

STATE OF MICHIGAN
COURT OF APPEALS

SEALED POWER TECHNOLOGIES LIMITED
PARTNERSHIP,

Plaintiff-Appellant,

v

THE TORRINGTON COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 30, 1997

No. 157851
Muskegon Circuit Court
LC No. 91-027404-CK

ON REMAND

Before: Neff, P.J., and MacKenzie and Young, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court for consideration as on rehearing granted for the sole purpose of addressing the issue whether, under the peculiar circumstances of this case, including subsequent events on remand to the trial court, the taxation of costs in favor of defendant as a prevailing party is in the interest of justice. We find that taxation of costs in defendant's favor is not in the interest of justice and therefore vacate our earlier order to the contrary.

The underlying facts of this case are set out in *Sealed Power Techs v Torrington Co*, unpublished opinion per curiam of the Court of Appeals, issued 3/22/96 (Docket No. 157851). The result of that opinion was a remand to the trial court for reconsideration of the motion for partial summary disposition. On remand the trial court again denied defendant's motion for partial summary disposition and affirmed the jury's verdict and judgment in favor of plaintiff.

Prior to the decision on remand defendant was awarded costs on appeal pursuant to MCR 7.219. The court rule entitles the "prevailing party" to costs on appeal. In this case, after further review of this case and in light of the result on remand, we cannot say that defendant was the "prevailing party" on appeal. On appeal, defendant succeeded only in obtaining a remand for further findings by the trial court which resulted in an affirmance of the jury's verdict in favor of plaintiff. Defendant cannot be viewed as a "prevailing party" under these circumstances because it did not improve its position as a result of the appeal. MCR 2.625; *Ullery v Sobie*, 196 Mich App 76, 82-83; 492 NW2d 739 (1992). Taxation of costs on appeal in favor of defendant would not be in the interest of justice.

The order taxing costs in favor of defendant is vacated.

/s/ Janet T. Neff

/s/ Barbara B. MacKenzie

/s/ Robert P. Young