5-7-1977

Alspaugh v. District Court In and For Boulder County

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. _____

MARK H. ALSPAUGH AND JUANITA S. ALSPAUGH, Petitioners, vs. THE DISTRICT COURT IN AND FOR THE COUNTY OF BOULDER, HONORABLE WILLIAM D. NEIGHBORS, Judge, PAUL MULLINS, d/b/a PAUL MULLINS CONSTRUCTION CO., PAUL MULLINS CONSTRUCTION CO., A Colorado Corporation, Respondents.	BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

COME NOW the Petitioners, Mark H. and Juanita S. Alspaugh, by and through their attorney, John H. Love, and hereby submits this "BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION."

I. STATEMENT OF ISSUES

A. ISSUE NO. 1: Are the Petitioners entitled in advance of any trial to a final determination of jurisdictional issues present in Civil Action No. 75-0383-1:

(1) Where the asserted jurisdiction of the Respondent Court and Judge over the subject matter of the dispute is at most provisional and may be a nullity since it is dependent upon Respondent's position that the Homeowners have waived their arbitration rights, which the Homeowners dispute, and which issue the Supreme Court has recognized as not having been decided with finality, and

(2) Either directly from the Supreme Court in this Original Proceeding under C.A.R. Rule No. 21 or, alternatively, by appellate review under C.A.R. Rule No. 1 (a) (1) and (3).

B. ISSUE NO. 2: Do the actions of the Respondent Court and Judge,

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which constitute state action:

(1) Deprive the Homeowners of their property without due process of the law and without the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States and Sections 3, 6, and 25 of Article II of the Constitution of the State of Colorado, and

(2) Further deprive them of their property by unilaterally modifying a contractual Undertaking submitted under the provisions of 1973 C.R.S., Sections 38-22-131, 132, without their consent and without giving them the opportunity to be fully heard, and also applying such statutory provisions so as to impair the Homeowners' rights under contract, contrary to the provisions of Article I, Section 10, Clause 1 of the Constitution of the United States, and

(3) Thereby further entitle the Petitioners, in advance of any trial, to relief, either directly from the Supreme Court in this Original Proceeding under C.A.R. Rule No. 21, or alternatively, by appellate review under C.A.R. Rule No. 1 (a) (1) and (3).

II. STATEMENT OF FACTS

A. BACKGROUND INFORMATION GENERALLY PRESENT IN ORIGINAL PROCEEDING NO. 26960 BEFORE THE SUPREME COURT.

The Petitioners in this Original Proceeding have previously appeared before the Supreme Court in Original Proceeding No. 26960. The Supreme Court is requested to treat all of the documents which have been previously filed in Original Proceeding No. 26960, and which are listed in the attached Appendix K as an exhibit to this Petition and the Homeowners, accordingly, incorporate all such documents herein by reference.

This Original Proceeding is also based upon issues and matters now present in Civil Action No. 75-0383-1 before the Respondent Judge and Court. The Docket Sheets of the Respondent Court and Judge for said Civil Action No. 75-0383-1 are given in the attached Appendix B, and are

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also incorporated herein by reference. Unless otherwise indicated in this brief, the references to "Contractor," "Plaintiff," and "construction contract," are based upon the definitions of said terms in Appendix I

Based upon the information presented to it in the earlier Original Proceeding 26960, this Supreme Court included the following in its Opinion (Alspaugh v. District Court, Appendix A);

> "On March 12, 1974, Paul Mullins Construction Co.,(hereinafter "Contractor") and Mark H. and Juanita S. Alspaugh, (hereinafter "Homeowners"), entered into a contract for the construction of a home in Boulder County. The contract contained an arbitration clause which reads as follows:
>
> 'Article 15 Arbitration. All claims or disputes arising out of this Contract or the breach thereof shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining, unless the parties mutually agree otherwise. Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen.'
>
> A dispute arose between the Contractor and the Homeowners, and on December 9, 1974, the Homeowners filed a demand for arbitration.*** On January 3, 1975, the Contractor submitted himself to arbitration by filing a response. The response denied various allegations, and asserted a counterclaim for amounts owed for labor and materials. The Contractor, in accordance with its submission to arbitration, indicated its choice of arbitrators and dates for the arbitration. However, the response reserved the right to arbitrate, 'only as a condition precedent to a possible court action.'
>
> In late January, 1975, the Homeowners filed an action in the district court, alleging a wrongful attempt by the Contractor to avoid finality of submission to arbitration. ***Included with this complaint,***, was a motion to compel arbitration.[1] In early February, 1975, the Contractor initiated a mechanics' lien foreclosure suit, naming as defendants the Homeowners, Capitol Federal Savings (as beneficiary under a deed of trust), and the Public Trustee of the County of Boulder. The Homeowners responded with a motion to quash the summons and dismiss the foreclosure complaint with prejudice, based upon the theory that the matter should be resolved by arbitration.
>
> ***The Court,***, on August 15, 1975, issued its rulings and order. The Court ruled that 'the principal issue raised by all the motions, briefs and argument of counsel is simply whether the contractor can be compelled to participate in the arbitration proceedings.'
>
> The Court held that the Contractor had asserted a mechanics' lien against the Homeowners, which mechanics' lien was not waived by the construction contract and which could be enforced only through judicial proceedings.
>
> The Court further stated:

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'/W/hen the parties each filed their respective law suits they revoked their agreement to arbitrate by implication. The filing of an action in court based on the same cause of action as the arbitration submission revokes by implication the agreement to arbitrate.***' (Emphasis added)

***The encyclopedia citations are not very supportive of a ruling based on revocation. We conclude that while the trial court was referring to revocation, under the wording of Gillette v. Brookhart, which it cited, it really meant that by filing the law suits the parties waived their agreement to arbitrate. We treat the order before us as the ruling that there were waivers.

***The Homeowners filed a petition for writ of prohibition in this court, and a rule to show cause was issued. The Homeowners claim that the trial court exceeded its jurisdiction in not compelling arbitration and, further, that the court would be exceeding its jurisdiction in the mechanics' lien case, since according to the Homeowners, the Contractor had waived his mechanics' lien rights by reason of the arbitration provision of the contract. The Homeowners also ask for reinstatement of the case they filed in district court.

Right or wrong, the trial court has ruled that the parties have waived their rights to arbitration. It cannot be denied that the court had jurisdiction to pass on the question of waiver. If it is right in this ruling, it has jurisdiction to proceed. This is not a proper case for this court to inject itself at this juncture into the ruling on waiver. If, in fact, the district court erred, the error may be corrected on appeal."

B. SUBSEQUENT ADMISSIONS BY THE CONTRACTOR NOT PREVIOUSLY DISCLOSED TO THE SUPREME COURT AND AS SUCH ADMISSIONS RELATE TO THE ARBITRATION PROVISIONS OF THE CONSTRUCTION CONTRACT.

The deposition of Paul Mullins was taken on May 13, 14, and 15, 1976. Paul Mullins testified that he signed the agreement and acknowledged that the construction agreement included the AAA Construction Industry Arbitration Rules, effective March 1, 1974. Based upon these admissions, the Homeowners submitted a "SUPPLEMENTAL OFFER OF PROOF OF HOMEOWNERS' STATUTORY ARBITRATION RIGHTS" to the Respondent Court on June 30, 1976 (Appendix K), which includes copies of several exhibits. In said Offer of Proof, the Homeowners showed that Paul Mullins had testified, in part, as follows:

"Q. Mr. Mullins is this Exhibit Number 17, these Construction Industry Rules of March 1, 1974, the rules which are referenced under Article 15, entitled 'arbitration'?

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A. I would say that it is.

Q. Do I understand, then, that you had agreed to be bound by these rules for any such dispute that may arise under the agreement?

MR. SILVERMAN: At what time frame? When did he agree?

MR. LOVE: At the time that you entered into the March 12, 1974 agreement.

MR. SILVERMAN: What is your answer?

A. My answer is yes."

The construction contract containing the arbitration provisions was still in effect when the dispute arose. Mr. Mullins admitted that he authorized the law firm of Thomas and Esperti to take the following position expressed in its letter to Mr. Alspaugh of November 13, 1974, which was introduced as Exhibit No. 25 at Mr. Mullins' deposition:

> "***It is our position that if the matter cannot be settled that it should indeed be referred to arbitration, pursuant to Article 15 of the March 12, 1974 agreement.***"

Subsequently, the law firm mailed another letter to Mr. Alspaugh on December 3, 1974, which was introduced as Exhibit No. 30 at Mr. Mullins' deposition (Appendix K), and took the following position:

> "As you know, Article 15 of the Agreement provides for arbitration in instances such as this. The AGreement provides for arbitration unless the parties mutually agree otherwise.
>
> * * *
>
> Therefore, we would propose that the parties mutually agree to waive arbitration and make use of the legal rights that are available to them through court litigation.
>
> I would hope to hear from you by Monday, December 9, 1974, regarding this matter. If we do not hear from you or if we are not able to reach a resolution of the matter, please be informed that we will file our notice of demand for arbitration as provided in the Agreement on December 10, 1974."

With regard to his deposition, Exhibit No. 30, Mr. Mullins testified as follows (Appendix K):

> "Q. Do I understand then that at that time you were fully in accord with the position that had been expressed by Mr. Thomas of the law firm of Thomas and Asperte (sic) that represented, I believe, both you and the Plaintiff corporation?
>
> A. That is correct, because Mr. Thomas goes on to state in this letter that -- I'd like to quote a portion of this letter.
>
> Q. Okay.

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A. The last paragraph, 'I would hope to hear from you Monday, by Monday, December 9, 1974, regarding this matter. If we do not hear from you or if we are not able to reach a resolution of the matter, please be informed that we will file our notice of demand for arbitration as provided in the agreement on December 10, 1974. Also, please be advised that we have indicated to Mullins Construction that they should not cash the check which you recently sent to them until all the matters are resolved.'

Now, Mr. Love, I believe that that is pretty clear that we are still going to comply with the contract, we are going to arbitrate and that the contents of the previous paragraph that I read just a few moments ago was merely a suggestion at that time as to a possible better solution. (Emphasis supplied.)

Q. I understand then you did not disagree with this statement in the first paragraph that says, 'The agreement provides for arbitration unless the parties mutually agree otherwise.'"

A. Mr. Love, I don't disagree with anything that my attorney says.

Mr. Mullins further testified, as follows (Appendix K):

"Q. Now, Mr. Mullins, I'd like to hand you a copy of deposition Exhibit No. 31 and ask you to identify that.

A. I identify Exhibit Number 31 as a letter from the law firm of Thomas and Asperte (sic) dated December 10, 1974, to Mr. Mark Alspaugh and the Arbitration Association, signed by Mr. Eldon Silverman.

Q. I understand then that you had authorized Mr. Silverman to transmit this letter to Mr. and Mrs. Alspaugh.

A. Yes, Mr. Love, at this time I believe that Mr. Silverman had been assigned this case by the firm."

The Contractor's additional letter of December 10, 1974, (Appendix K), which was introduced at Mr. Mullins' deposition as Exhibit No. 31, is quoted in part as follows:

"Pursuant to Article 15 of the March 12, 1974 agreement between Mark H. Alspaugh, Juanita S. Alspaugh, and our client, Paul Mullins Construction Company, this is to give you notice of a demand for arbitration involving a dispute that has arisen under such agreement. In particular, our client, Mullins, claims that $13,776.94 remains due and owing under such agreement."

In his appearance before the AAA of on or about January 3, 1975, the Contractor then took the following position:

"Statement with Regard to Section 46 of Rules

Paul Mullins Construction Company reserves its right to initiate an original proceeding in a Colorado Court of original jurisdiction in order to contest or retry any and all issues present in arbitration. Paul Mullins Construction Company's submission to arbitration in no way should be construed as a choice of remedies, but only as a condition procedent to possible court action."

Section 46 of said Rules provides in part as follows:

"Parties to these Rules shall be deemed to have consented that judgment upon the award rendered by the Arbitrator (s) may be entered in any Federal or State Court having jurisdiction thereof."

C. ACTIONS BY PETITIONERS TO SECURE THEIR STATUTORY ARBITRATION RIGHTS

(1) Initial Steps by Homeowners Before Respondent Court and Judge to Secure Arbitration Rights after Contractor's Appearance Before the AAA.

In the Contractor's last appearance before the AAA, the Contractor qualified such appearance by making a statement with regard to Section 46 of the Rules, as noted in subsection II, B, supra. As a consequence, the Homeowners filed a complaint, a motion to compel arbitration, and a supporting brief seeking to secure their statutory arbitration rights. In every prayer for relief in every cause of action in their complaint, the Homeowners expressly stated provisions demonstrating their intent to have the dispute resolved by arbitration. Attached to their complaint as Exhibit C were the above referenced AAA Rules. Civil Action No. 75-0203-1 was assigned to the Respondent Judge.

On or about February 6, 1975, Paul Mullins moved to dismiss C.A. 75-0203-1 and to strike the motion for arbitration and filed an affidavit to which only two of the contract documents of the construction contract were attached. His affidavit did not identify, acknowledge, or attach the above referenced AAA rules, effective March 1, 1974. The Homeowners opposed such motions by an opposing brief in C.A. 75-0203-1 and they also filed an affidavit.

On February 10, 1975, Plaintiff corporation filed Civil Action No. 75-0383-1, a complaint in foreclosure of an asserted mechanics' lien, which was also assigned to the Respondent Judge. Because the Homeowners had already appeared before the Respondent Judge in C.A. 75-0203-1 to secure their enforceable statutory arbitration rights, they filed a "MOTION TO QUASH SUMMONS AND COMPLAINT AND TO DISMISS WITH PREJUDICE" instead of making an answer in C.A. No. 75-0383-1 and by the Court and thus disputed the subject matter jurisdiction of the claim of the Plaintiff in C.A.75-0383-1.

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The Plaintiff filed a response and filed a further affidavit of Paul Mullins, dated March 5, 1975, which attached an additional contract document and also referenced the February 6, 1975 Affidavit in C.A. 75-0203-1 but still did not identify, acknowledge, or attach the above referenced AAA rules. For reference to the above designated documents, which copies were filed with the Supreme Court, refer to the August 27, 1975 Affidavit of Petitioner's attorney in Original Proceeding No. 26960.

As is indicated by the August 15, 1975 Minute Order, the Respondent Court and Judge heard oral arguments on all pending motions in Civil Actions No. 75-0203-1 and 75-0383-1 on April 23, 1975.

(2) Homeowners' Previous Appearance Before the Colorado Supreme Court to Secure Arbitration Rights.

Following the Respondent Court and Judge's August 15, 1975 "RULING ON ALL PENDING MOTIONS AND ORDER," the Homeowners sought a Writ of Prohibition in Original Proceeding No. 26960 which is summarized, supra, and which such petition and briefs of the Homeowners summarized the procedural steps which they indicated had been taken to secure their arbitration rights. In addition, several factual clarifications are set forth below, based upon the record in this civil action and in Original Proceeding No. 26960.

The early portion of the record in this civil action and in Original Proceeding No. 26960 indicates that the Homeowners objected to the Respondent Court's jurisdiction in this civil action in their "MOTIONS TO QUASH SUMMONS AND COMPLAINT AND TO DISMISS WITH PREJUDICE" which was filed on February 26, 1975. Their position was maintained in oral arguments held on April 23, 1975 before the Respondent Judge assigned to both civil actions.

The Supreme Court's opinion of February 23, 1976 does not reflect that the "American Arbitration Association Construction Industry Rules, effective March 1, 1974" were a part of the construction contract between the parties.

In connection with the Homeowners' offers of proof, it is noted that the Homeowners' "Petition for Writ of Prohibition" in Original Proceeding No. 26960 included the following statement under paragraph 11 on page 3:

"(11) Notwithstanding the above referenced "ORDER" the Home-

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owners contend that the Contractor waived mechanics' lien rights by signing the construction contract containing the statutory arbitration provisions, which were still in effect when the dispute arose and which were made operative by the Homeowners' filing of a Demand for Arbitration and by the Contractor's entering an appearance before the American Arbitration Association, by paying a filing fee, filing a response, filing a counter-claim, selecting arbitrators, requesting subpoenas and selection dates for the proceeding.***"

(3) Homeowners' Continuing Efforts to Preserve and to Secure Arbitration Rights in C.A. 75-0383-1 While Proceeding Involuntarily.

The Homeowners proceeded in C.A. No. 75-0383-1 as indicated in their "MOTION FOR EXTENSION OF TIME TO FILE PLEADINGS" filed February 26, 1976, in which they stated in part as follows:

"4.***The Defendants Alspaugh believe that they have no choice but to proceed with the Court proceeding in lieu of the arbitration proceeding at this time."

Pleadings and various other documents have been subsequently qualified in C.A. 75-0383-1 with respect to such arbitration rights or which reflect appropriate objections with regard to the Respondent Court's and Judge's lack of jurisdiction over the subject matter in connection herewith. Such documents include documents identified by the following date entries in the Docket Sheet (Appendix B):
2/26/75, 3/22/76, 4/12/76, 4/20/76, 4/30/76, 6/30/76, 7/12/76, 7/26/76, 8/19/76, 8/26/76, 11/2/76, 11/4/76, 11/15/76, 12/7/76, 12/14/76, 12/15/76, 2/18/77, 2/28/77, 3/16/77, 3/18/77, 3/24/77, 3/29/77, 3/30/77, 4/7/77,4/18/77, 4/27/77, 4/28/77, 5/2 /77.

Simultaneously, with the filing of pleadings on March 22, 1976, the Homeowners also filed their "MOTION TO RECONSIDER HOMEOWNERS' RIGHT TO STATUTORY ARBITRATION" and memorandum brief, which the Court denied on April 16, 1976. The Court observed that Homeowners' exception to such ruling of waiver was well preserved and the Respondent Judge indicated (slightly paraphrased) that the arbitration issue was a legitimate issue which he had hoped that the Supreme Court would have resolved one way or the other. April 16, 1976 Transcript p. 15 (Appendix K).

After taking the deposition of Paul Mullins and based upon the admissions as noted in paragraph (b), supra, on June 30, 1976 "SUPPLEMENTAL

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OFFER OF PROOF OF HOMEOWNERS' STATUTORY ARBITRATION RIGHTS," on July 12, 1976, the Homeowners filed their "HOMEOWNERS' MOTION FOR DESIGNATION OF ORDERS AS AN APPEALABLE JUDGMENT."

At the September 8, 1976 oral arguments on the motion, Mr. Silverman's position to the Respondent Court and Judge was to the effect that it did not matter what admissions Paul Mullins had made, and that no matter whether the rules of the American Arbitration Association were part of the contract or not, the Contractor was no longer bound by them, and he objected to appeal of any orders prior to trial. Reporter's Transcript on Motion Pursuant to Rule 54 (b), p. 8-10 (Appendix K).

The Respondent Court and Judge denied the Homeowners' motion in the November 4, 1976 "RULINGS AND ORDERS ON ALL PENDING MOTIONS," on the basis, essentially, that notwithstanding the Supreme Court's ruling in Original Proceeding 26960, the Respondent Court had jurisdiction over the subject matter, and that appellate courts look with disfavor upon piecemeal review. The Homeowners, on November 15, 1976, documented their assertion of preservation of statutory arbitration rights in their "EXCEPTION TO RULING AND ORDER ON ALL PENDING MOTIONS."

On August 24, 1976, the Homeowners also objected to the Contractor's amended pleadings on arbitration and jurisdictional grounds in their "HOMEOWNERS' RESPONSE TO MOTION TO AMEND PLEADINGS BY PLAINTIFF AND THIRD-PARTY DEFENDANT" which was also based upon the June 30, 1976 Supplemental Offer of Proof.

After the Contractor filed an additional pleading and despite Homeowners' objections, on November 4, 1976, the Respondent Court and Judge granted the Contractor's July 9, 1976 motion to amend, filed on August 18, 1976. Thus, the Contractor was able to add an additional quantum meruit cause of action and the act of God affirmative defense.

The Homeowners continued to assert arbitration rights in their pleading, filed November 17, 1976, in response to the Contractor's amended pleading.

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The Homeowners qualified their December 2, 1976 pre-trial statement to the effect that jurisdiction over the subject matter is contested, and that they have continuously maintained their right to statutory arbitration, pursuant to the construction contract. Following the receipt of the Court's "MINUTES OF PRE-TRIAL CONFERENCE," which was held on December 2, 1976, the Homeowners filed, on December 14, 1976, a "RESPONSE TO MINUTES OF PRE-TRIAL CONFERENCE," in which the Homeowners documented their intent to fully preserve arbitration rights.

The Homeowners filed their "MEMORANDUM BRIEF OPPOSING SUMMARY JUDGMENT" and requested, after renewal of the motion to dismiss for lack of jurisdiction over the subject matter, a one (1) day evidentiary hearing. The Contractor did not file a reply brief, and no ruling by the Respondent Court and Judge has been received on the Contractor's motions for summary judgment, although, on March 30, 1977, in connection with a hearing on a later motion, the Court effectively denied the Homeowners' request for an evidentiary hearing.

Subsequent to the procuring of the certified copy of the respondent Court's "Docket Sheet," reflecting entries through April 28, 1977 (Appendix B), several actions involving motions have occurred in the Trial Court. Such actions are either reflected in a supplemental certified copy of Docket Sheet entries through May 10, 1977, or may be reflected in copies of documents attached to the Affidavit of Petitioner's attorney (Exhibit K).

D. MOST RECENT EVENTS RELATIVE TO A CERTAIN UNDERTAKING

On March 16, 1977, Capitol Federal Savings and Loan Association of Denver, Transamerica Title Insurance Company, and the Homeowners, compromised and settled all motions, claims, counter-claims, cross-claims, and third-party claims between the parties, based upon an Undertaking of substituted security tendered to the Court on March 16, 1977, and which consisted of a Stipulation, an Order prepared for the Court's signature, a $20,668.41 check payable to the Clerk of the District Court, and a similarly prepared Certificate of Release of Mechanics' Lien, all of which are included as Exhibits in Appendix K. (with the exception of the check)

The Court approved the Undertaking on March 16, 1977, and the Order was entered on that date in the Docket Sheet. An attested true copy of the duly executed Certificate of Release of Mechanics' Lien was mailed to the Homeowners. However, prior to the recording of such certificate of release by any person and at the instance of the Plaintiff, who was not a party to the Undertaking, the Court orally and by Minute Order, on March 18, 1977, enjoined the Homeowners from recording the Release, pending a hearing on the matter.

The Plaintiff objected to the language of the Undertaking, which had been expressly conditioned to the effect that nothing contained therein was in any way to constitute a waiver of any rights the Homeowners may have to arbitration of their dispute nor to prejudice any other matters or issues raised by their pleadings and that the Court was to enter an order in accordance with the following:

> "That all funds so placed in the registry of the Court shall be placed in a regular passcard account with Capitol Federal Savings at the regular interest rate. Where the same shall be held as security and if the lien claimant shall be finally adjudged to be entitled to recover upon the claim upon which his lien is based, then such funds shall be paid out in accordance with such orders as may hereafter be entered by any court having jurisdiction thereof, pursuant to the above referenced statutory provisions." (emphasis added)

The Order first approved and issued by the Respondent Court and Judge on March 16, 1977 contained language identical to the above language. However, after the Plaintiff raised objections to the jurisdictional language of the Undertaking, and proposed modification of such language, a hearing was scheduled. The Homeowners served a subpoena on Paul Mullins for purposes of obtaining testimony in connection with the jurisdictional issues. At the March 30, 1977 Hearing, the Respondent Court and Judge took the position that jurisdictional issues would not be heard and denied the Homeowners' requested evidentiary hearing. Upon Plaintiff's oral motion, the subpoena was quashed and the Homeowners were ordered to serve no further subpoenas on the Contractor without the Courts' prior approval.

On April 7, 1977, the Court issued its "RULING ON PLAINTIFF'S OBJECTIONS TO SUBSTITUTION OF SECURITY," a copy of which is included as an

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exhibit in Appendix K. As noted therein, the Court modified the jurisdictional language of its earlier approved order, which is emphasized in the preceeding quotation by inserting the following language immediately following the phrase "then such funds."

> "or a portion thereof, shall be paid out upon order of this Court to satisfy any judgment obtained by the Plaintiff."

The Homeowners objected to the Court's modification of the Order as set forth in the "HOMEOWNERS' MOTION TO ALTER OR AMEND JUDGMENT OR FOR A NEW TRIAL," filed April 18, 1977. The objection also provided a supporting Offer of Proof, the Affidavit of Frank C. Olson, dated April 1, 1977, and other exhibits, all of which are also attached hereto as exhibits in Appendix K. With its Motion, the Homeowners returned the certified copy of the Certificate of Release to the Respondent Court, declining to record such document under the circumstances, and which was entered on the Docket Sheet on April 18, 1977.

However, Capitol Federal Savings, after having been dismissed with prejudice in the Court's March 16, 1977 "ORDER," which effect was not modified in the Courts' April 7, 1977 Ruling, filed a "MOTION TO COMPEL RECORDATION OF CERTIFICATE OF RELEASE OF MECHANICS' LIEN (Appendix K) on April 27, 1977. The Homeowners then filed on April 28, 1977 a preliminary response (Appendix K). Therein they requested a ten (10) day period in order to appropriately respond to said motion and to be able to file any further application which would then appear to be appropriate. Their motion was denied. They then filed an accelerated motion entitled "HOMEOWNERS' MOTION FOR TEMPORARY INJUNCTION TO PRECLUDE THE RECORDATION OF THE CERTIFICATE OF THE RELEASE OF MECHANICS' LIEN" to be simultaneously set.

After the Respondent Court's May 4, 1977 "NOTICE OF HEARING" was received (Appendix K), which contained reference to "Pending Motions" for the scheduled period, the Homeowners requested confirmation of the scope of said hearing since they had not been given to understand that the Court intended to include the Contractor's motion (s) for summary judgment, filed on January 13, 1977, and the Homeowners' Motion to Alter or Amend Judgment or for a New Trial. Clarification by the Court was timely made by the

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"AMENDED NOTICE OF HEARING," dated May 9, 1977 (Appendix K). It is contemplated that any further actions by the Respondent Court and Judge while this Court is deliberating the merits of this Petition could either be reflected by the Respondent Court's Answer to this Petition should this Court issue a "Rule to Show Cause" or, in the event that any orders by the Respondent Court and Judge be deemed to affect the underlying grounds of this Petition, the undersigned would so advise this Court.

