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.

RESPONDENTS' BRIEF.

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July 7, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

South Carolina Code § 34-21-10 gives the South Carolina Board of Financial Institutions authority to regulate companies engaged in a "trust business." The circuit court held that this two-word statutory phrase meant "a business involved with the administration of trusts," and that it did not expand the Board's jurisdiction to regulating other types of fiduciaries, such as guardians and conservators, who are not administering trusts. (R. p. 4; Order at 5.) Did the circuit court err in its reading of the phrase "trust business"?

STATEMENT OF THE CASE

The South Carolina Probate Code contains a comprehensive set of laws for administering and protecting the "affairs of decedents, missing persons, protected persons, minors, and incapacitated persons." S.C. Code Ann. § 62-1-102(b)(1). The General Assembly also established a specialized court—the Probate Court—to exercise "exclusive original jurisdiction over all subject matter" related to issues governed by the Probate Code. *Id.* § 62-1-302(a).

Probate courts have broad powers to appoint fiduciaries to assist and protect those persons who fall within their jurisdiction, including, for example, "guardians," *id.* § 62-1-201(15); "conservators," *id.* § 62-1-201(6); and "personal representatives," *id.* § 62-1-201(33). But often, the people needing the protections afforded by the Probate Code do not have a family member or friend available with the resources, skills, or even willingness to serve in a court-appointed fiduciary capacity.

Respondents CDM Corporation, Inc., and Guardian Fiduciary Services, LLC, fill this critical gap. They provide a suite of fiduciary services to elderly, disabled, or otherwise compromised individuals of South Carolina: guardianship, conservatorship, personal representative, and power-of-attorney services. (R. p. 199; Mantell Aff. ¶ 4.) CDM and Guardian are often called when vulnerable individuals—including, for instance, a patient in a coma, a severely drug-addicted minor, or a mentally-ill person—have no one else to protect their interests. (R. p. 199; *id*. at ¶¶ 8–9.) Nearly all of CDM and Guardian's clients are referred by licensed South Carolina attorneys, and the companies are then formally appointed to serve by judges of the South Carolina Probate Court. (R. p. 199; *id*. at ¶ 5.)

Because of the critical role fiduciaries play under the Probate Code, South Carolina's probate judges routinely utilize companies like CDM and Guardian to serve as non-trustee

fiduciaries for "vulnerable persons with limited financial means, persons suffering from physical or mental disabilities, or for those persons whom have no relative or family member that is willing, capable or qualified to serve." (R. p. 209; Judge Carter Aff. ¶ 12.)

In addition to these fiduciary services provided to those within the Probate Court's exclusive original jurisdiction, CDM had also been appointed to serve as trustee for a handful of trusts. As part of its authority to supervise "banks and building and loan associations," S.C. Code Ann. § 34-1-60, the South Carolina Board of Financial Institutions has authority to regulate companies that operate as a "trust business," *id.* § 34-21-10. Through its history, CDM had been assured by the Board that these trustee appointments did not render CDM regulable as a "trust business" by the Board, as CDM was "not actively managing investments." (R. p. 199; Mantell Aff. ¶ 12.)

But at some point, and for reasons unknown, the Board changed its position on this issue and sought to regulate CDM (and Guardian, too) pursuant to the agency's authority over banks that operate a "trust business."

On October 26, 2020, the Board filed this action in circuit court in Georgetown County, in which it sought a declaration that CDM and Guardian's non-trustee fiduciary services rendered them an "unlawful trust business," along with an injunction prohibiting them from "serving as conservator, guardian, attorney-in-fact in accordance with a power of attorney, personal representative or executor, and trustee of a trust, as well as holding themselves out as providing these services." (R. pp. 15–23; Compl. ¶¶ 24–39.)

CDM and Guardian counterclaimed, seeking a declaratory judgment that the statutory term "trust business" means exactly that—that is, a "business" involved in the administration of "trusts"—and that their service in other non-trustee fiduciary roles did not constitute "trust business" subject to the Board's authority. (R. pp. 24–35; Ans. & Countercl. ¶¶ 25–37).

On consent motion by the parties, Judge Culbertson referred the case to Judge Crosby, the Georgetown County Master-in-Equity, for resolution. (R. p. 1; Consent Order of Reference). On August 22, 2022, the parties filed competing motions for summary judgment. (R. pp. 77–181; Defendants' Motion for Summary Judgment and Accompanying Exhibits; R. pp. 42–76; Board's Motion for Summary Judgment and Accompanying Exhibits.)

Judge Crosby decided the motions without a hearing, finding that the statute means precisely what CDM and Guardian argued. Judge Crosby held that the term "trust business" regulated by the Board must involve administration of a "trust," and that CDM and Guardian's service as guardian, conservator, personal representative, executor, or attorney-in-fact did not constitute a "trust business." (R. pp. 4–12; Summary Judgment Order at 4–7.) Judge Crosby also held that CDM's prior service as a trustee for a handful of trusts would have fallen within the Board's jurisdiction over a "trust business," and enjoined CDM from further service as a trustee without first following the statutory procedures for a "trust business." (R. p. 4; *id.* at 6.)[1]

The Board sought reconsideration of Judge Crosby's decision on November 14, 2022. (R. p. 261; Motion for Partial Reconsideration.) Judge Crosby denied that motion on December 20, 2022. (R. p. 13; Order Denying Plaintiff's Motion for Partial Reconsideration.) This appeal followed.

STANDARD OF REVIEW

This appeal involves a question of statutory interpretation, which is reviewed *de novo*. *Books-A-Million, Inc. v. S.C. DOR*, 437 S.C. 640, 642, 880 S.E.2d 476, 477 (2022).

[1] This part of Judge Crosby's summary judgment ruling has not been appealed and is not before the Court. CDM acknowledged during the proceedings below that it was divesting itself of the small handful of trusts for which it had been tapped to serve as trustee. (R. p. 199; Mantell Aff. ¶ 14.)

ARGUMENT

I. The circuit court correctly held that the statutory phrase "trust business" means a "business" involving a "trust," not other businesses that involve services unrelated to administering trusts.

This case begins and ends with the plain language of the statute limiting the Board's authority to regulate certain businesses. The South Carolina Banking Code provides that "[n]o corporation, partnership, or other person shall conduct a ***trust business*** in this State without first making a written application to the State Board of Bank Control and receiving written approval from the Board." S.C. Code Ann. § 34-21-10 (emphasis added).

"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 v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute").

This ironclad rule of law controls here. Judge Crosby held that the term "trust business" means exactly what the words say: "a business involved with the administration of trusts." (R. p. 4; Order at 5.) And because CDM no longer serves as a "trustee" for "trusts" (and Guardian never did), the Respondents are beyond the scope of the Board's limited authority to regulate a "trust business." The circuit court's ruling is unimpeachable based on the statute's own words, and it should be readily affirmed.

II. Every tool of construction reinforces the circuit court's reading of the statutory phrase "trust business."

The Court should not resort to anything beyond the statute's plain language unless it finds that there is something unclear about the words "trust business." *See City of Camden v. Brassell*,

326 S.C. 556, 560, 486 S.E.2d 492, 494–95 (Ct. App. 1997) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning."). But if the Court decides it should test the circuit court's holding against norms of statutory construction, every principle reinforces Judge Crosby's reading of the phrase "trust business."

Usual and Customary Meaning. The Board makes much of the fact that the phrase "trust business" is not defined by statute. (*E.g.*, Board's Br. at 11, 16.) The fact that the Legislature did not include a definition of a basic phrase does not somehow render it unclear.

Where the General Assembly does not define a statutory term, courts must interpret the term according to its "usual and customary meaning." *Adoptive Parents v. Biological Parents*, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994). Here, the "usual and customary" definition of a "trust business" is a business involved with the administration of trusts, just as Judge Crosby held below; this is hornbook law. *See, e.g.*, 9 C.J.S. *Banks and Banking* § 650 ("It has been said that the primary and ordinary conception of a ***trust company*** is a corporation or institution organized to ***take and administer trusts***, rather than carry on the ordinary functions of banking.") (emphasis added).

