

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**A.T. MASSEY COAL COMPANY, INC.,
ELK RUN COAL COMPANY, INC.,
INDEPENDENCE COAL COMPANY, INC.,
MARFORK COAL COMPANY, INC.,
PERFORMANCE COAL COMPANY, INC., and
MASSEY COAL SALES COMPANY, INC.,**

Appellants,

v.

Appeal No. 33350

**HUGH M. CAPERTON,
HARMAN DEVELOPMENT CORPORATION,
HARMAN MINING CORPORATION, and
SOVEREIGN COAL SALES, INC.,**

Appellees.

**HUGH M. CAPERTON'S AMENDED MOTION FOR DISQUALIFICATION
DIRECTED TO CHIEF JUSTICE ELLIOTT E. MAYNARD**

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DIRECTED TO CHIEF JUSTICE ELLIOTT E. MAYNARD**

Hugh M. Caperton, by his undersigned counsel, and per Rule 29 of the West Virginia Rules of Appellate Procedure, moves Chief Justice Elliott E. Maynard to disqualify himself from participating in any further proceedings involving these litigants, save for withdrawing his earlier votes in this matter, particularly including his vote in favor of the Court's majority opinion. Should Chief Justice Maynard fail to do so, it is incumbent upon the remaining Justices of this Honorable Court to take all necessary steps to remedy the impact of the appearance of partiality that now looms over this case. Otherwise, Mr. Caperton will have been deprived of his Constitutional protections under the Due Process Clause and the Equal Protection Clause. In support of this motion, Mr. Caperton states follows:

1. On Monday, January 7, 2007, Mr. Caperton filed his initial motion for disqualification directed to Chief Justice Maynard on the basis that Mr. Caperton had been advised that Chief Justice Maynard was observed dining with Massey Energy Company and A.T. Massey Coal Company, Inc. Chief Executive Officer Don L. Blankenship on or about

November 8, 2007, in Logan, West Virginia, less than three weeks before this Court issued its majority opinion, in which then-Justice Maynard joined to overturn the judgment against A.T. Massey Coal Company, Inc. and the other Appellants (collectively, "Massey"). Upon information and belief, this was but one of many dinner meetings between the two at critical junctures in the proceedings.

2. Since the filing of that motion, Mr. Caperton has become aware of the existence of thirty-four (34) photographs which depict Chief Justice Maynard and Mr. Blankenship vacationing together in the Kingdom of Monaco during the time period of July 3-5, 2006. Copies of twenty-four (24) of these photographs are attached hereto as Exhibit "A."

3. Ten (10) of the photographs also depict, in addition to Chief Justice Maynard and/or Mr. Blankenship, two females apparently traveling with them as companions. In order that this motion might receive appropriate consideration, and that the Court might be advised that there are available witnesses to this spectacle, those ten (10) photographs are attached as Exhibit "B," but are being filed under seal herewith.

4. By the time of this trip to the Kingdom of Monaco, this Honorable Court had already given considerable attention to this case, having ruled upon numerous petitions and motions, and was in the process of finalizing the record for purposes of entertaining Massey's Petition for Appeal. In fact, approximately two (2) months prior to this trip, Massey moved for the disqualification of Justice Starcher, based upon his alleged personal bias, in the companion case of *State of West Virginia ex. rel. A.T. Massey Coal Co., Inc. v. the Honorable Jay M. Hoke*. Moreover, just one (1) month after this trip, Massey Energy filed suit against this Honorable Court. However, at no time during the pendency of any of these lengthy proceedings has Chief Justice Maynard ever made a voluntary disclosure to Mr. Caperton regarding the depth, extent or nature of his personal relationship with Mr. Blankenship.

