THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Opinion No. 2021-5818 (S.C. Ct. App. Filed July 1, 2021)

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

And South Carolina Optometric Physicians Association, ...Petitioner,

v.

Opternative, Inc.,.....Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on July 1, 2021.

QUESTION PRESENTED

I. Whether the Court of Appeals erred in reversing the lower court's decision holding Respondent Opternative, Inc. lacked standing to challenge the constitutionality of sections 40-24-10 and 40-24-20 of the South Carolina Code (Supp. 2020).

STATEMENT OF THE CASE

Respondent Opternative, Inc. ("Opternative") is a private foreign corporation that has developed a technology which allows ophthalmologists and optometrists to collect ocular refractive data and other information from patients. (R. p. 187, ¶ 5). Opternative initiated this declaratory judgment action on October 20, 2016 against the South Carolina Board of Medical Examiners (the "Board") and the South Carolina Department of Labor, Licensing & Regulation ("LLR"), challenging the constitutionality of South Carolina's Eye Care Consumer Protection Law ("ECCPL"), S.C. Code Ann. § 40-24-10 *et seq*. (R. pp. 11-27). Specifically, Opternative asserts the ECCPL is "protectionist" legislation and unconstitutional on grounds of (1) due process and (2) equal protection. (R. pp. 24-26). On January 12, 2017, Petitioner South Carolina Optometric Physicians Association ("SCOPA"), an association of optometric physicians practicing in South Carolina, moved to intervene as a defendant. (R. pp. 41-53). The circuit court granted SCOPA's motion on February 22, 2017. (R. p. 1).

On October 4, 2017, the circuit court heard arguments on the parties' cross-motions for summary judgment. (R. pp. 199-241). The motion of the Board and LLR, which SCOPA joined, argued that dismissal of Opternative's lawsuit was proper under any of the following grounds:

- Opternative lacked standing to challenge the constitutionality of the ECCPL.
- Opternative has not suffered an "injury in fact" at the hands of the Board or LLR because neither party regulates Opternative.
- The ECCPL is constitutional because it bears a reasonable relation to its legislative purpose that is supported by a rational basis.

(R. pp. 64-79; pp. 170-185).

On June 26, 2018, the circuit court issued an order denying Opternative's motion for summary judgment and granting the motion of the Board, LLR, and SCOPA as to the issue of

standing only. (R. pp. 2-9). In its ruling, the circuit court determined that Opternative failed to demonstrate it suffered an "injury in fact" because neither the Board, LLR, nor the ECCPL forbids optometrists or ophthalmologists from using Opternative's technology when prescribing eye glasses. (R. pp. 6-7). The fact that ophthalmologists or optometrists might be more willing to use Opternative's technology within Opternative's business model if the ECPPL were struck down was too hypothetical an injury to constitute an "injury in fact." (*Id.*). The circuit court also found that Opternative failed to show a causal connection between its alleged injury and the conduct complained of. (R. pp. 7-8). Specifically, the injury was not directly traceable to the actions of the Board or LLR, and instead depended on the independent actions of third parties who made their own decisions regarding whether and how to use Opternative's technology. (*Id.*). Finally, the circuit court held that Opternative failed to demonstrate its alleged injury would be redressed by a favorable decision in the case because ophthalmologists or optometrists can already work with Opternative to provide corrective-lens prescriptions to South Carolina residents. (R. pp. 8-9).

The Court of Appeals heard arguments on Opternative's appeal on November 2, 2020. On May 5, 2021, the Court filed a published opinion reversing the circuit court's decision and remanding the case for trial. *Opternative, Inc. v. S.C. Bd. of Med. Examiners*, 433 S.C. 405, 859 S.E.2d 263 (Ct. App. 2021), *reh'g denied* (July 1, 2021). In its Opinion, the Court of Appeals held that Opternative's inability to engage in its proposed business model constituted an "injury in fact" sufficient to confer standing. 433 S.C. at ____, 859 S.E.2d at 267-68. The Court of Appeals also found that Opternative demonstrated a causal connection between the injury and the ECPPL, holding there was some evidence that ophthalmologists stopped using Opternative's technology because of the ECPPL. 433 S.C. at ____, 859 S.E.2d at 268-69. Finally, the Court of Appeals held

the circuit erred in relying only on the allegations in Opternative's complaint when assessing the redressability of the injury. 433 S.C. at ____, 859 S.E.2d at 270.

