State of New Hampshire
Supreme Court

NO. 2019-0241

2019 TERM

OCTOBER SESSION

In the Matter of Ginger Allen and William Allen

RULE 7 APPEAL OF FINAL DECISION OF THE
MERRIMACK FAMILY COURT

BRIEF OF WILLIAM ALLEN, RESPONDENT/APPELLANT

October 14, 2019

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
(603) 226-4225 www.AppealsLawyer.net
75 South Main St. #7
Concord, NH 03301
NH Bar ID No. 9046

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Hampshire Cases

New Hampshire Statutes & Rules

QUESTIONS PRESENTED

I. Did the court err in improperly making findings of fact when ruling on a motion to dismiss, and err in granting the motion to dismiss?

Preserved: *Final Hrg*. at 2, 11-12; OBJECTION TO MOTION TO DISMISS (Dec. 16, 2018).

II. Did the court err in not allowing amendment of the petition to modify support, in order to consider all the evidence of the parties' comparative incomes including Ginger's raise?

Preserved: *Final Hrg*. at 9; MOTION TO AMEND PETITION (Dec. 16, 2018)

III. Did the court err in finding that William had two jobs simultaneously and ignoring health issues which caused a decrease in earnings?

Preserved: *Final Hrg*., *passim*; MOTION TO AMEND PETITION (Dec. 16, 2018)

IV. Did the court err in ordering William to pay Ginger's attorneys fees, when there was no basis for fee shifting?

Preserved: OBJECTION TO AFFIDAVIT OF FEES (Jan. 28, 2019); MOTION TO RECONSIDER FEES (Apr. 8, 2019).

STATEMENT OF FACTS AND STATEMENT OF THE CASE

William Allen and Ginger Allen were married in 1998, had a child in 2001, and were divorced in 2016.[1] Their divorce decree split their property, allocated parenting, and obligated William pay Ginger alimony and guidelines child support. The amounts were based on Ginger's annual income of about $71,000, and William's income as an airline pilot, which the court calculated at about $99,000 annually. ORDER ON FINAL HEARING (Nov. 21, 2016), *Appx*. at 9. The decree required that "[e]ach party shall promptly notify the other of … any material change in employment." FINAL DECREE ON PETITION FOR DIVORCE (Nov. 21, 2016) at 5, *Appx*. at 3.

In 2017, William experienced health issues which kept him out of work for three months and required surgery. Because his condition affected his ability to walk, it restricted which airports and flights were available to him. PETITION TO MODIFY SUPPORT (Feb. 13, 2018), *Appx*. at 11; OBJECTION TO MOTION TO DISMISS ¶1 (Dec. 16, 2018), *Appx*. at 26; *Mot.Hrg.* (Aug. 13, 2018) at 30-31. To William, this meant he had to leave his job at ExpressJet, where he had worked for 22 years, and a choice between collecting permanent disability or seeking alternative employment. PETITION TO MODIFY SUPPORT; OBJECTION TO MOTION TO DISMISS ¶10.

While the final day of William's employment with ExpressJet is unclear from the record, *Final Hrg*. at 3 (Ginger alleging "disparity on his personnel records," but records not entered into evidence); *see also Final Hrg*. at 6-7, he joined his new employer, JetBlue, on February 21, 2018 – though at a reduced rate of pay and with fewer hours of flying. *Mot.Hrg*. at 23-25; PETITION TO MODIFY SUPPORT ¶ 8-9; OBJECTION TO MOTION TO DISMISS ¶6.

---

[1]Because of a shared surname, the parties are referred to herein by their first names. No disrespect is intended.

On February 13, 2018, William filed a petition to modify alimony and child support, seeking to align his obligations with his changed circumstances. PETITION TO MODIFY SUPPORT (Feb. 13, 2018), *Appx*. at 11. Filed a week before he started his new job, the petition fulfilled his duty to "promptly notify" Ginger of changes in employment.

