

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**James C. Stewart,
Plaintiff Below, Petitioner**

vs) No. 11-0863 (Boone County 10-C-290)

**Newtown Energy, Inc., a West Virginia Corporation
Respondent Below, Respondent**

FILED

June 22, 2012

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner James C. Stewart, by counsel, Douglas V. Atkins, appeals from the Circuit Court of Boone County's April 19, 2011, order dismissing his action for civil damages against respondent Newtown Energy, Inc. for an alleged violation of West Virginia Code § 62-1D-3(a)(1) of the Wiretapping and Electronic Surveillance Act ("Wiretapping Act"). Respondent, by counsel, Thomas V. Flaherty, has filed its response. Petitioner has filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds that just cause exists for summary affirmance. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On January 24, 2009, petitioner was injured while working as a coal miner in respondent's underground coal mine. Thereafter, respondent placed petitioner on light duty in its mine office as an infrastructure safety monitor where he monitored such things as carbon monoxide levels and the location of miners in respondent's mine. While working light duty, petitioner filed a deliberate intent action against respondent for his injuries.

Respondent has a zero tolerance drug policy that prohibits use of illegal drugs at work. Petitioner received a copy of this drug policy when he was hired by respondent.

Respondent claims that it received an anonymous phone tip that petitioner was participating in illegal drug activity at work. In response, respondent installed security cameras in various places around its mine site. The video recordings show petitioner ingesting his prescribed Hydrocodone in a non-therapeutic manner by snorting the crushed pills into his nose; turning away from his computer for much of a work day; sleeping on the job; stealing gasoline from respondent's vehicles and placing it in his vehicle; and frequently talking on the office phone. Thereafter, respondent's manager, James Loving, listened in on some of petitioner's phone calls at work and heard petitioner trying to illegally procure drugs. The calls were not recorded. Mr. Loving claimed that he began

listening to petitioner's calls because he wanted to protect respondent's business interests, to enforce its drug policy, and to verify that illicit drug activity was ongoing prior to making an informed decision regarding petitioner's employment.

On August 11, 2010, Mr. Loving and another manager met with petitioner and reviewed the evidence against him. Petitioner admitted that his behavior had been inappropriate. At the conclusion of the meeting, petitioner was fired for compromising mine safety and violating respondent's zero tolerance drug policy.

On December 9, 2010, petitioner dismissed his deliberate intent lawsuit as a result of a settlement between the parties. Shortly thereafter, petitioner instituted the instant civil action alleging that respondent violated the Wiretapping Act by eavesdropping on his personal telephone calls made on his work phone. Thereafter, respondent filed a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. At a hearing on the matter, the circuit court stated it would treat respondent's motion as a motion for summary judgment pursuant to Rule 12(b). On April 19, 2011, the circuit court found petitioner's case to be without merit and granted respondent's motion.

This Court reviews a circuit court's entry of summary judgment de novo. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syl. Pt. 1, *Carr v. Michael Motors, Inc.*, 210 W.Va. 240, 557 S.E.2d 294 (2001).

Petitioner's job was vitally important to the health and safety of respondent's underground coal miners and he admits that he violated respondent's zero tolerance drug policy. Applying the above-stated standard, we find just cause to summarily affirm the circuit court's order entered on April 19, 2011.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 22, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin