STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Opternative Inc., Plaintiff, v. South Carolina Board of Medical Examiners, South Carolina Department of Labor, Licensing and Regulation, Defendants, and South Carolina Optometric Physicians Association, Defendant-Intervenor.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2016-CP-40-06276 **ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT-INTERVENOR**

This matter is before the Court on cross-motions for summary judgment filed pursuant to Rule 56 of the South Carolina Rules of Civil Procedure by Plaintiff Opternative Inc. ("Plaintiff") on June 15, 2023, and by Defendant-Intervenor South Carolina Optometric Physicians Association ("SCOPA") on August 7, 2023. Defendants South Carolina Board of Medical Examiners and South Carolina Department of Labor, Licensing and Regulation (collectively, "Defendants") filed a response in opposition to Plaintiff's motion on August 4, 2024. On August 7, 2023, Plaintiff moved to strike SCOPA's motion for summary judgment, and on May 29, 2024, Plaintiff filed a response to SCOPA's motion for summary judgment.

A hearing took place by WebEx on June 3, 2024. At the beginning of the hearing, Plaintiff's counsel informed the Court that Plaintiff's Motion to Strike was withdrawn, and the Court agreed to consider all memoranda and exhibits filed by both parties in support of and in opposition to the motions for summary judgment.

After review of the materials submitted to the Court and consideration of the arguments made

by counsel at the hearing, and based on applicable law, this Court concludes summary judgment is appropriate against Plaintiff as to all causes of action set forth in the pleadings in this case. Therefore, pursuant to Rule 56, SCRCP, this Court denies Plaintiff's Motion for Summary Judgment and grants summary judgment in favor of Defendants and SCOPA.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff[1] initiated this action against Defendants on October 20, 2016, seeking a declaratory judgment that portions of the Eye Care Consumer Protection Law, S.C. Code Ann. §§ 40-24-10, *et seq.* ("ECCPL") are unconstitutional because they result in a denial of both equal protection and substantive due process. Specifically, Plaintiff challenges sections 40-24-20(C) and (D) of the ECCPL, alleging these provisions violate Article I, Section 3 of the South Carolina Constitution. It also challenges Section 40-24-10(9) of the ECCPL, which provides that vision assessments:

> may not be based solely on objective refractive data or information generated by an automated testing device, including an auto refractor or other electronic refractive-only testing device, to provide a medical diagnosis or to establish a refractive error for a patient as part of an eye examination.

S.C. Code Ann. 40-24-10(9).

The Court granted SCOPA's motion to intervene on February 22, 2017. Following a brief discovery period, Defendants moved for summary judgment on the basis that (1) Plaintiff lacked standing to challenge the constitutionality of the ECCPL, and (2) even if Plaintiff possessed standing, the ECCPL passes constitutional muster because it bears a reasonable relationship to its legislative purpose that is supported by rational basis. Plaintiff responded with its own Motion for Summary Judgment on September 6, 2017, arguing the ECCPL amounted to "naked economic protectionism" that served no purpose except protecting the financial interests of brick-and-mortar optometrists "all

[1] Plaintiff was called Opternative Inc. at the time the action was commenced but changed its name in 2018 to Visibly, Inc.

while doing literally nothing to protect the public health or safety." (Pl.'s Mot. Summ. J. 1-2). On October 3, 2017, SCOPA filed a brief in support of Defendants' motion and opposition of Plaintiff's motion.

The circuit court granted Defendants' Motion for Summary Judgment and dismissed Plaintiff's Complaint with prejudice on January 26, 2018, finding Plaintiff failed to demonstrate that it had standing to bring its Complaint. In light of this conclusion, the circuit court expressly declined to address the parties' equal protection and due process arguments regarding the constitutionality of the ECCPL.

On February 23, 2018, Plaintiff filed a Notice of Appeal from the circuit court's order granting summary judgment to the Defendants. On May 5, 2021, the Court of Appeals reversed the circuit court's order, finding Plaintiff had satisfied the requirements for constitutional standing. *Opternative, Inc. v. S.C. Bd. Med. Exam'rs*, 433 S.C. 405, 418, 859 S.E.2d 263, 270 (Ct. App. 2021). The South Carolina Supreme Court affirmed the decision of the Court of Appeals on August 24, 2022. *Opternative, Inc. v. S.C. Bd. Med. Exam'rs*, 437 S.C. 258, 878 S.E.2d 861 (2022). The case was then remitted to this Court for further disposition.

