State of New Hampshire Supreme Court

NO. 97-235

1997 TERM

AUGUST SESSION

MICHAEL GLICK

v.

VICTORIA NAESS

RULE 7 APPEAL FROM FINAL DECISION OF SUPERIOR COURT

BRIEF OF PLAINTIFF/APPELLANT, DR. MICHAEL GLICK

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QUESTIONS PRESENTED

1. Was the Plaintiff entitled to rely upon the court's order setting forth the elements of liability, and upon a reasonable construction of New Hampshire law, and if so was the award of attorneys fees unjustified as a matter of law?

2. Did the court err in granting the defendant attorney's fees in light of Dr. Glick's lack of bad faith, and in light of the evidence he presented on the elements of liability, which elements were based on a reasonable construction of New Hampshire law and the Court's previous order?

STATEMENT OF THE CASE

Michael Glick and Victoria Naess were divorced in 1992. Their decree ordered that two of their four children were to live with their mother and the other two (Ephriam and Henry) with their father. In 1994, Ms. Naess sought an *ex parte* modification of the children's living arrangements. The Carroll County Superior Court (*O'Neill*, J.) held an emergency hearing without notifying Dr. Glick. The crux of Ms. Naess's offer of proof at the *ex parte* hearing was that the two children living with Dr. Glick were in imminent danger of being held back a grade in school because Dr. Glick was refusing to send them to school. The court granted Ms. Naess's request, and as a result Dr. Glick lost primary custody of his two sons. *Appendix to NOA* at 2-3.[1]

In fact, the boys were in no danger of being held back, and there was nothing warranting emergency involvement of the court.

Thereafter, Dr. Glick sued Ms. Naess for her conduct in pressing the court for emergency relief. The suit alleged five separate counts. Upon Ms. Naess's motion, three of them were dismissed while the two remaining counts alleged that Ms. Naess's conduct in obtaining *ex parte* relief was a tortious interference with custody, and an intentional infliction of emotional distress. The factual predicate for both was that Ms. Naess made misrepresentations to the court concerning the supposed imminence of the children repeating a grade in school. *Appendix to NOA* at 4-9.

Both of Dr. Glick's claims were in developing areas of the law, and each is grounded in a

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[1]Citations to the record are as follows:
"Appendix to NOA" refers to the Appendix to the Notice of Appeal.
"*Appendix to Brief*" refers to the Appendix to this brief.
"*Miller*" refers to the trial testimony of Michelle Miller
"*Hastings*" refers to the video-taped deposition testimony of Attorney Honey Hastings

single decision of this Court. When applied to the facts of this case, the law of each claim is somewhat ambiguous regarding the elements a plaintiff must prove to establish liability. Dr. Glick proceeded on his understanding of the law, and on his reliance on the court's order denying Ms. Naess's Motion to Dismiss.

On the claim of interference with custody, the court (*Fauver*, J.) directed that to establish liability Dr. Glick would have to prove that Ms. Naess "gained custody solely on the basis of misrepresentations to the Court." *Appendix to NOA* at 6. On the claim of intentional infliction of emotional distress, the court held that liability turned on proving those misrepresentations were extreme and outrageous conduct, and may also require proof of bodily harm. *Appendix to NOA* at 8-9.

In 1996, the suit went to trial before a jury. After the close of the plaintiff's case, Ms. Naess's motions to dismiss and for directed verdict were granted. The court held (*Coffey*, J.) that he failed to prove the necessary elements, and the case was withdrawn from the jury. *Appendix to Brief* at 24 *et seq.*

After successfully defending the suit, Ms. Naess filed a request for attorneys fees, alleging that in the underlying suit Dr. Glick did not state a claim on any theory, and that he pressed it in bad faith. Dr. Glick answered that he brought his suit in good faith, that the two theories of liability on which he proceeded had survived a motion to dismiss, that the plaintiff here was proceeding on developing theories, that the theories were actionable under a reasonable construction of New Hampshire law, that the theories were actionable pursuant to the court's earlier order which had become law of the case, that evidence on each element of proof was presented, that a plaintiff's mere failure to meet a burden of proof does not trigger attorneys fees,

that the American system of justice does not countenance attorneys fees except in extraordinary circumstances, and that a "looser-pays" system dulls the creativity of litigants seeking innovative avenues of redress.

Nonetheless, the Court (*Coffey*, J.) awarded fees and costs totaling close to $25,000. Dr. Glick entered this appeal from the award of attorney's fees.

STATEMENT OF THE FACTS

During the trial on his two claims, Dr. Glick presented two witnesses whose testimony is relevant to this appeal. The first was Michelle Miller, Principal of the Moultonborough Central School in Moultonborough, New Hampshire. *Miller* at 4. At the time of trial she had been the Principal for eight years. *Id.* She testified that she knew both Ephriam and Henry, Dr. Glick's sons. *Id.* at 5. Based on her records, she indicated that both boys had been out of school on a number of days for a variety of reasons. *Id.* at 10-22.

Miller said that Henry's school did not have a limit whereby if a student is absent a certain number of days the student will be required to repeat a grade. *Id.* at 22-23. She also acknowledged that Henry was an especially good student. *Id.* Based on these things, her records, and experience, she testified that there was no possibility that Henry could be held back a year for missing days of school. *Id.*

Miller also testified regarding Ephriam. She said that the high school also does not have a policy of holding students back based on missing a certain number of days, although for absences greater than 18 days a waiver is necessary. *Id.* at 23-24. She testified that Ephriam also was an especially good student, and would not have been held back based on the number of days he missed. *Id.*

The second relevant witness was Attorney Honey Hastings, whose testimony was presented to the jury by video-taped deposition. The transcript indicates she began her testimony by detailing her experience and knowledge in the field and practice of family. *Hastings* at 6-11. Ms. Naess's attorney stipulated that Attorney Hastings is an expert. *Id.* at 11.

Attorney Hastings explained the nature of an emergency *ex parte* hearing, and in what

circumstances one is likely to be requested by an attorney and granted by a judge. *Id.* at 14-36. She also indicated that emergency hearings are reserved for situations in which there is a immediate danger of irreparable harm, and that except for allegations of domestic violence or retaliation, they are rarely granted. *Id.* at 14-36, 100-103.

Attorney Hastings detailed the misrepresentations made to the court by Ms. Naess, in both documents and testimony, in the course of the emergency *ex parte* hearing. *Id.* at 39-79, 103-141, 149-152. While the particular nature of the misrepresentations is not relevant, they tended to show that Dr. Glick's boys were likely to be held back in school if the court did not immediately grant custody to Ms. Naess. *Id.*

Attorney Hastings testified that, in her expert opinion, the court would not have entertained an emergency *ex parte* hearing, nor granted the relief, but for Ms. Naess's misrepresentations. *Id.* at 38-39, 80, 99. While Ms. Naess's lawyer cross-examined Hastings as to whether the misrepresentations were actually that, there was no attempt to attack Attorney Hastings's expert opinion.

Finally, Attorney Hastings testified that because courts are reluctant to constantly uproot children, Ms. Naess's victory in the emergency *ex parte* hearing was likely to have a permanent prejudicial effect against Dr. Glick's ability to ever regain custody. *Id.* at 80-81.

SUMMARY OF ARGUMENT

Dr. Glick first argues that exceptions to the "American Rule" that parties bear their own legal costs are few and narrow. He then states that the winner in a dispute cannot recover attorney's fees if the loser can articulate a claim in existing or developing law. Dr. Glick asserts that he successfully articulated claims for tortious interference with parental rights and intentional infliction of emotion distress, that he was entitled to rely on the court's acceptance of the claims, and that he presented proof of both claims with admissible evidence. Accordingly, he argues, attorney's fees cannot be assessed against him.

Dr. Glick then demonstrates that contrary to the court's finding, there was no evidence of bad faith to support an award of attorney's fees.

