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Correcting the Pattern: Pattern Jury Instructions Can Be Challenged

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As any seasoned trial attorney will tell you, one of the key events during a jury trial is the reading of the jury instructions to the jury. During the reading of the instructions, for a lengthy amount of time, the jury hears from the one impartial authority in the courtroom, the judge. Counsel for both parties are free to refer to the instructions during their closing arguments to persuade the jury that the law is on each of their respective sides. Yet research shows that juries struggle to understand instructions.[1] Given the pivotal role jury instructions play during trial, and the difficulty jurors have understanding them, the drafting and sourcing of jury instructions for each case is one of the most important tasks for attorneys. To help alleviate the difficult task of drafting instructions, ensure consistency in instructions across trials, and aid courts in ruling on which instructions to use — many jurisdictions use pattern jury instructions. Oftentimes, courts require parties to use the pattern jury instruction where one applies,[2] leading to the conclusion that such instructions cannot or should not be challenged at trial. Yet a recent decision in the Georgia Court of Appeals serves as a reminder to all trial counsel that pattern jury instructions are not always set in stone, and it may be advantageous to challenge such instructions even where the court requires that those instructions are given.

On October 3, the Georgia Court of Appeals held that a trial court erred in using the state pattern jury instruction on a highly important issue — the preponderance of the evidence.[3] Preponderance of the evidence is an evidentiary standard that requires the party with the burden of proving their case to show that something is more likely than not.[4] It is the standard applied to all civil claims and each element of a civil claim.[5] After a defense verdict in a car accident negligence case here, the plaintiff-appellant challenged the pattern jury instruction as misleading.[6] Despite tracking the current pattern jury instruction language on the preponderance of evidence, the plaintiff-appellant objected to the giving of the instruction at trial.[7] The challenged language for the pattern jury instruction stated:

The plaintiff has the burden of proof, which means that the plaintiff must prove whatever it takes to make his/her case, except for any admissions (in pleadings) by the defendant. The plaintiff must prove his/her case by what is known as a preponderance of the evidence; that is, evidence upon the issues involved, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.[8]

The pattern instruction mirrored the definition of preponderance of the evidence in the old version of the Georgia

Evidence Code.[9] That provision from the repealed Georgia Rules of Evidence read:

Preponderance of the evidence means that the weight of evidence upon the issues involved, which, while not enough to free the mind wholly from a reasonable doubt is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than law of evidence to the other.[10]

However, in 2011, the state of Georgia adopted the Federal Rules of Evidence, which became effective on January 1, 2013.[11] Despite the statute being defunct for a decade, the pattern jury instructions have not been updated and Georgia trial courts continue to use the pattern jury instruction modeled after the repealed evidentiary statutes.[12]

Given these changes, the Court of Appeals looked at whether the trial court erred in giving the pattern jury instruction, which contained the definition of the preponderance of evidence as set forth in the repealed code.[13] The court concluded that giving the pattern jury instruction in this instance was improper because the pattern instruction included a reference to the criminal reasonable doubt standard without stating how much higher that standard is or making clear that it does not apply in civil cases.[14] The court further found that such a vague reference to the criminal standard, which required a "much higher burden of proof … posed a significant risk of confusing or misleading the jury as to the applicable (and much lower) burden of proof."[15] While the Court of Appeals went on to hold that the error in giving the pattern instruction was harmless (meaning that, when viewed in context of the instructions and trial as a whole, that one error did not require the verdict to be overturned), it nevertheless found the pattern instruction problematic in considering the question of the proper preponderance of the evidence standard to apply.[16]

Since the new Georgia Rules of Evidence are largely meant to adopt many of the Federal Rules of Evidence, which do not define preponderance of the evidence, the Court of Appeals looked to federal court precedent for guidance.[17] This precedent defined the "preponderance of the evidence" standard as "simply requir[ing] the trier of fact to believe that the existence of a fact is more probable than its nonexistence."[18] This definition is like the Georgia Supreme Court's recent holding that referenced the standard for preponderance while determining error on another jury instruction.[19] In dicta, the Georgia Supreme Court stated "[p]roof by a preponderance simply requires that the evidence show that something is more likely true than not."[20] While the Court of Appeals declined to adopt either of these definitions, the Court implied that these definitions from federal courts and the Georgia Supreme Court should be the standard.[21]

This decision neither clarifies nor changes the standard for the preponderance of evidence in Georgia as the Court declined to adopt a particular standard in its decision.[22] Rather, the Court of Appeals merely suggested that the standards used by federal courts and referenced by the Georgia Supreme Court are more accurate than the current pattern jury instruction.[23] While the standard may have been artificially inflated in the eyes of juries due to the confusing language referencing the higher criminal standard, the Court of Appeals decision did not change the preponderance standard, only recommending the pattern jury instruction be updated to more accurately reflect the standard used by federal courts and the Georgia Supreme Court.[24]

