STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2154
A13-0558

In re the Marriage of: Laurel A. Ferris, petitioner,
Respondent (A12-2154),
Appellant (A13-0558),

vs.

Edward H. Szachowicz,
Appellant (A12-2154),
Respondent (A13-0588)

Filed December 2, 2013
Affirmed
Stoneburner, Judge
Concurring in part, dissenting in part, Hudson, Judge

Hennepin County District Court
File No. 27FA000275703

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Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

In these consolidated appeals of separate rulings on two post-judgment motions in this marital-dissolution action, wife argues that the district court erred by (1) using a four-year average to calculate husband's income; (2) failing to make findings to support denial of need-based attorney fees; (3) denying conduct-based attorney fees; and (4) permitting husband to relitigate, in a new motion brought while husband's motion to amend the denial of his first motion was pending, the same issues that were fully litigated and decided in proceedings on the first motion. Husband argues that the district court abused its discretion by failing to grant modification of his maintenance obligation from the date of his first motion through the date of his second motion. Because all of the challenged decisions fall within the broad discretion of the district court, which ultimately reached a correct decision, we affirm.

FACTS

The marriage of Laurel A. Ferris (wife) and Edward H. Szachowicz (husband) was dissolved by decree in July 2004. At that time, husband's annual income from his solely owned plastic-surgery business was determined to be $313,000, based on a three-year average of fluctuating income. Husband's monthly budget was determined to be $8,659. Wife was found to have annual income of $42,000 and a monthly budget of $12,596 for herself and the parties' only child. Husband was ordered to pay $1,744 per month in child support and $10,000 per month in permanent spousal maintenance. On appeal, this

court affirmed the amount and duration of maintenance. *Ferris v. Szachowicz*, No. A05-553, 2006 WL 9576, *6-7 (Minn. App. Jan. 3, 2006).

In June 2006, to resolve cross-motions concerning support, the parties agreed to modify husband's maintenance and support obligations. The agreement, which was read into the record, involved, in relevant part, husband's employment of a financial consultant chosen by wife to equally divide between the parties the profits from husband's business. In March 2010, on wife's motion, the district court terminated the agreement and reinstated the maintenance and support obligations contained in the decree as modified by cost-of-living adjustments. Husband subsequently employed the financial consultant as his business manager to assist in financial decision-making for the business.

In a motion filed with the court in June 2011 and amended in November 2011 (first motion), husband sought modification of his maintenance and child-support obligations. Husband claimed a reduction in income stemming from a 75% loss of business referrals, increased rent and expenses, business-related loan debt, tax arrearages, and the economic recession. Husband supported his motion with his own affidavit explaining the changes he had been required to make to the business and stating that he could only meet his support obligations by not paying taxes. Husband also provided tax and budget records and documents; an affidavit from a certified public accountant opining that husband's monthly pre-tax cash flow was $13,984 and describing the growing tax debt; an affidavit from the financial consultant/business manager, detailing the dire financial circumstances of the business, the decrease in husband's income, and the austerity measures undertaken to keep the business running; and an affidavit from a

specialist in practice management and marketing in the field of plastic surgery, explaining the effect of the recession on plastic surgeons. Wife opposed the motion and moved for need-based and conduct-based attorney fees. Wife supported her opposition to the motion with the affidavit of a certified public account who, by including repayment of loans from husband's retirement account to the business and excluding husband's payment of a claimed business loan, opined that husband's income had actually increased since the decree.[1]

By order dated April 11, 2012, the district court denied husband's motion, concluding that he had failed to establish a substantial change in circumstances that warranted modification of his support obligations. To reach this conclusion, the district court credited wife's expert's inclusion of loan repayments as income, used a three-year income average rather than the five-year average urged by husband, and did not deduct a monthly payment for the claimed business loan, stating that evidence about the loan was "sparse" and noting that husband "did not provide one piece of documentary evidence that delineates the details of the loan . . . ." The court implicitly denied wife's motion for need-based attorney fees and explicitly denied her motion for conduct-based attorney fees, finding that husband did not "unnecessarily contribute[] to the length and expense of the proceeding."

[1] Wife's expert's affidavit states that the loan payment was not considered for calculation of husband's income because husband failed to disclose the original amount of the loan; renewal documents; use of all proceeds; details of how the loan transitioned to a personal debt, the amount and source of all payments, and whether payments are current. Subsequent affidavits of husband and wife dispute whether wife requested documents beyond what husband provided in discovery. Wife did not bring a motion to compel additional discovery.

