

1.19 BURDEN OF PROOF — CLEAR AND CONVINCING EVIDENCE (Approved 4/1988; Revised 8/2011)

With regard to (state here the factual issue(s) to be proved) it is the obligation of (state here the party or parties upon whom the burden of proof rests) to prove those allegations by clear and convincing evidence. Clear and convincing evidence is evidence that produces in your minds a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing as to cause you to come to a clear conviction of the truth of the precise facts in issue.

The clear and convincing standard of proof requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes you to be convinced that the allegations sought to be proved are true.

NOTE TO JUDGE

Clear and convincing establishes a standard of proof falling somewhere between the traditional standards of “preponderance of the evidence” and “beyond a reasonable doubt.” It is an exception to the rule requiring proof by a preponderance of the evidence in civil cases and proof beyond a reasonable doubt in criminal cases. Although the committee does not recommend it, it nonetheless

recognizes that some judges may feel more comfortable in defining the usual civil standard, preponderance of the evidence, as well as the criminal standard, beyond a reasonable doubt, as an aid to the jury in understanding what clear and convincing evidence means. If such an election is made, the judge should consult the standard civil charge for preponderance of the evidence and criminal charge 1.104 for “proof beyond a reasonable doubt.” Accordingly, depending on the specific circumstances, this standard is mandated by both case law and statute. The following is a non-exclusive list of the instances where the clear and convincing standard is the applicable burden of proof; please note that most of the following citations involve matters ruled upon by a judge without a jury. They have been listed solely for any research benefit they might provide.

- to prove a claim under Statute of Frauds, Statute of Wills, or the parole evidence rule. *Herman and MacLean v. Huddleston*, 459 U.S. 375, 74 L.Ed.2d 548, 549, 103 S.Ct. 683 (1983).
- the adverse parties are at a gross disadvantage in disputing an allegation. *State v. Sugar*, 100 N.J. 214 (1985).
- when the threatened loss resulting from civil proceedings is comparable to the consequences of a criminal proceeding. *In re Polk License Revocation*, 90 N.J. 550, 563 (1982).
- before a decision is made to withdraw a life sustaining treatment from an incompetent nursing home patient. *Matter of Conroy*, 98 N.J. 321, 382 (1985).
- in a civil commitment proceeding. *Addington v. Texas*, 441 U.S. 418, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1079).
- whenever the interests of the natural parents in the care, custody and management of their child are threatened. *Santosky v. Kramer*, 455 U.S. 754, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982).

- where the circumstances or issues are so unusual or difficult that proof by a lower standard will not serve to generate confidence in the ultimate factual determination. *In re Polk License Revocation*, *supra* at 568.
- cases involving defamation or where the defendant has a qualified immunity or privilege. *Burke v. Deiner*, 97 N.J. 465, 481 (1984).
- discipline or disbarment proceedings against an attorney, *In re Pennica*, 36 N.J. 401 (1962); *In re Racmiel*, 90 N.J. 646, 661 (1982).
- proving fraud. *Minter v. Bendix Aviation Corp.*, 26 N.J. Super. 268, 274 (App. Div. 1953). When the allegation of fraud is presented as an affirmative defense and is actually a claim of non-entitlement to alleged contractual benefits or is tantamount to a claim of breach of contract on the part of a plaintiff, the standard of proof is the usual “greater weight of the evidence” standard. *See Italian Fisherman v. Commercial Un. Assur.*, 215 N.J. Super. 278 (App. Div. 1987) (defendant insurance company’s affirmative defense of arson on the part of the insured, as well as the incidental torts of fraud and false swearing involved in the presentation of the claim for fire damage, must be proved by the preponderance of the evidence and not by clear and convincing proof). However, *see also Batka v. Liberty Mutual*, 704 F.2d 684 (3 Cir. 1983) which held that where insurance company asserts fraud in the inducement to the contract the allegation must be proved by clear and convincing proof.
- proving a public nuisance. *Township of Cherry Hill, N.J. v. N.J. Racing Commission*, 131 N.J. Super. 125 (Law Div. 1974), *aff’d. o.b.*, 131 N.J. Super. 482 (App. Div. 1974).
- challenging special assessments. *McNally v. Township of Teaneck*, 132 N.J. Super. 441 (Law Div. 1975), *mod.* 75 N.J. 33 (1977).
- amending an election petition. *Lepre v. Caputo*, 131 N.J. Super. 118 (App. Div. 1974).
- showing that sterilization is in the best interests of an incompetent person and that the person to be sterilized lacks the capacity to consent or withhold consent. *In re Grady*, 85 N.J. 235 (1981).

- establishing that officers of a corporation seeking a casino license or an applicant for a casino key employee license possess good character, honesty and integrity. *In re Boardwalk Casino License Application*, 180 *N.J. Super.* 324 (App. Div. 1981), *mod.* on other grounds. 90 *N.J.* 361 (1982), *app. dismiss.* 459 *U.S.* 1081, 74 *L.Ed.2d* 927, 103 *S.Ct.* 562 (1982); *In re Tufi Application*, 182 *N.J. Super.* 631, 638 (App. Div. 1981), *certif. denied*, 91 *N.J.* 189 (1982).
- demonstrating that persons connected with an applicant for a license for the collection, transportation, treatment, storage and disposal of solid wastes, who have been previously convicted of a serious crime, have since been rehabilitated. *N.J.S.A.* 13:1E-133.
- overcoming the presumption that the facts related in a sheriff's return of service are true. *Garley v. Waddington*, 177 *N.J. Super.* 173 (App. Div. 1981).
- demonstrating that government action constitutes a taking of property. *Matter of Egg Harbor Associates (Bayshore Centre)*, 94 *N.J.* 358, 374, showing that a rent control ordinance has a widespread confiscatory effect upon efficient landlords. *Helmsley v. Borough of Fort Lee*, 78 *N.J.* 200 (1978), *app. dismiss.* 440 *U.S.* 978, 60 *L.Ed.2d* 237, 99 *S.Ct.* 1178 (1979); *Orange Taxpayers Council, Inc. v. City of Orange*, 169 *N.J. Super.* 288 (App. Div. 1979), *aff'd.* 83 *N.J.* 246 (1980).
- showing that an attorney's extrajudicial speech truly jeopardized the fairness of an ongoing trial. *In re Hinds*, 90 *N.J.* 604, 626 (1982).
- justifying the debarment of a contractor from doing any further business with the State. *N.J.A.C.* 17:12-7.3(a)5; *Keys Martin & Co. v. Director, Div. of Purchase*, 99 *N.J.* 244, 263 (1985).
- establishing that a contract should be reformed. *St. Pius X House of Retreats v. Camden*, 88 *N.J.* 571, 580-581 (1982).
- overcoming the presumption that the value of a partner's interest in a professional partnership is accurately reflected by the value ascribed to it in a buy-sell agreement. *Stern v. Stern*, 66 *N.J.* 340, 346-347 (1975).

- showing that there was inadequate consideration for a mortgage. *Continental Bank of Pa. v. Barclay Riding Acad.*, 93 N.J. 153, 170 (1983), *cert. den.* 464 U.S. 994 (1983); *Federal Beneficial Ass'n. v. Eastern Land Co.*, 96 N.J. Eq. 628, 631 (E. & A. 1924).
- overcoming the presumption that the last of two or more marriages is valid. *Newburgh v. Arrigo*, 88 N.J. 529, 538 (1982).
- showing a waiver of the newsperson's privilege. *N.J.S.A. 2A:84A-21.3B* (Rule 27).
- overcoming the presumption of validity attaching to a certification received by a municipality for its plan for providing for its fair share of low and moderate income housing from the State Council on Affordable Housing. *N.J.S.A. 52:27D-317*.
- a trial judge should not set aside a jury verdict as against the weight of the evidence unless it clearly and convincingly appears that allowing the verdict to stand would work a manifest denial of justice under the law. *R. 3:20-1*; *R. 4:49-1(a)*. The same standard applies to an appellate court which is asked to overturn a trial court's denial of a motion for a new trial on the ground that the verdict was against the weight of the evidence. *State v. Carter*, 91 N.J. 86, 96 (1982). *See State v. Sims*, 65 N.J. 359, 373-374 (1974); *R. 2:10-1*.

CAUTION: MOST OF THE FOREGOING CASES ARE NON-JURY CASES; THESE CASES ARE BROUGHT TO YOUR ATTENTION AS EXAMPLES OF THE APPLICATION OF THE CLEAR AND CONVINCING STANDARD.

SEE ALSO:

- *Aiello v. Knoll Golf Club*, 64 N.J. Super. 156, 162; *In re Boardwalk Regency Casino License Application*, 180 N.J. Super. 324, 399 (App. Div. 1981), *mod.* on other grounds, 90 N.J. 361 (1982); *Lepre v. Caputo*, 131 N.J. Super. 118, 124 (L. Div. 1974); *New*

Jersey Rules of Evidence, Comments 5 and 7 to Rule 1(4), at 35 and 46 (1986 ed.).

- *Chance v. McCann*, 405 N.J. Super. 547, 574 (App. Div. 2009) requiring the trial charge to analyze the proofs and determine if a prima facie case of breach of contract has been presented based on a writing alone or if the prima facie case is dependent upon oral statements. If it is the former, the jury should only be charged that it must find clear and convincing evidence of statements or acts attributed to a party to the contract but that otherwise the preponderance of the evidence standard is applicable to the cause of action. If it is the latter, the jury must be charged that the entire cause of action must be proven by clear and convincing evidence.