

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT,  
IN AND FOR ORANGE COUNTY,  
FLORIDA

I.C.C. GENERAL CONTRACTORS,

Appellant,

v.

TOTAL BRICK PAVERS, INC.,

Appellee.

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CASE NO.: 2015-CV-000001-A-O  
Lower Case No.: 2013-SC-011518-O

Appeal from the County Court, for Orange County,  
Adam McGinnis, County Judge.

Michael D. Jones, Esquire, for Appellant.

Ada Aviles-Yaeger, Esquire, for Appellee.

Before BLACKWELL, THORPE, and EGAN, J.J.

**PER CURIAM.**

**FINAL ORDER REVERSING TRIAL COURT**

Appellant, I.C.C. General Contractors, (“ICC”) timely appeals the trial court’s “Order on Defendants Entitlement to Attorneys Fees” entered on December 5, 2014. This Court has jurisdiction pursuant to section 26.012(1), Florida Statutes, and Florida Rule of Appellate Procedure 9.030(c)(1)(A). We dispense with oral argument. Fla. R. App. P. 9.320.

### *Summary of Facts and Procedural History*

ICC contracted to pay \$13,000.00 to Appellee, Total Brick Pavers, Inc. (“Total Brick”) for all labor and materials etc. to reinstall existing pavers and other additional work at Orlando Premium Outlets (“mall”) commencing October 1, 2013. The work commenced timely, but a dispute arose as to the quality of the work whereupon the mall owner demanded that the pavers installed by Total Brick be removed and replaced. Total Brick refused to comply with the mall owners’ demand. Thereafter, ICC retained another subcontractor, Tex Brick Pavers, Inc. (“Tex Brick”) to complete the job for \$5,589.33. On or about November 22, 2013, ICC advised Total Brick that the amount paid to Tex Brick would be deducted from the \$13,000 contracted amount. Total Brick accepted the proposal and was provided with a check in the amount of \$7,410.67. Upon receipt of the check, Total Brick provided ICC with a sworn Final Waiver and Release of Lien (“Waiver”) dated November 26, 2013.

Notwithstanding the existence of the Waiver, on December 18, 2013, Total Brick recorded a lien in the amount of \$5,589.33 and filed pro se a Statement of Claim in the lower court seeking the jurisdictional limits of \$5,000.00. On January 30, 2014, ICC received a letter from Total Brick’s counsel advising that a lien had been filed against the subject property and demanded payment for \$5,589.33. The case progressed through mediation with no agreement.

On April 25, 2014, ICC filed a Verified Motion for Summary Judgment arguing that Total Brick had no valid claim against it as evidenced by the Waiver. On June 10, 2014, Total Brick, through counsel, filed a Notice of Voluntary Dismissal. Thereafter, on June 27, 2014, ICC filed a safe harbor letter and Motion for Attorney Fees pursuant to section 57.105(1)(a-b), Florida Statutes, that provides for the award of attorney fees for frivolous claims. On December 4, 2014, a hearing was held addressing ICC’s Motion for Attorney Fees and the trial court

reserved ruling. On December 5, 2014, the trial court entered the Order without findings denying ICC's entitlement to attorney fees that ICC now appeals.

### ***Arguments on Appeal***

ICC argues: The trial abused its discretion in failing to award attorney fees and costs to ICC in light of the clear evidence that the lawsuit, when initially brought, was frivolous and not substantiated by fact or law and the trial court erred in its apparent belief that section 57.105, Florida Statutes, did not apply to small claims actions.

Conversely, Total Brick argues that the trial court properly denied ICC's Motion for Attorney Fees because ICC failed to properly serve Total Brick with the Motion for Attorney Fees pursuant to section 57.105(4), Florida Statutes, when ICC's counsel sent the safe harbor letter and Motion to a wrong address.

### ***Standard of Review***

While the standard of review for a trial court's determination as to the amount of attorney's fees to award is abuse of discretion, a trial court's determination as to the entitlement to attorney fees involve questions of law and thus, appellate review is de novo. *Hinkley v. Gould, Cooksey, Fennell, O'Neill, Marine, Carter & Hafner, P.A.*, 971 So. 2d 955, 956 (Fla. 5th DCA 2007) (interpreting statutes and contractual provisions as to entitlement to attorney fees).

### ***Analysis***

First, from review of the record, Total Brick's argument that the safe harbor letter and Motion for Attorney Fees were sent to the wrong address, was not argued in the lower case and thus, not preserved for appeal and should be barred from appellate review. *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985); *Florida Emergency Physicians-Kang & Associates, M.D., P.A. v. Parker*, 800 So. 2d 631, 636 (Fla. 5th DCA 2001). Further, Total Brick did not present any arguments or evidence in opposition to ICC's Motion for Attorney Fees. Instead, the only

argument made by Total Brick was at the hearing where it argued that per the voluntary dismissal, the trial court lacked jurisdiction to address the Motion for Attorneys Fees. Lastly, there is evidence in the record including the contract and invoice that states the same address for Total Brick as is stated in the safe harbor letter.

Second, section 57.105(1), Florida Statutes (2014), states:

Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense 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.

This Court finds that the record evidence specifically the Waiver, invoices, and the testimony at the hearing from ICC's representative, William Lowery, clearly supports ICC's argument that Total Brick's claim was baseless. Further, Total Brick's Statement of Claim was filed 22 days after the Waiver was executed; thus revealing that Total Brick, upon filing the lawsuit, knew or should have known that because of the Waiver its claim was not supported by material facts or by then-existing law. Also, there is no language in the statute precluding the statute's application to small claims actions.

Accordingly, based on the evidence in this case and from the plain meaning of the statute, this Court finds that the trial court erred in denying ICC entitlement to Attorney Fees. "When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141,

137 So. 157, 159 (Fla. 1931); *Osorio, Sr. v. Board of Professional Surveyors and Mappers*, 898 So. 2d 188, 190 (Fla. 5th DCA 2005) (applying plain meaning of the statute). Further, Total Brick did not present any arguments or evidence in opposition to ICC's Verified Motion for Summary Judgment or ICC's Motion for Attorney Fees. Lastly, while not specifically argued in the lower case or on appeal, this Court notes that because the case arose from a written contract that contained an attorney fee provision, an award of attorney fees to ICC as the prevailing party may also have been warranted per section 57.105(7), Florida Statutes.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED**: The trial court's "Order on Defendants Entitlement to Attorneys Fees" entered on December 5, 2014 is **REVERSED** and **REMANDED** for further proceedings consistent with this opinion.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida, on this 11th day of August, 2015.

/S/ \_\_\_\_\_  
**ALICE L. BLACKWELL**  
**Presiding Circuit Judge**

THORPE and EGAN, J.J., concur.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished to: **Michael D. Jones, Esquire**, Michael D. Jones & Associates, P.A., 361 S. Central Avenue, Oviedo, Florida 32765; **Ada Aviles-Yaeger, Esquire**, Aviles-Yaeger Law Office, PLC, 4923 North Pine Avenue, Winter Park, Florida 32792; **The Honorable Adam McGinnis**, and **The Honorable Tina L. Caraballo**, 425 N. Orange Avenue, Orlando, Florida 32801, on this 11th day of August, 2015.

/S/ \_\_\_\_\_  
Judicial Assistant