

807.54 BREACH OF DUTY - CONTROLLING SHAREHOLDER OF CLOSELY HELD CORPORATION - ISSUE OF CLOSELY HELD CORPORATION¹.

The (*state number*) issue reads:

"Was (*name corporation*) a closely held corporation?"

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, that (*name corporation*) was organized by its shareholders to take advantage of the benefits of incorporation while conducting themselves more like partners for the purposes of internal governance.² Corporations typically benefit their shareholders by conferring limited liability, perpetual existence and easy transferability of ownership interests. In closely held corporations, the shareholders seek these same benefits, but as among themselves they are more like partners who act on important matters by consensus or by unanimous or near unanimous agreement.

In deciding whether (*name corporation*) was closely held, you may consider

[whether the shares of (*name corporation*) are owned by a limited number of people]

[whether the shareholders have other relationships outside of (*name corporation*), such as family ties]

[whether the shareholders originally founded or organized (*name corporation*)]

[whether the shareholders provided for partner-like rules of governance in a written shareholders' agreement]

[whether the shareholders have by course of dealing, course of performance or other regularly observed custom or behavior conducted themselves in a partnership-like manner]

[whether the shareholders, prior to incorporation, owned and operated the business of (*name corporation*) as a [partnership] [*name similar entity, e.g., limited liability company*]]

[whether the shareholders held themselves out to third parties or to the public to be more like partners than shareholders (such as in a business plan)]

[whether the percentage ownership of shares is relatively uniform among the shareholders]

[whether the shareholders have availed themselves of statutory procedures that dispense with standard corporate governance (such as dispensing with a board of directors)³]

[whether the internal governance of (*name corporation*) has by custom or practice been conducted informally without adherence to standard corporate procedures]

[*state other factors as supported by the evidence*].

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 (*name corporation*) was a closely held corporation, 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. In closely held corporations, a controlling shareholder owes a fiduciary duties to a minority shareholder to refrain from taking improper advantage of his power. Thus, a threshold question in such cases is whether the corporation is closely held. Surprisingly, "closely held corporation" is not defined in the North Carolina Business Corporation Act or in any North Carolina appellate decision. The most illuminating reference to "closely held corporation" is contained in *Meiselman v. Meiselman*, 309 N.C. 279, 289, 307 S.E.2d 551, 557 (1983) where it is described "as a 'corporate entity typically organized by an individual, or a group of individuals, seeking the recognized advantages of incorporation, limited liability, perpetual existence and easy transferability of interests - but regarding themselves basically as partners and seeking veto powers as among themselves much more akin to the partnership relation than to the statutory scheme of representative corporate government.'" Furthermore, no appellate case clarifies whether the status of an entity as closely held is a question of fact for the jury or law for the court. In the several cases dealing with controlling shareholders' alleged breaches of fiduciary duty, the status of the entity as "closely held" was apparently assumed, stipulated or not contested.

2. *Meiselman, supra*.

3. N.C. Gen. Stat. § 55-8-01(c).