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| DISTRICT COURT, ADAMS COUNTY, COLORADO1100 Judicial Center Drive Brighton, CO 80601**Plaintiff :**American Family Mutual Insurance Company, As Subrogee of Kathryn Windt, | DATE FILED: December 20, 2016 8 FILING ID: 981483F135F3DCASE NUMBER: 2015CV31808* COURT USE ONLY 
 |
| v. |  |
| **Defendants/Third Party Plaintiffs:**Jvonne Beceril and Aurelio Meza-Cuevas, | Case Number: 2015CV31808 |
| v. | Div.: W Ctrm.: |
| **Third Party Defendant/Counterclaimant:** |  |
| Kathryn Windt |  |
| **Attorneys for Defendants Beceril and Meza-Cuevas**Jeffrey Clay Ruebel Katherine L. Brim Ruebel & Quillen, LLC8501 Turnpike Drive, Ste 106Westminster, Colorado 80031Phone Number: (888) 989-1777FAX Number: (303) 362-5724E-mail: Jeffrey@rq-law.com |  |
| **DEFENDANTS’ RESPONSE TO WINDT’S MOTION TO AMEND COUNTERCLAIM COMPLAINT AND ADD CLAIM FOR PUNITIVE DAMAGES** |

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Jvonne Becerril and Aurelio Meza-Cuevas (“Defendants”), by and through counsel, Ruebel & Quillen, LLC, and in response to Plaintiff’s Motion to Amend her Counterclaim Complaint, states as follows:

# STANDARD OF REVIEW

In order to recover on a claim for exemplary damages, Mrs. Windt (“Windt” or “Plaintiff”) must establish, *beyond a reasonable doubt*, that Mrs. Becerril’s injurious conduct was attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of Plaintiff’s rights and feelings. *See* § 13-21-102 (6), C.R.S.; *Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986). Plaintiff must prove that Mrs. Becerril’s conduct was committed with an evil intent, and with the purpose of injuring Mrs. Windt, or with such a wanton and reckless disregard of Mrs. Windt’s rights as to show that Mrs. Becerril possessed a wrongful motive. *Id*. (citations omitted). Conduct that is merely negligent is not a basis for a claim for exemplary damages. *Webster v. Boone*, 992 P.2d 1183 (Colo. App. 1999); *Sheron v. Lutheran Med. Ctr*., 18 P.3d 796, 802 (Colo. App. 2000). Where the conduct upon which a proposed claim for exemplary damages is based shows mere negligence, a motion for leave to amend to add the complaint should be denied as futile. *See Macurdy v. Faure*, 176 P.3d 80, 884 (Colo. App. 2007); *Sheron*, 18 P.3d at 802. Plaintiff’s burden is a heavy one, and she has not met it merely by citing Defendant’s admission that she was talking on her cell phone at the time of the accident at issue in this case.

# RELEVANT FACTS

1. The accident at issue occurred at the intersection of 104th Avenue and Fox Run in Thornton, Colorado. See **Exhibit A**, Traffic Accident Report. The intersection is a four way stop controlled by traffic lights. **Exhibit B**, Deposition of Kathryn Windt, November 23, 2016 at 23.20-22.
2. Mrs. Becerril will testify that as she was proceeding through the intersection on a green light Plaintiff suddenly and unexpectedly pulled out directly into her path. **Exhibit C**, Deposition of Ivonne Becerril, November 23, 2016 at p. 36.6-8. She will testify that she did not anticipate Plaintiff would run a red light and appear within the intersection, and, although she attempted to stop, she was unable to avoid the accident. *Id*. at 41.16-42.8; **Exhibit D**, Defendant’s Second Set of Responses to Written Discovery at Response to Non-Pattern Interrogatory 5.
3. Mrs. Windt did not observe Mrs. Becceril’s vehicle or conduct prior to the accident. *See*

**Exhibit B,** Windt Deposition at 29.7-9; 33.4-6.

1. No witnesses to the accident have been identified.
2. The investigating officer did not determine that either party ran a red light, nor did he issue Mrs. Becerril a citation for a traffic violation related to the accident. See **Exhibit A**, Accident Report; **Exhibit B**, Windt Deposition at 47.14-16.
3. Nothing in the investigating officer’s report indicates that cell phone use caused or contributed to the accident. See **Exhibit A**, Accident Report.
4. Plaintiff has not endorsed any expert who will offer opinions as to the effect of cell phone use.
5. Plaintiff has not disclosed any witness competent to testify that Defendant’s cell phone use caused or contributed to the accident.
6. Mrs. Becerril was talking to her husband on her cell phone at the time of the accident. **Exhibit C**, Becerril Deposition, 33.12-22, 35.10-15. He was providing her with directions as to an alternative route to take. *Id*.
7. Mrs. Becerril admitted having been on her cell phone around the time of the accident in her discovery responses filed on October 11, 2016.[1](#_bookmark0) **Exhibit E**, Becerril First Set of Discovery Responses at Response 4.

# ARGUMENT

1. **Plaintiff has not met her burden of establishing *prima facie* proof of a triable issue regarding her entitlement to exemplary damages.**

Colorado law requires that Plaintiff establish prima faciae proof of a triable issue in order to amend her Counterclaim Complaint to add a claim for exemplary damages. C.R.S. § 13-21- 102 (1.5)(a) (“A claim for exemplary damages in an action governed by this section may be allowed by amendment to the pleadings only after the exchange of initial disclosures…*and the Plaintiff establishes prima facie proof of a triable issue*) (emphasis added). Plaintiff must

1 Mrs. Becerril stated that she was talking on her cell phone at the time of the accident at her deposition. Mrs. Becerril does not speak English, and due to a miscommunication as to when exactly the call ended, Mrs. Becerril’s original responses to written discovery stated that Mrs. Becerril had just concluded the call to her husband at the time of the accident.

establish, *beyond a reasonable doubt*, that Defendant’s conduct was accompanied by circumstances of fraud, malice, or willful and wanton conduct. C.R.S § 13-21-102 (1)(a); C.R.S

§ 13-25-127(2); *Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986); *Miller v. Solagas California, Inc.*, 870 P.2d 559, 568 (Colo. App. 1993). The sufficiency of the evidence to justify an award of exemplary damages is a matter of law for the court’s determination. *Western Fire Truck, Inc. v. Emergency One, Inc.,* 134 P.3d 570, 578 (Colo. App. 2006). Conduct justifying a claim for exemplary damages is that which was committed with an evil intent, and with the *purpose* of injuring the plaintiff, or with such a wanton and reckless disregard of her rights as to show that the defendant possessed a *wrongful motive*. *Tri-Aspen,* 714 P.2d. at 486 (citations omitted). The specific conduct upon which the claim is based must have a causal link to the injury complained of. *See* C.R.S. § 13-21-102 (1)(a) (in civil actions where “the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct” the jury may award reasonable exemplary damages.)

There is no evidence which can be gleaned from Plaintiff’s Motion and Exhibits thereto that Defendant’s conduct was willful and reckless or that Defendant’s conduct caused Plaintiff’s damages. Plaintiff has done nothing more than show what Defendant herself has acknowledged: that Mrs. Becerril was talking to her husband at the time of the accident. She has not shown that Mrs. Becerril was talking on the phone with the purpose of injuring Mrs. Windt or with any wrongful motive. She has presented no evidence whatsoever that Mrs. Becerril’s behavior had any causal connection to the accident.

Mrs. Becerril was speaking with her husband in order to obtain directions as to an alternate route to take to his job site. **Exhibit C**, Becerril Deposition at 33.12-22, 35.10-15. She was not in any hurry. *Id*. at 52.23-53.3. Plaintiff has presented no evidence that Mrs. Becerril

was driving erratically. Mrs. Becerril will testify that her phone call in no way caused or contributed to the accident. **Exhibit D** at Response 5. Mrs. Windt cannot testify to Mrs. Becerril’s pre-accident conduct as she did not even see Mrs. Becerril’s vehicle until after the accident occurred. **Exhibit B**, Windt Deposition at 29.7-9; 33.4-6 The investigating officer was unable to determine fault for the accident, did not cite Mrs. Becerril for any traffic violation, and did not indicate anywhere in his report that cell phone use contributed to the accident. **Exhibit A**, Traffic Report.

Mrs. Becerril’s conduct is akin to looking at a map in order to obtain directions while driving. It is a far cry from choosing to drive while intoxicated. Although conduct may be viewed as negligent, it is quite another matter to conclude that the conduct warrants punishment in the form of exemplary damages. *See Mince v. Butters*, 616 P.2d 127, 129 (Colo. 1980). The Colorado legislature has not outlawed talking on a cell phone while driving; indeed, even the drivers’ handbook which Plaintiff cites as support for her Motion advises only that drivers *limit* their cell phone use to brief or essential calls. That is exactly what Mrs. Becerril was doing. Plaintiff has cited no binding precedent holding that merely talking on a cell phone while driving justifies a claim for exemplary damages, and the orders of Colorado district courts on this issue show that cell phone use clearly is not per se justification for such a claim and that the specific circumstances of such use must be evaluated in each case. See **Exhibit F**, Colorado District Court Orders Denying Exemplary Damages for Cell Phone Use.

