N O T I C E

IN THE MATTER OF JAMES MICHAEL BROWN, PETITIONER

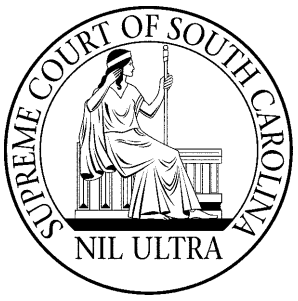
Petitioner was definitely suspended from the practice of law for three (3) years, retroactive to April 13, 2011. *In re Brown*, 392 S.C. 142, 708 S.E.2d 218 (2020). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness
P. O. Box 11330
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina
May 5, 2021



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
May 5, 2021
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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The Supreme Court of South Carolina

Re: Rule Amendments

Appellate Case Nos. 2019-001845, 2020-001509, and 2021-000086

ORDER

On January 29, 2021, the following orders were submitted to the General Assembly pursuant to Article V, §4A of the South Carolina Constitution:

(1) An order amending Rules 218, 240, 262, and 267 of the South Carolina Appellate Court Rules.

(2) An order adopting Rules 611 and 612 of the South Carolina Appellate Court Rules.

(3) An order amending Rule 3(a) of the South Carolina Rules of Criminal Procedure.

(4) An order amending Rules 2 and 5 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

(5) An order amending Rule 9 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

Since ninety days have passed since submission without rejection by the General Assembly, the amendments contained in the above orders are effective immediately.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
April 29, 2021

The Supreme Court of South Carolina

RE: Amendments to the South Carolina Appellate Court Rules

Appellate Case No. 2021-000086

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rules 218, 240, 262, and 267 of the South Carolina Appellate Court Rules are amended as indicated in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 29, 2021

The South Carolina Appellate Court Rules (SCACR) are amended as follows:

(1) Rule 218, SCACR, is amended to add the following:

(d) Remote Oral Argument. With the permission of the Chief Justice, an appellate court may conduct oral argument in a case using remote communication technology. Further, any necessary oath or affirmation may be administered by remote communication technology. For the purpose of this provision, remote communication technology means technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at different locations in real time.

(2) Rule 240(h), SCACR, is amended to read:

(h) Hearing. Unless otherwise directed by the court, motions or petitions shall be decided without oral argument. If argument is directed, the appellate court may elect to conduct the argument using remote communication technology. Further, any necessary oath or affirmation may be administered by remote communication technology. For the purpose of this provision, remote communication technology means technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at different locations in real time.

(3) Rule 262, SCACR, is amended to read:

(a) Filing. Except for petitions for rehearing (Rule 221) and motions for reinstatement (Rule 260), filing may be accomplished by:

(1) Delivering the document to the clerk of the appellate court. The date of filing shall be the date of delivery;

(2) Depositing the document in the U.S. mail, properly addressed to the clerk of the appellate court, with sufficient first class postage attached. The date of filing shall be the date of mailing; or,

(3) Filing the document by electronic means in a manner provided by order of the Supreme Court of South Carolina.

(b) Proof of Service to Be Filed. Any document filed with the appellate court shall be accompanied by proof of service showing the document has been served on all parties.

(c) Service. Whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the appellate court. Service upon the attorney or upon a party shall be made by:

(1) Delivering a copy to the person, in which case service is complete upon delivery. Delivery of a copy under this provision means: handing it to the attorney or to the party; or leaving it at the office of that person with a clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at the person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein;

(2) Depositing a copy in the U.S. mail, properly addressed to the person at that person's last known address with sufficient first class postage attached, or, if no address is known, by leaving it with the clerk of the appellate court. Service by mail is complete upon mailing; or,

(3) Serving a copy on the person by electronic means in a manner provided by order of the Supreme Court of South Carolina.

(4) Rule 267(b), SCACR, is amended to read:

(b) Signatures. A document filed with the appellate court shall be signed by the lawyer or the self-represented litigant filing the

document. In addition to a traditional hand-written signature, a lawyer or self-represented litigant may sign a document using "s/ [typed name of person]," a signature stamp, or a scanned or other electronic version of the person's signature. Regardless of form, the signature shall act as a certificate that the person has read the document; that to the best of the person's knowledge, information, and belief there is good ground to support it; and that the document is not interposed for delay.

