[Cite as *Brooks Capital Servs., L.L.C.*, 2012-Ohio-4539.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Brooks Capital Services, LLC et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 12AP-30 (C.P.C. No. 10CVE-07-10386)
5151 Trabue Ltd. et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 27, 2012

Bailey Cavalieri LLC, Anthony J. Sugar and *Timothy A. Riedel*, for appellants.

Barrett, Easterday, Cunningham & Eselgroth LLP, David C. Barrett, Jr., Troy A. Callicoat and *Amanda J. Stacy*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Plaintiffs-appellants, Brooks Capital Service, LLC and Thomas Heilman (collectively "plaintiffs"), appeal from a judgment of the Franklin County Court of Common Pleas granting the Civ.R. 56 summary judgment motion of defendant-appellee 5151 Trabue Ltd. ("5151 Trabue"), and denying plaintiffs' motion seeking summary judgment against defendant. Because the trial court properly construed R.C. 1705.35 in granting summary judgment to 5151 Trabue, we affirm.

I. Facts and Procedural History

{¶ 2} The parties do not dispute the underlying facts in this appeal that raises only a legal question concerning the trial court's interpretation of R.C. 1705.35. On June 21, 2005, David Rhodehamel, James Pearson on behalf of Green Lizard Freedom Flight and Mercy Mission, LLC, and Steven Kahn, on behalf of Doogie, LLC, executed the operating agreement forming the limited liability corporation, 5151 Trabue, in which all were members. 5151 Trabue was created to own, develop, operate, manage, sell, and lease real property, including property located at 5151 Trabue Road.

{¶ 3} 5151 Trabue's operating agreement clearly enumerated the powers afforded to each member and manager. Section 8.1 of the operating agreement stated the managing member, Kahn, would control the company and alone had the power to "encumber through debt placement or replacement Company Property in furtherance of the purposes" of the company. (R. 74, exhibit A.)

{¶ 4} Moreover, section 8.2 of the operating agreement specifically prohibited non-managing members from taking any of the following actions without the vote of members holding at least 75 percent interest in the company:

> "(a) Do any act in contravention of the Agreement;
>
> * * *
>
> (f) Amend or otherwise change the Agreement so as to modify the rights or obligations of the Member[ ];
>
> * * *
>
> (h) Take any actions and/or decisions that result in a financial expenditure or commitment of the Company of greater than $250.00 to any entity or person * * *;
>
> (i) Subject to the authority of the Managing Member to encumber Company Property, sell, convey or transfer Company Property;
>
> (j) Enter into any contract(s) and guarant[ee]s; incur any liabilities; borrow money * * * and/or secure * * * any of its obligations by mortgage or pledge of any Company Property or income."

{¶ 5} In 2007, Rhodehamel initiated discussions with Thomas Heilman to request a short-term loan on behalf of 5151 Trabue in the amount of $125,000, ostensibly to develop the 5151 Trabue's property. He gave Heilman a forged copy of what he claimed to be 5151 Trabue's operating agreement. It reflected Rhodehamel to be the sole member with 100 percent interest and the managing member with the authority to contract, to enter into loan agreements and to encumber the 5151 Trabue's property. Rhodehamel also supplied Heilman with a personal financial statement.

{¶ 6} Heilman agreed to the loan and conveyed the proceeds with a check made payable to Rhodehamel. Rhodehamel, on behalf of 5151 Trabue, executed and delivered to Heilman a promissory note for $125,000.00 and a mortgage on 5151 Trabue's property. Brooks Capital purchased from Heilman a 50 percent interest in the note; Brooks, on behalf of Brooks Capital, wrote a personal check to Heilman for $63,350.69. The other members of 5151 Trabue were not aware at that time of Rhodehamel's actions.

