807.56 BREACH OF DUTY[1] - CONTROLLING SHAREHOLDER OF CLOSELY HELD CORPORATION - ISSUE OF TAKING IMPROPER ADVANTAGE OF POWER[2].

The (*state number*) issue reads:

"Did the defendant[3] take improper advantage of *his* power as a controlling shareholder of (*name corporation*)?"

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

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:

First, that the defendant controlled (*name corporation*) through the exercise of *his* power as controlling shareholder.

And Second, that the defendant used *his* power as controlling shareholder to the detriment of the plaintiff and for the benefit of the defendant.[4]

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 defendant took improper advantage of *his* power as controlling shareholder of (*name 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. Shareholders are subjected to a variety of duties to the corporation and to other shareholders not applicable here. These include the duty to pay the agreed (and non-watered) price for stock, N.C. Gen. Stat. § 55-6-22(a), to eschew unlawful distributions, N.C. Gen. Stat. § 55-8-33(b)(2), and to refrain from making or receiving fraudulent conveyances of corporate assets. Where the corporation has limited or dispensed with the role of the Board of Directors in favor of a group of shareholders, those shareholders have the same duties as directors. N.C. Gen. Stat. § 55-8-01(d). *See* N.C.P.I.-Civil 807.50 (Breach of Duty-Corporate Director).

2. There is no broad rule which imposes a fiduciary rule on shareholders in favor of the corporation or other shareholders. *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993). However, in closely-held corporations, "it is well established that a controlling shareholder owes a fiduciary duty to minority shareholders. *Id*. "[M]ajority shareholders owe a fiduciary duty and obligation of good faith to minority shareholders as well as to the corporation." *Loy v. Lorm Corp.*, 52 N.C. App. 428, 432, 278 S.E.2d 897, 901 (1981).

3. In many cases there will be more than one defendant. In such instances, the defendants will be alleged to have acted in concert, combination or coordination. This instruction must be appropriately modified.

4. Relevant cases explain that the fiduciary duty of a controlling shareholder is "to exercise good faith, care and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and to pay over to them their just proportion of the income and of the proceeds of the corporate property." *Gaines v. Long Mfg. Co.*, 234 N.C. 340, 344-45, 67 S.E.2d 350, 353 (1951). *Accord Hill v. Erwin Mills, Inc.*, 239 N.C. 437, 443 80 S.E.2d 358, 362 (1954). *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 407, 537 S.E.2d 248, 260 (2000). The language requiring proof of benefit to the defendant and detriment to the plaintiff is based upon the Supreme Court's 1997 decision in *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997). *Barger* was not a minority shareholder case, but it did establish the plaintiff's burden of proof in fiduciary duty breach cases. At least one post-*Barger* decision has tracked *Barger's* requirements in a minority shareholder case: "Plaintiffs have [sufficiently] alleged in great detail acts of the individual defendants and the business entities they control to divert assets and business opportunities from the Company to the defendants . . . and thus enrich themselves as the expense of the Company and the plaintiffs." *Norman*, 140 N.C. App. at 408, 537 S.E.2d at 260 (emphasis supplied).