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ELEVENTH CIRCUIT CLARIFIES WHEN NEW ISSUES ON APPEAL ARE FORFEITED: GOULD V. INTERFACE, INC.

October 15, 2025

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In Gould v. Interface, Inc., No. 23-12882, 2025 WL 2798842 (11th Cir. Oct. 2, 2025), the Eleventh Circuit held that the plaintiff-appellant forfeited his principal argument on appeal because it was in direct conflict with the argument he raised (and lost) before the trial court.

Interface fired Gould, its then CEO, based on alleged misconduct at an annual sales meeting. Gould brought suit for breach of his employment agreement based on the manner of his termination and Interface's failure to pay him as provided for in that agreement.

Interface moved for summary judgment arguing that it enjoyed absolute discretion to determine the existence of "cause" or, if its discretion was qualified by a duty of good faith, it discharged that duty by relying on an independent report prepared by outside counsel. In response, Gould argued that Interface failed to act in good faith, appearing to accept the proposition that Interface had qualified discretion to determine the existence of "cause." The trial court ruled for Interface. In his motion for rehearing, Gould argued for the first time that Interface lacked discretion to determine the existence or non-existence of "cause" and that its determination was in error. The trial court denied rehearing in part because Gould raised a new argument which it found he waived.

On appeal, the Eleventh Circuit first clarified that waiver and forfeiture were different concepts: the former being an intentional relinquishment or abandonment of a known right with the latter being a failure to timely assert a right. The Eleventh Circuit found there had been a forfeiture, explaining that Gould raised a new issue as opposed to an argument based on a theory he had presented to the trial court: "Gould impermissibly sought to present a new position (or issue) on appeal when, having contended in the district court that his employment agreement meant one thing, he reversed course and contended on appeal that it meant something else." The Eleventh Circuit explained that the new theory completely changed the "factual landscape" of the case and applicable law. Finally, the Eleventh Circuit acknowledged that in "extraordinary circumstances" it has the right to consider forfeited issues, but explained that Gould had not argued that such circumstances existed, nor could he given his failure to raise his new theory before the trial court when he had the opportunity to do so.

The decision serves as a reminder that, absent "extraordinary circumstances," the Eleventh Circuit will not consider new theories advanced for the first time on appeal where a litigant had the opportunity raise that theory in the trial court.

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