STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0560

JOHN M. FLOYD & ASSOCIATES, INC.

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VERSUS

JEW

ASCENSION CREDIT UNION

Judgment Rendered: DEC 22 2021

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On Appeal from the Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Docket No. 115930

Honorable Alvin Turner, Jr., Judge Presiding

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* * * * * *

BEFORE: McCLENDON, WELCH AND THERIOT, JJ.

McCLENDON, J.

In this contract dispute, the defendant-in-reconvention appeals a trial court judgment that granted summary judgment in favor of the plaintiff-in-reconvention. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

The dispute at issue in this appeal arises from a contract between John M. Floyd & Associates, Inc. (JMFA) and Ascension Credit Union (the credit union). By written proposal dated February 9, 2015, JMFA offered to install its "OVERDRAFT PRIVILEGE® program" (the program) for the credit union. JMFA described the program as a product that would increase the credit union's non-interest income, without significantly increasing the credit union's non-interest expense, while simultaneously providing a competitive and popular service for the credit union's account holders. The contract described four phases of the engagement: the "analysis phase," the "presentation phase," the "implementation phase," and the "follow-up phase." Initially, the credit union would pay JMFA a $10,000 retainer. Beginning sixty days after installation of the program, the credit union would pay JMFA a monthly contingency fee based on the net increase in the credit union's earnings. The monthly contingency fee would be first applied against the retainer. The credit union executed the contract on February 10, 2015, and JMFA executed the contract on February 11, 2015.

It is undisputed that the credit union paid the $10,000 retainer. However, the credit union later informed JMFA that it was not going to proceed with installation of the program.[1] Consequently, the program was not installed by JMFA prior to termination of the contract. In a December 1, 2015 letter to JMFA, the credit union wrote:

> Your company began the analysis phase of the project but no further work was done and the program was never installed by the credit union. The credit union has since hired a new CEO and it is no longer interested in implementing an overdraft privilege program at this time.

The credit union went on to assert that because JMFA never installed the program, the $10,000 retainer was not earned. Thus, the credit union requested that JMFA return the retainer.

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[1] It is unclear from the record when the credit union initially made this decision and communicated same to JMFA.

Subsequently, on May 4, 2016, JMFA filed suit against the credit union seeking payment for works and services JMFA performed for the credit union under a separate contract. The credit union answered the petition and asserted the reconventional demand from which this appeal arises. Pertinent to this appeal, the reconventional demand sought the return of the retainer, as well as payment of the credit union's attorney's fees and costs in connection with the reconventional demand.[2]

On March 10, 2017, the credit union, as the plaintiff-in-reconvention, filed a motion for partial summary judgment, arguing that it was entitled to the return of the retainer and payment of its attorney's fees and costs. In support of the credit union's motion, the credit union offered the contract. The credit union argued that the contract "designates itself as a 'retainer contract' whereby [the credit union] would pay a retainer deposit to be held in trust by JMFA for future services." The credit union maintained that under the terms of the contract, JMFA's contingency fees would be earned in their entirety only after the program was installed; because the program was never installed, JMFA did not earn the $10,000 retainer, and the credit union was entitled to the return of the retainer. The credit union concluded by citing a section of the contract providing that in the event legal action was necessary to enforce the contract, the prevailing party would be entitled to recover attorney's fees and costs.

In addition to the contract, the credit union offered the affidavit of Nichole Dupuy, the credit union's Vice President, in support of the motion for summary judgment. Ms. Dupuy's affidavit affirmed that the credit union paid the retainer, but that the program was never installed.[3]

JMFA opposed the credit union's motion. JMFA contended that the terms of the contract did not provide for the return or refund of the retainer. JMFA further

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[2] In the same pleading, the credit union also filed a peremptory exception raising the objection of no cause of action as to JMFA's claim for attorney's fees. The parties signed a consent judgment agreeing to the dismissal of JMFA's claim for attorney's fees on December 14, 2016. **John M. Floyd & Assocs., Inc. v. Ascension Credit Union**, 2017-0900 (La.App. 1 Cir. 2/22/2018), 2018 WL 1024375, at *1, fn 1 (unpublished).