III. SUMMARY OF ARGUMENT

Before summarizing the factors which support the present application of the Homeowners for the extraordinary writ of prohibition, several comments are made with regard to the Supreme Court's February 23, 1975 opinion which reflected the basis upon which the rule was discharged in their previous application.

Assuming for purposes of argument and without conceding the matter, the Supreme Court was correct in concluding that the previous application only involved error, the Homeowners contend that the subsequent deposition admissions of Paul Mullins provide a factual basis which justify their present application in advance of the scheduled trial.

Therefore, based upon such assumption, it would follow that any major deviation of evidence which would substantially affect the Respondent's position, upon which the Supreme Court relied, especially with regard to raising a clear question of law as to the validity of the full scope of all of the arbitration provisions of the contract, could affect the prior opinion discharging the rule and therefore result in the rule being made absolute in this Original Proceeding.

Such admitted facts clearly portray the full scope of the arbitration provisions in the construction contract and, thus, can be determined as a clear question of law as to the validity of both (a) the American Arbitration Associations' Construction Industry Arbitration Rules, effective March 1, 1974, and which were then obtaining under the agreement, and (b) Article 15 of the contract document entitled "Agreement" which was

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executed on March 12, 1974. Such admitted facts also amply acknowledge the Contractor's participation before the American Arbitration Association (AAA Case No. 71 10 0090 74). Such participation with the now admitted full knowledge, consent, and authorization of the Contractor of the actions taken by the Contractor's attorneys in first filing an unqualified demand for arbitration with the AAA and in then filing a qualified response (including a counterclaim to the Homeowners' demand for arbitration. The Contractor's qualification of the Contractor's Response resulted in Original Proceeding No. 26960.

The effect of the deposition admissions have been tendered to the Respondent Court as an offer of proof which, as nearly as we can determine, has been ignored and disregarded by the Respondent Court, even though the Homeowners' assertion of lack of jurisdiction over the subject matter has been renewed several times. Such admissions reinforce the position which the Homeowners had actually taken before the Supreme Court in Original Proceeding No. 26960, which was based upon the AAA rules, effective March 1, 1974, as being the rules then obtaining.

In addition, such admissions are materially inconsistent with and contradict the position of the Respondents in Original Proceeding No. 26960, whose position also seriously misquoted the Homeowners' position before the Supreme Court. Such misquotation appears to have effectively reformed the Homeowners' position because of the Supreme Court's apparent reliance upon several statements in the Respondent's Answer and Brief in addition to the Respondent Court's prior August 15, 1975 ruling. It thus appears to the Homeowners that the Supreme Court then concluded that the Respondent Court, which had not acknowledged that the referenced AAA rules were a part of the arbitration provisions of the construction contract, had jurisdiction to pass on the question of waiver.

The facts established since the rule was discharged in Original Proceeding No. 26960 indicate that there is a more important underlying

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matter involving the validity of all of the arbitration provisions of the construction contract than the issue of waiver, which this Court previously stated could be corrected on appeal if the District Court erred.

We submit that the AAA rules, effective March 1, 1974, which were then obtaining when the construction contract was executed, and which were still in effect when the dispute arose, were a valid portion of the contractual terms of the construction agreement. There is, accordingly presented, a clear question of law as to the validity of Article 15 of the Agreement, together with the above referenced AAA rules as constituting the entire arbitration provisions of the construction contract.

Such question of law is independent of the issue of waiver, and decisions of the Supreme Court indicate to the Homeowners that the Supreme Court is not bound by any ruling of the Respondent Court as to a question of law which is presented as to the construction of the complete terms of a contract which, in this case, involves a construction of the legal effect of the complete arbitration provisions, including the AAA rules. This question is particularly significant in this case because the question of whether or not the Respondent Court and Judge has jurisdiction over the subject matter depends upon the legal effect of such AAA rules and particularly Section 46 of said rules, which was the subject of the Homeowners' briefs in Original Proceeding No. 26960, as constituting an enforceable statutory arbitration agreement rather than a common-law arbitration agreement. Since, based upon the third paragraph of Section 46 of such rules, the parties have consented that judgment upon the Arbitrator (s) award is enterable in any federal or state court having jurisdiction, then it logically follows that there can be no retrial to the Court and that the Contractor's qualification of the response and counterclaim filed with the AAA after filing an unqualified demand for arbitration is contractually unjustified. The Contractor's qualification was a breach of contract which entitled the Homeowners to endeavor to secure an advance judicial determination of the enforceability of any such award (Appendix J). The other facts as to the Contractor's participation before

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the AAA are similarly admitted. There now appears to be no unclear questions of fact having legal significance which would be determinative of jurisdiction and we believe that the Supreme Court can fully determine jurisdiction in this Original Proceeding before trial, or can make such rulings as will alternatively enable such jurisdiction to be made before trial under C.A.R. Rule No. 1. The Respondent Court has denied the Homeowners an evidentiary hearing on the jurisdictional issue, and has refused to designate an order under Rule 54 (b), C.R.C.P. The Record also clearly shows that the Respondent Court has not disagreed with the Supreme Court's construction of the Trial Court's ruling of revocation as being a ruling of waiver.

The Homeowners contend that knowledge of the actual jurisdictional facts by the Respondent Court involves a responsibility to exercise a sound reasonable and legal discretion to determine jurisdiction, based upon such facts, especially where such facts (a) are inconsistent with both the previous findings and position of the Respondent Court and the position of the Respondent Contractor, and (b) reinforce the Homeowners' actual position in Original Proceeding No. 26960. The failure of the Respondent Court on several occasions to consider and to make corrective findings and rulings upon several applications by the Homeowners, therefore, constitutes an excessive abuse of discretion and shows that the Respondent Court and Judge are proceeding in Civil Action No. 75-0383-1 in excess of their jurisdiction over the subject matter. Proper findings, as a matter of law, should establish that C.A. 75-0383-1 is a nullity.

The seriousness of such actions by the Respondent Court has been compounded and is believed to have caused further complications with regard to the Court's unilateral modification of the provisions of the stipulation of March 16, 1977, involving substituted security for the Plaintiff's lien. The Court's modification was made without the Homeowners' consent, and has resulted in the effective impoundment of the $20,668.41 of funds placed by the Homeowners with the Court because they were then placed

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in the position of either (a) being compelled to waive their preserved arbitration and jurisdictional rights if they recorded the Certificate of Release of Mechanics Lien which had been signed by the Clerk of the Respondent Court on or about March 16, 1977, or (b) being placed in a position of being subject to actions by Capitol Federal Savings and Transamerica Title Insurance Company by virtue of not recording such release which possibly could affect the compromise and settlement by the Homeowners with such parties.

Therefore, the Homeowners have returned an attested true copy of the certificate of release to the custody of the Court, and have taken the position that it is necessary to finally determine the jurisdictional issue before trial. However, Capitol has applied to the Respondent Court to compel recordation which is the subject of a separate abbreviated hearing, scheduled at 10:00 a.m. on May 19, 1977, in which the jurisdictional issue will not be resolved. The Homeowners believe that there is a substantial likelihood that the Respondent Court will, in some way, direct some person to record such certificate of release or an attested true copy, notwithstanding Homeowners' motion for a temporary injunction to preclude its recordation, pending a final jurisdictional determination. The ultimate consequences of recordation over the Homeowners' objections are presently not known. However, any such recordation by direction of the Respondent Court would not negate the need for a final appellate ruling on the underlying jurisdictional issue before trial.

Other important technical considerations are set forth in the several sections of argument including the rationale for their conclusions that they have been denied and will continue to be denied their property without due process of law, without equal protection of the law, and contrary to the prohibition against the impairment of obligations of contract.

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IV. ARGUMENT

(A) ISSUE NO. 1:

THE PETITIONERS ARE ENTITLED TO SECURE THEIR STATUTORY ARBITRATION RIGHTS TO BE HEARD IN AN ARBITRATION PROCEEDING BEFORE THE AMERICAN ARBITRATION ASSOCIATION WITHOUT BEING SUBJECTED TO A TRIAL IN CIVIL ACTION NO. 75-0383-1 FOR THE FOLLOWING REASONS:

(1) The Respondent Court and Judge Have Exceeded Their Discretionary Powers and are Acting in Excess of Their Jurisdiction.

The legal issue concerning the validity of all arbitration provisions has arisen due to Paul Mullins' admissions since the rule was discharged in contrast to Respondents position and limited acknowledgment of facts in Original Proceeding No. 26960. The repeated disregard and the ignoring of these significant facts constitute a clear abuse of discretion and results in the Respondent Court and Judge acting in excess of their jurisdiction, since they have no jurisdiction over the subject matter.

If, for purposes of argument only, we now conclude that the Respondent Court and Judge did not have actual knowledge of the AAA rules then obtaining being a part of the agreement notwithstanding said Respondents were represented by the Contractor's counsel in Original Proceeding No. 26960, said Respondents exceed their discretionary powers and abused their discretion by failing to consider, by failing to make additional findings, and specific rulings upon the subsequent admissions by Paul Mullins concerning arbitration. In addition, said Respondents further abused their discretion by denying the Supreme Court of a timely opportunity to determine before trial on appeal under C.A.R. No. 1 of the overriding legal question of the validity of all of the arbitration provisions of the construction contract, including said AAA rules.

It further appears that the abuse of discretion and acts in excess of said Respondents jurisdiction developed in several phases, most notably by:

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(a) Partially, by refusing to make findings or rulings adopting or clarifying the Supreme Court's construction of said Respondents ruling of revocation by implication as that of waiver. Therefore, it is concluded that said Respondents have adopted this Court's treatment of the August 15, 1975 Order as a ruling that there were waivers.

(b) Ignoring evidentiary effects of a supplemental offer of proof (Appendix K, Item 14 and Items 1 and 2), based upon Paul Mullins' deposition testimony in May, 1976, when such admissions were presented to the Respondent Court for consideration with the "Motion to Designate Orders for Appealable Judgment, filed on July 12, 1976 (Appendix K, Items 16, 17). In substance, the essential element of the AAA rules existed even though the precise theory presented in this brief as to the validity of the arbitration provisions of the construction contract was not then recognized as being independent and controlling over the question of waiver, which this Court had emphasized in the rule to show cause.

(c) The ignoring of such evidentiary aspects by offer of proof is not a proper exercise of discretion under the circumstances, since the Respondent Court then clearly had knowledge of the operative facts which were contrary to the Respondent Court's previous position to the Supreme Court in the Answer and Brief which did not recognize three elements of the Homeowners actual position before the Supreme Court.

(d) Such acts in excess of jurisdiction were further compounded by the Respondent Court's March 30, 1977 summary denial of evidentiary hearing, including the oral quashing of the subpoena duces tecum on March 30, 1977. The Homeowners have tried to obtain an evidentiary hearing (i) based upon their prior request in the "MEMORANDUM BRIEF OPPOSING SUMMARY JUDGMENT" (Appendix K, Item 28) which has not yet been ruled upon to our knowledge, (ii) in the Homeowners "Response to the "MOTION OF PLAINTIFF OBJECTING TO PROVISIONS IN COURT'S MARCH 16, 1977 ORDER AND FOR ALLOWANCE OF CERTAIN COSTS" (Appendix K, Item 36), and (iii) in their

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"MOTION TO ALTER OR AMEND JUDGMENT OR FOR A NEW TRIAL" (Appendix K, Item 38). Thus, it clearly appears that the Respondent Court will not allow evidence to be introduced at trial pertaining to the arbitrability of the dispute and the related jurisdictional issue.

(e) Such abuse of discretion was further compounded by the Respondent Court's unilaterally modifying the March 16, 1977 Stipulation provisions and the March 16, 1977 Order in excess of the statutory authority under 1973 C.R.S. § 38-22-131, and -132. The Respondent Court also applied such statute in a matter as to constitute impairment of the Homeowners' contract contrary to the law which existed when the construction contract was signed on March 12, 1974

(f) The Respondent Court has also scheduled Capitol Federal Savings' "MOTION TO COMPEL RECORDATION OF THE CERTIFICATE OF RELEASE OF MECHANICS' LIEN" for a one-half hour hearing over Homeowners objections (Appendix K, Item 39). The Homeowners' jurisdictional rights have been fully preserved.

(g) It is against public policy to permit litigation to continue with parties who have been dismissed with prejudice, pursuant to a stipulated compromise and settlement under these circumstances and in a manner which appears to be contrary to the Rules of Civil Procedure insofar as Capitol Federal Savings' Motion to Record the Release of Mechanics' Lien is concerned (Appendix K, Item 39)

Even though it was clear to the Homeowners in Original Proceeding No. 26960 that the AAA Rules were a part of the construction contract by the language in Article 15 of the March 12, 1974 Agreement to such rules "then obtaining" and by the specific reference to several specific sections of such referenced AAA rules in the Contractor's Response and Counter-claim before the AAA, Paul Mullins has since undisputedly admitted, under oath, that such rules were a part of the construction contract, and

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that they were in effect when the dispute arose as is evident by the Statement of Facts and his referenced depositions documentation. Therefore, the arbitration provisions of the construction contract and the AAA rules (Section 46 in particular) are unambiguous. Hence, the construction of the complete arbitration provisions of the construction contract is clearly an issue of law and this Court should not therefore be bound by the Respondent Court's August 15, 1975 findings. Merrill Lynch, Pierce, Fenner, and Smith, Inc. v. District Court, ___ Colo. ___, 545 P. 2d 1035. Helmericks v. Hotter 30 Colo. App. 242, 492 P. 2d 85, Hyland Hills, etc. v. McCoy Enterprises ___ Colo. App. ___, 554 P. 2d 708. This Supreme Court should not be bound either by such supplemental findings which appeared to be made in the Answer and Brief of Respondents, though opposing counsel, in Original Proceeding No. 26960 or by the Court's failure to make additional findings in the November 4, 1976 "RULINGS AND ORDERS ON ALL PENDING MOTIONS" with respect to the AAA rules being a part of the Agreement. This ruling followed Mr. Silverman's remarkable argument on September 8, 1976 to the effect that it made no difference whether the AAA rules were part of the Contract or what Mr. Mullins said. (Rule 54 (b) Transcript Appendix K, Item 21).

Hence, based on the foregoing, the preventive and restraining character of prohibition as indicated in Prinster v. District Court, 137 Colo. 393, 325 P. 2d 938 is now appropriate because there has been an excess of jurisdiction through a mistaken excercise of the Respondent Court's exceeding its discretion in failing to consider the damaging admissions of Paul Mullins and to make findings with respect thereto, including both the AAA rules , effective March 1, 1974, still in effect when the dispute arose and the actual position of the parties before the AAA tribunal.

We further contend that the extremely substantial misquotation of the Homeowners' actual position before this Court in Original Proceeding No. 26960, infra, through Mr. Silverman as Counsel for the Respondent Court was an act in excess of the Respondent Court's jurisdiction and

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was a failure to exercise a sound, reasonable discretion where the result was to effectively reform the Homeowners' stated position in order to more fully assure that the Contractor would be able to secure to the Respondent Court and Judge the jurisdiction over the subject matter in this Civil Action. Such acts in excess of jurisdiction are also contrary to Leonhart v. District Court, 138 Colo. 1, 329 P. 2d 781. The extent of the misquotation can be ascertained by the analysis which immediately follows:

The Supreme Court in Alspaugh v. District Court, supra, quoted the Article 15 arbitration clause contained in a construction contract document entitled "AGREEMENT" but did not cite the AAA Rules which are also a part of the Construction Contract. It thus seems clear that the Supreme Court relied upon the Respondents' theory of the case which makes no mention of the contractual effect of the AAA rules. The basis for this conclusion is the substantial adoption by the Supreme Court of the thrust of the following statements on pages 3 and 5, respectively of the "ANSWER AND BRIEF***" of the Respondents in Original Proceeding No. 26960:

> "*** The Homeowners responded with a motion to quash summons and complaint and to dismiss with prejudice based upon the theory that the matter should properly be in arbitration, pursuant to Article 15 of the construction contract.***"
> (emphasis supplied)

> "*** In their Writ, Petitioners-Homeowners claim that the Trial Court exceeded its jurisdiction in ruling against arbitration in this case and further, the court would be exceeding its jurisdiction in the mechanic's lien case which it allowed, since according to the Petitioners-Homeowners, the contractor had waived his mechanics' lien rights by Article 15 of the contract. Respondents oppose these claims by this Response and Brief. (emphasis supplied)

These quoted remarks are not supported by the record for two reasons. First, they cite only Article 15, without reference to the AAA Rules. Secondly, they infer that the Homeowners had claimed that the Contractor had waived his mechanics' lien rights only by reason of signing the "AGREEMENT" containing the Article 15 arbitration provision of the contract. The Homeowners' documentation in Original Proceeding No. 26960 clearly shows that the Homeowners had based their contractual position upon three additional elements as follows:

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(a) The construction contract arbitration provisions consisted of both Article 15 and the rules then obtaining, i.e. the AAA rules effective March 1, 1974.

(b) All of which arbitration provisions were still in effect when the dispute arose, and

(c) By the conduct of the Contractor in his appearance before the AAA. See, for example, the Homeowner's statements in their "REPLY TO THE ANSWER AND BRIEF OF RESPONDENTS" in paragraph (3) on page 3 and also in paragraphs (10) and (11) on pages 5 and 6.

It therefore appears that the Respondents, through counsel, unilaterally reformed the Homeowners' actual position before the Supreme Court to reflect a position which would not have entitled the Homeowners to any relief under Original Proceeding No. 26960. The statement of facts and exhibits identified in the appendices accompanying this brief reenforce and even more substantially buttress the position of the Homeowners.

Because of the third paragraph in Section 46 of the AAA rules, the parties agreed that judgment upon an award may be entered in any Federal or State Court having jurisdiction thereof and such language constitutes a statutory type of arbitration clause rather than a common-law arbitration clause, which is also governed by Rule 109, C.R.C.P. Such procedure negates any trial to the Court and makes any lien foreclosure proceeding a nullity which would result in the present jurisdiction asserted by the Respondent Court only temporary and provisional in nature, at best. The legal authorities upon which the Homeowners rely have been previously set forth in their briefs in Original Proceeding No. 26960. Waiver is a statutory arbitration doctrine and revocation by implication is a common law arbitration doctrine. The Respondent Court has not disagreed with the Supreme Court's construction of the trial court's revocation rulings as that of waiver. As a consequence, there should be no unclear questions of fact involving waiver as a matter of law because the Homeowners timely, clearly, and continuously have sought to secure their

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enforceable statutory arbitration rights in C.A. 75-0203-1

Rather than mere conversations as in Thomas Wells, the Homeowners' timely and continuous attempts to secure and preserve their arbitration rights are documented throughout the record before the Respondent Court and Judge, before the Supreme Court in Original Proceeding No. 26960, and by proceeding in C.A. 75-0383-1 on an involuntary basis and by fully preserving the record with regard to such arbitration rights. In addition, they also later presented affirmative motions to secure arbitration rights before the Respondent Court and Judge on several occasions which are reflected in the Statement of Facts, supra.

Since the Contractor's conduct after an appearance before the AAA, as previously stated, was unjustified and without contractual sanction, there should be no unclear questions of fact as to any waiver of arbitration rights by the Homeowners and the Contractor clearly waived any residual lien rights which otherwise would have existed after the substantial portion of lien rights were waived by signing checks with lien waiver statements. Even if the Contractor had not executed any lien waiver statements by signing checks, the entire amount of his assertable lien rights would have been waived by his entering an appearance before the AAA by first filing a demand for arbitration that was unqualified and then by responding to the Homeowners'demand for arbitration with a response and counter-claim, etc.

The effect of the Contractor's appearance before the AAA was simply to fulfill his contractual arbitration obligation which resulted in a complete waiver of lien rights as provided by the construction contract. The Contractor should not have the same lien retention rights as a Contractor who has no Article 15 Arbitration provision and no AAA rules like the rules in the contract between the parties.

Furthermore, a true common-law arbitration submission would require no qualification to reserve the right to retry any and all issues in a Court of competent jurisdiction. The attempted qualification by the

Contractor is neither authorized by the Agreement or the AAA Rules but it also conflicts with the provisions of Rule 109, C.R.C.P. Hence, dismissal should follow, based upon Wales v. State Farm Mutual Automobile Insurance Co., ___ Colo. App. ___, 559 P. 2d 255, 6 Colorado Lawyer 288 (February 1977), and at best the waiver issue is a subsidiary issue and is controlled by the legal question of the validity of all of the arbitration provisions of the contract.

Such considerations support the jurisdictional qualification in the March 16, 1977 stipulation of settlement between Capitol, Transamerica, and the Homeowners in connection with which the statutory undertaking was placed with the Respondent Court. The Court's April 7, 1977 unilateral modification of the accompanying order that was signed on March 16, 1977 also applied the recent statutory provisions providing for substituted security so as to impair the obligation of contract and the Court also exceeded the statutory authority. The full implications of the Court's granting of Capitol's very recent motion to compel recordation of the Certificate of Release of Mechanics' Lien, if granted upon the hearing scheduled for 1/2 hour at 10:00 a.m. on May 19, 1977, is not known if the Court rules in favor of Capitol.

(2) A Recent Opinion by This Court Reinforces the Homeowners' Rights to a Juridictional Determination Before Trial.

After the Respondent Paul Mullins and the associated corporation filed two motions for summary judgment, the decision in Thomas Wells & Assoc. v. Cardinal Properties, Inc., ___ Colo. ___, 557 P. 2d 396 was published. Unlike Alspaugh v. District Court, Appendix A, that case was remanded for an evidentiary hearing as is illustrated by the following statement in the opinion.

> ***Our review of the record indicates that at the hearing on the Motion to Dismiss, counsel for the Plaintiff made an offer of proof regarding certain conversations between agents for Mid-Continent and Wells which, if fulfilled, would conceivably form a factual basis for a finding of waiver or estoppel."

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To more clearly illustrate why the Thomas Wells case was apparently remanded for a hearing on the issue of waiver, the record at page 12 in Thomas Wells, supra, should be examined with regard to the particulars of the nature of the conversations between the attorneys, (i.e. Mr. Shellman for the Petitioner Thomas Wells & Associates, and Mr. Besing for Cardinal), which formed the basis of Mr. Shellman's offer of proof:

> "*** Secondly, if the Defendant were to assert this claim and adduce facts in regard to it, I believe, if the Court please, that it can be demonstrated that Mr. Besing and I discussed whether arbitration was appropriate at the time and decided, generally, that it would be better to go ahead and proceed with suit. I'm speaking of Mr. Besing, Cardinal's attorney."

Also, implicit in the remand of Thomas Wells, supra, should be a right of an appropriate review before any trial since Thomas Wells was clearly remanded for an evidentiary hearing in contrast to Alspaugh v. District Court.

The Homeowners have requested one-day evidentiary hearings on several occasions, including the following referenced dates: February 18, 1977, March 30, 1977, and April 18, 1977 (Appendix K. Items 28, 36, and 38 respectively). Item 36 was denied by the Respondent Court on March 30, 1977 and which was confirmed by the April 7, 1977 ruling (which effectively denied the request in Item 28). The Court has not yet given leave for such a requested evidentiary hearing or allotted an adequate time in any hearing subsequently scheduled, including the hearing scheduled on May 19, 1977. In connection with such requests, the Homeowners have again renewed assertion of lack of jurisdiction over the subject matter in Civil Action No. 75-0383-1 and are entitled to an evidentiary hearing before trial, based on Thomas Wells, supra. The motions for(a)summary judgment and (b) to alter or amend judgment or for a new trial have not yet been ruled upon, as well as several other motions involving the disposition of the certificate of release of mechanics' lien and the substituted security.

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In any event, it presently appears clear that the Homeowners would not receive an evidentiary hearing on the issue of waiver and its jurisdictional consequences either before or during trial.

The foregoing further establishes the abuse of discretion exercised by the Respondent Court with respect to its proceeding in excess of its jurisdiction.

(3) The Earlier Decision of this Court in Alspaugh v. District Court in Original Proceeding No. 26960 has been Independently Questioned Very Recently on a Scholarly Basis.

A very recent commentary of the University of Colorado Associate Professor of Law, Michael J. Waggoner, setting forth an analysis of Alspaugh v. District Court, supra, was published in his article entitled "Civil Procedure," 1976 Annual Survey of Colorado Law, published by Continuing Legal Education in Colorado, Inc., a copy of which is attached as Appendix H.

Even though he poses the jurisdictional problem before trial in an interesting manner, I do not entirely agree with his analysis and conclusions, primarily because of the legal effect of the admissions of Paul Mullins which were not fully evident in Alspaugh v. District Court.

Even though he suggests that this case might be distinguishable with Merrill Lynch, supra, on the grounds that the Alspaugh case involved unclear questions of fact as to the waiver of an agreement and that Merrill Lynch involved clear questions of law, as to the validity of an agreement, we submit that the arbitration rights involved a determination as to the validity of the arbitration provisions of the agreement and in the AAA rules incorporated by reference which were in effect when the dispute arose.

Paul Mullins' deposition admissions clearly enables this conclusion to be derived, especially since there now appears to be no doubt that the Respondent Court has not disagreed with the Supreme Court's treatment of the revocation ruling as that of waiver. To assure that

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there is no doubt on this point, it is shown that following the discharge of the rule, the Homeowners requested clarification in their "MOTION TO RECONSIDER HOMEOWNERS' RIGHT TO STATUTORY ARBITRATION" and in the associated brief. The Court's oral denial of this motion on April 16, 1976 (Reporter's Transcript Informal Conference p. 3,4), and the written order of that date, reflects that the motion was summarily denied without any explanation or clarification of the modification of this Court's ruling of August 15, 1975 by the Colorado Supreme Court. A summary analysis of our understanding of the nature and effect of the Colorado Supreme Court's holding in Alspaugh v. District Court in this regard is also set forth on pages 27 and 28 of the "MEMORANDUM BRIEF OPPOSING SUMMARY JUDGMENT," a copy of which is attached to the affidavit of the undersigned attorney for Petitioners.

