

**DISTRICT COURT OF APPEAL, THIRD DISTRICT,  
STATE OF FLORIDA**

**LAWRENCE F. ARABIA,**

**Appellant,**

**v.**

**Case No.: 0000**

**Lw. Case No.: 07-000 CA 00**

**DESERT MORTGAGE, INC.,**

**Appellee.**

**INITIAL BRIEF OF APPELLANT**

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## STATEMENT OF THE CASE AND FACTS

This is an appeal from a nonfinal order denying Appellant Lawrence F. Arabia's (hereinafter "Arabia") Motion for Attorney's Fees pursuant to section 57.105(1), Florida Statutes (2007). (*See* App. Ex. 1.) The basis of the motion for fees is that final summary judgment was entered in favor of Arabia based upon the doctrine of res judicata. (*See* App. Exs. 2, 6.) The trial court, however, denied Arabia's Motion for Attorney's Fees without any findings of fact, discussion, or reason for the denial. (*See* App. Ex. 1; Ex. 7 at 13.)

The factual background of this dispute concerns an alleged breach of a lease agreement between Appellee Desert Mortgage, Inc. (hereinafter "Desert Mortgage") as Lessee, and Appellant Arabia as Lessor. (*See* App. Ex. 8, ¶¶ 6-8; Ex. 9, ¶¶ 4-7.) The parties agreed in 2000 to amend the commercial lease, such that Arabia would cooperate in assisting Desert Mortgage with obtaining a conditional use permit from the City of Miami Beach to use part of the leased property as parking lots in exchange for a \$1,000 monthly rent increase. (*See* App. Ex. 8, ¶ 10; Ex. 9, ¶ 9.) Desert Mortgage was successful in obtaining the permit. (*See* App. Ex. 8, ¶ 12; Ex. 9, ¶ 10.) When the conditional use permit was due to expire in 2006, Desert Mortgage contacted Arabia, seeking his signature for the application with the City of Miami Beach for the conditional use permit renewal. (*See* App. Ex. 8, ¶ 15; Ex. 9, ¶ 13.)

When Desert Mortgage was unsuccessful in obtaining Arabia's signature, Desert Mortgage filed a lawsuit in the Circuit Court of the Eleventh Judicial Circuit in and for Miami Dade County, Case No. 06-0000-CA-00, against Arabia for breach of the lease agreement, alleging damages arising from Arabia's failure of cooperation in renewing the conditional use permit (hereinafter "the original lawsuit"). (*See* App. Ex. 9.) Specifically, the complaint claimed damages to Desert Mortgage arising from "legal liability from those sub-tenants for not complying with the terms of their leases." (*See* App. Ex. 9, ¶ 17.) Arabia then filed a proposal for settlement pursuant to section 45.061, Florida Statutes (2007). (*See* App. Ex. 14.) The proposal for settlement states that it resolves the claim for damages in Count I of the complaint in Case No. 06-0000-CA-06 and offers in settlement thereof \$6,000 to Desert Mortgage and Arabia's signature on the renewal application for the conditional use permit as to specified lots. (*See* App. Ex. 14.) Desert Mortgage then filed an acceptance of the proposal for settlement without condition. (*See* App. Ex. 14.) Thereafter, on November 28, 2006, the original lawsuit, Case Number 06-0000-CA-06, was dismissed with prejudice pursuant to Florida Rules of Civil Procedure, Rule 1.420, by stipulation of the parties. (*See* App. Ex. 11.)

The case at bar was initiated by Sunset Sands, LLC, a subtenant of Desert Mortgage, for breach of contract relating to the failure of Desert Mortgage to renew that same conditional use permit for the parking lots with the City of Miami

Beach. (*See* App. Ex. 16.) Subsequent thereto, the Third-Party Complaint, at issue in this appeal, was filed by Desert Mortgage against Arabia, seeking indemnity for those damages asserted by its subtenant, Sunset Sands, LLC. (*See* App. Ex. 8.) The basis of the indemnity claim is Arabia's failure to cooperate with Desert Mortgage in renewing the same conditional use permit with the City of Miami Beach. (*See* App. Ex. 8.) The Third-Party Complaint contains virtually identical factual allegations and seeks the same damages as does the complaint filed by Desert Mortgage against Arabia in the original lawsuit, Case No. 06-0000-CA-00, which was dismissed with prejudice pursuant to the acceptance of the proposal for settlement. (*See* App. Exs. 8, 9.)

