

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FRED NICASTRO and PAMELA NICASTRO,  
  
Petitioners-Appellees/Cross-  
Appellants,

UNPUBLISHED  
September 24, 2013

v

DEPARTMENT OF HUMAN SERVICES,  
  
Respondent-Appellant/Cross-  
Appellee.

No. 304461  
Ingham Circuit Court  
LC No. 09-001672-AA

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Before: WILDER, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

In this case involving a request for expunction from Michigan’s central registry for child abuse and neglect by petitioners, Fred and Pamela NiCastro, respondent, the Department of Human Services (DHS), appeals by leave granted the circuit court’s order reversing the final decision of DHS and ordering that petitioners be immediately removed from the central registry. Petitioners cross-appeal and argue that the central-registry statute is unconstitutional on its face and as applied to them by DHS. We reverse and remand to the circuit court for further proceedings consistent with this opinion.

**I. BASIC FACTS AND PROCEDURAL HISTORY**

This case arose in March 2008 when Saginaw County Child Protective Services received two complaints against petitioners. The complaints contained allegations of physical abuse, threatened harm, maltreatment, and failure to protect regarding two foster-care children in petitioners’ home and also mental injury to Mrs. NiCastro’s daughter. After a two-month investigation—during which the investigator notified petitioners of the allegations, received petitioners’ response to the allegations, and interviewed various individuals, including the children—the investigator concluded by a preponderance of the evidence that petitioners committed child abuse and neglect. Petitioners were listed on the central registry. After DHS notified petitioners of both the listing and their rights upon being listed, petitioners requested review the investigation record, an immediate administrative hearing, and expunction from the registry. DHS denied the request for expunction and requested an expedited hearing.

An administrative law judge (ALJ) conducted a four-day evidentiary hearing in which DHS bore the burden of proof to establish by a preponderance of the evidence that petitioners

committed child abuse or neglect. Over 15 witnesses testified. Petitioners, who were represented by counsel, were able to cross-examine DHS's witnesses and offer exhibits to be admitted into evidence; over ten witnesses testified on behalf of petitioners, including petitioners themselves. After the hearing concluded, the ALJ issued two separate written decisions, concluding that DHS had proven by a preponderance of the evidence that petitioners committed child abuse and neglect and, thus, that petitioners were properly placed on the central registry and that DHS properly denied the requests for expunction.

The circuit court reversed the ALJ's decision and ordered the expunction of petitioners' names from the central registry. The court held, "Although DHS seems to have had a reasonable, good faith basis for listing the Nicastro's on the [central registry] initially, that decision was not supported by a preponderance of evidence as presented at the administrative hearing." The court stated that, unlike the ALJ, it would have placed more weight on the testimony of certain witnesses, including the testimony of mandatory reporters of child abuse and neglect who never reported suspected abuse in this case. In addition, the court expressed its belief that petitioners' fears of witness and investigatory bias were not wholly unfounded. The circuit court opined that the case was a "close call"—"one that is too close to rise to the level of preponderance."

## II. STANDARD OF REVIEW

The parties disagree over what standard of review this Court applies when reviewing a circuit court's review of an agency decision. DHS contends that this Court has issued conflicting opinions regarding the appropriate standard of review and that we should review the circuit court's decision de novo. In contrast, petitioners contend that the law in Michigan is well settled that this Court reviews a circuit court's decision for clear error. We conclude that it is well settled that the proper standard of review to be applied by this Court is the clearly erroneous standard.

In *Boyd v Civil Serv Comm*, 220 Mich App 226, 232; 559 NW2d 342 (1996), this Court recognized that the standard for an appellate court reviewing a lower court's review of an agency decision had not yet been settled in Michigan. When determining what standard of review should be applied, the *Boyd* Court analyzed federal precedent and a treatise by Professor Don LeDuc. *Id.* at 232-234. Quoting the United States Supreme Court's decision in *Universal Camera Corp v NLRB*, 340 US 474; 71 S Ct 456; 95 L Ed 456 (1951), the *Boyd* Court explained that the United States Supreme Court uses the clearly erroneous standard of review:

Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. [*Boyd*, 220 Mich App at 232-233, quoting *Universal Camera Corp*, 340 US at 490-491.]

The *Boyd* Court then cited with approval Professor LeDuc's comments that Michigan should apply the clearly erroneous test as the Supreme Court did in *Universal Camera Corp* so that the first reviewing court (the circuit court) is the primary fact-finding check on agencies and each

subsequent reviewing court reviews the previous court's decision, rather than the findings of the agency. *Id.* at 233-234. The *Boyd* Court determined that the clearly erroneous standard was the proper standard of review to be applied in Michigan, opining as follows:

The *Universal Camera* standard will preserve scarce judicial resources, enhance the role of this Court as an intermediate appellate court, and discourage unnecessary appeals. . . . We therefore hold that when reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. As defined in numerous other contexts, a finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made. [*Id.* at 234-235; see also *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 575-576; 659 NW2d 629 (2002).]

