

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2015-000162

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JUN 08 2015

SC Court of Appeals

Pankaj Patel, individually and derivatively on behalf of Nominal Defendant,
VP Enterprises, Inc.,Appellant,

v.

Krish Patel, Vijay Patel, and P Communications, Inc., Respondents.

MOTION FOR CERTIFICATION

Appellant, above-named, pursuant to Rule 204(b) of the South Carolina Appellate Court Rules (SCACR), and S.C. Code Ann. § 14-8-210(b), and in accordance with Rule 240, SCACR, hereby moves for certification of the above-captioned appeal for review by this Honorable Court. In support thereof, Appellant would show as follows:

1. Appellant served the Notice of Appeal of the underlying Order on January 23, 2015.
2. The transcript of the trial testimony was completed on or about October 23, 2014.
3. Appellant served his Initial Brief on April 24, 2015. The Initial Brief of Appellant was filed by the clerk of court of the Court of Appeals on April 27, 2015.

4. With Appellant's consent, Respondents have moved for an extension to file Respondents' Initial Brief. Absent any further extensions, Respondents' Initial Brief will be due on or before June 25, 2015 if the motion is granted.

5. Under Rule 204(b), SCACR, and S.C. Code Ann. § 14-8-210(b), this Court may certify cases that involve issues of significant public interest or legal principles of major importance. Certification of this case is appropriate under the Court's standard for the following reasons:

a. This case advances the state's recorded case law on the issue of the statute of limitations where the offending acts have been fraudulently concealed by defendants (*i.e.*, Respondents in the case). Specifically, the case addresses whether a fiduciary defendant may disclose only a sliver of truthful information or must make a full and fair disclosure to start the running of the statute of limitations.

b. Though not necessarily dispositive, this case also addresses the related question under the discovery rule of whether corporate directors and officers as fiduciaries are held to a higher standard of disclosure, that of providing actual knowledge to their shareholders, or whether the general discovery rule requirement of reasonable diligence applies to corporate shareholders-beneficiaries, in calculating compliance with the statutes of limitations contained in S.C. Code Ann. §§ 33-8-300(e) and -420(e).

c. This case addresses a corollary issue of whether the duties owed by a corporate director and officer not to usurp a corporate opportunity continue after a corporation receives an initial denial of a respective business opportunity from a

third party. Specifically, the underlying substantive issue involves whether the South Carolina Business Corporation Act and the common law of this state allow a corporate director/officer to exploit a corporate opportunity initially denied to the corporation, without fully and fairly disclosing: (1) the reasons for a third party's refusal to deal and (2) the director/officer's plan to take the business opportunity for himself. Of particular relevance are the standard-bearer cases of Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) and Energy Res. Corp. v. Porter, 14 Mass.App.Ct. 296, 302, 438 N.E.2d 391, 395 (1982).

d. This case also involves the question of whether the tort of usurpation of a business opportunity by a corporate executive requires that the business opportunity be unique in order to be the subject of misappropriation as required by the Lower Court.

6. Appellant submits that the foregoing constitute issues of significant public interest and involve legal principles of major importance.

7. This Court may also certify a case on such other grounds as it deems appropriate. Rule 204(b), SCACR; S.C. Code Ann. § 14-8-210(b). Appellant submits that certification of this case is appropriate here for the following additional reasons:

a. Respondents as director/officers exploited a business opportunity initially sought by Appellant and the parties' corporation, but denied to their corporation when a prospective licensor rejected their corporation's license application. Without informing Appellant, Respondents repackaged the parties' prior license application and business plan and obtained the license approval

under a different name, to the complete exclusion of Appellant and the parties' corporation.

b. Respondents as officers and director withheld vital material information from Appellant and the parties' corporation on why the prior license application may have been denied. The withheld facts include significant details such as (1) one individual Respondent, being a director and officer of the parties' corporation, had a recent shoplifting conviction when the parties submitted their license application and business plan to the prospective licensor, and (2) the other individual Respondent, being an officer of the parties' corporation, had been fired from his employment with the prospective licensor only three months before the license application and business plan were submitted to the prospective licensor.

