**ORAL ARGUMENT**
**April 16, 2003**

**02-0193**
**Universal Health Services, Inc., RCW of Edmond, Inc., Renaissance Women's Center of Austin L.L.C., and Renaissance Women's Center of Austin, L.P.**
**vs.**
**Renaissance Women's Group, P.A.**

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ALEXANDER: May it please the Court. Contractual obligations come in one of only two flavors, they are either expressed or they are implied. In this case the Court of Appeals agreed that there was no expressed obligation to keep the hospital open for the entire fifteen-year term of the lease.

O'NEILL: Let me ask you this. What if the agreement was just breached. What if they said, if one promise was dependant on the other, we will move here, we will rent this office space as long as you've got a hospital there. What if the contract was just breached, they didn't keep the hospital? You keep worrying in terms of forced to keep the hospital open, but just in terms of the contract being breached, one of the promises they made in it. What's the difference in the situation we have here?

ALEXANDER: Well, perhaps what we need to do is look at the nature of the obligation and, ugh, I think the best thing to do, I've got a handout I think will answer that.

ENOCH: (Cross talking?)Let me put a variation on that theme.

ALEXANDER: What's that?

ENOCH: You acknowledged that you had an obligation to make reasonable efforts to perform under this contract. Let's assume that the jury finds that you did not make reasonable efforts to perform under the contract, then wouldn't you only be arguing about the measure of damages?

ALEXANDER: Well perhaps if we had, first off, and we need to talk about the nature, we need to talk about two things with the variations of the theme. One, are we talking about an absolute obligation or a conditional one and two of course in this case we did not have reasonable efforts. I think that maybe the best thing to do is to turn to the operative instrument to address the questions that you have, Justice O'Neill and that's under Tab two of the handout I have.

O'NEILL: Well, about, well just on the basic concept, they were mutual obligations. You are

not contesting the measure of damages. This is just a simple breach of an agreement.

ALEXANDER: If there was an absolute obligation, and, and in other words, let us say, let's just assume that there was an absolute obligation to keep the hospital open for the entire fifteen-year term of the lease, and that obligation was breached, then yes we are not arguing about damages.

O'NEILL: Well let's say, that the, the lease agreement says we agree to provide you electricity to your premises.

ALEXANDER: Right.

O'NEILL: Um, and we will make all reasonable efforts to provide you electricity and in return you agree to lease the premises, and electricity becomes pretty expensive and the landlord says, I'm not going to provide the electricity any more. That's a breach of contract.

ALEXANDER: I think that in that circumstances that would be a condition allowing there to be a termination of the lease.

O'NEILL: Why would this not be? Why is this not similar? Because they are making the same argument, that, you know critical, but the hospital was sort of the electricity here and you cut that off, we can't operate.

ALEXANDER: Right.

O'NEILL: Why is that different?

ALEXANDER: Well, this is the reason it is different. We look at Tab 2 of my handout, this is the October 11, 1995 agreement. Well, first off, if we look at Tab 1, I mean let's just go ahead and get that out of the way and I won't spend any time on that and I really want to spend a lot of time on Tab 2. Tab 1, everybody agrees that no where in these lease documents is there any expressed provision to keep a hospital open. So what they are trying to do is go to Tab 2 and we need to focus on the language of Tab 2.

O'NEILL: (Cross talk). Let me ask you this, if they had never opened the hospital, would that have been failure of a condition _____?

ALEXANDER: If they had never opened the hospital and again under Tab 2 that tells us that, then they would have never had an obligation to pay rent, that was the mutual obligation. Our obligation if you want to look at it that way in terms of mutuality was, we were to furnish a facility, and this is true in any landlord-tenant case. The landlord's obligation is to furnish the premises. The tenants corresponding mutual obligation is to pay rent. In this case we furnished a 17 million dollar facility, they in return were required to pay rent until there was a failure of a condition at which point the lease terminated. This is what Tab 2 was all about, ugh, and I really want to spend some time

on it. Tab 2 is the 1995 letter agreement that they really rely upon as the source of the implied obligation to keep the lease open. Now the language that you need to focus on is in that first paragraph that I have there. The validity and binding effect of the lease are subject to the following terms and conditions, this answers your question. There is mandatory language that's used that understand the context, this was written two years before the hospital was ever opened, this was written before a site was ever selected, the lease was attached to this document. This document is prepared on the doctors' letterhead, it is as protection for the doctors and what it provides is this. Look at the first one, a site for the project must be selected. Well, if Universal never selects a site, their binding obligation to pay rent never arises. Number two, you must have design and construct the project according to plans and specifications. If you never do that, the obligation, the mutual obligation never arises. Number three, shall proceed with construction. If we never constructed the binding obligation to pay rent never arises and number four, and we are getting close to the one that they see is on, shall use diligent efforts to obtain all licenses if we don't get licenses, what's the legal effect, no binding obligation to pay rent and finally number five, which is their key provision, thou shall provide managed-care contracts which mirror those of the doctors. And what that means just briefly is, if, if they have Acne HMO under their deal and they have a patient that goes to Acne HMO, they want to make sure that when that patient goes downstairs there is matching managed-care contracts, that's a continuing obligation throughout the lease. Their argument, and this is the crux of it, let me just spend some time on this, their crux of it is, if you close the hospital, if the hospital closes you cannot meet the requirements of Number five, you cannot have managed-care contracts throughout the term of the lease. That is true, but what is the legal effect? The legal effect is stated at the very beginning. The validity and the binding effect are subject to the following terms and conditions. That condition fails, they tend to declare the lease invalid, not binding and they can walk.

