In the United States Court of Appeals for the Eleventh Circuit

No. 11–11662

JOHN M. FLOYD & ASSOCIATES, INC.,
Plaintiff/Appellant,

v.

FIRST FLORIDA CREDIT UNION,
Defendant/Appellee.

On Appeal from the U.S. District Court for the
Middle District of Florida, No. 09–cv–168
(Honorable Monte C. Richardson, U.S. Magistrate Judge)

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

U.S. District Judge Henry Lee Adams, Jr.

Howard J. Bashman, Esquire

Curtis Hugh Blanton, Jr., Esquire

First Florida Credit Union

U.S. District Judge Marcia Morales Howard

John M. Floyd & Associates, Inc.

Jack E. Kiker, III, Esquire

Kosto & Rotella, PA

U.S. Magistrate Judge Monte C. Richardson

Seaboard Credit Union

James Eric Sorenson, Esquire

Williams, Gautier, Gwynn, DeLoach & Sorenson, PA

STATEMENT REGARDING ORAL ARGUMENT

Counsel for plaintiff–appellant John M. Floyd & Associates, Inc. respectfully requests oral argument to address whatever questions this Court may have about the ambiguous nature of the contractual language at issue in this appeal and to demonstrate, in light of the contingent aspect of JMFA's compensation under the contract, that JMFA's understanding of the contract's compensation obligation is a reasonable (and indeed the most reasonable) understanding.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT i

STATEMENT REGARDING ORAL ARGUMENT ii

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION 1

ISSUE ON APPEAL 2

STATEMENT OF THE CASE 3

A. Statement Of Facts 4

B. Standard Of Review 8

SUMMARY OF THE ARGUMENT 9

ARGUMENT 12

A. The District Court Erred In Entering Summary Judgment In Favor Of First Florida Credit Union On JMFA's Claim For Breach of Contract 12

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

**Chalfonte Condominium Apartment Ass'n, Inc.* v. *QBE Ins. Corp.*, 561 F.3d 1267 (11th Cir. 2009) 12, 21

**Downs* v. *United States Army Corps of Eng'rs*, 333 Fed. Appx. 403 (11th Cir. 2009) 13, 22

Friedman v. *Va. Metal Prods. Corp.*, 56 So. 2d 515 (Fla. 1952) 12, 21

Lundgren v. *Town of Stratford*, 530 A.2d 183 (Conn. App. Ct. 1987) 20

Saregama India Ltd. v. *Mosley*, 635 F.3d 1284 (11th Cir. 2011) 8

**Sekula* v. *FDIC*, 39 F.3d 448 (3d Cir. 1994) 20

Soncoast Community Church v. *Travis Boating Ctr.*, 981 So. 2d 654 (Fla. 4th DCA 2008) 13, 22

**Talbott* v. *First Bank Florida, FSB*, 59 So. 3d 243 (Fla. 4th DCA 2011) 12, 21

Statutes

28 U.S.C. §1291 1

28 U.S.C. §1332(a) 1

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court possessed subject matter jurisdiction pursuant to 28 U.S.C. §1332(a) because the parties are citizens of different States and the amount in controversy exceeds $75,000, exclusive of interest and costs.

In early January of 2011, defendant First Florida Credit Union filed a motion for summary judgment on the claim for breach of contract that plaintiff John M. Floyd & Associates, Inc. (JMFA) had asserted against the credit union. By means of an opinion and order entered March 14, 2011, the district court granted summary judgment in favor of the credit union on JMFA's claim for breach of contract. The district court entered final judgment in favor of the credit union, and against JMFA, on March 15, 2011. Thereafter, on April 11, 2011, JMFA filed its timely notice of appeal. This Court possesses appellate jurisdiction pursuant to 28 U.S.C. §1291.

