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COURT OF APPEALS, STATE OF COLORADO
2 East 14th Avenue, 3rd Floor
Denver, CO 80203

Plaintiff-Appellant:

Robert T. Deland

v.

Defendant/Appellee:

Richard Fox, M.D.

▲FOR COURT USE ▲

Attorney for Appellant:
Randall J. Paulsen
Street Address:
8704 Yates Drive, Suite 100
Westminster, CO 80031
Phone: 303-426-7336
Email: randy@rjpaulsenlaw.com

Case Number: 2018CA46

APPELLANT'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

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

This Reply Brief complies with the applicable word limits set forth in C.A.R. 28(g).

It contains 5,683 words (does not exceed 5,700 words).

This Reply Brief complies with the standard of review requirements set forth in C.A.R. 28(a)(1)-(3).

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.

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ISSUES PRESENTED

In the Answer Brief, counsel for the Defendant advances five arguments:

I. Plaintiff has incorrectly characterized Dr. Fox's actual testimony;

II. Dr. Fox's testimony was properly and timely disclosed before trial;

III. The Plaintiff did not timely object;

IV. The District Court did not abuse its discretion; and

V. The admission of the testimony was harmless.

The record does not support the Defendant's claims.

STATEMENT OF THE FACTS

Although the Defendant Dr. Fox makes numerous references to the Plaintiff having multiglandular disease or hyperplasia, he did not. He had three normal parathyroid glands which Dr. Fox removed and one adenoma, which he failed to remove.[1]

The final pathologic diagnosis for all three samples Dr. Fox removed from Mr. Deland's neck was normal parathyroid tissue (*TR 8/22 PM, pp 39:4–40:12*) (*Exhibit p 1:46-47*). The final pathologic/histologic evaluation of Mr. Deland's left parathyroid gland confirmed the frozen section analysis done previously by Dr.

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[1] Dr. Fox, in his deposition, acknowledged that if he had removed the adenoma he left behind for Dr. Raeburn to remove, Mr. Deland would have been cured. *[TR 8/24 PM, p 134:5-7]*

Howland, *i.e.*, normal parathyroid tissue. None of the parathyroid glands removed by Dr. Fox were either abdomenous or hyperplastic. [*Exhibit p 18:1*] See Dr. Hahn's testimony as well. *[TR 8/23 PM, p 54:2-17]*

Even the Defendant Dr. Fox acknowledged that histology controls functionality. When asked the following question, Dr. Fox answered "correct."

> Q. And the histology controls functionality. Normal parathyroid glands operate normally. Abnormal parathyroid glands that are adenomatous or have some other disease process don't operate normally, true?
>
> A. Correct. Enlarged, firm, abnormal parathyroid glands function abnormally as advanced by parathyroid hormones. [*TR 8/25 AM, pp 51:22–52:3*]

I. <u>The Defendant's first claim in the Answer Brief is "Plaintiff has incorrectly characterized Dr. Fox's actual testimony."</u> The record states otherwise as follows:

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

A. He did. [*TR 8/24 AM, p 80:11-18*][2]

Q. So, what is 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 PM, p 58:15-22]*

Q. And we look at the pathology report when it says, "a normal cellular," does that mean clinically that the gland is normal?

A. It doesn't mean that the gland is normal functioning. And what we found in this case, again, the parathormone levels went up and they didn't decline with the removal with the largest of those three glands. And given the visual appearance having seen all four, having a qualitative assessment of all four of those pieces of tissues, I opted to proceed with the subtotal resection and leave his right upper pole gland intact so as not to revascularize it or run the risk of hurting it. *[TR 8/24 PM, p 98:14-25]*

Q. And is it multi-gland disease because it is adenomatous, rather, is it multi-gland disease because it is partly adenomatous and partly hyperplastic, or is it multi-gland disease because it is hyperplastic?