Ginger objected. OBJECTION TO MOTION TO MODIFY SUPPORT (Mar. 2, 2018), *Appx*. at 15. She believed William's new job at JetBlue was a ploy: because it "was the only way [he] could challenge" support, OBJECTION TO MOTION TO MODIFY SUPPORT ¶16, he "voluntarily obtain[ed] a lower paying position in order to modify … his child support and alimony obligation." OBJECTION TO MOTION TO MODIFY SUPPORT ¶¶ 17, 9-11; *Mot.Hrg*. at 22-24.

Ginger thus assiduously invoked the mandatory discovery requirements of the family court, FAM.CT.R. 1.25-A(B)(1), seeking details of William's medical conditions, seniority pay scales, and flight opportunities. *Mot.Hrg*. at 21-32; OBJECTION TO MOTION TO MODIFY SUPPORT ¶19; MOTION TO COMPEL DISCOVERY ¶14 (June 15, 2018) (omitted from appendix); ORDER ON CONTEMPT (Aug. 29, 2018) (omitted from appendix); MOTION TO ADMIT DEPOSITION OF DOCTOR (Nov. 16, 2018) (omitted from appendix); OBJECTION TO DEPOSITION (Nov. 21, 2018) (omitted from appendix); MOTION TO ADMIT MEDICAL RECORDS (Nov. 30, 2018) (omitted from appendix); OBJECTION TO MEDICAL RECORDS (Dec. 5, 2018) (omitted from appendix); NOTICE OF DECISION (on limine motions) (Nov. 30, 2018) (omitted from appendix).

William learned, from a paycheck attached to Ginger's financial affidavit (filed on the day of the hearing), that Ginger had recently changed jobs. The paycheck demonstrated that Ginger had not only neglected her prompt notification obligation, but that her new job paid her $90,000 annually, about $15,000 more than her old job. ADP EARNINGS STATEMENT (Nov. 16, 2018), *Sealed Appx*. at 6.

At the hearing, William alerted the court to Ginger's new salary. *Final Hrg*. at 9. A few days later, based on this "newly discovered information," William also filed a motion to amend his initial petition, to take Ginger's propitious circumstances into account in calculating support. MOTION TO AMEND PETITION (Dec. 16, 2018), *Appx*. at 23. After an objection, response, order, and reconsideration, the court denied the amendment without explanation. *Id.* (denied by margin order, Dec. 31, 2018); OBJECTION TO AMENDMENT (Dec. 20, 2018), *Appx*. at 30; NOTICE OF DECISION (Dec. 31, 2018), *Addendum* at 30; MOTION TO RECONSIDER AMENDMENT (Jan. 10, 2019), *Appx*. at 40 (denied by margin order, Jan. 26, 2019); OBJECTION TO RECONSIDER AMENDMENT (Jan. 19, 2019), *Appx*. at 52; NOTICE OF DECISION (Jan. 28, 2019), *Addendum* at 31.

Meanwhile, Ginger had received (a week before the hearing), nine of William's ExpressJet paychecks. Inconsistently dated, the paystubs covered most of the period between January 1 and June 30, 2018 – about six weeks before his new job at JetBlue, to about four months after. EXPRESSJET PAYSTUB (Jan. 15, 2018), *Appx*. at 68; EXPRESSJET PAYSTUB (Jan. 19, 2018), *Appx*. at 69; EXPRESSJET PAYSTUB (Jan. 25, 2018), *Appx*. at 70; EXPRESSJET PAYSTUB (Jan. 31, 2018), *Appx*. at 71; EXPRESSJET PAYSTUB (Feb. 15, 2018), *Appx*. at 72; EXPRESSJET PAYSTUB (Feb. 28, 2018), *Appx*. at 73; EXPRESSJET PAYSTUB (Mar. 15, 2018), *Appx*. at 74; EXPRESSJET PAYSTUB (May 31, 2018), *Appx*. at 75; EXPRESSJET PAYSTUB (June 30, 2018), *Appx*. at 76.

