IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 16, 2015 Session

JOHN HAMER v. SOUTHEAST RESOURCE GROUP, INC. ET AL.

Appeal from the Chancery Court for Williamson County
No. 43645 James G. Martin, III, Chancellor

No. M2015-00643-COA-R3-CV – Filed March 3, 2016

Plaintiff, a member of a Limited Liability Company that sells insurance products to credit union members, filed this declaratory judgment action seeking a determination that the LLC's operating agreement does not require him to make a "telemedicine counseling" business opportunity available to the LLC. The operating agreement requires members to "disclose and make available to [the LLC] each and every business opportunity that is within the scope and purpose of [the LLC] . . . ." However, "no such disclosure or offer shall be required with respect to business opportunities that are not within the scope and purpose of [the LLC]." The trial court granted Plaintiff summary judgment, finding that the undisputed facts demonstrated that the "scope" of the LLC's business was selling insurance and that the telemedicine opportunity was not an insurance product. We have determined that the parties intended "scope" to have its ordinary meaning and that the undisputed facts show that the scope of the LLC's business at the relevant time was the sale of insurance products and the telemedicine counseling business opportunity is not an insurance product. Consequently, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and W. NEAL MCBRAYER, JJ., joined.

E. Todd Presnell, Ty E. Howard, and Joshua J. Phillips, Nashville, Tennessee, for the appellants, Southeast Resource Group, Inc. and Action Financial Company, LLC.

James R. Kelley, Marc T. McNamee, and Stephen M. Montgomery, Nashville, Tennessee, for the appellee, John Hamer.

OPINION

Action Financial Company, LLC ("Action") is a limited liability company organized under Florida law. Its only members are John Hamer ("Plaintiff") and Southeast Resource Group, Inc. ("Southeast"). Action is a "manager-managed" LLC, and Plaintiff is one of its managers. *See* Fla. Stat. Ann. § 605.0407 (2014).

Plaintiff founded Action and, beginning in 2009, sold membership interests to Southeast in several different transactions. At the time of trial, Southeast owned 59.5% of Action, and Plaintiff owned 40.5%. Action is in the business of selling insurance products to credit union members, often by direct mail. The products Action sells are subject to insurance regulations, and Plaintiff is required to be a licensed insurance broker to sell these products.

In conjunction with the sale of membership interests in Action, Plaintiff and Southeast entered an operating agreement. Section 6.6 of the agreement states in relevant part:

> Except as otherwise provided in this Section . . . each Member may engage in whatever activities they choose, whether the same are competitive with [Action] or otherwise . . . without any obligation to offer any interest in such activities to [Action] or any Member. Notwithstanding the foregoing, the Members hereby acknowledge and agree that each Member owes to [Action] and each Member the highest fiduciary loyalty and duty. In furtherance, and not in limitation, of such loyalty and duty:
>
> > (a) Each Member covenants and agrees to disclose and make available to [Action] each and every business opportunity that is *within the scope and purpose of* [Action] that such Member becomes aware of in his capacity as Member or otherwise; provided, however, *no such disclosure or offer shall be required with respect to business opportunities that are not within the scope and purpose* of [Action].

(Emphasis added).

The 2009 operating agreement does not define "scope" or "scope and purpose."[1] Additionally, the agreement does not specify whether "scope and purpose" is a reference to Action's business at the time the agreement was signed, at the time a member

[1] The parties entered the operating agreement in August 2009 and amended it in August 2012. The amendments did not substantively change the sections quoted in this opinion.

discovers a business opportunity, or at some other time in the future. Instead, section 18.7 of the agreement states that "[e]very covenant, term and provision of this Agreement shall be construed simply according to its fair meaning and not strictly for or against any Member."

Further, in Article 2 (titled "Organization"), the agreement provides:

> **2.4 Purposes** [Action] may engage in any and all other business activities whatsoever that may lawfully be conducted by limited liability companies under the [Florida Limited Liability Company Act], and [Action] may exercise all powers necessary to, connected with or incidental to the accomplishment of any business that may lawfully be conducted by limited liability companies under the [Florida Limited Liability Company Act]; provided, however, [Action] shall primarily serve credit unions.