5. The attached photographs clearly evidence the appearance of impropriety. Indeed, inasmuch as Chief Justice Maynard had decided to intentionally withhold disclosure of this trip, despite the fact that he was duty-bound to do so, these photographs raise over this Honorable Court, the highest and sole appellate court of this state, the specter of corruption or worse. In fact, despite that he was duty-bound to disclose the details of such an obviously intimate relationship, Chief Justice Maynard's conscious decision not to do so leaves Mr. Caperton, the Appellees, the remaining Justices of this Honorable Court, and the people of the State of West Virginia to legitimately inquire as to the particulars of this conduct, including the source of payment for the luxurious accommodations at issue as well as the cost of transportation and similar expenditures.

6. At a bare minimum, it is incumbent upon Chief Justice Maynard, if the people of the State of West Virginia are to maintain any confidence at all in the appearance of the impartiality of this state's highest legal and only appellate tribunal, to withdraw his vote in support of the majority opinion of this Court issued on November 20, and in all other proceedings relative to this case prior to the date of this Petition, and to then disqualify himself from any further involvement whatsoever with these proceedings and these litigants.

7. If Chief Justice Maynard fails or refuses to do so, then Mr. Caperton specifically requests that, and submits that it is incumbent upon, the remaining members of this Court to undertake all necessary steps to remove the impact of the specter of bias, impropriety, and the deprivation of any semblance of fairness that now looms over this case in particular and this Honorable Court in general.

The Legal Standard and Analysis

8. Rule 29(b) of the West Virginia Rules of Appellate Procedure states that a justice "shall disqualify himself or herself ... in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct"

9. Canon 3(E)(1) states that “A judge *shall* disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where...the judge has personal bias or prejudice concerning a party...” (emphasis supplied).

10. Respectfully, the Justice’s *subjective* determination of his ability to be fair is not the standard governing disqualification. Rather “a judge *shall* disqualify himself or herself in a proceeding *in which the judge’s impartiality might reasonably be questioned.*” Code of Judicial Conduct, Canon 3(E)(1) (emphasis provided). Given these parameters, the determination is “whether a reasonable person, knowing all of the relevant facts, would harbor doubts about the judge’s impartiality.” *United States v. Burger*, 964 F.2d 1065, 1070 (10th Cir. 1992).

11. That standard was previously espoused by this Court through former Justice Cleckley’s opinion in *Tennant*:

To protect against the appearance of impropriety, courts in this country consistently hold that a judge should disqualify himself or herself from any proceeding in which his or her impartiality might reasonably be questioned. *** [T]he United States Supreme Court described the standard for recusal as whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge’s impartiality. The Supreme Court stated: “The goal is to avoid even the appearance of partiality.” To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself.

Tennant v. Marion Health Care Found., Inc., 194 W. Va. at 108, 459 S.E.2d at 385.

12. As Canon 2(B) states, “A judge shall not allow family, *social*, political, or other relationships to influence the judge’s judicial conduct or judgment. ... nor shall a judge convey or knowingly permit others to convey the impression that they are *in a special position to influence the judge*” (emphasis supplied). It is beyond the realm of human comprehension that any judge could claim any semblance of impartiality when, before casting the deciding vote in a \$76 million case, he accompanies the CEO of the litigant on the hook for that judgment on a luxurious trip to the French Riviera. As if that were not enough, he then consciously chooses not

to disclose the very fact of the trip. Apparently unsatisfied, he then casts the deciding vote in support of a “majority” opinion which was not only expressly intended to deprive Mr. Caperton, by reason of a dismissal “with prejudice” of any further opportunity to obtain justice, but also to bestow a \$76 million windfall upon Massey and good friend Don Blankenship.

13. Further, Canon 3(B)(7) requires that a “judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding,” other than certain limited exceptions not applicable here. As stated by this Court, “‘*Ex parte*’ is defined as ‘on one side only; by or for one party; done for, in behalf of, or on the application of, one party only.’” *In re Kaufman*, 187 W. Va. 166, 171 (W. Va. 1992) *citing* Black’s Law Dictionary 517 (5th ed. 1979).

14. Additionally, Canon 4(A) states broadly that: “A judge *shall* conduct *all* of the judge’s extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties” (emphasis supplied).

