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Futch v. McAllister Towing, Inc.: Transforming the Punitory Effect of a Breach of the Employee Duty of Loyalty

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FUTCH V. MCALLISTER TOWING, INC.: TRANSFORMING THE PUNITORY EFFECT OF A BREACH OF THE EMPLOYEE DUTY OF LOYALTY?

I. INTRODUCTION

In South Carolina, if employees breach their duty of loyalty, they may now be able to demand compensation for services rendered to their employers during the period they acted disloyally. *Futch v. McAllister Towing, Inc.*[1] involved an employee's breach of the implied duty of loyalty to his employer. In *Futch* the South Carolina Supreme Court specifically addressed the effect that a breach of the duty of loyalty will have on an employee's ability to receive compensation for services rendered during the course of employment.[2] Prior to the decision in *Futch*, the general rule in South Carolina provided that an agent could not recover any compensation for a period of employment during which the agent acted disloyally to his principal.[3]

The South Carolina Supreme Court departed from this bright-line test in *Futch*, opting instead for an alternative balancing test.[4] This new balancing test focuses upon the particular circumstances of the case, including factors such as (1) the nature of the employment relationship, (2) the nature and extent of the services rendered, (3) the loss or expense the employer experiences as a result of the breach of duty, and (4) the benefit received by the employer during the period the employee was disloyal.[5] This Note analyzes this balancing test in detail and addresses its effect on the duty of loyalty and a disloyal employee's right to compensation in South Carolina, along with the relevant public policy considerations surrounding this change.

II. BACKGROUND

A. Futch v. McAllister Towing, Inc.

The facts of *Futch* are somewhat unusual and unlikely to be duplicated. The employee, Futch, was an eighty-eight year old, well-respected tugboat captain who had worked in the ports of Charleston and Georgetown, South

1. 335 S.C. 598, 518 S.E.2d 591 (1999).
2. *Id.* at 604, 518 S.E.2d at 594.
3. *Id.* at 605, 518 S.E.2d at 594.
4. *Id.* at 607, 518 S.E.2d at 595.
5. *Id.* at 609, 518 S.E.2d at 596-97.

Carolina since the 1960's.[6] McAllister Towing (McAllister) was headquartered in New York, but conducted business in South Carolina.[7] In 1981 Georgetown's only tugboat company ceased operations, and Futch personally leased tugboats for six months to continue operations until McAllister took over the defunct company's business.[8]

During a discussion with McAllister in late 1992, Futch informed McAllister that he had no desire to retire in the near future.[9] After this exchange, Futch believed his job would continue indefinitely.[10] However, in December of 1992, McAllister notified Futch that his job would terminate at the end of 1993.[11]

In addition to the termination of his employment, Futch had reason to believe that McAllister would cease operations in Georgetown.[12] He then began discussing plans to start his own tugboat company with a coworker.[13] They planned to compete directly with McAllister, and intentionally set their pricing structure fifteen percent lower than the rate McAllister charged customers.[14] Additionally, Futch and his partner solicited customers as well as employees of McAllister.[15] While secretly preparing to begin his new business, Futch continued to perform his work for McAllister.[16] In August of 1993, McAllister learned of the plans for Futch's new business and immediately terminated Futch's employment.[17] McAllister then refused to pay Futch the $4200 Futch had earned in monthly commissions during July and August of 1993.[18]

At trial, the jury awarded Futch $4,200 for wages earned.[19] The judge then trebled the damages and awarded Futch attorney's fees under the South Carolina Payment of Wages Act.[20]

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6. *Id.* at 602-03, 518 S.E.2d at 592.
7. *Id.* at 601, 518 S.E.2d at 592.
8. *Id.* at 602, 518 S.E.2d at 592.
9. *Id.*
10. *Id.* at 602, 518 S.E.2d at 592-93.
11. *Id.* at 602, 518 S.E.2d at 593.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 602-03, 518 S.E.2d at 593.
16. *Id.* at 603, 518 S.E.2d at 593.
17. *Id.*
18. *Id.*
19. *Id.* at 604, 518 S.E.2d at 593. The jury only deliberated for sixteen minutes. *Id.*
20. *Id.* The South Carolina Wage Payment Act provides:

> In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee may recover in a civil action an amount equal to three times the full amount of the *unpaid* wages, plus costs and reasonable attorney's fees as the court may allow. Any civil action for the recovery of wages must be commenced within three years after the wages become due.

