The Bullet Point: Ohio Commercial Law Bulletin

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When can someone be an apparent agent for a company?

Statutory Construction and Summary Judgment

Beverage Holdings, LLC v. 5701 Lombardo, LLC, **Slip. Op. 2019-Ohio-4716.**

In this appeal, the Ohio Supreme Court reversed the appellate court's decision, finding that a provision in a contract for the sale of a franchise business was enforceable and not "manifestly absurd."

The Bullet Point: In interpreting a contract, courts are to give effect to the intent of the parties, and presume that the intent of the parties is reflected in the plain language of the contract. To that end, if the language of a contract is plain and unambiguous, courts enforce the terms as written, and will not turn to evidence outside the four corners of the contract to alter its meaning. When considering the language of a particular contractual provision, "[c]ommon words will be given their ordinary meaning unless manifest absurdity results or unless some other meaning is clear from the face or overall contents of the agreement." The "manifest absurdity" exception to this is very narrow. First, "the word 'absurd' conveys a degree of extremeness. Contract language is absurd not simply when it is unreasonable, but rather when it is 'ridiculously unreasonable, unsound, or incongruous.' Second, the word 'manifest' requires that any absurdity in contract language be obvious."

Authority of Apparent Agent

Briskey v. KAF Properties, LLC, **5th Dist. Delaware No. 19 CAE 07 0042, 2019-Ohio-4563.**

Gregory Filbrun and his company, AHV Construction, LLC defaulted on a loan made to them by Appellant, Richard A. Briskey. Mr. Filbrun filed for bankruptcy protection, so Appellant attempted to collect the debt from Appellee KAF Properties LLC, relying upon Gregory Filbrun's signature on a cognovit note, purportedly signing on behalf of Appellee. Kathleen Filbrun, wife of Greg Filbrun and owner of KAF Properties objected, claiming that Greg Filbrun had no authority to sign on behalf of her company. Appellant argued that Mr. Filbrun was authorized as an agent to bind KAF,

but the trial court disagreed and found that the Appellee was entitled to summary judgment. On appeal, the Fifth Appellate District upheld a trial court's decision, finding that a debtor was not an agent of a company and could not bind that company to a cognovit note.

The Bullet Point: The creation of an agency relationship may be express or implied. "The relationship of principal and agent, and the resultant liability of the principal for the acts of the agent, may be created by the express grant of authority by the principal. Absent express agency, the relation may be one of implied or apparent agency." Apparent agency exists "where one who is assuming to act as an agent for a party in the making of a contract but in fact has no actual authority to do so, such party will nonetheless be bound by the contract 'if such party has by his words or conduct, reasonably interpreted, caused the other party to the contract to believe that the one assuming to act as agent had the necessary authority to make the contract.'" For a principal to be bound by the acts under a theory of apparent agency, two things must be shown: (1) principal held the agent out to the public as possessing sufficient authority, and (2) the person dealing with the agent knew about this and, acting in good faith, had reason to believe and did believe that the agent had authority.

Ohio Consumer Sales Practices Act

Hatfield v. Preston Chevrolet-Cadillac, Inc., **11th Dist. Geauga No. 2018-G-0168, 2019-Ohio-4730.**

In this appeal, the Eleventh Appellate District affirmed the trial court's decision to dismiss a claim brought under Ohio law and the Consumer Sales Practices Act (CSPA) related to a fee charged in connection with a vehicle lease.

The Bullet Point: The CSPA prohibits unfair or deceptive acts and unconscionable acts or practices by suppliers in consumer transactions whether they occur before, during, or after the transaction. The Ohio legislature has given the Attorney General authority to adopt, amend, or repeal substantive rules that define acts or practices that violate the CSPA. One such rule is Ohio Adm. Code 109:4-3-16(B) which makes it a violation of the CSPA to, among other things, advertise the price of a vehicle unless the price includes all costs to the consumer (except for tax, title and registration fees.) A plain reading of Ohio Adm.Code 109:4-3-16(B)(21) reveals that it does not preclude a dealer or seller of an automobile from charging fees other than those specified. To the contrary, a plain reading confirms that this provision is designed to ensure that the advertised price includes all costs, except those specified.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C.*, Slip Opinion No. 2019-Ohio-4716, 2019-Ohio-4716.]

SLIP OPINION NO. 2019-OHIO-4716

BEVERAGE HOLDINGS, L.L.C., APPELLANT, *v.* 5701 LOMBARDO, L.L.C., D.B.A. VALENTINO-VAV,[1] L.L.C., APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Beverage Holdings, L.L.C. v. 5701 Lombardo, L.L.C.,* Slip Opinion No. 2019-Ohio-4716.]

Contract dispute—Plain language of contract provision does not lead to manifest absurdity—Court of appeals' judgment reversed.

(No. 2018-0616—Submitted May 21, 2019—Decided November 19, 2019.)

APPEAL from the Court of Appeals for Cuyahoga County,
No. 104559, 2017-Ohio-7090.

O'CONNOR, C.J.

{¶ 1} This case involves the sale of a franchise business and the real property on which it sits. The parties structured the agreement for the sale of the

1. In its complaint, appellant identified appellee's separate entity as Valentino-Val, L.L.C. The secretary of state's records as well as evidence in this case show that the correct name is Valentino-VAV, L.L.C. The caption in this case has been changed accordingly.

real property to include several adjustments that would be made to the overall purchase price based on circumstances present at the time of the closing. When the closing was initiated, however, the parties disputed how one of the credit provisions should be interpreted.

{¶ 2} The trial court granted summary judgment in favor of the buyer, plaintiff-appellant, Beverage Holdings, L.L.C., finding that the plain language of the disputed credit provision supported its position. The Eighth District Court of Appeals initially affirmed, 2017-Ohio-2983, but it later granted reconsideration and reversed on the ground that the plain language of the provision was manifestly absurd, 2017-Ohio-7090. It therefore remanded the case to the trial court for consideration of evidence concerning the provision's meaning.

{¶ 3} For the reasons discussed below, we hold that the Eighth District erred. We therefore reverse.

I. Relevant Background

{¶ 4} Defendant-appellee, 5701 Lombardo, L.L.C., d.b.a. Valentino-VAV, L.L.C., ("Lombardo"), owns real property in Independence, Ohio, on which it operated a preschool and daycare-center franchise. As of 2011, Lombardo owed $1,726,000 on several loans on the property, and it sought to sell both the property and the franchise to Beverage Holdings. The parties conducted the real-property and franchise sales through separate transactions.[2]

{¶ 5} The sale of the franchise business to Beverage Holdings took place in one transaction, and Beverage Holdings began operating the business immediately. That transaction is not directly at issue in this appeal. The transaction for the sale of the real property was more complicated, however, because of a penalty that would be imposed by one of Lombardo's lenders if its loan was paid off early. To

2. The parties used related entities to complete the transactions, at least in part, but for the purposes of this opinion, we refer to the entities used by Lombardo simply as Lombardo and the entities used by Beverage Holdings as Beverage Holdings.

effectuate the sale of the real property, the parties entered into agreements on April 29, 2011. Relevant here, one agreement was for the sale of the real property (the "Real Estate Purchase Agreement"). The parties set the purchase price at $1,726,000, but they agreed that the closing would not take place until a date in the future, to be selected after Beverage Holdings had delivered to Lombardo a notice of its intent to close the transaction. The second was a lease of the property designed to be in effect before the closing occurred (the "Lease Agreement"). Beverage Holdings agreed to pay $12,500 per month in rent.

{¶ 6} In the Real Estate Purchase Agreement, the parties also agreed that several credits would be applied to reduce the purchase price at the time of closing. One credit would reduce the purchase price by the amount the principal on Lombardo's loans was reduced between the date of the agreement and the date of the closing. ("Reduction in Principal Credit"). Another credit would reduce the purchase price by the amount of "[r]ents received by [Lombardo] from [Beverage Holdings], prorated to date of closing" ("Rents Credit"). Beverage Holdings also agreed that, if it elected to close the transaction before February 15, 2018, and thereby caused Lombardo to be required to pay the early-termination penalty to one of its lenders, Beverage Holdings would pay the penalty for Lombardo.

{¶ 7} On March 12, 2015, after leasing the property for approximately four years, Beverage Holdings notified Lombardo that it intended to close the real-estate transaction. In the notice, Beverage Holdings asserted that it was entitled to a Rents Credit of $462,500. Combining that credit with others provided in the agreement, including the Reduction in Principal Credit, Beverage Holdings asserted the total purchase price was reduced to $1,202,110.09. Lombardo rejected the notice, asserting that Beverage Holdings's calculation of the Rents Credit was not in line with what was originally contemplated by the parties.

{¶ 8} Beverage Holdings sued Lombardo, seeking, among other things, a declaratory judgment that its interpretation of the Rents Credit was correct. The

trial court granted summary judgment to Beverage Holdings as to its request for declaratory judgment interpreting the Rents Credit clause, finding that the plain meaning of the Rents Credit clause was unambiguous and in line with the position of Beverage Holdings. The Eighth District initially affirmed on appeal, but it subsequently granted reconsideration and reversed.

