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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHINO VALLEY PATHOLOGY MEDICAL GROUP et al., Plaintiffs and Appellants, v. DOCTORS' HOSPITAL MEDICAL CENTER OF MONTCLAIR et al., Defendants and Respondents.	B190108 c/w B191450 (Los Angeles County Super. Ct. No. BC324476)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County, James Dunn, Judge. Reversed.

Andrews & Hensleigh and Joseph Andrews for Plaintiffs and Appellants.

Hooper, Lundy & Bookman, Glenn E. Solomon, Lil G. Delcampo and Salvatore J. Zimmitti for Defendants and Respondents.

INTRODUCTION

Plaintiffs Chino Valley Pathology Medical Group and Shanti Miglani Sahgal, M.D., Inc. appeal from a summary judgment against them in their lawsuit against defendants Doctors' Hospital Medical Center of Montclair, AHMC Inc., and W&L AHMC Inc., and from a post-judgment order awarding attorney's fees to defendants.

FACTUAL AND PROCEDURAL BACKGROUND

On or about February 1, 2001, plaintiff Chino Valley Pathology Medical Group (Medical Group) and defendant Doctors' Hospital Medical Center of Montclair (Hospital) entered into a written contract entitled Anatomical and Clinical Pathology Services Agreement (the contract).[1] Pursuant to the contract, Medical Group provided anatomical and clinical pathology services to patients treated at Hospital's facility on an exclusive basis. Some of the services were provided to patients who were Medi-Cal beneficiaries to whom Hospital provided services pursuant to its contract with Medi-Cal. The contract was terminated on or about March 31, 2004.

Plaintiffs filed suit against defendants on November 12, 2004 to recover for the professional component of payments to Hospital by Medi-Cal as reimbursement for services rendered by plaintiffs to Medi-Cal beneficiaries under the contract from February 1, 2001 through March 31, 2004. The first cause of action alleged defendants breached the contract and the covenant of good faith and fair dealing by billing, collecting and converting to their own use the professional component of Medi-Cal reimbursement and refusing to account to plaintiffs or pay to plaintiffs the corresponding

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[1] The contract was signed on behalf of Hospital by its Chief Executive Officer, David Chu (Chu). On behalf of Medical Group, its two founding partners signed: Edward Lai, M.D. (Lai) and plaintiff Shanti Miglani Sahgal, M.D., Inc. by its representative Shanti M. Sahgal, M.D. (individually and collectively, Sahgal).

amounts Hospital billed and collected from Medi-Cal, which amounts were estimated to be in excess of $100,000.

The second cause of action alleged that plaintiffs were entitled to possess the Medi-Cal professional component amounts which defendants had billed and collected and that defendants converted the amounts to their own use through acts of fraud sufficient to support an award of punitive damages. The third cause of action alleged that defendants had been unjustly enriched at the expense of plaintiffs at least by the Medi-Cal professional component amounts retained by defendants. In their prayer for relief under the breach of contract cause of action, plaintiffs also requested attorney's fees, costs and expenses pursuant to Paragraph 21 of the contract and Civil Code section 1717.

During the course of the litigation, defendants filed a motion for summary judgment based upon their contention that, pursuant to the terms of the contract, plaintiffs were not entitled to payment for any portion of the amounts Hospital billed and collected from Medi-Cal as reimbursement for clinical pathology services rendered to Medi-Cal beneficiaries at Hospital's facilities.

Counsel for defendants represented to the trial court that the contract stated that plaintiffs can bill for Professional Services, defined as services that physicians personally provide, and the contract excluded clinical pathology services from the definition of Professional Services. After hearing argument, the trial court acknowledged that the meaning given to the critical words, clinical pathology services, by defendants was different than the meaning given by plaintiffs. Plaintiffs' counsel urged that it was an issue for the trier of fact. Defendants' counsel asserted that the term clinical pathology services was not the key dispute, but rather the only dispute between the parties was the meaning of the term "Professional Services" in Paragraph 3,[2] since they are the only services for which plaintiffs are entitled to receive payment under the contract pursuant to

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[2] Unless otherwise expressly identified, all references to Paragraphs herein are to the Paragraphs as numbered in the parties' contract.