In May 2012, husband moved for amended findings, and wife opposed the motion. In June 2012, before the motion for amended findings was heard, husband filed another motion for modification of his support obligations (second motion). As in his first motion, husband cited loss of business, the recession, mounting tax arrearages, and business-loan debt as the basis for his claim of changed circumstances resulting in decreased income and inability to meet his tax and support obligations. Husband stated in his affidavit that he was "completely unaware" that payment of $3,660 per month on a business debt "would receive so much scrutiny," and reiterated information from the affidavit filed with his first motion about the origin of the debt and the tax savings that resulted from listing both himself and the business as borrowers. He also attached loan documents, the absence of which the district court had commented on in the April 2012 order. Husband testified that since the April 2012 order (1) he had consulted with a bankruptcy attorney who opined that restructuring the business debt through bankruptcy would not provide the necessary cash flow to meet his support obligations and (2) Hennepin County had begun taking steps to suspend his driver's license, without which he could not maintain his practice. Additionally, husband provided an affidavit from the certified public accountant for husband and the business, refuting some of wife's expert's assumptions about husband's business and income and stating that as of June 21, 2012, tax authorities "have filed a tax lien, levied or proposed to levy wages, and have seized/levied one of [husband's] bank account[s]," and opining that without some relief from the district court, husband would have to shut down his business.

Wife opposed husband's second motion, arguing that husband was attempting to relitigate the same issues fully litigated in his first motion. The motion to amend and husband's second motion were heard together in July 2012.

On October 1, 2012, the district court issued three separate orders. The first two orders denied in part and granted in part husband's motion to amend the April 11, 2012 order and set out the amendments to that order, continuing to deny modification of maintenance but granting modification of child support (together, amended April 2012 order). The third order granted husband's second motion to modify maintenance retroactive to the date of the second motion (October 2012 order).

In the amended April 2012 order, the district court used a four-year average to calculate husband's income, but reiterated that there was insufficient evidence to deduct the loan repayment from his income calculation. The four-year income average supported modification of child support but not modification of maintenance. The parties' child has since become emancipated, and the only issue in this appeal relating to child support is the use of a four-year average to calculate husband's income for child-support purposes and the resulting reduction in child support for the months between modification and the child's emancipation.

In the October 2012 order granting husband's second motion for modification, the district court found that husband's "new" evidence was sufficient to prove that the loan repayment is a business-related expense that should be deducted from his income. Based on a four-year average and subtracting the loan payment, the district court found that husband had shown a 25% decrease in his income since entry of the dissolution judgment

and that this decrease satisfied his burdens of proof to show significant change in circumstances and that the current award was unreasonable and unfair. After considering the factors set forth in Minn. Stat. § 518.552, subd. 1, for determining a reasonable amount of maintenance, the court modified husband's maintenance obligation to $6,000 per month, effective July 1, 2012.

Wife moved to amend the October 2012 order, arguing that because there were no changed circumstances since the denial of husband's first motion and no new or previously unavailable evidence presented in husband's second motion, the district court erred by failing to apply the doctrine of res judicata to bar the second motion. The district court denied wife's motion for application of res judicata in a March 2013 order which granted some clerical amendments to the October 2012 order. The district court stated that case law relied on by wife to argue that the district court erred by considering the loan documents was inapplicable because "[t]his case is not before an appellate court." The district court found that "it appropriately considered the loan documents . . . [and] [s]uch documentation provided . . . sufficient information . . . to deduct [the loan payment] from its previous finding of [husband's] income." These appeals and related appeals followed and were consolidated by order of this court.

D E C I S I O N

I. Challenges to amended April 2012 order

A. Wife's challenge to use of four-year average to determine husband's income for purposes of child support

Wife asserts that the district court erred by using a four-year average to determine husband's income, arguing that inclusion of 2007 income unreasonably distorted husband's average income and resulted in an inequitable reduction of child support. A district court has broad discretion to grant or deny a motion to modify child support, and the decision will not be reversed unless it resolves the matter in a manner that is "against logic and the facts on record." *Rohrman v. Moore*, 423 N.W.2d 717, 720 (Minn. App. 1988) (quoting *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984)).

In *Veit v. Veit*, this court upheld the district court's use of a 42-month average to determine the husband's income, stating that "[a]n average takes into account fluctuations and more accurately measures income." 413 N.W.2d 601, 606 (Minn. App. 1987). Here, the district court found that averaging husband's income "is appropriate . . . due to the fluctuating nature of his income." The district court rejected husband's expert's use of a five-year average and wife's expert's use of a three-year average, finding that averaging "the past four years . . . is a more reliable indicator of [husband's] income, and better takes into account the fluctuating nature of [husband's] business." The district court averaged husband's income for 2007, 2008, 2009, and 2010, specifically omitting 2011 due to the "incomplete nature of income figures" for 2011.

