respondents, and

J. Mars Sapp is the..... Petitioner.

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PETITION FOR REHEARING

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondents Kennedy Funding, Inc. and BNP Paribas (collectively for purposes of this Petition, “Kennedy”) requests rehearing of *Kennedy Funding, Inc. as predecessor-in-interest, and BNP Paribas v. Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-Cribb, and J. Mars Sapp*, Op. No. 2015-MO-061 (S.C. Sup. Ct. filed October 14, 2015) (Toal, C.J., Pleicones, Beatty, Kittredge and Hearn, JJ., concur) (the “Opinion”). Kennedy respectfully submits that issuance of a new opinion affirming the Court of Appeals, in full, is warranted because the Court overlooked or misapprehended the issues raised to the Court of Appeals.

### **INTRODUCTION**

Rehearing is proper in this action for three reasons. First, the issue of whether the mortgage transaction between Pawley’s Island North, LLC (“Pawley’s”) and Kennedy was fraudulent was properly raised to and ruled upon by the trial court. Second, Kennedy is permitted to raise arguments to the Court of Appeals as to why the conveyance was not fraudulent as “additional sustaining grounds” for the ruling. Third, the sole question on remand has already been addressed by the Court of Appeals. Accordingly, Respondent respectfully requests that his Court grant the instant Petition for Rehearing and issue a new opinion affirming in full the Court of Appeals’ order or dismissing the petition as improvidently granted.

### **ARGUMENT**

**1. The issues addressed by the Court of Appeals in Sections II and III of its opinion were raised by Appellant Sapp to the Master.**

This Court vacated Sections II and III of the Court of Appeals’ opinion on the basis that those sections addressed arguments that were not raised to the Court of Appeals. Section II of the Court of Appeals’ opinion examined the mortgage transaction between Kennedy and Pawley’s to determine whether it was a fraudulent conveyance. Having found the Kennedy

mortgage valid, Section III of the opinion logically addressed lien priority between Sapp and Kennedy. As set forth below, the arguments addressed in both Sections II and III of the Court of Appeals' opinion were raised in Sapp's briefing in the trial court and were ruled upon by the Master, and were therefore preserved for appellate review.

In order to preserve an issue for appellate review, the issue "must have been raised to and ruled upon by the trial judge...". *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)). Sapp raised the issue of whether the mortgage transaction between Pawley's and Kennedy was fraudulent and the impact on Kennedy's mortgage in his Rule 59 Motion to Alter or Amend. (R. p. 793). Specifically, Sapp moved to alter or amend the Master's order on, *inter alia*, the ground that "[t]he Court failed to address Kennedy Funding's participation in the fraudulent conveyance by [Wheeler] and the impact of the participation on Kennedy Funding's alleged mortgage." (R. p. 793). At trial, Sapp argued that Kennedy knew of the alleged fraudulent conveyance of the property from Wheeler to Pawley's, and that Kennedy's mortgage was not supported by valuable consideration on the basis that Kennedy only loaned 36% of the value of the property in exchange for the mortgage. (R. p. 695, lines 7-15). As a result, Sapp argued, his judgment lien had priority over Kennedy's mortgage. (R. p. 695, lines 8:16-20). The Master denied Sapp's motion to alter or amend at trial, (R. p. 696, lines 10-13), and ruled in his June 7, 2013 Order that the mortgage transaction between Pawley's and Kennedy was not fraudulent. (R. pp. 10-11, ¶¶ 29-31). Having been raised by Sapp and addressed by the Master, the issue of whether the mortgage transaction between Pawley's and Kennedy was fraudulent and the impact on Kennedy's mortgage was therefore preserved for appellate review.

2. **The issues addressed by the Court of Appeals in Sections II and III of its opinion were raised by Kennedy to the Court of Appeals and constitute additional sustaining grounds upon which the Court of Appeals properly relied.**

Furthermore, the Court of Appeals is not limited to arguments raised on appeal by the appellant in deciding a case. Pursuant to Rule 208(b)(2), SCACR, the Respondent's brief "may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)." Rule 220(c), SCACR, then authorizes the appellate court to "affirm any ruling, order, decision or judgment upon any grounds appearing in the Record on Appeal." In *I'On, L.L.C. v. Town of Mt. Pleasant*, this Court clarified the law regarding additional sustaining grounds, and noted that "[i]n revising the appellate court rules, we intended to abandon restrictions surrounding additional sustaining grounds and allow a more flexible process." 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000). This Court went on to explain that,

[u]nder the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions.

*Id.* at 419, 526 S.E.2d at 723.

As the prevailing party in the lower court, Kennedy was not required to raise every "additional sustaining ground" to the trial court and obtain a ruling on those grounds in order to preserve an issue for appellate review. *Id.* at 420, 526 S.E.2d at 723. So long as the basis for those additional sustaining grounds appears in the record on appeal, the respondent may raise

those arguments to the Court of Appeals. *Id.* (“The basis for respondent’s additional sustaining grounds must appear in the record on appeal, but other requirements contained in former rules and pre-1990 precedent no longer apply.”). “This approach is in keeping with the view, as expressed in Rule 220(c), SCACR, that an appellate court may affirm the lower court’s judgment for any reason appearing in the record on appeal.” *Id.* at 420-21, 526 S.E.2d at 723. Finally, this Court opined in *I’On, L.L.C.*, that “[a]n affirmance promotes judicial economy and finality in private and public affairs, which are important public policies.” *Id.* at 421, 526 S.E.2d at 723-24.

