

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 24, 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. 96-2018

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**JUDITH L. MARSHE, PATRICIA L. COATES, AND
PAULETTE M. GUNDRY,**

PLAINTIFFS-RESPONDENTS,

V.

PATRICK B. SHEEHAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
EDWIN C. DAHLBERG, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

PER CURIAM. This appeal involves a landlord/tenant dispute. The tenant, Patrick Sheehan, appeals from a judgment against him for damages he caused to his rented apartment. Sheehan contends that the jury based its verdict, in part, on a videotape of his apartment which the court improperly admitted into

evidence. He argues that the videotape lacked a proper evidentiary foundation because: (1) his landlord entered his apartment without notice or permission in violation of § 704.05, STATS., and (2) his landlord entered his apartment and made the tape in violation of his Fourteenth Amendment right to privacy. We conclude that the trial court properly admitted the tape into evidence and therefore affirm.

BACKGROUND

In 1994, Sheehan leased a furnished apartment from Judith Marshe, Patricia Coates, and Paulette Gundry. In April 1995, Marshe discovered that the apartment's bathroom had suffered water damage from a faulty shower unit. Marshe asserted that she notified Sheehan by telephone that she was coming to the apartment to plan some repairs and remove some furnishings on April 29, 1995. As scheduled, but with Sheehan absent, Marshe inspected the apartment, took photographs and made a walk-through videotape. On May 1, 1995, Marshe gave Sheehan a twenty-eight day notice to vacate the apartment. Sheehan moved out May 31, 1995.

In July 1995, Marshe filed a complaint requesting a judgment against Sheehan for damage caused to the apartment and two months' lost rent for the time needed to make repairs. At trial, Marshe introduced the videotape she made of the apartment. Sheehan objected and argued that, because the tape was made without notice or permission, it should not be shown to the jury. The court overruled Sheehan's objection and allowed the jury to see the tape. The jury returned a verdict in favor of Marshe and awarded \$9,609.28 in damages plus costs.

Sheehan moved for a mistrial, contending that the court erred when it allowed the jury to see the videotape. Sheehan also argued that the jury's

verdict was contrary to law, against the weight of the evidence and excessive. Following a hearing, the court denied the motion. Sheehan appeals.

DISCUSSION

Sheehan contends that the videotape lacked a proper evidentiary foundation because Marshe entered his apartment and made the tape without his permission, in violation of § 704.05(2), STATS., and his constitutional right to privacy. Therefore, he argues that the court erred when it admitted the tape into evidence.

We will uphold the trial court's decision to admit or exclude evidence unless it erroneously exercised its discretion. *State v. Ross*, 203 Wis.2d 66, 80, 552 N.W.2d 428, 433 (Ct. App. 1996). The court may suppress illegally obtained evidence upon a timely objection to its admission. *Hartman v. Hartman*, 253 Wis. 389, 395, 34 N.W.2d 137, 140 (1948).

First, Sheehan argues that the videotape should have been suppressed because Marshe entered his apartment in violation of § 704.05(2), STATS. This section provides that “[t]he landlord may upon advance notice and at reasonable times inspect the premises, make repairs and show the premises to prospective tenants or purchasers.”

Marshe testified: “And when [Sheehan] called, he said, what time are you girls going to be there? I said, we are going to be there from noon—no longer than 4:00...” Sheehan did not testify. His girlfriend testified that Sheehan did not tell her that Marshe was coming to the home, but Sheehan does not explain the significance of lack of notice to his girlfriend. Marshe gave as a reason for entering the premises that she needed to know the condition of the bathroom

because she believed that it badly needed repair. Thus, the only evidence in the record is that Marshe complied with § 704.05(2), STATS., by giving advance notice to Sheehan that she was coming to the premises.

Sheehan cites no authority for the notion that there is a statutory prohibition against videotaping a tenant's dwelling while lawfully in the dwelling. Section 704.05(2), STATS., does not do so. Because Marshe laid a proper evidentiary foundation that the requirements of § 704.05(2), STATS., had been met, the court did not erroneously exercise its discretion in admitting the tape.

Second, Sheehan argues that the videotape should have been suppressed because Marshe violated his constitutional right to privacy when she entered without his consent and made the videotape without his permission. Sheehan states that the Fourteenth Amendment to the United States Constitution guarantees his right to privacy.

The Fourteenth Amendment right to privacy “is a relatively narrow right, limited to protection against *government interference*” *Weber v. City of Cedarburg*, 125 Wis.2d 22, 29, 370 N.W.2d 791, 795 (Ct. App. 1985) (emphasis added). The Fourteenth Amendment does not shield citizens from wrongful private conduct. *Ross v. Ebert*, 275 Wis. 523, 530-31, 82 N.W.2d 315, 319 (1957); *see also DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189 (1989). Therefore, Marshe, as a private citizen, could not violate Sheehan's Fourteenth Amendment right to privacy.

Sheehan cites *Welsh v. Pritchard*, 241 P.2d 816 (Mont. 1952), for the proposition that a landlord's uninvited entry into a tenant's apartment is an invasion of privacy. *Pritchard* was a tenant's action for invasion of privacy which arose because Pritchard failed to give his tenant a statutory thirty-day notice to

vacate. There, the tenant's right to privacy was not derived from the Fourteenth Amendment. Unlike the landlord in *Pritchard*, Marshe complied with Wisconsin's statutory notice requirements. Therefore, *Pritchard* is inapplicable.

Sheehan has cited no applicable authority for a tenant's right to privacy other than § 704.05(2), STATS. Marshe did not violate this statutory right to privacy when she entered and videotaped his apartment because the only relevant evidence showed that she entered with advance notice to Sheehan. Therefore, the trial court did not erroneously exercise its discretion when it admitted the videotape into evidence and showed it to the jury.

By the Court.—Judgment affirmed.

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