{¶ 7} Rhodehamel moved the funds to his private account. The note was not paid by the December 30, 2008 due date, though Rhodehamel made interest payments well into 2009. By January 2010, plaintiffs became aware that the operating agreement Rhodehamel provided was forged and 5151 Trabue had two more members. Kahn forwarded a copy of the actual operating agreement and stated Rhodehamel lacked authority to bind 5151 Trabue to the note.

{¶ 8} Plaintiffs filed a complaint seeking to recover on the note and to foreclose on the property. Both sides filed motions for summary judgment. The trial court denied plaintiffs' motion and granted 5151 Trabue's motion. The court explained that, pursuant to R.C. 1705.35, Rhodehamel could not bind 5151 Trabue. Accordingly, the court refused to enforce the note and declared plaintiffs' recorded mortgage against 5151 Trabue's real property to be invalid.

II. Assignments of Error

{¶ 9} Plaintiffs appeal, assigning the following errors:

> [I.] The Trial Court erred when it held that Defendant David Rhodehamel ("Rhodehamel") - a member of Defendant 5151 Trabue, Ltd., an Ohio limited liability company ("5151 Trabue") - lacked statutory authority to bind 5151 Trabue to the Note and Mortgage (as hereinafter defined).

> [II.] The Trial Court erred when in posited that Appellants' "...case relies on the determination that the operating agreement of 5151 Trabue creates a member-managed limited liability company..." because the form of a limited liability company as member-managed or manager-managed is irrelevant under R.C. 1705.35 if the applicable instruments and documents (i.e., the Note and Mortgage) are executed by a member of the company.
>
> [III.] The Trial Court erred when it found that the Note and Mortgage were not binding on 5151 Trabue under R.C. 1705.35 because they were signed by only a member of 5151 Trabue and not by the manager of 5151 Trabue.
>
> [IV.] The Trial Court erred when it engrafted onto R.C. 1705.35 the imagined requirement that a limited liability company ("LLC") must be managed by its members for a member thereof to have the power and authority under such statute to bind the company to a mortgage of its property.
>
> [V.] The Trial Court erred when it failed to hold that R.C. 1705.35, being the more specific statute, is controlling over R.C. 1705.25, the more general statute.
>
> [VI.] The Trial Court erred when it held that the Utah statute (Utah Code Ann. § 48-2b-127(2)) at issue in *Taghipour v. Jerez*, 2002 Utah 74, 52 P.3d 1252 (2002) ("*Taghipour*") was identical to R.C. 1705.35.
>
> [VII.] The Trial Court erred when it held that Appellants' failed as a matter of law to demonstrate that Rhodehamel had the apparent authority to bind 5151 Trabue.

III. First, Second, Third, Fourth, Fifth and Sixth Assignments of Error - Interpretation of R.C. 1705.35

{¶ 10} Plaintiffs assert the trial court improperly granted summary judgment to defendants because R.C. 1705.35 permits, as to third parties, either the managing member or any member to bind the 5151 Trabue in the circumstances present here. Because Rhodehamel was a member at the time he signed the note and mortgage, plaintiffs contend the court improperly granted summary judgment to 5151 Trabue and improperly denied summary judgment to plaintiffs.

{¶ 11} An appellate court's review of summary judgment is conducted under a de novo standard. *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41 (9th Dist.1995); *Koos v. Cent. Ohio Cellular, Inc.*, 94 Ohio App.3d 579, 588 (8th Dist.1994). Summary judgment is proper only when the parties moving for summary judgment demonstrate: (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181 (1997).

{¶ 12} A limited liability company is a relatively new form of doing business in Ohio, created and defined by state law. *In re ICLNDS Notes Acquisition, LLC*, 259 B.R. 289, 292 (Banks.N.D.Ohio 2001). Management of an LLC is vested in its members in proportion to their capital contribution, unless a written agreement provides otherwise. *Id.*, citing R.C. 1705.09, 1705.14, and 1705.24. In Ohio, "member-managed" LLCs are the default rule, and an LLC desiring to be "manager-managed" must so specify in the company's operating agreement. R.C. 1705.24.

