STATE OF MICHIGAN

COURT OF APPEALS

FOREMOST FABRICATIONS, INC.,

Plaintiff-Appellee,

v

ACKER WORGESS INSURANCE AGENCY, INC.,

Defendant-Appellant.

UNPUBLISHED

No. 196198
Isabella Circuit Court
LC No. 89-005229-CK

Before: Neff, P.J., and Sawyer and Murphy, JJ.

NEFF, P.J. (dissenting).

I respectfully dissent. While avoiding additional litigation is a laudable aim, I do not believe that this public policy goal should be employed to punish defendant for pursuing its entitlement under the first amended judgment or to undermine the integrity of that judgment.

As first amended in 1995, the judgment clearly creates the obligations of the parties and just as clearly binds them to pay set percentages of the underlying damage suit settlement amount. Under that judgment plaintiff is required to pay twenty-five percent of the $508,344 damage settlement, which amounts to $127,086. In addition, plaintiff is required to pay twenty-five percent of defense costs, but it is not entirely clear whether those costs should be aggregated ($90,311.45 paid by plaintiff and $9,240.83 paid by defendant; we could find no substantiation in the record for the latter amount). If costs are to include those paid by both parties, plaintiff's share should be $24,888.07. If only plaintiff's costs are to be subject to the amended judgment, its share should be $22,577.86. Therefore, under the terms of the judgment, plaintiff's share of the settlement of the negligence claim is either $151,974.07 or $149,663.86 and this case should be remanded for a determination of which amount is applicable.

Both the trial court and the majority here are critical of the parties for failing to sort out the exact amounts due by each party when the negligence claim was settled. However, with a valid judgment in this case already entered, I can think of no reason why they should have concerned themselves with that at the time of the settlement. The law of the case requires that the judgment, as amended in 1995, be enforced against the settlement and costs incurred in the negligence case. This involves simply applying

the relevant percentages to the damage settlement and the costs. When plaintiff moved to amend the judgment a second time, after the settlement, it sought, in essence, a change in those percentages: it had not paid its full twenty-five percent of the damages, yet wanted to recover a full seventy-five percent of its costs.

As noted by defendant in its brief, the resultant percentages to be paid by the parties do not reflect the twenty-five percent/seventy-five percent split required by the first amended judgment which reflected this Court's earlier opinion and represented the law of the case. Moreover, it seems to me that plaintiff, as the party seeking to change the status quo established by the first amended judgment, should bear the burden of establishing that the parties agreed to a different percentage when the negligence case was settled. Plaintiff, which negotiated the settlement, made no apparent effort to place anything on the record in the negligence case of any agreement to alter the percentages and presented no evidence to that effect when it moved to amend the judgment in this case.

I would reverse and remand for a determination of the proper amount of costs to be subjected to the twenty-five percent/seventy-five percent split required by the first amended judgment and for an application of those percentages to the entire amount of the damage settlement and costs.

/s/ Janet T. Neff