15. Ultimately, our system of justice, as articulated in our criminal and civil laws, is fundamentally designed to preclude a litigant from providing, and certainly a judge from accepting, anything of value that might influence his or her decision, so much so that even the *appearance* of such impropriety mandates disqualification. Otherwise, the natural public perception is that justice is available only to the highest bidder.

16. Here, Chief Justice Maynard was duty-bound to disclose the scope, nature and content of all his meetings or other communications with Mr. Blankenship when this appeal was impending as well as pending. The commentary to Canon 3(E)(1) requires that “A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real

basis for disqualification,” and this Court in *Tennant* specifically pointed out that a judge is “duty bound to disclose [those facts] *sua sponte*.” *Tennant*, 459 S.E.2d 374 at 386.

17. “The legal system will endure only so long as members of society continue to believe that our courts endeavor to provide untainted, unbiased forums in which justice may be found and done. ... [F]undamental to the judiciary is the public’s confidence in the impartiality of our judges and the proceedings over which they preside.” *Tennant*, 194 W. Va. at 107, 459 S.E.2d at 384.

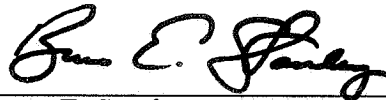
18. Given the foregoing, Mr. Caperton submits that Chief Justice Maynard’s actions in failing to make the required disclosures and to disqualify himself, as set forth above, are contrary to law and to his obligations under the Constitution of the United States and of this State. Mr. Caperton further submits that it is improper for Chief Justice Maynard to participate any further in these proceedings except for the sole purposes of withdrawing his vote in support of the majority opinion on the merits in this case and to vacate his participation in any prior proceedings in this matter. His actions and lack of forthrightness in the face of his express Constitutional and judicial obligations have demeaned the judicial system, defiled justice, and have caused a denial of Mr. Caperton’s legal and Constitutional rights.

19. Mr. Caperton respectfully suggests that, if the public’s confidence in West Virginia’s highest court is to be restored and maintained, this Honorable Court must act fairly, decisively and quickly by restoring to Mr. Caperton the judgment awarded him below. Failing this, Mr. Caperton will have been denied any semblance of the due process of law guaranteed to him by the Constitution of the United States and of this state, and of the equal protection of the law, as further guaranteed by those same fundamental documents.

20. In the absence of obtaining the relief requested herein, Mr. Caperton will clearly have been deprived of his Constitutional right to equal protection under law and to due process of law.

WHEREFORE, Movant Caperton respectfully requests that Chief Justice Elliott E. Maynard, except for withdrawing his vote in support of the majority opinion and vacating his participation in all prior proceedings in this matter, immediately disqualify himself from further participation in any proceedings among these litigants. Further, Mr. Caperton respectfully submits that, should Chief Justice Maynard refuse to do so, the remaining members of this Honorable Court must take all necessary actions to finally and properly insure that they abide by their sworn oaths to uphold the Constitution of the United States and the State of West Virginia, and to insure that justice is done and that Appellee Hugh M. Caperton is made whole.

Respectfully submitted,



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Dated: January 14, 2008

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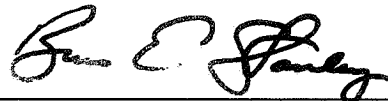
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Appellees.

VERIFIED CERTIFICATE

I, Bruce E. Stanley, pursuant to Rule 29(c) of the West Virginia Rules of Appellate Procedure, do hereby verify that I have read the foregoing Amended Motion for Disqualification Directed to Chief Justice Elliott E. Maynard and that, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.



Bruce E. Stanley
(W.Va. Bar 5434)

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CERTIFICATE OF SERVICE

I, Bruce E. Stanley, the undersigned counsel for Appellee Caperton, do hereby certify that I have served the foregoing Amended Motion for Disqualification Directed to Chief Justice Elliott E. Maynard, by hand delivery this 14th day of January, 2008.

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