SCOPA filed a Petition for Hearing on May 20, 2021, seeking to have the Court of Appeals reconsider its decision. The Court of Appeals denied SCOPA's petition on July 1, 2021.

STATEMENT OF THE FACTS

A. The Parties.

Founded in 2012, Opternative is a healthcare company that developed a technology through which individuals can determine the refractive error of their eyesight without ever needing to speak to or interact with a licensed eye care professional. (R. p. 187, ¶ 5; p. 393, ¶¶ 3-4). Opternative's technology is freely accessible online and collects information from a user by soliciting responses to questions and visual stimuli through a computer interface. (R. p. 187, ¶¶ 6-7). Opternative then uses the user's responses to generate a dataset about the user and his or her ocular refractive error; it does not measure objective data about the user's eyes or eye health. (R. p. 187, ¶¶ 8-9). Lastly, the data is sent to a South Carolina-licensed ophthalmologist, who will review the results and determine if a prescription for corrective lenses is appropriate. (R. p. 187, ¶ 9).

Ophthalmologists are medical doctors specializing in eye and vision care, who by study and training are qualified to diagnose and treat ocular diseases, perform eye exams and surgeries and prescribe lenses to correct vision problems. (R. pp. 187-88, ¶ 10). Ophthalmologists who practice in South Carolina are licensed and regulated by the Board. S.C. Code Ann. § 40-47-10. While Opternative's business model relies on the participation of independent ophthalmologists, Opternative itself is not licensed to practice medicine in the State of South Carolina and is therefore not regulated by the Board. (R. p. 15, ¶ 27 – p. 16, ¶ 29). Similarly, LLR does not regulate or exercise any authority over Opternative, as Opternative is not licensed by any board that LLR administers. Rather, LLR "is responsible for all administrative, fiscal, investigative, inspectional, clerical, secretarial, and license renewal operation and activities" of the Board. S.C. Code Ann. § 40-1-50(A).

SCOPA is a domestic non-profit corporation whose members are optometrists licensed by the State of South Carolina. (R. p. 42). Optometrists are independent primary health care professionals for the eye that, unlike ophthalmologists, are not licensed to perform surgery. (R. p. 192, ¶ 6). As doctors of optometry, Optometrists examine, diagnose, treat, and manage diseases, injuries, and disorders of the visual system, the eye, and associated structures as well as identify related systemic conditions affecting the eye. (*Id.*). Optometrists practicing in South Carolina are licensed and regulated by the South Carolina Board of Examiners in Optometry, which is also administered by LLR. S.C. Code Ann. § 40-1-40(B).

B. The Eye Care Consumer Protection Law

The South Carolina General Assembly first considered the Eye Care Consumer Protection Law during the 2016 legislative session. (R. p. 180). On April 29, 2016, the General Assembly passed the ECCPL with overwhelming support from both the House of Representatives and Senate. (R. p. 375). Governor Nikki Haley vetoed the ECCPL on May 16, 2016. On May 19, 2016, the General Assembly overrode the Governor's veto by a vote of 98 to 1 in the House of Representatives and by a vote of 39 to 3 in the Senate. (R. p. 101; p. 386). The ECCPL is now codified at S.C. Code Ann. §§ 40-24-10 and 40-24-20.

The ECCPL contains two parts: the first part establishes the relevant definitions, while the second part contains the substance of the Act. Part one of the ECCPL defines a "provider" as "an individual licensed by the South Carolina Board of Examiners in Optometry or the South Carolina Board of Medical Examiners," meaning both optometrists and ophthalmologists are governed by the Act. S.C. Code Ann. § 40-24-10(7). Part two of the ECCPL provides as follows:

> **SECTION 40-24-20.** Valid prescription required to dispense spectacles or contact lenses; penalties.
>
> (A) A person in this State may not dispense spectacles or contact lenses to a patient

without a valid prescription from a provider.