The Supreme Court of South Carolina

RE: Amendment to the South Carolina Appellate Court Rules

Appellate Case No. 2021-000086

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, the South Carolina Appellate Court Rules are amended to add Rules 611 and 612 as indicated in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 29, 2021

The South Carolina Appellate Court Rules are amended to add the following rules:

RULE 611
EMERGENCY MODIFICATION OF REQUIREMENTS OF COURT RULES

In response to a natural or man-made disaster, including but not limited to a hurricane, earthquake, flood, war or other armed conflict, riot, or pandemic, the Supreme Court of South Carolina may, by order, temporarily modify the requirements of court rules as may be necessary to respond to the disaster, including declaring days to be holidays for the purpose of computing time. The order may be applicable to the entire state or may be limited to the county or counties directly affected by the disaster. The order may be effective for up to ninety (90) days, and the order may be extended for such additional periods of ninety (90) days or less as the Supreme Court may determine is appropriate. A copy of any order issued under this rule shall be provided to the Chairs of the House and Senate Judiciary Committees.

RULE 612
USE OF REMOTE COMMUNICATION TECHNOLOGY

By order, the Supreme Court of South Carolina may provide for the use of remote communication technology by the courts of this State to conduct proceedings, including, but not limited to trials, hearings, guilty pleas, discovery, grand jury proceedings, and mediation or arbitration under the South Carolina Court-Annexed Alternative Dispute Resolution Rules. For the purposes of this rule, remote communication technology means technology such as video conferencing and teleconferencing which allows audio and/or video to be shared at different locations in real time. The use of this technology for oral argument and hearings before the Supreme Court of South Carolina and the South Carolina Court of Appeals is governed by Rules 218 and 240, SCACR.

The Supreme Court of South Carolina

RE: Amendment to Rule 3(a) of the South Carolina Rules of Criminal Procedure

Appellate Case No. 2021-000086

ORDER

Pursuant to Article V, § 4 of the South Carolina Constitution, Rule 3(a) of the South Carolina Rules of Criminal Procedure is amended as indicated in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, § 4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 29, 2021

Rule 3(a) of the South Carolina Rules of Criminal Procedure is amended to read as follows:

> **(a) Transmittal to Clerk.** Magistrates, municipal judges, and other officials authorized to issue warrants shall, in all cases within the jurisdiction of the Court of General Sessions, forward to the Clerk of the Court of General Sessions all documents pertaining to the case including, but not limited to, the arrest warrant and bond, within fifteen (15) days from the date of arrest in the case of an arrest warrant and date of issuance in the case of other documents. If it is determined that the defendant is already in the custody of the South Carolina Department of Corrections or a detention center or jail in South Carolina, the judge shall annotate the warrant to reflect that a copy has been mailed to the defendant, mail a copy of the annotated warrant to the defendant, and immediately forward the annotated warrant and any allied documents to the clerk of the court of general sessions. Transmittal shall be pursuant to procedures now or hereafter promulgated by the Office of South Carolina Court Administration.

The Supreme Court of South Carolina

Re: Amendments to Rules 2 and 5, South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2020-001509

ORDER

Pursuant to Article V, § 4A of the South Carolina Constitution, Rules 2 and 5 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules are amended as set forth in the attachment to this order. These amendments shall be submitted to the General Assembly as provided in Article V, §4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 29, 2021

Rule 2 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended to add new paragraphs (l) and (m), which provide:

(l) Online Dispute Resolution (ODR). The use of remote communication technology, such as video conferencing and teleconferencing which allows audio and/or video to be shared at differing locations in real time, at any stage of the ADR Conference or early neutral evaluation.

(m) Sign or signing. For purposes of these rules, the reference to sign or signing shall include the physical signature or electronic signature or electronic consent.

Rule 5 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended to add new paragraph (h), which provides:

(h) Online Dispute Resolution (ODR) in an ADR Conference or Early Neutral Evaluation. Unless a party objects, an ADR Conference or Early Neutral Evaluation may be conducted in whole or in part by ODR.

(1) The persons required to physically attend an ADR Conference or Early Natural Evaluation under these rules may attend via ODR if agreed to by the neutral and all parties or as ordered or approved by the Chief Judge for Administrative Purposes of the circuit.

(2) A mediator, arbitrator, or evaluator shall at all times be authorized to control the use of ODR at any stage of an ADR Conference or Early Neutral Evaluation.

