THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Joe M. Crosby
Master-in-Equity

Appellate Case No. 2023-000017

South Carolina Board of Financial Institutions ..... Appellant,

v.

CDM Corporation, Inc., and Guardian Fiduciary Services, LLC ..... Respondents.

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITION FOR REHEARING 1

I The Opinion contradicts well-established rules of statutory construction. 2

II. The consequences of the Court's decision will be calamitous for vulnerable South Carolinians. 6

III. The Legislature defines the boundaries of an agency's authority, not the Judiciary and not an agency itself. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Ballard v. Newberry County, 432 S.C. 526, 854 S.E.2d 848 (Ct. App. 2021) 4
Bennett v. Estate of King, 436 S.C. 614, 875 S.E.2d 46 (2022) 9
Brown v. Bi-Lo, Inc., 354 S.C. 436, 581 S.E.2d 836 (2003) 8
Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) 4, 5
Joseph v. S.C. LLR, 417 S.C. 436, 790 S.E.2d 763 (2016) 8
Med. Soc'y v. MUSC, 334 S.C. 270, 513 S.E.2d 352 (1999) 7
Rainey v. Hailey, 404 S.C. 320, 745 S.E.2d 81 (2013) 5
Smith v. S.C. Ins. Co., 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002) 3

Statutes

12 U.S.C. § 92a 3
26 U.S.C. § 584 5
S.C. Code Ann. § 34-21-10 ..... 2, 3
S.C. Code Ann. § 34-21-20 4
S.C. Code Ann. § 62-1-112 8

Other Authorities

1996 S.C. AG LEXIS 25 (Feb. 9, 1996) 2

Rules

Rule 221(a), SCACR 1

PETITION FOR REHEARING

Rule 221(a), SCACR, provides that a petition for rehearing should be granted when the Court has "overlooked or misapprehended" relevant information or law. Respectfully, that is the case here. The Court's reversal of the trial court's plain-language reading of "trust business" in South Carolina Code § 34-21-10 conflicts with how the Board of Financial Institutions and the Attorney General have construed that phrase for decades. It conflicts with well-settled rules for statutory construction. And, critically, the Court's opinion has created immediate turmoil within the state's Probate Court about appointing Respondents to serve as non-trustee fiduciaries for some of South Carolina's most vulnerable citizens. This is an important case that should be reconsidered.

The Probate Court counts on Respondents CDM Corporation and Guardian Fiduciary Services and companies like them to serve when needed to protect incapacitated individuals. But the Court's opinion eliminates these providers as an essential option—even though they fill a gap in the market that exists because these incapacitated citizens have no one else available to provide non-trustee fiduciary services—when the Probate Court is searching for someone to help.

As a telltale sign that the Court's analysis overreads "trust business" to reach Respondents, the Board of Financial Institutions *doesn't even have an option for companies like Respondents to apply to be a "trust business."* The Board's "Applications Manual"—which was last updated on June 2, 2025, after the Court issued its opinion—says that only Banks, Credit Unions, Savings Associations, and Savings Banks can apply for "trust powers." State of South Carolina Board of Financial Institutions, *Applications Manual* at 6 ("Trust Powers"), *available at* Applications Manual 6.2.2025.pdf And it recognizes that Section 34-21-10 applies to Banks or "Out-of-State Non-Depository Trust Companies," not to providers like Respondents that do not provide trust services. *Id.* at 6–7. Respectfully, the Court's opinion should be revisited.

I The Opinion contradicts well-established rules of statutory construction.

The Court's Order holds that companies that provide ***any*** fiduciary services fall within the term "trust business," a statutory phrase that appears in the state's Bank Code as part of an overall statutory scheme which is aimed exclusively at regulating companies that invest in "common trust funds" (which Respondents indisputably do not). In other words, following the Court's opinion, a company that serves as a fiduciary in any capacity, but is not a trustee and does not invest client funds in a "common trust fund," is nevertheless a "trust business" now regulated by the Board of Financial Institutions as part of its limited jurisdiction to oversee companies that invest in "common trust funds."