{¶ 13} R.C. 1705.25(A)(1) prescribes the powers and duties of members when the LLC is member-managed, including that "[e]very member is an agent of the company for the purpose of its business." When an LLC is manager-managed, "[e]very manager is an agent of the company for the purpose of its business." R.C. 1705.25(B)(1). *See also* R.C. 1705.29(A) (providing that in a manager-managed LLC, "the business of the company shall be exercised by or under the direction of its managers").

{¶ 14} The parties do not dispute that 5151 Trabue was manager-managed, with Kahn as the company's sole manager. The dispute surrounds the trial court's interpretation and application of R.C. 1705.35 to the undisputed facts. R.C. 1705.35 states that certain documents "providing for the acquisition, mortgage, or disposition of property of a limited liability company are valid and binding upon the company if the instruments or documents are executed by one or more members of the company or, if the management of the company has not been reserved to its members, by one or more of its managers."

{¶ 15} The trial court concluded the statute limits such power to a manager in a manager-managed LLC; plaintiffs assert the statute allows either a manager or member of a manager-managed LLC to bind the LLC. The issues arising from the trial court's decision are two: (1) is the statutory language ambiguous, and (2) does application of the rules of statutory construction lead to the conclusion the trial court reached?

{¶ 16} The paramount goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute. *Yonkings v. Wilkinson*, 86 Ohio St.3d 225, 227 (1999); *Brooks v. Ohio State Univ.*, 111 Ohio App.3d 342, 349 (10th Dist.1996), citing *Featzka v. Millcraft Paper Co.*, 62 Ohio St.2d 245 (1980). In so doing, the court must first look to the plain language of the statute and the purpose to be accomplished. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 173 (1996) (internal quotations omitted).

{¶ 17} Words used in a statute must be accorded their usual, normal and customary meaning. *Id.*, citing R.C. 1.42. If the words in a statute are " 'free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation.' " *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, ¶ 12, quoting *Slingluff v. Weaver*, 66 Ohio St. 621 (1902), paragraph two of the syllabus. " 'An unambiguous statute is to be applied, not interpreted.' " *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 190 (1980), quoting *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus.

{¶ 18} " 'It is only where the words of a statute are ambiguous, uncertain in meaning, or conflicting that a court has the right to interpret a statute.' " *In re Adoption of Baby Boy Brooks*, 136 Ohio App.3d 824, 829 (10th Dist.2000), quoting *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81 (1997). "Ambiguity in a statute exists only if its language is susceptible of more than one reasonable interpretation." *Id.*, citing *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513 (1996).

{¶ 19} " 'When a statute is susceptible of more than one interpretation, courts seek to interpret the statutory provision in a manner that most readily furthers the legislative purpose as reflected in the wording used in the legislation.' *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St.3d 508, 513, 668 N.E.2d 498 (1996), citing *United Tel. Co. v. Limbach*, 71 Ohio St.3d 369, 372, 643 N.E.2d 1129 (1994), and *Harris v. Van Hoose*, 49

Ohio St.3d 24, 26, 550 N.E.2d 461 (1990)." *AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, ¶ 18. In construing an ambiguous statute, the court may consider a number of factors, including legislative history, the circumstances under which the statute was enacted, and the administrative construction of the statute. R.C. 1.49; *Family Medicine Found., Inc. v. Bright*, 96 Ohio St.3d 183, 2002-Ohio-4034, ¶ 9.

{¶ 20} "Further, when interpreting a statute, courts must 'avoid an illogical or absurd result.' *State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 122 Ohio St.3d 148, 2009-Ohio-2522, 909 N.E.2d 610, ¶ 34 (Pfeifer, J., dissenting), citing *In re T.R.*, 120 Ohio St.3d 136, 2008-Ohio-5219, 896 N.E.2d 1003, ¶ 16." *AT&T Communications*. Rather, courts must seek to construe the statute to operate sensibly. *State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, ¶ 19, quoting *State ex rel. Saltsman v. Burton*, 154 Ohio St. 262, 268 (1950) (noting " '[s]tatutes must be construed, if possible, to operate sensibly and not to accomplish foolish results' "); *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, ¶ 25 (observing that courts should construe statutes and rules to avoid unreasonable or absurd results).

