

NEGLIGENCE 10
Willful or Wanton Conduct*
(Aggravated Negligence)

[*Name of defendant*] claims that [*name of plaintiff*] engaged in willful or wanton conduct. This type of fault involves aggravated negligence.

Willful or wanton conduct is action or inaction with reckless indifference to the results, or to the rights or safety of others. A person is recklessly indifferent if he knows or a reasonable person in his position ought to know that:

- (1) The action or inaction creates an unreasonable risk of harm; and
- (2) The risk is so great that it is highly probable that harm will result.

If you find that [*name of plaintiff*] willfully or wantonly caused [*name of plaintiff*]'s injury, and that [*name of defendant*] was at fault, then you should not determine relative degrees of fault. However, you may find for [*name of defendant*] or for [*name of plaintiff*], as you deem fit.¹

***Read Use Note and Comment before using.**

Continued

SOURCE:*Williams v. Thude*, 188 Ariz. 257, 934 P.2d 1349 (1997); A.R.S. § 12-2505(A); *Southern Pacific Transportation Co. v. Lueck*, 111 Ariz. 560, 535 P.2d 599 (1975), *cert. denied*, 425 U.S. 913 (1976).

USE NOTE:¹

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(Continued)

¹ Use this instruction if defendant claims that plaintiff is guilty of willful or wanton conduct. This specific language was approved by the Supreme Court in *Williams v. Thude*, 188 Ariz. 257, 934 P.2d 1349 (1997). The Court expressly disapproved the instruction adopted by the Court of Appeals in *Bauer v. Crotty*, 167 Ariz. 159, 162-63, 805 P.2d 392, 395-96 (App. 1991) and incorporated in the previous version of this RAJI instruction. *Bauer* held that the jury must be instructed that, if it finds the plaintiff guilty of willful or wanton contributory negligence, it must choose either to award the plaintiff full damages or render a verdict for the defendant. 167 Ariz. at 168, 805 P.2d at 401. The Supreme Court rejected this “all or nothing” approach in favor of one advising the jurors that they should not compare fault, while leaving them free “to do whatever they choose with respect to the plaintiff’s conduct.” 188 Ariz. at 260, 934 P.2d at 1352.

COMMENT:1.No Right to Comparative Fault: A.R.S. § 12-2501(C) provides that there is no right of contribution in favor of a tortfeasor and A.R.S. § 12-2505(A) provides that there is no right to comparative negligence in favor of a claimant who has intentionally, willfully, or wantonly caused or contributed to an injury or wrongful death. RAJI (CIVIL) 4th Negligence 10 refers only to willful or wanton conduct; further modification will be necessary if there is also an issue of intentional conduct. RAJI (Civil) 4th Intentional Torts Instructions may be used to provide a definition of the intentional conduct. The terms willful and wanton and aggravated negligence should be replaced by the term “intentional”. The definition of the intentional conduct can be inserted in place of the definition of “willful and wanton” conduct.

2.What If Plaintiff and Defendant Are Both Willful or Wanton?: In Arizona, a defendant that willfully and wantonly causes injury may reduce its liability by proving the plaintiff or a co-defendant was also at fault. *Wareing v. Falk*, 182 Ariz. 495, 498, 897 P.2d 1381, 1384 (Ct. App. 1995)¹ (“section 12-2506 of the UCATA allows a person defending a claim to seek a reduction in liability based on the claimant’s comparative fault even if the defendant acted willfully or wantonly.”); *see also Lerma v. Keck*, 186 Ariz. 228, 921 P.2d 28 (Ct. App. 1996) (willful and wanton defendants can benefit from the UCATA but willful and wanton plaintiffs cannot); *Cf. Thomas v. First Interstate Bank of Arizona, N.A.*, 187 Ariz. 488, 489-490, 930 P.2d 1002, 1003-1004 (Ct. App. 1996)

(“The legislature defined fault broadly to include all types of fault [i.e. intentional, willful and wanton conduct, and mere negligence] committed by all persons.”).

The Court in *Wareing* at 501, referring to the willful and wanton conduct of the defendant stated:

We find the cited instruction [RAJI (Civil) 3rd] to be an incorrect statement of the law. This portion of the RAJI was correct statement of the law when Arizona followed the common law rule that a willful or wanton defendant may not assert the defense of contributory negligence to bar a plaintiff's recovery. Because we hold that the legislature abolished this rule by adopting comparative fault, this portion of the RAJI [Civil 3rd] instruction should no longer be used.

¹ A Key cite of *Wareing* reveals a yellow flag. The reason for this yellow flag is a Michigan appellate court that allegedly declines to follow *Wareing*. See *Lamp v. Reynolds*, 645 N.W.2d 311, 317-318 (Mich. Ct. App. 2002). However, a careful analysis of the holding in *Lamp* reveals that the Michigan appellate court actually follows *Wareing* while rejecting conflicting precedent from other jurisdictions.