FACTS

I. THE PARTIES

Founded in 2012 by Aaron Dallek and Steven Lee, O.D., Plaintiff is a Chicago-based telehealth company that developed a technology through which individuals can use a computer or smartphone to determine the refractive error of their eyesight without having an ophthalmologist or optometrist in the room ("Technology"). Plaintiff currently offers its Technology in approximately 35 states and, in addition to its remote vision tests, sells contact lenses through its subsidiary, Next Day Contacts, LLC, an online contact lens retailer.

SCOPA is an association of optometric physicians practicing in South Carolina. Optometrists are independent primary health care professionals for the eye that 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. 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. Ophthalmologists who practice in South Carolina are licensed and regulated by the South Carolina Board of Medical Examiners ("BME"), within the Department of Labor, Licensing & Regulation ("LLR").

II. PLAINTIFF'S TECHNOLOGY AND IN-PERSON EYE EXAMINATIONS

Users can access Plaintiff's Technology through Plaintiff's website or, alternatively, they may be routed to Plaintiff's vision test through any one of its dozens of affiliated third-party corrective lenses retailers. Plaintiff's Technology then collects the user's information by soliciting responses to questions and visual stimuli through a computer interface. Plaintiff uses the responses to generate a dataset about the user and his or her ocular refractive error, which—after receiving a fee from the user—it will then send to Optimized Eye Care, Inc. ("Optimized"), a separate corporation that contracts with optometrists and ophthalmologists to review the results and write prescriptions. Once a prescription is generated, Optimized will send it via Plaintiff back to the original user, who can use the prescription to purchase contacts. Plaintiff's Technology does not measure objective data about the user's eyes or eye health, it cannot detect or aid in diagnosing diseases of the eye or systemic diseases, nor does it perform a corneal examination and evaluation.

Conducting comprehensive eye examinations is within the scope of practice of both optometrists and ophthalmologists. Comprehensive eye examinations consist of, but are not limited

to, the following: a review of the patient's health history; measuring visual acuity, both aided and unaided; performing an examination with a slit lamp of the anterior segments of the eyes and eyelids; performing an internal ophthalmoscopic examination through a dilated pupil, including evaluation of the optic nerve head, macular and peripheral retina; performing a subjective refraction; performing tonometry; evaluating pupils; assessing ocular motility and eye alignment; performing confrontation visual field or similar screening field; performing other tests and procedures as indicated by the patient's chief complaint, case history or objective signs and symptoms discovered during the course of the eye examination; making a diagnosis and formulating a treatment plan; seeking consultation and/or making referrals for assessment/treatment to other health providers as appropriate.

Optometrists and ophthalmologists are under an affirmative obligation to look after the health and safety of their patients, which requires them to use their judgment to determine whether their patients' complaints or symptoms pertaining to their eyesight or eye health are indicators of systemic or body-wide disease processes or pathologies. They are likewise obliged to make such determinations even when the disease processes or pathologies are asymptomatic. It undisputed that optometrists and ophthalmologists are best able to make those necessary determinations through in-person comprehensive eye examinations.

Both optometrists and ophthalmologists are authorized to issue prescriptions for corrective lenses, including spectacles and contact lenses. A contact lens evaluation is a set of diagnostic tests and procedures performed in addition to a comprehensive eye examination. These tests and procedures include a measurement of the corneal curvature (keratometry or corneal topography) and an evaluation of the anterior segment and tear layer of the eye in relation to the contact lens fit. A poorly fit contact lens can cause irritation to the eyes, and the prolonged use of irritating contact lenses can cause pain, scarring, and vision loss even when a patient does not exhibit any symptoms. Such

consequences of a poorly fit contact lens can only be detected by a corneal evaluation. (Shipp Aff., ¶ 14; Robinson Aff., ¶ 12). Typically, a prescriber will not prescribe contact lenses they have not seen on their patient's eyes and will factor in a trial period to evaluate how the lenses are fitting and whether the lenses are causing vision problems. (Shipp Depo. 41:3-12; 53:8 – 54:12).

