COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1087

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

IN RE THE ESTATE OF MARYANN YODELIS SMITH:

KIM R. SMITH,

APPELLANT,

V.

BARBARA J. EASTRIDGE,

RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Kim Smith appeals from an order denying his motion for a new trial. In earlier proceedings, the trial court construed his late wife's will adversely to him, based on extrinsic evidence of her intent. His appeal

was dismissed on procedural grounds. Smith then alleged newly discovered evidence, and asked for a new trial. The trial court denied his motion and we affirm that determination as well.

¶2 When Smith first married MaryAnn Yodelis Smith, she made him the sole beneficiary of her estate. Shortly before her death in 1994, she executed a new will that was alleged to reduce his share. How much it was reduced, however, was the subject of litigation between Smith and the estate. After the trial court found her will ambiguous, and heard extrinsic evidence of her intent, the court construed the will contrary to Smith's interests. After we dismissed Smith's first appeal, he filed a motion for a new trial and two affidavits containing numerous factual assertions he labeled "newly discovered evidence." They included detailed observations concerning his wife's mental and physical health and treatment records, her financial history, her personal family history and her educational background. He also quoted from letters she wrote, and quoted the trial transcript to attack the credibility of various witnesses for the estate. The trial court denied him a new trial.

¶3 A trial court shall order a new trial if it finds that evidence has come to the moving party's attention after trial, the moving party's failure to discover the evidence earlier is not attributable to lack of diligence, and the evidence is material, not cumulative, and would probably change the result. *See* § 805.15(3), STATS. A trial court's decision on this issue is discretionary. *See* ***Mikaelian v. Woyak***, 121 Wis.2d 581, 586, 360 N.W.2d 706, 709 (Ct. App. 1984). We will affirm a discretionary decision if the trial court relies on facts of record, properly applies the law and articulates a reasoned and reasonable decision. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982).

¶4 We conclude that the trial court properly denied Smith a new trial. Even if the evidence that Smith offered was material and would have changed the result, he did not show that it came to his notice after the trial and he offered no explanation for his failing to discover it earlier. Virtually all of the evidence consisted of documents and statements either by or pertaining to his wife, which were made or uttered before she died in 1994. Smith therefore had three years to discover and present it at the 1997 trial. The rest of the "evidence" consisted of attacks on the credibility of various witnesses, based on citations to their trial court testimony. Smith attended the trial and could have timely disputed their credibility then. Therefore, we conclude that the circuit court did not erroneously exercise its discretion.

¶5 The respondent, Barbara Eastridge, moves for an award of costs and fees for filing a frivolous appeal, pursuant to RULE 809.25(3), STATS. She contends that Smith knew or should have known that his appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. We agree that there is little merit to this appeal, but conclude that the appeal is not so lacking in merit as to justify an award for filing a frivolous appeal.

By the Court.—Order affirmed.

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