

DENVER DISTRICT COURT, STATE OF COLORADO 1437 Bannock St., Room 256 Denver, CO 80202	DATE FILED: February 15, 2016 12:02 PM FILING ID: 5A7C92C1BAE45 CASE NUMBER: 2014CV32160
Plaintiff: LAURA DIETER v. Defendant: CHILDREN'S HOSPITAL COLORADO	▲ COURT USE ONLY ▲
<i>Attorneys for Plaintiff:</i> Marco F. Bendinelli (#28425) Julian M. Bendinelli (#49155) Hugh S. O'Sullivan (#31520) BENDINELLI LAW FIRM, P.C. 9035 Wadsworth Pkwy., Suite 4000 Westminster, CO 80021 Phone Number: 303.940.9900 Fax Number: 303.940.9933 Email: MFB@COLawFirm.com; JMB@COLawFirm.com; HSO@COLawFirm.com	Case No: 2014CV32160 Division : 424 Courtroom:
PLAINTIFF'S TRIAL BRIEF REGARDING THE NEED FOR EXTENDED TIME FOR <i>VOIR DIRE</i> AND OPENING STATEMENTS	

Plaintiff, Laura Dieter ("Plaintiff"), by and through her attorneys, Bendinelli Law Firm, P.C., hereby submits the following Trial Brief Regarding the Need for Extended Time for *Voir Dire* and for Opening Statements, and, as grounds therefore, states as follows:

BACKGROUND

On June 7, 2012, Plaintiff had taken her minor child to the Emergency Room at Children's Hospital Colorado ("CHC"), to be treated for a head injury. While there, Plaintiff herself became severely injured when she slipped and fell on liquid on a hallway floor at CHC.

A five-day jury trial is scheduled to begin in this case on February 29, 2016. The case involves many substantive and unique factual, medical and damages issues which Plaintiff's counsel believes cannot adequately be explored or presented to the jury in the time typically allotted for *voir dire* and opening statement. Imposing arbitrary restrictions will unfairly limit Plaintiff's ability to present her case in front of an unbiased jury. With considerations of due process, equity, proportionality, and Plaintiff's future at stake, procedural time limits on crucial trial components should be enlarged. As such, Plaintiff respectfully requests the Court allow Plaintiff 45 minutes to conduct appropriate, meaningful, *voir dire*; and 45 minutes for opening statement.

ARGUMENT

A. Plaintiff Respectfully Requests 45 Minutes of *Voir Dire* to Ensure a Fair and Impartial Jury in Light of the Nature of this Case and the Many Potential Biases Implicated by the Facts and Evidence to be Presented.

Plaintiff submits that counsel should be afforded 45 minutes in which to examine prospective jurors.

Voir dire permits litigants to determine whether potential jurors possess beliefs which would cause them to be biased in such a manner as to prevent one of the parties from obtaining a fair and impartial trial. *People v. Alexander*, 797 P.2d 1250, 1259 (Colo. 1990); accord *Smith v. District Court*, 907 P.2d 611 (Colo. 1995) (“the purpose of *voir dire* . . . is to enable counsel to select as fair and impartial a jury as possible.”). To that end, Plaintiff respectfully requests that the Court extend the time allowed for *voir dire*.

1. The Impartial Fact-Finder Test for Juror Qualification or Disqualification Requires Extended Time Here, Given the Emotional Nature of the Case and the Voluminous Amount of Evidence Involving up to Eight Expert Witnesses, Multiple Eyewitnesses, and Numerous Other Lay Witnesses.

The parties are entitled to “considerable latitude” during good faith examination of prospective jurors to enable the parties properly to exercise both peremptory challenges and challenges for cause. *Oglesby v. Conger*, 507 P.2d 883, 885 (Colo. App. 1972). A trial court may not limit *voir dire* to the point of preventing the parties from intelligently exercising challenges. See *People v. Greenwell*, 830 P.2d 1116 (Colo. App. 1992). “Limitations in terms of time or content must be reasonable in light of the total circumstances of the case.” *Minnesota v. Petersen*, 368 N.W.2d 320, 322 (Minn. App. 1985). Thus, if the circumstances of a case involve many emotional or prejudicial issues, extended time for meaningful *voir dire* is both appropriate and necessary for parties to effectively exercise both peremptory challenges and challenges for cause.