[3] Ms. Dupuy also attested that prior to the execution of the contract, the credit union conducted a data back-up of all General Ledger data. During the analysis phase of the project, JMFA requested certain data that was necessary to cure accounting irregularities within its software prior to installation and implementation of the program software. However, the requested data was not readily accessible by the credit union, because it had been encrypted following the General Ledger data back-up. Ms. Dupuy maintained that the program could not be installed for and/or implemented by the credit union for this reason.

maintained that by arguing JMFA would not earn a fee until after the program was installed, the credit union impermissibly overlooked certain contractual provisions. Specifically, JMFA cited a provision stating that the credit union would pay out-of-pocket expenses during all project phases, and that JMFA would invoice semi-monthly for out-of-pocket expenses during the initial analysis, presentation, implementation or follow-up phases. JMFA also cited a provision stating that the credit union would receive credit up to the amount of the retainer against JMFA's monthly fee billings. JMFA reasoned that when all provisions of the contract are read in conjunction, "it is clear that the Contract envisioned JMFA would be paid with the retainer for services utilized before the installation phase."

JMFA also argued that genuine issues of material fact precluded summary judgment, such as the amount of work performed by JMFA, the cause of the contract's dissolution, and the nature of the retainer at issue. In support of this argument, JMFA submitted the December 1, 2015 letter in which the credit union requested that JMFA return the retainer, Ms. Dupuy's affidavit, and the affidavit of Thomas Aleman.[4] Mr. Aleman attested that JMFA prioritized work for the credit union ahead of work for other clients at the credit union's request. After JMFA performed over three months of work for the credit union, the credit union's new CEO "decided that he wanted to cancel all vendor contracts," preventing JMFA from installing the program. Mr. Aleman also attested that in the event the contract was canceled, JMFA would keep the retainer for services rendered.

Following a May 8, 2017 hearing, the trial court took the matter under advisement. On May 11, 2017, the trial court granted summary judgment in favor of the credit union in a written judgment with incorporated reasons. The trial court's judgment ruled that the credit union was entitled to the return of the retainer, as well as attorney's fees and costs, to be determined by the trial court after presentation of same.

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[4] We note that Mr. Aleman's affidavit did not explain his connection to JMFA, or the dispute at issue. However, it does not appear that the credit union challenged the affidavit, and the court is required to consider any documents to which no objection is made. LSA-C.C.P. art. 966(D)(2).

JMFA appealed the May 11, 2017 judgment.[5] This Court dismissed the appeal for lack of subject matter jurisdiction.[6]

Thereafter, the parties compromised the claims asserted in JMFA's May 4, 2016 petition. The parties filed a joint motion seeking the dismissal of JMFA's petition, while reserving the claims asserted in the credit union's reconventional demand regarding the retainer and attorney's fees and costs. The trial court granted the joint motion on July 13, 2018.

Subsequently, the credit union filed an *ex parte* motion to certify the May 11, 2017 judgment as final and appealable. The credit union stated that after JMFA's petition was dismissed, the parties entered into a stipulation regarding the credit union's claim for attorney's fees and costs, such that no issues remained to be resolved. The trial court granted the credit union's motion on March 22, 2019.

JMFA appealed, and the credit union filed a motion seeking attorney's fees related to the appeal. This Court dismissed the appeal for lack of subject matter jurisdiction and denied the motion for attorney's fees.[7]

On February 2, 2021, the trial court executed an amended judgment and incorporated reasons. It is from this judgment that JMFA appeals,[8] contending that the trial court erred in its interpretation of the contract.

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[5] We borrow our discussion of the facts relative to JMFA's prior appeals in this matter in part from our related opinions, **John M. Floyd & Assocs., Inc. v. Ascension Credit Union**, 2017-0900 (La.App. 1 Cir. 2/22/2018), 2018 WL 1024375, at *1 (unpublished), and **John M. Floyd & Assocs., Inc. v. Ascension Credit Union**, 2019-0574 (La.App. 1 Cir. 12/27/19), 292 So.3d 922, 923-24.

[6] On appeal, this Court reviewed *sua sponte* whether we had subject matter jurisdiction over the appeal of the partial summary judgment. We found that the May 11, 2017 judgment did not satisfy the requirements of a partial summary judgment under LSA-C.C.P. art. 1915, because it was not expressly designated by the trial court that there was no just reason for delay. Accordingly, this Court dismissed the appeal and remanded the case to the trial court. See **John M. Floyd & Assocs., Inc.**, 2018 WL 1024375, at *2.

[7] On appeal, this Court again reviewed *sua sponte* whether we had subject matter jurisdiction. We concluded that "no part of the writing could stand alone and satisfy all of the requirements of a final, appealable judgment." **John M. Floyd & Assocs., Inc.**, 292 So.3d at 924. Consequently, this Court dismissed the appeal. See **Floyd**, 292 So.3d at 924-25.