ISSUE ON APPEAL

Did the district court err in ruling as a matter of law, on summary judgment, that the language in the contract between JMFA and First Florida Credit Union did not require First Florida Credit Union, after First Florida merged with Seaboard Credit Union, to compensate JMFA over a newly commenced 24–month period for the added profits realized by the merged entity as the result of the merged entity's having installed JMFA's Overdraft Privilege program?

STATEMENT OF THE CASE

Plaintiff John M. Floyd & Associates, Inc. (JMFA) initiated this suit in the U.S. District Court for the Middle District of Florida by means of a complaint filed in February 2009. The complaint asserted a single claim for breach of contract against defendant First Florida Credit Union. The parties agree, in accordance with the contract's text, that Florida law governs this contract, and the district court applied Florida law.

Following discovery, the credit union in early January 2011 filed a motion for summary judgment. On March 14, 2011, after the parties had fully briefed the summary judgment motion, the district court issued an opinion and order granting the motion. The district court held as a matter of law that the language contained in the contract between the parties did not give rise to a new 24–month period during which First Florida Credit Union was obligated to compensate JMFA as the result of First Florida Credit Union's merger with Seaboard Credit Union followed by the successor entity's use after the merger of JMFA's Overdraft Privilege program. One day later, on March 15, 2011, the

district court formally entered final judgment in favor of First Florida Credit Union and against JMFA.

JMFA filed its timely notice of appeal to this Court on April 11, 2011.

A. Statement Of Facts

In December 2005, John M. Floyd & Associates, Inc. (JMFA) entered into a written contract with First Florida Credit Union with the goal of implementing JMFA's Overdraft Privilege program at the credit union. An overdraft privilege program enables a bank or credit union to choose to honor its customers' checks even when the checks exceed the amount of collected funds in the customers' accounts, thereby allowing such customers to avoid the embarrassment, expense, and annoyance of bouncing a check. In exchange, the bank or credit union assesses and collects fees from its customers whose overdrafts the bank or credit union has covered, enabling the bank or credit union to profit from the arrangement.

The written agreement between the parties to this lawsuit provides that JMFA, in exchange for providing its recommendations, advice, and know–how to the credit union, would be entitled to receive the

compensation specified in the agreement, expressed as a percentage of the credit union's increased income from the overdraft program.

First Florida Credit Union successfully implemented JMFA's Overdraft Privilege program and began paying to JMFA in June 2006 the contingent compensation specified in the parties' written agreement. Under the terms of the written agreement, First Florida Credit Union was originally obligated to pay that compensation to JMFA for a period of 24 months.

In January 2007, First Florida Credit Union merged with a previously separate financial institution known as Seaboard Credit Union. The entity that emerged from the merger continued to operate under the name First Florida Credit Union. However, the resulting entity consisted not merely of the credit union that had originally entered into the contract with JMFA. Rather, the resulting entity consisted both of original First Florida Credit Union and the separate financial institution previously known as Seaboard Credit Union.

It is undisputed, for purposes of the summary judgment, that following the merger First Florida Credit Union implemented JMFA's Overdraft Privilege program throughout its entire operation, including

that portion of its business that had formerly been known as Seaboard Credit Union.

Beginning in July 2007, First Florida Credit Union began calculating JMFA's contingent compensation under the parties' written agreement based on the combined financial performance of the product of the merger between First Florida Credit Union and Seaboard Credit Union. Thereafter, however, a disagreement arose between the parties over when First Florida Credit Union's obligation to compensate JMFA would conclude under the terms of the written contract between the parties.

In the contract itself, First Florida Credit Union selected a billing period of 24 months, meaning that it would compensate JMFA on a contingent basis over an original period of 24 months. The dispute at issue in this appeal arises from the following language contained in the contract between JMFA and First Florida Credit Union:

> If any recommendations or materials or software are shared or adopted either in their original or modified form by other member institutions, companies or affiliated financial institutions of First Florida Credit Union or its holding company, or if First Florida Credit Union either acquires or is acquired by another financial institution, then First Florida Credit Union agrees to compensate John M. Floyd & Associates on the same terms as stated in this proposal

> agreement. This provision shall survive the termination of the agreement.

