

102.87 WILLFUL AND MALICIOUS CONDUCT ISSUE-USED TO DEFEAT
PARENT-CHILD IMMUNITY.

(NOTE WELL: Use this instruction only where the plaintiff-child seeks to overcome the defendant-parent's immunity by proving defendant's conduct was willful and malicious.)

The *(state number)* issue reads:

"Was the plaintiff [injured] [damaged] by the willful and malicious conduct of the defendant?"

An unemancipated child may not recover in an action against *his* parent for ordinary negligence.¹ However, the plaintiff-child may recover when the defendant's conduct is willful and malicious.²

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 and malicious conduct and that such conduct caused [injury] [damage] to the plaintiff.

Willful conduct is conduct done purposely and deliberately in violation of law, or done knowingly and of a set purpose, or done without regard for reason.³

An act is malicious if it is deliberately done, without just cause, excuse or justification, and it is reasonably calculated to injure another [others].⁴

The plaintiff not only has the burden of proving willful and malicious conduct, but also that such willful and malicious conduct caused [injury] [damage] to the plaintiff.

In this case, the plaintiff contends, and the defendant denies, that

the defendant engaged in willful and malicious conduct in one or more of the following respects:

(Read all contentions of willful and malicious conduct supported by the evidence.)

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

The plaintiff further contends, and the defendant denies, that such alleged willful and malicious conduct caused [injury] [damage] to the plaintiff.

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 and malicious, and that such conduct caused [injury][damage] to the plaintiff, 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 Doe By & Through Connolly v. Holt, 332 N.C. 90, 95, 418 S.E.2d 511, 514 (1992).

2 *Id.* at 96, 418 S.E.2d at 514. See also *Needham v. Price*, ___ N.C. ___, 780 S.E.2d 549 (2015), *rev'g in part* ___ N.C. App. ___, 768 S.E.2d 160 (reversing the Court of Appeals' conclusion that allegations of gross negligence or willful and wanton conduct were sufficient to overcome parent-child immunity and holding that "anything short of willful and malicious conduct does not support a valid claim against the parent").

3 *Yancey v. Lea*, 354 N.C. 48, 52, 550 S.E.2d 155, 157 (2001).

4 *Doe*, 332 N.C. at 96, 418 S.E.2d at 514.