

**MARTIN NEIL AND REGINA NEIL, HIS WIFE, Plaintiffs,**  
**v.**  
**SHINGLE CARE, LLC, Defendant, and**  
**SPOTTS, INC., Defendant-Appellant/Cross-Respondent, and**  
**ENTERPRISE MANAGEMENT UNLIMITED OF CENTRAL FLORIDA, INC., Defendant-**  
**Respondent/Cross-Appellant.**

Docket No. A-1214-12T4.

**Superior Court of New Jersey, Appellate Division.**

Argued June 4, 2013.

Decided June 14, 2013.

Patricia M. Henrich argued the cause for appellant/cross-respondent (Reilly, Janiczek & McDevitt, P.C., attorneys; Ms. Henrich and Chrystale B. Hewitt, on the brief)

Edward L. Thornton argued the cause for respondent/cross-appellant (**Methfessel & Werbel**, attorneys; Mr. Thornton, of counsel; James H. Foxen, on the brief).

Before Judges Harris and Hayden.

PER CURIAM.

This appeal presents the aftermath of products liability litigation. Defendant Spotts, Inc. (Spotts) — the operator of a hardware store and garden center, and the retail seller of containers of a roof shingle cleaning solution — appeals from the Law Division's October 12, 2012 order denying its motion for indemnification of the costs to defend itself in this action. Defendant Enterprise Management Unlimited of Central Florida, Inc. (Enterprise) — the manufacturer of the product — cross-appeals from a separate October 12, 2012 order denying its motion for fees and sanctions. We affirm both orders.

## I.

On July 25, 2009, plaintiff Martin Neil was injured while using Shingle Care Roof Cleaner Concentrate. Several months later, Neil and his spouse filed suit against Spotts as the seller, Enterprise as the manufacturer, and defendant Shingle Care, LLC (Shingle Care) as the owner of the formula for the injurious product.

The initial complaint consisted of five counts, asserting causes of action sounding in strict liability, breach of warranty, negligence, and gross negligence against Spotts and Shingle Care. An amended complaint was filed on May 17, 2010, which interposed the same claims against Enterprise.

On June 2, 2010, Spotts's attorney forwarded an affidavit to Neil's attorney, supposedly pursuant to N.J.S.A. 2A:58C-9, which explained Spotts's involvement in the purchase and resale of the product, and claimed that it did not "alter, re-label or change the product in any way prior to its sale to a prospective purchaser." Spotts insisted that Neil dismiss the case against Spotts, which demand was refused.

Meanwhile, the parties engaged in routine discovery.<sup>[1]</sup> On May 11, 2011, Spotts wrote to Enterprise demanding that Enterprise provide it a defense and indemnity because Spotts was being "sued . . . on a strict liability theory as a downstream seller of a product manufactured by [Enterprise]." The letter was ignored.

In November 2011, Spotts unsuccessfully moved for summary judgment, which sought to dismiss Neil's complaint.

The Law Division concluded that Neil had sufficiently raised a factual dispute as to whether Spotts was negligent in "disregarding . . . and removing [DOT Corrosive 8 warning] labels without providing indicators of the product's corrosiveness on its retail floor." The court also determined that "this arguably falls under [N.J.S.A.] 2A:58C-[9](d)(2) if the seller was in possession of facts from which a reasonable person could conclude showed knowledge of the alleged defect on the part of the product seller." Accordingly, Spotts remained potentially vulnerable to Neil's claims under both strict liability and negligence theories at that time.

Spotts renewed its demand to Enterprise for a defense and indemnity. This request fell on deaf ears.

The trial commenced in early September 2012. Spotts successfully suppressed Neil's products liability expert report in limine, and the matter proceeded to a verdict. The jury absolved Spotts of any liability. The Jury Verdict Sheet utilized at trial only asked whether Spotts was "negligent in its sale of the Shingle Care product." The tally was seven-to-one: "No." On the other hand, the jury reported that both Enterprise and the defaulted Shingle Care were responsible to Neil for his injuries caused by a defective product due to "a defective or inadequate label which made the product not reasonably safe for its intended purpose." The jury allocated five percent of the fault to Enterprise, and the remaining ninety-five percent to Shingle Care. The damages awarded to Neil were \$5000.

Shortly thereafter, Spotts filed an application "to allocate costs." It argued that because it was a blameless "downstream retail seller in the chain of distribution," and Enterprise was at least five percent at fault, Enterprise owed Spotts for its defense costs. The Law Division denied the application upon its finding that "the whole essence of [Neil's theory against Spotts was] the negligence theory." It reflected, "all I can say is in my mind and in the mind of trial counsel and in the mind of the plaintiff's attorney this is a negligence case against [Spotts]." Thus, because the court viewed Spotts as not being subject to a strict liability verdict at trial, but only a negligence verdict, indemnification of Spotts's defense costs was inappropriate. In addition, the court denied Enterprise's cross-motion for the imposition of fees and sanctions against Spotts for filing the application to allocate costs not in good faith. The appeal and cross-appeal followed.

## II.

In products liability cases, an indemnity claim has been allowed by a retail seller against a manufacturer where the liability of the retailer is purely vicarious. See Promaulayko v. Johns Manville Sales Corp., 116 N.J. 505, 511 (1989). A common law indemnitee forced to defend claims for which its liability is only vicarious, is entitled to the cost of the defense occasioned by the indemnitor's fault. Cent. Motor Parts Corp. v. E.I. duPont deNemours & Co., Inc., 251 N.J. Super. 5, 11 (App. Div. 1991). Indemnification of defense costs is not permitted, absent contractual arrangements that are not here present, if the cost of the defense is caused by the retail seller's potential direct liability such as might arise under a negligence theory. The recurring problem in cases such as the present one is the admeasurement of the indemnitor's wrongful conduct that occasioned the claim against the indemnitee and the calculation of whether an injured party's claims were bottomed on vicarious or direct liability principles. The discernment of these factors is made easier in this case because there was a trial, rather than a settlement, and we are able to examine the totality of the litigation to determine whether indemnification is owed by Enterprise to Spotts.

The fact that Neil made strict liability allegations against Spotts does not mean that indemnification is automatically triggered. As we observed in Cent. Motor Parts, "[a]llegations in the pleadings may be a starting point to determine whether counsel fees and costs are recoverable by [an indemnitee], but the actual facts developed during trial should control." *Id.* at 11. The Law Division judge who considered Spotts's application was also the trial judge. He was in the most advantageous position to assess the true nature of the exposure of Spotts, and it is his exercise of discretion in analyzing the litigational landscape that we review. Our analysis of the record confirms that the judge reasonably considered the competing interests of the parties and did not mistakenly exercise his discretion in refusing to order Enterprise to be responsible for the costs of Spotts's defense.

At trial, Neil's attorney explained to the jury the conduct of Spotts that he thought made it responsible to his client:

Why are we suing [Spotts]?

....

When this product arrives to [Spotts] in a box with a Corrosive 8 sticker on the outside of it, this is exactly the kind of information that [a] retailer needs to determine if the product — or determine the quality of the characteristics of the product. What happened in this case apparently, according to testimony that's been given in this case, is that the employees at [Spotts] unboxed the product, put it on the shelf and disposed of the [box] leaving the product like this without notification that it could burn the crap out of you.

Neil's theme throughout the trial was one of casting liability upon Spotts for the conduct of its employees — their acts and omissions — in failing to protect their customer in the purchase of a non-defective product. Spotts was not portrayed as a mere conduit through which Shingle Care Roof Cleaner Concentrate passively passed.

Although the instructions read to the jury touched broad principles of strict liability pursuant to the Products Liability Act, N.J.S.A. 2A:58C-1 to-11, the trial judge's conclusion that Spotts ultimately was only exposed to a negligence theory is supported by the record. Accordingly, the stray comments concerning Spotts's supposed liability occasioned by Enterprise's upstream conduct were mere surplusage.

We further observe that in support of its application to allocate costs Spotts conceded that it was subject to the jury's scrutiny for negligence. However, it made no effort to explain how much of its defense costs was attributable to defending the negligence aspect of the case versus the defense of the supposed strict liability claim. When an indemnitee has defended against its independent fault, the indemnitor is not liable for indemnification for those costs. Cent. Motor Parts Corp., 251 N.J. Super. at 12. "[T]he indemnitee may recover only those fees and expenses attributable to the making of defenses which are not primarily directed toward rebutting charges of active negligence." Ibid. (quoting Piedmont Equip. Co. v. Eberhard Mfg. Co., 665 P.2d 256, 260 (1983)). Thus, Spotts shouldered the burden of persuasion on the allocation of the apportionment, which it failed to satisfy in this case. We have no basis to interfere with the conclusions of the Law Division judge who was fully familiar with all aspects of the litigation that he had shepherded to a verdict.

Enterprise's cross-appeal seeking fees and sanctions, which cites no applicable authority for its claim, is meritless. R. 2:11-3(e)(1)(E).

Affirmed on the appeal and cross-appeal.

[1] Shingle Care did not participate in the litigation, and default was entered against it in due course.

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