Paragraph 5(d). Plaintiffs' counsel noted that Sahgal and Chu had the same understanding of Professional Services and its relation to clinical pathology services, that understanding was based upon the meaning of terms used in the industry with respect to the Medi-Cal program, and argued that this was an instance where there was a latent ambiguity which precluded the trial court from interpreting the contract from its own understanding of the plain meaning of words. Plaintiffs and defendants offered evidence to support their respective positions. The trial court issued an order overruling each party's objections to evidence offered by another party and taking judicial notice of the documents requested by each party.

The trial court granted defendants' motion for summary judgment. The trial court determined the contract was not ambiguous, and thus, it was not necessary to accept and consider any extrinsic evidence offered by the parties for its consideration. Interpreting the contract in accordance with the plain meaning of its language, the trial court found that plaintiffs were not entitled to Medi-Cal payments as they alleged.

Plaintiffs moved for reconsideration of the order granting summary judgment, which the trial court denied. Judgment was filed against plaintiffs on February 1, 2006. Plaintiffs filed a notice of appeal from the judgment on March 24, 2006. The appeal was designated as number B190108.

After the judgment was entered, defendants moved to be awarded attorney's fees under Paragraph 21 of the contract. On April 25, 2006, the trial court granted the motion, awarded defendants attorney's fees in the amount of $156,319, and issued a written ruling. On May 26, 2006, plaintiffs filed a notice of appeal from the attorney's fees award. The appeal was designated as number B191450. Plaintiffs' two appeals were consolidated by order of this court filed July 18, 2006.

DISCUSSION

Plaintiffs offer a number of grounds on which they base their primary contention: That the trial court erred in granting defendants' motion for summary judgment on the

basis that the contract was not ambiguous, declining to consider extrinsic evidence, and ruling that, under the plain meaning of Paragraphs 5(d), 3(c) and 5(h), plaintiffs were not entitled to bill, collect or otherwise receive payment for any part of the reimbursement paid by Medi-Cal to Hospital for clinical pathology services.[3]

Plaintiffs contend that the trial court erred in interpreting Paragraph 5(d) of the contract as a matter of law on the basis of the plain language of the contract, not interpreting the paragraph in context with other contract provisions, and not interpreting it against the defendants as the drafters of the contract. Plaintiffs claim the trial court erred in excluding all extrinsic evidence. Specifically, the court erred in failing to consider evidence of the parties' intent, medical business usage and custom with respect

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[3] The trial court issued a written decision in its minute order entered December 14, 2005, which reads in part as follows: "[E]ach of the causes of action is based on the claim that plaintiff did not receive any payments for 'clinical pathology services' rendered to Medi-Cal patients at the Hospital, and the court finds that they were not entitled to such payments under the terms of the contract . . . . [¶] The court finds there are no disputed issues of material fact and that this motion is decided on the basis of the written contract which the court finds clear and unambiguous. . . . Even if there is a professional component to Clinical Pathology Services, under this contract plaintiffs were not entitled to bill or collect for such services, as the contract specifically defines the nature of those services which may be billed and collected for under this agreement. Clinical Pathology Services was not one of them. . . . [¶] The plain meaning of the Agreement is that plaintiff was entitled to payment 1) only for services which meet the definition of Professional Services, 2) clinical pathology services do not meet the contractual definition of Professional Services, 3) only the Hospital was entitled to bill and collect for clinical pathology services, and 4) PLAINTIFF WAS NOT PERMITTED TO BILL FOR CLINICAL PATHOLOGY SERVICES. All of these requirements are defined in their effect by specific, detailed definitions contained in the Agreement and need no explication or interpretation based on extrinsic evidence. [¶] . . . There is no basis for contending that the term 'Professional Services' contained in paragraphs 3(c) and 5(d) should be different in each paragraph. . . . Plaintiff contends that [Paragraph] 5(h), which prohibits plaintiffs from billing any payors for clinical pathology services, applies only to Medicare. The plain language of the paragraph states that the contractor ['agrees not to bill, or cause to be billed; Medicare patients, Medicare carriers, private patients, OR ANY OTHER ENTITIES, WHETHER PRIVATE PAYING OR OTHERWISE, for . . . including clinical anatomical and Clinical Pathology services . . . .' The language could not be more clear, and is not limited to Medicare."

to contract terminology, circumstances under which the parties entered into the contract, the parties' conduct after the contract was signed, and whether the court's interpretation would render the contract illegal under Medi-Cal fraud and anti-kickback laws such as Health and Safety Code section 445 and Title 42, United States Code, section 1320a-7b.

Plaintiffs further contend that the trial court erred in interpreting Paragraph 21 of the contract as authorizing the award of attorney's fees to the prevailing party in the instant litigation, and on that basis, awarding attorney's fees to defendants.

As we explain more fully below, we agree that the contract is ambiguous and extrinsic evidence should be considered in order properly to interpret the contract with respect to whether plaintiffs had a right to payment for the professional component of Medi-Cal reimbursement received by Hospital for clinical pathology services rendered by plaintiffs. We disagree, however, with plaintiffs' contention that contract Paragraph 21 is solely an indemnity provision and not an agreement that the prevailing party in litigation such as presented here is entitled to its attorney's fees.

1. *Standard of Review on Appeal from Summary Judgment*

On appeal from a summary judgment, our review is de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) Summary judgment properly is granted if the admissible evidence in the papers submitted by the parties "show[s] that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We exercise our independent judgment to make the determination. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) Generally, we are required to consider all of the admissible evidence set forth in the papers and all inferences reasonably deducible from the evidence, except inferences which are contradicted by other evidence or inferences, which raise a triable issue of material fact. (Code Civ. Proc., § 437c, subd. (c).)

In the instant case, however, the first issue was interpretation of the contract between the parties. The threshold inquiry in contract interpretation is whether the contract is ambiguous. (*Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554.) A trial

court's ambiguity determination is a question of law and thus, subject to independent appellate review. (*Roden v. Bergen Brunswig Corp.* (2003) 107 Cal.App.4th 620, 625; *Appleton, supra*, 27 Cal.App.4th at pp. 554-555.) If the trial court determines the contract language is unambiguous, the court may not consider parol, or extrinsic, evidence offered by a party as to the interpretation of a contract. (Code Civ. Proc., § 1856[4]; *Appleton, supra*, at p. 554.) In determining ambiguity, however, parol evidence is admissible to show the words have a particular meaning by trade usage or the contracting parties' understanding. (Code Civ. Proc., § 1856, subd. (c); *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40.) "Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible." (*Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, 1351.)

Basic principles of contract interpretation are well-established. "'The primary object of all interpretation is to ascertain and carry out the intention of the parties. [Citations.] All the rules of interpretation must be considered and each given its proper weight, where necessary, in order to arrive at the true effect of the instrument. [Citation.]' [Citations.]" (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th

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[4] Code of Civil Procedure section 1856 provides: "(a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement. [¶] (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement. [¶] (c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance. [¶] . . . [¶] (f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue. [¶] (g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud."

232, 238.) A contract must be construed according to the "ordinary and popular" meaning of its language. (Civ. Code, § 1644; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265.) Generally, "if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822.) A contract must be interpreted by consideration of the whole agreement and not isolated provisions. (Civ. Code, § 1642; *City of Manhattan Beach, supra,* 13 Cal.4th at p. 240.)