c. Because of these lack of disclosures combined with Respondents' immediate usurpation of Appellant's prospective business opportunity, Appellant was never able to test the inalterability of the licensor's initial denial. The question facing the Court is what disclosures must be made by a director/officer to his or her corporation before exploiting a prospective business opportunity for the director/officers' own benefit.

d. This case has a fully developed discovery and trial record on the issues raised herein. The Lower Court issued a lengthy order denying Appellant's claims. The case offers this Court a thorough factual record through which this Court can review the issues raised.

e. It is expected that the issues on appeal will include, *inter alia*, Respondents' argument that a legally defined corporate opportunity did not exist

in this case. Also it is anticipated Respondents may argue that the legal duties of corporate promoters who later become director/officers owed to the corporation and its shareholders vary under South Carolina law depending on the stage of corporate formation and development when the acts occur and that Respondents did not breach any duties at the applicable stages. (Appellant Mem. Ex. A, Order, pp. 20-21, ¶¶ 17-21). Therefore expedience and judicial economy weigh in favor of the Court assuming immediate jurisdiction over the appeal; and

f. Respondent P Communications, Inc. owns approximately 40 or more Verizon retail stores in several states (Appellant Mem. Ex. B, Tr. Transcript, p. 17:23-25). Given the importance of the issues and amount in controversy, any opinion of the Court of Appeals would likely be appealed to this Court regardless of the outcome, which will further delay a final resolution of this case.

8. This motion for certification is not interposed for delay. Appellant wants this appeal heard as soon as possible. With the transcription process already complete, this appeal may proceed forward on the merits without delay.

9. Appellant submits the attached Memorandum in Support of the within motion as required by Rule 240(c)(2), SCACR, and the attached exhibits as required by Rule 240(c)(3), SCACR.

WHEREFORE, having fully set forth his motion, Appellant requests that the above-captioned appeal be certified for review by the Court and that he be granted such other and further relief as is just and proper.

Respectfully submitted,

THE GILREATH LAW FIRM, P.A.

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ATTORNEYS FOR APPELLANT

Date: June 5, 2015
Greenville, South Carolina.

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VP Enterprises, Inc.,Appellant,

v.

Krish Patel, Vijay Patel, and P Communications, Inc., Respondents.

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the Respondents in the foregoing matter with a copy of the foregoing **MOTION FOR CERTIFICATION AND MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION** by Hand Delivery as follows:

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Attorney for Appellants Pankaj Patel, individually
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VP Enterprises, Inc.

June 5, 2015
Greenville, South Carolina.

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SC Court of Appeals

VIA FEDERAL EXPRESS

Honorable Daniel E. Shearouse
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

RE: *Pankaj Patel, individually and derivatively on behalf of Nominal Defendant, VP Enterprises, Inc. v. Krish Patel, Vijay Patel, and P Communications, Inc.*
Appellate Case No.: 2015-000162

Dear Mr. Shearouse:

Please find enclosed the original and seven (7) copies of the Appellant's Motion for Certification, Memorandum in Support of Motion for Certification with Exhibits A- I, and Certificate of Service regarding the above-referenced matter. Also enclosed is the filing fee of \$25 for the Motion for Certification. Please file these enclosures and return a clocked-in copy to me in the enclosed, self-addressed stamped envelope.

By copy of this letter to counsel of record, I am serving them with a copy of the same.

Sincerely,



William M. Hogan

WMH/kmk

Enclosures

cc (w/enclosures):

The Honorable Jenny Abbott Kitchings (via Federal Express)
Monty Desai, Esquire (via Hand Delivery)
Nihar Patel, Esquire (via Hand Delivery)
J. Matthew Whitehead, Esquire (via Hand Delivery)
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Hon. Jenny Abbott Kitchings
South Carolina Court of Appeals
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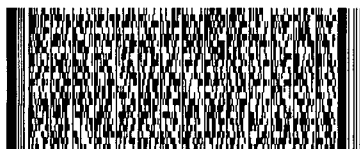
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