(*See* page 9 of contract between JMFA and First Florida Credit Union, attached as exhibit to plaintiff's second amended complaint, located at tab 24 of Record Excerpts.)

It was and remains JMFA's position that the "same terms" language set forth above obligated First Florida Credit Union, after it acquired Seaboard Credit Union, to compensate JMFA over the 24–month period that began once First Florida Credit Union implemented JMFA's Overdraft Privilege program throughout the merged entity, which included the financial institution formally known as Seaboard Credit Union. On the other hand, First Florida Credit Union asserted that the "same terms" language quoted above merely served to keep the contract's original termination date in effect following any merger.

In ruling on First Florida Credit Union's motion for summary judgment, the district court ruled as a matter of law that "Plaintiff's interpretation is not reasonable." (D.C. Op. at 7.) According to the district court's opinion, "The word 'same' means the opposite of what Plaintiff is contending — no change." (*Id.*) The opinion continues, "The Court is left to enforce the Agreement as it finds it — an agreement

which provided that upon acquisition of another company, Defendant was to compensate Plaintiff on the same terms, not pursuant to a different billing period or an extended billing period." (*Id.*)

Because the parties did not dispute that First Florida Credit Union had paid to JMFA the contingent compensation due over the 24–month period measured from when the payment obligation originally came into being, the district court ruled as a matter of law that First Florida Credit Corporation had not breached the contract between the parties.

This appeal followed.

B. Standard Of Review

This Court exercises plenary review over a district court's decision granting summary judgment. *See Saregama India Ltd.* v. *Mosley*, 635 F.3d 1284, 1290 (11th Cir. 2011). This Court also exercises plenary review over whether a contract is ambiguous — meaning reasonably susceptible to more than one understanding — thus necessitating a trial at which the finder of fact may consider extrinsic evidence to determine what the contract actually means. *See id.*

SUMMARY OF THE ARGUMENT

Two men are seated together at a luncheonette. The waitress approaches to take their order. "I'll have a roast beef sandwich," one says. "I'll have the same thing," says the other. Should the waitress bring two sandwiches, one for each man, or do the men intend to share a single sandwich?

* * *

Two men, one of whom is wearing a sweater, are walking toward each other on a city sidewalk on a cool fall day. "I own the same sweater," one says to the other. Has the speaker just accused the other man of theft of property?

* * *

A tenant's two–year apartment lease is scheduled to expire within a few months. The landlord asks the tenant if the tenant would like to sign a new lease containing the same terms. Three months later, the landlord asks the tenant why the tenant has not yet vacated the premises. The tenant thought he had signed a new lease extending two years into the future, but the landlord had in fact presented the tenant

with a new lease containing precisely identical terms as the original lease, including the identical expiration date as the original lease.

* * *

As the above examples illustrate, the word "same" is frequently capable of having multiple meanings. And so it is in this case. The contract between the parties states in pertinent part that if "First Florida Credit Union either acquires or is acquired by another financial institution, then First Florida Credit Union agrees to compensate John M. Floyd & Associates on the same terms as stated in this proposal agreement."

On the one hand, "to compensate John M. Floyd & Associates on the same terms as stated in this proposal agreement" could mean that the resulting merged financial institutions would compensate JMFA at the agreed upon contingent rate for the two–year period beginning when the newly created merged entity begins implementing JMFA's proposals and recommendations. Or that language could mean, as the magistrate judge held in this case, that the resulting merged financial institutions were liable to compensate JMFA at the agreed upon 14%

contingent rate only for the remaining duration of the original two–year contractual term.

For the reasons explained below, JMFA's proposed understanding of the contract represents the more reasonable and logical understanding of the specific contractual language at issue and of the surrounding contractual language. But, at a minimum, the contractual language at issue is ambiguous, which should have precluded the district court's entry of summary judgment in favor of First Florida Credit Union.

