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**Jun 01 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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

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

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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.

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**APPELLANT’S RETURN TO RESPONDENT SCOPA’S PETITION FOR REHEARING**

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When this appeal was first briefed, Respondent South Carolina Optometric Physicians Association (SCOPA) declined to make any original arguments, opting instead to incorporate the state Respondents' brief by reference. *See* SCOPA's Initial Br. 1. Now, however, SCOPA asks this Court to reconsider two arguments the Court has already heard and properly rejected. First, SCOPA asserts that the Court "ignored" the South Carolina Supreme Court's decision in *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008). SCOPA Pet. Reh'g 3. But *ATC* was fully discussed in the parties' briefs, counsel for both sides discussed *ATC* during oral argument, and this Court cited *ATC* in its decision. Second, SCOPA argues that the Court erred in holding that the Eye Care Consumer Protection Law caused Opternative's injury. SCOPA Pet. Reh'g 4. But the Court's holding was correct, and SCOPA fails to cite any cases or evidence not already discussed in the Court's opinion. The Court should reject SCOPA's attempt to reopen these old arguments and deny SCOPA's petition for rehearing.

**I. The Court did not ignore *ATC*, and in any event, *ATC* is inapposite.**

To prevail on a petition for rehearing, SCOPA "must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). SCOPA cannot do so. Its primary argument is that the Court "ignored" the South Carolina Supreme Court's decision in *ATC South, Inc.*, 380 S.C. 191, 669 S.E.2d 337. SCOPA Pet. Reh'g 3. That is plainly wrong: The parties that filed substantive arguments briefed *ATC*. *See* Appellant's Opening Br. 20–21 & n.51; Respondents' Br. 6–9, 11. Counsel for both sides discussed *ATC* during the November 2 argument before this Court. *See* Oral Arg. Recording 16:07–16:47 (state Respondents' counsel discussing *ATC*), 34:15–34:50 (Opternative's counsel discussing *ATC*). And this Court cited *ATC* in its decision.

*See Opternative, Inc. v. S.C. Bd. of Med. Exam'rs*, No. 2018-000326, 2021 WL 1774528, at \*3 (S.C. Ct. App. May 5, 2021).

Simply put, SCOPA's arguments about *ATC* are old news. And old news is not a reason to rehear a case. *See Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 (explaining that a petition for rehearing is not a vehicle "for the losing parties . . . to have the case tried in the appellate court a second time") (cleaned up); *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933) ("It is a rare thing when the court grants such a petition. Usually, they are dismissed with a simple order to that effect, for the reason that they contain nothing but a 'rehash' of what the losing party has said before, matters which the court has already considered well and disposed of.").

In any event, as Opternative has already explained, *ATC* is inapposite. *See* Appellant's Opening Br. 20–21 & n.51; Oral Arg. Recording 34:15–34:50. In *ATC*, a company sued to prevent a competitor from building on a nearby tract of land. 380 S.C. at 193–94, 669 S.E.2d at 338–39. The South Carolina Supreme Court held that the plaintiff lacked standing because *new market competition* is not an injury. *Id.* at 196, 669 S.E.2d at 339–40. Here, Opternative is not suing to prevent anybody from competing with it. Just the opposite: Opternative *wants to compete*, but *cannot* because SCOPA lobbied for a law that prevents Opternative "from engaging in business under the business model it desires." *Opternative, Inc.*, No. 2018-000326, 2021 WL 1774528, at \*3–4 & n.2. That is an injury, and *ATC* does not say otherwise.

## **II. The Court did not overlook any evidence or cases on causation.**

SCOPA next argues that the Court "overlooked the Appellant's failure to offer proof of causation." SCOPA Pet. Reh'g 3. But the Court did not "overlook" anything: The Court held that the Eye Care Consumer Protection Law bans eye doctors from using Opternative's technology as

designed. *Opternative, Inc.*, No. 2018-000326, 2021 WL 1774528, at \*3. The Court relied on uncontroverted affidavits showing that the Law was the *only* reason eye doctors stopped using Opternative’s technology, and thus the *only* reason Opternative shut down. *Id.* at \*4; *cf. Smiley v. S.C. Dep’t of Health & Env’t Control*, 374 S.C. 326, 330–32, 649 S.E.2d 31, 33–34 (2007) (finding plaintiff’s affidavit sufficient to establish standing). And the Court properly held that, under the South Carolina Supreme Court’s decision in *Joseph*, the Law caused Opternative’s injury. *Opternative, Inc.*, No. 2018-000326, 2021 WL 1774528, at \*4 (citing *Joseph v. S.C. Dep’t of Labor, Licensing & Regul.*, 417 S.C. 436, 449, 790, S.E.2d 763, 770 (2016) (plurality) (finding that law banning doctors from hiring physical therapists caused practitioners’ inability to work in employment relationships they preferred)).

SCOPA cites no evidence or cases not already discussed in the Court’s opinion. Instead, SCOPA is merely a “losing part[y]” asking “to have the case tried in the appellate court a second time.” *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322. Again, that is not a reason to rehear a case.

\* \* \*

For these reasons, SCOPA has not shown that “the Court overlooked or misapprehended their argument.” *Id.* (citing Rule 221(a), SCACR). Appellant therefore respectfully requests that the petition be denied.

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PROOF OF SERVICE

I, the undersigned counsel for Opternative, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading hereinbelow specified by electronic mail (see attached sent mail), to the following addresses:

Pleadings: Appellant's Motion to Stay Appeal

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*Attorney for Respondent-Intervenor*



Miles E. Coleman

June 1, 2021

## Miles Coleman

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**From:** Miles Coleman  
**Sent:** Tuesday, June 1, 2021 1:09 PM  
**To:** gmatthews@richardsonplowden.com; zzKirby Shealy  
**Cc:** Robert McNamara; Joshua Windham  
**Subject:** Opternative -- Return to Petition for Rehearing  
**Attachments:** 2021.6.1 -- Opternative -- Appellant's Return to Respondent SCOPA's Petition for Rehearing.pdf

Kirby and Gene,

Please find attached for electronic service a copy of Opternative's Return to SCOPA's Petition for Rehearing. We'll be filing a copy of it with the Court of Appeals shortly.

Miles



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June 1, 2021

**Via electronic mail**

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

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**SC Court of Appeals**

RE: *Opternative v. S.C. Board of Medical Examiners*  
Appellate Case No. 2018-000326  
Our File No. 049516/01500

Dear Ms. Kitchings:

Pursuant to Rule 221(a), SCACR, and in response to your letter dated May 24, 2021, please find enclosed Appellant's Return to the Petition for Rehearing that was filed by Respondent South Carolina Optometric Physician's Association. Also enclosed is a certificate of service of the same. We ask that you file these documents and, at your convenience, return file-stamped copies of them to us.

Very truly yours,



Miles E. Coleman

CC: (by electronic mail):  
Eugene H. Matthews, Esq.  
Robert McNamara, Esq.  
Kirby D. Shealy, III, Esq.  
Joshua Windham, Esq.