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Evidence: Proof Beyond a Reasonable Doubt in Civil Cases

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CASE COMMENTS

EVIDENCE: PROOF BEYOND A REASONABLE DOUBT IN CIVIL CASES

Allstate Insurance Co. v. Vanater, 297 So. 2d 293 (Fla. 1974)*

Respondent brought suit against petitioner insurance company for reformation of his fire insurance policy and for payment of a loss claim under the policy as reformed. In seeking reformation, respondent alleged mutual mistake in the execution of the insurance contract.[1] The trial court instructed the jury that contract reformation based on mutual mistake requires proof by clear, convincing, and satisfactory evidence that would satisfy the jury of the mutual mistake beyond a reasonable doubt.[2] The jury found no mistake, and the trial court denied respondent's prayer for relief. Respondent appealed to the Fourth District Court of Appeal, which reversed and remanded to the trial court holding that it was error to instruct the jury that mutual mistake must be proved beyond a reasonable doubt.[3] The Supreme Court of Florida granted certiorari[4] and, in affirming the district court, HELD, the burden of proof a plaintiff must bear in a suit for reformation of a written contract is only that of clear and convincing evidence, and the plaintiff need not prove his cause beyond a reasonable doubt.[5]

The minimum standard of proof that must be met by the plaintiff in a civil case is normally proof by a preponderance of the evidence.[6] This standard is sometimes described as the greater weight of the evidence[7] or the probability of truth.[8] Controversy over the meaning of this standard exists, primarily because it contains potential for one-dimensional application by juries. For example, a jury might simply compare the number of witnesses for each party or

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1. Vanater v. Allstate Ins. Co., 279 So. 2d 40 (4th D.C.A. Fla. 1973).
2. 297 So. 2d 293, 294 (Fla. 1974).
3. 279 So. 2d at 41.
4. Certiorari was granted pursuant to the jurisdictional provisions of FLA. CONST. art. V, §3(b)(3).
5. 297 So. 2d at 296 (Roberts, J., dissented; Boyd, J., concurred specially with opinion).
6. *See, e.g.*, Fidelity Mut. Life Ass'n v. Mettler, 185 U.S. 308, 317 (1902); Lawton v. State, 152 Fla. 821, 824, 13 So. 2d 211, 212 (1943); 9 AM. JUR. PLEADING AND PRACTICE FORMS *Evidence* forms 52, 91, 93 (rev. ed. 1969). One state has defined this standard by statute. GA. CODE ANN. §38-106 (1972).
7. *See, e.g.*, United States v. Southern Pac. Co., 157 F. 459, 462 (N.D. Cal. 1907); Cincinnati Butchers Supply Co. v. Conoly, 204 N.C. 677, 679, 169 S.E. 415, 416 (1933); Davis v. Zucher, 62 Ohio L. Abs. 81, 87, 106 N.E.2d 169, 173 (Ct. App. Cuyahoga County 1951).
8. *See, e.g.*, Asher v. Fox, 134 F. Supp. 27, 29 (E.D. Ky. 1955); Mut. Life Ins. Co. v. Springer, 193 Ark. 990, 995, 104 S.W.2d 195, 198 (1937); Boyd v. Gosser, 78 Fla. 64, 74, 82 So. 758, 761 (1919).

ignore differences in the credibility of evidence.[9] Generally, however, this standard is comprehensible to juries.[10]

Where the potential loss to the defendant is great or where something the defendant is entitled to on the record is sought to be taken from him, a standard of proof stricter than "greater weight of the evidence" may be required.[11] Thus, the guilt of a defendant in a criminal prosecution must be proven beyond and to the exclusion of every reasonable doubt.[12] Similarly, in certain civil actions where there is potential deprivation of rights vested in the defendant by some strong presumption of law, the plaintiff must do more than prove his case by a preponderance of the evidence.[13] Such cases include, among others, actions to reform written instruments,[14] establish parol trusts,[15] impeach acknowledgments,[16] or show a deed absolute on its face to be a mortgage.[17]

The intermediate standard of proof required in this special category of civil cases has been variously defined. Some of the many variations are: clear and convincing;[18] clear, precise, and indubitable;[19] clear, cogent, and convincing;[20] positive and unequivocal;[21] and clear, convincing, and sufficient to overcome a strong presumption.[22] The common denominator of these various definitions is the recognition that the degree of proof required is "more than a preponderance of the evidence, but less than beyond a reasonable doubt."[23]

9. *See, e.g.*, Burch v. Reading Co., 240 F.2d 574, 578 (3d Cir.), *cert. denied*, 353 U.S. 965 (1957); Romines v. Brumfield, 199 Ark. 1066, 1069, 136 S.W.2d 1023, 1024 (1940); Atlantic Coast Line R.R. v. McIntosh, 144 Fla. 356, 198 So. 92 (1940). *See also* J. RICHARDSON, FLORIDA JURY INSTRUCTIONS §877, at 385 (1954).