Therefore, this Court evaluates whether the circuit court has erred in using *its* standard of review. In *Monroe v State Employees' Retirement Sys*, 293 Mich App 594, 607; 809 NW2d 453 (2011) (quotation and internal citations omitted), we explained the appropriate standard of review to be applied by a circuit court reviewing a decision of an administrative agency:

A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of the law. "Substantial" means evidence that a reasoning mind would accept as sufficient to support a conclusion. Courts should accord due deference to administrative expertise and not invade administrative fact finding by displacing an agency's choice between two reasonably differing views.

DHS argues that *Boyd* and, thus, our analysis employed herein conflicts with this Court's earlier decision in *Barker Bros Constr v Bureau of Safety and Regulation*, 212 Mich App 132; 536 NW2d 845 (1995), and that we should convene a conflict panel to settle the issue regarding which standard of review is appropriate. However, *Barker Bros* is inapposite to this case. The petitioner in *Barker Bros* contested the board's determination that petitioner had willfully violated the Michigan Occupational Safety and Health Act ("MIOSHA"), but the petitioner did not raise this issue with the circuit court. *Id.* at 140-141. This Court concluded that the issue was unpreserved but, nevertheless, decided to afford the petitioner a cursory review of the decision of the administrative agency—not the decision of the circuit court. *Id.* at 141. The Court specifically opined,

Preliminarily, we note that petitioner only vaguely raised this issue in its petition for judicial review and did not raise it at the circuit court hearing. Notwithstanding petitioner's failure to preserve this issue properly for appellate

review, we afford it cursory review because it was raised and addressed by the hearing referee in the administrative hearing. [*Id.*]

The *Barker Bros* Court then stepped into the shoes of the circuit court solely on the specific issue of whether the petitioner had willfully violated MIOSHA and conducted the same limited review of the administrative agency that the circuit court would have conducted if that issue had been presented to the circuit court. See *id.* at 141-143. The *Barker Bros* Court used the substantial evidence standard because this is the standard that the circuit court would have used. *Id.* The Court explained, “This Court reviews a decision of an administrative agency in the same limited manner as does the circuit court. Agency findings of fact are conclusive unless unsupported by competent, material, and substantial evidence on the whole record.” *Id.* at 141 (internal citations omitted). Accordingly, *Boyd* and *Barker Bros* do not conflict.

DHS also argues that this Court’s decision in *Lehmann v State Employees’ Retirement Sys*, 207 Mich App 453; 526 NW2d 28 (1994), stands for the proposition that this Court should use the substantial evidence test to review a circuit court’s review of agency decisions. *Lehmann*, however, is distinguishable from this case because the facts were not disputed in *Lehmann* as they are here. See *id.* at 454-459. Instead, the *Lehmann* Court was looking to see whether the administrative agency violated the constitution or a statute or was affected by substantial and material errors of law. *Id.* The *Lehmann* Court did not apply the substantial evidence test. See *id.* Indeed, the Court did not even mention the substantial evidence test. See *id.* Thus, *Lehmann* does not support DHS’s argument.

DHS further argues that this Court applied *Barker Bros* and *Boyd* in *Mackey v Dep’t of Human Servs*, 289 Mich App 688, 696-697; 808 NW2d 484 (2010), which demonstrates clear confusion in this Court’s jurisprudence. This Court’s decision in *Mackey* states that “[t]he substantial evidence standard is indistinguishable from the clearly erroneous standard of review” and then adopts the clearly erroneous test. *Id.* *Mackey* cites *Boyd* for the proposition that the substantial evidence test is indistinguishable from the clearly erroneous test, *id.* at 697, but this is not what the *Boyd* decision holds. *Boyd* states,

We therefore hold that when reviewing a lower court’s review of agency action this Court must determine whether the lower court applied correct legal principles and *whether it misapprehended or grossly misapplied the substantial evidence test* to the agency’s factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review that has been widely adopted in Michigan jurisprudence. [*Boyd*, 220 Mich App at 234-235 (emphasis added).]

*Boyd*, therefore, applies the clearly erroneous test to the circuit court’s application of the substantial evidence test to determine whether the circuit court clearly erred. *Boyd* does not state that the two standards are indistinguishable. *Mackey*, therefore, represents a poor reading and interpretation of *Boyd* and is distinguishable in that regard. Moreover, *Mackey* uses the clearly erroneous test to reverse the circuit court—not the substantial evidence test—which further demonstrates that the law is well settled that this Court is to apply the clearly erroneous standard. *Mackey*, 289 Mich App at 708.