PHILLIPS: As I understand it, you could have a very profitable hospital, but decide that maybe a hospital in San Marcos would be slightly more profitable and you could walk away and if they change their name and relocated and have to go contract to a higher price for similar quarters elsewhere, they are just out of luck. Is that right?

ALEXANDER : Well, I think, I think we need to talk about the theory of reality. Theoretically, yes. Theoretically.

PHILLIPS: O.K. Well, yes that's all that contract cases are.

ALEXANDER: Right. Exactly. Now the reality is of course, that what we are trying to do in this case is to get a return on the 12.9 million dollar investment. O.K., in reality what this hospital is trying to do is to make a go of it and to make a go of it for two plus years they have pumped 5.5 million dollars into it down a hole. But the question becomes, once they've pumped it down the hole, do they have an obligation to keep pumping 2.5 million dollars a year down the hole for fifteen years. There is nothing here that says they do.

ENOCH: Well, let me as you a question. You say this is just a landlord-tenant, that's all this case is, it's just a landlord-tenant, and there's nothing in this landlord-tenant relationship that requires the landlord to keep the hospital operating for fifteen years, so I'm a landlord and it may not

be reasonable, but I ultimately enter into a lease for three years with a tenant. I say tenant, this is your lease for three years and it is in a shopping center and the business is going fine and the landlord decides, I can't make a profit from this center so they shut down the center and they turn off the electricity and walk and there's two years left on the lease. I understood your argument to be well, see that allows the tenant to walk. That's their, apparently, that's their recovery, that's their remedy, they can leave and they have no further rent obligation, but don't they have some sort of damages against the landlord potentially? The landlord said that you've got this lease to use for two years, your company is profitable, but now you are shut down, you have no electricity, you've got to now move your business. There is some liability for something other than you are now released from paying your rent? Doesn't the tenant have some claims against the landlord who does that?

ALEXANDER: No.

ENOCH: O.K.

ALEXANDER: Look at the *Lilac Variety* case. I think the *Lilac Variety* case is your hypothetical.

ENOCH: So the landlord has no obligation to honor the lease subject to just simply losing the rent that they could have otherwise acquired.

ALEXANDER: Unless provision is made otherwise expressly in the lease, and once again, I would point you to the *Lilac Variety* case. Now it may sound unwise, unjust, unfair. And that is where you are coming from. This doesn't seem fair, that taint fair.

ENOCH: No, no, no, my hypothet was that the landlord had given the tenant a three year lease and there was two years left to go on the lease. This is moot. This is a clear of obligation for a term of years for the lease. Your in the that hypothet, you say that the tenant's remedy is to be free from paying rent.

ALEXANDER: Unless the provision is made otherwise, and let me just give the facts of *Lilac Variety* because, I mean that's the case that we have in Texas jurisprudence on that, in that case, there was a tenant who says, look I want these other anchored tenants to be here, and the landlord contracted saying we will have these other anchored tenants here for you and one of the tenants left and was not replaced. What was the remedy? The remedy was that the tenant walked. O.K., now, and they will say, well that's because that was the provision that was made there for. Well O.K., but if anything that demonstrates that that apparently in that case where the parties actually sat down and thought of it, they determined to be the appropriate remedy. That is to say that they could walk.

O'NEILL: Well now, the remedy for breach of contract is the benefit of your bargain, right? Why wouldn't that apply here, you are entitled to the benefit of your bargain, and the bargain here was this sort of you operate the hospital, we will lease the space. So it strikes me that, O.K. they are entitled to what they could have made over the term of the lease, but then, they would have to mitigate, if the hospital is no longer there, they have got to find another place to go and that would go to mitigating their damages, um, but I, this seems to me to be just be a typical breach of contract

_____.

ALEXANDER: Well and that's the problem. Here is the bargain. This is the bargain. The only document that they point to, if you read, if you read their Respondent's Brief on the merits, you know we talked about, there's three documents that were submitted to the jury. The only document that they point to in their Respondent's Brief on the Merits is the 1995 letter agreement. O.K., what is the bargain? This is the bargain. The validity and binding effect of the lease are subject to the following terms and conditions. O.K. That's their bargain. This was written by their attorney on their letterhead and it's exactly the same type of bargain that was struck in *Lilac Variety*, you read the *Lilac Variety* case, nobody stands up and says, well what about my moving costs, what about my lost profits, you know if you maintain that tenant in there, I would have made more money, I get to recover that as well. Look at the *Weil* case, same thing, writ refused case by this decision.

O'NEILL: Well, but again, I...

ALEXANDER: No benefit of the bargained damages.

O'NEILL: I need to understand, if you are saying, if you are looking at the language of the '95 letter agreement, I want to follow up on Judge Enoch's question, what if a jury were to find that Renaissance did not use reasonable efforts to _____, then.

ALEXANDER: Well, this is interesting. We are kind of a couple of steps away from the type of benefit of the bargain that you are after and let me address that.

O'NEILL: Well, I mean, I guess the problem we are struggling with is the measure of damages appears to be the problem here. Because the amount that was awarded presumed that the hospital had stayed open. The measure of damages has never been contested, and I think that is the difficulty that we are struggling with.

ALEXANDER: Well, I think, well and rightly so. The question is whether any entitlement to a recovery of damages at all ever arose or based upon what the parties contracted for was the only right to walk the lease.

O'NEILL: So you are saying this language restricted the measure of damages due.

