

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 11, 2007

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. 2007AP912-FT

Cir. Ct. No. 2002FA6

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

YVONNE L. DIEKVOSS, P/K/A YVONNE L. LUNDT,

PETITIONER-RESPONDENT,

V.

RONALD E. LUNDT,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Oneida County:
ROBERT E. KINNEY, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM.¹ This is a companion appeal to *Diekvoss v. Lundt*, No. 2007AP165-AC, unpublished slip op. (Wis. Ct. App. July 24, 2007) (*Diekvoss I*). The two cases involve different aspects of a reopened divorce judgment. In this appeal, Ronald Lundt appeals three postjudgment orders. He argues he is entitled to a new trial to determine whether he committed a fraud on the court. He also argues the court erred in awarding his ex-wife, Yvonne Diekvoss, \$1,790 and \$551.50 in attorney fees she incurred responding to two motions. The fraud issue was resolved against Lundt in his earlier appeal and may not be relitigated here. We affirm the award of \$1,790 but reverse the award of \$551.50.

BACKGROUND

¶2 Lundt and Diekvoss were married in 1987 and divorced in 2002. Both parties represented themselves in the divorce proceedings. The court reopened the divorce judgment in March 2006, and held a “reopened final hearing” in August 2006. On December 19, 2006, the court issued a written memorandum decision that ordered new property division and maintenance terms more favorable to Diekvoss. The decision was reduced to judgment the next day.

¶3 After the judgment was entered, Lundt moved for a stay pending appeal. The court denied that motion. Lundt then filed a new motion in which he asked for a new trial and asked the court to reconsider its decision denying a stay. The court denied that motion as well. Written orders denying the motions were entered on February 20, 2007. Lundt filed a motion in this court asking for a stay of the judgment. We stayed the judgment pending appeal as to property division.

¹ This is an expedited appeal pursuant to WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 The court also awarded Diekvoss attorney fees she expended defending against the two motions. Written orders awarding \$551.50 and \$1,790 to Diekvoss were entered February 5, 2007 and April 4, 2007 respectively.

¶5 Lundt filed two notices of appeal. The first was an appeal of the December judgment and the court's order reopening the original divorce judgment. We affirmed the judgment and order. *Diekvoss I*, ¶1. The second notice of appeal was from the court's February 20, 2007 order denying Lundt's motion for a new trial on the fraud issue, and from the two orders awarding fees. That notice led to this appeal.

DISCUSSION

¶6 When an appellate court decides an issue in a case, that decision becomes the law of the case, and it

must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, [or] controlling authority has since made a contrary decision of the law applicable to such issues.

State v. Brady, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986) (citation omitted).

¶7 In Lundt's first appeal, he argued the court erred in reopening the 2002 divorce judgment based on fraud under WIS. STAT. § 806.07(2). *Diekvoss I*, ¶19. We concluded the court properly exercised its discretion when it reopened the case under § 806.07(1)(h) and therefore it was unnecessary to decide whether a second independent basis for reopening applied. *Diekvoss I*, ¶20. We decided Lundt's first appeal just over a month ago, and neither the law nor the facts have

changed since then. Our resolution of the issue in Lundt's first appeal therefore is binding here. *See Brady*, 130 Wis. 2d at 448.

¶8 Lundt next challenges the court's two awards of attorney fees. A circuit court's decision to shift fees in a family law case, and the amount of fees to shift, is committed to its sound discretion. *Ondrasek v. Ondrasek*, 126 Wis. 2d 469, 483, 377 N.W.2d 190 (Ct. App. 1985). Fees can be shifted based on a disparity in ability to pay, based on overtrial by a party, or because a party refuses to provide information necessary to speed the process along. *Randall v. Randall*, 2000 WI App 98, ¶22, 235 Wis. 2d 1, 612 N.W.2d 737. A court may shift fees for overtrial 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.

¶9 The circuit court shifted the \$1,750 in fees both for ability to pay and for overtrial:

[W]e can shift the fees on this just like we could in the divorce for the same reasons. She has no ability to pay and ... we're getting to the point now where this is being overlitigated in my opinion.

In Lundt's first appeal, we affirmed the circuit court's decision to award Diekvoss her fees up to entry of the revised judgment, noting that there is "no serious dispute that Lundt is in a better position to pay attorney fees than Diekvoss." *Diekvoss I*, ¶27. Lundt does not argue that Diekvoss's ability to pay was any different at the time of the postjudgment motions. As noted above, our holdings in Lundt's first appeal are binding here. *See Brady*, 130 Wis. 2d at 448.

¶10 Lundt focuses his arguments on the court's finding of overtrial. He argues the hearing was necessary to establish a record on the fraud issue.

However, Lundt’s motion actually asked for a trial on the fraud issue on the grounds of newly discovered evidence. His “newly discovered evidence” was a property tax bill that had been in his possession since 2001. The motion also asked for reconsideration of other past decisions the court had made. Under those circumstances, we concur with the circuit court’s conclusion that the motion represented an “unreasonable approach” to the litigation that resulted in unnecessary fees. *Zhang*, 248 Wis. 2d 913, ¶13.

¶11 Lundt also argues the court lacked jurisdiction because the record had already been transmitted to the court of appeals. Lundt omits part of the statute. Under WIS. STAT. § 808.075(3), when the record of a case is transmitted to the court of appeals, the circuit court does not lose jurisdiction over every aspect of the case; instead, it “may act only as provided in” WIS. STAT. §§ 808.075(1) and (4). Section 808.075(1) provides that “whether or not an appeal is pending, the circuit court may act under” a number of statutes, including WIS. STAT. §§ 805.15 and 806.07. The \$1,750 award was for legal fees Diekvoss incurred responding to Lundt’s motions under §§ 805.15 and 806.07, and was therefore ordered while the court was “acting under” §§ 805.15 and 806.07.²

¶12 Finally, Lundt challenges the court’s award of \$551.50 in attorney fees for expenses Diekvoss incurred responding to his circuit court motion for a stay pending appeal. We ultimately granted the stay when Lundt applied to this

² We also note that the date of transmittal Lundt cites is the date the record was transmitted for Lundt’s first appeal, the appeal of the divorce judgment. The supplemental record transmitted for this appeal was not transmitted until May 17, 2007, well after the court entered its order assessing the \$1,750 in fees. While we need not decide which transmittal date controls for purposes of WIS. STAT. § 808.075(3), we see no reason why the transmittal of the supplemental record would not control when the appeal in question makes a supplemental record necessary.

court. As we noted in our order granting the stay, the circuit court did not give the reasons it denied the stay. It also did not indicate why it was awarding attorney fees. In view of the fact that we ultimately granted the stay, we are unwilling to uphold an award that may have been based on the court's belief that Lundt's request for a stay was an unreasonable approach to the litigation. *See Zhang*, 248 Wis. 2d 913, ¶13. We therefore reverse the February 5 order awarding \$551.50 in attorney fees. *See Randall*, 235 Wis. 2d 1, ¶25. On remand, the court shall adjust Lundt's obligation accordingly.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions. No costs.

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