ARGUMENT

I. The 'American Rule' of Attorney's Fees and Exceptions To It

The "American Rule" is that each party in litigation pay their own legal fees. That has been the rule in New Hampshire for its entire history. *Adams v. Bradshaw*, 137 N.H. 7, 16 (1991); *Appeal of Parmelee*, 127 N.H. 758, 761 (1986).

> "Underlying the rule that the prevailing litigant is ordinarily not entitled to collect his counsel fees from the loser is the principle that no person should be penalized for merely defending or prosecuting a lawsuit. An additional important consideration 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 v. Adams, 117 N.H. 687, 690 (1977); 22 AM.JUR.2D, *Damages* § 611.

However:

> "An award of attorney's fees . . . must be grounded upon statutory authorization, 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. Exceptions include situations where an individual is forced to seek judicial assistance to secure a clearly defined and established right if bad faith can be established; where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct; as compensation for those who are forced to litigate in order to enjoy what a court has already decreed; and for those who are forced to litigate against an opponent whose position is patently unreasonable."

DePalantino v. DePalantino, 139 N.H. 522, 525-26 (1995) (internal quotations and citations omitted).

Attorney's fees are not awarded merely because a party loses or its case was weak. *Clipper Affiliates v. Checovich*, 138 N.H. 271, 279 (1994) (fact that Clipper was "unsuccessful in proving [its] theory of liability by itself does not warrant the award of attorney's fees"); *Belknap Textiles, Inc. v. Belknap Indus., Inc.*, 121 N.H. 28, 31 (1981) ("[W]e cannot say that the [case]

was frivolous. The defendant's error in this case is only in his assumption of the conclusiveness of his proofs."); *R.J. Berke & Co. v. J.P. Griffin, Inc.,* 118 N.H. 449, 452 (1978).

II. Winner Gets No Fees if Loser Can Articulate a Claim in Existing or Developing Law

There is no authority for attorney's fees in this case involving a statute or agreement between the parties. Instead, the court below relied on a variety of exceptions to the American rule. The Superior Court found that fees should be awarded on a rationale first fully enunciated by Justice Souter in *Keenan v. Fearon*, 130 N.H. 494 (1988). Courts have the

> "power to award counsel fees in any action commenced, prolonged, required or defended without any reasonable basis in the facts provable by evidence, or any reasonable claim in the law as it is, or as it might arguably be held to be."

Keenan, 130 N.H. at 502. For the prevailing party to get fees, the loser's position must be "patently unreasonable." *DePalantino v. DePalantino*, 139 N.H. 522, 526 (1995); *Clipper Affiliates v. Checovich*, 138 N.H. 271, 278 (1994). This is determined by an objective measure. *Keenan*, 130 N.H. at 502.

It is important to note that *Keenan* is a permissive standard. It disallows attorney's fees when the loser had a reasonable claim in existing law, or a reasonable claim in the law as it might be arguably construed. Thus, to defeat an award of attorneys fees, the loser must articulate either: 1) some set of elements that trigger liability in the law as it currently exists, or 2) some set of elements that may trigger liability in a developing area of law where the elements are unsettled, ambiguous, or unclear.

In *Appeal of Parmelee*, 127 N.H. 758, 761 (1986), this Court found that attorney's fees are not appropriate where "there was a genuine question of statutory construction [so that] it

cannot be said that either party acted in bad faith by requesting the [Court] reconcile their dispute." Similarly, in *Adams v. Bradshaw*, 135 N.H. 7 (1991), this Court found that:

> "Although the plaintiff's position did not carry the day, . . . resolution of the issue turned on a fine question of law never before answered by this court. We therefore cannot hold that the plaintiff's claim lacked any 'reasonable basis in the facts provable by evidence, or . . . in the law as it is, or as it might arguably be held to be.' We . . . den[y] attorney's fees for the defendants."