The nine paystubs show several types of earnings, and also benefits disbursements:

Pay Period	Type of Compensation During Period
Two-week period: January 1 to January 15	Regular and per diem wages, disability pay,[2] sick pay, vacation pay, "imputed-excess"[3]
One-day period: January 19	Profit sharing, retention bonus
One-day period:[4] January 25	Bonus pay
Two-week period: January 16 to January 31	Regular wages, disability pay, "imputed-excess"
Two-week period: February 1 to February 15	Regular and per diem wages, disability pay, "over guarantee,"[5] "imputed excess," "duty ovrride"[6]
Two-week period: February 16 to February 28	Vacation pay
Two-week period: March 1 to March 15	Regular and per diem wages, sick pay, training pay
Two-week period:[7] May 16 to May 31	Vacation pay
Two-week period:[8] June 16 to June 30	Vacation pay

[2]"Disability pay" refers to the entry "Imputed LTD" on the paystubs, but its meaning is unexplained in the record.

[3]The meaning of "imputed-excess" is unexplained in the record.

[4]The existence of two one-day pay periods, both within the two-week period from January 16 to January 31, is unexplained in the record.

[5]The meaning of "over guarantee" is unexplained in the record.

[6]The meaning of "duty ovrride" is unexplained in the record.

[7]The gap between March and May is unexplained in the record.

[8]The gap for the first half of June is unexplained in the record.

The record of payments shows that William was paid regular or per diem wages twice in January, once in February, and once in March, but never after that. He received a bonus in January. He got disability or sick pay in January, February, and March. There were three disbursements for unused vacation, in February, May, and June. Beyond the nine paystubs, there is no other evidence in the record regarding William's employment dates, pay rates, or outstanding benefits.

Ginger surmised from this that William had two jobs at one time; he was being "double compensated," making *both* "$48,168.00 per year from JetBlue and … $88,362.00 per year from ExpressJet." This totals $136,530 – about $37,000 more than he ever earned. *See* ORDER ON FINAL HEARING (Nov. 21, 2016), *Appx*. at 9 (imputed income of "$8,283 per month," or $99,396 per year).

Ginger thus argued William should pay support commensurate with that supposed income. Ginger also claimed that disbursements of benefits – disability, vacation, and sick time – should be counted as income. *Final Hrg*. at 3, 6-7; MOTION TO DISMISS & FOR FEES ¶ 12 & *passim* (Dec. 10, 2018), *Addendum* at 23; REPLICATION TO OBJECTION TO MOTION TO DISMISS ¶¶ 4-7 (Dec. 20, 2018), *Appx*. at 31. William answered that he did not have two jobs: the existence of ExpressJet paychecks after his resignation is explained by union rules which require that terminated employees be kept on the payroll for six months to ensure full disbursement of all benefits due, and that benefits disbursements for terminated employees are paid in installments rather than by lump sum. He argued that benefits disbursements are not income for purposes of calculating support. *Final Hrg*. at 4-6; OBJECTION TO MOTION TO DISMISS ¶¶ 7-8 (Dec. 16, 2018), *Appx*. at 26.

Though conceding she had no evidentiary support beyond her lawyer's "widely known" "idea about the compensation of airlines," OBJECTION TO

MOTION TO MODIFY SUPPORT ¶ 12; *Mot.Hrg*. at 22, Ginger also alleged that William would earn more at JetBlue than he had at ExpressJet.[9] *Mot.Hrg*. at 25-27; *Final Hrg*. at 5, 7-9; OBJECTION TO MOTION TO MODIFY SUPPORT ¶ 7, 12-15. William said he would be earning substantially less. *Final Hrg*. at 5-6, 8, 10-11; PETITION TO MODIFY SUPPORT ¶¶ 8-9; OBJECTION TO MOTION TO DISMISS ¶ 14; MOTION TO RECONSIDER DISMISSAL ¶ 4 (Jan. 9, 2019), *Appx*. at 37.

Because, Ginger argued, William's petition for modification did not accurately report his job situation, his benefits payments, or his likely new earnings, his situation had not changed. Thus, on the day of the hearing, Ginger filed a motion to dismiss. MOTION TO DISMISS & FOR FEES (Dec. 10, 2018), *Addendum* at 23.The court gave William leave to file a post-hearing response, which he did. *Final Hrg*. at 11-12; OBJECTION TO MOTION TO DISMISS ¶7 (Dec. 16, 2018), *Appx*. at 26.

Ginger presumed that because William knew his income had increased and was rising, he had purposely misled the court in his original petition to modify, and should therefore pay her attorneys fees. MOTION TO DISMISS & FOR FEES; *Final Hrg*. at 2-3, 6-7; REPLICATION ¶¶ 4-6, 9 (Dec. 20, 2018), *Appx*. at 31; OBJECTION TO RECONSIDERATION ON DISMISSAL ¶¶ 2, 5 (Jan. 16, 2019), *Appx*. at 43; OBJECTION TO RECONSIDERATION ON AMENDMENT ¶ 5. William objected. OBJECTION TO MOTION TO DISMISS & FOR FEES ¶ 12.

A final hearing was held on December 10, 2018, at which William was prepared to offer evidence of his medical condition, his disability, and his salary scheme. OBJECTION TO MOTION TO DISMISS ¶¶ 5-15. The hearing was scheduled to take 5½ hours, but lasted just 16 minutes. *Mot.Hrg*. at 43; NOTICE

[9] Ginger made no effort to reconcile this allegation with her earlier contention that William took the job at JetBlue for the purpose of making less money in order to pay less child support.

OF HEARING (May 15, 2018), *Appx*. at 20; *Final Hrg*., *passim*. This was because, upon court convening, Ginger filed her motion to dismiss. Although William's lawyer told the court William was not prepared to argue the late-filed motion, because the court understood the motion "could be dispositive," *Final Hrg*. at 2, it narrowed the proceeding to consist wholly of Ginger's lawyer reciting her allegations, with William's lawyer rebutting. *Final Hrg*., *passim*.

No evidence was taken. William never submitted his financial affidavit, and the discovery material about his medical condition and compensation program was never reached. The only documents identified were William's nine paystubs, which had been attached to a pleading, and Ginger's sealed financial affidavit with paycheck. *Final Hrg* at 3. After the hearing, the parties submitted pleadings and arguments, but no further facts.

A few weeks later, the Merrimack Family Court (*Michael J. Ryan*, J.) dismissed the case, approving Ginger's proposed order. MOTION TO DISMISS & FOR FEES (margin order, Dec. 31, 2018); ORDER ON MOTION TO DISMISS (Dec. 31, 2018) (margin order), *Addendum* at 28; NOTICE OF DECISION (Dec. 31, 2018), *Addendum* at 30. The court held that William's paystubs showed he was being paid by ExpressJet and JetBlue simultaneously, totaling $136,530 per year. It ruled that William's petition to modify "lacks a basis in fact," and dismissed the case. ORDER ON MOTION TO DISMISS ¶ 5.

The phrase "frivolous suit" was crossed-out from Ginger's proposed order. Without further explanation, however, the court ordered that William "shall pay all of [Ginger's] reasonable attorneys fees." *Id.*

William requested reconsideration, noting the court had not heard evidence of all the circumstances, presumed a salary of $136,530 without any evidentiary basis, ignored Ginger's elevated income, and neglected to consider the consequences of William's diminished health. MOTION TO RECONSIDER DISMISSAL (Jan. 9, 2019) (margin order, Jan. 26, 2019), *Appx*. at 37;

OBJECTION TO RECONSIDERATION OF DISMISSAL (Jan. 16, 2019), *Appx*. at 43. He also asked the court to put the "matter back on [its] docket for an evidentiary hearing." OBJECTION TO MOTION TO DISMISS & FOR FEES, ¶B. Reconsideration was denied. NOTICE OF DECISION (Jan. 28, 2019), *Addendum* at 31.