{¶ 21} R.C. 1705.35 is ambiguous and susceptible of different interpretations. The interpretation plaintiffs ascribe is plausible, as the statute states, with intervening additional words, that a member or manager may engage in the activity described in the section. The trial court's interpretation is equally plausible, as the statute suggests that if an LLC is manager-managed, then the manager is the agent that can bind the LLC. *See Holdeman v. Epperson*, 111 Ohio St.3d 551, 2006-Ohio-6209, ¶ 19 (stating the term "if," as used in R.C. 1705.15, 1705.18, and 1705.20, is a "limiting word[]"); R.C. 1.02(F) (stating " '[a]nd' may be read 'or,' and 'or' may be read 'and' if the sense requires it").

{¶ 22} Had the legislature intended what plaintiffs contend, it easily could have stated that *either* a manager or member has the authority to bind the LLC in the transactions described in R.C. 1705.35. It did not. Similarly, had the legislature intended the interpretation the trial court ascribes, it again could have stated its intent more clearly, providing that a member may bind the LLC, *but if* the LLC is manager-managed, then the manager can bind the LLC in the transactions the statute describes. The

legislature did neither, and we are left to determine, through application of the rules of statutory construction, what it intended.

{¶ 23} To avoid an absurd interpretation of the statute, the statute needs to be coherent in its application not only internally, but also in the context of the other provisions in R.C. Chapter 1705 addressing LLCs. Plaintiffs' interpretation fails in both respects. Initially, to interpret R.C. 1705.35 to allow a member to bind a manager-managed LLC is unworkable. Although the manager is charged with operating the LLC under R.C. 1705.25, plaintiffs' interpretation of R.C. 1705.35 would allow a one percent member, without the manager's knowledge or consent, to obligate the LLC and its assets, all possibly undermining business transactions the manager planned for the LLC. Such an interpretation presents an unworkable framework for any business and takes the LLC back into the pitfalls of a simple partnership.

{¶ 24} Not only is such an interpretation of R.C. 1705.35 internally unworkable, it raises comparable problems in the application of R.C. 1705.27, worded similarly to R.C. 1705.35. R.C. 1705.27 provides that "[t]he members of a limited liability company or, if and to the extent authorized by its members, the managers of a limited liability company may adopt bylaws that are not inconsistent with the articles of organization or the operating agreement." Plaintiffs' interpretation would allow both members and managers to move forward with efforts to adopt potentially inconsistent bylaws, possibly culminating in questions as to whose bylaws control.

{¶ 25} Nor does R.C. 1705.44 suggest a different interpretation of R.C. 1705.35. R.C. 1705.44 provides that "the members of a dissolved limited liability company who have not wrongfully dissolved the company, a liquidating trustee selected by those members, or, if the management of the company has not been reserved to its members, its managers may wind up the affairs of the company." Although the language bears some similarity to both R.C. 1705.27 and 1705.35, it compels a different interpretation. Unlike R.C. 1705.27 and 1705.35, R.C. 1705.44 lists three entities possibly able to dissolve the LLC, its members, liquidators or managers, and connects them with "or." Such language typically is construed to mean any of the three. To achieve the same result with the two alternatives used in R.C. 1705.27 and 1705.35, the statute would need "either-or" language lacking in both statutes.

{¶ 26} The reasonable interpretation of R.C. 1705.35, consistent with the practicalities of conducting a business, permits the members to take such action unless the members have vested the authority in a manager. If so, the manager, not the members, may obligate the LLC under R.C. 1705.35.