Adams, 135 N.H. at 17, 18 (quoting *Keenan*, 130 N.H. at 502). Together, *Keenan*, *Parmelee*, and *Adams* show that when a party has a colorable claim that is not clear as a matter of statutory or decisional law, even if the claim is ultimately erroneous, the party cannot be required to pay attorney's fees.

If it were otherwise, innovative claims would never be pursued, the law would not progress, and the common-law process would halt.

Here, Dr. Glick articulated a claim in two developing areas of the law. Dr. Glick initially sued his former wife on five separate claims. Upon her motion, the court dismissed three of them, allowing him to go forward on a claim of tortious interference with parental rights and intentional infliction of emotional distress. *Appendix to NOA* at 6-7.

A. Dr. Glick Articulated a Claim for Tortious Interference with Parental Rights

Tortious interference with parental rights was recognized as a cause of action in New Hampshire in *Plante v. Engel*, 124 N.H. 213 (1983). Lawyers are taught to reason by analogy, and no reasonable lawyer would confine an appellate decision to its facts. There are no later cases limiting *Plante*, and the whole area of tortious interference with parental rights is one that appears to be growing, not fading. *See e.g.,* Annotation, *Liability of Legal or Natural Parent, or One Who Aids and Abets, for Damages Resulting from Abduction of Own Child*, 49 A.L.R. 4th 7.

Thus, while the *Plante* facts involved a clear case of interference by abduction, the language of the decision is broad, leading a reasonable lawyer to believe that liability may rest on other methods of interference as well. Moreover, *Plante* cites *Sargent v. Mathewson*, 38 N.H. 54 (1859), and says that the cause of action recognized in *Plante* is merely an extension of *Sargent*. In *Sargent*, there was no evidence of abduction; rather the defendant merely allowed the boy, who ran away from home, to stay with him. Finally, it appears that other states may allow the claim to go forward based on interference by methods other than abduction. *See* Annotation, 49 A.L.R. 4th 7.

Thus, it was not unreasonable to suppose that Dr. Glick could state a case for interference with parental rights by alleging, and seeking to prove, that Ms. Naess procured custody of the children through the misrepresentation of facts to a court.

Dr. Glick then followed through on his statement of his claim. He presented evidence that Ms. Naess mislead the court, and that without her misleading statements the court would probably not have granted the emergency *ex parte* relief she sought.

It is certainly possible that the subsequent judge of the Superior Court may not read *Plante* in the way Dr. Glick did, or that the Supreme Court would accept his claim. However, it is not the role of a trial court to feign the role of an appellate court, and strike down causes of action, through the assessment of attorney's fees.

B. Dr. Glick Articulated a Claim for Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress was recognized as a cause of action in *Morancy v. Morancy,* 134 N.H. 493 (1991). *Morancy* held that:

"'One who by extreme and outrageous conduct intentionally or recklessly causes

> severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.'"

Morancy, 134 N.H. at 496 (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)). While the Restatement language indicates that bodily harm is not an element of the claim, the Supreme Court did not reach the issue. *Morancy,* 134 N.H. at 496.

Extreme and outrageous conduct is described in the Restatement:

> "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"

RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965).

A mother lying to a court to gain custody from an able father is an act utterly intolerable in a civilized community, and could lead members of a jury — after exclaiming "Outrageous!" — to arrive at a verdict in Dr. Glick's favor. As such, it may be the type of extreme and outrageous conduct contemplated by the *Morancy* Court. There is little doubt that losing custody of one's child through lies told to a court by one's ex-spouse is severe emotional distress. *See e.g.,* Annotation, *Liability of Legal or Natural Parent, or One Who Aids and Abets, for Damages Resulting from Abduction of Own Child*, 49 A.L.R. 4th 7.

As above, there is not a case in New Hampshire on point stating the exact factual situation posed by Dr. Glick, and stating that his claim is actionable. However, based on the law outlined above, a reasonable lawyer would conclude that it is. Thus, Dr. Glick stated a claim for intentional infliction of emotional distress sufficiently to avoid an award of attorney's fees.