Wife objects to the four-year average, asserting that the evidence demonstrated that "with the exception of 2009, husband's income was on an upward trend from 2006 through 2010." We conclude that when income averaging is appropriate, as it is here based on fluctuating income, the district court has discretion to select the averaging period. The facts relied on by wife do not demonstrate that the district court abused its discretion by using a four-year average rather than a three-year average.

B. Wife's challenge to denial of motion for need-based attorney fees

Minn. Stat. § 518.14, subd. 1 (2012), "requires the court to award attorney fees if the fees are necessary to allow a party to continue an action brought in good faith, the party from whom fees are requested has the means to pay the fees, and the party seeking fees cannot pay the fees." *Holmberg v. Holmberg*, 588 N.W.2d 720, 727 (Minn. 1999) (summarizing the 1998 version of the statute, which uses the same language as the current version of the statute). Wife argues that the district court erred by denying need-based fees without making findings that reflect the district court's consideration of the statutory factors. We disagree.

In *Wende v. Wende*, we reversed a denial of need-based fees because of a "total absence of any findings on each party's financial position and [wife's] need for financial assistance." 386 N.W.2d 271, 276 (Minn. App. 1986). But, in this case, the district court made numerous findings on each party's financial position, including a finding that wife "has the ability to work full-time earning $42,500.00 per year or $3,542.00 per month."

In *Geske v. Marcolina*, we stated:

> [A] lack of specific findings on the statutory factors for a need-based fee award under Minn. Stat. § 518.14, subd. 1, is not fatal to an award where review of the order reasonably implies that the district court considered the relevant factors and where the district court was familiar with the history of the case and had access to the parties' financial records.

624 N.W.2d 813, 817 (Minn. App. 2001) (quotations omitted). We find no merit in wife's challenge to denial of need-based attorney fees.

C. Wife's challenge to denial of conduct-based attorney fees

Conduct-based fee awards "are discretionary with the district court." *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 295 (Minn. App. 2007); *see also* Minn. Stat. § 518.14, subd. 1 (stating that the court "may" award conduct-based fees, "in its discretion," against a party who unreasonably contributes to the length or expense of the proceeding). Wife argues that the district court erred in its finding that husband did not unnecessarily contribute to the length and expense of the modification proceeding and in its finding that "some of the litigiousness of this motion could have been avoided if the parties agreed to an appointment of a neutral." Wife points to husband's extensive discovery requests concerning her spending as an example of the conduct that unnecessarily increased costs. But the requested information pertains to the statutory bases for support modification. Wife also argues that the district court should not have considered her conduct concerning use of a neutral in evaluating her request for conduct-based fees. We conclude that the district court has the discretion to consider the totality of the

circumstances in evaluating the need for conduct-based fees, and we conclude that wife's challenge to the district court's exercise of discretion on this issue is without merit.

D. Husband's challenge to denial of first motion to modify maintenance

Husband asserts that the district court abused its discretion in the amended April 2012 order by denying his motion to modify his maintenance obligation from the date of his first motion through the date of his second motion. We construe this as a challenge to the district court's denial of his first motion.[2]

We review a district court's decision regarding modification of an existing maintenance award for abuse of discretion. *Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn. App. 2000). An abuse of discretion occurs when the district court resolves the matter in a manner that is "against logic and the facts on record." *Rutten*, 347 N.W.2d at 50 (citation omitted). A party seeking to modify maintenance must show both a substantial change in circumstances and that the changed circumstances render the existing maintenance award unreasonable and unfair. Minn. Stat. § 518A.39, subd. 2(a) (2012); *Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997).

The district court found that husband failed to establish substantially changed circumstances. This finding was based, in part, on husband's failure to produce loan documents corroborating affidavit testimony about the loan repayment he sought to have deducted from income. From our review of this record, we conclude that the district court could have exercised its discretion to grant husband's first motion to modify, based

[2] In husband's reply brief, he confirms that his challenge is to denial of the first motion and is not a challenge to the effective date of modification granted in the October 2012 order granting his second motion for modification.

on the evidence in the record at the time of that motion. This is especially true in light of the district court's later determination that husband established a dramatic change in his business and income from the date of the decree. But "[t]he decision of a district court should not be reversed merely because the appellate court views the evidence differently." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999) (making this statement in the context of a real-property dispute). We therefore decline to hold that the district court abused its discretion by denying modification of maintenance as of the date of husband's first motion.

II. Wife's challenge to the October 2012 order granting maintenance modification.

Wife argues that the district court erred by permitting husband to relitigate facts and issues that were decided in the initial order denying his first motion. Her argument is based on application of the doctrine of res judicata.

"Although none of the principles or doctrines requiring that judicial decisions have preclusive effect apply to [modification motions in family law] in a technical sense, the underlying principle that an adjudication on the merits of an issue is conclusive, and should not be relitigated, clearly applies." *Loo v. Loo*, 520 N.W.2d 740, 743-44 (Minn. 1994). Generally, res judicata bars claims in a subsequent action where all of four elements have been met: "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004).

Whether res judicata is available in a particular case is reviewed de novo. *Erickson v. Comm'r of Dep't of Human Servs.*, 494 N.W.2d 58, 61 (Minn. App. 1992). If res judicata is available, whether to actually apply the doctrine is discretionary with the district court. *Id.*

There is no dispute that husband's second motion involved the same parties as the first motion or that husband had a full and fair opportunity to litigate his first motion. The district court, however, found that the first element of res judicata had not been met because husband "set forth new evidence between" his first and second motions. But the record demonstrates that the evidence provided to support husband's second motion was either submitted or available at the time of the hearing on his first motion and does not support the district court's finding that the first element of res judicata was not met.

Neither party disputes that, for traditional res judicata purposes, the April 2012 order represents a final judgment on the merits. *See Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, 732 N.W.2d 209, 221 (Minn. 2007) (holding that a judgment entered in the district court is final for purposes of res judicata even when an appeal of the judgment is pending). But all of the cases applying res judicata to family law decisions involve motions seeking to reargue issues after the appeal period for orders deciding those issue had expired. None of the cases involve the circumstances of this case, in which the second motion was brought while the district court's first order remained under review by the district court on a motion for amended findings.

The district court specifically rejected wife's reliance on *Tuthill v. Tuthill*, 399 N.W.2d 230, 232 (Minn. App. 1987) for the proposition that a party cannot complain

about a refusal to modify maintenance that results from inadequate documentation of the party's position. The district court noted that *Tuthill* merely demonstrates that the appellate court will not overturn the district court in such a case and does not preclude a district court from considering additional documentation. The district court essentially reopened the record to consider documents that the district court determined to be necessary to its analysis of whether husband is entitled to modification of his maintenance obligation.

A district court has broad discretion to correct its own errors and to change its decision before an order is final. Husband's use of a second motion to provide the district court with documentation that the district court sua sponte found dispositive in the first motion was procedurally flawed. But given the district court's discretion to receive additional evidence, its discretion in applying res judicata, and its conclusion, after reviewing the loan documents, that husband is entitled to a modification of maintenance, we conclude that justice would not be served by applying res judicata to prevent the district court from making a correct decision that is amply supported by the record.

Support rulings in family law cases are not traditional final adjudications and should be based on the actual circumstances of the parties. *Maschoff v. Leiding*, 696 N.W.2d 834, 838 (Minn. App. 2005); Minn. Stat. § 518A.39, subd. 2 (2012) (codifying the legislative policy of ensuring that support obligations are reasonable and fair given the actual circumstances of the parties). District courts have the responsibility to review and respond to individual circumstances when considering modification. We conclude that the record in this case overwhelmingly supports the district court's ultimate holding

that substantial changes in circumstances make husband's income, which is the sole source of support for both parties due to wife's decision not to work to her potential, insufficient to support the lifestyle the parties' enjoyed during the marriage and that to continue maintenance at the original level is unreasonable and unfair. The district court's consideration of the evidence provided by husband with his second motion allowed it to make a reasoned decision based on the actual circumstances of the parties and we decline to reverse what is an obviously correct decision for procedural flaws in reaching the decision. *See Katz v. Katz*, 408 N.W.2d 835, 839 (Minn. 1987) ("[W]e will not reverse a correct decision simply because it is based on incorrect reasons.").

Affirmed.

HUDSON, Judge (concurring in part, dissenting in part)

While I generally concur with the majority's opinion, the district court should have applied the doctrine of res judicata to bar husband's June 2012 motion to modify spousal maintenance. Therefore, I respectfully dissent from the portion of the majority opinion ruling to the contrary.

