

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAR 26 2018

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-000326
Civil Action No. 2016-CP-40-06276

Opternative, Inc.,..... Appellant,

v.

South Carolina Board of Medical Examiners and the South
Carolina Department of Labor, Licensing & Regulation,..... Respondents,

and

South Carolina Optometric Physicians Association, Respondent.

APPELLANT’S DESIGNATION OF MATTER FOR THE RECORD ON APPEAL

Pursuant to Rule 209, SCACR, Appellant designates the following matter for inclusion in the record on appeal. These designations are in addition to the matters designated by opposing counsel in Respondents’ Designation of Matter, which are incorporate as if set forth herein.

Undersigned counsel certifies pursuant to Rule 209(c), SCACR, that the designation contains no matter irrelevant to the appeal.

Orders

1. Order Granting Respondent South Carolina Optometric Physicians Association’s Motion to Intervene (February 15, 2017).
2. Order Granting Respondents South Carolina Department of Labor, Licensing and Regulation and South Carolina Board of Medical Examiners’ Motion for Summary Judgment (January 25, 2018).

Pleadings

3. Appellant Opternative, Inc.'s Complaint (October 20, 2016).
4. Respondents South Carolina Department of Labor, Licensing and Regulation and South Carolina Board of Medical Examiners' Answer (November 21, 2016).
5. Respondent South Carolina Optometric Physicians Association's Answer (March 7, 2017).

Motions and Memoranda

6. Respondent South Carolina Optometric Physicians Association's Motion to Intervene (January 12, 2017).
7. Appellant Opternative, Inc.'s Conditional Consent to Respondent South Carolina Optometric Physicians Association's Motion to Intervene (February 1, 2017).
8. Appellant Opternative, Inc.'s Motion to Compel Responses and Production (May 17, 2017).
9. Respondents South Carolina Department of Labor, Licensing and Regulation and South Carolina Board of Medical Examiners' Motion for Summary Judgment (July 10, 2017).
10. Appellant Opternative, Inc.'s Motion for Summary Judgment (September 6, 2017).
11. Appellant Opternative, Inc.'s Brief in Opposition to Respondents Department of Labor, Licensing and Regulation and South Carolina Board of Medical Examiners' Motion for Summary Judgment (September 27, 2017).
12. Respondent South Carolina Optometric Physicians Association's Memorandum of Law in Response to the Parties' Motions for Summary Judgment (October 2, 2017).

Transcripts

13. Transcript of October 4, 2017 trial court hearing.


Exhibits

14. Affidavit of Joshua A. Windham, attached to Appellant Opternative, Inc.'s Motion for Summary Judgment (September 6, 2017), including:

- a. Exhibit 1: Michael Zolman Deposition Excerpts.
- b. Exhibit 2: E-mail Chain Forwarded by Angelia Owens with Subject Line: "FW: FW: Kiosks and Online Eye Exams."
- c. Exhibit 3: E-mail Chain Last Responded to by Michael Zolman with Subject Line: "Re: URGENT: Senate OVERRIDES Gov. Haley's veto of our bill, 39-3."
- d. Exhibit 4: American Academy of Ophthalmology Policy Statement Titled "Frequency of Ocular Examinations."
- e. Exhibit 5: Jackie Rivers Deposition Excerpts.
- f. Exhibit 6: E-mail Chain Forwarded by Angelia Owens with Subject Line "Fwd: SCOPA's Bill – How to Reference."
- g. Exhibit 7: E-mail Chain Last Responded to by Jackie Rivers with Subject Line: "FW: AOA Update on Opternative."
- h. Exhibit 8: E-mail Chain Last Responded to by Michael Zolman with Subject Line: "Re: Meeting Monday."
- i. Exhibit 9: E-mail Chain Last Responded to by Jackie Rivers with Subject Line: "RE: AOA Letter of Support."
- j. Exhibit 10: E-mail Chain Forwarded by Jackie Rivers with Subject Line: "Fwd: SCOPA – Powerpoint presentation for PC."
- k. Exhibit 11: Darra Coleman Deposition Excerpts.
- l. Exhibit 12: E-mail from Peter Candela with Subject Line: "Re: S.1016 'EYE CARE CONSUMER PROTECTION LAW.'"
- m. Exhibit 13: E-mail Chain Last Responded to by Michael Zolman with Subject Line: "Fw: Governor Haley's Decision on the Consumer Eye Care Protection Bill."
- n. Exhibit 14: E-mail Chain Last Responded to by Mark Kelley with Subject Line: "Re: S 1016."
- o. Exhibit 15: May 3, 2016 Testimony of Holly Beeson on behalf of the Department of Labor, Licensing and Regulation, before the Board of Medical Examiners.

- p. Exhibit 16: May 16, 2016 Veto Statement of Governor Nikki Haley Regarding the Eye Care Consumer Protection Law.
 - q. Exhibit 17: Respondent South Carolina Optometric Physicians Association's Answer to Appellant Opternative, Inc.'s First Set of Interrogatories.
15. Affidavit of Daniel Bodde, attached to Appellant Opternative, Inc.'s Motion for Summary Judgment (September 6, 2017).
16. Affidavit of Edward Chaum, MD, attached to Appellant Opternative, Inc.'s Motion for Summary Judgment (September 6, 2017).

**Institute for Justice
Nelson Mullins Riley & Scarborough, LLP**

By: 

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Attorneys for Appellant

Columbia, South Carolina
March 26, 2018

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Association..... Respondents-
Intervenors.

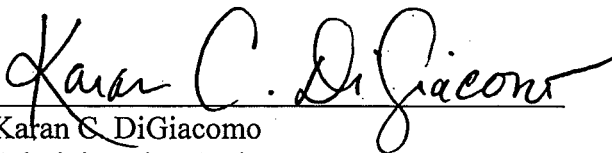
PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Opternative, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleading: Initial Brief of Appellant
Appellant's Designation of Matter for the Record on Appeal

Counsel Served:
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March 26, 2018



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SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Opternative, Inc. v. South Carolina Board of Medical Examiners *et al.*
Appellate Case No. 2018-000326
Our File No. 049516/01500

Dear Ms. Kitchings:

Pursuant to Rules 208 and 209, SCACR, enclosed please find an original and one copy of Appellant's Initial Brief and Appellant's Designation of Matter for the Record on Appeal. We ask that you file the originals and return a file-stamped copy of each to us via our courier. By copy of this letter to counsel of record, we are serving them with a copy of this filing.

Very truly yours,

Miles E. Coleman

Enclosures

cc: Eugene H. Matthews, Esquire
Kirby D. Shealy III, Esquire