10. *See* James, *Burdens of Proof*, 47 VA. L. REV. 51, 54-55 (1961).

11. Hickey v. Board of Dental Examiners, 10 Fla. Supp. 12 (Cir. Ct. Dade County 1955).

12. *In re* Winship, 397 U.S. 358, 361 (1970); Myers v. State, 43 Fla. 500, 521, 31 So. 275, 281 (1901); THE SUPREME COURT COMM'N ON STANDARD JURY INSTRUCTIONS, FLORIDA STANDARD JURY INSTRUCTIONS FOR CRIMINAL CASES §2.11 (1970).

13. See 9 J. WIGMORE, EVIDENCE §2498(3) (3d ed. 1940).

14. *See, e.g.*, Aetna Ins. Co. v. Paddock, 301 F.2d 807, 810 (5th Cir. 1962); Fidelity Phenix Fire Ins. Co. v. Hilliard, 65 Fla. 443, 446, 62 So. 585, 586 (1913); Molyneux v. Twin Falls Canal Co., 54 Idaho 619, 631, 35 P.2d 651, 655 (1934). *See also* RESTATEMENT OF CONTRACTS §511 (1932).

15. *See, e.g.*, Williams v. McAdow, 103 Fla. 644, 646, 137 So. 891 (1931); Moore v. Terry, 293 Ky. 727, 731, 170 S.W.2d 29, 31 (1943).

16. *See, e.g.*, Northwestern Mut. Life Ins. Co. v. Nelson, 103 U.S. 544, 548 (1880); Smith v. McEwen, 119 Fla. 588, 600, 161 So. 68, 72 (1935).

17. *See, e.g.*, Campbell v. Northwest Eckington Improvement Co., 229 U.S. 561, 584 (1913); Mathews v. Porter, 16 Fla. 466, 490 (1878).

18. *See, e.g.*, Alexander v. Warren, Ark. School Dist. No. 1 Bd., 464 F.2d 471, 474 (8th Cir. 1972); Whitson v. Aurora Iron & Metal Co., 297 F.2d 106, 110 (7th Cir. 1961); Weight v. Miller, 16 Utah 2d 112, 114, 396 P.2d 626, 627 (1964).

19. *See, e.g.*, McDonnell v. General News Bureau, 93 F.2d 898, 901 (3d Cir. 1937); Popovitch v. Kasperlik, 70 F. Supp. 376, 382 (S.D. Pa. 1947); Easton v. Washington County Ins. Co., 391 Pa. 28, 37, 137 A.2d 332, 337 (1957).

20. *See, e.g.*, Legal Sec. Life Ins. Co. v. Brooks, 244 Ark. 652, 658, 426 S.W.2d 784, 787 (1968); Fisher v. Miceli, 291 S.W.2d 845, 848 (Mo. 1956); Bland v. Mentor, 63 Wash. 2d 150, 154, 385 P.2d 727, 730 (1963).

21. *See, e.g.*, Steven v. Turlington, 186 N.C. 191, 197, 119 S.E. 210, 213 (1923).

22. *See, e.g.*, Sobel v. Lobel, 168 So. 2d 195, 197 (3d D.C.A. Fla. 1964).

23. *See, e.g.*, Germann v. Matriss, 104 N.J. Super. 466, 470, 250 A.2d 424, 426 (App. Div. 1969); Cross v. Ledford, 161 Ohio St. 469, 477, 120 N.E.2d 118, 123 (1954).

Thus, most jurisdictions employ three standards of proof – the well-defined standards of "greater weight of the evidence" and "beyond a reasonable doubt" at the extremes and an intermediate standard in certain civil cases.[24] Some courts, however, have combined one of the common formulas for the intermediate standard, such as "clear and convincing evidence," with the phrase "beyond a reasonable doubt," presumably to emphasize to the jury that the proof must be more than a preponderance of the evidence.[25] Prior to the instant case, the Florida judiciary had developed such a hybrid definition of the degree of proof necessary to establish mutual mistake in an action to reform a written instrument.[26] The implication of the instant case is that the addition of "beyond a reasonable doubt" does not merely emphasize the intermediate standard of proof but introduces a wholly different standard that is too burdensome for civil cases and that renders the hybrid definition internally contradictory.