(4) Past Decisions of this Court Indicates That There is a Basis Through This Original Proceeding for Direction of a Statutory Arbitration Proceeding Without a Trial.

The Homeowners have elected to file this "Petition for Writ of Prohibition" directly with the Supreme Court for a determination of jurisdiction including matters raised in the first Writ of Prohibition with the belief that the Supreme Court should make a determination as to jurisdiction in connection with 1973 C.R.S., Section 13-4-110(3).

With regard to the foregoing question raised as to the proper jurisdiction, i.e. in the Supreme Court or the Court of Appeals, our further analysis follows, which indicates that the Original Proceeding No. 26960 was then properly before the Supreme Court and this Original Proceeding is now properly before the Supreme Court. The Homeowners would also show by offer of proof Mr. Irvin M. Kent, 910 15th Street, Room 900, Denver, Colorado, would testify in Court or before arbitrators as to the reasonableness of the approach to arbitration and litigation, including utilization of C.A.R. No. 21, for purposes of supporting the reasonableness of attorney's fees, which the Homeowners have reserved

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the right to reassert. Mr. Kent had previously lectured on the subject of "Original Writs, Appellate Rule 21, in conjunction with Continuing Legal Education in Colorado, Inc.'s April 10, 1976 program, entitled "Colorado Civil Procedure: Extraordinary Writs and Injunctive Relief."

Since the Supreme Court in Thomas Wells indicated that conversations between counsel could conceivably result in waiver or estoppel, it would follow that actions of a party would have a greater effect in establishing a factual basis for a finding of waiver or estoppel. This conclusion is borne out by Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. District Court, ___ Colo.___, 545 P. 2d 1035. In that case, and even though there was no evidentiary record, the Supreme Court did not agree that Merrill Lynch waived its right of arbitration in that it failed to institute the arbitration proceedings in a timely manner, waiting until Bryant filed his complaint in District Court. Since Bryant was in the position of claimant in the dispute, the Supreme Court stated that he must make the demand in the proper forum, and the rule was made absolute with directions to dismiss the complaint or stay proceedings pending completion of arbitration, whichever may be appropriate. In the instant case, the question of waiver is presented in slightly different form than in Merrill Lynch, supra.

The parties' mutual agreement to have all claims or disputes arising out of the contract or breach thereof according to the AAA's Construction Industry Rules then obtaining, i.e. those effective March 1, 1974, and which were still in effect under the construction contract when the dispute arose, could be appropriately also referred to, in Associate Professor Waggoner's words, supra, as a mutual renunciation of the jurisdiction of the Courts, which would seem to be as enforceable and reviewable as a consent to jurisdiction. The Homeowners' timely and continuous efforts to secure enforceable statutory arbitration rights, coupled with the Contractor's conduct, supra, pursuant to the complete arbitration provisions of the construction contract, should be

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given just as much consideration is this Original Proceeding as was the statement in Merrill, Lynch, supra, which reads as follows:

> "***Further, prior to the filing of the suit and during correspondence concerning settlement, Merrill Lynch called Bryant's attention to the arbitration requirement."

The foregoing analysis of the instant case, together with a more detailed analysis involving equal protection, infra, indicates that there was no circumstances comparable to the offer of proof in Thomas Wells, supra, which would form the basis of any waiver of the Homeowners' arbitration rights.

The Homeowners allege that the Respondent Court and Judge's findings, rulings, and orders with respect to arbitration in these proceedings and the jurisdictional issue before the Court are either manifestly erroneous or are actuated by prejudice against a statutory arbitration proceeding before the American Arbitration Association. Therefore, there is a basis for said findings, rulings, and orders to be disturbed on review on the basis of Western Motors v. Carlson, 138 Colo. 404, 418, 335 P. 2d 272, 279. Furthermore, there should be no conclusive presumption in favor of such findings, rulings, and orders on documentary evidence alone since said Respondents denied the Homeowners their requested evidentiary hearing and precluded the Caveators from tendering further evidence by quashing the subpoena duces tecum. Since the due process analysis under ISSUE NO. 2 infra, shows that the Respondent Court and Judge should not be able to substitute their judgment for that of the arbitrator(s), it would logically follow that the Supreme Court of Colorado could immediately direct arbitration, since there are specified grounds of a limited nature for review of an arbitration award under Rule 109, C.R.C.P.

The Homeowners submit that the better view, based on Merrill Lynch, supra, would be for the Supreme Court to retain jurisdiction and to resolve the jurisdictional issue directly on the basis that the documentation presented in this Original Proceeding provides a sufficient factual basis.

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Even though the Supreme Court previously determined that only error was involved, the foregoing analysis shows that there is such a substantial abuse of discretion resulting in an excess of jurisdiction being exercised by the Respondent Court, that the prior decision should be reconsidered, based upon the admissions of Paul Mullins.

(5) A Possible Appeal Alternative Before Trial Would Require This Court's Directions Concerning Appealable Orders and Certification Under Rule 54 (b), C.R.C.P.

With regard to any possible alternative to C.A.R. No. 21 by an appeal in advance of trial under C.A.R. No. 1, based upon any of the Trial Court's Orders up to and including the present time, the Homeowners would show that they previously attempted to obtain a C.R.C.P. Rule 54 (b) designation for the Trial Court's April 16, 1976 denial of their motion to reconsider arbitration.

Since the Homeowners' Rule 54 (b) motion was predicated upon their June 30, 1976 "SUPPLEMENTAL OFFER OF PROOF OF HOMEOWNER"S STATUTORY ARBITRATION RIGHTS," and since the Trial Court, on November 4, 1976, would not clarify its prior findings and rulings, based upon the evidence shown to the Court by offer of proof (Exhibit K, Item 22), it appears that the Trial Court misconceived the force and effect of such evidence and/or is prejudiced against the Homeowners' statutory arbitration rights, Western Motors v. Carlson, and Stephenson v. Stephenson, 134 Colo 96, 299 P. 2d 1095.

The Homeowners believe that it would require an order of this Court directing the Trial Court to find and determine that there is no just reason for delay, to direct the entry of a final judgment for an order or orders subject to Rule 54 (b), including pending motions not yet ruled upon, and to further stay proceedings pending the final outcome of the case. However, it is not known when the Respondent Court will rule upon the Contractor's motion for Summary Judgment (Appendix K, Item 26), or the Homeowners' Motion to Alter or Amend Judgment or for

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a New Trial (Appendix K, Item 38), and it does not appear that the Respondent Court would designate any Order pursuant to Rule 54 (b) because the jurisdictional issue involving the enforceability of the arbitration rights of the Homeowners underlies each of the motions and any existing or pending order by the Respondent Court.

Even if the Supreme Court exercised its supervisory powers to direct the Respondent Court to make an appropriate Rule 54 (b) certification for all such orders as is appropriate for review and which, directly or indirectly, involve the jurisdictional issue, and directed that this Original Proceeding be transferred to the Court of Appeals under 1973 C.R.S., § 13-4-110(3), it would appear that such procedure may be unnecessarily complicated and lengthy, and involve collateral matters which may be possible to avoid by a direct resolution of the fundamental issue of jurisdiction, based upon the question of law concerning the validity of all of the arbitration provisions of the construction contract, based upon cases previously cited.

(B) ISSUE NO. 2: THE HOMEOWNERS HAVE BEEN DEPRIVED OF THEIR PROPERTY BY THE ACTIONS OF THE RESPONDENT COURT AND JUDGE FOR THE FOLLOWING REASONS:

(1) Respondents Denied Homeowners of Due Process of Law Rights

The constitutional due process of law rights to which the Homeowners are entitled under the federal and state constitutions are set forth in Appendix C, infra.

Throughout these proceedings, the Homeowners have timely, diligently, and continuously attempted to secure their arbitration rights of a statutory nature which would result in an award being enforceable as a judgment, pursuant to Rule 109, C.R.C.P. After being compelled to proceed involuntarily in C.A. 75-0383-1, they have also continued to qualify and preserve the Record for appellate review of the underlying jurisdictional issue and the foregoing arbitration rights.

The Homeowners contend that the Respondent Court treats the contractual agreement of the parties (including the AAA rules referenced),

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which was still in effect when the dispute arose and that said Respondents also treat Rule 109, C.R.C.P. as though they can be unilaterally disregarded by the Contractor. Yet the Contractor can procedurally assert claims against the Homeowners in C.A. 75-0383-1, based upon other parts of the construction contract. The Homeowners have been effectively left without a remedy with regard to any rights which they have to have the dispute determined by arbitration in lieu of a court trial. They believe that the right to make and enforce contracts is a very valuable right of individuals. They also believe that a Court should not transform a contract into a new contract by effectively rewriting the contract and that a valid contract should be upheld and that procedural relief commensurate with the substantive rights of the parties should be granted accordingly.

The Homeowners assert that they are entitled to have the dispute heard before the agreed upon arbitration body, based upon Rule 109, C.R.C.P. A background review of Rule 109 indicates that the provisions of Rule 109 in connection with arbitration proceedings should be accorded greater respect in the judicial process considering the principle that, in construing a document, courts must enforce the document as written, and are not at liberty to rewrite the contract for the parties. Yamin v. Levine, 120 Colo. 35, 206 P. 2d 596, Helmericks v. Hotter, supra, and Hyland Hills etc. v. McCoy, Inc.,supra.

Rule 109, C.R.C.P., was included in the Rules of Civil Procedure that were adopted by the Supreme Court of Colorado, en banc, January 6, 1941 (see Order, page 616, Book 34, Records in the Office of the Clerk of the Court) which were to take effect on April 6, 1941. Hence, the transferral of the code provisions and legislature policy to the Colorado Supreme Court of such code sections under the Rules of Civil Procedure was effected in order that procedure and the placement might be adopted in Colorado, following as far as practicable, the new federal rules.

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It is also important to note that Chapter 80 of the Colorado Session Laws of 1939 (Appendix D) provides that the Rules shall neither abridge, enlarge, nor modify the substantive rights of any such litigants. Such act, Senate Bill No. 119, was approved February 25, 1939, and a copy of such act is attached hereto in Appendix No. D, Section 1 of the 1939 Act now set forth in 1973 C.R.S., Sec. 13-2-108.

On the basis that a change from a court of law to an arbitration panel involves substantive law and makes a radical difference in ultimate result and thus substantially effects the controversy or dispute, whatever its merits or shortcomings, the courts in Colorado may not substantially affect the enforcement of the right to statutory arbitration, based on the agreement of the parties. The inclusion of enforceable statutory arbitration agreements as a part of the substantive law is supported by the last paragraph on page 520 of 5 Am. Jur. 2d, ARBITRATION AND AWARD, Section 2.

The measure of the respect that this Court has had for Rule 109, C.R.C.P. is reflected in a number of decisions. In addition to several cases we previously cited in Original Proceeding No. 26960, several cases are commented upon as follows with regard to enforceability of an award.

In People v. Crystal River Corporation, 280 P. 2d 429, 131 Colo. 163 (1955), at page 432 of 280 P. 2d, in connection with Rule 109 (g), R.C.P. Colo. (the old Code Provisions), the Court noted the following:

> "The award of the arbitrators is of equal dignity with a judgment, and may only be reviewed for the causes set forth in Rule 109 (g), R.C.P., Colo."
>
> "In Wilson v. Wilson, 18 Colo. 615, 34 P. 175, 178... In reversing the case we said: 'In this case the district court went behind the award, and substituted its judgment, both upon the law and the facts of the case, for that of the arbitrators....Giving to the award the effect of a judgment, this action of the District Court is not sustained"

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"By Rule 109(g), R.C.P., Colo., it is provided that such matter so arbitrated shall be held to have been adjudicated and settled and not open, either directly or indirectly for review, etc., except by impeachment for fraud, etc." (At page 433 of 280 P. 2d)

In addition to Wilson v. Wilson, supra, the cases of Empson Packing Co. v. Clawson, 95 P. 546, 547, 43 Colo. 188 and Twin Lakes Reservoir & Canal Co. v. Platt Rogers, 147 P. 2d 828, 112 Colo. 155, are supportive of the Homeowners' contentions.

In connection with statutory arbitration agreements, if a district court cannot substitute its judgment for that of arbitrators after an arbitration proceeding is conducted and an award is made, then a fortiori, a district court should not be able to substitute its judgment in advance of an arbitration hearing or award. In addition, an arbitration award was upheld under Rule 109, C.R.C.P., in the case of Sisters of Mercy of Colorado v. Mead and Mount Construction Co.,439 P. 2d 733, 165 Colo. 447.

An example of this Court's denial of substantial rights of the Homeowners is the striking of allegations concerning attorney's fees and mental suffering in the December 7, 1976 Order, and there is no guarantee that the Court will later approve a motion to amend the pretrial order which is yet to be prepared at the time specified by the Court, which would be shortly before the presently scheduled trial date. The Homeowners assert a right to have such issues presented to and considered by the arbitrator(s), based on the foregoing authorities and upon the federal and state constitutional provisions (Appendix C).

With regard to the demonstrated intent of the Homeowners and their continuous assertion of arbitration rights, such rights have been preserved under the principles enunciated in the following cases and the results of said cases:

Hart v. Orion Insurance Co., 453 F. 2d 1358, 1360 (1958)

Carich v. Reder A/B Nordie, 2 Cir., 389 F. 2d 692,696

Commercial Metals Co. v. International Union Marine Corp., 294 F. Supp. 570 (1968)

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The previous analyses of the foregoing cases is set forth on pages 18 and 19 of the Homeowners' "BRIEF IN SUPPORT OF WRIT OF PROHIBITION" in Original Proceeding 26960. The above designated actions by the Homeowners, as reflected by positions taken and filed with the Respondent Court and Judge in C.A. 75-0383-1 since February 23, 1976 should be regarded as cumulative to the previous actions taken by the Homeowners in C.A. 75-0203-1, C.A. 75-0383-1, and Original Proceeding No. 26960, which are summarized on pages 19 through 21 of the above referenced Brief in Original Proceeding No. 26960. For the convenience of this Court, the expressions of the Homeowners' intent to arbitrate in the initial C.A. 75-0203-1 pleadings and motions and the initial C.A. 75-0383-1 motion to quash summons and complaint are condensed and emphasized in Appendix J (which includes summary background notes concerning the motions and pleadings of the Homeowners) to clearly illustrate the extent of the Homeowners' intent to arbitrate and their continuous assertion of such intent to arbitrate.

The purpose of Appendix J is to clearly show this Court the Homeowners' actual position before the Respondent Court and Judge early in the proceedings in both civil actions since the counsel for the Respondents in Original Proceeding No. 26960 made statements, quoted supra, which had the effect of reforming the Homeowners' actual position before this Court from the standpoint of the Respondent Court and Judge. Because the misquotation was so substantial, the effect appears to be as though there were supplemental findings by the Respondent Court and Judge in their counsel's Answer and Brief in Original Proceeding No. 26960 upon which the Supreme Court appeared to rely since the Supreme Court indicated that the trial court had jurisdiction to pass on the question of waiver. If, in fact, the Homeowners' actual position before the Supreme Court was only as it was stated by the Respondents in the Answer and Brief, quoted supra, then there would have been no basis for the Petition to have been filed by the Homeowners in the first place in Original Proceeding No. 26960!

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Therefore, the Homeowners assert that they were deprived of their property by denial of federal and state consitutional due process of law by such unilateral reformation in behalf of the Respondents and which must be imputed to the Respondent Court and Judge. The additional elements of the Homeowners' actual position before this Court in that Original Proceeding generally include (a) the existence of all of the arbitration provisions of the construction contract (including the AAA rules then obtaining) which demonstrably were in effect when the dispute arose. (b) the Contractor's conduct in his appearance before the AAA, (c) the Homeowners' clear demonstration of their timely application to secure enforceable statutory arbitration rights, based upon recognized principles of law. (d) their continuous assertion of such rights in C.A. 75-0203-1 and C.A. 75-0383-1 before the Respondent Court and Judge. They believe that they are entitled to have the Supreme Court, in another Opinion, supplement the findings reflected in the Opinion, dated February 23, 1976 (Appendix A) to correctly reflect their actual position and to also have their correct position stated under Note 1 thereto with regard to their demonstrated intent to obtain their arbitration relief by fully qualifying their pleadings.

As a consequence of the February 23, 1976 decision by this Court in Alspaugh v. District Court, supra, and in addition to the foregoing, the Homeowners have effectively conditioned their appearance in this Civil Action as participating on an involuntary basis before filing any pleadings in this action (Appendix K, Item 4).

The denials of the requested one (1) day evidentiary hearing on March 30, 1977, confirmed by the April 7, 1977 ruling, deprives the Homeowners of their property and constitutes a denial of due process of law under the referenced constitutional provisions, based on Thomas Wells, supra, and also based on both their several offers of proof (Appendix K) and the circumstances of this case. The Court has still not permitted an opportunity for an adequate evidentiary hearing in connection with the jurisdic-

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tional issue in connection with other motions pending before the Court.

In connection with their full rights to be fully heard from the standpoint of due process of law, the Homeowners rely on fundamental principles of a meaningful opportunity to be heard, which includes an opportunity for a person to speak up in his own defense, being afforded an opportunity to present objections, and an effective opportunity to defend by confronting any adverse witnesses and presenting his own arguments and evidence orally. See, for example,

> Fuentes v. Shevin, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed. 2d 556;
>
> Boddie v. Connecticut, 401 U.S. 371, 377, 28 L. Ed 2d 13, 91 S. Ct. 780;
>
> Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314, 94L. Ed. 865, 70 S. Ct. 652;
>
> Goldberg v. Kelly, 397 U.S. 254, 260, 90 S.Ct. 1011, 25 L. Ed. 2d 287.

In connection with Fuentes v. Shevin, supra, this Court has very recently upheld Fuentes v. Shevin in Valley Development, at Vail, Inc. v. Warder, County Eagle, Colo., 557 P. 2d 1180. Such case appears relevant because the District Court Judge limited the C.R.C.P. 120 hearing to the question of the debtor's military status. The Colorado Supreme Court did not agree that the receivership hearing provided petitioners with an effective opportunity to be heard on the issue of foreclosure, and, on the facts in that case, petitioners had no opportunity to be heard at a meaningful time or in a meaningful manner concerning the matters constituting the alleged defaults, apparently challenged, particularly as to the details of the accumulated indebtedness alleged to be in default. Fuentes v. Shevin,supra.

The case of Bonner v. Gorman, 213 U.S. 86, 53 L.E. 709, 29 S. Ct. 483 previously quoted in the "BRIEF IN SUPPORT OF THE REPLY TO THE ANSWER AND BRIEF OF RESPONDENTS" at pages 25 and 26, is even more pertinent today, in view of the due process of law principles set forth in this brief. In addition, as also therein noted at page 25, based on Shelley v. Kramer, 334 U.S. 1, 14,

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92 L.E. 1161, 68 S. Ct. 836 indicates that the Respondent Court and Judge would be responsible for state action which would deprive Homeowners of their constitutional rights by ignoring the several offers of proof and requests for evidentiary hearings before trial.

The Homeowners were further effectively deprived of their property by the Respondent Court and Judge's April 7, 1977 unilateral amendment of the paragraph relating to the custody and disposition of funds for the substituted security paid to the Court in the amount of $20,668.41 and thus altering the language which was set forth at the bottom of page 1 and at the top of page 2 of the Court's March 16, 1977 "ORDER" and at the end of paragraph (4) on Page 1 of the March 16, 1977 "STIPULATION AND MOTION TO DISMISS AND DISCHARGE THE MECHANICS' LIEN." (Appendix K, Items 33, 37, 45).

Such unilateral modification of the stipulation is believed to have placed the Homeowners in the untenable position of waiving their preserved statutory arbitration rights by filing, or consenting to the filing, of the signed "CERTIFICATE OF RELEASE OF MECHANICS LIEN" with the Clerk and Recorder for the County of Boulder. Such modification was a clear abuse of discretion, especially since the Homeowners' subpoena duces tecum was quashed and the Homeowners were denied an evidentiary hearing regarding their arbitration and jurisdictional rights. In addition, the substituted language in the April 7, 1977 Order could enable the Respondent Court to apply such substituted security to the non-lien Counts of the lien foreclosure complaint (No. II and No. III), and could preclude any offset against Paul Mullins. Such action exceeds the scope of 1973 C.R.S. § 38-22-131(2), which does not provide that a Judge may unilaterally modify an Undertaking.

It would also seem that the completion of the trial proceedings between only the Alspaughs with the Plaintiff Corporation and Third-Party Defendant, Paul Mullins, DBA: Paul Mullins Construction Company and any ensuing judgment, even if in favor of the Plaintiff and such Third-Party

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Defendant, would not completely determine the rights of the parties and would further deny the Homeowners due process of law, especially considering the provision of Section 38-22-113 (2), 1973 C.R.S., which reads in relevant part as follows:

> "(2) Judgments shall be rendered according to the rights of parties. The various rights of all the lien claimants and other parties to any such action shall be determined and incorporated in one judgment and decree.***"

when the March 16, 1977 Stipulation has not been given effect.

Even though the Respondent Court has abused its discretion and exceeded its jurisdiction and has denied the Homeowners of a meaningful opportunity to be heard, based upon principles of due process of law contrary to the federal and state constitutions (Appendix C). However, based on the admissions of Paul Mullins, it appears that an evidentiary hearing would not be required to establish the validity and legal effect of the arbitration provisions still in effect when the dispute arose, which should be paramount and controlling over the issue of waiver which should now be a clear question of law.

(2) Respondents Denied Homeowners of the Equal Protection of the Law.

Generally, the Homeowners assert that the Court has not applied equivalent standards to the issues waiver of arbitration and lien rights with respect to both the Homeowners and the Contractor. In addition, it now clearly appears that the Court is denying the Homeowners equal protection under the Federal and State Constitutions (See Appendix No. C, attached) by refusing to further consider offers of proof as to the Homeowners' arbitration rights prior to trial even though the Colorado Supreme Court has just held that a petitioner was entitled to a hearing, including an opportunity to present evidence to sustain a claim of waiver as a result of an offer of proof. Thomas Wells, supra.

The denial of an evidentiary hearing on jurisdictional facts before trial to the Alspaughs, landowners, is a clear denial of equal protection of the law, especially when contrasted with the Colorado Supreme Court's granting a contractor (i.e. the architect in Thomas Wells,

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supra, who sued to foreclose a mechanics' lien), a right to an evidentiary hearing on a question of waiver without requiring trial as a prerequisite to a determination of the status of arbitration rights.

The Respondent Court has applied an unequal standard of waiver, resulting in a further denial of the equal protection of the law, by:

(a) effectively making it possible for the Contractor to unilaterally, and without contractual justification, assert lien rights by:

(i) filing the unqualified demand for arbitration, based upon the complete arbitration provisions of the contract,
(ii) then breaching the construction contract by also filing the qualified response and counter-claim to the Homeowners' demand for arbitration,
(iii) and then by filing a lien foreclosure complaint,

and yet,

(b) deny to the Homeowners the opportunity to then seek a judicial determination as to enforceable statutory arbitration rights, pursuant to the contract between the parties and based upon Rule 109, C.R.C.P., without first being compelled to go through trial in C.A. 75-0383-1.

A detailed side by side comparison of steps taken by the Contractor and by the Homeowners is included on pages 25 and 26 in the "MEMORANDUM BRIEF OPPOSING SUMMARY JUDGMENT." (Appendix K, Item 28).

A detailed analysis of the standard to be applied follows such comparison on pages 26 through 28, and includes such factors as intent, ***, whether or not arbitration was continuously asserted by the Homeowners, and the presence of prejudice, i.e. substantial prejudice , which was previously analyzed on pages 17 through 21 of the "BRIEF IN SUPPORT OF WRIT OF PETITION" in Original Proceeding No. 26960. A detailed, numbered, step by step analysis of the application of the standard also is included therein, commencing at page 28 and ending at page 31 of said opposing brief (Appendix K, Item 28). In addition, such opposing brief also reflects in that section that the rulings of this Court and the Trial Court were inconsistently stated. It is further believed that the combined effect

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of the rulings of the Trial Court and this Court (including this Court's construction of the trial court's ruling) was quoted out of context. Since the standard for waiver of arbitration rights is affected by the type of arbitration agreement, which we assert to be of a statutory type, it is essential that a determination be made by this Court since the Respondent Court has declined to make such determination. It was simply stated that the Trial Court did have jurisdiction over the matter in the "RULINGS AND ORDERS ON ALL PENDING MOTIONS, on November 4, 1976 (Appendix K, Item 22). Previously, the Respondent Court and Judge stated at an informal conference on April 16, 1976 that there was going to be no arbitration, period, based upon authority from the Supreme Court. However, based on the issue concerning the validity of the arbitration provisions of the construction contract which has emerged, this conclusion should no longer be given such effect, based upon Helmericks v. Hotter, Hyland Hills, Yamin, and Merrill Lynch, supra.

The Homeowners submit the record, as summarized by the Statement of Facts, and the referenced documentation will lead the Supreme Court to the conclusion that the Respondent Court and Judge have, in fact, applied an unequal standard of waiver either by act or omission, or a combination of both, all of which constitutes an abuse of discretion and which results in their acting in excess of their jurisdiction.

(3) Respondents Impaired Their Statutory Arbitration Rights under the Enforceable Statutory Provisions of the Construction Contract and Impairing Their Further Rights of Compromise and Settlement.