Respectfully, this cannot be what the General Assembly meant when it revised Section 34-21-10 in 1972, and before this case, no one ever suggested that it did. The circuit court reviewed the simple two-word phrase "trust business" and held that it means exactly what the words say: "a business involved with the administration of trusts." (R. p. 4; Circuit Court's Order at 5.) That matched the Board's historic understanding of its authority. (R. p. 199; Mantell Aff. ¶ 12.) It matched what the Attorney General historically advised the public. (R. p. 219; 1996 S.C. AG LEXIS 25, at *7 (Feb. 9, 1996).) And it matched the overall structure of Title 21 of the State Bank Code, which is aimed at regulating companies that invest in "common trust funds."

Instead of giving the words "trust business" their plain-language, long-established, and whole-of-the-statute meaning, the Court's analysis isolated the last sentence of Section 34-21-10 from the rest of the entire statutory scheme and placed disproportionate and out-of-context weight on that single sentence. (Op. at 5–8.) That sentence says only that the statutory scheme regulating companies that invest in common trust funds and a statutory provision grandfathering in companies engaged in "trust business" as of January 1, 1972, do not somehow create an impediment for "a

natural person or a national bank association having a principal place of business in this State from qualifying and acting as trustee, executor, administrator, guardian, committee or in any other fiduciary capacity." S.C. Code Ann. § 34-21-10.

This analysis runs contrary to several rules of statutory construction. First, words and phrases within a statute must not be finely sliced, but instead must be read "as a whole and in a manner consistent and in harmony with its purpose." *Smith v. S.C. Ins. Co*., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002). But by reaching its holding based on the final sentence of Section 34-21-10, the Court improperly isolated the last sentence of Section 34-21-10 from the rest of that same section (which limits the Board's authority to companies involved in a "trust business"), from the rest of Chapter 21 (which makes clear that the Board's jurisdiction is designed to reach companies that invest in "common trust funds"), and from the rest of the South Carolina Code as a whole (which repeatedly distinguishes between "trustees" and all other types of fiduciaries).

Second, the Court respectfully appears to misunderstand the purpose of Section 34-21-10's final sentence. It was added through a 1972 amendment to Section 34-21-10, and it was not designed to expand the definition of "trust business" to all types of fiduciaries; instead, it served to harmonize South Carolina law with the federal legislation passed before it, as Respondents explained during oral argument in this matter. The last sentence of Section 34-21-10 tracks the language of 12 U.S.C. § 92a, which provides that national banks have the same fiduciary authority allowed at the state and local level, which can include trustee, executor, administrator, guardian, and "any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act." 12 U.S.C. § 92a. The final sentence of Section 34-21-10 was never intended to expand the meaning of "trust business" or the Board's jurisdiction, but rather harmonizes state law with federal law to provide that nothing

within Section 34-21-10 is intended to contradict 12 U.S.C. § 92a. And because this final sentence serves the function of melding state law with federal law, understanding this sentence in its proper context does not render it "surplusage," as the Court's opinion suggests. (Op. at 8.)

Third, the very sentence upon which the Court based its analysis distinguishes "trustee" from all other types of fiduciary roles. But the only fiduciary role over which the General Assembly gave the Bank Board jurisdiction is for "trust business." When a statute specifically includes one item, the statute necessarily excludes all other items that the Legislature did not include. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" (quoting Black's Law Dictionary 602 (7th ed. 1999))). Likewise, when a statute uses only one word—here, "trust"—a court cannot rewrite the statute to add words—here, "any institutional fiduciary, whether serving as a trustee, personal representative, guardian, conservator, or agent" (Op. at 11). *See, e.g.*, *Ballard v. Newberry County*, 432 S.C. 526, 532, 854 S.E.2d 848, 851 (Ct. App. 2021) ("We are not at liberty to add to the statutory law or subtract from it.").

Fourth, there is no way to harmonize the Court's conclusion with other parts of the Bank Code. Consider South Carolina Code § 34-21-20, which authorizes the Board to examine and regulate "trust companies, and fiduciary corporations authorized to conduct trust business." Through Section 34-21-20, the General Assembly explicitly recognized that there are some "fiduciary corporations" that are not engaged in "trust business"—like Respondents—and it did not include them within the scope of the Board's authority. The Court's opinion wipes out this written-into-the-statute distinction created by the General Assembly.