Certain 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. There is also a risk that individuals may mistakenly believe that they have received a comprehensive eye examination after receiving a prescription for spectacles or contact lenses from an ophthalmologist who only relies upon Visibly's Technology. (Shipp Aff., ¶ 15; Robinson Aff., ¶ 15).

In addition to assessing eye and vision problems, an eye examination may be the first opportunity to detect diabetes and other health conditions. Examples include high blood pressure, hypercholesterolemia, and certain inflammatory diseases. Diabetes is currently the nation's seventh leading cause of death in the United States. Diabetes is also a risk factor for heart disease and stroke, and a leading cause of kidney disease and blindness in adults. Early detection can allow early treatment and management of both systemic and eye-related diabetic changes. One of the more debilitating eye-related outcomes associated with type 2 diabetes in adults is vision impairment, including blindness. Diabetes-related eye conditions include, but are not limited to, refractive changes, cataracts, diabetic retinopathy, and glaucoma. Diabetic retinopathy is among the leading causes of preventable blindness in the United States. Most symptoms associated with diabetic eye disease progress slowly, and unnoticeably; therefore, comprehensive dilated eye examinations are necessary to diagnose, prevent and manage these conditions. Importantly, diabetic eye disease can be detected and diagnosed during a routine comprehensive dilated eye examination.

III. THE EYE CARE CONSUMER PROTECTION LAW

The General Assembly passed the ECCPL on April 29, 2016. Governor Nikki Haley vetoed the ECCPL on May 16, 2016, but 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. 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.[2]

S.C. Code Ann. § 40-24-20.

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

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 refractive error measurements generated by a computer or smart phone.

APPLICABLE LEGAL STANDARD

I. SUMMARY JUDGMENT

Summary judgment shall be granted "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." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). Even when the evidentiary facts are not disputed, "if the conclusions to be drawn from them are, summary judgment should be denied." *Coker v. Cummings*, 381 S.C. 45, 49, 671 S.E.2d 383, 385 (2008). "Summary judgment is not appropriate when further inquiry into the facts is desirable to clarify the application of law." *Id.*

II. STATUES PRESUMED CONSTITUTIONAL

"Statutes are presumed constitutional, and a law that neither creates a suspect class nor abridges a fundamental right is given only minimal equal protection scrutiny." *Faircloth v. Finesod*, 938 F.2d 513, 516 (4th Cir. 1991) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). A statute is presumed constitutional and will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt. *Sojourner v. Town of St. George*, 383 S.C. 171, 175, 679 S.E.2d 182, 185 (2009). "Constitutional constructions of statutes are not only judicially preferred, they are mandated[.]" *State v. McGrier*, 378 S.C. 320, 329, 663 S.E.2d 15, 19 (2008)

(quoting *Henderson v. Evans*, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977)).

When the constitutionality of a statute is at issue, "every presumption will be made in favor of its validity, and no statute will be considered unconstitutional unless its invalidity leaves no doubt that it conflicts with the constitution." *S.C. Dep't Soc. Servs. v. Sarah W.*, 402 S.C. 324, 334, 741 S.E.2d 739, 745 (2013); *see also Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 S.E.2d 601, 609 (2013); *McMaster v. Columbia Bd. Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 663 (2011). Accordingly, the burden is on the challenging party to prove the unconstitutionality of the statute. *Home Health Serv., Inc. v. S.C. Tax Comm'n*, 312 S.C. 324, 327, 440 S.E.2d 375, 377 (1994) (emphasis added).

Similarly, "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)); *accord McLeod v. Starnes*, 396 S.C. 647, 723 S.E.2d 198 (2012) ("[A] classification is presumed reasonable and will remain valid unless and until the party [making an equal protection challenge] proves beyond a reasonable doubt that there 'is no admissible hypothesis upon which it can be justified.'" (quoting *Carolina Amusement Co. v. Martin*, 236 S.C. 558, 576, 115 S.E.2d 273, 282 (1960))).

ANALYSIS

Plaintiff challenges the ECCPL on grounds of equal protection and due process and argues the statute is mere economic protectionist legislation that violates the South Carolina Constitution. In particular, Plaintiff first claims that the ECCPL denies it equal protection of the law because it treats doctors who prescribe contact lenses differently than all other doctors who use telemedicine. Plaintiff further claims that the ECCPL violates South Carolina's due process clause because it does not rationally protect patient health and only serves to insulate brick-and-mortar optometrists from online

competition.

