STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	**FOR THE FIFTH JUDICIAL CIRCUIT**
Michael Wise, as Director of the South Carolina Department of Insurance, Petitioner, vs. Oceanus Insurance Company, a Risk Retention Group, Respondent.	C.A. No. 2017-CP-40-05195 **ORDER APPROVING SEVENTH CLAIMS REPORT & RECOMMENDATION OF LIQUIDATOR**

1. This matter comes before the Court pursuant to the Liquidator's Seventh Claims Report, Recommendation & Application for Order Approving Same ("the Application") filed in accordance with S.C. Code Ann. § 38-27-620 (2015). Attached as Exhibit A to the Application is a schedule containing the names and addresses of claimants holding a class 2 claim as defined by S.C. Code Ann. § 38-27-610(2) (2015), and recommended amounts to be paid on each claim. Attached as Exhibit B to the Application is a schedule containing the names and addresses of claimants holding a class 2 claim as defined by S.C. Code Ann. § 38-27-610(2) (2015), and recommended amounts to be paid on each claim determined by the Special Referee. Attached as Exhibit C are copies of the determinations made by the Special Referee. Attached to the Application as Exhibit D is a detailed Affidavit of the duly-appointed Special Deputy Liquidator filed in support of the Application. It is appearing that the Recommendation is in the interests of these claimants and other creditors in this matter, the Application is hereby approved, with actual distributions to be determined at a later time in accordance with S.C. Code Ann. § 38-27-610 (2015).

IT IS THEREFORE ORDERED that pursuant to S.C. Code Ann. §§ 38-27-10 *et seq.*, the Seventh Claims Report and Recommendation is APPROVED.

IT IS FURTHER ORDERED that if any additional factors hereafter come to the attention of the Liquidator or his Special Deputy that may require modification, the Liquidator shall promptly file an application to modify these claims or the Recommendation thereon.

AND IT IS SO ORDERED.

Jocelyn Newman
Chief Administrative Judge
Fifth Judicial Circuit

August ____, 2024
Columbia, South Carolina

Richland Common Pleas

Case Caption: Raymond G Farmer , plaintiff, et al vs Oceanus Insurance Company

Case Number: 2017CP4005195

Type: Order/Other

IT IS SO ORDERED.

Jocelyn Newman, Chief Judge for Administrative Purposes, Court of Common Pleas, 5th Judicial Circuit

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	**IN THE COURT OF COMMON PLEAS** **FOR THE FIFTH JUDICIAL CIRCUIT**
Michael Wise, as Director of the South Carolina Department of Insurance, Petitioner, vs. Oceanus Insurance Company, a Risk Retention Group, Respondent.	C.A. No. 2017-CP-40-05195 **LIQUIDATOR'S SEVENTH CLAIMS REPORT, RECOMMENDATION & APPLICATION FOR ORDER APPROVING SAME**

Comes now Petitioner Michael Wise, as Liquidator of the above-captioned insurance company (Oceanus), by and through the undersigned counsel and files herewith his Seventh Claims Report, applies to the Court for an Order approving the Liquidator's undisputed claim determinations specified herein and recommends approval thereof.

This application is made pursuant to the South Carolina Insurers Rehabilitation and Liquidation Act, S.C. Code Ann. §§ 38-27-10 *et seq.*, specifically, S.C. Code Ann. § 38-27-620(a) (2015), wherein the Liquidator is required to review all claims duly filed in the liquidation proceedings, make such further investigation as he deems necessary, and submit a claims report to the Court containing his claim recommendations.

In support of his report, recommendation and application, the Liquidator would respectfully show the following:

1. On September 21, 2017, the Court entered an Order Commencing Liquidation Proceedings & Granting an Injunction & Automatic Stay of Proceedings regarding Oceanus.

2. Between the Liquidation Date of September 21, 2017, and March 20, 2018, the Claims Bar Date, the Liquidator issued approximately seven thousand one hundred and sixty-two

(7,162) Notices of Liquidation and Proof of Claim (POC) forms, with instructions to policyholders, third-party claimants and other potential claimants and/or creditors of Oceanus.

3. For five (5) consecutive days commencing October 27, 2017, notice of the liquidation was published in the New York Times, a newspaper of nationwide circulation, informing interested parties of the liquidation proceedings and including contact information and instructions for the timely filing of a POC.

4. For two (2) consecutive days commencing October 22, 2017, notice of the liquidation was published in the Miami Herald, a newspaper of countywide circulation in Miami-Dade, Broward, and Monroe Counties, informing interested parties of the liquidation proceedings and including contact information and instructions for the timely filing of a claim.

5. On or before the Bar Date of March 20, 2018, the Liquidator received one thousand three hundred and seventy-eight (1,378) timely-filed POCs. The Liquidator also received fifty-three (53) late-filed claims, fifteen (15) of which have now been deemed timely filed, with the remaining thirty-eight (38) pending review.

6. Nine hundred and nineteen (919) claims have previously been adjudicated and submitted to the Court for approval, with such approval granted by orders entered June 26, 2019, February 21, 2020, October 29, 2020, May 24, 2022, September 13, 2023, and April 10, 2024.

7. Twenty-seven (27) additional POC's have now been completely adjudicated. All remaining POCs received are presently under evaluation.

8. Attached as Exhibit A and incorporated herein is a Schedule listing the names and addresses of twenty (20) claimants holding a class 2 claim as defined by S.C. Code Ann. § 38-27-610(2) (2015), the POC number assigned by the Liquidator, the original claim amount, and the valuation of the claim proposed by the Liquidator and as agreed to by the claimant.

9. Attached as Exhibit B and incorporated herein is a Schedule listing the names and addresses of seven (7) claimants holding a class 2 claim as defined by S.C. Code Ann. § 38-27-610(2) (2015), the POC number assigned by the Liquidator, the original claim amount, and the recommended amount by the Special Referee. These disputed claims were processed according to the Procedures Governing Referee's Participation in Claim Administration approved by the Court on February 8, 2019.

10. Attached as Exhibit C are the findings by the Special Referee for each of the seven (7) disputed claims, which includes an Order of the Circuit Court affirming the Special Referee's findings in one of the claims that was appealed.

11. In further support of this report, recommendation and application, the Liquidator has attached as Exhibit D, the affidavit of Michael J. FitzGibbons, Special Deputy Liquidator.

WHEREFORE, the Liquidator prays the Court issue an Order approving this Seventh Claims Report and recommendation, as well as such other relief as the Court deems just and proper.

HAYNSWORTH SINKLER BOYD, P.A.

s/John C. Bruton, Jr.
John C. Bruton, Jr., Esq.
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Attorneys for Special Deputy Liquidator

August 1, 2024

Oceanus Insurance, a RRG in Liquidation
Exhibit A

POC	Claimant	Contact	Contact II	Address	City	State	Zip	Claim Amount	LIQUIDATOR'S RECOMMENDED AMOUNT	20% Distribution
1000295	A. W. adm of Estate of M. W.	Mary Anne Walling, Esq	Sullivan Papain Block McGrath & Cannavo, P.C.	1140 Franklin Avenue, Suite 200	Garden City	NY	11530	1,000,000.00	165,000.00	33,000.00
1001023	A. L.	Gregory L Johnson	Johnson Moore	100 E Thousand Oaks Blvd #229	Thousand Oaks	CA	91360	10,081,552.00	795,000.00	159,000.00
1001395	G. D., M.D.	Zachary Mattison	Sugarman Law Firm LLP	211 West Jefferson Street	Syracuse	NY	13202	unstated	0.00	0.00
1001238	G. H., Adm B. H.	Douglas Brannon	Brannin & Assoc	130 W 2nd #900	Dayton	OH	45402	1,000,000.00	0.00	0.00
1001258	K. G., MD	Zachary Mattison	Sugarman Law Firm	211 West Jefferson Street	Syracuse	NY	13202	unstated	0.00	0.00
1000285	M. P.	Brianne M. Carbonaro, Esq.	Stanley Law Offices	215 Burnet Ave.	Syracuse	NY	13203	4,000,000.00	350,000.00	70,000.00
1000284	M. P.	Brianne M. Carbonaro, Esq.	Stanley Law Offices	215 Burnet Ave.	Syracuse	NY	13203	4,000,000.00	250,000.00	50,000.00
1001193	M. H. MD	Michael Hill	Lake County Neurosurgical	704 Doctors Ct #101	Leesburg	Fl	34740	unstated	0.00	0.00
1000376	N. H.	David Freeman, Esq	Philip J. Rizzuto PC	50 Charles Lindbergh Blvd, Suite 501	Uniondale	NY	11553	5,000,000.00	25,000.00	5,000.00
1000566	N. L.	Jeffrey Bloom	Gair Gair Conason	80 Pine St, 34th Fl	New York	NY	10005	unstated	370,000.00	74,000.00
1000183	R. G.	John Sandberg, Esq	Sandberg, Phoenix & Von Gontard PC	600 Washington Ave., 15th Floor	St. Louis	MO	63101	1,000,000.00	13,232.64	2,646.53
1000042	S. R.	Duane M. Fiedler	Law Offices of Duane M. Fielder	81 Main St. Suite 304	White Plains	NY	10601	unstated	340,000.00	68,000.00
1000174	S. G.	John Sandberg, Esq	Sandberg, Phoenix & Von Gontard PC	600 Washington Ave., 15th Floor	St. Louis	MO	63101	1,000,000.00	0.00	0.00
1000224	T. B.	Jeff DeFancisco, Esq	DeFrancisco & Falgiatano	6739 Meyers Road	Adams Center	NY	13057	unstated	142,500.00	28,500.00
1000700	D. T.	Roger Kunkas	Law office of Roger Kunkis	31 West 34th St Suite 8026	New York	NY	10001	5,000,000.00	250,000.00	50,000.00
1000697	B. C. O.	Mark B. Connely	Hall, Hieatt & Connely & Bowen, LLP	444 Higuera Street Third Floor	San Luis Obispo	CA	93401	unstated	26,391.36	5,278.27
1000116	E. B.	Edward A. Ruffo Esq.	Rheingold, Giuffra, Ruffo & Plotkin LLP	551 Fifth Ave. 29th Floor	New York	NY	10176	2,300,000.00	925,000.00	185,000.00
1001310	H. A. S.	James V. Hatem	Nixon Peabody, LLP	900 Elm Street, Suite 1400	Manchester	NH	03101	unstated	114,057.09	22,811.42
1000230	B. G.	James LiCalzi, Esq	Duffy & Duffy, PLLC	1370 RXR Plaza	Uniondale	NY	11556	unstated	100,000.00	20,000.00

Oceanus Insurance, a RRG in Liquidation
Exhibit A

POC	Claimant	Contact	Contact II	Address	City	State	Zip	Claim Amount	LIQUIDATOR'S RECOMMENDED AMOUNT	20% Distribution
1000018	D. D. Sr.	John Ogles Esq.	Ogles Law Firm	PO Box 891	Jacksonville	AR	72078	3,173,291.80	1,000,000.00	200,000.00
							Total	**37,554,843.80**	**4,866,181.09**	**973,236.22**