ALEXANDER: It restricted, well in effect it restricted, well if you want to look at it this way, the remedy. It restricted what the legal obligations of the parties was. That's correct. Absolutely. Look at the language, the validity and binding effect of the lease are subject to the following terms and conditions. Now there is, what happens is if the site is not selected, we don't get the mutual obligation of getting rent. If you don't design and construct it, we don't get the mutual obligation of paying rent. If we don't do all these things, we don't get the rent.

WAINWRIGHT: Mr. Alexander, after two years of negotiating, ugh between the parties here, building the building, the doctors relocating their practice, their patients, was there any implied term for the hospital to remain open? Could it have shut down after a week?

ALEXANDER: Well once again, and it need to answer that in terms of technical reality. Yes.

WAINWRIGHT: Well, I am interested in the law.

ALEXANDER: The law is, the law is...

WAINWRIGHT: How this case should come out?

ALEXANDER: The law is, they could have shut...

O'NEILL: Excuse me, did you say technical reality?

ALEXANDER: No, no, I said there's technical and then there's reality. I did not say technical reality. Or if I did, I misspoke. So I was talking about technicalities and realities, so technicality and back to your legal question, yes legally they could have walked after one week. Now let's talk about the real world. This is where I want to talk about the real world.

WAINWRIGHT: When you say they, you mean your client are shutting down after a week.

ALEXANDER: Our clients, correct. But let's think about how much sense would that make, you have now sunk 17 million dollars into a facility. You are trying to get a return on your investment, what could be more, let's use another analogy. I build a doughnut factory, because I can relate to doughnuts more easily than hospitals, doughnut factory, completely equip it, completely staff it and then kind of go, after one week, nana nana boo boo, I am going to shut it down what sense would that make to do it? How do you get, where is the money coming from? It is not coming from the rent. These doctors are paying $450,000 a year which is nothing compared to the return on the investment. It would make no business sense to shut down a hospital after a week. That's what everybody expected.

OWEN: I thought the lease had an initial five year term?

ALEXANDER: Well, its got, its got, it has a term. He is talking about the situation where, if you shut it down, what would happen.

PHILLIPS: Her question is, what is the term of this lease? What is the term of this lease?

ALEXANDER: The term of the lease is ten years, its an initial ten year lease with an optional five year term. And in terms of the mutual obligations if we shut it down after a week, we don't get the mutual response of the rent, but we don't get all this other stuff.

OWEN: But if they went and paid higher rent somewhere else, you would be liable for that under just typical landlord-tenant law.

ALEXANDER: Only if you were dealing truly with a, no you wouldn't.

PHILLIPS: Now wait a minute. If somebody else came along and says we will pay you $500,000 a year for that space and so you just kick the Renaissance Women out and you would breach this lease?

ALEXANDER: I, I think, I think that, well, there now, now we are going into...

PHILLIPS: I want theory. Theoretically, under your reason of beliefs, you could kick them out, if you could find a better deal?

ALEXANDER: I think under that one, no. (Cross talk). And now, and now I am starting to get back to the reasonable efforts, I mean I think that in that type of situation we're really arguing with reasonable efforts at that point. I mean, to the extent that you can corporate some obligation of this you might have a reasonable efforts obligation. We would not be able to just kind of go, we found something better, so we can do it. Cross talk–_____. That would be _____ as damages. That's different from we are trying or damndest to keep this thing open, we are paying 5.5 million dollars to do it and we can't do it.

PHILLIPS: So if I read this lease long enough, I will see that, you can shut the business down for any reason at all. Unprofitable or profitable, but you can't kick them out because you can find a higher paying tenant. That's going to be somewhere in here, it's not going to be implied with the other...

ALEXANDER: One place that you might look for that and again, this is giving them some benefits here. Look at number 5 on Tab 2.

PHILLIPS: Number 5 you are talking about reasonable efforts to obtain and maintain in full force throughout the term, would seem to me to obligate you to keep this hospital open if it was a profitable, beneficial thing.

ALEXANDER: But it is qualified by reasonable efforts. Reasonable efforts.

PHILLIPS: But it is different that you earlier answers. That's why I'm trying to _____ through.

ALEXANDER: O.K., I understand, but to the extent that there is an obligation here would be one of reasonable efforts. And this is the language that they are hinging on.

O'NEILL: But the case was not tried this way. I mean, the jury was not asked to determine whether there were reasonable efforts, were they?

ALEXANDER: Precisely right, and that's another problem, that there is with this, what the jury was asked to do...

O'NEILL: But was this argument raised at trial? I didn't see that this argument was raised at trial, that the dispute was over the wording of the ambiguity instruction.

ALEXANDER: Well, and if you look at Number 4, I mean this was the really, the wording, if you look at, it is Tab 4, here is the jury instruction. What the jury was effectively asked to do here, if you look at what the jury was asked to do, which is let's read three agreements here and determine whether this obligation exists, what the jury effectively did and again and if you look at the *Weil* decision which I think is key, the jury effectively made an implied-covenant analysis. That's what happened here.

OWEN: What was your objection to that jury issue?

ALEXANDER: The jury, that it should not have been issued, submitted at all, because this isn't an implied-covenant case. Implied covenants are decided by the court not by the jury. This case should never have gone to the jury.

PHILLIPS: Don't we know a fairly respectable line of cases saying that implied covenants frequently will have underlying factual disputes that do have to go to the jury? It falls in *Garrett v. Gorbett Bros. Welding*, I'm sure comes to your mind, just like it does to my mind.