I. SOUTH CAROLINA'S EQUAL PROTECTION CLAUSE

The Court turns first to an analysis of whether the ECCPL violates South Carolina's Equal Protection Clause. "Courts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or (3) strict scrutiny. If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). The parties do not dispute that the determination of whether the ECCPL violates the Equal Protection Clause turns upon the application of the rational basis test.

"Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." *Id.*; *see also Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013); *Harleysville Mut. Ins. Co. v. State*, 401 S.C. 15, 26, 736 S.E.2d 651, 656-57 (2012); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 428, 593 S.E.2d 462, 469 (2004); *Fraternal Order of Police v. S.C. Dep't Revenue*, 352 S.C. 420, 430, 574 S.E.2d 717, 722 (2002); *Gary Concrete Prods., Inc. v. Riley*, 285 S.C. 498, 504, 331 S.E.2d 335, 339 (1985). South Carolina's equal protection jurisprudence reveals no discernable difference between its application of the rational basis test to questions of equal protection under the South Carolina Constitution and the federal courts' use of the standard to measure equal protection under the United States Constitution.

A. The ECCPL is Reasonably Related to Its Legislative Purpose.

The ECCPL protects the public health and welfare because it upholds the standard of care for eye care professionals in South Carolina and prevents citizens from unwittingly putting their eye

health at risk by obtaining a prescription for corrective lenses without a comprehensive eye examination. The applicable standard of care for eye care professionals in South Carolina requires them to use their medical judgment to determine whether their patients' complaints or symptoms pertaining to their eyesight or eye health are indicators of systemic or body-wide disease processes or pathologies. As Plaintiff acknowledges, certain 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. Corrective lens wearers may therefore incur health risks if they forego regular eye exams that would allow the optometrist or ophthalmologist to spot emerging health problems in their early stages.

Plaintiff argues that the ECCPL does nothing to protect the public health and safety, ignoring the evidence in the record to the contrary. For instance, it fails to acknowledge that one-year prescriptions for corrective lenses are consistent with national optometric standards and with extant South Carolina and federal law concerning contact lenses. *See*, *e.g.*, S.C. Code Ann. § 37-25-10 *et seq.*; 15 U.S.C. § 7601 *et seq.*; 16 C.F.R. § 315.1. It likewise glosses over the fundamental requirement of the ECCPL: that corrective lens prescriptions must be based on more than just a refractive examination. *See* S.C. Code Ann. § 40-24-20 (Supp. 2016).

Instead, Plaintiff argues that the ECCPL does not serve its stated purposes because it does not *require* eye-health exams, nor does it *require* eye doctors to check for emerging health problems. Again, this ignores that optometrists and ophthalmologists are already under an affirmative obligation as part of their standard of care to look after the health and safety of their patients, including using their judgment to determine whether their patients' complaints or symptoms are indicative of a latent disease or other issue. The ECCPL need not spell out what particular steps an optometrist or ophthalmologist needs to take during a comprehensive eye examination for it to survive rational basis

scrutiny. Both the General Assembly and the common law have long recognized that the standard of care for professionals across a wide range of disciplines is too nuanced and fact-specific to be established by legislative act. *See, e.g.*, S.C. Code Ann. § 15-36-100 (Supp. 2016) (expert witness must attest to standard of care and its breach as a prerequisite to bringing a claim for professional negligence); *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 758 S.E.2d 501 (2014) (expert testimony required in medical malpractice action). What the ECCPL does is establish a baseline for corrective lens prescriptions, just as other laws and regulations establish minimum requirements in the healthcare context and otherwise. *See, e.g.*, S.C. Code Ann. § 40-33-32 (outlining minimum standards for licensure as a nurse); S.C. Code Ann. § 40-57-135 (establishing minimum standards for real estate brokers-in-charge management agreements); S.C. Code Ann. § 37-15-30 (setting minimum standards for using a contest as a ruse to promote the sale of goods, property or services).

