NOT DESIGNATED FOR PUBLICATION

No. 96,042

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

DONNA MERZ,
Appellant,

and

BRIAN MERZ,
Appellee.

MEMORANDUM OPINION

Appeal from Seward District Court; KIM R. SCHROEDER, judge. Opinion filed March 2, 2007. Affirmed.

M. Duane Coyle, of Hinkle Elkouri Law Firm L.L.C., of Wichita, for appellant.

Linda P. Gilmore, of Gilmore, Shellenberger & Maxwell, P.A., of Liberal, for appellee.

Before GREEN, P.J., ELLIOTT and MALONE, JJ.

Per Curiam: Donna Merz appeals the district court's refusal to amend the pretrial order during the trial to permit her to seek maintenance in a divorce proceeding. Finding no abuse of discretion, we affirm.

Donna and Brian Merz were married in January 1984, when they were both teenagers. The couple had four children: Kyle, Drew, Austin, and Brice. The three youngest boys were minors when the divorce petition was filed, but only two were minors at the time of trial.

Donna and Brian separated in December 2001. In April 2004, Donna filed a petition for divorce. Donna requested equitable division of the parties' assets, joint legal custody of the minor children, child support, and spousal maintenance.

After the action had been pending about 1 year, a scheduling order was issued setting a pretrial conference for June 17, 2005, and directing both parties to have pretrial questionnaires filed the day before the conference. Both parties filed pretrial questionnaires. In her pretrial questionnaire, Donna listed the fact questions as being the valuation date and the value of the property. The only question of law listed was whether the records of Brian's corporation were discoverable.

The pretrial conference was held July 26, 2005, and a pretrial order was filed that day. During the conference, counsel agreed custody and parenting time issues had been

resolved as long as Donna continued to live in the Sublette area. The parties also reported they thought they could come to an agreement on child support. The parties had exchanged information on assets and credit card debt and reported they could compile a list of both; in addition, an appraisal of the marital home was nearly compete. There was disagreement as to whether the valuation date for assets for the property division should be the date of separation (2001) or the date of the petition (2004). The parties advised the district court there were no special property issues other than the value of the marital home, the sale of the couple's business to Donna's father, and the use of the proceeds of that sale to pay off credit card debt. In conclusion, the parties reported no other issues other than "child support, property, [and] the date of valuation."

As with the questionnaires, the questions of fact and law as set forth in the pretrial order were the valuation date, value of assets and debts, and whether Brian's corporate records were discoverable. Donna's factual contentions and theory of claim were listed as "Incompatibility; equitable divisions of debts and assets." The pretrial order did not mention spousal maintenance.

The trial was held as scheduled on August 30, 2005. Highly summarized, the trial testimony showed that after Brian and Donna married, they both worked for her father, Larry Qualls, at his grocery store. Donna worked off and on at the store, while Brian worked his way up to store manager. However, for most of their marriage, Brian was the primary financial supporter and Donna stayed at home taking care of the four children.

After a few years, Brian and Qualls became involved in a business installing and providing equipment for car washes. Donna did not participate in the car wash business, although she and Brian owned half of the business and her father the other half. The couple sold their interest in the car washes to Qualls for $100,000. Donna testified she and Brian agreed the proceeds would be used to pay off credit card debt.

When the parties separated in 2001, Donna remained in the marital home. The couple had built the marital home themselves by investing $120,000 and obtaining a mortgage for an additional $220,000. During the first year of the separation, Brian gave Donna approximately $3,400 a month for the children and expenses, even though there was no child support order. After the first year, his payments reduced to $2400 a month. Brian also paid additional expenses for the boys. Donna also received funding from her father of approximately $150,000 over the 2 years prior to the trial. Notwithstanding this income, the parties' credit card debt increased from approximately $30,000 to over $60,000.

After the separation, Donna accepted a position as a receptionist at a medical clinic in Garden City, earning $7.50 an hour and then $8 an hour. After 8 months of working, Donna quit that job because Kyle began skipping school and having other problems. Brian started his own car wash distributorship in March 2005. The parties stipulated that Brian's income for child support purposes was $64,000, and that Donna's income (based upon minimum wage) would be $10,716 per year. However, Donna asserted Brian was

an excellent salesman and had much greater earning potential now that he ran his own company.

During Donna's testimony, her attorney asked what amount she was seeking in maintenance. Brian's counsel objected, noting that maintenance was not identified as an issue in the pretrial order. Donna's counsel advised the district court that maintenance had always been an issue and that he routinely discussed the issue of maintenance with opposing counsel. The district court determined it was bound by the pretrial order and sustained the objection.

At the conclusion of Donna's evidence, her attorney raised the issue of maintenance again, arguing the pretrial order should be amended to prevent manifest injustice. Brian's counsel again objected. In considering the motion, the district court discussed several cases and the need for manifest injustice to amend the pretrial order. The district court concluded it would be manifestly unjust to allow the amendment because the opposing party had no notice the maintenance claim would be made at trial. The district court also concluded that maintenance was a separate and distinct issue from property division and, therefore, was not within the terms of the current pretrial order. Accordingly, the district court denied the motion to amend.

After the parties filed posttrial summations, the district court's journal entry was filed October 7, 2005. The district court granted the petition for divorce. The parties

were given joint custody of the two minor children, with Donna being designated as the residential parent and Brian being given specified parenting time. Child support was set at $845 per month, based upon the parties' stipulations about their respective incomes. The child support was later changed to $715 per month by a nunc pro tunc order due to a clerical error. The district court made detailed findings concerning an equitable division of the parties' property and debts. The district court did not order any maintenance. Donna timely appeals.