ALEXANDER: It just leads. Well, that certainly was not what was submitted here. In other words, again, we did not, I mean, look at the *Weil* decision. In the *Weil* decision, that was an implied-covenant case. The court correctly said, this is not an issue for the jury. That was a case that was tried to a jury and the court in a writ refused decision said this should never have gone to the jury. This is an implied-covenant case, you apply in an implied covenant, these five standards and under these standards they could not recover damages. What happened here is that the jury was effectively given the job of the court and there is just no way around that. If you look at PJC 101.8, that tells us how you submit a contractual ambiguity which is that you submit specific language that is ambiguous. We don't have that here. We don't have a single provision that is ambiguous in this entire brief..

PHILLIPS: *Farnsworth* says that a contract, that vagueness can in terms equal ambiguity. Do you think that's right, or do you think that's wrong?

ALEXANDER: I think that vagueness if you are talking about a particular express obligation can, in other words, I mean, let's talk about the greenhouse on Pecan Street, that is the classic example of a contractual ambiguity. That is to say, thou shall deliver the goods to the greenhouse on Pecan Street, but there are two greenhouses on Pecan Street. In that situation, the obligation is expressly stated, but it is vague. It is vague. But that's what distinguishes the contractual ambiguity case from our case. If you look again at Tab 1, here the court said, there was no express obligation, absolute binding obligation to keep this hospital open for the entire fifteen-year term of the lease and that's why the court had to basically look for an implied one.

O'NEILL: But there was an express obligation to use reasonable efforts.

ALEXANDER: Well, and again, and this is where I started to hedge back on some of the questions when we were talking about technicalities and reality. I think that, some of the answer and

also this might give _____ of good faith and fair dealing, you know the notion that you know the landlord could go, well, I found a better deal. That would be a different case. That would be a different case. It's different when you, you have open, you have tried, you are doing everything you can to keep it open, you are just pouring money down a rat hell, you close it down, then what do you do, you look at the operative agreement as to what happens. That operative agreement here is the 1995 letter agreement and it merely says, in that situation the lease becomes invalid, which means that they can walk, which is exactly the same remedy as *Lilac* they might have contracted for something else, but they didn't, and where they don't, they cannot be bound by it. That's the problem.

WAINWRIGHT: Mr. Alexander, you said previously in answer to my question that if the Universal shut down the facility after a week that would be fine with no obligation implied for the hospital to stay open any minimum period of time and that the hospital or Universal would not have to answer in a damages action either, is that correct?

ALEXANDER: Well and I've revisited that. When I focused to get on the reasonable efforts language which is where the _____ occurs. (Cross talk)

WAINWRIGHT: My next question is going to be, could the doctors have done likewise?

ALEXANDER: Effectively yes, in other words and this is the situation. They could have, I mean had they walked, they would have had to pay their rent, but what if the hospital says but, but, but we were wildly profitable with you here and therefore we want to get our profits that we would have obtained. The answer to that would be no you cannot. Under this lease agreement, you can get your guaranteed rent subject to the duty of mitigation under the _____*Plaza* situation, but you don't get your lost profits.

ENOCH: So you would just be objecting to the damages question and not the duty question?

ALEXANDER: Not at all. That is not what we would be doing.

ENOCH: You would be objecting saying you can't claim those damages under this contractual _____.

ALEXANDER: No, we would be making the same argument and that is what is, we would be saying that under the contract that exists, all that happens is, that if you look at the language in the contract and again, looking back our way, if the lease is invalid, what does not mean? They don't have an obligation to pay rent. That's it. It's not a matter of objecting to the damages question. It is a matter of what is the obligation. It is a conditional one.

O'NEILL: Would that be _____ incidental and consequential damages?

ALEXANDER: In that situation, no.

O'NEILL: Not removing costs, not down time, have to remove?

ALEXANDER: Look at the *Lilac Variety* case. In other words, and let me very careful about that, what is going through your mind is, it seems that it would have been reasonable for the parties to contract for something like that or that those would reasonable to be...O.K.

O'NEILL: It seems like that is a simple breach of contract measure of damages.

ALEXANDER: Well, but once again, we are back to talking about when you look at the letter agreement, we are talking about a conditional obligation and they really don't want to focus on that language. They do not want to focus on the conditional language. When we are talking about a condition, what happens when the lease is no longer valid and binding. All that means is that we've sunk in 17 million dollars, they've paid whatever rent they can, we can no longer insist on rent. We can no longer insist upon their mutual obligation to pay rent. But, but that's it. That really is it. That is the provision that is made in every implied-covenant case that has been decided in this state and every other state has examined it that way. The parties could have expressed it.

PHILLIPS: I think we've had enough, unless there is another question. Thank you counsel. The Court is ready to hear arguments from Respondent.

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## RESPONDENT

MCNEIL: Good morning your honors. I'm Barry McNeil and I'm here on behalf of the Plaintiff/Respondent, the physician clinic . Your honor this case is not about an implied covenant on on exclusive remedy issue which is what the defense counsel seems to suggest. This case is not about a return on the investment, it's not about damages, its not about conditional obligations, it's about the clear meaning of the October 11 agreement. There was no doubt at the trial that the October 11 agreement was front and center.

PHILLIPS or HECHT?: When you say clear meaning, do you mean as a matter of law?

MCNEIL: I mean as a matter of law.

PHILLIPS: So the Court of Appeals got the right result for totally the wrong reasons.

MCNEIL: Well, I think they had an alternative and I think they chose one of two courses.

PHILLIPS: And you are going to give us the first course, just read the agreement and go home.

