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3-17-1976

### Buxman v. Shallenberger

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CERAMIC  
CERAMIC

MAR 17 1972

Robert D. Clark

RESPONSE TO PETITION FOR RELIEF  
IN NATURE OF WRIT OF BOTH  
MANDAMUS AND CERTIORARI

  
Richard L. Banta, Jr.  
Attorney Registration No. 1689  
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1016 First National Bank Building  
333 West Hampden Avenue  
Englewood, Colorado 80110  
Telephone: (303) 789-4408

IN THE SUPREME COURT OF THE

STATE OF COLORADO

No. 27130

PATRICIA BUXMAN and  
H. THOMAS BUXMAN,

Petitioners,

vs.

RESPONSE TO PETITION FOR RELIEF  
IN NATURE OF WRIT OF BOTH  
MANDAMUS AND CERTIORARI

THE HONORABLE FRANCIS L.  
SHALLENBERGER, THIRTEENTH  
JUDICIAL DISTRICT,

Respondent.

Comes now William Larrick, by his Counsel of record, and though not named as a Respondent in this proceeding, submits his response to the Petition for Writ of Both Mandamus and Certiorari and suggests to the Court that the proceeding is not well taken, that mandamus or certiorari do not lie, and this Court should not accept jurisdiction.

Counsel for William Larrick was served by mail with a copy of the Petition filed by Petitioners in this cause. William Larrick is the named Defendant in the Civil Action No. 12456 in the District Court in and for the County of Morgan entitled Patricia Buxman, et.al., versus William Larrick, wherein certain orders were entered by the Honorable Francis L. Shallenberger, of which orders the Petitioner complains. William Larrick should have been named a party to the original proceeding filed in this Court by Petitioners and by this response asserts his position in opposition thereto.

It is unnecessary at this juncture to review or respond to each allegation of the Petition. However, to put the Petitioners position in the proper prospective it is noted the Petitioners seek:

(a) A review of the dismissal of the claims of Thomas Buxman by the Court under the provisions of Rule 37 CRCP for willful failure to appear for a deposition. The writ sought by Petitioners lies only to compel an inferior tribunal to

exercise its judgment or discharge its functions, but not to control its judicial discretion.

(b) A review of the dismissal of the claim of Patricia Buxman based on negligence and her claim for exemplary damages, both being rulings of the trial court based on the evidence adduced at the trial of the Patricia Buxman claim.

Although Certiorari is in the nature of any appellate process, the principal office of the writ is to determine whether the conduct of an inferior tribunal was within its jurisdiction and otherwise legal, and to correct substantial errors of law not otherwise reviewable by a Court. The supervisory jurisdiction of the Court cannot be exercised in order to review the judgment or other as to its intrinsic correctness, either on the law or the facts of the case. 14 Am.Jur.2d.Certiorari §2 at 778-779.

Petitioners seek to invoke the original jurisdiction of this Court under Section 3, Article VI, Colorado Constitution and Rule 21, CAR. Original proceedings cannot supersede the ordinary functions of an appeal. People ex rel. Larkey v. District Court, 30 Colo. 123, 69 P.597, (1902); People ex rel City & County of Denver v. District Court, 81 Colo. 163, 255 P.447 (1927).

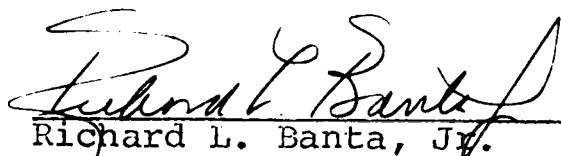
Petitioners have a speedy and adequate remedy without resort to the extra ordinary process of seeking the jurisdiction of this Court by original proceedings. The remedy available and in this instance appropriate, if timely filings have been made, is by appeal from the judgments entered by the trial court. This process has been recognized by Petitioners as evidenced by the following:

(a) Notice of Appeal, filed March 8, 1976, with the Clerk of the District Court, Morgan County, Colorado (Exhibit A and Exhibit B, attached hereto); and

(b) Notice to the Clerk of the Court of Appeals of the State of Colorado that a Notice of Appeal was filed in the District Court of the County of Morgan, State of Colorado (Exhibit C attached hereto).

By the appeal process, the rights of the Petitioners are protected. There is no danger to the substantive rights of either Petitioner.

Mandamus and Certiorari do not lie.