This understanding is even confirmed by the Board's own citations. For instance, on Page 17 of its brief, the Board cites a 1996 Attorney General's opinion as suggesting that "trust business" means something beyond a business that administers trusts. Not so.

That opinion—authored by the current South Carolina Solicitor General—concludes that a "trust business" means "taking, accepting, administering and executing ***trusts***," not simply taking on any fiduciary responsibility. (R. p. 219; 1996 S.C. AG LEXIS 25, at *7 (Feb. 9, 1996) (emphasis added).) That opinion surveyed courts nationally that have reached this exact same understanding. *See id.* at *4–5 (citing *Carney v. Sam Houston Underwriters*, 272 S.W.2d 942, 946 (Tex. Civ. App.

1954), for the proposition that "the ordinary conception of a ***trust company*** as being one authorized to ***take and administer trusts***") (emphasis added); *id.* at *5 ("In *Goss and Hamlyn Howe v. State*, 285 P.2d 428, 431 (Okla. 1955), the Court cited Webster's *New International Dictionary* (2d ed. Unabridged) defining a ***'trust company'*** as 'any corporation found for the purpose of acting as ***trustee***.'") (emphasis added). Accordingly, the Board's own authorities confirm that the customary understanding of the phrase "trust business" is precisely as Judge Crosby held below.

Cannot Add to a Statute. The statutory phrase controlling this case is "trust business." It is a simple two-word phrase that, as noted above, traditionally means being in the business of administering trusts. In opposing this straightforward understanding of the term, the Board argues that the Court should construe it expansively: "'trust business' refers to the undertaking of a broad range of fiduciary activities, including trustee, as well as other fiduciary roles such as personal representative, guardian, conservator, and agent pursuant to a power of attorney." (Board's Br. at 12; *see also id.* at 17 (arguing that "trust business" means not only "trustee," but also "conservator, guardian, personal representative, and agent").) In short, the Board urges the Court to read the word "trust" to mean "trustee ***and*** personal representative ***and*** guardian ***and*** conservator ***and*** agent pursuant to a power of attorney ***and*** other fiduciary roles."

Respectfully, a court has no authority to add to or alter the plain language of a statute. *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."). The General Assembly did not vest the Board with jurisdiction to govern "personal representatives" and "guardians" and "conservators" and "agents pursuant to a power of attorney" and "other fiduciary roles." Instead, it gave the Board limited authority to regulate companies who administer "trusts," and Judge Crosby rightly held that the statute means nothing more than what the Legislature actually said.

Inclusion of "Trusts" Means Exclusion of Other Types of Fiduciaries. As a corollary, if the General Assembly had intended to give the Board broad authority to regulate any entity that provides any possible fiduciary services, it certainly could have said so. In fact, it has legislated heavily regarding other types of fiduciaries throughout the State Code. *See, e.g.*, S.C. Code Ann. §§ 62-5-201 to -310, *id.* §§ 62-5-701 to -716 (addressing guardians); *id.* §§ 62-5-401 to –431 (addressing conservators); *id.* §§ 62-5-501 to –518 (addressing agents acting through a healthcare power of attorney).

But the General Assembly did not identify any type of fiduciary beyond "trusts" when shaping the scope of the Board's authority. When a statute specifically includes one item, courts construe the law to necessarily exclude all other items that the legislature did not include. *See Hodges*, 341 S.C. at 86, 533 S.E.2d at 582 ("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))).

This understanding is reinforced by the very next section of the State Banking Code. While Section 34-21-10 directs companies engaged in a "trust business" to register with the Board, Section 34-21-20 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 "fiduciary corporations" who are not engaged in "trust business," and it did not include them within the scope of the Board's authority.