In *Jackson v. Magbee*[27] the Florida supreme court held that the proof of facts necessary for reformation of a description of land in a real property deed had to be full, satisfactory, and beyond reasonable controversy.[28] The *Jackson* standard was sustained without substantial change for more than twenty years.[29] In 1908 the decision of *Horne v. J.C. Turner Cypress Lumber Co.*[30] modified this definition by substituting "beyond reasonable doubt" for "beyond reasonable controversy."[31] *Horne* signaled the beginning of a period of judicial experimentation with the definition of the standard of proof in

24. *See generally* James, *Burdens of Proof*, 47 VA. L. REV. 51, 54-55 (1961). A very clear expression of this three-tier system appears in the California Evidence Code: "The court on all proper occasions shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." CAL. EVID. CODE §502 (West 1966). For an analysis of burden of proof and presumption questions in federal cases in light of Erie R.R. v. Tompkins, 304 U.S. 164 (1938), see J. MOORE, FEDERAL PRACTICE ¶43.08, at 1358-65 (2d ed. 1948). *See also* UNIFORM RULES OF EVIDENCE rule 1(4) (1953).

25. *See, e.g.*, Continental Cas. Co. v. City of Ocala, 99 Fla. 851, 855, 127 So. 894, 895 (1930); Dutton v. Prudential Ins. Co., 238 Mo. App. 1058, 1068, 193 S.W.2d 938, 943 (1946); Douglas v. Douglas, 176 Okla. 378, 384, 56 P.2d 362, 369 (1936).

26. Rosenthal v. First Nat'l Fire Ins. Co., 74 Fla. 371, 381, 77 So. 92, 94 (1917); Fidelity Phenix Fire Ins. Co. v. Hilliard, 65 Fla. 443, 446, 62 So. 585, 586 (1913); Old Colony Ins. Co. v. Trapani, 118 So. 2d 850, 853 (2d D.C.A. Fla. 1960); Crosby v. International Inv. Co., 101 So. 2d 15, 18 (2d D.C.A. Fla. 1958). *But cf.* Goodstone v. Shamblen, 141 So. 2d 8 (2d D.C.A. Fla. 1962). The court receded from any intimation in its decision in *Crosby* that reformation for mutual mistake must be based on evidence that is more than clear and convincing. However, the court based its decision on the belief that "clear and convincing" encompasses "beyond a reasonable doubt" where trial is to the court. The instant case, however, is concerned with the propriety of the "beyond a reasonable doubt" wording in an instruction to a jury, which may not perceive the two standards as identical.

27. 21 Fla. 622 (1885).

28. *Id.* at 627.

29. Griffin v. Société Anonyme la Floridienne, 53 Fla. 801, 44 So. 342 (1907); Jacobs v. Parodi, 50 Fla. 541, 555, 39 So. 833, 837 (1905); Franklin v. Jones, 22 Fla. 526, 528 (1886).

30. 55 Fla. 690, 45 So. 1016 (1908).

31. *Id.* at 698, 45 So. at 1018.

reformation cases. During this period the supreme court held in various cases that such evidence must be clear,[32] convincing,[33] and satisfactory to a moral certainty,[34] and that it should not be loose, contradictory, and equivocal,[35] or vague and meager.[36]

The most important decision in this experimental period was *Fidelity Phenix Fire Insurance Co. v. Hilliard.*[37] *Fidelity* required "clear and convincing evidence" that would satisfy the jury "beyond a reasonable doubt" that a mutual mistake had occurred in the execution of an insurance contract that the plaintiff sought to reform.[38] With its decision in *Rosenthal v. First National Fire Insurance Co.*[39] the court settled on the *Fidelity* definition as the proper intermediate standard of proof.[40] This definition prevailed until the instant case.[41]

The principal case overruled the *Fidelity* line of cases and established "clear, convincing, and satisfactory evidence" as the sole measure of proof in suits for reformation of written contracts in Florida.[42] By deleting the requirement for proof "beyond a reasonable doubt," the instant court reduced the ambiguity of the intermediate standard of proof but fell short of an adequate definition.