The sole issue on appeal is whether the district court erred in denying Donna's motion to amend the pretrial order to permit her to pursue a claim for spousal maintenance. Donna contends that because she asserted a claim for maintenance in her original petition and the issue had been a subject of negotiations prior to trial, Brian was not prejudiced or surprised by her request for maintenance at trial. Donna emphasizes she was a stay-at-home mother during the parties' 20-year marriage. She also asserts that a determination of maintenance could have been made based on the evidence presented at trial, and no additional evidence would have been required to address the issue.

The appellate court reviews a claim that the district court erred in denying a motion to amend a pretrial order for an abuse of discretion. *Smith v. Printup*, 262 Kan. 587, 592, 938 P.2d 1261 (1997); *State Farm Fire & Cas. Co. v. Liggett*, 236 Kan. 120, 124-25, 689 P.2d 1187 (1984). Discretion is abused only when no reasonable person would take the view adopted by the district court. The exercise of judicial discretion

requires that the district court have proper regard for what is just and fair under the existing circumstances and that it not act in an arbitrary fashion or unreasonable manner. 236 Kan. at 124-25. A party claiming an abuse of the district court's discretion bears the burden of showing such abuse. *Marshall v. Mayflower Transit, Inc.*, 249 Kan. 620, Syl.¶ 8, 822 P.2d 591 (1991).

K.S.A. 60-216(e) provides that pretrial orders "shall control the subsequent course of the action unless modified by a subsequent order. The order . . . shall be modified only by agreement of the parties, or by the court to prevent manifest injustice." The party seeking to amend a pretrial order carries the burden of showing manifest injustice. *Butler v. HCA Health Svcs. of Kansas, Inc.*, 27 Kan. App. 2d 403, 418, 6 P.3d 871, *rev. denied* 268 Kan. 885 (1999). The purpose of pretrial conference procedures is to prevent surprise and enable the parties to prepare for trial knowing that the issues and evidence will not be "moving targets." *Norton Farms, Inc. v. Anadarko Petroleum Corp.*, 32 Kan. App. 2d 899, 904, 91 P.3d 1239 (2004).

Cases applying the "manifest injustice" standard have been very fact intensive. The courts have been more willing to permit amendments to pretrial orders when the amendments alter evidence used, but not the parties' claims. For example, in *Boyle v. Harries*, 22 Kan. App. 2d 686, 923 P.2d 504 (1996), this court upheld a last minute amendment to the pretrial order to permit the use of new evidence for damage calculations. The new evidence had been sought by the plaintiff in early discovery

requests, but had been secreted in one of the defendant's cars until a few days before trial. 22 Kan. App. 2d at 690. But see *Norton Farms, Inc.*, 32 Kan. App. 2d at 902-03 (upholding district court's refusal to amend pretrial order to include additional videotape exhibit in light of party's unjustified delay in creating the videotape and delay in seeking to amend the pretrial order).

However, when an amendment to a pretrial order seeks to add or change the claims or the parties, manifest injustice becomes more difficult to establish. For example, in *Butler*, the plaintiff attempted to add an additional party and add an additional theory in a medical malpractice case after the pretrial conference, blaming delays in discovery responses by the hospital. Citing the plaintiff's delays in issuing and following up on discovery, the district court denied the motion to amend and this court affirmed. 27 Kan. App. 2d at 417-18. See also *Pink Cadillac Bar & Grill, Inc. v. USF & G Co.*, 22 Kan. App. 2d 944, 952, 925 P.2d 452 (1996), *rev. denied* 261 Kan. 1084 (1997) (finding district court erred in allowing consideration of claim not contained in pretrial order); *Herbstreith v. de Bakker*, 249 Kan. 67, 74-75, 815 P.2d 102 (1991) (upholding refusal to amend pretrial order to allow new claim that physician was unqualified to perform procedure); *Herrell v. Maddux*, 217 Kan. 192, 194, 535 P.2d 935 (1975) (reversing district court for permitting amendment adding contributory negligence theory after evidence presented and instructions were prepared); *Tillotson v. Abbott*, 205 Kan. 706, 709, 472 P.2d 240 (1970) (upholding denial of motion to amend pretrial order to add additional ground of defense made at beginning to trial). But see *Black v. Don Schmid*

Motor, Inc., 232 Kan. 458, 468-69, 657 P.2d 517 (1983) (upholding amendment to add breach of express warranty claim which had been included in original pleadings, but not explicitly mentioned in pretrial order).

Here, Donna's request to amend the pretrial order was more in the nature of adding an additional claim rather than just seeking to include additional evidence. Therefore, the burden of showing manifest injustice is more difficult. Reviewing all the circumstances, Donna's motion to amend the pretrial order results in a close question. A request for maintenance had been asserted in the original pleadings and, according to Donna, maintenance had consistently been an issue during negotiations. This has not been disputed by Brian. Moreover, in light of all the testimony in the trial about the parties' assets, debts, and income-earning potential, it is difficult to determine what additional evidence would have been necessary to resolve the maintenance issue.

On the other hand, there was absolutely no discussion of maintenance in the pretrial conference, and counsel failed to note the missing claim in the 30 days between the pretrial conference order and the trial date. Moreover, counsel did not request a continuance of the trial to allow opposing counsel time to prepare for the additional claim of maintenance. Finally, it should be noted that Donna does not challenge the division of property as being inequitable in light of the lack of maintenance.

While a different judge may have ruled differently in this case, we conclude the district court's refusal to amend the pretrial order did not rise to the level of abuse of discretion. We cannot say that no reasonable person would have taken the view adopted by the district court. Accordingly we decline to set aside the district court's judgment.

Affirmed.