Finally, the Court looks to Article 3 within Chapter 21 to reinforce its conclusion, but that article fully supports the Respondents' overarching point: the Bank Board's regulatory authority over "trust business" is limited to companies who invest in "common trust funds." Common trust funds, as set forth in Article 3 (and its federal corollary 26 U.S.C. § 584), are creatures of statute. The purpose of Article 3 is to regulate banks and "trust institutions" investing ***trust money*** in a ***common trust fund***—which has nothing to do with Respondents or the fiduciary services they provide. In other words, the definitions within Article 3 are simply inapplicable to institutions, like Respondents, that do not invest trust money into a common trust fund.

* * * * *

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Rainey v. Hailey*, 404 S.C. 320, 324, 745 S.E.2d 81, 82 (2013). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and a court has no right to impose another meaning. *See Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute").

The General Assembly has vested the Bank Board with regulatory authority over companies engaged in "trust business." Respondents are not engaged in "trust business." They provide fiduciary services to elderly, disabled, or otherwise compromised individuals of South Carolina to ensure their physical, emotional, and medical needs are protected, specifically in situations where there is no one else to serve in that role (issues about which the Bank Board has absolutely no expertise or experience). If the General Assembly wants to expand that regulatory authority to "fiduciary business," then it is free to do so. And there is no doubt the General Assembly repeatedly distinguishes between "trusts" and other types of fiduciaries: it lists different

non-trustee fiduciaries in Section 34-21-10; it acknowledges that some "fiduciary corporations" are not engaged in "trust business" in Section 34-21-20; and it specifically carves all other types of fiduciaries out of the definition of "trust" elsewhere in state law, such as Section 62-1-201(49).

At present, the Legislature has given the Bank Board authority over only companies operating in a "trust business," which the General Assembly explained to be companies investing in a common trust fund. The Court's opinion expanding "trust business" beyond its statutory bounds should be reconsidered accordingly.

II. The consequences of the Court's decision will be calamitous for vulnerable South Carolinians.

The Court's ruling in this matter will have—and has already begun to have—adverse ramifications within the Probate Court. The Court's decision eliminates a key tool of the Probate Court to appoint fiduciary companies to serve South Carolinians and prevents that court from utilizing companies like Respondents to serve as non-trustee fiduciaries to vulnerable persons with limited financial means, persons suffering from physical or mental disabilities, or for those with no relative or family member that is willing, capable or qualified to serve.

With this order, the Court reopens a critical gap, leaving South Carolinians in need of help, but with no one willing or able to provide it. The Court's expansive definition of "trust business" forecloses fiduciary companies' ability to serve as a fiduciary unless approved by and under the supervision of the Bank Board—a state agency that is unqualified and unequipped to regulate the fiduciary services provided by Respondents, and whose own "applications manual" doesn't even contemplate Respondents and companies like them applying to be a "trust business."[1]

[1] In its Order, the Court also notes Respondents' mention of the Board's $15,000 application fee and annual $19,600 "supervisory fee." Despite the Court's contention, Respondents do not reference these fees to complain of the expense (though such a complaint would be legitimate from small businesses like Respondents), but rather to highlight the Board's apparent motivation in

In the agency's own words: "The mission of the Board of Financial Institutions is to protect the citizens of South Carolina by preserving a sound financial industry through effective and efficient regulatory oversight of *financial institutions* in order to strengthen consumer confidence, assure reliable access to *financial services*, and encourage economic growth." Board of Financial Institutions Mission Statement (emphasis added). This mission has nothing to do with helping wards, or the vulnerable, or the incapacitated, but the Bank Board's jurisdictional overreach and the Court's opinion endorsing it, have handicapped the Probate Court's ability to serve those citizens who most desperately need the Respondents' services.

III. The Legislature defines the boundaries of an agency's authority, not the Judiciary and not an agency itself.

In support of its adoption of the Board's definition of "trust business" to encompass all fiduciary services, the Court cites to "a nationwide compact between states" joined by the Board in June 2018 that expansively defines "trust business." But the Bank Board's decision to join this nationwide compact—which was not endorsed by the General Assembly—has no bearing on the powers delegated by the General Assembly to the agency.

