

Forty-Year Anniversary of Louisiana's Medical Malpractice Act, Act 817 of 1975

Donald J. Palmisano, MD, JD

"Do your homework, have courage, and don't give up!"¹ Those words of wisdom for success from my heroic policeman dad once again proved correct in the medical liability reform battle in Louisiana in 1975 because of the leadership of Dr. John Cooksey of Monroe, Louisiana. Dr. Cooksey was the cheerleader who gathered the team and constantly inspired everyone.

Here we are at the 40th anniversary of the passage of the 1975 Medical Malpractice Act, Act 817.² How time flies! Act 817 of 1975 lives and the Louisiana State Supreme Court has ruled the current law, a total cap on all damages with its 1984 amendment for unlimited future medical payments as incurred (La. Act 435 of 19843), constitutional in the Butler case previously cited in the 20-year anniversary article (reprinted in this issue of the Journal). Louisiana's law was voted into law prior to California's famous medical liability law.⁴ For another great triumph, see Texas and its success in 2003.⁵ Three different laws; three proven long-term successes.

The father of this Louisiana law, Dr. John Cooksey, is alive and well. All in Medicine should write Dr. Cooksey and thank him. His medical office listed in the 20-year anniversary article⁶ remains at the same location.

Sadly, only 3 of us in the signing photo are here today: Former Governor Edwin Edwards, Dr. Cooksey, and me. Mary Lou Winters, Attorney Jessie McDonald, Louisiana Representative Shady Wall, and Dr. Dave Carlton have passed on. May they Rest in Peace, these wonderful folks.

On Independence Day, July 4, 2015, I spoke with Dr. Cooksey and he commented about our adventures in 1975: "The magic that made possible Louisiana's Act 817 of 1975 was the team and the timing. We had a team of people who represented many different interests in healthcare and the timing was right."

The humble Dr. Cooksey underestimates his leadership role. Without him, there would not be the Louisiana law that reduced medical liability premiums and allowed patients to have access to medical care in their hour of need; but, he rightly praises the team effort.

Many joined the team in 1975 including Drs. Gerald LaNasa, Robert diBenedetto, Wright Kemmerly, Ronald French, Eugene Worthen, Michael Smith (President of LSMS in 1975), Broox Garrett, Jr., Vincent Culotta Jr., Brobson Lutz, and many more that I mentioned in other articles. Of course, Dr. Harry Winters, husband of the indispensable and key player Mary Lou Winters,⁷ was there from the beginning making phone calls on a



Dr. Cooksey (left) and Dr. Palmisano (right).

daily basis to key individuals around the state.

Let me not forget the important work of the Louisiana State Medical Society once it signed on to the quest. Component parish medical societies also played a critical role as its members knew the legislators personally and legislators listen best to their own constituents. After my medical office hours I piloted my T-34A aerobatic plane on night flights to parish medical society meetings around the state asking all doctors to help get the proposed legislation passed.⁸ Lots of excitement in those adventures.

Remember, "All politics is local." Proof of that adage is the key role played by the Louisiana State Medical Society Auxiliary (now Alliance). I notified these spouses of physicians from a pay phone (before the days of cell phones!) near the legislative chamber every time we saw a legislator from their district attacking the medical liability reform on the floor of the chamber. At that time, the legislators had phones on their desks in the legislature and the spouses immediately would call the legislators and ask them why they were doing something different than what they promised in their district at the last town hall meeting. The exercise was effective and it was fun to watch the legislators' reactions to the phone calls!

How well I remember that summer of '75. Truly dramatic times! The tension in the state between the proponents and detractors of the proposed law was high and there was much print press, radio, and TV coverage of this issue. Here is an excerpt of a 1975 TV debate I had with a representative of the plaintiff trial bar reflecting the passion about the various bills on medical liability reform introduced into the legislature. (Thanks to Dr. Ronald J. French who recorded the debate prior to cable TV and before readily available consumer TV tape recorders!) <https://www.youtube.com/watch?v=TBN5bkonPa4>

At the same time, Right-to-Work legislation was hotly debated in 1975 and subsequently passed in 1976 (enacted July 9, 1976). The advertising guru promoting that law was murdered the night of July 9, 1976 with a shotgun blast outside his hotel in Baton Rouge as the controversy about the Right-to-Work law continued. His murder remains unsolved. It initially was reported as a random killing, but that view quickly changed. All of these events added to the tension in the Capitol in those years.

Another bit of history in the long journey to the final ruling of constitutionality of the law by the Louisiana Supreme Court clearly confirms the value of doing your homework and keeping records! In the WILLIAMS v. KUSHNER, et al. case,¹⁰ the court, before making a final decision, had ordered a "Sibley" evidentiary hearing in 1983 to ascertain legislative intent and findings that led to the passage of the law to determine if the stated basis and facts are consistent with the Louisiana Constitution. Judge Fredrick Ellis, retired from the bench but available for special duty, was selected to preside over the hearing. He did a great job. Unfortunately the Louisiana Legislature did not retain any records of the 1975 hearings and no 1975 witness list was available. However, I remembered that I had recorded every legislative hearing on H.B. 1465 that later became Act 817 of 1975. The tapes were given to the court as well as to the plaintiff and defense attorneys.

With those tapes, a treasure trove of witnesses was uncovered. Over 40 witnesses were located and testified in the evidentiary hearing about the state of medical liability and the problems getting insurance at that time. Dr. Gerald LaNasa and I attended the 5 weeks of courtroom testimony, Dr. LaNasa as the representative of the recently formed (1982) Louisiana Medical Mutual Insurance Company (LAMMICO) and I as the representative of The Louisiana State Medical Society (LSMS). Attorney Robert Conrad, Jr. was the key trial attorney for the defense of the law and he was outstanding. My boxes of tapes from 1975 and the summoned witnesses of 1975 confirmed the crisis of 1975. A great victory for Medicine and patients.

So, when the naysayers say it can't be done, ignore them and just do it. Gain inspiration from successes against great odds, even those outside of Medicine like the recent New Horizons space probe success:

"Just like we planned it, just like we practiced. We did it," said Alan Stern, principle investigator of New Horizons space probe

as it sent back data including pictures of Pluto this month from 3 billion miles away after a 9½ -year journey.¹¹ As Joseph Rago of The Wall Street Journal said of the New Horizons success, "It is an extraordinary testimony to human curiosity, science and engineering and to the spirit of discovery."¹²

Our Louisiana medical liability law is a legacy to all in the medical profession and to the patients who rely on doctors when medical illness strikes. It now is up to the youth in medicine to fight to maintain ethical science-based medicine as well as a fair medical liability system so doctors can continue to advise, heal, and comfort patients in the trusted role of physician. The future is yours. Guard it well. We had an unforgettable summer of 1975. Plan now to have your summer!

FOOTNOTES

1. Donald J. Palmisano, *On Leadership*. (New York: Skyhorse Publishing Co., 2008) Chapter 2. See for details on the circumstances about this lesson to me from my dad as well as his heroic action rescuing hostages when he entered a house unarmed to face the hostage-taker, disarmed him, and saved the hostages. Also, I give additional anecdotes about the summer of 1975 in that book. <http://onleadership.us/>; Accessed July 18, 2015.
2. The Louisiana State Legislature passed Act No. 817 of 1975 on July 14, 1975. Governor Edwin Edwards signed it into law on August 4, 1975. The effective date of the law was August 15, 1975 and it applied to alleged acts of malpractice after September 1, 1975. See LA Rev Stat § 40:1299.41 et. seq. for full details of the law.
3. See LSA-R.S. 40:1299.43
4. The highly acclaimed, and rightly so, California law on medical liability reform, the Medical Injury Compensation Reform Act of 1975 (MICRA) was signed into law after the Louisiana law. "Governor Brown signed the CMA-supported bill on September 23, 1975, and MICRA today remains the model for national medical liability tort reform, as the law has been hugely pivotal in making access to care a reality for patients." The California Supreme Court upheld it as constitutional and the United States Supreme Court on October 15, 1985, declined to review the case, "for want of a substantial federal question." MICRA also survived a ballot referendum, Proposition 46 in 2015. It was defeated overwhelmingly by a vote of 67-33. Another team win by many groups advocating for MICRA. <http://www.cmanet.org/issues-and-advocacy/cmas-top-issues/micra/micra-a-brief-history/>; Accessed July 18, 2015.
5. The Texas law is outstanding in that it completely removed the issue of the state constitution voiding a cap on damages in medical liability cases. See Tex. Const. art. III, § 66. With the successful passage of Proposition 12 on September 13, 2003 stating the legislature has the right to set caps on damages in medical liability cases and the Texas legislature passing House Bill 4 in 2003, Tex. Civ. Prac. & Rem. Code. § 74.301 (Westlaw 2007), the medical community has a \$250,000 cap on non-economic damages for all physicians in a case. There can be additional awards up to \$250,000 in non-economic damages from each hospital but only up to a total of \$500,000 for all institutions.

The Texas Medical Association documented the beneficial effects of the legislative and constitutional changes here: <http://www.texmed.org/Templates.aspx?id=5238&terms=Proposition%2012%20in%202003> Accessed July 20, 2015

My comment in 2003 on the changes in Texas:

"Said American Medical Association President Donald J. Palmisano, MD":

"Today's victory was desperately needed to help curb lawsuit abuse in Texas. Opponents of reform tried to confuse the issues, but Texas patients were not fooled by empty rhetoric and junk science.

"The Texas Medical Association and physician members worked tirelessly to present the facts because they did not want to see health care in the Lone Star state deteriorate any further." <http://www.texmed.org/Template.aspx?id=2819>. Accessed July 20, 2015

6. Donald J. Palmisano, The 20-Year Anniversary of the Louisiana Medical Malpractice Act of 1975, "Act 817 of 1975": "A Rescue From Danger": A Tribute to John C. Cooksey, MD, 147 J. LA. STATE MED. Soc. 481-484 (1995). http://intrepidresources.com/assets/DJP_20year.pdf

Also see an LSU Law Review article regarding this Louisiana law: Sarah H. Levin, The Medical Malpractice System and the Payment of Future Medical Damages: On Life Support Elsewhere, Resuscitated in Louisiana. Vol. 68, No. 3, Spring 2008, 955-982. <http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6244&context=lalrev>. Accessed July 20, 2015.

7. Mary Lou Trawick Winters served many years as Chairperson and Vice-Chair of the Democratic Party of Louisiana. In addition, she was on the National Democratic Central Committee for 32 years. If Mary Lou ever noted a senator refusing to talk to me in the halls when I tried to engage him for a moment about the proposed medical liability bill, Mary Lou would appear and tell the senator: "Surely you want to speak with my friend, this nice doctor." The conversation then proceeded.

8. John Wilds, Crises, Clashes, and Cures: A Century of Medicine in New Orleans, p. 82-83. 1978. MD Takes Matters Into His Own Hands, American Medical News, September 17, 1982.

9. See <http://www.nrtw.org/c/lartwlaw.htm> and <http://labi.org/issues/presidents-view/presidents-view-evolve-or-die> For more details of the Right-to-Work politics in Louisiana, see Gumbo Politics: Unions, Business, and Louisiana Right-to-Work Legislation. <http://50.87.169.168/Documents/EPRN/Gumbo-Politics-unions-business-and-louisianaright-to-work-legislation.pdf>. For a description of the murder, see <http://www.ktbs.com/story/24811348/badge-of-dishonor>

"July 9, 1976, Leslie was returning to a Baton Rouge hotel after lawmakers passed his hard-won Right to Work legislation when a hired gunman - hidden in the parking lot - squeezed the trigger and claimed Leslie's life." "Leslie never felt the load of buckshot that struck him between the shoulder blades," Joiner writes of the night. "The blast tore through his body, leaving a massive wound the size of a basketball. Leslie spun sideways and was dead when he hit the ground." Accessed July 22, 2015

10. 524 So.2d 191 (1988), Public Domain cite: WILLIAMS v. KUSHNER, 8709 (LA. APP. 4 CIR. 4/12/88); 524 SO. 2D 191 APPEAL FROM THE CIVIL DISTRICT COURT, PARISH OF ORLEANS, NO. 83-1115, SECTION "A", HONORABLE FREDERICK S. ELLIS, AD HOC.

11. <http://www.wired.com/2015/07/alive-new-horizons-survived-date-pluto/>. Accessed July 18, 2015.

12. Joseph Rago on The Journal Report July 18, 2015.

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VIEWPOINT

THE 20-YEAR ANNIVERSARY OF THE LOUISIANA MEDICAL MALPRACTICE ACT OF 1975, 'ACT 817 OF 1975'

'A RESCUE FROM DANGER'

A TRIBUTE TO JOHN C. COOKSEY, MD

DONALD J. PALMISANO, MD, JD

JOHAN C. COOKSEY, MD is the humble and persistent visionary who produced the legendary House Bill 1465 that became, against great odds, the idea whose time had come: Louisiana Act 817 of 1975, which contained a \$500,000 total cap on malpractice awards.

THE SUMMER OF '75

How well I remember. It was the summer of '75. I was shuttling back and forth to Baton Rouge to testify on behalf of the Orleans Parish Medical Society before the Joint Conference Study Committee chaired by Senator Ted Hickey. The Committee's task was to study the medical malpractice insurance climate in Louisiana. A dramatic story unfolded as multiple witnesses told of their plight.

The Louisiana malpractice climate in 1975 was in a crisis, mirroring similar crises in other states.¹ The Louisiana State Medical Society had its Patients' Insurance Package (PIP) of professional liability bills, none of which contained a cap on damages. A fierce debate raged at the annual meeting of the Louisiana State Medical Society with one of the legal counsel who

advised the Medical Society against a cap.

Enter John Cooksey, a 34-year-old ophthalmologist from Monroe, Louisiana. Like Cincinnatus of yesteryear in Roman times, John came forward to prevent a crisis and win the battle, then returned to his daily devotion of improving and restoring eyesight to his patients. He initially worked outside of the Medical Society and obtained a copy of the Indiana law containing a cap on damages which had recently passed in Indiana. John then got a friendly legislator to enter it into the Louisiana legislature on the last day bills could be filed. Next, he set about to assemble a team that was subsequently known as the "Street Fighters". With his team he eventually got the Medical Society to support HB 1465. As a result, this John Cooksey-inspired legislative bill, patterned after the recently passed Indiana bill, overcame great odds, passed its last hurdle in the Senate, and went to Governor Edwards for signature. But like a good suspense novel, one more attempt was made to kill the bill. More on this later.

My first encounter with John Cooksey was Friday ►

night, May 30, 1975. While on-call for my surgical group, I received a phone call. A northern Louisiana voice, distinctly different from my Irish Channel New Orleans accent, said:

"Hello, this is John Cooksey in Monroe, Louisiana. I have heard how you effectively debated the attorney at the Louisiana State Medical Society meeting who opposed a limitation of liability cap in medical malpractice cases. I am putting together a team to get the Indiana Plan passed in Louisiana and I want you on the team. There is a 6:00 AM flight tomorrow from New Orleans to Monroe. I will pick you up at the airport and we will drive to Shreveport to pick up Senator Adam Benjamin of Indiana, a key player in the passage of the Indiana law, who is flying here to meet with us and inform us how it was accomplished in Indiana."

Thus began an odyssey through the corridors of power in our state capital that did not end until House Bill 1465 was passed by the Senate on July 13, and then presented to the Governor for signature at a luncheon with members of the "Street Fighters" in attendance.

Crises abounded during the session. Physician testimony was given by Dr Dave Carlton from LeCompte, Louisiana, representing the rural family practitioners, and by me, representing the urban specialists. The details of this dramatic civics lesson could fill the pages of a best-selling suspense thriller. Could the movie be far behind? Leading characters included State Representative Shady Wall of West Monroe. He was a co-sponsor of the bill and was the equivalent of the bill's godfather. Whenever it appeared that the bill was caught in a logjam or was being filibustered, Shady would appear and speed the bill on its way to the next destination. Finally, the possibility of failure came forth again at the luncheon with Governor Edwards. The Governor's General Counsel whispered in his ear and advised him to veto the bill. The Governor smiled, turned to us and said,

"No, I am not going to veto this bill. This is the first time I have ever seen the doctors come to the Legislature in favor of something. Previously they only showed up to oppose something. I am going to sign it."

He picked up a pen, signed the bill, and the flash of the photographer's camera recorded for posterity

the end result of our equivalent of the climbing of Mount Everest for the first time. John Cooksey was there every step of the way, picking the team, planning strategy, offering encouragement, and never losing faith in the eventual successful outcome.

Thus House Bill 1465 became Act 817 of 1975 (LSA-R.S.40:1299.41 et seq.) and the liability cap was upheld as constitutional by the Louisiana Supreme Court in *Butler v. Flint Goodridge* (No 92 CC 0559, decided October 19, 1992, 607 So.2d 517 (La 1992), and a rehearing was denied on November 25, 1992). Other provisions of the Act were upheld in *Williams v. Kushner*, 549 So.2d 294 (La 1989) and in *Everett v. Goldman* 359 So.2d 1256 (La 1978).

Although there is a need to enroll and pay a "surcharge" to the Patients' Compensation Fund, the law² has dramatically improved the professional liability climate in Louisiana.³

The lead story in the October 13, 1975 issue of *Medical Economics*, "They Won Malpractice Relief—Without A Walkout", publicized the dramatic chronology of this success story. In addition, I wrote articles for the August 1975 and September 1975 issues of *The Bulletin of the Orleans Parish Medical Society* about the individuals who played key roles in the passage of this historic legislation. Spouses were also enlisted in this battle and the woman who played a critical role was Mary Lou Winters, wife of Dr Harry Winters, of Columbia, Louisiana. She was Democratic National Committeewoman, and her charm and political acumen endlessly opened doors originally inaccessible to physicians.

Also it is important to remember that attorneys helped accomplish the enactment of HB 1465 into law. Jesse McDonald, the legal scholar and special counsel hired by John Cooksey to help with the passage of Act 817, played a key role, as did State Representative John Hainkel and State Senator Tom Casey. Finally, Governor Edwards, an attorney, signed the bill into law. Don't forget this the next time you hear a doctor say it is impossible to pass liability reform because the legislature is controlled by attorneys.

That legislative session was a watershed for the LSMS and truly a "rescue from danger".⁴ The successful struggle that summer to accomplish malpractice reform with "Act 817" as the centerpiece combined with the "PIP" and other bills poignantly demonstrat-



Figure. Governor Edwards signs Act 817, the Louisiana Medical Malpractice Act, July 25, 1975: *Seated, left to right, John C. Cooksey, MD; Mary Lou Winters, Governor Edwin Edwards, Donald J. Palmisano, MD. Standing, left to right, Dave M. Carlton, MD; Representative Shady Wall, Jesse D. McDonald.*

ed the need for enhancement of our legislative efforts and led to the development of the Louisiana State Medical Society's modern Office of Governmental Affairs.

John has continued to serve his patients, his community, and those in need of his services in foreign lands. He set up a clinic in Africa and has treated the poor and the rich equally with care and excellence. In addition, he recently completed the MBA program at the University of Texas in Austin, shuttling there on weekends and working in his practice during the week. He is humble, compassionate, eloquent, honest and fulfills Rudyard Kipling's adage in the poem "If":

"If you can fill the unforgiving minute

with sixty seconds of distance run—

Yours is the Earth and everything that's in it,

And—which is more—you'll be a Man, my son!"

John's visionary ideas and energy continue to abound. His prematurely gray hair gives him a distinctive, statesman-like appearance. He is about to reactivate his Cincinnatus role and begin the quest to be a citizen-legislator in the United States Congress. John is assembling his campaign staff, planning strategy, and is about to begin the necessary fund raising for this arduous task. He awaits the next important development, which is the redistricting of the congressional districts as mandated by federal court.

In October 1983, I wrote an update about Act 817 ►

of 1975 in *Capsules*, the newsletter of the Louisiana State Medical Society (Vol VI, No 10). In that article, I stated:

"Yes, as the winds of the professional liability crisis reach hurricane velocity in other states, let us not fail to thank our humble and courageous visionary, Dr John Cooksey, father of 'Act 817' on the eighth anniversary of the passage of this model legislation. At the very least, mail a thank-you note to John C. Cooksey, MD, 1310 N 19th St, Monroe, LA 71201. Never fail to personally thank a hero."

On this 20th anniversary, there is even more reason to thank John. Write him a note (the address has not changed), and offer to help him with advice and financial assistance in his quest for Congress.

In addition, you can forward comments to me about how we can help John. For the Internet travelers among you, I can be reached at Intrepid Resources Home Page on the World Wide Web at: <http://www.intrepidresources.com> or send E-mail to: djp@intrepidresources.com.

FOOTNOTES

1. Most of the following information was taken from various briefs submitted to the Louisiana Supreme Court in *Butler v. Flint-Goodridge*:
 - A. In Louisiana, as of 1975:
 1. Insurance for physicians.
 - a. Aetna Insurance Company, Travelers Insurance Company, Commercial Union Insurance Company, and ICA all left the Louisiana market.
 - b. There were only two carriers still providing malpractice insurance for Louisiana physicians: Hartford Insurance Company and St Paul Fire and Marine Insurance Company.
 2. St Paul stopped writing new physicians for a period of 14 months, and switched to the claims-made type of policy and eliminated occurrence policies. In effect, with a claims-made policy, the insured must have the policy in effect when the alleged incidence of malpractice occurs and also have the policy in effect when the claim is filed. Thus, if a physician leaves the company and a suit is subsequently filed for an act that occurred during the policy period, there is no coverage unless a "tail policy" is purchased when the physician leaves. The premium for this


"tail policy" is determined at the time the physician leaves. This is definitely an advantage for the insurance company.

3. Between the two, premium increases over the few proceeding years had been astronomical, as high as 300%, with a promise of equivalent if not greater increases in the years to come.
 - a. Hartford got two successive rate increases that essentially caused a 370% rate increase.
4. The two carriers were openly considering terminating business in the state altogether.
 - B. St Paul Insurance Company's Louisiana experience showed:
 1. Payment for malpractice claims doubled from 1973 to 1974 and doubled again in 1975.
 2. The frequency of claims increased from 84 claims in 1968 to 384 claims in 1974.
 3. In 1968 there was one claim for every 20 doctors while in 1974 there was one claim for every 6 doctors.
 4. The average payout per claim went from \$4,883.00 in 1968 to \$10,137.00 in 1974.
 - C. Of the approximately 138 private hospitals in Louisiana in 1974, 57 were insured by the Argonaut Insurance Company. In 1974 Argonaut sought a 100% increase in its rates. The Louisiana Hospital Association supported Argonaut's request for fear that the insurer would otherwise abandon Louisiana. Despite receiving this increase, Argonaut refused to renew any insurance policies beyond April 1, 1975.
 1. Among the hospitals canceled by Argonaut were Baton Rouge General Medical Center, East Jefferson General Hospital, Ochsner Foundation Hospital, Southern Baptist Hospital, Touro Infirmary, and West Jefferson Medical Center.
 2. Many of the hospitals canceled by Argonaut could not obtain other insurance and were required to "go bare." Among those hospitals were Thibodeaux General Hospital, Calcasieu Children's Hospital, Baton Rouge General Medical Center, and Crowley Hospital.
 3. Other hospitals were able to purchase insurance, but received lower coverage at a much higher cost.
2. Key advantages of Act 817 of 1975:
 - A. Limitation of liability \$100,000 for Health Care Provider.
 - B. Limitation of total recovery (not just a limitation on non-economic loss) to \$500,000 plus future medical bills as incurred (the addition of medical payments as incurred was added in 1984 amendments after a recommendation by the Governor's Commission on Medical Malpractice).
 - C. Medical Review Panel (or option of binding arbitration providing the arbitration agreement was signed by the doctor and the patient prior to the filing of a claim).
 - D. Proscription of the Ad Damnum Clause
 - Prevents stating how much money the plaintiff is suing for; eliminates some of the sensationalism.
 3. Kridelbaugh WW, Palmisano DJ. Compensation caps for medical malpractice. *Am Coll Surg Bull* April 1993; V 78:4:27-30. This article demonstrates how the Louisiana law slowed premium escalation and reduced cost to patients for medical care compared to states without caps.
 4. Palmisano DJ. Louisiana's Medical Malpractice Laws: A Rescue from Danger. AMA State Health Legislative Report, November 1984, V 12:4:1-8.

FURTHER REFLECTIONS

Danger invites rescue. The cry of distress is the summons to relief. (From: Cardozo, Benjamin N. In: *Wagner v. International Ry. Co.*, 232 N.Y. 176, 180 (1921).

The punishment of wise men who refuse to take part in the affairs of government is to live under the government of unwise men.—Plato (This quote from Plato was engraved on a plaque and sent to Dr Palmisano from Dr Cooksey after the passage of the Louisiana Medical Malpractice Act.)

 Palmisano M.D.