S.C. CODE ANN. § 41-10-80(C) (West Supp. 1998) (emphasis added).

The court of appeals reversed the trial judge's decision and held the trial court improperly denied McAllister's motion for a directed verdict.[21] The South Carolina Supreme Court reversed the court of appeals, reinstating both the jury's verdict and the trial judge's award of treble damages and attorney fees.[22] The supreme court specifically rejected the court of appeals's use of a bright-line rule requiring a disloyal agent or employee to forfeit all compensation during the period in which the employee or agent was disloyal.[23] Instead, the South Carolina Supreme Court introduced a new balancing test to govern the disposition of a disloyal employee's claim for compensation.[24] The possibility of a disloyal employee being able to recover compensation for services performed during a period of disloyal conduct may have a profound effect on the South Carolina common law duty of loyalty owed by an employee.

B. An Employee's Duty of Loyalty

In addition to any express duty that an employee agrees to undertake within a contract for employment, the common law of South Carolina has historically imposed an implied duty of loyalty owed by all employees.[25] The general duty of loyalty stems from the belief that "[i]t is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment."[26] If an employee acts adversely to the interest of the employer, the employee is deemed disloyal and discharge of that employee is justified.[27]

The South Carolina Supreme Court has determined the nature of a contract for employment includes a promise by the employee, either by express statement or mere implication, that "he or she will perform the work in a diligent and reasonably skillful manner."[28] Every employee has a duty to abide by and carry out an employer's instructions and policies throughout the

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21. Futch v. McAllister Towing, 328 S.C. 312, 320, 491 S.E.2d 577, 583 (Ct. App. 1997).
22. *Futch*, 335 S.C. at 612, 518 S.E.2d at 598.
23. *Id.* at 607, 518 S.E.2d at 595.
24. *Id.*
25. *See* Young v. McKelvey, 286 S.C. 119, 122, 333 S.E.2d 566, 567 (1985); Berry v. Goodyear Tire & Rubber, 270 S.C. 489, 491, 242 S.E.2d 551, 552 (1978); Lowndes Products, Inc. v. Brower, 259 S.C. 322, 333, 191 S.E.2d 761, 767 (1972); *see also* Tory A. Weigand, *Employee Duty of Loyalty and the Doctrine of Forfeiture*, B.B.J., Sept.-Oct. 1998, at 6.
26. *Berry*, 270 S.C. at 491, 242 S.E.2d at 552 (finding that an employee who worked for employer's competitor while on sick leave breached the duty of loyalty owed to his employer).
27. *Id.*; *see also* Gussin v. Shockey, 725 F.Supp. 271, 274 (D. Md. 1989), *aff'd*, 933 F.2d 1001 (4th Cir. 1991) (finding that where a horse trader breached his duty of loyalty to his employer, the fundamental duties of an agent include the duty not to put himself in a position in which his own interests may conflict with the interests of the principal).
28. *Young*, 286 S.C. at 122, 333 S.E.2d at 567.

employee's term of employment.[29] Any actions that are adverse to the employer's interests are disloyal.[30]

An employee's duty of loyalty may be breached when any of the following events occur: (1) an employee competes with his current employer;[31] (2) an employee solicits the employer's customers or otherwise diverts the employer's business;[32] (3) an employee lures his coworkers or former coworkers away from the employer to a competing business;[33] (4) an employee fails to disclose to the employer matters that are adverse to the employer and which impair the employee's ability to fulfill her duty of loyalty;[34] (5) an employee takes an undisclosed payment from a third party who is conducting business with the employer;[35] or (6) an employee divulges an employer's secret or confidential information to others not privy to the information.[36]

1. *Development of the Common Law Duty of Loyalty in South Carolina*

Three leading cases in South Carolina have aided the development of the state's common law duty of loyalty owed to an employer.[37] The first case, *Berry v. Goodyear Tire & Rubber Co.*, involved a nineteen-year employee (Berry) who took nineteen weeks of sick leave, and while on leave worked for a direct competitor of Goodyear.[38] Goodyear ultimately terminated Berry's employment when he refused to produce a doctor's written confirmation of his health problems.[39] Berry filed suit attempting to recover severance pay for the time he was on leave.[40] The court found Berry had breached his duty of loyalty and that this breach constituted an abandonment of his employment contract.[41] Thus, the discharge was justified.[42] Applying the bright-line rule, a breach of

29. *Id.*
30. *Id.*
31. *Berry*, 270 S.C. at 491, 242 S.E.2d at 552.
32. Lowndes v. Products, Inc. v. Brower, 259 S.C. at 333, 191 S.E.2d at 767 (stating an employee has a "duty not to do disloyal acts looking to future competition").
33. *Id.* at 337, 191 S.E.2d at 769.
34. EMPLOYEE DUTY OF LOYALTY: A STATE-BY-STATE SURVEY 508-09 (Stewart S. Manela et al. eds., 1995) [hereinafter EMPLOYEE DUTY OF LOYALTY].
35. Ocean Forest Co. v. Woodside, 184 S.C. at 420, 192 S.E. at 443-44 (1937).
36. EMPLOYEE DUTY OF LOYALTY, *supra* note 34, at 509.
37. *See* Young v. McKelvey, 286 S.C. 119, 333 S.E.2d 566 (1985); Berry v. Goodyear Tire & Rubber, 270 S.C. 489, 242 S.E.2d 551 (1978); *Lowndes*, 259 S.C. 322, 191 S.E.2d 761 (1972); *see also* EMPLOYEE DUTY OF LOYALTY, *supra* note 34, at 511 (citing *Berry*, *Lowndes*, and *Young* as "[t]hree leading South Carolina cases in this area of the law").
38. *Berry*, 270 S.C. at 490-91, 242 S.E.2d at 552.
39. *Id.* at 490, 242 S.E.2d at 552.
40. *Id.*
41. *Id.* at 492, 242 S.E.2d at 553.
42. *Id.*

the duty of loyalty meant that Berry was entitled to no compensation whatsoever.[43]

Another important case in the evolution of South Carolina's employee duty of loyalty is *Lowndes Products, Inc. v. Brower*.[44] In *Lowndes* several employees left their employment to begin a new business in direct competition with their former employer, Lowndes.[45] The employees also solicited and acquired some of Lowndes's key employees and customers.[46] Lowndes alleged that the employees misappropriated its trade secrets for the manufacture of nonwoven textile fabric.[47]

Lowndes's argument failed because the court found that the company failed to take proper and reasonable measures to protect its trade secrets.[48] However, the court did agree that the employees' actions were disloyal, and the employer was entitled to recover all damages proximately resulting from their wrongful conduct.[49] The court also extended liability to certain third parties involved in helping the employees of Lowndes establish the competing business, stating that "[i]t is well recognized that a person who without privilege knowingly causes an agent to abandon his duties, or otherwise aids or assists him to violate a duty to his principal, is subject to tort liability to the principal."[50] This decision not only broadened the duty of loyalty in South Carolina, but also extended the duty to individuals outside of the employment relationship.

Young v. McKelvey is the third major case impacting the evolution of South Carolina's duty of loyalty.[51] Young sued his employer for compensation allegedly due under his employment contract.[52] The employment contract at issue required sixty day's notice of its termination by either party.[53] Young was discharged - only nineteen days after being hired for conducting a romantic relationship with a subordinate employee expressly against company policy.[54] The court, citing *Berry*[55] and *Lowndes*,[56] ruled that an employee has a duty to abide by and carry out his employer's instructions and policies.[57] By acting in violation of company policy, Young "wilfully disobeyed his employee's

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43. *Id.*
44. 259 S.C. 322, 191 S.E.2d 761 (1972).
45. *Id.* at 325, 191 S.E.2d at 763.
46. *Id.* at 325, 335, 191 S.E.2d at 763, 768.
47. *Id.* at 325, 191 S.E.2d at 763.
48. *Id.* at 331, 191 S.E.2d at 766.
49. *Id.* at 335, 191 S.E.2d at 768. The court also held that the employees' other actions, such as providing the employer with notice of the employees' resignation by mail many days after the employees had quit their positions, were disloyal. *Id.* at 334-35, 191 S.E.2d at 768.
50. *Id.* at 337, 191 S.E.2d at 769 (quoting 3 AM. JUR. 2D *Agency* § 290 (1986)).
51. 286 S.C. 119, 333 S.E.2d 566 (1985).
52. *Id.* at 120, 333 S.E.2d at 566.
53. *Id.* at 121, 333 S.E.2d at 567.
54. *Id.*
55. 270 S.C. at 491, 242 S.E.2d at 552 (1978).
56. 259 S.C. at 767, 191 S.E.2d at 333 (1972).
57. *Id.* at 121, 333 S.E.2d at 567.