In the proceedings before the trial court in the case at bar, Arabia filed a motion to transfer Case No. 07-000-CA-00 to Judge Breeze because the original lawsuit had been heard and dismissed with prejudice by Judge Breeze. (*See* App. Ex. 12.) Arabia then filed a motion to dismiss, raising the argument of res judicata based upon the dismissal with prejudice of the original lawsuit filed by Desert Mortgage against Arabia, which said motion was denied based upon the trial court's having an incomplete record. (*See* App. Ex. 13.) The Order of dismissal in Case No. 06-0000-CA-00 was attached to the motion to dismiss. (*See* App. Ex. 11.) Arabia also filed a motion for sanctions pursuant to section 57.105(4), Florida Statutes. (*See* App. Ex. 10.) Then Arabia filed an answer and affirmative defense of res judicata, citing the prior dismissal with prejudice in the original lawsuit.

(*See App. Ex. 16.*) Arabia then moved for summary judgment in the instant case on the Third-Party Complaint, based upon the doctrine of res judicata. (*See App. Ex. 18.*) Arabia argued that the claim raised in Desert Mortgage's Third-Party Complaint for damages arising out of the legal liability of Desert Mortgage to its subtenant, Sunset Sands, for Arabia's failure to renew the conditional use permit was fully adjudicated in the original lawsuit when Desert Mortgage accepted Arabia's proposal for settlement and stipulated to the entry of voluntary dismissal with prejudice. (*See App. Ex. 12.*) The trial court granted Arabia's motion for summary judgment based upon the doctrine of res judicata, stating that the "issues in this case between Desert Mortgage and Arabia were legally terminated by stipulation and order of dismissal with prejudice in Case No. 06-0000-CA-00 and may not be relitigated in this case." (*See App. Ex. 6.*) No appeal was filed from the Order of final summary judgment.

Arabia then filed the Motion for Attorney's Fees at issue in this appeal. (*See App. Ex. 2.*) Arabia moved for attorney's fees under section 57.105 on the principle that where a party seeks to relitigate the same issue or claim that has been determined in a prior proceeding, the trial court should award attorney's fees under section 57.105(1), as the claim cannot be supported by the application of then-existing law but, rather, is barred by res judicata. (*See App. Ex. 3.*) In support of the Motion for Attorney's Fees under section 57.105, Arabia filed an affidavit. (*See App. Ex. 4.*) The affidavit raises a supporting factual basis for attorney's fees,

stating that a certain individual, Dino A. Libretto, instigated both this lawsuit and the original lawsuit; that Libretto was the managing member of Sunset Sands as well as the agent for, and moving force behind, Desert Mortgage; and that this instant suit was instigated in bad faith by Libretto to extort money from Arabia. (*See App. Ex. 4.*) The affidavit was unopposed, and Desert Mortgage's motion to strike the affidavit was denied. (*See App. Ex. 1.*) Now that summary judgment has been granted in favor of Arabia, Sunset Sands and Desert Mortgage claim to have no dispute between them, and the case will be voluntarily dismissed by Sunset Sands. (*See App. Ex. 7, at 15-17.*)

At the hearing on the motion for fees, Arabia argued that Dino Libretto was the moving force behind both lawsuits and behind Sunset Sands and Desert Mortgage, and that the case at bar was a setup to attack Arabia. (*See App. Ex. 7, at 6-8.*) The trial court, however, was not interested in this basis for fees and asked Arabia to move on to the res judicata argument. (*See App. Ex. 7, at 8:17-25.*) After hearing argument from both Arabia and Desert Mortgage on the issue of attorney's fees on the basis of the doctrine of res judicata, the trial court denied the motion without any explanation or reasoning. (*See App. Ex. 7, at 13:19-20.*) Thereafter, the trial court entered the Order denying Arabia's Motion for Attorney's Fees, and this appeal ensued. (*See App. Ex. 1.*)

## SUMMARY OF ARGUMENT

The trial court's final summary judgment Order herein granted summary judgment for Arabia because the third-party suit brought by Desert Mortgage was barred by res judicata. The trial court specifically ruled that the "issues in this case between Desert Mortgage and Arabia were legally terminated by stipulation and order of dismissal with prejudice in Case No. [06-0000-CA-00] and may not be relitigated in this case." The Appellee did not take an appeal from that final Order, and the Order is thus binding on the parties. As such, Arabia's Motion for Attorney's Fees under section 57.105(1), Florida Statutes, should have been granted, and the trial court abused its discretion in denying the motion.