2. *Ambiguity Determination*

We first consider whether the contract is ambiguous. (*Appleton v. Waessil, supra*, 27 Cal.App.4th at p. 554.) Defendants agree with the trial court that the contract is not ambiguous. They contend that Paragraph 5(d) unambiguously provides that plaintiffs may only bill and collect for Professional Services, not Clinical Pathology Services.[5]

Paragraph 5(d) states: "Contractor [i.e., plaintiffs] shall be responsible for, and solely entitled to, billing and collection of the fees for [] Professional Services provided in Hospital by Contractor. Hospital [i.e., defendants] shall be responsible for, and solely entitled to, billing and collection of all charges for Hospital services, including all clinical Anatomical and Clinical Pathology Services rendered to patients in Hospital." Defendants contend that the language of this Paragraph confirms that plaintiffs may only bill and collect for Professional Services as expressly defined in Paragraph 3(c). Defendants assert that the express language of the contract in Paragraph 3(d) designates Clinical Pathology Services as being "Provider Services" and that Paragraph 5(h) provides that plaintiffs are not entitled to bill for "Provider Services," just as

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[5] The term "Clinical Pathology Services," which defendants use in their brief, does not appear in the contract except as part of the lengthier phrases "Anatomical and Clinical Pathology Services" and "clinical Anatomical and Clinical Pathology Services." Hereinafter, for clarity and convenience, we will use the term "Clinical Pathology Services" to represent the actual contract phrases.

Paragraph 5(d) provides that plaintiffs are not entitled to bill for Clinical Pathology Services.

The interpretation proffered by defendants begins to unravel with their claim that, under the plain words of the contract, "Professional Services" do not include Clinical Pathology Services. By definition in Paragraph 3(c), "Professional Services" are one component of "Medical Services,"[6] which itself is defined in Paragraphs 3(a) and (b) as consisting of all Clinical Pathology Services that plaintiffs are required to provide to Hospital.[7] According to Paragraph 3(d), the other component of "Medical Services" is "Provider Services."[8] From these definitions, it appears that "Professional Services" and "Provider Services" are mutually exclusive classes of Clinical Pathology Services.

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[6] Paragraph 3(c) provides: "Medical [S]ervices shall constitute 'Professional Services' to the extent that such services: i. Are personally furnished for individual patient by [the plaintiffs' physician who is the] Director, or any Associate hereunder; ii. Ordinarily require performance by a physician; and iii. Contribute directly to the diagnosis or treatment of an individual patient. [¶] Consultative [Clinical Pathology Services] shall also be deemed to constitute Professional Services if they (1) are requested by the patient's attending physician; (2) relate to a test result that lies outside the clinically significant normal or expected range in view of the condition of the patient (3) result in a written narrative report included in the patient's medical records and (4) require the exercise of medical judgment by the consulting Pathologist."

[7] "Medical Services" are defined as Clinical Pathology Services (1) "customarily provided by a[n] *Anatomical and Clinical Pathology* Department in a hospital similar in size and location to Hospital" (¶ 3(a), italics added) and (2) "normally performed in a hospital of comparable size and containing comparable equipment as Hospital" (¶ 3(b)) and constitute the services which plaintiffs are required to provide.

Paragraph 3(s) confirms that plaintiffs "have the sole and exclusive right to render to all persons admitted . . . to or . . . treated . . . at the Hospital, all of the [Clinical Pathology Services] described in Paragraph 3 (a) & (b)." Applying the "Medical Services" definition, Paragraph 3(s) may be interpreted as giving plaintiffs the sole and exclusive right to render to all patients admitted or otherwise treated at Hospital's facilities all of the "Medical Services."

[8] Pursuant to Paragraph 3(d), "Medical Services which do not qualify as Professional Services but which are rendered by [plaintiffs] or any Associate hereunder

An inconsistency appears and ambiguity arises, however, in the Paragraph 3(d) statement following the "Provider Services" definition: "For *all* purposes under this Agreement *and* for billings to the Medicare program or Medicare beneficiaries, [Clinical Pathology Services] provided by [plaintiffs] shall be considered Provider Services." (Italics added.) The statement is in direct contradiction to the definitions "Medical Services," "Professional Services," and "Provider Services" in Paragraphs 3(a), (b), (c), and the first sentence of Paragraph 3(d). If "[f]or *all* purposes," Clinical Pathology Services provided by plaintiffs constitute "Provider Services," then it would logically follow that no Clinical Pathology Services provided by plaintiffs would constitute "Professional Services," no matter what the definition of "Professional Services" is in Paragraph 3(c).