express instruction."[58] Young did not abide by his employer's instructions and policies; therefore, the court denied the employee's motion for summary judgment.[59]

2. *Application of the Common Law to* Futch

The *Futch* court held that Futch's actions breached the duty of loyalty.[60] He solicited his employer's customers, hired away coworkers, and initiated a competing business.[61] Clearly, an employee cannot solicit current customers of the employee's employer.[62] Futch violated this well-established rule when, during his employment, he asked McAllister's customers to commit to Futch's new company.[63] In addition, the duty of loyalty requires an employee to exert his best effort for the benefit of his employer.[64] Futch did work for the benefit of his employer and performed his job well while making plans to compete actively with McAllister.[65]

Though it is a well-established rule in South Carolina that an employee cannot compete directly with his employer,[66] an employee in South Carolina *is* permitted take limited steps to initiate future plans to compete with his employer.[67] For example, submitting forms to create a new corporation is likely to be deemed pretermination planning but not a breach of the duty of loyalty.[68] This line separating mere preparation from active competition may be difficult to discern in some cases. In Futch's case, the court of appeals concluded that his solicitation of McAllister's customers combined with other acts and plans aimed at competing with McAllister crossed that line and constituted a breach of the duty of loyalty.[69]

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58. *Young*, 286 S.C. at 122, 333 S.E.2d at 567.

59. *Id.*

60. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 558, 604, 518 S.E.2d 591, 594 (1999).

61. *Futch*, 335 S.C. at 603, 518 S.E.2d at 593; *see also* Lowndes Products, Inc. v. Brower, 259 S.C. 332, 332-38, 191 S.E.2d 71, 767-70 (1972) (finding that the employees, who solicited their employer's customers while making plans to begin a competing textile company, were guilty of disloyalty and owed the employer damages); Ocean Forest Co. v. Woodside, 184 S.C. 428, 442, 192 S.E. 413, 420 (1937) (holding that the employee was not entitled to his commission because his job was to collect an outstanding debt for his employer, but he converted the money for his own use).

62. Maryland Metals, Inc. v. Metzner, 382 A.2d 564, 568 (Md. 1978).

63. *Futch*, 335 S.C. at 602, 518 S.E.2d at 593.

64. *Maryland Metals*, 382 A.2d at 568.

65. *Futch*, 335 S.C. at 603, 518 S.E.2d at 593.

66. *See generally* Berry v. Goodyear Tire & Rubber Co., 270 S.C. 489, 491-92, 242 S.E.2d 551, 552-53 (1978).

67. *Futch*, 335 S.C. at 610, 518 S.E.2d at 597 (citing Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486, 493 (Colo. 1989)).

68. *Id.*

69. Futch v. McAllister Towing, Inc., 328 S.C. 312, 319, 491 S.E.2d 577, 581 (Ct. App. 1997).

III. ANALYSIS

A. The Effect of Disloyalty on an Employee's Right to Receive Compensation

The traditional rule in South Carolina is that an agent guilty of disloyalty to his principal must forfeit all compensation earned during that period of disloyalty.[70] As the Restatement (Second) of Agency explains:

> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned.[71]

The rule that a disloyal employee forfeits the right to receive compensation is derived from the broader principle of contract law that "a party who violates an agreement should not be permitted to recover under the contract."[72] It also follows the rule of equity in which one who does not come with "clean hands" cannot recover.[73] Thus, because the employee has breached an implied contract with her employer, she should not receive compensation.

This rigid rule gives courts little flexibility when deciding employee disloyalty cases. Before *Futch*, South Carolina courts automatically denied the employee all compensation earned during the period in which disloyal acts were committed. The courts did not look to extenuating circumstances or external factors to reach their decision.[74]

B. The Futch *Balancing Test*

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70. *See Futch*, 328 S.C. at 316, 491 S.E.2d at 579 (Ct. App. 1997) (citing Ocean Forest Co. v. Woodside, 184 S.C. 428, 442, 192 S.E. 413, 420 (1937)); Berry v. Goodyear Tire & Rubber Co., 270 S.C. 489, 492, 242 S.E.2d 551, 553 (1978) (finding that the employee, a tire-salesman fired after working for a direct competitor, was not entitled to severance pay).

71. RESTATEMENT (SECOND) OF AGENCY § 469 (1958).

72. Hartford Elevator, Inc. v. Lauer, 289 N.W.2d 280, 285 (Wis. 1980) (citing JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS, § 11-26 (2d ed. 1977) and 9 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1017B (3d ed. 1967).

73. *See* Arnold v. City of Spartanburg, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943) (discussing the doctrine of "unclean hands," which precludes a plaintiff from recovering in equity if he acted unfairly and to the prejudice of the defendant in a matter that is the subject of the litigation).

74. Futch v. McAllister Towing, Inc., 335 S.C. 598, 605, 518 S.E.2d 591, 594 (1999).

Instead of relying on the common law bright-line rule of automatic forfeiture, the *Futch* court invoked a balancing test.[75] The new test requires several factors to be considered when determining whether an employee should be denied all or part of compensation earned during a period of disloyalty.[76] Specifically, a court must look to (1) the nature of the employment relationship; (2) the nature and extent of the employee's services and the employee's breach of duty; (3) the expenses and inconvenience caused to the employer by the employee's breach; and (4) the value to the employer of services properly rendered by the employee.[77]

Prior to the South Carolina Supreme Court's decision in *Futch*, no South Carolina court had addressed the issue of whether a disloyal agent or employee should forfeit all or only a portion of compensation earned while disloyal.[78] However, other jurisdictions have chosen to adopt a balancing test similar to the one pronounced in *Futch*.[79] For example, in *Hartford Elevator v. Lauer*[80] the Wisconsin Supreme Court introduced a balancing test that includes the same factors applied in *Futch*.[81] That court explicitly rejected the per se rule that an agent who is disloyal in the performance of his duties forfeits the right to any compensation.[82] The court explained that under the new test, merely proving an employee's disloyalty is no longer sufficient.[83] In order to recover damages, an employer must also prove that the disloyalty had such an impact on job performance that the employee would be unjustly enriched if allowed to retain the compensation previously paid.[84] Once an employer proves a breach of loyalty, the burden shifts to the employee to produce mitigating circumstances as a defense to his breach of loyalty.[85] If the employee is

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75. *Id.* at 613, 518 S.E.2d at 598 ("[W]e reverse the Court of Appeals's application of a bright-line rule requiring a disloyal agent or employee to forfeit all compensation, and adopt instead the balancing approach . . . .").

76. *Futch*, 335 S.C. at 609, 518 S.E.2d at 596 (citing Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486, 497 (Colo. 1989)).

77. *Futch*, 335 S.C. at 609, 518 S.E.2d at 596-97.

78. *Id.* at 612, 518 S.E.2d at 598 ("The balancing approach we adopt today is a new development in South Carolina employment law . . . .").

79. *E.g.*, Hartford Elevator, Inc. v. Lauer, 289 N.W.2d 280, 287 (Wis. 1980); Chelsea Indus., Inc. v. Gaffney, 449 N.E.2d 320, 326 (Mass. 1983).

80. 289 N.W.2d 280 (Wis. 1980).

81. *Id.* at 287.

82. *Id.* ("[W]e do not adopt the rigid, mechanical rule urged by the employer that compensation is automatically denied to the agent during the period in which he has committed a wilful, and significant breach of duty of loyalty.").

83. *Hartford Elevator*, 289 N.W.2d at 287.

