**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

June 24, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-2465**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**IN RE THE ESTATE OF ELMER R. NEEDHAM, DECEASED:**

**DOUGLAS NEEDHAM, JAMES W. NEUENDORF, AND CHRIS PRANGE,**

**PETITIONERS-RESPONDENTS,**

**V.**

**LEILA BAILIE, DAVID SCOTT, KERRY SCOTT, AND ALLEN SCOTT,**

**APPELLANTS.**

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APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. David, Kerry and Allen Scott and Leila Bailie (collectively "the Scotts") appeal from an order denying their motion for a new

trial based on newly discovered evidence. The issues are: (1) whether the trial court properly denied the motion for a new trial; and (2) whether the respondents are entitled to attorney's fees and costs under the frivolous appeals statute. *See* RULE 809.25(3), STATS. We affirm.

This is the second time this dispute has come before this court. The Scotts previously appealed the trial court's order admitting Elmer Needham's will into probate. We affirmed the trial court's order, concluding that the trial court did not erroneously exercise its discretion in ruling that the copy of Elmer Needham's will found by Douglas Needham, his nephew, was not forged and had not been revoked. After we affirmed that order, the Scotts brought a motion in the trial court for a new trial based on newly discovered evidence. The trial court denied the motion for a new trial.

The Scotts argue that the trial court should have granted their motion for a new trial. A new trial shall be ordered on the grounds of newly discovered evidence if the trial court finds that the evidence has come to the moving party's notice after trial, the moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it, the evidence is material and not cumulative, and the new evidence would probably change the result. *See* § 805.15(3), STATS.

The Scotts argue that the fact that the vast majority of the wills done before 1985 by the attorneys who drafted Elmer Needham's will, the Frantz Law Office, were done on legal-size paper, as opposed to letter-size paper, is "newly discovered evidence" entitling them to a new trial. While the previous appeal was pending before this court, the Scotts' attorney conducted a survey of the wills drafted by Attorney Frantz in the period before 1985, and discovered that of forty-

four wills drafted by Attorney Frantz, all were done on legal-size paper. Elmer Needham's will, however, was done on letter-size paper.

The Scotts' belated discovery does not entitle them to a new trial because they have not discovered new evidence. They have made a *new argument* based on evidence that already existed. Even though the Scotts' attorney may not have realized he should investigate the paper size issue until he was preparing for appeal, the Scotts' failure to previously identify this argument prohibits them from raising it now.

Douglas Needham moves this court for attorney's fees and costs on appeal under RULE 809.25(3), STATS. We will grant attorney's fees and costs only if the entire appeal before this court is frivolous. *See* ***Nichols v. Bennett***, 190 Wis.2d 360, 365 n.2, 526 N.W.2d 831, 834 (Ct. App. 1994), *aff'd*, 199 Wis.2d 268, 544 N.W.2d 429 (1996). Because at least one of the arguments raised by the respondents is not frivolous, we deny the motion for attorney's fees and costs under RULE 809.25(3). Needham is, however, entitled to statutory costs allowed by RULE 809.25(1).

*By the Court.*—Order affirmed.

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