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| DISTRICT COURT, ADAMS COUNTY, COLORADO  1100 Judicial Center Drive, Brighton, CO 80601 | DATE FILED: January 18, 2016 5:3 FILING ID: C2548E97B1C04 CASE NUMBER: 2015CV31808 |
| **PLAINTIFF: AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AS SUBROGEE OF KATHRYN WINDT** |
| **V.** |  |
| **DEFENDANTS: JVONNE BECERRIL & AURELIO MEZA-CUEVAS** | * COURT USE ONLY  |
| **&** |  |
| **DEFENDANTS:/THIRD PARTY PLAINTIFFS: JVONNE BECERRIL & AURELIO MEZA-CUEVAS** |  |
| **V.** |  |
| **THIRD PARTY DEFENDANT/COUNTERCLAIMANT: KATHRYN WINDT** |  |
| Name: **COOK & PAGANO, P.C.**  Address: 2590 Trailridge Drive East, Suite 202 Lafayette, Colorado 80026  Telephone: 303-543-1000  Facsimile: 303-543-8582  Atty. Reg#: Stephen H. Cook: 6692  James L. Pagano: 39508 | Case No. 2015CV31808  Ctrm: |
| **KATHRYN WINDT’S UNOPPOSED MOTION FOR LEAVE TO AMEND RESPONSIVE PLEADING TO ASSERT COUNTERCLAIM AGAINST THIRD PARTY PLAINTIFFS** | |

Third Party Defendant, Kathryn Windt, through counsel, moves this Court for an Order allowing her leave to amend her responsive pleading to assert a counterclaim against Jvonne Becerril and Aurelio Meza-Cuevas through the filing of her Counterclaim Complaint. As grounds, Mrs. Windt states the following:

**CERTIFICATE OF CONFERRAL**

On January 18, 2016, undersigned counsel conferred with Mr. Jeffrey Ruebel, counsel for Ms. Becerril and Mr. Meza-Cueva regarding the relief sought herein and the grounds. Mr. Ruebel stated that his clients are not opposed to the relief sought. Thus, this motion is UNOPPOSED.

**FACTUAL BACKGROUND**

1. On October 3, 2014, Mrs. Windt was involved in a motor vehicle collision with a vehicle being driven by Ms. Becerril.
2. Mrs. Windt was injured in the collision.
3. Mrs. Windt’s vehicle is insured by American Family.
4. Ms. Becerril caused the collision by failing to comply with traffic signals and failing to yield the right of way to Mrs. Windt.
5. Ms. Becerril was an unlicensed driver, at the time of the collision.
6. The vehicle that was being driven by Ms. Becerril is owned by Mr. Meza-Cueva.

**PROCEDURAL BACKGROUND**

1. On November 6, 2015, American Family, as subrogees to Mrs. Windt, filed a Complaint against Ms. Becerril and Mr. Meza-Cueva (hereinafter Defendants). The Complaint sought recovery of benefits paid on behalf of Mrs. Windt by American Family. This would include property damages and potentially medical payment benefits. American Family’s Complaint does not seek to recover for Mrs. Windt personal injury losses.
2. On December 23, 2015, Defendants filed their Answer to American Family’s Complaint. Therein, they asserted a Third-Party Complaint against Mrs. Windt. The third party complaint seeks recovery from Mrs. Windt for the personal injuries of Defendants.
3. On January 15, 2016, American Family filed its Answer to Defendants’ Third Party Complaint.
4. Mrs. Windt now seeks leave to assert her counterclaims against Defendants, for recovery of personal injury losses.

**STANDARD OF REVIEW FOR MOTION FOR LEAVE TO AMEND**

The granting of leave to amend pleadings is within the discretion of the trial court. *Polk v. Denver District Court,* 849 P.2d 23, 25 (Colo. 1993). C.R.C.P. 15(a) provides in part that “a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” The phrase “when justice so requires,” under Rule 15(a) is liberally construed, and courts are encouraged to look favorably upon requests to amend. *Benton v. Adams*, 56 P.3d 81, 85–86 (Colo. 2002); *Polk*, 849 P.2d at 25; *Eagle River Mobile Home Park, Ltd. V. District Court*, 647 P.2d 660 (Colo. 1982). The “rationale behind the rule is that a substantive right should never be sacrificed to mere form.” *Van Schaack v. Phipps*, 38 Colo. App. 140, 558 P.2d 581, 586 (1976). If the underlying facts or circumstances relied on by the moving party may be a proper subject of relief, they ought to be afforded an opportunity to test their claims on the merits. *Polk,* 849 P.2d at 25 (*citing Varner v. Denver District Court*, 618 P.2d 1388, 1390 (Colo. 1980)). Mrs. Windt seeks leave to amend her responsive pleading to the Third Party Complaint by filing a Counterclaim Complaint for personal injuries. It may be that Mrs.

Windt’s counterclaim is a compulsory counterclaim pursuant to the procedural rules. If that is the case, then if she does not make her claims now, she will lose them; thus the interests of justice are served by allowing her leave to assert her claims against Defendants. If her claims are not compulsory, then the interests of judicial efficiency and justice are

served by allowing her to assert her claims in this action, to avoid a duplicative lateral proceeding.

**MOTION FOR LEAVE**

Mrs. Windt seeks leave to assert her counterclaim for personal injuries. There is a dispute as to liability. Defendants have alleged that Ms. Becerril had a green light as she approached the intersection where the collision occurred. Defendants’ Answer, Jury Demand and Third Party Complaint Against Kathryn Windt, ¶39. Mrs. Windt alleges that she had a green light as she proceeded through the intersection. Complaint, ¶9.

Mrs. Windt alleged claims of negligence and negligence *per se* against Defendant Becerril. Complaint, p. 2-3. Mrs. Windt alleged a claim of negligent entrustment against Defendant Meza-Cuevas. Mrs. Windt’s Counterclaim Complaint is attached hereto. It alleges the same causes of action. A proposed order granting Mrs. Windt leave to assert her counterclaims is attached hereto.

Amendments may be denied only upon a showing of prejudice to the Court or the non-moving party. *K-R Funds, Inc. v. Fox,* 640 P.2d 257 (Colo. App. 1981). Here, the Court will not be prejudiced by the amendments as no trial has been set and this case became at- issue only one business day ago. There should be no prejudice to the Defendant particularly since this motion is unopposed and there has been no discovery conducted to date and disclosures have not yet been exchanged. There should further be no prejudice against Defendants given that the causes of action alleged against Defendants by Mrs.

Windt are the same claims asserted in American Family’s Complaint. The only addition is a claim for personal injury losses by Mrs. Windt.

WHEREFORE, for the above reasons, Kathryn Windt requests that the Court grant her leave to file her Counterclaim Complaint*,* which includes a claim for personal injuries, and accept the Counterclaim Complaint as filed and served as of the date of the Order granting her motion for leave.

DATED: January 18, 2016.

**COOK & PAGANO, P.C.**

*Signature on file at COOK & PAGANO, P.C.*

/s/*James L. Pagano*

James L. Pagano

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served on January 18, 2016, via *ICCES* to the following:

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| David Perry  Law Office of David B. Perry, LLC 7200 East Dry Creek, F203 Centennial, CO 80112  Dylan Lewis PO Box 3328  Englewood, CO 80155-3328 | Jeffrey Ruebel  RUEBEL & QUILLEN, LLC  8501 Turnpike Drive, Suite 106  Westminster, CO 80031 |

*Signature on file at COOK & PAGANO, P.C.*

*/s/ Ashley Neumann*

Ashley Neumann