Accordingly, this Court should vacate the district court's entry of summary judgment and should remand so that the trier of fact may consider relevant extrinsic evidence to determine which party's proposed construction of the contractual language at issue is correct.

ARGUMENT

A. The District Court Erred In Entering Summary Judgment In Favor Of First Florida Credit Union On JMFA's Claim For Breach of Contract

This appeal arises from a lawsuit that JMFA brought against First Florida Credit Union alleging a single claim for breach of contract. The contract between the parties is in writing, and the contract explicitly provides that Florida law shall govern its construction and application.

Under Florida law, as this Court has recognized, if the pertinent language of a contract is reasonably susceptible to more than one meaning, that language is ambiguous. *See Chalfonte Condominium Apartment Ass'n, Inc.* v. *QBE Ins. Corp.*, 561 F.3d 1267, 1274 (11th Cir. 2009) (citing *Friedman* v. *Va. Metal Prods. Corp.*, 56 So. 2d 515, 517 (Fla. 1952)). And where, as here, the pertinent contractual language is ambiguous, the meaning of the contract cannot be determined by a court, as a matter of law, on summary judgment. *See Talbott* v. *First Bank Florida, FSB*, 59 So. 3d 243, 245 (Fla. 4th DCA 2011) ("When a contract is ambiguous, an issue of fact is created that cannot be resolved by summary judgment."). Rather, the finder of fact must determine the meaning of the contract after considering whatever relevant extrinsic

evidence the parties have presented. *See Downs* v. *United States Army Corps of Eng'rs*, 333 Fed. Appx. 403, 411 (11th Cir. 2009) (applying Florida law); *Soncoast Community Church* v. *Travis Boating Ctr.*, 981 So. 2d 654, 655 (Fla. 4th DCA 2008).

Before turning to examine the specific contractual language at issue in this appeal, a bit of background is useful. JMFA is in the business of serving as a profitability consultant to banks and credit unions. JMFA, as the contract at issue in this case illustrates, will examine the operations of a bank or credit union and then will offer specific recommendations regarding how the bank or credit union can improve its profitability. Under the terms of the contract, if the bank or credit union agrees to implement JMFA's proposals or recommendations, then JMFA becomes entitled to receive the agreed upon contingent compensation paid as a percentage of the profits that the bank or credit union has realized as a result of implementing JMFA's proposals and recommendations.

Corporate consolidations regularly occur in the banking industry. For example, someone who banks at CoreStates may awaken one day to learn that he is now a customer of First Union. At some later date, a

customer of First Union may awaken to learn that he is now a customer of Wachovia. Thereafter, a customer of Wachovia may awaken to learn that his bank has become Wells Fargo. Yet even after Wells Fargo had completed its corporate acquisition of Wachovia, Wells Fargo continued to operate Wachovia as a separate subsidiary until plans to merge Wachovia account holders into Wells Fargo could be drawn up and implemented.

The language in the written contract between JMFA and First Florida Credit Union that is at the center of this dispute is as follows:

> If any recommendations or materials or software are shared or adopted either in their original or modified form by other member institutions, companies or affiliated financial institutions of First Florida Credit Union or its holding company, or if First Florida Credit Union either acquires or is acquired by another financial institution, then First Florida Credit Union agrees to compensate John M. Floyd & Associates on the same terms as stated in this proposal agreement. This provision shall survive the termination of the agreement.

(*See* page 9 of contract between JMFA and First Florida Credit Union, attached as exhibit to plaintiff's second amended complaint, located at tab 24 of Record Excerpts.)

These two sentences contained in the contract between the parties to this lawsuit control this Court's resolution of this appeal. The first

sentence quoted above is rather lengthy, but the sentence itself is in the form of a traditional conditional "if" – "then" format. That first sentence begins with the word "if," while the word "then" immediately follows the final comma in the sentence.