In its brief to the Court of Appeals, Kennedy responded to and raised arguments relative to the legitimacy of its mortgage transaction and the priority of liens.<sup>1</sup> Specifically, Kennedy argued in Section I of its Initial Brief that the mortgage transaction did not violate the Statute of Elizabeth on the basis that it was supported by valuable consideration and that Kennedy had no notice of any fraudulent activity. (Respondent’s Initial Brief, pp. 11-17). Additionally, Section III of Kennedy’s Initial Brief addressed lien priorities and the recording statute and argued that, absent any evidence that Kennedy’s mortgage was fraudulently obtained, Kennedy’s mortgage was superior to Sapp’s lien. (Respondent’s Initial Brief, pp. 25-27).

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<sup>1</sup> Sapp also raised these issues in his briefing to the Court of Appeals. Section “C” of Sapp’s Initial Brief challenged the Master’s finding that the mortgage transaction between Kennedy and Pawley’s was not fraudulent. (Appellant’s Initial Brief, pp. 23-26). Sapp argued the Kennedy’s mortgage should be set aside as a fraudulent conveyance, in part, because Kennedy knowingly participated in a fraud and its mortgage to Pawley’s was not supported by consideration. (Appellant’s Initial Brief, pp. 23-26). Sapp alternatively argued, even if the Kennedy mortgage was supported by consideration, the consideration was “grossly inadequate” and, therefore, the Kennedy mortgage violated the Statute of Elizabeth. (Appellant’s Initial Brief, pp. 26-27). Finally, Sapp argued that, even if the Kennedy mortgage were not set aside as a fraudulent conveyance, it should be subordinated to Sapp’s lien. (Appellant’s Initial Brief, p. 27).

Moreover, in section “D” of Sapp’s Initial Reply Brief, he argued at length about the applicability of the recording statute on the competing liens. In Section “D” of his reply brief, Sapp continues to argue that the Kennedy mortgage is independently void as a fraudulent conveyance because the transaction was not “bona fide” (Appellant’s Initial Reply Brief, p. 24). Specifically, Sapp argued that Kennedy did not take the mortgage at a fair price and “the consideration was grossly inadequate.”

Even if these arguments were not raised to and ruled upon by the trial court, they would be additional sustaining grounds upon which the Court of Appeals was authorized to affirm the lower court's ruling. Kennedy presented these arguments to the Court of Appeals because they were based on the same issues the Master addressed in his final Order and were the same issues the parties litigated below in Sapp's motion to reconsider and at trial. Furthermore, Sapp's Motion to Alter or Amend, (R. pp. 791-799), the February 11, 2014 trial transcript, (R. pp. 688-740), and the Master's Order and Judgment, (R. pp. 1-17), all appear in the record on appeal. Thus, in accordance with Rules 208(b)(2) and 220(c), SCACR, Kennedy was permitted to raise any additional arguments that its mortgage was not fraudulent, and the Court of Appeals was permitted to rule on those additional grounds.

**3. The Court of Appeals has already answered the question posed by this Court.**

Finally, in Sections II and III of its opinion, the Court of Appeals already ruled on the question this Court remanded. In remanding the case, this Court asked the Court of Appeals to answer whether "the fraudulent conveyance between Will Darwin Wheeler and Pawley's Island North, LLC, rendered the mortgage void and, therefore, petitioner's lien is superior to Kennedy Funding, Inc, and BNP Paribas' lien." In Section II of its opinion, the Court of Appeals addressed whether Kennedy was a good faith purchase for value without notice – that is, whether Kennedy's mortgage should be rendered void on the basis that it knew of and participated in the fraudulent conveyance between Wheeler and Pawley's. The Court of Appeals decided that Kennedy was a good faith purchaser for value without notice, and therefore its mortgage was not void.

Next, in Section III of its opinion, entitled "Voiding of Mortgage," the Court of Appeals addressed whether Kennedy's mortgage should be set aside, which it refers to as "voiding" in the

title of Section III, or declared subordinate to Sapp's lien. The Court of Appeals acknowledged Sapp's argument for the mortgage to be set aside ("voided"); however, having found that Kennedy was a good faith purchaser for value without notice and thus ruling that Kennedy's mortgage was not void in Section II, the Court of Appeals moved on to whether Kennedy's mortgage should be subordinate to Sapp's lien.

The Court of Appeals then expressly stated that it disagreed with Sapp's argument for setting aside ("voiding") the mortgage. After reciting the arguments of both parties and properly relying on *Atlas Supply Co. v. Davis*, 273 S.C. 392, 256 S.E.2d 859 (1979), the Court of Appeals upheld the mortgage and found the Kennedy lien superior. In upholding the mortgage, the Court of Appeals clearly held that it was not void as a result of the Wheeler to Pawley's transfer. In sum, the Court of Appeals has already answered the question posed and this Court should affirm the Court of Appeals' order in its entirety.

### **CONCLUSION**

For the reasons set forth above, Kennedy respectfully requests that this Court grant the instant Petition for Rehearing and affirm the Court of Appeals' Opinion in full or dismissing the petition as improvidently granted.

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October 29, 2015

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**PROOF OF SERVICE**

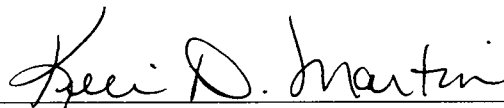
I the undersigned Administrative Assistant of the law firm of Nelson Mullins Riley & Scarborough, LLP, attorneys for Kennedy Funding, Inc. as predecessor-in-interest, and BNP Paribas, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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