To that end, Plaintiff acknowledges in its disclaimer to potential consumers that its Technology is not available to individuals over the age of 55, stating: "Because we want to ensure that our patients' health is at its best, we recommend that those over 55 see a doctor in person to ensure that any of these health conditions that we acquire as we get older are not missed." In doing so, Plaintiff has instituted its own minimum baseline for the appropriate standard of care regarding the need for in-person eye exams for those over a certain age.

The South Carolina Constitution grants the General Assembly the authority to legislate for the protection of the public health and welfare, and this Court finds the ECCPL does just that by protecting the public from receiving inadequate eye care. Because there is an identifiable risk that the law addresses, Plaintiff has not met its evidentiary burden to overcome the presumption of the ECCPL's constitutionality

B. The ECCPL Treats All Ophthalmologist and Optometrists Alike Under Similar Circumstances and Conditions.

The ECCPL creates a bright line rule for all ophthalmologists and optometrists to follow. This is not a case in which some ophthalmologists or optometrists are treated differently than others. *See, e.g., Daniel v. Cruz*, 268 S.C. 11, 14, 231 S.E.2d 293, 294 (1977) (holding legislation that treated fortune tellers in one county differently from those in another violated equal protection). Nor are ophthalmologists and optometrists being treated differently from other health care providers, as the ECCPL only applies to conduct that falls within ophthalmologists and optometrists' scope of practice. *See, e.g., Joseph v. S.C. Dep't Lab., Licensing & Regul.*, 417 S.C. 436, 450-53 790 S.E.2d 763, 770-72 (2016) (holding classification which distinguished physical therapists from other licensed healthcare providers had no rational relationship to the legislative purposes of a statute at issue); *Broome v. Truluck*, 270 S.C. 227, 230-32, 241 S.E.2d 739, 740-41 (1978) (holding different statutes of limitations for different professionals involved in making improvements to real property violated equal protection).

Plaintiff argues the ECCPL singles out ophthalmologists from other types of physicians because "dermatologists, cardiologists, endocrinologists, psychiatrists, family doctors, and all other doctors are allowed to prescribe using telemedicine." This comparison is inapposite. These other types of doctors cannot prescribe contact lenses, while eye doctors can. While eye doctors may still prescribe treatment via telemedicine as permitted under South Carolina law and their standard of care, they cannot base a prescription for corrective lenses based solely upon the refractive error measured by a kiosk or computer. In other words, the standard for prescribing corrective lenses is applied uniformly, just like eye doctors, or any other type of doctor, cannot prescribe "drugs to individuals the licensee has never personally examined based solely on answers to a set of questions." S.C. Code Ann. § 40-47-113.

Furthermore, the ECCPL prohibit reliance upon Plaintiff's Technology in the course of

treating a patient; it merely proscribes writing prescriptions for patients based solely upon the refractive error that the Technology measures. Plaintiff acknowledges that it is possible for eye doctors to use its Technology in conjunction with an in-person eye exam, although it has not attempted to market it for use in that manner because that is not where the "demand" lies. Regardless, South Carolina is not unique in determining it is necessary to protect consumers in this fashion while acknowledging a place for telemedicine. *See e.g.,* Ga. Code Ann. § 31-12-12(a)(5) and (b)(1)(C) (mandating that "[n]o person in this state shall write a prescription for contact lenses or spectacles unless an eye examination is conducted," and defining "eye examination" as a "real-time examination, which includes the use of telemedicine, in accordance with the applicable standard of care of the prescriber, of the ocular health and visual status of an individual that does not consist solely of objective refractive data or information generated by an automated testing device, including an autorefractor or kiosk, in order to establish a medical diagnosis or refractive diagnosis for the establishment of refractive error, conducted with the patient and prescriber in the same physical location or via telemedicine.").

The ECCPL bears a reasonable relation to the State's legitimate interest in protecting the eye and systemic health of South Carolina citizens. The ECCPL's utility in tackling traditional police power concerns easily survives rational basis scrutiny. The distinction between ophthalmologists who write prescriptions for corrective lenses based solely upon Plaintiff's Technology and the ophthalmologists who write prescriptions based upon a comprehensive eye examination is not arbitrary or capricious, but a rational reflection of the statutory standard for appropriate patient care in the realm of eye health. This Court is not empowered to pass judgment upon that standard, except to acknowledge the legislative prerogative to establish it.