{¶ 9} In its decision on reconsideration, the Eighth District agreed with the trial court that "standing alone, the plain language of the [Rents Credit] clause stating that the purchase price of the property would be decreased by '[r]ents received by [Lombardo] from [Beverage Holdings], prorated to date of closing' appears to apply to all rents received from [Beverage Holdings], not just the rent paid during the closing period." 2017-Ohio-7090 at ¶ 7. But it declined to apply the plain language in Beverage Holdings's favor because it believed the plain language led to a "manifestly absurd result." *Id.*, citing *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, 789 N.E.2d 1094, ¶ 34. Specifically, the court of appeals believed that because the parties recognized from the outset that "Lombardo's financing at the time made it impractical to currently close the transaction and, in fact, that the sale might not close for 'several years,' " it would be absurd to conclude that Lombardo intended to provide Beverage Holdings with credits against the purchase price for *both* (1) all rents paid between the start of the agreement and the closing (pursuant to Beverage Holdings's interpretation of the Rents Credit clause) and (2) the amount by which the principal on the loans was reduced during that time (pursuant to the Reduction in Principal Credit clause). It therefore remanded the case to the trial court for "fact-finding to give the contract the most sensible and reasonable interpretation." *Id.* at ¶ 7.

{¶ 10} Beverage Holdings appealed to this court, and we granted discretionary review.

II. Analysis

A. The plain language of the Rents Credit

{¶ 11} We review de novo the Eighth District's decision regarding the propriety of the trial court's grant of summary judgment in favor of Beverage Holdings. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 24. Summary judgment should be granted only when "there is no genuine issue as to any material fact and * * * the moving party is entitled to judgment as a matter of law." Civ.R. 56(C).

{¶ 12} In its first proposition of law, Beverage Holdings argues that the plain language of the Rents Credit provides that it is entitled to a credit for all rent payments made during the life of the Lease Agreement and that the Eighth District erred by concluding that the plain language resulted in a manifest absurdity. Lombardo counters that Beverage Holdings's interpretation of the Rents Credit is, in fact, manifestly absurd and, therefore, the Eighth District correctly remanded the case for consideration of extrinsic evidence regarding the parties' intent. We agree with Beverage Holdings.

{¶ 13} Our legal standards for the interpretation of contracts are well established. We seek primarily to give effect to the intent of the parties, and we presume that the intent of the parties is reflected in the plain language of the contract. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11. As a result, if the language of a contract is plain and unambiguous, we enforce the terms as written, and we may not turn to evidence outside the four corners of the contract to alter its meaning. *See id.*; *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989) ("Intentions not expressed in the writing are deemed to have no existence and may not be shown by parol evidence"). When considering the language of a particular contractual provision, "[c]ommon words * * * will be given their ordinary meaning unless manifest absurdity results or unless some other meaning is clear from the

face or overall contents of the agreement." *Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, 789 N.E.2d 1094, at ¶ 34, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146 (1978), paragraph two of the syllabus.

{¶ 14} As noted above, the Rents Credit clause provides that the purchase price shall be reduced by the amount of "[r]ents received by [Lombardo] from [Beverage Holdings], prorated to date of closing." Beverage Holdings argues that the clause creates a credit for all rent paid between the beginning of the lease and the closing of the sale of the real property. For example, if the agreements were signed on January 1 of a given year and the closing occurred on May 8 of that year, a Rents Credit would be awarded for rent paid for the entire period between January 1 and May 8.

{¶ 15} Lombardo, by contrast, argues that because the full amount of each month's rent was paid by Beverage Holdings in advance, at a time when the exact date of the closing might not have been known, the Rents Credit is properly understood as providing a credit for rent covering the partial-month period *after* the closing. Using the same example, a Rents Credit would be awarded for rent paid for the period between May 9 and May 31.

{¶ 16} The language of the Rents Credit is plain and unambiguous, and it supports only the interpretation asserted by Beverage Holdings. The language is broad and clear, providing that a credit would be provided for all "rents" paid and that the credit would be prorated to the date of closing. Notably, the parties made clear in the Lease Agreement that Beverage Holdings's obligation to pay rent would extend only to the date of the closing, at which point, of course, it would become the owner of the property, and the proration language in the Rents Credit makes clear that the credit is limited to the same date. The interpretation proffered by Lombardo would be a plausible reading of the clause only if it contained different language stating that the credit applied to the period *after the date of the closing*. Because there is no such language in the Rents Credit clause, we reject the

interpretation advanced by Lombardo. *See Alexander*, 53 Ohio St.2d at 246, 374 N.E.2d 146 ("where the terms in an existing contract are clear and unambiguous, this court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties").

B. The dissenting opinions

{¶ 17} The first dissenting opinion asserts that the plain language of the Rents Credit has only one reasonable interpretation, namely that it provides Beverage Holdings with a credit only for the portion of the last month's rent attributable to the period *after* the closing. The second dissenting opinion asserts that this post-closing-only interpretation of the Rents Credit is at least plausible, and because it also believes our interpretation is plausible, it would find that the Rents Credit is ambiguous and remand the case to the trial court for consideration of extrinsic evidence. We disagree with both views. Although both dissenting opinions raise questions about our interpretation, that is not enough to support their ultimate conclusions. Both dissenting opinions lack a convincing affirmative explanation for why the alternative, post-closing-only interpretation is plausible. Without that, the approaches of both opinions lack merit.

{¶ 18} The most notable claims of the dissenting opinions are their assertions that the proration language is rendered superfluous under our interpretation and that the proration language has no meaning unless the Rents Credit applies to only the post-closing portion of the final month of the lease. We do not agree with either point. As we stated above, the proration language is not superfluous under our view because it can reasonably be understood as ensuring that the end date for the Rents Credit is clearly defined and matches the end date for Beverage Holdings's obligation to pay rent. The dissenting opinions' post-closing-only interpretation also fails to provide relevant meaning to the proration language because, under their interpretation, the Rents Credit *as a whole* would be superfluous. If the parties wanted the last month's rent to be "distributed

proportionately between the buyer and the seller, as determined by the closing date," dissenting opinion of Kennedy, J., at ¶ 40, there was no need to create a special "Rents Credit" to achieve that result. Even without such a credit, Beverage Holdings would have had a legal right to receive back the portion of the last month's rent covering the period *after* the closing, because its obligation to pay rent extended only to the date of the closing and no further. The dissents' avoidance-of-surplusage argument is therefore not convincing.

{¶ 19} Ultimately, it is better to put theories of surplusage to the side and to simply look to the text of the contract. The post-closing-only interpretation proffered by the dissenting opinions would be plausible only if additional language were included in the credit, language clearly indicating that the credit applies only to the post-closing period of the last month of the lease. Because the Rents Credit does not contain any such language, the only reasonable interpretation is the one we find here: that the Rents Credit applies to all rents received during the life of the lease.

C. Manifest absurdity

{¶ 20} We also reject the conclusion of the Eighth District that the plain language of the Rents Credit leads to a manifest absurdity. The Eighth District relied on our statement in *Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, 789 N.E.2d 1094, at ¶ 34, that common words in a contract should "be given their ordinary meaning unless manifest absurdity results * * *." Although we have repeated this statement on numerous occasions, *e.g.*, *Aultman*, 46 Ohio St.3d at 54, 544 N.E.2d 920; *Alexander*, at paragraph two of the syllabus, this exception to the plain-meaning rule is narrow in scope and is necessarily limited by the meaning of the term "manifest absurdity" itself. First, the word "absurd" conveys a degree of extremeness. Contract language is absurd not simply when it is unreasonable but rather when it is "*ridiculously* unreasonable, unsound, or incongruous" (emphasis added), *Webster's Third New International Dictionary* 8 (2002) (defining

"absurd"). Second, the word "manifest" requires that any absurdity in contract language be *obvious*. *See Webster's Third New International Dictionary* at 1375 (defining "manifest" to mean "easily understood or recognized at once by the mind * * * : OBVIOUS"); *see also Black's Law Dictionary* 1107 (10th Ed.2014) (defining "manifest injustice" as "[a] *direct, obvious, and observable* error in a trial court" (emphasis added)); *id.* at 660 (defining "manifest error" as "[a]n error that is *plain and indisputable*" (emphasis added)). The Eighth District failed to acknowledge the narrow scope of the manifest-absurdity exception to the plain-meaning rule.

{¶ 21} The Eighth District also erred in its application of the exception. It determined that the plain language of the Rents Credit resulted in a manifest absurdity based on two factors. First, it believed that if the Rents Credit is interpreted to include all rent payments, it would be absurd for the parties to reduce the purchase price by *both* the Reduction in Principal Credit and the Rents Credit "during what could be a lengthy lease term." 2017-Ohio-7090 at ¶ 9. As an example, the Eighth District observed that, although the initial term of the lease was 10½ years, the Lease Agreement permitted two five-year extensions, meaning the lease could potentially continue for up to 20½ years. If the lease remained in effect for that full period, then under Beverage Holdings's interpretation, the court stated that it "would not only acquire the property" at the end of the lease but because the Rents Credit would have grown enormously over the lease period, Beverage Holdings "would also be owed money at closing—all the while enjoying the profits from operating the business." *Id.* Second, the Eighth District stated that the Real Estate Purchase Agreement provides for a closing period of between 120 and 180 days, which it believed "indicates that the [proration provision in the Rents Credit] was meant to apply only to rent paid after Beverage Holdings gave notice of intent to close." *Id.* at ¶ 10.