Elimination of the reasonable doubt element should prevent jury confusion caused by a dual and apparently contradictory standard of proof.[43] Justice Roberts, however, in his dissenting opinion, denied the existence of a contradiction in the hybrid standard. He concluded that "beyond a reasonable doubt" had become synonymous with "clear and convincing evidence" in cases for reformation of insurance contracts.[44] Judges and attorneys aware of the history of the combined definition may perceive this long usage as establishing a single standard. Juries, however, do not know the history of the definition and have no alternative to taking the words of the court's instruc-

32. Fidelity Phenix Fire Ins. Co. v. Hilliard, 65 Fla. 443, 446, 62 So. 585, 586 (1913); Prior v. Davis, 58 Fla. 510, 512, 50 So. 535 (1909); Indian River Mfg. Co. v. Wooten, 55 Fla. 745, 767, 46 So. 185, 192 (1908); Bexley v. High Springs Bank, 73 Fla. 422, 425, 74 So. 494, 495 (1907).

33. Fidelity Phenix Fire Ins. Co. v. Hilliard, 65 Fla. 443, 446, 62 So. 585, 586 (1913); Prior v. Davis, 58 Fla. 510, 512, 50 So. 535 (1909).

34. Bexley v. High Springs Bank, 73 Fla. 422, 425, 74 So. 494, 495 (1907).

35. Robinson Point Lumber Co. v. Johnson, 63 Fla. 562, 563, 58 So. 841 (1912).

36. Bexley v. High Springs Bank, 73 Fla. 422, 425, 74 So. 494, 495 (1907).

37. 65 Fla. 443, 62 So. 585 (1913).

38. *Id.* at 446, 62 So. at 586.

39. 74 Fla. 371, 77 So. 42 (1917).

40. *Id.* at 381, 77 So. at 94.

41. See cases cited note 26 *supra.*

42. 297 So. 2d at 296.

43. *Id.* at 295. The majority in the instant case believed that the dual standard of proof was confusing, contradictory, and misleading and affirmed the reversal of the trial court because of the resultant potential for error, *citing* Finch v. State, 116 Fla. 437, 156 So. 489 (Fla. 1934); Key West Elec. Co. v. Albury, 91 Fla. 695, 109 So. 223 (1926); Florida E. Coast Ry. v. Jones, 66 Fla. 51, 62 So. 898 (1913). The court noted that where a jury concluded a mistake had been shown by clear, convincing, and satisfactory evidence but had not been proven beyond a reasonable doubt, an improper verdict would result from the instruction.

44. 297 So. 2d at 298.

tions at face value. If it is assumed that the reasonable doubt instruction has some effect on the jury, its removal from the intermediate standard necessarily reduces the burden of persuasion to be borne by the plaintiff.

Simplifying the intermediate standard, however, has its costs. The reasonable doubt requirement had two important virtues. First, it supplied a second dimension to the definition of the intermediate standard. The phrase "beyond a reasonable doubt" describes a state of the fact-finder's mind, while "clear and convincing evidence" describes a state of the evidence.[45] Additionally, the dual standard bracketed the plaintiff's burden, since "clear and convincing evidence" indicates how much evidence is required to support the plaintiff's cause, while "beyond a reasonable doubt" indicates how much contrary evidence will defeat it. This bracketing function may be critical to a just result where both parties present a convincing case and the evidence adds up to more than unitary probability in the jurors' minds.[46] Prior to the instant case, the "reasonable doubt" aspect of the intermediate definition would have disposed of such a situation in the defendant's favor. The new definition is favorable to plaintiffs because the establishment of a reasonable doubt in the jurors' minds by the defendant no longer defeats a plaintiff's cause in these special civil cases.

The court failed to take advantage of the opportunity afforded by the principal case to construct an effective definition of the intermediate standard of proof. It merely trimmed the former definition to "clear, convincing, and satisfactory evidence."[47] The word "clear," though meaningful to laymen, implies a preference for evidence that is within the everyday experience of the jury against evidence that, though compelling, is unfamiliar or difficult to understand.[48] The determination whether an argument is "convincing" initially requires a standard of persuasion. Therefore, to use this language as a standard of persuasion is to beg the question. The word "satisfactory," in normal usage, suggests a low, rather than high, standard of proof and could easily describe a mere preponderance of the evidence. Moreover, no greater clarity attaches to these words when they are used in combination. All three words imply some prior conclusion that has no relation to the true strength

45. Professor Maguire criticized the "preponderance of the evidence" standard for the same reason: "This phrasing suggests a delusive objectivity by talking in terms of scales and balances about what is not in any literal sense a ponderable commodity. Indeed, the annexed excursion into talk of cogency shows the impossibility of being strictly objective. The subjective element demands strict recognition." J. MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 188 (1947). Because the jury must use a subjective standard at some point in its deliberation, greater uniformity would be provided were the court to give the jury some standard to apply so that it would not be up to each juror to guess what his mental state must be to find a certain fact.