Article I, Section 10, Clause 1 of the United States Constitution provides in part as follows:

> "No state shall ***; pass any bill of attainder, ex-post facto law, or law impairing the obligation of contracts,***

In McCracken v. Hayward, 2 How 608, 11 L. Ed 397, it is stated, in par as follows:

> "*** The obligations of a contract consist in its binding force on the party who makes it. This depends upon the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other.*** (emphasis supplied)

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In connection with the application of the foregoing principle concerning impairment of contracts, the following principle in 73 Am. Jr. 2d STIPULATIONS, Section 4, Subject Matter should be considered where it is stated in part:

> "it may be stated as a broad general principle, subject to the limitations hereinafter noted, that matter relating merely to the conduct of a pending proceeding or to the designation of the issues involved therein, which affects only the rights or convenience of the parties thereto and does not involve any interference with the duties and functions of the court, may be the subject of a stipulation.[28]"***

The following phrase of the stipulation of the parties in the March 16, 1977 Order, and also in the stipulation and motion of that date:

> "*** shall be paid out in accordance with such orders as may hereafter be entered by any court having jurisdiction thereof, pursuant to the above referenced statutory provisions.

should be given effect just as much as the stipulation which was upheld in United States v. Harding, 491 F. 2d 697 (10th Cir., 1974), Appeal after remand, 507 F. 2d 294, Cert. denied 420 U.S. 997, 43 L. Ed. 2d 679, 95 S. Ct. 1437, which would result in this Court's having no subject matter jurisdiction to adjudiate the issues at trial. This is especially true, since the following statement is set forth in the March 16, 1977 stipulation between Capitol, Transamerica and the Homeowners:

> "(6) That the Court shall enter an order in accordance with the foregoing***"

and it is clear from the language of the stipulation provisions that the parties to the stipulation did not authorize the Court to modify the March 16, 1977 Order. Such stipulation of the parties should be given force and effect, based upon the analysis in the supporting memorandum brief pertaining to stipulations. Capitol and Transamerica cannot stipulate in to one thing and later change their mind and withdraw that consent without the agreement of the Homeowners.

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The Homeowners also contend that their construction agreement with the Contractor, dated March 12, 1974, which was in effect when the dispute arose, and which also includes the above referenced AAA rules, would be impaired by any provision of the sections of the State of Colorado Revised Statutes, providing for the Court's substituting the language in its April 7, 1977 Ruling in lieu of the stipulated language.

In addition to consideration of principles of law applied to the validity of contracts, supra, the previously analyzed principles connected with due process of law and the equal protection of the law have a bearing upon the application of the principle pertaining to impairment of contracts. Based upon the agreement of the parties, supra, and based upon the enforceable character of such an arbitration award under the construction contract based upon Rule 109, C.R.C.P., which was founded by the legislature and which should be fully accorded binding effect, based upon the 1939 Session Laws (Appendix D), the Homeowners are entitled as a matter of law to preserve their statutory arbitration and jurisdictional rights by qualifying language in the undertaking by which the Homeowners have lodged $20,668.41 as substituted security for the mechanic's lien claim of the Plaintiff on March 16, 1977 (Appendix K, Item 3). The Supreme Court of Colorado reserved a ruling on the correctness of the Respondent Court and Judge's ruling on the issue of waiver until appeal and hence did not authorize the trial Court to exceed it's discretion and authority beyond either the February 23, 1976 Opinion discharging the rule to show cause or to exceed it's authority to approve a bond or undertaking under 1973 C.R.S., Section 38-22-131(2) by enabling the Court to modify a bond or undertaking, especially one which was limited to certain terms by stipulation.

In addition, the Homeowner's object to the reference, in the quoted phrase above, which includes any judgment obtained by the Plaintiff. This is objectionable because such language could include Counts 2 and 3 of the Plaintiff's complaint and would preclude the Alspaughs from off-

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setting any judgment against Paul Mullins, individually, doing business as Paul Mullins Construction Company.

Because of a denial of due process as to an evidentiary hearing on underlying jurisdictional issues, the Homeowners have been denied of a meaningful opportunity to a due process of law hearing, based upon foregoing principles and, hence, the one-half hour scheduled hearing on May 19, 1977 on the two motions identified in the Respondent Court's "AMENDED NOTICE OF HEARING, dated May 9, 1977 will not remedy nor appear to affect the Court's April 7, 1977 ruling in terms of scope. Rather, the hearing would appear to only affect the timing of the recording of the Certificate of Release of Mechanic's Lien now in the possession of the Respondent Court and Judge if the Court rules in favor of Capitol.

The Respondent Court's actions herein further show an abuse of discretion leading to its acting in excess of its jurisdiction.

V. CONCLUSION:

It appears that the procedural problem could be most directly and efficiently resolved by the Supreme Court in this Original Proceeding by ordering that the proceedings in Civil Action No. 75-0383-1 are a nullity with appropriate relief as requested in the accompanying Petition so that the Homeowners may amend their demand for arbitration against Paul Mullins d/b/a Paul Mullins Construction Company, and against the now disclosed corporation by that name.

Respectfujly submitted,

Dated: May 1977.

John H. Love, No. 2493
Attorney for the Petitioners
250 Arapahoe, Suite 202
Boulder, Colorado 80302
(303) 449-6762

No. 26960

Mark H. Alspaugh and Juanita S. Alspaugh,
Petitioners,
v.
The District Court in and for the County of Boulder; Honorable William D. Neighbors, Judge; Paul Mullins, d/b/a Paul Mullins Construction Co., a Colorado corporation; Capitol Federal Savings; and Gerald Caplan, Public Trustee for the County of Boulder, State of Colorado,
Respondents.

Original proceeding. Rule discharged as improvidently granted.

John H. Love, for petitioners.
Thomas and Esperti, P.C., Eldon E. Silverman, for respondents except Capitol Federal Savings and the Public Trustee.

MR. JUSTICE GROVES delivered the opinion of the Court.

This is an original proceeding in which we issued a rule to show cause why the district court had not exceeded its jurisdiction in refusing to compel arbitration according to an arbitration provision in a construction contract. We discharge the rule.

On March 12, 1974, Paul Mullins Construction Co., (hereinafter "Contractor") and Mark H. and Juanita S. Alspaugh, (hereinafter "Homeowners"), entered into a contract for the construction of a home in Boulder County. The contract contained an arbitration clause which reads as follows:

> "*Article 15* Arbitration. All claims or disputes arising out of this Contract or the breach thereof shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen."

A dispute arose between the Contractor and the Homeowners, and on December 9, 1974, the Homeowners filed a demand for arbitration. The demand was on a standard form of the American Arbitration Association which, with added claims for relief, was filed with the Association. On January 3, 1975, the Contractor submitted himself to arbitration by filing a response. The response denied various allegations, and asserted a counterclaim for amounts owed for labor and materials. The Contractor, in accordance with its submission to arbitration, indicated its choice of arbitrators and dates for the arbitration. However, the response reserved the right to arbitrate, "only as a condition precedent to a possible court action."

In late January, 1975, the Homeowners filed an action in the district court, alleging a wrongful attempt by the Contractor to avoid finality of submission to arbitration. In this action the Homeowners also alleged breach of contract, negligence, and attempted wrongful reformation of contract. Included with this complaint, which consisted of a table of contents, 48 allegations and 18 pages, was a motion to compel arbitration.[1] In early February, 1975, the Contractor initiated a mechanic's lien foreclosure suit, naming as defendants the Homeowners, Capitol Federal Savings (as beneficiary under a deed of trust), and the Public Trustee of the County of Boulder. The Homeowners responded with a motion to quash the summons and dismiss the foreclosure complaint with prejudice, based upon the theory that the matter should be resolved by arbitration.

Both the action filed by the Homeowners and the action filed by the Contractor were assigned to the respondent judge. The court, without objection by either party, heard oral arguments on all pending motions in both cases on April 23, 1975, and on August 15, 1975, issued its rulings and order. The court ruled that "the principal issue raised by all the motions, briefs and argument of counsel is simply whether the contractor can be compelled to participate in the arbitration proceedings."

The court held that the contractor had asserted a mechanic's lien against the homeowners, which mechanic's lien was not waived by the construction contract and which could be enforced only through judicial proceedings.

The court further stated:

> "[W]hen the parties each filed their respective law suits they *revoked* their agreement to arbitrate by implication. The filing of an action in court based on the same cause of action as the arbitration submission *revokes* by implication the agreement to arbitrate. *Gillette v. Brookhart*, 123 N.E.2d 693 (Ohio 1954); 5 Am. Jur. 2d Arbitration and Award § 46 (1962); 6 C.J.S. Arbitration and Award § 34(e) (1937)." (Emphasis added.)

In *Gillette v. Brookhart* the court stated:

> "[I]t is the considered opinion of the court that although the plaintiff lessee had a right to arbitrate and the defendant lessor had a corresponding duty, the plaintiff lessee by bringing this action *waived* such right." (Emphasis added.)

The encyclopedia citations are not very supportive of a ruling based on revocation. We conclude that while the trial court was referring to *revocation*, under the wording of *Gillette v. Brookhart*, which it cited, it really meant that by filing the law suits the parties *waived* their agreement to arbitrate. We treat the order before us as the ruling that there were waivers.

The court further dismissed the complaint filed by the Homeowners without prejudice, ruling that the complaint was "filled with legal arguments, immaterial and irrelevant matters and clearly is not a short and plain statement of their claim," and was thus in violation of C.R.C.P. 8(a)(2). It then held that the Homeowners could assert any and all of their claims against the Contractor in the foreclosure action still pending.

The Homeowners filed a petition for writ of prohibition in this court, and a rule to show cause was issued. The Homeowners claim that the trial court exceeded its jurisdiction in not compelling arbitration and, further, that the court would be exceeding its jurisdiction in the mechanic's lien case, since according to the Homeowners, the Contractor had waived his mechanic's lien rights by reason of the arbitration provision of the contract. The Homeowners also ask for reinstatement of the case they filed in district court.

A writ of prohibition under Colo. Const. Art. VI, § 3, and C.A.R. 21 is traditionally used to prevent an inferior judicial body from exercising a jurisdiction with which it is not vested. Rule 21(a) in pertinent part reads as follows:

> "Relief in the nature of prohibition may be sought in the Supreme Court where the district court is proceeding without or in excess of its jurisdiction or where the district court has granted or denied change of venue. . . ."

This extraordinary writ does not include the correction of error made by the trial court. Prohibition may not "be used to restrain a trial court from committing error in deciding a question properly before it; it may not be used in lieu of a writ of error." *Prinster v. District Court*, 137 Colo. 393, 325 P.2d 938 (1958).

Right or wrong, the trial court has ruled that the parties have waived their rights to arbitration. It cannot be denied that the court had jurisdiction to pass on the question of waiver. If it is right in this ruling, it has jurisdiction to proceed. This is not a proper case for this court to inject itself at this juncture into the ruling on waiver. If in fact the district court erred, the error may be corrected on appeal. *Leonhart v. District Court*, 138 Colo. 1, 329 P.2d 781 (1958).

The petitioners urge that the right to arbitrate will be lost if the trial court proceeds with the case before it, and that the unnecessary delay and expense of the trial is sufficient grounds to invoke the jurisdiction of this court. In *Prinster, supra*, the court stated that "[t]he delay and expense of a trial may not be urged as grounds for prohibition."

The rule, having been improvidently granted, is discharged.

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1. The main complaint contained seven causes of action, including the ones which were the basis of the original dispute. Among them were three based on negligence, and one on wrongful attempt to revoke arbitration. Later an amended complaint was filed containing 38 allegations. Additional motions were also filed to compel arbitration, to add additional parties, and to accelerate the proceedings.

Appendix Exhibit Notes:

(1) Reproduced from 5 Colorado Lawyer 583 (April 1976)

(2) This Original Proceeding is also cited at ___ Colo. ___, 545 P. 2d 1035 (1976)

DOCKET SHEET

Action No. 77 CV 0353

DISTRICT COURT OF BOULDER COUNTY, COLORADO

Assigned to: JUDGE NEIGHBORS Re-assigned to: Nature of Action: MECHANICS LIEN (MECH) 13,778.00

THE C. F. HOECKEL CO., DENVER, COLO. 303484

TITLE OF CASE	ATTORNEYS
PAUL MULLINS CONSTRUCTION CO., VS MARK H. ALSPAUGH and JUANITA S. ALSPAUGH, CAPITOL FEDERAL SAVINGS, and GERALD CAPLAN, PUBLIC TRUSTEE FOR THE COUNTY OF BOULDER, STATE OF COLORADO.	For THOMAS and ESPERTI By: Eldon E. Silverman For JOHN H. LOVE--Dfts Alspaugh DAVID C. WELLS--Capitol Federal Sav. HARRY M. WILLIAMS-Co-Counsel

DATE	FOR		NAME	Amount Received	Rec. No.	Amount Paid Out	Check No.	Misc. Costs
Feb.10,1975	Pltf	D. FEe & Tx	Thomas & Esperti	26.00	16006			
Feb.26,1975	Dft	D. Fee	John H. Love	12.50	16334			
Feb.27,1975	Dft	D.Fee	David C. Wells	25.00	16339			
Mar 22,1976	Dft	D Fees	John H. Love	140.00	5614			
Apr 06,1976	DFt	D Fee	David C. Wells	40.00	5963			
Apr 06,1976	Dft	Refund	David C. Wells			20.00	1400	
Aug 30,1976	Dft	Jury Fee	John H. Love	25.00	0019			
Dec 20,1976		Jury Fee	Dennis L. Blewitt	25.00	2554			
Mar 16,1977	Dfts	Deposit	Mark & Juanita Alspaugh	20,668.41	4547			
Mar 17,1977	Other	Per Order	Capitol Fed. Savings			20,668.41	2064	
Mar 17,1977	Other	S.Act. Open	Capitol Fed. Savings	20.668.41	4576			

DATE	PROCEEDINGS	Order Book	Page
Feb.10,1975	Complaint filed.		
Feb.26,1975	MOTION to Quash Summons and Complaint and to Dismiss with Prejudice filed, by dfts Alspaugh.		
	Memorandum Brief in Support of Motions to Quash Summons and Complaint and to Dismiss with Prejudice filed.		
	MOTION to Accelerate Proceedings-filed.		
	Affidavit of Mark H. and Juanita S. Alspaugh filed.		
	Certificate of Delivery and Certificate of Mailing filed.		
Feb.27,1975	Answer and Crossclaim file by Dft Capitol Federal Savings.		
Mar.3,1975	Summons filed with return of service on Gerald Caplan personally, at 1301 Spruce Street, on Feb. 7, 1975. Upon Juanita S. Alspaugh, personally at 6 Bench Mark Drive, Boulder, Colo on Feb.8, 1975		
	Affidavit of Service by Disinterested Person for Juanita S. Alspaugh at 6 Bench Mark Drive, Boulder on Feb. 8, 1975.		
	Affidavit of Service by Disinterested Person for CAPITOL FEDERAL SAVINGS, by leaving with Leslie McClendore, at 2625 South Colorado Blvd., Denver, Colorado, Feb. 10, 1975.		
	Notice of Hearing filed for March 12, 1975, at 3:30 p.m.		
Mar.7,1975	Response to Motions of Dfts Alspaugh to Quash Summons and Complaint and to Dismiss with Prejudice filed.		
	Affidavit of Paul Mullins filed.		

75-0383-1 Action No. PAUL MULLINS CONSTRUCTION VS. ALSPAUGH etal,

DATE	PROCEEDINGS	Order Book	Page
Mar.12,1975	M.O. entered and filed. Signed Mar. 12, 1975. Hearing in cases 75-0203-1 and 75-0383-1 for March. 12, 1975 is Vacated. Counsel will arrange a hearing date at a later time.		
Mar.18,1975	Clerk's Notice of Resetting Hearing filed forApril 23, 1975 at 2:30 p.m.		
Mar.31,1975	Supplement to Motion to Quash Summons and Complaint and to Dismiss with Prejudice filed by Dfts Alspaugh.		
Apr.24,1975	Certificate of Mailing for Answer and Crossclaim filed.		
May 08,1975	(Filed May 07,1975) Second Supplement to Motion to Quash Summons and Complaint and to Dismiss with prejudice filed by Dfts. Alspaugh.		
Aug 15,1975	M.O. Entered and Filed. The Clerk of the District Court is directed to enter judgment dismissing Civil Action No. 75-0203-1, without prejudice, theparties to pay their own costs. Mark H. Alspaugh and Juanita S. Alspaugh are directed to file an answer to the complaint of Paul Mullins Construction Co. within 30 days from the date of this order. They may assert their claims against Paul Mullins Construction Co. by a counterclaim filed at the same time. Any claims they have against Paul Mullins individually may be asserted by filing a third party compalint within 30 days from the date of thisorder. In addition, Mark and Juanita S. Alspaugh are directed to file a reply to the cross claim of Capitol Federal Savings within 30 days from the date of this order. No additional fees shall be charged by the Clerk of the District Court for the filing of these additional pleadings in Civila Action No. 75-0383-1.		
Sep 16,1975	Original Proceeding from the Supreme Court. It is hereby ORDERED that a rule to show cause issue out of this court commanding the respondent to answer in writing and show cause within 20 days from service of such rule why the relief requested in the prayer of said petition shoud not be granted. It is further ORDERED that all proceedings be stayed until further order of this court.		
Sep 16,1975	Rule to Show Cause filed by Clerk of the Supreme Court of the State of Colorado.		
Oct 01,1975	Copy of Motion for Extension of Time filed in Supreme Court.		
Oct 03,1975	Original Proceeding from the Supreme Court. Respondents have additional time, to and including Oct 06,1975 within which to file answer to rule to show cause.		
Oct 14,1975	Copy of Original Proceeding: Answer and Brief of the Rsps The Honorable William D. Neighbors, Paul Mullins and Paul Mullins Construction Co. in Opposition to Petition for WRit of Prohibition.		
Oct 24,1975	Copy of Reply of the Answer and Brief of Respondents filed.		
Oct 24,1975	Copy of the Table of Contents to Brief in Support of the Reply to the ANswer and Brief of Respondents filed.		
Nov 05,1975	Copy of Motin on Behalf of Responsdnets, The Distirct in and for the County of Boulder, The Honorable William D. Neighbors, Judge; Paul Mullins and Paul Millins Construction Co.; for Permission to file Supplemental Answer and Brief.		
Nov 14,1975	Copy of Reply to the Supplemental Answer and Brief of the Respondents filed from the Supreme Court.		
Jan 20,1976	Copy of Notice of Change of Address of Thomas and Esperti, PC. filed.		
Feb 26,1976	Copy of Original Proceedings from Supreme Court RE: Rule Discharged as Improvidently Granted, filed.		
Feb 26,1976	Motion forExtension of Time to File Pleadings filed by Dfts Alspaugh		
Mar 01,1976	Certificate of Mailing filed by Dfts.		
Mar 11,1976	Letter from John Love to Judge Neighbors Re: Extension to Plead. (Dated Mar 09,1976)		
Mar 11,1976	Letter from John Love to Judge Neighbors Re: Order discharging rule. (Dated Mar 10,1976)		
Mar 11,1976	ORIGINAL PROCEEDINGSform Supreme Court: It is hereby ORDERED that the rule to shaow cause herefofore issued in this action be, and it is, discharged as having been improvidently granted. By the Court En Banc. Feb 23,1976.		
Mar 11,1976	ORDER Granting extension for filing pleadings entered and filed. Extension of time to file pleadings granted until March 22, 1976.		
Mar 22,1976	Motion to Reconsider Homeowners' Right to Statutory Arbitration filed by Dfts and 3rd Pty Pltfs, Alspaugh.		
Mar 22,1976	Memorandum Brief in Support of Motion to Reconsider Homeowners' Right to Statutory Arbitration filed by Alspaugh.		

75-0383-1 Civil Action No. PAUL MULLINS CONTS. VS ALSPAUGH et al

OUT WEST B-3023

DATE	PROCEEDINGS	Order Book	Page
Mar 22,1976	Answer and Counterclaim filed by Dfts and Homeowners, Alspaugh.		
Mar 22,1976	Third-Party Complaint Against Transamerica Title Ins. Co. filed by Alspaugh.		
Mar 22,1976	Amendment to Third-Party Complaint Against Transamerica Title Ins. Co. filed by Alspaugh.		
Mar 22,1976	Third-Party Complaint Against Paul Mullins, Third-Party Defendant filed by Alspaugh.		
Mar 22,1976	Answer to Crossclaim and Counterclaim filed by Dfts Alspaugh.		
Mar 22,1976	Summons filed by Dfts showing service on Beatrice Diltz, agent for service of Process and Clerk in the Office of the Commissioner of Ins. for the State of Colo at 1510 Sherman St., #106, Denver, CO on Mar 22, 1976 at 12:45 pm., for 3rd Pty Dft, Transamerica Title Ins. Co.		
Mar 24,1976	Summons filed by Dfts showing service on Paul Mullins at 751 Cypress Dr., Boulder, CO on Mar 22,1976. (Filed with Certificates of Mailing)		
Mar 30,1976	Motion to Extend Time to Reply to Counterclaim filed by Dft Capitol Fed Savings.		
Apr 05,1976	M.O. Entered Apr 02,1976. Teh motion of Dft Capitol to extend time to reply to counterclaim is granted. It is therefore ordered that said Dft shall have through and including Apr 30,1976 within which to file its reply to the counterclaim filed by Dfts Alspaugh.		
Apr 06,1976	Motion to Dismiss Memorandum and Motion to Tax costs file by 3rd Pty Dft Transamerica Title.		
Apr 12,1976	Undifferentiated Motion by Homeowners filed by Alspaugh.		
Apr 12,1976	Motion for Withdrawal, Entry of Appearance, and Order filed by Pltf.		
Apr 12,1976	Reply of Pltf to Counterclaim, Answer of 3rd Party Dft, Paul Mullins, and Response of Both to Dfts' Motion to Reconsider, filed by Pltf Paul Mullins Construction Co. and 3rd Pty Dft Paul Mullins.		
Apr 12,1976	Motion to Accelerate Proceedings filed by Pltf P. Mullins Const.		
Apr14,1976	Notice to Set on Apr 16,1976 at 8:45 a.m. filed by Dfts Alspaugh.		
Apr14,1976	Certificate of Mailing filed by Dfts Alspaugh.		
Apr 20,1976	M.O. Entered Apr 16,1976. Informal conference with the Court held Apr 16,1976 at 8:45 a.m. The motion of Thomas and Esperti for leave to withdraw as counsel of record for Paul Mullins and Paul Mullins Const. Co. was granted with the Court noting the entry of appearance by the Firm of Silverman and Reeves on behalf of said parties. The motion to reconsider arbitration filed by the Dfts and third party Pltfs Alspaugh was denied. The Alspaughs were granted until and including Apr 23,1976 within which to file a brief in opposition to Transamerica's motion to dismiss. Said opposition brief shall be no longer that five pages and a copy of the title insurance policy shall accompany said brief. The Court shall then rule on the motion to dismiss without the benefit of oral arguments and the Court will not consider matters outside the pleadings other than the copy of the insurance policy. The motion to accelerate filed by Pltf P. Mullins Const. Co and 3rd Pty DFt Mullins was granted and the parties were directed to have all discovery completed before the pre-trial conference which is set for 10:00 a.m. August 31,1976. The motion by Dft Transamerica for costs pur. to Rule 11 C.R.C.P. shall be set for hearing at a later date after other motions now contemplated by the parties have been filed. It was agreed by the parties that the Alspaughs and Mullins shall avail themselves for deposition within 30 days from the date of this order with regard to the issues between said parties.		
Apr 23,1976	Homeowners' Opposition Brief to Transamerica's Motion to Dismiss Memorandum and Motion to Tax Costs filed by Homeowners (Alspaughs).		
Apr 26,1976	Letter to the Clerk from Eldon E. Silverman re: change of address.		
Apr 28,1976	Notice of Deposition of Dft Mark H. Alspaugh Pursuant to Rule 30 to be taken May 12,1976 at 10:00 a.m. at the office John H. Love 250 Arapahoe, Suite 202, Boulder, filed by Pltf.		
Apr30,1976	Reply of Homeowners to Affirmative Defenses of Pltf and Third-Party Dft Mullins filed.		
May05,1976	Notice of Deposition of Pltf and Third-Party Dft Paul Mullins and Request to Produce filed, by Dfts Alspaugh.		
May 26,1976	Entry of Appearance of Harry M. Williams as co-counsel of record with David C. Wells on behalf of Defendant, Capitol Federal Savings.		
May 26,1976	Motions to Strike and/or Motion for More Definite Statement filed by Defendant Capitol Federal Savings.		
May 26,1976	Consolidated Brief in Support of Motions to Strike and Motion for More Definite Statement filed.		

VS Civil Action No.