In January 2014, Plaintiff was introduced to a "telemedicine opportunity." For purposes of this appeal, it is undisputed that the telemedicine opportunity "is a telephone and videoconferencing-based doctor consultation service that allows customers to discuss health problems with medical doctors." The service of telemedicine counseling is not an insurance product, and an insurance-related license is not required to sell this service. Further, telemedicine counseling can be marketed to all consumers, not just credit union members.

Plaintiff presented this opportunity to Southeast's board of directors in February 2014. After considering a competing telemedicine counseling service proposed by another entity, Southeast, acting on behalf of Action as one of its managing members, elected to proceed with Plaintiff's proposal. In the interim, Plaintiff, the other managing member of Action, decided to market the telemedicine opportunity on his own, without Action or Southeast.

In December 2014, Plaintiff filed this declaratory judgment action against Southeast and Action seeking a determination that the telemedicine counseling business opportunity was not within the "scope" of Action's business. After Plaintiff filed a motion for summary judgment, Southeast and Action opposed the motion relying in part on the Declaration of David Kelly, Southeast's President, which was filed pursuant to Tenn. R. Civ. P. 72.[2] The Declaration states that "[i]n addition to Action's historical

[2] Tenn. R. Civ. P. 72 states: "Whenever these rules require or permit an affidavit or sworn declaration, an unsworn declaration made under penalty of perjury may be filed in lieu of an affidavit or sworn declaration. Such declaration must be signed and dated by the declarant and must state in substantially the following form: 'I declare (certify, verify or state) under penalty of perjury that the foregoing is true and correct.'" This rule went into effect on July 1, 2011, and is intended to make the practice in Tennessee state courts consistent with the practice in the federal courts in accordance with 28 (continued…)

business, it has and intends to continue to expand its business lines to other areas. As such, the scope of Action's business is not and was never intended to be static." Mr. Kelly also cites a 2008 letter from Plaintiff in which he stated that "the possibilities in our marketplace are endless . . . ," and "[t]here are countless options with virtually no limitations." Mr. Kelly also states in his declaration that, "[a]s the controlling interest in Action, [Southeast] has taken steps to expand its business to add new financial products and new insurance brokers."

At the hearing on the motion for summary judgment, the following exchanges occurred:

> THE COURT: Because when I looked at the financial information that was appended, it appeared that, literally, the history of this business has been associated with the sale of insurance products.
>
> [Counsel for Southeast/Action]: And I think that's fair, Your Honor.
>
> . . . .
>
> THE COURT: [Plaintiff] says, [Action is] engaged in basically the same business today that it was prior to . . . 2009, and that is the direct mail of accidental death, dismemberment insurance and other direct mail insurance products to credit union members.
>
> Isn't that true?
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> [Counsel for Southeast/Action]: I think it's true except it's not just direct mail, it's through other means.
>
> . . . .
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> THE COURT: There is no dispute that, historically, all Action has ever done is sell insurance-related products to credit union members.
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> [Counsel for Southeast/Action]: I would agree with that.

U.S.C. § 1746, which allows unsworn declarations to be used as evidence in federal courts under certain circumstances. *See* Tenn. R. Civ. P. 72, 2011 Advisory Comm'n Cmt. Additionally, in 2010 the Tennessee General Assembly enacted the "Uniform Unsworn Foreign Declarations Act," which provides in part: "Except as otherwise provided in subsection (b), if a law of this state requires or permits use of a sworn declaration, an unsworn declaration meeting the requirements of this part has the same effect as a sworn declaration." Tenn. Code Ann. § 24-9-304.

