

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
  
CASE NO.: 2018-CP-10-5367

CARL OWENS CONTRACTING, INC., )  
 )  
*Plaintiff,* )

**DEFENDANT’S RESPONSE IN  
OPPOSITION TO PLAINTIFF’S  
MOTION TO DISMISS GULFSIDE  
SUPPLY, INC.’S COUNTERCLAIM(S)**

GULFSIDE SUPPLY, INC. D/B/A )  
GULFEAGLE SUPPLY, AND )  
WEYERHAEUSER NR COMPANY, )  
*Defendants,* )

v. )  
DON ROSS, LLC, )  
*Third Party Defendant.* )

FILED  
2019 MAR 26 AM 11:11  
JULIE J ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_ JS

COMES NOW Defendant GULFSIDE SUPPLY, INC. D/B/A GULFEAGLE SUPPLY (“Defendant” or “Gulfside”), by and through its undersigned counsel, and submits this Response in Opposition to Plaintiff’s Motion to Dismiss Gulfside Supply, Inc.’s Counterclaim(s), as follows:

Defendant supplied roofing shingles to Third Party Defendant and roofing subcontractor, Don Ross, LLC (“Third Party Defendant”), in connection with a residential construction project on Sullivan Island, South Carolina (the “Project”). Plaintiff was the general contractor for the Project and hired Third Party Defendant to install the roof component of the Project. On November 8, 2018, Plaintiff brought this action alleging claims for breach of warranty, strict liability and negligent misrepresentation in connection with the shingles at issue, all of which are denied by Defendants. Defendant contends that any damages alleged by Plaintiff is the result of the negligence of Plaintiff and Third Party Defendant resulting in the defective installation of the roof

at issue, not any breach of warranty, negligent misrepresentation or defect in the subject shingles, as alleged by Plaintiff. Accordingly, in its *Answer, Counterclaim Against Plaintiff, Crossclaim Claim Against Defendant Weyerhaeuser NR Company and Third Party Complaint Against Don Ross, LLC*, filed February 11, 2019 (the “Answer and Counterclaim”), Defendant asserted a counterclaim against Plaintiff and a third party claim against Third Party Defendant for equitable indemnification – i.e., Plaintiff and Third Party Defendant are liable to indemnify Defendant because it was *their* acts and omissions, not those of Defendant, that caused the damages alleged by Plaintiff; and because of the negligence of Plaintiff and Third Party Defendant, Defendant has been forced to incur costs and expenses in defending the instant case.

On February 26, 2019, Plaintiff filed a Motion to Dismiss Defendant’s counterclaim, essentially alleging that a defendant cannot assert a counterclaim against a plaintiff for equitable indemnification. This contention is without merit. South Carolina has long recognized a right of equitable indemnity where a party is exposed to liability or forced to incur fees solely because of the wrongful act of another. See Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 301 S.E. 2d 552 (1983); Addy v. Bolton, 247 S.C. 28, 183 S.E.2d 708 (1971); Griffin v. Van Norman, 302 S.C. 520 (1990) (“if the wrongful act of the defendant has involved the plaintiff in litigation with others or placed him in such relation with others as makes it necessary to incur expenses to protect his interest, such expenses should be treated as the legal consequence of the original wrongful act and may be recovered”); Town of Winnsboro v. Weidman-Singleton, Inc., 307 S.C. 128, 414 S.E.2d 118 (1992). Claims for equitable indemnification are commonly asserted between contractors and sub-contractors in cases that are brought by property owners in negligent construction cases. See e.g. Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 619–20, 776 S.E.2d 426, 429 (2015); Winnsboro v. Weidman-Singleton, Inc., *supra*.

Although a more traditional construction-related case might often involve a plaintiff homeowner adverse to a defendant general contractor, subcontractor or supplier, research revealed no case law that prohibits a defendant, such as Gulfside, from filing a counterclaim against a plaintiff general contractor where that defendant contends that it was the negligence of that general contractor that is now forcing the supplier to incur damages, fees and expenses. The mere position of the general contractor as the plaintiff in this lawsuit does not cause Gulfside's cause of action to fail<sup>1</sup>. Instead, a sufficient relationship for purposes of an equitable indemnity claim exists where "the at-fault party's negligence . . . is directed at the non-faulting party and the non-faulting party incurs attorney fees and costs in defending itself against the other's conduct", as is the case here. See Toomer v. Norfolk Southern Ry. Co., 344 S. C. 486, 492, 544 S.E.2d 634, 637 (2001).

Plaintiff's contention that Defendant cannot recover attorneys' fees and expenses because of "the general rule that attorneys' fees are not recoverable unless authorized by contract or statute" is without merit. See Plaintiff's Motion to Dismiss, p. 3. While this is a general proposition that is recognized under South Carolina law, South Carolina appellate courts have made it clear that attorney's fees and costs are recoverable in connection with an equitable indemnification claim irrespective of whether there is contractual privity between the parties. See Town of Winnsboro v. Wiedeman-Singleton, Inc., *supra*, at 131 ("[t]he principle of equitable indemnity including attorney fees and costs is not new to American law")(citing McGaw v. Acker, Merrall & Condit Co., 111 Md. 153, 73 A. 731 (1909)); Addy v. Bolton, *supra*, at 33 (answering "the single question of whether appellants, in the absence of an express contract of indemnity, are entitled to recover their costs and attorney's fees incurred in the successful defense of this action . . . because they were put to the necessity of defending themselves" in the affirmative).

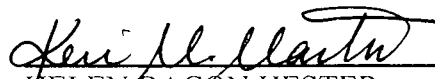
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<sup>1</sup> As set forth in Defendant's Answer and Counterclaim, Defendant contends that Plaintiff lacks standing to assert the claims that have been alleged, as Plaintiff is not the property owner.

Finally, and perhaps most critically, whether Gulfside is entitled to equitable indemnification from Plaintiff is a question of fact for the jury, not an issue that can be addressed on a motion to dismiss. See Griffin v. Van Norman, 302 S.C. 520, 524, 397 S.E.2d 378 (1990) (“the allegations of the Complaint listing her as a defendant and alleging her to be guilty of fraud are not determinative of whether she has the right to indemnify. Rather, such a determination is based on the evidence and the facts found by the fact finder. Where, as here, the person seeking indemnity was exonerated at trial from all liability, indemnity is allowed”) (citing Addy v. Bolton, *supra*, Town of Winnsboro v. Wiedeman-Singleton, Inc., *supra*). Moreover, the standard on a motion to dismiss is steep: dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524 (2009). The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. Id. As set forth above, Defendant's equitable indemnification claim against Plaintiff falls directly within the ambit of what this equitable theory of recovery is designed to prevent - - the negligence of one party being cast upon a non-faulting party without the non-faulting party's ability to recover for the costs and expenses it is forced to incur in defending. See Toomer v. Norfolk Southern Ry. Co., *supra*.

Respectfully submitted, this 25 day of March, 2019.

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STATE OF SOUTH CAROLINA )  
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COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
  
CASE NO.: 2018-CP-10-5367

CARL OWENS CONTRACTING, INC., )  
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*Plaintiff,* )

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**CERTIFICATE OF SERVICE**


GULFSIDE SUPPLY, INC. D/B/A )  
GULFEAGLE SUPPLY, AND )  
WEYERHAEUSER NR COMPANY, )

*Defendants,* )

v. )

DON ROSS, LLC, )

*Third Party Defendant.* )

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CLERK OF COURT  
BY 

I hereby certify that a true and correct copy of Defendant Gulfside Supply, Inc. d/b/a Gulfeagle Supply's Response in Opposition to Plaintiff's Motion to Dismiss Gulfside Supply, Inc.'s Counterclaim(s) has this day been served upon all parties in the above-captioned action by U.S. Mail and electronic mail, as follows:

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March 25, 2019

VIA FEDEX OVERNIGHT NO. 7747 8432 9066

Charleston County Clerk of Court  
Attn: Ms. Julie J. Armstrong  
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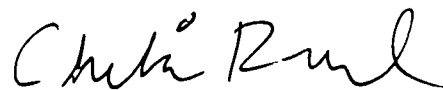
Re: In the Court of Common Pleas of Charleston County, South Carolina  
Carl Owens Contracting, Inc. v. Gulfside Supply, Inc. d/b/a Gulfeagle Supply and Weyerhaeuser NR  
Company  
Case No. 2018-CP-10-5367

Dear Ms. Armstrong:

Please find enclosed that certain original Defendant's Response in Opposition to Plaintiff's Motion to Dismiss Gulfside Supply, Inc.'s Counterclaim(s) for filing along with a copy.

I trust you will find all in order, but should you have any questions or concerns regarding this recording, please do not hesitate to contact me. I have further enclosed a stamped return envelope so that you may return the file-stamped copy to me.

Sincerely,



Chelsie L. Rudeseal  
Legal Assistant to Helen Bacon Hester  
and Keri Martin

Enclosures