The arguments Plaintiff makes as to the effect of cell phone use generally cannot support her claim. *City of Fountain v. Gast*, 904 P.2d 478 (Colo. 1995) (the arguments of counsel are not evidence). Plaintiff has not endorsed any expert witness who will opine as to the effect of cell phone use on a driver. Nor would any such opinion prove that Mrs. Becerril was using her cell

phone in order to purposefully injure Mrs. Windt or with such reckless and wanton disregard of Mrs. Windt’s rights as to show that Mrs. Becerril possessed a wrongful motive. The deadline to disclose experts has passed.

Here, where Mrs. Becerril’s use of her cell phone is unaccompanied by any egregious conduct or evidence of impairment, the evidence Plaintiff has presented amounts, at *most*, to a primae faciae showing of negligence. *See Core-Mark Midcontinent, Inc. v. Sonitrol Corp*., 300 P.3d 963, 970 (Colo. App. 2012). The willful and wanton conduct upon which an exemplary damages claim must be based extends beyond mere unreasonableness; it must be reckless conduct exhibiting an intent consciously to disregard the safety of others. *Id*. Plaintiff’s Motion must therefore be denied. *See Webster v. Boone*, 992 P.2d 1183 (Colo. App. 1999) (conduct that is merely negligent cannot serve as a basis for exemplary damages); *Sheron v. Lutheran Med. Ctr*., 18 P.3d 796, 802 (Colo. App. 2000).

# Plaintiff’s Motion is untimely, she has not made the requisite showing that her late filing is justified, and the late filing prejudices Defendants.

The deadline to amend pleadings passed on May 18, 2016. Mrs. Windt must therefore demonstrate a lack of knowledge, mistake, inadvertence, or other reason for having moved to amend her complaint earlier. *See Union Ins. Co. v. Kjeldgaard*, 820 P.2d 1183, 1186 (Colo. App. 1991); *Polk v. Denver District Court*, 849 P.2d 23, 26-27 (Colo. 1993). Both undue delay and prejudice to the opposing party are valid reasons for denial of a motion to amend. *Polk*, 849 P.2d at 27. The court must balance the policy favoring amendments to pleadings with the burdens which granting the amendment will impose on the opposing parties. *Id*. at 26. Where the movant has not met his burden of justifying the untimeliness of his motion, the motion should be denied, especially if the late filing causes prejudice which outweighs the interests

served by the amendment. *See id* at 26; *Werkmeister v. Robinson Dairy, Inc.,* 669 P.2d 1042, 1044 (Colo. App. 1983); *Koontz v. Rosener,* 787 P.2d 192, 197 (Colo. App. 1989).

An important factor in the court’s analysis is the timing of the movant’s knowledge as to the basis for his motion. *Id*. at 27. Here, Plaintiff knew that Defendant was on her cell phone immediately prior to the accident as of the October 11, 2016 filing of Defendant’s first set of responses to written discovery. Plaintiff did not depose Defendant in order to inquire further into the circumstances of Mrs. Becerril’s cell phone use until November 23, 2016. Lack of diligence in the discovery process is not a valid justification for delay in filing a motion to amend. *Polk*, 849 P.2d at 26-27.

Discovery closes just weeks from now on Jan 13, 2017. This matter is set for trial beginning on March 7, 2016.If Plaintiff’s Motion is granted, additional discovery as to the circumstances of the accident will be necessary. The investigating officer has not been deposed. His deposition testimony regarding the nature and extent of any knowledge he has as to Mrs. Becerril’s cell phone use would likely be necessary were Plaintiff’s Motion granted. Moreover, if Plaintiff’s Motion is granted, she will likely seek additional discovery regarding Mrs. Becerril’s cellular telephone records. Discovery as to the substance and meaning of the records, as well as the specific correlation between data shown in the records and the timing of the accident, would cause additional delay and significant expense, thereby prejudicing Defendants.

Under such circumstances, Plaintiff should not be permitted to amend her Complaint to allege an exemplary damages claim against Defendant Becerril. Plaintiff’s Motion should be denied.

WHEREFORE, Defendants request that Windt’s Motion be denied.

**DATED** this 20th day of December, 2016.

Respectfully submitted, RUEBEL & QUILLEN, LLC



Jeffrey C. Ruebel

Katherine L. Brim, No. 46532

# CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing Response was E-Served by the Court-authorized E-System provider, to the following on this 20th day of December, 2016:

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 */s/ Katherine L. Brim*

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