Oceanus Insurance, a RRG in Liquidation
Exhibit B

POC	Claimant	Contact	Contact II	Address	City	State	Zip	Claim Amount	Referee's Determination	20% Distribution
1000010	H. M. & C. M.	Christopher S. Olson Esq.	Doreen Shindel Esq.	325 Middle Country Road, Suite D.	Selden	NY	11784	unstated	20,000.00	4,000.00
1000012	S. S.	Christopher S. Olson Esq.	Doreen Shindel Esq.	325 Middle Country Road, Suite D.	Selden	NY	11784	unstated	50,000.00	10,000.00
1000493	F. D.	Clifford F. Zelen	Ross, Legan, Rosenberg, Zelen & Flaks, LLP	450 7th Ave, St. 2901	New York	NY	10123	1,000,000.00	125,000.00	25,000.00
1000502	N. K., Ind and as Executor of Est of M. K.	Keith M Sullivan, Esq	Sullivan & Galleshaw, LLP	108-15 Crossbay Blvd	Ozone Park	NY	11417	2,500,000.00	200,000.00	40,000.00
1000541	M. V.	Randall J. Phillips	Charles G. Monnett III & Assoc	6842 Morrison Blvd, Suite 100	Charlotte	NC	28211	2,000,000.00	0.00	0.00
1000720	C. T.	Randall J. Phillips	Charles G. Monnett III & Assoc	6842 Morrison Blvd, Suite 100	Charlotte	NC	28211	750,000.00	0.00	0.00
1001005	R. L. P., Personal Rep of N. L. P.	Darryn L Silverstein, Esq	Silverstein, Silverstein & Silverstein	20801 Biscayne Blvd Suite 504	Aventura	FL	33180	18,000,000.00	0.00	0.00
							Total	**24,250,000.00**	**395,000.00**	**79,000.00**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Civil Action No. 2017-CP-40-05195

RAYMOND G. FARMER, DIRECTOR OF THE

SOUTH CAROLINA DEPARTMENT OF INSURANCE,

Petitioner,

vs.

OCEANUS INSURANCE COMPANY, A RISK

RETENTION GROUP,

Respondent.

IN RE: Heidi Mauchan and Chrles Mauchan (Claimants)

Marc Finkelstein, MD (Insured)

POC NO.: 100010

SPECIAL REFEREE'S FINDINGS OF FACT AND DETERMINATION OF CLAIM

This matter came before the undersigned Special Referee pursuant to the Consent Order Appointing Special Referee and Approving Procedures Governing Referee' Participation in Claims Administration entered by the Honorable Jocelyn Newman, Chief Judge for Administrative Purposes, Court of Common Pleas, Fifth Judicial Circuit, on February 8, 2019. In accordance with said Order and the Procedures which were approved by and incorporated into said Order, the Special Referee has conducted the Hearing, considered all submissions, and has now makes a determination of the claim, *de novo,* as set forth below. This decision is hereby submitted to the Court as the written findings, determination, and recommendations to the Court.

FINDINGS OF FACT

1. The patient, Heidi Mauchan, was a 53-year-old female, married to Charles Mauchan, who underwent incisional hernia repair surgery with placement of mesh performed by Marc Finkelstein MD in December of 2009. Dr. Finkelstein followed the patient thereafter for post-operative care though September 2010. She later had surgery by

other physicians in December 2010 which included removal of infected mesh, and she apparently had a good result and recovery from that surgery.

2. The patient and her husband filed suit against Dr. Finkelstein in March 2013, alleging negligence in the management of the incisional hernia, including during both the planning for and performance of the surgery in December 2009, and in the post-operative care through September 2010, resulting in infected mesh. They also included a claim based on lack of informed consent. It is alleged that the patient had to undergo hospitalizations, surgeries, and other additional treatments as well as pain and suffering, scarring, and inability to perform activities of daily living and that her husband sustained loss of consortium damages.

3. The insurance carrier providing malpractice coverage for Dr. Finkelstein Simon was Oceanus Insurance Company, which entered liquidation. As part of the liquidation process, counsel for the patient/plaintiff timely submitted a claim to the Special Deputy Liquidator (SDL) against Dr. Finkelstein, making a demand for an unstated dollar amount. The decision of the SDL was to recommend the amount of $20,000 to be paid on behalf of Dr. Finkelstein to resolve the claim but to otherwise deny the claim, based on an evaluation of no liability on the part of Dr. Finkelstein. Counsel for the patient/claimants timely submitted an objection and request for re-consideration to the SDL. Upon re-consideration, there was a determination by the SDL to stand by the previous decision. Counsel for the patient/claimants thereafter timely appealed that decision, resulting in the assignment to the undersigned as Special Referee in accordance with the court order and procedures referenced above and the applicable statutes cited therein.

4. It appears that private insurance and Medicare covered the patient's medical bills.

5. It further appears that there were no claims made for loss of income.

6. As part of their claims, the claimants submitted the Summons & Verified Complaint, the attorney's Certificate of Merit, and Verified Bill of Particulars from the lawsuit, as well as their attorney's arguments in a detailed letter dated October 25, 2018, and a large set of medical records.

7. The materials submitted did not contain affidavits, affirmations, depositions or other expert testimonial evidence regarding the allegations of medical negligence, causation or damages.

8. There was no testimony or other proof contained in the record on the issue of informed consent

After opening of the Hearing and consideration of all submissions by counsel for the patient/claimants and counsel for the SDL, the Special Referee has conducted a *de novo* review and hereby issues below his determination of the claim and recommendation to the Court.

DETERMINATION OF CLAIM AND RECOMMENDATION

The undersigned is of the opinion that while the claimants have described and argued their claims in the documents submitted, they have not submitted documents that would be necessary to prove their claims to a finder of fact. As noted above, there were no affidavits, affirmations, depositions, or other documents setting forth expert opinions with regard to the standard of care, a breach of the standard of care, or causation, and the undersigned has been unable to locate any such expert opinion evidence in the voluminous medical records provided. Similarly, there is insufficient evidence in the record to support the claim based on lack of informed consent. Consequently, it is difficult to see how the claimant's case could survive defense motions and get before a jury or other finder of fact.

In light of the foregoing and having fully considered all matters submitted, it is the determination of the Special Referee that the sum of Twenty Thousand Dollars ($20,000.00) is a reasonable and appropriate disposition of the claim against Dr. Finkelstein, such that the decision of the SDL should be affirmed.

This is the determination and recommendation of the Special Referee.

DATED: December 4, 2023

s/ E. Brown Parkinson, Jr.

E. Brown Parkinson, Jr., SCB # 4437

SPECIAL REFEREE

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Civil Action No. 2017-CP-40-05195

RAYMOND G. FARMER, DIRECTOR OF THE
SOUTH CAROLINA DEPARTMENT OF INSURANCE,

Petitioner,

vs.

OCEANUS INSURANCE COMPANY, A RISK
RETENTION GROUP,

Respondent.

IN RE: SUSAN SANTAGATA/ESTATE OF CAMILLO SANTAGATA, DECEASED (Claimants)

JOHN MATTHEW SIMON, MD (Insured)

POC NO.: 1000012

SPECIAL REFEREE'S FINDINGS OF FACT AND DETERMINATION OF CLAIM

This matter came before the undersigned Special Referee pursuant to the Consent Order Appointing Special Referee and Approving Procedures Governing Referee' Participation in Claims Administration entered by the Honorable Jocelyn Newman, Chief Judge for Administrative Purposes, Court of Common Pleas, Fifth Judicial Circuit, on February 8, 2019. In accordance with said Order and the Procedures which were approved by and incorporated into said Order, the Special Referee has conducted the Hearing, considered all submissions, and has now makes a determination of the claim, *de novo,* as set forth below. This decision is hereby submitted to the Court as the written findings, determination, and recommendations to the Court.

FINDINGS OF FACT

1. The patient, Camillo Santagata, was a 47-year-old male, married to Susan Santagata, and the father of four children, who presented to the emergency department at Southside Hospital on February 10, 2009, with abdominal complaints and constipation for nine days. He was seen in consultation by John Simon, MD, a general surgeon. Based on CT results and examination, the patient was diagnosed with complete large bowel

obstruction. Dr. Simon took the patient to surgery on February 10, 2009, and performed exploratory laparotomy, lysis of adhesions, and colon resection. The patient was obese and had a history of myocardial infarction with stenting, hypertension, coronary artery disease and smoking. Prior to being taken to surgery, the patient was evaluated by pulmonology and cardiology at Dr. Simon's request and was cleared for surgery. The surgery apparently went as planned and the patient tolerated the surgery fairly well. Postoperatively, he was placed in ICU for close monitoring. He seemed to progress from a surgical recovery standpoint, but died three days post op on February 13, 2009, from presumed cardiac arrhythmia. A medical malpractice lawsuit was commenced on February 3, 2011 against Dr. Simon (and his practice group), Dr, Kapoor (cardiologist and her practice group), and the hospital and its nurses. The Plaintiff is Susan Santagata (wife) both as administrator of the estate and individually.

2. With regard to Dr. Simon, it is not claimed that the surgery was performed in a negligent manner or that the actual decision to perform surgery was wrong. Rather, it is claimed that Dr. Simon was negligent in not having a proper plan in place for monitoring and care of the patient by cardiology in light of his cardiac history and other conditions and that Dr. Simon was negligent in failing to appreciate and act upon post-op lab values and other diagnostic studies to diagnose and treat a decompensating cardiac condition that led to his death. There is also a claim of lack of informed consent.

3. Dr. Simon was deposed in the case. He denied any negligence in his care and treatment of the patient. He had the patient seen and evaluated preoperatively by Dr. Kapoor (the patient's own cardiologist who has been following him for several years), and by a pulmonologist. Both those physicians cleared the patient for the abdominal surgery. It was also arranged for Dr. Kapoor to follow the patient postoperatively from a cardiology standpoint. Dr. Simon also had the patient admitted to ICU after surgery as that would afford him the closest monitoring available in that hospital and where critical care physicians could address any cardiac or pulmonary issues which might arise. Dr. Simon acknowledged that the patient had co-morbidities that placed him at high risk for the surgery, but that the surgery was necessary and needed to be done to relieve the bowel obstruction and address the possibility of cancer causing the blockage. Dr. Simon testified that he told that patient that he was a high risk surgical candidate but that he thought the surgery was necessary and the patient consented to the surgery. Dr. Simon stated that in the post-op period, he would monitor any lab values or other reporting to him related to his involvement as a surgeon, but he left any other diagnostic results or reporting related to cardiology and pulmonology to the physicians caring for him in ICU. Dr. Simon did see the patient in ICU on February 10 (after the surgery) and on February 11 and he wrote orders related to his care on February 12. Dr. Simon's surgery partner saw the patient on the morning of February 13, and determined that the patient was stable and progressing from a surgical recovery standpoint. The

patient suddenly "coded" after 2pm on February 13 and resuscitation efforts were unsuccessful. The autopsy indicated that there was no leakage internally from the surgical anastomosis of the bowel and that the cause of death was "presumed cardiac arrhythmia."

4. The medical records indicate that the patient was being followed in ICU by Dr. Kapoor's cardiology group, by critical care pulmonologists and by the medical service. From a surgical standpoint, the patient was recovering and had no apparent surgical complications or issues.

5. The plaintiff Susan Santagata was deposed. There is nothing in her deposition that that contradicted the bases of Dr. Simon's defense.

6. Dr. Simon has testified that he was not negligent in the care and treatment which he provided to this patient. There is no other expert medical testimony in the record. There is no testimony or evidence that challenges or contradicts the expert opinions of Dr. Simon offered on his own behalf.

7. There does not appear to be a basis for an informed consent claim against Dr. Simon in this case.

8. The record does not reflect the status or disposition, if any, of the claims asserted against the co-defendants Kapoor and her practice group and Southside Hospital and its nurses.

9. The insurance carrier providing malpractice coverage for Dr. Simon and his group is Oceanus Insurance Company, which entered liquidation. As part of the liquidation process, counsel for the patient/plaintiff timely submitted a claim to the Special Deputy Liquidator (SDL) against Dr. Simon, making a demand for an unstated dollar amount. The decision of the SDL was to recommend the amount of $50,000 to be paid on behalf of Dr. Simon to resolve the claim but to otherwise deny the claim, based on an evaluation of no liability on the part of Dr. Simon. Counsel for the patient/plaintiff timely submitted an objection and request for re-consideration to the SDL. Upon re-consideration, there was a determination by the SDL to stand by the previous decision. Counsel for the patient/plaintiff thereafter timely appealed that decision, resulting in the assignment to the undersigned as Special Referee in accordance with the court order and procedures referenced above and the applicable statutes cited therein.

After opening of the Hearing and consideration of all submissions by counsel for the patient/plaintiff and counsel for the SDL, the Special Referee has conducted a *de novo* review and hereby issues below his determination of the claim and recommendation to the Court.

DETERMINATION OF CLAIM AND RECOMMENDATION

The undersigned is of the opinion that the position of Dr. Simon, is the more compelling position and that the odds would favor a defense verdict for Dr. Simon at trial. Nevertheless, a trial involves risk and potential exposure to large verdict based on the death of this patient and the family he leaves behind. The case does have settlement value. In assessing a value to assign, the undersigned has considered all of the information discussed here and in the submissions of the parties. Significant factors to consider include the limited involvement of Dr. Simon; the apparent progression from a surgical standpoint, the patient's medical history and comorbid conditions; and that many other physicians participated in the patient's care and treatment in ICU in the post-operative period, etc. It is noted that the SDL did assign a settlement value of $50,000 which was made available to the plaintiff.

In light of the foregoing and having fully considered all matters submitted, it is the determination of the Special Referee that the sum of Fifty Thousand Dollars ($50,000.00) is a reasonable and appropriate disposition of the claim against Dr. Simon only, such that the decision of the SDL should be affirmed.

This is the determination and recommendation of the Special Referee.

DATED: November 28, 2023

s/ E. Brown Parkinson, Jr.

E. Brown Parkinson, Jr., SCB # 4437

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STATE OF SOUTH CAROLINA **IN THE COURT OF COMMON PLEAS**

COUNTY OF RICHLAND Civil Action No. 2017-CP-40-05195

RAYMOND G. FARMER, DIRECTOR OF THE

SOUTH CAROLINA DEPARTMENT OF INSURANCE,

Petitioner,

vs.

OCEANUS INSURANCE COMPANY, A RISK

RETENTION GROUP,

Respondent.

IN RE: FE DE LEON (Claimant)

ROBERT D. SOLOMON, MD (Insured)

POC NO.: 1000493

SPECIAL REFEREE'S FINDINGS OF FACT AND DETERMINATION OF CLAIM

This matter came before the undersigned Special Referee pursuant to the Consent Order Appointing Special Referee and Approving Procedures Governing Referee' Participation in Claims Administration entered by the Honorable Jocelyn Newman, Chief Judge for Administrative Purposes, Court of Common Pleas, Fifth Judicial Circuit, on February 8, 2019. In accordance with said Order and the Procedures which were approved by and incorporated into said Order, the Special Referee has conducted the Hearing, considered all submissions, and has now makes a determination of the claim, *de novo,* as set forth below. This decision is hereby submitted to the Court as the written findings, determination, and recommendations to the Court.

FINDINGS OF FACT

1. The patient, Fe De Leon, was a 69-year-old widowed female, who was referred to Third Avenue Open MRI for screening bilateral mammography which was performed on December 12, 2011. The mammograms were interpreted by Robert Solomon, MD, a radiologist. Dr Solomon wrote a report indicating that this was an "unremarkable exam," and "negative," and recommended a routine follow-up exam in one year.

2. On May 16, 2012, the patient came to her physcian complaining of pain, tenderness, and change of color at the right breast for the past month. On exam, the right breast was found to be tender with mild pain on palpation and with palpable mass above the nipple and with no discharge. The assessment was right breast tenderness with palpable mass above nipple. The plan was for her to return to clinic with her mammogram films and for follow-up in 1 week.

3. On May 23, 2012, the patient returned to her physcian to discuss further management and had brought her imaging studies. Patient reported feeling right breast mass for 2 months (after mammogram) and some local pain. Negative nipple discharge. History of cyst aspirations. No family history of cancer. The assessment/plan was 69 year old female complaining of suspicious mass right breast-review of mammogram shows retroaureolar density with calcifications. Patient instructed to get last 3 years of films. Fine needle aspiration performed with 1 week for results. Likely additional imaging needed and surgery/additional biopsy.

4. On May 23, 2012, mammogram and sonogram of right breast reported area of asymmetry and solid masses highly suggestive of malignancy and lymph nodes concerning for possible metastatic disease with biopsy recommended. There was notation of BI-RADS Category 5: Highly Suggestive of Malignancy.

5. On May 25, 2012, the Fine Needle Biopsy report was issued indicating a pathology diagnosis that was Suspicious for Malignancy.

6. On June 12, 2012, the patient underwent surgery that involved removal of axillary lymph nodes, breast lymph nodes, removal of breast cancer lesion (lumpectomy), and tissue reconstruction at the site of the lesion removal. Intraoperative pathology was performed to confirm clean margins. Pathology showed no cancer in the lymph nodes and carcinoma in the lump removed.

7. After recovery from her surgery, the patient underwent radiation and chemotherapy for a period of months and follow-up monitoring and care thereafter, with imaging in 2013 and 2017 which showed no evidence of cancer.

8. The patient filed suit against Dr. Solomon and Third Avenue Open MRI, Inc., in April 2013, alleging that Dr. Solomon committed medical malpractice by misinterpreting the December 2011 mammogram by failing to diagnose cancer and thereby causing a delay in diagnosis until May 2012. It is alleged that this delay allowed the cancer to grow,

resulting in a more extensive treatment regimen and a decrease in life expectancy. The damages claimed were right breast lumpectomy for carcinoma, scarring, visibly asymmetrical breast, undergoing more extensive regimen of chemotherapy and radiation, nipple distortion, extreme pain, extreme fear, fright and suffering, impairment of enjoyment of living, and diminished life expectancy.

9. Dr. Solomon responded by denying liability and took the position that any alleged delay did not result in any change in treatment or prognosis for the patient.

10. Both sides obtained and submitted expert reviews.

11. The Plaintiff submitted an affirmation from a diagnostic radiologist in which they state that they compared the mammograms from December 2011 and from May 2012 and that the tumor significantly increased in size in the interim.

12. The Plaintiff submitted an affirmation from an oncologist in which they state that the delay adversely impacted the patient in two ways. During the interval from December to May, the tumor changed from a Stage I tumor (which does not require adjuvant systemic chemotherapy) to a Stage II tumor (which does require adjuvant chemotherapy treatment). The expert also stated that the five-year survival rate was reduced from 100% to 90%, a reduction of 10%.

13. The Defendant Dr. Solomon submitted an affirmation from an oncologist. That expert stated that any alleged delay in diagnosing the breast cancer had no impact on the patient's prognosis or treatment as evidenced by her cancer being diagnosed at Stage 1. The expert further stated that the standard protocol for treating triple negative breast cancer, regardless of the size of the mass, is to remove the mass by either lumpectomy or mastectomy and then follow with a combination of chemotherapy and radiation. In terms of prognosis, the expert stated that after three years the risk of the patient developing breast cancer is no higher than it would was for the patient prior to diagnosis and this patient had been cancer free six years after diagnosis and breast surgery in 2012.

14. Based on the discussions of tumor size and growth between December and May, it seems that both sides agree that a tumor was present at the time of the December 2012 mammogram which Dr. Solomon interpreted as normal or negative.

15. There is no expert opinion in the record before the Special Referee that speaks to the issue of whether Dr. Solomon breached the standard of care for a diagnostic radiologist in not identifying and reporting on the presence of the mass or in not suggesting further

testing or follow-up. Both sides submitted affirmations by their own reviewing expert radiologists, but they did not address standard of care.

16. It is noted that the court denied a motion for summary judgment filed by Dr. Solomon. This suggests there were questions of fact on liability and/or proximate cause such that the case would go to trial and be submitted to a jury or other finder of fact.

17. The insurance carrier providing malpractice coverage for Dr. Solomon and his group is Oceanus Insurance Company, which entered liquidation. As part of the liquidation process, counsel for the patient/plaintiff timely submitted a claim to the Special Deputy Liquidator (SDL) against Dr. Solomon, making a demand for $1,000,000. The decision of the SDL was to recommend the amount of $25,000 to be paid on behalf of Dr. Solomon to resolve the claim but to otherwise deny the claim. Counsel for the patient/plaintiff timely submitted an objection and request for re-consideration to the SDL, and made a demand for $350,000. Upon re-consideration, there was a determination by the SDL to increase the valuation to $50,000, but to otherwise stand by the previous decision. Counsel for the patient/plaintiff thereafter rejected that offer, standing by the previous demand of $350,000, and proceeded to timely appeal the SDL decision. This resulted in the assignment of the matter to the undersigned as Special Referee in accordance with the court order and procedures referenced above and the applicable statutes cited therein.

After opening of the Hearing and consideration of all submissions by counsel for the patient/plaintiff and counsel for the SDL, the Special Referee has conducted a *de novo* review and hereby issues below his determination of the claim and recommendation to the Court.

DETERMINATION OF CLAIM AND RECOMMENDATION

It appears to the undersigned that the Plaintiff/Claimant had put forth a case that would get to a jury or other finder of fact on issues of negligence, proximate cause and damages, with the most contested issues relating to whether the delay made any difference in treatment needed or prognosis. The finder of fact could determine that the patient did sustain damages by having to undergo more extensive treatment as well as fear and emotional distress from living through a delayed start to her treatment regimen and least some period of years with a reduced risk of successful outcome. On the other hand, that risk was reduced from 100% to 90% and the patient has now gone beyond the three year risk period out to more than nine years plus with no evidence of recurrence. Also, the patient did have breast cancer unrelated to any alleged fault on the part of Dr. Solomon and would have had some treatment and emotional distress no matter what. In their negotiations which occurred prior to submissions to the Special Referee, the parties attempted to reach an agreement on a mutually agreeable dollar figure, with the SDL offering $50,000 and the Claimant demanding $350,000. The undersigned is of the opinion that the case value lies between those figures.

In light of the foregoing and having fully considered all matters submitted, it is the determination of the Special Referee that the sum of One Hundred Twenty-Five Thousand Dollars ($125,000.00) is a reasonable and appropriate disposition of the claim against Dr. Solomon.

This is the determination and recommendation of the Special Referee.

DATED: November 30, 2023

s/ E. Brown Parkinson, Jr.

E. Brown Parkinson, Jr., SCB # 4437

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND In re: Oceanus Insurance Company, A Risk Retention Group, In Liquidation	IN THE COURT OF COMMON PLEAS CASE NO.: 2021-CP-40-05691
Michael J. FitzGibbons, Special Deputy Liquidator, Petitioner	**ORDER**
In re: Nicholas Kemp/Estate of Mary Anne Kemp, Deceased (Claimant) Mark Finkelstein, MD (Insured) POC No. 1000502	

Upon reading and filing the Briefs submitted by Petitioner, Michael J Fitzgibbons, Esq., Special Deputy Liquidator, and Tyler Lee, Esq., for Respondent Nicholas Kemp as Administrator of the Estate of Maryanne Kemp, and oral argument held before me on October 21, 2022,

IT IS HEREBY:

ORDERED, that the determination reached by the Special Referee on October 29, 2021 finding that the value of claimant's clam of $200,000 in this matter is hereby affirmed;

AND IT IS SO ORDERED.

November ____, 2022

The Honorable Donald B. Hocker
Presiding Judge
Fifth Judicial Circuit

Richland Common Pleas

Case Caption: Michael J Fitzgibbons VS Nicholas Kemp , defendant, et al

Case Number: 2021CP4005691

Type: Order/Other

Circuit Court Judge

s/Donald B. Hocker, Judge Code 2167

STATE OF SOUTH CAROLINA **IN THE COURT OF COMMON PLEAS**

COUNTY OF RICHLAND Civil Action No. 2017-CP-40-05195

RAYMOND G. FARMER, DIRECTOR OF THE
SOUTH CAROLINA DEPARTMENT OF INSURANCE,

Petitioner,

vs.

OCEANUS INSURANCE COMPANY, A RISK
RETENTION GROUP,

Respondent.

IN RE: NICHOLAS KEMP/ESTATE OF MARY ANNE KEMP, DECEASED (Claimant)

MARC FINKELSTEIN, MD (Insured)

POC NO.: 1000502

SPECIAL REFEREE'S FINDINGS OF FACT AND DETERMINATION OF CLAIM

This matter came before the undersigned Special Referee pursuant to the Consent Order Appointing Special Referee and Approving Procedures Governing Referee' Participation in Claims Administration entered by the Honorable Jocelyn Newman, Chief Judge for Administrative Purposes, Court of Common Pleas, Fifth Judicial Circuit, on February 8, 2019. In accordance with said Order and the Procedures which were approved by and incorporated into said Order, the Special Referee has conducted the Hearing, considered all submissions, and has now makes a determination of the claim, *de novo,* as set forth below. This decision is hereby submitted to the Court as the written findings, determination, and recommendations to the Court.

FINDINGS OF FACT

1. The patient, Mary Anne Kemp, was a 49-year-old married female who presented to the emergency department at Good Samaritan Hospital on the evening of Friday January 2, 2009, with a complaint of several days of worsening abdominal pain along with nausea, loose bowel movements, and abdominal distention. Her past medical history included a kidney transplant, as well as hyperlipidemia and hypertension.

2. The ER physician documented non-radiating pain in the lower abdomen, worse on the right, with mild distention and tenderness. There was no rebound tenderness or guarding. It was noted that she had chronic worsening of kidney transplant rejection with treatment with immunosuppressant medication and she was awaiting another kidney transplant when one became available. Lab studies showed elevated white blood count (WBC) and renal studies showed elevated BUN and creatinine levels. She had mild fever and weighed 250 pounds, which is morbidly obese. The ER physician ordered Levaquin and Flagyl (both antibiotics) and a CT scan of the abdomen/pelvis.

3. The CT scan revealed pericolonic inflammatory stranding at the sigmoid mesocolon of the left lower quadrant, suggestive of acute colonic diverticulitis. Extraluminal air bubbles were noted at the sigmoid mesocolon, indicative of a perforated sigmoid diverticulitis, which was confined to the sigmoid mesocolon. There was no fluid collection or gross free air.

4. At 11:50pm on January 2, 2009, the ER physician diagnosed the patient with diverticulitis and documented history of transplant and renal failure. The patient was admitted to the hospital to the service of Stephen Hom, MD (internal medicine) with a diagnosis of acute sigmoid diverticulitis.

5. Dr. Hom requested a surgical consult at 12:20am (after midnight and now Saturday January 3) and the patient was seen and examined at approximately 1:00am by Marc Finkelstein, MD, a surgeon with fellowship training in colorectal surgery. Dr. Finkelstein noted her complaints of abdominal pain for several days and her history of left kidney transplant. His physical findings included tenderness on the left side with some guarding, but no rebound or peritoneal signs. He referred to the CT scan report findings as consistent with acute colonic diverticulitis. His impression was air in the sigmoid mesocolon consistent with acute diverticulitis. He noted that the patient had already been started on IV antibiotics as ordered in the ER. He advised that if there was no improvement from conservative management with IV antibiotics in the next 24 hours that surgery would be required.

6. The patient was admitted to the medical floor and on Saturday January 3 at 8:35am, she was seen by Stephen Bernhardt, MD, (nephrologist) consulted by Dr. Hom. Dr. Bernhardt noted her worsening kidney rejection and the patient acknowledged that she may need hemodialysis soon. Dr. Bernhardt recorded that the patient reported feeling better. Upon examination, he found her abdomen distended with mild tenderness in the left lower quadrant, but with no guarding and no rebound. He acknowledged the surgical consultation and mentioned the patient's substantial risk for any surgical procedure. He agreed with the surgeon's recommendation for conservative management with IV antibiotics.

7. On January 3 between 1:00-3:00pm, the patient was seen by Jennifer Castro, MD, (surgeon) who was on call for the weekend. She noted that the patient was feeling much better and had no abdominal pain, no distention, and minimal tenderness. She recommended continued treatment with IV antibiotics with continued restricted diet and supplementary IV fluids.

8. On January 3 at 5:00pm, the patient was seen by Rajiv Saxena, MD (gastroenterologist) seeing the patient in consultation requested by Dr. Hom. Dr. Saxena noted that the patient's abdomen was soft, with low abdominal tenderness and no rebound. His impression was diverticulitis and he agreed with the plan of IV antibiotics and restricted diet.

9. The next day, Sunday January 4, 2009, at 9:05am, the patient was seen again by Dr. Bernhardt (nephrologist), who noted that the patient feels better. His impression was renal transplant with chronic rejection and acute diverticulitis with microperforation. He advised continued conservative management, including IV antibiotics.

10. Later on Sunday January 4 between 9:30am-12:00pm, Dr. Castro (surgery) again saw the patient. She noted that the patient was feeling much better and was hungry. There was no abdominal pain and no distention or tenderness on exam. Her impression was acute diverticulitis clinically improving. She ordered the patient's diet to advance to clear liquids and to continue IV antibiotics.

11. Also on Sunday January 4, the patient was seen by Dr. Singh (medical hospitalist) who noted that the patient's abdominal pain was less as compared to yesterday. This note is followed by another note by Dr. Saxena (gastroenterologist) reporting that the patient was feeling better and to continue IV antibiotics. Other notes in this time period reflect that the patient was out of bed, ambulating, and feeling better. On Monday January 5, she was noted to have had a bowel movement

12. On Monday January 5, 2009, at 8:30am, Dr. Finkelstein (surgeon) again saw the patient. He noted that the patient feels better; that she had passed her bowels; and that her abdomen was soft. Her WBC was down from here it had been. Dr. Finkelstein noted that he had a discussion with the patient that if she should have a second episode or worsening of diverticular pain, she should be seen and treated at North Shore Hospital in order to have her regular transplant nephrologist involved in her care. This was the last time that Dr. Finkelstein saw the patient. He signed off her case as the surgical consultant. The patient remained in the hospital at Good Samaritan under the care of other physicians for another week until January 12, 2009, when she was transferred. No

one asked Dr. Finkelstein to see the patient again during the rest of her stay at Good Samaritan Hospital.

13. Later on Monday January 5, 2009, at 11:45am, Dr. DiSanti (gastroenterologist) saw the patient. She reported no complaints of pain. She was tolerating a liquid diet. His impression was resolving diverticulitis/anemia. He ordered an additional 10-14 days of antibiotics and advanced the patient's diet. He recommended that the patient have a colonoscopy once she recovered.

14. On Tuesday January 6, 2009, at 9:30am, Dr. DiSanti saw the patient again. He noted that she had no abdominal pain and that her abdomen was soft and nontender. His impression was resolving diverticulitis, improving. He instructed the patient to follow up with her primary care physician for a complaint of back pain.

15. On Tuesday January 6, 2009, at 4:15pm, Dr. Hom (internal medicine-admitting physician) saw the patient again and noted that her abdomen was soft and nontender. He continued the antibiotics an advanced her diet.

16. Dr. Hom saw her again on Wednesday January 7, 2009, and the patient had no complaints. The abdomen was soft and nontender. The WBC was down further. He discontinued the IV antibiotics and started her on oral antibiotics.

17. Dr. Bernhardt (nephrologist) saw her on January 7, 2009, due to complaints about leg edema. He discontinued IV fluids and continued the oral antibiotics.

18. On Thursday January 8, 2009, Dr. Hom saw the patient and noted that her abdomen was soft and nontender. The WBC was down to 8.8. He continued antibiotics for treatment of diverticulitis.

19. Also on Thursday January 8, Dr. Bernhardt saw the patient again, who noted that she felt better. Antibiotics were continued.

