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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-000326
Case 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.

RESPONDENT SOUTH CAROLINA OPTOMETRIC PHYSICIANS ASSOCIATION'S PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240 of the *South Carolina Rules of Appellate Procedure*, Respondent South Carolina Optometric Physicians Association ("the Association") respectfully files this Petition for Rehearing regarding the Court's decision filed May 5, 2021 (Op. No. 5818). In its opinion, this Court reversed the lower court's finding that Appellant Opternative, Inc. ("Opternative") lacked standing to challenge the constitutionality of the Eye Care Consumer Protection Law under sections 4-24-10 and 4-24-20 of the South Carolina Code (Supp. 2020) ("the Act").

Rule 221(a), SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law and/or fact to petition for rehearing. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933). For the following reasons, Respondent South Carolina Optometric Physicians Association submits the Court misapprehended applicable law and/or fact to support a finding that Opternative had standing to challenge the validity of the Act. Namely, the Court failed to apply applicable South Carolina law in concluding: 1. Opternative sustained an injury in fact; and 2. a causal connection existed between Opternative's alleged injury and the Act becoming law.

ARGUMENTS

I. OPTERNATIVE LACKS STANDING BECAUSE IT IS CHALLENGING A LEGISLATIVE ACTION SOLELY TO PROTECT ITS OWN COMPETITIVE ADVANTAGE.

A. The Court erroneously misapprehended the injury-in-fact required to establish constitutional standing.

In *ATC South, Inc. v. Charleston Cty.*, the South Carolina Supreme Court joined the majority of jurisdictions in holding that a plaintiff lacks standing to challenge a legislative or executive action solely to protect its own competitive advantage. 380 S.C. 191, 197-98, 669 S.E.2d 337, 340 (2008). Therefore, when the alleged injury is only an increase in business competition, such injury is insufficient to confer standing. *Id.* Nothing in the Act prohibits eye care professionals in the State from continuing to use Opternative's technology; rather, it prohibits prescriptions for spectacles or contact lenses from being based *solely* on the measurements generated by such technology. *See* S.C. Code Ann. § 40-24-20 (Supp. 2020). Ophthalmologists and optometrists may still use Opternative's technology to assess their patients' refractive errors and to help inform their treatment decisions, but they must also

perform additional tests and examinations that Opternative's technology is not capable of performing on its own.

Opternative has an interest in allowing eye care consumers to obtain corrective lens prescriptions using its technology alone, because 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 Act 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 does not confer standing on its own. *See ATC,* 380 S.C. at 197-98, 669 S.E.2d at 340. In reversing the trial court's determination that Opternative lacked standing to challenge the legislation, this Court ignored the holding in *ATC South* and failed to address Respondents' arguments relating to the absence of an injury-in-fact.

B. The Court overlooked the Appellant's failure to offer proof of causation.

The Court correctly noted that constitutional standing requires the showing of a causal connection between the alleged injury and the challenged conduct. *See Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 467, 790 S.E.2d 763, 779 (2016). A causal connection exists if the harm is "fairly … trace[able]" to the challenged conduct. *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 609, 550 S.E.2d 287, 291 (2001) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). 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).

Here, the Court found Opternative's proof of a causal connection between the Act's enactment and an injury in fact sufficient even though the evidence in the record clearly shows that Opternative's technology has not been outlawed or restricted in any way. Eye care professionals can still use the technology in the course of performing eye examinations. The only thing they *cannot do* is write a prescription for corrective lenses based *solely* upon Opternative's technology. Whether eye care professionals *choose* to use the technology or not following the Act's passage is not indicative of a causal connection between the Act and an injury in fact, as such choices are market driven, rather than compulsory. Opternative's evidence goes no further than to suggest that certain ophthalmologists would choose not to use its technology after the Act 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 Act.

CONCLUSION

Opternative "presents to the Court as a disgruntled competitor, nothing more" and therefore lacks standing. *ATC,* 380 S.C. at 200, 669 S.E.2d at 342. For these reasons, Respondent respectfully files this Petition for Rehearing due the Court's misapprehension of law and fact.

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

PROOF OF SERVICE

I certify that I have served **Respondent South Carolina Optometric Physicians Association's Petition for Rehearing** on counsel by depositing a copy of said document in the United States Mail, postage prepaid, on May 20, 2021, addressed to counsel of record as follows:

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May 20, 2021

VIA E-MAIL ONLY: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *Opternative v. SC Board of Medical Examiners*
Appellate Case No.: 2018-000326
AR File No. 052759-000005

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter is Respondent's Petition for Rehearing. A check in the amount of $50.00 to cover the filing fee will be hand-delivered to the Court within three (3) business days.

By copy of this letter, I am serving all counsel of record with the Petition as set forth in the enclosed Proof of Service. Thank you for your attention to this matter.

Sincerely,

Kirby D. Shealy III

KDS/vmc
Enclosures
cc: Miles E. Coleman, Esq.
William C. Wood, Jr., Esq.
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