DATE	PROCEEDINGS	Order Book	Page
Jun 2,1976	Homeowners' Combined Motion to Strike, Motion "In Limine" and Objections filed by Defendants and Third-Party Plaintiffs.		
Jun 2,1976	Memorandum Brief in Support of Homeowners' Combined Motion to Strike Motion "In Limine" and Objections filed.		
Jun 07,1976	Homeowners' Opposing Brief to Dft Capitol Federal SAvings Motions to Strike and/or Motion for More Definite Statement filed by Dfts and 3PP Mark H. nad Juanita S. Alspaugh.		
Jun 22,1976	RULING On Transamerica Title Insurance Company's Motion To Dismiss. Counsel for all parties appeared for an informal conference on April 16,1976. ORDER: The third party complaint filed by Mark H. and Juanita S. Alspaugh against Transamerica Title Ins. Co. is dismissed. The parties are directed to set all remaining motions for oral argument. One hour will be allocated for the argument.		
Jun 28,1976	Deposition of PAUL MULLINS taken May 13,14, & 15, 1976 placed in file.		
Jun 28,1976	Objections to Ruling and Order Dismissing Homeowners' Third-Party Complain Against Transamerica Title Ins. Co. filed by DFts. and 3PP's Alspaugh.		
Jun 28,1976	Affidavit of Mark H. Alspaugh filed.		
Jun 28,1976	Certificate of mailing filed.		
Jun 30,1976	Supplemental Offer of Proof of Homeowners' Statutory Arbitration Rights filed by DFts and 3PP Alspaugh.		
Jun 30,1976	Affidavit of Court Reporter filed.		
Jun 30,1976	Certificate of Mailing filed.		
Jul 07,1976	Deposition of MARK H. ALSPAUGH placed in file.		
Jul 09,1976	Entry of Appearance by Dennis L. Blewitt as co-counsel with John H. Love for the DFts and 3PP's Alspaugh and Mullins.		
Jul 12,1976	Homeowners' Motion for Designation of Orders as an Appealable Judgment filed by Homeowners.		
Jul 12,1976	Memorandum Brief in Support of Homeowners' Motion for Designation of Orders as an Appealable Judgment filed by Homeowners.		
Jul 12,1976	Notice to Set on Jul 19,1976 at 8:45 a.m. filed by Dfts and 3PP's Alspaugh.		
Jul 22,1976	Letter form John H. Love to Mr. Eldon Silverman Re: Pretrial conference, filed.		
Jul 26,1976	Entered and filed Jul 23,1976. The pre-trial conference set for Aug 31,1976 at 10:00 a.m. is vacated. A pre-trial conference will be held in this case on Oct 05,1976 at 10:00 a.m. The Court will hold a hearing on all pending motions on Sept 08,1976 at 1:30 p.m. One hour will be allocated for the argument. Each party shall have 20 minutes to present arguments addressed to the motion.		
Aug 19,1976	Motion to Amend Pleadings by Pltf and Third-Party Defendant filed.		
Agu 26,1976	Homeowners' Response to Motion to Amend Pleadings by Pltf and Third-Party Defendant filed.		
Aug 27,1976	Demand for Jury Trial filed by Dfts and 3PPs.		
Aug 31,1976	Motion to Strike Demand for Jury Trial filed by Pltf.		
Sep 07,1976	Motion to Strike Jury Demand filed by Dft Capitol Fed. Savings.		
Sep 24,1976	Request for Admissions filed by Dfts and 3PPs.		
Oct 01,1976	Affidavit of Mark H. Alspaugh filed.		
Oct 01,1976	Motion for Continuance of the Commencement of the Pre-trial Conference filed by Dfts and 3PPs Alspaugh.		
Oct 08,1976	Notice of Resetting Pre-trial Conference to Dec 02,1976 at 1:30 p.m. filed by Court.		
Nov 04,1976	RULINGS and Oiders on All Pending Motions entered. Hearing was held on Sep 08,1976 at 10:00 a.m. ORDERS: The motion to strike the jury request is granted. The motion to amend the pleadings of Paul Mullins Construction Co. and Paul Mullins is granted and the pleadings are amended to add the affirmative defense of "act of God" and a cause of action in quantum meruit. The Alspaughs' request to have the Court's rulings on arbitration and the dismissal of Transamerica as a party defendant designated as a final order pursuant to Rule 54(b) CRCP is denied. The motions of Transamerica Title Ins. Co. to tax costs is denied. Capitol Federal's motion to strike the first four affirmative defenses of the Alspaughs is granted. The motion to strike the cross-claim dealing with the Unfair Practices Act is denied. The motion for a more definite statement of the alleged violations by Capitol Federal Savings of the Unfair Practices Act is granted. The Alspaughs are given 10 days from the date of this order to detail the violations they allege against Capitol Federal Savings. The Alspaughs' motion in limine and to strike is denied.		

75-0383-1 Civil Action No. ..... VS .....

OUT WEST B-3323

DATE	PROCEEDINGS	Order Book	Page
Nov 05,1976	Response of Plaintiff Paul Mullins Const. Co. and Third Party Dft Paul Mullins to Request for Admissions filed.		
Nov15,1976	More Definite Statement of Homeowners filed by Dfts and 3PPs Alspaugh.		
Nov 15,1976	Exception to Ruling and Order on All Pending Motions filed by Dfts and 3PPs.		
Nov15,1976	Certificate of Mailing filed by Dfts.		
Nov 17,1976	Amendment to Homeowners' Answer and Counterclaim and reply to the Amended Pleadings of Pltf and Third-Party Dft Paul Mullins, filed.		
Dec 01,1976	Reply filed by DFt Capitol Federal Savings.		
Nov 02,1976	Def. Capitol Federal Savings and Lona's Pre-trial Statement as to Pla's Claim and Dft Capitol's Crossclaim for Indemnity, filed with the Court.		
Nov 02,1976	Captiol Federal Savings' Pre-trial Statement (Alspaugh Counterclaim) filed with the Court.		
Nov 02,1976	Preliminary Pre-trail Statement of Dfts and Third-Party Pltfs Mark H. and Juanita S. Alspaugh, filed with the Court.		
Nov 02,1976	Pre-trial Statement of Pla Paul Mullins Construction Co. and Third-Party Dft Paul Mullins, filed with the Court.		
Dec 07,1976	Minutes of Pre-trial Conference held on Dec 02,1976. Within 35 days from the date of this order, the Alspaughs shall identify the defects in their house which they claim are not in conformity with the construction plans and specifications, why the structure, materials or workmanship is defective and the name or names of witnesses who will testify that the structure, materials or workmanship is defective and the costs necessary to remedy the defects. Within 35 days from the date of this order, the Alspaughs shall specify what specific objections they have to the settlement sheet prepared by the contractor at or prior to the time of closing. The Alspaughs shall set forth in specific detail the areas of disagreement they have with the contractor regarding extras which were to be incorporated into the home. Within 20 days after the specification of the Alspaughts' claims are filed with the Court, the contractor shall file with the Court a response to the claims of the Alspaughs. Within 35 days fromthe date of this order, the contractor shall specify the nature of the evidence and the names and addresses of witnesses to be called in support of the affirmative defense of Act of God. The Alspaughs are ordered to furnish copies of all insurance settlement documents they executed in connection with the compromise of their claim against their homeowner's ins. carrier, State Farm Ins. Co. within 20 days fromthe date of this order. The Alspaughs are specifically ordered to produce copies of proof of loss claim forms, a copy of the assignment and the settlement contract. The parties are ordered to exchange reports of persons who will be called as expert witnesses in this case at least 60 days prior to trial. The parties were directed to deliver all exhibits to be used at trial to the Court at least 15 days prior to the trialdate. The Alspaughs will have 30 days from the date of the contractor's motion for summary judgment and brief are filed with the Court to file a responsive brief. Counsel for the contractor was directed to prepare the pre-trial order and submit it to the Court on or before June 1,1977. Trial in this actionis set on the trailing docket for the week of July 11,1977.		
Dec 10,1976	Letter from John H. Love to Eldon Silverman RE: copies of documents, filed.		
Dec15,1976	Amendments to Minutes of Pre-trial Conference, entered and filed. Paragraph (1) of the stipulations is amended to reflect that the parties modified the counstruction contract in several respects after it was executed on March 12,1974. The section of the minutes of the pre-trial conference setting forth the nature of the motions fur summary judgment which will be filed by counsel for the contractor is amended to reflect that the contractor will file a motion for summary judgment on the issue raised by paragraph (4) of the Alspaughs' second affirmative defense.		
Dec 16,1976	Response to Minutes of the Pre-trial Conference filed by Dfts. Alspaugh.		
Dec20,1976	Demand for Jury Trial filed by DFts and 3PPs. Alspaugh.		
Dec22,1976	Request for Admissions (First Series) filed, by Captiol Fed. Savings.		
Jan 11,1977	Homeowners' Response to Certain Orders Contained in the Minutes of the Pre-trial Conference Dated December 07,1976, filed by Dfts and 3PPs.		

Jan [illegible] 1977 Re[illegible]se Pltf [illegible]h r[illegible]d tc [illegible]Af[illegible]ativ [illegible]fens[illegible]f Act of God, filed by Pltf.

Jan 13,1977 Motion for Summary Judgment with REspect to a certain Affirmative Defense and the Third Party Complaint Against Paul Mullins, Ind. and Memorandum Brief in Support thereof, filed by Pltf Paul Mullins.

Jan 13,1977 Affidavit of Paul MUllins Construction Co. filed.

Jan 14,1977 Stipulation Extending Time to Respond to Capitol Fed. Savings Request for Admissions filed by Dfts and 3PPs.

Jan 14,1977 ORDER that the provisions of the foregoing stipulation be carried into effect and such stipulatio nis approved.

Jan 26,1977 Letter from Eldon E. Silverman to John H. Love filed.

Feb 18,1977 Memorandum Brief Opposing Summary Judgment filed by Dfts and 3PPs.

Feb 18,1977 Affidavit of John H. Love filed.

Feb 18,1977 Affidavit of Mark H. Alspaugh filed.

Feb 28,1977 M.O. entered and filed. Counsel for Paul Mullins Constr. Co. and Paul Mullins is granted 10 days from the date of this order to file a reply brief to the Dfts' Memo brief opposing summary judgment.

Mar 16,1977 Stipulation and Motion to Dismiss and Discharge the Mechanic's Lien filed w/Court by Dfts and 3PPs Alspaugh.

Mar 16,1977 Certificate of Release of Mechanics' Lien, signed by Clerk of the District Court, filed.

Mar 16,1977 ORDER entered and filed. (See file for details). All actions between Dfts and 3PPs Alspaugh, Captiol Fed. Savings and 3PD Transamerica Title Ins. Co. are dismissed with prejudice, each party to pay their own costs.

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Mar 18,1977 M.O. entered andfiled. The Certificate of Release of Mechanic's Lien signed by the Clerk of the District court on Mar 16,1977 shall not be recorded in the records of the Clerk and Recorder of Boulder Counter pending further order of the Court. Counsel for Paul Mullins Constr. Co. is directed to file his objections to the bond on or before Mar 25,1977. A hearing on the objections will be held on Mar 30,1977 at 2:30 p.m.

Mar 24,1977 Motion of Pltf Objecting to Provisions in Court's March 16, 1977 Order and For Allowance of Certain Costs filed by Pltf.

Mar 29,1977 Subpoena Duces Tecum filed w/service on Joseph Page at 2040-14th St. in Boulder, CO on Mar 28,1977.

Mar 29,1977 Subpoena Duces Tecum filed w/service on Paul Mullins at 751 Cypress Dr. in Boulder on Mar 28,1977 at 6:30 p.m.

* Apr 04,1977 Certificate of Mailing filed by John Love's office.

* Mar 30,1977 Homeowner's Response to "Motion of Pltf Objection to Provisions in Court's March 16,1977 Order and for Allowance of Certain Costs" filed by the Alspaughs.

Apr 07,1977 Ruling on Pltf's Objections to Substitution of Security entered and filed. The Pltf's objections are overruled. The minute order of Mar 18, 1977 is vacated. Re: the order of Mar 16,1977: the paragraph relating to custody and disposition of the funds depsoted with the Clerk of the Dist. Court is amended. The motinn of Mark H. and Juanita S. Alspaugh for an evidentiary hearing, related jurisdictional ruling and a vacation of the trial date is denied. Mark H. Alspaugh and Juanita S. Alspaugh may not cause a subpoena to be issued directing the appearance in Court, fora deposition or any other action of Paul Mullins Constr. Co., Paul Mullins or any officer employee or agent therof without prior court approval.

Apr 18,1977 Combined Table of Contents for Homeowner's Motion to Alter or Amend Judgment or for a NewTrial and Supporting Memorandum Brief filed by Homeowner's.

Apr 18,1977 Homeowner's Motion to Alter or Amend Judgment or for a New Trial filed.

Apr 18,1977 Memornadum Brief in Support of Motion to Alter or Amend Judgment or for a New Trial filed.

Apr 18,1977 Certificate of Release of Mechanics' Lien (Certified Copy), filed.

Apr 18,1977 Affidavit of Frank C. Olson filed, w/service on Paul Mullins on 03-28-77 at 6:30 a.m. at 751 Cypress St.

Apr 18,1977 Supporting Offer of Proof (In Support of Oral General Offer of Proof at 03-30-77 Hearing). Appendix I to Homeowners Motion to Alter or Amend Judgment or for a New Trial, filed.

Apr 20,1977 Certificate of Mailing filed by John Love.

Apr 27,1977 Motion to Compel Recordation of Certificatoof Release of Lien filed by Dft Capital Fed. Savings.

MULLINS CONSTR. VS ALSPAUGH 75-0383-1 Civil Action No.

DATE	PROCEEDINGS	Order Book	Page
Apr 27,1977	Notice of Setting hearing on May 03,1977 at 8:30 a.m. filed by Dft Capital Fed. Savings.		
Apr 28,1977	Homeowners' Request for Vacation of the May 03,1977 Appearance for Setting Scheduled by Capitol Federal Savings and Certain Other Interim Relief, filed by Alspaugh.		
Apr 28,1977	Certificate of Mailing, filed by Alspaugh.		
Apr 28,1977	M.O. entered and filed. The motion of Mark H. and Juanita S. Alspaugh to vacate the May 03,1977 appearance for setting and for certain other iterim relief is denied.		

ATTEST: TRUE COPY
Dated 4-29-77
Clerk of District Court
Boulder County, Colorado
By Deputy

MULLINS CONSTR. VS ALSPAUGH 75-0383-1 Civil Action No.

DATE	PROCEEDINGS	Order Book	Page
Apr 27,1977	Notice of Setting hearing on May 03,1977 at 8:30 a.m. filed by Dft Capital Fed. Savings.		
Apr 28,1977	Homeowners' Request for Vacation of the May 03,1977 Appearance for Setting Scheduled by Capitol Federal Savings and Certain Other Interim Relief, filed by Alspaugh.		
Apr 28,1977	Certificate of Mailing, filed by Alspaugh.		
Apr 28,1977	M.O. entered and filed. The motion of Mark H. and Juanita S. Alspaugh to vacate the May 03,1977 appearance for setting and for certain other iterim relief is denied.		
May 02,1977	Homeowner's Motion for Temporary Injunction to Preclude the Recordation of the Certificate of the Release of Mechanics' Lien filed by Alspaughs.		
May 02,1977	Notice to Appear for Setting on May 03,1977 at 8:45 a.m. filed by Alspaughs.		
May 02,1977	Certificate of Mailing filed by JOhn Love.		
May 04,1977	Notice of Hearing on Pending Motions (1/2 Hour Allotted) set for 10:00 a.m. May 19,1977, filed by Court.		
May 09,1977	Amended Notice of Hearing on Motion to Compel Recordation of Certificate of RElease of Mechanic's Lien and Motinn for Temporary Injunction (1/2 hour allotted) set for 10:00 a.m. on Mah 19, 1977 filed by Court.		
May 09,1977	Homeowners' Request for Clarification of Scope of May 19,1977 Hearing filed by Alspaugh.		
May 09,1977	Motion to Compel Discovery and for Sanctions filed by Pltf and 3PD.		

ATTEST: TRUE COPY
Dated 5-10-77
Clerk of District Court
Boulder County, Colorado
By Deputy

APPENDIX C

Federal and State Constitutional Provisions

A. AMENDMENT 14, CONSTITUTION OF THE UNITED STATES:

"Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws."[1]

B. ARTICLE I, SECTION 10, CLAUSE 1, CONSTITUTION OF THE UNITED STATES:

"No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."[2]

ARTICLE II, BILL OF RIGHTS, CONSTITUTION OF COLORADO:

"Section 3. Inalienable Rights

All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property and of seeking and obtaining their liberty and happiness."[3]

"Section 6. Equality of Justice

Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay."[4]

"Section 25. Due Process of Law

No person shall be deprived of life, liberty or property, without due process of law."[5]

[1]USCS, Const. Amend. 14, Sec. 1, and also p. 22, Volume 1, C.R.S. 1973

[2]USCS, Constitution of the United States, Art. I, § 10, Cl. 1, and also P. 13 of Volume 1, C.R.S. 1973

[3]See p. 62, Volume 1, C.R.S. 1973

[4]See p. 66, Volume 1, C.R.S. 1973

[5]See p. 164, Volume 1, C.R.S. 1973

JOHN H. LOVE
ATTORNEY
BOULDER
COLORADO

APPENDIX D

STATUTES (SESSION LAWS 1939, 1973

COLORADO REVISED STATUTES)

1939 STATUTE:

CHAPTER 80

CIVIL PROCEDURE

SUPREME COURT PRESCRIBE RULES

(Senate Bill No. 119. By Senators Cummings, Bosworth, Crowley, Constantine and Gillum)

AN ACT

AUTHORIZING THE SUPREME COURT OF COLORADO BY RULE TO PRESCRIBE THE PROCEDURE IN CIVIL ACTIONS IN COURTS OF RECORD IN COLORADO.

Be It Enacted by the General Assembly of the State of Colorado:

Supreme Court Prescribe Rules of Procedure in Civil Actions

Section 1. The supreme court of the state of Colorado shall have the power to prescribe, by general rules, for the courts of record in the state of Colorado the practice and procedure in civil actions and all forms in connection therewith, provided, that no rules shall be made by the supreme court permitting or allowing trial judges to comment on the evidence given on the trial. Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants. Such rules shall take effect three months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force nor effect.

Rules Effective When

Safety Clause

Section 2. The general assembly finds, determines, and declares this act to be necessary for the immediate preservation of the public peace, health and safety.

Emergency

Section 3. In the opinion of the general assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage.

Approved: February 25, 1939.

1973 COLORADO REVISED STATUTES:

13-2-108. Rules of civil procedure. The supreme court has the power to prescribe, by general rules, for the courts of record in the state of Colorado the practice and procedure in civil actions and all forms in connection therewith; except that no rules shall be made by the supreme court permitting or allowing trial judges to comment on the evidence given on the trial. Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigants. Such rules shall take effect three months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Source: L. 39, p. 264, § 1; not in CSA; CRS 53, § 37-2-8; C.R.S. 1963, § 37-2-8.

13-4-110. Determination of jurisdiction - transfer of cases. (1) (a) When a party in interest alleges, or the court is of the opinion, that a case before the court of appeals is not properly within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court. The supreme court shall decide the question of jurisdiction in a summary manner, and its determination shall be conclusive.

(b) A party in interest shall allege that a case is not properly within the jurisdiction of the court of appeals by motion filed with the court of appeals within twenty days after the date the record is filed with the clerk of the court of appeals, failing which any objection to jurisdiction by a party in interest shall be waived.

(2) Any case within the jurisdiction of the court of appeals which is filed erroneously in the supreme court shall be transferred to the court of appeals by the supreme court.

(3) No case filed either in the supreme court or the court of appeals shall be dismissed for having been filed in the wrong court, but shall be transferred and considered properly filed in the court which the supreme court determines has jurisdiction.

Source: L. 69, p. 267, § 1; C.R.S. 1963, § 37-21-10; L. 71, p. 372, § 1.

38-22-113. Hearing - judgment - summons. (1) The court, whenever the issues in such case are made up, shall advance such cause to the head of the docket for trial and may proceed to hear and determine said liens and claims or may refer the same to a referee to ascertain and report upon said liens and claims and the amounts justly due thereon.

(2) Judgments shall be rendered according to the rights of the parties. The various rights of all the lien claimants and other parties to any such action shall be determined and incorporated in one judgment or decree. Each party who establishes his claim under this article shall have judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established and determined in said decree upon the property to which his lien has attached to the extent stated in this section.

(3) Proceedings to foreclose and enforce mechanics' liens under this article are actions in rem, and service by publication may be obtained against any defendant therein in a manner as provided by law, and personal judgment against the principal contractor or other person personally liable for the debt for which the lien is claimed shall not be requisite to a decree of foreclosure in favor of a subcontractor or materialman.

Source: L. 1899, p. 273, § 13; R. S. 08, § 4037; C. L. § 6454; CSA, C. 101, § 27; CRS 53, § 86-3-13; C.R.S. 1963, § 86-3-13.

38-22-131. Substitution of bond allowed. (1) Whenever a mechanic's lien has been filed in accordance with this article, the owner, whether legal or beneficial, of any interest in the property subject to the lien may, at any time, file with the clerk of the district court of the county wherein the property is situated a corporate surety bond or any other undertaking which has been approved by a judge of said district court.

(2) Such bond or undertaking plus costs allowed to date shall be in an amount equal to one and one-half times the amount of the lien plus costs allowed to date and shall be approved by a judge of the district court with which such bond is filed.

(3) The bond or undertaking shall be conditioned that if the lien claimant shall be finally adjudged to be entitled to recover upon the claim upon which his lien is based, the principal or his sureties shall pay to such claimant the amount of his judgment, together with any interest, costs, and other sums which such claimant would be entitled to recover upon the foreclosure of the lien.

Source: Added, L. 75, p. 1425, § 5.

38-22-132. Lien to be discharged. Notwithstanding the provisions of section 38-22-119 upon the filing of a bond or undertaking as provided in section 38-22-131, the lien against the property shall be forthwith discharged and released in full, and the real property described in such bond or undertaking shall be released from the lien and from any action brought to foreclose such lien, and the bond or undertaking shall be substituted. The clerk of the district court with which such bond or undertaking has been filed shall issue a certificate of release which shall be recorded in the office of the clerk and recorder of the county wherein the original mechanic's lien was filed, and the certificate of release shall show that the property has been released from the lien and from any action brought to foreclose such lien.

Source: Added, L. 75, p. 1426, § 5.

38-22-133. Action to be brought on bond or undertaking. When a bond or undertaking is filed as provided in section 38-22-131, the person filing the original mechanic's lien may bring an action upon the said bond or undertaking. Such action shall be commenced within the time allowed for the commencement of an action upon foreclosure of the lien, and the statute of limitations applicable to a lien foreclosure shall apply to the action upon the bond or undertaking as it would had no bond or undertaking been filed.

Source: Added, L. 75, p. 1426, § 5.

APPENDIX E

COLORADO APPELLATE RULES

Rule 1. Scope of Rules

(a) Matters Reviewable. An appeal to the appellate court may be taken from:

(1) A final judgment of any district, superior, probate, or juvenile court in all actions or special proceedings whether governed by these rules or by the statutes;

(2) A judgment and decree, or any portion thereof, in a proceeding concerning water rights; and an order refusing, granting, modifying, cancelling, affirming or continuing in whole or in part a conditional water right, or a determination that reasonable diligence or progress has or has not been shown in an enterprise granted a conditional water right;

(3) An order granting or denying a temporary injunction;

(4) An order appointing or denying the appointment of, or sustaining or overruling a motion to discharge, a receiver.

(b) Limitation on Taking Appeals. The taking of appeals shall be in accordance with C.A.R. 4; provided that in pending cases within section (a) of this Rule, where the judgment sought to be reviewed became final prior to the effective date of this proviso, the appeal may be taken within three months after the entry of the judgment; and provided further that in special proceedings, where a different period is fixed by the applicable statute for the taking of an appeal, the statute shall control.

(c) Appeal Substitute for Writs of Error. Matters designated by statute to be reviewable by writ of error shall be reviewed on appeal as herein provided.

(d) Ground for Reversal, etc. Each party in this brief required by C.A.R. 28 (a) shall state clearly and briefly the grounds upon which he relies in seeking a reversal or modification of the judgment or the correction of adverse findings, orders, or rulings of the trial court. He will be limited to the grounds so stated although the court may in its discretion notice any error appearing of record. When an appeal has been taken, it shall not be dismissed upon motion of an appellant without notice to all interested parties whose appearances have been entered in the appellate court, and order of the court permitting such dismissal; if dismissal is objected to by any such interested party, he may, in the court's discretion, seek reversal, modification, or correction of the judgment.

(e) Review of Water Matters. The notice of appeal (see C.A.R. 4) for review of the whole or any part of a judgment and decree or order as defined in subsection (a) (2) of this Rule shall designate as appellant the party or parties filing the notice of appeal and as appellee all other parties whose rights may be affected by the appeal and who in the trial court entered an appearance, by application, protest, or in any other authorized manner. If he is not an appellant the division engineer shall be an appellee; provided that upon his application a dismissal may be entered as to him in the absence of objection made by any party to the appeal within ten days from the mailing to such party of such application. The notice of appeal shall describe the water rights with sufficient particularity to apprise each appellee of the issues sought to be reviewed.

Rule 21. Procedure in Original Actions

(a) **Writs Under Constitution.** This Rule applies only to the original jurisdiction of the Supreme Court to issue writs as provided in Section 3 of Article VI of the Colorado Constitution as amended. (See Rule 106, C.R.C.P., for remedial writs in the district court.) Relief in the nature of prohibition may be sought in the Supreme Court where the district court is proceeding without or in excess of its jurisdiction or where the district court has granted or denied change of venue in actions in rem or in actions where the statute prescribes the forum.

(b) **Form of Pleadings; Briefs.** All petitions or motions and all briefs and original proceedings shall be typewritten or reproduced by any duplicating or copying process which produces a clear black image on white paper, double spaced, and on good and durable paper, 8 ½ inches by 13 inches; bound at the top. Petitions, motions and briefs not in conformity herewith shall not be accepted by the clerk except by order of the court. (Amended and effective July 30, 1970.)

(c) **Number of Copies to be Filed and Served.** Ten copies of each petition, motion or brief or other paper shall be filed. (Amended and effective July 30, 1970.)

(d) **Content of Pleadings.** The petition filed shall set forth the nature of the action or threatened action or the refusal to act by the court below or in the inferior tribunal; the circumstances which render it necessary or proper that the Supreme Court exercise its original jurisdiction, and the type of relief sought. When the action, threatened action or refusal to act is within the discretion of the district court, prohibition or mandamus shall not be a remedy, but the same may be a ground for appeal after final judgment.

(e) **Response; Opposition Briefs.** The response to any order of the court and the opposition's brief supporting said response shall conform to section (b) of this Rule. (Effective January 1, 1970.)

(f) **Petition for Rehearing.** In all proceedings under this Rule, where the Supreme Court shall have issued an order directed to the respondent to show cause why the relief prayed for in the petition should not be granted, and where a decision shall have been rendered by the Court on the merits of the petition, a petition for rehearing may be filed in accordance with the provisions of C.A.R. 40. (Amended and effective February 18, 1972.)

APPENDIX F

COLORADO RULES OF CIVIL PROCEDURE

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and order to or from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims, or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

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Rule 109. Arbitration

(a) Controversies May Be Arbitrated. All controversies, which may be the subject of a civil action, may be submitted to the decision of one or more arbitrators, in the manner and with the effect set forth in this Rule.

