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| DISTRICT COURT, ADAMS COUNTY, COLORADO  1100 Judicial Center Drive, Brighton, CO 80601 | DATE FILED: December 1, 2016 4 FILING ID: D831784CB8DF2 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: IVONNE 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 AMENDED MOTION TO AMEND COUNTERCLAIM COMPLAINT TO ADD CLAIM FOR PUNITIVE DAMAGES** | |

Kathryn Windt submits her Amended[1](#_bookmark0) Motion to Amend Counterclaim Complaint to add a claim for exemplary damages based on Ivonne Becerril’s driving conduct and states:

1 The amendments are citations to the depositions of Mrs. Windt and Ms. Becerril. No other changes were made other than to ¶6 of the factual background to correct a misstatement.

The original motion had Ms. Becerril initiating the telephone call to her husband. After review of the transcript, that was corrected to reflect that Ms. Becerril’s husband initiated the telephone call.

**CERTIFICATE OF CONFERRAL**

Immediately after hearing Ms. Becerril’s deposition testimony that is the grounds for this motion, undersigned counsel conferred regarding the relief sought in this motion. Ms. Becerril’s counsel reports opposition to the motion.

**FACTUAL BACKGROUND**

1. On October 3, 2014, Kathryn Windt and Ivonne Becerril were involved in a motor vehicle collision at the intersection of 104th and Fox Run in Thornton, Colorado.
2. Just prior to the collision, Ms. Becerril was in through-lane of 104th approaching the intersection. Ms. Windt was headed towards the intersection coming from Ms. Becerril’s right. Ms. Windt was driving through the intersection to proceed onto Fox Run. Ms. Windt testified at her deposition that her light was green. *Exhibit 10,* Windt Depo. 26:24-27:17.
3. At her deposition, Ms. Becerril testified that she never saw Ms. Windt proceeding through the intersection until she struck Ms. Windt’s vehicle. *Exhibit 11,* Becerril Depo. 40:2-6.
4. At her deposition, Ms. Becerril testified that she was on the phone with her husband at the time of the collision. *Exhibit 3,* 52:3-7. In her discovery responses, dated October 11, 2016, Ms. Becerril told a different story; claiming she had ended her phone call before the collision. *Exhibit 1,* Becerril’s Responses to Request for Admission, #4.
5. At her deposition, Ms. Becerril testified that her husband was giving her directions and telling her she was on the wrong road when the collision occurred. *Exhibit 11,* 53:4-9.
6. At her deposition, Ms. Becerril testified that her husband initiated the call to her.

*Exhibit 11,* 52:14-15.

1. At her deposition, Ms. Becerril testified that driving while talking on the phone is unsafe. *Exhibit 11,* 56:16-18.
2. Kathryn Windt was injured in the collision.

**STANDARD OF REVIEW**

The granting of leave to amend the complaint 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 a 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)). Ms. Windt seeks leave to amend the Complaint to add a claim for exemplary damages against Ms. Becceril.

**LEGAL STANDARDS FOR EXEMPLARY DAMAGES**

C.R.S. § 13-21-102(1.5)(a) states that a claim for exemplary damages “may be allowed by amendment to the pleadings only after the exchange of initial disclosures pursuant to Rule 26 of the Colorado Rules of Civil Procedure and the plaintiff establishes *prima facie* proof of a triable issue.” Initial disclosures have been exchanged.

The facts show *prima facie* proof of a triable issue of exemplary damages. Plaintiff need not conclusively prove entitlement to exemplary damages; instead, a triable issue of exemplary damages is established by a showing of a reasonable likelihood that the issue will ultimately be presented to the jury for resolution. *Evans v. Colorado Permanente Medical Group, P.C.,* 902 P.2d 867, 873 (Colo. App. 1995), *aff’d in part, rev’d in part on other grounds,* 926 P.2d 1218 (Colo. 1996). The threshold standard is lenient. This threshold is met when conduct is purposefully committed which the actor must have realized was done

heedlessly and recklessly without regard to the consequences to or the rights of the other party. *Coors v. Security Life of Denver Ins. Co.,* 112 P.3d 59, 66 (Colo. 2005).

“In all civil actions in which damages are assessed by a jury for a wrong done to the person… and the injury complained of is attended by circumstances of …willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. C.R.S. 13-21-102(1)(a); *Frick v. Abell*, 602 P.2d 852, 854 (Colo. 1979). "Willful and wanton conduct" is defined as "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff." C.R.S. 13-21-102(1)(b); *Palmer v. A.H. Robbins Co.*, 684 P.2d 187, 215 (Colo. 1984); *Archer v. Farmer Bros. Co.*, 70 P.3d 495, 500-501 (Colo. Ct. App. 2002).

Amendments may be denied only upon a showing of prejudice to the Court or defendant. *K-R Funds, Inc. v. Fox,* 640 P.2d 257 (Colo. App. 1981). Here, the Court will not be prejudiced by the amendments as there will be no effect on the trial date or trial. Ms. Becerril faces no prejudice as the amendments arise from her conduct that she has always been aware, and from the illegality of her conduct, and the effect her conduct has had on the other individuals and in particular Mrs. Windt. Further, because Ms. Becerril initially stated in discovery that she was not on her phone at the time of the crash, only to contradict that statement at her November 23, 2016 deposition, any temporal issues arising from this motion were caused by Ms. Becerril and/or her counsel.

**ARGUMENT**

A jury can reasonably infer from the evidence that Ms. Becerril’s telephone conversation distracted her and caused her to fail to see Ms. Windt in the intersection and

fail to see that Ms. Becerril had a red light as she approached the intersection. Ms. Becerril testified that she knows that being on the phone while driving is unsafe. A reasonable jury could determine that her conduct in causing the collision while distracted on the phone was a willful and wanton disregard for the consequences to or the rights and safety of Mrs. Windt and that her conduct merits an award of exemplary damages. C.R.S. 13-21- 102(1)(b). Mrs. Windt has established a *prima facie* showing of a triable issue of exemplary damages. Justice requires that Mrs. Windt be given leave to amend her Complaint to add that claim for damages.

To undersigned counsel’s knowledge, there is not yet an appellate case in Colorado addressing the use of a cellular phone while driving. Other Colorado District Courts have permitted plaintiffs to pursue exemplary damages against a defendant when evidence is presented that the defendant was using or attempting to use a cell phone while driving.

*Exhibit 2,* Colorado District Court Orders Allowing Exemplary Damages for Cell Phone Use While Driving. As Ms. Becerril admitted, driving while using a cell phone is unsafe. It distracts the driver’s attention from the road and is associated with a substantially higher incidence of motor vehicle collisions. Talking on the phone while driving creates a substantial risk of harm to another and is performed with an awareness of the risk and a disregard of the consequences, thus, satisfying the willful and wanton standard in *Palmer* and *Archer.*

Driving while talking on the phone is such a substantial risk to others that Colorado’s legislature has declared that: “the use of wireless telephones in motor vehicles is a matter of statewide concern.” C.R.S. §42-4-239 (9).

The Colorado Driver’s Handbook cautions drivers from the use of cell phone while driving: “A distraction is anything that diverts your attention, even momentarily, from the task of driving. . . . Do not allow yourself to become distracted by your cell phone[.]” *Exhibit 3,* p. 15.

The Colorado State Patrol conducted research concluding that inattention to driving (a category that includes talking on a cell phone while driving, *inter alia)* was the leading cause of fatal and injury causing collisions in 2013 in the state of Colorado. *Exhibit 4,* Colorado State Patrol Crash Trends, CY 2010-2013 Fatal and Injury Crashes Primary Causal Factors*, available at* [*www.colorado.gov/pacific/csp/crash-trends.*](http://www.colorado.gov/pacific/csp/crash-trends)

Scientific studies also point out the clear and known dangerous circumstances arising from drivers who talk on the phone while driving. Published research has established that the use of a cell phone while driving is as dangerous as drunk driving. *Exhibit 5,* Cell Phone Use as Dangerous as Drunken Driving (“Cell phone users have been found to be 5.36 times more likely to get in an accident than undistracted drivers. Other studies have shown the risk is about the same as for drivers with an .08 blood-alcohol level”), *available at* [*http://www2.potsdam.edu/alcohol/DrivingIssues/20060830105036.html#.VP8GN\_nF\_ng.*](http://www2.potsdam.edu/alcohol/DrivingIssues/20060830105036.html#.VP8GN_nF_ng)

In a University of Utah study, researchers found that: “With respect to traffic safety, the data suggest that the impairments associated with cell phone drivers may be as great as those commonly observed with intoxicated drivers One the one hand, we found that

intoxicated drivers hit the brakes harder, had shorter following distances On the other

hand, we found that cell phone drivers had slower reactions, had longer following distances, took longer to recover speed lost following a braking episode, and *were involved*

*in more accidents.* In the case of the cell phone driver, the impairments appear to be attributable, in large part, to the diversion of attention from the processing of information necessary for the safe operation of a motor vehicle.” *Exhibit 6,* STRAYER, DAVID, ET AL., “A Comparison of the Cell Phone Driver and the Drunk Driver”, p. 388. “[T]he relative risk of being in a traffic accident while using a cell phone is similar to the hazard associated with driving with a blood alcohol level at the legal limit. The data presented in this article are consistent with this estimate and indicate that when driving conditions and time on task are controlled for, the impairments associated with using a cell phone while driving can be as profound as those associated with driving with a blood alcohol level at .08%.” *Id.* p. 390. “Logical consistency would seem to dictate that any activity that leads to impairments in driving equal to or greater than the drunk driving standard should be avoided.” *Id.*

A University of Minnesota Department of Mechanical Engineering study showed that: “drivers engaged in the conversations (on cellular phones) or completing in-vehicle tasks were more impaired than drivers that were not involved in any distraction task.

Indeed, both the cell phone and in-vehicle sources of distraction were generally more impairing than intoxication at the legal limit.” *Exhibit 7,* RAUKUSAS, MICHAEL, ET AL., “Driving Performance During Cell Phone Conversations and Common In-Vehicle

Tasks While Sober and Drunk”, Minnesota Department of Transportation Research Services Section (October 2005), *available at* [*http://www.lrrb.org/PDF/200541.pdf.*](http://www.lrrb.org/PDF/200541.pdf)

A World Health Organization study showed that: “drivers using a mobile phone are approximately four times more likely to be involved in a crash than when a driver does not use a phone.” *Exhibit 8,* Mobile Phone Use: a Growing Problem of Driver Distraction, *available at*

[*http://www.who.int/violence\_injury\_prevention/publications/road\_traffic/distracted\_driving*](http://www.who.int/violence_injury_prevention/publications/road_traffic/distracted_driving_summary.pdf)

[*\_summary.pdf.*](http://www.who.int/violence_injury_prevention/publications/road_traffic/distracted_driving_summary.pdf)

The U.S. Department of Transportation’s National Highway Traffic Safety Administration found that in 2011, 3,331 people were killed and 387,000 were injured in distraction collisions. *Exhibit 9,* Traffic Safety Facts Research Note, *available at* [*http://www.distraction.gov/downloads/pdfs/traffic-saftey-facts-04-2013.pdf.*](http://www.distraction.gov/downloads/pdfs/traffic-saftey-facts-04-2013.pdf)Of those killed in fatal distraction collisions, 385 were killed by a driver using a cell phone. *Id.* Of those injured, 21,000 involved a driver using a cell phone. *Id.*

A jury can reasonably infer from the evidence that it was Ms. Becerril’s use of a cell phone, and the resulting known distraction of talking on a phone while driving, that caused the subject collision. Ms. Becerril was aware of the known risk of distraction that results from talking on the phone while driving, yet she engaged in that conduct regardless of the consequences to those on the road with her, including other drivers such as Mrs. Windt.

That evidence is sufficient for the issue of exemplary damages to be submitted to the jury.

*Stamp v. Vail Corp.*, 172 P.3d 437, 450 (Colo. 2007).

Ms. Becerril has shown the elements of *prima facie* proof of a triable issue on exemplary damages. She should be granted leave to amend her complaint to add that

claim.

A proposed Order is attached.

WHEREFORE, for the above reasons, Kathryn Windt requests that the Court grant her

leave to file her First Amended Counterclaim Against Third Party Plaintiffs, attached hereto as *Exhibit 10,* which includes a claim for exemplary damages against Ms. Becerril, and

accept the First Amended Counterclaim Against Third Party Plaintiffs as filed and served as of the date of the Order granting this motion.

DATED: November 29, 2016.

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

*Original Signature on file at the offices of Cook & Pagano, P.C.*

By: */s/ James Pagano*

James Pagano

Attorneys for Kathryn Windt CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on November 29, 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  Megan Fountain 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