Also as above, Dr. Glick followed through and provided facts to establish liability. He

showed that more probably than not Ms. Naess misrepresented facts to the court, and that without such misrepresentations she would not have gained custody of the children.

C. The Court's Ruling Allowing Claims to go Forward Were Law of the Case

Even if Dr. Glick's reading of the law was in error, he was entitled to pursue the claims — and therefore cannot be charged with bad faith — because they withstood a motion to dismiss. As such, he cannot be charged with the defendant's attorneys fees if his reading of the developing law was incorrect.

> "As most commonly defined, the doctrine of the law of the case posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16 (1988) (parentheticals, citations, quotations omitted). Law of the case:

> "is thus akin to the doctrines of collateral estoppel, res judicata, and stare decisis. If law of the case were strictly applied, a trial court would be absolutely bound by its first adjudication of an issue; there would be no possibility of a change of decision at the trial level. The doctrine rarely has been considered so ironclad, however, given the . . . trial courts' unquestioned power to reconsider their earlier rulings. Law of the case principles are therefore best understood as rules of sensible and sound practice that permit logical progression toward judgment, but that do not disable a court from altering prior interlocutory decisions in a case."

Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 597-99 (1987).

Law of the case promotes efficiency, saves litigants and courts from duplication of effort, prevents tenacious litigants from endlessly raising the same issue over and over again in effort to wear down the judge into changing a ruling, and prevents litigants from shopping from judge to judge to find a sympathetic one. *Id.* at 602-05. *See also UniGroup, Inc. v. Winokur*, 45 F.3d

1208, 1211 (8th Cir. 1995).

It is clear that courts have the power to alter interlocutory decisions before a case reaches final judgment, s*ee e.g., Redlon v. Franklin Square Corp.*, 91 N.H. 502, 503 (1941), and that the law of the case doctrine doesn't change that. *Arizona v. California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power.").

The law of the case for any particular interlocutory order is established at some point in the life of the case. In determining whether to revisit a decided issue, courts should consider:

1) whether the law has changed;
2) whether the issue is immediately determinative of the outcome of the case, or otherwise so important, either inherently or to the further course of the proceedings, as to warrant reconsideration;
3) whether the prior ruling is clearly erroneous, manifestly unjust or a clear abuse of discretion;
4) whether the issue is of such a nature that a different ruling would disappoint justified expectations, prejudice any of the parties, or undermine respect for the law and the courts;
5) whether or to what extent the case's progress toward judgment may be impeded by reconsideration; and,
6) how much duplication of effort is entailed.

A Judicial Puzzle, 135 U. PA. L. REV. at 612-13. Mere doubt as to the correctness of a prior decision is not a sufficient reason to alter it; there must be a clear conviction of error. *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940); *Fagan v. City of Vineland*, 22 F.3d 1283, 1290 (3rd Cir. 1994) (law of case doctrine recognizes that successor judge should not lightly overturn decision of predecessor judge in same case).

Failure to appropriate apply law of the case may "threaten to send litigants into a vicious circle of litigation." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988).

In New Hampshire, "[w]here a party acquiesces to a trial court's ruling, the ruling

becomes the law of the case." *Bailey v. Sommovigo*, 137 N.H. 526, 529 (1993). In *Bailey*, the amount of damages was at issue, and the court calculated them using a list of costs then in the record. "The plaintiff made no attempt to identify errors in his list of costs, and the trial court relied, without objection from the plaintiff, on this list." This Court thus found that once a party accepts a trial court's ruling, the ruling becomes the law of the case. *Bailey,* 137 N.H. at 529. While *Bailey* concerned whether law of the case applied on the appellate level, the decision is apposite because the issue of how law of the case is established is independent from the issue of which court it applies in. *See Union Hosiery Co. v. Hodgson*, 72 N.H. 427 (1904) (where court ruled that action could be tried on certain theory, and no objection made, availability of theory was law of the case); *Stone v. Howe*, 92 N.H. 425 (1943) (jury instruction not objected to is law of the trial); *Wood v. Manufacturers & Merchants Mut. Ins. Co.*, 89 N.H. 524 (1938) (same).

The effect of the law of the case is that the issue is determined. Like *res judicata*, law of the case precludes the parties from re-litigating it. *Taylor v. Nutting*, 133 N.H. 451 (1990). In *Commonwealth v. Starr*, 664 A.2d 1326, 1332 (Pa. 1995), for instance, after litigation on the matter, a criminal defendant was allowed to defend himself *pro se.* On the eve of trial, however, the trial judge reversed the order. The Pennsylvania Supreme Court found that once an interlocutory pre-trial decision has been made, the party in whose favor the decision was rendered must be allowed to rely on it and proceed in accordance with it. *See* A. Vestal, *Law of the Case: Single-Suit Preclusion*, 12 UTAH L. REV. 1 (1967).

Thus, a party is entitled to rely on an order that is law of the case. *Taylor v. Nutting*, 133 N.H. at 451. *See e.g., Robertson v. Monroe*, 80 N.H. 258 (1922); *Morrison v. Noone*, 78 N.H. 549 (1918); *Whittemore v. Boston & M.R.R.,* 77 N.H. 593 (1914); *Kidd v. New York Sec. & Trust*

Co., 75 N.H. 154 (1909); *Olney v. Boston & M.R.R.*, 73 N.H. 85 (1904).

Referring to the factors listed above, the court here should have left the prior ruling alone. The law had not changed; while the issue was dispositive of the case, it took facts away from the jury which had already heard them; the prior ruling was not clearly erroneous, in fact the prior ruling was probably a correct reading of *Plante* and *Morancy;* the prior ruling was also neither unjust or an abuse of discretion; both parties had absolutely relied on the prior ruling, and Dr. Glick had formulated his proofs to conform to the court's order; the subsequent ruling impeded progress in the case, as it was clear from Dr. Glick's earlier actions that he would appeal the court's order; and substantial duplication resulted from the court's subsequent order because it entailed complete re-litigation of a settled issue.

Here, long before trial, the court refused to grant the defendant's Motion to Dismiss, and therefore allowed Dr. Glick to go forward on his twin claims of tortious interference with parental rights and intentional infliction of emotional distress. That decision was, by the time he put on his proofs, law of the case. Thus, Dr. Glick was entitled to rely on it, and cannot be assessed attorney's fees for doing so.

III. Dr. Glick Showed No Bad Faith to be Assessed Attorney's Fees

For its award of attorney's fees, the court below also relied on a bad faith exception to the American Rule of parties bearing their own legal costs. Attorney's fees can be awarded where a person is forced to seek judicial assistance to secure a clearly defined and established right, *Adams v. Bradshaw*, 135 N.H. 7, 16 (1991), as compensation for those who are forced to litigate in order to enjoy what a court has already decreed, *Indian Head Nat'l Bank v. Corey*, 129 N.H. 83 (1986), or where litigation is instituted or unnecessarily prolonged through a party's

oppressive, vexatious, arbitrary, capricious or bad faith conduct. *Town of Nottingham v. Bonser*, 131 N.H. 120, 132 (1988). Absent evidence of bad faith in the conduct of a lawsuit however, a trial court's award of fees is reversible error. *Guaraldi v. Trans-Lease Group*, 136 N.H. 457, 460 (1992).

In this case, Ms. Naess had a court order as a result of the emergency *ex parte* hearing. However, because her order was based on misrepresentations and material omissions, her "right" was neither clearly defined nor established. Dr. Glick was not given notice of the hearing, so he nor his representative were present. Rather, his lawsuit was simply a collateral attack on the court's order, because that was the only available means to demonstrate the misrepresentations and omissions upon which the order was based. Approval of attorney's fees in this case would suggest that all collateral attack strategies are dishonorable, or somehow suspect. C.f. *Daigle v. City of Portsmouth*, 137 N.H. 572 (1993).