And this understanding is reinforced by the Probate Code as well, where the Legislature specifically distinguished among the various types of fiduciaries. *See* S.C. Code Ann. § 62-1-201(49) (defining "trust" for purposes of the Probate Code and providing that the term "excludes"

certain categories of fiduciary, including *inter alia* conservatorships, personal representatives, certain custodial arrangements, "and any arrangement under which a person is nominee or escrowee for another").

In short, if the Legislature intended for the Board to regulate fiduciaries who are not administering trusts, it could have, and would have, expressly delegated that power. In fact, Pages 19 and 20 of the Board's brief list several states where other legislatures passed laws that give bank regulators authority far beyond regulating only "trusts." But the South Carolina General Assembly did not, and—as a matter of law—it expressly excluded fiduciary companies and other non-fiduciary roles from the scope of the Board's authority under Section 34-21-10.

Agencies are Limited as Creatures of Statute. Further confirming Judge Crosby's plain-language reading of the phrase "trust business" is the fact that this statute is a limitation on a state agency's authority. 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). Accordingly, courts "are 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).

This principle applies with full force here. The Board was created to "supervise all ***banks and building and loan associations*** and provide regulations and instructions for the direction, control and protection of all such institutions, the conservation of their assets and the liquidation thereof, as may be necessary or proper to effectuate the purposes of this Title." S.C. Code Ann.

§ 34-1-60 (emphasis added). CDM and Guardian are certainly not "banks" or "building and loan associations." If the Board's authority is truly intended to reach beyond these types of businesses, and if the Board is truly supposed to have the wide jurisdiction that it claims in this case, then the General Assembly—not the Board, and not the Judiciary—must be the one to make that clear.

In support of its overreaching position, the Board dedicates an entire section of its opening brief—Section II—to arguing that courts are required to defer to an agency's "interpretation" of a statute. That vastly overstates the law. Deference may be given when a statute is silent, but not when, as here, the agency's position is squarely contrary to the statute's plain language. *See, e.g.*, *Jack's Custom Cycles, Inc. v. S.C. DOR*, Op. No. 5970 (S.C. Ct. App. Apr. 26, 2023) (Howard Adv.Sh. No. 16, at 33) ("While this court typically defers to the agency's interpretation of an applicable statute, we will reject its interpretation where the plain language of the statute is contrary to the agency's interpretation.").

In a recent concurring opinion, Justice Kittredge gave a stern warning against blindly accepting the type of jurisdiction-expanding argument the Board presents here: "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). He further observed: "'[S]urely one thing no agency can do is apply the wrong law to citizens who come before it, especially when the right law would appear to support the citizen and not the agency. . . . An agency decision . . . that loses track of its own controlling regulations and applies the wrong rules in order to penalize private citizens can never stand." *Id*. at 461, 790 S.E.2d at 776 (quoting *Caring Hearts Pers. Home Servs., Inc. v. Burwell,* 824 F.3d 968, 977 (10th Cir. 2016)) (cleaned up).

Justice Kittredge's scolding of "the so-called Fourth Branch of government," *id.* at 465, 790 S.E.2d at 778, is especially relevant in this case, as the Board issued "written guidance" ***during litigation before the circuit court*** on which it now relies as some type of legal authority that binds this Court. (R. p. 100; Board's "Policy Statement," cited on Pages 21–23 of the Board's Brief.) This is remarkable overreach by the agency.

If the Board intends for its self-serving, mid-litigation "Policy Statement" to have the force of law, then it must attempt to promulgate that "Policy Statement" as a regulation in compliance with the South Carolina Administrative Procedures Act. *See Joseph*, 417 S.C. at 453, 790 S.E.2d at 772 ("[W]e hold that the Board's adoption of the 2011 Position Statement violates the requirements of the APA.").[2] Otherwise, the "Policy Statement" carries no more weight than any other extra-judicial writing by any other litigant in any other case.