Richard L. Banta, Jr.  
Attorney Registration No. 1689  
BANTA, BANTA & EITEL  
1016 First National Bank Bldg.  
333 West Hampden Avenue  
Englewood, Colorado 80110  
Telephone: (303) 789-4408

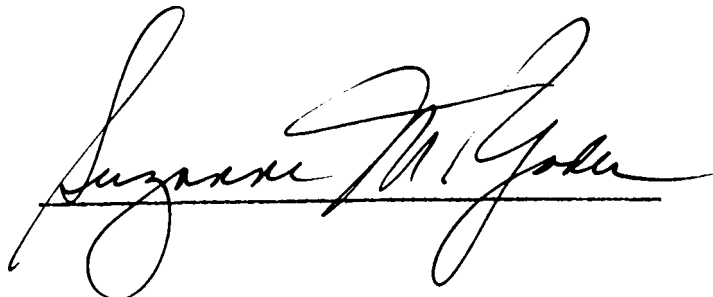
#### CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing RESPONSE TO PETITION FOR RELIEF IN NATURE OF WRIT OF BOTH MANDAMUS AND CERTIORARI, by depositing the same in the United States Mail, postage prepaid, at Englewood, Colorado, on this 17th day of March, 1976, to the following:

Allen J. Kincaid  
Attorney for Petitioners  
320 Edison Street  
Post Office Box 116  
Brush, Colorado 80723

George Alan Holley  
Attorney for Petitioners  
GEORGE ALAN HOLLEY & ASSOCIATES  
13949 West Colfax Avenue  
Golden, Colorado 80401

Paul D. Cooper  
YEGGE, HALL & EVANS  
1340 Denver Club Building  
Denver, Colorado 80202



IN THE DISTRICT COURT IN AND FOR THE COUNTY OF  
MORGAN AND THE STATE OF COLORADO  
Civil Action No. 12456

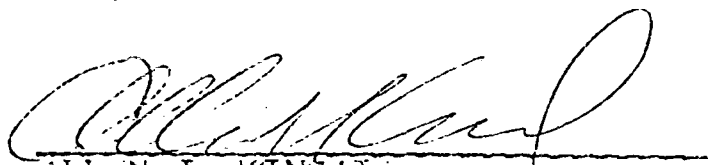
PATRICIA BUXMAN,  
Plaintiff,  
vs.  
WILLIAM LARRICK,  
Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN:

That Patricia Buxman, Plaintiff above-named, pursuant to Colorado Appellant Rules 3 and 4, hereby appeals to the Colorado Court of Appeals that Order entered on the 6th day of February, 1976, by the trial court herein, a copy of which is attached hereto as Exhibit "A" and incorporated herein.

Dated this 5th day of March, 1976.

  
ALLEN J. KINCAID  
Attorney for Plaintiff  
Attorney Registration No. 2826  
320 Edison Street  
Post Office Box 116  
Brush, Colorado 80723  
Telephone: 842-2805

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I placed a true copy of the above Notice of Appeal in the United States Mail, postage prepaid, addressed as follows: Richard L. Banta Jr., Attorney at Law, 1016 First National Bank Building, 333 West Hampden Avenue, Englewood, Colorado 80110 and Paul D. Cooper, Attorney at Law, 1340 Denver Club Building, Denver, Colorado 80202 this 5th day of March, 1976.

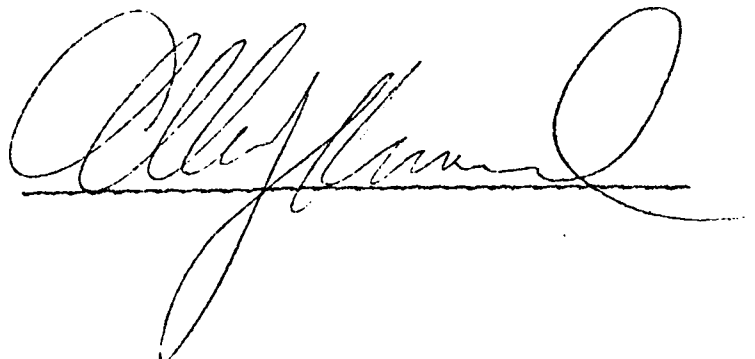


EXHIBIT "A"

IN THE DISTRICT COURT IN AND FOR THE COUNTY OF  
MORGAN AND THE STATE OF COLORADO

Civil Action No. 12456

PATRICIA BUXMAN,

Plaintiff,

vs.

WILLIAM LARRICK,

Defendant.

ORDER

THIS MATTER, having come on for hearing this 6<sup>th</sup> day  
of February, 1976, and the Court having been fully advised  
in the premises:

DOTH ORDER

That Plaintiff's Motion for New Trial, Rehearing or  
Amendment of Judgment filed on or about September 15, 1975 and  
Plaintiff's Motion for New Trial filed on or about October 3,  
1975, are hereby denied.