Notably, this opinion serves as a reminder to all trial counsel of the importance of challenging problematic jury instructions even when such instructions are part of the jurisdiction's pattern jury instructions, and preserving the objections to pattern jury instructions for the appellate record, even when reversal or rejection of the pattern

instruction seems unlikely. While there was no reversal of the verdict in this decision due to the court finding the error harmless, the plaintiff's counsel preserved the issue for appellate review through an objection to a routinely used pattern jury instruction.[25] Despite the pattern instruction's almost century of use, and a decade since the new evidence code was enacted, record preservation proved to be vital foresight.[26] Regardless of the likelihood of reversal, counsel should be diligent in objecting to any rulings adverse to their clients.

This decision provides an opportunity to reevaluate pattern jury instructions going forward not just in Georgia, but across jurisdictions. While not a common occurrence, state appellate courts in other jurisdictions have reviewed and held pattern jury instructions to be erroneous.[27] Litigators often utilize pattern jury instructions without considering the minutiae of the language within them. This decision reminds parties to scrutinize pattern instructions for language based on law that is no longer correct, either due to revision of the statutes supporting the instructions or due to applicable precedent. When the opportunity strikes and the law supports, it is up to vigilant counsel to correct the pattern.

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[1] *See* Nancy Marder, *Bringing Jury Instructions into the Twenty-First Century,* 81 Notre Dame L. Rev. 449, 454 (2006); Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Instructions, and Comprehension Issues,* 67 Tenn. L. Rev. 701 (2000); Ronald W. Eades, *The Problem of Jury Instructions in Civil Cases,* 27 Cumb. L. Rev. 1017 (1996-97); Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project,* 23 U. Mich. J.L. Reform 401, 432 (1990).

[2] *See, e.g., People v. Simms*, 736 N.E.2d 1092, 1133 (Ill. 2000) ("[i]f an appropriate … instruction exists, it must be used."); *State v. Tisius*, 362 S.W.3d 398, 412 (Mo. 2012) ("instructions are presumed to be valid and, when applicable, must be given."); N.D. Ga. S.O. at 42; N.D. Cal. S.O. at 4.

[3] *See White v. Stanley,* A23A0986, 2023 WL 6413214, at *5 (Ga. Ct. App. Oct. 3, 2023).

[4] 75A Am. Jur. 2d Trial § 1096 (2023).

[5] 3C Fed. Jury Prac. & Instr. § 178:40 (6th ed. 2023).

[6] *See id.,* at *2.

[7] *See id.,* at *5.

[8] Georgia Suggested Pattern Jury Instructions, Vol. I, 02.020, (Burden of Proof; Generally; Preponderance of Evidence, Defined).

[9] O.C.G.A. § 24-1-1 (2013).

[10] *Id.*

[11] *See Olds v. State*, 299 Ga. 65, 69 (2) n.5, 786 S.E.2d 633 (2016) ("The new Evidence Code applies in cases tried on or after January 1, 2013.").

[12] *See* Georgia Suggested Pattern Jury Instructions, Vol. I, 02.020 (Burden of Proof; Generally; Preponderance of Evidence, Defined).

[13] *See generally*, *Stanley*, 2023 WL 6413214.

[14] *See id.,* at *5.

[15] *Id.* at *4.

[16] *See id.,* at *3-5.

[17] *See* Ga. L. 2011, pp. 99, 100 § 1 (The new Georgia evidence code largely adopts the Federal Rules of Evidence).

[18] *Stanley*, 2023 WL 6413214, * at 3 (quoting *Concrete Pipe & Prod. of Cali., Inc. v. Constr. Laborers Pension Tr. for S. Cali.*, 508 U.S. 602, 622 (1993) (internal quotations omitted).

[19] *See White v. State*, 307 Ga. 601, 607 (2020).

[20] *Id.*

[21] *See Stanley*, 2023 WL 6413214, at *5.

[22] *See Stanley*, 2023 WL 6413214, at *5.

[23] *See id.*

[24] *See id.*

[25] *Id.*

[26] *See, e.g.*, *Spooner v. Cobb*, 155 Ga. 458, (1923).

[27] *See Johnson v. Friends of Weymouth, Inc.*, 461 S.E. 801, 804 (N.C. Ct. App. 1995); *People v. Anderson*, 977 N.E.2d 222, 239 (Ill. App. Ct. 2012).

Benjamin Geller also contributed to this article. He is not licensed to practice law in any jurisdiction; application pending for admission to the Georgia Bar.

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