

University of Colorado Law School

Colorado Law Scholarly Commons

Colorado Supreme Court Records and Briefs Collection

9-7-1977

Buxman v. Shallenburger

Follow this and additional works at: <https://scholar.law.colorado.edu/colorado-supreme-court-briefs>

Recommended Citation

"Buxman v. Shallenburger" (1977). *Colorado Supreme Court Records and Briefs Collection*. 119.
<https://scholar.law.colorado.edu/colorado-supreme-court-briefs/119>

This Brief is brought to you for free and open access by Colorado Law Scholarly Commons. It has been accepted for inclusion in Colorado Supreme Court Records and Briefs Collection by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

IN THE SUPREME COURT
OF THE STATE OF COLORADO

Case No. 27791

PATRICIA BUXMAN,

Petitioner,

vs.

THE HONORABLE FRANCIS L.
SHALLENBURGER, 13th
JUDICIAL DISTRICT,

Respondent.

FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO
SEP - 7 1977

Flourence Walsh

RESPONDENTS' ANSWER TO RULE TO SHOW CAUSE

Paul D. Cooper - Mo. 1648
of YEGGE, HALL & EVANS
Attorneys for Respondent - Defendant
1340 Denver Club Building
Denver, Colorado 80202
573-5022

DATED: September 7, 1977

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF THE CASE	1
II. ARGUMENT	1
III. CONCLUSION.	2

TABLE OF CASES

None

IN THE SUPREME COURT
OF THE STATE OF COLORADO

Case No. 27791

PATRICIA BUXMAN,)	
)	
Petitioner,)	
)	
vs.)	<u>RESPONDENTS' ANSWER TO RULE</u>
)	<u>TO SHOW CAUSE</u>
THE HONORABLE FRANCIS)	
L. SHALLENBURGER, 13th)	
JUDICIAL DISTRICT,)	
)	
Respondent.)	

I. STATEMENT OF THE CASE

This is an action for negligence and assault and battery filed in approximately May of 1974. Trial was held commencing September 23, 1975. A Motion for New Trial was filed and granted. The new trial was scheduled for August 22, 1977.

On August 10, 1977, Plaintiff filed a Motion for Continuance on the grounds that their expert witness, Dr. Richard Sanders, stated he would not appear at trial.

On August 11, 1977, Defendant filed a Motion to Dismiss for failure of the plaintiff to comply with discovery.

On August 15, 1977, a hearing was held on Plaintiff's Motion for Continuance. The motion was denied.

On August 18, 1977, a hearing was held on Defendant's Motion to Dismiss. After extensive testimony, the Court found that Plaintiff has willfully failed to comply with discovery, and the action was dismissed.

II. ARGUMENT

A. THE APPEAL IS MOOT.

At the August 18, 1977, hearing on Defendant's Motion to Dismiss, the Court found that there had been a continuing willful failure on the part of the plaintiff to comply with discovery, and that said failure would materially prejudice defendant at the

time of trial. Since the failure of the plaintiff to submit to discovery dated from the inception of this action more than three years ago, defendant was through no fault of his own unable to adequately prepare to defend the matter. Accordingly, the action was dismissed.

Since the action was dismissed for failure of the plaintiff to comply with discovery, the issue as to the propriety of the Order denying a continuance is moot.

B. THE ORDER WAS PROPER AND WITHIN THE SOUND DISCRETION OF THE COURT.

Although plaintiff knew of the upcoming trial date, and promised the Court there would be no more continuance, she failed to notify her expert of the date.

At the hearing on Plaintiff's Motion for Continuance, the Court denied the continuance on the grounds that since Dr. Sanders was under subpoena by plaintiff, he was not unavailable for trial as set forth by statute. It further held that defendant could not be ordered to proceed by way of deposition of Dr. Sanders since no written notice had been given to defendant that plaintiff intended to take the deposition of Dr. Sanders in lieu of testimony at trial and since Dr. Sanders was not unavailable at any rate.

The inability of plaintiff to proceed was due entirely to her lack of diligence, and the denial of the motion was within the sound discretion of the Court.

III. CONCLUSION

The appeal is moot and the order denying the continuance

was proper, and respondent respectfully requests that this Court quash the Order to Show Cause previously issued in this proceeding.

Respectfully submitted,

Paul D. Cooper

Paul D. Cooper - No. 1648
of YEGGE, HALL & EVANS
1340 Denver Club Building
Denver, Colorado 80202
Attorneys for Defendant - Respondent
573-5022

CERTIFICATE OF MAILING

I hereby certify that on this 7th day of September, 1977, I deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing RESPONDENTS' ANSWER TO RULE TO SHOW CAUSE to Mr. Allen J. Kincaid, Attorney at Law, Suite 204 Livestock Exchange, P. O. Box 116, Brush, Colorado 80723 and Mr. Richard L. Banta, Sr., Attorney at Law, 900 First National Bank Building, 333 West Hampden Avenue, Englewood, Colorado 80110.

Susan J. Gante