

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 31, 1997

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. 96-3271-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ROBERT C. KAHUT,

PLAINTIFF-APPELLANT,

V.

**EUGENE D. KAHUT AND JANE DOE, HUSBAND AND WIFE,
DALE E. KAHUT AND JUNE DOE KAHUT, HUSBAND AND
WIFE,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rusk County:
FREDERICK A. HENDERSON, Judge. *Affirmed.*

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

PER CURIAM. Robert Kahut appeals a judgment partitioning real estate between himself and his brothers Eugene and Dale, and granting his

brothers credit for their out-of-pocket contributions to the property.¹ Robert argues that his brothers' expenditures should not be fully deducted because they occupied the cabins for more time than Robert. He also argues that the court should not have given his brothers credit for paying Robert's share when the brothers bought out the one-quarter interest in the property held by their sister. We reject these arguments and affirm the judgment.

The three brothers and their sister, Janet, inherited the two parcels of riverfront property as tenants in common in 1977. In 1981, Janet sold her undivided one-quarter interest to her three brothers, but Eugene and Dale paid the full amount without contribution from Robert. During their ownership of the property, each of the brothers made improvements. The trial court did not compensate the brothers for their labor,² but compensated them for their out-of-pocket expenses by subtracting those expenses from the value of the property, dividing the remaining equity in equal thirds, and requiring Eugene and Dale to pay Robert for his one-third of the difference.

Section 841.14(4), STATS., allows the trial court to partition property or direct that it be sold. That statute expressly allows the trial court to divide the property unequally based on the improvements any party has made to the property with the knowledge or assent of the other owners. Therefore, Eugene's and Dale's out-of-pocket expenditures such as payment of insurance and taxes, expansion and repair of the dwellings and other expenses that prevented waste or enhanced the value of the property were subject to reimbursement. See *Ranier v. Holmes*, 272

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

² Robert concedes that Eugene and Dale also contributed more labor to improvements and upkeep.

Wis. 349, 352-54, 75 N.W.2d 290, 292-93 (1956). By subtracting these expenditures from the value of the property before dividing the difference in thirds, the trial court retroactively secured Robert's payment of one-third of these expenses.

Robert argues that these expenditures should not have been fully deducted because Dale and Eugene spent more time on the property than Robert. That issue was not raised in the trial court and was therefore not properly preserved. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980). In addition, the record does not suggest that Robert was precluded from using the property at any time. Finally, the effect of his argument is that he would have Eugene and Dale pay rent for their occupation. A tenant in common is ordinarily not obliged to pay rent to a non-occupying co-tenant. *See Heyse v. Heyse*, 47 Wis.2d 27, 36, 176 N.W.2d 316, 320 (1970).

The trial court also properly reimbursed Eugene and Dale for the payments they made to Janet when the three brothers bought out her interest. Robert's share would have been one-quarter rather than one-third had his brothers not paid for his share of the buy out. As Robert noted, equitable principles apply in a partition action. *See Jezo v. Jezo*, 23 Wis.2d 399, 404, 127 N.W.2d 246, 249 (1964). Even in the absence of a separate agreement or a demand for payment, the trial court properly recognized the greater contributions made by Eugene and Dale and reimbursed them for the payments they made on Robert's behalf.

By the Court.—Judgment affirmed.

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