C. The Classification in the ECCPL Has a Reasonable Basis.

In arguing the ECCPL has no rational basis, Plaintiff relies heavily upon *Joseph v. South Carolina Department of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016). In *Joseph*, the Supreme Court held that the statute at issue "deprives physicians of the right to practice medicine in the best interest of their patients" by not being able to hire physical therapists. *Id.* at 452, 790 S.E.2d at 771. Plaintiff draws a parallel with that case, claiming the ECCPL deprives ophthalmologists of their right to practice medicine in the best interest of their patients. The comparison fails because the ECCPL addresses a particular public health risk, whereas it was impossible to find any such risk to the public health and welfare that the statute in *Joseph* was allegedly designed to mitigate.

The text of the ECCPL does not prevent ophthalmologists from exercising their medical judgment to write corrective lens prescriptions. If anything, it prevents Plaintiff, and other similar healthcare technology providers, from fulfilling a market desire for convenience, to the detriment of ophthalmologists' patients. *See Denene, Inc.*, 359 S.C. at 97, 596 S.E.2d at 923 ("No one has an unfettered right to pursue a business detrimental to the public health, safety, and welfare."). Unlike the statute at issue in *Joseph*, the ECCPL does not prevent ophthalmologists and optometrists from practicing medicine in the best interest of their patients. To the contrary, the ECCPL prevents corrective lens prescriptions from being issued without an examination that takes into consideration a patient's overall health. Addressing that risk is well within the General Assembly's constitutional prerogative.

Accordingly, this Court concludes Plaintiff has not proved beyond a reasonable doubt that the ECCPL violates the Equal Protection Clause.

II. SUBSTANTIVE DUE PROCESS

Likewise, this Court concludes Plaintiff has not proved beyond a reasonable doubt that the

ECCPL violates its right to substantive due process. The test for a substantive due process claim is "[w]hether [a statute] bears a reasonable relationship to any legitimate interest of government." *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 478, 527 S.E.2d 763, 765 (2000). "In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Harbit v. City of Charleston*, 382 S.C. 383, 394, 675 S.E.2d 776, 782 (Ct. App. 2009) (citing *Sunset Cay, LLC*, 357 S.C. at 430, 593 S.E.2d at 470). "The State's deprivation of the property interest must fall so far beyond the outer boundaries of legitimate governmental authority that no process could remedy the deficiency." *Id.*

Although the analysis of Plaintiff's due process claim largely mirrors its equal protection claim, it is nonetheless clear that the ECCPL bears a reasonable relationship to the State's legitimate interest in protecting the eye and systemic health of South Carolina citizens.

The undisputed facts before the Court reveal that the ECCPL's legislative purpose is to protect the public from receiving inadequate eye care. The ECCPL protects the public health and welfare because it prevents citizens from unwittingly putting their eye health at risk by obtaining a prescription for corrective lenses without a comprehensive eye examination. There is no dispute that that undiagnosed diseases of the eye are a public concern, and that certain diseases of the eye or of the body may go undiagnosed if patients forego an in-person comprehensive eye examination. The provisions of the ECCPL are reasonably related to protecting and upholding the applicable statutory standard of care for medical professionals in South Carolina, which requires them to use their professional judgment to determine whether their patients' symptoms are indicators of systemic diseases.

Accordingly, because the South Carolina Constitution grants the General Assembly the authority to legislate for the protection of the public health and welfare, and because the ECCPL does

just that, the ECCPL is constitutional. Plaintiff has not met its evidentiary burden to overcome the presumption of constitutionality beyond a reasonable doubt.

CONCLUSION

For the above-stated reasons, this Court concludes Plaintiff has not to carried its evidentiary burden to overcome the presumption of the ECCPL's constitutionality beyond a reasonable doubt. Summary judgment is therefore warranted on Plaintiff's claims against Defendants.

Accordingly, for the reasons stated in this Order, the Court hereby grants the Motion for Summary Judgment filed by SCOPA. Plaintiff's claims against Defendants are hereby dismissed with prejudice.

IT IS SO ORDERED.

(*Judge's E-Signature Page to Follow*)

Richland Common Pleas

Case Caption:	Opternative Inc vs South Carolina Board Of Medical Examiners , defendant, et al
Case Number:	2016CP4006276
Type:	Order/Summary Judgment

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762