Here, based on its determination that husband presented "new evidence" in his second motion to modify maintenance, the district court ruled that the first element of res judicata—identity of issues—was not satisfied, and therefore the doctrine was unavailable. *See Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004) (reciting the elements of res judicata). The majority rightly reverses the district court's ruling that husband presented "new evidence" in his second motion, and correctly concludes both that this record satisfies all four elements of res judicata, and that res judicata was available here. For three reasons, however, it was an abuse of discretion not to apply that doctrine on this record.

First, while res judicata and collateral estoppel are generally applicable where the relevant prerequisites are satisfied, "[b]oth rules are qualified or rejected when their application would contravene an overriding public policy." *AFSCME Council 96 v. Arrowhead Reg'l Corr. Bd.*, 356 N.W.2d 295, 299 (Minn. 1984). Here, it is undisputed that one of the primary reasons for husband's attempt to reduce his maintenance obligation was the debt associated with his business. It is also undisputed that husband's first motion to modify maintenance was denied, in large part, because he failed to provide the district court with adequate documentation regarding that debt. After the district

court denied husband's first motion, husband moved for amended findings. But before the district court had the opportunity to resolve that motion, husband filed a second motion to modify maintenance, this time including documents addressing the business debt. The record shows, however, that the documents husband submitted with his second motion existed before he filed his first motion. Indeed, only days after the district court denied his first motion for inadequate documentation of the business debt, husband procured the documents from his bank. The majority minimizes the nature—indeed dispositive effect—of husband's successive motions by characterizing them as simply "procedurally flawed." But I respectfully submit that, by affirming on this issue, we are condoning unnecessary successive motions by allowing husband—a sophisticated party represented by counsel throughout these proceedings—to burden the district court and wife with multiple substantively identical motions in hopes of eventually achieving his desired end. Allowing unnecessary serial litigation is not fair to wife, is a waste of scarce judicial resources, and runs afoul of the supreme court's observation that a party moving to modify a dissolution judgment cannot "present new evidence which might have been presented at the trial so as to call for a different or modified judgment." *Kiesow v. Kiesow*, 270 Minn. 374, 381, 133 N.W.2d 652, 658 (1965) (quoting *Plankers v. Plankers*, 173 Minn. 464, 466, 217 N.W. 488, 488 (1928)). On this record, I cannot say that precluding (re)litigation of whether to modify husband's maintenance obligation "would contravene an overriding public policy" as required by *AFSCME Council 96*, 356 N.W.2d at 299.

Second, a district court's decision not to apply res judicata is *discretionary with the district court*. *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 843 (Minn. App. 2007). Here, however, the district court ruled that res judicata was unavailable because husband's documents constituted "new evidence." As a result of the district court's erroneous belief that res judicata was not available, it either (a) failed to exercise its discretion in declining to apply the doctrine or (b) ruled, as a matter of law, that it could not apply the doctrine because it was unavailable. Because the prerequisites for applying res judicata were, in fact, satisfied, whichever of these decisions the district court made its decision is defective. *See Leiendecker*, 731 N.W.2d at 843 (stating that "because the application of res judicata is discretionary and the district court did not address the issue, there is nothing for this court to review"); *In re Welfare of M.F.*, 473 N.W.2d 367, 370 (Minn. App. 1991) (remanding for a district court to exercise its discretion where it erroneously ruled on a discretionary issue as a matter of law); *see also Jones v. Jarvinen*, 814 N.W.2d 45, 48 (Minn. App. 2012) (applying *M.F.*). Thus, the district court's initial error in ruling that the documents husband submitted with his second motion constituted "new evidence," and hence that res judicata was unavailable, cannot be overstated.

Third, it is clear from the district court's order granting husband's second motion to modify maintenance, that, but for the "new evidence" of the documents submitted with husband's second motion and the second order's misapplication of *Phillips v. Phillips*,

472 N.W.2d 677 (Minn. App. 1991),[3] husband's second motion to reduce his maintenance obligation would have been properly denied. Specifically, it was husband's "new evidence" on which the district court based its ruling that his $3,600 monthly payments on his business debt should be deducted from his income. That deduction reduced husband's gross income by about 25%, thereby triggering a statutory presumption of substantially changed circumstances, as well as a statutorily rebuttable presumption that the substantially changed circumstances rendered husband's existing maintenance obligation unreasonable and unfair. *See* Minn. Stat. § 518A.39, subd. 2(b)(5) (2012) (noting that a 20% decrease in a party's gross income creates these presumptions). Absent husband's "new evidence," these statutory presumptions would not have been triggered.

