"Zombie" Remands: a Peculiarly Appellate Monster

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By Catherine W. Smith

With Halloween fast approaching, this column is devoted to that peculiarly appellate monster: the "zombie" remand.

A remand, of course, is often the result a successful appellant is looking for. If the appellate court reverses, some sort of "do-over" is often required in the trial court. For instance, when a case is improperly decided on summary judgment, remand for trial will be necessary. If a case has gone to verdict, but the jury was improperly instructed, the appellate court will remand for a new trial before a properly instructed jury. And if a trial court's discretionary decision is reversed because it was based on an incorrect understanding of the applicable law, or improper consideration of irrelevant factors, the appellate court may remand for the trial court to exercise its discretion based on the appellate court's explanation of the applicable law and proper factors.

Washington Rule of Appellate Procedure (RAP) 12.2, "Disposition on Review," is largely a set of "guardrails" that, in theory, channel the trial court's journey on remand. The rule provides that "the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court."1 Recognizing that the trial court may have "housekeeping" to do on remand, the rule also provides that "the trial

court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule" — but only "so long as those motions do not challenge issues already decided by the appellate court."

In a "zombie remand," the trial court, contrary to RAP 12.2, revisits issues that were — or could have been — decided on appeal. In other words, the trial court and/or losing party on review resurrect "dead" issues.

Given the prophylactic measures in RAP 12.2, how does a remand get infected with the "undead virus" and become a "zombie"?

Ironically, an appellate court's deference to the trial court's exercise of discretion can sometimes cause a remand to go off the rails. When a trial court's decision is outside the range of acceptable choices, the appellate court often doesn't (and shouldn't) impose its own idea of the "best" decision. Instead, the appellate court will often remand to allow the trial court to re-exercise its discretion in light of the applicable law or relevant facts. The trial court, however, may view the remand as a license to revisit issues outside the scope of the exercise of discretion required by the remand.

In other instances, the appellate court decision may be unclear as to what is required on remand. Particularly when the closing paragraph of the appellate decision directs remand "for proceedings consistent with this opinion," a party (or the trial court) may seize upon something as innocuous as the appellate court's recital in the opinion of the parties' positions on appeal to authorize revisiting that position on remand.

And in some instances, quite frankly, it appears that the trial court is determined to reach a particular result, or to reinstate the result reversed on appeal. When that happens, it can sometimes seem as though the appellate court's decision is viewed as an obstacle that must be overcome, rather than a guidepost for the trial court's decision-making on remand.

All of those scenarios are abetted (and often instigated) by the "creativity" of parties, and counsel, who, having lost on appeal, and despite the admonitions of RAP 12.2, see remand as an opportunity for a "second bite at the apple." When that is the case, the restrictions on the law of the case doctrine in RAP 2.5(c) are often invoked to encourage the trial court to "review the propriety of an earlier decision." But that reading of RAP 2.5 is flat wrong — RAP 2.5(c) governs when the appellate court is not bound by a previous decision, "if the same case is again before the appellate court following remand." It does not authorize the trial court to review — or reinstate — its (or the appellate court's) earlier decisions.

Here, I go on record to state categorically that "zombie remands" are bad. Here's a real-life example to illustrate why:

I recently represented an economically-disadvantaged party, originally a respondent, who had prevailed and obtained a remand on her cross-appeal. The trial court's memorandum decision on remand began with the observation that the appellate court's decision was wrong, and proceeded to reinstate the decision reversed in the first appeal, on the basis of supposedly "new" reasoning that in truth had been foreclosed by the appellate court's opinion reversing the trial court's first decision — as the Court of Appeals (not so) promptly pointed out in reversing for a second time.

The Court of Appeals remanded on the second appeal to a different trial court judge — but only after almost a decade of litigation, and tens of thousands of dollars in fees, driven by a well-heeled party who has apparently adopted as her motto "millions for defense, not one cent for tribute." No matter the eventual outcome — and any litigation in which the appellate opinions sport Roman numerals[2] does not have a truly happy ending — this case illustrates many of the reasons why "zombie remands" are bad:

Zombie remands are inefficient. They are wasteful of the courts' resources, and the parties' time. Ideally, the goal in litigation should be one trial, and (if necessary) one appeal. When remand, for whatever reason, is taken as an opportunity to revisit issues that have been or could have been resolved in previous proceedings, a second (and sometimes a third) appeal, and years more of litigation, are virtually guaranteed.

Zombie remands are expensive. Because litigation in general is expensive, zombie remands promote injustice toward the less economically-advantaged party. Although there should be some efficiencies in litigating on remand, revisiting "dead" issues can dramatically increase the cost by requiring the party who prevailed on appeal to brief and argue (again) not only the merits, but also why the issue should no longer be in the case. Indulging in a zombie remand nearly always benefits the party with deep pockets.

Zombie remands are corrosive. When the losing party and/or trial court disregard or evade the direction of the appellate court, zombie remands encourage a lack of respect for the litigation process, and the respective roles of the trial and appellate courts.

Finally, zombie remands eat your brains. Really. There is nothing like having to re-argue a substantive legal point for the fifth time[3] to make me want to put a stake in the heart[4] of the zombie remand.

So what is to be done about this "monstrous" phenomenon — one that, in my (admittedly anecdotal) view, has become more common in recent years? My next column, on the riveting doctrine of "law of the case" and the underutilized provisions of RAP 12.9, will offer a few suggestions.

Catherine W. Smith is a principal in Smith Goodfriend. She founded the Washington Appellate Lawyers Association and is a Past President of the American Academy of Appellate Lawyers. She can be reached at cate@washingtonappeals.com.

1 Subject to the provisions of RAP 2.5(c)(2), discussed briefly infra, and RAP 12.9, which will be the topic of another column in the next few months.

2 E.g., Marriage of Katare (I, II and III); Marriage of Rockwell (I, II and III), Jarndyce v. Jarndyce (among too many others). More on this topic in a future column on "law of the case."

3 Assuming a minimum of once at trial, once on appeal, once on reconsideration, once in answering a petition for review, and once on remand. Your mileage may vary, depending on the tenacity of opposing counsel and the patience of the courts.

4 To mix a monster metaphor.