20. On Friday January 9, 2009, at 11:20am, the patient was seen by Dr. Hom. She complained of back pain and constipation for three days. He abdomen was soft and nontender. Her WBC was 4.3 (normal reference range is 4.5-11.0). Dr. Hom ordered laxatives and a tapering of steroid medications. He requested follow up exam by nephrology due to her complaint of back pain and her history of renal disease. It was noted that the patient requested to be transferred to North Shore Hospital so that her renal issues could be followed by her regular nephrologist there and contact was attempted with that nephrologist in an attempt to arrange transfer.

21. Also on Friday January 9, 2009, Dr. Bernhardt saw her. The family complained of weight gain and the patient complained of low back pain. Her abdomen was soft and nontender. WBC was 4.3. Dr. Bernhardt ordered bladder ultrasound and insertion of catheter for urinary retention. Her request for transfer to North Shore Hospital was again noted.

22. On Saturday January 10, 2009, Dr. Hom saw the patient who complained of low back pain and some stomach discomfort. Her WBC was now 3.6. His assessment was perforated diverticulitis, treated with antibiotics, renal failure. The plan was for renal transplant when the diverticulitis resolved.

23. Also on January 10, 2009, Dr. Bernhardt saw the patient and noted complaints of right lower quadrant pain, the opposite of her diverticulitis. His assessment was diverticulitis that was better clinically.

24. On Sunday January 11, 2009, Dr. Hom saw the patient again and noted that she was very lethargic and was still in pain (location not noted). Her abdomen was soft with some tenderness. She had swelling in her extremities and her WBC was 2.5. The diagnosis was end stage renal disease, pending transfer to North Shore University Hospital; perforated diverticulitis on antibiotics, conservative management and worsening mental status. Dr. Hom ordered the patient transferred to a telemetry unit for closer monitoring and discussed hemodialysis with the family and transfer to North Shore University Hospital.

25. Dr. Bernhardt saw the patient that day, January 11, 2009, and noted that she was fatigued and complained of right lower quadrant pain. Dr. Bernhardt reported speaking with the physician at North Shore University Hospital and advised the patient that she would be transferred when a bed became available.

26. On January 11, 2019, at 6:20pm, the patient was transferred to a monitored bed for a higher level of monitoring. She complained of continued lower back pain. Her abdomen was distended, and she had not had a bowel movement for 5 days. She had an open wound on her left toe and open and scabbed areas on her lower back. A vascular surgeon was called at 8:00pm for urgent placement of a catheter for hemodialysis, which was started soon thereafter.

27. On Monday January 12, 2009, Dr. Bernhardt saw the patient and noted no rebound on abdominal exam. He stopped her immunosuppressant medications due to drop in her WBC to 3.5. He continued her on oral antibiotics for diverticulitis. He noted that she was awaiting transfer to North Shore University Hospital.

28. On January 12, 2009, Dr. Hom's transfer note indicates that the patient's abdomen was soft and nontender. At 4:20pm, the patient left Good Samaritan Hospital via ambulance for transfer to North Shore University Hospital. Dr. Hom's discharge note indicates that the patient responded well to antibiotics and her abdominal pain significantly improved during hospitalization, but her renal function deteriorated, requiring hemodialysis and at the patient's request, she was transferred to North Shore University Hospital.

29. On Monday January 12, 2009, at North Shore University Hospital, the patient was accepted. The record documents her complaints of severe low back pain and constipation for 6 days. She was alert, oriented, and nontoxic. She had right lower quadrant pain on palpation. She was diagnosed with immune suppression, renal failure, history of transplant with vascular disease with acute diverticulitis with mild sigmoid mesocolon perforation managed medically. The admitting physician continued the Levaquin and Flagyl (antibiotics) and ordered Miralax. At 6:00pm, the nephrologist diagnosed advanced renal failure, continued the antibiotics, and ordered pain medication. He requested a surgical consult.

30. On that same day, January 12, 2009, the patient was seen for surgical consultation by Dr. Bhaskaran. He noted the CT scan at Good Samaritan Hospital as showing sigmoid diverticulitis with small amount of pericolonic free air bubbles, without a focal fluid collection and no obstruction. He reported the patient as saying her abdominal pain has improved over the past week. Her complaints at the time of transfer included back and right flank pain, some left lower quadrant pain, in the setting of chronic back pain. Upon exam, he noted mild diffuse tenderness of the abdomen, tenderness in the left lower quadrant, with guarding and tenderness to percussion. He ordered a repeat CT scan to rule out abscess/perforation.

31. A CT scan of the pelvis performed on Tuesday January 13, 2009, revealed a large amount of retroperitoneal extraluminal gas with associated inflammatory changes consistent with perforated diverticulitis, but no peritoneal free air.

32. On January 13, 2009, the patient underwent an exploratory laparotomy, Hartmann's procedure, and placement of drains and vacuum. In the immediate post-operative period for January 14-16, 2009, the patient was extubated and was noted to be "clinically better," and "doing better," and "feeling better." She was transferred to the regular surgical floor on January 19, 2009. The colorectal surgeon noted that the patient was "well and stable and her diet was advanced."

33. The patient remained at North Shore University Hospital though the time of her death on September 17, 2009 (nearly 9 months). She apparently experienced multiple complications while in the hospital there related to her medical condition, kidney failure

and overall poor health. The records reveal repeat emergency surgery, colonic fistula, multiple wound debridements due to infection as well as multiple issues surrounding her kidney failure, including hypoxia due to fluid overload.

34. She patient died on September 17, 2009. At the time of her death, she was married to Nicholas Kemp and had been married to him since October 24, 1999.

35. A lawsuit was filed on April 11, 2011, in the Supreme Court of the State of New York, County of Suffolk, by Nicholas Kemp, individually and as Executor of the Estate of Mary Anne Kemp, against Dr. Hom, Dr. Finkelstein, Dr. Saxena, and Good Samaritan Hospital, to recover for alleged medical malpractice, wrongful death, and loss of services in connection with the course of treatment and death of Mary Anne Kemp, as described above.

36. In the lawsuit, the Plaintiff has set forth claims for loss of income in the net amount of $334,125.00 and loss of household services in the amount of $768,034. The record does not reflect any claim or dollar amount for medical bills, or any other type of economic damages claimed.

37. The record does not reflect the status or disposition, if any, of the claims asserted against the co-defendants Hom, Saxena and Good Samaritan Hospital.

38. Dr. Finkelstein and Dr. Saxena both filed motions for summary judgment supported by the medical records and affidavits/affirmations of defense expert witnesses in each of their specialties. In opposition to the motions, the plaintiff submitted affidavits/affirmations from plaintiff expert witnesses in the fields of surgery, gastroenterology, and diagnostic radiology. The matter was considered by the Court and the motions for summary judgment were denied in an order by the Honorable Paul J. Baisley, Jr., dated August 2, 2017. It appears that the motions were denied due to the competing and opposing expert opinions presented as to whether the standard of care was met.

39. The insurance carrier providing malpractice coverage for Dr. Finkelstein is Oceanus Insurance Company, which entered liquidation. As part of the liquidation process, counsel for the patient/plaintiff timely submitted a claim to the Special Deputy Liquidator (SPL) against Dr. Finkelstein, making a demand of $2.5 million. The decision of the SPL was to recommend the amount of $50,000 to be paid on behalf of Dr. Finkelstein to resolve the claim but to otherwise deny the claim, based on an evaluation of no liability on the part of Dr. Finkelstein. Counsel for the patient/plaintiff timely submitted an objection and request for re-consideration to the SPL. Upon re-consideration, there was a determination by the SPL to stand by the previous decision.

Counsel for the patient/plaintiff thereafter timely appealed that decision, resulting in the assignment to the undersigned as Special Referee in accordance with the court order and procedures referenced above and the applicable statutes cited therein.

After opening of the Hearing and consideration of all submissions by counsel for the patient/plaintiff and counsel for the SPL, the Special Referee has conducted a *de novo* review and hereby issues below his determination of the claim and recommendation to the Court.

DETERMINATION OF CLAIM

Dr. Finkelstein saw this patient only twice as a surgical consultant during the course of her time at Good Samaritan Hospital running from the evening of Friday January 2, 2009, through the afternoon of Monday January 12, 2009.

The first time was just after midnight in the early hours of Saturday January 3 soon after her presentation to the ER and the taking of the CT scan. Based on his exam and his review of the CT report, it was his impression that there was no need to take the patient to surgery at that time, but that surgery might be warranted if she did not improve within 24 hours of being on conservative medical management and IV antibiotics. During the course of the weekend, the records show that she did improve on this therapy, as documented in the notes made by multiple physicians who saw her on Saturday January 3 and Sunday January 4. This included her admitting/attending physician, Dr. Hom (medicine), as well as Dr. Bernhardt (nephrologist), Dr. Castro (surgeon), Dr. Saxena (gastroenterologist), and Dr. Singh (medicine). Their charting throughout the weekend indicated stability and improvement both objectively based on exam and subjectively based on patient remarks.

Dr. Finkelstein saw the patient for the second time on Monday morning, January 5, 2009, at which time the physician notes from the weekend were available to him. He noted that the patient felt better; that she had passed her bowels; and that her abdomen was soft. Her WBC was down from here it had been. Dr. Finkelstein noted that he had a discussion with the patient that if she should have a second episode or worsening of diverticular pain, she should be seen and treated at North Shore Hospital in order to have her regular transplant nephrologist involved in her care.

This was the last time that Dr. Finkelstein saw the patient. He signed off her case as the surgical consultant. The patient remained in the hospital at Good Samaritan under the care of other physicians for another week until January 12, 2009, when she was transferred. No one asked Dr. Finkelstein to see the patient again during the rest of her stay at Good Samaritan Hospital, where she remained under that care of her other physicians until she was transferred to another hospital at her request for access to her regular nephrologist. By the time that she had her next CT and her abdominal surgery there, it was eight days after Dr. Finkelstein last saw her.

It appears that the plaintiff is claiming that Dr. Finkelstein violated the standard of care by placing too much reliance on the physical exams, diagnostic testing, and patient remarks, all of which were reassuring, and by not considering the possibility that her underlying chronic renal problems and medications might mask or blunt signs and symptoms of the need for surgery. The plaintiff appears to claim that Dr. Finkelstein should have ordered a repeat CT scan to re-check the abdomen and pelvis before signing off the case on Monday January 5. Presumably, the plaintiff takes that a step further to argue that a repeat CT would have shown the need for immediate surgery rather than continued conservative treatment/medical management including IV antibiotic therapy and that earlier surgery would have resulted in a different patient course and outcome. In support of his position, the plaintiff points to the medical records, his expert witness affirmations of Dr. Drew (surgeon) and Dr. Boxer (radiologist), and the denial of Dr. Finkelstein's motion for summary judgement.

The SPL argues that Dr. Finkelstein met and did not violate the standard of care and that no act or omission on the part of Dr. Finkelstein was the cause of the patient's subsequent course and outcome. The SPL relies upon the medical records, deposition testimony, and the expert witness affirmation of Dr. Yeo (colorectal surgeon).

The patient clearly had a difficult medical history and difficult medical course during and after her stay at Good Samaritan Hospital. She obviously had pain and suffering leading up to her death occurring as a result of her medical condition. This naturally would have had both an economic and emotional impact on her husband, the plaintiff here. The undersigned has great empathy for the plaintiff as a result of all this.

The denial of summary judgment, which is common in medical malpractice cases, does not of course mean that the plaintiff would obtain a favorable jury verdict at trial. The defense has other opportunities to prevail by means of directed verdict or defense verdict rendered by the jury or even on post-trial motions or on appeal. It does, however, mean that the defense would have to go to trial and run a risk of an adverse verdict. Many cases get settled before trial, in recognition of that risk and other factors.

The undersigned is of the opinion that the position of Dr. Finkelstein and his expert, Dr. Yeo, is the more compelling position and that the odds would favor a defense verdict for Dr. Finkelstein at trial. Nevertheless, there is the risk of trial, and the case does have settlement value. In assessing a value to assign, the undersigned has considered all of the information discussed here and in the submissions of the parties. Significant factors to consider include the limited involvement of Dr. Finkelstein; the medical charting of other physicians that describe continuous improvement by the patient during that period; the fact that no one (physician or patient) sought out Dr. Finkelstein's involvement in the week after he signed off the case; the patient's medical history and comorbid conditions; that many other physicians participated in her care and treatment; and the likelihood of less than normal lifespan for the patient based on her renal disease, etc. On the other hand, the plaintiff does have expert support to go to the jury with large monetary damage claims and a death.

In light of the foregoing and having fully considered all matters submitted, it is the determination of the Special Referee that the sum of Two Hundred Thousand Dollars ($200,000.00) is a reasonable and appropriate disposition of the claim against Dr. Finkelstein only.

This is the determination and recommendation of the Special Referee.

DATED: October 29, 2021

s/ E. Brown Parkinson, Jr.

E. Brown Parkinson, Jr., SCB # 4437

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STATE OF SOUTH CAROLINA **IN THE COURT OF COMMON PLEAS**

COUNTY OF RICHLAND Civil Action No. 2017-CP-40-05195

RAYMOND G. FARMER, DIRECTOR OF THE
SOUTH CAROLINA DEPARTMENT OF INSURANCE,

Petitioner,

vs.

OCEANUS INSURANCE COMPANY, A RISK
RETENTION GROUP,

Respondent.

IN RE: MICHELLE VISCONTE (Claimant)

JOHN DAVID HAMEL, MD (Insured)

POC NO.: 1000541

SPECIAL REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DETERMINATION OF CLAIM

This matter came before the undersigned Special Referee pursuant to the Consent Order Appointing Special Referee and Approving Procedures Governing Referee' Participation in Claims Administration entered by the Honorable Jocelyn Newman, Chief Judge for Administrative Purposes, Court of Common Pleas, Fifth Judicial Circuit, on February 8, 2019. In accordance with said Order and the Procedures which were approved by and incorporated into said Order, the Special Referee has conducted the Hearing, considered all submissions, and has now makes a determination of the claim, *de novo,* as set forth below. This decision is hereby submitted to the Court as the written findings, determination, and recommendations to the Court.

FINDINGS OF FACT

1. The Claimant, Michelle Visconte, underwent cosmetic surgery at Complete Laser Clinic on March 17, 2016. According to the medical records (Hamel-Visconte 00305-00307), multiple procedures were performed, including a vertical abdominoplasty. The surgery was performed by John Hamel, MD and Scott Caudle, MD. The patient returned for

postoperative follow up care on several occasions. The Claimant thereafter alleged that she sustained injuries and damages as a result of medical negligence and lack of informed consent in connection with the surgery and care she received.

2. The insurance carrier providing malpractice coverage for Dr. Hamel was Oceanus Insurance Company, which entered liquidation. As part of the liquidation process, counsel for the patient/claimant submitted a claim to Oceanus/the Liquidator against Dr. Hamel, making a demand of $2,000,000.00, to resolve the claim.

3. The Liquidator denied the claim in its entirety on the basis that there was no insurance coverage (policy exclusions) under the Oceanus policy, based on the facts and the terms of the policy, as will be discussed below.

4. Counsel for the Claimant objected to this initial determination and requested review/reconsideration by the Liquidator based on arguments and documents submitted. Upon re-consideration, there was a determination by the Liquidator to stand by the previous decision. Counsel for the Claimant thereafter timely appealed that decision, resulting in referral to the undersigned as Special Referee in accordance with the court order and procedures referenced above and the applicable statutes cited therein.

5. Having opened the hearing process for written submissions and having considered all submissions by counsel for the Claimant and counsel for the Liquidator, the undersigned Special Referee has conducted a *de novo* review and now issues herein his Findings of Fact and Conclusions of Law and Determination of Claim and recommendation to the Court.

6. Dr. Hamel had entered into a Consent Order with the North Carolina Medical Board in 2014 ("the 2014 Consent Order"), by which his medical license was restricted in certain particulars, including a prohibition on performing the type of surgery (abdominoplasty) that was performed on the Claimant. Both sides contend that Dr. Hamel violated the 2014 Consent Order when he performed this surgery on the Claimant and make reference to this in support of their positions-the Claimant in her claims of culpable conduct on the part of Dr. Hamel and the Liquidator in his position that Dr. Hamel's conduct falls under insurance coverage exclusions.

7. The 2014 Consent Order provided that "if Dr Hamel failed to comply with the terms of the order, such failure "would constitute unprofessional conduct within the meaning of N.C. Gen. Stat. Section 90-14(a)(6)," and would constitute grounds to annul, suspend, or revoke his license to practice medicine and surgery.

8. In October 2016, Dr. Hamel's medical license was summarily suspended by order of the North Carolina Medical Board, citing patient care events and surgeries on patients in violation of the 2014 Consent Order and instances of where Dr. Hamel fraudulently entered the name of another physician in the medical records to obscure the fact that he was performing surgery in violation of the 2014 Consent Order. There was also a reference to a DWI arrest and concerns over alcohol abuse.

9. In April 2017, the North Carolina Medical Board issued an Amended Notice of Charges and Allegations as to Dr. Hamel in which it was once more alleged that Dr. Hamel had violated the 2014 Consent Order by, inter alia, performing prohibited surgeries and by fraudulently entering the name of another physician in the medical records to obscure the fact that he was performing surgery in violation of the 2014 Consent Order. There were further references to such conduct in a March 2019 Consent Order between Dr. Hamel and the Medical Board.

10. It is noted that the patient care events cited in the 2016 suspension order, the 2017 Amended Notice of Charges, and the 2019 Consent Order were in the same time frame as the Claimant's surgery (2016), and had similar facts alleged.

11. This 2017 Amended Notice of Charges was cited by the Claimant and attached to her claim documents presented to the Liquidator as confirmation of Claimant's position on Dr. Hamel's conduct. It was suggested that Ms. Visconte was one of the patients whose care by Dr. Hamel was discussed in that Amended Notice of Charges.

12. The medical malpractice lawsuit filed by the Claimant in the North Carolina court in March 2019 alleged that Dr. Hamel had operated on the Claimant in violation of the 2014 Consent Order and that he had failed to advise her in advance that he was not permitted to perform such surgery (lack of informed consent).

13. The Oceanus liability insurance policy issued to Complete Laser Clinic provided medical malpractice coverage for the dates in question and listed Dr. Hamel as an insured. Oceanus and the Liquidator have asserted that the coverage is not applicable due to the facts/claims involved here and based on certain coverage exclusions contained in the language of the policy.

14. This is the crux of the dispute here-whether one or more of the coverage exclusions cited are applicable to this claim.

15. In the insurance policy, Section VII **Exclusions** provides that this policy does not apply to any liability of any insured or to any damages, incident, claims or suits:

(2) **Violation of Statutes or Acts**

b. Arising from the willful, knowing, deliberate or intentional violation of any statute, ordinance, rule or regulation, regardless of whether or not the resulting injury was expected or unintended.

(5) **Dishonest or Criminal Acts**

Arising out of or resulting from any dishonest, fraudulent, criminal or malicious acts or omissions or deliberate or intentional wrongdoing committed or alleged to have been committed, directed, or allowed by any insured.

16. The Liquidator takes the position that insurance coverage for this Visconte claim is excluded based on either or both of the exclusions set forth above in paragraph 15 as applied to the facts/claims presented here. The Claimant argues that these exclusions do not apply and that therefore there is coverage under the policy for the claims presented against Dr. Hamel.

17. Counsel for the Liquidator and counsel for the Claimant have both presented detailed written arguments including case law and documents in support of their respective positions. Both are to be commended for the thoroughness of their presentations.

18. Having considered the entire record, including all documents, the arguments of counsel and the case law presented, the Special Referee finds that either or both of Exclusion (2)b and Exclusion (5) are applicable and operate to exclude coverage in this instance.

19. Although not specifically argued here, the Special Referee takes notice of another separate exclusion found in the same **VII Exclusions** section of the policy:

(10) **License Suspension or Revocation**

Arising from any incident in the performance of any professional services:

c. That is not permitted pursuant to any probation or restriction of your professional license…

20. In the opinion of the Special Referee, Exclusion (10) is applicable and would also appear to operate to exclude coverage in this instance. This finding would be in the nature of an "additional sustaining ground," and the same is not required to support the conclusion that coverage is excluded here, as set forth in Number 18 above.

21. The undersigned finds that the denial of the claim by the Liquidator based on exclusion of insurance coverage was justified and appropriate and should be affirmed.

DETERMINATION OF CLAIM

For and in light of the reasons set forth above, it is the decision of the Special Referee that the language of the policy excludes coverage for the claim presented here. The decision of the Liquidator to deny the claim based on exclusion of insurance coverage should be sustained and affirmed.

This is the determination and recommendation of the Special Referee.

DATED: October 27, 2023

s/ E. Brown Parkinson, Jr.

E. Brown Parkinson, Jr., SCB # 4437

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STATE OF SOUTH CAROLINA **IN THE COURT OF COMMON PLEAS**

COUNTY OF RICHLAND Civil Action No. 2017-CP-40-05195

RAYMOND G. FARMER, DIRECTOR OF THE

SOUTH CAROLINA DEPARTMENT OF INSURANCE,

Petitioner,

vs.

OCEANUS INSURANCE COMPANY, A RISK

RETENTION GROUP,

Respondent.

IN RE: CHARLENE E. TATE (Claimant)

JOHN DAVID HAMEL, MD (Insured)

POC NO.: 1000720

SPECIAL REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DETERMINATION OF CLAIM

This matter came before the undersigned Special Referee pursuant to the Consent Order Appointing Special Referee and Approving Procedures Governing Referee' Participation in Claims Administration entered by the Honorable Jocelyn Newman, Chief Judge for Administrative Purposes, Court of Common Pleas, Fifth Judicial Circuit, on February 8, 2019. In accordance with said Order and the Procedures which were approved by and incorporated into said Order, the Special Referee has conducted the Hearing, considered all submissions, and has now makes a determination of the claim, *de novo,* as set forth below. This decision is hereby submitted to the Court as the written findings, determination, and recommendations to the Court.

FINDINGS OF FACT

1. The Claimant, Charlene E. Tate, underwent cosmetic surgery performed by John D. Hamel, MD, of Complete Laser Clinic, PLLC, on July 24, 2015, consisting of liposuction and abdominoplasty. Another physician, Scott Caudle, MD, is also shown in the records as being involved in performing the surgery. The patient returned for postoperative

follow up care on several occasions and it is claimed that she had open wounds, erythema, and drainage along with pain for an extended time. She had a second surgery for postop scar revision on September 24, 2015. It is claimed that her surgical wounds eventually healed, but she was left with extensive scarring, and that she has suffered pain, disfigurement, depression, anxiety, depression, and embarrassment. The Claimant has asserted a claim for medical malpractice based on this care and treatment provided.

2. The insurance carrier providing malpractice coverage for Dr. Hamel was Oceanus Insurance Company, which entered liquidation. As part of the liquidation process, counsel for the patient/claimant submitted a claim to Oceanus/the Liquidator against Dr. Hamel, making a demand of $750,000.00, to resolve the claim.

3. The Liquidator denied the claim in its entirety on the basis that there was no insurance coverage (policy exclusions) under the Oceanus policy, based on the facts and the terms of the policy, as will be discussed below.

4. Counsel for the Claimant objected to this initial determination and requested review/reconsideration by the Liquidator based on arguments and documents submitted. Upon re-consideration, there was a determination by the Liquidator to stand by the previous decision. Counsel for the Claimant thereafter timely appealed that decision, resulting in referral to the undersigned as Special Referee in accordance with the court order and procedures referenced above and the applicable statutes cited therein.

5. Having opened the hearing process for written submissions and having considered all submissions by counsel for the Claimant and counsel for the Liquidator, the undersigned Special Referee has conducted a *de novo* review and now issues herein his Findings of Fact and Conclusions of Law and Determination of Claim and recommendation to the Court.

6. Dr. Hamel had entered into a Consent Order with the North Carolina Medical Board in 2014 ("the 2014 Consent Order"), by which his medical license was restricted in certain particulars, including a prohibition on performing the type of surgery (abdominoplasty) that was performed on the Claimant. Both sides contend that Dr. Hamel violated the 2014 Consent Order when he performed this surgery on the Claimant and make reference to this in support of their positions-the Claimant in her claims of culpable conduct on the part of Dr. Hamel and the Liquidator in his position that Dr. Hamel's conduct falls under insurance coverage exclusions.

7. The 2014 Consent Order provided that "if Dr Hamel failed to comply with the terms of the order, such failure "would constitute unprofessional conduct within the meaning of

N.C. Gen. Stat. Section 90-14(a)(6)," and would constitute grounds to annul, suspend, or revoke his license to practice medicine and surgery.

8. In October 2016, Dr. Hamel's medical license was summarily suspended by order of the North Carolina Medical Board, citing patient care events and surgeries on patients in violation of the 2014 Consent Order and instances of where Dr. Hamel fraudulently entered the name of another physician in the medical records to obscure the fact that he was performing surgery in violation of the 2014 Consent Order. There was also a reference to a DWI arrest and concerns over alcohol abuse.

9. In April 2017, the North Carolina Medical Board issued an Amended Notice of Charges and Allegations as to Dr. Hamel in which it was once more alleged that Dr. Hamel had violated the 2014 Consent Order by, inter alia, performing prohibited surgeries and by fraudulently entering the name of another physician in the medical records to obscure the fact that he was performing surgery in violation of the 2014 Consent Order.

10. It is noted that the patient care events cited in the 2016 suspension order and 2017 Amended Notice of Charges were in the same time frame as the Claimant's surgery (2015), and had similar facts alleged.

11. This 2017 Amended Notice of Charges was cited by the Claimant and attached to her claim documents presented to the Liquidator as "confirmation" of Claimant's position on Dr. Hamel's conduct.

12. The lawsuit filed by the Claimant in the North Carolina court in 2018 alleged that Dr. Hamel had operated on the Claimant in violation of the 2014 Consent Order and that he had failed to advise her in advance that he was not permitted to perform such surgery (lack of informed consent).

13. The Oceanus liability insurance policy issued to Complete Laser Clinic provided medical malpractice coverage for the dates in question and listed Dr. Hamel as an insured. Oceanus and the Liquidator have asserted that the coverage is not applicable due to the facts/claims involved here and based on certain coverage exclusions contained in the language of the policy.

14. This is the crux of the dispute here-whether one or more of the coverage exclusions cited are applicable to this claim.

15. In the insurance policy, Section VII **Exclusions** provides that this policy does not apply to any liability of any insured or to any damages, incident, claims or suits:

(2) **Violation of Statutes or Acts**

b. Arising from the willful, knowing, deliberate or intentional violation of any statute, ordinance, rule or regulation, regardless of whether or not the resulting injury was expected or unintended.

(5) **Dishonest or Criminal Acts**

Arising out of or resulting from any dishonest, fraudulent, criminal or malicious acts or omissions or deliberate or intentional wrongdoing committed or alleged to have been committed, directed, or allowed by any insured.

16. The Liquidator takes the position that insurance coverage for this Tate claim is excluded based on either or both of the exclusions set forth above in paragraph 15 as applied to the facts/claims presented here. The Claimant argues that these exclusions do not apply and that therefore there is coverage under the policy for the claims presented against Dr. Hamel.

17. Counsel for the Liquidator and counsel for the Claimant have both presented detailed written arguments including case law and documents in support of their respective positions. Both are to be commended for the thoroughness of their presentations.

18. Having considered the entire record, including all documents, the arguments of counsel and the case law presented, the Special Referee finds that either or both of Exclusion (2)b and Exclusion (5) are applicable and operate to exclude coverage in this instance.

19. Although not specifically argued here, the Special Referee takes notice of another separate exclusion found in the same **VII Exclusions** section of the policy:

(10) **License Suspension or Revocation**

Arising from any incident in the performance of any professional services:

c. That is not permitted pursuant to any probation or restriction of your professional license…

20. In the opinion of the Special Referee, Exclusion (10) is applicable and would also appear to operate to exclude coverage in this instance. This finding would be in the nature of an "additional sustaining ground," and the same is not required to support the conclusion that coverage is excluded here, as set forth in Number 18 above.

21. The undersigned finds that the denial of the claim by the Liquidator based on exclusion of insurance coverage was justified and appropriate.

DETERMINATION OF CLAIM

For and in light of the reasons set forth above, it is the decision of the Special Referee that the language of the policy excludes coverage for the claim presented here. The decision of the Liquidator to deny the claim based on exclusion of insurance coverage should be sustained and upheld.

This is the determination and recommendation of the Special Referee.

DATED: October 27, 2023

s/ E. Brown Parkinson, Jr.

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STATE OF SOUTH CAROLINA **IN THE COURT OF COMMON PLEAS**

COUNTY OF RICHLAND Civil Action No. 2017-CP-40-05195

RAYMOND G. FARMER, DIRECTOR OF THE
SOUTH CAROLINA DEPARTMENT OF INSURANCE,

Petitioner,

vs.

OCEANUS INSURANCE COMPANY, A RISK
RETENTION GROUP,

Respondent.

IN RE: Robert Louis-Pierre, for Estate of Natasha Louis-Pierre (Claimant)

RICHARD LAURIELLO, CRNA (Insured)

POC NO.: 1001005

SPECIAL REFEREE'S FINDINGS OF FACT AND DETERMINATION OF CLAIM

This matter came before the undersigned Special Referee pursuant to the Consent Order Appointing Special Referee and Approving Procedures Governing Referee' Participation in Claims Administration entered by the Honorable Jocelyn Newman, Chief Judge for Administrative Purposes, Court of Common Pleas, Fifth Judicial Circuit, on February 8, 2019. In accordance with said Order and the Procedures which were approved by and incorporated into said Order, the Special Referee has conducted the Hearing, considered all submissions, and has now makes a determination of the claim, *de novo,* as set forth below. This decision is hereby submitted to the Court as the written findings, determination, and recommendations to the Court.

FINDINGS OF FACT

1. The patient, Natasha Louis-Pierre, was a 32-year-old female, married with children, who underwent abdominoplasty outpatient surgery performed by Camille Chavez, MD (plastic surgeon) at Seduction Cosmetic Center on June 13, 2013. Richard Lauriello, CRNA, was the certified registered nurse anesthetist present to provide anesthesia for the procedure.

2. The patient was recovering at home for a period of five days, began to feel unwell, went to the cosmetic surgery center, was referred to the hospital emergency department, was diagnosed with pulmonary embolism (PE), and was undergoing a procedure to address the PE when she coded and died on June 18, 2013.

3. Thereafter, her estate submitted a Notice of Intent and then a lawsuit alleging claims for medical negligence and wrongful death against Dr. Chavez, Seduction Cosmetic Center and Mr. Lauriello. The Plaintiff's claims against Dr. Chavez were accompanied by an expert affidavit from a plastic surgeon, Stanley Sherman, MD. The claims against Mr. Lauriello were accompanied by an expert affidavit from Ziad Alsokary, CRNA. It was alleged that medical negligence on the part of these medical providers caused or contributed to the development of the PE resulting in the patient's death.

4. The Plaintiff alleged, and Mr. Alsokary opined, that the patient was not medically cleared for surgery; the patient was obese and a known smoker which made her an ASA 3 patient and thus should not have been cleared for surgery by Mr. Lauriello; the patient should not have undergone surgery at an outpatient center as a higher risk ASA 3 patient given her risk factors; no measures were taken to protect the patient from DVTs before, during, and after the surgery; there was a failure to monitor the patient's heart rhythm during surgery; there was no documentation of the ST segment for the VS lead; and the patient's heart rate was suspiciously documented on the anesthesia record as unchanging with only slight variations in blood pressure despite surgical stimulation. It was the claimant's expert's contention that these deviations from the standard of care led to the patient developing a pulmonary embolism which caused her death.

5. Mr. Lauriello engaged counsel and contested the claims against him. An expert affidavit from an anesthesiologist, Michael Meister, MD, was submitted on behalf of Lauriello, which supported his position that he was not negligent and that he acted reasonably and appropriately and in accordance with the standard of care.