When a party seeks to relitigate the same issues that were already adjudicated in a prior suit, there can be no justiciable issues of fact or law. *See, e.g., Americana Assocs. v. WHUD Real Estate Ltd. P'ship*, 846 So. 2d 1194, 1196 (Fla. 5th DCA 2003) (holding that an attempt to relitigate the same issues presented in a prior lawsuit equates to the failure to plead a justiciable issue of law or fact, and the trial court abused its discretion in denying attorney's fees under section 57.105(1)).<sup>1</sup> Thus, where the doctrine of res judicata applies to bar a subsequent lawsuit, the claims in that subsequent suit can not be supported by the application of then-existing law to those material facts. *See id.* at 1196. Appellee has not raised any argument that would support a good-faith attempt "for the

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<sup>1</sup>The decision in *Americana Assocs.* was decided under the current version of section 57.105(1), Florida Statutes.

extension, modification, or reversal of existing law or the establishment of new law" regarding the trial court's application of the long-standing doctrine of res judicata. § 57.105, Fla. Stat. (2007).

Both Desert Mortgage and its attorney had numerous opportunities to withdraw the Third-Party Complaint and were expressly made aware of the issue of res judicata and the original lawsuit when Arabia filed the motion to transfer, the motion to dismiss, and the motion for sanctions. The record evidence additionally supports a finding that Desert Mortgage instigated the suit between Sunset Sands and itself in order to file the Third-Party Complaint, and that the entire lawsuit herein is a sham brought to harass Arabia and to attempt to get additional monies from Arabia subsequent to the initial settlement.

As the doctrine of res judicata bars this subsequent suit between Desert Mortgage and Arabia, the trial court abused its discretion in denying Arabia attorney's fees under section 57.105. This Court should therefore reverse the trial court's Order on attorney's fees and remand for a determination as to the amount of fees or, in the alternative, remand the matter to trial court to make findings of fact and conclusions of law as to why the Motion for Attorney's Fees was denied.

## ARGUMENT

### I. STANDARD OF REVIEW AND JURISDICTION.

The issue of whether the trial court properly denied a Motion for Attorney's Fees under section 57.105, Florida Statutes, is reviewed under an abuse-of-discretion standard. *See Bierlin v. Lucibella*, 955 So. 2d 1206, 1207-08 (Fla. 4th DCA 2007); *Nesci v. Duffau*, 913 So. 2d 659, 660 (Fla. 3d DCA 2005). As stated by the Fourth District Court of Appeal in *Bierlin*, "[t]rial court orders on motions for attorney's fees under section 57.105 are reviewed to determine whether the trial court abused its discretion on the issue of whether the complaint included justiciable issues of fact or law (because an award of attorney's fees becomes mandatory if the complaint included no justiciable issues, *see Morton v. Heathcock*, 913 So. 2d 662, 668 (Fla. 3d DCA 2005))." 955 So. 2d at 1207-08. This Court has jurisdiction of this appeal pursuant to Florida Rules of Appellate Procedure, Rule 9.030(b)(1)(B) and Rule 9.130(a)(4).

**II. APPELLANT ARABIA SHOULD BE GRANTED ATTORNEY'S FEES UNDER SECTION 57.105(1), FLORIDA STATUTES, BECAUSE DESERT MORTGAGE PREVIOUSLY SETTLED WITH ARABIA THE SAME EXACT CLAIM BROUGHT IN THIS LAWSUIT, AND SUMMARY JUDGMENT FOR ARABIA WAS ENTERED ON THAT BASIS UNDER THE DOCTRINE OF RES JUDICATA.**

The only issue before this Court is whether the trial court abused its discretion in denying an award of attorney's fees to Arabia under section 57.105(1).

As aptly explained by this Court in *Morton v. Heathcock*, 913 So. 2d 662, 667 (Fla. 3d DCA 2005):

It has long been recognized that use of the word "shall" in section 57.105, "evidences the legislative intention to impose a mandatory penalty in the form of a reasonable attorney's fee once the determination has been made that there was a complete absence of a justiciable issue raised by the losing party." *Wright v. Acierno*, 437 So.2d 242, 244 (Fla. 5th DCA 1983) (reversing denial of a 57.105 fee award in an action found to be frivolous); *see also Wood v. Price*, 546 So.2d 88, 90-9 1 (Fla. 2d DCA 1989) (concluding under a prior version of 57.105 that "[o]nce the determination has been made by the trial court that there is a complete absence of a justiciable issue of law or fact, the award of attorney's fees to the prevailing party . . . is required ") (emphasis added); *Debra, Inc. v. Orange County*, 445 So.2d 404, 405 (Fla. 5th DCA 1984) (same).

In the case at bar, the court granted final summary judgment for Arabia on the basis that the original lawsuit between Desert Mortgage and Arabia was res judicata on the instant suit. As the trial court held, and has entered a final order, that the original lawsuit was an adjudication on the merits between the same parties on the same issues, there was a complete absence of any justiciable issue raised by the losing party in the present litigation, and attorney's fees under section 57.105 are required.

**A. Where Final Summary Judgment Is Entered On The Basis Of The Doctrine Of Res Judicata, An Award Of Attorney's Fees Under Section 57.105 Is Required.**

Section 57.105(1) provides:

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party . . . at

any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

The basis of fees herein is that both Desert Mortgage and its attorney knew of the prior lawsuit and that the claims asserted herein were previously adjudicated in the prior action. Thus, the claim raised in the Third-Party Complaint was not supported by the application of then-existing law to the material facts alleged.

The law in Florida is well established that where the party seeks to relitigate the same issue or claim that has been already determined in a prior proceeding, the trial court should award attorney's fees under section 57.105(1) as the claim cannot be supported by the application of then-existing law but, rather, is barred by res judicata. *See, e.g., Americana Assocs.*, 846 So. 2d at 1196; *Olson v. Potter*, 650 So. 2d 635, 637 (Fla. 2d DCA 1995); *Bay Fin. Sav. Bank, F.S.B. v. Hook*, 648 So. 2d

305, 307 (Fla. 2d DCA 1995); *Southland v. Hatton*, 566 So. 2d 527, 528 (Fla. 2d DCA 1990). As succinctly stated by the court in *Olson*, by attempting to relitigate the same issues that were determined in a prior proceeding, the plaintiff "did not plead any justiciable issue of law or fact." 650 So. 2d at 637. The court held that "[t]he trial court should have awarded attorney's fees to the appellees/cross-appellants since they prevailed on the motion for summary judgment on the doctrine of *res judicata*." *Id.* Thus, simply the entry of the final summary judgment on the basis of *res judicata* should create a sufficient basis, in and of itself, for the imposition of attorney's fees herein under section 57.105(1).

**B. As The Appellee Did Not Have A Good-Faith Basis To Argue Against The Application Of Res Judicata As A Bar To The Present Suit, The Trial Court Should Have Awarded Attorney's Fees In Favor Of Arabia.**

While the trial court's order granting final summary judgment on the basis of *res judicata* is not before this Court, Appellee, in opposing the Motion for Attorney's Fees before the trial court, argued that fees were inappropriate because there was a legitimate and good-faith argument that the indemnity claim against Arabia herein was not adjudicated in the prior suit. (*See Ex. 5, at 5-8.*) Even if this Court looks behind the entry of final summary judgment in determining whether or not attorney's fees should have been granted, Appellee cannot establish any good-faith argument against the application of the doctrine of *res judicata* herein.

The law in Florida is well established that acceptance of an offer of

judgment in a prior suit operates as an adjudication on the merits of those claims and damages covered by the offer of judgment, and, therefore, the application of the doctrine of res judicata is appropriate in a subsequent suit between the same parties, raising the same claims. *See, e.g., Losco v. Falk*, 654 So. 2d 1068, 1068 (Fla. 3d DCA 1995) (holding that the case was barred by the terms of the offer of judgment in a prior lawsuit); *Mlenak v. Roland Offsetmaschinenfabrik Faber & Schleicher, A.G.*, 408 So. 2d 619, 619 (Fla. 4th DCA 1982) (holding that summary judgment on the basis of res judicata was proper where, in prior litigation, the appellant had asserted an identical claim, and the litigation was terminated by acceptance of an offer of judgment); *McCutcheon v. Hertz Corp.*, 463 So. 2d 1226, 1228 (Fla. 4th DCA 1985) (holding that the offer of judgment, which included all damages alleged by the plaintiff, barred claim by plaintiff against other tortfeasor). Additionally, the entry of judgment dismissing an action with prejudice by stipulation of the parties operates as an adjudication of the merits of the claims asserted therein and bars another action on the same cause. *See, e.g., Lomelo v. Am. Oil Co.*, 256 So. 2d 9, 11 (Fla. 4th DCA 1971) (stating that a dismissal with prejudice upon stipulation of the parties operates to bar another case on the same cause). Accordingly, Desert Mortgage cannot argue that because "no facts were determined" in the prior suit, the subsequent suit was not barred by res judicata. (*See Ex. 5, at 4.*)

The long-standing doctrine of res judicata bars a subsequent suit when four

identities are present: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made." *Topps v. State*, 865 So. 2d 1253, 1255 (Fla. 2004) (citing *McGregor v. Provident Trust Co. of Philadelphia*, 119 Fla. 718, 162 So. 323, 328 (1935)). The prior suit and the present suit both involve the exact same parties, in the same capacities, and both seek monetary damages. Appellee's argument before the trial court, however, essentially boiled down to a claim that it had a good-faith argument that the two suits involved different causes of action. (*See Ex. 5*, at 6.)

While the original lawsuit was styled as a breach-of-contract claim and this lawsuit was brought as an indemnity claim, in order for there to be an identity of the cause of action, the stated claims do not need to be the exact stated legal claim. *Atl. Shores Resort, LLC v. 507 S. St. Corp.*, 937 So. 2d 1239, 1243 n.3 (Fla. 3d DCA 2006). Rather "[t]he determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions." *Id.* (quoting *Albrecht v. State*, 444 So. 2d 8, 12 (Fla. 1984) (superseded on other grounds by statute)). The facts and evidence necessary to maintain both the original lawsuit and the instant third-party case are the same, which is evidenced by the fact that both complaints contain virtually identical, word-for-word allegations.

The original suit also specifically included in its claims for damages those

damages arising for legal liability from subtenants, such as Sunset Sands, for Desert Mortgage's failure to comply with the terms of the subleases because of the failure to renew the conditional use permit. Thus, Desert Mortgage chose to bring into its initial suit for breach of contract against Arabia those specific damages that are asserted against Desert Mortgage in the instant suit by Sunset Sands, a subtenant of Desert Mortgage. Additionally, Arabia's proposal for settlement specifically covered the entire claim in Count I of Desert Mortgage's original complaint, which included that claim for damages. The claim for indemnity herein requires the same facts and evidence necessary to maintain the suit as would have been necessary to maintain the original suit if Desert Mortgage had not chosen to accept the proposal for settlement. Desert Mortgage accepted that proposal for settlement without condition. As was discussed in *McCutcheon*, Desert Mortgage could have offered to accept the proposal upon the condition that the judgment would not cover any damages arising from legal liability from any subtenant. *See* 463 So. 2d at 1228. Desert Mortgage, however, did not do so, and, as such, both the acceptance of the proposal for settlement and the entry of dismissal with prejudice operate as an adjudication on the merits for any claim to the damages arising from legal liability of any subtenant flowing from Arabia's alleged failure to renew the conditional use permit with the City of Miami Beach. To hold otherwise would allow Desert Mortgage to rewrite the terms of the settlement and have a second bite at the apple. Desert Mortgage received both \$6,000 from Arabia and

Arabia's cooperation with renewing the conditional use permit to settle its claims against Arabia. Res judicata now bars Desert Mortgage from coming back into court claiming additional damages arising out of the same claim that it previously settled and dismissed with prejudice.

While Desert Mortgage's counsel here might not have initially realized at the time of filing the Third-Party Complaint that Desert Mortgage had previously filed a complaint requesting the exact same damages alleged herein, Desert Mortgage certainly knew of the prior suit. Desert Mortgage's counsel knew (or should have known), however, that the current case was barred by the doctrine of res judicata when Arabia filed the motion to transfer and the motion to dismiss citing the prior litigation and attaching the order of dismissal and the affirmative defense of res judicata. See § 57.105(1), Fla. Stat. (2007); *E. Indus. v. Fla. Unemployment Appeal*, 960 So. 2d 900 (Fla. 1st DCA 2007). Additionally, pursuant to the requirements of section 57.105(4), Arabia filed a motion for sanctions, which also raised the prior litigation and the res judicata argument. Thus, Desert Mortgage and its counsel had ample notice and opportunity to withdraw the Third-Party Complaint. See § 57.105(1), Fla. Stat. (stating that attorney's fees may be awarded if "the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense" would "not be supported by the application of then-existing law to those material facts" "*at any time before trial*" (emphasis added)).