{¶ 22} When considered with the standard for "manifest absurdity" described above in mind, neither of these rationales supports a finding that the contract language at issue here is absurd, much less *obviously* absurd.

{¶ 23} Contrary to the Eighth District's first concern, we see no manifest absurdity in the Rents Credit including all rent payments made during a potentially "lengthy lease term." Beverage Holdings argues that the rent payments are properly understood as prepayments of the purchase price. The growth in the Rents Credit over time therefore would not reduce the overall amount of money received by Lombardo for the sale of the property, because the reduction in the purchase price due to the Rents Credit would be matched dollar-for-dollar by the rent payments received by Lombardo. As noted above, Lombardo also received the benefit of completing the sale in the near future with Beverage Holdings agreeing to pay the early-termination penalty to one of Lombardo's lenders—a payment Lombardo otherwise would have been required to make in order to complete the transaction before February 15, 2018, and that offset the credits from the perspective of Beverage Holdings. Finally, if the lease were to last long enough for the credits to add up to the initial purchase price of $1,726,000, Beverage Holdings could easily avoid the overpayment situation envisioned by the Eighth District by providing notice of its intent to close the transaction before that occurs. We therefore reject the conclusion of the Eighth District that the inclusion of the Rents Credit and the Reduction in Principal Credit in a potentially lengthy lease supports a finding of a manifest absurdity. *See Alexander*, 53 Ohio St.2d at 246, 374 N.E.2d 146 (finding no absurdity where extreme result theoretically permitted by plain language would reasonably be expected not to occur).

{¶ 24} We similarly see no manifest absurdity in the second concern raised by the Eighth District. It is true that the Real Estate Purchase Agreement allowed the closing to occur several months after Beverage Holdings provided notice of its intent to close the transaction, but nothing in the language of the provision

addressing the time for closing alters the plain language of the Rents Credit or otherwise provides a basis for interpreting the Rents Credit in the manner sought by Lombardo.

{¶ 25} Putting aside the rationales relied on by the Eighth District, we see no other basis on which to conclude that the plain language of the Rents Credit results in a manifest absurdity. The parties are sophisticated entities and were represented by counsel. Together they agreed to a unique transaction in which the purchase price would be reduced over time due to the application of various accumulating credits. To the extent Lombardo may be dissatisfied with the purchase price that resulted from the plain language agreed to by the parties, "[i]t is not the responsibility or function of this court to rewrite the parties' contract in order to provide for a more equitable result." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 362, 678 N.E.2d 519 (1997); *see also Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v. Circle, Inc.*, 915 F.2d 986, 991 (5th Cir.1990) ("Although a business decision may be unwise, imprudent, risky, or speculative, it is not necessarily 'absurd.' We decline to allow contracting parties to escape the unfortunate and unexpected, though not objectively 'absurd,' consequences of a contract by subsequently characterizing their consequences as 'absurd' ").

III. Conclusion

{¶ 26} For these reasons, we reverse the judgment of the Eighth District Court of Appeals and reinstate the judgment of the trial court.

Judgment reversed.

FRENCH, FISCHER, DONNELLY, and SCHAFER, JJ., concur.

KENNEDY, J., dissents, with an opinion.

DEWINE, J., dissents, with an opinion.

JULIE A. SCHAFER, J., of the Ninth District Court of Appeals, sitting for STEWART, J.

KENNEDY, J., dissenting.

{¶ 27} I agree with the majority that "[i]t is not the responsibility or function of this court to rewrite the parties' contract in order to provide for a more equitable result." *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 362, 678 N.E.2d 519 (1997). It *is* our responsibility, however, "to discover and effectuate the intent of the parties" when we construe a contract. *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 313, 667 N.E.2d 949 (1996), citing *Skivolocki v. E. Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. Here, the majority addresses whether a certain reading of the contract is manifestly absurd. But the problem is that the majority, like the appellate court, misinterprets the contract. The contract doesn't say what the majority says it says, and therefore, the majority's discussion regarding whether the contract is manifestly absurd under its reading is irrelevant. Section 3(a)(ii), the "Rents Credit" clause of the Real Estate Purchase Agreement ("Purchase Agreement"), does not credit the appellant, Beverage Holdings, L.L.C., with all the rents that have been paid since the signing of the Purchase Agreement; instead, pursuant to the Rents Credit clause, the prepaid rent for the last month of the lease is distributed proportionately to the owners—the buyer and the seller—based on the dates of ownership determined by the closing date. That is, the owner of the property before the closing receives the proportionate share of the rent that covers the dates before the closing and the owner after the closing takes the part of the rent that covers the remainder of the month after the closing.

{¶ 28} The first proposition of law set forth by Beverage Holdings is "Courts cannot disregard unambiguous contract terms by deciding that they could lead to an absurd result under hypothetical circumstances." I would hold that that proposition of law is true, but contrary to the argument of Beverage Holdings, I would hold that the unambiguous contract terms require judgment in favor of the

appellee, 5701 Lombardo, L.L.C. Because this case is resolved by addressing the first proposition of law, I would decline to address the four remaining propositions of law. I would affirm the court of appeals' reversal of the trial court on other grounds and would remand the case to the trial court to enter judgment for the appellee. Accordingly, I dissent.

{¶ 29} The contract at issue in this case is the Purchase Agreement between Beverage Holdings and Valentino-VAV, L.L.C., specifically Section 3 of the agreement, titled "Adjustments to Purchase Price." The majority opinion does not set forth the language of the entire section. Here is how it reads in the contract:

> 3. ***Adjustments to Purchase Price.*** *At closing*, the purchase price shall be adjusted by providing Buyer a credit for the following:
>
> a) The Purchase Price shall be decreased by:
>
> i) All general taxes and assessments which are a lien on the property at closing and which are not paid at closing.
>
> ii) *Rents received by Seller from the tenant of the Premises, prorated to date of closing*.
>
> iii) Any security deposit held by Seller from the tenant occupying the property.
>
> iv) The Reduction in Principal Credit.
>
> v) Any indebtedness of Seller assumed by Buyer
>
> b) The purchase price shall be increased and Buyers shall be responsible to pay an additional amount equal to the Credit-Swap Differential.

(Emphasis added.)

{¶ 30} The specific term in dispute is Section 3(a)(ii), which grants the purchaser "Rents received by Seller from the tenant of the Premises, prorated to date of closing." The majority says, "The language is broad and clear, providing that a credit would be provided for all 'rents' paid and that the credit would be prorated to the date of closing." Majority opinion at ¶ 16. But the language does not say or mean what the majority thinks it says or means.

{¶ 31} First, Section 3(a)(ii) does not use the word "all." That word is assuredly missing from the clause. Every rent payment is not part of the credit; the credit includes only those rents that the seller receives from the tenant that are prorated to the date of closing. The significance of the word "prorated" is discussed below.

{¶ 32} Second, the fact that "rents" is plural does not necessarily mean that the credit is for multiple months. We need to look to the Lease Agreement executed the same day as the Purchase Agreement; "[a]s a general rule of construction, a court may construe multiple documents together if they concern the same transaction." *Ctr. Ridge Ganley, Inc. v. Stinn*, 31 Ohio St.3d 310, 314, 511 N.E.2d 106 (1987). The Lease Agreement addresses different *types* of rent. Leases can include clauses that call for "additional rent" to be paid, a charge for instance, for the reasonable cost of operating and maintaining common areas. *See, e.g.*, *Ohio Forms & Transactions*, Section 18:19 (2019). The lease in this case contains the statement, in Section 4, "Any other sums payable to Lessor under this Lease shall be deemed to be additional rent." And the lease specifically addresses at least one "additional rent":

> For each Lease Year during the Term, Lessee shall pay Lessor, *as additional rent on a monthly basis*, one-twelfth (1/12th) Real Property Taxes assessed against the Premises annually as such taxes become due and payable during the Lease Term, prorated for *any*

> partial assessment period occurring immediately before the Rent Commencement Date and after the Expiration Date.

(Emphasis added.) Therefore, the presence of more than one type of rent in the Lease Agreement accounts for the use of the word "rents" in the Purchase Agreement. Moreover, it makes sense under the Purchase Agreement that the prepaid portion of the real-estate taxes paid on the first of each month would be prorated such that the purchaser gains the benefit of that payment when it becomes the owner of the property. That is, this "additional rent" would be prorated like the monthly rent for the premises.

{¶ 33} Third, the majority's interpretation of Section 3(a)(ii) renders the word "prorated" meaningless. "When interpreting a contract, we will presume that words are used for a specific purpose and will avoid interpretations that render portions meaningless or unnecessary." *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, ¶ 22. To prorate is to "divide, assess, or distribute proportionately." *Black's Law Dictionary* 1340 (9th Ed.2009). There was only one thing under the Rents Credit clause that would require proration, that would require a proportionate division: the prepaid rents for the one month during which the buyer and the seller each owned the property for a separate part of the month. The Rents Credit clause controls the seller as well as the buyer. Each gets a proportionate share. Under the majority's interpretation of the contract, there is nothing to be divided proportionately. If the buyer is receiving as a credit all the rents received by the seller, then proration is unnecessary—the buyer simply receives credit for all the rents that were paid. A proration is meant to ensure that the entity with the burden of ownership gets the benefit of the rent. For example, if the sale of a rental property closes on October 15, the seller gets the rents paid from October 1 to October 15, and the buyer gets the rent from October 16 through October 31. The

use of "prorated" in Section 3(a)(ii) ensures that the last month's rent is distributed according to the periods of ownership.