In order to appreciate the ambiguity contained in the first sentence's "then" clause, it is necessary to focus first on the sentence's two "if" clauses. The sentence's "if" clauses describe several different actions that First Florida Credit Union could take or events that could happen affecting First Florida Credit Union. The first "if" clause recognizes that First Florida Credit Union or its holding company could share JMFA's recommendations with "other member institutions, companies or affiliated financial institutions" that could then decide to adopt or implement those recommendations.

A second "if" clause contained in the first sentence quoted above recognizes that First Florida Credit Union could "acquire[ ] or [be] acquired by another financial institution."

If either of these "ifs" come to pass, under the express language of the contract, "then First Florida Credit Union agrees to compensate John

M. Floyd & Associates on the same terms as stated in this proposal agreement."

The critical question presented in this appeal is whether the phrase "on the same terms as stated in this proposal agreement" retains the contract's original date for concluding First Florida's compensation obligation to JMFA or refers to a new 24–month compensation obligation if the "then" clause is triggered. First Florida argues in favor of maintaining the contract's original termination date, which is the same understanding that the district court adopted as a matter of law on summary judgment, while JMFA argues that the language gives rise to a newly calculated 24–month contractual duration if the "then" clause is triggered.

To appreciate which understanding of the "then" clause is more reasonable and logical, it helps to begin with the hypothetical scenario of First Florida's sharing JMFA's proposals and recommendations with an affiliated financial institution. Assume, hypothetically, that First Florida is affiliated through the same corporate holding company with a seemingly separate credit union entity named Second Florida Credit Union. Assume further that after the JMFA contract with First Florida

has been in effect for 20 months, First Florida decides to share JMFA's recommendations and proposals with Second Florida, after which Second Florida implements those recommendations and proposals and experiences a resulting growth in its profits.

To be sure, if JMFA has contracted directly with Second Florida, Second Florida would owe JMFA a contingent share of those resulting profits over a 24–month period. But, under First Florida's proposed understanding of the contract's "same terms as stated in this proposal agreement" language, Second Florida would only owe contingent compensation to JMFA for the next four months, after which that payment obligation would lapse because First Florida's contract with JMFA would have expired. Moreover, if First Florida instead had shared JMFA's proposals and recommendations with Second Florida on the day after First Florida's contract with JMFA had expired, the credit unions would owe no compensation to JMFA whatsoever under the district court's incorrect understanding of the relevant contractual language.

Indeed, the district court's understanding of the first sentence of the key contractual provision quoted above is not only unpersuasive, but

that understanding entirely destroys the purpose and effect of the sentence that immediately follows, which states that "This provision shall survive the termination of the agreement." If the provision's use of the words "same terms as stated in this proposal agreement" meant that First Florida's obligation to compensate JMFA could never extend past expiration of the contract's original 24–month period, then the parties' express intention, which appears in the immediately following sentence, that "[t]his provision shall survive the termination of the agreement" is rendered a nullity.

Thus, it makes no sense to suspect that, if First Florida Credit Union provided JMFA's proposals and recommendations to an affiliated bank or credit union, JMFA's right under the contract to be compensated on a contingent fee basis for the increased profits that the affiliated bank or credit union experienced would be limited to some period of time less than 24–months and might even be entirely non–existent. Yet that is the illogical result that the district court's contractual construction, reached as a matter of law on summary judgment, would dictate.

It is the contract's second "if" clause — "if First Florida Credit Union either acquires or is acquired by another financial institution" — that is

directly at issue in this case. Here, First Florida Credit Union acquired Seaboard Credit Union. Although the resulting merged entity operated under the preexisting name of First Florida Credit Union, the resulting entity was in fact a newly created product of a corporate merger. Instead of it being the same credit union with which JMFA had originally contracted that was implementing JMFA's proposals and recommendation, following the merger it was now a combination of two credit unions that were implementing JMFA's proposals and recommendations. Under the terms of the contract, the existence of what actually was a new, far larger entity that was now benefitting from JMFA's proposals and recommendations meant that this new entity now had the obligation to compensate JMFA over a newly commenced 24–month period under the contract's "then" clause.