6. More specifically, the defense expert stated that the decision for pre-operative clearance and testing rested with the surgeon, Dr. Chavez, and not with the CRNA; that appropriate pre-operative clearance by history taking, physical exam, and testing was performed by Dr. Chavez in April and May prior to the surgery in June; that Dr. Chavez had assigned the patient an anesthesia risk score of ASA 1 (meaning a normal healthy patient), but Mr. Lauriello had raised the score pre-operatively to ASA 2 (meaning a patient with mild systemic disease), based on her history of smoking and obesity; that the patient did not qualify for a score of ASA 3 (meaning a patient with severe systemic disease); that it was appropriate for this patient to undergo the surgery at an outpatient surgery center; that the patient's lab studies showing lower hemoglobin and hematocrit had been noted by Mr. Lauriello and discussed with Dr. Chavez per-operatively; that

these values were not a contraindication for surgery, did not increase her risk of surgical complication, and did not contribute to her developing a PE; that Mr. Lauriello appropriately assessed the patient before surgery; that based on the assessment it was appropriate from an anesthesia standpoint to proceed with surgery; that the patient was appropriately monitored by the CRNA and remained stable during surgery and in the recovery room prior to discharge; that provisions for DVT prophylaxis are not the responsibility of the CRNA, but rather rest with the surgeon and surgery center; that risk of DVT and PE appear to have been explained to the patient pre-operatively; that the patient was instructed about DVT prophylaxis prior to discharge from the surgery center; and that the patient's development of post-operative PE and her death were unrelated to her pre-operative condition but rather was a recognized complication or risk of surgery and not the result of any medical negligence.

7. With regard to Dr. Chavez, the surgeon, the Plaintiff/Claimant alleged that it was inappropriate and a violation of the standard of care for Dr. Chavez to perform this surgery on the patient based on her risk factors. It was also alleged that Dr. Chavez violated the standard of care by not ordering appropriate DVT prevention measures that led to the PE suffered by the patient. It is unknown what defenses or resolution, if any, occurred with regard to the claims made against Dr. Chavez.

8. The Florida Department of Health investigated the claims against Mr. Lauriello with regard to this patient. This investigation included review of the Notice of Intent allegations and documents submitted by Plaintiff's counsel, which included the affidavit from Plaintiff's nurse anesthetist expert, Mr. Alsokary. In response to the investigation, the affidavit of Dr. Meister was submitted along with detailed written argument submitted by his defense counsel. At the conclusion of the investigation, the Florida Department of Health Probable Cause Panel for the Board of Nursing issued a written decision indicating that it had reviewed all the information and evidence and had found no probable cause for an action against Mr. Lauriello, dismissing the case investigation.

9. The insurance carrier providing malpractice coverage for Mr. Lauriello was Oceanus Insurance Company, which entered liquidation. As part of the liquidation process, counsel for the patient/plaintiff timely submitted a claim to the Special Deputy Liquidator (SDL) against Mr. Lauriello, making a demand for $18,000,000. The decision of the SDL was to deny the claim based on review and evaluation and a determination of no liability on the part of Mr. Lauriello. Counsel for the Plaintiff/Claimant timely submitted an objection and request for re-consideration to the SDL, and reiterated a demand of $18,000,000. Upon re-consideration, there was a determination by the SDL to stand by the previous decision. Counsel for the Plaintiff/Claimant thereafter proceeded to timely appeal the SDL decision. This resulted in the assignment of the

matter to the undersigned as Special Referee in accordance with the court order and procedures referenced above and the applicable statutes cited therein.

After opening of the Hearing and consideration of all submissions by counsel for the patient/plaintiff and counsel for the SDL, the Special Referee has conducted a *de novo* review and hereby issues below his determination of the claim and recommendation to the Court.

DETERMINATION OF CLAIM AND RECOMMENDATION

It appears to the undersigned, based on the preponderance of the evidence presented, that the defense and position of the Defendant Lauriello is the more credible and convincing and would be found to be so by a jury or other finder of fact on the issues of negligence, proximate cause and damages. The SDL determination of no liability on the part of Mr. Lauriello was reasonable and appropriate.

In light of the foregoing and having fully considered all matters submitted, it is the determination of the Special Referee that a determination of no liability and no payment to be made of behalf of Richard Lauriello, CRNA, is supported by the preponderance of the evidence and should be affirmed.

This is the determination and recommendation of the Special Referee.

DATED: November 30, 2023

s/ E. Brown Parkinson, Jr.

E. Brown Parkinson, Jr., SCB # 4437

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Exhibit D

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND** Michael Wise, as Director of the South Carolina Department of Insurance, Petitioner, vs. Oceanus Insurance Company, a Risk Retention Group, Respondent.	**IN THE COURT OF COMMON PLEAS** **FOR THE FIFTH JUDICIAL CIRCUIT** C.A. No. 2017-CP-40-05195 **AFFIDAVIT OF MICHAEL J. FITZGIBBONS IN SUPPORT OF LIQUIDATOR'S SEVENTH CLAIMS REPORT, RECOMMENDATION & APPLICATION FOR ORDER APPROVING SAME**

Michael J. FitzGibbons, being first duly sworn, deposes and says as follows:

1. I am the Special Deputy Liquidator of Oceanus Insurance Company, a Risk Retention Group ("Oceanus"). I was appointed to my position by the Liquidator, Raymond G. Farmer, Director of the South Carolina Department of Insurance, which designation was approved by the Court on September 21, 2017.

2. I am over 21 years of age and suffer no legal disability.

3. By virtue of my appointment as Special Deputy Liquidator, I have been actively and personally involved in the liquidation of Oceanus at all times since it was placed into liquidation, including the matters addressed in this Affidavit. My responsibilities as the Special Deputy Liquidator include supervision and oversight of and direct involvement in the liquidation process. I am familiar with the claims process and with the claims that have been filed. Therefore, I have personal knowledge of the matters addressed in this Affidavit.

4. The claims process has included the following components, each and every one of which has been followed:

a. Notice of Oceanus' liquidation was given in accordance with S.C. Code Ann. § 38-

27-410(a) (2015).

b. In accordance with S.C. Code Ann. § 38-27-410(b) (2015), the notice specified that the last date to file a timely proof of claim with the Liquidator was March 20, 2018. Proofs of claim had to be postmarked no later than 5:00 P.M. Eastern Daylight Time on that date to be considered timely.

c. The Liquidator's Proof of Claim (POC) forms are in compliance with S.C. Code Ann. § 38-27-550(a) (2015) and provided notice of the liquidation of Oceanus in accordance with S.C. Code Ann. § 38-27-410(b) (2015).

d. As the duly-appointed Special Deputy Liquidator, I have considered each of the twenty-seven (27) POCs subject to this Claims Report, in accordance with the requirements of the South Carolina Insurers Rehabilitation and Liquidation Act, S.C. Code Ann. §§ 38-27-10 *et seq*.

e. I am administering the claims process. I initially retained as Oceanus employees Tim Morris and Jennifer Arias to assist me in the adjudication of claims under policies for losses incurred. Mr. Morris and Ms Arias are no longer employees of Oceanus. In their stead, I have engaged Glynloen Consulting with the responsibility to make recommendations to the Liquidator as to the validity, valuation and priority of each POC. The Liquidator and/or his duly-appointed Special Deputy then independently approves or denies these recommendations, in whole or in part, and submits the same to this Court for approval.

f. Each POC subject to this Claims Report contains the necessary claim file documentation for the Liquidator's recommendation thereon.

g. To the extent this Claims Report includes claims that were denied in whole or in

part, notice of such denial complying with S.C. Code Ann. § 38-27-580(a) (2015) was provided to the affected claimants and either no timely objection was made by the affected claimants, the objection was resolved by mutual agreement, or decided pursuant to the Order Approving Procedures Governing Referee's Participation in Claims Administration.

5. I am submitting this Affidavit in support of the Liquidator's Seventh Claims Report, Recommendation & Application for Order Approving Same ("Report, Recommendation and Application"), which pertains to twenty-seven (27) Class 2 claims as prescribed by S.C. Code Ann. §§ 38-27-610 & -620 (2015).

6. Between the entry of the Liquidation Order on September 21, 2017, and March 20, 2018, I caused to be issued approximately seven thousand one hundred and sixty-two (7,162) Notices of Liquidation and Proof of Claim (POC) forms, with instructions to policyholders, third-party claimants, and/or other potential claimants and creditors of Oceanus.

7. For five (5) consecutive days commencing October 27, 2017, I caused to be published Notice of the liquidation in the New York Times, a newspaper of nationwide circulation, informing interested parties of the liquidation proceedings and including contact information and instructions for the timely filing of a claim.

8. For two (2) consecutive days commencing October 22, 2017, I caused to be published Notice of the liquidation in the Miami Herald, a newspaper of countywide circulation in Miami-Dade, Broward and Monroe Counties, informing interested parties of the liquidation proceedings and including contact information and instructions for the timely filing of a claim.

9. On or before the Bar Date of March 20, 2018, I received one thousand three-hundred and seventy-eight (1,378) timely filed POCs, and I received fifty-three (53) late-filed

claims. Fifteen (15) of the fifty-three (53) late-filed claims have been deemed timely filed, with thirty-eight (38) pending further review.

1. Nine hundred and nineteen (919) claims have previously been adjudicated and submitted to this Court for approval, with such approval granted by orders entered June 26, 2019, February 21, 2020, October 29, 2020, May 24, 2022, September 13, 2023, and April 10, 2024.

10. Twenty-seven (27) additional claims have now been adjudicated and are the subject of this application. All remaining unadjudicated POCs are under evaluation.

11. Attached to the Report, Recommendation and Application and incorporated by reference as Exhibit A is a listing of the names and addresses of twenty (20) claimants with Class 2 claims as defined in S.C. Code Ann. § 38-27-610(2) (2015), the POC number assigned, the original claim amount, and the Liquidator's valuation and recommendation pursuant to S.C. Code Ann. § 38-27-620 (2015).

2. Also attached to this Application and incorporated by reference is Exhibit B, which is a Schedule listing the names and addresses of seven (7) claimants holding a class 2 claim as defined by S.C. Code Ann. § 38-27-610(2) (2015), the POC number assigned by the Liquidator, the original claim amount, and the recommended amount by the Special Referee. These disputed claims were processed according to the Procedures Governing Referee's Participation in Claim Administration approved by the Court on February 8, 2019.

12. To the best of my knowledge and belief, the claims and recommendation thereon subject to this Report and Application are not subject to modification. If any additional factors hereafter come to my attention which may require any modification, such as third-party payments or releases of any such claims, I will immediately notify the Liquidator, and he and/or I will

promptly bring those matters to the attention of this Court in an amendment to modify such claims and recommendation.

FURTHER AFFIANT SAYETH NOT.

Michael J. FitzGibbons
Special Deputy Liquidator

SWORN to before me this 1st day of August, 2024

Sarah E. Alexander
Notary Public for the State of Arizona
My commission expires 09-15-2026

SARAH E. ALEXANDER
Notary Public - Arizona
Maricopa Co. / #633463
Expires 09/15/2026