{¶ 34} Lastly, the majority gives very little attention to the Reduction in Principal Credit clause in the contract. However, we must construe the contract as a whole, "and the intent of each part will be gathered from a consideration of the whole." *Foster Wheeler Enviresponse*, 78 Ohio St.3d at 361, 678 N.E.2d 519. In Section 3(a)(iv) of the Purchase Agreement, the buyer receives a credit for "The Reduction in Principal Credit." That credit is separately defined in Section 4 of the agreement:

> 4. ***Reduction in Principal Credit.*** Due to the current financing Seller has in place for the property; it is not practical to currently close this transaction. Because this transaction may not close for several years, Seller agrees to reduce the purchase price to Buyers by the amount of principal payments made by Seller to Seller's lender for the mortgage notes currently on the property. Therefore, at closing, Buyers will receive a credit equal to the reduction in principal for the mortgage notes from the date of the execution of this agreement until the closing date (The Reduction in Principal Credit).

{¶ 35} The Reduction in Principal Credit already provides a credit to the buyer for a portion of the rents paid from the execution of the Purchase Agreement through the closing; this is where the seller recognizes through the granting of a credit that an affiliate of the buyer has paid down the principal of the mortgage notes on the property through long-term rental payments. Therefore, credits to the buyer for *all* rents paid under the Lease Agreement would be redundant. The buyer would be getting a credit for the amount the principal was reduced through the

payment of rents under Section 3(a)(iv) as well as a complete credit for all rents paid under Section 3(a)(ii). Therefore, the buyer would be credited twice for the amount paid toward reducing the principal—once through the Reduction in Principal Credit and then again through the Rents Credit as the majority reads it. If the buyer already got credit for all rents paid under Section 3(a)(ii), why would it receive another credit for a portion of rents paid under Section 3(a)(iv)?

{¶ 36} The majority's interpretation of the contract is unreasonable. To get where it ends up, the majority adds the word "all," ignores the meaning of the word "prorated," and fails to recognize any significance of the Reduction in Principal Credit clause. We need only follow our rules of contract interpretation to properly resolve this case:

> When confronted with an issue of contract interpretation, our role is to give effect to the intent of the parties. We will examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract. In addition, we will look to the plain and ordinary meaning of the language used in the contract unless another meaning is clearly apparent from the contents of the agreement. When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. "As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Westfield Ins. Co. v. Galatis,* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11.

Sunoco, Inc. (R & M) v. Toledo Edison Co., 129 Ohio St.3d 397, 2011-Ohio-2720, 953 N.E.2d 285, ¶ 37.

{¶ 37} There is only one reasonable interpretation of the contract in this case. Again, the crux of the case is Section 3(a)(ii) of the Purchase Agreement, through which the buyer is credited with "Rents received by Seller from the tenant of the Premises, prorated to date of closing." When it sets forth this phrase in its opinion, the majority substitutes "Lombardo" for "Seller," which is unimportant, but also substitutes "Beverage Holdings" for "tenant." The tenant, however, is not Beverage Holdings; it is PRB Development, L.L.C., the affiliate of Beverage Holdings that was running the Goddard School at the property. And the use of the word "tenant" is important to consider. The reasonable interpretation of Section 3(a)(ii) is that Lombardo was selling a building that had a tenant and the parties had to address what would happen to payments from the tenant occupying the building. The clause at issue speaks of the "[r]ents received by Seller from the *tenant* of the Premises." (Emphasis added.) An Ohio treatise discusses the prorating of prepaid rent in a sale subject to tenancies:

> At the time of conveyance and transfer of possession to purchaser, all rentals from property prepaid beyond the transfer date will be prorated between seller and purchaser as of that date. All rentals after that date falling due will be the sole property of purchaser.

Ohio Forms Legal & Business, Section 1:186 (2019). Therefore, the clause at issue recites a common clause included in sales of property that include tenancies. Since rent is prepaid under the lease—$12,500 rent is paid on the first of each month—it follows that the Purchase Agreement would account for the portion of the monthly payment that applies to the days remaining in the month after the closing of the sale. That prorated portion of the rent would go to the purchaser, who is the new owner of the property.

{¶ 38} Another clause in Section 3 also addresses the fact that the transfer involves property that includes a tenant under a lease. Section 3(a)(iii) credits to the buyer "[a]ny security deposit held by Seller from the tenant occupying the property." As the new landlord, the buyer takes the whole of the security deposit and theoretically returns that amount less deductions to the tenant at the conclusion of the lease.

{¶ 39} The only reasonable interpretation of the Purchase Agreement is that Section 3(a)(ii) and Section 3(a)(iii) were designed to address the issues that any transfer of property that involves a tenant under a lease would address—how to distribute the last month of prepaid rent when the closing doesn't fall on the last day of the month and what to do with the security deposit. Section(3)(a)(iv) is the term unique to this agreement and how the buyer in this case gets credit for the benefit the seller received from the long-term lease payments. That clause gets its own explanatory paragraph in Section 4 of the Purchase Agreement.

{¶ 40} I agree with the appellant's first proposition of law, that "[c]ourts cannot disregard unambiguous contract terms by deciding that they could lead to an absurd result under hypothetical circumstances." But I would hold that the unambiguous language of the contract should be interpreted differently from the interpretation supported by the appellant. Section 3(a)(ii) of the Purchase Agreement says that the last month's rent paid by the tenant should be distributed proportionately between the buyer and the seller, as determined by the closing date. Therefore, I would remand the cause to the trial court for it to enter judgment in favor of the appellee.

DEWINE, J., dissenting.

{¶ 41} The dispute here concerns a contract provision that reduces the purchase price of the property by the amount of "[r]ents received by Seller [i.e., appellee, 5701 Lombardo, L.L.C.,] from the tenant [i.e., an affiliate of appellant,

Beverage Holdings, L.L.C.] of the Premises, prorated to date of closing." Both the majority and the other dissent insist that this clause is unambiguous. The majority says the contract unambiguously favors Beverage Holdings's interpretation, entitling the company to a credit for all rents paid over the entire term of the lease. The other dissent says the contract unambiguously favors Lombardo's interpretation, providing Beverage Holdings a credit only for a portion of the last month's rent payment. Neither story is wholly satisfying. While both opinions identify contract terms that seemingly point in their direction, neither is able to account for terms that seem to go the other way. In my view, the contract reasonably admits of competing interpretations, each of which is equally plausible on the face of the contract. I would thus hold that the disputed provision is ambiguous and remand the matter to the trial court for it to consider extrinsic evidence.

{¶ 42} As a rule, "written contracts are usually enforced in accordance with the ordinary meaning of the language used in them and without recourse to evidence, beyond the contract itself, as to what the parties meant." *Beanstalk Group, Inc. v. AM Gen. Corp.*, 283 F.3d 856, 859 (7th Cir.2002). This "strong presumption" that we not look beyond the four corners of the contract "simplifies the litigation of contract disputes and, more important, protects contracting parties against being blindsided by evidence intended to contradict the deal that they thought they had graven in stone by using clear language." *Id.*

{¶ 43} Accordingly, it is the duty of the court to exhaust principles of contract interpretation before resorting to extrinsic evidence of the parties' intent. *See* 11 Lord, *Williston on Contracts*, Section 30:4 (4th Ed.2019); *CNH Indus. N.V. v. Reese*, __ U.S. __, 138 S. Ct. 761, 765, 200 L.Ed.2d 1 (2018). Using basic principles of interpretation, it will usually be the case that one interpretation of a contract is the most plausible, because competing interpretations strain ordinary usage or are at odds with the apparent structure or purpose of the contract read as a

whole. In such a case, the mere fact that a motivated attorney can formulate a competing interpretation that is arguably consistent with the text of a contractual provision doesn't mean that the contract is ambiguous.

{¶ 44} But here, the case turns on a provision that is, to say the least, underspecified, given the effect that it has on the terms of the deal between the parties. And looking to the broader context of the contract doesn't help to resolve the issue in favor of one or the other of the dueling interpretations offered. As both the majority and other dissent illustrate, each of the interpretations is an imperfect fit for the contractual language—both require modifying the contractual language in order to yield a wholly unambiguous statement of the parties' intent.

{¶ 45} Start with the majority. The majority states that the "language is broad and clear, providing that a credit would be provided for all 'rents' paid and that the credit would be prorated to the date of closing." Majority opinion at ¶ 16. The majority thus reads the disputed provision to mean *all* rents received by the seller from the tenant *over the entire course of the lease agreement*, prorated to the date of closing. At first blush, this reading would appear to make sense. If A enters into a contract for the purchase of 100 widgets from B and the contract states that "the widgets shall be delivered on March 15," the referent of "the widgets" is usually fairly understood to be all 100 widgets that are the subject of the transaction and not some subset thereof. Reading "the widgets" to encompass all the widgets seems right based on the broader structure and context of the contract.