46. *See generally* Ball, *The Moment of Truth: Probability Theory and Standards of Proof,* 14 VAND. L. REV. 807 (1961); Kaplan, *Decision Theory and the Factfinding Process,* 20 STAN. L .REV. 1065 (1968), for an analysis of probability theory as applied to standards of proof.

47. 297 So. 2d at 295.

48. This bias would be worse where the jury is required to weigh expert testimony. The jury is then one step removed from the actual evidence and must judge the "clearness" of the expert's opinion on a subject it is presumed incompetent to pass upon. The demand for "clear" evidence in this situation thereby heightens the jury's responsiveness to criteria un-

of the evidence. This definition, therefore, has more value in rationalizing conclusions than in reaching them.[49]

In attempting the difficult task of defining an intermediate standard, the instant court should have examined applications of the standard to determine whether other methods exist for imposing a greater burden of persuasion on the plaintiff than that of greater weight of the evidence. When judges are finders of fact, they are keenly aware of the specific reasons for requiring a higher degree of proof in certain civil cases. They need not rely on abstract distillations of concepts of proof. Accordingly, juries should be able to impose a just burden of persuasion merely by being more or less difficult to persuade when instructed adequately about relevant presumptions and the policies underlying the required degrees of proof.[50]

The most serious problem is that the judge's intended meaning in an instruction concerning the burden of persuasion may be lost in the layman's translation of the instruction. The Simon/Mahan study,[51] for instance, indicated that jurors require a drastically higher probability of truth than judges require in order to satisfy the "preponderance of the evidence" standard.[52] But the same study found that jurors require less proof than judges to convict under the "beyond reasonable doubt" standard.[53] Thus, as a practical matter, there may be no conceptual room for an intermediate standard of proof in the minds of the jury where they rely on the traditional definitions of the three standards of proof. Justice Boyd, concurring specially in the instant case, stated that the court should adhere to the greater weight of the evidence instruction in all civil cases in the interests of uniformity and speed in the judicial process.[54] If the Simon/Mahan results[55] are valid, it is possible that the result sought by Justice Boyd already prevails, irrespective of the three-tier semantic distinctions found in appellate decisions and jury instructions.

The instant court's removal of the reasonable doubt wording from the intermediate standard of proof is an improvement in the clarity of the definition of that standard. The remaining words of art, however, are insufficient to control a very complicated process; they are too simple and vague. Hopefully,

related to the basic evidence, such as the witness' personality or verbal skills. *See* J. MAGUIRE, *supra* note 45, at 28.

49. *See generally* E. M. MORGAN, SOME PROBLEMS OF PROOF 81-86 (1956).

50. "[Professors Morgan and Thayer] believe that presumptions are created for reasons of policy and argue that if the policy underlying a presumption is of sufficient weight to require a finding of the presumed fact when there is no contrary evidence it should be of sufficient weight to require a finding when the mind of the trier of fact is in equilibrium, and, a fortiori, it should be of sufficient weight to require a finding if the trier of fact does not believe the contrary evidence." CAL. EVID. CODE §601, Official Comment (West 1966).

51. Simon & Mahan, *Quantifying Burdens of Proof*, 5 LAW & SOC'Y REV. 319 (1971).

52. *Id.* at 325, 327. The responses of the judges and jurors in this study were expressed as probabilities from 1.0 to 10.0, with 5.0 meaning equal probability and 10.0 meaning certainty. The judges interpreted "preponderance of the evidence" to be around 5.5 probability, whereas the jurors required 7.5 probability to satisfy the preponderance test.

53. *Id.* at 324-25. For the "beyond a reasonable doubt" standard, the judges required 8.9 probability, whereas the jurors required only 7.9 probability.

54. 297 So. 2d at 297.

55. See notes 51, 52 *supra*.