If, as defendants contend, we apply the plain words of the Paragraph 3(d) statement to interpret the "Professional Services" definition in Paragraph 3(c) as addressed above, together with the payment provisions in Paragraphs 5(d) and (h), we reach an anomalous result. Paragraph 5(d)[9] would provide that only Hospital is entitled to bill and collect for all Clinical Pathology Services rendered to patients in the Hospital. Paragraph 5(h)[10] would provide that plaintiffs are not entitled to bill and collect for Clinical Pathology Services provided by plaintiffs at the Hospital. The illogical result would be an interpretation that, although plaintiffs have the duty and, pursuant to

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for the general benefit of patients in the Hospital shall constitute 'Provider Services.'" (Italics added.)

[9] As noted previously, Paragraph 5(d) states: "Contractor [i.e., plaintiffs] shall be responsible for, and solely entitled to, billing and collection of the fees for [] Professional Services provided in Hospital by Contractor. Hospital [i.e., defendants] shall be responsible for, and solely entitled to, billing and collection of all charges for Hospital services, including all clinical Anatomical and Clinical Pathology Services rendered to patients in Hospital."

[10] Paragraph 5(h) provides: "[Plaintiffs] agree[] not to bill . . . Medicare patients, Medicare carriers, . . . or any other entities, whether private paying or otherwise, for . . . Provider Services . . . ."

Paragraph 3(s), the exclusive right to render all Clinical Pathology Services at Hospital's facilities, only the Hospital has the right to bill and collect for the services, and, following defendants' interpretation of the right to bill and collect to its logical conclusion, only the Hospital has the right to payment for all Clinical Pathology Services. A fundamental tenet of contract interpretation is to avoid any interpretation that creates an irrational or unreasonable result. (Civ. Code, § 1638.) Accordingly, restricting the basis for contract interpretation to the plain words of the contract in these provisions yields ambiguity, not clarity, with regard to the respective rights to bill, collect and be paid for Clinical Pathology Services rendered at the Hospital.

Defendants also contend that Paragraphs 5(d) and (h) make it clear that only Hospital is entitled to bill the Medicare program or Medicare beneficiaries for Clinical Pathology Services and that plaintiffs are entitled to bill and collect only for "Professional Services" as defined in Paragraph 3(c). Defendants fail to mention the contradictory plain language in Paragraph 3(a) that Hospital is not entitled to bill Medicare for services provided by plaintiffs under Part A of Medicare.[11] The anomaly opens questions as to, for example, whether the parties intended that Medicare Part A services were to be considered "Professional Services" or, alternatively, whether they intended, as plaintiffs contend, that plaintiffs were to be solely entitled to bill for the professional component of federal health reimbursement programs in general, such as Medicare and Medi-Cal.[12]

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[11] Paragraph 3(a) provides that "[t]he parties agree that Hospital will neither bill Medicare nor pay [plaintiffs] for any services of [plaintiffs] under Part A of Medicare."

[12] Documentation provided to the trial court by defendants indicates, for example, that the Medicare program and the Medicaid program, implemented in California as Medi-Cal, are federal health care reimbursement programs and are subject to regulations and guidelines promulgated to combat fraud and abuse in submission of erroneous claims by hospitals and other health care providers. (See, e.g., 70 Fed.Reg. 4858 (Jan. 31, 2005), included in defendants' request for judicial notice in support of its summary judgment motion.)

We conclude that, when Paragraphs 3(c), 5(d) and 5(h) are considered in context with Paragraphs 3(a), 3(b), and 3(d), and terms are applied as defined in the plain words of the contract, the contract, on its face, is ambiguous.[13] (*Wechsler v. Capitol Trailer Sales* (1963) 220 Cal.App.2d 252, 263.) Interpretation utilizing only the plain words of the contract results in ambiguity as to which Clinical Pathology Services are to be attributed to plaintiffs, and which to defendant Hospital, for payment and all other purposes under the contract.

