N.C.P.I.—Civil 807.50
BREACH OF DUTY—CORPORATE DIRECTOR
GENERAL CIVIL VOLUME
REPLACEMENT FEBRUARY 2025
N.C.G.S. § 55-8-30

807.50 BREACH OF DUTY—CORPORATE DIRECTOR.[1]

The (*state number*) issue reads:

"Was the plaintiff[2] damaged by the failure of the defendant to discharge [his] [her] duties as a corporate director?"[3]

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things:[4]

First, that the defendant breached one or more of the defendant's duties, by

[failing to act in good faith.[5] Good faith requires a director to discharge the director's duties honestly, conscientiously, fairly and with undivided loyalty to the corporation.[6] A director acts in good faith so long as [he] [she] acts with reasonable care in the honest belief that [his] [her] action is in the best interests of the corporation. Errors in judgment alone do not constitute a failure to act in good faith, as long as the director reasonably believes [he] [she] is making a reasonable business decision.[7]]

[failing to act as an ordinarily prudent person in a like position would have acted under similar circumstances.[8] (Unless a director has actual knowledge to the contrary,[9] a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by

[one or more employees of the corporation who the director reasonably believes to be reliable and competent in the matter(s) presented]

[[a lawyer] [a public accountant] [*name other outside advisor*] as to the matter(s) the director reasonably believes are within such [professional's] [advisor's] competence]

[a committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence][10].)]

[failing to act in a manner the defendant reasonably believed to be in the best interests of the corporation.[11]]

And second, that the defendant's [acts] [omissions] were a proximate cause of damage to the plaintiff. Proximate cause is a cause which in a natural and continuous sequence produces a person's damage and is a cause which a reasonable and prudent person could have foreseen would probably produce such damage or some similar injurious result. There may be more than one proximate cause of damage. Therefore, the plaintiff need not prove that the defendant's acts were the sole proximate cause of the damage. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's acts were a proximate cause.

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff was damaged by the failure of the defendant to discharge the defendant's duties as a corporate director, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. The statutes no longer use the word "fiduciary" to describe the duty owed by a director to a corporation in order to avoid confusion between corporate and trust fiduciary duties. The substantive law regarding the duty owed by a director, however, has not been modified. *See* N.C.G.S. § 55-8-30 (1990) (amended 1993).

2. In *Green v. Freeman*, 367 N.C. 136, 749 S.E.2d 262 (2013), the Supreme Court noted the general rule that "shareholders, creditors or guarantors of corporations generally may not bring individual actions [against a director for breach of his fiduciary duties] to recover what they consider their share of the damages suffered by the corporation." *Id.* (quoting *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660, 488 S.E.2d 215, 220-21 (1997)). Rather, shareholders, creditors or guarantors may bring derivative actions against a director on behalf of the corporation and any damages recovered flow back to the corporation, not to the shareholder, creditor or guarantor individually. *Id.* The Court then discussed two exceptions to this general rule: (1) when the wrongdoer owed the shareholder, creditor or guarantor "a special duty" or (2) when the shareholder, creditor or guarantor suffered a personal injury "distinct from the injury sustained by . . . the corporation itself." *Id.* (quoting *Barger*, 346 N.C. at 659, 488 S.E.2d at 221). The Supreme Court has recognized the creation of a special duty in circumstances "when the wrongful actions of a [director] induced an individual to become a shareholder; . . . when the [director] performed individualized services directly for the shareholder; and when a [director] undertook to advise shareholders independently of the corporation." *Id.* (quoting *Barger*, 346 N.C. at 659, 488 S.E.2d at 220). This list, however, is not exhaustive. *See id.*

3. "As a general matter, post hoc judicial review of corporate action should not serve as a platform for second-guessing the business decisions of officers and directors." *Seraph Garrison, LLC ex rel. Garrison Enterprises, Inc. v. Garrison*, 247 N.C. App. 115, 122, 787 S.E.2d 398, 405 (2016).

4. N.C.G.S. § 55-8-30; *see also Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013) (citing N.C.G.S. § 55-8-30 (2011)). The Supreme Court has interpreted this section "as codifying the common law theory of the business judgment rule." *Jackson v. Marshall*, 140 N.C. App. 504, 510, 537 S.E.2d 232, 236 (2000). Either N.C.G.S. § 55-8-30 or the common law business judgment rule "could potentially insulate him [a director] from liability." *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 513 S.E.2d 812 (1999).

5. N.C.G.S. § 55-8-30(a)(1).

6. *Anthony v. Jeffress*, 172 N.C. 378, 380, 90 S.E. 414, 415 (1916); McIver v. Young Hardware Co., 144 N.C. 478, 57 S.E. 169 (1907) (discussing in detail the principles of good faith). A director's failure to disclose material facts to the corporation may constitute a breach of the director's undivided loyalty, and therefore, a failure to act in good faith. *See Harris v. Testar, Inc.*, 243 N.C. App. 33, 38, 777 S.E.2d 776, 780 (2015).

7. *See Oberlin Cap., L.P. v. Slavin*, 147 N.C. App. 52, 56–57, 554 S.E.2d 840, 845 (2001) (citing *Milling Co., Inc. v. Sutton*, 9 N.C. App. 181, 184, 175 S.E.2d 746, 748 (1970)).

8. N.C.G.S. § 55-8-30(a)(2); *Anthony v. Jeffress*, 172 N.C. 378, 380, 90 S.E. 414, 415 (1916) ("While the directors are not liable for losses resulting from mistakes of judgment such as are excused in law, they are liable for losses resulting from gross mismanagement and neglect of the affairs of the corporation. Good faith alone will not excuse them when there is lack of the proper care, attention, and circumspection in the affairs of the corporation which is exacted of them as trustees."). For an explanation of the meaning of the phases "in a like position" and "under similar circumstances", see the Official Comment to section 55-8-30. Note that directors of banks and other financial institutions may be held to a higher standard than a director of a typical private corporation. *Lillian Knitting Mills Co. v. Earle*, 237 N.C. 97, 103, 74 S.E.2d 351, 355 (1953) ("The general rule with respect to the liability of bank directors is not altogether applicable to officers and directors of a private corporation.").

9. N.C.G.S. § 55-8-30(c).

10. N.C.G.S. § 55-8-30(b). This language may be used when the defendant director presents evidence that he relied on business data even though the plaintiff may have been damaged. The director's reliance must be in good faith and reasonable. He cannot ignore the corporate information and expert advice and then expect to be protected by N.C. Gen. Stat. § 55-8-30(b). *State ex rel. Long v. ILA Corp*., 132 N.C. App. 587, 603, 513 S.E.2d 812, 822 (1999).

11. N.C.G.S. § 55-8-30(a)(3). A director fails to act in the best interests of the corporation if he uses his position for his own personal gain to the detriment of the corporation (or its shareholders), or uses his position to benefit others to the detriment of the corporation.