[Cite as *Wall v. Kroger Co.*, 2015-Ohio-734.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

DELLA WALL,	:	APPEAL NO. C-140355 TRIAL NO. A-1108406
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
THE KROGER CO.,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Judgment Entered

Date of Judgment Entry on Appeal: March 4, 2015

Gary F. Franke, for Plaintiff-Appellee,

Caroline M. DiMauro, *Matthew R. Byrne* and *Jamie M. Goetz-Anderson*, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

DEWINE, Judge.

{¶1} This is an appeal from a summary judgment. At issue is the construction of a separation agreement entered into between the Kroger Company and one of its high-ranking employees. The parties dispute the amount of compensation the employee was entitled to receive under the agreement following the termination of her employment. The trial court found that the agreement was ambiguous, determined that the ambiguity should be construed against the drafter of the contract (Kroger), and entered judgment in favor of the employee. Upon careful reading, we find that the court erred in finding the contract ambiguous. Rather, we conclude that the plain language of the contract supports Kroger's construction. As a result, we reverse the grant of summary judgment and enter judgment in favor of Kroger.

I. Background

{¶2} Della Wall was a long-time employee of Kroger. In June of 2010, she was the group vice president of human resources, responsible for overseeing all human resources functions of the company. She earned an annual salary of $273,000 and was eligible for an annual bonus of up to $225,000, plus stock options. She reported directly to Kroger CEO, Dave Dillon. On June 18, 2010, Mr. Dillon requested a meeting with Ms. Wall. In that meeting, Mr. Dillon expressed concern about Ms. Wall's attitude and her body language in other meetings. Shortly thereafter, Ms. Wall spoke with her attorney and delivered a letter to Mr. Dillon detailing her demands for leaving the company.

{¶3} On July 8, 2010, Ms. Wall signed a separation agreement with Kroger. The agreement provided that her last day of work would be August 7, 2010, but that she would remain on the payroll and be available for consulting until June 2013. The

agreement outlined her compensation for that period based upon her annual salary and her "bonus potential."

{¶4} Pertinent to this appeal are the following provisions of the agreement relating to cash compensation to be paid to Ms. Wall:

> 2. From August 7, 2010, through June 30, 2013, you will remain on the active management payroll * * *. You will receive cash compensation as follows:
>
> a) For the first 47 weeks of that period you will receive monthly payments based on your final annual salary of $273,000.
>
> b) You will receive payments under Kroger's 2010 and 2011 annual bonus plans, if a bonus is earned for other corporate executives, based on your bonus potential of $255,000. Your 2010 bonus, payable in March 2011, will be pro-rated based on service through September 4, 2010; your 2011 bonus, payable in March 2012, will be pro-rated based on six weeks of service in 2011.
>
> c) For the 24 months from June 30, 2011 through June 30, 2013, you will receive additional monthly pay of $35,875, an amount derived from adding one-twelfth of your annual salary and one-twelfth of your bonus potential at 70%.

{¶5} When Ms. Wall left the company in August 2010, Kroger began making the payments specified in paragraph 2(a) of the agreement—that is $22,750 per month, representing one-twelfth of her annual salary of $273,000. When the 47 weeks referenced in paragraph 2(a) expired in June of 2011, Kroger initially began paying Ms. Wall $58,625 a month. This compensation amount was comprised of the amount she

was due under paragraph 2(c), $35,875 per month, *plus* the amount that she had been previously receiving under 2(a), $22,750 per month.

{¶6} In September 2011, Kroger contacted Ms. Wall to inform her that the payments of $58,625 she had received over the previous three months had been a bookkeeping error and that she was entitled only to the $35,875 specified under paragraph 2(c). Ms. Wall at first expressed surprise, asking in an email "how on earth did this happen?" she suggested that Kroger might simply "reverse what was done and take the difference out of" the account into which it had been deposited. Before doing this, however, she asked that Kroger send her a copy of all of her pay stubs. After reviewing with her attorney the pay stubs and the termination agreement, Ms. Wall informed Kroger that she did not believe she had been overpaid.

{¶7} Ms. Wall filed suit against Kroger seeking declaratory relief and compensatory damages. Both parties filed motions for summary judgment. The trial court granted summary judgment in favor of Ms. Wall and against Kroger. The court reasoned that based upon the language of the contract itself and conflicting affidavits submitted by the parties, the agreement was ambiguous. It determined that the ambiguity should be construed against Kroger because it had drafted the agreement. This appeal followed.

II. No Ambiguity in the Employment Agreement

{¶8} In its first two assignments of error, Kroger asserts that the trial court erred by granting Ms. Wall's motion for summary judgment and by denying Kroger's motion for summary judgment. We consider both assignments of error together.

{¶9} Kroger makes three primary arguments. First, the trial court should not have resorted to the "construe against the drafter" principle because the contract was unambiguous. Second, even if the contract was ambiguous, the court should have

stopped after examining the parol evidence—which, in Kroger's view, conclusively established its position—and not applied the "construe against the drafter" rule. And third, that the "construe against the drafter" maxim should not have been applied in this case because Ms. Wall was a sophisticated negotiator who had consulted legal counsel. We agree that the contract was unambiguous, so we stop there and do not reach the remaining arguments.

{¶10} The Ohio Supreme Court has reminded us that we should not hastily find ambiguities in a contract. "When confronted with allegations of ambiguity, a court is to objectively and thoroughly examine the writing to attempt to ascertain its meaning." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 11; *see Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11. It is "[o]nly when a definitive meaning proves elusive should rules for construing ambiguous language be employed." *Porterfield* at ¶ 11. "Otherwise, allegations of ambiguity become self-fulfilling." *Id.* Thus, "[w]hen 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." *Westfield* at ¶ 11.

{¶11} A careful reading of the employment agreement here convinces us that there is no ambiguity and that the construction advanced by Kroger is the correct one. The contract speaks to two distinct temporal periods. "For the first 47 weeks," Ms. Wall was to receive payments based upon her annual salary. The first 47 weeks ended on June 30, 2011. During these 47 weeks, Ms. Wall did in fact receive monthly payments equaling one-twelfth of her annual salary ($22,750). The agreement then provides for a second temporal period from "June 30, 2011 through June 30, 2013." During this period, Ms. Wall was to receive "additional monthly pay of $35,875, an amount derived from adding one-twelfth of your annual salary and one-twelfth of your bonus potential

at 70%." Kroger contends that during this second period, Ms. Wall was entitled simply to the $35,875 indicated. Ms. Wall argues that she was entitled to not only the $35,875, but also a continuation of the $22,750 that she was owed in the first temporal period.

{¶12} We agree with Kroger's interpretation. The language of the contract is clear that the $22,750 monthly payment is owed for the first 47 weeks. That's it. There is no term in the agreement stating that this payment is to continue beyond this period. Rather, the agreement explicitly says that for the next 24 months she is to receive "$35,875" per month.

{¶13} Ms. Wall hinges her argument on the use of the term "additional" in the clause outlining her payments in the second period—"you will receive additional monthly pay of $35,875." And true, if one were construing this clause in a vacuum one might read the word "additional" to mean something in addition to what she was already receiving. But we do not read contract provisions in a vacuum; we must construe the contract as a whole. *See Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 678 N.E.2d 519 (1997). *See also Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, at ¶ 12. And here, the explicit delineation of "the first 47 weeks" makes clear that after 47 weeks the payments provided for in that provision were to end. Thus, the only sensible reading of the contract as a whole is that the word "additional" simply means that what she was to receive in the second period was more than she was to receive in the first period.

{¶14} Because the contract was unambiguous, the trial court should not have considered parol evidence and should not have applied the "construe against the drafter" principle. Based upon the language of the contract, Kroger's motion for summary judgment should have been granted and Ms. Wall's motion denied. Thus, we sustain Kroger's first two assignments of error.

III. We Do Not Reach Kroger's Third Assignment of Error

{¶15} Kroger argues in its third assignment of error that the trial court erred by failing to strike Ms. Wall's motion for summary judgment because it did not contain adequate citations to the record. It also alleges certain deficiencies in the affidavits attached to the motion. Our determination as to Kroger's first two assignments of error makes this assignment of error moot, so we do not reach the issue. *See* App.R. 12(A)(1)(c).

IV. Conclusion

{¶16} The judgment of the trial court is reversed, and judgment is entered for Kroger.

Judgment accordingly.

HENDON, P.J., and **CUNNINGHAM, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.