COURT OF APPEALS
DECISION
DATED AND RELEASED

April 18, 1996

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

NOTICE

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

No. 94-0401

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

HOWARD A. KOOP, AS ASSIGNEE OF CHRYSLER FIRST BUSINESS CREDIT CORPORATION,

Plaintiff-Respondent,

v.

WOODLAKE TRAILS DEVELOPMENT COMPANY, LTD., BUD M. STYER, JEFFREY W. KROL, JEFFREY W. KROL & ASSOCIATES, LTD., STATE BANK OF LODI,

Defendants,

WOODLAKE TRAILS RECREATION CLUB, INC., AND JERRY L. UDELHOVEN,

Intervenors-Appellants.

APPEAL from orders of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Reversed and cause remanded.*

Before Gartzke, P.J., Dykman and Sundby, JJ.

GARTZKE, P.J. Woodlake Trails Recreation Club, Inc. and Jerry L. Udelhoven, as its president and as a club member, appeal from orders authorizing Howard Koop, the receiver of Woodlake Trails, to make a unilateral emergency assessment against members of the Club. The issues are whether: (1) res judicata bars the orders; (2) the contract documents authorize unilateral amendment to them by Koop; (3) substantial evidence supports the assessment; and (4) the trial court erred because (a) it entered an order in the absence of a pleading stating a claim for relief, (b) it erroneously exercised its discretion by denying more time for discovery, and (c) it improperly denied the request of the Club and Udelhoven for a jury trial.

We conclude that res judicata does not bar the trial court's orders, but we reverse the orders because the court approved a unilateral amendment to the contract not authorized by the contract documents. We do not reach the remaining issues.

1. BACKGROUND

The land known as Woodlake Trails consists of a mobile home park and campgrounds in Dane and Columbia Counties. Woodlake Trails Development Co., Ltd. is "the Developer." It purchased Woodlake Trails in 1981, and sold different classes of "memberships" in the campground. The Developer retains title to the trailer park and campgrounds. The Membership Contract incorporates the terms and conditions of the offering brochure, "Questions and Answers About the Membership" and the "Rules." The Membership Contract refers to the Membership Certificate, the offering brochure, "Questions and Answers," the "Rules" and the contract itself as the "Operative Documents."[1]

"Resident Members" pay a $6000 initiation fee plus a $400 base maintenance charge adjusted annually and are entitled to occupy year-round a designated campsite for a travel trailer recreational vehicle or a mobile home.[2]

[1] The Woodlake Trails Members Handbook contains the set of Operative Documents.

[2] General Members pay a $4,000 initiation fee, plus a $150 base annual maintenance charge adjusted annually and are entitled to periodically occupy undesignated campsites with a travel trailer, recreational vehicle, camper or tent. Individuals may also purchase

The Membership Contract provides for annual adjustments to the maintenance charge equal to the sum of changes in the Consumer Price Index, real estate taxes, utility charges and cost of special amenities.[3] The "Questions and Answers About Memberships" document assures that annual maintenance charge increases will not exceed that sum.[4]

(..continued)
day memberships for access to all Woodlake Trail amenities, except campsites.

[3] The Membership Contract provides in pertinent part as follows with respect to the maintenance charge:

> 2. Maintenance Charges. Member agrees to pay a maintenance charge of $_____ (the "base charge) for each of the 1984-5 and 1985-6 seasons commencing May 1 of each year and an annual maintenance charge annually thereafter equal to the base charge *adjusted as determined below*....
>
> The Annual Maintenance Charge base charge shall be adjusted annually, commencing with the 1986-7 season, to reflect 90% of the change in the Consumer Price Index, CPI-U, all Items (1967=100) for January 1 of the prior season as compared with January 1 of the season before that, any increase in real estate taxes and utility expense over the 1985 base year expense, the addition of any new taxes not in existence at the end of 1985, and the cost of any special amenities desired by the Membership and not otherwise provided by the Developer. The tax, utility and special amenities adjustments will be prorated among the Membership then outstanding with a maintenance of 500 Memberships used in making the computation. (Emphasis added.)

[4] The "Questions and Answers" includes the following:

> CAN THE AMOUNT OF MY MAINTENANCE CHARGES BE INCREASED?
>
> Yes, but only to the extent that the year end Consumer Price Index changes from that of the prior year end Index and the tax and utility expenses are greater than the base year. Maintenance charges may also be increased for special assessments against Woodlake Trails or for amenities desired by the Woodlake Trails Recreation Club, Inc. (the Club) and not paid for by Developer. The maintenance charge gives recognition to the cost of utilities, taxes,

We use "members" to refer to individuals who purchase Woodlake Trail memberships and to Club members. Members automatically become members of the Woodlake Trails Recreation Club. (Both sides occasionally refer to the members as tenants, and so do we.) The Club's bylaws state that its purpose is to "aid in the planning and recreational functions at Woodlake Trails" and to assist the Developer "in enforcing the Rules."

In 1988, the Developer executed a note secured by a mortgage on Woodlake Trails land to the Chrysler First Business Credit Corporation ("Chrysler"). In 1990, Chrysler filed an action for foreclosure, and in 1991 a Dane County circuit court entered judgment of foreclosure and sale.

On March 20, 1991, prior to that judgment, the Developer proposed to levy against the members a special assessment for increased utility costs and property taxes. The Developer claimed it had been undercharging members since 1984 for "cost increases we have incurred in the areas of water; sewage; garbage; electricity; and real estate taxes."

The Club and two members sought declaratory judgment in Dane County Circuit Court invalidating the special assessment. Subsequently, the Developer filed a Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Wisconsin, and the declaratory judgment action was removed to that court.

In the declaratory judgment action, the bankruptcy court invalidated the special assessment. It granted partial summary judgment for the Club and two members and declared that "defendants are foreclosed by contract and by the rule of account stated from collecting any additional maintenance fees or utility assessment for the season May 1, 1990 to April 30, 1991 and seasons prior thereto."[5] After a trial, the bankruptcy court determined the amount the Developer could collect in a utility assessment for the 1991-92

(..continued)

> swimming pool maintenance, waste collection, security, management, major equipment repair and related maintenance duties and labor which are paid for by the Developer....

[5] The maintenance charge is adjusted annually on May 1.

season and then declared the method for determining the maintenance charges for the 1992-93 season. The judgment declares in part:

> The Operative Documents with respect to maintenance fees are construed as follows:
>
> (a) The base charge of $400.00 shall be increased each season (May 1-April 30) by 90% of the increase in the Consumer Price Index for All Urban Consumer ("CPI-U") comparing January of the prior season to January of the season before that. The CPI-U adjustment shall be computed on the $400 base charge only and not on prior utilities and tax assessments....
>
> (b) For purposes of the utilities and real estate tax adjustment, the terms "charge for the base year" and "base year expenses" are defined as those expenses actually incurred by the debtor in the member's base year regardless of when the expenses are actually paid. For purposes of real estate taxes, this means the amount of taxes assessed for the member's base year, not the sum paid for the prior year's taxes.
>
> (c) For purposes of the utilities adjustment, the term "utilities" is defined as water, sewer, electricity and waste collection expenses. Repairs and maintenance for the wells and septic system and all other expenses incurred in the operation of Woodlake Trails are excluded from the utilities charge. Water and sewer expense for a given year shall be computed by multiplying the number of gallons of water and sewage produced by Woodlake Trails in that year by a reasonable price per gallon charged by a public utility, such as the City of Lodi.
>
> Order Regarding Escrow Account and Maintenance Fees.

After the Developer and Chrysler stipulated to relief from the automatic stay provisions in 11 U.S.C. § 362 resulting from removal to the

bankruptcy court,[6] the foreclosure action resumed in Dane County Circuit Court. On June 30, 1993, Howard Koop purchased Chrysler's note and mortgage and on August 30, 1993, the parties stipulated that Koop be the receiver of the trailer park and campground. On September 9, 1993, Koop was appointed receiver.

On November 12, 1993, Koop, acting as receiver, moved the circuit court in the foreclosure action for authority to cease operation of Woodlake Trails due to insufficient funds. The court allowed the Club and Udelhoven to intervene. On November 24, 1993, the court ordered as follows:

> To the extent the Court has equitable power to do so, it authorizes the Receiver to declare a short-term emergency and propose amendments to the Rules of Woodlake Trails Members Handbook pursuant to Sec. P of the Rules and direct the Board of Directors of Woodlake Trails Recreational Club, Inc., to respond to the Receiver regarding the existence of an emergency and its position on the proposed amendments within five business days of receipt of said proposal.

Section P the Rules (one of the Operative Documents) provides in pertinent part:

> The Developer has adopted the Rules and may amend the Rules from time to time, including the rates for services referred to as being at the "current rate," upon 30 days notice unless Developer determines that the need for an amendment is caused by an emergency and the Board of Directors of the Club agrees there is an emergency. Notice of an amendment shall be given by posting the amendment on each of the bulletin boards used for general notices.... The Developer represents that it will not amend the Rules in a manner which would result in a reduction in the collective rights and privileges of the Members as

[6] In 1992, the bankruptcy case was dismissed in its entirety.

> expressed in the Operative Documents. In the event that at least 20% of the Members, by a petition submitted to the Developer, state that an amendment to the Rules would result in a reduction of the collective rights and/or privileges of the Members, Developer will refer the matter to the Board of Directors of the Club and the Board of Directors of the Club will determine whether such amendment is valid. Either the Members or the Director [sic] can seek a declaratory judgment as to the validity of the amendment.[7]

Koop did not give the thirty days' notice provided in Section P. Rather Koop, acting under the court's order, declared an emergency under Section P, and proposed an amendment to the Rules to assess the members pro rata $33,645. The Club's Board of Directors responded, objecting on grounds that a financial emergency did not exist. The directors rejected the proposed amendment. They contended that Section P permits amendments to the Rules but not other terms of the Operative Documents, particularly with respect to maintenance fees. They asserted that the maintenance fees members may be required to pay and the basis for increasing such fees are set forth in the Membership Contract.

On December 8, 1993, Koop moved the court in the foreclosure action for judgment declaring "the Receiver's amendment to be valid and binding as to the members of the Club," and ordering the Club and its members to members to pay the proposed assessment on a date certain. Koop argued that "section P of the Rules [provides] that when a proposed amendment is rejected, the validity of the amendment may be determined by a Court in an action for a declaratory judgment." He asserted the amendment was both reasonable and necessary to continue to operate Woodlake Trails, to preserve the property's value and prevent waste.[8]

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[7] The parties seem to assume that "Director" in the last sentence is intended to refer to the "Developer." Whether the assumption is valid is not an issue on appeal.

[8] The assessment covers charges for gas, electric, telephone, water and sewer, repairs and maintenance, salaries, management, payroll taxes, trash removal, snow removal/lawn care, legal and accounting, management fees-receiver, court approved legal

On December 16, 1993, the Club and Udelhoven objected to Koop's motion citing: (a) the absence of a pleading seeking relief against them; (b) insufficient time for discovery; (c) a demand for trial by jury; (d), res judicata; (e) the contract provisions; (f) violation of WIS. ADM. CODE § ATCP 125; and (g) the lack of a financial emergency. The trial court rejected their objections and permitted a trial to the court the same day.

On December 20, 1993, the court entered an order granting Koop the declaratory relief he sought and authorizing him, as receiver, to make an emergency assessment of $33,645 to prevent closing Woodlake Trails during December 1993 and January 1994 due to financial crisis. The court found that "[e]ssential services at Woodlake Trails are presently threatened with being terminated and by all reasonable analysis a serious emergency situation exists at the park," and that "[t]he projections of the receiver for emergency financial assessments are conservative and, at best, the income projected to the park are optimistic under the present facts to date." The court concluded that "no procedural bar" precluded Koop, as receiver, from seeking declaratory relief, that the Handbook contains provisions for emergency special assessments and that the Developer and the receiver in his stead "can utilize Section P to make short-term emergency adjustments."

In January 1994, the trial court amended its December 20 order to require that Koop deposit the funds collected on the assessment in a segregated account and use the funds only to pay current expenses. The court also amended its order to permit members to withdraw from their memberships without penalty by providing notice to the new owner of Woodlake Trails "within 30 days of the tenants' receipt of notice of this order."

On December 21, 1993, the Brylee Corporation purchased Woodlake Trails at the Sheriff's Sale on Foreclosure. As the sole or primary shareholder of the corporation, Koop had assigned it his rights under the mortgage. On February 21, 1994, the trial court entered an order confirming the sheriff's sale.

The Club and Udelhoven appeal from the trial court's orders of November 24, 1993, December 20, 1993, and January 31, 1994.

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fees, chlorination of water supply-special repair, interest expense-debt service.

2. RES JUDICATA

The Club and Udelhoven argue that the bankruptcy court's order interpreting the Operative Documents binds the Developer and Koop as receiver under the doctrine of res judicata. They argue that Koop cannot raise a new issue (his ability to amend the contract by way of a declaratory judgment to permit the special assessment) that could have been but was not raised before that court in the declaratory judgment action removed to it. We reject the arguments.

A declaratory judgment is res judicata as to matters actually decided but not as to matters which "might have been litigated." ***Barbian v. Lindner Bros. Trucking Co., Inc.***, 106 Wis.2d 291, 296, 316 N.W.2d 371, 374 (1982). The RESTATEMENT (SECOND) OF JUDGMENTS adopts the same rule.

> A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.

RESTATEMENT (SECOND) OF JUDGMENTS, § 33. "The effect of such a [prior] declaration .... is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue *further declaratory* or coercive relief in a subsequent action." RESTATEMENT (SECOND) OF JUDGMENTS, § 33, cmt. c. (emphasis added).

Because the Bankruptcy Court did not determine in the declaratory judgment action before it whether the Developer could amend the Operative Documents to impose a special assessment, Koop may raise that issue by way of his motion for declaratory relief in the circuit court foreclosure action.

3. THE EMERGENCY ASSESSMENT UNDER THE CONTRACT

The parties dispute whether Koop may amend the Operative Documents to make the $33,645 special assessment. Koop argues that Section P of the Rules, reasonably construed, allows "for cash assessments when a serious emergency situation exists." He argues Section P permits the Developer to amend any provision of the Operative Documents and to ask a court to approve an amendment over the objections of the Board. The trial court agreed with that reading. We do not.

Construction of a written contract normally raises a question of law which we resolve without deference to the trial court. ***Pleasure Time v. Kuss***, 78 Wis.2d 373, 379, 254 N.W.2d 463, 467 (1977). Koop as the receiver stands in the shoes of the Developer. ***Nick v. Holtz***, 237 Wis. 407, 411, 297 N.W. 387, 390 (1941). The documents are ambiguous, but no extrinsic evidence was offered regarding the intentions of the parties. The only reasonable inference from this record is that the Developer drew them. We construe ambiguous documents against the drafter, ***Dairyland Equipment Leasing, Inc. v. Bohen,*** 94 Wis.2d 600, 609, 288 N.W.2d 852, 856 (1980), and therefore against Koop, the Developer's successor.

Our approach is affected by the fact that far from being a disinterested receiver, Koop is highly interested. Koop wears more than one hat. Koop acquired the mortgage and his corporation later bought the property at the sheriff's sale. As receiver, Koop has a duty to preserve the property--the real estate which forms the security for the mortgage--against waste. But under the circumstances, Koop's motives cannot be limited to just that. If we accept Koop's proposed construction of the Operative Documents, in the future he could bear the aegis of emergency to compel members to pay more than their membership contracts require.

We read Section P to mean that the Developer may amend the Rules, including the rates for services referred to as being at the "current rate," upon 30 days notice. In the event of an emergency, and if the Board of Directors agrees that an emergency exists, the Developer may amend the Rules without notice. The Developer represents that its Rule amendments will not reduce the "collective rights and privileges" of the members. If 20 percent of the members object that an amendment infringes upon their "collective rights and privileges," the Board of Directors of the Club will decide if the amendment is valid. Finally, and we quote from the last sentence, "Either the Members or the Director can seek a declaratory judgment as to the validity of the amendment."

Thus, the Developer's power to amend the Rules does not depend upon whether an emergency exists. With or without an emergency, the Developer may amend the Rules. In Section P, an emergency affects only the notice the Developer must give before he can amend the Rules.

The Developer's power to amend the Rules is limited by the provision in which the Developer represents that its amendments will not reduce "the collective rights and privileges" of the members. If members believe an amendment does reduce their "collective rights and privileges," they may petition the Board to vote on the amendment's validity. Individual members may also seek a declaratory judgment as to the validity of the amendment.

Koop argues Section P grants the Developer the power to amend any provision of the Operative Documents, including the annual maintenance charge. The members contend the Developer's power of amendment extends only to the Rules, one of the five Operative Documents.

A reasonable person could differently understand the Developer's power of amendment. The extent of the Developer's power to amend the Operative Documents--with or without an emergency--is therefore ambiguous. ***Jensen v. Janesville Sand & Gravel Co.***, 141 Wis.2d 521, 530, 415 N.W.2d 559, 563 (Ct. App. 1987).

While all five Operative Documents must be construed together, from the members' point of view, the Membership Contract contains the most important provision affecting their financial responsibilities. That provision is Paragraph 2 entitled "Maintenance Charges," which we have quoted in footnote 3. That paragraph provides for modification to the annual maintenance charge to reflect changes in the consumer price index and increased expenses for utilities and property taxes. Consequently, the pertinent item in the question and answer brochure is the question asking whether members' maintenance charges may be increased and the following answer:

> Yes, but only to the extent that the year end Consumer Price Index changes from that of the prior year end Index and the tax and utility expenses are greater than the base year. Maintenance charges may also be increased for special assessments against Woodlake Trails or for

> amenities desired by the Woodlake Trails Recreation Club, Inc. (the Club) and not paid for by the Developer.

Given the maintenance charge provision in the Membership Contract and the quoted question and answer in the brochure, we see no basis for construing Section P to permit the Developer to make a unilateral emergency assessment against members except to charge a service rate referred to in the documents as being at the current rate. In contrast to the Membership Contract, which establishes the specific financial duties of individual members, the Rules are general and pertain largely to the relationship of members to each other. The preface to the Rules emphasizes the need for social cooperation: "Since the use of Woodlake Trails is available to all of its Members, it follows that Members can play a large part in maximizing their own enjoyment by treating Woodlake Trails with respect and following the Rules." The Rules also provide for reservations, registrations upon entering and leaving Woodlake Trails, responsibilities of members with regard to pets, consumption of liquor by minors, responsibility of members for the conduct of their minor children, the use of the swimming area, game equipment at the facilities, the playground, the adult lounge, the bulletin board and the like.

Section P of the Rules permits the Developer to amend the Rules from time to time, including the rates for services as referred as being at the "current rate," but those rates are minor matters compared to the maintenance charges and are relatively insignificant in amount. The appellants have identified nine services expressly defined in the Operative Documents as being at the current rate, and they have little in common with "maintenance charges."[9] In contrast, the maintenance charges pay "all operational and developmental costs, including taxes, insurance, repairs, maintenance and the salary of the Resident Manager and other employees of Developer at Woodlake Trails." The inference is reasonable that maintenance charges are intended to cover basic fixed costs of operation, and the nine service rates expressly are a far cry from those basic costs.

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[9] The nine services are as follows: extra air conditioner/refrigerator charge ($30 per season); sanitary pumping service ($3 per pumping); deliver and "spot" camping unit ($5); separate campsite for guests ($15 a night); reservation fee for guest privileges ($1 per night); copy of current directory ($5); maintaining and cleaning campsites ($15 per hour); camping equipment movement and storage (storage $2 per day; $14 per week; $50 per month and $500 per year; moving $5 one way); replacement membership cards ($5 each).

The relative insignificance of the "rates for services referred to as being at the `current rate'" led the trial court to ask why Section P permits an amendment in less than thirty days when the Developer "determines that the need for an amendment is caused by an emergency and the Board of Directors of the Club agrees there is an emergency." "Emergency" in the context of the nine identified services indeed involves relatively minor matters. However, Section P simply does not grant the Developer emergency power to impose a special assessment above annual adjustments to the maintenance charges. We cannot redraw the contract to fit our view of what is reasonable. ***Zweck v. D. P. Way Corp.***, 70 Wis.2d 426, 434, 234 N.W.2d 921, 926 (1975). The financial problems faced by the Developer in meeting operational expenses over and above those paid for by the annually adjusted maintenance charge are the Developer's problems and not the members'.

Were we to construe Section P to permit the special assessments the trial court authorized, the contractual protection provided to members by the maintenance charge provision would be illusory. Such a construction would allow the Developer, the landlord, to force the tenant/members to pay greater rents merely because of the landlord's financial difficulties. That is a result heretofore unheard of in landlord/tenant law in this state, and it ought not arise from a construction of ambiguous documents in favor of the successor to the person who drew them.

Moreover, Koop's motion for declaratory relief sought the court's approval for a unilateral amendment to--a modification of--an existing contract. The effect of that amendment is to create a new contract between the landlord and its tenants. Courts do not have the power to create express contracts.