84. *Id.*

85. *Id.* The burden of proof standard applied in *Hartford Elevator* does not appear to be a part of the *Futch* balancing test. In *Futch*, the trial judge instructed the jury to determine whether Futch had proven McAllister had breached Futch's employment contract by refusing to pay his wages. *Futch*, 335 S.C. at 603-04, 518 S.E.2d at 593. If Futch proved the breach of contract, the jury was to then determine whether McAllister had proven that Futch breached his duty of loyalty and was therefore justified in withholding his wages. *Id.*

successful, the employer's recovery of lost profits or previously paid compensation may be reduced or defeated.[86]

The Massachusetts Supreme Court has also elected to eliminate the bright-line rule of forfeiture.[87] In *Chelsea Industries, Inc. v. Gaffney* the court stated that unless the disloyal employee proves the value of his services, the employer is entitled to recover the entire amount of the employee's compensation during the period of disloyalty.[88] This rule is somewhat different from *Futch*, but is similar in that the employee is given the chance to prove he earned a right to compensation. The employee has the burden to prove the fair value of his services rendered to the employer.[89]

The goal of the balancing test is to avoid the unjust enrichment of either party.[90] An employer should not be placed in a better position than if the employee had not breached the duty of loyalty. If the employer receives value from the employee's work, he must compensate the employee for the value received.[91] This theory also works in the reverse, and the employee must repay any portion of his compensation that was in excess of the worth of his services to the employer.[92] If the employer does not compensate the employee for the value the employer received, the employer is unjustly enriched because the employer receives a windfall. The balancing test is applied to avoid this situation, and thereby adequately prevents the unjust enrichment of either party.

C. Public Policy

The *Futch* balancing test was adopted because the court recognized the conflicting policies at work in employment disloyalty cases: the integrity of the employment relationship versus the promotion of free competition in the marketplace.[93] The policy underlying the duty of loyalty owed to an employer is that "commercial competition must be conducted through honesty and fair dealing."[94] A healthy employment relationship is fostered by honesty and fair

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86. *Id.*

87. Chelsea Indus., Inc. v. Gaffney, 449 N.E.2d 320, 327 (Mass. 1983).

88. *Id.* (holding that employees who began a competing business violated their fiduciary duty and were not entitled to recover compensation because they did not prove the value of their services); *accord* Walsh v. Atlantic Research Assocs., 71 N.E.2d 580, 585 (Mass. 1947) (holding that an employer's right of recovery is limited to the amount of compensation paid during an employee's disloyalty that is greater than the value of the employee's services to the employer).

89. *Chelsea*, 449 N.E.2d at 327.

90. *See Futch*, 335 S.C. at 609, 518 S.E.2d at 596; *Hartford Elevator*, 289 N.W.2d at 287.

91. *Id.*

92. *Id.*

93. *Futch*, 335 S.C. at 606, 518 S.E.2d at 595 (citing Jet Courier Service, Inc. v. Mulei, 771 P.2d 486, 493).

94. *Jet Courier*, 771 P.2d at 492; *see also* Maryland Metals, Inc. v. Metzner, 382 A.2d 564, 568 (Md. 1978) (finding that fairness dictates that an employee should not be permitted to take advantage of his employer's trust in order to obtain an unfair advantage when competing with that employer).

dealing.[95] If employees are not loyal to their employers, our marketplace could face severe instability. For example, employees could be induced to change jobs or careers frequently, breeding only limited dedication to one's work. Without any intention to remain in a job or career for a period of time, an employee would not have much motivation for job advancement through hard work. This instability could create low employee morale because an employee may not be as satisfied with an atmosphere in which new co-workers are constantly coming and going. An additional effect would be the increase of an employer's costs for training new employees on a frequent basis.

The competing argument is that society, as a whole, has an interest in "fostering free and vigorous competition in the economic sphere".[96] An important part of the employee's duty of loyalty is his duty not to enter into competition with his employer's business. Yet, free competition is essential to our economic development and to the individual rights of employees to run their own businesses, change career paths, or work for higher salaries. All employees should have the right to improve their socioeconomic status by exercising a maximum degree of personal freedom and discretion in choosing their individual employment options.[97]

Many jurisdictions have recognized the need to balance the necessity for free competition in the marketplace and stability and integrity within an employment relationship.[98] The doctrine of "corporate opportunity" was developed to reconcile the competing interests of society and an employer.[99] It is an offshoot of the general duty of loyalty owed by corporate officers, directors, and upper-level managerial employees.[100] Generally, the doctrine provides that "if a business opportunity is presented to a corporate executive, the officer cannot seize the opportunity for himself if: (a) the corporation is financially able to undertake the opportunity; (b) the opportunity is within the corporation's line of business; or (c) the corporation is interested in the opportunity."[101] However, if a business opportunity is presented that is not an

95. *Jet Courier*, 771 P.2d at 492 (identifying the underlying policy consideration that commercial competition must be conducted through honesty and fair dealing).