A. It is multi-gland disease because it is all hyperfunctioning. *[TR 8/25 AM, pp 33:23–34:3]*

Q. And that is based on what? I mean, we didn't half life deterioration from 10 minutes to 20 minutes, according to your testimony?

A. It's because we still had a persistent hyperfunctioning gland in the left side of the neck and, also, in retrospect, the fifth hyperfunctioning gland in the right lower part of the neck. *[TR 8/25 AM, pp 36:20–37:1]*

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[2] Whether a parathyroid is adenomatous, hyperplastic or cancerous is a pathologic diagnosis. The parathyroid removed by Dr. Fox were normal, hence, he did not have multiglandular disease.

Q. And your hyperfunctioning clinical judgment was based upon the notion that Mr. Deland's PTH levels spiked after that gland was removed?

A. After those glands were manipulated, yes. *[TR 8/25 AM, p 35:2-5]*

Q. And in your clinical judgment, you didn't consider the notion that after 20 minutes you hadn't seen a degradation in the PTH levels; isn't that true?

A. I absolutely considered that. It is a very important data point.

Q. And –

A. And that data point tells me that there is hyperfunctioning tissue, and those glands were all abnormal, that tells me the patient has multiglandular disease. *[TR 8/25 AM, pp 39:21-40:4]*

Q. Well how come Dr. Howland and Dr. Forsythe can tell you whether or not the tissue they are looking at is normal cellular, not only by histological analysis, but according to the comments of Dr. Forsythe's final pathology report by weight.

A. That as you recall in Dr. Forsythe's final pathology report, he also writes clinical correlation is suggested. And, once again, they can't comment at all about functionality of a parathyroid gland. They can only comment about the histology of a parathyroid gland. *[TR 8/25 AM, p 51:12–21]*

Q. [By Mr. Paulsen] We know that from the pathology department at Boulder Community Hospital all samples, A, B, C, D and E, were diagnosed as normal cellular parathyroid tissue?

A. Histologically normal, functionally abnormal. *[TR 8/25 AM, p 69:9–13]*

Q. Is it best to leave "possible" alone and hope for normal, which can be corrected by later removal? Or is it best to take "possible" out with no

chance to fix "possible" down the road? What are – what of those two options do you, as his surgeon, exercising your clinical judgment with a patient's safety and lifelong care involved make, Dr. Fox?

A. That all, once again, takes into account an entire clinical picture, not just looking at but one piece of the whole story. And histology does not correlate with function. Function is better measured with parathyroid hormone, with a real-time activity and Mr. Deland had hyperfunctioning glands. They were all abnormal, and they were all hyperfunctioning despite histology. *[TR 8/25 AM, pp 74:18 – 75:5]*

Counsel for the Defendant Dr. Fox argued, "Intraoperative judgment" to support the notion that Dr. Fox did not remove three normally functioning parathyroid glands, despite conclusive pathologic/histologic findings of normal parathyroid tissue. *[TR 8/25 AM, pp 162:4-162:9]*

As a matter of fact, medical judgment was a primary theme in counsel for the Defendant's argument. When asked, "What does medical judgment mean to you as a practicing surgeon?" Dr. Fox answered, "Well, medical judgment is everything. I mean it's based on my education, my training, my experience, especially the experience. And everything we do – no two things in surgery really are the same thing, so judgment is very, very important and I think gets better the longer you have been in practice and the more experience you have." *[TR 8/23/18 PM, p 7:12–19]* When asked a question from the jury, Dr. Fox again emphasized his clinical judgment.

The Court: In your practice how frequently do you override the pathologist's findings during operations, *i.e.*, when the pathologist indicates the gland is normal, but you would consider it abnormal based on your visual inspection?

A. I have to use my clinical judgment and experience, and yes, sometimes I have to overrule the pathologist. I am the one responsible for the patient, not so much the pathologist. *[TR 8/23/18 PM, pp 107:21 –108:4]*[3]

Counsel for the Defendant asked Dr. Fox to diagram all of the different decision points that went into his "medical judgment." Specifically, the transcript reveals the following:

Q. And, doctor, can you diagram that for the jury about all of the different decision points that creates your medical judgment in a surgery like this?

A. Absolutely. *[TR 8/24 PM, pp 67:1-25 – 68:3]*

At this point, counsel for the Plaintiff interposed an objection regarding Dr Fox's testimony as follows:

Mr. Paulsen: We should make it clear to the doctor that his diagram should not include his opinion that stimulating what he believed to be the visually abnormal glands caused the PTH to rise because that's the subject of my previous objection.

The Court: Mr. Robinson.

Mr. Robinson: So, the stimulation of the abnormal gland raising the PTH you don't think should be included in the diagram?

[3] Dr. F ox, in his deposition stated: But for multiglandular patients, to answer your question, I absolutely depend on the pathologists report to help me make a game time decision. *[TR 8/25 AM, p 54:9-11].*

> Mr. Paulsen: Right, because he never testified to that before in his life, in his deposition, nor is he endorsed to testify to that, and this is trial by ambush. And Dr. Fox specifically said, "stimulating a normal gland will not increase the PTH level."

After a long discussion concerning the absence of any endorsement on behalf of anyone from the defense to support Dr. Fox's testimony, the Court ultimately overruled the objection. *[TR 8/24 PM, p 86:5-9]*

II. The Defendant asserts testimony was properly and timely disclosed before trial; and

III. The Plaintiff did not timely object.

Again, the record states otherwise on both counts. Nowhere in the Defendant's disclosures, the report of Dr. Hahn, or the deposition of Dr. Fox was it ever suggested that a pathologically normal parathyroid gland could secrete excess levels of parathormone or be "functionally" "hyper secreting." Dr. Hahn did not adopt this theory in either his trial testimony or his deposition.

In the Defendant's initial disclosures, Dr. William Hahn was endorsed to opine that Dr. Fox's care was reasonable and appropriate and that it is, "only with the bias of hind sight and in retrospect that Dr. Fox's care is being criticized." *[Apprec CourtRec p. 323]* Nowhere in this general endorsement does the word pathology even appear. A word search for "functionality" or "hyper secretor" or

any of their derivatives turns up nothing in the Defendant's expert disclosures, Dr. Hahn's expert report or Dr. Fox's deposition.

Richard Fox, M.D. the Defendant, was endorsed in Defendant's disclosures, which is the only endorsement for Dr. Fox aside from his deposition, the word pathology is not even mentioned. *[Apprec – CourtRec, p. 325-326]*

William Howland, M.D. was misidentified in the Defendant's disclosures as William Howard, a pathologist from Boulder Community Hospital. His endorsement simply 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. *[Apprec-CourtRec pp 326-327]*

Robert Forsythe, MD, the pathologist who performed the final pathological evaluation on Mr. Deland's parathyroids and determined them to all be normal cellular parathyroid tissue was endorsed as follows:

> Dr. Forsythe is a pathologist who completed the pathology report dated June 30, 2014. It is expected that Dr. Forsythe will testify about his pathology report and any recollections he has with respect to the issues in this case. Dr. Forsythe is expected to testify consistent with

his medical records and deposition if taken. *[Apprec. CourtRec. P 327]*

William E. Hahn, MD, the Defendant's primary expert on standard of care and causation authored a three-and-a-half-page expert witness report pursuant to C.R.C.P. 26(a)(2). *[Apprec – CourtRec p 328-331]*

The closest Dr. Hahn gets to talking about pathology, is the following:

> In hindsight, a different pathologist made the final call that all three parathyroid glands were normocellular, both on frozen and permanent sections. This series of events does not represent negligence on the part of Dr. Fox. *[Apprec – CourtRec p 328]*

Dr. Hahn, in his endorsement acknowledged that frozen section histological analysis is "the gold standard," as was previously mentioned by Dr. Hardy, the Plaintiff's expert witness. Specifically, the endorsement states as follows:

> Dr. Hardy notes in his assessment on page 4 of his report that visual inspection was used to make an assessment of hypercellularity – in this case the diagnosis was made based upon the pathologist's frozen section histological analysis and relayed to Dr. Fox by verbal report (*i.e.*, the gold standard as Dr. Hardy mentioned). [Apprec – CourtRec p 329][4]

[4] Although Dr. Fox, and Dr. Hahn as well as Dr. Hardy all indicated that frozen section analysis was the gold standard for determining hypercellularity, Dr. Hahn and Dr. Fox's testimony both morphed into the notion that a frozen section is only used to determine if the tissue is actually parathyroid tissue. Dr. Hahn: [TR 8/23 PM, p 24:5-10; Dr. Fox: [TR 8/24 PM, p 92:14-19].

Nowhere in Dr. Hahn's three-and-a-half-page expert witness report does he opine that pathologically normocellular parathyroids can produce excess levels of parathormone or be hypercellular.[5]

Curiously, counsel for the Defendant does not point to even a single reference either in the disclosures, Dr. Hahn's report, or Dr. Fox's deposition to support the claim that Dr. Fox's testimony was properly and timely disclosed before trial. Perhaps as telling is that Dr. Hahn, neither in his trial testimony or deposition ever mentioned pathology nor any parathyroid gland being a hyper secretor. In fact, Dr. Fox testified that normocellular parathyroid glands don't secrete excess parathormone when manipulated. *[TR 8/24 PM, p 55:14-16]*

The deposition of Dr. Fox was incorporated into his endorsement at the time expert witness disclosures were filed. Counsel for Dr. Fox, at trial, tried his best to locate a reference in Dr. Fox's deposition to pathologically normocellular parathyroids being functional hyper secretors, without success.[6] Initially, Dr. Fox testified at trial as follows:

Q. An abnormal gland, is that a clinical diagnosis or a pathological diagnosis?

---

[5] Hypercellularity and normocellular refers to the number of parathormone cells as a percentage of the parathyroid gland. The function of the gland is measured by its cellular content. *[Apprec. CourtRec. p 310]*

[6] This was after first advising the court h is client didn't so state. *[TR 8/24 PM, p 64:15]*

A. An abnormal gland can have both aspects. The visual is the first part of it, because in order to get the gland to the lab we suspect something in the first place. And then we have the laboratory part to identify what is the tissue type. And then we have the clinical correlation that goes with it. What is the functional capacity of those glands, despite what they look under the microscope, and what are they doing to the patient, most importantly.

And just to expand on the pathologist, what we are ingrained to understand is that with all of our tests there is a limit on any test we do, whether its imaging studies or lab studies, it is all how we apply it to the clinical scenario. But what we are all ingrained, and Dr. Hahn also talked about yesterday, is importantly, can the pathologist confirm parathyroid tissue. We know the complete limits on the frozen section.

Mr. Paulsen: Judge, may we approach?

The Court: You may.

The Court: Mr. Paulsen.

Mr. Paulsen: Judge, I have been giving Dr. Fox a fair amount of leeway, but he is not endorsed to say any of this stuff. This is the first time anybody has ever suggested that there can be a hyperfunctioning normal pathological parathyroid gland. Dr. Hahn was not endorsed to testify to that. Dr. Fox is not endorsed to testify to that. Dr. Fox didn't testify to that in his deposition. And Dr. Fox provided no expert witness report. He was just endorsed as an expert to testify concerning his treatment in this case. So, I would ask that any further testimony concerning this be stricken.

The Court: Mr. Robinson.

Mr. Robinson: He was endorsed consistent with his deposition. He was asked questions about this at his deposition and said that he removed abnormal glands during the surgery. And this his what he is describing, abnormal glands, which is consistent with the parathormal level. He has talked about this in his deposition. He has said, "I have removed three

> abnormal glands." And he said that all along. There is no information here. This is exactly what's been the defense all along. *[TR 8/24 PM, pp 59:2-60:22]*

At this point, the Court invited counsel for the Defendant to demonstrate in the deposition or disclosure where Dr. Fox's testimony was either disclosed or he was questioned concerning it. *[TR 8/24 PM, p 61:14-18]* At this point, counsel for the Plaintiff made his objection clear as follows:

> Mr. Paulsen: I want to make clear what my objection is. It's not that he took out what we believed to be abnormal glands. It's that the glands that he took out could produce more parathormone when they are agitated because they are abnormal. And that that would be the case even on pathological evaluation they were found to be normal parathyroid glands. That is not in his deposition. *[TR 8/24, pp 61:19-62:1]*

Initially, counsel for the Defendant Dr. Fox denied that Dr. Fox was testifying that pathologically normal glands could secrete excess amounts of parathormone. Specifically, Mr. Robertson stated the following, twice:

> Mr. Robinson: He is not saying that. He is not saying that a normal gland under pathological examination would secrete excess amounts of parathormone. He's not saying that. *[TR 8/24 PM, p 64:12-15]*

The Court asked Mr. Robinson to respond to the objection. He stated as follows:

> Mr. Robinson: He didn't testify that a normal gland under pathological examination would secrete excess amounts of parathormone, first of all. *[TR 8/24 PM, p 65:18-20]*

The trial court had some difficulty understanding the nomenclature. The following colloquy took place between the Court and counsel:

> The Court: So, where I am having the difficulty in understanding or locating the disclosure is the difference between the manipulation and the removal. And if I understand Mr. Paulsen – and Mr. Paulsen, you may correct me if I am wrong – he is arguing that you didn't disclose the manipulation of the adenoma is something that would cause the PTH to rise. And you are arguing the removal.
>
> Mr. Robinson: We don't disagree with that statement, what you just said.
>
> Mr. Paulsen: I do.
>
> The Court: I'm sorry, how did I say it wrong then, Mr. Paulsen?
> Mr. Paulsen: It's not the manipulation of an adenoma. The lesion that Dr. Fox removed was not an adenoma. Pathologically, clinically, it was not an adenoma. Dr. Fox says it was an abnormal appearing gland.
>
> The Court: I am sorry, he said, "manipulation of the visually abnormal gland." I apologize.
>
> Mr. Paulson: No apology necessary. We can't mix the nomenclature here. What he is testifying to now is not the manipulation of an adenoma can cause a spike in the PTH levels, which everybody agrees to. This is brand new stuff. And he is testifying that the manipulation of a pathologically normal gland that appears to him to be abnormal can cause an elevation in the PTH levels. And I don't believe there is any clinical support for that. And there is certainly no support in the record in this case, either in his endorsement or his deposition to support that.
>
> The Court: I am going to try and ask my question again in a more accurate and articulate manner. Mr. Paulsen is correct. What I had meant to say and what he stated and I wrote down was that the doctor

had not – the Defendant had not disclosed that the manipulation of a visually abnormal gland would cause the PTH to rise, and understand that to be different than the removal of an adenoma. So, if you want to try to educate to where I am misunderstanding –

Mr. Paulsen: I think you hit it right on the head.

Mr. Robinson: The abnormal appearing gland, which is what Dr. Fox has testified from the beginning, the manipulation, that means moving around or removal of that, will rise the PTH level, which is what happened in this case.

