

Court of Appeals of the State of New York

KIM E. SCHOCH, CNM, OB/GYN NP,

Plaintiff-Respondent,

- against -

LAKE CHAMPLAIN OB-GYN, P.C.,

Defendant-Appellant.

**AFFIRMATION IN RESPONSE TO DEFENDANT-APPELLANT'S
MOTION FOR LEAVE TO APPEAL**

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Appellate Division, Third Department
Docket No. 529615

Saratoga County Supreme Court
Index No.: 20184228

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KIM E. SCHOCH, CNM, OB/GYN NP,

Plaintiff-Respondent,

-against-

LAKE CHAMPLAIN OB-GYN, P.C.,

Defendant-Appellant.

Motion No. 2020-521

Appellate Division, Third
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**AFFIRMATION IN RESPONSE TO
DEFENDANT-APPELLANT’S MOTION FOR LEAVE TO APPEAL**

Justin A. Heller, an attorney duly admitted to practice law in the State of New York, hereby affirms the following under penalties of perjury pursuant to CPLR 2106:

1. I am a partner with Nolan Heller Kauffman LLP, attorneys for Plaintiff-Respondent Kim E. Schoch, CNM, OB/GYN NP (“Respondent”). I have personal knowledge of the matters herein.

2. I submit this Affirmation in response to the Motion of Defendant-Appellant Lake Champlain Ob-Gyn, P.C (“Appellant”) for leave to appeal to the Court (Appellant’s “Motion”).

3. The underlying appeal and this Motion stem from the demutualization of Medical Liability Mutual Insurance Company (“MLMIC”), which resulted in MLMIC’s conversion from a mutual insurance company to a stock insurance

company and the extinguishment of MLMIC Policyholders' Membership Interests.

4. MLMIC's demutualization has caused scores of lawsuits throughout New York State between employers and their current or former employees concerning the straightforward question presented to the Third Department below: Who is entitled to the cash consideration paid in exchange for a MLMIC Policyholder's Membership Interest: (i) the *employee* (here, Respondent) who became a MLMIC Policyholder—and thereby acquired a Membership Interest—as part of the bargained-for exchange of consideration under their employment agreement; or (ii) the *employer* (here, Appellant), which paid their employee's MLMIC premiums pursuant to, and in exchange for their employee's services under, the employment agreement?

5. Relying upon the statutory framework of the New York Insurance Law, MLMIC's Plan of Conversion, the Decision of the New York State Department of Financial Services ("DFS") approving the Plan, the plain terms of Respondent's Employment Agreement, and controlling unjust enrichment law, the Third Department definitively answered the foregoing in its June 18, 2020 Opinion and Order below (the "Schoch Order"),¹ holding that, (a) as Policyholder, Respondent was solely entitled to her share of the cash consideration, and (b) Appellant had no legal or equitable claim to the funds.

¹ A copy of the *Schoch Order* is attached as Exhibit A to Appellant's Motion.

6. The Third Department’s holding in the *Schoch* Order was consistent with the Fourth Department’s decision in *Maple-Gate Anesthesiologists, P.C. v. Nasrin* (182 A.D.3d 984 [4th Dep’t Apr. 24, 2020] [“Maple-Gate”]), which held that under the Insurance Law and Plan of Conversion, payment of the cash consideration was “required to be made to those policyholders who had coverage during the relevant period,” and not to the employer, which “as a matter of law . . . had no legal or equitable right of ownership to the demutualization payments.” *Id.* at 985.

7. As Appellant notes in its Motion, a split currently exists between the Third and Fourth Departments, on the one hand, and the First Department, on the other, as to who is entitled to the MLMIC cash consideration.

8. In *Matter of Schaffer, Schonholz & Drossman, LLP v. Title* (171 A.D.3d 465 [1st Dep’t 2019]), the First Department—hearing the case in the first instance, on submitted facts, pursuant to CPLR 3222—“summarily held, without any analysis,” that awarding the MLMIC cash consideration to the employee-Policyholder would constitute unjust enrichment. *Schoch* Order, at 9. Indeed, the First Department reached its determination in reliance upon inapposite ERISA case law and without discussing or citing any of the New York Insurance Law, the Plan of Conversion, the DFS Decision, the parties’ employment agreement, or New York unjust enrichment law—all of which, for the reasons explained in the *Schoch* Order and *Maple-Gate*, require that the cash consideration be paid to the Policyholders.

9. This split of authority has led to inconsistent results within the trial courts, and has resulted in (and will continue to result in) numerous appeals to the courts of the Appellate Division. As an example of the breadth of related MLMIC lawsuits, our law firm alone represents MLMIC policyholders in over 50 pending trial court cases and over 12 pending appeals (nearly all of which are pending in the First and Second Departments).

10. Respondent respectfully submits that given the breadth of litigation throughout New York State relating to MLMIC's demutualization, and the continued inconsistent holdings among the Appellate Division departments and the trial courts therein, this Court should grant Appellant's Motion.

11. Respondent notes that Appellant's substantive arguments in its Motion (at Points VII[B] through [F]) are contrary to the controlling statutory and documentary authority (i.e., the Insurance Law, the Plan of Conversion and the DFS Decision), the basic structure and operation of mutual insurance companies, and controlling unjust enrichment law. In the event the Court grants Appellant's Motion, Respondent will address Appellant's substantive arguments in either its letter or brief, as applicable under Rule 500.11 or 500.12 of the Court's Rules of Practice.

12. Based on the foregoing, Respondent respectfully submits that the Court should grant Appellant's Motion.

Dated: July 31, 2020
Albany, New York



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**CERTIFICATION OF COMPLIANCE PURSUANT TO COURT OF
APPEALS RULE 500.11(m)**

Affirmation prepared on:	Computer
Font Spacing:	Proportionally Spaced
Typeface:	Times New Roman
Point Size - Footnotes:	12 point
Point Size – Remainder:	14 point
Line Spacing Block Quotes and Footnotes:	Single-spaced
Line Spacing Remainder:	Double-spaced

The total number of words in the affirmation, inclusive of point headings and footnotes, and exclusive of the case caption, signature block, and pages containing proof of service and certification of compliance is 798.

Court of Appeals of the State of New York

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AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS

STATE OF NEW YORK)

: ss.:

COUNTY OF ALBANY)

PENELOPE D. MUNAFO, being duly sworn, deposes and says that she is over the age of 18 years; that she resides in Niskayuna, New York; that she is employed by Nolan Heller Kauffman LLP, counsel for Plaintiff/Respondent; that she served one (1) true and correct copy of the **AFFIRMATION IN RESPONSE TO DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL** dated July 31, 2020, upon:


James R. Peluso, Esq.
Dreyer Boyjian LLP
Attorneys for Defendant-Appellant
75 Columbia Street
Albany, New York 12210

ON JULY 31, 2020, VIA FEDERAL EXPRESS, by delivering a true and correct copy of the same addressed to the aforementioned attorneys, at the aforementioned address, that being the address where said attorneys then kept offices, according to

the last papers served by them in this matter, properly enclosed in a Federal Express envelope with the requisite pre-paid label.


PENELOPE D. MUNAFO

Sworn to before me this
31st day of July, 2020.



Notary Public
State of New York

DIVYA BOBBY MATHEW
Notary Public, State of New York
No. 01MA6394975
Qualified in Saratoga County
Commission Expires July 15, 2023