

**SUPREME COURT
STATE OF LOUISIANA**

DOCKET NO. 2017-C-1488

ROGER BURCHFIELD AND CAROL BURCHFIELD

VERSUS

**FORREST H. WRIGHT, M.D., THOMAS RENDA, M.D.
AND WILLIS KNIGHTON MEDICAL CENTER**

**ON APPLICATION FOR WRITS OF CERTIORARI OR REVIEW
FROM THE COURT OF APPEAL, SECOND CIRCUIT, NO. 51,459-CA,
IN AND FROM THE FIRST JUDICIAL DISTRICT COURT,
PARISH OF CADDO, STATE OF LOUISIANA
CIVIL ACTION DOCKET NO. 585,046-B
HONORALBE CRAIG MARCOTTE, PRESIDING**

CIVIL PROCEEDING

AMICUS CURIAE BRIEF ON BEHALF OF LOUISIANA HOSPITAL ASSOCIATION,
LOUISIANA HOSPITAL ASSOCIATION MEDICAL MALPRACTICE AND GENERAL
LIABILITY TRUST, LOUISIANA STATE MEDICAL SOCIETY, LOUISIANA NURSING
HOME ASSOCIATION, LAMMICO, MEDICINELOUISIANA, LOUISIANA ACADEMY OF
FAMILY PHYSICIANS, LOUISIANA CHAPTER OF THE AMERICAN ACADEMY OF
PEDIATRICS, LOUISIANA DENTAL ASSOCIATION, LOUISIANA SOCIETY OF
ANESTHESIOLOGISTS, LOUISIANA RURAL HOSPITAL COALITION, LOUISIANA
ORTHOPEDIC ASSOCIATION, AND LOUISIANA AMBULANCE ALLIANCE IN
SUPPORT OF THE WRIT APPLICATION OF
THE LOUISIANA PATIENT'S COMPENSATION FUND

Respectfully Submitted:

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MAY IT PLEASE THE COURT:

I

INTRODUCTION

This *Amicus Curiae* brief is submitted by the Louisiana Hospital Association, Louisiana Hospital Association Medical Malpractice and General Liability Trust, Louisiana State Medical Society, Louisiana Nursing Home Association, LAMMICO, MedicineLouisiana, Louisiana Academy of Family Physicians, Louisiana Chapter of the American Academy of Pediatrics, Louisiana Dental Association, Louisiana Society of Anesthesiologists, Louisiana Rural Hospital Coalition, Louisiana Orthopedic Association and Louisiana Ambulance Alliance (collectively “*Amicus Curiae*”) in support of the Writ Application of the Louisiana Patient’s Compensation Fund related to the valuation of damages in a loss of a chance for a better outcome case. The Louisiana Patient’s Compensation Fund requests that this court reverse a decision by the Second Circuit Court of Appeal that amended a jury verdict which properly awarded a lump sum general damage award of \$680,000.00 that was reduced to \$500,000.00 in accordance with the cap on damages in medical malpractice cases provided by Louisiana Revised Statutes 40:1231.2. The Second Circuit amended the damage award and rendered judgment awarding separate and distinct awards for general damages and special damages, which included lost wages and medical expenses that were not subject to the medical malpractice cap on damages, for a total award of \$1,585,870.64, as well as entitlement to future medical care pursuant to Louisiana Revised Statutes 40:1231.3.

The Second Circuit’s decision directly conflicts with this court’s decisions in *Smith v. State Department of Health and Hospitals*, 676 So. 2d 543 (La. 1996) and *Graham v. Willis-Knighton Medical Center*, 699 So. 2d 365 (La. 1997) that mandated a lump sum award in the nature of general damages for the lost chance of survival (or for a better outcome) that is subject to the \$500,000.00 medical malpractice cap on damages in Louisiana Revised Statutes 40:1231.2. In *Smith*, this court determined the method of valuation of damages recoverable for the loss of a chance of survival in a medical malpractice case. This court said the chance of survival lost on account of malpractice is **a distinct injury compensable as a lump sum award as general damages** that is different from the value of a wrongful death or survival claim. This lump sum general damage award is subject to the \$500,000.00 medical malpractice cap on damages. In *Graham*, this court adopted the same method of valuation for the lost chance of a

better outcome.

In this case, the jury followed *Smith* and *Graham* and awarded a lump sum of \$680,000.00 in the nature of general damages for the lost chance of a better outcome. The trial court properly reduced that award to \$500,000.00 in accordance with the cap on damages under Louisiana Medical Malpractice Act, and then credited the Louisiana Patient's Compensation Fund \$100,000.00, for the settling underlying provider.

Contrary to this court's direction in *Smith* and *Graham*, the Second Circuit amended the jury's lump sum award in the nature of general damages and rendered judgment awarding the plaintiffs not only general damages subject to the \$500,000.00 malpractice cap, but also additional special damages in the form of lost wages and medical expenses not subject to the cap on damages, and certified entitlement to future medical care. This court should review the Second Circuit's decision that failed to follow *Smith*, *Graham* and its progeny, which has been the law relied upon by health care providers in Louisiana for over twenty (20) years.

All health care providers rely on the protections of the Act, including the cap on damages, to provide affordable medical services to the public. The effect of the Second Circuit's decision is to circumvent the \$500,000.00 cap on damages in a medical malpractice case involving a loss of a chance of a better outcome by permitting additional special damages outside the \$500,000.00 cap when this court has mandated that loss of a chance of survival (or of a better outcome) is a distinct injury compensable as a lump sum general damage award subject to the medical malpractice cap on damages. In this case, the entire lump sum general damage award of the jury was properly capped by the trial court at \$500,000.00.

The uncertainty in the Second Circuit's decision threatens the ability of health care providers to provide quality health care in Louisiana at an affordable cost to the patient. Without a meaningful cap on medical malpractice damages in a loss of a chance of survival (or of a better outcome) case, surcharges paid to the Louisiana Patient's Compensation Fund could increase. The impact of additional costs to hospitals, physicians, nursing homes, emergency medical service providers, dentist and other health care providers could be devastating to medical communities, particularly small, rural hospitals and the patients that they serve. The Second Circuit erred when it circumvented the \$500,000.00 medical malpractice cap on damages and awarded additional special damages not subject to the cap. This court should grant the writ application of the Louisiana Patient's Compensation Fund and review that decision.

II

INTEREST OF AMICUS CURIAE

The Louisiana Hospital Association is a non-profit organization founded in 1926 and incorporated in 1966 for the purpose of promoting the public welfare of the State of Louisiana by helping to provide hospitals and related health service institutions of the highest possible quality health care, in sufficient quantity to best serve the state's citizens. The Association's membership is composed of over one hundred fifty (150) member institutions, with more than a thousand (1,000) individual members. Membership consists of hospitals of all kinds, including public, private, non-profit, for-profit, federal, state, municipal, hospital service district, religious, general, specialty, acute care, psychiatric, and rehabilitation classifications. In the course of providing critically needed health care services, Louisiana hospitals employ thousands of people and have an annual payroll of well in excess of one billion dollars, making them among the leading industries in the state.

The Louisiana Hospital Association Medical Malpractice and General Liability Trust is a professional and public liability trust fund established in accordance with Louisiana Revised Statutes 22:46 by the Louisiana Hospital Association to provide a means by which professional malpractice and public liability claims or judgments arising from such claims against participants may be satisfied. The Hospital Trust is currently composed of over seventy (70) participant hospitals or health care institutions, many of whom are rural hospitals, and all of whom have a vital interest in and will be adversely affected by the action taken by this court.

The Louisiana State Medical Society is an association of approximately six thousand three hundred twenty-eight (6,328) physicians who practice throughout the State of Louisiana, one thousand six hundred forty-seven (1,647) of which are student members. This organization is a voluntary association of physicians providing leadership for the advancement of the health of the people of Louisiana and serving as the premier advocate for patients and physicians. Members of the Society practice in all fields of medical specialization.

The Louisiana Nursing Home Association is a nonprofit organization representing nearly two hundred fifty (250) member nursing facilities and assisted living facilities that care for more than twenty-five thousand (25,000) of Louisiana's elderly and disabled individuals each day. On behalf of its members, the Association advocates for providing quality care and nurturing environments to Louisiana's frail and elderly.

LAMMICO, formerly Louisiana Medical Mutual Insurance Company, is a mutual insurance company domiciled in Louisiana. LAMMICO was founded in 1981, and it is the leading provider of medical professional liability insurance in this state. LAMMICO insures seven thousand (7000) healthcare providers and entities, including physicians, advanced practice registered nurses, physician assistants, dentist, hospitals, surgery centers, and other facilities.

MedicineLouisiana is a collaborative of physicians working to better the practice environment for medical professionals in the state of Louisiana. Since its establishment in 2010, MedicineLouisiana membership has reached over nine hundred (900) independent multi-specialty physicians statewide. The organization provides a unified voice for the physician community and serves as an advocate working with policymakers at all levels of government.

The Louisiana Academy of Family Physicians was established in 1947 and it is one of the state's largest primary care organizations, with more than one thousand nine hundred (1,900) member physicians, residents and medical students throughout the state of Louisiana. Its mission is to promote and support Louisiana's family physicians in providing excellent health care and to provide a unified voice for family medicine.

The Louisiana Chapter of the American Academy of Pediatrics is a nonprofit organization founded in 1954 and incorporated in 1984 with the primary mission of being advocates for all children in Louisiana. The Academy represents nearly seven hundred (700) pediatricians and pediatric subspecialists throughout Louisiana. The Academy is dedicated to promoting the interests of Louisiana pediatricians in the American Academy of Pediatrics, increasing involvement of pediatricians in the legislative arena to positively influence the quality of pediatric practice and the welfare of children in Louisiana, increasing pediatricians' knowledge of and participation in legislative and advocacy activities at a local level, and building coalitions with other organizations working towards improving children's health and well-being.

The Louisiana Orthopedic Association is a nonprofit, voluntary health association that represents four hundred ninety (490) orthopedic surgeons. Established in 1953, the Association proudly serves as the leading advocacy voice for orthopedic surgeons in Louisiana.

The Louisiana Society of Anesthesiologists is composed of over four hundred (400) physician anesthesiologists in Louisiana and it is a state component society of the American

Society of Anesthesiologists. The mission of the Society is to communicate the scope and value of the physician anesthesiologist to the public, to monitor and promote public policy to enhance patient care, and to serve as an advocate for physician anesthesiologists to their patients.

The Louisiana Rural Hospital Coalition was incorporated in 1994 as a Section 501 (c) (6) corporation. It is a non-profit Louisiana corporation that serves as a trade association for Louisiana's small rural hospitals. The Coalition currently has a membership of forty (40) small rural hospitals located all over Louisiana. The membership includes both public and private hospitals of no more than 60 beds as defined by the Rural Hospital Preservation Act (La. R. S. 40:1189.1 et seq).

The Louisiana Dental Association was established in 1878 and it is the largest professional health organization for dentists in Louisiana. It is a state-wide grassroots organization whose purpose is to promote, advocate for, and protect the dental profession. The Association has more than one thousand eight hundred (1,800) members, including members in all recognized dental specialties.

The Louisiana Ambulance Alliance was founded in 1995 and it is a not for profit membership organization for Emergency Medical Service Providers in Louisiana. Membership is open to all Louisiana licensed Emergency Medical Service Providers. From the state's largest EMS provider to the state's smallest EMS provider, the Alliance serves over 90% of the EMS providers in the state. These providers, in turn, employ thousands of licensed emergency medical service practitioners who serve the communities in which they live. The Alliance serves its membership by acting as an advocate for emergency medical transportation, promoting improved health status, and fostering improvements to the health system for residents of Louisiana.

All hospitals, physicians, nursing homes, emergency medical service providers, dentist and other health care providers in Louisiana have a substantial interest in and will be affected by the action taken by this court. The decision by this court will have a great impact on all health care providers who rely on the limitations of the medical malpractice cap to provide quality medical services to the public at an affordable cost. The interest and concerns of all hospitals, nursing homes, emergency medical service providers, dentist and other health care providers, as well as those of the general public served by them, are substantial and these health care providers have a legitimate interest in the issues in this proceeding.

III RAMIFICATIONS

A Importance of Limitations on Medical Malpractice Liability

It has been the experience of the *Amicus Curiae* that the provisions of the Act limiting judgments in medical malpractice cases have enabled qualified health care providers to continue to provide quality services at a reasonable cost to the public, while assuring a source of compensation for potential claimants.

In 1975, the Louisiana Legislature enacted the Louisiana Medical Malpractice Act in response to a medical malpractice insurance crisis. Medical cost and medical malpractice insurance premiums were skyrocketing in Louisiana prior to 1975. This Court discussed the crisis in health care in the state prior to the 1975 Act, in *Descant v. Administrators of Tulane Education Fund*, 639 So. 2d 246 (La. 1994):

In 1975, the Louisiana Legislature enacted the Medical Malpractice Act in an effort to combat the rising costs of health care in this state. In part, the Act was designed to increase the likelihood that health care providers would carry malpractice insurance by regulating the total damage recovery of medical malpractice victims, thereby reducing insurance premiums. *Butler v. Flint Goodrich Hospital*, 607 So. 2d 517 (La. 1992), *cert. denied sub nom., Butler v. Medley*, 508 U.S. 909, 113 S. Ct. 2338, 124 L. Ed. 2d 249 (1993); *Williams v. Kushner*, 549 So. 2d 294, 307-308 (La. 1989) (Dixon, C.J., dissenting); *Everett v. Goldman*, 359 So. 2d 1256, 1263 (La. 1978).@ *Descant, supra* at page 248.

The intent of the legislature in enacting the Act was also discussed by this court in *Hutchinson v. Patel*, 637 So. 2d 415, 419 (La. 1994), and the court said:

The legislature intended the Act to reduce or stabilize medical malpractice insurance rates and to assure the availability of affordable medical care services to the public. *See id.* To those ends, the Act confers upon qualified health care providers two principal advantages in actions against them for malpractice. First, the liability of a qualified health care provider for all malpractice claims for injury to or death of any one patient may not exceed \$100,000.00, and the total amount recoverable from all defendants and the Patient's Compensation Fund for all malpractice claims for injuries to or death of any one patient, exclusive of future medical care and related benefits, may not exceed \$500,000.00 plus interest and costs. La. R.S. 40:1299.42(B). Second, no action for malpractice against a qualified health care provider or his or her insurer may be commenced in a court of law before the complaint has been presented to a medical review panel and the panel has rendered its expert opinion on the merits of the complaint, unless the parties agree to waive this requirement. La. R.S. 40:1299.47. *Hutchinson, supra.*

The Act protects providers who chose to be qualified and pay a surcharge to the Louisiana Patient's Compensation Fund for excess coverage above the \$100,000, individual cap and unlimited medical expenses. Without such limitations, a single malpractice claim could bankrupt a health care provider and potentially terminate its operations. Essentially, the

provisions of the Act help to assure the availability of affordable medical services to the public.

B. Consequence of Circumventing Cap

The consequences of circumventing the cap on damages in medical malpractice cases involving loss of a chance of survival (or of a better outcome) could render the cap meaningless in those cases, which could increase the cost of the surcharge paid by providers and potentially reduce the benefit to patients by compromising the solvent fund from which they have to collect judgments. Circumventing the cap and awarding damages not contemplated by the Act could compromise the resources the Fund.

The Second Circuit decision will affect all health care providers. If that decision is not reviewed, all health care providers will be affected by the uncertainty of how the medical malpractice cap will apply to a loss of a chance of survival (or of a better outcome) case. As a result, a similar crisis as the one that existed in 1975 when the Act was passed could affect every provider and patient in this state.

The *Amicus Curiae* are concerned about these consequences. All health care providers rely on the provisions of the Act to assure affordable and quality services to the public. The decision by the Second Circuit in this case threatens the ability of providers to provide quality medical care and services to the public at an affordable cost. This court should grant the Writ Application of the Louisiana Patient's Compensation Fund and review that decision.

IV

LAW AND ARGUMENT

A. Jurisprudence Permits Recovery for Any Chance Lost

This court in *Hastings v. Baton Rouge General Hospital*, 498 So. 2d 713 (La. 1986) was concerned that doctors and hospitals could be released from liability because the patient had a less than fifty percent chance of survival, and first recognized:

“It is not necessary to prove that a patient would have survived if proper treatment had been given, but only that there would have been a chance of survival. Destruction of a two percent chance of survival has been held to present a jury question as to causation.”
Hastings, supra at page 720.

Loss of a less than even chance of survival allows a plaintiff to recover from a health care provider without the having to prove more likely than not the death was caused by medical malpractice. The plaintiff in a loss of a chance of survival case does not have to prove a reasonable or substantial chance of survival. The issues are whether the patient lost *any* chance of survival because of medical malpractice and the value of that loss. This court in *Smith* said

allowing such a recovery is recognizing that loss of a chance of survival is a distinct compensable injury caused by medical malpractice that should be distinguished from loss of life in wrongful death cases.

In *Graham v. Willis-Knighton Medical Center*, 699 So. 2d 365 (La. 1997), this court extended this rationale to cases involving the lost chance of a better outcome. In *Graham*, the patient lost a chance of saving his leg. This court in *Graham* did note that damages for the lost chance of saving the leg were less than damages for loss of the leg, and said:

“Considering in the present case that an award of approximately \$470,000 would have been reasonable for the loss of the leg, that the plaintiff had a chance of saving his leg from amputation if revascularization had been performed promptly at Willis-Knighton and completed within five to five-and-one-half hours of the trauma, that the less-than-even chance on this record would have been within the range of perhaps twenty to thirty-three percent, and that the plaintiff sustained other damages from the delay (as recognized by the trial court), this court fixes the overall damages at \$140,000. This amount would be awarded, subject to a credit for the \$100,000 previously paid in settlement.”
Graham, supra at page 373.

In *Graham*, this court permitted recovery when there was only a twenty to thirty-three percent chance the patient would have had a better outcome. In such a case where a patient is permitted to recover for a less than even chance of a better outcome this court recognized that valuation of such damages must not allow for full recovery.

B. Loss of Chance Compensable as Lump Sum Award

This court in *Smith* adopted the method of valuation in a loss of a chance of survival case that considers all of the evidence and only awards one lump sum award in the nature of general damages. The court said the lost chance is a distinct injury that is compensable with a lump sum award for the value of the lost chance based on all of the evidence in the record as is done for any other item of general damages, and the court said:

“[T]he method we adopt today in this decision, is for the factfinder – judge or jury – to focus on the chance of survival lost on account of malpractice as a distinct compensable injury and to value the lost chance as a lump sum award based on all the evidence in the record, as is done for any other item of general damages.”
Smith, supra at page 547.

This court rejected other methods to value damages in a lost chance case in favor of an award of a single lump sum amount that is only attributed to the lost chance of survival and it is the “*only* damages at issue – the lost chance,” as is done for any other measurement of general damages. *Smith, supra* at page 549. Such a valuation does not permit separate damage awards but rather a lump sum award. Further, the entire lump sum general damage award shall be capped at five hundred thousand dollars in accordance with the medical malpractice cap on

damages in Louisiana Revised Statutes 40:1231.2.

C. Full Recovery Not Available for Loss of a Chance

This court in *Smith* acknowledged that full recovery for survival and wrongful death damages are not available for deprivation of a chance of survival of less than fifty percent. This court said that to allow such a full recovery would ignore plaintiff's inability to prove by a preponderance of the evidence that the malpractice victim would have survived but for the malpractice, which is required for full recovery. This court further said:

“The lost chance of survival in professional malpractice cases has a value in and of itself that is different from the value of a wrongful death or survival claim.”

This court in *Graham, supra* also said:

“When the chance of survival (or in this case of saving the leg from amputation) is less than fifty percent, the court may not award damages for the loss of live (or loss of the leg).

Graham, supra at page 373.

The Second Circuit in this case awarded full damages to the plaintiff, as the court not only awarded general damages, but also separate special damages that included full medical expenses and full lost wages. The Second Circuit amended the damage award to include separate awards of \$400,000 for general damages, \$692,850.64 for all medical expenses resulting from the heart transplant and \$493,020.00 for lost wages representing all years of lost wages, for a total of \$1,585,870.64 in damages. This total award eclipses other reported cases awarding lump sum damages for the lost chance of a better outcome. See *Graham, supra* (reduced award of \$470,000 for loss of a leg to \$140,000 for a 20-33% chance of saving the leg); *Cody v. Barraza*, 111 So. 3d 485 (La. App. 2nd Cir. 2013)(awarded \$250,000 for loss of a chance of a better outcome or longer survival of ovarian cancer); *Hargroder v. Unkel*, 888 So. 2d 953 (La. App. 2nd Cir. 2004)(reduced award of \$150,000 for loss of off less than even chance of a better recovery from stroke to \$75,000 finding that jury considered entire residual deficit suffered as a result of stroke and \$150,000 was excessively high); *Pesses v. Angelica*, 165 So.3d 131 (La. App. 5th Cir. 2014)(awarded \$12,000 to compensate plaintiff for less than even chance of a better outcome following a heart attack).

The Second Circuit also did not limit the total award to five hundred thousand dollars in accordance with the medical malpractice cap on damages in Louisiana Revised Statutes

40:1231.2. As such, the decision of the Second Circuit allowed the plaintiffs to recover a total of \$1,585,870.64, more than three times the \$500,000 medical malpractice cap on damages, when the jury's lump sum general damage award that encompassed all elements of damages in one lump sum was capped at \$500,000. This court should review this decision.

D. Lost Wages Included in Malpractice Cap on Damages

The Second Circuit also erred when it awarded the plaintiffs a separate award for lost wages totaling \$493,020.00 that the court excluded from the cap on damages in Louisiana Revised Statutes 40:1231.2. Lost wages is one of the factors considered by the jury when arriving at the lump sum award for the lost chance of a better outcome. The jury was instructed on this consideration and the jury would have considered lost wages as a factor in its lump sum award of \$680,000.00. The Second Circuit erred in amending the jury's lump sum award to include a separate and distinct award for lost wages that was not reduced by the total cap on damages in Louisiana Revised Statutes 40:1231.2.

Most troubling by the Second Circuit's decision to award a separate amount for lost wages is the court excluded this amount from the total damages recoverable under the medical malpractice cap in Louisiana Revised Statutes 40:1231.2. Louisiana Revised Statutes 40:1231.2(B)(1) clearly does not exclude lost wages from the malpractice cap on damages, and it provides:

“The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R. S. 1231.3, shall not exceed five hundred thousand dollars plus interest and cost.”

Clearly, the legislature only intended to exclude future medical care and related benefits from the total amount recoverable for all malpractice claims for injuries to or death of a patient. Lost wages are not excluded and they are encompassed within the malpractice cap on damages. If the legislature intended to exclude lost wages from the \$500,000.00 medical malpractice cap on damages, it could have done so. The Second Circuit did what the legislature chose not to do, which is to exclude lost wages from the medical malpractice cap on damages.

The Second Circuit was clearly attempting to compensate the plaintiffs for both “general and special damages” for the lost chance of a better outcome and improperly included lost wages as special damages outside the cap when the legislature did not exclude lost wages from the cap on damages in Louisiana Revised Statutes 40:1231.2. The Second Circuit's decision is contrary

to the mandate of the legislature that the total amount recoverable for all malpractice claims, exclusive of future medical care, shall not exceed five hundred thousand dollars. This court should review and reverse the Second Circuit.

VI

CONCLUSION

The Second Circuit erred when it amended the jury's lump sum award of \$680,000.00 in this loss of a chance for a better outcome case and rendered judgment awarding separate and distinct awards for general damages and special damages, including lost wages and medical expenses that were not capped. This court should grant the Writ Application of the Louisiana Patient's Compensation Fund and review this decision.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing brief was placed in the United States mail, first class, postage pre-paid, properly addressed to:

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This 1st day of September, 2017.



Chris J. LeBlanc

VERIFICATION

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned notary, personally came and appeared:

CHRIS J. LeBLANC

who, after being duly sworn, did depose and say that he is the attorney for the *Amicus Curiae* and that he has read the foregoing *Amicus Curiae* brief, and that allegations contained therein are true and correct to the best of his knowledge, information and belief.

Affiant further states that copies of this *Amicus Curiae* brief have this day been mailed to:

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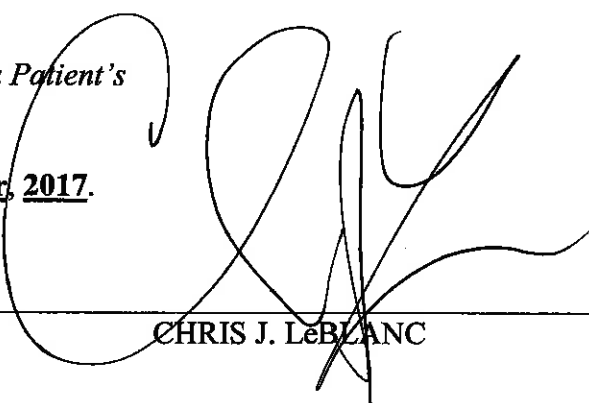
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This 1st day of September, 2017.



CHRIS J. LeBLANC

SWORN TO AND SUBSCRIBED before me this 1st day of September, 2017.



NOTARY PUBLIC
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Notary Number: 28800