Done this 6<sup>th</sup> day of February, 1976.

BY THE COURT:

*James L. Schallenger*

Judge

*James L. Schallenger*

*Exhibit "A" Page 2 of 2*

STATE OF COLORADO,  
County of MORGAN } ss.

In the DISTRICT Court

Civil Action No. 12456

PATRICIA BLIXMAN

PLAINTIFF.....

vs.

WILLIAM LARRICK

DEFENDANT.....

NOTED MAR 10 1976

CERTIFICATE OF MAILING OF  
COPY OF NOTICE OF APPEAL

NOTICE OF APPEAL

I hereby certify that I have this day mailed a copy of the ~~XXXXXXXXXXXXXXXXXXXX~~ in this action, with postage prepaid thereon, to each person hereinafter named at the address hereinafter set opposite..... name....., to-wit:

Name Allen J. Kincaid  
Attorney at Law

Address P. O. Box 116  
Brush, Colorado 80723

Name Holley, Boatright & Villano  
Attorneys at Law

Address 4315 Wadsworth Boulevard  
Denver, Colo.

Name Banta, Banta & Eitel  
Attorneys at Law

Address 1016 First National Bank Bldg.  
333 West Hampden Ave.  
Englewood, Colo. 80110

Name Yegge, Hall & Evans  
Attorneys at Law

Address 1340 Denver Club Bldg.  
Denver, Colo. 80202

Name John Seifert  
Clerk of Colo. Court of Appeals

Address 1575 Sherman  
Denver, Colo. 80203

Name.....

Address.....

Name.....

Address.....

Name.....

Address.....

Dated March 9, 1976

MARY ELYN SACHS

CLERK OF SAID COURT

By

Kay McMillan

DEPUTY CLERK.

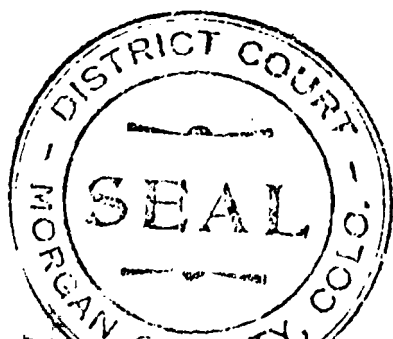


Exhibit "B" Page 1 of 3



MAR - 8 1976

MARY ELYN SACHS,  
CLERK

IN THE DISTRICT COURT IN AND FOR THE COUNTY OF  
MORGAN AND THE STATE OF COLORADO

Civil Action No. 12456

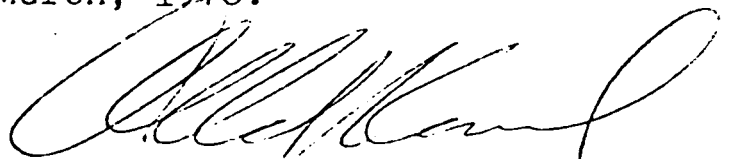
PATRICIA BUXMAN,  
Plaintiff,  
vs.  
WILLIAM LARRICK,  
Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN:

That Patricia Buxman, Plaintiff above-named, pursuant to Colorado Appellant Rules 3 and 4, hereby appeals to the Colorado Court of Appeals that Order entered on the 6th day of February, 1976, by the trial court herein, a copy of which is attached hereto as Exhibit "A" and incorporated herein.

Dated this 5th day of March, 1976.



ALLEN J. KINCAID  
Attorney for Plaintiff  
Attorney Registration No. 2826  
320 Edison Street  
Post Office Box 116  
Brush, Colorado 80723  
Telephone: 842-2805

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I placed a true copy of the above Notice of Appeal in the United States Mail, postage prepaid, addressed as follows: Richard L. Banta Jr., Attorney at Law, 1016 First National Bank Building, 333 West Hampden Avenue, Englewood, Colorado 80110 and Paul D. Cooper, Attorney at Law, 1340 Denver Club Building, Denver, Colorado 80202 this 5th day of March, 1976.