{¶ 46} The majority assumes that something similar is happening here: that one can fairly infer that "rents received by Seller from the tenant" means *all* rents received. And if the contract had merely provided a credit for rents received by the seller from the tenant, without additional qualifying language, that might be the most logical reading of the contract. But as the other dissent points out, the majority's account struggles to make sense of the proration clause—"the purchase price shall be decreased by * * * [r]ents received by Seller * * * *prorated to date*

of closing." (Emphasis added.) Since rent is prepaid, if the buyer gets a credit for all rents received by the seller, then there is nothing left to prorate—the proration clause has no effect. The majority offers no real rationale for the inclusion of the provision. It says only that "the proration language in the Rents Credit makes clear that the credit is limited to the [date of closing.]" Majority opinion at ¶ 16. But that makes little sense. If, as the majority contends, there is a credit for all rents received, then the rent credit isn't prorated at all.

{¶ 47} So, to adopt the majority's view, we must necessarily conclude that the proration clause is without practical effect, that it is simply surplusage. The necessity to do so certainly counts against the majority's interpretation. But I do not believe it completely forecloses our adoption of that approach. As the United States Supreme Court has noted, a "preference for avoiding surplusage constructions is not absolute." *Lamie v. United States Trustee*, 540 U.S. 526, 536, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). And in this case, the competing view of the contract offered by the other dissent also fails to satisfactorily account for the contractual provision at issue.

{¶ 48} The other dissent would read the disputed provision to mean *prepaid* rents received by the seller from the tenant *for the month of closing*, prorated to the date of closing. This reading has the advantage of allowing the proration clause to do something. But it is premised upon an inference about the narrow reach of the "rents received" clause that isn't apparent from the text alone. And the other dissent's supporting arguments fall short of yielding confidence that its interpretation is required.

{¶ 49} The other dissent struggles to get around the fact that the most natural reading of the plural "rents" is the one adopted by the majority—*all* rents received. It argues that the use of the plural "rents" could be explained by the fact that there are different types of rent—the monthly rent payment and the additional rent payment covering property taxes. But that just establishes that Lombardo's

interpretation is permissible, the use of the plural "rents" notwithstanding. It doesn't show that Lombardo's interpretation is correct.

{¶ 50} Second, the other dissent argues that giving Beverage Holdings a credit for both all rents paid under the lease agreement and for any reduction in principal would be "redundant." Dissenting opinion of Kennedy, J., at ¶ 35. But it is hard to see how "redundancy" is a relevant concept if we look simply at the purchase agreement. To see why, consider that there is no reason, in theory, why the parties could not have agreed to a credit equal to twice the reduction in principal or to twice the total rent payments. Given other conditions, that might even be a sensible deal for both parties—for instance, if both the monthly rent payment and the sale price were far above the actual market values. Based on the rent payments, the sale price of the property, the property's market value, and the date of closing, we could calculate an effective interest rate for the money transferred by the buyer to the seller prior to closing. That interest rate may be high, it may be low, or it may be quite reasonable. If under prevailing commercial norms that effective rate is too high or too low, that might count against a party's interpretation of the contract. But that is something that can be assessed only through extrinsic evidence. From the face of the contract, this court simply cannot tell. And it would be a mistake to rule out that sort of transaction by declaring the credits contemplated by the agreement to be redundant.

{¶ 51} So, we are left with two competing interpretations, either of which could be claimed to be permitted by the text but neither of which is an especially good fit for it. The ordinary rules of contract interpretation do not answer the question before us; instead, they point us in different directions. I would therefore find that the text of the contract is ambiguous. "[W]here a contract is ambiguous, parol evidence may be employed to resolve the ambiguity and ascertain the intention of the parties." *Illinois Controls, Inc. v. Langham*, 70 Ohio St.3d 512, 521, 639 N.E.2d 771 (1994). I would send the matter back to the trial court for it

to look to extrinsic evidence in order to determine the intent of the parties regarding the disputed rent-credit provision.

{¶ 52} So, like the court of appeals, and unlike the majority and the other dissent, I believe a remand for further proceedings is in order. But I believe that the court of appeals erred in finding that Beverage Holdings' interpretation was manifestly absurd. As the majority correctly points out, the court of appeals did not adequately respect the narrow scope of our manifest-absurdity doctrine. That doctrine should not be invoked to rescue a party from a harsh result of applying the clear meaning of a contract. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 362, 678 N.E.2d 519 (1997). Rather, it is appropriately applied only to interpretations that make the contract incoherent in some fundamental way—perhaps by requiring a party to do something that is functionally impossible or by yielding nonsense.

{¶ 53} Here, there is nothing manifestly absurd about Beverage Holdings's interpretation. As I have explained, whether Beverage Holdings's interpretation of the contract is even a bad deal for Lombardo depends on what additional assumptions one makes about the market rental and sale value of the property. Indeed, this case illustrates the dangers of a court deploying the manifest-absurdity doctrine to protect against what it perceives to be a bad deal for one of the parties. Courts that get involved in assessing whether a contract is a bad deal can often be mistaken in that assessment. And, anyway, sometimes contracting parties make bad deals. The better course in deploying the manifest-absurdity doctrine is to stick with the face of the contract and ask whether a plain reading would render it fundamentally incoherent, such that no reasonable person would have agreed to it. Beverage Holdings's interpretation of the contract is certainly not fundamentally incoherent in a way that would legitimate invoking the manifest-absurdity exception to the plain-meaning rule. Thus, while I would remand the matter to the

trial court for it to look to extrinsic evidence to determine the parties' intent, I would do so without any presumption that Beverage Holdings's interpretation is absurd.[3]

Polito Rodstrom Burke, L.L.P., Joseph T. Burke, and James D. Romer, for appellant.

DiCaudo, Pitchford & Yoder, L.L.C., J. Reid Yoder, and Benjamin R. Sorber, for appellee.

Nee Law Firm, L.L.C., and Leigh S. Prugh, urging reversal for amicus curiae West Shore Bar Association.

Haddad Law Office and Tina R. Haddad, urging reversal for amici curiae Harlan D. Karp and Tina R. Haddad.

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3. We accepted five propositions of law. The disposition of this case turns on the first proposition of law, which relates to the proper interpretation of the contract. Based on how I would resolve this case, propositions two through four are moot. In the fifth proposition of law, Beverage suggests that when parties are of equal bargaining power, ambiguities are construed against the drafter of the contract. But most courts today do not apply the principle that ambiguities are construed against the drafter to contracts negotiated by sophisticated commercial parties represented by counsel. *See Beanstalk*, 283 F.3d at 858. This court has not yet explicitly held that the principle has no application to such disputes. But it has also never held that it applies without first attempting to resolve the ambiguity through other means. Ohio courts routinely hold that to the extent that the principle of construing ambiguities against the drafter applies at all, it is a secondary rule of construction that comes into play only when an ambiguity remains after a court has looked to extrinsic evidence. *See Porterfield v. Bruner Land Co., Inc.*, 2017-Ohio-9045, 103 N.E.3d 152, ¶ 19 (7th Dist.); *Cline v. Rose*, 96 Ohio App.3d 611, 615, 645 N.E.2d 806 (3d Dist.1994); *Malcuit v. Equity Oil & Gas Funds, Inc.*, 81 Ohio App.3d 236, 240, 610 N.E.2d 1044 (9th Dist.1992).

[Cite as *Briskey v. KAF Properties, L.L.C.*, 2019-Ohio-4563.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD A. BRISKEY,	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellant	:	Hon. Craig R. Baldwin, J.
	:	Hon. Earle E. Wise, J.
-vs-	:	
	:	
KAF PROPERTIES LLC,	:	Case No. 19 CAE 07 0042
	:	
Defendant - Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 17 CVH 100661
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	November 4, 2019

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
DAVE LACKEY Sybert, Rhoad, Lackey & Swisher, LLC 153 S. LIberty St. Powell, Ohio 43065	PATRICK H. BOGGS JOHN P. MILLER Onda, LaBuhn, Rankin & Boggs Co., LPA 35 North Fourth Street, Suite 100 Columbus, Ohio 43215-2511

Baldwin, J.

{¶1} Appellant, Richard A. Briskey, appeals the decision of the Delaware County Court of Common Pleas denying his motion for summary judgment and granting Appellee KAF Properties, LLC's motion for summary judgment.

STATEMENT OF FACTS AND THE CASE

{¶2} Gregory Filbrun and his company, AHV Construction, LLC defaulted on a loan made to them by Appellant, Richard A. Briskey. Mr. Filbrun filed for bankruptcy protection, so Appellant attempted to collect the debt from Appellee, relying upon Gregory Filbrun's signature on a cognovit note, purportedly signing on behalf of Appellee. Kathleen Filbrun, wife of Greg Filbrun and owner of KAF Properties objected, claiming that Greg Filbrun had no authority to sign on behalf of her company. Appellant argued that Mr. Filbrun was authorized as an agent to bind KAF, but the trial court disagreed and found that the Appellee was entitled to summary judgment.

{¶3} AHV Construction, LLC, Gregory Filbrun's company was suffering financial distress. Appellant had the resources to provide a loan and attorney Brian Duncan was a mutual acquaintance of both parties who was aware of financial status of the parties. While the details are not clear, Attorney Duncan did concede that he was part of the reason that Appellant and Gregory Filbrun began discussing a loan from Appellant to AHV Construction, LLC.