MCNEIL: Correct. Yes and Justice Phillips at the trial court level as you know, both parties took the position that as a matter of law they went, both parties took the position at the Summary Judgment proceeding that the letter agreement and related documents were clear as a matter of law. The court decided that there was ambiguity with respect to the terms and submitted that to the jury. There is no question that the charge is not on appeal at this point in time. I was struck in reviewing the record by the misdirection if you will that Respondent counsel was hoping to achieve. I would

ask that you look to Tab C of our handout. It is critical it seems to me to the Defendant, Universal's argument on the basic contract question that it is critical to their argument that the case law in their view does not allow a court to find as a matter of law a contract to be unambiguous if there is no express literal language. That is the first thing they say, because there is no express literal language that says Universal has to stay here during the term of the contract of the lease and because, and because in their view the jury was just given a whole mass of documents and said glean an agreement from that. I was struck by two things, first, is that that's not what happened at the trial court. At the trial court in closing argument, defense counsel said "I'm going to tell you all that you can look at that lease all you want to, but the documents that you really need to be looking at, but the documents that you are really going to be interested in looking at in answering these questions is the October 11 letter and the January 31 letter." Now the January 31 letter only substitutes Universal for _____so it really doesn't relate to the October 11. At trial from voir dire to opening through the testimony of the witnesses through the closing arguments, there was no doubt but that this jury was focused on the October 11 agreement so to the extent that defense counsel will suggest to you that the jury was somehow confused to the extent that the defense counsel would suggest to you that if there is no literal language in an agreement that says the following, there can be no binding as a matter of law that that agreement is unambiguous. _____. *Columbia Gas* 1995 this Court's opinion *Columbia Gas*, a buyer and seller of natural gas, I'm sure you remember the case. The buyer and seller enter into an agreement that has two different pricing provisions. 311 sets out pricing that will take effect, perhaps forever, but certainly until 1984 when a lot of gas was going to be coming on the market because of deregulation. A second provision, 313 where there was a right to renegotiate by both seller and buyer. And what happened there was that the buyer chose to renegotiate under the second provision, they operated under that for a period of time, the seller then says I want to go back to the first provision, buyer says you can't do it, someone says I can do it because the contract doesn't expressly say I can't. This Court of course looked at that and said that even though there is no expressed (this is Tab E, if you will your honor) *Columbia Gas*, the failure to include more express language of the party's intent does not create an ambiguity when only one reasonable interpretation exists. You must examine all parts of the contract and the formula and the circumstances surrounding the formulation and then importantly they said the only reasonable interpretation of the contract is that one provision _____ another.

HECHT: So I'll be clear, you said that the argument is that the jury was confused. It doesn't matter in your argument whether the jury was confused or not, correct. And, then you, I guess the premise to the argument you just made is there is no express language in these agreements, one way or the other. I think that to address the last _____ there is expressed language. I would like to go through that.

HECHT: That' what we need to see.

MCNEIL: And, Justice Hecht, I did not mean to say that the jury was confused, what I meant to say was...

HECHT: You said, they argued that the jury was confused.

MCNEIL: Correct, I'm sorry, yes.

OWEN: Let me ask you real quick. I want to hear the expressed language, but let me ask you this question. What if we disagree with you and we said the contract, we agree with you that the contract is not ambiguous, but we conclude that its a reasonable efforts obligation. Where does that lead this case?

MCNEIL: Where that leads is the reasonable efforts clause in paragraph four and five made clear that the parties had to must, shall use reasonable efforts to complete HMO agreements and to get licenses. That's what's clear from the agreement. There is no one suggesting in this law suit that they were unable to do that, in fact those agreements were in place. If there had been a failure to obtain HMO agreements and they therefore had walked the lease, that might have been a law suit, it might not have been a law suit. That's not this law suit, there's nothing in that agreement, in those agreements that suggest that Universal may walk the lease at its own choosing. Nothing. The reasonable efforts goes to obtaining the contracts once those contracts with HMO and PPOs are arrived at and achieved and they are, then that condition is satisfied. And if you look then at a second modification, not, within the record but not one of the documents I gave you, it becomes clear that the physician clinic is bound to the terms of that lease once those obligations are satisfied. If we could go to Tab D, because I wanted to return to this precise language of the agreement. Tab I, incidentally, is the entire agreement, and what I did with Tab D is take the first sentence of each of those paragraphs, but I am happy to discuss any of them, because this is certainly not a case where we are trying to hide behind any particular provision.

HECHT: The problem with these provisions which are in your brief and um, we've looked at them, is that you might put these same provisions in an agreement that said no matter what, we are going to stay married fifteen years or in an agreement that said, after a certain period of time we all reserve the right to reconsider. It is hard to see how these provisions would be inconsistent with either other position.

MCNEIL: Well, if I may, your honor, go to paragraph 5.

HECHT: All right.

MCNEIL: And I must note that in the materials provided you, the second provision of paragraph 5 was not provided. In other words, in the other, in the other handout the second provision is not provided and I would like to direct your attention to the full paragraph 5. Universal shall use reasonable efforts to obtain HMO groups that the physician clinic desires. The second provision, though, importantly, is in the event that Universal does not obtain those agreements that the physician group had designated, it will obtain and maintain written agreements with benefit providers satisfactory to the physician group and it will do that throughout the term of the lease.

HECHT: Well, it just doesn't say that. The last part it doesn't say. So what I am wondering is, if you were instructed at the outset, either side, either the doctors or the hospital, that this might fail and then what? How would you word this differently, you would only say, will obtain and maintain written agreements up through, subject to paragraph 12 that lets you out of the agreement or?