{¶ 27} Significantly, such an interpretation is consistent with the other provisions of the chapter. R.C. 1705.25 specifies who retains the management of an LLC, providing that the members retain the authority to manage an LLC if the members reserve that right to themselves. R.C. 1705.25(A). In that case, "[e]very member is an agent of the company for the purpose of its business, and the act of every member * * * binds the company." R.C. 1705.25(A)(1). By contrast, if the management is not reserved to its members because the members have chosen to be a manager-managed LLC, then "every manager is an agent of the company * * * and the act of every manager * * * binds the company." R.C. 1705.25(B)(1). Nothing in the section suggests the role of the members and manager overlaps: if a manager manages the LLC, then the manager, not the members, binds the LLC.

{¶ 28} Plaintiffs suggest that if the trial court's interpretation of R.C. 1705.35 be proper, the legislature would have had no need to separately address by-laws and property acquisition in R.C. 1705.27 and 1705.35, respectively; R.C. 1705.25 would govern all issues. Plaintiffs' argument, however, does not acknowledge additional language in R.C. 1705.25. Although the statute clearly delineates the authority of a member in a member-managed LLC and that of a manager in a manager-managed LLC, those provisions apply only to transactions in the usual way the business is conducted. In other circumstances, more than one member is needed to achieve the activities described in R.C. 1705.25(A)(3). Similarly, the manager alone lacks the authority to engage in the activities listed in R.C. 1705.25(A)(3). R.C. 1705.25(B)(3).

{¶ 29} Accordingly, to allow either a single manager or member to engage in the activities R.C. 1705.27 and 1705.35 address, the legislature was required to separately delineate that authority. The legislature, however, not likely would have kept the lines so clear between members and managers in R.C. 1705.25 and then blurred them to the extent reflected in plaintiffs' interpretation of R.C. 1705.35. Instead, to be consistent with the other sections, R.C. 1705.35, unclear on its face, should be interpreted as the trial

court did: the member may bind the LLC under R.C. 1705.35 unless a manager manages the LLC.

{¶ 30} Lastly, Ohio did not adopt the Uniform Limited Liability Act in whole. The Act nonetheless provides some guidance in interpreting Ohio's R.C. Chapter 1705. *Darwin Limes, L.L.C. v. Limes*, 6th Dist. No. WD-06-049, 2007-Ohio-2261, ¶ 33, fn. 6 (relying on the Uniform Limited Liability Company Act to support its interpretation of an R.C. Chapter 1705 section, analyzing R.C. 1705.15, and interpreting the statute "consistent with the language of the Uniform Limited Liability Company Act, and with interpretation of LLC statutes in treatises").

{¶ 31} Much like R.C. 1705.25 in substance, the Uniform Limited Liability Company Act (Unif.Ltd.Liability Co. Act (1996) § 301 ("ULLCA1996")) provides that in "a manager-managed company: (1) A member is not an agent of the company for the purpose of its business solely by reason of being a member." ULLCA1996 § 301(b). In such an LLC, a manager is an agent of the company for the purpose of the company's business and may bind the company. *Id.* Thus, "any member of a member-managed company or manager of a manager-managed company may sign and deliver any instrument transferring or affecting the company's interest in real property." ULLCA1996 § 301(c). The comment to § 301 reinforces that provision, stating that "[m]embers of a manager-managed company are not as such agents of the firm and do not have the apparent authority, as members, to bind a company." *See also* Steven C. Alberty, *1 Advising Small Businesses*, Section 7:23 (2012) (stating that "[i]f the LLC is manager managed, members have no apparent authority to act as agents of the LLC"); F. Hodge O'Neal and Robert B. Thompson, *2 Close Corp and LLCs: Law and Practice*, Section 8:7 (3d Ed.2012) (stating that "[i]n manager-managed LLCs, members have no statutory agency power, following the pattern of limited partners in partnerships").

