

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Colorado Supreme Court Records and Briefs Collection

---

5-18-1977

### Alspaugh v. District Court In and For Boulder County

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

---

#### Recommended Citation

"Alspaugh v. District Court In and For Boulder County" (1977). *Colorado Supreme Court Records and Briefs Collection*. 2942.

<https://scholar.law.colorado.edu/colorado-supreme-court-briefs/2942>

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

①

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 27677

FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO

MAY 18 1977

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: )

*Louise Walsh*

ORIGINAL PROCEEDING

PETITION IN ORIGINAL PROCEEDING IN  
THE NATURE OF PROHIBITION

John H. Love, No. 2493

250 Arapahoe, Suite 202  
Boulder, Colorado 80302  
(303) 449-6762

Attorney for Petitioners

IN THE SUPREME COURT OF THE STATE OF COLORADO

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

MARK H. ALSPAUGH and	)	
JUANITA S. ALSPAUGH,	)	
	)	
Petitioners,	)	
	)	
vs.	)	<u>COVER SHEET FOR PETITION</u>
	)	
The DISTRICT COURT IN AND FOR THE	)	<u>FOR WRIT OF PROHIBITION</u>
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	)	

The parties to this Original Proceeding before the Supreme Court of the State of Colorado are connected with Civil Action No. 75-0383-1 in the District Court in and for the County of Boulder, State of Colorado. Other related actions include a previous Original Proceeding No. 26960 before this Court and Action No. 75-0203-1 before the Respondent Court and Judge.

The parties to this Original Proceeding and their designations are as follows:

PARTY	C. A. 75-0383-1
Mark H. Alspaugh and Juanita S. Alspaugh	Defendants and Third-Party Plaintiffs and Homeowners
Paul Mullins d/b/a Paul Mullins Construction Co.	Third-Party Defendant and Contractor.
Paul Mullins Construction Co., A Colorado Corporation	Plaintiff which has asserted itself to be the Contractor.

By order of the Respondent Court and Judge, dated March 16, 1977, Capitol Federal Savings and Loan Association of Denver and Transamerica Title Insurance Company were dismissed with prejudice from Civil Action No. 75-0383-1 and therefore they are not named as Respondents herein.

However, their status does appear to be somewhat clouded since, after their dismissal, the Respondent Judge and Court permitted Capitol to make a further appearance by motion, which was filed on April 27, 1977, as noted by the accompanying "Docket Sheet" of the Respondent Court.

Counsel for each party before the Supreme Court is as designated below:

- (1) Mark H. Alspaugh and Juanita S. Alspaugh

Counsel: John H. Love  
250 Arapahoe, Suite 202  
Boulder, Colorado 80302  
(303) 449-6762

- (2) Paul Mullins, d/b/a Paul Mullins Construction Company

- and -

Paul Mullins Construction Co., A Colorado Corporation

Counsel: Silverman and Reeves  
Mr. Eldon Silverman  
700 Denver Club Bldg.  
Denver, Colorado 80202  
(303) 573-5266

IN THE SUPREME COURT OF THE STATE OF COLORADO

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

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

Cover Sheet for Petition for Writ of Prohibition . . . . .	i
Table of Contents for Writ of Prohibition and the Brief in Support Thereof, Including Appendices . . . . .	iii
	<u>Page of</u> <u>Petition</u>
PETITION FOR WRIT OF PROHIBITION . . . . .	1
BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION: .	<u>Page of</u> <u>Brief</u>
I. STATEMENT OF ISSUES:	
(A) ISSUE NO. 1 . . . . .	1
(B) ISSUE NO, 2 . . . . .	1
II. STATEMENT OF FACTS:	
(A) Background Information Generally Present in Original Proceeding No. 26960 . . . . .	2
(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 . . . . .	4
(C) Actions by Petitioners to Secure Their Arbitration Rights:	
(1) Initial Steps by Homeowners before Respondent Court and Judge to Secure Arbitration Rights after Contractor's Appearance before the AAA . . . . .	7
(2) Homeowners' Previous Appearance Before the Colorado Supreme Court to Secure Arbitration Rights . . . . .	8