96. *Maryland Metals*, 382 A.2d at 568.

97. *Id.* at 568-69.

98. *Jet Courier*, 771 P.2d at 492-93; *Maryland Metals*, 382 A.2d at 568; *Futch*, 335 S.C. at 606, 518 S.E.2d at 595.

99. Phoenix Airline Serv., Inc. v. Metro Airlines, Inc., 390 S.E.2d 219, 223 (Ga. Ct. App. 1989) (stating that "a corporate opportunity exists when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage") (quoting WILLIAM MEADE FLETCHER, CYCLOPEDIA OF CORPS. § 861.1 (1986)).

100. *Id.*

101. Science Accessories Corp. v. Summagraphics Corp., 425 A.2d 957, 963 (Del. 1980).

opportunity in which the corporation has an actual or expectant interest, the corporate officer is permitted to treat the opportunity as his own.[102]

If an employee takes advantage of a corporate opportunity or secretly profits from a competitive activity, an employer may recover the lost value of the opportunity or the lost profit.[103] The lost profit includes the compensation the employer paid to the employee during the employee's period of disloyalty.[104]

The doctrine of corporate opportunity has not been discussed within any South Carolina court opinions. Use of the doctrine could potentially provide an alternative method to balance the need for both free competition and stability within the employment atmosphere. Unlike the balancing test that provides a great deal of uncertainty and unpredictability, the doctrine of corporate opportunity would allow the court to employ a test that is not as restrictive as the former bright-line test, yet it would eliminate some of the uncertainty associated with the vague balancing test.

IV. CONCLUSION

The facts of the *Futch* case are unusual and unlikely to be replicated. Futch, a vigorous eighty-eight year old, is not what one would imagine as the stereotypical disloyal employee. Futch was portrayed as "saving" all of Georgetown's port operations in 1981 by taking it upon himself to lease the needed tugboats.[105] He claimed he had reason to believe his employer was preparing to cease operations and therefore initiated plans to provide the tugboat services himself.[106]

Futch's *individual* appeal probably had a great impact on the jury and created sympathy for Futch's situation. Individuals, serving as jurors, are most likely employees themselves and may tend to rally behind the plight of another employee. The desire to reach into the "deep pockets" of an out-of-state employer may also arise from a fact situation such as that found in *Futch*.

The potential effect of the *Futch* balancing test is difficult to predict. It may lead to an increase in litigation due to confusion between employers and employees about the effect of a breach of the duty of loyalty. The outcome of a breach of loyalty case is now less predictable. No longer can an employer in negotiations with a disloyal employee rely on the argument that the employee will be unable to recover. Prior to *Futch*, an employee may not have been willing to challenge the established bright-line test. However, if an employee is faced with the possibility of attaining some of his wages earned during a

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102. *Id.* at 963; *see also Phoenix Airline*, 390 S.E.2d 219, 226 (Ct. App. Ga. 1990) (finding that the employer has the burden of establishing that the employees were presented with a corporate opportunity, then the burden shifts to the employee to prove the employee acted in good faith in dealing with the opportunity and that no disloyalty occurred).

103. RESTATEMENT (SECOND) OF AGENCY § 401 (1958).

104. Cameco, Inc. v. Gedicke, 724 A.2d 783 (N.J. 1999) (involving an employee who used his employer's shipping information and truckers to aid his own business activities).

105. *Futch*, 335 S.C. at 602, 518 S.E.2d at 592-93.

106. *Id.*

period of disloyalty, the employee is more likely to pursue litigation. An increase in employment litigation will place a further strain on judicial caseloads and create uncertainty about the application of the test in different fact situations.

While it is possible that the balancing test is a more equitable solution to the previous bright-line rule of forfeiture, more clarification is necessary for the balancing test to be employed as an effective means of resolving breach of loyalty disputes.

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