(b) Articles of Agreement; Award. The parties before they make their submissions, shall execute a written agreement that they will submit all matters, or some particular matter of difference, to the arbitrator named therein, and will abide the award, and that the award may be filed with the clerk of the district court, as a basis of a judgment, and that an execution may be issued for its collection.

(c) Oath of Arbitrators. Arbitrators shall not act until they subscribe to an oath and swear that they will well and truly try, and impartially and justly decide the matter in controversy, according to the best of their ability, which oath shall be filed with their award.

(d) Powers of Arbitrators. Arbitrators shall have power to issue subpoenas for witnesses, which a court of record in a proper case may aid and enforce by attachment, and after a trial and hearing, they shall decide the matters in controversy in writing. Any arbitrator may administer oaths to witnesses, and where there are three arbitrators, two of them may do any act which might be done by all.

(e) Award Filed; Judgment; Execution. The party in whose favor any award shall be made, may file the same with the clerk of the district court of the county wherein the matters were arbitrated, who shall enter a judgment thereon, and if such award requires the payment of money, the clerk may issue execution therefor.

(f) Fees of Arbitrators. Unless otherwise agreed each arbitrator shall receive $100.00 per day for his services, and the amount of their compensation shall be included in their award and in the judgment entered thereon. The arbitrators shall not be required to deliver their award until their compensation shall have been paid.

(g) Arbitrated Matters Held Adjudicated; Except for Fraud, etc. Whenever it shall appear in any action that the subject matter of such action, or proceeding, or any part thereof, or the defense thereto, or of any part thereof, has been submitted to and decided by arbitrators, according to the terms of this rule, such matter so arbitrated shall be held to have been adjudicated and settled, and not open, either directly or indirectly, for review; but this shall not be construed to prevent an adjudication by arbitrators from being impeached and set aside for fraud or other sufficient cause, the same as a judgment of a court of record, nor to prohibit relief on the ground of mistake, inadvertence, surprise or excusable neglect, as in case of other judgments, orders or proceedings of the court.

APPENDIX G

MISCELLANEOUS CITATIONS

5 AM. JURS. 2d ARBITRATION AND AWARD

§ 2. Nature of rights and remedies.

The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Thus arbitration carries no right to trial by jury that is guaranteed by both the federal and most state constitutions; arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for the results; the record of their proceedings is not as complete as it is in a court of law; and judicial review of an award is more limited than judicial review of the trial.[9]

Though there are certain instances and certain jurisdictions where arbitration may be compulsory,[10] parties to an arbitration are generally those who have become so by virtue of a contract to arbitrate, and the submission of a controversy to decision by arbitration is, perforce, the agreement of the parties thereto to arbitrate.[11] There was no common-law right of arbitration even though there had been a prior agreement to arbitrate; hence if a dispute is to be submitted for arbitration as a matter of right, it must be under a statute.[12]

Although at common law an agreement for arbitration may create substantive rights between the parties, common-law arbitration is a part of the law of remedies, rather than of the substantive law.[13] But statutes have changed the basic concept of arbitration. Under the statutes, arbitration agreements, instead of being revocable at will by either party, may be specifically enforced by either party. By this change the statutes have made arbitration a part of the substantive, as well as the remedial, law.[14]

73 AM. JUR 2d STIPULATIONS:

§ 4. Subject matter.

It may be stated as a broad general principle, subject to the limitations hereinafter noted, that matter relating merely to the conduct of a pending proceeding or to the designation of the issues involved therein, which affects only the rights or convenience of the parties thereto and does not involve any interference with the duties and functions of the court, may be the subject of a stipulation.[28] But, as more fully developed elsewhere, parties may not by stipulation invest a court with jurisdiction over the subject matter of a cause which it would not otherwise have had.[29] And clearly, the parties to an action may not stipulate for the determination thereof by the trial court in a manner contrary to the statutes or rules of court.[30] It is also established that matters affecting the public interest cannot be made the subject of stipulations so as to control the court's action in respect of such matters.[31]

APPENDIX H

EXCERPTS FROM "CIVIL PROCEDURE"

1976 Annual Survey of Colorado Law, by Michael J. Waggoner, Associate Professor of Law

At Page 35:

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In *Alspaugh v. District Court*[75] the Supreme Court held that the trial court, in ruling that an arbitration agreement was revoked or waived by the filing of civil actions by both sides, whether right or wrong, was acting within its jurisdiction, and that C.A.R. 21 was available only when the trial court was acting without, or in excess of, its jurisdiction, so dismissed the writ. The decision is questionable. First, the Court made no attempt to distinguish its three-weeks earlier decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court*[76] in which under C.A.R. 21 it did reverse a trial court's decision refusing to dismiss or stay pending arbitration. (The two cases might be distinguished on the grounds that *Merrill Lynch* involved clear questions, of law, as to the validity of an agreement, while *Alspaugh* involved unclear questions, of fact, as to the waiver of an agreement.) Second, an arbitration agreement may be viewed as a mutual renunciation of the jurisdiction of the courts, and it would seem that such an agreed renunciation of jurisdiction should be as enforceable and reviewable as a consent to jurisdiction, which was done under C.A.R. 21 in *Clinic Masters, Inc. v. District Court.*[77] In none of the many opinions reviewing personal jurisdiction questions under C.A.R. 21 has the Court said, "A court of course always has jurisdiction to determine its jurisdiction, so that a decision on whether a court has jurisdiction, whether right or wrong, is within its jurisdiction so must be reviewed on appeal after trial and not under C.A.R. 21." Finally, C.R.S. 1973, § 13-22-221 would permit appeal of an order denying an application to compel arbitration such as was involved in this case. Although this provision is not directly applicable as the arbitration agreement was made prior to the effective date provided in C.R.S. 1973, § 13-22-222 for the adoption by Colorado of the Uniform Arbitration Act, it would seem that such an order would be appealable under C.A.R. 1(a)(3) as an order granting or denying a temporary injunction.[78] If the order was appealable, it would seem that the proceeding should have been transferred to the Court of Appeals under C.R.S. 1973, § 13-4-110(4) rather than dismissed. (emphasis supplied)

At Page 38 and 39:

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Two cases upheld arbitration clauses in standard contracts, in each case reversing the trial court. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court*[107] approved the standard arbitration clause in employment agreements between members of the New York Stock Exchange and their account representatives, following similar cases in other jurisdictions and distinguishing the question of arbitration clauses in contracts between brokerage firms and their customers. *Wales v. State Farm Mutual Automobile Insurance Co.*[108] approved the standard arbitration clause in the uninsured motorist's coverage of automobile insurance policies. A troubling aspect of the *Wales* case is that plaintiff had earlier requested arbitration and defendant insurance company had agreed, but arbitration had not occurred and there was no explanation why not. Although it might have been appropriate to remand for a determination of why not, because arbitration might have been waived, the Court of Appeals ordered the complaint dismissed.

And at pages 47 and 48:

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75. ___ Colo. ___, 545 P.2d 1362 (1976), 5 The Colorado Lawyer 583 (April 1976).
76. ___ Colo. ___, 545 P.2d 1035 (1976), 5 The Colorado Lawyer 561 (April 1976). Both opinions are by the same justice.

77. ___ Colo. ___, 556 P.2d 473 (1976), 6 The Colorado Lawyer 170 (January 1977), discussed under "Personal Jurisdiction and Venue" in the text at note 12.
78. See Wales v. State Farm Mutual Automobile Insurance Co., ___ Colo. App. ___, ___ P.2d ___ (1976), 6 The Colorado Lawyer 288 (February 1977).

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107. ___ Colo. 545 P.2d 1035 (1976), 5 The Colorado Lawyer 561 (April 1976).
108. ___ Colo. App. ___, ___ P.2d ___ (1976), 6 The Colorado Lawyer 288 (February 1977).

APPENDIX I

DEFINITIONS

(1) Contractor. Any reference to the Contractor in this document or in referenced documents of any type filed in Civil Action No. 75-0203-1, Civil Action No. 75-0383-1, Supreme Court Case No. 26960, or in Case No. 71 10 0090 74 before the AAA, should be deemed to mean Paul Mullins, a/k/a L. Paul Mullins, a/k/a Lloyd Paul Mullins, d/b/a Paul Mullins Construction Company, and also includes his agents, employees and authorized representatives.

(2) Plaintiff. Any reference to the Plaintiff; Plaintiff Corporation; Paul Mullins Construction Co., a Colorado Corporation; or K-M Development, Inc., d/b/a Paul Mullins Construction Co. as alleged by Plaintiff, shall also be deemed, for purposes of this petition, to refer to the Contractor as defined above only in the sense that said corporation accepted the benefits of the agreement as defined herein and ratified such agreement by a combination of several or all of the following roles:

(a) Plaintiff was an unnamed party to the agreement;

(b) Plaintiff acted as an undisclosed principal during the performance of the agreement; and/or

(c) Plaintiff subsequently adopted the agreement and which further ratified such dealings of Paul Mullins before and after the dispute arose.

(3) Construction Contract. Any reference to the construction contract shall be deemed to refer to the construction agreement of March 12, 1974, between Mark H. and Juanita S. Alspaugh and the Contractor, including the contract documents enumerated in the agreement, supplementary and other conditions, and the Construction Industry Arbitration Rules of the American Arbitration Association, effective March 1, 1974, which were then obtaining under Article 15 of the agreement and the drawings and specifications, all amendments, change orders, and written interpretations of the contract documents issued by owner.

JOHN H. LOVE
ATTORNEY
BOULDER
COLORADO

APPENDIX J

CONDENSATION OF PLEADINGS AND MOTIONS PRIOR

TO

ORIGINAL PROCEEDING NO. 26960 (WITH BACKGROUND NOTES)

This Exhibit J is a condensed digest of various pleadings and motions filed with the Respondent Court and Judge prior to the August 15, 1975 "RULING ON ALL PENDING MOTIONS AND ORDER." This digest illustrates that in every prayer for relief in each cause of action in the Homeowners pleadings, including an amended pleading submitted to the Trial Court for approval, and in the supporting motions, the Homeowners clearly expressed an intent to submit the subject matter of the dispute in Civil Action No. 75-0203-1 and also in Civil Action No. 75-0383-1 to arbitration and which thus shows that they were not waiving their arbitration rights. Copies of these documents in their entirety have previously been provided to the Supreme Court in Original Proceeding No. 26960.

Included are portions of the following documents with informative notes:

Note: Because of extremely dangerous wind conditions resulting in a portion of the tile on the roof blowing off without it being known as to the degree of responsibility which would be taken by the Contractor and because time was of the essence to secure arbitration with an enforceable statutory award without having to retry the case to the Court, the Homeowners set forth three separate breach of contract

counts and three separate negligence counts which could be expeditiously selected by an election of remedies technique hopefully without having to further amend the complaint before arbitration was ordered. If feasible, such election was contemplated before arbitration was ordered. Hence, the expression of the intent to arbitrate was deemed necessary for each cause of action and for each prayer for relief to avoid a risk of being deemed to have waived arbitration.

3. Motions to (1) Amend the Complaint and to Add an Additional Party and (2) To Accelerate Proceedings, filed on or about March 9, 1975 . . . . . J-19

Note: This motion was made primarily because the Plaintiff Corporation had filed a lien foreclosure complaint in C.A. 75-0383-1 on February 10, 1975, based upon the same cause of action which was initially before the American Arbitration Association by the Contractor's unqualified demand for arbitration by Mr. Silverman's December 10, 1974 letter which was followed by the Contractor's qualified response and counter-claim to the Homeowners December 9, 1974 Demand for Arbitration. Hence, there was an additional party to include in the arbitration proceeding. In addition, because of certain responses from the Contractor with regard to responsibility for the roof, the contract and negligence causes of action could be reduced to one each. Since the complaint had to be amended with the approval of the Court to include the corporation as an additional party, the previously contemplated election of remedies was reflected in the amended complaint that was proposed to the Court by restating the original complaint in its entirety. Such amended pleading was never approved by the Court, since C.A. No. 75-0203-1 was dismissed on August 15, 1975.

4. Amended Motion to Compel Arbitration in Accordance with Agreement and Rules, filed on or about March 9, 1975 . . . . . J-21

Note: This motion was filed with the above referenced motion to amend the complaint to fully demonstrate the Homeowners intent to secure arbitration and to avoid any waiver of arbitration rights.

5. Amended Complaint for (1) Breach of Contract; (2) Negligence; (3) Wrongful Attempt to Revoke Finality of Submission to Arbitration and for Wrongful Reformation of Contract; and (4) Additing Additional Party Defendant, filed on or about March 9, 1975 . . . . . J-25

JOHN H. LOVE
ATTORNEY
BOULDER
COLORADO

B. CIVIL ACTION NO. 75-0383-1 (INITIATED BY PLAINTIFF CORPORATION):

1. Homeowners' "Motions to Quash Summons and Complaint and to Dismiss with Prejudice, filed on or about February 26, 1977 . . . . . J-31

Note: This motion was filed prior to any pleadings being filed by Homeowners and who also moved to amend by motion in C.A. 75-0203-1, supra. After the Rule to Show Cause was discharged in Original Proceeding No. 26960, further pleadings were filed as is indicated in docket sheet entries (Appendix B)

2. Homeowners' "Second Supplement to Motion to Quash Summons and Complaint and to Dismiss with Prejudice" J-35

Note: This supplement was filed as a procedural precaution to assure preservation of arbitration rights and to avoid waiving such rights after the Homeowners' counsel was served by mail with Capitol's Answer and Cross-claim" immediately following oral arguments on April 23, 1975 for all motions under C.A. 75-0203-1 and C.A. 75-0383-1 which were taken under advisement.

JOHN H. LOVE
ATTORNEY
BOULDER
COLORADO

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF BOULDER

STATE OF COLORADO

Civil Action No.

RK H. AND JUANITA S. ALSPAUGH,

Plaintiffs,

v.

AUL MULLINS, d/b/a
AUL MULLINS CONSTRUCTION CO.

Defendant.

MOTION TO COMPEL ARBITRATION IN ACCORDANCE WITH [illegible] AND RULES

COMES NOW the Plaintiffs by and through their attorney, John H. Love, nd hereby moves this Honorable Court for an order to compel arbi[illegible]on of all of the controversies, issues, claims, and disputes of the parties arising out of "THE AGREEMENT" (i.e. contract) between the parties, dated March 12, 1974 and related to the "DEMAND FOR ARBITRATION" by Mark H. and Juanita S. Alspaugh, as "CLAIMANTS", dated December 9, 1974, as more fully set forth in the accompanying "COMPLAINT" by Mark H. and Juanita S. Alspaugh entitled "COMPLAINT FOR BREACH OF CONTRACT, NEGLIGENCE, WRONGFUL ATTEMPT TO REVOKE FINALITY OF SUBMISSION TO ARBITRATION AND FOR ATTEMPTED WRONGFUL REFORMATION OF CONTRACT", as Plaintiffs, dated January 20, 1975.

As grounds therefore, the Court is referred to the facts and circumstances as set forth in the "COMPLAINT" which are summarized under the "SEVENTH CAUSE OF ACTION" which references other pertinent paragraphs of the "COMPLAINT" which further identifies the relevant exhibits.

In addition and as further grounds therefore the March 12, 1974 "AGREEMENT" between the parties clearly incorporated the American Arbitration Association Construction Industry Arbitration Rules by reference, under "ARTICLE 15" therein. (See "COMPLAINT" for details) Section 46 of those Rules clearly provides for the entry of an award as a judgment in the State Court having jurisdiction (see "COMPLAINT" for details), and Rule 109 of the Colorado Rules of Civil Procedure provides for the entry of an award as a judgment.

[illegible]

The Defendant should be bound to those rules under the doctrine of incorporation by reference as summarized in the attached "MEMORANDUM BRIEF IN SUPPORT OF MOTION TO COMPEL ARBITRATION IN ACCORDANCE WITH AGREEMENT AND RULES."

In addition, the Defendant should be bound to those rules by virtue of his conduct in making an appearance as the Respondent on or about January 3, 1975, before the American Arbitration Association, by filing a response to the December 9, 1974 "DEMAND FOR ARBITRATION" by Plaintiffs as "CLAIMANTS", which is detailed in the "COMPLAINT". Defendant should not be able to question the authority of the arbitrator or arbitration tribunal, expecially since Defendant affirmatively filed a counterclaim. The Defendant should not be able to go along with the arbitration proceedings, hoping for a favorable award but secure in the knowledge that any award may be attacked successfully in court if it should prove unfavorable. Defendant's conduct as "RESPONDENT" before the American Arbitration ASsociation is evidence that the Defendant has made an informed and deliberate decision to have his claims arbitrated in accordance with the Construction Industry Arbitration Rules. It is significant that the Defendant has proceeded to conform with the referenced Construction Industry Rules in all other respects - including the preliminary steps for the selection of an arbitrator and an arbitration tribunal.

Therefore, the Defendant's attempt to convert this dispute from a statutory arbitration proceeding, whereby the award can be filed with the Clerk of the District Court upon which execution can be issued thereon, into a common-law arbitration proceeding, whereby a common-law arbitration suit must be brought on the award is a wrongful attempt to unilaterally reform "THE AGREEMENT" between the parties.

Therefore, the Plaintiffs request that an early determination be made because time is of the essence due to present wind conditions in the Boulder area and move this Court to grant an order containing the following provisions to compel arbitration:

(a) Compel arbitration of all controversies, issues, claims and disputes to be submitted by the Plaintiffs, Mark H. and Juanita S. Alspaugh in an amendment to the "DEMAND FOR ARBITRATION" previously filed on December 9,

1974 with the American Arbitration ASsociation for a determination by the arbitrator or by an arbitration tribunal designated pursuant to the American Arbitration Association's Construction Industry Arbitration Rules, effective March 1, 1974 and also as provided under Rule 109 of the Colorado Rules of Civil Procedure entitled "ARBITRATION".

(b) Plaintiffs also request that the court direct that the sworn oath be subscribed to by the arbitrator or arbitrators appointed pursuant to the American Arbitration's Construction Industry Rules as follows:

> "That they will well and truly try and impartially and justly decide the matter in controversy, according to the best of their ability."

(c) Plaintiffs also request that the court direct that the sworn oath or oaths of the arbitrators be filed with the Clerk of the District Court in and for the County of Boulder, State of Colorado, together with their award.

(d) Plaintiffs also request that the court direct that the arbitrator or arbitrators may administer oaths to witnesses.

(e) Plaintiffs also request the court to direct that the appointed arbitrator or arbitrators shall have the power to issue subpoenas for witnesses pursuant to Rule 45 of the Colorado Rules of Civil Procedure.

(f) Plaintiffs also request that the award of the arbitrator or arbitration tribunal arising out of this "COMPLAINT", pursuant to the above referenced rules may be filed with the Clerk of the above referenced District Court, as a basis of a judgment and that execution may be issued for its collection since the parties to the March 12, 1974 "AGREEMENT" had agreed that arbitration, in accordance with the then existing Construction Industry Arbitration Rules of the American Arbitration Association were final and binding insofar as the requirements for effective statutory arbitration pursuant to Rule 109 of the Colorado Rules of Civil Procedure.

(g) The Plaintiffs further request that the Defendant Paul Mullins d/b/a Paul Mullins Construction Co. be and hereby is enjoined from refraining and refusing to fully arbitrate the grievances as set forth in "ARTICLE 15" of "THE AGREEMENT" and Section 46 of the Construction Industry Arbitration Rules of the American Arbitration Association, effective March 1, 1974.

(h) Plaintiffs further pray for reasonable attorney's fees, expenses and costs connected with the legal proceedings to compel arbitration to assure that the arbitration award will have the finality and binding effect as provided under Rule 109 of the Colorado Rules of Civil Procedure.

(i) The Plaintiffs further request that the parties pay the arbitration fees specified by the Construction Industry Rules of the American Arbitration Association in lieu of directly paying compensation to the appointed arbitrator or arbitrators.

Respectfully submitted

DAted: January 20, 1975

John H. Love
Attorney for the Plaintiffs
250 Arapahoe, Suite 202
Boulder, Colorado 80302

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF BOULDER

STATE OF COLORADO

Civil Action No. 75-0203-1

MARK H. AND JUANITA S. ALSPAUGH, Plaintiffs, vs. PAUL MULLINS, d/b/a PAUL MULLINS CONSTRUCTION CO., Defendant.	COMPLAINT FOR BREACH OF CONTRACT, NEGLIGENCE, WRONGFUL ATTEMPT TO REVOKE FINALITY OF SUBMISSION TO ARBITRATION AND FOR ATTEMPTED WRONGFUL REFORMATION OF CONTRACT

COMES NOW, the Plaintiffs, Mark H. and Juanita S. Alspaugh, by and through their attorney, John H. Love, and complains and alleges against the Defendant Paul Mullins, d/b/a Paul Mullins Construction Co., against whom a "DEMAND FOR ARBITRATION" has been filed, as follows:

FIRST CAUSE OF ACTION
BREACH OF CONTRACT - ROOF REPAIR BY CONTRACTOR

* * *

(9) As of the time of the Plaintiffs' filing a "DEMAND FOR ARBITRATION" with the American Arbitration Association, as the "CLAIMANT", on December 9, 1974, together with the "EXHIBIT A", incorporated therein by reference, the Plaintiffs had paid to the Defendant the sum of SEVENTY-ONE THOUSAND FIFTEEN AND 69/100 ($71,015.69) DOLLARS in progress payments as provided by "ARTICLE 5" of "THE AGREEMENT". No further payments have been made since the time of the filing of the "DEMAND FOR ARBITRATION" including "EXHIBIT A" thereto which are also attached hereto as "EXHIBIT A" to this Complaint and incorporated herein by reference.

* * *

(19) The Plaintiffs filed a "DEMAND FOR ARBITRATION", as "CLAIMANT" on December 9, 1974, as referenced above and designated as "EXHIBIT A", attached hereto and incorporated herein by reference, which contained the following provisions under "ARTICLE 15 -- ARBITRATION" and also a related provision under

Section 46 of the Construction Industry Rules of the American Arbitration Association, effective March 1, 1974, which were in effect at the time of "THE AGREEMENT'S" execution, and which are incorporated by reference under 'ARTICLE 15" of "THE AGREEMENT" and which are attached hereto as "EXHIBIT B".

(a) Under "ARTICLE 15 - ARBITRATION":

> "All claims or disputes arising out of this Contract or the breach thereof shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. Notice of the demand for arbitration shall be filed with the American Arbitration Association and shall be made with a reasonable time after the dispute has arisen.""

(b) Under section 46 of the above referenced rules, the third paragraph reads as follows:

> "Parties to these Rules shall be deemed to have consented that judgment upon the award rendered by the Arbitrator(s) may be entered in any Federal or State Court having jurisdiction thereof."

(20) The Defendant filed a response, through the Defendant's attorney, to the "DEMAND FOR ARBITRATION" on or about January 3, 1975, after requesting an extension from Plaintiffs and obtaining concurrence as evidenced by the December 30, 1974 letter from the Regional Director of the American Arbitration Association in Dallas, Texas, copy attached hereto as "EXHIBIT C".

(21) The above identified response, a copy which is attached hereto and incorporated herein by reference as "EXHIBIT D" contains the following statement:

> "Statement With Regard To Section 46 of Rules
>
> Paul Mullins Construction Company reserves the right to initiate an original proceeding in a Colorado court of original jurisdiction in order to contest or retry any and all issues present in the arbitration. Paul Mullins Construction Company's submission to arbitration in no way should be construed as a choice of remedies, but only as a condition precedent to a possible court action."

(22) The above statement in the response of the purported "right to initiate an original proceeding in a Colorado Court of original jurisdiction to contest or retry any and all issues present in the arbitration" clearly violates and breaches the construction agreement of the parties, supra.

(23) The additional qualification in the above designated response that such "submission to arbitration in no way should be construed as a choice of remedies, but only as a condition precedent to a possible court action" is nowhere set forth in the above referenced agreement or referenced arbitration rules and is a further breach of "THE AGREEMENT".

(24) The additional foregoing breaches of the arbitration provisions of "THE AGREEMENT" has further effect of delay, increase in costs and expenses, and further constitutes an aggravation of damages caused by such action and the Plaintiffs request that they later be permitted to amend the Complaint to alternatively amend the "DEMAND FOR ARBITRATION" at a reasonable time when the full effects of the actions of the Defendant are better known and can be more accurately estimated, and that such sums be withheld and deducted from the contract price to the extent possible. (See Seventh Cause of Action, infra.)

WHEREFORE, the Plaintiffs pray for the following specific types of relief hereafter set forth and additionally seek an award by the duly constituted arbitrator or arbitration tribunal selected by the American ARbitration Association, pursuant to its Construction Industry Arbitration Rules, effective March 1, 1974, which may be entered with this District Court, filed with the Clerk of this District Court, as a basis of a judgment and that an execution may be issued to its collection pursuant to the statutory arbitration provisions of Rule 109, entitled "ARBITRATION" of the Colorado Rules of Civil Procedure, with the oath of arbitrators to be given and with the arbitrators to have the power to issue subpoenas for witnesses:

* * *

(d) Plaintiffs request reimbursement for the costs of arbitration (including legal fees, expenses, and costs connected with the filing of this civil action together with related proceedings).

(c) Plaintiffs request that the Court direct that no further progress payments be paid to Defendant until Defendant fully complies with the final award of the arbitrator or arbitration tribunal as may be selected by the American Arbitration Association, including full compliance with all conditions and any directives, orders or partial awards of such arbitration tribunal.

* * *

SECOND CAUSE OF ACTION
BREACH OF CONTRACT -- ALTERNATE ROOF REPAIR BY OWNER

(25) Plaintiffs incorporate and reallege paragraphs one (1) through paragraph twenty-four (24), of this Complaint as if fully set forth under this second cause of action.