Although Desert Mortgage and its counsel have chosen to continue to litigate and pursue this claim against Arabia despite knowledge of the original lawsuit and of Arabia's res judicata defense, Desert Mortgage has made no argument under the safe-harbor provision of the statute. Section 57.105(2) provides that a party should not be sanctioned where its claim is based upon "a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success." Appellee made no such argument at any time before the trial court, nor is this type of argument appropriate in this matter. The doctrine of res judicata is an old and well-established judicial principle under Florida's common law. *Cragin v. Ocean & Lake Realty Co.*, 101 Fla. 1324, 133 So. 569, 571 (1931) ("This principle [res judicata] was recognized by the Roman law, and later by the English courts, and it is said that it pervades, not only our own, but all other, systems of jurisprudence to this day, and has become a rule of universal law."). Nothing about the application of this principle herein is novel or new or suggests a modification of the well-established doctrine of res judicata. As such, Appellee cannot shield itself from attorney's fees under the safe-harbor provision of the statute.

**C. The Instant Lawsuit Was Filed In Bad Faith With The Intent To Harass Arabia, Which Further Supports An Award Of Attorney's Fees.**

Arabia's unopposed affidavit filed in support of his Motion for Attorney's Fees is further evidence that this lawsuit had no justiciable issue but was brought in bad faith and for the purpose of harassing Arabia. As the Appellee filed no opposing affidavit, the facts within Arabia's affidavit are uncontroverted and should be accepted by the Court. *See, e.g., Peninsula Yacht Cay Dev. v. Southland Floridabanc Sav. Ass'n*, 552 So. 2d 1139, 1140 (Fla. 3d DCA 1989) (holding that the facts based upon the uncontroverted affidavit did not support a claim for fraud); *Wilkerson v. Butterworth*, 492 So. 2d 1169, 1170 (Fla. 4th DCA 1986) (holding that the uncontroverted affidavit controlled the issue of whether the undersheriff had the authority to terminate the appellant). As Arabia's unopposed affidavit states, Dino Libretto is the moving force behind both this lawsuit and the prior lawsuit, and is either a manager, an officer, or an agent of both Sunset Sands and Desert Mortgage. Dino Libretto is also the person who initially contacted Arabia regarding the renewal of the permit. In his capacity for both Sunset Sands and Desert Mortgage, Libretto was well aware of the settlement in the prior suit.

Moreover, further evidence that this suit was not brought in good faith but merely for the purpose of harassing Arabia is the fact that nothing has been done in the underlying suit between Sunset Sands and Desert Mortgage. (*See Ex. 7, at 15-17.*)

Both Sunset Sands and Desert Mortgage ignored the trial court's arbitration order, and, at the time of the hearing on attorney's fees, the parties had done

nothing to proceed with arbitration. (*See Ex. 7, at 16-17.*) Furthermore, when the trial judge inquired into where the case stood with Arabia out, counsel Dennis Menace stated that the case would most likely be dismissed in the next week because Sunset Sands was now dealing directly with Arabia under a new lease for operating the parking lots. (*See Ex. 7, at 15-16.*) First, this reasoning by Mr. Menace makes no sense, as the case between Sunset Sands and Desert Mortgage concerned damages arising from the failure to get the conditional use permit renewed in 2006, not damages relating to the operation of those parking lots now. Thus, the damages and dispute alleged by Sunset Sands against Desert Mortgage in this litigation have nothing to do with which entity is currently leasing the parking lots. Second, Mr. Menace, at the hearing, stated that he had been Desert Mortgage's attorney in the original lawsuit but that he had "negotiated on behalf of Sunset Sands with Mr. Arabia." (*See Ex. 7, at 15:4-23.*) Further confusing the distinction between Sunset Sands and Desert Mortgage, Mr. Menace kept referring to his client as Desert Mortgage, but then stated, "I will most likely in the next week or two enter a notice of voluntary dismissal, Sunset Sands will, and this case is going to be over with. It is not going anywhere." (*See Ex. 7, at 16:12-16.*)

