

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 17, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP54

Cir. Ct. No. 1992FA893

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

HEIDI FRISCH, P/K/A HEIDI HENRICHs,

PETITIONER-APPELLANT,

v.

RONALD HENRICHs,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
RALPH M. RAMIREZ, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. The post-divorce disputes between Heidi Frisch and Ronald Henrichs are again before this court. Frisch appeals from a circuit court order finding that she owes Henrichs \$44,977¹ in child support arising from a change in placement of one of their children, denying Frisch interest on awards payable to her by Henrichs, and denying Frisch attorney’s fees from Henrichs for overtrial during previous proceedings in this court and the Wisconsin Supreme Court. We affirm Frisch’s child support obligation and the circuit court’s refusal to award attorney’s fees to her for the previous appeals. We reverse the circuit court’s refusal to award statutory interest to Frisch and remand for further proceedings relating to that issue.

¶2 We will recite a brief history to place the current appeal in context. Frisch and Henrichs were divorced in 1993. In 2004, the circuit court found Henrichs in contempt for his conduct surrounding the required disclosure of his income for child support purposes and ordered him to pay Frisch \$100,000. The January 19, 2005 order memorializing this ruling granted Frisch “12% interest [on this amount] from June 15, 2004 until fully paid pursuant to WIS. STAT. §§ 814.04 and 814.05.” The court also found that Henrichs engaged in overtrial and ordered him to pay Frisch \$32,001 in attorney’s fees for overtrial. The January 19 order granted Frisch “interest [on this amount] from November 12, 2004 pursuant to WIS. STAT. §§ 814.04 and 814.05.” The court ordered Frisch to pay child support to Henrichs, but the court suspended Frisch’s child support obligation pending

¹ The circuit court’s November 15, 2007 order establishes Frisch’s child support obligation at \$44,977. However, the October 24, 2007 child support calculation appearing in the record shows that the obligation was \$44,797, this was the figure discussed and agreed upon at the October 24 hearing, and this is the figure that the parties discuss in their briefs. If the order needs to be corrected, the parties may raise this issue on remand. We will use the figure appearing in the order from which this appeal is taken.

payment of amounts due from Henrichs to Frisch. Henrichs appealed, and we reversed. *Frisch v. Henrichs*, 2006 WI App 64, 290 Wis. 2d 739, 713 N.W.2d 139 (*Frisch I*). Frisch sought review in the supreme court, and the supreme court reversed this court. *Frisch v. Henrichs*, 2007 WI 102, 304 Wis. 2d 1, 736 N.W.2d 85 (*Frisch II*).

¶3 In October 2007, the parties returned to the circuit court to sort out their obligations in light of the supreme court's ruling. Frisch sought attorney's fees she incurred during the proceedings in the court of appeals and the supreme court to defend the circuit court's rulings that she was owed \$100,000 plus \$32,001 in attorney's fees for overtrial. The court denied Frisch's request for appellate fees. The court also declined to award Frisch interest on the amounts due from Henrichs because the court did not make such an order in its bench ruling. The circuit court also found that Frisch owed Henrichs \$44,977 in child support. Frisch appeals.

¶4 On appeal, Frisch seeks post-judgment interest. It is unclear whether Frisch seeks interest relating to the period before judgment is entered, WIS. STAT. § 814.04(4) (2005-06),² and/or the period after judgment is entered and before payment is made, WIS. STAT. § 815.05(8). The circuit court's January 19, 2005 order awarded interest until Henrichs paid amounts owed, but the court later vacated that award. We agree with Frisch that the question of interest, both prior to and after entry of judgment, is governed by statute. We reverse for a determination of interest due Frisch pursuant to the applicable statutes.

² All subsequent references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶5 WISCONSIN STAT. § 814.04(4) provides:

[I]f the judgment is for the recovery of money, interest at the rate of 12% per year from the time of verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs.

WISCONSIN STAT. § 815.05(8) states that “every execution upon a judgment for the recovery of money shall direct the collection of interest at the rate of 12% per year on the amount recovered from the date of the entry of the judgment until it is paid.”

¶6 Once the court awarded Frisch \$132,001, Frisch was entitled under the interest statutes to be compensated for the time-value of the money she had been awarded. *See Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 224 Wis. 2d 312, 326, 592 N.W.2d 279 (Ct. App. 1998). That is the purpose of these statutes, and we reject Henrichs’ argument that the circuit court had discretion to ignore the interest statutes. We reverse and remand for computation of interest due to Frisch pursuant to these statutes.³

¶7 Frisch next argues that the circuit court erred when it declined to award her attorney’s fees for the previous appeals to the court of appeals and supreme court. During the October 24, 2007 hearing, the court acknowledged that the question before it was whether the appeals constituted overtrial by Henrichs and whether the court had authority to impose attorney’s fees. The court noted it awarded circuit court overtrial fees to Frisch because Henrichs overtried the facts

