COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, 3rd Floor Denver, CO 80203	DATE FILED: July 3, 2018 8:21 AM FILING ID: D7421856F54AD CASE NUMBER: 2018CA46
APPEAL FROM: Boulder County District Court Honorable Judith L. LaBuda Trial Court Case No. 16CV30714	▲ **COURT USE ONLY** ▲
PLAINTIFF-APPELLANT: Robert T. Deland vs. DEFENDANT-APPELLEE: + Richard Fox, M.D.	Case No. 18CA46
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AMENDED OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28(I) and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

- This Opening Brief complies with C.A.R. 28(G) or C.A.R. 28.1(G)
- It contains 6,318 words (principle brief does not exceed 9500 words.
- This Opening Brief complies with the Standard of Review requirements as set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(B).
- For each issue raised by the Appellant, the Brief contains under a separate heading before the discussion of the issues; a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.
- I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Randall J. Paulsen (#10643)

TABLE OF CONTENTS

Certificate of Compliance i

Table of Contents ii

Table of Authorities iii

I. STATEMENT OF ISSUE PRESENTED FOR REVIEW 1

A. Whether the Trial Court Erred in Permitting the Defendant Physician to Testify to a New Theory of Defense Presented for the First Time at Trial When Said Theory had Never Been Endorsed by the Defense and is Unsupported by the Medical Literature 1

II. STATEMENT OF THE CASE 1

A. Nature of the Case 1

B. Relevant Faces and Procedural History 1

III. SUMMARY OF THE ARGUMENT 16

IV. ARGUMENT 16

A. Whether the Trial Court Erred in Permitting the Defendant Physician to Testify to a New Theory of Defense Presented for the First Time at Trial When Said Theory had Never Been Endorsed by the Defense and is Unsupported by the Medical Literature 16

1. Standard of Review 16

2. Preservation of the Record 17

V. CONCLUSION 26

TABLE OF AUTHORITIES

CASELAW:

Ceiomber v. Coop. Plus, Inc., 527 F.3d 635, 641 (7th Cir. 2008) 17

Clearone Communications, Inc. v. Blamp, United States Court of Appeals, 10th Cir., 653 F.3d 1163 . . . . 17, 18

Jacobsen v. Deseret Book Company, 287 F.3d 936, 953 10th Cir. 2002) 17, 23, 24, 25, 26

Kwik Way Stores, Inc. v. Caldwell, 745 P.2d 672, 678 (Colo. 1987) 16

Sheid v. Hewlett Packard, 826 P.2d 396, 399 (Colo.App. 1991) 16

Simms v. Great Am Life Insurance Co., 469 F.3d 870. 874-95 (10th Cir. 2006) . 17

FEDERAL COURT RULES:

Fed.R.Civ.P. 37(c)(1) 17, 18

COLORADO COURT RULES:

C.R.C.P. 26 18

C.R.C.P. 26(a)(2)(B)(I) 18

C.R.C.P. 26(a)(2)(B)(II) 18, 19

OTHER:

Fed.R.Civ.P. 26(a)(2) Advisory Committee Note (1993) 24

COMES NOW the Plaintiff-Appellant, Robert Deland, by and through his attorneys, RANDALL J. PAULSEN & ASSOCIATES, P.C. and tenders the following Amended Opening Brief in support of his appeal from the District Court of Boulder County, the Honorable Judith L. LaBuda, presiding.

I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

A. Whether the Trial Court Erred in Permitting the Defendant Physician to Testify to a New Theory of Defense Presented for the First Time at Trial When Said Theory had Never Been Endorsed by the Defense and is Unsupported by the Medical Literature.

II. STATEMENT OF THE CASE

A. Nature of the Case:

This appeal arises out of a medical malpractice trial which commenced on August 21, 2017. [TR 8/21/17, p 216.] On August 25, 2017, the jury returned a verdict at 5:30 p.m. in favor of the Defendant. [TR 8/25/17, p 217.]

B. Relevant Facts and Procedural History:

On August 27, 2017, the Defendant, Richard Fox, M.D., removed three pathologically normal parathyroid glands from the Plaintiff, Robert Deland. At trial, for the first time, Dr. Fox testified to a new theory of the defense, not previously disclosed, i.e., "pathologically normal parathyroid glands can be "high

secretors." Neither Dr. Fox nor any other defense witness was endorsed for this proposition which is unsupported in the medical literature.

Robert Deland, the Plaintiff, presented to the Defendant, Richard Fox, M.D., with primary hyperparathyroidism. The parathyroids are four glands which generally exist on the back of the thyroid gland and secrete a hormone known as parathormone. Parathormone, when it's secreted, tightly regulates calcium production in the body. [TR 8/22/17 a.m., pp 58:2-61:15.] When parathormone levels are high, too much calcium is excreted into the bloodstream and causes a myriad of different problems. [TR 8/22/17 a.m., pp 61:1-62:1.] Functioning parathyroid glands are therefore crucial to maintaining the balance of calcium in the human body. It goes without saying that normal parathyroid glands should be preserved and only abnormal parathyroid glands should be removed.

Prior to surgery on August 27, 2014, the Defendant, Dr. Richard Fox, had the benefit of two separate ultrasounds, one performed by Dr. Christopher Fox, an endocrinologist, and one performed by the Defendant. Both ultrasounds gave indications that a possible adenoma could be found below the thyroid and posterior to the right carotid artery.[1] [TR 8/22/17 a.m., p 27:13-23.] Dr.

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[1] Dr. Fox agrees that during his surgery on Mr. Deland, he was nowhere near posterior to the carotid artery. [TR 8/25/17 a.m. , pp 7:24-8:2.]

Christopher Fox noted “there is a hypoechoic nodule measuring 5 x 6 x 8 mm (central hyler line suggested, favor lymph node vs. less likely parathyroid adenoma).” [EX 13, Trial, p 3.]

The Defendant, Dr. Richard Fox, also performed an ultrasound prior to surgery. His ultrasound results were stated as follows:

Ultrasound:

> Parathyroid, the neck was scanned with a high frequency transducer. Findings are as follows: right lower neck beneath lower thyroid pole and adjacent to common carotid artery is an ovoid 0.63 x 0.57 x 1.19 cm hypoechoic mass without posterior shadowing or internal flow. A hyler stripe is not noted as suggested by prior ultrasound.

[EX 1, Trial, p 18.]

When Dr. Fox was asked at trial whether or not he found the same lesion Christopher Fox, the endocrinologist, had found in May of 2014, he denied that was true. He was reminded of his testimony at deposition at Page 64, line 22 as follows:

> Q. And at a later date in time you found essentially the same lesion that Dr. Christopher Fox found back in May; is that a fair statement?
>
> Your answer on Page 65 quotes “in retrospect that’s probably correct.”

Isn't that what you testified to under oath in y our deposition back on April 28, 2017?

A. I did say that, but I believe that my understanding of your question at that time was–whereupon an objection to strike was sustained.

[TR 8/25/17 a.m., p 20:23.]

This issue came up again with multiple ultrasounds. Dr. Fox was referred back to his deposition in the following colloquy:

Q. Let's go back to Page 73, line 10.

And getting back to my question, which was a little bit different. Am I correct that in every ultrasound that was taken prior to the excision of the three parathyroids in Mr. Deland, only one lesion showed up on the right side?

A. That's a correct statement. Yes that's correct.

[TR 8/25/17 a.m., p 27:8-14.][2]

On August 27, 2014, Mr. Deland was taken to surgery by the Defendant, Dr. Richard Fox. [EX 1 Trial, p 42.] When the Defendant entered the patient's neck, he noticed, "immediately evident tucked against the right lower pole of the thyroid gland was a clinically enlarged, firm parathyroid gland." [EX 1, Trial, p 42.] This

[2] Anecdotally, counsel for the Plaintiff asked Dr. Fox, "Do you agree with me that the truth never changes." His answer was no. When asked why not, Dr. Fox testified the truth is the truth is one of the–as one interprets the truth to be." [TR 8/25/17 a.m., p 6:10-15.]

gland was excised in total. [EX 1, Trial, p 42.] The left upper and lower parathyroid glands were also exposed and they were biopsied. [EX 1, Trial, p 42.] According to the Defendant, frozen sectioning showed "probable hyper cellular right lower pole tissue with a paucity of fat. The left-sided glands were possibly hyper cellular with slightly more fatty tissue than the contralateral side." See operative report of Dr. Fox. [EX 1, Trial, p 42.] This description by the Defendant is at odds with the frozen section analysis; Dr. Howland's testimony; and the permanent sections where final pathology determined all parathyroid glands removed from Mr. Deland were normal. [EX 18, Trial, p 1 and EX 1, Trial, pp 46-47.] The testimony of Dr. Howland and the defense expert, Dr. Haun, corroborated that all parathyroids removed from Mr. Deland were pathologically/histologically normal. [TR 8/22/17 p.m., pp 39:4-41:5.]

On the initial analysis on frozen section, Dr. Howland indicated his accuracy rate on frozen section analysis is about 90-95 percent. [TR 8/22/17 p.m., p 24:12-13.] The confidence level on permanent section is 99 percent. [TR 8/22/17 p.m., p 24:24-25.] Although a frozen section analysis isn't as accurate as a permanent section analysis, Dr. Howland expects surgeons will rely on his best impression on frozen section analysis. [TR 8/22/17 p.m., p 43:7-22; pp 83:15-84:2.] "The histology of a gland on pathological evaluation controls functionality.

Normal parathyroid glands operate normally. Abnormal parathyroid glands that are adenomatous or have some other disease don't operate normally." [TR 8/25/17 a.m., pp 51:22-52:3.]

Even Dr. Fox acknowledged as follows:

> Q. And your understand that hyperplasia is a pathological diagnosis?
>
> A. It's a histological diagnosis.
>
> Q. And "histological diagnosis" just so that the jury is clear, is what you see under a microscope.
>
> A. Correct.

[TR 8/25/17 a.m., p 73:19-25.]

When asked about the left-sided parathyroids on frozen section, Dr. Howland responded as follows:

> Q. (by Mr. Paulsen) Dr. Howland, your job, in looking at a slide, is to make your best pathological assessment, take your best guess: this is normal, hyperplastic, or adenomatous. And whatever you decide, that's what you call to the OR, true?
>
> A. We write down out number one choice, but sometimes we will discuss other possibilities.
>
> Q. And your number one choice in this case for both left-sided samples was normal parathyroid tissue?
>
> A. Correct.
>
> Q. And that's what you called to the operating room?

A. Correct.

[TR 8/22/17 p.m., pp 86:17-87:4.]

Dr. Howland went on to state as follows:

Q. (by Mr. Paulsen) Dr. Howland, the reason that you send your evaluation, your diagnosis of normal tissue to the operating room is so the surgeon will rely upon it, true?

A. Correct.

Q. And the reason surgeons send specimens to you for frozen section biopsy is so you can determine if they are normal.

A. To the best of our ability, that's what they are hoping.

Q. And the only information provided, either in the permanent section report or your handwritten notes is that the tissue samples in the left upper and lower were both normal.

A. Our conversation was not recorded.

Mr. Paulsen moved to strike as not responsive to the question.

The Court: The objection is sustained. . . .

. . .

Q. (by Mr. Paulsen) Dr. Howland please listen to my question. The only written evidence in the medical record for Robert Deland from Boulder Community Hospital, both in your handwritten notes contemporaneously drafted when you evaluated the slides and in the permanent section drafted by Dr. Forsythe, is that the tissue on the left side of Mr. Deland's neck was normal, both upper and lower, true?

A. No. This is an operative note that discusses these findings further.

Q. And they don't discuss your evaluation, they discuss a conversation that Dr. Fox says he had, true?

A. That was a discussion of our evaluation.

Q. Let me rephrase the question. The only information contained in the pathology department's records at Boulder Community Hospital for the pathological evaluation of the specimens on the left side of Mr. Deland's neck, both frozen section and permanent section, is that they were normal.

A. That's correct.

[TR 8/22/17 p.m., pp 91:21-93:11.]

Dr. Howland, when he spoke with the Defendant, Dr. Fox, after his frozen section analysis, indicated he could not make a diagnosis of adenoma or hyperplasia with respect to the first gland removed by the Defendant from the posterior lower of the right thyroid. Dr. Howland testified as follows:

> He asked me when we had finished most of the frozens whether there was any cause to raise the possibility of hyperparathyroidism. And the first frozen, if we looked at the slides, we'll see are a little difficult to interpret. And I said, you know; 'I can't rule that out completely. My best guess is it's normal, but I can't say it's not.' And I told him that your definitely stuck with the third gland that is hyperplastic by weight; but microscopically, I can't tell you that it's hyperplastic.

[TR 8/22/17 p.m., p 45:5-14.]

Subsequently, on permanent section, all three parathyroids removed from Mr. Deland's neck were found to be normal; Dr. Howlands' microscopic diagnosis

was confirmed on permanent section; these glands were not hyperplastic nor adenomatous. [TR 8/22/17 p.m., p 46:10-14.] Dr. Howland also testified he didn't tell the Defendant, Dr. Fox, that the lower right gland was probably hyperplastic, he said it was possibly hyperplastic based on weight, but microscopically, it wasn't hyperplastic. [TR 8/22/17 p.m., p 47:15-25.]

Ultimately, the lower right gland or Specimen C, was determined to contain other tissues besides parathyroid which accounted for its heavy weight. The parathyroid portion of the sample was determined to be normal. [TR 8/22/17 p.m., p 48:1-3.]

Dr. Haun, the defense expert witness, also acknowledged the parathyroid glands removed from Mr. Deland were pathologically normal. He testified as follows:

> Q. Okay. I mine [sic] you realize in this case that the three parathyroid glands that Dr. Fox removed from Mr. Deland were normal parathyroid glands?
>
> A. Well, they were normo-cellular on final pathology histologically.
>
> Q. Meaning they were normal parathyroid glands?
>
> A. Well, again, you have to look at this prospectively at the time of surgery.
>
> Q. They weren't adenomatous were they?

A. They weren't.

Q. They weren't adenomatous. There wasn't an adenoma in any of those three?

A. No, visually they were enlarged.

Q. They weren't hyperplastic in any of those three samples, true?

A. On final pathology no.

Q. They weren't hyperplastic even on frozen section according to all the reports from the laboratory, true?

A. Yeah. That's not my experience with our pathologists.

Mr. Paulsen objection moved to strike not responsive.

The Court: Objection is sustained.

. . .

[TR 8/23/17 p.m., p 54:2-2.]

After all of Mr. Deland's normal parathyroids were removed, Dr. Fox maintained there must have been a fifth supra numary gland causing all of the problems. In fact, the Defendant drew a diagram for Mr. Deland after his surgery to indicate what he described as a supra numary or fifth parathyroid gland which was coincidentally right where it appeared on Dr. Christopher Fox's ultrasound and the Defendant's ultrasound. [EX 1, Trial p61.] The Defendant, Dr. Fox, performed another ultrasound on September 4, 2014, and found the following:

> Ultrasound:
>
> PARATHYROID: The neck was scanned with a high frequency transducer. Findings are as follows: Right lower neck immediately above the clavicle within the carotid sheath is a 7 mm hypoechoic nodule corresponding to the ultrasound findings. No vascular flow is elicited. No fatty hilem.

[EX 1, Trial, p 29.]

On September 9, 2014, the Defendant, Dr. Fox, performed a fine needle aspiration on the same nodule he discovered in his most recent ultrasound. He extracted fluid from this lesion and sent it to the laboratory for parathormone assessment. [EX 1, Trial, p 31.] The parathormone assessment returned with a value of 582. [EX 1, Trial, p 76.] Subsequently, Mr. Deland was evaluated by Christopher Raeburn, M.D. at University Hospital, who diagnosed a likely parathyroid adenoma posterior to the right common carotid artery on clinical ultrasound, 4DCT scan and fine needle aspiration biopsy. [EX 1, Trial, p 87.] On March 11, 2015, Mr. Deland underwent surgery with Dr. Raeburn for removal of an adenoma posterior to his right carotid artery. [EX 11, Trial, p 44.] Dr. Raeburn performed another ultrasound and stated as follows:

> Findings:
>
> Prior to prepping the patient, I performed a neck ultrasound and was able to identify the hypoechoic nodule that was just below the inferior pole of the thyroid and posterior to the common carotid artery, low in the neck. This nodule was easily identified and removed, and frozen section confirmed

> parathyroid tissue, and its intraoperative parathyroid hormone level dropped appropriately from 72 down to 8 at ten minutes after removing the gland. . . .

[EX 11, Trial, p 44.]

In the Plaintiff's surgery, the Defendant, Richard Fox, M.D., removed three pathologically normal parathyroid glands. Dr. Fox did not remove the abnormal parathyroid gland which was located posterior to the carotid artery on the right side of Mr. Deland's neck. Subsequently, Mr. Deland had to have the single diseased parathyroid adenoma removed by another surgeon. [TR 8/22/17 a.m., p 43:13-17.]

An understanding of the mechanism of parathormone production is necessary to understand why the Trial Court's Order permitting unendorsed testimony in this case prevented the Plaintiff from receiving a fair trial. Primary hyperparathyroidism, or the production of too much parathormone, occurs in one of two ways. It can occur as a result of an adenoma which is a non-cancerous tumor in the parathyroid which carries an abundance of parathormone cells resulting in excess excretion of parathormone into the blood supply. Primary parathyroidism can also result from what is known as hyperplasia, which is an abundance of parathormone cells in all four parathyroid glands. [TR 8/22/17 a.m., pp 37:10-38:22.] It is crucial to understand the mechanism of excess

parathormone production. It is based upon the hypercellularity of the parathormone glands, regardless of whether that hypercellularity is caused by an adenoma, or single-gland disease, or by hyperplasia, a multi-gland disease. Either way, the parathormone levels increase because of an overabundance of parathormone cells within the parathyroid glands.

Whether a gland is adenomatous or hyperplastic is a pathologic diagnosis. If a single gland or multiple glands possess more than the normal amount of parathormone-producing cells, parathormone levels will rise. On the other hand, if the glands are pathologically normal or normo-cellular, the parathyroids will not produce excess levels of parathormone. [Hardy Affidavit, CF, p. 320-321.]

Dr. Fox, at trial, opined his decisions were based upon his medical judgment. He testified he believed Mr. Deland had multi-glandular hyperplasia.[3] The problem with Dr. Fox's testimony is he testified that pathologically normal parathyroid glands can be "hyper secretors," a concept for which no one was endorsed, and a concept which the medical literature does not support. [Hardy Affidavit, CF, p. 320-321.]

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[3] It is uncontroverted Mr. Deland did not have multi-glandular hyperplasia, because hyperplasia is a pathologic diagnosis. Both the frozen sections and the permanent sections of the normal parathyroid glands removed by Dr. Fox demonstrated they were normo-cellular and did not contain excess parathormone-producing cells.

After surgery, after Dr. Fox's endorsement and his deposition, for the first time, during trial, Dr. Fox advanced the following new defense:

Dr. Fox testified histology does not correlate with function. Function is better measured with parathyroid hormone, with a real time hormone activity. And Mr. Deland had hyper functioning glands. They were all abnormal and they were all hyper functioning despite histology. [TR 8/25/17 a.m., p 75:1-5.]

Dr. Fox was questioned on direct examination as follows:

> Q. Dr. Fox, did you remove normally functioning glands–parathyroid glands in this case?
>
> A. I absolutely did not.
>
> Q. Does normal cellular on pathology always equal normal functioning glands?
>
> A. Absolutely not.
>
> Q. Did Mr. Deland have multi-gland disease?
>
> A. He did.

[TR 8/24/17 a.m., p 80:11-18.]

Dr. Fox testified "so what's important is that "normal cellular" doesn't mean normal functioning glands. We have two completely different aspects of the gland we are looking at. We are seeing morphology and we are seeing function. . .

[TR 8/24/17 p.m., p 58:19-22.]

Multiple expert witnesses testified on behalf of Dr. Fox, including William Haun, M.D., a general surgeon, William Howland, M.D., a pathologist, and the Defendant, Richard Fox, M.D., a surgeon. None of those witnesses were endorsed to testify that pathologically normal parathyroid glands could be "hyper secretors" or secrete abnormal amounts of parathormone. This was raised for the first time by the Defendant, Dr. Fox, the last witness to testify. Counsel for the Plaintiff objected to the unendorsed testimony, however, the Trial Court overruled the objection and allowed Dr. Fox to testify, despite a clear lack of any endorsement to do so. Counsel for the Defendant argued disclosure was sufficient because the Defendant always maintained Mr. Deland had hyperplasia or multi-gland disease. While this might have provided a plausible defense to Dr. Fox intraoperatively, i.e., I thought he had hyperplasia (despite two normal findings on pathologic frozen section), that defense evaporated after the final pathology report found all samples he removed were normal. Mr. Deland, categorically did not have hyperplasia; he had an adenoma behind his right carotid artery just beneath the right thyroid lobe which Dr. Fox failed to remove.

Although Dr. Fox still maintained Mr. Deland had hyperplasia, he testified further that pathology doesn't determine function and that pathologically normal glands can be "hyper functioning." [TR 8/25/17 a.m., p 75:1-5; TR 8/24/17 a.m., P

80:1-18; TR 8/24/17 p.m., p 58:19-22.] This was not something he nor any other defense witness was endorsed to say. Additionally, it is not supported by any medical literature. [See Hardy Affidavit, CF, p 320-321.]

III. SUMMARY OF THE ARGUMENT

The Trial Court erred and denied the Plaintiff a fair trial by allowing the Defendant, Dr. Fox, the last witness to testify, to testify to previously undisclosed theories of the defense which are unsupported by medical literature; i.e., that pathologically normal parathyroid glands can be hyper secretors and therefore he had to exercise his medical judgment and remove those hyper secretors which were unequivocally pathologically normal.

IV. ARGUMENT

A. Whether the Trial Court Erred in Permitting the Defendant Physician to Testify to a New Theory of Defense Presented for the First Time at Trial When Said Theory had Never Been Endorsed by the Defense and is Unsupported by the Medical Literature.

1. Standard of Review

The Trial Court's imposition of discovery sanctions or lack thereof pursuant to C.R.C.P. 37 is reviewed for an abuse of discretion. *Kwik Way Stores, Inc. v. Caldwell*, 745 P.2d 672, 678 (Colo. 1987); *Sheid v. Hewlett Packard*, 826 P.2d 396, 399 (Colo.App. 1991). The standard of review for refusal to exclude expert

witness evidence pursuant to C.R.C.P. 26(a) is reviewed on an abuse of discretion standard. *Clearone Communications, Inc. v. Biamp*, 653 F.3d 1163 (10th Cir. 2011).

2. Preservation of the Record

Counsel for the Plaintiff objected to the non-disclosed testimony. [TR 8/24/17 p.m., p 60. The Court, having originally sustained the objection, overruled the objection and permitted the testimony. [TR 8/24/17 p.m., p 86:5.]

When a party fails to comply with Rule 26(a) disclosures, that party is generally not allowed to introduce the expert witness's testimony at trial. *Ceiomber v. Coop. Plus, Inc.*, 527 F.3d 635, 641 (7th Cir. 2008) (*quoting* Federal Rule of Civil Procedure 37(c)(1)); *see also Simms v. Great Am Life Insurance Co.*, 469 F.3d 870. 874-95 (10th Cir. 2006). There are exceptions to the requirement of exclusion of expert witnesses if the violation is "justified" or "harmless." *Clearone Communications, Inc. v. Biamp;* Fed.R.Civ.P. 37(c)(1).

> "In determining whether the failure to comply with Rule 26(a) is justified or harmless, courts weigh four factors; (1) the prejudice or surprise to the party against whom the testimony is offered; (2) the ability of the party to cure the prejudice; (3) the extent to which introducing such testimony would disrupt the trial; and (4) the moving party's bad faith or willfulness. *Jacobsen v. Deseret Book Company,* 287 F.3d 936, 953 (10th Cir. 2002). A district court abuses its discretion in determining that a Rule 26(a) violation is "justified or harmless" when the court's decision is "based on an erroneous

> conclusion of law . . . or would result in fundamental unfairness in the trial of the case." *Id.*

C.R.C.P. 26(a)(2)(B)(I) & (II) established the requirements for disclosure of expert testimony. [*See* C.R.C.P. 26.] With respect to retained experts, a disclosure is to be made by written report signed by the witness which includes the following, in pertinent part:

> (a) a complete statement of all opinions to be expressed and the basis and reasons therefor;
>
> (b) a list of the data or other information considered by the witness in forming the opinions;
>
> (c) references to literature that may be used during the witness's testimony . . . .;

[*See* C.R.C.P. 26(a)(2)(B)(I).]

With respect to other witnesses, including a party who may be called upon to provide expert testimony, the disclosure shall be made by a written report or statement that shall include the following:

> (a) a complete description of all opinions to be expressed and the basis and reasons therefore;
>
> (b) a list of the qualifications of the witness; and
>
> (c) copies of any exhibits to be used as a summary of or support for the opinions. If the report has been prepared by the witness, it shall be signed by the witness.

> If the witness does not prepare a written report, the party's lawyer or the party, if self-represented, may prepare a statement and shall sign it. The witness's direct testimony expressing an expert opinion shall be limited to matters disclosed in detail in the report or statement.

[*See* C.R.C.P. 26(a)(2)(B)(II).]

The relevant disclosures by the defense were silent on what turned out to be the primary defense theory, i.e., that pathologically normal glands could still produce excess levels of parathormone, and therefore, had to be removed.

The endorsement of Dr. Fox is quite short. It states as follows:

> Dr. Fox is the Defendant in this case. His deposition was taken on April 28, 2017, and is hereby incorporated into this disclosure. Dr. Fox will also explain his and other entries in the medical chart, as well as his interaction with Robert Deland, as well as the other medical care providers and family members. Dr. Fox will explain the reasons for his actions, as well as the custom and habit of a surgeon caring for a patient such as Mr. Deland under all of the circumstances of this case. Dr. Fox will explain why he believes his actions in caring for Mr. Deland was prospectively reasonable and not negligent.

[CF, p 325-326.]

There is nothing in Dr. Fox's endorsement which would indicate he would testify that pathologically normal parathyroid glands can excrete excess levels of parathormone. While there is no doubt he testified to his belief, intraoperatively that Mr. Deland suffered from hyperplasia, that ship had sailed by the time of trial. Dr. Fox then added a new opinion to the mix; i.e., pathologically normal

parathyroids can be "hyper secretors." This is not only a new theory, it defies pathologic and histologic science.

William Howard, M.D. [sic],[4] a pathologist, was endorsed from Boulder Community Hospital. His endorsement is also short and states as follows:

> Dr. Howard [sic] is a pathologist who spoke with Dr. Fox during the June 27, 2014, parathyroid surgery. It is expected that Dr. Howard [sic] will testify about his recollections he has with respect to the issues in this case. Dr. Howard [sic] is expected to testify consistent with his medical records and deposition, if taken.

[CF, p. 326.]

Dr. Howland was not endorsed to testify that pathologically normal parathyroids can excrete excess levels of parathormone.

William E. Haun, M.D. was also endorsed by the defense. Dr. Haun provided a written report, however, in the endorsement, it is stated he will testify as follows:

> It is Dr. Haun's opinion that the care provided by Dr. Fox was reasonable and appropriate and that it is only with the bias of hindsight and in retrospect that Dr. Fox's care is being criticized. It is Dr. Haun's opinion that Dr. Fraterrelli [sic] exercised prospectively reasonable medical judgment in his care and treatment of Mr. Deland and was not negligent. Additionally, it is Dr. Haun's opinion that the care and treatment provided by Dr. Fox did not cause all the claimed injuries in this case. Dr. Haun would explain the importance of this case being reviewed prospectively rather than retrospectively and

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[4] William Howard, M.D. is actually William Howland, M.D.

> would cite literature supporting his opinions. Dr. Haun will testify concerning the steps of parathyroid surgery and discuss variations of "normal" anatomy and of the various anatomical scenarios commonly encountered in these surgeries. There is no one "standard" with anatomy in this area of the human body. There are many known variations and distortions resulting from different placements of parathyroid glands that general surgeons potentially face with each and every surgery.

[CR, p. 323-324–1]

Dr. Haun's written report comprised three and a half pages and can be found at CR, p. 28-31. Nowhere in Dr. Haun's endorsement does he opine that pathologically normal parathyroid glands can secrete excess parathormone. As a matter of fact, Dr. Haun states histologic analysis is the "gold standard" as had been mentioned by Plaintiff's expert, Dr. Hardy. [CR, p. 329.]

The Defendant conflates two concepts to confuse and obfuscate the issue.[5] Those concepts are multi-glandular disease or four-gland hyperplasia and pathologically normal parathyroid glands which are high secretors or hyper secretors. While it is clearly true that multi-gland hyperplasia can secrete excess amounts of parathormone, Mr. Deland did not have four-gland hyperplasia. Mr. Deland had an adenoma behind his right carotid artery that Dr. Fox did not remove or even get close to according to Dr. Fox. TR 8/25/17 a.m. , pp 7:24-8:2.] This

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[5] The colloquy between the court and counsel regarding the "disclosure" or lack thereof can be found at TR 8/24/17 p.m., pp 66-87.]

gland was later removed by Dr. Raeburn at University Hospital. When that occurred, Mr. Deland's parathormone levels dropped to zero. Although Dr. Fox, at trial, blamed the three pathologically normal parathyroid glands for being hyper secretors, the evidence did not support the claim. Mr. Deland's pre-operative parathormone level was 87. [EX 1, p 17.] After Dr. Fox removed all three pathologically normal parathyroid glands, Mr. Deland's post-operative parathormone levels were roughly the same, at 83.1. [EX 1, p 25.] When the unresected adenoma behind the right carotid artery was tested for parathormone levels, it was in the 583's. Once it was removed, Mr. Deland's parathormone levels again dropped to zero.[6]

The issue in this appeal is not whether Dr. Fox can make a case for hyperplasia at the time he operated on Mr. Deland. For purposes of this appeal, one can assume he had the argument available. Rather, the issue here is whether Dr. Fox or any other witness was endorsed to testify that pathologically normal parathyroid glands can be "hyper secretors." They cannot, because they are not hyper cellular. [*See Affidavit of Mark Hardy, M.D.* CR, p. 320-321.]

As Dr. Hardy states:

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[6] The half-life of parathormone is three to five minutes. [TR 8/25/17 a.m., p 35:24-25.]

> Permanent histologic and pathologic evaluation of the parathyroid glands is the gold standard by which the functioning of parathyroids is gaged, and this includes the diagnosis of adenoma, hyperplasia, and cancer. I have never, in my experience, seen a single case of histologically normal parathyroid tissue that was deemed to be "hyper secreting" due to its "abnormal" appearance on a clinical examination, or the spiking of parathormone levels. Spiking of parathormone levels can occur when any normal parathyroid gland has been manipulated during the operation, but this is short-lasting, less than thirty minutes and that does not equate to the gland being a "hyper secretor" in histologically normal parathyroid gland. Such an entity does not exist in my long and extensive experience. The notion that elevated parathormone levels that remained elevated at 10, 15 an 20 minutes is related to "hyper secreting" "abnormally appearing" glands is simply not accurate in the presence of normal histologic evaluation on permanent section. Such an entity does not exist. The "abnormal appearance" is highly subjective and has no relation to the biochemical activity of the gland in secreting parathormone, either acutely or chronically.
>
> Moreover, I have extensively searched the literature and the concept of a pathologically, histologically normal parathyroid gland that appears clinically "abnormal" being a "high secretor" is not documented in the annals of medical literature. I could not find any reference to the term "high secretor" about the parathyroid gland, particularly one where the secretion continues at higher level than found originally, once each gland is removed. If such an entity did exist, it would have been documented in the medical literature. The fact that such an entity does not appear anywhere in the medical literature, means it does not exist.

[CR, p. 320-321.]

Using the *Jacobsen* factors to determine whether or not the Defendant, Dr. Fox, should have been precluded from testifying about pathologically normal

"hyper secretors," the analysis is simple. Without question, there was both surprise and prejudice to the party against whom the testimony was offered, the Plaintiff. Prior to trial, counsel for the Plaintiff could easily refute the testimony of Dr. Fox that he thought the Plaintiff had hyperplasia. Everyone from Dr. Fox to Dr. Haun to Dr. Howland to Dr. Hardy recognized all three parathyroid glands removed from Mr. Deland were pathologically and histologically normal. Accordingly, they did not have too many parathormone cells and they would function consistent with their histology and pathology. Dr. Fox was the last witness to testify at trial. When he opined that pathologically normal glands could be hyper secretors and that he used his clinical and surgical judgment with that knowledge in mind to remove the pathologically normal parathyroid glands of Mr. Deland, he disclosed for the first time at trial, a brand new theory of the defense. Not only was this theory brand new, it is erroneous. As the court can see by the Affidavit of Dr. Hardy, he thoroughly researched the issue and there are no published reports in the annals of medical literature indicating that pathologically histologically normal parathyroid glands can be "hyper secretors."

The purpose of Rule 26(a) expert reports is "intended not only to identify the expert witness, but also to set forth the substance of the direct examination." *Jacobsen, supra.*; Fed.R.Civ.P. 26(a)(2) Advisory Committee Note (1993). "Such

disclosure is necessary to allow the opposing party 'a reasonable opportunity to prepare for effective cross examination' and perhaps arrange for expert testimony from other witnesses." *Jacobsen, supra.* In order to avoid prejudice, a party opposing the expert testimony needs to know the substance of the expert testimony. *Id.* *Jacobsen* involved pretrial discovery issues where a motion to exclude expert testimony was originally denied. The trial court was reversed based upon the four factors cited in *Jacobsen.*

Here, Dr. Fox introduced a new theory of defense, i.e., hyper secreting normal glands which had never even remotely been discussed. The second factor in the *Jacobsen* analysis is whether the party opposing the testimony could somehow cure the prejudice. Again, in *Jacobsen*, these issues were pretrial. "Prejudice results because the expert reports did not reveal what the experts will testify to at trial." *Id.* Having no way to anticipate that Dr. Fox would introduce a new theory at trial, there was nothing counsel for Plaintiff could have done prior to trial to guard against the late disclosure.

The third factor in *Jacobsen* has more to do with pretrial issues than it does issues at trial because the question addresses disruption of the trial schedule. Here, the disclosure violation occurred during the testimony of the last witness at trial.

The fourth factor in *Jacobsen* involves whether or not the Defendant acted in bad faith. Here, a finding can clearly be made that the Defendant did act in bad faith because the theory he advanced as the last witness in the trial is not supported by medical literature. There is simply no such thing as a pathologically histologically normal parathyroid gland that is a "hyper secretor."

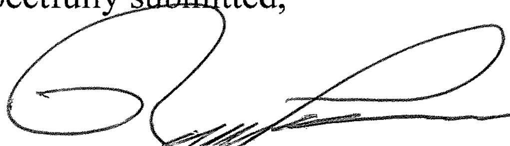
As the court found in *Jacobsen*, even assuming this court were to make a finding that Dr. Fox acted in good faith, that would not be enough to overcome the other factors. "If the experts are allowed to testify on the basis of their incomplete reports," a defendant will be prejudiced. *Id.* Absent a complete disclosure by the experts, the prejudice cannot be cured. *Id.*

V. CONCLUSION

Allowing the Defendant, as the last witness at trial, to testify to an undisclosed theory of the defense prejudiced the Plaintiff and denied him a fair trial. Wherefore, the Plaintiff respectfully requests this Court vacate the judgment against the Plaintiff and remand this matter to the District Court for a new trial.

Dated this 30 day of June, 2018.

Respectfully submitted,



By: ________________________________
Randall J. Paulsen

CERTIFICATE OF MAILING

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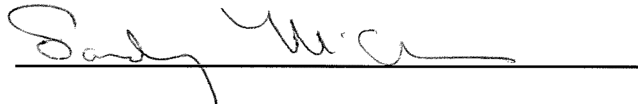

Date: 7-3-18