Because the Board is created by the General Assembly, it only has the powers the Legislature gives to it. *See, e.g.*, *Med. Soc'y v. MUSC*, 334 S.C. 270, 275, 513 S.E.2d 352, 355 (1999) (holding that the MUSC Board of Trustees did not have "the power to dispose of real or personal property" because "[a]n agency created by statute has only the authority granted it by the legislature," and there was no such authority expressly stated in the State Code). The Court is

seeking to expand its jurisdiction. Grabbing additional fees provides explanation as to (1) why the Board seeks expand its regulatory authority over fiduciaries completely uninvolved in financial services, and (2) why the Board inexplicably changed its prior position that non-trustee fiduciaries were not "trust businesses" regulable under Section 34-21-10.

"bound to strictly construe the terms of the statute and to rely on the General Assembly to amend the statute where necessary." *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 441, 581 S.E.2d 836, 838 (2003).

A compact entered by the Board alone has zero impact on its scope of authority and regulatory power. Justice Kittredge was clear in his warning against this exact type of jurisdiction-expansion: "In South Carolina, to preserve some semblance of the separation of powers we once held sacred, an administrative agency may not make law without legislative oversight and approval." *Joseph v. S.C. LLR*, 417 S.C. 436, 461, 790 S.E.2d 763, 777 (2016) (Kittredge, J., concurring). Respectfully, the Court was mistaken in considering this executive-branch compact as support to confirm the Board's expansion of regulatory authority beyond "trust businesses," as granted by the General Assembly.

Further, the Court appears to have misconstrued the Respondents' position regarding the coexistence of the Probate Court and the Board. Respondents have never contended that matters regulated by the Probate Court cannot also fall within the Board's authority. Respondents do, however, dispute the Board's overarching theme of "If not us, then who?" when it comes to regulating non-trustee fiduciaries.

The Board has argued that its unilateral expansion of its oversight from "trust business" to "all fiduciary business" must be justified because there is no other source of oversight of non-trustee fiduciaries, but this is false. It is simply inaccurate to suggest that Respondents or anyone else performing fiduciary services unrelated to trusts can slip through the cracks, unregulated. When the Probate Court appoints Respondents or anyone else to serve as a guardian, or a conservator, or a personal representative, it retains jurisdiction over that appointee and has full authority to monitor and penalize the appointee should it breach its fiduciary responsibilities. *See* S.C. Code Ann. § 62-1-112 ("The inherent power of the court to impose penalties for contempt

extends to all filing requirements, proceedings, judgments, and orders of the court."). Moreover, the common law recognizes a private cause of action for breaching a fiduciary duty. *See generally Bennett v. Estate of King*, 436 S.C. 614, 626–27, 875 S.E.2d 46, 52–53 (2022) (analyzing a claim for breach of fiduciary duty that arose in the context of a personal representative's conduct after being appointed by the Probate Court, and listing numerous cases where a breach had been affirmed).

The Respondents did not contend that the Bank Board and the Probate Court can never have concurrent oversight, and the Court appears to have misunderstood this aspect of the Respondents' argument. Whether the Bank Board and the Probate Court can have concurrent jurisdiction over non-trustee fiduciaries is a decision is for the Legislature to make, but there is no basis for judicially expanding the Board's regulatory power beyond "trust businesses" investing in a "common trust fund," as currently provided by the General Assembly. The Court should reconsider its improper expansion of the narrow authority given to this state agency.

CONCLUSION

The Court's decision to construe the phrase "trust business" to include every conceivable type of fiduciary, irrespective of whether a "trust" is actually involved, is inconsistent with the plain language of South Carolina Code § 34-21-10, is inconsistent with the Board's fundamental purpose of regulating banks and is inconsistent with every applicable norm of statutory construction. Moreover, the ramifications of such a decision have imperiled vulnerable South Carolinians who depend on the services offered by Respondents and other businesses like it. Accordingly, Respondents respectfully request the Court grant their petition for rehearing and reinstate the circuit court's straightforward, plain-language construction of the phrase "trust business."

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Respondents, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by emailing a copy of the same to the following address(es):

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