

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

City of Manchester, et al.

v.

William M. Gardner, Secretary of State

Docket No. 216-2012-CV-00366

~~PROPOSED ORDER~~

The petitioners, the City of Manchester, Hon. Barbara E. Shaw, and John R. Rist (collectively the "Manchester petitioners"), brought this action against the respondent, William M. Gardner, the Secretary of State, seeking a declaration that RSA 662:5 (2012) was unconstitutional and enjoining the respondent from implementing it. The New Hampshire House of Representatives, through its Speaker, intervened. Upon the agreement of the parties, this Court transferred the case to the New Hampshire Supreme Court without ruling. The New Hampshire Supreme Court held that all of the petitioners failed to meet their burden of proof to show that RSA 662:5 (2012) was unconstitutional and remanded the case.

Shortly after remand, this Court held a status conference to determine what, if any, issues remained to be adjudicated. At the hearing, the Manchester petitioners asserted only that the Supreme Court did not decide one of the arguments they had raised on appeal and that they were entitled to continue to litigate that argument on remand. The intervenor and the Attorney General disagreed, arguing that the Manchester petitioners were precluded from continuing to litigate that argument. The

court provided the parties with several weeks to submit memoranda of law on the issue.¹ The court held a hearing on those memoranda of law on August 29, 2012 and subsequently requested and accepted proposed orders from the parties.

Upon review of the parties' memoranda of law and arguments, the Court finds and rules as follows.

BACKGROUND

On March 28, 2012 the legislature enacted RSA 662:5 (2012), the law redistricting the New Hampshire House of Representatives. The City of Manchester filed suit to enjoin the Secretary of State from implementing RSA 662:5 (2012) on April 23, 2012. Two individuals subsequently joined the City of Manchester's lawsuit, the Hon. Barbara E. Shaw and John R. Rist. Numerous other lawsuits seeking temporary and preliminary injunctive relief against the implementation of RSA 662:5 (2012) followed.

On May 3, 2012, the parties had a temporary hearing before this Court. At the hearing, all of the petitioners, including the Manchester petitioners, requested that this Court transfer this case directly to the New Hampshire Supreme Court on a stipulated factual record for the Supreme Court to decide finally on the merits whether RSA 662:5 (2012) was unconstitutional. The intervenor objected to this procedure and suggested that the petitioners likely required an evidentiary hearing in order to secure the relief they sought. The petitioners, including the Manchester petitioners, disagreed with the intervenor's position. They represented that their claims did not require further factual development and indicated that they could stipulate to a factual record governing all of their claims. The intervenor subsequently agreed to transfer only if the factual record remained closed in this case after the interlocutory transfer

¹ During that time, all of the other petitioners whose cases had been consolidated with this case either entered a voluntarily non-suit with prejudice or a stipulation recognizing that the Supreme Court's opinion had concluded all of their claims finally on the merits.

statement was completed and submitted to this Court. The petitioners, the Attorney General, the intervenor, and the court ultimately agreed to transfer on this basis.

On May 14, 2012, the Supreme Court accepted transfer of this case. Among the issues the Supreme Court accepted for review was the following: “Whether RSA 662:5 is unconstitutional under the Federal or State Constitutions?” The Manchester petitioners submitted an initial brief to the Supreme Court wherein they raised numerous arguments regarding this issue, including the argument they seek to continue to litigate on remand. See, e.g., City of Manchester v. Sec’y of State, __ N.H. __, slip op. at 13, 15-16 (June 19, 2012). On June 6, 2012, during oral argument before the Supreme Court, the Manchester petitioners also raised several arguments regarding the constitutionality of RSA 662:5 (2012), including the argument they seek to continue to litigate on remand. Specifically, the Manchester petitioners began their oral argument as follows:

Article 11 requires allocating districts within the city to the extent possible. It calls for keeping towns and cities and wards whole. In New Hampshire, definitionally, towns include the term cities, and that’s in RSA 21:5, and also Articles 9 and 11, Part II, talk about ‘one or more’ seats available for individual towns or wards. There are several plans out there that give Manchester on its own 33 or 34 seats without involving adjoining towns.

Audio of Oral Argument, City of Manchester v. Sec’y of State, available at

<http://www.courts.nh.gov/cstream/index.asp>; *compare* Pets.’ Memo. Concerning Remaining Viable Issues in this Case, at 3 (“Petitioners plan to argue that Manchester is entitled as a whole to be treated like a town for purposes of Part II, Article 11, and not merely as an agglomeration of wards. *See*, RSA 21:5, 21:6 and 44:1.”).

On June 19, 2012, the Supreme Court issued its opinion in City of Manchester v. Secretary of State. The opinion addressed and resolved the issue of whether RSA 662:5 (2012) was unconstitutional: “These consolidated cases are before us on interlocutory transfer without ruling from the Superior Court (Brown, J.). The petitioners . . . seek a declaration that [RSA 662:5 (2012)] violates the State

Constitution. We conclude that such a declaration is unwarranted.” See City of Manchester, ___ N.H. ___, slip op. at 2-3. In analyzing whether the petitioners’ proposed redistricting plans persuaded it that the legislature’s redistricting plan was unconstitutional, the Supreme Court stated that “[n]one of the petitioners’ plans persuades us that [the legislature’s plan] lacks a rational or legitimate basis.” *Id.* at 11 (emphasis added). In reviewing the Gilford petitioners’ proposed plan, the Supreme Court held that “[t]his plan fails to persuade us that the legislature had no rational or legitimate basis for combining Gilford and Meredith in one district.” *Id.* at 12 (emphasis added). In addressing the City of Concord’s proposed plans, the Supreme Court held that “[n]one of these proposals convinces us that the legislature lacked a rational or legitimate basis for combining Concord Ward 5 and the Town of Hopkinton in a single district.” *Id.* at 13 (emphasis added). The Supreme Court subsequently rejected the proposed redistricting plan the Manchester petitioners seek to continue to litigate on remand using nearly identical language: “The Manchester petitioners contend that such a plan somehow would have complied more fully with Part II, Article 11. In the absence of developed argument, we are unpersuaded that this is the case.” *Id.* (emphasis added).

The Supreme Court went on to hold globally that: (1) “none of the plans the petitioners propose maintain a roughly equivalent level of population deviation as does the [legislature’s plan],” *id.* at 14 (internal quotations omitted); (2) “the petitioners have not presented evidence that any of their plans have an overall deviation range of under 10%,” *id.*; and (3) “[t]he petitioners have failed to persuade us that the trade-offs the legislature made in enacting [RSA 662:5 (2012)] were unreasonable,” *id.* at 15 (emphasis added) (internal quotations omitted). The Supreme Court ultimately concluded its opinion as follows: “Accordingly, because the petitioners have not met their burden of proving that [RSA 662:5 (2012)] violates the State Constitution, they are not entitled to the declaration they seek.” *Id.* at 16. The Supreme Court subsequently remanded the case. *Id.*

ANALYSIS

The Manchester petitioners assert that the Supreme Court did not rule on their argument that appears on page thirteen of the Supreme Court's slip opinion that "a [redistricting] plan [exists] under which Manchester would have thirty-three or thirty-four seats (two seats for each [of twelve] ward[s], plus nine or ten seats arranged in three or four floterial[s]) instead of the thirty-three seats currently allotted to Manchester under [RSA 662:5 (2012)] (31 [seats] . . . and two more . . . shared in a floterial district with Litchfield)," and that this proposed plan demonstrates that RSA 662:5 (2012) is unconstitutional under the State Constitution. *Id.* at 13 (internal quotations omitted). The Manchester petitioners do not appear to dispute that they raised this argument to the Supreme Court, see *Pets.* Memo. Concerning Remaining Viable Issues, at 2, 4, but assert only that the Supreme Court did not decide the argument. See generally id.

The Manchester petitioners also do not appear to argue, nor could they, that the factual record in this case is not closed. As stated earlier, at the outset of this litigation, the petitioners, including the Manchester petitioners, took the position that they wanted to proceed directly to the Supreme Court on a closed, stipulated merits record. The parties and this Court agreed to interlocutory transfer on that basis. Accordingly, the Manchester petitioners would be judicially estopped from arguing at this juncture that the factual record is not closed. See *Cohon v. IDM Software, Inc.*, 153 N.H. 1, 4 (2005) ("The doctrine of judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."); see also *Intellivision v. Microsoft Corp.*, ___ F.3d ___, 11-cv-1657, slip op. (2d Cir. June 2012) (affirming district court's holding that judicial estoppel can apply to different phases of the same case). Instead, the Manchester petitioners appear to argue that the Supreme Court's opinion in this case allows them to reopen the factual record.

