

STATE OF MICHIGAN
COURT OF APPEALS

L AND L WINE AND LIQUOR
CORPORATION,

Plaintiff-Appellant,

v

LIQUOR CONTROL COMMISSION,

Defendant-Appellee,

and

R LEONE IMPORTS LTD, INC.,

Intervenor-Appellee.

UNPUBLISHED
March 22, 2012

No. 301841
Ingham Circuit Court
LC No. 10-000623-AA

L AND L WINE AND LIQUOR
CORPORATION,

Plaintiff-Appellees,

v

LIQUOR CONTROL COMMISSION,

Defendant-Appellee,

and

R LEONE IMPORTS LTD, INC.,

Intervenor-Appellee.

No. 302620
Ingham Circuit Court
LC No. 10-000623-AA

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

These consolidated appeals involve a dispute between plaintiff L & L Wine and Liquor Corporation (L & L Wine) and R. Leone Imports Ltd. (R. Leone) over the distribution rights to a brand of wine—Cruz Garcia Real Sangria. The dispute ended up before the Michigan Liquor Control Commission, which determined that L & L Wine did not have the authority to distribute Real Sangria in the 12 counties that R. Leone also distributed Real Sangria. L & L Wine asked the circuit court to review the Commission’s decision and the circuit court affirmed in an opinion and order entered in December 2010. In docket number 301841, L & L Wine appeals by leave granted the circuit court’s decision to affirm the Commission’s order. Before the circuit court, R. Leone argued that the Commission erred when it implicitly determined that R. Leone did not have the distribution rights to Real Sangria in 15 additional counties and that, accordingly, the Commission erred when it refused to bar L & L Wine from distributing in those additional counties. In docket number 302620, R. Leone appeals by leave granted the circuit court’s January 2011 order denying R. Leone’s motion for reconsideration of the circuit court’s order affirming the Commission’s decision. We conclude that the circuit court properly deferred to the Commission’s findings, which were supported by competent evidence. For that reason, we affirm in both dockets.

I. BASIC FACTS

Shaw-Ross International Importers supplies the Real Sangria brand in Michigan. Mike Nichols testified at the Commission’s hearing that he previously worked for L & L Wine, but that after National Wine & Spirits, LLC (National Wine) purchased L & L Wine in 2007, he worked for National Wine. Nichols is National Wine’s Brand and Business Development Manager. Nichols stated that L & L Wine used to distribute Real Sangria, but relinquished those rights in February 1992. He was “fairly certain” that Viviano Wine Importers, Inc. became the statewide distributor of Real Sangria after February 1992.

In 2001, J. Lewis Cooper purchased Viviano; as such, it acquired whatever rights Viviano had to distribute Real Sangria. In July 2002, Shaw-Ross executed a written agreement with R. Leone, which gave R. Leone the right to distribute Real Sangria in seven counties: Ingham, Livingston, Macomb, Monroe, Oakland, Washtenaw, and Wayne. It also apparently orally agreed to permit R. Leone to distribute in Eaton, Genesee, Jackson, Lapeer, and Shiawassee Counties. Where two wholesalers have the right to distribute the same brand in a given territory, the wholesalers are commonly referred to as “dual” or “dualing” distributors and the right is referred to as the right to “dual” the brand. On December 2004, J. Lewis Cooper transferred its right to distribute Real Sangria to L & L Wine in exchange for distribution rights to other products.

L & L Wine eventually applied to the Commission for permission to transfer its stock to National Wine, which the Commission approved in February 2007. National Wine, however, is—through its sole member—an authorized distribution agent (authorized agent)¹ for the Commission. Accordingly, L & L Wine was an authorized agent-wholesaler after the transfer. The Commission made it clear to L & L Wine in its February 2007 order approving the transfer

¹ See MCL 436.1105(4) (defining authorized distribution agent).

that L & L Wine would have to comply with the restrictions against dualing provided under the then existing version of MCL 436.1205(3).² After the Commission's approval, L & L Wine asked the Commission for clarification and the Commission replied by letter that the order was clear and that under MCL 436.1205(3) L & L Wine would not be able to dual those brands of wine for which it obtained the right to distribute after September 24, 1996.

Approximately one year later, R. Leone filed a complaint with the Commission alleging that L & L Wine was dualing Real Sangria and other brands in counties where R. Leone had distribution rights. The Commission investigated and determined that there was reason to believe that L & L Wine was violating the restrictions against an authorized agent-wholesaler dualing brands. Consequently, in March 2009, the Commission ordered L & L Wine to show cause why it should not be sanctioned for violating the dualing restriction and approval order and why it should not be forced to cease distributing Real Sangria and other brands in the affected territories.³ Before the show-cause hearing, the Commission granted R. Leone's request to intervene.

At the show cause hearing, L & L Wine conceded that it could not dual Real Sangria under MCL 436.1205(3) unless it qualified to do so under one of the statutory exceptions. It further conceded that it was not itself distributing Real Sangria before September 24, 1996, and, therefore, did not meet the requirements of the first exception. However, it sought to prove that its predecessor in interest—Viviano—was distributing Real Sangria in the territories at issue before September 24, 1996. It argued that, because it acquired Viviano's rights from J. Lewis Cooper, it qualified under the exception for rights acquired through "acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996." See MCL 436.1205(3). R. Leone disputed L & L Wine's evidence and argued that the second exception did not apply to subsequent transfers of distribution rights; instead, the second exception only applied to the acquisition of rights from the original wholesaler. R. Leone also presented evidence that it had the right to distribute Real Sangria throughout the state, not just those counties identified in its written agreement.

Following the hearing, both R. Leone and L & L Wine filed supplemental briefs and submitted additional evidence to the Commission. After the hearing and a review of the record, the Commission issued its decision and order on December 22, 2009. It found that L & L Wine failed to establish that Viviano had been selling Real Sangria in the counties at issue prior to September 24, 1996. For that reason, it concluded that L & L Wine had not established an exception to the statutory prohibition against it engaging in dual distribution of that brand in the disputed territories. However, it also found that L & L Wine was only engaged in prohibited dualing in the 12 counties within which R. Leone also had the right to distribute Real Sangria; hence, it implicitly found that R. Leone did not have the right to distribute Real Sangria in

² The Legislature significantly amended the statutes governing the sale and distribution of alcohol in 2010, including MCL 436.1205(3). See 2010 PA 213. Unless otherwise stated, every citation to MCL 436.1205 is to the version as it existed prior to the enactment of 2010 PA 213.

³ The other brands are not at issue on appeal.

counties other than those 12. The Commission concluded that L & L Wine was violating the prohibition against authorize agents engaging in dualing brands and had failed to comply with the prior approval order. In its decision, the Commission ordered L & L Wine to cease distributing Real Sangria in the 12 counties where Shaw-Ross had granted R. Leone the right to distribute Real Sangria.

L & L Wine and R. Leone both appealed the Commission's decision to the circuit court. The circuit court affirmed the Commission's decision. In doing so, it determined that the second exception provided under MCL 436.1205(3) only applied to the first transfer of distribution rights. It also determined that the Commission's findings were supported by competent, material, and substantial evidence on the entire record.

This appeal followed.

II. THE COMMISSION'S DECISION

A. STANDARDS OF REVIEW

On appeal, L & L Wine argues that the Commission committed an error of law when it improperly construed MCL 436.1205(3). Specifically, it argues that the second exception stated under MCL 436.1205(3) permits an authorized agent to dual brands if it can trace its distribution rights through any number of predecessors to a predecessor who held the right and actively sold the brand prior to September 24, 1996. L & L Wine also argues that the Commission's findings that L & L Wine failed to establish that its predecessor held the distribution rights was unsupported by the record. L & L Wine maintains that the circuit court should have reversed the Commission's decision and order.

R. Leone contends that the trial court should have determined that the Commission's finding that R. Leone did not have the right to distribute Real Sangria beyond the twelve counties identified in the Commission's decision was not supported by the record. It maintains that the circuit court should have reversed the Commission's decision on that basis.

