

BREACH OF DUTY--CONTROLLING SHAREHOLDER OF CLOSELY HELD CORPORATION--  
ISSUE OF TAKING IMPROPER ADVANTAGE OF POWER--DEFENSE OF GOOD FAITH,  
CARE AND DILIGENCE.

The (*state number*) issue reads:

"Did the defendant act in good faith and with care and diligence in exercising *his* power as controlling shareholder of (*name corporation*)?"

You will answer this issue only if you have answered (*state number*) issue "Yes" in favor of the plaintiff.

On this issue the burden of proof is on the defendant.<sup>1</sup> This means that the defendant must prove, by the greater weight of the evidence, that *he* acted in good faith and with care and diligence<sup>2</sup> in exercising *his* power as controlling shareholder of (*name corporation*). A controlling shareholder acts in good faith and with care and diligence if he acts with the purpose of [making the property of the corporation produce the largest possible amount] [protecting the interests of the minority shareholder(s)] [securing and paying over to the minority shareholder(s) their just proportion of the income and proceeds of the corporation's property]<sup>3</sup>, and if *his* actions are otherwise inherently fair<sup>4</sup> and free from oppression.<sup>5</sup>

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<sup>1</sup>*Hill v. Erwin Mills, Inc.*, 239 N.C. 437, 444, 80 S.E.2d 358, 363 (1954); *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993); *Loy v. Lorm Corp.*, 52 N.C. App. 428, 432, 278 S.E.2d 897, 901 (1981).

<sup>2</sup>*Gaines v. Long Mfg. Co.*, 234 N.C. 340, 344-45, 67 S.E.2d 350, 353 (1951); *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 407, 537 S.E.2d 248, 260 (2000).

<sup>3</sup>*Id.*

<sup>4</sup>*Hill*, 239 N.C. at 444, 80 S.E.2d at 363.

<sup>5</sup>*White v. Kincaid*, 149 N.C. 415, 420-21, 63 S.E. 109, 111 (1908).

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ISSUE OF TAKING IMPROPER ADVANTAGE OF POWER--DEFENSE OF GOOD FAITH,  
CARE AND DILIGENCE. (Continued).

Finally, as to the (*state number*) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the defendant acted in good faith and with care and diligence in exercising *his* power as controlling shareholder of (*name corporation*), then it would be your duty to answer this issue "Yes" in favor of the defendant.

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 plaintiff.