COURT OF APPEALS
DECISION
DATED AND RELEASED

August 31, 1995

NOTICE

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.

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No. 95-1116-FT

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

IN RE THE MARRIAGE OF:

ELIZABETH TOOKE,

Petitioner-Respondent,

v.

ROBERT TOOKE,

Respondent-Appellant.

APPEAL from an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed*.

Before Dykman, Sundby, and Vergeront, JJ.

DYKMAN, J. This is an appeal from an order directing Robert Tooke to pay his former wife, Elizabeth Tooke, $7,534.80, the amount of a real

estate special assessment.[1] Because we conclude that the parties' marital settlement agreement required Robert to pay the special assessment, we affirm.

Elizabeth and Robert were divorced in 1992. A part of their marital settlement agreement provided: "Any outstanding debt or liability not disclosed shall be the responsibility of the person who incurred it, and that party shall hold the other harmless for its payment." The parties further agreed:

> Both parties agree that the provisions of this agreement shall survive any subsequent judgment of (divorce/legal separation) and shall have independent legal significance. This agreement is a legally binding contract, entered into for good and valuable consideration. It is contemplated that in the future either party may enforce this agreement in this or any other court of competent jurisdiction.

Several of the major assets involved in the divorce included parcels of land located in Onalaska, Wisconsin. Elizabeth received this land which was estimated by her to be worth about $550,000, and by Robert to be worth $585,000.

Unfortunately, Robert's financial statement did not mention that in 1988, the City of Onalaska had levied special assessments against the parcels of land totalling $7,534.80. After the divorce, Elizabeth discovered the special assessments and asked the trial court to order Robert to pay them. The trial court did so, and Robert appeals. His brief raises three issues:

1. Whether the trial court can modify a property settlement.

2. Whether Elizabeth's only remedy is a constructive trust.

[1] This is an expedited appeal under RULE 809.17, STATS.

3. Whether the range of value on the property prevented the special assessments from being an omitted asset.

In Robert's reply brief, he mentions that special assessments are not debts. But we generally do not review issues raised for the first time in a reply brief. ***State v. Schindler***, 146 Wis.2d 47, 51 n.2, 429 N.W.2d 110, 112 (Ct. App. 1988), *modified*, ***State v. Lee***, 175 Wis.2d 348, 499 N.W.2d 250 (Ct. App. 1993). Permitting an appellant to raise new issues in a reply brief gives that party an unfair advantage because the respondent cannot counter such arguments. As we concluded in ***Schindler***, we see no reason to depart from this rule here.[2] Therefore, we will only address the three issues that Robert raises in his brief-in-chief.

MODIFICATION OF PROPERTY SETTLEMENT

Robert asserts, without citing any authority, that a trial court cannot modify a property division, and that forcing him to pay the special assessments is such a modification. We agree that a trial court may not modify

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[2] Even were we to consider this argument, we would likely reach the same result. Common sense dictates that a special assessment is a debt because if the owner of real estate does not pay a special assessment, the land is sold to pay the debt. The supreme court took this common sense approach in ***Riesen v. School District No. 4***, 192 Wis. 283, 292, 212 N.W. 783, 786 (1923), where the court said:

> Certain real estate of the school district had been assessed for special improvements, and the district was liable for the payment thereof. It is the contention of the appellants that this amount should not be considered as a liability against the district. There can be no question but that this was an indebtedness of the district which had to be paid in the future. It was not a liability for current expenses, and therefore it should be considered, as the court held, a future capital liability.