(B) To be valid, a prescription must contain an expiration date on spectacles or contact lenses of one year from the date of examination by the provider or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient. The prescription must take into consideration medical findings made and refractive error discovered during the eye examination. If a provider determines a patient is a suitable candidate for a prescription for contact lenses or spectacles, a provider may not thereafter refuse to issue a prescription for spectacles or contact lenses to a patient.

(C) A prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk.

(D) Violation of this section constitutes misconduct as provided for in Sections 40-37-110 and 40-47-110. A provider who violates this section is subject to the penalties authorized in Chapter 37, Title 40 or Chapter 47, Title 40, as applicable.[1]

S.C. Code Ann. § 40-24-20.

It is undisputed that SCOPA lobbied in favor of – and worked with legislators to enact – the ECCPL. (R. p. 180; p. 390). In doing so, SCOPA relied on the collective training and clinical experience of its members to help pass a law that "protects patients of ophthalmologists and optometrists from unwittingly putting their eye health at risk by obtaining a prescription for corrective lenses without a comprehensive eye examination." (R. p. 390). SCOPA further notes that "[c]ertain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination," including diabetes, high blood pressure, hypercholesterolemia, and other maladies. (R. p. 194, ¶¶ 15-16).

In sum, the ECCPL establishes a baseline in the standard of care for corrective lens prescriptions such that they must be based upon more than just refractive error measurements

[1] Chapter 37, Title 40 applies to optometrists. Chapter 47, Title 40 applies to ophthalmologists, among other physicians.

generated by a computer. However, throughout the time the ECCPL has been in effect, neither the Board nor LLR has taken any enforcement action against any person that it regulates for an alleged violation of the ECCPL. (R. p. 204, lines 10-24).

ARGUMENT AND CITATION OF AUTHORITY

I. GRANTING CERTIORARI IN THIS CASE IS SUPPORTED BY SPECIAL AND IMPORTANT REASONS UNDER RULE 242(b), SCACR.

A. The Decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court on the Law of Standing (Rule 242(b)(3), SCACR).

This Court should grant certiorari because the Court of Appeals' opinion conflicts with prior decisions of this Court.

Where a private party seeks to have a statute declared unconstitutional, it must first demonstrate that it has standing. *ATC v. Charleston Cty.*, 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008). Standing is defined as "a personal stake in the subject matter of a lawsuit." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (citing *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999)). "In its most basic sense, '[s]tanding refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right.'" *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 209, 845 S.E.2d 481, 485 (2020) (citing *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018)).

Standing may be acquired (1) by statute, (2) under the principles of constitutional standing, and (3) through the public importance exception. *Pres. Soc'y of Charleston*, 430 S.C. at 209-10, 845 S.E.2d at 485. The only theory at issue in this case is that of constitutional standing. The principles of constitutional standing require a plaintiff to satisfy the following three-part test:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or

> imminent, not 'conjectural' or 'hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

ATC, 380 S.C. at 195-96, 669 S.E.2d at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations omitted)).

i. The Court of Appeals Misapprehended the Injury-in-Fact Required to Establish Constitutional Standing.

With respect to the first element, a private person or entity does not have standing unless he has sustained, or is in immediate danger of sustaining, prejudice from an executive or legislative action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Decisions of this Court make it clear that standing does not exist when the plaintiff's alleged injury flows from increased or perceived unfair competition. *ATC v. Charleston Cty.*, 380 S.C. at 195-96, 669 S.E.2d at 339; *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 86, 644 S.E.2d 58, 60-61 (2007).

In *ATC South, Inc. v. Charleston Cty.*, ATC, a cellular telephone tower builder brought a declaratory judgment action challenging the county's decision to rezone a nonadjoining property that was leased to a competitor to permit the construction of a tower. 380 S.C. at 193, 669 S.E.2d at 338. The thrust of ATC's argument was that "[a]ny favored treatment by a regulatory/zoning authority to one competitor ... harms other competitors by lessening the favored competitor's costs of doing business." 380 S.C. at 196, 669 S.E.2d at 339-41. This Court rejected that assertion, holding that a plaintiff lacks standing to challenge a legislative or executive action solely to protect its own competitive advantage. 380 S.C. at 197-98, 669 S.E.2d at 340. In so holding, this Court noted that "[t]his approach, which denies standing to a mere competitor, is the prevailing law throughout the country." 380 S.C. at 196, 669 S.E.2d at 340.

Here, the Court of Appeals erred by failing to apply or consider the holding in *ATC* that "a competitor challenging legislative or executive action solely to protect its own economic interest lacks standing." 380 S.C. at 198, 669 S.E.2d at 340 ("We conclude that where, as here, the potential injury or prejudice is only an increase in business competition, such injury or prejudice is insufficient to confer standing. We join the majority of jurisdictions in holding that a competitor challenging legislative or executive action solely to protect its own economic interests lacks standing."). This is precisely what Opternative is challenging. It is undisputed that Opternative has an economic interest in allowing eye care consumers to obtain corrective lens prescriptions using its technology alone, as such an arrangement would reduce the demand for services that can only be provided by eye care professionals who perform in-person eye examinations. Opternative is at a competitive disadvantage if corrective lens prescriptions can only be obtained with the additional services provided through such in-person exams, although the ECCPL does not preclude the use of its technology as part of such exams. The injuries, if any, that Opternative has allegedly suffered are solely to its competitive advantage in the marketplace for delivering eye care, which this Court has already determined to be insufficient to confer standing. *See ATC*, 380 S.C. at 197-98, 669 S.E.2d at 340.

The Court of Appeals further erred by narrowly focusing its analysis on the holding in *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 790 S.E.2d 763 (2016), an analysis which necessarily ignored the irreconcilable factual differences between that case and the current dispute. These differences are most apparent when Opternative's lawsuit is compared to the plaintiffs in *Joseph* and the specific action they were challenging. The dispute in *Joseph* concerned a physical therapist ("PT") and two orthopedic surgeons challenging a 2011 position statement from the South Carolina Board of Physical Therapy that – unlike other licensed healthcare

professionals – forbade PTs from providing treatment as direct employees of physicians. The *Joseph* Court found that the 2011 position statement – an *actual act* taken by the South Carolina Board of Physical Therapy – injured the PT "by the infringement on her ability to practice her chosen profession and by the adoption of a regulation that requires she and other PTs be treated differently from other health care professionals who may be employed by doctors." 417 S.C. at 449, 790 S.E.2d at 770. Similarly, the court found that the surgeons were injured because "they have an interest in how the PT system works and in their ability to employ PTs." *Id.*

In this case, Opternative can justly lay claim to none of the concerns aired in *Joseph*. Professionals under the authority of the Board are not forbidden by the ECCPL – and certainly not by any action of the Board or LLR – from using Opternative's technology. As the circuit court properly determined, a South Carolina-licensed ophthalmologist may still use Opternative's technology to assist him or her in making a determination to write a prescription for spectacles or contact lenses. (R. pp. 6-7). He or she simply cannot base the prescription *solely* on the refractive eye error of the human eye, nor can such prescription be generated by a kiosk.

In short, unlike the plaintiffs in *Joseph*, Opternative is neither a professional regulated by LLR, nor is it protesting an actual action taken by any board that LLR administers. Indeed, Opternative cannot challenge any specific action of the Board or LLR because (1) no enforcement proceedings have been initiated against any ophthalmologist for using Opternative's technology and (2) the threat of future enforcement of the ECCPL is far too speculative given that ophthalmologists may still employ Opternative's technology when writing prescriptions. (R. p. 204, lines 10-24). Rather, Opternative is only challenging the loss of its competitive advantage over South Carolina-licensed optometrists.

ii. The Court Failed to Properly Consider the Lack of a Causal Connection

The Court of Appeals applied an impermissibly lenient standard when assessing whether Opternative met the second requirement for constitutional standing: a causal connection between the injury and the conduct complained of. A causal connection exists if the harm is "fairly ... trace[able]" to the challenged conduct. *Sea Pines Ass'n for Prot. of Wildlife, Inc.*, 345 S.C. at 609, 550 S.E.2d at 291 (quoting *Lujan*, 504 U.S. at 560). A showing of a substantial likelihood that the challenged conduct caused the alleged injury or establishing a "but for" causal connection will satisfy the causation requirement. *See Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 74-78 (1978).