After the hearing, the trial court issued an order concluding that the operating agreement was not ambiguous and that, according to section 18.7, it was required to interpret the agreement's terms "simply, according to their fair meaning and not strictly for or against any Member." The court found that "the only business [Action] has engaged in, since its inception and up to today, is the sale of regulated insurance-related products" and that the scope of Action's business was the sale of insurance and insurance-related products. Further, the court found that the telemedicine opportunity "may have some relationship" to insurance products but that it is not regulated like insurance and does not require a license to sell. Based on the above and other findings, the court concluded that Plaintiff was not required to share the telemedicine opportunity with Action. As a consequence, the court granted Plaintiff's motion for summary judgment. This appeal by Southeast and Action followed.[3]

STANDARD OF REVIEW

Appellate courts review a trial court's decision on a motion for summary judgment de novo without a presumption of correctness. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, --- S.W.3d ---, No. W2013-00804-SC-R11-CV, 2015 WL 6457768, at *12 (Tenn. Oct. 26, 2015). In so doing, we must make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Id.* (citing *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013)).

The Tennessee Supreme Court has recently clarified the appropriate standard for granting summary judgment.[4] "[S]ummary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial." *Id.* at *22 (citing Tenn. R. Civ. P. 56.04, 56.06) (emphasis in original). Under this standard, "[t]he focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial." *Id.*

An issue is only "genuine" if the nonmovant presents evidence from which a rational trier of fact could find in its favor. *Id.* ("The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find

[3] Southeast and Action are represented by the same attorneys and make the same arguments on appeal. Accordingly, we will refer to both entities as "Southeast" unless it is necessary to distinguish between them.

[4] The Tennessee Supreme Court's decision in *Rye* was a judicial decision that overruled a prior case: *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008). *See Rye*, --- S.W.3d ---, 2015 WL 6457768, at *21 n.9. Accordingly, the summary judgment standard articulated in *Rye* applies retroactively. *Id.*

in favor of the nonmoving party."); *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993) ("[T]he test for a 'genuine issue' is whether a reasonable jury could legitimately resolve that fact in favor of one side or the other."); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (disputes about material facts are "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). "Material" facts are those that must be decided in order to resolve the substantive claim at issue. *Byrd*, 847 S.W.2d at 215; *see Anderson*, 477 U.S. at 248 ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.").

In contract cases, a court's initial task is to determine whether the language of the contract is ambiguous. *Spears v. Tennessee Farmers Mut. Ins. Co.*, 300 S.W.3d 671, 678 (Tenn. Ct. App. 2009) (citing *Planters Gin Co. v. Federal Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002)). If the contract is not ambiguous, then summary judgment is appropriate because interpretation is a pure question of law. *See id.*

ANALYSIS

The operating agreement states that it is governed by Florida law, and there is no dispute about the validity of that choice-of-law provision. Accordingly, the substantive law of Florida governs our analysis. *See Williams v. Smith*, 465 S.W.3d 150, 153 (Tenn. Ct. App. 2014) (discussing choice of law provisions).[5]

Under Florida law, the operating agreements of limited liability companies are construed by applying principles of contract interpretation. *Blechman v. Estate of Blechman*, 160 So. 3d 152, 156 (Fla. Dist. Ct. App. 2015) (citing *Berkowitz v. Delair Country Club, Inc.*, 126 So. 3d 1215, 1218 (Fla. Dist. Ct. App. 2012)). "The polestar guiding the court in the construction of a written contract is the intent of the parties." *Okeechobee Landfill, Inc. v. Republic Servs. of Florida, Ltd. P'ship*, 931 So. 2d 942, 944-45 (Fla. Dist. Ct. App. 2006). The parties' intent must be determined by examining the contract as a whole. *Id.*at 945. When the language of a contract is clear and unambiguous, the court will enforce the contract according to its terms. *Id.*; *see Emerald Pointe Prop. Owners' Ass'n, Inc. v. Commercial Const. Indus., Inc.*, 978 So. 2d 873, 877 (Fla. Dist. Ct. App. 2008).

In contrast, when "the contract is susceptible to two different interpretations, each one of which is reasonably inferred from the terms of the contract, the agreement is ambiguous." *Miller v. Kase*, 789 So. 2d 1095, 1097-98 (Fla. Dist. Ct. App. 2001).