Ginger's attorney then submitted an affidavit of fees, totaling $18,341.50. AFFIDAVIT OF LEGAL FEES (Jan. 18, 2019), *Appx*. at 46. William objected on the grounds that there had been no finding of frivolous litigation – such a finding was explicitly excised from the proposed order – and there were no other grounds for fee shifting. William again argued that he had suffered medical issues which precipitated a change in employment and a commensurate decrease in earnings, and contended that the amount of Ginger's lawyer's fees was unreasonable. OBJECTION TO AFFIDAVIT OF FEES (Jan. 28, 2019), *Appx*. at 55; RESPONSE TO OBJECTION ON FEES (Jan. 31, 2019), *Appx*. at 58. The court approved the fees, to be paid within 90 days. NOTICE OF DECISION (Mar. 27, 2019), *Addendum* at 32. William requested reconsideration, Ginger objected, and the court denied. MOTION TO RECONSIDER FEES (Apr. 8, 2019) (margin order, Apr. 30, 2019), *Appx*. at 61; OBJECTION TO RECONSIDERATION OF FEES (Apr. 11, 2019), *Appx*. at 65; NOTICE OF DECISION (May 8, 2019), *Addendum* at 33.

This appeal followed.

SUMMARY OF ARGUMENT

William notes that the purpose of a motion to dismiss is to test legal issues against allegations that are assumed to be true, not to determine the truth of factual allegations. He argues that the court perverted the purpose of the procedure by finding facts, and by then determining the outcome (and awarding attorneys fees) based on those findings.

Regarding Ginger's new job with higher compensation, William contends that the court should have allowed him to amend his petition to account for the new information, and continued the hearing so the parties could address the matter and so the court could determine support based on full information.

William objects to the award of attorneys fees when all he did was file a petition to modify support after health issues affected his ability to work and the amount he can earn. He points out that the court made no findings that would support an award of fees, and that no such finding is supportable.

William thus requests reversal of the dismissal and grant of attorneys fees, and a remand for a full hearing of all the evidence on both parties' financial situations.

ARGUMENT

I. Family Court Improperly Granted Ginger's Motion to Dismiss

The purpose of a motion to dismiss is to test legal issues. The court assumes the truth of the facts alleged, and determines whether, given those facts, they state a legal claim.

> In reviewing a trial court's grant of a motion to dismiss, our task is to determine whether the allegations in the complaint are reasonably susceptible of a construction that would permit recovery. We assume all facts pleaded in the complaint to be true and construe all reasonable inferences drawn from those facts in the plaintiff's favor. … We engage in a threshold inquiry that tests the facts in the complaint against the applicable law, and if the allegations constitute a basis for legal relief, we must hold that it was improper to grant the motion to dismiss.

Estate of Mortner v. Thompson, 170 N.H. 625, 631 (2018) (citations omitted).

All known family-law cases which resolved on a motion to dismiss, in accord with the axiom, assumed the petitioner's allegations, and then decided a purely legal question. *See, e.g*, *Mortner*, 170 N.H. at 631 (whether unjust enrichment applies after abatement of divorce action due to death of party); *Matter of Serodio*, 166 N.H. 606, 609 (2014) (whether prenuptial agreement is valid when signed original is lost); *Surprenant v. Mulcrone*, 163 N.H. 529, 530-31 (2012) (whether GAL enjoys judicial immunity); *Gray v. Kelly*, 161 N.H. 160, 164 (2010) (whether replevin is available in a domestic violence action); *In re J.B.*, 157 N.H. 577, 579 (2008) (whether statute allows a non-parent to maintain a parenting petition); *Matter of Lemieux*, 157 N.H. 370, 372-73 (2008) (whether reformation of contract exists for mutual mistake of fact); *In re Kenick*, 156 N.H. 356, 358 (2007) (whether amended alimony statute applied retroactively); *In re Juvenile 2004-789-A*, 153 N.H. 332, 334 (2006) (whether statute permits school district to recoup costs of special education); *In re Hunt*, 146 N.H. 65, 66-67 (2001) (whether movant in modification of child custody action must prove a material change in circumstances).

In *In re Larue*, 156 N.H. 378 (2007), there had been a stipulation regarding parents' visitation schedules, which the parties had not strictly followed, leading the mother to request that the course of conduct be memorialized in a modification of the parenting plan. The family court granted the father's motion to dismiss on the grounds that "[t]he allegation upon which [mother] premises her motion to modify *is factually incorrect*." *Id.* at 379 (emphasis added). This court reversed, finding that because the parties' intentions were ambiguous, the mother "alleged sufficient facts to withstand a motion to dismiss." *Id.* at 381. This court ordered that "[a] factual finding after an evidentiary hearing is necessary to determine whether or not an express or implied agreement to modify occurred." *Id.*

Here, the family court's grounds for dismissal – that William's petition to modify "lacks a basis in fact" – is identical to the "factually incorrect" grounds reversed in *Larue.*

William alleged in his petition that, due to his health, his salary was decreasing. Assuming William's allegations are true, which the court must, Ginger never suggested they did not state a basis to modify. *See* RSA 458:14, :19, :19-aa (modification of alimony) and RSA 458-C:7 (modification of child support). Because William's "allegations constitute a basis for legal relief, [this court] must hold that it was improper to grant the motion to dismiss." *Mortner*, 170 N.H. at 631.

II. Because The Court Dismissed Before Hearing Evidence, it Was Precluded from Finding Facts on Any Matter, But Nonetheless Made Findings of Fact

In a modification proceeding, the court "should consider *all* relevant evidence with regard to the ability of *all* persons owing a duty to support the children. This includes all of the assets and income of all parties." *In re Rohdenburg*, 149 N.H. 276, 280 (2003) (emphasis in original) (quotations and citations omitted).

The court terminated the evidentiary hearing, and dismissed the case without hearing any witnesses, and without benefit of William's personnel or health records. Yet it made findings of fact. As a result, the court incorrectly considered William employed by ExpressJet, after whatever date he was no longer employed there. To the extent the court counted as income the disbursements for unused benefits, it should not have, because they are not compensation. The court also should not have calculated William's future earnings at JetBlue, because there was no factual basis on which to calculate.

The only documents available for the court's consideration regarding William's jobs situation and earnings were the ExpressJet pay stubs. From these alone, Ginger inferred that William was simultaneously working at both ExpressJet and JetBlue, and that his pay was about to increase – matters that cannot possibly be gleaned from the paystubs. What types of compensation the paystubs represent is unclear, whether some payments are disbursements for unused benefits is unknown, and even the end-date of William's employment was not identified. The court never inquired regarding William's health, or whether it affected his ability to maintain this or that job. The court took no evidence on the two companies' compensation schemes or available work hours.

The court nonetheless found that William had two simultaneous pilot jobs, and that his salary would increase by $37,000 despite his health problems. Without hearing evidence, however, the court could not properly make these determinations. Accordingly, as in *Larue*, this court should reverse the dismissal, and order a resumption of evidentiary proceedings in the family court.

III. Court Should Have Allowed Amendment of William's Petition

As noted, in a modification proceeding, the court "should consider *all* relevant evidence with regard to the ability of *all* persons owing a duty to support the children. This includes all of the assets and income of all parties." *Rohdenburg*, 149 N.H. at 280 (emphasis in original) (quotations and citations omitted).