For example, meaningful *voir dire* examination includes questioning to elicit attitudes of bias or prejudice in light of the particular facts and evidence of the case at issue. “The test for determining disqualification for bias is whether the person will render a fair and impartial verdict according to the law and evidence presented at trial.” *People v. Fuller*, 791 P.2d 702, 706 (Colo. 1990); see C.R.C.P. 47(e). Rule 47(e) also lists bias and/or prejudice as one of the grounds for a challenge for cause, described as:

- (6) Having formed or expressed an unqualified opinion or belief as to the merits of the action;
- (7) The existence of a state of mind in the juror evincing enmity against or bias to either party. (LexisNexis 2015)

In determining whether a prospective juror possesses a “state of mind . . . evincing enmity against or bias to either party” within the meaning of the Rule, the trial court must consider the juror’s statements during *voir dire* as a whole. *Blades v. Dafore*, 704 P.2d 317, 324 (Colo. 1985).

Thus, counsel for the parties must be allowed sufficient time to elicit from the jurors any statements of bias or enmity that exists in the mind of each juror. “Facts which indicate a possibility of bias must be considered along with facts which indicate impartiality.” *Id.*

Therefore, meaningful *voir dire* will require an explanation of the parties’ theories of the case and the nature of the evidence the jury would be required to evaluate. *Blades*, 704 P.2d at 324.

The substantive issues in this case that are related to liability and damages are ripe for biases and emotional reactions that would lead to an improper result. Plaintiff will need to explore these issues to effectuate meaningful *voir dire* and ensure a fair result. (Several of these issues are subject to Motions in Limine currently before the Court.)

The time requirements for counsel to investigate and identify bias in any one person, let alone an entire panel on these numerous issues will be substantial and necessitates extending the normal time period allowed for *Voir Dire*.

2. Extended *Voir Dire* is Consistent With and Practicable Under the Provisions of C.R.C.P. 47.

Colorado Rule of Civil Procedure 47(a)(3) states, in pertinent part:

The parties or their counsel *shall* be permitted to ask the prospective jurors additional questions . . . The court may limit or terminate repetitious, irrelevant, unreasonably lengthy, abusive, or otherwise improper examination.

(Emphasis added). Thus, while the parties’ opportunity to examine prospective jurors is mandatory, the Rule also provides the Court with discretion to stop any improper *voir dire* examination, and eliminates the potential risk that allowing an extended *voir dire* will be a fruitless use of time. *Id.*

As the Colorado Supreme Court has explained, the purpose of *voir dire* is “to enable counsel to determine whether any members of the panel are possessed of beliefs which would cause them to be *biased* in such a manner as to prevent his client from obtaining a fair and impartial trial.” *Edwards v. People*, 418 P.2d 174, 177 (Colo. 1966) (emphasis added). Therefore, *before* a limitation may be imposed, the purpose of *voir dire* should first be achieved.

As this Court well knows, the critical importance of a meaningful *voir dire* cannot be overstated. Colorado Rule of Civil Procedure Rule 47 provides guidance for the Court and counsel to insure each case will be determined by a jury of fair and impartial individuals. Without the complete assurance that all impaneled jurors can be fair and impartial in their verdict before the trial begins and before any evidence is heard, the Court and the parties cannot proceed with any confidence of attaining a fair result. To allow even one juror with enmity or bias to be impaneled would result in a costly injustice, contradictory to the Court’s desire to provide a fair trial to all parties.

Consistent with the limitations and purpose of Rule 47, the Court must balance Plaintiff's interest to a fair and impartial jury with the time constraints on the justice system.

B. Plaintiff Respectfully Requests 45 Minutes for Opening Statement to Afford Plaintiff the Ability to Prove the Merits of Her Case, given the Factual Complexity and Large Volume of Evidence Likely to be presented at Trial.

Plaintiff respectfully submits that counsel be afforded 45 minutes for opening statement given the complexity of factual issues in this case; the large number of expert and lay witnesses likely to be called upon to give evidence; and, lastly, the fact that Plaintiff has the burden of proof and thus her right to prove her case should not be subjected to arbitrary time restrictions.

The management of a trial is generally left to the sound discretion of the court. *Armour v. Colorado National Bank*, 658 P.2d 284, 285-86 (Colo. App. 1982). In fact, the court's discretion is similar to its ability to extend or limit *voir dire*, as necessary to the particular circumstances of the case. See generally *Edwards v. People*, 418 P.2d 174, 177 (Colo. 1966).

The purpose of an opening statement, whether in a criminal or civil action, is to inform the fact finder of the evidence which may be offered to support the claims of the parties. *Melton By and Through Melton v. Larrabee*, 832 P.2d 1069, 1071 (Colo. App. 1992). As with *voir dire*, the time allotted should be proportional to the evidence and circumstances of the case at issue, and the purpose of the procedure should be fully satisfied before any limitations are considered or imposed. In the instant case, there will be a great deal of technical medical information presented through a large number of experts.

Further, the purpose behind the Colorado Rules of Evidence, and the discretion the Rules afford to the Court, also lends support to Plaintiff's Motion. For example, C.R.E. 611 gives trial courts control "so as to (1) make the interrogation and presentation *effective* for the presentation of the *truth*" and (2) to avoid the needless consumption of time. The truth-seeking function of trial is paramount and should be held sacrosanct over mere procedural efficiencies. As a further illustration of this point, the Colorado Supreme Court, in the context of summary judgment, has explained:

Although summary judgment serves the salutary goal of saving judicial resources that otherwise might be expended in protracted litigation, it is not a substitute for trial. As one court observed:

'We have long recognized that no matter how enticing, in an era of congested dockets, is a device to dispose of cases without the delay and expense of traditional trials with their sometime cumbersome and time-consuming characteristics, summary judgment was not devised for, must not be used as, a substitute for trial. . . . Consequently, where the proceedings have indicated that a genuine issue existed, we have consistently rejected appealing shortcuts . . .'

Mt. Emmons Min. Co. v. Town of Crested Butte, 690 P.2d 231, 239 (Colo. 1984) (quoting *Bruce Construction Corp. v. United States*, 242 F.2d 873, 874 (5th Cir. 1957)).

The Colorado Supreme Court has thus cautioned against taking “short cuts” to save time, and, despite the fact that trials are sometimes consuming and cumbersome, the Court’s admonition should apply with as much or even greater force to the crucial trial components themselves. “[T]here is a strong judicial preference for deciding cases on the merits rather than on the basis of time limitations.” *People v. Moore*, 562 P.2d 749, 751 (Colo. 1977). Thus, Plaintiff should not be artificially restricted in the time she is allowed to present her case with respect to *voir dire* or opening statement, especially in circumstances such as these where such time restrictions would unfairly prejudice her ability to present the merits of her case.

CONCLUSION

Plaintiff acknowledges the value of judicial resources in light of this complicated case involving numerous expert and lay witnesses on both sides, requiring additional time. Allowing additional time to obtain a fair result is critical with the large volume of witnesses and evidence, as well as the large number of potential emotional distractions that could influence the jury. With the volume and complexity of evidence likely to be presented in this case, Plaintiff requests adequate time to fully present her arguments.

WHEREFORE, Plaintiff respectfully requests the Court allow both sides 45 minutes to conduct *voir dire* and to allow both sides 45 minutes to present their respective opening statements to the jury.

DATED this 15th day of February, 2016.

BENDINELLI LAW FIRM, P.C.

*This pleading is filed electronically pursuant to C.R.C.P.
121 § 1-26. The original signed pleading is in counsel’s
file.*

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