[5] Because Tennessee is the forum state for this case, the procedural law of Tennessee, including its summary judgment standard, applies. *See Beach Cmty. Bank v. Labry*, No. W2011-01583-COA-R3-CV, 2012 WL 2196174, at *3 n.6 (Tenn. Ct. App. June 15, 2012); *In re Stalcup's Estate*, 627 S.W.2d 364, 368 (Tenn. Ct. App. 1981).

Determining whether a contract term is ambiguous is a question of law for the court. *Strama v. Union Fid. Life Ins. Co.*, 793 So. 2d 1129, 1132 (Fla. Dist. Ct. App. 2001).

A "true ambiguity does not exist merely because a contract can possibly be interpreted in more than one manner." *BKD Twenty-One Mgmt. Co., Inc. v. Delsordo*, 127 So. 3d 527, 530 (Fla. Dist. Ct. App. 2012). "[F]anciful, inconsistent, and absurd interpretations of plain language are always possible. It is the duty of the trial court to prevent such interpretations." *Id.* (quoting *Am. Med. Int'l, Inc. v. Scheller*, 462 So. 2d 1, 7 (Fla. Dist. Ct. App. 1984)). Consequently, a language in a contract is ambiguous "only if it is susceptible to more than one *reasonable* interpretation." *Id.* (emphasis in original).

Generally, an interpretation of a contact that gives a reasonable meaning to all its provisions is preferred to one that leaves a part useless or inexplicable. *Resnick v. J. Weinstein & Sons, Inc.*, 163 So. 3d 700, 703 (Fla. Dist. Ct. App. 2015) (quoting *PNC Bank, N.A. v. Progressive Emp'r Servs. II*, 55 So. 3d 655, 658 (Fla. Dist. Ct. App. 2011)). "The inconvenience, hardship, or absurdity of one interpretation of a contract or its contradiction of the general purpose is weighty evidence that such meaning was not intended when the language is open to an interpretation which is neither absurd nor frivolous and is in agreement with the general purpose of the parties." *Branscombe v. Jupiter Harbour, LLC*, 76 So. 3d 942, 948 (Fla. Dist. Ct. App. 2011) (quoting *Am. Med. Int'l, Inc.*, 462 So. 2d at 7).

When interpreting a contract, ordinary words typically have their ordinary meanings unless there is evidence that the parties intended for the words to have a special meaning. *Madson v. Madson*, 636 So. 2d 759, 761 (Fla. Dist. Ct. App. 1994). The ordinary meaning of a word is often described as its meaning in the dictionary. *See Siegle v. Progressive Consumers Ins. Co.*, 788 So. 2d 355, 360 (Fla. Dist. Ct. App. 2001); *Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. Dist. Ct. App. 1999). The ordinary meaning of a word or phrase is also described as "a natural meaning or the meaning most commonly understood when considered in relation to the subject matter and circumstances." *See J.N. Laliotis Eng'g Const., Inc. v. Mastor*, 558 So. 2d 67, 68 (Fla. Dist. Ct. App. 1990) (quoting *Granados Quinones v. Swiss Bank Corp.*, 509 So. 2d 273, 275 (Fla. 1987)).

If parties wish to depart from the ordinary meaning of common words and assign uncommon meanings to them, they must do so explicitly. *See Madson*, 636 So. 2d at 761. "One who would ascribe an exotic meaning to a term in a contract which otherwise has perfectly ordinary connotations must take pains to define the term either expressly or by express reference." *E. Ins. Co. v. Austin*, 396 So. 2d 823, 825 (Fla. Dist. Ct. App. 1981); *see Russ v. State*, 832 So. 2d 901, 907 (Fla. Dist. Ct. App. 2002) ("[W]here a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense." (alteration in original)); *Koplowitz v. Imperial Towers Condo., Inc.*, 478 So. 2d 504, 505 (Fla. Dist. Ct. App. 1985) ("Whether they appear in a statute or in a

declaration of condominium, words of common usage should be construed in their plain and ordinary sense.").

