

Déjà Vu in Florida Courts: When Courts “Re-view” the Law of the Case

An appellate court generally resolves all of the issues presented to it with finality. After resolution in the appellate court, however, it is not uncommon for the case to be remanded to the trial court for further proceedings consistent with the appellate court's ruling. These proceedings may give rise to a subsequent appeal in which the issues previously decided by the appellate court are contested once again. The law of the case doctrine generally applies to preclude parties from relitigating any issue previously resolved by the appellate court.¹

The law of the case is a procedural bar that protects judicial resources and preserves the integrity of appellate rulings.² However, in certain circumstances, its application may be unjust. Such circumstances have given rise to exceptions to the doctrine's application where there has been a change in the applicable facts or law, and where the prior appellate decision was erroneous and its application would result in manifest injustice. This article discusses the parameters of the law of the case and explores the exceptions to its application in Florida's appellate courts.

Determining Whether the Law of the Case Applies

The law of the case doctrine is a “rule of convenience designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static.”³ Over the years, the doctrine has been narrowed and refined to accommodate its purpose. The doctrine's application is not rigid, nor is it juris-

dictional.⁴ Accordingly, counsel should not assume that a subsequent appeal in the same case will be fruitless. Not only may exceptions to the law of the case doctrine apply, but the subsequent appeal may not implicate the doctrine in the first instance.

The law of the case doctrine is generally restricted to circumstances involving the same parties⁵ in the same case in which an appellate court previously decided the matter at issue, either expressly or impliedly.⁶ While this definition may sound all-encompassing, it is subject to several limitations. Flowing from the doctrine's definition, issues neither presented nor resolved in the prior appeal generally do not constitute the law of the case.⁷ As the Florida Supreme Court has explained, this is true even when the parties could have raised certain issues in the prior appeal, but chose not to do so.⁸ Where waiver does not otherwise preclude a party from raising an issue neither presented nor decided in a prior appeal, the law of the case does not preclude raising the issue in a subsequent appellate proceeding.⁹

Similarly, where an issue was not presented to the trial court and, therefore, was not properly raised in the prior appeal, that issue cannot be the subject of the law of the case.¹⁰ Courts may adhere to this principle to preclude the application of the law of the case even where an issue was squarely presented to the appellate court in a prior appeal, but the court was unable to decide the issue because the parties failed to properly present it to the trial court.¹¹ Thus, even if an issue was raised in a prior appeal, a

determination of whether the issue could have been properly decided in that appeal is key to assessing whether the issue may be raised again in a subsequent appeal.

Further, issues only tangentially related to those decided in a prior appeal are not the law of the case.¹² In addition, if the matter at issue was left unresolved by the trial court due to an erroneous legal ruling, the law of the case does not apply despite a prior appeal in the same case.¹³ However, if an issue was necessarily determined by the appellate court, the necessary resolution of the issue becomes the law of the case.¹⁴

Appellate rulings on preliminary matters decided before a factual record has developed generally do not constitute the law of the case.¹⁵ For example, appellate rulings on preliminary injunctions generally do not constitute the law of the case because they are addressed in the appellate court on a preliminary basis before a complete record is developed.¹⁶ However, where the record has been developed, an appellate ruling on a temporary injunction may become the law of the case on the same basis as any other appellate ruling.¹⁷ In this regard, the stage of record development when the prior appeal was decided, may be relevant not only to determining whether the law of the case doctrine applies in the first instance, but also to determining whether the “new facts” exception to the doctrine, discussed below, applies to permit subsequent review.

A per curiam affirmance is the law of the case with respect to all issues presented and necessarily decided in

the appellate court even where the court issues an affirmance without an opinion.¹⁸ However, prior appellate rulings that are not on the merits do not implicate the doctrine. For example, dismissals of appeals generally do not establish the law of the case.¹⁹ Similarly, denials of certiorari relief or writs of prohibition without elaboration are not deemed to be decisions on the merits and, therefore, do not give rise to the preclusive effect of the law of the case.²⁰ However, where a denial clearly results from a ruling on the merits, it may implicate the law of the case.²¹ Thus, the prior appellate ruling must be examined to determine whether it may be deemed a ruling on the merits.²²

Conjecture by an appellate court that addresses matters not at issue in the appeal constitutes dicta and does not establish the law of the case.²³ In addition, concurring opinions are generally not binding in later proceedings.²⁴ However, if an issue addressed in a concurring opinion is joined by enough judges to create a majority,

the resolution of that issue becomes the law of the case.²⁵

Accordingly, counsel seeking to overcome the application of the law of the case doctrine should determine whether the doctrine applies in the first instance. The question of whether the law of the case applies is a question of law, which is reviewed de novo by an appellate court.²⁶ Accordingly, a trial court's ruling that the law of the case precludes it from considering an issue already decided does not hinder the appellate court from reviewing the issue anew. In fact, unlike appellate courts, trial courts are generally bound by the law of the case and are unable to exercise any discretion to disregard its application.²⁷

Counsel seeking to overcome the application of the law of the case should utilize arguments that the doctrine does not apply where such arguments are available. Arguments that the doctrine does not apply are governed by fairly well-established, objective legal principles and do not require a showing of exceptional

circumstances. On the other hand, a showing of exceptional circumstances is generally required to establish that an exception to the law of the case applies.

Exceptions to the Law of the Case Doctrine

- *Material Changes in Facts*

Courts may apply an exception to the law of the case based on a change in facts or where the appellate court's prior ruling is erroneous and results in manifest injustice. With respect to the first exception, the law of the case applies "so long as the facts on which [an appellate] decision was predicated continue to be the facts in the case."²⁸ Thus, where the facts change after the initial appellate ruling, an exception to the law of the case may apply.²⁹ However, it is important to note that not just any change in facts will suffice to overcome the doctrine's application. The change in facts must be material to the decision at issue.³⁰

New facts are commonly established where the initial appellate decision involved the review of a preliminary interlocutory order such as an order on a temporary injunction.³¹ Workers' compensation cases may also involve preliminary or prior decisions that do not constitute the law of the case with respect to later rulings based on different facts or circumstances.³² Issues related to class certification that are necessarily resolved by appellate courts on a preliminary basis may be subject to this exception to the law of the case as well where there is a change in facts that occurs after the initial ruling regarding class certification.³³

Although courts have cautioned that to overcome the law of the case the change in facts must be material, the "new facts" exception may apply where "there is even an arguable change in the substantive evidence presented."³⁴ Nevertheless, counsel utilizing the "new facts" approach to overcome a prior appellate ruling that would otherwise constitute the law of the case should not underestimate this standard and should clearly distinguish, to the fullest extent possible, the facts upon which the prior decision was based from those later revealed.

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Counsel may also argue that a prior appellate decision does not establish the law of the case by showing the insufficiency or premature nature of the appellate record in the prior appeal.³⁵ This type of showing is essentially a version of the "new facts" exception. It can be used where initial legal rulings made on incomplete facts later prove to be without merit due to the undeveloped nature of the record when the initial rulings were issued.

• *Changes in the Law and Manifest Injustice*

Where the appellate court's prior ruling is erroneous, an exception to the law of the case exists if manifest injustice would result from maintaining the ruling.³⁶ The application of this exception is particularly common in criminal cases where the law of the case would impose a harsher criminal penalty than that provided by law.³⁷ On the other hand, a court may adhere to the law of the case and decline to find manifest injustice where the law of the case erroneously compels a lesser criminal penalty than that otherwise provided by law.³⁸

Courts frequently decline to adhere to the law of the case where they recognize that their prior ruling was in error.³⁹ In this regard, the Florida Supreme Court has held that the law of the case "is not an absolute mandate, but rather a self-imposed restraint that courts abide by to promote finality and efficiency in the judicial process and prevent relitigation of the same issue in a case."⁴⁰ The court held further that it may "reconsider and correct erroneous rulings in exceptional

circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become the law of the case."⁴¹ Nevertheless, where exceptional circumstances do not warrant review of the law of the case, the doctrine will apply with full force in subsequent appellate proceedings.⁴²

The Florida Supreme Court has similarly emphasized that an appellate court should reconsider the law of the case "only as a matter of grace, and not as a matter of right; and that an exception to the general rule . . . should not be made except in unusual circumstances and for the most cogent reasons — and always, of course, only where 'manifest injustice' will result from a strict and rigid adherence to the rule."⁴³ Appellate courts have applied this language to preclude their consideration of a legal issue previously resolved as the law of the case where the challenging party has failed to prove that manifest injustice would result from its application.⁴⁴ Nevertheless, a change in the law since the appellate court issued its prior decision may often result in manifest injustice so as to justify an exception to the doctrine's application.⁴⁵ While counsel may argue that the law of the case doctrine does not apply based upon a change in the law at issue, this exception cannot be used to reargue a point of law that is merely contested and not patently erroneous.⁴⁶

Conclusion

Overall, there are two stages in a determination of whether the law of

the case will mandate the same result in a subsequent appellate proceeding. The first stage centers around the determination of whether the law of the case is implicated. This requires an examination of whether the issue before the appellate court the second time was expressly or impliedly decided on the merits in the first appeal. The second stage of the analysis involves a determination of whether one of the exceptions to the law of the case applies. These exceptions include new facts, new law, and manifest injustice, the latter of which is often deemed an overarching requirement to overcome the doctrine's application.

Where there is an identity of the parties, the issues, the facts, and the applicable law, the law of the case will generally apply to effect the same ruling. However, where the first or second stage of the analysis reveals that the law of the case should not apply, counsel may be able to revisit issues previously addressed in the appellate court. □

¹ *Smith v. City of Fort Myers*, 944 So. 2d 1092, 1094 (Fla. 2d D.C.A. 2006); *Hernandez v. State*, 979 So. 2d 1013, 1017 (Fla. 3d D.C.A. 2008); *City of Hollywood v. Witt*, 939 So. 2d 315, 318 (Fla. 4th D.C.A. 2006).

² See, e.g., *DeGennaro v. Janie Dean Chevrolet, Inc.*, 600 So. 2d 44, 45 (Fla. 4th D.C.A. 1992) (Anstead, J., specially concurring) ("Judicial resources, already heavily taxed, are hardly efficiently allocated when they are used to twice review the same issue.")

³ *Robbie v. Robbie*, 726 So. 2d 817, 820 (Fla. 4th D.C.A. 1999) (internal citations and quotations omitted).

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⁴ *Id.*

⁵ *Specialty Rests. Corp. v. Elliott*, 924 So. 2d 834, 837-838 (Fla. 2d D.C.A. 2005).

⁶ *Smith*, 944 So. 2d at 1094; *Witt*, 939 So. 2d at 318; see also *Graef v. Hegeudus*, 827 So. 2d 394, 395-396 (Fla. 2d D.C.A. 2002) (holding that implicit in the appellate court's ruling that it had jurisdiction to decide an appeal was a ruling as to the finality of the order appealed).

⁷ *Witt*, 939 So. 2d at 318. However, where an issue is not raised by the appellant, but is raised by the appellee as an alternative means for an affirmance under the "tipsy coachman" doctrine, the alternative argument is not deemed to have been rejected where the appellate court reverses on an altogether different basis. *Smith*, 944 So. 2d at 1094.

⁸ *Fla. Dep't of Transp. v. Juliano*, 801 So. 2d 101, 105-107 (Fla. 2001).

⁹ *Id.* at 107.

¹⁰ *White Sands, Inc. v. Sea Club V. Condo. Ass'n*, 591 So. 2d 286, 288 (Fla. 2d D.C.A. 1991).

¹¹ *Analyte Diagnostics, Inc. v. D'Angelo*, 792 So. 2d 1271, 1272 (Fla. 4th D.C.A. 2001).

¹² *Carollo v. Carollo*, 972 So. 2d 930, 931 (Fla. 3d D.C.A. 2007) (holding that while the appellate court's prior ruling determined that a certain item was a marital asset, it did not determine the remedies available to the parties regarding payment related to that marital asset, and the law of the case, therefore, did not preclude the trial court from imposing an equitable remedy in subsequent proceedings).

¹³ *Wells Fargo Armored Servs. Corp. v. Sunshine Sec. & Detective Agency, Inc.*, 575 So. 2d 179, 180-181 (Fla. 1991).

¹⁴ *City of Pembroke Pines v. Villasenor*, 894 So. 2d 991, 995 (Fla. 1st D.C.A. 2005) (holding that where the date of an injury was necessarily decided in a prior appeal that determined compensability of the injury, the determination of the date was the law of the case and could not be relitigated).

¹⁵ *Klak v. Eagles' Reserve Homeowners' Ass'n*, 862 So. 2d 947, 952 (Fla. 2d D.C.A. 2004).

¹⁶ *Hasley v. Harrell*, 971 So. 2d 149, 152 (Fla. 2d D.C.A. 2007); *Whitby v. Infinity Radio, Inc.*, 951 So. 2d 890, 896 (Fla. 4th D.C.A. 2007).

¹⁷ *Hasley*, 971 So. 2d at 152.

¹⁸ *Pompi v. City of Jacksonville*, 872 So. 2d 931, 933 (Fla. 1st D.C.A. 2004); *Woolin v. Bernay*, 920 So. 2d 1151, 1153 (Fla. 3d D.C.A. 2006); *Schultz v. Schickedanz*, 884 So. 2d 422, 424 (Fla. 4th D.C.A. 2004).

¹⁹ *Pompi*, 872 So. 2d at 933; *Dep't of Children & Family Servs. (In re B.H.)*, 893 So. 2d 639, 640-641 (Fla. 2d D.C.A. 2005) (holding that the appellate court's prior dismissal of an appeal for lack of jurisdiction in the same case did not establish the law of the case).

²⁰ *State, Dep't of Highway Safety & Motor Vehicles v. Trauth*, 971 So. 2d 906, 907 (Fla. 3d D.C.A. 2007); *Smith v. State*, 738 So. 2d 410, 412 (Fla. 5th D.C.A. 1999).

²¹ *Smith*, 738 So. 2d at 412 (holding that a denial of a writ of prohibition implicated the law of the case because the denial

clearly demonstrated that the court rejected the petitioner's substantive double jeopardy argument).

²² See *Candyworld, Inc. v. Granite State Ins. Co.*, 700 So. 2d 424, 425 (Fla. 4th D.C.A. 1997) (holding that the appellate court's prior ruling on a motion for attorneys' fees based on an offer of judgment was not a decision on the merits because the court determined that the motion had failed to present grounds sufficient to enable the court to rule on its merits).

²³ *Myers v. Atl. Coast Line R.R. Co.*, 112 So. 2d 263, 267 (Fla. 1959).

²⁴ *Greene v. Massey*, 384 So. 2d 24, 27 (Fla. 1980).

²⁵ *Id.*; *Miami-Dade County v. Associated Aviation Underwriters*, No. 3D07-110, 2008 WL 1805793, at *1 (Fla. 3d D.C.A. Apr. 23, 2008) (slip opinion) (holding that where a specific point in a concurring opinion was joined by a dissenting judge, thereby creating a majority, it became the law of the case).

²⁶ *TRW Auto. U.S. LLC v. Papandopoulos*, 949 So. 2d 297, 300 (Fla. 4th D.C.A. 2007).

²⁷ *Tiede v. Satterfield*, 870 So. 2d 225, 229 n.2 (Fla. 2d D.C.A. 2004).

²⁸ *Feigen v. Sokolsky*, 65 So. 2d 769, 771 (Fla. 1953) (quoting *McGregor v. Provident Trust Co.*, 162 So. 323, 327 (Fla. 1935)).