The Supreme Court of South Carolina

Re: Amendments to Rule 9, South Carolina Court-Annexed Alternative Dispute Resolution Rules

Appellate Case No. 2019-001845

ORDER

Pursuant to Article V, § 4A of the South Carolina Constitution, Rule 9 of the South Carolina Court-Annexed Alternative Dispute Resolution Rules is amended as set forth in the attachment to this order. This amendment shall be submitted to the General Assembly as provided in Article V, §4A of the South Carolina Constitution.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
January 29, 2021

Rule 9, South Carolina Court-Annexed Alternative Dispute Resolution Rules, is amended to provide:

Rule 9
Compensation of Neutral

(a) By Agreement. When the parties stipulate the neutral, the parties and the neutral shall agree upon compensation.

(b) By Appointment. When the mediator is appointed by the Clerk of Court pursuant to Rule 4(c), Rule 4(d)(2)(B), or Rule 4(d)(2)(C) of these rules, the mediator shall be compensated by the parties at a rate of $200 per hour, provided that the court-appointed mediator shall charge no greater than one hour of time in preparing for the initial ADR conference. Travel time shall not be compensated. Reimbursement of expenses to the mediator shall be limited to: (i) mileage costs accrued by the mediator for travel to and from the ADR conference at a per mile rate that is equal to the standard business mileage rate established by the Internal Revenue Service, as periodically adjusted; and (ii) reasonable costs advanced by the mediator on behalf of the parties to the ADR conference, not to exceed $150. An appointed mediator may charge no more than $200 for cancellation of an ADR conference.

(c) Payment of Compensation by the Parties. Unless otherwise agreed to by the parties or ordered by the court, fees and expenses for the ADR conference shall be paid in equal shares per party. Payment shall be due upon conclusion of the conference unless other prior arrangements have been made with the neutral, or unless a party's application for waiver has been granted by the court prior to mediation.

(d) Indigent Cases. Where a mediator has been appointed pursuant to paragraph (b), a party seeking to be exempted from the payment of neutral fees and expenses based on indigency shall file an application for indigency prior to the scheduling of the ADR conference. The application shall be filed on a form approved by the Supreme Court or its designee. Determination of indigency shall be in the discretion of the Chief Judge for Administrative Purposes or his designee. In cases where leave to proceed in forma pauperis has been granted, a party is exempt from payment of neutral fees and expenses, and no application is required to be filed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2018-000326

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5818
Heard November 2, 2020 – Filed May 5, 2021

REVERSED AND REMANDED

Miles Edward Coleman, of Greenville, and William C. Wood, Jr., of Columbia, both of Nelson Mullins Riley & Scarborough, LLP; and Robert J. McNamara and Joshua A. Windham, of the Institute for Justice, of Arlington, Virginia, admitted pro hac vice, all for Appellant.

Eugene Hamilton Matthews, of Richardson Plowden & Robinson, P.A., of Columbia, for Respondents South Carolina Board of Medical Examiners and South

Carolina Department of Labor, Licensing and Regulation.

Kirby Darr Shealy, III, of Adams and Reese, LLP, of Columbia, for Respondent South Carolina Optometric Physicians Association.

WILLIAMS, J.: This appeal arises from Opternative, Inc.'s (Opternative) action challenging the constitutionality of sections 40-24-10 and 40-24-20 of the South Carolina Code (Supp. 2020). The trial court found Opternative lacked standing to challenge the statutes and granted summary judgment to the South Carolina Department of Labor, Licensing and Regulation (the Department), the South Carolina Board of Medical Examiners (the Board), and the South Carolina Optometric Physicians Association (the Association) (collectively, Respondents). We reverse and remand.

FACTS/PROCEDURAL HISTORY

Opternative developed technology (Technology) that would allow an individual to determine the refractive error[1] of his or her eyesight without going to an optometrist or ophthalmologist for an examination. With the Technology, the individual answers a series of questions relating to his or her medical history and uses a computer and a smart phone to complete the examination to determine his or her refractive error. The results are then reviewed by a South Carolina-licensed ophthalmologist, and if the ophthalmologist determines the individual needs a prescription for corrective lenses, the ophthalmologist writes a prescription. According to Opternative, the Technology is available to the public for free and Opternative only charges the patient for the ophthalmologist's review.

