“Once More, With Feeling” — Law of the Case and Motions to Recall the Mandate

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“Always Appealing” is a column addressing current issues in appellate practice and recent appellate cases written by the lawyers of Smith Goodfriend, PS, a Seattle law firm that limits its practice to civil appeals and related trial court motions practice.

Last month, this column dealt with the frightful topic of “zombie remands” — those cases that, after an appeal, never seem to die — when the party who lost on appeal tries to snatch “victory from the jaws of defeat” by resurrecting arguments that were unsuccessful (or untried) on appeal as a basis to reinstate a favorable decision on remand. In that column I went out on a limb, declaring “zombie remands” bad, and inconsistent with the guiding principle 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

This month, I address two possible cures for the zombie remand — one substantive (the “law of the case”), and fairly well-developed in the case law, and one procedural (recall of the mandate), and, in my opinion, underutilized.

Law of the case. When the appellate court directs the trial court to consider an issue on remand, “it must adhere to the appellate court’s instructions,”2 and it cannot “ignore [] specific holdings and directions on remand.”3 “The decision of the appellate court establishes the law of the case and it must be followed by the trial court on remand.”4

“Upon the retrial, the parties and the trial court are all bound by the law as made by the decision on the first appeal.”5 The trial court has no discretion to ignore the appellate court’s holdings.6 “An individual trial court is not free to determine which appellate court orders, if any, it chooses to follow. If a trial court were free to ignore such orders, total chaos would result in the court system.”7

The law of the case limits three different types of improper argument and decisions on remand. First, the trial court cannot on remand rely on arguments and theories rejected by the appellate court in the earlier appeal.8 Remand is not an opportunity for the losing party on appeal to reargue issues already resolved against her by the appellate court.9

Second, the trial court cannot on remand reinstate a decision that was reversed by the appellate court, or make a decision at odds with the higher court's holding, by purporting to rely on "new" issues, or issues not directly addressed by the appellate court, to support its original decision.10 Remand is not an opportunity for the losing party on appeal to raise new issues or claims in an effort to get the same, or a better, result than in the judgment that was reversed.11

In Bank of America, for instance, Treiger successfully challenged the trial court's decision giving the Bank's lien priority over his lien. Division I's decision for Treiger was affirmed by the Supreme Court. On remand, the Bank once again argued that it had priority, this time based on an "in rem" claim that the Bank had previously raised but that had not been adjudicated by the trial court or addressed in the earlier appeal. When the trial court on remand once again gave the Bank priority to the proceeds over Treiger's claim, Division I reversed once again on Trieger's second appeal.

Similarly, in Humphrey I, the Supreme Court had reversed the trial court's decision ordering appellant Humphrey to pay attorney fees based on the trial court's finding that Humphrey acted arbitrarily, vexatiously, and not in good faith.12 On remand, the trial court reinstated a portion of the vacated attorney fee award against Humphrey, ostensibly on the grounds that it "recalled that quite apart from the evidence found inadmissible by the Supreme Court, there was significant other evidence that indicated that Humphrey acted arbitrarily, vexatiously, or not in good faith."13 The Supreme Court reversed again, holding that the trial court had no authority to reinstate an award of attorney fees that the higher court had previously vacated because it had implicitly rejected any other basis to impose attorney fees against Humphrey when it held that "the record does not establish that Humphrey's actions were arbitrary, vexatious, and not in good faith."14 The Court held "this became the law of the case, and the trial court on remand was not authorized to reconsider fees against Humphrey."15

Third, neither a party nor the trial court can "reserve" issues for consideration on remand after an appeal of the trial court's decision. In Bank of America, for instance, the trial court purported to "reserve" for consideration after an appeal the Bank's alternative, "in rem" reasoning for priority of its lien. The appellate court rejected that attempt, consistent with the rule that any alternative grounds for affirming must be raised (and decided) on the initial appeal of the trial court's decision. The court held that "the trial court erred by allowing the Bank to resurrect its in

rem claim on remand, in effect allowing the Bank to sit on its in rem theory and to raise it upon its not prevailing on its initial theory. Doing so flies squarely in the face of the indisputable policy against allowing piecemeal appeals."16

Recall of the mandate. The substantive principles relevant to the law of the case doctrine are usually addressed in a second (or third) appeal after remand. The Rules of Appellate Procedure contain a little-used procedural mechanism that could, in theory, short-circuit that process when it appears a case is going off the rails and is in danger of becoming a zombie remand. RAP 12.9 authorizes motions to recall the mandate to either "correct mistake or remedy fraud," or (relevant here) "to require compliance" with its decision: "The appellate court may recall a mandate issued by it to determine if the trial court has complied with an earlier decision of the appellate court given in the same case."17

RAP 12.9 codifies the appellate court's inherent power to enforce its decisions. "If the superior court proceeds contrary to the mandate of this court, that would be an interference with this court's jurisdiction, and the proper procedure for the aggrieved party to pursue would be to apply to this court for an appropriate writ requiring the superior court to enter judgment conforming to the mandate."18

Although "[t]he question of compliance by the trial court may be raised by motion to recall the mandate," the rule goes on to provide that "the question" can also be raised "by initiating a separate review of the lower court decision entered after issuance of the mandate."19 Unfortunately, in my experience the appellate courts usually deny, without explanation, motions to recall the mandate, and prefer to consider law of the case issues in the context of formal appellate review. For instance, in Bank of America, the Supreme Court denied a motion to recall the mandate and transferred the appeal of the trial court's decision on remand to the Court of Appeals, which held that the trial court "failed on remand to comply with the Supreme Court's decision" after full briefing (and, alas, another two years).

From this practitioner's perspective, the motion to recall the mandate procedure should be a less expensive, less time-consuming, and more satisfactory means of ensuring compliance with the appellate court's earlier decision. I hope the courts will consider more robust use of RAP 12.9 when a zombie remand comes walking their way.

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1 RAP 12.2.

2 McCausland v. McCausland, 129 Wn. App. 390, 399, ¶ 16, 22, 118 P.3d 944 (2005), rev'd on other grounds by 159 Wn.2d 607, 152 P.3d 1013 (2007).

3 McCausland, 129 Wn. App. at 400, ¶ 18; see also Bank of America, N.A. v. Owens, 177 Wn. App. 181, 189, ¶ 22, 311 P.3d 594 (2013), rev. denied, 179 Wn.2d 1027 (2014).

4 Lodis v. Corbis Holdings, Inc., 192 Wn. App. 30, 58, ¶ 51, 366 P.3d 1246 (2015), rev. denied, 185 Wn.2d 1038 (2016) (emphasis in original) (citations omitted).

5 Lodis, 192 Wn. App. at 57, ¶ 50.

6 Lodis, 192 Wn. App. at 57, ¶ 50.

7 State v. Strauss, 119 Wn.2d 401, 413, 832 P.2d 78 (1992).

8 See Estate of Langeland v. Drown, 195 Wn. App. 74, 380 P.3d 573 (2016) (unsuccessful respondent cannot rely arguments rejected in an earlier appeal to ask the trial court to effectively reinstate its reversed decision on remand); see also Allyn v. Asher, 132 Wn. App. 371, 379-80, ¶ 18, 131 P.3d 339 (2006) (dismissing appeal of order enforcing the Court of Appeals mandate by unsuccessful respondent in earlier appeal because argument on remand was fully considered and rejected in the first appeal).

9 McCausland, 129 Wn. App. at 399, 401 ¶¶ 16, 22.

10 Bank of America, 177 Wn. App. at 191, ¶ 24; Humphrey Industries, Ltd. v. Clay St. Associates, LLC, 176 Wn.2d 662, 669, ¶ 13, 295 P.3d 231 (2013) (Humphrey II).

11 Bank of America, 177 Wn. App. at 189, ¶ 22; Humphrey II, 176 Wn.2d at 669, ¶ 13.

12 Humphrey Industries, Ltd. v Clay Street Associates, LLC, 170 Wn.2d 495, 507, ¶ 22, 242 P.3d 846 (2010) (Humphrey I).

13 Humphrey II, 176 Wn.2d at 669, ¶ 11.

14 Humphrey II, 176 Wn.2d at 671, ¶ 16.

15 Humphrey II, 176 Wn.2d at 671, ¶ 16.

16 Bank of America, 177 Wn. App. at 193, ¶ 27.

17 RAP 12.9(a).

18 Frye v. King Cty., 157 Wash. 291, 294, 289 P. 18 (1930); Robert Morton Organ Co. v. Armour, 179 Wash. 392, 396, 38 P.2d 257 (1934); Garratt v. Dailey, 49 Wn.2d 499, 500, 304 P.2d 681 (1956) (pre-RAP cases).

19 RAP 12.9(a).