(3) Homeowners' Continuing Efforts to Preserve and to Secure Arbitration Rights in C.A.75-0383-1 While Proceeding Involuntarily . . . . .	9
(D) Most Recent Events Relative to a Certain Undertaking . . . . .	11
III. SUMMARY OF ARGUMENT . . . . .	14
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 . . . . .	19
(2) A RECENT OPINION BY THIS COURT REINFORCES THE HOMEOWNERS' RIGHTS TO A JURISDICTIONAL DETERMINATION BEFORE TRIAL . . . . .	26
(3) THE EARLIER DECISION OF THIS COURT IN <u>ALSPAUGH V. DISTRICT COURT</u> IN ORIGINAL PROCEEDING NO. 26960 HAS BEEN INDEPENDENTLY QUESTIONED VERY RECENTLY ON A SCHOLARLY BASIS . . . . .	28
(4) PAST DECISIONS OF THIS COURT INDICATE THAT THERE IS A BASIS THROUGH THIS ORIGINAL PROCEEDING FOR DIRECTION OF A STATUTORY ARBITRATION PROCEEDING WITHOUT A TRIAL . . . . .	29
(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. . . . .	32
(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 . . . . .	33
(2) RESPONDENTS DENIED HOMEOWNERS OF EQUAL PROTECTION OF THE LAW, AND . . . . .	41
(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 . . . . .	43

V.	CONCLUSION . . . . .	46
VI.	APPENDICES:	
A.	Colorado Supreme Court's February 23, 1976 Opinion, <u>Alspaugh v. District Court</u> . . . . .	A-1
B.	Docket Sheets of Respondent Court . . . . .	B-1
C.	Federal and State Constitutional Provisions . . . . .	C-1
D.	Statutes (Session Laws 1939, 1973 Colorado Revised Statutes) . . . . .	D-1
E.	Colorado Appellate Rules . . . . .	E-1
F.	Colorado Rules of Civil Procedure . . . . .	F-1
G.	Miscellaneous Citations . . . . .	G-1
H.	Excerpts from "Civil Procedure," 1976 Annual Survey of Colorado Law, by Michael J. Waggoner, Associate Professor . . . . .	H-1
I.	Definitions . . . . .	I-1
J.	Condensation of Pleadings and Motions Prior to Original Proceeding No. 26960 (with background notes) . . . . .	J-1
K.	Referenced Materials:	
	Affidavit of Petitioner's Attorney . . . . .	1-3
	Table of Contents for Referenced Materials . . . . .	ki - kiii
	*Part I of Appendix K - Selected Materials . . . . .	K-1 to K264
	*Part II of Appendix K-Complete Materials . . . . .	K-1 to K264

\* Parts I and II are separately bound,  
entitled Appendix "K"

# CITATIONS OF CASES

Page No.

1. Alspaugh v District Court, \_\_\_\_ Colo. \_\_\_\_ 545 P. 2d 1362 . . . . 3,23,26,27,28,  
29,38
2. Boddie v Connecticut, 401 U.S. 371, 28 L. Ed 2d 13,  
91 S. Ct. 780. . . . . 39
3. Bonner v Gorman, 213 U.S. 86, 53 L.E. 709, 29 S. Ct.  
483 . . . . . 39
4. Carich v Reder A/B Nordie, 2 Cir 389 F. 2d 692 . . . . . 36
5. Commercial Metals Co. v International Union Marine  
Corp. 294 F. Supp. 570 (1968) . . . . . 36
6. Empson Packing Co. v Clawson, 95 P. 546, 43 Colo. 188 . . . . 36
7. Fuentes v Shevin, 407 U.S.67, 92 S Ct. 1983, 32 L. Ed.  
2d 556 . . . . . 39
8. Gillette v Brookhart, 123 N.E. 2d 693 (Ohio, 1954) . . . . . 4
9. Goldberg v Kelly, 397 U.S. 254, 90 S. Ct. 1011,  
25 L. Ed. 2d 287. . . . . 39
10. Hart v Orion Insurance Company, 453 F. 2d 1358 (1958) . . . . 36
11. Helmericks v Hotter, 30 Colo. App. 242, 492 P. 2d 85 . . . . 22, 34, 43.
12. Hyland Hills, etc. v McCoy Enterprises, \_\_\_\_ Colo.\_\_\_\_,  
554 P. 2d 708 . . . . . 22, 34, 43.
13. Leonhart v District Court, 138 Colo. 1, 329 P. 2d  
781 (1958) . . . . . 23
14. McCracken v Hayward 2 How 608, 11 L. Ed. 397 . . . . . 43
15. Merrill Lynch, Pierce, Fenner, and Smith, Inc.  
v District Court, \_\_\_\_ Colo., 545 P. 2d 1035 (1976), 5  
The Colorado Lawyer 561 (April, 1976) . . . . . 22, 28, 30, 31, 43
16. Mullane v Central Hanover Trust Co., 339 U.S. 306,  
94 L. Ed. 865, 70 S. Ct. 652 . . . . . 39
17. People v Crystal River Corp., 280 P. 2d 429, 131 Colo.  
163 (1955) . . . . . 35
18. Prinster v District Court, 137 Colo. 393, 325 P. 2d  
938 . . . . . 22
19. Shelley v Kramer, 334 U.S. 1, 92 L.E. 1161,  
68 S. Ct. 836 . . . . . 39
20. Sisters of Mercy of Colorado v Mead and Mount  
Construction Co., 439 P. 2d 733, 165 Colo. 447 . . . . . 36
21. Stephenson v Stephenson, 134 Colo. 96, 299 P. 2d, 1095 . . . . 32
22. Thomas Wells & Assoc. v Cardinal Properties, Inc., \_\_\_\_  
Colo. \_\_\_\_, 557 P. 2d 396 . . . . . 25,26,27,30,31,  
38, 41.