All of this discussion significantly highlights the fact that Desert Mortgage was behind this lawsuit to begin with and that the suit herein was filed solely in order to

bring the Third-Party Complaint against Arabia to harass him and to attempt to get

additional monies from him. Certainly there is no argument that Desert Mortgage and Sunset Sands are the same legal entity, but the persons behind these entities were operating the entities in conjunction to go after and harass Arabia. As direct evidence of this, counsel Dennis Menace, who filed the initial suit for Desert Mortgage against Arabia, appeared at the hearing on attorney's fees (despite the fact that he has not specifically appeared in this case), stating that he was representing Desert Mortgage, but then stating that he had negotiated on behalf of Sunset Sands with Arabia and that he would be filing the voluntary dismissal for Sunset Sands. (*See* App. Ex. 18.) Moreover, the unopposed affidavit of Arabia states that another person, Dino Libretto, is also a moving force behind both Sunset Sands and Desert Mortgage. (*See* App. Ex. 18.) The instant case is simply infused with frivolity, bad faith, and improper motive. *See de Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 683 (Fla. 1st DCA 2007). At the hearing for attorney's fees, Mr. Menace, representing Desert Mortgage, essentially admitted that now that Arabia was out of the lawsuit, there was no lawsuit.

An award of attorney's fees here is supported by the case of *Puder v. Raymond Int'l Builders*, 424 So. 2d 78 (Fla. 3d DCA 1983). In *Puder*, an architect sought to collect for services rendered in connection with a construction project. *See id.* at 78. The building owner counterclaimed for negligence and construction defects, and the architect then filed a third-party complaint for indemnity and contribution against a subcontractor. *See id.* The trial court awarded attorney's

fees under section 57.105 after the third-party plaintiff voluntarily dismissed his third-party indemnification action following the presentation of evidence at trial, and the Third District Court of Appeal affirmed the trial court's award. *See id.* In support of its holding that the award of attorney's fees was appropriate under section 57.105, this Court relied upon the fact, among others, that Puder had previously settled its obligations under a mechanics' lien action and that the attempt by the third-party plaintiff "to create controversy was frivolous," as the third-party defendant "was brought into the lawsuit solely for tactical reasons." *Id.* at 78-79.

Just as in *Puder*, Arabia here previously settled its claims with Desert Mortgage, and Desert Mortgage should not be permitted to instigate a second lawsuit brought in bad faith to harass Arabia and to attempt to recover additional monies from him for the same conduct for which it previously accepted \$6,000 in settlement.

## **CONCLUSION**

Appellee Desert Mortgage initiated the original lawsuit against Arabia, settled that suit, and stipulated to dismissal of that suit with prejudice. Desert Mortgage then instigated a new suit against Arabia through the procedure of a Third-Party Complaint, raising the same issues and damages settled in the original

suit. The trial court appropriately entered final summary judgment for Arabia in this subsequent lawsuit, based upon res judicata. The trial court, however, abused its discretion in then denying Arabia's Motion for Attorney's Fees under section 57.105(1), Florida Statutes, after holding that issues raised in the suit at bar had been previously litigated and adjudicated in the original lawsuit brought by Desert Mortgage. The trial court made no findings of fact or conclusions of law in so ruling, but merely denied the motion with no explanation. Therefore, the trial court's Order denying attorney's fees to Arabia should be reversed, and this case should be remanded for a determination of the amount of fees. In the alternative, Arabia requests this Court to remand the case

to the trial court for specific findings of fact and conclusions of law as to why attorney's fees should not be granted herein.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Thomas Beckett, Esquire, Suite 800, 400 Douglas Road, Miami Beach, FL 33000, Jed Pickle, Esquire, Eeny, Meany, Miny & Pickle, Suite 200 South, 1000 Vine Boulevard, Hollywood, FL 30001, Dennis Menace, Suite 007, 1000 North Maple Drive, Miami, FL 33132, and Tallie Calico, 2720 Lucky Drive, Tallahassee, FL 32303, by regular United States mail this \_\_\_\_ day of July 2008.

\_\_\_\_\_  
Lawrence F. Arabia, Esquire

## **CERTIFICATE OF TYPE SIZE AND STYLE**

This brief is typed in a proportionally spaced typeface using Times New Roman 14-point font, which complies with the requirements of Fla. R. App. P. 9.100(l).

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Lawrence F. Arabia, Esquire