Here, this dispute exists because the parties' agreement does not define "scope" or "scope and purpose." Furthermore, the agreement does not identify the point in time when the "scope" of Action's business is to be determined. Southeast contends that "scope and purpose" is ambiguous because it is susceptible to multiple reasonable interpretations. According to Southeast, "scope and purpose" means "at a minimum any business opportunity to be marketed to credit union members, including the telemedicine opportunity." However, the entirety of the parties' agreement and the "inconvenience, hardship, or absurdity" that would result from Southeast's proposed interpretation demonstrate that the agreement is not ambiguous and that the parties intended for the words "scope and purpose" to have their ordinary meanings. *See Branscombe*, 76 So. 3d at 948.

"Scope" and "purpose" are commonly-used words with commonly-understood meanings. Therefore, if the parties intended to ascribe an uncommon meaning to "scope" or "scope and purpose," they should have explicitly defined those terms. *See E. Ins. Co.*, 396 So. 2d at 825. Instead of explicitly stating that these words have an uncommon definition, the agreement provides that its terms, covenants, and provisions "shall be construed simply and according to [their] fair meaning[s] . . . ." Consequently, the failure to specify a unique meaning for "scope and purpose" and the inclusion of the above-quoted section indicate that the parties intended for these words to have their ordinary meanings. *See id.*; *see also Russ*, 832 So. 2d at 907; *Koplowitz*, 478 So. 2d at 505.

Under Southeast's interpretation, Plaintiff agreed to disclose and make available every business opportunity "to be marketed to credit union members." Such a broad definition appears to encompass every product or service imaginable, whether they have anything to do with Action or not. Under this interpretation, Plaintiff would be required to disclose an opportunity to sell cars to credit union members even though Action's business is not related to cars at all. The inconvenience, hardship, or absurdity that would result are weighty evidence that the parties did not intend for "scope and purpose" to have this meaning, especially when interpreting the agreement based on the ordinary meaning of "scope" avoids these difficulties.[6] *See Branscombe*, 76 So. 3d at 948 ("The

[6] According to Southeast, "scope and purpose" is "an idiom commonly used, both in law and other contexts, as a unitary phrase." In support of this contention, Southeast cites numerous Florida cases in which the words "scope and purpose" are used. However, using the words that constitute an idiom does not always signify that those words are meant to be interpreted a unitary phrase. Instead, additional context is often required to determine whether those words are meant to be interpreted together or separately. For example, saying "I hope you break a leg" to an actor is different than saying "I hope you break a leg" to one's opponent in an Olympic figure skating competition. *See Jealousy on Ice*, New York Times, (Jan. 6, 1994), http://www.nytimes.com/packages/html/sports/year_in_sports/01.06.html (continued…)

inconvenience, hardship, or absurdity of one interpretation of a contract or its contradiction of the general purpose is weighty evidence that such meaning was not intended when the language is open to an interpretation which is neither absurd nor frivolous and is in agreement with the general purpose of the parties.").

The ordinary meaning of words is found in the dictionary and is the most commonly understood meaning in relation to the subject matter of the parties' agreement. *See Siegle*, 788 So.2d at 360; *Beans*, 740 So. 2d at 67; *J.N. Laliotis*, 558 So. 2d at 68. According to one dictionary, "scope" means "**1.** The range of one's perceptions, thoughts, or actions. **2.** Breath or opportunity to function. **3.** The area covered by a given activity or subject." The American Heritage College Dictionary 1222 (3d ed. 1997). The operating agreement is concerned with the relationship of Action's members to each other and to Action, and the subject matter of section 6.6 is the duty to make certain business opportunities available to Action in order to avoid competition between Action and its members. Based on the dictionary and the subject matter of the parties' agreement, "scope" most naturally refers to the range or breadth of the business that Action is engaged in at the relevant time.

Southeast contends this interpretation renders "purpose" redundant because "by definition, scope would always be within the purpose." We respectfully disagree. Contrary to Southeast's contentions, "scope" and "purpose" refer to different concepts. "Purpose" is aspirational and refers to what Action is capable of doing in the future (i.e. all lawful business for limited liability companies). In contrast, "scope" refers to what Action *actually* is doing or has done at the relevant point in time. Thus, an opportunity might be within Action's scope but not its purpose if, for example, Action had been organized for a limited purpose (e.g. to acquire real estate in Florida) but was in fact also engaged in the business of selling disposable mobile phones to college students. In this example, a business opportunity to sell mobile phones to college students would be within Action's scope but not its purpose.

Therefore, under the ordinary meaning of "scope," a member is required to disclose a business opportunity if that opportunity (1) is within Action's aspirational goal – its purpose; and (2) is within the area that Action's business has or is actually covering

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(recounting a 1994 incident in which an assailant struck figure skater Nancy Kerrigan's right knee with a blunt object). The fact that the words "break a leg" appear in both these examples does not mean that the speaker intends them to mean the same thing. Instead, the context of the statement helps the listener (or reader) decide how to interpret the phrase. Thus, the former use is a courtesy because the words "break a leg" are meant to be interpreted together as one phrase with the figurative meaning "good luck." *See* The American Heritage College Dictionary 172 (3d ed. 1997) (stating that the idiom "break a leg" is "[u]sed to wish someone success in a performance."). However, the latter use is poor sportsmanship (or an omen of criminal activity) because the words "break a leg" are intended to be interpreted individually and literally. In this case, even if "scope and purpose" is a commonly-used idiom, use of those words does not by itself indicate that the parties intended to use them as an idiom.

at the relevant point in time. As a result, interpreting "scope" according to its ordinary meaning does not render any part of the agreement redundant.

Having concluded that "scope" refers to the breadth of the business Action is or has engaged in, we must turn our attention to determining when Action's "scope" should be assessed. The agreement does not specify whether Action's scope is to be determined as of the date of the agreement, the date of the discovery of an opportunity, or some other date.[7] After reviewing the agreement, we conclude that the parties intended for Action's scope to be determined at the time when a member seeks to pursue the business opportunity in question.

The agreement states that the covenant to "disclose and make available" is "in furtherance of" Plaintiff's duty of loyalty. Under Florida law, managers of manager-managed LLCs owe a fiduciary duty of loyalty to the LLC and its members. Fla. Stat. Ann. § 605.04091 (2014). Further, the dissociation of a member who is also a manager removes that person as a manager. Fla. Stat. Ann. § 605.04072(5) (2014). Because Plaintiff is both a member and a manager, his dissociation as a member would remove him as a manager and end his duty of loyalty. *See id.*; Fla. Stat. Ann. § 605.04091. Similarly, under section 6.6 of the agreement, "Members" owe the LLC and each other a duty of loyalty. Under both the agreement and Florida law, Plaintiff's duty of loyalty is a continuing duty that exists for as long as he is a member of the LLC. *See* Fla. Stat. Ann. §§ 605.04072(5), 605.04091, 605.0603 (2014). Because the agreement makes the covenant to disclose part of the duty of loyalty, the covenant to disclose is also a continuing duty that exists for the same duration as the duty of loyalty.

Consequently, the scope of Action's business is not frozen at the time the operating agreement is signed. By coupling the covenant to disclose with an ongoing duty the parties agreed that the breadth of the covenant would expand as Action's business expanded. If one of Action's members decided to engage in a business opportunity at a time when Action had not yet expanded into that area, then the opportunity is not within Action's "scope." Thus, Action's scope must be determined at the time when Plaintiff sought to pursue the telemedicine consulting business opportunity, which was in January and February of 2014.

It is undisputed that Action has engaged in the same business – the sale of insurance products to credit union members – from 2009 until the date of the summary

[7] The parties could have agreed to assess Action's "scope" as of a specific date. When the parties amended Action's operating agreement in August 2012, they amended section 6.6(b), in which Plaintiff agreed not to compete with Action. In relevant part, the amendment to this section states that Plaintiff agreed not to "engage in any product sales or provide services in connection therewith that compete with the products sold or the services provided in connection therewith by [Action] *as of August 17, 2012* [the effective date of the amendments]." (Emphasis added).

judgment hearing. The statements of Southeast's counsel at the hearing before the trial court confirm this assessment. Therefore, the "scope" of Action's business has not changed since its organization in 2009. Additionally, it is undisputed that the telemedicine opportunity is not an insurance product. Consequently, the telemedicine consulting business opportunity is not within Action's scope, and Plaintiff was not required to make it available to Action.