[8] The credit union filed a motion seeking attorney's fees related to the appeal. To be awarded attorney's fees and costs for the work associated with answering and defending an appeal, an appellee must either file its own appeal or answer the appeal. See **Molinere v. Lapeyrouse**, 2016-0991 (La.App. 1 Cir. 2/17/17), 214 So.3d 887, 897-98. Thus, based on the credit union's failure to follow proper appellate procedure, this Court denied the credit union's motion for attorney's fees by order dated August 13, 2021.

SUBJECT MATTER JURISDICTION

Appellate courts have the duty to examine our subject matter jurisdiction and to determine *sua sponte* whether such subject matter jurisdiction exists, even when the issue is not raised by the litigants. **Kelley v. Est. of Kelley**, 2019-1044 (La.App. 1 Cir. 2/21/20), 299 So.3d 720, 722. Our appellate jurisdiction only extends to "final judgments." A final judgment determines the merits in whole or in part and is appealable. LSA-C.C.P. arts. 1841 and 2083(A). **Markiewicz v. Sun Constr., LLC**, 2019-0869 (La.App. 1 Cir. 5/28/20), 304 So.3d 877, 880.

A valid judgment must be precise, definite, and certain. **Kelley**, 299 So.3d at 722. Moreover, a final appealable judgment must contain appropriate decretal language naming the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied. **Simon v. Ferguson**, 2018-0826 (La.App. 1 Cir. 2/28/19), 274 So.3d 10, 13. These determinations should be evident from the language of a judgment without reference to other documents in the record. The absence of the necessary decretal language means that the judgment is not final and appealable. **Simon**, 274 So.3d at 13-14.

The February 2, 2021 judgment at issue in this appeal specifically provides that the motion for summary judgment was granted in favor of the credit union and against JMFA. It further identifies the relief granted to the credit union, as it explicitly assesses judgment in the amount of $10,000.00 in favor of the credit union and against JMFA, and recites the parties' stipulation that the credit union is entitled to payment of attorney's fees and costs in the amount of $6,750.00 for work at the trial court level. Moreover, the February 2, 2021 judgment expressly states that "all issues in this case have been disposed of." Thus, the judgment presently before this Court is a final, appealable judgment.[9]

[9] We note that the February 2, 2021 judgment, like the May 11, 2017 judgment that was before this Court in the two prior appeals in this matter, contains a recitation of the merits of the case. Louisiana Code of Civil Procedure article 1918(B) provides that when written reasons for judgment are assigned, they shall be set out in an opinion separate from the judgment. However, as we recognized in **Floyd**, 292 So.3d at 924, the Louisiana Supreme Court has held that this language is precatory and, as such, an otherwise complete and valid judgment should not be nullified or held to be invalid merely because it contains surplus language. Thus, although the February 2, 2021 judgment improperly contains the trial court's reasons, the judgment nevertheless constitutes a valid final judgment.

SUMMARY JUDGMENT

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that governs the trial court's determination of whether summary judgment is appropriate. **Shoemake v. Scott**, 2019-1261 (La.App. 1 Cir. 8/3/20), 310 So.3d 191, 194. That is, after an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(A)(3).

On a motion for summary judgment, the burden of proof rests with the mover. LSA-C.C.P. 966(D)(1). If the mover will bear the burden of proof at trial on the issue before the court in the motion for summary judgment, the burden of showing there is no genuine issue of material fact remains with the mover. When the mover makes a *prima facie* showing that the motion should be granted, the burden then shifts to the non-moving party to present factual support which establishes the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law, through the use of proper documentary evidence attached to its opposition. LSA-C.C.P. art. 966(D)(1); **June Med. Servs., LLC v. Louisiana Department of Health**, 2019-0191 (La.App. 1 Cir. 3/4/20), 302 So.3d 1161, 1164. If the non-moving party fails to do so, there is no genuine issue of material fact and summary judgment will be granted. **Murphy v. Savannah**, 2018-0991 (La. 5/8/19), 282 So.3d 1034, 1038.

Material facts are those that potentially insure or preclude recovery, affect the litigant's success, or determine the outcome of a legal dispute. **Jenkins v. Hernandez**, 2019-0874 (La.App. 1 Cir. 6/3/20), 305 So.3d 365, 370, writ denied, 2020-00835 (La. 10/20/20), 303 So.3d 315. A genuine issue of material fact is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Marks v. Schultz**, 2020-0197 (La.App. 1 Cir. 12/10/20), 316 So.3d 534, 538. Because it is the applicable substantive law that determines materiality, whether a

particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Shoemake**, 310 So.3d at 193-94.