²⁹ *Id.*; *Lahodik v. Lahodik*, 969 So. 2d 533, 534-535 (Fla. 1st D.C.A. 2007) (holding that changed circumstances with respect to child custody justified revisiting the issue of child support despite the law of the case); *Hernandez*, 979 So. 2d at 1017 (holding that the appellate court's prior decision excluding an unredacted tape recording had no preclusive effect as the law of the case with respect to a redacted version offered into evidence in subsequent proceedings).

³⁰ Cf. *Fla. Patient's Comp. Fund v. St. Paul Fire & Marine Ins. Co.*, 559 So. 2d 195, 197 (Fla. 1990) (holding, in the context of res judicata, that the circumstances at issue were not sufficiently different to overcome the binding effect of the prior ruling).

³¹ *Hasley*, 971 So. 2d at 152; *Whitby*, 951 So. 2d at 896.

³² *Holder v. Keller Kitchen Cabinets*, 610 So. 2d 1264, 1267 (Fla. 1992); cf. *Caron v. Systematic Air Servs.*, 576 So. 2d 372, 375-376 (Fla. 1st D.C.A. 1991) (applying this general principle in the context of res judicata and the law of the case).

³³ *Toledo v. Hillsborough County Hosp. Auth.*, 747 So. 2d 958, 960-961 (Fla. 2d D.C.A. 1999) (finding an exception to the law of the case with respect to the numerosity aspect of a class certification issue because the challenging party established new facts in this regard, but holding that the appellate court's prior resolution of the adequate representation aspect of the issue was the law of the case because there were no new facts as to that aspect of the court's ruling).

³⁴ *Metropolitan Dade County v. Martino*, 710 So. 2d 20, 22 (Fla. 3d D.C.A. 1998).

³⁵ *Warner Cable Commc'ns, Inc. v. City of Niceville*, 581 So. 2d 1352, 1356 (Fla. 1st D.C.A. 1991); *Salazar v. Santos (Harry)*

& Co., Inc., 614 So. 2d 1125, 1127 (Fla. 3d D.C.A. 1993).

³⁶ *Logue v. Logue*, 766 So. 2d 313, 314-315 (Fla. 4th D.C.A. 2000) (applying the manifest injustice exception to the law of the case doctrine to correct a mathematical error in the formula that the appellate court used to calculate child support in a prior appellate ruling in the same case).

³⁷ See, e.g., *State v. Sigler*, 967 So. 835, 840 (Fla. 2007) (affirming the appellate court's ruling, which was contrary to the law of the case, and quoting the appellate court's rationale that "[i]f an illegal conviction is not well within the concept of exceptional circumstances and manifest injustice requiring a relaxation of the law of the case, it is not easy to imagine what would be" (quoting *Sigler v. State*, 881 So. 2d 14, 17 (Fla. 4th D.C.A. 2004)); *Lago v. State*, 975 So. 2d 613, 614 (Fla. 3d D.C.A. 2008) (applying the manifest injustice exception to the law of the case doctrine to correct a prison sentence that violated double jeopardy laws).

³⁸ *Green v. State*, 813 So. 2d 184, 185 (Fla. 2d D.C.A. 2002).

³⁹ See, e.g., *VLX Props., Inc. v. S. States Utils., Inc.*, 792 So. 2d 504, 509 (Fla. 5th D.C.A. 2001) (en banc) (stating that "[n]either this court nor the law is served by our adhering to a previous position which we now believe to be wrong").

⁴⁰ *Owen v. State*, 862 So. 2d 687, 694 (Fla. 2003).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Strazzula v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965).

⁴⁴ See, e.g., *Allstate Ins. Co. v. Perez*, 817 So. 2d 945, 945-946 (Fla. 3d D.C.A. 2002) (holding that adhering to the law of the case would not result in manifest injustice even though the applicable law had changed since the issue was previously resolved in the appellate court).

⁴⁵ See, e.g., *Tiede*, 870 So. 2d at 228-229.

⁴⁶ See *Hodges v. Marion County*, 774 So. 2d 950, 952 (Fla. 5th D.C.A. 2001) (holding that a party's mere contention that the prior appeal was wrongly decided was insufficient to overcome the law of the case).

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