DUTY OF OWNER TO TRESPASSER--DEFENSE OF CONTRIBUTORY WILLFUL OR WANTON CONDUCT ("GROSS NEGLIGENCE").

NOTE WELL: The jury should answer this issue only if it has answered the issue as to the defendant's willful or wanton conduct "yes" in favor of the plaintiff.

The (*state number*) issue reads:

"Did the plaintiff, by *his* own willful or wanton conduct, contribute to *his* [injury] [damage]?"

You will answer this issue only if you have answered the issue as to the defendant's willful or wanton conduct "yes" in favor of the plaintiff in the previous issue. Ordinarily, such an answer would entitle the plaintiff to recover. However, there is a complete defense to liability, called contributory willful or wanton conduct, which would prevent the plaintiff's recovery of damages. Contributory willful or wanton conduct occurs when the conduct of the plaintiff goes beyond ordinary negligence and is willful or wanton.

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

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An act is willful if the plaintiff intentionally[1] 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 plaintiff acts in conscious or reckless disregard for the rights and safety of others.[3]

As to this issue, the defendant contends and the plaintiff denies that the plaintiff engaged in willful or wanton conduct. Whether or not such conduct occurred is for you to decide.

If the plaintiff's willful or wanton conduct was a proximate cause of and therefore contributed to *his* own [injury] [damage], *he* cannot recover.

Willful or wanton conduct is not to be presumed from the mere fact that [injury] [damage] occurred. Proximate cause is not to be presumed from the mere existence of willful or wanton conduct.

Finally, as to this issue on which the defendant has the burden of proof, if you find, by the greater weight of the evidence, that the plaintiff's conduct was willful or wanton, and

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[1]For an instruction on intent, see N.C.P.I.--Civil 101.46.

[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).

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that such willful or wanton conduct was a proximate cause of plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the defendant.

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 plaintiff.