In *Indian Head Nat'l Bank v. Corey*, 129 N.H. 83 (1986), the bank had a dispute with its customer which resulted in litigation — at which both parties were present — and ended in a consent decree under which the bank committed to pay the customer a sum of money. The bank did not comply with the decree, and the customer had to go back to court to recover the money. Thus, this Court found, attorney's fees were proper because the second litigation was "gratuitous," *id.* at 86, and the bank's position was"throughly devoid of equity."

In Dr. Glick's case, the second litigation was not gratuitous. Dr. Glick wasn't present at the first litigation through the deliberate and calculated action of Ms. Naess. It was she who moved the court for emergency and *ex parte* relief. If Dr. Glick had been there, made his case, and merely lost, and then filed his suit, it could be said that his action was gratuitous. Because

that is not what happened, this case is not controlled by *Indian Head* and similar law.

IV. Dr. Glick's Suit Was Not Brought or Conducted in Bad Faith

Beyond the court's conclusory finding of bad faith, there is no evidence of it. Dr. Glick sued Ms. Naess for the harm she caused him. He articulated two theories of recovery based on reasonable constructions of developing law. There is no doubt, as in most cases, that he was motivated by anger and frustration — people rarely seek the aid of a court for happy reason. Yet there was no evidence that he had nefarious or sinister purposes.

Dr. Glick's actions can be distinguished from such cases as *Town of Nottingham v. Bonser*, 131 N.H. 120, 132 (1988). There, Bonser both "persistently refused to comply with [a court] order, and for three and one-half years he had repeatedly attempted to relitigate what he had consistently failed to appeal." *Id.* His position, which he asserted for six years, the court found, was "as unreasonable in law as it has been in fact." *Id.*

In this case, Dr. Glick appealed at the logical times,[2] and has conducted his suit decorously. He filed just a single suit, based in reasonable and court-approved constructions of developing law, and has pursued it in the normal course without delays or undue tactics.

Moreover, he presented facts and testimony to support his claims. Michelle Miller, the Principal of the school, provided ample testimony that Dr. Glick's sons were in no danger of repeating a grade. Attorney Hastings's testimony demonstrated that had Ms. Naess told the truth, the court would not have held an emergency *ex parte* hearing nor granted relief. Thus, because Dr. Glick in good faith presented his claims and the evidence to support them, attorney's fees

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[2] *Naess v. Glick*, Sup. Ct. No. 96-053, was an appeal from the court's granting of the relief in the *ex parte* hearing, and was declined for review by this Court. *Glick v. Naess*, Sup. Ct. No. 96-284, was an appeal from the court's directed verdict of Dr. Glick's suit, and was also declined for review by this Court.

cannot be awarded.

The court made the additional error of refusing to take into account Attorney Hastings's testimony. The court *sua sponte* found that "much of her testimony legally inadmissible." *Appendix to Brief* at 25.

However, Ms. Naess did not object to the admissibility of the testimony, and therefore the court was obligated to consider it. *Plante v. Engel*, 124 N.H. 213 (1983) (court must consider all inferences most favorably to the plaintiff). Courts cannot rule on evidence without a contemporaneous objection. *See* N.H. R. Ev. 103; *State v. Wisowaty*, 133 N.H. 604 (1990); *Brunelle v. Nashua Bldg. & Loan Ass'n*, 95 N.H. 391 (1949) (no objection to testimony of expert, thus allowed to testify); *Ware v. Champagne's Supermarket*, 99 N.H. 19 (1954) (no objection to lack of best evidence, thus evidence admissible); *Broderick v. Watts*, 136 N.H. 153 (1992) (court will not inquire into merits of objection which was not timely). A party who wants evidence excluded bears the burden of providing a record from which it can be determined that the evidence should be excluded. *Mankoski v. Briley*, 137 N.H. 308, 312 (1993). No such record exists here. Without an offer of proof, or a judicial investigation into the qualifications of an expert, the evidence cannot be summarily excluded. *Id.* at 313. While the admissibility of expert testimony is in the discretion of the court, all known New Hampshire cases involved an apparent objection by some party. *See e.g.*, *State v. St. Laurent*, 138 N.H. 492 (1994); *State v. Cressey*, 137 N.H. 402 (1993); *State v. Cavaliere*, 140 N.H. 108 (1995).

The court indicated that the reason Attorney Hastings testimony would be disregarded was that she "comment[ed] on the truth and veracity of statements in the ex-parte affidavit." *Appendix to Brief* at 25. However, an expert can give testimony on the ultimate issue. N.H. R.

EV. 704; *State v. St. Laurent*, 138 N.H. 492 (1994). Here, the ultimate issue was whether Ms. Naess's statements were true. Thus, the ultimate issue is indistinguishable from "the truth and veracity of statements in the ex-parte affidavit." Attorney Hastings testimony cannot be stricken.

Moreover, the ability of Attorney Hastings to testify was a matter stipulated by the parties. *Hastings* at 11. There are some matters to which parties cannot stipulate, such as subject matter jurisdiction, which can be raised *sua sponte*. But parties can stipulate to most things, including evidence otherwise inadmissible, as long as there is some indica of reliability. *Fernald v. Ladd*, 4 N.H. 370 (1828); s*ee, e.g.,* Annotation, *Admissibility of Lie Detector Test Taken Upon Stipulation That the Result Will be Admissible in Evidence*, 53 A.L.R. 3d 1005.

Once made, stipulations are generally binding upon trial and appellate courts, in the absence of any valid ground or reason for refusing to enforce them. In *State v. Profenno*, 516 A.2d 201 (Me. 1986), the Maine Supreme Court was faced with the question of whether prior bad acts evidence, which was otherwise inadmissible, was properly admitted as evidence when the defendant stipulated that it could be admitted. The court pointed to the defendant's trial strategy, which relied on the evidence, and ruled that a stipulation can result in the admission of otherwise inadmissible evidence. *Leonard v. Los Angeles*, 107 Cal. Rptr. 378 (1973) (binding stipulation properly resulted in admission of otherwise inadmissible evidence on assumption that party had trial strategy reasons, and intoning that point is beyond dispute); *Hackfeld v. United States*, 197 U.S. 442 (1904) (stipulation of facts binding on court); 73 AM. JUR. 2d *Stipulations* § 8; 3 AM. JUR. 2d *Agreed Case* § 5.

Finally, the court made its ruling on admissibility in the middle of trial, on Ms. Naess's motions to dismiss and for directed verdict. That is the wrong time for such a ruling, as the

parties had no opportunity to cure. *Daigle v. City of Portsmouth*, 129 N.H. 561, 583 (1987). For this reason, motions to suppress evidence must be filed in advance of trial. SUPER CT. R. 94. Moreover, if the evidence is found to be admissible in advance of trial, it will be admitted at trial without further procedure. *Id.* Here, the admissibility of the evidence was stipulated to, and encountered no objection. Thus, the court cannot, in the middle of trial, *sua sponte* determine that evidence is inadmissible.

The trial court should have therefore taken into account Attorney Hastings testimony. Even if the court was correct in not considering it, however, the testimony nonetheless is relevant to the matter of whether Dr. Glick brought his suit in good faith.

In either case, there is no evidence that Dr. Glick conducted himself in bad faith. Accordingly, he cannot have attorney's fees assessed against him.

CONCLUSION

Based on the forgoing, Dr. Glick requests that this court reverse the award of attorney's fees assessed against him.

Respectfully submitted,

Dr. Michael Glick
By his Attorney,

Law Office of Joshua L. Gordon

Dated: August 20, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Dr. Michael Glick requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on August 20, 2000, a copy of the foregoing will be forwarded to Phillip S. Rader, Esq.; and Clerk, Carroll County Superior Court.

Dated: August 20, 2000

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APPENDIX