# CITATIONS OF CASES (continued)

23. Twin Lakes Reservoir and Canal Co. v Platt Rogers,  
147 P. 2d 828, 112 Colo. 155 . . . . . 36
24. 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 . . . . . 44
25. Valley Development, at Vail, Inc. v  
Warder, County Eagle, Colo., 557 P. 2d 1180 . . . . . 39
26. Wales v State Farm Mutual Automobile  
Insurance Co., \_\_\_\_ Colo App. \_\_\_\_, 559 P. 2d  
255 (1976), 6 The Colorado Lawyer 288 (February 1977) . . . 26
27. Western Motors v Carlson, 138 Colo. 404, 335 P. 2d 272 . . 31, 32.
28. Wilson v Wilson, 18 Colo. 615, 34 P. 175 . . . . . 35, 36.
29. Yamin v Levine, 120 Colo. 35, 206 P. 2d 596 . . . . . 34, 43.

## FEDERAL AND STATE CONSTITUTIONAL PROVISIONS

(See Appendix C)

1. Article 1, Section 10, Clause 1, Constitution  
of the United States . . . . . 2, 43.
2. Fourteenth Amendment to the United States  
Constitution . . . . . 2,33, 41,43
3. Section 3, Article II, Constitution of the  
State of Colorado . . . . . 2, 33
4. Section 6, Article II, Constitution of the  
State of Colorado . . . . . 2, 41
5. Section 25, Article II, Constitution of Colorado . . . . . 2,33

## STATUTES

(Session Laws 1939, 1973, Colorado Revised Statutes)

1. Chapter 80 of the Colorado Session Laws of 1939  
(Senate Bill No. 119, approved February 5, 1939 . . . . . 35
2. 1973 C.R.S., Section 13-2-108 . . . . . 35
3. 1973 C.R.S., Section 13-4-110 (3) . . . . . 29, 33
4. 1973 C.R.S. Section 38-22-113 . . . . . 41
5. 1973 C.R.S., Section 38-22-131 . . . . . 2, 21, 40, 45.
6. 1973 C.R.S., Section 38-22-132 . . . . . 2, 21

COLORADO APPELLATE RULES CITED

(See Appendix E)

Page No. of  
Brief

- |                                |                |
|--------------------------------|----------------|
| 1. Rule No. 1, C.A.R. . . . .  | 1, 17, 19, 32, |
| 2. Rule No. 21, C.A.R. . . . . | 1, 29, 30      |

COLORADO RULES OF CIVIL PROCEDURE CITED

(See Appendix F)

- |   |  |
|---|--|
| 1. C.R.C.P. (Order dated January 6, 1941) . . . . . | 34                                       |
| 2. C.R.C.P. (Rule 54 b) . . . . .                   | 17, 32, 33                               |
| 3. C.R.C.P. (Rule 109) . . . . .                    | 24, 25, 31, 33<br>34, 35, 36, 42,<br>45. |

MISCELLANEOUS CITATIONS

(See Appendix G)

- |   |    |
|---|----|
| 1. 5 Am. Jur. 2d Arbitration and Award, Section 2 . . . . . | 35 |
| 2. 73 Am Jur. 2d Stipulations, Section 4 . . . . .          | 44 |

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.