The school district had argued that a special assessment against its real estate was not a debt. As the supreme court noted, the special assessment had to be paid in the future and was therefore a debt. In his reply brief, Robert has made the same argument as the school district did in ***Riesen***. But he does not explain why we should not reach the same result as the court reached in ***Riesen***.

a property division. Section 767.32(1), STATS. *See also* ***Wright v. Wright***, 92 Wis.2d 246, 263, 284 N.W.2d 894, 903 (1979), *cert. denied*, 445 U.S. 951 (1980). But the trial court did not modify the parties' agreement—it enforced the agreement. The parties stipulated in their marital settlement agreement that any undisclosed debt or liability would be the responsibility of the person who incurred it. And, they agreed that this provision could be enforced in the trial court which entered the order of which Robert complains. Were we to accept Robert's assertion, no property settlement could be enforced, even if the parties agreed that it could be. This would be contrary to ***Rotter v. Rotter***, 80 Wis.2d 56, 62-63, 257 N.W.2d 861, 864-65 (1977), where the court concluded that trial courts have inherent powers in family court matters to remedy injuries arising from violations of or noncompliance with their judgments. We conclude that the trial court did not modify the parties' property division by requiring Robert to pay the special assessments.

CONSTRUCTIVE TRUST

Section 767.27(5), STATS., provides in pertinent part:

> If any party deliberately or negligently fails to disclose information required by sub. (1) and in consequence thereof any asset or assets with a fair market value of $500 or more is omitted from the final distribution of property, the party aggrieved by such nondisclosure may at any time petition the court granting the annulment, divorce or legal separation to declare the creation of a constructive trust as to all undisclosed assets, for the benefit of the parties and their minor or dependant children, if any, with the party in whose name the assets are held declared the constructive trustee, said trust to include such terms and conditions as the court may determine.

Robert asserts that because Elizabeth did not petition for a constructive trust and because the trial court did not order a constructive trust, the trial court's order is improper. Robert does not explain his contention further. He cites no authority for his position, except for several cases holding

that an unambiguous statute must be interpreted literally. We agree, but that does not explain why § 767.27(5), STATS., is applicable. We are unable, without more from Robert, to see the significance of the statute to Robert's case. Section 767.27(5) pertains to undisclosed assets. Elizabeth did not complain that Robert failed to disclose an asset but asserted that he omitted a debt. Robert does not explain how creating a constructive trust over a debt would be anything other than an exercise in futility. Even if § 767.27(5) were to apply to debts, the use of the word "may" in the statute means that such a procedure is not required. *See* ***Schmidt v. Department of Local Affairs & Dev.***, 39 Wis.2d 46, 53, 158 N.W.2d 306, 310 (1968) (use of the word "may" is permissive unless different construction is demanded by statute). Perhaps Robert is suggesting that despite the use of the word "may," the statute is the exclusive remedy for an undisclosed liability. But he fails to explain or cite any authority for this proposition. We conclude that § 767.27(5) is inapplicable to this case.

UNCERTAIN VALUE

Robert asserts that the value of the property ranged from $500,000 to $550,000. He concludes that the real estate was not omitted from his financial statement. We agree, but we cannot see the significance of this conclusion. Even Elizabeth does not contend that Robert omitted the real estate. Robert then notes: "To the extent that the sidewalk special assessment might be considered a debt, such improvement actually enhanced the resale and development value of the real estate and should [in] equity go with the property in any event." But the special assessments were made in 1988, and Robert's financial statement showed that the appraisals on the real estate were made in 1990 and 1991. The improvements which caused the special assessments would have been a part of the value of the real estate at the time of the appraisals. We reject Robert's third assignment of error.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

SUNDBY, J. (*concurring*). I conclude that the trial court reached the right conclusion for the wrong reasons. The marital settlement agreement provided: "Any outstanding debt or liability not disclosed shall be the responsibility of the person who incurred it, and that party shall hold the other harmless for its payment." A special assessment is not a debt of the party. A municipality may not sue the owner of the property for special assessments.

However, special assessments are a lien against property. Therefore, Robert was required to show on the standard form the lien of the special assessment. The standard financial disclosure form contains the following: "3. DEBTS AND OBLIGATIONS: Attach schedules if necessary. Include: Mortgages and *Liens*...." (Emphasis added.) Robert did not show the lien of the special assessment and in that respect he violated the requirement that he make full disclosure of all debts and obligations. Therefore, I concur in the majority opinion.