Worse yet, the "Policy Statement" adds nothing but confusion to the issue. In it, the Board opines that the term "trust business" extends to several non-trustee roles, but then it adds:

> In addition to these explicitly defined fiduciary roles, the Board acknowledges that there exists a broad range of fiduciary activities which might constitute conducting trust business. This guidance does not constitute a comprehensive list of activities which constitute trust business. The Board strongly advises entities to contact the Office of the Commission of Banking with questions regarding whether specific activities constitute conducting trust business.

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[2] Even then, the "Policy Statement" would fail as a matter of law, as an agency cannot use the rulemaking process to alter—or, as here, expand—its statutory authority. *See, e.g.*, *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 499, 685 S.E.2d 600, 608–09 (2009) (striking a regulation of the State Ethics Commission to the extent it was more restrictive than the statutes that governed what agency materials could be made public); *Soc'y of Prof'l Journalists v. Sexton*, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) (striking as "invalid and repugnant to FOIA" a DHEC regulation that attempted to limit the class of persons who could obtain a death certificate and reiterating that "[a]mending FOIA to restrict the class of persons to whom DHEC must furnish death certificates is a legislative function," not something that can be done by an agency itself).

(R. p. 100; Board "Policy Statement," at 2.) The agency's "we'll know it when we see it, and you'll know it when we tell you" approach would be entirely unworkable and underscores why Judge Crosby's straightforward reading of the phrase "trust business"—"a business involved with the administration of trusts"—is correct. (R. p. 4; Order at 5.) Accordingly, the Court should reject the agency's arguments and affirm the circuit court's opinion.

III. Companies performing fiduciary tasks unrelated to administering trusts are regulated by both the Probate Court and the common law.

An overarching theme of the Board's argument is that someone, somewhere must be able to monitor how fiduciaries conduct themselves. Even though the Board is tasked with regulating banking and has no skills, expertise, or jurisdiction with respect to, say, protecting patients in comas, drug-addicted minors, or mentally-ill persons—who are among CDM and Guardian's clients (R. p. 199; Mantell Aff. ¶¶ 8–9)—the agency urges the Court to deem it the clearinghouse for any entity that provides any type of fiduciary services in South Carolina. (Board Br. at 23–29.)[3] And it supports this request by using ominous rhetoric, such as pointing out that Mr. Mantell "utiliz[es] the names and corporate veils of both CDM Corporation and Guardian Fiduciary Services" when accepting fiduciary appointments from the Probate Court. (*Id.* at 28.)[4]

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[3] The fact that CDM and Guardian provide fiduciary services such as these when called upon by South Carolina lawyers and the Probate Court highlights a core flaw in the Board's argument to this Court. The Board devotes huge portions of its opening brief to discussing its belief that various state and national banking laws support its arguments here. (*E.g.*, Board's Br. at 13–20.) But those banking laws are fundamentally irrelevant to the fiduciary services that are in dispute, and the total mismatch between the Board's argument and the fiduciary roles played by CDM and Guardian underscores the correctness of Judge Crosby's plain-language reading of the phrase "trust business."

[4] As Mr. Mantell explained in his affidavit, he uses the corporate form to obtain insurance coverage, not for some nefarious reason, as implied by the Board's appellate argument: "Operating through my company, instead of individually, allows me to obtain insurance. This insurance benefits me personally, but also benefits my clients." (R. p. 199; Mantell Aff. ¶ 7.)

The Court should not credit the Board's portrayal of this as a lawless situation that demands an agency's urgent involvement. For one, the Board does not allege that CDM or Guardian have done anything inconsistent with any standard or expectation of a fiduciary in any respect. Instead, the source of this litigation appears to be little more than CDM and Guardian's failure to pay a $15,000 application fee and annual $19,600 "supervisory fee" to the Board, and their refusal to voluntarily subject themselves to the Board's jurisdiction. (R. p. 209; Judge Carter Aff. ¶ 14.)