In 2016, the General Assembly enacted the Eye Care Consumer Protection Law (the Act). *See* §§ 40-24-10 to -20. Following the Act's implementation, ophthalmologists stopped using the Technology, believing the Act prohibited its

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[1] The refractive error relates to how light bends within the eye. The patient's refractive error can be determined by different methods, but one method involves asking the patient whether certain lenses placed in front of his or her eye make a projected image better or worse.

use. Opternative filed an action against the Department and the Board, seeking a declaratory judgment finding the Act violated its rights under the South Carolina Constitution and an injunction prohibiting enforcement of the Act. The Association moved to intervene, and the trial court granted the motion following Opternative's conditional consent.[2]

Opternative submitted two affidavits to the trial court—one by Daniel Bodde, its Chief Marketing Officer, and one by Doctor Edward Chaum, an ophthalmologist. Bodde stated in his affidavit that Opternative was successfully operating in South Carolina to provide prescriptions to state residents through an ophthalmologist. But, Opternative's operations in the state ended once the Act was passed because ophthalmologists stopped using its Technology to provide prescriptions. Bodde stated Opternative was in contact with ophthalmologists who would resume use of the Technology to write corrective-lens prescriptions if the Act was struck down. In his affidavit, Dr. Chaum stated he used the Technology to write prescriptions for South Carolina residents but stopped doing so when the Act went into effect.

The Department and the Board moved for summary judgment, asserting Opternative lacked standing and the Act was constitutional. Opternative opposed the motion and requested summary judgment in its favor. The Association filed a memorandum of law joining the Department and the Board's motion and providing additional arguments regarding the Act's validity. Following a hearing on the motions, the trial court granted summary judgment in favor of Respondents, finding Opternative lacked standing because the Act only prohibited Opternative's chosen business model. The court expressly declined to address the issue of the Act's validity. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in finding that Opternative lacked standing to challenge the validity of the Act?

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[2] The Association worked with legislators to draft the Act and lobbied for the Act. The Association moved to intervene because optometrists are subject to the Act's provisions.

STANDARD OF REVIEW

This court reviews a grant of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP. *Loflin v. BMP Dev., LP*, 427 S.C. 580, 588, 832 S.E.2d 294, 298 (Ct. App. 2019). Pursuant to Rule 56(c), summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). To withstand a summary judgment motion in cases applying a heightened burden of proof, the nonmoving party must provide "more than a mere scintilla of evidence." *Id.* at 330–31, 673 S.E.2d at 803. "[A] scintilla is a perceptible amount. There still must be a verifiable spark, not something conjured by shadows." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). Because a statute will not be declared unconstitutional unless it is clearly proven beyond a reasonable doubt, more than a mere scintilla of evidence is required to defeat a summary judgment motion in cases questioning a statute's validity. *See Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (per curiam) ("A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.").

LAW/ANALYSIS

Under South Carolina law, standing can be established in three ways: (1) by statute, (2) by constitutional standing, and (3) under the public importance exception. *Bodman v. State*, 403 S.C. 60, 66–67, 742 S.E.2d 363, 366 (2013). Opternative's arguments at trial and on appeal are limited to constitutional standing. Accordingly, we review standing only under this theory.

Constitutional standing consists of three elements: "(1) the plaintiff must have suffered an 'injury in fact;' (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be 'redressed by a favorable decision.'" *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 770 (2016) (plurality opinion) (quoting *Sea Pines Ass'n for Prot. of Wildlife, Inc. v.*

S.C. Dep't of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001)). "A party seeking to establish standing carries the burden of demonstrating each element." *Id.*

Opternative argues the trial court erred in granting Respondents summary judgment. Specifically, Opternative asserts it satisfied the three elements of standing and therefore requests that this court remand the matter for a determination on its motion for summary judgment as to the Act's constitutionality.

I. Injury in Fact

Opternative argues the trial court erred in finding it had not suffered an injury as a result of the Act's enactment because the Act only prohibited Opternative's chosen business model. We agree.

Opternative asserts it was injured when its operations in South Carolina ended and that the Act was the source of its injury because the Act prohibits ophthalmologists from using its Technology to prescribe corrective lenses. Because this theory of injury depends on an interpretation of the Act, we must first interpret the Act to determine whether it actually causes Opternative an injury in fact. *See Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 354, 815 S.E.2d 446, 452 (2018). Statutory interpretation is an issue of law that this court reviews de novo. *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 6, 809 S.E.2d 223, 226 (2018).

The Act requires that a prescription written by an optometrist or an ophthalmologist to correct refractive error be "based on an eye examination." § 40-24-10(6). "Eye examination" is defined as an assessment of the patient's ocular health and must include an assessment of the patient's "visual status."[3] § 40-24-10(3). The patient's visual status assessment cannot "be based solely on objective refractive data or information generated by an automated testing device . . . to provide a medical diagnosis or to establish a refractive error for a patient as part of an eye examination." § 40-24-10(9). Additionally, the Act states a prescription "may not be based solely on the refractive eye error of the human

[3] Doctor Michael W. Zolman, a South Carolina-licensed optometrist, stated in his deposition that "ocular health" is an anatomical assessment and "visual status" is an assessment of visual accuracy, accommodation of amplitudes, and ocular alignment.

eye or be generated by a kiosk." § 40-24-20(C). The Act defines "kiosk" as "automated equipment or an automated application, which is designed to be used on a phone, computer, or Internet-based device that can be used in person or remotely to provide refractive data or information." § 40-24-10(4).

