

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

**A**n 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.<sup>1</sup>

The law of the case is a procedural bar that protects judicial resources and preserves the integrity of appellate rulings.<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup> 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 parties<sup>5</sup> in the same case in which an appellate court previously decided the matter at issue, either expressly or impliedly.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> However, if an issue was necessarily determined by the appellate court, the necessary resolution of the issue becomes the law of the case.<sup>14</sup>

Appellate rulings on preliminary matters decided before a factual record has developed generally do not constitute the law of the case.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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

