

IN THE SUPREME COURT OF OHIO

KATHLEEN BLUS,	:	Case No. 2025-1431
	:	
APPELLANT,	:	On Appeal from the Erie County Court of
	:	Appeals, Sixth District
Vs.	:	Case No. E-24-029
	:	
CIVISTA BANK,	:	
	:	
APPELLEE.	:	
<hr/>		
DAVID JOHNSON,	:	
	:	
APPELLANT,	:	On Appeal from the Erie County Court of
	:	Appeals, Sixth District
vs.	:	Case No. E-24-029 (E-24-30)
	:	
CIVISTA BANK,	:	
	:	
APPELLEE.	:	

APPELLEE’S MEMORANDUM OPPOSING JURISDICTION

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**EXPLANATION OF WHY THIS CASE IS NOT
OF PUBLIC OR GREAT GENERAL INTEREST**

This discretionary appeal arises from a garden-variety breach of contract action brought by two consumers who challenged Appellee-Civista Bank’s (“Civista”) handling of overdrafts from their checking accounts. The Sixth Appellate District’s Decision and Judgment (“Decision”),¹ affirming the trial court’s grant of summary judgment rests entirely on a straightforward application of well-established law unique to the specific facts of this case—and not on a statement of law that is unsettled, confusing, overreaching, or in conflict with another appellate district in this state.

Below, the parties agreed to consolidate two separate cases and to present them to the trial court on a motion for summary judgment. Following briefing and an extensive oral argument, the trial court granted Civista’s motion, ruling that the assessment of overdraft fees (“OD Fees”) and non-sufficient funds fees (“NSF Fees”) was permitted by the clear and unambiguous language of two separate customer agreements dated 2018 and 2020, respectively.

Appellants (referred to individually as “Blus” and “Johnson”), appealed to the Sixth Appellate District, raising five assignments of error. After thorough consideration of Appellants’ arguments, the court of appeals issued a detailed decision finding that each lacked merit and affirmed the trial court’s grant of summary judgment in full. Appellants now file this discretionary appeal alleging that the court of appeals erred. A review of their single proposition of law shows that Appellants seek nothing more than error correction. Historically this Court has not accepted discretionary appeals presented mainly to address alleged errors of the trial and appellate courts limited to the case on appeal.

¹ The Decision is attached to the Appellants’ Memorandum In Support Of Jurisdiction Of Appellants Kathleen Blus and David Johnson (“Memorandum In Support”) at Appendix A (“Appx. A”).

Nor are Appellants asking this Court to resolve an unsettled question of law or a conflict among districts. They are asking for a wholesale rewrite of Ohio contract law. Their proposed “reasonable consumer” standard would upend centuries of precedent, inject uncertainty into every standardized contract, and create litigation over subjective expectations rather than objective text. The Sixth Appellate District applied the correct rule: enforce the plain language of the contract. This case is fact-specific, governed by clear agreements, and offers no guidance beyond its own record. There is no reason for this Court to grant review.

STATEMENT OF THE CASE AND FACTS

Appellants were parties to two written contracts with Civista. Decision at ¶ 12. The first contract is called the “Consumer Account Disclosures,” and is dated September 17, 2018 (the “2018 Agreement”). The second contract is titled “Notice Of Change To Our Funds Availability Policy And the Terms Of Your Account,” dated July 1, 2020 (the “2020 Agreement”). *Id.* at ¶ 2.

As permitted under these contracts, Civista charged Appellants OD Fees when point-of-sale debit card “swipes” were presented for payment from their overdrawn accounts. Appellants argued that as long as their balances were sufficient when the merchant first initiated a point-of-sale transaction, that Civista should have “sequestered” the funds and “held” them until that purchase was presented for payment—even though payment of their *intervening* transactions overdrew their accounts and was the reason they lacked sufficient funds to pay. Appellants call this the “authorize-positive-purportedly-settle-negative” or “APPSN” theory. *Id.* at ¶ 5.