The intervenor and the Attorney General disagree with the Manchester petitioners' assertions and characterizations of the Supreme Court's opinion. They argue, in the first instance, that the law of the case doctrine precludes the Manchester petitioners from re-litigating the issue of whether RSA 662:5 (2012) is unconstitutional and, in the second instance, that the Supreme Court actually decided the argument the Manchester petitioners seek to re-litigate and stated nowhere in its opinion that the factual record should be reopened. The court agrees with the intervenor and the Attorney General.

The law of the case doctrine provides that:

Questions once decided on appeal . . . are not ordinarily reexamined in the same case upon a subsequent appeal. The question decided on the first appeal is known as the law of the case, and becomes binding precedent to be followed in successive stages of the same litigation. Thus, where an appellate court states a rule of law, it is conclusively established and determinative of the rights of the same parties in any subsequent appeal or retrial of the same case.

Saunders v. Town of Kingston, 160 N.H. 560, 566 (2010) (emphasis added) (quoting Merrimack Valley Wood Prods. v. Near, 152 N.H. 192, 201 (2005)). Under the law of the case doctrine,

[o]nly such issues as have actually been decided, either explicitly, or by necessary inference from the disposition, constitute the law of the case. Thus while a party on the first appeal may not omit argument on a point of law necessarily involved in the disposition of an appeal and present it on a second appeal, points of law not reached and decided in the first appeal remain open on remand and on a second appeal.

Id. (emphasis added) (quoting Taylor v. Nutting, 133 N.H. 451, 456 (1990)).

The law of the case doctrine “operates to narrow the issues in successive stages of litigation and fosters uniformity of decisions and judicial economy.” Id. at 567 (emphasis added) (quoting City of San Antonio v. Edwards, 974 S.W.2d 148, 151 (Tex. App. 1998)). “The doctrine is based on public policy and is aimed at putting an end to litigation.” Id. (quoting City of San Antonio, 974 S.W.2d at 151). “Among the law of the case rules is the obligation of every court to honor the rulings of a court that stands higher in the hierarchical judicial structure.” Mason v. Texaco, Inc., 948 F.2d 1546, 1553 (10th Cir. 1991).


The Manchester petitioners' assertion that the law of the case doctrine does not apply because the argument they seek to continue to litigate was not decided on appeal misapprehends the law. The law of the case doctrine precludes the re-litigation of issues actually decided on appeal. See Saunders, 160 N.H. at 566; Taylor, 133 N.H. at 456. An issue is “[a] point in dispute between two or more parties.” BLACK’S LAW DICTIONARY 907 (9th ed. 2009). The legal issue before the Supreme Court in City of Manchester v. Secretary of State was: “Whether RSA 662:5 [was] unconstitutional under the Federal or State Constitutions.” The Supreme Court decided this issue on a closed, stipulated merits record, holding that none of the petitioners, including the Manchester petitioners, had met their burden of proof of demonstrating that RSA 662:5 (2012) was unconstitutional. This legal holding constitutes a ruling of law on the legal issue before the Supreme Court and is entitled to preclusive effect under the law of the case doctrine.

An argument, on the other hand, is “[a] statement that attempts to persuade.” BLACK’S LAW DICTIONARY 121. Arguments are generally made in an effort to persuade a decision-maker to decide an issue in one’s favor. See id. (defining argument as “the remarks of counsel in analyzing and pointing out or repudiating a desired inference, for the assistance of the decision-maker”). The argument the Manchester petitioners seek to continue to litigate was raised in an attempt to persuade the Supreme Court that RSA 662:5 (2012) was unconstitutional. See City of Manchester, __ N.H. __, slip op. at 13. Upon review of the Supreme Court’s opinion, it appears that the Supreme Court rejected this argument, see id., and that the Supreme Court did not permit the Manchester petitioners the opportunity to reopen the closed factual record. The Manchester petitioners attempt to re-assert in this Court the same argument they raised on appeal is simply an attempt by them to re-litigate the same issue the Supreme Court already decided on interlocutory transfer.

Accordingly, the law of the case doctrine precludes the Manchester petitioners from re-litigating the argument that appears on page thirteen of the Supreme Court's opinion. The Manchester petitioners' request to continue this case on remand is therefore DENIED. The Manchester petitioners have not represented that any outstanding issues beyond those subject to this opinion remain to be adjudicated in this case. Accordingly, the Manchester petitioners' petition is DISMISSED with prejudice.

SO ORDERED.

2/17/12
Date



Kenneth C. Brown
Presiding Justice