When reviewing a circuit court's review of an agency decision, this Court determines whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's findings. *Dep't of Labor and Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212, 222; 771 NW2d 423 (2009). The circuit court's review was limited to determining whether the agency's decision was contrary to law, was supported by substantial evidence, was arbitrary and capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. *Id.* at 223. However, this Court reviews de novo the proper interpretation and application of a statute. See *Danse Corp v City of Madison Heights*, 466 Mich 175, 178; 644 NW2d 721 (2002).

B. DUALING AND AUTHORIZED AGENTS

An authorized agent is a person or entity that the Commission has authorized to act on its behalf in the storage and delivery of spirits. See MCL 436.1105(4); MCL 436.1205(1). A wholesaler, in contrast, does not handle spirits for the Commission; rather, the wholesaler is a

person or entity that sells beer, wine or mixed-spirit drinks to retailers. See MCL 436.1113(7). For various reasons, the Legislature determined that authorized agents should be strictly limited in their ability to also serve as suppliers or wholesalers. Accordingly, the Legislature prohibited authorized agents from having a direct or indirect interest in a supplier and prohibited suppliers from having a direct or indirect interest in an authorized agent. See MCL 436.1205(3). Similarly, the Legislature provided that a “wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act” MCL 436.1205(3).

Here, L & L Wine was a wholesaler and became an authorized agent. As such, it could not sell wine in a county or part of a county which another wholesaler—such as R. Leone—has been appointed to sell that same brand. However, in order to protect the distribution rights of wholesalers who were already dualing—that is, competing against other wholesalers in the same territory with the same brands, the Legislature provided two exceptions to the general rule that a wholesaler that is also an authorized agent cannot dual. First, the Legislature provided that a wholesaler who “was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996” could continue to sell the brand in those counties. MCL 436.1205(3). Second, the Legislature provided that a wholesaler who obtained the right to distribute in a given territory “as a result of an acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.” *Id.* There is no dispute that L & L Wine does not qualify under the first exception; as such, the only question during the Commission’s hearing was whether L & L Wine established that it had the right to sell Real Sangria under the second exception.

Although L & L Wine argues that the Commission erred when it interpreted MCL 436.1205(3) to limit the second exception to those situations where the wholesaler acquired its right to distribute directly from a wholesaler who was selling the wine brand to a retailer prior to September 24, 1996, it is not clear that the Commission relied on such an interpretation. In its decision and order the Commission stated that L & L Wine “did not demonstrate that the wholesaler it claims to have acquired the distribution rights from in 1992—Viviano Wine Importers, Inc. d/b/a J. Lewis Cooper Company—continued to sell Cruz Garcia Real Sangria through September 24, 1996.” Specifically, it stated that L & L Wine did not “present sufficient evidence” to establish the application of this exception. Reading the decision as a whole, it is clear that the Commission found that L & L Wine failed to carry its burden to prove that its predecessor in interest was a wholesaler who was selling Real Garcia to a retailer in the counties or in parts of the counties at issue prior to September 24, 1996. See MCL 436.1205(3). Because we conclude that this finding is dispositive, we shall address it first.⁴

⁴ Accordingly, we decline to address whether the prior version of MCL 436.1205(3) allowed dualing where the authorized agent acquired its rights through a chain of predecessors going back to a predecessor who had the right to sell and did sell a particular brand prior to September 24, 1996.

L & L wine's argument on appeal essentially focuses on whether there was competent, material, and substantial evidence to support *its* conclusion. However, the relevant inquiry is whether there was competent, material, and substantial evidence to support the Commission's finding that Viviano did not sell Real Sangria in the specific counties at issue. Substantial evidence is "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994). Thus, we must determine whether there was evidence that a reasonable mind would accept as sufficient to conclude that L & L Wine had not demonstrated that Viviano had the right to sell Real Sangria and actually sold it in the counties at issue.