It has been recognized that when, as here, the same words appear to have different meanings as used in separate parts of a contract and extrinsic evidence offered by the parties to aid interpretation is contradictory, a question of fact is presented which precludes summary judgment. (*Wolf v. Superior Court, supra,* 114 Cal.App.4th at p. 1351.) Ruling that the contract was not ambiguous, the trial court declined to make, or base its contract interpretation on, any factual findings derived from extrinsic evidence offered by either party. The trial court's stance was consistent with the general rule that parol evidence may not be considered if the contract is unambiguous. (Code Civ. Proc., § 1856; *Appleton v. Waessil, supra,* 27 Cal.App.4th at p. 554.)

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[13] Defendants point out that each of the plaintiffs responded "No" to form interrogatory number 50.6 regarding whether the contract was ambiguous. They contend that plaintiffs have, therefore, admitted that the contract is not ambiguous, and cannot now make their contradictory argument asserting that the contract language is ambiguous and consideration of extrinsic evidence is necessary to determine the parties' intended meaning. Plaintiffs agree that, early in the lawsuit, they admitted the agreement was not ambiguous, based upon Chu's prior agreement with them that the contract required that plaintiffs be paid for all professional services and the Hospital be paid only for technical services. Chu affirmed his interpretation in his deposition testimony. However, the position defendants subsequently took in the litigation was contradictory to that interpretation, and accordingly, plaintiffs changed their position to assert the contract was ambiguous. The record supports plaintiffs' position that their alleged admissions were not that, under the interpretation now proffered by defendants, the agreement is unambiguous. Hence, we conclude that the alleged admissions do not bar plaintiffs from raising their contentions in opposition to the summary judgment motion and on appeal.

Review of the record, however, supports the conclusion that, in the instant case, proffered extrinsic evidence is contradictory. Defendants relied on the evidence of the plain language of the contract. Plaintiffs, on the other hand, offered several other documents as evidence which appear consistent with three purposes for which extrinsic evidence is not prohibited by the parol evidence rule—to establish the meaning of contract words and terms consistent with their trade usage in the health care industry (Code Civ. Proc., § 1856, subd. (c)), to evaluate the legality and validity of the contract (*id*., subds. (f), (g)) and to consider evidence of the circumstances under which the contract was made in order to determine if the words are consistent with the parties' intent at the time of contracting (*id*., subd. (g)).

Plaintiffs offered evidence of trade usage and custom expressed in relevant federal statutes, regulations and guidelines (Code Civ. Proc., § 1856, subd. (c)), of the circumstances under which the contract was made (*id.*, subd. (g); see *Estate of Powell* (2000) 83 Cal.App.4th 1434, 1440), and whether the questioned contract terms were within the "reasonable expectations" of the parties when they signed the contract (*Fischer v. First Internat. Bank* (2003) 109 Cal.App.4th 1433, 1448-1449). They offered evidence in the form of statements made under oath by Sahgal as plaintiffs' representative and Chu as chief executive officer of Hospital. Both Sahgal and Chu were signatories to the contract in the same representative capacities and presumably had personal knowledge regarding the intent of the parties with respect to the terms of the contract. In their respective sworn statements, each of them used the terminology urged by plaintiffs as consistent with trade usage in the healthcare industry. They referred to the professional component of Medi-Cal reimbursement as being payment for professional medical services rendered by physicians, and the technical component as being payment for services provided by a hospital.

The statements also indicate that Chu represented to Sahgal, and they each believed, that the contract was essentially the same as another contract plaintiffs had previously entered into with another hospital. The other contract allowed plaintiffs to bill Medi-Cal and collect for the professional component of Clinical Pathology Services.

