

STATE OF MICHIGAN
COURT OF APPEALS

ALBERT SIMON, JR.,

Plaintiff-Appellant,

v

PLANTE & MORAN, P.C.,

Defendant-Appellee.

UNPUBLISHED

July 25, 1997

No. 192148

Oakland Circuit Court

LC No. 94-470759-NM

Before: Doctoroff, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action following a jury verdict, entered in favor of defendant in this professional malpractice case. On appeal, plaintiff argues that the jury's verdict was against the great weight of the evidence and that the trial court erred in denying his motion for a new trial. Plaintiff further argues that defendant's counsel presented improper arguments at trial which were unsupported by the facts in evidence, thus denying plaintiff a fair trial, and that the trial court erred in issuing conflicting instructions to the jury with regard to plaintiff's burden of proof. We reverse and remand for a new trial.

We first consider plaintiff's issue regarding the instructions issued to the jury at trial. We review jury instructions to determine whether the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Rice v ISI Mfg, Inc*, 207 Mich App 634, 637-638; 525 NW2d 533 (1994). The failure to give a properly requested, applicable, and accurate instruction requires reversal only where failure to vacate the jury verdict would be inconsistent with substantial justice. *Johnson v Corbet*, 423 Mich 304, 327-328; 377 NW2d 713 (1985); *Callesen v Grand Trunk Western R Co*, 175 Mich App 252, 263; 437 NW2d 372 (1989).

Plaintiff argues that the trial court impermissibly raised the plaintiff's burden of proof by issuing to the jury an instruction regarding clear and convincing evidence. We agree.

The trial court instructed the jury, in pertinent part, as follows:

I shall now explain to you the burden of proof, which the law places on the parties to establish their respect [sic] claims. When I say that a party has the burden of proof, I mean the evidence must satisfy you that the proposition on which that party has the burden of proof has been established by evidence which outweighs the evidence against them. *When I say that a party has the burden of proving a proposition by clear and convincing evidence, I mean that the evidence must be more- - must more than outweigh the evidence against it. To be clear and convincing, the evidence must satisfy you that the proposition has been established with a high degree of probability.* You must consider all the evidence regardless of which party produced it. [Emphasis added.]

The burden of proof in civil cases such as this one is preponderance of the evidence. *Residential Ratepayer Consortium v Public Service Comm*, 198 Mich App 144, 149; 497 NW2d 558 (1993). The trial court's instruction in this case erroneously embodies both the preponderance of the evidence instruction set forth in SJI2d 16.01 and the alternative, inapplicable clear and convincing evidence instruction. Having been instructed regarding both the clear and convincing evidence standard and the preponderance of the evidence standard, it may not be assumed that the jury elected to apply the correct burden of proof. See *Iwrey v Fowler*, 367 Mich 311, 314-316; 116 NW2d 722 (1962). Instructional errors that increase a plaintiff's burden of proof are grounds for a reversal of a jury verdict. *Karas v White*, 101 Mich App 208, 211; 300 NW2d 320 (1980). Because the trial court effectively increased plaintiff's burden of proof, failure to vacate the jury verdict would be inconsistent with substantial justice. *Johnson, supra* at 327-328; *Callesen, supra* at 263. We therefore must reverse and remand for a new trial.

Because we conclude that the trial court's error in instructing the jury warrants reversal, it is unnecessary to consider plaintiff's remaining issues on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin