

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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In re Estate of KENNETH L. KOSKI, Deceased.

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MICHAEL K. KOSKI, Individually and as Personal  
Representative of the Estate of KENNETH L.  
KOSKI, Deceased,

Appellant,

v

MARY L. HYTINEN,

Appellee.

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UNPUBLISHED  
October 27, 1998

No. 202972  
Marquette Circuit Court  
LC No. 82-862660 IE

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Judgment was entered in favor of appellee following a jury trial in which the jury determined that an investment account should be included in the decedent's probate estate and divided equally among his three surviving children. The trial court thereafter denied appellant's motion for judgment notwithstanding the verdict (JNOV) or new trial. Appellant appeals this denial as of right, and we affirm.

At trial, appellant wanted to advance his theory that the decedent's will was insufficient to change the beneficiary of the investment account. He requested special jury instructions, which were not given. In denying appellant's motion for JNOV, the trial court stated:

Michael Koski requested a special jury instruction which would have informed the jury that if the owner of a stock account declared himself to be a trustee, the law required the named beneficiary to inherit the property. The court refused to give that part of the instruction. . . . One of the reasons stated for denial of the instruction is that the use of the term "trustee" without a trust instrument was not deemed to be sufficient to establish a trust that would remove the [investment] account from the probate estate.

Appellant also wanted to argue that a change in beneficiary on the investment account was ineffective unless it was communicated to the investment company prior to the decedent's death. The trial court refused to give an instruction to this effect. It apparently did so because there was no evidence to support that the company required certain steps to be taken before a change in beneficiary could occur.

Following entry of judgment in favor of appellee, appellant obtained a document entitled "Declaration of Trust - Revocable", which evidenced that a trust existed and that the beneficiary could not be changed unless certain steps were taken to notify the company. Shortly thereafter, appellant filed his motion for JNOV or new trial. He basically argued that the newly discovered document supported his theory that the decedent's will was insufficient to change the beneficiary of the investment account, and that therefore, his motion should be granted based on the newly discovered evidence. The trial court disagreed, finding that appellant had not exercised due diligence to find and produce the document at the time of trial.

On appeal, appellant argues that the trial court erred in deciding that he had not exercised due diligence to discover the trust document prior to trial. We disagree. To justify a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself is newly discovered; (2) the evidence is not merely cumulative; (3) the new evidence would probably have caused a different result at trial; and (4) the party could not with reasonable diligence have discovered and produced the evidence at the trial. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). This Court does not regard a motion for new trial based on newly discovered evidence with favor, *Kroll v Crest Plastics, Inc*, 142 Mich App 284, 291; 369 NW2d 487 (1985), and will not reverse a trial court's ruling on such a motion absent an abuse of discretion. *Miller, supra* at 47.

In the instant case, we agree that the "declaration of trust" document could have altered the jury's decision by allowing it to determine that the decedent's intent was to exclude the investment account from his probate estate. However, we conclude that the trial court did not abuse its discretion in deciding that appellant failed to exercise due diligence in discovering this evidence in time for trial. Specifically, a review of the deposition of William J. Andrews, which was taken prior to trial, evidences that appellant was aware that the company had a form called "declaration of trust, revocable". In spite of knowing that such a form generally existed, counsel failed to determine if one was in existence for the trust at issue. In fact, appellant's counsel admits, by way of affidavit, that he only contacted the investment company to conduct a specific search for this document on the day *after* trial. Moreover, a review of the lower court record reveals that appellant's counsel had to have known of the possible existence of the "declaration of trust" prior to mediation. In his mediation summary, he argued that a trust was created. Surely, counsel should have been aware that a document creating the trust must be in existence if the decedent set up a trust. For the aforementioned reasons, and because the trial court was in a better position to examine the credibility of counsel's statements regarding his diligence in obtaining this document, we conclude that the trial court did not abuse its discretion in denying appellant's motion because of a lack of due diligence.

Appellant also argues on appeal that the trial court erred in deciding appellant's motion for a new trial under MCR 2.612(C)(1)(b) instead of under MCR 2.611(A)(1)(f). He claims that this error

requires reversal. We agree that the trial court improperly decided that appellant's motion was untimely pursuant to MCR 6.111(A)(1)(f) and MCR 2.610(A)(1), and was proper only under MCR 2.612. However, we find that this error does not require reversal. The error did not cause the trial court to incorrectly weigh the importance of appellant's newly discovered evidence. In fact, to the contrary, the trial court stated:

Whichever rule applies, the key to deciding this motion is whether or not due diligence was exercised in attempting to locate the trust instrument prior to trial.

The trial court clearly and correctly identified the issue as one of due diligence and decided the issue based on appellant's efforts to obtain the "declaration of trust" document before trial. As such, we conclude that the trial court's error was harmless. MCR 2.613(A); *People v Mateo*, 453 Mich 203, 210-212; 551 NW2d 891 (1996).

Affirmed.

/s/ Henry William Saad

/s/ Harold Hood

/s/ Roman S. Gibbs