Accordingly, this Court reviews for clear error a decision of the circuit court reviewing an administrative agency.

### III. THE CIRCUIT COURT'S DECISION

DHS contends that the circuit court erred by applying an incorrect standard of review. DHS argues that instead of applying the substantial evidence test, the circuit court essentially conducted a de novo review. We agree.

As previously discussed, we review the circuit court's decision to "determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review . . . ." *Boyd*, 220 Mich App at 234-235. "[A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id.* at 235; see also *Tuttle v Dep't of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976).

A circuit court's review of an administrative agency's decision is limited to "determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law." *Monroe*, 293 Mich App at 607, quoting Const 1963, art 6, § 28; MCL 24.306. Substantial evidence is "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion." *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). "While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *Id.*

In *Detroit Symphony Orchestra*, the Court explained that review under the constitutional substantial evidence standard is not de novo review:

"The cross-fire of debate at the Constitutional Convention imports meaning to the 'substantial evidence' standard in Michigan jurisprudence. What the drafters of the Constitution intended was a thorough judicial review of administrative decision, a review which considers the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. Cognizant of these concerns, the courts must walk the tightrope of duty which requires judges to provide the prescribed meaningful review." [*Id.* at 692-693, quoting *Mich Employment Relations Comm'n v Detroit Symphony Orchestra, Inc*, 393 Mich 116, 124; 223 NW2d 283 (1974).]

In this case, the circuit court stated that it was using the substantial evidence standard; however, the circuit court's opinion and order illustrates that the court actually stepped into the

shoes of the ALJ and conducted a de novo review to determine whether the burden of a preponderance of the evidence had been met. For example, the circuit court stated, “Other than testimony regarding screaming and yelling in the home, the record is too sparse to support a finding of mental abuse of DM by a preponderance of the evidence.” It opined, “This case presents a close call and, in this Court’s opinion, one that is too close to rise to the level of preponderance.” It also opined, “Although DHS seems to have had a reasonable, good faith basis for listing the Nicasstros on the CRS initially, that decision was not supported by a preponderance of evidence as presented at the administrative hearing.” Although the circuit court may feel that the ALJ did not consider all of the evidence, the court still must use the substantial evidence test as its guide-post, not the preponderance of the evidence test. The circuit court may only reverse an ALJ’s findings of fact if the findings were not supported by competent, material, and substantial evidence on the whole record, which may be substantially less than a preponderance. *Id.* at 692. The circuit court clearly erred by failing to apply this standard.

Furthermore, despite the circuit court’s statements that “an ALJ decides what weight to place on evidence when making a decision,” the circuit court disagreed with how the ALJ placed that weight in this case. The circuit court would have placed more weight on the testimony of the mandatory reporters of child abuse and neglect who never reported any suspected abuse. It would not have placed as much weight as the ALJ did on the testimony of two of the children. It would have placed greater weight on the testimony of Dr. Terence Campbell, and it gave credence to Dr. Campbell’s testimony that the presence of a husband-wife investigative team presented an issue of inherent bias. Moreover, the court opined that petitioners’ fears of potential bias were not wholly unfounded. Because the ALJ has considerable discretion over evidentiary issues and may determine the weight of evidence and assess the credibility of witnesses, the circuit court should only have discerned whether the record supports the ALJ’s decision. See *Dep’t of Community Health v Risch*, 274 Mich App 365, 373; 733 NW2d 403 (2007). “[I]t is not the function of a reviewing court to assess witness credibility.” *Id.* at 372. As long as the ALJ’s decision is supported by competent, material, and substantial evidence, a level of support that can be substantially less than a preponderance of evidence, it must be affirmed, even if the record could support coming to an opposite conclusion. *Id.* at 373. The circuit court clearly erred by substituting its own factual findings and credibility determinations for those of the ALJ.

Accordingly, we conclude that the circuit court grossly misapplied the substantial evidence test to the agency’s factual findings and, thus, clearly erred.<sup>1</sup> See *Boyd*, 220 Mich App at 234-235. Upon remand, the circuit court still has the latitude to determine whether the ALJ’s decision was “contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law,” *Monroe*, 293 Mich App at 607, but it may not step into the shoes of the ALJ by conducting its own de novo review for a

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<sup>1</sup> In light of our conclusion and the necessity to remand to the circuit court, we do not address the constitutional issues raised by petitioners.

preponderance of the evidence. Substantial evidence may be substantially less than a preponderance. *In re Payne*, 444 Mich at 692. If the evidence before the ALJ would allow a reasonable mind to find as the ALJ did, then there is substantial evidence to support the ALJ's finding. *Id.*

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ Pat M. Donofrio  
/s/ Jane M. Beckering