Imagine this: You litigate a case for years. Your opponent wins summary judgment. You appeal. The appellate court agrees that the summary judgment was erroneous and remands for trial. On remand, your opponent argues that the appellate court actually affirmed the dismissal of one the claims that was clearly remanded for trial. The lower court accepts that argument. What do you do?

You are facing the injustice of being denied the victory you just won in the appellate court. You know you can return to the appellate court again—someday—as of right. But if that return trip does not happen until after trial, you will waste substantial time and resources on the erroneously-limited trial.

Fortunately, appellate courts take this issue very seriously and will entertain interlocutory appeals to ensure that lower courts obey their commands. When an appellate court remands a case to a lower court, it issues a “mandate”—an order directing the lower court to take some specified action. Case law is clear that the mandate must be followed to the letter. In New Jersey, for example, the leading case on this issue, *Flanigan v. McFeely*, was authored by then-state Supreme Court Justice William J. Brennan less than a year before his elevation to the U.S. Supreme Court. Justice Brennan explained that “the trial court is under a peremptory duty to obey in the particular case the mandate of the appellate court precisely as it is written.” He further explained that “[r]elief from its [i.e., the mandate’s] directions, even though manifestly erroneous, can be had only in the appellate court whose judgment it is.”

A recent unpublished Order confirms that New Jersey appellate courts continue to take Justice Brennan’s words seriously. In 2019, in *Deborah Heart and Lung Center v. Virtua Health, Inc.*, the appellate court reversed and remanded for trial claims by plaintiff, a charity cardiac hospital, that the defendants, a nearby competing hospital system and a number of its officials and physicians, had effected a “plan to put Deborah out of business” by bullying vulnerable cardiac patients to transfer to a more distant hospital in Pennsylvania instead of to Deborah. The appellate court held that: “Our review of the record reveals email exchanges, deposition testimony, and certifications suggesting defendants collectively worked to shutter Deborah.” It then stated its mandate, in relevant part, as follows: “Reversed and remanded as to Deborah’s claims against defendants for unfair competition and civil conspiracy limited to the identified patients.”
Despite the clarity of this language, the main defendant, Virtua Health, argued on remand that only the civil conspiracy claim had been remanded, and the dismissal of the unfair competition claim had actually been affirmed. And one of the individual defendants, Richard Miller, the former CEO of Virtua Health, argued that his dismissal had actually been affirmed in its entirety. The lower court agreed with both of these defendants and entered in limine orders excluding from trial all claims against Miller and the unfair competition claims against Virtua.

The plaintiff responded by making a motion for an interlocutory appeal. The Appellate Division granted that motion and summarily reversed the trial court, ordering that:

Appellant’s motion for leave to appeal is granted, and the orders of September 29 and December 4, 2020, are reversed summarily. In our opinion in Deborah Heart and Lung Center v. Virtua Health, Inc., et al., No. A-2307-17 (App. Div. July 16, 2019), we reversed the summary judgment granted by the trial court to defendant Richard Miller. We also reversed the dismissal of Deborah’s claims for unfair competition and civil conspiracy, limited to the identified patients, as to all defendants, including the Virtua defendants, and remanded the case for trial on those claims. As the trial court’s orders of September 29 and December 4, 2020 are inconsistent with our opinion and the terms of the remand, they are reversed and the case again remanded for trial of plaintiff’s claims of unfair competition and civil conspiracy, limited to the identified patients, as to all defendants.

In the New Jersey Appellate Division, only about 14% of motions for interlocutory appeal are granted. Most appeals (about 78%) are ultimately affirmed—usually after full briefing and arguments on the merits. The summary reversal of the lower court in Deborah v. Virtua shows that appellate courts continue to take the principle first enunciated by Justice Brennan seriously.

©2023 Epstein Becker & Green, P.C. All rights reserved.

National Law Review, Volumess XI, Number 69