

State of New Hampshire Supreme Court

IN THE MATTER OF
TATJANA DONOVAN
and
ROBERT DONOVAN

N.H. Sup. Ct. No. 2004-0288

OBJECTION TO MOTION TO ADD LATE AUTHORITY

NOW COMES Robert Donovan, by and through his attorney, Joshua L. Gordon, and respectfully objects to Tatjana Donovan's Motion to Add Late Authority.

As grounds it is stated:

1. Tatjana Donovan has filed a Motion to Add Late Authority, attached to which is the purported authority, a Superior Court order. Robert Donovan objects on two grounds: Superior Court orders are not "authority" within the meaning of this Court's citation rules, and the grounds relied on by the Superior Court in its order were not argued or preserved by Tatjana.

I. Superior Court Orders are Not "Authority" Within Supreme Court Rules

2. The Supreme Court Rules provide:

Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief, he may similarly file . . . such new matters up to and including the day of oral argument, or by leave of the supreme court thereafter.

SUP. CT. R. 16(7) (emphasis added).

3. In the American system there are, obviously, various types of legal authority – some binding, some not. To be authority, however, a case has to have some precedential value. *See e.g., Karl N. Llewellyn, 3 Encyclopedia of the Social Sciences 249 (1930)* (“generalizations contained in, or built upon, past decisions, when taken as normative for future disputes, create a legal system of precedent”).

4. Unlike in some states, notably Pennsylvania, New Hampshire’s court of general jurisdiction – the Superior Court – is not a court of record.¹ This means that its decisions are not binding on anyone except the parties named in the caption. Although lawyers may be aware of certain judges’ positions on unsettled issues, Superior Court orders have no precedential value. This is not the case, for example, of federal courts of general jurisdiction – the federal district courts – many decisions of which are published in the Federal Supplement. Federal district court opinions are precedent within the federal district and are therefore cite-able as authority in other trial and appellate courts.

5. Although it was in a criminal case, this Court quoted Webster’s Dictionary to construe “authority” to mean the “power to require and receive submission: the right to expect obedience: superiority derived from a status that carries with it the right to command and give final decisions.” *State v. Carter*, 140 N.H. 114, 116 (1995); *see also State v. Fortier*, 146 N.H. 784, 794 (2001). The Superior Court is bound to follow this Court; the reverse is not true. Accordingly, the decision attached to Tatjana’s motion is not “authority” within the meaning of Supreme Court Rule 16(7).

¹By legislation enacted early in New Hampshire’s history, the Supreme Court is a court of record. RSA 505:1, *et seq.* (providing for court reporter, requiring publication of opinions, etc.). No such statute applies to the Superior Court.

6. Until the Superior Court is fully made a court of record², there is also an institutional danger in allowing the routine citation of Superior Court orders. Because it is not a court of record, its orders are not widely nor comprehensively published, and are not listed in any digest or legal search resource. Thus, to find an on-point Superior Court order, one must cast around among one's lawyer friends, have extensive contacts in the various courts, or self-create some system of gathering and organizing them. The pioneers of *stare decisis*-based legal analysis, nearly a thousand years ago, recognized this problem and thus developed a system of law reporters. See e.g., Richard Fitz-Nigel, *DIALOGUS DE SCACCARIO* (1179), cited in Henry J. Abraham, *THE JUDICIAL PROCESS*, 6th Ed. 9 (1993).

7. This means that for those with sufficient interest or resources, orders of the Superior Court can be regularly accessed; but for everyone else, they cannot. Such uneven availability of legal materials creates constitutional problems. See e.g., *Bounds v. Smith*, 430 U.S. 817 (1977) (inmates' right of access to law libraries).

8. Moreover, citation to unreported cases are barred by the rules of this Court, which provide:

Citations to other State court decisions may either be: (a) to the official report and to the West Reporter system, with the year of decision; or (b) to the West Reporter only, in which case the citation should identify the State court by name or level, and should mention the year of decision.”)

SUP. CT. R. 16(9).

²The posting of Superior Court orders on the Supreme Court listserve is a step in this direction, but it is not yet sufficiently comprehensive, regular, digested, or mandated to allow the Superior Court to be considered a court of record.

9. There is no question that citation of trial court orders is useful for some purposes.

This Court's Notice of Discretionary Appeal form, for instance, in paragraph 14 suggests that a reason for accepting an appeal might be

The case raises a question of first impression, a novel question of law, an issue of broad public interest, an important state or federal constitutional matter, or an issue on which there are conflicting decisions in New Hampshire courts.

FORM, <http://www.courts.state.nh.us/supreme/orders/discretionary_noa_form.pdf>.

II. Grounds for Decision Not Preserved

10. Even if this Court allows Tatjana to use the unreported Superior Court order as "authority," it is not useful in this case because the issues decided in the Superior Court order attached to Tatjana's motion were waived by Tatjana, and are therefore un-preserved.

11. In her brief, Tatjana argued that a new statute regarding college costs conflicts with an older less specific statute, and that this court should (in derogation of accepted rules of statutory construction) reconcile them. *Appellant's Answering Brief* at 5-7.

12. The Hillsborough County Superior Court order attached to Tatjana's motion addresses similar issues, but on very different grounds. It suggests that application of the new law is barred by the statute's language, its legislative history, and the constitution. Either through inadvertence or strategic choice, Tatjana has never advanced such notions. In any case, she cannot now advance them under the guise of merely citing a late authority. The Superior Court order is thus inapposite to this case and should be disregarded.

WHEREFORE, Robert Donovan respectfully requests this honorable Court to deny Tatjana Donovan's Motion to Add Late Authority.

Respectfully submitted
for Robert Donovan
by his attorney,

Dated: December 14, 2004

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I hereby certify on this 14nd day of December 2004, a copy of the foregoing is being forwarded to Bronwyn Asplund-Walsh, Esq..

Dated: December 14, 2004

Joshua L. Gordon, Esq.