Chu also indicated that Hospital hurried the contracting process in order to be in compliance with laws governing the operation of a clinical laboratory at Hospital's facilities and that virtually no contract negotiations occurred. Chu explained that when he found a copy of a prior contract between defendants' predecessor, the Hospital's prior owner and a third-party medical group, he simply had his secretary change the identification of the parties and presented it to plaintiffs for signature. Such circumstances suggest that the actual words of the contract were not accorded much attention prior to the signing and, therefore, may not have accurately embodied the parties' intentions.

Other evidence offered by both defendants and plaintiffs raises the possibility that defendants' interpretation would render the contract's payment arrangement as to Medi-Cal reimbursement illegal and in violation of federal prohibitions against fraud and abuse involving financial arrangements between hospitals and hospital-based physicians such as plaintiffs (Code Civ. Proc., § 1856, subds. (f), (g)).[14] It is well-settled that an

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[14] Paragraph 11 of the contract requires plaintiffs to comply with all applicable law. That there may be a legality issue with respect to rights to Medi-Cal payment is indicated, for example, in various federal guidelines offered into evidence by each party with respect to financial arrangements between hospitals and physicians with exclusive contracts to provide clinical laboratory services in the hospitals. Defendants provided guidelines in 70 Federal Register 4858 (Jan. 31, 2005) which state: "Arrangements between hospitals and traditional hospital-based physicians (e.g., . . . pathologists) raise . . . concerns. [¶] . . . [¶] Nothing in this supplemental C[ompliance] P[rogram] G[uidance] should be construed as requiring hospital-based physicians to perform administrative or clinical services at no or a reduced charge. Uncompensated or below-market arrangements for goods or services will be subject to close scrutiny for compliance with the [federal anti-kickback] statute." (70 Fed.Reg. 4867 (Jan. 31, 2005).) Plaintiffs offered into evidence the prior guidelines from 63 Federal Register 8987 (Feb. 23, 1998) which apparently were in effect at the time the parties entered into the contract in 2001. They caution as follows: One "risk area" is "[f]inancial arrangements between hospitals and hospital-based physicians" "that compensate physicians for less than the fair market value of services they provide to hospitals . . . . Examples of such arrangements that may violate the anti-kickback statute [include] token or no payment for Part A supervision and management services; . . ." (63 Fed.Reg. 8990 and fn. 25 (Feb. 23, 1998).)

illegal contract is void and cannot be enforced. (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 408.) Hence, such evidence merits consideration prior to ruling on the interpretation of the contract.

For the foregoing reasons, we conclude that the contract is ambiguous in that, on its face, it is capable of more than one reasonable interpretation. (*Wechsler v. Capitol Trailer Sales*, *supra*, 220 Cal.App.2d at p. 263.) In addition, the extrinsic evidence suggests that there is a latent ambiguity which renders the contract provisions at issue reasonably susceptible to more than one meaning. (*Wolf v. Superior Court*, *supra*, 114 Cal.App.4th at p. 1351.) Accordingly, we cannot agree with the trial court that the contract is subject to interpretation as a matter of law regarding whether plaintiffs were entitled to bill for or otherwise recover for the clinical pathology services they provided. The summary judgment must be reversed (Code Civ. Proc., § 437c) and the matter remanded to the trial court for consideration of admissible extrinsic evidence for the purpose of interpreting the contract.[15]

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[15] On appeal, plaintiffs raised additional contentions regarding the trial court's denial of their request to order defendants to produce Lai for a deposition to be held prior to the hearing on defendants' motion for summary judgment. Although Lai and Sahgal were founding partners of Medical Group, Lai was not a named plaintiff in the lawsuit. Rather, in their moving papers, defendants included Lai's declaration in support of defendants' motion against plaintiffs. Among other matters, Lai made representations about conversations he had with Sahgal regarding payment for the physician's component of the Medi-Cal reimbursement received by Hospital and statements that contradicted Sahgal's deposition testimony. Lai also disclosed that he and Sahgal had a legal dispute following termination of the contract with Hospital. The trial court, however, denied plaintiffs the opportunity in effect to cross-examine Lai on his declaration through taking his deposition prior to the hearing on the summary judgment motion. Having concluded on other grounds that the summary judgment must be reversed, we decline to address the contentions regarding Lai's statements and any additional claims made by either plaintiffs or defendants.