We agree with the trial court that the Act prohibits Opternative's current business model. Under its model, ophthalmologists review only the information provided by the Technology and do not interact with the patient or conduct any other type of examination or assessment before writing a prescription. Because a prescription cannot be based solely on the patient's refractive error but also requires medical findings regarding the patient's ocular health and visual status, the Act precludes ophthalmologists from relying solely on Opternative's Technology when issuing prescriptions. *See* § 40-24-10(3).

However, we find the trial court erred in ruling the Act's prohibition of Opternative's chosen business model was not an injury in fact. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent'" rather than conjectural or hypothetical. *ATC S., Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). An economic interest is a legally protected interest. *See Toussaint v. State Bd. of Med. Exam'rs*, 285 S.C. 266, 268, 329 S.E.2d 433, 434–35 (1985) ("[The a]ppellant's 'interest in his own reputation and in his economic well-being' clearly give him a personal stake in the outcome of the controversy." (quoting *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969))).

In *Joseph*, our supreme court held a physical therapist and two doctors suffered an injury and had standing to challenge a particular law. 417 S.C. at 449–50, 790 S.E.2d at 770. The law precluded physical therapists from being employed by a doctor and treating patients referred to them by the doctor. *Id.* at 443–44, 790 S.E.2d at 766–67. However, the law did not prohibit doctors from employing other healthcare professionals and referring patients to them. *Id.* at 442, 790 S.E.2d at 766. The law also did not prohibit a physical therapist from being employed in a physical therapist group practice and treating patients referred by another therapist in the practice. *Id.* at 445, 790 S.E.2d at 767–68. The court held this was sufficient to find the appellants had suffered an injury because the law prohibited the appellants from pursuing their profession under the arrangement they desired. *Id.* at 449–50, 790 S.E.2d at 770.

We find Opternative suffered an injury in fact. Opternative's affidavits provide evidence that Opternative suffered an actual and particularized injury: Opternative previously conducted business in South Carolina, but it no longer does. Similar to the physical therapists and physicians in *Joseph*, Opternative is prohibited from engaging in business under the business model it desires. *See id.* Pursuant to *Joseph*, the fact that the Act would allow Opternative to operate under a different model does not eliminate Opternative's ability to challenge the Act. *See id.* Although the State can regulate businesses and business models in pursuit of protecting the public, those affected by such laws have the right to challenge their validity. *Compare Denene, Inc. v. City of Charleston*, 359 S.C. 85, 97, 596 S.E.2d 917, 923 (2004) (stating the government can regulate and restrict businesses in pursuit of preserving public health, safety, and welfare), *with Joytime*, 338 S.C. at 639–40, 528 S.E.2d at 649–50 (finding the appellant had standing to challenge a statute regulating its business). Therefore, we hold the trial court erred in finding Opternative had not suffered an injury in fact because it could change its business model to comply with the Act.

II. Causation

Opternative argues the trial court erred in finding there was no causal connection between its injury and the Act. We agree.

The second element of standing is establishing a causal connection between the injury and the challenged conduct. *See Joseph*, 417 S.C. at 467, 790 S.E.2d at 779. A causal connection exists if the injury is "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." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (omissions and alterations in original) (quoting *Lujan*, 504 U.S. at 560). Establishing a "but for" causal connection or showing a substantial likelihood that the challenged action caused the injury is sufficient. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 74–78 (1978); *see also Bailey v. S.C. Dep't of Health & Envtl. Control*, 388 S.C. 1, 7, 693 S.E.2d 426, 429 (Ct. App. 2010) (finding no causal connection existed when the conduct causing the appellant's alleged injury existed before the challenged state action).