WHEREFORE, the Plaintiffs pray in the alternative for the following alternative specific types of relief as hereafter set forth and additionally seek such alternative award by the duly constituted arbitrator or arbitration tribunal selected by the American Arbitration Association, pursuant to its Construction Industry Arbitration Rules, effective March 1, 1974, which may be entered with this District Court, filed with the Clerk of this District Court as a basis of a judgment and that an execution may be issued to its collection pursuant to the statutory arbitration provisions of Rule 109, entitled "ARBITRATION" of the Colorado Rules of Civil Procedure, with the oath of arbitrators to be given and with the arbitrators to have the power to issue subpoenas for witnesses:

* * *

(d) Plaintiffs request reimbursement for the costs of arbitration (including legal fees, expenses, costs connected with the filing of this civil action together with related proceedings).

(e) Plaintiffs request that the Court direct that no further progress payments be paid to Defendant until Defendant fully complies with the final award of the arbitrator or arbitration tribunal as may be selected by the American Arbitration Association, including full compliance with all conditions and any directives, orders or partial awards of such arbitration tribunal.

THIRD CAUSE OF ACTION
BREACH OF CONTRACT - ALTERNATE EQUITABLE ADJUSTMENT FOR ROOF

(26) Plaintiffs incorporate and reallege paragraphs one (1) through twenty-five (25), of this Complaint as if fully set forth under this Third Cause of Action.

WHEREFORE, the Plaintiffs pray for the following specific types of relief hereafter set forth and additionally seek an award by the duly constituted arbitrator or arbitration tribunal selected by the American Arbitration Association, pursuant to its Construction Industry Arbitration Rules, effective March 1, 1974, which may be entered with this District Court, filed with the Clerk of the District Court as a basis of a judgment and that an execution may be issued to its collection pursuant to the statutory arbitration provisions of Rule 109, entitled "ARBITRATION" of the Colorado Rules of Civil Procedure with the oath of arbitrators to be given and with the arbitrators to have the power to issue subpoenas for witnesses:

* * *

(d) Plaintiffs request reimbursement for the costs of arbitration (including legal fees, expenses, costs connected with the filing of this civil action together with related proceedings).

(e) Plaintiffs request that the Court direct that no further progress payments be paid to Defendant until Defendant fully complies with the final award of the arbitrator or arbitration tribunal as may be selected by the American Arbitration Association, including full compliance with all conditions and any directives, orders or partial awards of such arbitration tribunal.

* * *

FOURTH CAUSE OF ACTION
NEGLIGENCE - ROOF REPAIRS BY CONTRACTOR

(27) Plaintiffs incorporate and reallege paragraphs one (1) through twenty-six (26) of this Complaint as if fully set forth under this cause of action.

(31) Therefore, the Defendant's action and conduct is the proximate cause of the unsafe condition which now exists and for which high winds have already caused a loss of some of the tiles since the "DEMAND FOR ARBITRATION" was filed. Defendant was notified through his attorney of such damage by letter on or about January 10, 1975.

(32) The additional breach of "THE AGREEMENT" by the Defendant's attempted reservation of a purported "right to initiate an original proceeding in a Colorado Court of original jurisdiction, to contest or retry any and all issues present in the arbitration" and the additional qualification that the Defendant, as the respondent before the American Arbitration Association, "submission to arbitration in no way should be construed as a choice of remedies but only as a condition precedent to a possible court action", identified supra, under the First Cause of Action, is clearly an extreme aggravation of the exposure to damage which is an intentional, wanton, and reckless disregard of the rights of the Plaintiffs, which is further detailed in its wrongful character under the Seventh Cause of Action, infra.

(33) The Defendant was clearly put on notice as to the urgency and the importance of time being of the essence due to severe wind conditions because of the following language in the referenced and attached copy of the "DEMAND FOR ARBITRATION" dated December 9, 1974, attached hereto as "EXHIBIT A".

> "FIRST CLAIM FOR RELIEF - For the above contractor to remedy and correct alleged defects and for other equitable adjustments as provided under Article 3 of the above referenced "EXHIBIT A" including the correction and remedying of the roof by the above contractor at the earliest possible time since time is of the essence due to severe wind conditions in the location."

(34) Therefore, the irresponsible acts of the contractor during construction and subsequent to construction during the arbitration proceedings thus far clearly constitute the proximate cause to the existence and continuance of the conditions constituting negligence under this Fourth Cause of Action.

(37) Since the parties have expressly agreed to submit the claims and disputes to arbitration under "ARTICLE 15", and which is enforceable pursuant to Section 46 of the Construction Industry Rules of the American Arbitration Association, supra, the Plaintiffs are entitled to recovery of exemplary damages pursuant to the statute.

WHEREFORE, the Plaintiffs pray for the following specific types of relief hereafter set forth and additionally seek an award by the duly constituted arbitrator or arbitration tribunal selected by the American Arbitration Association, pursuant to its Construction Industry Arbitration Rules, effective March 1, 1974, which may be entered with this District Court, filed with the Clerk of the District Court as a basis of a judgment and that an execution may be issued to its collection pursuant to the statutory arbitration provisions of Rule 109, entitled "ARBITRATION" of the Colorado Rules of Civil Procedure with the oath of arbitrators to be given and with the arbitrators to have the power to issue subpoenas for the witnesses:

* * *

(a) In addition to the prayer for ***

other relief as detailed under the First Cause of Action, supra, the Plaintiffs' request for the same relief as actual damages under this Fourth Cause of Action.

* * *

FIFTH CAUSE OF ACTION
NEGLIGENCE - ALTERNATE ROOF REPAIR BY OWNER

(38) Plaintiffs incorporate and reallege paragraphs one (1) through paragraph thirty-seven (37), of this Complaint as if fully set forth under this Fifth Cause of Action.

WHEREFORE, the Plaintiffs pray for the following specific types of relief hereafter set forth and additionally seek an award by the duly constituted arbitrator or arbitration tribunal selected by the American Arbitration Association, pursuant to its Construction Industry Arbitration Rules, effective March 1, 1974, which may be entered with this District COurt, filed with the Clerk of the District Court as a basis or a judgment and that an execution may be issued to its collection pursuant to the statutory arbitration provisions of Rule 109, entitled "ARBITRATION" of the Colorado

Rules of Civil Procedure with the oath of arbitrators to be given and with the arbitrators to have the power to issue subpoenas for the witnesses:

(a) In addition to the prayer for ***

other relief as detailed under the Second Cause of Action, supra, the Plaintiffs request such same relief as actual damages under this Fifth Cause of Action.

***

SIXTH CAUSE OF ACTION
NEGLIGENCE - ALTERNATE EQUITABLE ADJUSTMENT FOR ROOF

(39) Plaintiffs incorporate and reallege paragraphs one (1) through paragraph thirty-eight (38), of this Complaint as if fully set forth under this Sixth Cause of Action.

WHEREFORE, the Plaintiffs pray for the following specific types of relief hereafter set forth and additionally seek an award by the duly constituted arbitrator or arbitration tribunal selected by the American Arbitration Association, pursuant to its Construction Industry Arbitration Rules, effective March 1, 1974, which may be entered with this District Court filed with the Clerk of the District Court as a basis for a judgment and that an execution may be issued to its collection pursuant to the statutory arbitration provisions of Rule 109, entitled "ARBITRATION" of the Colorado Rules of Civil Procedure with the oath of arbitrators to be given with the arbitrators to have the power to issue subpoenas for the witnesses:

(a) In addition to the prayer for ***

other relief as detailed under the Third Cause of Action supra, the Plaintiffs also request that such same relief as actual damages under this Sixth Cause of Action.

SEVENTH CAUSE OF ACTION
WRONGFUL ATTEMPT TO REVOKE FINALITY OF SUBMISSION TO ARBITRATION
AND FOR ATTEMPTED WRONGFUL REFORMATION OF CONTRACT.

(40) Plaintiffs incorporate and reallege paragraphs one (1) through thirty-nine (39), of this Complaint as if fully set forth under this Seventh Cause of Action.

(41) After entering into "THE AGREEMENT", supra, with the subsequent breaching of "THE AGREEMENT" by the Defendant, supra, the Plaintiffs filed a "DEMAND FOR ARBITRATION" as "CLAIMANT" on December 9, 1974, supra, which is also attached hereto as "EXHIBIT A" and incorporated herein by reference.

(42) The Construction Industry Rules of the American Arbitration Association, effective March 1, 1974, were in effect at the time of the execution of "THE AGREEMENT" and were incorporated by reference by "ARTICLE 15" of "THE AGREEMENT" which Rules are attached hereto as "EXHIBIT B".

(43) The Defendant breached the Arbitration provisions by refusing to fully comply with any award to be rendered by the arbitrator or arbitration tribunal to be selected by the American Arbitration Association, as detailed under paragraph 19, et. seq. and as also detailed under paragraph 32, et.seq. of this Complaint, supra.

(44) The Defendant's actions, interpretation, and conduct, supra, under the circumstances amounts to a wrongful attempt to reform "THE AGREEMENT" in bad faith.

(45) As a consequence, Plaintiffs are compelled to seek a judicial remedy to assure that an arbitration award to be made pursuant to "THE AGREEMENT" would be enforceable in the cognizant court without being exposed to a risk of continuing litigation to retry any and all of the issues on the basis that Paul Mullins Construction Co.'s submission to arbitration is only a condition precedent to a possible court action.

(46) Not only has the Defendant filed a response to Plaintiffs' "DEMAND FOR ARBITRATION" as "RESPONDENT" before the American Arbitration Association, paid an initial fee, filed a list of acceptable arbitrators with the American Arbitration Association, filed a schedule of available dates for arbitration proceedings to be held, and communicated with the American Arbitration

Association regarding further criteria desired for the selection of arbitrators, the Defendant, as the "RESPONDENT" also filed affirmatively, a counterclaim against the Plaintiffs herein designated. The counterclaim set forth no specific basis justifying recovery for a claim for relief sought in the counterclaim in the amount of THIRTEEN THOUSAND SEVEN HUNDRED SEVENTY-SIX AND 94/100 ($13,776.94) DOLLARS plus interest, attorney's fees and all fees and expenses incurred in arbitration.

* * *

(48) In order to enable the intent of the parties to be fulfilled as evidenced by "THE AGREEMENT" controversies and disputes to be resolved in an efficient manner as contemplated, it is imperative that the integrity of the arbitration proceedings be secured at the outset even though the dispute should be resolved in an expeditious manner under the circumstances.

WHEREFORE, the Plaintiffs pray, in addition to the foregoing causes of action, for an order of this court to:

(a) Compel arbitration of all controversies, issues, claims and disputes to be submitted by the Plaintiffs Mark H. and Juanita S. Alspaugh in an amendment to the "DEMAND FOR ARBITRATION" previously filed on December 9, 1974 with the American Arbitration Association for a determination by the arbitrator or by an arbitration tribunal designated pursuant to the American Arbitration Association's Construction Industry Arbitration Rules, effective March 1, 1974 and also as provided under Rule 109 of the Colorado Rules of Civil Procedure entitled "ARBITRATION".

* * *

(f) Plaintiffs also request that the award of the arbitrator or arbitration tribunal arising out of this complaint, pursuant to the above referenced rules may be filed with the Clerk of the above referenced District Court, as a basis of a judgment, and that execution may be issued for its collection since the parties to the March 12, 1974 "AGREEMENT" had agreed that arbitration, in accordance with the then existing Construction Industry Arbitration Rules of the American Arbitration Association were final and binding insofar as the requirements for effective statutory arbitration

(g) The Plaintiffs further request that the Defendant Paul Mullins d/b/a Paul Mullins Construction Co. be and hereby is enjoined from refraining and refusing to fully arbitrate the grievances as set forth in "ARTICLE 15" of "THE AGREEMENT" and Section 46 of the Construction Industry Arbitration Rules of the American Arbitration Association, effective March 1, 1974.

(h) Plaintiffs further pray for reasonable attorney's fees, expenses and costs connected with the legal proceedings to compel arbitration to assure that the arbitration award will have the finality and binding effect as provided under Rule 109 of the Colorado Rules of Civil Procedure.

(i) The Plaintiffs further request that the parties pay the arbitration fees specified by the Construction Industry Rules of the American Arbitration Association in lieu of directly paying compensation to the appointed arbitrator or arbitrators.

Respectfully submitted

Dated: January 20, 1975

John M. Love
Attorney for the Plaintiffs
250 Arapahoe, Suite 202
Boulder, Colorado 80302

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF BOULDER

STATE OF COLORADO

Civil Action No. 75-0203-1

MARK H. AND JUANITA S. ALSPAUGH, Plaintiffs,	)	MOTIONS TO (1) AMEND THE COMPLAINT AND TO ADD AN ADDITIONAL PARTY AND (2) TO ACCELERATE PROCEEDINGS
vs.	)	
PAUL MULLINS, d/b/a PAUL MULLINS CONSTRUCTION CO., Defendant.	)	

COMES NOW, the Plaintiffs, Mark H. and Juanita S. Alspaugh, by and through their attorney, John H. Love, and hereby moves this Honorable Court, pursuant to the Colorado Rules of Civil Procedure, Rules 15 and 20, for an Order adding the "PAUL MULLINS CONSTRUCTION CO.", a Colorado corporation, as an additional party Defendant to this Civil Action, which is hereafter referred to as "DEFENDANT CORPORATION", for the following reasons:

(1) That Plaintiffs' rights to relief against said additional Defendant and the original Defendant, "PAUL MULLINS, d/b/a PAUL MULLINS CONSTRUCTION CO.", hereafter referred to as "DEFENDANT MULLINS":

(a) Arose from the same transaction or occurrences set forth in the original "COMPLAINT" as well as subsequent occurrences; and

(b) Numerous common questions of fact and law exist in this same transaction.

(2) That the principal basis for an additional "DEFENDANT CORPORATION'S" liability is summarized in the allegations in paragraphs (1) through (25) of the "AMENDED COMPLAINT FOR (1) BREACH OF CONTRACT; (2) NEGLIGENCE; (3) WRONGFUL ATTEMPT TO REVOKE FINALITY OF SUBMISSION TO ARBITRATION AND FOR WRONGFUL REFORMATION OF CONTRACT; AND (4) ADDING ADDITIONAL PARTY DEFENDANT" which is also being filed with the Court at this time.

(3) The supporting legal analysis is set forth in the following documents (including briefs) which are incorporated herein by reference and hence, there is no necessity of filing a separate brief with this "MOTION":

(a) "OPPOSING MEMORANDUM BRIEF TO DEFENDANT'S MOTION TO DISMISS , previously filed in this Civil Action No. 75-0203-1; and

(b) "MOTIONS TO QUASH SUMMONS AND COMPLAINT AND TO DISMISS WITH PREJUDICE" which the Alspaughs very recently filed in their capacity as Defendants in Civil Action No. 75-0383-1 in response to the "DEFENDANT CORPORATION'S" filing an independent "COMPLAINT IN FORECLOSURE OF MECHANIC'S LIEN" in Civil Action No. 75-0383-1 with supporting "MEMORANDUM BRIEF" and the "AFFIDAVIT" of the Alspaughs.

(4) Thus, it is claimed that the additional "DEFENDANT CORPORATION" is jointly and severally liable with "DEFENDANT MULLINS" since said Corporation is responsible for many of the same acts and omissions which the original "DEFENDANT MULLINS" is liable for.

(5) The basis for acceleration of proceedings is set forth by the Alspaughs, in their capacity as Defendants in Civil Action No. 75-0383-1, in their "MOTION TO ACCELERATE PROCEEDINGS" which is filed in that Civil Action and which is incorporated herein by reference to enable the Court to take notice of such "MOTION", with the single exception that the designation of the parties as Plaintiffs and Defendants therein is herein reversed.

WHEREFORE, Plaintiffs respectfully request this Court to grant these "MOTIONS" to permit the Plaintiffs Alspaugh to add the "DEFENDANT CORPORATION" as an additional party to this action and to effect service of the above designated "AMENDED COMPLAINT" upon both the individual and corporation Defendants prior to the granting of Plaintiffs' previous "MOTION TO COMPEL ARBITRATION IN ACCORDANCE WITH AGREEMENT AND RULES" which will be amended to include reference to the "DEFENDANT CORPORATION".

Respectfully submitted

Dated: March 9, 1975

John H. Love
Attorney for the Plaintiffs
250 Arapahoe, Suite 202
Boulder, Colorado 80302
(303) 449-6762

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF BOULDER

STATE OF COLORADO

Civil Action No. 75-0203-1

MARK H. AND JUANITA S. ALSPAUGH, Plaintiffs, vs. PAUL MULLINS, Individually and d/b/a PAUL MULLINS CONSTRUCTION CO. and PAUL MULLINS CONSTRUCTION CO., A Colorado Corporation, Defendants.	AMENDED MOTION TO COMPEL ARBITRATION IN ACCORDANCE WITH AGREEMENT AND RULES

COMES NOW, the Plaintiffs Mark H. and Juanita S. Alspaugh, by and through their attorney, John H. Love, and hereby moves this Honorable Court for an Order to compel arbitration of all the controversies, issues, claims, and diputes of the parties arising out of "THE AGREEMENT" (i.e. contract) between the parties, dated March 12, 1974 and related to the "DEMAND FOR ARBITRATION" by Mark H. and Juanita S. Alspaugh, as "CLAIMANTS", dated December 9, 1974, as more fully set forth in the accompanying "AMENDED COMPLAINT FOR (1) BREACH OF CONTRACT; (2) NEGLIGENCE; (3) WRONGFUL ATTEMPT TO REVOKE FINALITY OF SUBMISSION TO ARBITRATION AND FOR WRONGFUL REFORMATION OF CONTRACT; AND (4) ADDING ADDITIONAL PARTY DEFENDANT", submitted by Plaintiffs and which is attached to Plaintiffs' "MOTIONS TO (1) AMEND THE COMPLAINT AND TO ADD AN ADDITIONAL PARTY AND (2) TO ACCELERATE PROCEEDINGS". The Plaintiffs also request the Court to approve service of this "AMENDED MOTION TO COMPEL ARBITRATION IN ACCORDANCE WITH AGREEMENT AND RULES" upon said Corporation with the "AMENDED COMPLAINT" in order to facilitate a final determination of all the parties defendant as being subject to a decision compelling arbitration. However, in the event the "MOTION" is not approved to add such Corporation as a party defendant, the Plaintiffs would still desire to amend their original "COMPLAINT" against the individual Defendant Paul Mullins as identified in the above referenced "AMENDED COMPLAINT".

As grounds therefore, the Court is referred to the procedural developments as to the subject matter of the litigation in this Civil Action No. 75-0203-1 and that Civil Action No. 75-0383-1, involving the lien foreclosure complaint by the Defendant Corporation which has been moved to be added herein as a party defendant.

The referenced documentation (including motions, briefs, affidavits and exhibits) is referenced to a large extent in the Plaintiffs' "MOTION TO AMEND THE COMPLAINT AND TO ADD A PARTY DEFENDANT".

However, the primary grounds for compelling arbitration of the dispute is set forth in detail in Plaintiffs' original "MOTION TO COMPEL ARBITRATION IN ACCORDANCE WITH AGREEMENT AND RULES" which is incorporated herein by reference. Because of the relationship of the parties defendant to "THE AGREEMENT", (i.e. Paul Mullins and the Corporation now chartered by the name "PAUL MULLINS CONSTRUCTION CO.") as is more fully analyzed in Plaintiffs' "OPPOSING MEMORANDUM BRIEF TO DEFENDANT'S MOTION TO DISMISS" in this Civil Action 75-0203-1 and the Alspaughs' "MOTIONS TO QUASH SUMMONS AND COMPLAINT AND TO DISMISS WITH PREJUDICE" relating to the lien foreclosure complaint filed by the Defendant Corporation, as Civil Action No. 75-0383-1, above designated. Also see the accompanying "AFFIDAVIT" and "MEMORANDUM BRIEF".

Therefore, the Plaintiffs request that an early determination be made because time is of the essence due to wind conditions in the Boulder area which have already substantially damaged the Alspaughs' roof as depicted by photographs included as Figures 1 through 6 in the February 25, 1975 "AFFIDAVIT OF MARK H. AND JUANITA S. ALSPAUGH" filed in Civil Action No. 75-0383-1. Plaintiffs therefore move this Court for permission to serve this "MOTION" upon the above designated Corporate Defendant, to then have the "MOTION" heard with both individual and corporate Defendants with regard to Plaintiffs "MOTION" for this Court to grant an Order containing the following provisions to compel arbitration:

(1) Compel arbitration of all controversies, issues, claims and disputes to be submitted by the Plaintiffs Mark H. and Juanita S. Alspaugh in an amendment to the "DEMAND FOR ARBITRATION" previously filed on or about December 9, 1974 with the American Arbitration Association for a determination by the arbitrator or an arbitration tribunal designated pursuant to the American Arbitration Association's Construction Industry Arbitration Rules, effective March 1, 1974 and also as provided under Rule 109 of the Colorado Rules of Civil Procedure entitled "ARBITRATION". Said amended demand for arbitration may be filed against PAUL MULLINS, Individually and d/b/a PAUL MULLINS CONSTRUCTION CO. and against PAUL MULLINS CONSTRUCTION CO., A Colorado Corporation. Plaintiffs Alspaugh may attach the "AMENDED COMPLAINT FOR (1) BREACH OF CONTRACT; (2) NEGLIGENCE; (3) WRONGFUL ATTEMPT TO REVOKE FINALITY OF SUBMISSION TO ARBITRATION AND FOR WRONGFUL REFORMATION

75-0203-1 to such amended demand and may incorporate said "AMENDED COMPLAINT" therein by reference.

(2) Plaintiffs also request that the Court direct that the sworn oath be subscribed to by the arbitrator or arbitrators appointed pursuant to the American Arbitration's Construction Industry Arbitration Rules as follows:

> "That they will well and truly try and impartially and justly decide the matter in controversy, according to the best of their ability."

(3) Plaintiffs also request that the Court direct that the sworn oath or oaths of the arbitrators be filed with the Clerk of the District Court in and for the County of Boulder, State of Colorado, together with their award.

(4) Plaintiffs also request that the Court direct that the arbitrator or arbitrators may administer oaths to witnesses.

(5) Plaintiffs also request the Court to direct that the appointed arbitrator or arbitrators shall have the power to issue subpoenas for witnesses pursuant to Rule 45 of the Colorado Rules of Civil Procedure.

(6) Plaintiffs also request that the award of the arbitrator or arbitration tribunal arising out of this "COMPLAINT" pursuant to the above referenced rules may be filed with the Clerk of the above referenced District Court, as a basis of a judgment, and that execution may be issued for its collection since the parties to the March 12, 1974 "AGREEMENT" had agreed that arbitration, in accordance with the then existing Construction Industry Arbitration Rules of the American Arbitration Association were final and binding insofar as the requirements for effective statutory arbitration pursuant to Rule 109 of the Colorado Rules of Civil Procedure.

(7) The individual Defendant Paul Mullins and the Defendant Corporation presently having the name PAUL MULLINS CONSTRUCTION CO. be and hereby are enjoined from refraining and refusing to fully arbitrate the grievances as set forth in Article 15 of "THE AGREEMENT" and Section 46 of the Construction Industry Arbitration Rules of the American Arbitration Association, effective March 1, 1974.

(8) The Plaintiffs further pray for reasonable attorney's fees, expenses and costs connected with the legal proceedings to compel arbitration to assure that the arbitration award will have the finality and binding effect as provided under Rule 109 of the Colorado Rules of Civil Procedure.

(9) The Plaintiffs further request that the parties pay the arbitration fees specified by the Construction Industry Arbitration Rules of the American

Arbitration Association in lieu of directly paying compensation to the appointed arbitrator or arbitrators.

Respectfully submitted

Dated: March 9, 1975

John H. Love

John H. Love
Attorney for the Plaintiffs
250 Arapahoe, Suite 202
Boulder, Colorado 80302
(303) 449-6762

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF BOULDER

STATE OF COLORADO

Civil Action No. 75-0203-1

MARK H. AND JUANITA S. ALSPAUGH, Plaintiffs, vs. PAUL MULLINS, Individually and d/b/a PAUL MULLINS CONSTRUCTION CO, and PAUL MULLINS CONSTRUCTION CO., A Colorado Corporation, Defendants.	AMENDED COMPLAINT FOR (1) BREACH OF CONTRACT; (2) NEGLIGENCE; (3) WRONGFUL ATTEMPT TO REVOKE FINALITY OF SUBMISSION TO ARBITRATION AND FOR WRONGFUL REFORMATION OF CONTRACT; AND (4) ADDING ADDITIONAL PARTY DEFENDANT.

COMES NOW, the Plaintiffs, Mark H. and Juanita S. Alspaugh, by and through their attorney, John H. Love, and complain and allege as follows, in this first amended original "COMPLAINT" by adding the "PAUL MULLINS CONSTRUCTION CO.", a Colorado corporation, as an additional party Defendant in this "AMENDED COMPLAINT", which supersedes the original "COMPLAINT" filed on or about January 20, 1975, in its entirety. In this "AMENDED COMPLAINT", (a) references to "DEFENDANT MULLINS" will be with respect to Paul Mullins individually by (i) his doing business as "PAUL MULLINS CONSTRUCTION CO." and (ii) his acting as an officer of said "DEFENDANT CORPORATION" under its previous and present corporate name, whether undisclosed or disclosed; (b) All references to "DEFENDANT CORPORATION" will be with respect to the "DEFENDANT CORPORATION" under its present name "PAUL MULLINS CONSTRUCTION CO." or its former name "K-M DEVELOPMENT, INC."; and (c) All references to "THE CONTRACTOR", "PAUL MULLINS CONSTRUCTION CO.", or the "DEFENDANTS" will include "DEFENDANT MULLINS" and "DEFENDANT CORPORATION" as defined above, unless otherwise specified.

FIRST CAUSE OF ACTION --- BREACH OF CONTRACT

(1) That the "DEFENDANT MULLINS" represented to the Plaintiffs that he was doing business as "PAUL MULLINS CONSTRUCTION CO."