{¶4} Appellant and Mr. Filbrun reached an agreement regarding the terms of a loan and reported the same to Attorney Duncan, and he drafted a cognovit note for $132, 000.00 dated January 24, 2017. The terms of this note and the following two notes were negotiated by Appellant and Mr. Filbrun and then relayed to Attorney Duncan for drafting.

{¶5} Mr. Filbrun failed to make timely payments on the January 24, 2017 note, and he and Appellant negotiated a second cognovit note in the amount of $242,500.00, dated July 5, 2017. Mr. Filbrun again defaulted and a third note was issued in the amount of $255,000.00, dated August 29, 2017. The parties agreed that the final note replaced the first two notes and represented the total amount of principal and interest on the date of the execution of the note.

{¶6} The second and third notes included a signature line captioned KAF Properties, LLC, Gregory A. Filbrun, Authorized Representative. In his deposition, Attorney Duncan contended this addition was negotiated between the parties to the note and was incorporated at their request. Mr. Filbrun stated in an affidavit that Attorney Duncan included it without consulting with him. Regardless of who was responsible, Mr. Filbrun signed the notes in the space reserved for the authorized representative of Appellee, KAF Properties, LLC.

{¶7} The note was not paid in a timely fashion and Appellant filed a complaint and entry confessing judgment on the note and began foreclosure on real estate held by Appellee. Kathleen Filbrun, principal of Appellee and the sole member of its parent company, F-Holdings, LLC first received notice of Appellee's purported involvement as a borrower on the cognovit note and its inclusion in the judgment when she received notice of the complaint. Appellee sought and was granted relief from judgment, based upon its contention that Gregory Filbrun was not an authorized agent and Appellee did not receive any consideration for the loan or the note.

{¶8} Appellee filed a motion for summary judgment repeating the same argument that it presented in its motion for relief from judgment. Appellee contended that it had no

knowledge of the transactions and had not authorized Gregory Filbrun to sign on its behalf. Further, Appellee contended that it had done nothing that could reasonably be interpreted as granting Mr. Filbrun apparent agency to bind it. Finally, it contended that it had not received any consideration for the loan and thus the note did not create a binding contract.

{¶9} Appellant responded that Mr. Filbrun did have apparent authority to bind the company based upon his actions in litigation. Mr. Filbrun appeared at an environmental court hearing regarding problems with a property titled to Appellee and signed a pleading allegedly on behalf of Appellee. Appellee's principal, Kathleen Filbrun, was aware of the litigation and her husband's appearance, but believed he was investigating what repairs were to be completed on the property. She was not notified of any settlement and did not authorize him to bind the company.

{¶10} Appellant included his affidavit with his motion for summary judgment stating:

> I no reason(sic) to doubt whether Greg had the authority to sign Note 2 and Note 3 on behalf of KAF. I relied upon the fact that those notes were prepared by an attorney (Brian Duncan) who purported to represent the makers on those notes, as well as Greg's signatures purporting to be an authorized agent for AHV and KAF.

{¶11} The trial court found that Appellee was entitled to summary judgment because there were no material questions of fact remaining to be resolved and the single legal issue, whether Gregory A. Filbrun had authority to execute the notes on behalf of Appellee, must be decided in favor of Appellee. Appellant dismissed the claims against

AHV and Gregory A. Filbrun that were not decided by the motion for summary judgment and filed a timely notice of appeal with four assignments of error:

{¶12} "I. THE TRIAL COURT ERRED WHEN IT HELD THAT GREG FILBRUN LACKED EXPRESS OR ACTUAL AUTHORITY TO EXECUTE PROMISSORY NOTES ON BEHALF OF KAF."

{¶13} "II. THE TRIAL COURT ERRED WHEN IT HELD THAT GREG FILBRUN LACKED APPARENT AUTHORITY TO EXECUTE PROMISSORY NOTES ON BEHALF OF KAF."

{¶14} "III. THE TRIAL COURT ERRED WHEN IT HELD THAT KAF COULD NOT BE HELD LIABLE UNDER THE PROMISSORY NOTES UNDER THEORIES OF WAIVER AND EQUITABLE ESTOPPEL."

{¶15} "IV. THE TRIAL COURT ERRED WHEN IT HELD THAT KAF COULD NOT BE HELD LIABLE UNDER THE PROMISSORY NOTES AS AN ACCOMMODATION PARTY BECAUSE IT RECEIVED NO CONSIDERATION."

STANDARD OF REVIEW

{¶16} We review cases involving a grant of summary judgment using a de novo standard of review. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.,* 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 24. A de novo review requires an independent review of the trial court's decision without any deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.,* 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993) as cited in *State v. Standen*, 9th Dist., 173 Ohio App.3d 324, 2007-Ohio-5477, 878 N.E.2d 657, ¶ 7. "Thus, viewing the pleadings in the light most favorable to the [appellant], we must determine whether [appellee] was entitled to judgment as a matter of law." Civ.R.

56(C). *Troyer v. Janis*, 132 Ohio St.3d 229, 2012-Ohio-2406, 971 N.E.2d 862, ¶ 6 (2012). Accordingly, we apply the same standard as the trial court and court of appeals in this case. *771 *Bonacorsi v. Wheeling & Lake Erie Ry. Co*., 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 24 (2002). "* * * we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate." *Tornado Techs., Inc. v. Quality Control Inspection, Inc.,* 8th Dist., 2012-Ohio-3451, 977 N.E.2d 122, ¶ 13.

ANALYSIS

{¶17} This case is before us on the accelerated calendar which is governed by App.R. 11.1. Subsection (E), Determination and Judgment on Appeal, provides in relevant part: "The appeal will be determined as provided by App.R. 11.1. It shall be sufficient compliance with App.R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form."

{¶18} One of the important purposes of the accelerated calendar is to enable an appellate court to render a brief and conclusory decision more quickly than in a case on the regular calendar where the briefs, facts, and legal issues are more complicated. *Crawford v. Eastland Shopping Mall Assn*., 11 Ohio App.3d 158, 463 N.E.2d 655 (10th Dist.1983).

{¶19} This appeal shall be considered in accordance with the aforementioned rules.

{¶20} Appellant has listed four assignment of error, but resolution of each assignment is dependent on the determination of whether Gregory Filbrun was an agent of Appellee and therefore we will focus on that issue.

{¶21} Appellant asserts Gregory Filbrun was an express agent of Appellee acting with apparent authority. The creation of an agency relationship may be express or implied. "The relationship of principal and agent, and the resultant liability of the principal for the acts of the agent, may be created by the express grant of authority by the principal. Absent express agency, the relation may be one of implied or apparent agency." *Master Consolidated Corp. v. BancOhio Natl. Bank,* 61 Ohio St.3d 570, 574, 575 N.E.2d 817 (1991). Apparent agency exists "where one who is assuming to act as an agent for a party in the making of a contract but in fact has no actual authority to do so, such party will nonetheless be bound by the contract 'if such party has by his words or conduct, reasonably interpreted, caused the other party to the contract to believe that the one assuming to act as agent had the necessary authority to make the contract.'" *Scott v. Kindred Transitional Care & Rehab*., 8th Dist. Cuyahoga No. 103256, 2016–Ohio–495 ¶13 quoting *Master Consolidated*, 61 Ohio St.3d at 576, 575 N.E.2d 817 quoting *Miller v. Wick Bldg. Co.,* 154 Ohio St. 93, 93 N.E.2d 467 (1950).

{¶22} For a principal to be bound by the acts of his agent under the theory of apparent authority, evidence must affirmatively show the existence of an express agency relationship and : (1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of those facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority. *Master Consolidated Corp*., *supra* at syllabus. The burden of proving that apparent authority exists rests upon the party asserting the agency.

Scott supra at ¶ *15* quoting *Irving Leasing Corp. v. M & H Tire Co.,* 16 Ohio App.3d 191, 475 N.E.2d 127 (2nd Dist.1984).

{¶23} The Appellant has not presented evidence that supports the existence of an express grant of authority by Appellee to Gregory Filbrun. We have reviewed the record before us and find insufficient evidence to establish an express agency relationship between Appellee and Gregory Filbrun and, therefore, we hold that the record contains no evidence of apparent authority.

{¶24} Appellant describes past litigation and offered copies of pleadings in support of his contention that an agency relationship arose from the actions of Appellee. We have reviewed the record and the litigation cited by Appellant and, whether reviewed individually or considered collectively, these facts do not support a conclusion that Gregory Filbrun was an agent of Appellee for the purpose of executing the cognovit notes that are the subject of this litigation.

{¶25} Appellant suggests that the filing of a notice of a bankruptcy filing by Gregory Filbrun in *Deutsche Bank National Trust Company v. Carolyn Filbrun, et al*., Montgomery County Common Pleas 2007 CV 09793 should be construed as evidence of an agency relationship, but the pleading offered by Appellant lists Gregory Filbrun as a defendant in that matter. Neither Mrs. Filbrun nor Appellant provide any context regarding the nature of that litigation or the purpose of the attached filing. We will not speculate regarding the circumstances regarding that pleading.