We find the trial court erred in holding there was no causal connection between Opternative's injury and the Act. The trial court reasoned Opternative's injury was

caused by ophthalmologists declining to use the Technology, which was "an act from a third party not before the court." We disagree. The ophthalmologists' decision to stop using the Technology was not an independent action because it is fairly traceable to the Act. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 ("[T]he injury has to be 'fairly . . . trace[able] to the challenged action of the defendant . . . .'" (first omission and second alteration in original) (quoting *Lujan*, 504 U.S. at 560)). Opternative's affidavits presented evidence that ophthalmologists stopped using the Technology because the Act prohibited Opternative's business model. *See Joseph*, 417 S.C. at 449–50, 790 S.E.2d at 770 (stating there was a causal connection between the doctors and physical therapist's injury of not being able to work in an employer-employee arrangement and the laws precluding such an employment arrangement). The record does not contain any evidence that ophthalmologists stopped using the Technology for any other reason. Accordingly, the evidence, when viewed in the light most favorable to Opternative, shows a "substantial likelihood" that the Act caused Opternative's injury. *See Duke Power*, 438 U.S. at 77 (stating a showing of substantial likelihood satisfies the causal connection requirement); *cf. Bailey*, 388 S.C. at 7, 693 S.E.2d at 429 (finding no causal connection existed when the conduct causing the appellant's alleged injury existed before the challenged state action).

The Department and the Board assert Opternative also failed to show a causal connection because (1) they have not had an occasion to enforce the Act, (2) they do not have any authority over Opternative, and (3) Opternative has not complained of any conduct by the Department or the Board. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 ("[T]here 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 . . . .'" (first omission and second alteration in original) (quoting *Lujan*, 504 U.S. at 560)). We disagree.

The Department and the Board are responsible for enforcing violations of the Act. *See* S.C. Code Ann. § 40-1-40(B) (2011) (stating the Department oversees the Board); S.C. Code Ann. § 40-47-10(I) (2011 & Supp. 2020) (providing the Board with the powers and duties of regulating the practice of medicine); S.C. Code Ann. §40-47-110 (2011 & Supp. 2020) (providing the Board with the authority to take disciplinary action for misconduct by licensed professionals); § 40-24-20(D) (stating violation of the Act constitutes misconduct as provided in section 40-47-110). The Department's and the Board's future enforcement of the Act against ophthalmologists using the Technology affects Opternative. Also, the fact

that the Department and the Board have not taken any action against Opternative or to enforce the Act does not affect Opternative's standing. Opternative seeks declaratory judgment of the Act's validity, and a party does not have to first violate a statute to challenge its validity. *See Joseph*, 417 S.C. at 450, 790 S.C. at 770 ("The Declaratory Judgment Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships." (quoting *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 16, 567 S.E.2d 881, 888–89 (Ct. App. 2002))). Finally, because Opternative provides a service to the public and ophthalmologists, the Department's and the Board's lack of regulatory authority over Opternative is irrelevant. *See Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000) ("[V]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." (alteration in original) (quoting *Craig v. Boren*, 429 U.S. 190, 195, (1976))). Accordingly, we hold the trial court erred in finding there was no causal connection between Opternative's injury and the Act.

III. Redressability

Opternative argues the trial court erred in finding a lack of redressability. We agree.

To satisfy the third element of standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Hoyler v. State*, 428 S.C. 279, 305, 833 S.E.2d 845, 859 (Ct. App. 2019) (quoting *Sea Pines*, 354 S.C. at 601, 550 S.E.2d at 291). When summary judgment would be appropriate under Rule 56, the nonmoving party cannot solely rely on allegations or denials asserted in his pleadings but must respond, such as through an affidavit, and show there is a genuine issue of fact for trial. Rule 56(e). "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.*

The trial court erred in finding Opternative failed to show a favorable decision would redress its injury. The trial court referred only to Opternative's complaint when discussing redressability and did not address Bodde's affidavit. In his

affidavit, Bodde stated that based on his personal knowledge and experience, Opternative was in contact with ophthalmologists who indicated they would resume use of the Technology if the Act was struck down. *See* Rule 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge . . . ."). When viewed in the light most favorable to Opternative, this is evidence that a favorable decision would redress Opternative's injury. *See Hancock*, 381 S.C. at 329–30, 673 S.E.2d at 802 (stating all the evidence and all inferences therefrom are viewed in the light most favorable to the nonmoving party). Accordingly, we reverse this finding.

CONCLUSION

Based on the foregoing, we hold the trial court erred in finding Opternative lacked standing, and we reverse. Because the trial court ruled only on the issue of standing and did not rule on the merits of Opternative's constitutional challenge to the Act, we decline to address the merits on appeal. Therefore, we remand this case for further consideration.

Accordingly, the trial court's order is

REVERSED AND REMANDED.

HUFF and GEATHERS, JJ., concur.