{¶ 32} The difference in language used in the uniform act and Ohio's version may arise from the premise underlying each. Under ULLCA1996 § 203(a)(6), an LLC must set forth in its articles of organization "whether the company is to be manager-managed," including the name and address of the manager. *See also* ULLCA2006 § 407. By contrast, R.C. 1705.24 provides that LLCs are member-managed "[u]nless otherwise provided in writing in the operating agreement." Indeed, R.C. Chapter 1705 does not refer to

manager-managed LLCs as such, but rather to LLCs where "the management of the company is not reserved to its members." *See also* R.C. 1705.04; 1705.35. The distinction may help to explain why R.C. 1705.35 does not use the terms "manager-managed" or "member-managed," a factor that possibly contributes to the ambiguity in the statute. Instead, R.C. 1705.35 initially addresses a default LLC that is member-managed and accordingly allows members to execute mortgage documents. It then contrasts those with LLCs where "the management of the company has not been reserved to its members," that is manager-managed LLCs where managers may bind the LLC.

{¶ 33} In the final analysis, the rules of statutory construction applied to the ambiguous language in R.C. 1705.35 produce the result the trial court reached: the statute authorizes members to sign mortgage instruments in member-managed LLCs, provides managers the same authority to sign instruments in manager-managed LLCs, but does not permit members to bind manager-managed LLCs.

{¶ 34} Plaintiffs' first six assignments of error are overruled.

IV. Seventh Assignment of Error – Apparent Authority

{¶ 35} The remaining issue is whether Rhodehamel acted with apparent authority. The Uniform Limited Liability Company Act amended in 2006 precludes application of apparent authority, rejecting the concept. It instead explains that "[a]n LLC's status as member-managed or manager-managed determines whether members or managers have the statutory power to bind. * * * A third party must check the public record, which may reveal that the LLC is manager-managed, which in turn means a member as member has no power to bind the LLC." ULLCA2006 § 301, Comment.

{¶ 36} Unlike the uniform act, R.C. Chapter 1705 does not charge the public with constructive knowledge of the terms of an LLC's documents simply because they were filed with the Secretary of State. R.C. 1705.07. Even if apparent authority remains a viable basis to bind an LLC under R.C. Chapter 1705, the assumption does not assist plaintiffs' argument. Initially, even though plaintiffs in one portion of their appellate brief assigned the trial court's ruling on apparent authority as error, they did not argue it in their brief. *See Summit Cty. Children Servs. Bd. v. State Personnel Bd. of Rev.*, 10th Dist. No. 10AP-780, 2011-Ohio-2543, ¶ 28 (concluding that "[p]ursuant to App.R. 12(A)(2), we may choose to disregard any assignment of error that an appellant fails to separately argue").

{¶ 37} Moreover, the trial court appropriately concluded the record presents no basis to find Rhodehamel had apparent authority to act here. As the trial court correctly noted, "[u]nder an apparent-authority analysis, the acts of the principal, rather than the agent, must be examined." *Groob v. Keybank*, 108 Ohio St.3d, 348, ¶ 56, 2006-Ohio-1189. Apparent authority arises when "the principal held the agent out to the public as possessing sufficient authority to act on his behalf," a "person dealing with the agent knew these facts," and the person "acting in good faith had reason to believe that the agent possessed the necessary authority." *Ohio State Bar Assn. v. Martin*, 118 Ohio St.3d 119, ¶ 41, 2008-Ohio-1809.

{¶ 38} Here, the trial court found such evidence to be absent, Rhodehamel forged the documents that supposedly defined his authority, he delivered them to the lender, and he assured plaintiffs he had the requisite authority to procure the loan. Plaintiffs point to no evidence suggesting the LLC in any way held Rhodehamel out as having the authority to act on behalf of the LLC. Even one letter on which plaintiffs relied in the trial court was not made to plaintiffs until well after the transaction at issue was completed.

{¶ 39} Accordingly, plaintiffs' seventh assignment of error is overruled.

V. Disposition

{¶ 40} Having overruled plaintiffs' seven assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶41} Because I simply cannot agree with the majority's interpretation of R.C. 1705.35, I dissent.

{¶42} R.C. 1705.35 reads:

> **Execution of instruments regarding acquisition or disposition of property**
>
> Instruments and documents providing for the acquisition, mortgage, or disposition of property of a limited liability

> company are valid and binding upon the company if the instruments or documents are executed by one or more members of the company or, if the management of the company has not been reserved to its members, by one or more of its managers.

{¶43} The statute clearly and unambiguously states that a member can bind a limited liability company ("LLC"). At all relevant times, David Rhodehamel was a member of 5151 Trabue Ltd. Thus, he clearly could bind 5151 Trabue Ltd. The position of the majority of this panel that R.C. 1705.35 is ambiguous is clearly not tenable.

{¶44} R.C. 1705.35 also allows an LLC to be bound by a manager, but only for LLCs which have not reserved the power to bind the LLC to members. Thus, the statute allows all members and some managers to bind the LLC. Again, R.C. 1705.35 is not in the least ambiguous and clearly allows members of an LLC, even dishonest members of an LLC, to bind the LLC.

{¶45} If a member of an LLC abuses the position of member, R.C. 1705.23 provides that the member is liable to the LLC to return any unauthorized payment to the LLC. This is the remedy provided by the pertinent statutes. The statutes clearly do not provide a defense for the LLC against third parties who have made loans to the LLC based upon a member's signature.

{¶46} In some ways, the Ohio statutory scheme parallels partnership law present in Ohio before LLCs were permitted. A partner could bind the partnership in financial transactions. However, under partnership law, the individual partners could be sued for the debts of the partnership. Under LLC law, the debt of an LLC is solely the debt of the LLC. It is not the debt of the individual members of the LLC. Thus, LLCs provide protection for individuals or individual corporations who joined together to form an LLC, as compared to individuals or corporations who joined together to form a partnership.

{¶47} Another flaw in the majority's opinion is in its position that third parties who loan money to an LLC are somehow bound by the terms of the operating agreement of the LLC. Lenders can loan money to an LLC without seeing the terms of the LLC's operating agreement. R.C. 1705.35 clearly allows members of the LLC to seek loans from third parties. All the third party lender has to know is that it is a member of the LLC who is seeking the loan.

{¶48} The majority's discussion of legislature intent also troubles me. We do not delve into legislative intent when the language of a statute is clear. Further, the very conjunction which the majority faults the legislature for not including in the statute to clarify the statute is there. Again, R.C. 1705.35 reads:

> Instruments and documents providing for the acquisition, mortgage, or disposition of property of a limited liability company are valid and binding upon the company if the instruments or documents are executed by one or more members of the company or, if the management of the company has not been reserved to its members, by one or more of its managers.

{¶49} The statute enables members to bind the LLC and it enables managers, in certain circumstances, to bind the LLC. It enables both, not one instead of the other. The use of "or" in a statute works in the conjunctive. Both options are possible and one option does not exclude the other. Interestingly, the majority acknowledges the correct interpretation of the word "or" in discussing R.C. 1705.44.

{¶50} The majority also acknowledges that the Ohio legislature clearly rejected its position on the proper interpretation of R.C. 1705.25 when the legislature rejected the portions of the Uniform Limited Liability Company Act which stated that in a manager managed company, "[a] member is not an agent of the company for purpose of its business solely by reason of being a member." ULLCA § 301(b)(1). I see no reason to get to the issue of legislative intent, because the language of R.C. 1705.25 is clear on its face. However, if legislative intent is to be considered, the legislative intent could not be more clearly demonstrated than by the legislature's rejection of the very language and position the majority now espouses.

{¶51} In brief, I would sustain the first, second, third, fourth, and fifth assignments of error, and overrule the sixth assignment of error. My ruling of the first five assignments of error would rule the seventh assignment of error moot and I would reverse the trial court's decision. Because the majority does not, I dissent.