PETITION FOR WRIT

OF

PROHIBITION

BE IT REMEMBERED that the Petitioners-Homeowners have previously appeared before the Supreme Court of the State of Colorado in Original Proceeding No. 26960, the record of which is incorporated herein by reference in its entirety and whose use as an exhibit in this Original Proceeding is requested. For the convenience of the Supreme Court, a copy of its Opinion is included as Appendix A.

COME NOW, the above named Petitioners-Homeowners, by and through their attorney, John H. Love, and hereby petition the Supreme Court for a Writ of Prohibition to grant the following relief:

(a) Enjoining the Respondent Court and Judge, hereinafter referred to as the Respondent Court, from asserting jurisdiction over the subject matter of the controversy and from proceeding to trial in Civil Action No. 75-0383-1,

(b) Declaring the proceedings in Civil Action No. 75-0383-1 to be a nullity and ordering the dismissal of said Civil Action with prejudice, and

(c) Ordering the parties to the construction contract to submit their dispute to arbitration in accordance with (i) the Article 15

Arbitration Provisions of the recorded Agreement, executed on March 12, 1974, and the Construction Industry Arbitration Rules of the American Arbitration Association, effective March 1, 1974; and (ii) Rule 109 of the Colorado Rules of Civil Procedure.

AS GROUNDS THEREFORE, the Homeowners would show:

(1) That in Civil Action No. 75-0383-1, the Respondent Court is (a) without jurisdiction over the subject matter therein; (b) exceeding its jurisdictional and discretionary authority with regard to a certain Undertaking, pursuant to 1973 C.R.S. § 38-22-131 and 132; and (c) generally abusing and exceeding its discretionary powers.

(2) That as a consequence of such acts, the Homeowners are being deprived of their property without due process and equal protection of the law and their rights under contracts have been impaired.

(3) That new evidence has become available since Original Proceeding No. 26960 was concluded. Such evidence is based upon deposition admissions under oath of the Respondent Contractor and demonstrates the truth of the Homeowners' previous and continuing allegations as to the scope of the arbitration provisions of the construction contract, which construction contract is as defined in Appendix I.

The Homeowners allege that the Respondent-Contractor has made admissions which establish: (a) that he signed the recorded Agreement containing the Article 15 Arbitration provision, (b) that the construction contract consists of more than the recorded Agreement of March 12, 1974, (c) that the Construction Industry Arbitration Rules of the American Arbitration Association (AAA), effective March 1, 1974, are a part of the construction contract, (d) that the Article 15 arbitration provisions and said AAA Rules were still in effect when the dispute arose, (e) that when the dispute arose, he authorized his attorney to correspond with the Homeowners and that such correspondence acknowledged that the contract provided for arbitration unless the parties mutually agreed otherwise and also unsuccessfully attempted to persuade the Homeowners to waive their arbitration rights, (f) that on or about December 10, 1974, he caused an

unqualified demand for arbitration to be filed with the American Arbitration Association, asserting a claim against the Homeowners in the amount of \$13,776.94, (g) that, after the Homeowners filed a Demand for Arbitration, dated December 9, 1974, he caused a response and counterclaim to be filed, (h) that he unilaterally took exception to the AAA Rules by reserving a right to retry in a judicial proceeding any and all issues present in arbitration by qualifying his submission to arbitration as a condition precedent to a possible court action, (i) that he caused to be filed with the AAA a list of preferred arbitrators, requested dates for arbitration proceedings, and requested subpoenas from the AAA, (j) that he was in full agreement with positions taken in his behalf by his attorneys (Exhibit K, Items 1, 2, 14, 15, 30, and Original Proceeding No. 26960 exhibits).

(4) That the effect of such admissions clearly establishes the facts by which it is alleged that the construction contract of the parties is a statutory type of arbitration agreement and is not a common-law arbitration agreement. It is further alleged that (a) a statutory arbitration agreement is one in which the subject matter is not subject to a lien foreclosure proceeding or a trial to Court and, therefore, the proceedings in Civil Action No. 75-0383-1 are a nullity, and (b) the statutory arbitration rights in contract of the parties are fundamental, and should be determinative of the jurisdictional issue under the circumstances of these proceedings.

