

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 14, 1995

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. 95-1264-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

In re the Marriage of:

AUDREY ANN (BRICKO) YENTER,

Petitioner-Respondent,

v.

ANDREW KENNETH BRICKO,

Respondent-Appellant.

APPEAL from an order of the circuit court for Marathon County:
MICHAEL W. HOOVER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Andrew Bricko appeals an order denying his motion to modify child support.¹ The divorce judgment incorporated a stipulation that Bricko pay \$439 per month child support. He requested a modification to require him to pay 17% of his income. The trial court found that Bricko had not established a substantial change of circumstances from the time

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

of the initial divorce judgment. Because the record supports the trial court's finding, we affirm the order.

Six months before the divorce judgment, Bricko voluntarily quit his job at Marion Plywood to start his own sawmill business. He stipulated to pay \$439 per month child support. That amount represented 17% of his income at Marion Plywood. At the time he entered the stipulation and the divorce judgment was granted, Bricko had no income.

The record supports the trial court's finding that Bricko did not establish a substantial change in circumstances. At the time Bricko agreed to pay \$439, he knew he was entering into a new business venture. Bricko presented no evidence that the business is not doing as well as he anticipated at the time he entered the stipulation. Bricko's agreement to pay \$439 per month when he had no income showed that changes in his financial circumstances relating to the start-up of the new business were anticipated at the time of the initial divorce judgment. The stipulation represented 17% of his earning capacity at that time. Bricko presented no evidence that his earning capacity changed. The principles of *res judicata* preclude relitigation of the amount of support when the factual situation has not materially changed. See *Besaw v. Besaw*, 89 Wis.2d 509, 520, 279 N.W.2d 192, 197 (1979).

Bricko argues that § 767.32(b)(4), STATS., creates a rebuttable presumption of a substantial change in circumstances because he established a difference between the amount of child support ordered by the court and the amount he would have had to pay based on the percentage standards. That presumption applies when the court did not use the percentage standards in determining the initial child support payments. Bricko's argument fails for two reasons. First, although the initial judgment did not recite that it was based on the percentage standard, the amount ordered constituted 17% of Bricko's previous wages. Therefore, it appears that the percentage standards were used in determining the initial amount. Second, the presumption of changed circumstances has been rebutted by evidence showing that Bricko's business, working hours and conditions, and the marketability of his product were the same or better compared to the time the stipulation was entered.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.