Appellant Johnson also alleges that on one occasion under the 2018 Agreement he was charged more than one NSF fee on the same pre-authorized ACH transaction when his account didn’t have enough money to pay the charge the first time—or when his merchant’s bank re-presented the charge two more times in an effort to get paid. *Id.* at ¶ 5.

In NSF transactions a customer has given a merchant prior authorization to make periodic deductions from an account. Examples include monthly withdrawals for insurance, utilities, installment loans, and the like. If the account has insufficient funds to pay, the item is returned unpaid, and an NSF fee is charged. The merchant's bank, via the Automated Clearing House ("ACH") system, is permitted to re-submit the payment up to two more times. Civista may assess fees for each subsequent presentment if the account remains overdrawn.

The latter two presentments are the "retries" which are the subject of Appellant Johnson's second breach of contract claim, which he calls the "Multiple NSF Fee" theory." Decision at ¶ 5. *See, e.g., Lambert v. Navy Army Fed. Credit Union*, 2019 WL 3843064, * 1 (E.D. Va. 2019) (describing a retry transaction).

On April 25, 2025, the trial court granted summary judgment in favor of Civista. With respect to the APPSN theory, the trial court reasoned that both the 2018 and 2020 Agreements "unambiguously provide that a customer will not have access to his or her funds immediately; that the available balance can be less than the actual balance on a customer's account; and that the NSF or OD Fees may be charged when the available balance is insufficient to cover the item presented." *Id.* at ¶ 9. The trial court rejected Appellants' argument that the NSF determination is made at the time of authorization, not payment. The trial court also rejected Appellants' argument that Civista was required to "sequester" funds relating to specific temporary authorization holds.

With respect to the Multiple NSF Fee theory under the 2018 Agreement, the trial court rejected Johnson's argument that the NSF Fee refers to a single order or instruction for payment, and ruled that Civista did not breach the contract when it charged an NSF Fee each time a merchant re-submitted an item for payment. *Id.* at ¶ 10.

Appellants timely appealed the trial court's decision and, on September 12, 2025, the Sixth

District Court of Appeals entered its Decision affirming the ruling of the trial court, with one dissenting opinion.

LAW AND ARGUMENT

Appellants’ Proposition of Law No. 1: In determining whether a customer’s checking account contract with a bank is ambiguous, a court must credit how that customer could reasonably understand the meaning of the contract language used, taking into account the ordinary meaning of words and a customer’s expectations from everyday life.

Appellants ask this Court “to recognize the correct standard for interpreting consumer contracts” which they claim requires a court to answer this question: “[h]ow would a reasonable consumer understand each contract?” Appellants’ Brief at 2, 5. Appellants acknowledge that Ohio has never before recognized such a rule, but argue that because other states have done so in the context of the so-called “APPSN” cases, so should the Supreme Court of Ohio. *Id.* at 2. Appellants’ argument is wrong as a matter of law and unnecessary here because the Sixth District correctly ruled that the 2018 and 2020 Agreements are clear and unambiguous, thus precluding any examination of extrinsic evidence, much less what a “reasonable consumer”—a fictional third party—might expect.

The “Reasonable Consumer” Standard Contradicts Long-Settled Ohio Contract Law

From the inception of this case, Appellants have argued that both the trial and appellate courts should consider “extrinsic evidence” and adopt a “reasonable consumer” standard to govern the interpretation of the customer account agreements. Nine times the dissent below cited a variation on this theme, including references to a “reasonable consumer,” Decision at ¶¶ 76, 86, 89; “a reasonable customer,” ¶ 76; “a typical customer,” ¶¶ 85, 102; “a typical bank customer,” ¶ 85; “a consumer’s perspective,” ¶ 97; and “the perspective of a consumer,” ¶ 105.

If applied, both Appellants and the dissent contend that this standard would automatically create “a factual issue [] regarding whether a typical customer, upon reading the 2018 [and 2020]

agreement, would reasonably understand” the meaning of the contract. Memo. at 12, quoting Decision at ¶ 103.

The majority rejected this argument for the unassailable reason that “the perspective of a banking customer . . . does not permit the customer to replace” the language in the contracts “with his or her expectations from everyday experience.” Decision at ¶ 14; *see also* ¶ 27.

Starting with well-established law, the court of appeals stated that “in all cases involving contract interpretation, we start with the primary interpretive rule that courts should give effect to the intentions of the parties as expressed in the language of their written agreement.” *Id.* at ¶ 17. Ohio law is clear that it is the duty of the court to exhaust principles of contract interpretation *before* resorting to extrinsic evidence of the parties’ intent. *Id.*, citing *Sutton Bank v. Progressive Polymers, L.L.C.*, 2020-Ohio-5101, ¶ 15. As one court noted in the APPSN context, “If the text of the agreement is unambiguous, then the court is without authority to resort to extrinsic evidence’ such as public confusion, ‘in interpreting its meaning.’” *Lambert v. Navy Fed. Credit Union*, 2019 WL 3843064 (E.D. Va. 2019). “The fact that a customer may have . . . reasonably believed that a debit card transaction would be immediately debited from the account at the time of a transaction, does not create an ambiguity when the contract at issue clearly states otherwise.” *Green v. Widget Fin. Credit Union*, 2023 WL 7017743, *5 (Pa. C.P.). In Ohio, courts may not use extrinsic evidence to create ambiguity; the ambiguity must be present on the face of the contract. *Westbrock v. Western Ohio Health Corp.*, 137 Ohio App.3d 304, 315 (2nd Dist. 2000).

Here, the court of appeals carefully and thoroughly interpreted each of the challenged contractual provisions, found them to be clear on their face, and refused to create ambiguity by importing a “reasonable consumer” rule. There was no need for the court’s analysis to go further.

Moreover, the proposed “reasonable consumer” standard isn’t even “extrinsic evidence.” Under Ohio law, extrinsic evidence for contract interpretation is limited to three primary categories: “(1) the circumstances surrounding *the parties* at the time the contract was made, (2) the objectives *the parties* intended to accomplish by entering into the contract, and (3) any acts by *the parties* that demonstrate the construction they gave to their agreement.” *United Dairy Farmers, Inc. v. Value Development Corp.*, 2023-Ohio-4232, ¶ 52 (5th Dist.) (emphasis added), quoting *Lutz v. Chesapeake Appalachia, L.L.C.*, 2016-Ohio-7549, ¶ 9. In each case, extrinsic evidence focuses on the contracting *parties* themselves; not on the expectation of a third-party “consumer” with no connection to the parties at all.

What’s more, adoption of Appellants’ proposed “reasonable consumer” standard to govern consumer contracts would wholly contradict and implicitly overrule the plain language rule, create ambiguity by impermissibly expanding the scope of extrinsic evidence, and contradict centuries of controlling precedent.

Indeed, imagine two Civista customers with the same contract. One is found to be a “reasonable consumer” and the other is not. In that scenario—promoted by the Appellants—the *same* contract would mean *different* things to each person depending on how the “reasonable consumer” standard was applied. The result is unpredictable, unworkable, and absurd. It is also unfair. By creating an express presumption in favor of the fictional “reasonable consumer” and adverse to any person or entity involved in a consumer transaction, Appellants’ proposal would unconstitutionally abridge the substantive rights of a specific class of Ohio citizens and businesses in violation of Ohio Const. Art. IV, § 5 by depriving them of the neutral and uniform application of Ohio contract law. Appellants’ proposal is contrary to the public interest.

The Agreements Unambiguously Permit Assessment of OD and NSF Fees.

Appellants’ invention of new “extrinsic evidence” is wholly unnecessary because, as the court of appeals correctly held, both the 2018 and 2020 contracts clearly and unambiguously permitted Civista to assess both OD and NSF Fees.

Starting with the 2018 Agreement, it describes the first stage in the debit/point-of-sale transaction, which includes both the temporary debit hold and its effect on the available balance to determine overdrafts at the time of payment:

A temporary debit authorization hold affects your account balance – On debit card purchases, merchants may request a *temporary hold* on your account for a specified sum of money, which may be more than the actual amount of your purchase * * * * This temporary hold, and the amount charged to your account, will eventually be adjusted to the actual amount of your purchase, but it may be up to three days before the adjustment is made. Until the adjustment is made, the amount of funds in your account available for other transactions will be reduced by the amount of the temporary hold * * * *

Agreement at 3 (emphasis added).

Next, the Customer Overdraft Policy provision describes the second stage in the debit card transaction, including how intervening transactions can affect the available balance and result in the assessment of fees:

CUSTOMER OVERDRAFT POLICY

An insufficient balance can result from several events, such as: (1) the payment of checks, electronic funds transfers or other withdrawal requests; (2) payments authorized by you; (3) the return of unpaid items deposited by you; (4) bank service charges; or (5) the deposit of items which, according to the bank’s Funds Availability Policy, are treated as not yet available or finally paid. *We are not obligated in any way to pay any item presented for payment if your account does not contain sufficient funds* * * * *

(Emphasis added.)

This section also includes the order of payment provision, which explains how the payment order can cause the assessment of fees:

In the normal course of business, we generally pay items presented in a branch (over the

counter) or at an ATM first, then electronic transactions and then checks in serial number order * * * * Also, please be aware that *the order of payment item may create multiple overdraft items* during a single banking day for which you will be charged our Non-Sufficient Funds (NSF) item paid fee of \$35 for each overdraft item paid.

2018 Agreement at 18 (emphasis added).

Thus, reading all of the relevant terms together, the contract makes clear that *all* transactions, including those subject to a temporary hold, are paid in a prescribed order—not in the order they may have been authorized or received.

Notably, the payment order provision does not say that it operates subject to the temporary hold, or that the payment order language does not apply to transactions for which there was a temporary hold. *See, e.g., Razavi v. Green State Credit Union*, 2020 WL 7379064, *7 (Dist. Ct. Iowa) (contract did not “provide that any such hold means that the payment order language of the contract should be disregarded.”).

Based on the forgoing provisions, the court of appeals concluded that:

*** the plain and unambiguous terms of the 2018 Agreement provide that when a Civista Bank customer swipes his or her debit card at a merchant and the transaction is authorized, a temporary hold is placed on the customer’s account. The funds are not paid out of the account, however, until the time of settlement at which point the NSF Fee assessment occurs. Civista Bank clearly sets forth the order of payment to be, generally, “items presented in a branch (over the counter transactions) or at an ATM first, then electronic transactions and then checks in serial number order, per the bank’s policy,” and an NSF Fee is assessed whenever “the payment of checks, electronic funds transfers or other withdrawal requests, [or] payments authorized by [the customer]” exceeds the available balance. Therefore, the 2018 Agreement unambiguously authorizes Civista Bank to impose an NSF Fee on debit card transactions that authorize into a positive balance but settle into a negative balance.

Decision, ¶ 30.

With respect to the 2020 Agreement, the court of appeals noted that the Appellants “raise[d] no new arguments” and thus affirmed the trial court ruling that it, too, clearly and unambiguously supported assessment of OD Fees. Decision, ¶ 48.

APPELLANTS' ARGUMENTS

The "APPSN" Claims

Appellants' strategy below, as here, was to "cobble together language from different parts of the agreement" to manufacture ambiguity in the contracts' language to create and exploit a negative presumption against Civista. Decision, ¶ 22. Appellants argue that the words "hold," "honor," "pay," and "presented for payment" are susceptible to multiple meanings, and are thus ambiguous. *See* Memorandum in Support at 5-10. In support, Appellants contend that "a reasonable customer's understanding of the term 'hold'" means that once the temporary hold is placed on funds for a point-of-sale debit card transaction, the amount is effectively sequestered until that transaction clears. Memorandum In Support at 6.

The court of appeals disagreed and correctly held that the "'hold' referred to in the agreement is a 'temporary debit authorization hold'" that is subsequently "adjusted to the actual amount of [the] purchase." Decision, ¶ 24.

The fact that [the hold] is "temporary" and will "be adjusted" distinguishes it from Civista Bank's "payment" of the transaction out of the customer's account. Indeed, if the terms were synonymous, then the contemplation that the hold could be "adjusted" would be nonsensical since the funds would have already transferred from the customer's account to the merchant.

Id.

Appellants next argue that the word "honor" is subject to multiple interpretations because "a reasonable customer" assumes Civista "honors" the debit swipe at the moment of authorization; not the moment the charge is actually presented for payment. Memorandum In Support at 7.

Relatedly, Appellants argue that "the typical bank customer" would understand the "undefined" words "pay" and "presented for payment" to mean that payment occurs at the moment of the debit card swipe, not when the merchant presents the charge for payment three days later. Memorandum In Support at 8-9.

The court of appeals rejected this argument, noting that when read as a whole, the 2018 Agreement “repeatedly refers to NSF Fees being determined at the time the charge is ‘presented for payment.’” Decision, ¶ 26. The court of appeal’s conclusion was supported by the plain meaning of the word “[p]ayment,’ while not defined in the agreement, commonly means the ‘[p]erformance of an obligation by the delivery of money * * * *’” *Id.*, ¶ 28. The court emphasized that in the 2018 Agreement, “‘payment’ is *always* used in the context of Civista Bank paying or making the payments.” *Id.* (emphasis in original).

In reaching this conclusion, the court relied on well-settled law that “[i]n interpreting a provision in a written contact, the words used should be *read in context* and given their usual and ordinary meaning.” *Id.* (emphasis in original).

The court also rejected the absurdity that would result if Appellants’ argument were to be accepted:

If, as appellants suggest, payment occurs at the time of authorization, then the agreement’s use of the term “hold” would be rendered meaningless, which is an interpretation we cannot abide. *See State ex rel. Casey v. Brown*, 2023-Ohio-2264, ¶ 46 (“This court ‘avoid[s] interpretations that render portions [of a contract] meaningless or unnecessary.’”); *American Eagle Invests., Inc. v. Marco’s Franchising, LLC*, 2024-Ohio-3038, ¶ 39 (6th Dist.) (“In interpreting a contract, a court must avoid any interpretation that would render terms or provisions superfluous or meaningless.” (Quotations omitted.)).

Id. at ¶ 29.

Notably, the court of appeals considered and rejected the Ohio and out-of-jurisdiction cases relied upon by Appellants for “appl[ying] the same logic advanced by appellants.” *Id.* at ¶ 31. And, of particular importance here, the court of appeals observed that “while [the cases] analyzed similar contractual language, we do not find them persuasive relative to the specific, unambiguous language in this case.” *Id.*

The linguistic differences among these contracts destroys any claim that this is a case of broad significance. A decision here will not resolve other disputes and will not guide cases

involving similar agreements with different terms. This case is a unicorn—unique, fact-specific, and of little precedential value beyond these contracts. Accepting jurisdiction serves no purpose.

The “Multiple NSF Fee” Claim

Appellant Johnson also challenges the assessment of multiple NSF Fees under the 2018 Agreement when his account was overdrawn each time a merchant re-submitted a pre-authorized ACH charge for payment. Memorandum In Support at 11-12.