{¶26} Appellant refers to an allegation in a complaint filed on Gregory Filbrun's behalf that states that Appellee was a holding company created by Mr. Filbrun and interprets that statement as an admission by Appellee that Appellant was an owner of the

company. We cannot stretch the language of that allegation to mean anything more than what is alleged--that Mr. Filbrun claims that he allegedly created Appellee. Ownership and control of Appellee is not addressed.

{¶27} Appellant offers a copy of an answer filed in a lawsuit against Appellant, Kathleen Filbrun and Appellee, and argues that because only Mr. Filbrun signed the document, he was acting on behalf of Appellee and Mrs. Filbrun. That pleading expressly lists all three defendants as acting pro se, and there is nothing in the document indicating that Mr. Filbrun was acting on behalf of Appellee, refuting any argument that Appellant was acting on behalf of any of the parties.

{¶28} Appellant points to another action filed in Franklin County's Environmental Court involving Appellee's property. Mrs. Filbrun retained counsel to represent Appellee and, though she was aware that Mr. Filbrun was attending hearings, she assumed his role was only to discover the nature of the complaint and make repairs. In that case, the City of Columbus asked to have Mr. Filbrun joined as a party because he "may claim an interest in the real estate which is the subject matter of this action" and further alleged that Mr. Filbrun was "an owner/occupant and/or interested party in this case pursuant to Columbus City Code Section 4703.01(E)(5) and (6) by virtue of being an agent and/or manager and /or having care and control of the property." The trial court in that case granted the motion without any finding regarding Appellant's status. We cannot draw any conclusion regarding the status of Mr. Filbrun from the allegations, though Mrs. Filbrun did admit that Mr. Filbrun did "handywork" on the property, suggesting that he was seen by the City of Columbus as a person who held himself " out to be in charge, care or control of the premises as evidenced by performing maintenance or repairs on the premises ***"

Columbus City Code 4703.01(E)(6). The record provided does not contain sufficient explanation of the facts of the environment court action to rely on the allegations of the City as evidence of an express grant of authority by Appellee to Mr. Filbrun.

{¶29} Appellant contends that "At some point, Greg and/or Katie decided to hire attorney Brian Duncan ("Attorney Duncan") to represent KAF. (See Katie tr. p. 29, lines 11-19 and Duncan tr. page 15, line 13 through page 16, line 1)." (Appellant's Brief, p. 9) However, Mrs. Filbrun (Katie) denied that she knew Attorney Duncan and instead referenced an attorney who she only remembered as "Andy" who she believed may have worked at the same firm. She never spoke to Attorney Duncan regarding this litigation. Attorney Duncan was hired by Gregory Filbrun (Duncan Deposition, p. 8, lines 12-17) and he did not represent that Gregory Filbrun was an agent of KAF, though he assumed that was true. (Duncan Deposition, p. 84, lines 9-11; p. 94 lines 1-4). The fact that Mr. Filbrun appeared at hearings, hired Attorney Duncan and the litigation involved both Mr. Filbrun and Appellee does not support the existence of an express grant of authority by Appellee to Mr. Filbrun.

{¶30} The fact that legal bills for representation of KAF may have been paid by Mr. Filbrun's company also falls short of demonstrating an express agency.

{¶31} Because Appellant did not demonstrate Gregory Filbrun was an agent of Appellee as a result of express grant of authority by Appellee, we need not consider Appellant's argument that Mr. Filbrun had apparent authority to bind KAF to the obligation in the cognovit note. We noted in *Globalcor Assoc. v. Law Office of Robert Soles*, 5th Dist. Stark No. 2018CA00090, 2019-Ohio-2208, ¶¶ 57-58, "that [a]pparent authority" and "apparent agency" are sometimes referred to interchangeably but are in fact two different

theories. “Apparent agency is a distinct concept from apparent authority; while the first works to create an agency relationship between two parties, the second expands the authority of an actual agent, and thus, apparent authority is relevant only if actual agency has already been established.” To establish liability premised upon apparent authority, evidence of a principal/agent relationship is a prerequisite. Mr. Filbrun and Appellee did not have a principal/agent relationship when Appellant executed the cognovit notes. Thus, the doctrine of “apparent authority” is inapplicable.

{¶32} Appellant's reliance on the holding of *Master Consol. Corp. v. Bancohio Natl. Bank,* 61 Ohio St.3d 570, 570, 575 N.E.2d 817, (1991) is misplaced as that case is dealing with an established relationship of principal and agent and the question was whether the agent had the authority to act. That express agency relationship does not exist in this case, so further analysis of apparent authority is unnecessary.

{¶33} If we were to consider whether the facts support an apparent agency, we would come to the same conclusion. "To establish liability premised upon apparent agency, a plaintiff must show that (1) the defendant made representations leading the plaintiff to reasonably believe that the wrongdoer was operating as an agent under the defendant's authority, and (2) the plaintiff was thereby induced to rely upon the ostensible agency relationship to his detriment. See *Johnson v. Wagner Provision Co*. (1943), 141 Ohio St. 584, 26 O.O. 161, 49 N.E.2d 925, paragraph four of the syllabus. *Shaffer v. Maier,* 68 Ohio St.3d 416, 1994-Ohio-134, 627 N.E.2d 986 (1994). Appellant did not provide evidence that he relied upon representations of the Appellee. Instead, within his affidavit he states:

> I no reason (sic) to doubt whether Greg had the authority to sign Note 2 and Note 3 on behalf of KAF. I relied upon the fact that those notes were prepared by an attorney (Brian Duncan) who purported to represent the makers on those notes, as well as Greg's signatures purporting to be an authorized agent for AHV and KAF.

{¶34} All of the Appellant's argument regarding the allegation that Gregory Filbrun was an agent as a result of his involvement in litigation is made moot by this statement, as Appellant did not rely on this information to conclude that Mr. Filbrun had authority to sign the note nor did he rely on any representations or actions of Appellee.

{¶35} We find that there were no material issues of fact that remained to be resolved and, even construing the evidence most strongly to favor the Appellant, the trial court did not err in finding that no agency relationship was created authorizing Mr. Filbrun to execute notes on behalf of Appellee and that Appellee was entitled to judgment as a matter of law.

{¶36} The Appellant's first and second assignments of error are denied.

{¶37} Appellant's third and fourth assignments of error, that the "trial court erred when it held that KAF could not be held liable under the promissory notes under theories of waiver and equitable estoppel" and that “KAF could not be held liable under the promissory notes under theories of waiver and equitable estoppel” are rendered moot by our denial of the first two assignments of error. As Gregory Filbrun did not have any authority to bind the Appellee to pay the notes, we need not decide whether it waived any defense, was bound by equitable estoppel or signed as an accommodation party.

{¶38} Appellant's third and fourth assignments of error are denied and the decision of the Delaware County Court of Common Pleas is affirmed.

By: Baldwin, J.

Gwin, P.J. and

Wise, Earle, J. concur.

[Cite as *Hatfield v. Prston Chevrolet-Cadillac, Inc.*, 2019-Ohio-4730.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

PATRICK H. HATFIELD,	:	**O P I N I O N**
Plaintiff-Appellant,	:	
		CASE NO. 2018-G-0168
- vs -	:	
PRESTON CHEVROLET-CADILLAC, INC., d.b.a. PRESTON CHEV-CAD-KIA, INC.,	:	
	:	
Defendant-Appellee.		

Civil Appeal from the Geauga County Court of Common Pleas, Case No. 2017 P 000862.

Judgment: Affirmed.

Ronald I. Frederick, and *Michael L. Berler*, Frederick & Berler, LLC, 767 East 185th Street, Cleveland, OH 44119 (For Plaintiff-Appellant).

Robert A. Poklar, and *Matthew Charles Miller*, Weston Hurd, LLP, The Tower at Erieview, 1301 East Ninth Street, Suite 1900, Cleveland, OH 44114 (For Defendant-Appellee).

THOMAS R. WRIGHT, P.J.

{¶1} Appellant, Patrick Hatfield, appeals the judgment dismissing his complaint with prejudice against appellee, Preston Chevrolet-Cadillac, Inc. (Preston). We affirm.

{¶2} Hatfield raises one assignment of error:

{¶3} "The trial court erred in granting Preston's motion to dismiss pursuant to Civ.R. 12(B)(6) based on Regulation M of the Federal Truth in Lending Act because (a)

Regulation M does not supersede state law, and (b) Appellee's 'lease acquisition fee' is prohibited under Ohio law (OAC 109:4-3-16(B)(21) and case law interpreting that law.)"

{¶4} We review the trial court's decision granting motions to dismiss de novo, without deference to the trial court's decision. *LGR Realty, Inc. v. Frank & London Ins. Agency,* 152 Ohio St.3d 517, 2018-Ohio-334, 98 N.E.3d 241 ¶ 10.

{¶5} Upon reviewing motions to dismiss for failure to state a claim for which relief can be granted under Civ.R. 12(B)(6), we accept all factual allegations in the complaint as true and dismiss only when "it appears 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Id. quoting O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 327 N.E.2d 753 (1975), syllabus. We must also afford a plaintiff all reasonable inferences derived from the factual allegations included. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). "A copy of any written instrument attached to a pleading is a part of the pleading for all purposes." Civ.R. 10(C).

