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# 102.86 WILLFUL OR WANTON CONDUCT ISSUE ("GROSS NEGLIGENCE")-USED TO DEFEAT CONTRIBUTORY NEGLIGENCE.

> *(NOTE WELL: Use this instruction only where an issue as to plaintiff's contributory negligence will be submitted and where the plaintiff seeks to overcome a prospective adverse finding on the issue of contributory negligence by proving defendant's conduct was willful or wanton.[1] If plaintiff's contributory negligence is not at issue, N.C.P.I.-Civil 102.85 should be used.)*

The (*state number*) issue reads:

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

You will answer this issue only if you have answered the (*state number*) issue as to the defendant's negligence "yes" in favor of the plaintiff and the (*state number*) issue as to plaintiff's contributory negligence "yes" in favor of the defendant. Ordinarily a finding of contributory negligence would prevent any recovery by the plaintiff. However, the plaintiff may recover when the defendant's conduct goes beyond ordinary negligence and is willful or wanton.

On this issue the burden of proof is on the plaintiff. This means 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 the plaintiff's [injury] [damage].

The tests for negligence and contributory negligence which I defined and explained to you previously are not the same tests which you will apply in considering this issue. The issue here is whether the defendant's conduct was willful or wanton.

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 and intentional disregard of and indifference to the rights and safety of others.[3]

In this case, the plaintiff contends, and the defendant denies, that the 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 alleged willful or wanton conduct was a proximate cause of the plaintiff's [injury] [damage]. The test for proximate cause which I defined and explained to you previously is the same test which you will apply in considering this issue.

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. *See Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971); *King v. Allred*, 76 N.C. App. 427, 333 S.E.2d 758, *disc. rev. denied*, 315 N.C. 184, 337 S.E.2d 857 (1985); *Harrington v. Collins*, 40 N.C. App. 530, 253 S.E.2d 288, *aff'd*, 298 N.C. 538, 259 S.E.2d 275 (1979). This sentence will be accurate only when there is a single defendant. *See also* Restatement (Second) of Torts §§ 482(1), 503(1); W. Page Keeton et. al, *Prosser and Keeton on Torts* § 65, at 462 (5th ed. 1984).

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

3. *Yancey v. Lea*, 354 N.C. 48, 54, 550 S.E.2d 155, 158 (2001) (quoting *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 397 (1956)); *cf. Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988) (defining gross negligence as wanton conduct done with conscious or reckless disregard for the rights and safety of others).