At the truncated hearing, Ginger filed her financial affidavit, to which she had attached a recent paycheck. The paycheck revealed that Ginger had a new employer, and enjoyed substantially higher pay than before – thus adding a basis for modifying support. *See* RSA 458:19, IV(b) (in setting alimony, "the court shall consider the … occupation [and] amount and sources of income … of each of the parties"); RSA 458-C:3, II(b) ("total child support obligation shall be divided between the parents in proportion to their respective incomes").

William thus requested amendment of his petition, to add as a basis for modification of support obligations, both the fact and magnitude of Ginger's $15,000 raise. It would have promoted justice to allow the amendment, *see Bel Air Assocs. v. New Hampshire DHHS*, 154 N.H. 228, 235-36 (2006), especially insofar as any tardiness was caused by Ginger in failing to "promptly notify" William of changes in her employment. And the court could have rescheduled the hearing to take evidence regarding both parties' earnings.

Admittedly, William can file a new petition, and probably would have, but was deterred by the court's order that he pay Ginger's attorneys fees.

IV. Court Erred by Awarding Attorneys Fees

Regarding attorneys fees, “New Hampshire generally follows the American Rule; that is, absent statutorily or judicially created exceptions, parties pay their own.” *Shelton v. Tamposi*, 164 N.H. 490, 501 (2013).

> An award of attorney’s fees must be grounded upon statutory authorization, a court rule, an agreement between the parties, or an established exception to the rule that each party is responsible for paying his or her own counsel fees.

In re Martel, 157 N.H. 53, 63 (2008). The court “can order a party who has instituted or prolonged litigation through bad faith or obstinate, unjust, vexatious, wanton, or oppressive conduct, to pay his opponent’s counsel fees.” *Harkeem v. Adams*, 117 N.H. 687, 688 (1977). *But see In re Hampers*, 154 N.H. 275, 290 (2006) (“In [divorce] cases, the trial court has the discretion to award … attorney’s fees when the trial court has found need on the part of one party and ability to pay on the part of the other.”) (quotation omitted).

It is unknown what the basis was for an award of attorneys fees here. The court explicitly declined to find that William’s petition was frivolous, and it did not identify any agreement, statute, or other grounds. It nonetheless ordered William pay Ginger’s lawyer over $18,000.

William filed his petition to modify because he suffered a health problem which restricted his ability to fly, forcing him to take a different job with a lower salary. He was prepared to prove all of that during the scheduled 5½ hour hearing, but the court truncated after 16 minutes, and did not reschedule, robbing him of the opportunity.

In *Harkeem*, this court noted that among the reasons for the American Rule is that “the threat of having to pay an opponent’s costs might unjustly deter those of limited resources from prosecuting or defending suits.” *Harkeem*, 117 N.H. at 690. William’s request to modify support in this case was based on his declining financial situation, and he has been unjustly deterred from filing a renewed petition.

With no statutory or other justification, the court erred in awarding fees, and this court should reverse.

CONCLUSION

The family court made a preposterous finding that William had two jobs simultaneously, while ignoring his health issues which caused him to work less, not more. The only evidence for these findings was incomplete paystubs, which on their face cannot possibly support the findings accorded to them. By making these findings and deciding the matter on a motion to dismiss, rather than after an evidentiary hearing, the court perverted the purpose of dismissal, which is not for finding facts, but for testing whether assumed facts state a legal claim. The court compounded its error first by refusing evidence of Ginger's increased income, and then by groundlessly awarding attorneys fees.

The family court effectively circumvented the standard litigation process. If the procedure used here is allowed, it will undermine traditional expectations that courts decide facts after hearing evidence.

REQUEST FOR ORAL ARGUMENT

Because the issues raised in this appeal could affect the pattern of litigation in all New Hampshire courts, it is of concern to all citizens, and this court should thus entertain oral argument.