MCNEIL: I guess my concern with the question your honor and perhaps I don't understand it is that the parties are not suggesting that this particular provision was one not fulfilled and we are suggesting that this particular provision read inconsistent with October 11 letter suggests at the very least that if there is an obligation to keep HMO agreements throughout the terms of lease, then there is necessarily, necessarily an agreement to operate a hospital.

PHILLIPS: Is there anything about reasonable efforts that could go to the feasibility of keeping a hospital? Or is it just reasonable efforts mean that you've got to keep writing and keep begging to get these permits and once you get them and there wasn't a single customer... Is there any amount of money that they could have lost that would have made a difference? If the whole company goes under you believe you are an unsecured creditor in a Chapter 7 proceeding for your moving expenses, loss of profits, etc.

MCNEIL: My answer to that would be that there is certainly nothing within the agreement that allows them to close after one day or one week or one _____ and,

PHILLIPS: Or nine and one-half years.

MCNEIL: Or nine and one-half years. Now should they have chosen to do that, because sometimes parties do result to resort to an efficient breach, they certainly may, I mean they could have closed, they did close after one year, two years, two and one-half years and that is certainly anyone as we know from contracts has the right to breach an agreement, but there is a remedy that is available to the other party.

PHILLIPS: Do you have any cases anywhere in the nation where a tenant recovers because the landlord shuts down the underlying commercial premises?

MCNEIL: Recovers their lost profits?

PHILLIPS: Yeah.

MCNEIL: Is that the question?

PHILLIPS: Yes, or their moving expenses or attorney's fees or any of the other damages.

MCNEIL: Well, I don't know the answer to that your honor, but I just don't know on that.

PHILLIPS: If that is the answer, no. I'm just shock, because there's been, like in Lubbock all the skyscrapers looked like they were ls or something after the tornado went through there. Were there no law suits that came out of that?

MCNEIL: But I would suggest to you that there is a reason that the case law is silent on that and that is that in most instances when there are a landlord-tenant disputes and this is a liable case and that is the *Weil* case also, in most instances when the law addresses landlord-tenant disputes it addresses them in the following context. Either one, a key tenant, so someone moves in relying upon

a key tenant and in those cases and in those contracts, typically almost invariably there is a provision that allows another tenant a non-key tenant to exit.

HECHT: Right. But does he get his lost profits, that is the question?

MCNEIL: Because of the contract, he does not. Because of the provisions within those particular leases and I think, Justice Hecht that there is a long line of landlord-tenant cases that would suggest that typically deal with number one, a key-tenant issue and number two, whether the contract allows them to do anything other than walk _____.

PHILLIPS: So if a contractor is silent in a key-tenant case, and the key tenant moves out, the other tenants could get their lost profits?

MCNEIL: Well, I think the answer to that, now I think the answer to that is to look at ordinary contract law, look at ordinary contract law and define their rights at that _____ pursuant to an ordinary_____ what is the contract that they have.

PHILLIPS: The contract doesn't say, but clearly, it does say, we don't want this premises if the key tenant goes away, that is the whole point of being here and so the key tenant goes away; they leave and so they say well then we want out of the lease, clearly they can, if the lease says they can, and maybe if there is fault on the landlord's part they can get moving expenses, lost value of the lease or something, but could you get the lost profits that you were going to make had the key tenant stayed in, anchor tenant stayed in?

MCNEIL: I guess my answer to that is the same as I just mentioned and I think it just depends solely upon the contract.

HECHT: Well let me as a question.

MCNEIL: I think it depends upon how the or the jury at that point would look at that arrangement. An ordinary contract law would suggest that you look to the circumstances surrounding the entry of that contract. The conduct of the parties and my suggestion to you Justice Hecht would be that in this particular instance, it would be off the mark in deed if we and you were to look at this as an ordinary landlord tenant case.

HECHT: Oh, I think you are right about that. But, it seems to me if you had asked either side of this agreement or either side of most agreements, do you mean to stay put until you go to the bottom? They are going to say, no, I don't mean that. If you said to the doctors are you guys really going to stay in this lease, even if you start losing a huge amount of money every year they are going to say no, we just think that is going to happen.

MCNEIL: Does that suggest that therefore if the doctors were to pull out,Universal would have no remedy with respect to the law? It's suggests to me.

HECHT: No. If you had a remedy, but would you get lost profits? That is the question.

MCNEIL: And, and I'm suggesting to you that, I'm suggesting two things on that, one is that that is a remedy issue and that is a remedy issue and that issue is not before this Court. For whatever reasons...

HECHT: It depends on what you can get for this contract, you could clearly put in the contract if anybody leaves before the end of fifteen years you get not only moving expenses, the lost value of the lease, the lost value of the tenant and maybe you mitigate or don't have to and lost profit and put in there whatever the parties would agree to.

MCNEIL: And I would just suggest with all respect your honor that that could be put into any contract anywhere any time. And ordinarily we don't see remedies put, we don't see the various loss profit remedy formulations put into contracts. I am sorry Justice Enoch.

ENOCH: I'm going to change the analogy a little bit and have it a little bit closer to this case. This is not a key-tenant issue. Is there any case out there where the landlord, the shopping center itself, because it loses a key tenant, shuts down the shopping center and therefore cuts every other tenant free? Is there any case there where there is a lost profit complaint that could be made? And you understand that the distinction is, I'm not the tenant who argues the lease is breached because you lost some other tenant. I'm arguing, I'm leasing this space in this shopping center from you, I have a profitable enterprise, I have been operating for three years and I have a five year lease, but because you for economic reasons decided you were going to shut down the shopping center I now am cut free with two years left on my lease. There is no case out there that talks about whether or not the tenant can get lost profits for the two years on the remaining period of the lease?