Nichols testified at the Commission's show-cause hearing that it was "his job to know" who was distributing various brands back when he worked for L & L Wine and that he was "fairly certain" that Viviano took over the state-wide distribution of Real Sangria. But Nichols also testified that he did not know if L & L Wine sold the rights to Viviano, did not see an appointment letter from Shaw-Ross appointing Viviano as the distributor, and was not involved with brand transfers at that time. Instead, he came to his conclusion on the basis of his "general knowledge" of the brands at that time.

In addition to Nichols' testimony, L & L Wine presented documentation showing that Viviano sold Real Sangria to specific retailers as far back as 1998. It also submitted the affidavit of Greg Tignanelli, who has been Shaw-Ross' Vice-President of Sales since 2000. Tignanelli averred that he "researched" whether Viviano had secured the distribution rights to Real Sangria prior to 1996 and determined that Viviano had been assigned those rights.

Although this evidence would be sufficient to permit the conclusion that Shaw-Ross had authorized Viviano to sell Real Sangria sometime before September 1996, neither Nichols nor Tignanelli could state that fact from actual knowledge. Nichols admitted that he was not involved in L & L Wine's decision to relinquish its rights and that his belief that Viviano took over the rights was the result of his general knowledge. Similarly, Tignanelli did not aver that he was involved with Shaw-Ross' decision to appoint Viviano to distribute Real Sangria; rather, he stated that he came to his conclusion after conducting "research." But his understanding of the evidence discovered during his research is not entitled to any particular deference and the actual documentation submitted with his affidavit does not show that Viviano sold Real Sangria prior to 1998. In addition, there was no evidence whatsoever that Viviano actually sold Real Sangria to any retailer in the counties or parts of the counties at issue prior to September 24, 1996. See MCL 436.1205(3) (stating that the predecessor in interest must have been "selling that brand to a retailer in that county or part of that county prior to September 24, 1996."). Given the lack of first-hand evidence concerning whether Viviano had been authorized to distribute Real Sangria and the lack of evidence tending to show that Viviano actually sold Real Sangria to retailers in the specific counties at issue, we cannot conclude that the Commission's findings were unfounded. While one might reasonably infer from the evidence that Shaw-Ross had authorized Viviano to distribute Real Sangria prior to September 1996 and even infer that Viviano must have sold *some* Real Sangria to retailers *somewhere*, the fact that one could disagree with the findings is not a sufficient basis to reverse the Commission's findings and order. "When there is sufficient evidence to support an administrative decision, a reviewing court may not substitute its discretion for that of the administrative tribunal even if the court might have reached a different

result.” *Black v Dep’t of Social Servs*, 212 Mich App 203, 206; 537 NW2d 456 (1995). The circuit court did not err when it deferred to the Commission’s findings and affirmed the Commission’s decision and order.

C. R. LEONE’S TERRITORIES

The circuit court did not, for similar reasons, err when it refused to reverse the Commission’s decision and order to the extent that it found that R. Leone only had the right to distribute Real Sangria in 12 counties. Here, the Commission found that Shaw-Ross had granted R. Leone the right to distribute Real Sangria in 12 counties. R. Leone, however, argues that Shaw-Ross had given it distribution rights in more than 15 additional counties and even encouraged it to sell Real Sangria throughout the state. R. Leone supported this position with evidence of sales receipts that reflect that it sold the brand in numerous other counties. But these receipts do not establish that it had the *right* to distribute in these additional counties; this evidence only established that it did distribute there. Likewise, although there was evidence tending to show that Shaw-Ross actually did encourage R. Leone to distribute throughout the state, Tignanelli directly contradicted that evidence in his affidavit. Accordingly, whether R. Leone had distribution rights in more than the 12 counties found by the Commission was a matter of credibility best left to the Commission. *Dep’t of Community Health v Risch*, 274 Mich App 365, 373; 733 NW2d 365 (2007) (stating that “if the administrative findings of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence.”). Here, the Commission resolved that dispute by relying on the actual agreements and the documentation tending to show that R. Leone had been orally granted authority to distribute in several counties not covered by its written agreement. See *Black*, 212 Mich App at 206. Consequently, the circuit court correctly determined that the Commission’s findings were properly founded on competent, material, and substantial evidence.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro