

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-01681-WJM-MEH

I.P., a minor, by and through her mother and conservator, Cynthia Cardenas,

Plaintiff,

v.

SUSAN E. BIRCH, in her individual capacity and official capacity as the Executive Director of the Colorado Department of Health Care Policy and Financing, and
DAVID SMITH, in his individual capacity and official capacity as Manager of the Benefits Coordination Section in the Colorado Department of Health Care Policy and Financing,

Defendants.

ORDER

Michael E. Hegarty, United States Magistrate Judge.

Before the Court are Defendants' Motion for Leave to Amend Final Pretrial Order [filed May 25, 2011; docket #127] and Plaintiff's Partially Unopposed Motion to Amend Final Pretrial Order [filed May 25, 2011; docket #128]. The motions are referred to this Court for adjudication. (Docket #130.) The Court **GRANTS** the motions as follows.

Defendants request the following amendments to the Final Pretrial Order: 1) Defendants will not pursue the defense of a prior binding settlement as stated in Section 3(b); 2) addition of the Settlement Agreement between I.P. and St. Anthony North Hospital and the Second Amended Complaint from the underlying personal injury litigation as exhibits; 3) addition of Plaintiff's 2011 accounting of her disability trust as an exhibit; and 4) permission to use "a summary exhibit to present voluminous Medicaid claims information."

Plaintiff requests the following amendments to the Final Pretrial Order: 1) Defendants will not pursue the defense of a prior binding settlement as stated in Section 3(b); 2) substitution of the

“updated” Exhibit List included with Plaintiff’s motion (referring to Defendants’ proposed Exhibit C and Plaintiff’s proposed Exhibit 5); 3) indication that the parties will engage in continued settlement discussion; and 4) addition of James Leventhal as a possible personal injury counsel witness, in addition to Lorraine Parker.

Plaintiff objects to the inclusion of Defendants’ proposed Exhibit C, the “2011 accounting of the I.P. Disability Trust.” Defendants object to the inclusion of Plaintiff’s proposed Exhibit 5 (“First Amended Disability Trust”) and the addition of James Leventhal as a may-call witness. Otherwise, the parties do not object to the proposed amendments.

Paragraph Twelve of the Final Pretrial Order prescribes that the order may not be amended except by consent of the parties and approval by the court or by order of the court to prevent manifest injustice. (Docket #70 at 16.) “The burden of demonstrating manifest injustice falls upon the party moving for modification.” *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1222 (10th Cir. 2000). When reviewing a decision by a district court to deny a request to amend the Final Pretrial Order, the Tenth Circuit considers: “(1) prejudice or surprise to the party opposing trial of the issue; (2) the ability of that party to cure any prejudice; (3) disruption to the orderly and efficient trial of the case by inclusion of the new issue; and (4) bad faith by the party seeking to modify the order.” *Koch*, 203 F.3d at 1222, 1222 n.10 (recognizing that a district court is not required to consider these factors in adjudicating a motion to amend the pretrial order).

Here, the Court finds that the proposed amendments, including the three contested proposals, are appropriately included in the Final Pretrial Order. The parties’ objections to the two exhibits regarding the disability trust are premised on relevance. The Court believes these objections are better disposed of at trial, and inclusion of the two proposed exhibits in the Final Pretrial Order would prevent possible injustice and would not unduly prejudice either side.

Regarding James Leventhal, Defendants base their objection to the addition of Mr. Leventhal as a may-call witness on an assumption of prejudice, as Defendants did not depose Mr. Leventhal and have not reviewed Mr. Leventhal's file and notes. (Docket #139 at 2.) The Court believes this objection is readily cured by an opportunity for Defendants to depose Mr. Leventhal before trial. Therefore, the Court grants Plaintiff's request to include Mr. Leventhal as a potential witness and grants a brief re-opening of discovery for the sole purpose of a deposition of Mr. Leventhal by Defendants, to occur before trial.

Accordingly, the Court **GRANTS** Defendants' Motion for Leave to Amend Final Pretrial Order [filed May 25, 2011; docket #127] and Plaintiff's Partially Unopposed Motion to Amend Final Pretrial Order [filed May 25, 2011; docket #128] as stated herein and accepts the proposed amendments enumerated in the parties' respective motions.

Entered and dated at Denver, Colorado, this 1st day of June, 2011.

BY THE COURT:

A handwritten signature in black ink that reads "Michael E. Hegarty". The signature is written in a cursive, flowing style.

Michael E. Hegarty
United States Magistrate Judge