CONTRACTUAL INTERPRETATION

The substantive law applicable herein is the law governing the interpretation of a contract. Interpretation of a contract is the determination of the common intent of the parties. LSA-C.C. art. 2045. This is an objective inquiry. **McCary v. Oceaneering International, Inc.**, 2017-1163 (La.App. 1 Cir. 2/27/18), 243 So.3d 613, 616.

Courts begin their analysis of the parties' common intent by examining the words of the contract itself. See LSA-C.C. art. 2046; **Baldwin v. Bd. of Supervisors for University of Louisiana System**, 2014-0827 (La. 10/15/14), 156 So.3d 33, 37. The words of a contract must be given their generally prevailing meaning. LSA-C.C. art. 2047. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract. LSA-C.C. art. 2048. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole. LSA-C.C. art. 2050. One provision of the contract should not be construed separately at the expense of disregarding other provisions. **Baldwin**, 156 So.3d at 37-8.

The determination of whether a contract is clear or ambiguous is a question of law. **Country Club of Louisiana Prop. Owners Association, Inc. v. Baton Rouge Water Works Co.**, 2019-1373 (La.App. 1 Cir. 8/17/20), 311 So.3d 395, 399. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. LSA-C.C. art. 2046. In such cases, the meaning and intent of the parties to the written contract must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence. LSA-C.C. art. 1848. Thus, the use of extrinsic evidence is proper only when a contract is found to be ambiguous after an examination of the four corners of the agreement. **James Construction Group, L.L.C. v. State ex rel. Department of Transportation and Development**, 2007-0225 (La.App. 1 Cir. 11/2/07), 977 So.2d 989, 993.

Although summary judgment is generally not appropriate to establish the intent of contracting parties, where the words of a contract are clear, explicit and lead to no absurd consequences, the interpretation of the contract is a matter of law and summary judgment is appropriate. **Claitor v. Brooks**, 2013-0178 (La.App. 1 Cir. 12/27/13), 137 So.3d 638, 644-45, writ denied, 2014-0198 (La. 4/4/14), 135 So.3d 1182. In contrast, where a contract is ambiguous and the intent of the parties becomes a question of fact, there are very often conflicting affidavits concerning the intent of the parties. Under these circumstances, granting a summary judgment is not appropriate. **Country Club of Louisiana**, 311 So.3d at 399.

With these rules of contract interpretation and summary judgment practice in mind, we review *de novo* the provisions of the contract at issue.

ANALYSIS

The issue presented by this motion for summary judgment is whether the credit union is entitled to recover the $10,000 retainer under the terms of the contract as applied to the undisputed facts. As noted above, JMFA contends that the trial court erred in granting summary judgment ordering the return of the retainer because the terms of the contract did not provide for the refund of the retainer. JMFA also argues that the return of the retainer would result in an absurd consequence, namely that JMFA performed work with the intention of installing the program in the credit union, for which JMFA will not be compensated if the retainer is returned. The credit union argues that the trial court properly granted summary judgment ordering the return of the retainer because the contract provided that JMFA would earn fees only after installation of the program, and the program was never installed.

As set forth above, both the credit union and JMFA submitted the contract, as well as additional documentary exhibits, for the trial court's consideration. If the words of the contract itself are clear and explicit and lead to no absurd consequences, our analysis will remain confined to the four corners of the contract; if the contract is ambiguous, we may consider the extrinsic evidence contained in the parties' additional exhibits. See LSA-C.C. arts. 1848 and 2046; **James Construction**, 977 So.2d at 993.

Thus, our analysis begins with the question of whether the contract at issue is clear or ambiguous as a matter of law.

The first contractual provision pertaining to payment for JMFA's services appears in the "Objectives" section and states, "Because [JMFA is] confident that this increase [in earnings] is achievable, we offer our service on a contingency basis." R. 55. The "Cost of the Engagement" section of the contract further provides, in pertinent part:

> The cost to your institution for the engagement will be priced using the monthly quantified net increase in non-interest income and returned item expenses related to NSF and overdraft income...
>
> ...
>
> [The credit union] will have the program operational for sixty (60) days prior to JMFA billing for contingency fee pricing. After the recommendations have been installed and monitored for sixty (60) days, we will quantify the increased income and [the credit union] agrees to pay monthly the fees, as referenced above. The monthly billings will be first applied against the retainer, and then the remaining payments are to be paid by the 15th of each month.
>
> ...
>
> [The credit union] will pay out-of-pocket expenses during all project phases. We will invoice semi-monthly for out-of-pocket expenses during initial analysis, presentation, implementation or follow-up phases.
>
> At the beginning of the engagement we will invoice [the credit union] a $10,000 retainer which is due and payable upon receipt of invoice which usually occurs within one week of execution of the contracts. The institution will receive credit up to the amount of the retainer, against JMFA's monthly fee billings.
>
> Fees to [JMFA] will commence following the first full month after sixty (60) days after (sic) the installation of recommendations and will continue throughout the contracted engagement period for contingency fee pricing.

An additional section of the contract, entitled "Earned Fees," provides, in pertinent part:

> Once the Overdraft Privilege Program is installed by the client, the fee owed to JMFA is earned in its entirety and will be paid in accordance with the provisions of the "Cost of the Engagement" section herein...

Having thoroughly reviewed the contract at issue, we find that the terms of the contract are clear and explicit. In sum, JMFA offered its services to the credit union on a contingency fee basis, and the credit union would pay a $10,000 retainer to JMFA at the beginning of the parties' engagement. The retainer would serve as an advance payment of the first $10,000 in contingency fees earned by JMFA. Beginning sixty days after installation of the program, JMFA's fees would be calculated based on the theoretical

increase in income resulting from the installation of the program. The credit union would receive credit for the first $10,000 of contingency fees due to JMFA against the retainer, and when JMFA's contingency fees exceeded $10,000, the credit union would begin to pay JMFA's contingency fees monthly. When applied to the undisputed facts before us, where the program was not installed and the credit union did not realize an increase in income, JMFA did not earn a fee and the terms of the contract require the return of the retainer. Thus, for the reasons that follow, we find that the trial court properly granted the credit union's motion for summary judgment.

As set forth above, each provision of the contract must be interpreted in light of the others so that each is given the meaning suggested by the contract as a whole. LSA-C.C. art. 2050. With this in mind, we consider the relevant portions of the contract.

The "Cost of the Engagement" section of the contract twice states that payment for JMFA's services will commence sixty days after installation, providing, "After the recommendations have been installed and monitored for sixty (60) days, we will quantify the increased income and [the credit union] agrees to pay monthly the fees..." and "Fees to [JMFA] will commence following the first full month after sixty (60) days after (sic) the installation of recommendations..." Consistent therewith, the "Earned Fees" section of the contract provides that "once [the program] is installed," the fee owed to JMFA is "earned in its entirety." When considered together, these provisions make clear that JMFA's fees would be earned after the program was installed, and that payment of JMFA's fees would become due sixty days later.[10] As the program was never installed, JMFA's fees were not earned, nor did payment become due.

Further, the contract explicitly states that JMFA's services are offered "on a contingency basis." As set forth above, the words of a contract must be given their generally prevailing meaning. LSA-C.C. art. 2047. Black's Law Dictionary, 11th edition 2019, defines "contingency" as "1. An event that may or may not occur in the future; a possibility. 2. The condition of being dependent on chance; uncertainty. 3. CONTINGENT FEE." Black's Law Dictionary further defines "contingent fee" as follows:

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[10] In contrast, the contract requires that the credit union pay out-of-pocket expenses "during all project phases," establishing that out-of-pocket expenses and JMFA's fees are distinct costs subject to separate payment arrangements.

> A fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court. • Contingent fees are usu. calculated as a percentage of the client's net recovery (such as 25% of the recovery if the case is settled, and 33% if the case is won at trial). — Also termed *contingency fee*; *contingency*; *conditional fee.*

Thus, the generally prevailing meaning of "contingency" and "contingent fee" indicates that payment for services performed on a "contingency basis" may or may not occur, depending on whether the service is successful.[11] The contract's use of the term to describe the structure of the contract plainly reflects the parties' intent that JMFA would receive fees that would correlate with the success, or failure, of JMFA's program in producing profits for the credit union.[12] Correspondingly, because JMFA's contingency fees hinged on a successful outcome, the fees could not be earned in the absence of a successful outcome, which could not be obtained in the absence of installation of the program. Thus, the contingent nature of JMFA's fees further supports the conclusion that because the program was not installed, JMFA's fees were not earned and payment did not become due.

Moreover, two provisions found in the "Cost of the Engagement" section specifically address the payment and purpose of the $10,000 retainer, stating "The monthly billings will be first applied against the retainer..." and "[The credit union] will receive credit up to the amount of the retainer, against JMFA's monthly fee billings." This language plainly indicates that while the retainer was due at the beginning of the

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[11] See also Merriam-Webster Online Dictionary, which defines "contingency" as follows:

1 : a contingent event or condition: such as

a : an event (such as an emergency) that may but is not certain to occur

b : something liable to happen as an adjunct to or result of something else

2 : the quality or state of being contingent

Merriam-Webster's Dictionary further defines "contingent," when used as an adjective, as follows:

1 : dependent on or conditioned by something else

2 : likely but not certain to happen : possible

3 : not logically necessary

4 : a : happening by chance or unforeseen causes

b : subject to chance or unseen effects : unpredictable

c : intended for use in circumstances not completely foreseen

5 : not necessitated : determined by free choice

Merriam-Webster Online Dictionary (https://www.merriam-webster.com (1 Oct. 2021)).

[12] This intent is also reflected in the "Cost of the Engagement" section provisions stating that the credit union's cost "will be priced using the monthly quantified net increase in non-interest income and returned item expenses..." and "we will quantify the increased income and [the credit union] agrees to pay monthly the fees."

engagement, the parties intended for the retainer to serve as an advance payment of the first $10,000 in contingency fees earned by JMFA.

In this matter, the contract explicitly identifies itself as a contingency contract. It repeatedly and consistently provides for payment to JMFA beginning sixty days after installation of the program, at a rate based on an increase in income which could only be realized after installation of the program. Likewise, it repeatedly expressed that the retainer would be applied against the first $10,000 in contingency fees, which again could only be earned after installation of the program. Most compelling, the contract specifically states that JMFA's fee would be earned in its entirety "Once [the program] is installed by [the credit union]." Thus, having thoroughly reviewed the contract at issue, and considering each relevant provision together with the others, we find that the words of the contract clearly establish that JMFA would not earn a fee unless and until the program was installed and the credit union enjoyed a related increase in income.

JMFA's first and third assignments of error are that the trial court erred in granting the credit union's motion for summary judgment because the plain language of the contract does not provide for the return or refund of the retainer, rendering the contract ambiguous on this point. A contract is ambiguous on the issue of intent when it lacks a provision bearing on that issue or the intent of the parties cannot be ascertained from the language employed. **Country Club of Louisiana**, 311 So.3d at 399. However, the interpretation of ambiguous terms in a contract requires construction against the contract's drafter. See LSA-C.C. art. 2056. Thus, to the extent the absence of language expressly stating whether the retainer was subject to return or refund creates ambiguity, we are required to construe any ambiguity against JMFA as the drafter of the contract. These assignments of error lack merit.

JMFA's second assignment of error is that the trial court erred in granting the credit union's motion for summary judgment because the trial court's construction of the contract led to an impermissible absurd consequence. Specifically, JMFA contends that the credit union's interpretation results in JMFA receiving no compensation for the work it performed for the credit union prior to the termination of the contract. The credit union counters JMFA's argument by maintaining that if the retainer is not subject

to return or refund, JMFA would be entitled to payment in the amount of $10,000 prior to completing any work and regardless of whether any work is completed, which would be an absurd result. Further, the credit union contends that the contract characterized itself as a contingency contract, and under contingency arrangements, the party extending services bears the risk of non-payment should the condition for payment not manifest. We agree with the credit union. Although the contract does not specifically state that the retainer is non-refundable, it identifies as a contingency contract and repeatedly stresses that JMFA's fee is earned only after installation. We are required to interpret each provision in the contract in light of the other provisions and give each the meaning suggested by the contract as a whole. See LSA-C.C. art. 2050. Interpreting the contract to preclude the return of the retainer, in the absence of any language explicitly providing for same, would conflict with the clearly expressed contingency payment schedule set forth within and referenced throughout the contract. This assignment of error lacks merit.

JMFA's fourth assignment of error is that the trial court erred in awarding the credit union attorney's fees and costs, because summary judgment was improper and the credit union is not the prevailing party. Having found no merit in JMFA's first three assignments of error addressing the merits of the motion for summary judgment, we likewise find no merit in this assignment of error.

CONCLUSION

For the foregoing reasons, we affirm the February 2, 2021 judgment of the trial court granting summary judgment in favor of Ascension Credit Union. All costs of the appeal are assessed to John M. Floyd & Associates, Inc.

AFFIRMED.