Modification of a contract creates a new contract between the parties. ***Lakeshore Commercial Finance Corp. v. Drobac***, 107 Wis.2d 445, 458, 319 N.W.2d 839, 845 (1982), *citing* ***Holte v. Miller***, 334 P.2d 849 (Cal. 1959). One party cannot unilaterally modify a contract without the other party's assent. ***Weil v. Biltmore Grande Realty Corp.***, 251 Wis. 13, 18, 27 N.W.2d 713, 716 (1947). Section P is consistent with that basic principle of contract law, because it provides in substance that if the Developer proposes an amendment to the Rule and twenty percent of the members object, then the "Developer will refer the matter to the Board of Directors and the Board of Directors of the Club will determine whether such amendment is valid."

Section P does not permit the Developer to impose an amendment to the Operative Documents through a declaratory judgment action. When it approved the amendment, the trial court exceeded its authority under the declaratory judgments act.[10] The assessment ordered by the trial court is therefore void.

A court's competency to grant declaratory relief originates in § 806.04, STATS., subsection (2) of which provides in pertinent part:

> Any person interested under a ... written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a...contract...may have determined any question of construction or validity arising under the...contract and obtain a declaration of rights, status or other legal relations thereunder.

The declaratory judgments statute permits courts to "declare" rights, not to create them. Section 806.04(1).

4. REFORMATION

At the hearing on the motion of the Club and Udelhoven for reconsideration, the trial court said

> [T]he prior order of this Court was made in an equitable context and there was need for a form of interpretation and/or *reformation* of the earlier contract which is acknowledged to have had some ambiguity, and it is clear that that was only done by me on the basis of a finding that there was a clear financial emergency at the time, that this park was in danger of imminent cessation of operations, and was only done with

[10] It does not matter that the trial court later amended its December 20, 1993 order to permit members to withdraw from their amended contracts without penalty. The trial court did not have the authority to give members a take-it-or-leave-it proposition.

> considerable reluctance on my part to stave off what I believe to be a genuine emergency.... (Emphasis added.)

Only in the limited instances of mutual mistake or fraud should a court reform a contract. ***Frantl Indus. v. Maier Constr., Inc.***, 68 Wis.2d 590, 594, 229 N.W.2d 610 (1975), *quoting* ***Touchett v. E.Z. Paintr Corp.***, 263 Wis. 626, 630, 58 N.W.2d 448, 450 (1953). A court must not reform a contract merely because a party faces unforeseen difficulties during its execution. Unrestrained reformation would make contracts not worth the paper on which they are written. ***Pincus v. Pabst Brewing Co.***, 893 F.2d 1544, 1552 (7th Cir. 1990).

The court heard no evidence that the contract failed to express the mutual understanding of the parties, much less that mutual mistake or fraud had caused such a failure. In the absence of such evidence, the court could not reform the contract.

5. A COURT'S EQUITABLE POWER TO AVOID WASTE

Koop argues that the court properly exercised its equitable power to avoid waste. Koop cites no authority for the proposition that, to avoid waste of property in receivership, a trial court may modify a contract over the objections of a party to it. We disregard arguments unsupported by references to authority. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

6. REMAND

Because we conclude that the trial court erred in its construction of Section P in the Rules, we reverse the order entered December 20, 1993, as modified on January 31, 1994, and remand with instructions to the trial court to vacate its authorization to the receiver to make an emergency assessment in the amount of $33,645.

The appellants ask that we not only reverse the trial court's order approving the assessment but declare that assessments for operating expenses

are not permitted under Section P. Our decision satisfies the second request. We have ordered vacation of that part of the trial court's order of December 20, 1993, providing that "The developer of Woodlake Trails and the Receiver, in his stead, can utilize Section P to make short-term emergency adjustments," other than those described in Section P as "the rates for services referred to as being at the `current rate.'"

The appellants also request that we order that the payments members have made under the assessments be deemed advances on their future maintenance fees. Appellants argue such an order would prevent unfairness to the tenants who might otherwise be forced into more litigation to recover amounts they paid under the invalid assessment, that suing the Developer is a meaningless option since it has no money to pay existing debts, and Koop and Brylee are the real beneficiaries of the payments. In our view, we would unnecessarily and inappropriately encroach upon the trial court's role were we to order that the amounts paid under the assessments be deemed prepayments against future maintenance charges. While the proposal appears just, whether it should be implemented we leave to the trial court.

By the Court.—Orders reversed and cause remanded for further proceedings consistent with this opinion.

Not recommended for publication in the official reports.