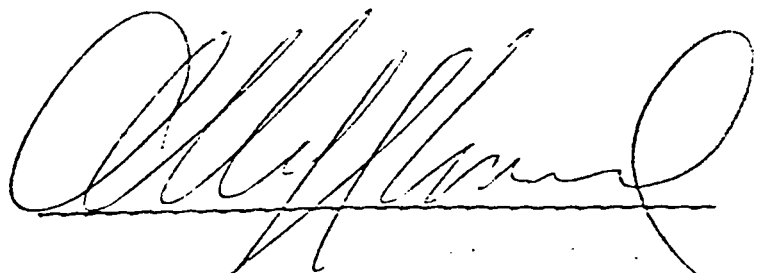


Exhibit "B" Page 2 of 3

EXHIBIT "A"

IN THE DISTRICT COURT IN AND FOR THE COUNTY OF  
MORGAN AND THE STATE OF COLORADO

Civil Action No. 12456

PATRICIA BUXMAN,

Plaintiff,

vs.

WILLIAM LARRICK,

Defendant.

ORDER

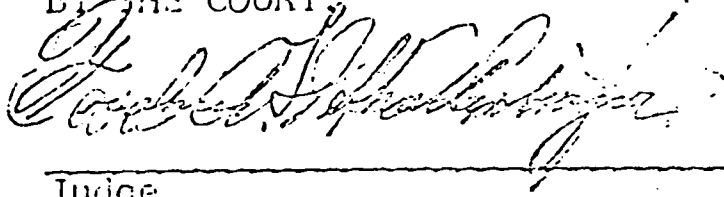
THIS MATTER, having come on for hearing this 6<sup>th</sup> day  
of February, 1976, and the Court having been fully advised  
in the premises:

DOTH ORDER

That Plaintiff's Motion for New Trial, Rehearing or  
Amendment of Judgment filed on or about September 15, 1975 and  
Plaintiff's Motion for New Trial filed on or about October 3,  
1975, are hereby denied.

Done this 6<sup>th</sup> day of February, 1976.

BY THE COURT:



Judge

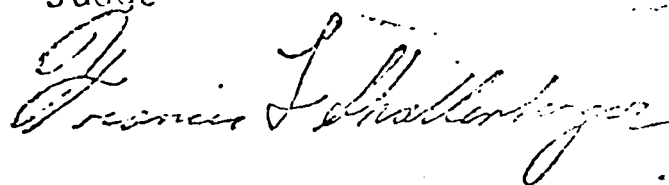


Exhibit "B" Page 3 of 3

NOTED MAR 12 1976

IN THE COURT OF APPEALS OF THE STATE OF COLORADO

No. \_\_\_\_\_

PATRICIA BUXMAN,

Plaintiff-Appellant,

vs.

WILLIAM LARRICK,

Defendant-Appellee.

} Appeal from the District Court  
of the County of Morgan No. 12456  
in Trial Court

} The Honorable Francis L. Shallen-  
berger

} Date of Entry of Final Judgment  
or Order: February 6, 1976, Order  
denying Motions for New Trial,  
Rehearing or Amendment of Judgment

TO THE CLERK OF THE COURT OF APPEALS OF THE STATE OF COLORADO:

YOU ARE HEREBY NOTIFIED that a Notice of Appeal was filed on March 5, 1976, in the District Court of the County of Morgan on behalf of the Plaintiff-Appellant, Patricia Buxman, in the above cause.

The parties to this proceeding are hereby designated as they appear in the above captioned.

The Plaintiff-Appellant is represented by the following counsel:

Allen J. Kincaid  
Attorney for Appellant  
320 Edison Street  
Post Office Box 116  
Brush, Colorado 80723  
Telephone: 842-2805

George A. Holley  
Attorney for Appellant  
13949 West Colfax Avenue  
Golden, Colorado 80401  
Telephone: 233-7838

The Defendant-Appellee is represented by the following counsel:

Richard L. Banta Jr.  
Attorney for Appellee  
1016 First National Bank Building  
333 West Hampden Avenue  
Englewood, Colorado 80110

Paul D. Cooper  
Attorney for Appellee  
1340 Denver Club Building  
Denver, Colorado 80202

*Exhibit "C" Page 1 of 2*

ALLEN J. KINCAID  
Attorney for Plaintiff-Appellant  
Attorney Registration No. 2826  
320 Edison Street  
Post Office Box 116  
Brush, Colorado 80723  
Telephone: 842-2805

(Designation of Parties)

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I placed a true and correct copy of the foregoing Designation of Parties in the United States Mail, postage prepaid, addressed as follows:

Richard L. Banta Jr., Attorney at Law, 1016 First National Bank Building, 333 West Hampden Avenue, Englewood, Colorado 80110 and Paul D. Cooper, Attorney at Law, 1340 Denver Club Building, Denver, Colorado 80202, this 10th day of March, 1976.

*Exhibit "C" Page 2 of 2*