

## NEGLIGENCE 10

### Willful or Wanton Conduct\*

#### (Aggravated Negligence)

[Name of ~~defendant~~ plaintiff] claims that [name of plaintiff/defendant] engaged in willful or wanton conduct. This type of fault involves aggravated negligence. ~~Where willful or wanton conduct causes an injury, rules of law apply that are different from the rules we have previously discussed.~~

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 defendant] willfully or wantonly caused [name of plaintiff]'s injury, you should determine the full amount of [name of plaintiff]'s damages and enter that amount on the verdict form without regard to [name of defendant]'s claim that [name of plaintiff] was at fault; you are not to determine relative degrees of fault.]<sup>1</sup>~~

[If you find that [name of plaintiff] willfully or wantonly caused [name of plaintiff]'s injury, and that [name of defendant] was at fault ~~but did not willfully or wantonly cause [name of plaintiff]'s injury~~], 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.]<sup>1,2</sup>

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

*Continued*

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**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:** <sup>1</sup> ~~Use this bracketed paragraph if plaintiff claims that defendant is guilty of willful or wanton conduct.~~

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### Willful or Wanton Conduct

(Continued)

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<sup>12</sup> Use this ~~bracketed instruction paragraph~~ 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 \(Civil\) 4<sup>th</sup> 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)<sup>1</sup> (“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 *Jerma 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.”).

~~Neither UCATA nor *Williams* gives any guidance on the legal effect if both plaintiff and defendant are willful or wanton. If the case presents the jury with cross-claims of willful or wanton conduct, the trial court will have to determine the law, and instruct accordingly. 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 3<sup>rd</sup>] instruction should no longer be used.

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<sup>1</sup> A ~~Key cite~~ 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.