3. *Attorney's Fees*

Reversal of the summary judgment necessitates the reversal of the post-judgment attorney's fees award to defendants. On appeal, plaintiffs contend the trial court erred in awarding attorney's fees to defendants, in that Paragraph 21 of the contract, which is entitled "Indemnification," does not authorize an award of attorney's fees to a party prevailing in the instant action. Given that the attorney's fees issue is likely to arise again, we will briefly address the issue. (See *Wachovia Bank v. Lifetime Industries, Inc.* (2006) 145 Cal.App.4th 1039, 1056.)

In their complaint, plaintiffs sought attorney's fees on the express basis of Paragraph 21. In their responses to special interrogatories propounded by defendants as to the basis for plaintiffs' prayer for attorney's fees, plaintiffs responded: "Paragraph 21 of the Anatomical and Clinical Pathology Services agreement provides, in part: 'Contractor shall indemnify and hold harmless Hospital for any loss, cost, or expenses, including attorneys' fees, which result from the failure of Contractor, or as applicable, any of its employees, agents, contractors, or subcontractors to comply with any of the obligations set forth in this Agreement.' Although by its terms the language applies only to the Contractor, under California Civil Code section 1717 the language applies equally to the Hospital." Thus, by their own statements, plaintiffs have previously contended that Paragraph 21 is made reciprocal by Civil Code section 1717[16] and, therefore, either plaintiffs or defendants may be determined to be the prevailing party, and the party so designated by the trial court will be entitled to attorney's fees. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.)

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[16] Civil Code section 1717, subdivision (a), provides in relevant part as follows: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs."

That Paragraph 21 begins with language typical of third-party indemnification clauses is not determinative of the contracting parties' intent or the scope of the paragraph's application. Generally, "[a] clause [such as Paragraph 21] which contains the words 'indemnify' and 'hold harmless' is an indemnity clause" to protect the indemnitee against liability to a third party. (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 968-969.) Regardless of the use of such words, however, the clause must be interpreted in accordance with "the language and contents of the contract as well as the intention of the parties as indicated by the contract." (*Id*. at p. 968; see also *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1183.)

Other than these words, indicia of intent to serve as a third-party indemnity clause are absent in Paragraph 21. It contains no clause, express or implied, limiting its application to losses resulting from third-party claims. (*Wilshire-Doheny Associates, Ltd. v. Shapiro* (2000) 83 Cal.App.4th 1380, 1396.) Thus the language of Paragraph 21 indicates that it was intended to operate between the contracting parties, rather than only as against nonparties, as an indemnity clause would operate. (*International Billing Services, Inc. v. Emigh, supra*, 84 Cal.App.4th at p. 1183.)

Paragraph 21 expressly authorizes indemnification for attorney's fees incurred as the result of the indemnitor's failure to comply with the contract. Thus, by its plain language, Paragraph 21 is subject to interpretation as applying to actions between the parties to enforce the contract. (Civ. Code, §§ 1638, 1644.) Although by its terms, Paragraph 21 creates a unilateral obligation to indemnify, which is typical of an indemnity agreement (*Myers Building Industries, Ltd. v. Interface Technology, Inc., supra*, 13 Cal.App.4th at p. 973), by operation of Civil Code section 1717, it constitutes a bilateral obligation requiring payment of attorney's fees to the prevailing party—whether defendants or plaintiffs prevail, in that it provides for the award of attorney's fees in an action on the contract. (*Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 455.)

DISPOSITION

The judgment is reversed and the post-judgment order awarding attorney's fees is vacated. The cause is remanded to the trial court for proceedings consistent with this opinion. Plaintiffs are to recover their costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.*

We concur:

MALLANO, Acting P. J.

ROTHSCHILD, J.

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.