Although the Court of Appeals correctly noted that a causal connection exists if the harm is "fairly ... trace[able] to the challenged action of the defendant," the court failed to properly consider whether the injury complained of was "not ... th[e] result [of] the independent action of some third party not before the court." *ATC*, 380 S.C. at 195-96, 669 S.E.2d at 339.

The Court of Appeals' opinion places undue reliance on the affidavits submitted by Opternative that assert ophthalmologists stopped using Opternative's technology because the ECCPL prohibited Opternative's business model. *Opternative Inc.*, 433 S.C. at ___, 859 S.E.2d at 268 ("Opternative's affidavits presented evidence that ophthalmologists stopped using the [t]echnology because the Act prohibited Opternative's business model."). In particular, the court gave considerable weight to the affidavit of Opternative's Chief Marketing Officer, Daniel Bodde, who stated "that based on his personal knowledge and experience, Opternative was in contact with ophthalmologists who indicated they would resume use of the [t]echnology if the Act was struck down." 433 S.C. at ___, 859 S.E.2d at 270. Here, the Court of Appeals uses Opternative's self-serving statements to again draw a parallel with *Joseph*, finding the ECCPL deprives ophthalmologists of their right to use Opternative's technology in the same way that the 2011

position statement in *Joseph* prohibited an employer-employee relationship between doctors and physical therapists. 433 S.C. at ___, 859 S.E.2d at 269. This false equivalency fails to account for the fact that Opternative's technology has not been outlawed or restricted in any way.

Whether ophthalmologists would choose to use Opternative's technology in their practice or not following the passage of the ECCPL is not indicative of a causal connection between the ECCPL and an injury-in-fact. Nothing about the ECCPL prohibits the use of Opternative's technology, nor does it prevent ophthalmologists from practicing medicine in the best interest of their patients. South Carolina-licensed ophthalmologists can presumably make their own decisions about whether and how to use – or not use – Opternative's online technology to assist them in their provision of lawful corrective lens prescriptions to their patients. The only thing they *cannot do* is write a prescription for corrective lenses based *solely* upon Opternative's technology. To the extent that Opternative argues that the ECCPL places it at a competitive disadvantage because its online technology cannot serve as the sole basis for a corrective lens prescription, its claim must be rejected, as "a competitor challenging legislative or executive action solely to protect its own economic interests lacks standing." *ATC*, 380 S.C. at 198, 669 S.E.2d at 340.

The Court of Appeals failed to consider the degree to which Opternative's claimed injury relies on the independent actions of third parties. Even in the absence of the ECCPL, the court was provided with a multitude of reasons as to why an ophthalmologist would choose not to use Opternative's technology as the sole basis for writing a prescription – namely, that it places convenience over patient health. (R. p. 188, ¶ 13 – p. 190, ¶ 20; p. 194, ¶ 7 – p. 196, ¶ 26). Regardless, the decision of whether and how to use Opternative's technology rests entirely with South Carolina-licensed ophthalmologists, not with SCOPA, the Board or LLR. Opternative's evidence goes no further than to suggest that certain ophthalmologists have chosen not to use its

technology after the ECCPL became effective, rather than demonstrating that such eye care professionals no longer had the option to use it at all. Such proof cannot satisfy the "but for" test, nor can it support a conclusion that Opternative's alleged injury is "fairly traceable" to the dictates of the ECCPL.

Through these shortcomings, the Court of Appeals' decision conflicts with applicable law and certiorari should be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue an order granting the petition for writ of certiorari in this case.

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