

807.52 BREACH OF DUTY—CORPORATE OFFICER.¹

The (*state number*) issue reads:

“Was the plaintiff damaged by the failure of the defendant to discharge [his] [her] duties as a corporate officer?”²

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:³

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

[failing to act in good faith.⁴ Good faith requires an officer to discharge the officer’s duties honestly, conscientiously, fairly and with undivided loyalty to the corporation.⁵ Errors in judgment alone do not constitute a failure to act in good faith, as long as the officer reasonably believes [he] [she] is making a reasonable business decision.⁶

[failing to act as an ordinarily prudent person in a like position would have done under similar circumstances.⁷ (Unless an officer has actual knowledge to the contrary,⁸ a reasonable officer 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 officer 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 officer reasonably believes are within such [professional’s] [advisor’s] competence]⁹.)]

[failing to act in a manner the defendant reasonably believed to be in the best interests of the corporation.¹⁰]

And second, that the defendant's [acts] [omissions] proximately caused 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 officer, 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.

1. N.C.G.S. § 55-8-42 (1990). Note that this "section provides that a nondirector with discretionary authority must meet the same standards of conduct required of directors" under N.C.G.S. § 55-8-30. *Official Comment*, N.C.G.S. § 55-8-42.

2. "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).

3. N.C.G.S. § 55-8-42.

4. N.C.G.S. § 55-8-42(a)(1).

5. *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).

6. 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)).

7. N.C.G.S. § 55-8-42(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

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lack of the proper care, attention, and circumspection in the affairs of the corporation which is exacted of them as trustees.”).

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.”).

8. N.C.G.S. § 55-8-42(c).

9. N.C.G.S. § 55-8-42(b). This language may be used when the defendant officer presents evidence that he relied on business data even though the plaintiff may have been damaged. The officer’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.G.S. § 55-8-30(b). *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 603, 513 S.E.2d 812, 822 (1999).

10. N.C.G.S. § 55-8-42(a)(3). See *Fulton v. Talbert*, 255 N.C. 183, 185, 120 S.E.2d 410, 411-12 (1961) (“Where, however, an officer of a corporation so utilizes his authority as to benefit himself to the detriment of the corporation, a right of action accrues to the corporation.”). An officer 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. *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E. 2d 551 (1983); *Brite v. Penny*, 157 N.C. 110, 115, 72 S.E. 964, 966 (1911) (“The law would not permit him to act in any such double capacity to appropriate business for himself belonging legitimately to his corporation and to reap the profits of it. Good faith to the stockholders forbade it.”).