102.85 WILLFUL OR WANTON CONDUCT ISSUE ("GROSS NEGLIGENCE").

NOTE WELL: Use this instruction only in conjunction with claims for relief arising prior to January 1, 1996. Furthermore, this instruction should not be used in (1) wrongful death cases[1] or (2) where an issue is to be submitted as to plaintiff's contributory negligence. If plaintiff's contributory negligence is at issue, N.C.P.I.-Civil 102.86 should be used. This instruction will be used most frequently where plaintiff has put defendant's alleged willful and wanton conduct at issue in order to recover punitive damages. Please note that for all claims for relief arising on or after January 1, 1996, "willful or wanton conduct" has been redefined by statute. See N.C. Gen. Stat. § 1D-5(7).

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged] by willful or wanton conduct of the defendant?"

The burden of proof on this issue is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, that the defendant engaged in willful or wanton conduct and that such conduct was a proximate cause of plaintiff's [injury] [damage].

An act is willful if the defendant intentionally fails to carry out some duty imposed by law or contract which is necessary to protect the safety of the person or property to which it is owed.[2]

An act is wanton if the defendant acts in conscious or reckless disregard for the rights and safety of others.[3]

The plaintiff not only has the burden of proving willful or wanton conduct, but also that such willful or wanton conduct was a proximate cause of the [injury] [damage].

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Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and one which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's willful or wanton conduct was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's willful or wanton conduct was a proximate cause.

In this case, the plaintiff contends, and the defendant denies, that defendant engaged in willful or wanton conduct in one or more of the following respects:

Read all contentions of willful or wanton conduct supported by the evidence.

You must decide whether such conduct occurred and, if it did occur, whether such conduct was willful or wanton.

The plaintiff further contends, and the defendant denies, that such willful or wanton conduct was a proximate cause of the plaintiff's [injury] [damage].

I instruct you that willful or wanton conduct is not to be presumed from the mere fact of negligence or injury, and proximate cause is not to be presumed from the mere existence of willful or wanton conduct.

Finally, as to this (*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's conduct was willful or wanton, and that such conduct was a proximate cause of the plaintiff's [injury] [damage], 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.

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1. *Cowan v. Brian Center Management Corp.*, 109 N.C. App. 443, 428 S.E.2d 263 (1993), specifies a different standard for recovery of punitive damages in wrongful death cases based on the language of N.C. Gen. Stat. § 28A-18-2(b)(5) prior to the 1995 amendments effective January 1, 1996. This special standard applies to all wrongful death punitive damages claims arising prior to January 1, 1996. For wrongful death punitive damages claims arising on or after January 1, 1996, different standards apply.

2. *Abernathy v. Consolidated Freightways Corp.*, 321 N.C. 236, 362 S.E.2d 559 (1987).

3. *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988).