BREACH OF DUTY--CORPORATE OFFICER[1]

The (*state number*) issue reads:

"Was the plaintiff damaged by the failure of the defendant to discharge *his* 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, four things:[3]

First, that the defendant failed to act in good faith.[4] Good faith requires an officer to discharge his 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; however, unless an officer honestly believes he is making a reasonable business decision, he fails to act in good faith.[6]

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[1]N.C.G.S. § 55-8-42 (1990) (amended 1993). 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]Note that the business judgment rule is generally available to officers of corporations. *Alford v. Shaw*, 320 N.C. 465, 466-67, 358 S.E.2d 323, 324 (1987) See also *HAJMM Co. v. House of Raeford Farms*, 94 N.C. App. 1, 10, 379 S.E.2d 868, 873, *review on additional issues allowed*, 325 N.C. 271, 382 S.E.2d 439 (1989), *and modified, aff'd in part, rev'd in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991) (noting that the "business judgment rule protects corporate directors from being judicially second-guessed when [directors] exercise reasonable care and business judgment").

[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 Robinson, Robinson on North Carolina Corporation Law* (6th Ed. 2000) §14.06.

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Second, that the defendant failed to act as an ordinarily prudent person in a like position would have done under similar circumstances.[7] (Unless he 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].)

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[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 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 § 55-8-30 (b). *State ex rel. Long v. ILA Corp.*, 132 N.C. App. 587, 603, 513 S.E.2d 812, 822 (1999).

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Third, that the defendant failed to act in a manner *he* reasonably believed to be in the best interests of the corporation.[10]

And Fourth, 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 *his* duties as a corporate officer, then it

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[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.").

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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.