I think the confusion is the adenoma vs. the multiglandular, and what the PTH level does when either one are manipulated or removed. If you remove the adenoma – which is what Plaintiff is saying in this case was that the PTH level should drop by 50% – and that's been the testimony by Dr. Hardy, that that drops by 50%.
But what is unusual in this case is the PTH when up by what we heard from Dr. Hahn, 85% from 87 – 133. In the testimonies when you start playing with these abnormal glands the PTH is either going to go up or go down, and that is dependent on is this an adenoma or is this a multiglandular disease. *[TR 8/24 PM, pp 80:20-83:5]*

Counsel for the Plaintiff attempted to clarify the objection as follows:

Mr. Paulsen: The objection is, there has never been an endorsement to indicate that Dr. Fox would testify that manipulating a pathologically normal gland that appears to him to be abnormal would cause PTH levels to rise. That's never been endorsed. I fully understand Mr. Robinson's argument that Dr. Fox has maintained that this was multiglandular disease, but that's a different thing. Everyone agrees that PTH has half-life of around three minutes. If – if this normal gland that was abnormal appearing according to Dr. Fox, was manipulated and removed, after it was removed, those PTH levels continued to rise to 139 at 20 minutes. That's impossible. And he knows it.

Whereupon the Court had the following exchange with counsel for the Plaintiff:

> The Court: Mr. Paulsen, I may not, then, have understood your argument correctly. So, I want you to correct me if I am wrong here. I understand the argument to be that you felt that Dr. Fox, the Defendant, had not disclosed that the manipulation of the pathologically normal but visually appearing abnormal gland caused an increase in the PTH level vs. the removal of the pathologically normal but visually appearing normal gland.
> Mr. Paulsen: They are the same thing. The removal of the gland occurs at the same time that the manipulation of the gland does. *[TR 8/24 pp 84:20-85:19]*

After the Court overruled the Plaintiff's objection to lack of disclosure, counsel for the Plaintiff made the following record:

> Mr. Paulsen: And my record would simply be that that's not a fair reading of anything that Mr. Robinson read. There's nowhere in this deposition, anywhere, where Dr. Fox indicated that manipulating a pathologically normal sample that appears visually abnormal will cause the PTH to rise. Although there were anecdotal discussions about removing adenomas, and that causing a precipitous drop in PTH levels, and anecdotal discussions about manipulating adenomas will cause a rise in PTH levels, nowhere is not a scintilla of a suggestion by Dr. Fox nor Mr. Robinson – he made endorsements in this case, including the endorsement of Dr. Hahn, who is his expert witness, to the effect that manipulating a non-adenomas, pathologically normal sample, both on frozen section and permanent section, would cause an increase in PTH levels. That's never been endorsed, not even by implication. *[TR 8/24 PM, pp 86:14-87:5]*

After the Trial Court overruled the objection of failure to disclose, counsel for the Defendant capitalized on the ruling as follows:

Q. And when we look at the pathology report when it says "normal cellular" does that mean clinically that the gland is normal?
A. It doesn't mean that the gland is normal functioning. And what we found in this case, again, the parathormone levels went up and they didn't decline with the removal of the largest of those three glands. And given the visual appearance having seen all four, having a qualitative assessment of all four of those pieces of tissues, I opted to proceed with a subtotal resection and leave his right upper pole gland intact so as not to devascularize it or run the risk of hurting it. *[TR 8/24 PM, p 98:14-25]*

Dr. Fox goes on to state as follows:

Q. Dr. Fox, do you believe that if you would have removed the parathyroid gland that Dr. Raeburn removed, the one that he removed on March 11, 2015, if you would have removed that at your surgery on June 27, 2014, would Robert Deland have been cured?

A. I do not think he would be. He has multi-gland disease.

Q. And what findings confirm that in your opinion?

A. The intraoperative findings of the abnormal parathyroid glands, the increase in parathormone level after removal of the largest of those glands, and the failure to decline, those being the major reasons. And then the fifth gland obviously seen after the fact. *[TR 8/24 PM, p 19:3-16]*

The foregoing statement at trial by Dr. Fox was 180° opposite from his deposition testimony. On cross examination at trial, the following colloquy occurred between Dr. Fox and counsel for the Plaintiff:

Q. Do you agree that had you explored behind the carotid artery, inferior to the thyroid, and found the adenomatous lesion that you found on your fine needle aspiration and Dr. Raeburn removed with

the same drop in PTH levels, you would have been done with your surgery?

A. If that's how things had occurred, possibly.

Q. In other words, had you found the parathyroid gland posterior to the carotid artery, and you had removed that, and your parathyroid or parathormone levels had dropped as they did in Dr. Raeburn's case, you would have had a successful surgery and Mr. Deland would have been taken to the recovery room and woke up with three normal parathyroid glands.

A. No, I don't necessarily agree with that. Sorry, I didn't understand your first question. *[8/24 PM, p 133:5-19]*

Dr. Fox was then referred to his deposition as follows:

Q. Do you recall the following question taken in your deposition on April 28, 2017?

Question: "Okay. Had you explored behind the carotid sheath and found the adenomatous lesion that ultimately you did a fine needle aspiration on."
Your Answer: "Correct."

And I concluded the question: "And ultimately was taken out by Dr. Raeburn, and that parathyroid had been removed and parathormone levels had dropped intraoperatively you would have been done without going any further. Is that a fair statement?"

Your Answer: "Sure. I mean that would be correct." [*TR 8/24 PM, p 134:5-17]*

Accordingly, Dr. Fox acknowledged in his deposition and nearly acknowledged in his trial testimony that the culprit in Mr. Deland's case was the adenoma behind the carotid artery which Dr. Fox did not remove. He

further acknowledged that had he removed it, Mr. Deland would have been cured. This is grossly inconsistent with the argument he came up with at trial and now advances to this Court that parathyroid glands which are completely normal on pathological examination can be hyper secretors.

Dr. Fox, at trial, acknowledged he cannot make a diagnosis of hyperplasia on a visual exam. *[TR 8/25 AM, p 17:2-4]*

Later on, Dr. Fox has difficulty answering this question:

> Q. When you say, "clinical correlation" are you testifying that you, as a surgeon, can look at a gland clinically and tell whether or not it is hyperplastic or adenomatous or normal?
>
> A. I can tell you if it is enlarged or I can tell you if it is normal in appearance. Or I can tell you it has a normal appearance that I can't – again, the whole picture its' a – it's a multifaceted picture in how to interpret a gland. It's not just any one particular finding.
> Q. Let me try my question again. Apparently, I didn't phrase it clearly enough.
>
> Can you tell, yes or no, by looking at a gland whether it is hyperplastic or adenomatous?
>
> A. Again, it has to do with the relative appearance to the other glands and what happens physiologically with the function of that gland as with the other glands.
>
> Q. Well let me rephrase the question in your terms.
> Looking at all of the glands in the patient's –
>
> A. Um – Hmm.

Q. – neck, can you determine and distinguish between glands which are adenomatous and hyperplastic?

A. No. *[TR 8/25 AM, p 19:4-20:1]*

Dr. Fox, in his testimony, reluctantly acknowledged a failure to endorse the theory he presented at trial. The exchange is as follows:

Q. Direct me to an exhibit in this case, your operative report, your progress notes, anything you have written about conversations you had with the Delands, where you indicated prior to coming to this courtroom that these glands that you took out were functionally abnormal?

A. As I interpret this as a surgeon, it is all completely implied in my – in my thought process at surgery and taking in that the parathyroid hormone didn't decrease with the removal of the largest gland, and, once again, having all of the abnormal glands –

Mr. Paulsen: Move to strike. Nonresponsive.

The Court: Your response is stricken from the record. You shall not consider it in your deliberations.

A. I would – first operative report is explicitly implied and the decision-making to do the subtotal resection. And in the follow-up notes with the Delands, where the normal cellular glands were noted, yet, the parathyroid hormones were still up tells me that the patient had another persistent functioning gland. So it is implied in what I am explaining to people, whether or not I use the word 'hyperfunctioning' or not, I can't recall. It's not listed *per se*.

Q. Dr. Fox, I want to make sure I am clear. I didn't ask you whether it was implied. I asked you to point me to the record, and this includes your operative note, your progress notes, any notes you have on conversations with any of the Delands or our expert witness endorsement, where prior to yesterday you told anyone these glands,

although they were pathologically normal in every respect, were functionally abnormal. Where do I find that in anything you have said or written before yesterday?
Are we clear on the question?

A. I understand your question. However, the premise has been from day one that this all multi-gland disease, which by definition means hyperfunctioning glands. That is the definition in the surgical world.

Q. Show me where it is?

A. Again, the definition of multi-glandular disease refers to functionality of glands. The definition of adenomatous disease refers to functionality of a solitary gland and so this – once again, we – we have talked about histologically normal cells all week, nobody has asked or is talking about gland function, hyper-cellularity.
Gland function is the most important part about this diagnosis, and that's what's evidenced by the elevated parathyroid hormone levels. I don't have to state it in my operative report "hyper-functioning" it is clearly implied with the – the rational for moving forward with this case. He has five glands that are all over functioning.

Q. At that is the most important thing? Hyper-functioning?

A. Correct. *[TR 8/25 AM, pp 71:2-72:12]*

IV. **The Defendant Alleges "The District Court did not abuse its discretion in allowing previously unendorsed testimony."**

For all of the reasons previously stated in the Plaintiff's opening brief, permitting unendorsed testimony that allowed the Defendant Dr. Fox to ignore the pathological diagnosis of normal parathyroid tissue on final pathological evaluation and conjure up the theory that even though the parathyroids were normal

pathologically, they must have still been hyper-secretors, is not supported by any endorsement or deposition testimony by the Defendant, either explicitly, or impliedly as Dr. Fox would like to argue. Although counsel for the Defendant continues to conflate the concepts of adenoma, hyperplasia and multi-glandular disease with the notion that all three can either be pathologically diagnosed or diagnosed by clinical evaluation and increasing parathormal levels from hyper-secretors is not only not scientifically based, it was never endorsed as a theory.

V. **The Defendant's final contention is "The admission of the testimony was harmless."**

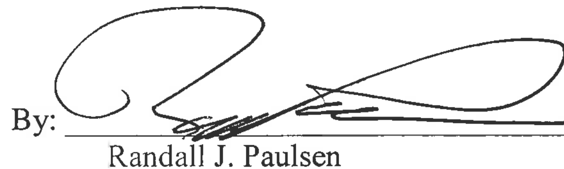
The admission of Dr. Fox's testimony that normocellular parathyroids can be hyperfunctioning is anything but harmless. Counsel for the Defendant structured his closing argument around the clinical judgment theme. 'Don't pay attention to the pathological evaluation, either on frozen section or permanent section, these were hyperfunctioning normal parathyroid glands.' Dr. Fox, when faced with this phenomenon of hyperfunctioning pathologically normal parathyroid glands had to exercise his clinical judgment to remove them. The problem is, of course, there is no such thing as a hyperfunctioning pathologically normal parathyroid gland. Plugging this fiction into one's surgical judgment serves only one purpose, which is

to mislead the jury and deprive the Plaintiff of a fair trial. Accordingly, this was not a harmless error, this was critical error and it denied the Plaintiff a fair trial.

WHEREFORE, the Appellant respectively requests this Court set the verdict aside and remand this matter for a new trial on all of the issues.

DATED: October 16, 2018October 16, 2018

Respectfully submitted,

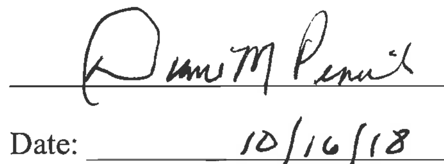


By: ______________________
Randall J. Paulsen

CERTIFICATE OF SERVICE

I hereby certify that I e-filed a true and correct copy of the foregoing Reply Brief to the following on the date hereinafter listed.

Bradley G. Robinson, Esq.
Robinson Waters & O'Dorisio, P.C.
1099 - 18th Street, 26th Floor
Denver, CO 80202



Date: 10/16/18