{¶6} Hatfield filed a class-action complaint against Preston alleging violations of the Ohio Consumer Sales Practices Act (CSPA) and Ohio's Administrative Code 109:4-3-16(B)(17) & (21). His complaint sets forth three claims for relief and attaches two documents, the Closed End Motor Vehicle Lease and Retail Lease Order. Hatfield generally avers that Preston "routinely commits acts declared deceptive" by including a lease-acquisition fee, in addition to the "agreed upon value," on its pre-printed lease agreement forms.

{¶7} "The CSPA prohibits unfair or deceptive acts and unconscionable acts or practices by suppliers in consumer transactions whether they occur before, during, or after the transaction. R.C. 1345.02(A) and 1345.03(A). * * *

{¶8} "The General Assembly has delegated authority to the attorney general to '[a]dopt, amend, and repeal substantive rules defining with reasonable specificity acts or practices that violate sections 1345.02 [and] 1345.03 * * * of the Revised Code.' R.C. 1345.05(B)(2). Pursuant to this authority, the attorney general has promulgated Ohio Adm.Code 109:4-3-16(B) * * *" that identifies certain acts as violating the CSPA. *Williams v. Spitzer Autoworld Canton, L.L.C.,* 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, ¶ 10-11.

{¶9} Hatfield's first claim for relief avers that "the advertised price for the vehicle was the 'agreed upon value for the vehicle' stated on the Lease Agreement of $29,300.00." Hatfield claims that the lease-acquisition fee is neither mentioned nor listed in the "Retail Lease Order." But Hatfield acknowledges that the lease-acquisition fee of $595 is listed under "other amounts included in the gross capitalization cost" in the Lease Agreement. Hatfield's complaint states that this lease-acquisition fee was not in the "agreed upon value for the vehicle," and it was added to the amount he was responsible for after the fact.

{¶10} Hatfield alleges that the Ohio Adm.Code does not authorize the charging of a lease-acquisition fee and that the regular charging of such a fee constitutes a violation of OAC 109:4-3-16(B)(17) & (21).

{¶11} In his second claim for relief, Hatfield alleges that Preston's inclusion of the lease-acquisition fee negligently misrepresented to him and the class that the fee was proper.

{¶12} Hatfield's third and final claim for relief avers that Preston materially misrepresented that the inclusion of the lease-acquisition fee was proper, even though it is in violation of Ohio law, and that this misrepresentation constitutes fraud.

{¶13} Hatfield seeks return of the lease-acquisition fee plus interest and tax; declaratory judgment that the inclusion of said fee constitutes an unfair, deceptive, and unconscionable sales practice in violation of Ohio law; and attorney fees and costs.

{¶14} Ohio Adm.Code 109:4-3-16(B)(17) & (21) state:

{¶15} "(B) It shall be a deceptive and unfair act or practice for a dealer, manufacturer, advertising association, or advertising group, in connection with the advertisement or sale of a motor vehicle, to:

{¶16} "* * *

{¶17} "(17) Raise or attempt to raise the actual purchase price of any motor vehicle to a specific consumer * * *;

{¶18} "* * *

{¶19} "(21) Advertise any price for a motor vehicle unless such price includes all costs to the consumer except tax, title and registration fees, and a documentary service charge, provided such charge does not exceed the maximum documentary service charge permitted to be charged pursuant to section 1317.07 of the Revised Code. Additionally, a dealer may advertise a price which includes a deduction for a discount or

rebate which all consumers qualify for, provided that such advertisement clearly discloses the deduction of such discount or rebate."

{¶20} Although advertised price is not defined in the Administrative Code, "advertisement" is defined as,

{¶21} "any electronic, written, visual, or oral communication made to a consumer by means of personal representation, newspaper, magazine, circular, billboard, direct mailing, sign, radio, television, telephone or otherwise, which identifies or represents the terms of any item of goods, service, franchise, or intangible which may be transferred in a consumer transaction." Ohio Adm.Code 109:4-3-01(C)(5).

{¶22} "When analyzing a statute, our primary goal is to apply the legislative intent manifested in the words of the statute. * * * Statutes that are plain and unambiguous must be applied as written without further interpretation. * * * In construing the terms of a particular statute, words must be given their usual, normal, and/or customary meanings. * * *." *Proctor v. Kardassilaris,* 115 Ohio St.3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 12.

{¶23} A plain reading of Ohio Adm.Code 109:4-3-16(B)(21) reveals that it does *not* preclude a dealer or seller of an automobile from *charging* fees other than those specified. To the contrary, a plain reading confirms that this provision is designed to ensure that the advertised price *includes all costs*, except those specified. Thus, one of the included costs in a car's advertised price could be a lease-acquisition fee, and accordingly, a lease-acquisition fee is *not* in violation of Ohio Adm.Code 109:4-3-16(B)(21) as long as that fee is encompassed in the "advertised" price of the vehicle. *But see Burns v. Spitzer Mgt., Inc.,* 190 Ohio App.3d 365, 2010-Ohio-5369, 941 N.E.2d 1256,

¶ 2 (8th Dist.) (finding, with no analysis of the statutory language, that Ohio Adm.Code 109:4-3-16(B)(21) "specifically limits the fees that may be charged by a dealer, so that consumers are informed of the actual price charged when comparison shopping.")

{¶24} Thus, to the extent that Hatfield's complaint avers that Preston's act of charging a lease-acquisition fee is illegal or contrary to this provision, we disagree. Moreover, since his second and third claims for relief, negligent misrepresentation and fraud, hinge on the incorrect premise that the charging of this type of fee is illegal and that Preston acted either negligently or fraudulently in hiding the illegally charged fee, Hatfield's second and third counts were correctly dismissed as a matter of law.

{¶25} As for Hatfield's first count, based on the allegation that the lease-acquisition fee was included after the fact, Hatfield alleges that Preston raised his vehicle's lease price in violation of Ohio Adm.Code 109:4-3-16(B)(17) by inserting this lease-acquisition fee via its pre-printed form lease agreements, or that Preston failed to include the lease-acquisition fee in the advertised price contrary to Ohio Adm.Code 109:4-3-16(B)(21).

{¶26} However, Hatfield only alleges that Preston's advertised price was conveyed to him and the other potential class members via the Lease Agreement, and because the "agreed upon value" set forth as $29,300 does not include the $595 lease-acquisition fee, Preston has raised the price and/or advertised to a price different than the one charged in violation of the foregoing Ohio Administrative Code Sections. We disagree. Hatfield's argument confuses a vehicle's stated "agreed upon value" with the advertised price. This misunderstanding is best evidenced by his allegation in paragraph 24 of his complaint, which states in part:

{¶27} "24. Typicality: Mr. Hatfield's claim is identical to the claims of other class members, being charged by Preston a fee in excess of the agreed upon value of the leased vehicle stated on a standard, pre-printed lease agreement."

{¶28} Moreover, Hatfield's argument also runs contrary to the basic principle of contract construction that a written agreement is to be read as a whole in order to attempt to give effect to each part. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.,* 78 Ohio St.3d 353, 1997-Ohio-202, 678 N.E.2d 519 (1997). Upon reading the "advertisement," i.e., the Lease Agreement, as a whole, it is evident the advertised price is not only the stated "agreed upon value of the vehicle," but that it also includes the stated lease-acquisition fee. Accordingly, dismissal here was proper because the at-issue lease-acquisition fee was set forth in the advertised price. *But see Burns v. Spitzer Mgt., Inc.,* 190 Ohio App.3d 365, 2010-Ohio-5369, 941 N.E.2d 1256, ¶ 2 (8th Dist.) (holding, with no analysis of the language of the governing provisions, that the charging of a dealer overhead fee via a preprinted form in addition to the price of the car states a cause of action under Ohio Adm.Code 109:4-3-16(B)(21)).

{¶29} Our decision is in accord with that in *Linn v. Roto Rooter, Inc.,* 8th Dist. Cuyahoga No. 82657, 2004-Ohio-2559, ¶ 17, which held in part that a predetermined fixed charge, disclosed to the customer in advance of the decision to accept goods or services and included within the price, is inherently legal, and "such charges are commonly imposed for such things as use of ATM machines, ticket processing fees, and even basic court costs. Furthermore, courts have found that these charges are lawful, especially considering that the fee is disclosed in advance."

{¶30} This is not a case where the suspect fees were surreptitiously added to the payment that Hatfield agreed to pay. *See Kelley v. Ford Motor Credit Co.,* 137 Ohio App.3d 12, 17, 738 N.E.2d 9, (1st Dist.2000) (holding that lessees were not misled about the total cost of the lease when the written lease contains all the fees, and as such, dealer did not act in a deceptive manner).

{¶31} This is also not a case in which Hatfield claims, for example, that he was orally advised of a price other than that set forth in the Lease Agreement that did not include the lease-acquisition fee or that he saw a television commercial that advertised the lease price for an amount that did not include this fee. For example, in *Phillips v. Andy Buick, Inc.*, 11th Dist. Lake No. 2004-L-093, 2006-Ohio-5832, ¶ 2, this court found a potentially viable CSPA claim was asserted based on the allegation that the car dealer added two additional charges to an agreed-upon sales price that the parties had already negotiated. Hatfield does not make allegations of this nature, and accordingly dismissal was warranted.

{¶32} Based on the foregoing, Hatfield's sole assignment of error lacks merit, and the trial court's decision is affirmed.

MATT LYNCH, J.,

MARY JANE TRAPP, J.,

concur.