Southeast also contends that Mr. Kelly's declaration creates an issue of fact as to what kinds of business Action is actually engaged in. However, the declaration does not create a genuine issue as to any material fact because it is not evidence that would allow a reasonable jury to find in favor of Southeast. *See Rye*, --- S.W.3d ---, 2015 WL 6457768, at *22; *Byrd*, 847 S.W.2d at 215; *see also Anderson* 477 U.S. at 248.

Mr. Kelly's declaration cites two examples of Action's expansion: a 2008 letter from Plaintiff and Mr. Kelly's own declaration that Southeast – not Action – has "taken steps to expand its business to add new financial products and new insurance brokers." Neither one of these examples would allow a reasonable jury to find in Southeast's favor. Plaintiff's 2008 letter regarding what Action's business *might be in the future* does not demonstrate that there is a genuine issue as to whether Action had in fact expanded its business lines – its scope – in 2014.[8]

As to the second example, the Declaration states that "[a]s the controlling interest in Action, [Southeast] has taken steps to expand *its* business to add new financial products and new insurance brokers." (Emphasis added). It is not clear which business "its" refers to: Action's or Southeast's. Although Southeast owns a controlling interest in Action, any steps Southeast has taken to add new products and brokers for its own business, meaning the business of Southeast, are not evidence that the scope of Action's business has expanded. Action's operating agreement is not concerned with Southeast's "scope and purpose," and consequently, efforts that Southeast has made to expand Southeast's business are not necessarily material to determining the scope of Action's business.

To the extent the Declaration references Action's conduct, it does not address a material issue. It states that Action has "taken steps to expand" by adding "new financial products and new insurance brokers." The material issue here is whether Action has expanded its business – its scope – to include the sale of telemedicine services or similar products. A dispute about whether Action has expanded its business with financial

[8] To the extent Southeast attempts to rely on the letter as parol evidence of the meaning of "scope and purpose," we cannot consider it because the agreement is unambiguous. *See Jenkins v. Eckerd Corp.*, 913 So. 2d 43, 53 (Fla. Dist. Ct. App. 2005) ("The terms of an integrated written contract can be varied by extrinsic evidence only to the extent that the terms are ambiguous and are given meaning by the extrinsic evidence.").

products that are not similar to telemedicine is immaterial. *See Byrd*, 847 S.W.2d at 215; *Anderson*, 477 U.S. at 248. Stating that Action has expanded as a general matter does not indicate whether Action has expanded into areas similar to telemedicine. Consequently, the Declaration does not establish that a genuine dispute exists about a material fact.

Plaintiff filed a properly-supported motion for summary judgment that includes facts to establish that Action has not expanded its scope since its organization in 2009. When faced with a properly-supported motion for summary judgment, the nonmoving parties, in this case Southeast and Action, "may not rest upon the mere allegations or denials of [their] pleading[s], but [their] response, by affidavits or as otherwise provided in this rule, must set forth *specific* facts showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06 (emphasis added); *see Rye*, --- S.W.3d ---, 2015 WL 6457768, at *22. The Declaration of David Kelly upon which Southeast and Action rely in their response to the motion fails to provide specific facts sufficient to demonstrate that a genuine issue of material fact exists.

Based on the foregoing, the parties intended "scope" to refer to the business that Action was actually engaged in at the time that Plaintiff sought to pursue the telemedicine opportunity. There is no dispute that Action was engaged only in the sale of insurance products at that time. Further, there is no dispute that the telemedicine opportunity is not an insurance product. As a result, Plaintiff was not required to disclose the opportunity to Action, and we affirm the decision of the trial court granting Plaintiff summary judgment.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Southeast Resource Group, Inc.

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FRANK G. CLEMENT, JR., JUDGE