To be sure, the "same terms" provision could mean, if a merger takes place, that the original contractual deadline would remain applicable to terminate First Florida's payment obligation to JMFA. Or the "same terms" provision could mean, as JMFA is arguing herein, that the merger gave rise to a new 24–month payment period at the contractually specified contingent fee amount.

The scenario that this case presents is, in essence, similar to the apartment lease hypothetical contained in the "Summary of the Argument" section, above. If a landlord offers a tenant, several months before the original lease is scheduled to expire, a replacement lease containing the "same terms" as the original lease, the tenant will expect that the duration of the lease and the rental payments will remain the same, but not that the original lease's termination date will continue to govern the new lease.

Regrettably, as other courts have recognized, sometimes the use of the word "same" in a contract, statute, or regulation can give rise to ambiguities. *See Sekula* v. *FDIC*, 39 F.3d 448, 455 (3d Cir. 1994) ("we recognize the ambiguity that the word 'same' creates"); *Lundgren* v. *Town of Stratford*, 530 A.2d 183, 186 (Conn. App. Ct. 1987) ("[w]e find that the words 'same position' as used in §7–433b(b) are ambiguous"). This very type of ambiguity exists here.

The district court, in its opinion, voiced criticism of JMFA for failing to draft the contract between the parties in a manner that would have more explicitly communicated that — in the event of a merger — the resulting entity would be liable to pay contingent compensation to

JMFA over a new 24–month period. (D.C. Op. at 7.) But the identical criticism could likewise be leveled against First Florida, whose lawyers examined the proposed contract at issue here before the parties entered into it. If First Florida wanted to ensure that its payment obligation could never extend beyond the original 24–month period, even in the case of a merger with another credit union, the contractual language at issue in this lawsuit could have been redrafted to make that intention crystal clear. This case thus presents a quintessential example of a contractual ambiguity — both sides can reasonably contend that the contractual language supports their proposed understanding.

For the reasons described above, the contract's "same terms" clause is reasonably susceptible to different understandings on the facts and circumstances presented here, thereby rendering the district court's entry of summary judgment in favor of First Florida Credit Union legally erroneous. *See Chalfonte Condominium Apartment Ass'n, Inc.*, 561 F.3d at 1274 (citing *Friedman*, 56 So. 2d at 517); *Talbott*, 59 So. 3d at 245. Instead, the trier of fact must be allowed to determine the intent of the parties concerning First Florida's continuing payment obligation following a merger after the parties are allowed to introduce relevant

extrinsic evidence at trial. *See Downs*, 333 Fed. Appx. at 411 (applying Florida law); *Soncoast Community Church*, 981 So. 2d at 655.

For these reasons, this Court should reverse the district court's entry of summary judgment in favor of First Florida Credit Union and should remand this case for a trial on the merits.

CONCLUSION

For the reasons set forth above, the district court's grant of summary judgment on John M. Floyd & Associates, Inc.'s claim for breach of contract should be reversed and this case should be remanded for trial.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type–volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief does not exceed 30 pages in length.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14–point Century Schoolbook font.

Dated: June 27, 2011

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Howard J. Bashman

CERTIFICATE OF SERVICE

I hereby certify that I am serving a true and correct copy of the foregoing document via first class U.S. Mail, postage prepaid, on the attorneys, at the address, and on the date shown below:

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Also on the date shown below, one original and six copies of this document were dispatched for filing via Federal Express overnight delivery to the Clerk's Office of the U.S. Court of Appeals for the Eleventh Circuit in Atlanta, Georgia.

Dated: June 27, 2011

Howard J. Bashman