(2) That the "DEFENDANT MULLINS" executed an "AGREEMENT", hereinafter referred to as "THE AGREEMENT", dated March 12, 1974 as "THE CONTRACTOR" and signed "THE AGREEMENT" individually.

(3) That the Plaintiffs negotiated with Paul Mullins, as an individual, who they understood was doing business as "PAUL MULLINS CONSTRUCTION CO.", and did

not negotiate with a corporation through a duly authorized representative, such as an officer, director, or an agent.

* * *

(12) The Plaintiffs have the obligation, upon exercise of their rights as set forth in paragraph (9), supra, and in the absence of a mutually agreeable resolution of the issues in dispute between the parties to "THE AGREEMENT", to seek timely resolution of the dispute as provided by "ARTICLE 15 - ARBITRATION" of "THE AGREEMENT".

(13) As provided by "THE AGREEMENT", the Plaintiffs as Claimant filed a "DEMAND FOR ARBITRATION" together with the "Exhibit A", incorporated herein by reference and attached to this "AMENDED COMPLAINT", with the American Arbitration Association, on or about December 9, 1974. No further Progress Payments have since been made to "THE CONTRACTOR" pending resolution of the issues in dispute in accordance with Plaintiffs' rights under Articles 17 and 25 of "THE AGREEMENT". The "DEMAND FOR ARBITRATION" filed by the Plaintiffs will hereinafter be referred to as "THE DEMAND".

(14) On or about January 3, 1975 "DEFENDANT MULLINS" filed, or caused to be filed, a "RESPONSE AND COUNTERCLAIM TO THE DEMAND" with the American Arbitration Association. In this "RESPONSE AND COUNTER CLAIM", as well as in subsequent appearances before the American Arbitration Association "DEFENDANT MULLINS" has not disclosed any corporate character of such company under the prior corporate name of "K-M DEVELOPMENT, INC." as a party to "THE AGREEMENT" nor under the present corporate name of "PAUL MULLINS CONSTRUCTION CO.".

(15) The "DEFENDANTS" designated "PAUL MULLINS CONSTRUCTION CO." have extensively appeared before the American Arbitration Association (Case No. 71 10 0090 74) by:

(a) Filing a "RESPONSE AND COUNTERCLAIM TO THE DEMAND";

(b) Payment of an initial arbitration fee;

(c) Filing a list of acceptable arbitrators and communicating with the AAA concerning criteria for arbitrators; and

(d) Filing a list of acceptable dates for arbitration proceedings to be held.

(16) That, after "THE DEMAND", and on or about January 7, 1975, said "K-M DEVELOPMENT, INC." changed its corporate name to "PAUL MULLINS CONSTRUCTION CO." by the act of the "DEFENDANT MULLINS" without advising Plaintiffs.

(18) That the "DEFENDANT CORPORATION" under its original name, either (a) was an unnamed Contractor to "THE AGREEMENT" under an assumed name acting through Paul Mullins (also known as L. Paul Mullins and Lloyd Paul Mullins) as president, agent, and authorized representative; (b) subsequently adopted "THE AGREEMENT" of Paul Mullins as "THE CONTRACTOR" and assumed rights and benefits under said "AGREEMENT" as well as obligations and liabilities under "THE AGREEMENT"; or (c) acted as an undisclosed principal during the performance of the Contract until on or about February 7, 1975, through Paul Mullins as its authorized agent and representative who had authority to act in behalf of said Corporation.

(19) That said "DEFENDANT CORPORATION" under its current or previous name, has likewise functioned as described under paragraph (18), supra.

(20) That with respect to all allegations in this "AMENDED COMPLAINT", said 'DEFENDANT CORPORATION", under both its prior and present name authorized, approved and/or ratified the acts of Lloyd Paul Mullins as an officer, i.e. as president, and as the agent and representative of said Corporation at all times in its dealings with Plaintiffs with respect to "THE AGREEMENT", before and after said "DEFENDANT CORPORATION" disclosed its identity to Plaintiffs.

(21) Since the Plaintiffs filed "THE DEMAND" the "DEFENDANTS" have further breached their obligations to arbitrate claims or disputes arising out of "THE AGREEMENT" or the breach thereof as required under Article 15 of "THE AGREEMENT" and in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, hereafter referred to as the "AAA RULES". In particular said "DEFENDANTS" have specifically breached the third paragraph under Section 46 of said "AAA RULES", effective March 1, 1974, which were incorporated by reference under Article 15 of "THE AGREEMENT" and which are attached hereto as "Exhibit B".

(22) The Plaintiffs have sought to enforce the arbitration provisions of "THE AGREEMENT" and the "AAA RULES", supra, by filing a "MOTION TO COMPEL ARBITRATION IN ACCORDANCE WITH AGREEMENT AND RULES" with the District Court in and for the County of Boulder, State of Colorado, designated as this Civil Action No. 75-0203-1, on or about January 20, 1975 and have diligently attempted to preserve their arbitration rights in this Civil Action and also under an independent "COMPLAINT IN FORECLOSURE OF MECHANIC'S LIEN" with "NOTICE OF COMMENCEMENT OF ACTION (LIS PENDENS)", designated as Civil Action No. 75-0383-1 which was filed or caused to be filed by "DEFENDANT CORPORATION" through its agent "DEFENDANT MULLINS" on or about February 7, 1975.

(23) The "DEFENDANTS" further breached "THE AGREEMENT" by filing, or causing to be filed, the above referenced "COMPLAINT IN FORECLOSURE OF MECHANIC'S LIEN" with "NOTICE OF COMMENCEMENT OF ACTION (LIS PENDINS)" with the District Court (Civil Action No. 75-0383-1) and causing such "LIS PENDENS" notice to be filed with the Clerk and Recorder for the County of Boulder, State of Colorado. This has placed a cloud on the marketable and merchantable title of the Plaintiffs' property at "Lot 6 Benchmark Subdivision, County of Boulder, State of Colorado", without legal justification and in gross disregard of Plaintiffs' arbitration rights under "THE AGREEMENT" which Plaintiffs have not waived and continue to diligently seek. ***

WHEREFORE, the Plaintiffs pray for the following specific types of relief against each Defendant jointly and severally:

(A) An Order of Court compelling arbitration of all controversies, issues, claims, and disputes to be submitted by the Plaintiffs Mark H. and Juanita S. Alspaugh in an amendment to the "DEMAND FOR ARBITRATION" previously filed on or about December 9, 1974 with the American Arbitration Association (which may include this "AMENDED COMPLAINT FOR (1) BREACH OF CONTRACT; (2) NEGLIGENCE; (3) WRONGFUL ATTEMPT TO REVOKE FINALITY OF SUBMISSION TO ARBITRATION AND FOR WRONGFUL REFORMATION OF CONTRACT; AND (4) ADDING ADDITIONAL PARTY DEFENDANT" in such an amended demand) and ordering that an award by the duly constituted arbitrator(s) selected by the American Arbitration Association may be entered with this District Court and filed with the Clerk of this District Court as a basis of a judgment and that an execution may be issued to its collection pursuant to the statutory arbitration provisions of Rule 109 of the Colorado Rules of Civil Procedure, entitled "ARBITRATION" with respect to the following prayer(s) or relief relating to the subject matter of the controversies, issues, claims and disputes set forth in this "AMENDED COMPLAINT";

***

SECOND CAUSE OF ACTION -- NEGLIGENCE

(28) Plaintiffs incorporate and reallege paragraphs one (1) through twenty-seven (27) of this "COMPLAINT" in their entirety as if fully set forth under this Second Cause of Action.

***

WHEREFORE, the Plaintiffs pray for the following specific types of relief against each Defendant, jointly and severally:

(A) An Order of the Court compelling arbitration of all controversies, issues, claims, and disputes as summarized under paragraph (A) of the prayer for the First Cause of Action on page (8), supra;

* * *

THIRD CAUSE OF ACTION
WRONGFUL ATTEMPT TO REVOKE FINALITY OF SUBMISSION TO ARBITRATION
AND FOR ATTEMPTED WRONGFUL REFORMATION OF CONTRACT

(34) Plaintiffs incorporate and reallege paragraphs one (1) through thirty-three (33) of this "COMPLAINT" as if fully set forth under this Third Cause of Action.

(35) The "DEFENDANTS" breached the arbitration provisions of "THE AGREEMENT" by reserving a purported right to refuse to comply with any award to be rendered by the arbitrator or arbitration tribunal to be selected by the American Arbitration Association, as detailed under paragraph (21). In addition the "DEFENDANT CORPORATION" and "DEFENDANT MULLINS" breached the arbitration provisions by causing the "COMPLAINT IN FORECLOSURE OF MECHANIC'S LIEN" to be filed as Civil Action No. 75-0383-1 without submitting the dispute to arbitration.

(36) The "DEFENDANTS" actions, interpretation and conduct, supra, under the circumstances amounts to a wrongful attempt to reform "THE AGREEMENT" in bad faith.

(37) As a consequence, Plaintiffs were compelled to seek a judicial remedy by filing Civil Action No. 75-0203-1 to assure that an arbitration award made pursuant to "THE AGREEMENT" would be enforceable in the cognizant court without being exposed to a risk of continuing litigation to retry any and all of the issues on the basis that the "DEFENDANTS" submission to arbitration is only a condition precedent to a possible court action.

* * *

(c) Said actions by the "DEFENDANTS" under paragraph (38)(b) above were made in deliberate disregard of the arbitration provisions of "THE AGREEMENT" after the "DEFENDANTS" deliberately concealed the identity of the "DEFENDANT CORPORATION" as the Respondent before the American Arbitration Association in Case No. 71 10 0090 74;

* * *

WHEREFORE, the Plaintiffs pray for the following specific types of relief against each Defendant, jointly and severally:

(A) An Order of the Court compelling arbitration of all controversies, issues, claims, and disputes as summarized under paragraph (A) of the prayer for the First Cause of Action on page (8), supra.

* * *

(I) For such other relief as the Court deems appropriate.

Respectfully submitted

John H. Love

John H. Love
Attorney for the Plaintiffs Alapaugh
250 Arapahoe, Suite 202
Boulder, Colorado 80302
(303) 499-6762

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF BOULDER

STATE OF COLORADO

Civil Action No. 75-0383-1

PAUL MULLINS CONSTRUCTION CO., Plaintiff, vs. MARK H. ALSPAUGH AND JUANITA S. ALSPAUGH, CAPITOL FEDERAL SAVINGS, AND GERALD CAPLAN, PUBLIC TRUSTEE FOR THE COUNTY OF BOULDER, STATE OF COLORADO, Defendants.	)	MOTIONS TO QUASH SUMMONS AND COMPLAINT AND TO DISMISS WITH PREJUDICE

COMES NOW, the Defendants Mark H. Alspaugh and Juanita S. Alspaugh, by and through their attorney John H. Love, and hereby moves this Honorable Court for an Order to quash the "SUMMONS" and "COMPLAINT" by virtue of *** lack of jurisdiction over the subject matter *** and to dismiss such "SUMMONS" and "COMPLAINT" with prejudice together with appropriate relief related thereto.

In addition to the "AFFIDAVIT OF MARK H. AND JUANITA S. ALSPAUGH", attached hereto, the Court is requested to take judicial notice of other documents and records (including "COMPLAINT", "MOTIONS", "BRIEFS", and referenced "AFFIDAVITS", with copies attached) filed before this same Court in a predecessor Civil Action No. 75-0203-1 in which said Mark H. Alspaugh and Juanita S. Alspaugh filed a "COMPLAINT" against Paul Mullins, d/b/a Paul Mullins Construction Company as Defendant:

(A) "SUMMONS" and "COMPLAINT" by said Alspaughs as Plaintiffs;

(B) "MOTION TO COMPEL ARBITRATION IN ACCORDANCE WITH AGREEMENT AND RULES" (served simultaneously with said "COMPLAINT" in behalf of said Plaintiffs Alspaugh;

II. BASIS OF MOTION TO DISMISS FOR LACK OF JURISDICTION OF SUBJECT MATTER AND FOR FAILURE TO STATE A CLAIM

(A) The "MOTION" is made pursuant to Rule 12(b)(1)g(5) and also under Rule 12(h)(3) of the CRCP which is quoted in part in the accompanying "BRIEF".

(B) The subject matter of the dispute pertaining to the above referenced March 12, 1974 "AGREEMENT" (a copy of which is attached to the "LIEN FORECLOSURE COMPLAINT" as "Exhibit A") appears to be precisely the same "AGREEMENT" as the "AGREEMENT" which comprises the subject matter in the Alspaughs' "DEMAND FOR ARBITRATION" and "MOTION TO COMPEL ARBITRATION" (with the associated "COMPLAINT") docketed as Civil Action No. 75-0203-1. A copy of such "AGREEMENT", incorporated by reference, and the "DEMAND FOR ARBITRATION" (and "Exhibit A" thereto) and in the "COMPLAINT" is on file under C.A. 75-0203-1 and the fact that the "AGREEMENT" comprising the subject matter of this Civil Action No. 75-0383-1 is identical to the "AGREEMENT" comprising the subject matter of C.A. 75-0203-1 can be easily verified by the Court.

* * *

(D) While it would be very convenient for the firm of Thomas and Esperti to avoid a possible conflict of interest by having to represent both the corporation and Paul Mullins individually, there does not appear to be any substantial reason for both the corporation and individual not to defend the Alspaughs' causes of action in Civil Action No. 75-0203-1 before the American Arbitration Association in accordance with the "AGREEMENT" of the parties which is clearly analyzed in the following documents filed under Civil Action No. 75-0203-1 in addition to the original "DEMAND FOR ARBITRATION" which was incorporated therein by reference:

(a) "COMPLAINT BY PLAINTIFFS' ALSPAUGH"--See paragraphs 19, 42, 43, 44, 45, 46, 47, and 48. It is noted under paragraphs 46 and 47 of the "COMPLAINT" that the Defendant was seeking relief in its counter-claim as a Respondent before the American Arbitration Association in the amount of THIRTEEN

II. BASIS OF MOTION TO DISMISS FOR LACK OF JURISDICTION OF SUBJECT MATTER AND FOR FAILURE TO STATE A CLAIM

(A) The "MOTION" is made pursuant to Rule 12(b)(1)g(5) and also under Rule 12(h)(3) of the CRCP which is quoted in part in the accompanying "BRIEF".

(B) The subject matter of the dispute pertaining to the above referenced March 12, 1974 "AGREEMENT" (a copy of which is attached to the "LIEN FORECLOSURE COMPLAINT" as "Exhibit A") appears to be precisely the same "AGREEMENT" as the "AGREEMENT" which comprises the subject matter in the Alspaughs' "DEMAND FOR ARBITRATION" and "MOTION TO COMPEL ARBITRATION" (with the associated "COMPLAINT") docketed as Civil Action No. 75-0203-1. A copy of such "AGREEMENT", incorporated by reference, and the "DEMAND FOR ARBITRATION" (and "Exhibit A" thereto) and in the "COMPLAINT" is on file under C.A. 75-0203-1 and the fact that the "AGREEMENT" comprising the subject matter of this Civil Action No. 75-0383-1 is identical to the "AGREEMENT" comprising the subject matter of C.A. 75-0203-1 can be easily verified by the Court.

* * *

(D) While it would be very convenient for the firm of Thomas and Esperti to avoid a possible conflict of interest by having to represent both the corporation and Paul Mullins individually, there does not appear to be any substantial reason for both the corporation and individual not to defend the Alspaughs' causes of action in Civil Action No. 75-0203-1 before the American Arbitration Association in accordance with the "AGREEMENT" of the parties which is clearly analyzed in the following documents filed under Civil Action No. 75-0203-1 in addition to the original "DEMAND FOR ARBITRATION" which was incorporated therein by reference:

(a) "COMPLAINT BY PLAINTIFFS' ALSPAUGH"--See paragraphs 19, 42, 43, 44, 45, 46, 47, and 48. It is noted under paragraphs 46 and 47 of the "COMPLAINT" that the Defendant was seeking relief in its counter-claim as a Respondent before the

THOUSAND SEVEN HUNDRED SEVENTY-SIX AND 94/100 ($13,776.94) DOLLARS which is identical to the sum claimed by the Paul Mullins Construction Company as the corporation Plaintiff in paragraph 6 of its "COMPLAINT" in this Civil Action No. 75-0383-1. Thus, beyond question the subject matter, is identical in both Civil Actions by the admission of Paul Mullins individually and as a representative of the corporation and also by their attorney, who is admittedly the attorney for both such parties.

(b) Plaintiffs Alspaughs' "MOTION TO COMPEL ARBITRATION IN ACCORDANCE WITH AGREEMENT AND RULES" and the "MEMORANDUM BRIEF IN SUPPORT OF MOTION TO COMPEL ARBITRATION IN ACCORDANCE WITH AGREEMENT AND RULES".

(c) "OPPOSING MEMORANDUM BRIEF TO DEFENDANT'S MOTION TO DISMISS" filed in behalf of the Alspaughs which analyzes a transaction and the relationship between the parties in depth and establishes the basic reasoning why it would be fair, just, and equitable to have the entire dispute resolved by arbitration after the corporation is made a party Defendant in Civil Action No. 75-0203-1 pursuant to a subsequent motion to be made by the Alspaughs.

***

(F) In addition, the corporate Plaintiff in this lien suit hereunder is bound by the provisions of Article 15 of the "AGREEMENT" providing for arbitration. Since said Plaintiff has not complied with the arbitration provisions of the "AGREEMENT", said corporation has not stated a claim for which relief can be granted.

The Defendants Alspaugh are not waiving their arbitration rights hereunder and are making a timely plea that such lack of arbitration proceeding is a defense in this case prior to filing a responsive pleading as set forth in the accompanying "BRIEF" under III. However, the counsel for the Alspaughs believes that such arbitration rights can only be procedurally secured by having

75-0203-1 and to have such amended complaint served upon the corporation in addition to being served upon Paul Mullins individually.

* * *

III. ADDED MOTION THAT DISMISSAL OF LIEN COMPLAINT BE WITH PREJUDICE

(A) The Defendants Alspaughs herein also request this Court to dismiss this Civil Action No. 75-0383-1 with prejudice * * *

However, dismissal with prejudice under Rule 41(b) in this action is not harsh because said Plaintiff can adjudicate the merits of the contract dispute before the arbitrator which right is recognized Hayutin v Gibbon, Colo. 338 P. 2d. 1032, 1035, after arbitration between all the parties is authorized under Civil Action No. 75-0203-1. For example, it appears from a copy of the February 18, 1975 letter from the American Arbitration Association which is attached to the attached "AFFIDAVIT" of the Alspaughs herein, that the American Arbitration Association is in a "standby position" awaiting direction from the Court.

* * *

WHEREFORE, the Defendants Alspaughs pray that this Court grant the following relief:

(1) Quash the "SUMMONS" and "COMPLAINT" of this Civil Action entitled "COMPLAINT IN FORECLOSURE OF MECHANIC'S LIEN" and "NOTICE OF COMMENCEMENT OF ACTION (LIS PENDENS)".

(2) Dismiss the Civil Action No. 75-0383-1 with prejudice under Rule 41(b) of the Colorado Rules of Civil Procedure.

Respectfully submitted

John H. Love

John H. Love
Attorney for Defendants Mark H. Alspaugh and Juanita S. Alspaugh
250 Arapahoe, Suite 202
Boulder, Colorado 80302
(303) 449-6762

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF BOULDER

STATE OF COLORADO

Civil Action No. 75-0383-1

[illegible] CONSTRUCTION CO., Plaintiff, vs. MARK H. ALSPAUGH and JUANITA S. ALSPAUGH; CAPITOL FEDERAL SAVINGS; and GERALD [illegible] PUBLIC TRUSTEE FOR THE COUNTY OF BOULDER, STATE OF COLORADO, Defendants.	SECOND SUPPLEMENT TO MOTION TO QUASH SUMMONS AND COMPLAINT AND TO DISMISS WITH PREJUDICE

COMES NOW the Defendants MARK H. and JUANITA S. ALSPAUGH, by and through their attorney, John H. Love, and hereby move this Honorable Court to dismiss the "CROSSCLAIM" contained in the "ANSWER AND CROSSCLAIM" that was served on said Defendants Alspaugh's Counsel by the attorney for Defendant Capitol Federal Savings, as evidenced by a Certificate of Mailing dated April 23, 1975 (apparently after oral arguments on the several motions in Civil Actions 75-[illegible] and 75-0383-1, which were taken under advisement by the Court) and which was received on April 24, 1975.

Therefore, said Defendants Alspaugh hereby withdraw "SECTION II - MOTION TO DISMISS FOR INSUFFICIENCY OF SERVICE OF PROCESS" relating to the "CROSSCLAIM" in the "SUPPLEMENT TO MOTION TO QUASH SUMMONS AND COMPLAINT AND TO DISMISS WITH PREJUDICE" in this Civil Action No. 75-0383-1, but retains the remaining portion of said previous motion supplement and referenced documents and hereby renews its said "MOTION TO DISMISS THE CROSSCLAIM" in addition to the "COMPLAINT" in this Civil Action on the grounds previously stated to the Court in writing by motion, etc., and in oral argument to the Court on April 23, 1975.

Since the said Defendants believe that the substantive contentions concerning dismissal of the Plaintiff and Cross-Claimant in this Civil Action have been sufficiently expressed to the Court, it does not appear any good purpose would be achieved by applying to the Court to have this "MOTION" set

down for hearing. Therefore, said Defendants Alspaugh are filing this "MOTION" for the express purpose of not prejudicing any of their procedural rights during such time as the Court requires to deliberate and rule upon the matters presently before the Court in these two Civil Actions, which should automatically affect the proceedings with regard to the Alspaughs and Capitol Federal Savings.

Respectfully submitted,

Dated: John H. Love
May 9, 1975

John H. Love
Attorney for the Defendants Alspaugh
250 Arapahoe, Suite 202
Boulder, Colorado 80302
(303) 449-6762

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. _____

MARK H. ALSPAUGH AND JUANITA S. ALSPAUGH, Petitioners, vs. THE DISTRICT COURT IN AND FOR THE COUNTY OF BOULDER, HONORABLE WILLIAM D. NEIGHBORS, Judge, PAUL MULLINS, d/b/a: PAUL MULLINS CONSTRUCTION CO., PAUL MULLINS CONSTRUCTION CO., A Colorado Corporation, Respondents:	AFFIDAVIT OF PETITIONER'S ATTORNEY

I, JOHN H. LOVE, being duly sworn, hereby state and affirm to the best of my knowledge, information, and belief:

This Affidavit, together with materials incorporated herein by reference, is Appendix K to an "Original Proceeding in the Nature of Prohibition." The materials incorporated herein by reference include:

(a) Table of Contents for Reference Material, Appendix K.

(b) Part I, Reference Material (Selected)

(c) Part II, Reference Material (Complete)

The reference material contained in Appendix K is both a compilation and condensed digest of copies of certain documents of record in Civil Action No. 75-0383-1, and it is believed that these documents are adequate to support the "Petition for Writ of Prohibition." The Exhibit K reference materials were reproduced from copies of documents in my files which are believed to be the same as those contained in the files of the Respondent Court and Judge.

JOHN H. LOVE
ATTORNEY
BOULDER
COLORADO

continued on page two

Part II of Appendix K has been separately bound and contains copies,in their entirety, of all items listed in the table of contents. Two copies of Part II of Appendix K have been filed with the Clerk of the Supreme Court for use in these proceedings as reference material.

Part I is a condensed digest of Part II. Ten (10) copies of Part I have been filed with the Clerk of the Supreme Court for distribution with the ten accompanying copies of the Petition, Petition Brief, and other appendices. The extent to which Part II materials are contained in Part I is described by the table of contents.

I understand that documents previously filed with the Supreme Court of the State of Colorado in Original Proceeding No. 26960 are still available to the Colorado Supreme Court and have been recently recovered from the archives for use in this proceeding. These documents are listed below:

PETITION FOR WRIT OF PROHIBITION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

AFFIDAVIT OF PETITIONERS' ATTORNEY, DATED AUGUST 27, 1975
(WITH LISTING OF COPIES OF ATTACHED EXHIBITS)

ORDER OF TRIAL COURT

ORIGINAL PROCEEDING; RULE TO SHOW CAUSE

MOTION FOR EXTENSION OF TIME

ANSWER AND BRIEF OF THE RESPONDENTS, THE HONORABLE WILLIAM D. NEIGHBORS, PAUL MULLINS, AND PAUL MULLINS CONSTRUCTION COMPANY IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

REPLY TO THE ANSWER AND BRIEF OF RESPONDENTS

BRIEF IN SUPPORT OF THE REPLY TO THE ANSWER AND BRIEF OF RESPONDENTS

MOTION ON BEHALF OF RESPONDENTS, THE DISTRICT COURT IN AND FOR THE COUNTY OF BOULDER, The Honorable William D. Neighbors, Judge; PAUL MULLINS AND PAUL MULLINS CONSTRUCTION CO.; FOR PERMISSION TO FILE SUPPLEMENTAL ANSWER AND BRIEF

SUPPLEMENTAL ANSWER AND BRIEF OF THE RESPONDENTS, THE DISTRICT COURT IN AND FOR THE COUNTY OF BOULDER

ORIGINAL PROCEEDING ORDER

JOHN H. LOVE
ATTORNEY
BOULDER
COLORADO

CONTINUED ON PAGE THREE

REPLY TO THE SUPPLEMENTAL ANSWER AND BRIEF OF THE RESPONDENTS

NOTICE OF CHANGE OF ADDRESS OF THOMAS AND ESPERTI, PROFESSIONAL CORPORATION

RULE DISCHARGED AS IMPROVIDENTLY GRANTED ON FEBRUARY 23, 1977

John H. Love

John H. Love

STATE OF COLORADO)
) ss.
COUNTY OF BOULDER)

Subscribed and sworn to before me this 18 day of May, 1977, by John H. Love.

Notary Public

My commission expires:

My Commission Expires Sept. 10, 1980

JOHN H. LOVE
ATTORNEY
BOULDER
COLORADO

APPENDIX K

TABLE OF CONTENTS FOR REFERENCED MATERIALS

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