³ The circuit court denied Henrichs interest on the child support owed to him by Frisch because Frisch’s obligation had been suspended until Henrichs paid her the sanction and attorney’s fees. Henrichs did not file a cross-appeal to challenge this ruling. Therefore, this ruling stands. *See State v. Huff*, 123 Wis. 2d 397, 408-09, 367 N.W.2d 226 (Ct. App. 1985) (a respondent seeking modification of the order being appealed must file a cross-appeal).

in the circuit court. The court observed that its use of the contempt power was the focus of both appeals. *Frisch I*, 290 Wis. 2d 739, ¶2, reversed *Frisch II*, 304 Wis. 2d 1, ¶1. The court ruled as follows:

And I will be quite honest, because of the genesis of these proceedings and the flagrant dishonesty on the part of Mr. Henrichs, if I felt that I could, I would impose those attorney's fees, but because of the nature of the proceedings and the focus on the issue of contempt, I can't find that it was overtrial. I wish I could, but I just can't find it to be the case. And I think that for that reason, that I can't find that there was overtrial on the appeals court level. And so I'm going to deny the request for those attorney's fees.

¶8 We read the circuit court's decision as linking the denial of attorney's fees to the absence of overtrial.⁴ The overtrial doctrine may be invoked in family law cases "when one party's unreasonable approach to litigation causes the other party to incur extra and unnecessary fees." *Zhang v. Yu*, 2001 WI App 267, ¶13, 248 Wis. 2d 913, 637 N.W.2d 754. The previous appeal generated a published court of appeals decision and a reversal by the supreme court, including a dissent and a concurrence. Clearly, the appellate courts wrestled with the issues presented in the previous appellate proceedings. We agree with the circuit court that the previous appellate litigation was not excessive. *See id.*, ¶11 (whether the facts of prior litigation constitute overtrial is a question of law). In addition, given that the appellate courts took diverging views of the appellate issues, the litigation was not frivolous. Therefore, attorney's fees were not available, and the circuit court properly denied Frisch's motion for fees.

⁴ We do not read the circuit court's decision as a determination that it did not have inherent authority to award attorney's fees on appeal due to overtrial. The court has such authority. *Zhang v. Yu*, 2001 WI App 267, ¶14, 248 Wis. 2d 913, 637 N.W.2d 754.

¶9 In the circuit court and here, Frisch cites WIS. STAT. § 767.27(2m) (2003-04), now WIS. STAT. § 767.54, *see* 2005 Wis. Act 443, § 122 as a basis for awarding reasonable attorney's fees for the previous appeal.⁵ WISCONSIN STAT. § 767.54 states:

In an action in which the court has ordered a party to pay child or family support under this chapter, including an action to revise a judgment or order under s. 767.59, the court shall require the parties annually to exchange financial information. Information disclosed under this section is subject to s. 767.127 (3). A party who fails to furnish information required by the court under this section may be proceeded against for contempt of court under ch. 785. If the court finds that a party has failed to furnish information required under this section, the court may award to the party bringing the action costs and, notwithstanding s. 814.04 (1), reasonable attorney fees.

¶10 The court rejected Frisch's argument in the circuit court for attorney's fees under this statute because the appellate issues focused on the court's use of the contempt power, not on the facts that were overtried by Henrichs. It is undisputed that Henrichs supplied the income information he was required to disclose before the prior appeals. *Frisch II*, 304 Wis. 2d 1, ¶47. Frisch has not convinced us that WIS. STAT. § 767.54 applies and justifies an award of appellate fees.

¶11 Finally, Frisch argues that the circuit court erroneously imposed child support on her in the amount of \$44,977 arising from the transfer of the

⁵ Frisch argues on appeal that WIS. STAT. § 785.04(1)(a) and WIS. STAT. § 814.036 support her claim for appellate attorney's fees. Frisch did not cite these statutes to the circuit court. We do not decide issues raised for the first time on appeal. *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

parties' son, Joseph, from Frisch to Henrichs. The court's January 19, 2005 order set out Frisch's child support obligation as follows:

Heidi shall pay \$895.00 per month to Ronald for child support for Joseph Henrichs which obligation is established, but which obligation shall be held open until the first day of the first month after payment in full is made from Ronald to Heidi of the [\$100,000 sanction and the \$32,001 in attorney's fees] at which time the support ordered for herein shall be paid from Heidi to Ronald.

¶12 Frisch argues that her support obligation was held open and did not begin to accrue until Henrichs paid his sanction and attorney's fees. We disagree. The court interpreted Frisch's child support payment as stayed pending the previous appeals, i.e., accruing but not payable until Henrichs first paid Frisch. We give deference to a circuit court's interpretation of its own order because that court is in a better position to know what it intended. *Estate of Schultz v. Schultz*, 194 Wis. 2d 799, 808, 535 N.W.2d 116 (Ct. App. 1995).

¶13 We affirm Frisch's child support obligation and the circuit court's refusal to award attorney's fees to her for the previous appeals. We reverse the circuit court's refusal to award statutory interest to Frisch and remand for further proceedings relating to that issue. No costs to either party.

By the Court.—Order affirmed in part and reversed in part and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