Johnson argues that the word “item” is ambiguous because a “typical consumer” would understand it to “mean an order by the accountholder to pay—not a third party’s resubmission” of a previously rejected charge. *Id.* at 12. Johnson continues that the “typical consumer’s” understanding is supported by the fact that the undefined word “item” is stated in the singular, which must mean that an NSF Fee may only be assessed once—not on subsequent re-submissions. *Id.*

The court of appeals rejected Johnson’s argument, holding that it was contrary to the plain language of the 2018 Agreement as well as the context within which the word “item” appeared. The court first analyzed the language of the contract, observing that the term “per item” appeared just twice in the contract, both times “in the context of an overdraft item that is paid.” Decision, ¶ 50. The use of the singular “item” in this context was “entirely logical since a transaction into insufficient funds that the bank nonetheless elects to pay is satisfied and cannot be re-presented.” *Id.*

In contrast:

* * * where the 2018 Agreement refers to presented items that are returned *unpaid* it uses expansive language such as “any” and “each:” “We are not obligated to pay *any item presented for payment* if your account does not contain sufficient funds;” “You will be charged *an NSF item returned unpaid fee of \$35 for each item returned.*” The expansive language clearly states that each item that is returned unpaid is subject to a \$35 fee.

Id. (emphasis in original).

The court said that this interpretation reflects the ordinary meaning of the word “item,” which is defined as “a negotiable instrument to pay money handled by a bank for collection or payment.” *Id.* Because the 2018 Agreement uses the term “item” “in the context of the negotiable instrument or order to pay that is presented to the bank,” it is “whatever is presented to the bank for payment on any particular day, regardless of whether it is being presented for the first, second, or third time.” *Id.* at ¶ 53. The court rejected Johnson’s “attempt to restrict the definition of ‘item’ to the specific order to pay created by the accountholder irrespective of its presentment to the paying bank” as both “contrary to the common definition of the term ‘item’ and its use in the 2018 Agreement.” *Id.* at ¶ 51.

Notably, the majority acknowledged the dissent’s argument that “a customer would necessarily read the banking contract from the perspective of a banking customer,” but firmly rejected it because “doing so does not permit the customer to replace the definition of the language used in its context in the agreement with his or her expectations from everyday experiences.” *Id.* at ¶ 54.

The court of appeals’ Decision finds additional textual support in that the 2018 Agreement “does not place a limit on how many fees [Civista] may charge if an item is presented multiple times and the account holder lacks sufficient funds.” *Ross v. Navy Army Comm. Credit Union*, 2022 WL 100110, at *4 (S.D. Tex. 2022); *accord Page v. Alliant Credit Union*, 52 F.4th 340, 347-348 (7th Cir. 2022) (because the contract provided for a \$25 “Nonsufficient Fund Item (each),” the agreement unambiguously permitted multiple fees on the same transaction); *Lambert v. Navy Fed. Credit Union*, 2019 WL 3843064, *3 (E.D. Va. 2019) (“[a] fee may be assessed ... for each returned debit item” unambiguously permitted fees on each retry); *Palfi v. Spire Credit Union*, 2023

WL 2589186, *4 (Dist. Ct. Minn.) (“plain language ... permits the assessment of NSF fees ‘for each item’, ... regardless of whether it is paid or returned.”).

The court of appeals correctly held that the 2018 Agreement permitted NSF fees on each re-try where the account holder lacked sufficient funds to make the payment.

CONCLUSION

This case is a straightforward contract dispute resolved by settled Ohio law. The lower courts analyzed clear, unambiguous contractual language and followed established principles—no ambiguity, no breach, and no public or general interest.

The Sixth District got it right. The contract means what it says. Undefined terms are not automatically ambiguous. Poorly reasoned, inapposite cases and hypothetical consumer expectations do not control. Adopting Appellants’ approach would inject uncertainty into every standardized contract in Ohio. This case does not raise a matter of public or great general interest. There is no reason for this Court to accept review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that, on November 20, 2025, a true and accurate copy of the foregoing Memorandum In Opposition of Appellee Civista Bank was served by email upon the following:

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