MCNEIL: I don't know, but I would suggest to you that's in the instance of the landlord just closing down the whole shopping center going away and tenants being dispossessed. I would suggest to you that they may or may not have a lost profits formulation and it depends upon the contract that they have and the deal that they entered into.

ENOCH: But isn't that what happened here, but wasn't this hospital shut down and the argument is that there was an agreement that you would be operating this hospital for a period of years?

MCNEIL: Well, what...

ENOCH: Isn't that the argument here?

MCNEIL: Well, the argument here is that, is several ...

ENOCH: They had an obligation. I was leasing from them a hospital that I understood was going to be a fifteen year period and we are arguing about what the length of that time was supposed to be and they shut it down. Isn't that what the argument is? Maybe I'm...

MCNEIL: No, no, I think that is. I mean the argument here, the law suit is based on the fact that they had an obligation in our view for the term of the lease and that obligation was not fulfilled and

that obligation was not fulfilled because of certain deficiencies that were more or less anticipated if you will. It was not fulfilled, because they simply chose to shut it down after two and one-half years at considerable, at considerable costs to the physician. The issue then ...

ENOCH: _____about how long a term it was that this enterprise you were supposed to be leasing this facility.

MCNEIL: I am suggesting to your honor that the only issue before this Court in my view is whether, it's not that issue, because that is a remedy issue and that's a damage issue, the only issue before this Court is whether there can be any reasonable reading of this contract that would permit a judge or a jury and a jury in this instance to find that the term of this contract was ten years. That is the only, only issue before this Court.

O'NEILL: Well let me ask you, it strikes me that this case has changed in theory from the trial court to here. Would that be accurate?

MCNEIL: Ugh, it has not on our side. I can't speak for the other.

O'NEILL: Well, because we are talking about lost profits and what kind of damages and that issue is not really before us.

MCNEIL: Correct, that is true.

O'NEILL: Um, so if we were to determine, I was trying to figure out where we go with our analysis. We either say it is unambiguous in your favor or it is unambiguous in their favor but if we say we can't tell it is ambiguous then the trial court properly submitted it. So it is all for you or all for them or the trial court acted correctly.

MCNEIL: Well, I would state it, that is correct. The way I would state it is that the only way in which the Petitioners can prevail in this Court is if you find that there is no reasonable reading of that contract, it would permit a ten year term if you will. If you find that, that, that either one is a matter of law, there was a ten year term, because look at the various paragraphs and look at the must and the shall or if you find alternatively, heck, I don't know what it is, I don't know whether it is a ten year term or not, then we of course prevail. Because the jury was given an ambiguity instruction and they answered it in our favor and they did not appeal it.

O'NEILL: Where does the implied-covenant analysis come from?

MCNEIL: Out of the _____.

O'NEILL: Well I mean was that ever raised in trial?

MCNEIL: Out of the clear blue sky in my view. It was in fairness; they touched on it. That was really focused when it came to this Court.

PHILLIPS: But you have an alternative argument that there was an implied agreement if we don't buy your express agreement?

MCNEIL: _____TAPE ENDS HERE. ...three legs.

PHILLIPS: Was that leg preserved anywhere before we got here? There is an implied agreement based on all these terms to stay open.

MCNEIL: I think that that issue is before this Court, yes. I think our position in candor your honor has been initially at the trial court, unambiguous, secondarily though when the court said before the trial began it's ambiguous, I am going to submit it to the jury. The trial proceeded on that basis and then thirdly, if this Court should write, if I just may button it down by if this Court chooses to write on implied covenants, which I think is a big, big mistake, because I think you are going to have to deal with *Columbia Gas* and I think you are going to have to deal with _____ if this goes off on an implied covenant basis and I don't know how you are going to do that, but in any event if this Court chooses to imply a covenant here it can only be implied in our favor in my humble opinion because implied covenants arise, arise when you are looking at language and it is clear that the parties intended that particular result. And that gets us back to the matter of law on the lack of ambiguity. But there would be the three legs, one it is unambiguous; two, it is ambiguous, it was given to the jury, that issue is not before the Court and then three, if you need to imply a covenant and again I suggest that that would be a _____ opinion.

WAINWRIGHT: Mr. McNeil, this case was submitted to the jury it looks like on the assumption solely that the hospital had an obligation to maintain operations for the entire term of the lease, I don't know if that means ten years or fifteen years, the Question number 1 to the jury just says the entire term of the lease. The damages question is predicated on that whether it was for attorney's fees, lost profits or the other items of damages so as submitted to the jury, we have to find that either it is ambiguous, there is some evidence to support what the jury says or that as a matter of law your reading is correct and I think that you pointed that out. If, God forbid from your standpoint, we find that the law is not ambiguous, but disfavors you, what is the remedy then?

MCNEIL: Well if you find that this contract is unambiguous as a matter of law and in favor of the Respondent, of course, then this matter is over.

WAINWRIGHT: No remand, render.

MCNEIL: Well, I, I mean if you find as a matter of law then there is no recourse of course, but if I could Justice Wainwright, go back to one moment, one thing for just a moment, the sufficiency of the evidence which you eluded to a moment ago is really not before this Court either. You had mentioned that evidence sufficiency was an issue that was an issue at the Court of Appeals and that is not an issue today. There is no question about that.

