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- Briefly: What to do with a reverse and remand
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Home / Expert Testimony / Briefly: What to do with a reverse and remand



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Briefly: What to do with a reverse and remand

By: Eric J. Magnuson and Geoffrey H. Kozen July 19, 2022

Trial court judges hate to be reversed. But if there's anything they hate more than an outright reversal, it's being reversed with a remand for further consideration. Being told you messed up is bad enough but being given a second chance to mess up again is even worse.

Lawyers probably have a more nuanced view. If you were tossed out of court based on the first trial court decision, at least you're back in the game. And if you are the party who initially prevailed only to have your victory snatched away by the appellate court, you at least have an opportunity to try again for a win.

That dynamic sets up a battle that frequently occurs after a reverse and remand—the fight over what the trial court can and cannot consider after the case is remanded.

It's pretty easy to state the general rules on the scope of remand. "It is the duty of the district court to execute the mandate of [the remanding court] **strictly** according to its terms." *State v. Roman Nose*, 667 N.W.2d 386, 394 (Minn. 2003) (emphasis added). Likewise, it's a maximum of appellate law that once an issue has been decided on appeal, it becomes the law of the case. This includes issues decided in the original trial court proceedings, which could have been raised on appeal but waived by the failure to appeal. The rule—often referred to as the mandate rule—prevents the trial court from reopening on remand an issue that was ripe for argument but omitted from an earlier appeal. *Havlish v. 650 Fifth Avenue Company*, 934 F.3d 174, 181-182 (2d Cir. 2019).



Eric Magnuson (left) and Geoffrey Kozen

Simple enough. In practice, however, it's often far more difficult to apply these rules than one would expect. What if the issue is raised at the appellate court, but isn't expressly decided? Or what if it's decided by one appellate court, and then not addressed on further review by the court *en banc* or by a higher appellate court? What if the issue on appeal is raised only by an amicus, but is critical to the appellate reversal and remand?

The Sixth Circuit recently decided an interesting case digging into some of these knotty issues. *Monroe et al. v. FTS USA, LLC et al.*, No. 20-6289 (Nov. 8, 2021), involved litigation over Fair Labor Standards Act allegations that the defendants had failed to pay required overtime to hundreds of employees. The case first reached the Sixth Circuit in 2016 following a jury determination of liability against the defendant-appellants. In that first appeal, appellants argued that the formula the district court judge used to determine the outstanding back wages was incorrect as a matter of law. The Sixth Circuit agreed—it reversed the district court and remanded for the judge to recalculate damages.

Although the Sixth Circuit didn't specifically remand to address other issues raised in the appeal, the defendants clearly believed the remand allowed them to re-argue those additional issues, raising a "host of new attacks." *Monroe* at *2. When the district court refused to hear them, defendants appealed.

The Sixth Circuit opined at length on the nature of remand. It explained that "An appellate court's remand can either be general or limited in scope, and that distinction governs the district court's authority on remand." *Id.* at *6. On general remand, a district court is free to address all matters as long as it remains consistent with the appellate court's opinion. *Id.* "By contrast, a limited remand 'constrains' the district court's authority to the issue or issues specifically articulated in the appellate court's order." *Id.* at *7. A lower court can identify a remand as limited because the appellate court "must sufficiently outline the procedure the district court is to follow. The chain of intended events should be articulated with particularity." *Id.*

In determining if a remand is general or limited, the Sixth Circuit explained that a court of appeals should "review the entirety of the previously entered opinion to determine whether the remand was limited." *Id.* at *5 (citing *Carter v. Mitchell*, 829 F.3d 455, 463 (6th Cir. 2016)).

Unfortunately, things are often not as cut-and-dried as the distinction the Sixth Circuit draws. For example, if the issue identified in the limited remand is intertwined with other issues, or other issues are contingent upon its determination, they may remain within the scope of the remand even if not identified by the appellate court.

The case drew enough commentary to warrant some additional reflection about how a prior appeal impacts further proceedings in Minnesota state courts. The Minnesota Supreme Court recently adopted the same distinction between "general" and "limited" remand that the Sixth Circuit endorsed. *State v. Thompson*, 942 N.W.2d 350, 354 (Minn.), *cert. denied*, 141 S. Ct. 424 (2020). As in the federal courts, the Minnesota court has concluded that a general remand grants a trial court "broad discretion to determine how to proceed." *Dobbins v. State*, 845 N.W.2d 148, 156 (Minn. 2013). In contrast, a limited remand offering specific instructions renders it "the duty of the district court to execute the mandate of [the remanding court] strictly according to its terms." *State v. Roman Nose*, 667 N.W.2d 386, 394 (Minn. 2003). "If we were to consider additional evidence presented beyond the issue to be determined on remand, the parties might consider the remand proceedings to be a 'second bite at the apple' and attempt to further litigate all issues in the case." *Id.* at 395.

But Minnesota Courts also recognize that there is wiggle around the edges. In contrast to the sharp distinction drawn by the Sixth Circuit, Minnesota courts recognize that even a limited remand permits a district court to act "in any way not inconsistent with the remand instructions provided." *Toyota-Lift of Minnesota, Inc. v. Am. Warehouse Sys., LLC*, No. A18-0199, 2018 WL 4201188, at *2 (Minn. Ct. App. Sept. 4, 2018). The facts of that case illustrate the difference from the Sixth Circuit's paradigm.

In an initial appeal, the court of appeals determined that the district court erred only by failing to determine whether an employer owed a statutory penalty for failing to pay commission income on a good-faith basis, and remanded the case to allow the district court to make that determination. *Id.* at *1. On remand, the district court ordered the employer to pay the statutory penalties, but also awarded the plaintiffs costs, disbursements, witness fees, and attorneys' fees, which a prevailing party can obtain under the penalty statute, Minn. Stat. § 181.171. *Id.* at *2.

The court of appeals endorsed the district court's ruling on a second appeal, rejecting an argument that "the narrowly phrased instruction precluded the district court" from making the additional orders. *Id.* The court held that the award of attorney fees was contingent upon the determination that Section 181.171 applied, concluding that the award, "while not expressly stated in our remand instruction, is not inconsistent with or an improper alteration of the instruction." *Id.*

It is critical that litigators, and not just judges, understand that distinction, and how much room there is to navigate between the two. Knowing the difference is important to advising your client on their chances of success and the reasonable settlement value of any outstanding claims. But knowing when even a limited remand opens a clear channel for additional arguments can help you advise your client on creative new strategies, surprise the opposing party, and offer additional paths to a successful outcome.

The bottom line is that all parties—the lawyers and the court—have to be careful in dealing with the scope of remand. They can't go too far, but they need to go far enough. Like Goldilocks, they have to find the solution that is "just right."

Geoffrey Kozen is an associate at Robins Kaplan.



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