But more fundamentally, it is not credible to suggest that CDM, Guardian, or anyone else performing fiduciary services unrelated to trusts can simply slip through the cracks. When the Probate Court appoints CDM, Guardian, 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.").[5]

And the Probate Court does not simply appoint fiduciaries blindly. The General Assembly has created criteria to govern the appointment process, as well as to direct and monitor the actual functions of each category of fiduciary, including *inter alia* guardians, S.C. Code Ann. §§ 62-5-201 to -310, *id.* §§ 62-5-701 to -716; conservators, *id.* §§ 62-5-401 to –431; and agents acting through healthcare powers of attorney, *id.* §§ 62-5-501 to –518.

None of these statutes require a commercial entity to be certified as a "trust business" under the Banking Code before the Probate Court can appoint it to serve in a fiduciary role unrelated to

[5] Judge Carter's affidavit provides first-hand insight into how the Probate Court "operates to effectively oversee the and regulate the appointment and responsibilities of guardians, conservators, attorneys-in-fact, and personal representatives." (R. p. 209; Judge Carter Aff. ¶ 20.)

a trust. But once it is appointed, the fiduciary subjects itself to the ongoing authority of the Probate Court to supervise its work.

Not only does the Probate Court have inherent authority over the fiduciaries it appoints, 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).

Accordingly, the Board's dire forecast of unchecked rogue behavior by fiduciaries in the event the Court does not reverse Judge Crosby's plain-language reading of the phrase "trust business" is unfounded. South Carolina law has redundancies built in to ensure faithful and prudent conduct by non-trustee fiduciaries and to impose consequences by the Probate Court and injured plaintiffs if fiduciaries breach their responsibilities.

If the Board believes that it, too, should be allowed to regulate and supervise the conduct of fiduciaries who are not administering trusts, it should so persuade the General Assembly, not this Court. Thus far, the Legislature has not given that broad jurisdiction to the Board, and Judge Crosby's ruling on this point should be affirmed.

IV. The Board's alternative argument is not preserved and is incorrect as a matter of law.

The Board concludes its opening brief with a brand new argument: that each of the fiduciary roles that CDM and Guardian perform under direction of the Probate Court essentially amount to being a "trustee," and that this Court should declare that CDM and Guardian are therefore in a "trust business." (Board Br. at 29–31.) This is the first time the Board has made such an argument in this case, and it is therefore improper and should not be considered. *See, e.g.*,

Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").[6]

But even if the Court takes up this argument, the Board's position fails. The Board's argument essentially suggests that any type of fiduciary is, in a sense, a "trustee" because it is operating for the benefit of another. But this is a generic gloss on a specific statutory term.

A "trust business" involves administering a "trust," just as Judge Crosby held. And CDM and Guardian's various fiduciary roles created and governed by the Probate Code are specifically distinct from "trusts." *See* S.C. Code Ann. § 62-1-201(49) (defining "trust" for purposes of the Probate Code and providing that the term "excludes" certain categories of fiduciary, including *inter alia* conservatorships, personal representatives, certain custodial arrangements, "and any arrangement under which a person is nominee or escrowee for another").

Accordingly, the Board's argument that serving as a conservator, a personal representative, or other non-trustee fiduciary roles is effectively the same as administering a trust fails as a matter of law. The Court should reject this unpreserved argument as a result.

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[6] The Board did not raise this specific argument below. It did, however, suggest in passing in its summary judgment briefing that there is no "relevant legal distinction" among various fiduciary roles. (R. p. 77, Board's Mot. for Summ. J. at 9.) To the extent the Court views this as similar enough to the new argument raised in the Board's appellate brief to potentially clear the "raised below" hurdle of the preservation analysis, the argument is still not preserved for appellate review because Judge Crosby never ruled on it, nor was it included in the Board's Rule 59 motion. *See, e.g.*, *Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 22, 522 S.E.2d 144, 145–46 (1999) ("[W]here an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review.").

CONCLUSION

Just as every square is a rectangle, but not every rectangle is a square, every trustee is a fiduciary, but not every fiduciary is a trustee. The Board's broad construction of 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. The Court should affirm the circuit court's ruling accordingly.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certify that this Brief complies with Rule 211(b), SCACR.

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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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