WAINWRIGHT: We reviewed legal sufficiency not the other _____. Are there any other damages that the doctors could have sought had the trial court decided lost profits and moving expenses and attorney's fees and costs of setting up a new practice?

MCNEIL: Are there any other damages? Well, they had a 5 million dollar guarantee unconditionally, personal guarantee to the physicians for the term of the lease so they unconditionally guaranteed the lease for 5 million dollars for ten years. That certainly would be a measure of damage. They had, they guaranteed a 1 million dollar debt for relocation, ah and there were other costs associated with both relocating their practice there in the first place and then relocating it afterwards, so, there could have been an alternate submission that would have roughly achieved the same amount of money.

PHILLIPS: Thank you counsel.

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## Rebuttal

ALEXANDER: Let me start my rebuttal.

PHILLIPS: If the Court finds that the Plaintiffs were entitled to a dollar, then do they, they get they whole verdict because you are not challenging any damages?

ALEXANDER: We are not challenging a measure of damages.

PHILLIPS: Its all or nothing if they are entitled to anything at all then we affirm.

ALEXANDER: It's all or nothing, this is not, this is, yes.

O'NEILL: And if we find ambiguity, you lose?

ALEXANDER: Correct.

ALEXANDER: Now let me go back to your initial question which I answered poorly and that was talking about breach of contract. I want to make two things clear. This is the way the premises worked. Second floor is the doctors' space, first floor is the hospital. This is the only space that was rented. If you turn to page 17 and if you look at page 17 of the lease, paragraph 6, that is services to be provided by the landlord which includes air conditioning, janitorial service, electric service. If we were to shut off the lights in the lease space, that is breach of the lease, they get consequential damages, if we were to turn off the air conditioning, if we were to do anything to try to kick them out, any of the things, failed to provide water, failed to do the passenger elevators, any of the things that are required under the lease, they get consequential damages. The issue here is not, none of those things were done. The issue here is what, and they did not lease the hospital. Let that be very, very clear.

PHILLIPS: Were you willing for them to stay on the second floor for thirteen more years?

ALEXANDER: Yes, correct, and we will keep the lights on, we will provide the air conditioning, absolutely. Correct. This is not a lease about...

PHILLIPS: The hospital is truly much like a key tenant.

ALEXANDER: The hospital is like a key tenant and every single case in this country that has ever faced this type of situation has analyzed it as an implied covenant case. That is why it is...

PHILLIPS: What did you do with this building after everybody left?

ALEXANDER: What's that?

PHILLIPS: What's happened to this building?

ALEXANDER: I believe it is just sitting idle still.

PHILLIPS: And it is still owned by the _____.

ALEXANDER: No, its been sold, its been sold. But, yeah, but, but this is what you need to make clear is that this is the lease space. This is the key tenant space. Every case in the country has analyzed it as an implied covenant situation which is why the answer to your question, Justice Phillips they can't point you to a single case of lost profits.

O'NEILL: Doesn't that beg a question? I mean, if we were just looking at a lease, you would say, well you are going to give us electricity, your going to have the space, but in this situation, they came to that space because of the hospital being there.

ALEXANDER: No question. And there was an expectation that it would do well. Now, let me take Justice Enoch's question to follow up, Justice Enoch when he talked about shutting down the shopping center, let's make sure we have it clear, are we shutting down their space as well; are we turning out their lights, if so, if the answer is yes, we're turning out their lights, they get consequential damages. If we have done anything to breach the lease of the tenant in the shopping center, then, then you are liable for consequential damages. But the question here becomes, what do we do, what do you do in this situation where the question is, can, what do we do, what control do we have over our space, what can be do, what economic decisions can we make? And the answer is there is nothing in the lease, if you look at the services to be provided by landlord there is nothing that says and you shall provide a fully functioning hospital continuously for the term of this lease. There isn't, it's not there.

O'NEILL: It's not in the lease, its in the October 11th agreement.

ALEXANDER: It is not in the October 11th agreement.

O'NEILL: But that's what we are arguing.

ALEXANDER**:** There is a condition, that's what they are arguing. But that's what we are arguing about, and the analysis is an implied covenant because as the Court of Appeals concluded, there is no express obligation to keep the hospital open anywhere. It isn't there. That's why we are not in ambiguity territory and every ambiguity case that you will find in this state of in this country, the obligation is expressly stated. Thou shall deliver the widgets to the greenhouse on Pecan Street. It's expressed, its vague, its ambiguous, but it is expressed. You will not find a single contractual ambiguity case where the obligation is just holding missing as it is here. They are trying to extract it out of a conditional obligation situation.

O'NEILL: What about the language they point to? Universal shall use reasonable efforts, and will obtain and maintain written agreements.

ALEXANDER: Let's take a look at that language, or what? Go back to the very beginning the language that they don't want to talk about, I don't even think that it appears there. Which is this. The validity and binding effect of the lease are subject to the following terms and conditions: if we don't fill the thing, if we don't maintain these things, then they can walk and that is the only thing that is provided for, it is exactly the same as in *Lilac Variety*, what they are saying is we should be able to get more, but there's nothing that gives it to them because there is no express obligation and absolute obligation, unlike the obligation to provide air conditioning, lights, all of the things that you correctly point out would give rise to consequential damages. There is nothing in the 1985 agreement that gives them the right to say, jees if we do well, then we can guarantee our profits for the entire term of the lease. It ain't there, and that's what they got.

PHILLIPS: Thank you counsel. That concludes the argument.