205 BURDEN OF PROOF: MIDDLE

The burden of proof on question(s) _____ rests upon the party contending that the answer to the question should be "yes." The burden is to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that "yes" should be the answer to (that) (those) question(s).

Clear, satisfactory, and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that "yes" should be the answer because of its greater weight and clear convincing power.

"Reasonable certainty" means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof.

[This burden of proof is known as the "middle burden." The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence, but may be less than beyond a reasonable doubt.]

COMMENT

This instruction was approved by the Committee in 1974 and revised in 1989, 1997, 2004, and 2010. A comma was added to the last sentence in 2011. The comment was updated in 1981, 1986, 1988, 1989, 1995, 2001, 2004, 2010, 2011, and 2016.

The Committee revised this instruction in 1997 because it concluded that the prior version of the instruction did not adequately explain to a jury what the middle burden of proof is. Under this former version, the jury was instructed as follows:

> The burden of proof as to each question in the verdict is on the plaintiff to convince you to a reasonable certainty by evidence that is clear, satisfactory, and convincing that the question should be answered "yes. "
>
> If you have to guess what the answer should be after discussing all evidence which relates to a particular question, then the party having the burden of proof as to that question has not met the required burden. Wis JI-Civil 205 (1989).

Some have suggested that explaining the differences between the two civil burdens is merely an academic/legalistic exercise because juries cannot realistically tell the difference between the "ordinary" and "middle" burden of proof. See Judge Cane's concurrence, joined by Judge Fine, in Carlson & Erickson v. Lampert Yards, 183 Wis.2d 220, 515 N.W.2d 305 (Ct. App. 1993). Others have argued that the "greater weight of the evidence" component of the ordinary burden actually sounds like a more rigorous or higher standard than "clear, satisfactory, and convincing" in our currently established middle burden. Although the Committee is aware of this criticism, it believes that (1) the supreme court has consistently required two civil burdens, and (2) the current version of this instruction conforms to the expressions of the court that the middle burden be expressed in terms of clear, satisfactory, and convincing evidence.

Weight; Degree of Certitude. Wisconsin case law provides little instruction on the middle burden. As to quantity, the middle burden is said to mean the clear preponderance which has been translated to mean "clear weight of the evidence" or "clearly more probable than not. " Klipstein v. Raschein, 117 Wis. 248, 94 N.W. 63 (1903). As to quality, the supreme court has said that clear, satisfactory, and convincing evidence refers to the quality or convincing power of the evidence necessary to produce the greater certainty a degree of reasonable certitude required. Kuehn v. Kuehn, 11 Wis.2d 15, 104 N.W.2d 138 (1960).

The middle burden of proof requires a greater degree of certitude than that required in ordinary civil cases, but a lesser degree than that required to convict in a criminal case. Kruse v. Horlamus Indus., 130 Wis.2d 357, 363, 387 N.W.2d 64 (1986).

Types of Cases. The middle burden of proof is required in certain civil actions which involve such matters as fraud, undue influence, punitive damages, and acts which would be considered criminal. Kruse v. Horlamus Indus., supra; Layton School of Art & Design v. WERC, 82 Wis.2d 324, 362-63, 262 N.W.2d 218 (1978); Wangen v. Ford Motor Co., 97 Wis.2d 260, 294 N.W.2d 437 (1980); Kuehn v. Kuehn, 11 Wis.2d 15, 26, 104 N.W.2d 138 (1960); Macherey v. Home Ins. Co., 184 Wis.2d 1, 516 N.W.2d 434 (Ct. App. 1994). Both the decisions in Kuehn and Wangen list the types of cases in which the middle burden is required. In addition, the middle burden applies in an action for reformation of a contract. Bailey v. Hovde, 61 Wis.2d 504, 213 N.W.2d 609 (1973). In adverse possession cases, the lower burden of proof (Wis JI-Civil 200) should be submitted, not the middle burden of proof. Kruse v. Horlamus Indus., supra at 367; Perpignani v. Vonasek, 139 Wis.2d 695, 735, 408 N.W.2d 1 (1987).

The question of whether the middle burden of proof applies to a given claim, defense, or limitation on liability was generally left to Wisconsin case law and the common law. That has changed significantly over the last 25 years as the Wisconsin Legislature has entered this area. The Wisconsin Legislature has now dictated that the clear and convincing evidence standard applies to many disparate areas of Wisconsin law. There are now over 100 Wisconsin statutes which contain the phrase "clear and convincing evidence." Numerous Wisconsin statutes now use these, or similar, phrases: "willfully, wantonly, or recklessly"; "reckless, wanton or intentional misconduct"; and "gross negligence. " It is the Committee's opinion that, when Wisconsin statutes use those phrases and similar phrases, the middle burden of proof is required.

Variations of Middle Burden at Common Law. The Committee recognizes that variations of this middle burden are found throughout earlier Wisconsin case law. For example, in release cases, the court in 1949 held that to impeach a written release on the ground of fraud or mistake, the proof must be "clear and convincing beyond reasonable controversy." Jandrt v. Milwaukee Auto Ins. Co., 255 Wis. 618, 39 N.W.2d 698 (1949). Similarly, the court said in 1981that use of excessive force in a battery action must be proved by a "clear and satisfactory preponderance of the evidence." Johnson v. Ray, 99 Wis.2d 777, 299 N.W.2d 849 (1981). Further variations of this middle burden are presented in Kuehn, supra. Despite these variations, the supreme court has expressly stated that the "preferential way" of stating the middle standard of proof is in terms of "clear, satisfactory, and convincing." Madison v. Geier, 27 Wis.2d 687, 135 N.W.2d 761 (1965). See also Wangen, supra at 299. In the interests of achieving uniformity in the expression of the middle standard, the Committee strongly recommends that whenever the trial court determines that the middle burden is required, the above instruction should be used even though a variation of the standard may exist in case law.