(5) That the actions of the Respondent Contractor, by taking unilateral exception to the AAA Rules which he has admitted are a part of the construction contract, constituted an intentional and wrongful attempt to convert the statutory type of arbitration agreement into a common-law arbitration agreement, and is a breach of the construction contract which justified the Homeowners' initial application to the Respondent Court in C.A. 75-0203-1 to obtain their enforceable statutory rights and to resist the subsequently filed lien foreclosure suit in C.A. 75-0383-1.

(6) That Appendix J, attached hereto, demonstrates that prior to the August 15, 1975 Ruling on All Pending Motions and Order, the Home-

owners had not waived their statutory arbitration rights and, in fact, were proceeding expressly, properly, and in a manner which has been judicially recognized and approved, to secure such rights, following the Respondent-Contractor's wrongful attempt to breach the arbitration provisions of the construction contract.

(7) That the admissions of the Respondent-Contractor are inconsistent with and materially contradict the position of the Respondents in Original Proceeding 26960 and, instead, support the Homeowners' position before the Supreme Court in that proceeding.

(8) That counsel for the Respondent-Contractor, acting also in behalf of the Respondent Court, substantially misquoted the Homeowners' position before the Supreme Court in the "Answer and Brief" of the Respondents, which had the practical effect of unilaterally reforming the technical basis of the Homeowners' Petition for Writ of Prohibition in that proceeding.

(9) The proceedings in C.A. 75-0383-1 clearly shows that the Homeowners, following their previous timely and continuous assertion of their rights to arbitrate the construction controversy, have continued to assert their rights to an enforceable statutory arbitration proceeding in lieu of a trial before the Respondent Court and Judge, and are proceeding in Civil Action No. 75-0383-1 involuntarily.

(10) That, at the conclusion of Original Proceeding 26960, because the Supreme Court treated the Respondent Court's ruling as one of waiver, instead of revocation, the Homeowners filed a "Motion to Reconsider Homeowners' Right to Statutory Arbitration," with a supporting brief. While the Respondent Court has not disagreed with the Supreme Court's treatment of its Ruling, without any expression of its reasoning, it simply denied the Motion. (Appendix K, Items 11, 12).

(11) That, following the denial of the Homeowners' Motion to Reconsider, the Homeowners filed (a) "Supplemental Offer of Proof of Homeowners' Statutory Arbitration Rights" (Exhibit K, Item 14), (b) "Homeowners' Motion for Designation of Orders as an Appealable Judgment" with a supporting brief (Exhibit K, Items 16, 17), (c) "Memorandum Brief

Opposing Summary Judgment" (Exhibit K, Item 28), (d) "Homeowners' Response to Motion of Plaintiff Objecting to Provisions in Court's March 16, 1977 Order and for Allowance of Certain Costs" (Exhibit K, Item 36), and (e) "Homeowners' Motion to Alter or Amend Judgment or for a New Trial" (Exhibit K, Item 38).

(12) That these documents demonstrate that on several occasions the Homeowners have renewed their assertion that (a) the Respondent Court lacks jurisdiction over the subject matter in Civil Action No. 75-0383-1, (b) the Homeowners have not waived their statutory arbitration rights, (c) the Respondent Contractor has waived his lien rights, (d) the Homeowners are being denied equal protection of the law, (e) the Homeowners are being deprived of their property without due process of law, (f) the Homeowners' rights in contract have been impaired and, (g) the Homeowners are participating in Civil Action No. 75-0383-1 involuntarily.

(13) That, together with such documents, the Homeowners have requested evidentiary hearings, have issued subpoenas, and have been in Court prepared to proceed therewith.

(14) That the Respondent Court has denied the Homeowners the opportunity to be heard in a meaningful and consequential way by denying their motions, including motions for evidentiary hearings, and quashing their subpoena of the Respondent-Contractor and ordering the Homeowners to serve no further such subpoenas on the Respondent-Contractor without the Court's prior approval. While it has not explained its reasoning for denying the requested evidentiary hearings, it has asserted flatly that there is going to be no arbitration period.