In the second order, the district court compounded its error of relying on husband's "new evidence" by misreading *Phillips* to say that as long as husband showed "some change" in circumstances since his original motion, the district court could consider the incremental effects of all changes in his circumstances occurring since the filing of the support order. Use of a "some change" standard misreads *Phillips* by

[3] *Phillips* addressed how to determine whether there existed a substantial change in circumstances rendering an existing obligation unreasonable and unfair. 472 N.W.2d at 679-80. It did so where a prior motion to modify support had been denied, and in the context of the 1990 child support statutes. *Id.* at 680-81. The 1990 support statutes lacked a provision, currently codified in Minn. Stat. § 518A.39, subd. 2(b) (2012), stating that certain circumstances create a presumption of substantially changed circumstances and a rebuttable presumption that an existing support order is unreasonable and unfair. *See* 1991 Minn. Laws ch. 292, art. 5, § 79 (enacting the predecessor to the current provision creating these presumptions). For purposes of this dissent, I assume that *Phillips* remains viable despite the post-*Phillips* enactment of statutory presumptions seemingly addressing a similar question.

understating the amount of change that must be present to allow the district court to consider all the changes back to the entry of the prior support order. *Phillips* holds that the changes must be "significant enough" or "weighty enough" that the change "might, because of its incremental effect, require the trial court to examine the cumulative changes since the order setting the support level." 472 N.W.2d at 680. Only if that quantum of change exists is the district court obligated to determine whether, altogether, the changes since the last time the obligation was set are substantial. *Id.*; *see also Hecker v. Hecker*, 568 N.W.2d 705, 709 (Minn. 1997) (holding that the circumstances existing at the time maintenance was last determined serve as "the baseline circumstances against which claims of substantial change are evaluated"). *Phillips* is consistent with the statutory standard. Under Minn. Stat. § 518A.39, subd 2, a party moving to modify child support or maintenance must show a "substantial" change in circumstances (not "some change") that renders the terms of an existing order "unreasonable and unfair." *See Rose v. Rose*, 765 N.W.2d 142, 145 (Minn. App. 2009) (holding that a party moving to modify maintenance has the burden to establish both a substantial change in circumstances and unfairness and unreasonableness because of the change). Because it affirms the district court on other grounds, the majority opinion did not address the district court's reliance on *Phillips*. It is difficult, however, to ignore the fact that the district court's errant analysis of *Phillips* is intertwined with its initial error in allowing husband to relitigate his business debts in the first place.

Finally, on this record, I am unconvinced by the majority's analysis suggesting that the district court did not abuse its discretion by, in effect, reopening the record to

accept the "new evidence" submitted with husband's second motion. To allow the district court to consider that evidence when deciding husband's second motion despite the fact that the "new evidence" could have been submitted with his first motion runs afoul of the portion of *Kiesow*, mentioned above, stating that a party cannot move to modify an obligation based on evidence that might have been presented earlier. 270 Minn. at 381, 133 N.W.2d at 658. As a practical matter, it also absolves the district court of even having to *consider* the applicability of res judicata. Stated otherwise, under the majority's analysis, because the district court has the unchecked discretion to simply reopen the record, there is no need to go through the res judicata analysis, the elements of which are intended to structure when and how a district court exercises its discretion.

In sum, the caselaw cited by both the majority and dissent recognize the importance of applying res judicata to motions to modify maintenance in order to avoid harassment by disgruntled parties, to promote finality, and to conserve precious judicial resources. In addition to showing that the prerequisites for applying res judicata were satisfied, this record shows that precluding husband from (re)litigating the denial of his first motion would not "contravene an overriding public policy" under *AFSCME Council 96*, 356 N.W.2d at 299; that whatever the district court's basis for declining to apply res judicata, that basis is suspect; and that the district court's resolution of the merits of husband's motion is irredeemably based on a combination of its erroneous determination that the documents husband submitted with his second motion were "new evidence" and a misreading of *Phillips*. I acknowledge that district courts must retain the discretion to address cases in a manner that will allow them to resolve those cases in a fair and legally

appropriate fashion and that the retention of this discretion is not only appropriate but *necessary* for addressing family-law matters. I am troubled, however, by the majority's conferring on the district court a degree of discretion that drastically undermines a legal doctrine as fundamental and longstanding as res judicata. Accordingly, I would reverse the district court on this issue, deny husband's June 2012 motion for modification of maintenance by application of res judicata, and remand for further proceedings.