Be Careful What You Ask For

Navigating a remand after you've won the appeal

BY BRENDAN BEERY

The literature on appellate practice abounds with guidelines about how and when to appeal a case, how to file motions in appeals, appellate deadlines, and appellate rules. But when the party who sought to overturn the result in the lower tribunal prevails on appeal, questions remain regarding what that party should do next. What happens in the lower tribunal when the appellate process is over? If the judgment of a lower tribunal was affirmed, there is little to do except tax costs (when appropriate) and ensure that the judgment is executed. But what happens if the judgment of the lower tribunal was reversed and the case was remanded to the lower tribunal? On this subject, the literature is sparse.

This article provides an overview of post-remand procedures for attorneys who have fallen victim to the admonition, "Be careful what you wish for; you just might get it." And because so much post-remand procedure depends on the discretion of trial judges, the article provides findings from original research. Surveys were sent to all Michigan circuit judges, and the information the judges provided is both helpful and interesting.

When is the Appellate Process Over?

A court of appeals judgment is effective once the time for filing an application for leave to appeal to the supreme court has expired or, if the application is filed, the judgment is effective after the supreme court's disposition of the case.[1] After a party has prevailed in the court of appeals and the judgment of a lower tribunal has been reversed, the losing party on appeal has three options: (1) file a motion for rehearing,[2] (2) apply for leave to appeal to the Michigan Supreme Court,[3] or (3) do nothing at all. To exercise either of the first two options, the losing party has 21 days to file after the court of appeals has entered its order.[4]

If the party files a motion for rehearing, the appellate process will be extended. The other party will have 14 days to file an answer,[5] after which the court of appeals will decide the motion. If the party files a timely motion for rehearing, the 21-day time period within which to file an application for leave to appeal to the supreme court is stayed pending the court of appeals' decision on the motion.[6] The court will not grant a motion for rehearing if it merely restates the arguments already raised in the appeal.[7]

Just as the unsuccessful party may file a motion for rehearing in the court of appeals, that party may also file a motion for rehearing in the supreme court asking the court to modify its opinion.[8] In a case where no opinion has been issued, but the unsuccessful party wishes to have the court reconsider an order (such as when the court has issued an order denying leave to appeal), that party may move the supreme court for reconsideration.[9] But a motion for reconsideration (rather than rehearing) "does not stay the effect of the order addressed in the motion."[10] Thus, should the unsuccessful party file a motion for reconsideration in the supreme court, counsel for the prevailing appellant should seek the return of the record to the lower court.

When Does the Trial Court Reacquire Jurisdiction?

The lower court or tribunal reacquires jurisdiction over a case when the clerk returns the record to it.[11] The lower court or tribunal does not have jurisdiction to conduct proceedings before the record is returned from an appellate court:[12]

> *As a general rule, appellate courts do not retain jurisdiction of cases after issuing opinions and orders in pursuance thereof. The court rules governing the appellate courts contemplate return of the original record to the court from which the appeal was taken whether the appeal results in affirmance, reversal, or remand for a specified purpose. Upon return of the record, the lower court is again vested with jurisdiction over the cause. When the mandate of an appellate court is filed in the lower court, that court reacquires the jurisdiction it lost by the initiation of the review proceedings.*[13]

Once appellate review has been exhausted or the deadline for applying for leave to appeal has passed, the process begins that ultimately results in the lower tribunal reacquiring jurisdiction over the case: the clerk of the court of appeals will "promptly send the original record" back to the lower court once the time for filing an application for leave to appeal to the supreme court has passed and there is no application to the supreme court or request for a special panel.[14]

Similarly, after the supreme court has disposed of a case, "the [supreme court] clerk shall return the record to the court of appeals clerk, to the clerk of the lower court or tribunal in which the record was made, or to the clerk of the court to which the case has been remanded for further proceedings, and the clerk of the lower court to which the record has been sent shall promptly notify the attorneys of the receipt of the record."[15]

Although a lower tribunal does not have jurisdiction to conduct proceedings in a remanded case until the record is returned, a lower tribunal's error in conducting proceedings prematurely is voidable, not void.[16] Thus, unless a party objects to the exercise of the lower tribunal's jurisdiction, the lower tribunal's exercise of jurisdiction will not be an error requiring reversal.

What Should a Trial Court Do When a Case is Remanded?

When a case has been remanded, the trial court clerk must notify the parties once the record has been returned (and jurisdiction has thus reattached) so the parties can "take appropriate action" in the trial court.[17] Thus, procedurally, the only thing the trial court is required to do under the court rules is provide notice. It is ultimately up to the prevailing appellant to make appropriate filings to begin post-remand proceedings.

Substantively, the only rule that applies to trial court conduct after a remand is that the conduct must be consistent with the appellate mandate.[18] There is little case law in Michigan regarding the scope of a trial court's authority after a remand. However, the supreme court has cited with approval those standards contained in American Jurisprudence.[19] Once the record is returned to the

trial court, the record, together with the appellate court's opinion and order, is called the "mandate." "The [lower tribunal] on remand is . . . generally required to proceed in accordance with the rules and reasoning stated in the [appellate] court's opinion, as both the letter and spirit of the mandate is to be implemented."[20] Therefore, "[a lower tribunal] is not free to ignore the mandate and opinion of the remanding appellate court, but instead must proceed in conformity with the views expressed by the appellate court."[21]

When an appellate court clearly rules on a procedural issue, it is simple enough for the lower tribunal to obey the appellate mandate as written. For example, when a case is remanded because certain evidence was improperly admitted, the lower court may conduct a new proceeding without the tainted evidence and reach a result consistent with the mandate. The more complicated question is what a lower tribunal may do when a case is remanded without detailed instructions but with the general admonition that subsequent proceedings should be "consistent with this opinion."

"[W]here a case is remanded without direction or restriction as to the method to be utilized for determining the issues in the case, it is up to the trial court on remand to determine, in its discretion, whether the record before it is sufficient, or whether additional evidence should be taken."[22] Thus, a general remand leaves open the question whether motions, hearings, or other proceedings that were not part of a case the first time around might nonetheless be entertained on remand. "On remand, the [lower tribunal] may consider and decide any matters left open by the appellate court, and is free to make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not presented or settled by such decision."[23]

It would appear that when an appellate court remands a case and states that a party is entitled to a new trial, the lower tribunal on remand may not decide that there will be no trial. For example, the court of appeals has held that when it had remanded a case "with specific instructions to submit the case to arbitration," it was an error for the lower court to fail to do so.[24]

The rules, however, appear to contain a gray area if a specific proceeding has been ordered, but issues not raised in the first lower-tribunal proceeding might negate the need for the proceeding the appellate court ordered. Thus, whether a trial court may entertain dispositive pretrial motions that might obviate the need for a trial after a new trial has been ordered is still an open question. If that is the case, and the pretrial motion is well grounded and was not raised before the first trial, it might be appropriate for the lower tribunal to entertain the motion. The question, then, would ultimately be whether entertaining the motion is consistent with the letter and spirit of the appellate mandate. If a dispositive motion is entertained and granted to avoid complying with an appellate mandate, the result will not likely stand.

Because the issue of what proceedings are appropriate so often involves trial court discretion and is constrained only by the rule that any proceedings on remand must not be inconsistent with the appellate mandate, the author conducted a survey of Michigan judges to ascertain the general attitude of trial judges about cases and procedures on remand. Following is a series of questions appellate practitioners might ask trial judges, with answers summarized briefly.

Will the same judge hear my case the second time around?

Probably. According to the survey 52 percent of judges said they would prefer to preside over the case themselves on remand.

Whose duty is it to get the case back on the docket?

Eighty-two percent of the judges agreed that it is the trial court's responsibility to get a case on track on remand; 63 percent of the judges said it was also the parties' responsibility.

When the record is returned and the lower tribunal reacquires jurisdiction, should I file new or amended pleadings?

Other than an appearance, probably not. Only 10 percent of judges said they would allow parties to amend pleadings on remand. Only 16 percent of the judges said they would accept new pleadings.

Will the lower tribunal issue a new scheduling order?

Probably. Sixty-one percent of judges said they would consider issuing a new scheduling order.

Will the lower tribunal likely entertain and decide issues not already addressed?

Probably not. Only 30 percent of the judges said they would consider permitting parties to raise issues implicated by the original pleadings but not fully litigated.

Will the lower tribunal entertain dispositive motions not raised in the initial proceedings?

Possibly. Forty-eight percent of the judges said they would consider entertaining new dispositive motions.

If the case is the subject of publicity during the appeal, will the lower tribunal entertain a motion for a change of venue?

Again, possibly. Forty-six percent of the judges said they would entertain such a motion.

If the case is remanded for a new trial, will the lower tribunal allow discovery to start anew?

Probably not. Only 15 percent of the judges said they would allow new discovery. Thirty-nine percent of them took no position.

If a case is remanded for limited proceedings, short of a new trial, will the lower tribunal permit new discovery?

Very unlikely. Only 5 percent of the judges said they would permit new discovery in a limited remand.

Will a trial judge consider ordering mediation on remand even if the case was mediated the first time around?

Probably not. Only 22 percent of the judges said they would consider it.

FAST FACTS

The court will not grant a motion for rehearing if it merely restates the arguments already raised in the appeal.

The lower court or tribunal reacquires jurisdiction over a case when the clerk returns the record to it.

Procedurally, the only thing the trial court is required to do under the court rules is provide notice.

Some Conclusions Based on the Research

- Once you have prevailed in the court of appeals, know the deadlines by which your opponent must act. Calendar 21 days after the court of appeals decision. After the twenty-first day, check with the court of appeals and supreme court clerks to see if your opponent has acted. If not, ask when the record will be returned.
- The prevailing party on appeal should be proactive. The rules seem to require action on the prevailing party's part, and trial judges seem to agree, even if they also see a role for the court in getting a remanded case on track. Check with the clerk of the lower tribunal to confirm that the record has been returned. Once it has, file a new appearance and ask the court for a scheduling order.
- You are not likely to get more discovery.
- You will most likely be dealing with the same judge, the same pleadings, and the same issues, although you should be prepared for the possibility that the lower tribunal might entertain new dispositive motions or permit some new discovery. Because of this possibility, your case is vulnerable in the trial court even if you've won the appeal. However, if the appellate court has specifically ordered a new proceeding (such as a new trial or arbitration), strenuously oppose any attempt by the lower tribunal to obviate the need for the proceeding that was ordered. ✦

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Footnotes

1. MCR 7.215(E)(1)(a).
2. See MCR 7.215(H).
3. See MCR 7.302(C).
4. MCR 7.215(H); MCR 7.302(C).
5. MCR 7.215(H)(2).
6. See MCR 7.302(C)(2)(c).
7. MCR 7.215(H)(1); MCR 2.119(F)(3).
8. See MCR 7.313(D).
9. MCR 7.313(E).
10. Id.
11. *Dep't of Conservation v Connor,* 321 Mich 648, 654 (1948).
12. *Luscombe v Shedd's Food Products Corp,* 212 Mich App 537, 541 (1995).
13. *Swickard v Wayne Co Medical Examiner,* 196 Mich App 98, 100–101 (1992) (citations omitted).
14. MCR 7.215(E)(1)(b).
15. MCR 7.311(B).
16. *Luscombe,* 212 Mich App at 542.
17. MCR 7.211(J).
18. *People v Kennedy,* 384 Mich 339, 343 (1979) (quoting 5 Am Jur 2d, Appeal and Error, § 993, p 419, 420); *Sokel v Nickol,* 356 Mich 460 (1959); *Bray v Dep't of State,* 97 Mich App 33, 37 (1980), rev'd on other grounds 418 Mich 149 (1983).
19. *Kennedy,* 384 Mich at 343.
20. 5 Am Jur 2d, Appellate Review, § 785, p 454, see also *Swickard,* 196 Mich App at 101.
21. 5 Am Jur 2d, Appellate Review, § 786, p 455.
22. Id.
23. *Kennedy,* 384 Mich at 343.
24. *Toska v Campbell,* 155 Mich App 671, 674 (1987).