

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

RUBALEE BOOKOUT,

Plaintiff and Respondent,

v.

OVE NIELSEN,

Defendant and Appellant.

G037727

(Super. Ct. No. 06FL001052)

ORDER DENYING PETITION FOR
REHEARING AND MODIFYING
OPINION; NO CHANGE IN
JUDGMENT

The court has received a petition from the Los Angeles County Public Defender requesting that this court, on its own motion, either grant rehearing or modify the opinion filed August 31, 2007. The request for rehearing is denied. On its own motion, the court modifies the opinion filed on August 31, 2007, as follows:

On page 7, delete the last paragraph (including but not limited to footnote 3), beginning “In this case,” and replace it with the following:

In this case, the trial court stated on the record that it was making its findings by clear and convincing evidence. Section 15657.03 does not require findings to be made by clear and convincing evidence; therefore, a preponderance of

the evidence is sufficient. (Evid. Code, § 115.)³ The Los Angeles County Public Defender has requested that we reconsider our opinion in this regard, and conclude instead that the clear and convincing standard applies. We reject this request for three reasons in addition to our reliance on Evidence Code section 115.

First, although section 15657.03 does not specify a burden of proof, section 15657 permits the recovery of attorney fees and costs and eliminates the limitations on damages imposed by Code of Civil Procedure section 377.34 if physical abuse or neglect of an elder is “proven by clear and convincing evidence.” When the Legislature specifies the clear and convincing evidence standard of proof applies in one statute, and omits such a standard from another statute in the same chapter and article, we presume the Legislature did not intend the clear and convincing evidence standard to apply in the latter statute. (*In re Manolito L.* (2001) 90 Cal.App.4th 753, 761-762.)

Second, the Los Angeles County Public Defender urges us to apply a heightened burden of proof to claims under section 15657.03 to make proof required under that statute consistent with the proof required under other statutes

³ “‘Burden of proof’ means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish 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. [¶] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.” (Evid. Code, § 115.)

prohibiting harassment. The Public Defender does not identify the statutes to which he refers. Assuming the Public Defender is referring to Code of Civil Procedure sections 527.6 and 527.8, those statutes expressly specify the heightened clear and convincing standard of proof applies, which distinguishes them from section 15657.03. (See Code Civ. Proc, §§ 527.6, subd. (d), 527.8, subd. (f).)

Third, the Public Defender relies on *People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1255-1256, in which the appellate court held the judiciary may determine a heightened standard of proof applies when it considers both “constitutional due process and more general public policy considerations.” (Citations and footnote omitted.) As that court noted, ““The degree of burden of proof applied in a particular situation is an expression of the degree of confidence society wishes to require of the resolution of a question of fact. [Citation.] The burden of proof thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. [Citations.] Preponderance of the evidence results in the roughly equal sharing of the risk of error. [Citation.] To impose any higher burden of proof demonstrates a preference for one side’s interests. [Citation.] Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake; even severe civil sanctions not implicating such

interests or rights do not require a higher burden of proof. [Citations.]” (*Id.* at pp. 1253-1254.)

Here, the public policy interest as articulated by the Legislature favors application of the preponderance of the evidence standard, not the clear and convincing standard. In enacting the Elder Abuse Act, the Legislature fully identified the goals and purposes of the Act as follows: “(a) The Legislature recognizes that elders and dependent adults may be subjected to abuse, neglect, or abandonment and that this state has a responsibility to protect these persons. [¶] (b) The Legislature further recognizes that a significant number of these persons are elderly. The Legislature desires to direct special attention to the needs and problems of elderly persons, recognizing that these persons constitute a significant and identifiable segment of the population and that they are more subject to risks of abuse, neglect, and abandonment. [¶] (c) The Legislature further recognizes that a significant number of these persons have developmental disabilities and that mental and verbal limitations often leave them vulnerable to abuse and incapable of asking for help and protection. [¶] (d) The Legislature recognizes that most elders and dependent adults who are at the greatest risk of abuse, neglect, or abandonment by their families or caretakers suffer physical impairments and other poor health that place them in a dependent and vulnerable position. [¶] (e) The Legislature further recognizes that factors which contribute to abuse, neglect, or abandonment of elders and dependent adults are

economic instability of the family, resentment of caretaker responsibilities, stress on the caretaker, and abuse by the caretaker of drugs or alcohol. [¶] (f) The Legislature declares that this state shall foster and promote community services for the economic, social, and personal well-being of its citizens in order to protect those persons described in this section. [¶] (g) The Legislature further declares that uniform state guidelines, which specify when county adult protective service agencies are to investigate allegations of abuse of elders and dependent adults and the appropriate role of local law enforcement is necessary in order to ensure that a minimum level of protection is provided to elders and dependent adults in each county. [¶] (h) The Legislature further finds and declares that infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits. [¶] (i) Therefore, it is the intent of the Legislature in enacting this chapter to provide that adult protective services agencies, local long-term care ombudsman programs, and local law enforcement agencies shall receive referrals or complaints from public or private agencies, from any mandated reporter submitting reports pursuant to Section 15630, or from any other source having reasonable cause to know that the welfare of an elder or dependent adult is endangered, and shall take any actions

considered necessary to protect the elder or dependent adult and correct the situation and ensure the individual's safety. [¶] (j) It is the further intent of the Legislature in adding Article 8.5 (commencing with Section 15657) to this chapter to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.” (§ 15600.)

Given these reasons set forth by the Legislature, it would be inappropriate for this court to provide less protection for the elderly and dependent adults and to make it harder to obtain relief under section 15657.03 than otherwise provided by the statutory scheme.

In considering whether the trial court's findings are supported by substantial evidence, we review the record as if the court had made its findings based on a preponderance of the evidence standard.

There is no change in the judgment.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.