(15) That the Homeowners have submitted an Undertaking to the Respondent Court which was approved without exception by the Respondent Court on March 16, 1977, pursuant to 1973 C.R.S., § 38-22-131, and 132. After approving the Undertaking, including acceptance of a \$20,668.41 cash bond tendered to the Court by the Homeowners, at the instance of the Respondent Contractor, and after denying the Homeowners a requested evidentiary hearing, the Respondent Court unilaterally modified the language of the Undertaking. Such modification would force the Homeowners to waive

their jurisdictional defenses and arbitration rights if they were to voluntarily record the Certificate of Release of Mechanics' Lien. While their money in the amount of \$20,668.41 has remained impounded by the Respondent Court since March 16, 1977, the mechanics' lien on their home still has not been discharged. Capitol Federal Savings, even though previously dismissed with prejudice, has been able to move the Court to compel the recordation of the Certificate of Release of Mechanics' Lien over Homeowners' objections. The Homeowners have also moved for a temporary injunction. A one-half hour hearing is scheduled for Thursday, May 19, 1977 at 10:00 a.m.

(16) That the issue of the force, effect, and validity of the arbitration provisions have reached a point in the proceedings so that they are now ready for an appellate decision as a matter of law and that the Respondent Court abuses and exceeds discretion by several actions, including (a) refusing to either grant an adequate evidentiary hearing for the purpose of resolving such jurisdictional issues before trial, based upon the offered evidence, or to permit appellate review by designating a ruling under Rule 54 (b) C.R.C.P., and (b) effectively impounding the Homeowners' bond by modifying the provisions of the March 16, 1977 Order.

(17) That the actions of the Respondent Court further abuses its discretion by effectively denying any timely opportunity or appeal, under C.A.R. No. 1, to resolve the question of the force, effect, and validity of the entire arbitration provisions of the construction contract, and appears to deny the Supreme Court of an opportunity to determine such question as a matter of law unless the Supreme Court injects itself into the proceedings at this juncture.

(18) That the purported jurisdiction of the Respondent Court over the subject matter in Civil Action No. 75-0383-1 is unjustified and unwarranted and is, in fact, a nullity, based upon the admittedly valid arbitration provisions of the construction contract.



(19) The Respondent Court, by attempting to proceed to trial without first determining the full force, effect and validity of the arbitration provisions of the construction contract attempts to compel the Homeowners to accept its judgment, in lieu of the judgment of arbitrators, and in so doing exceeds its jurisdiction and abuses its discretion, contrary to Rule 109, C.R.C.P.

(20) That the Respondent Court, by refusing to act upon information with which it has been provided that shows the full force, effect and validity of the arbitration provisions of the construction contract and by denying the Homeowners the opportunity to be fully heard in a meaningful and consequential manner on such issue, exceeds and abuses its discretion and exceeds its jurisdiction.

(21) That the Respondent Court has applied grossly unequal standards of waiver to the Homeowners and the Respondent Contractor and thereby denies the Homeowners equal protection of the law.

(22) That independent scholarly analysis and recent opinion by the Supreme Court supports the efforts of the Homeowners to obtain a final resolution of the jurisdictional issue before they are compelled to go to trial.

(23) That it clearly appears from the conduct and rulings of the Respondent Court and Judge that there will be no better record after trial for appellate review of such issues than now exists.

The foregoing actual and threatened actions of the Respondent Court, combined with its demonstrated refusal to act, establish a basis for the Homeowners to apply to the Supreme Court for a final appellate resolution prior to the scheduled July 11, 1977 trial either:

(a) Directly, as a result of this Original Proceeding, or

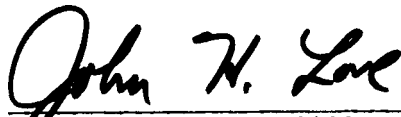
(b) Alternatively, pursuant to Colorado Appellate Rule No. 1 if the Supreme Court so directs and exercises its supervisory powers to enable an appellate review to be made prior to trial.

As a product and outgrowth of the foregoing alleged actions by the Respondent Court and Judge in excess of their discretionary authority

jurisdiction, the Homeowners have been deprived and will continue to be deprived of 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.

WHEREFORE, the Homeowners pray for the relief first set forth at the beginning of this Petition for Writ of Prohibition.

Respectfully submitted,



---

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

Dated: May 18, 1977.