

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
APPEAL NO. 33350

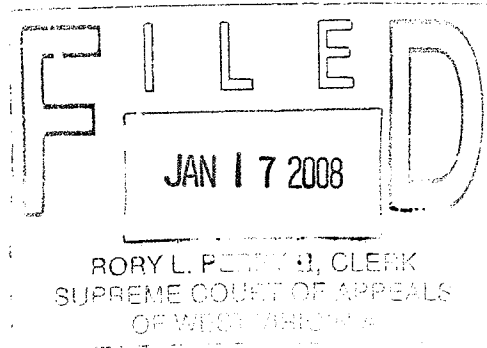
A.T. MASSEY COAL COMPANY, INC.,  
ELK RUN COAL COMPANY, INC.,  
INDEPENDENCE COAL COMPANY, INC.,  
MARFORK COAL COMPANY, INC.,  
PERFORMANCE COAL COMPANY, and  
MASSEY COAL SALES COMPANY, INC.,

Appellants,

v.

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

Appellees.



**MOTION OF HARMAN DEVELOPMENT CORPORATION,  
HARMAN MINING CORPORATION, AND SOVEREIGN COAL SALES, INC.  
FOR DISQUALIFICATION OF JUSTICE MAYNARD AND RENEWAL OF MOTION  
FOR DISQUALIFICATION OF JUSTICE BENJAMIN**

*Respectfully Submitted by:*

David B. Fawcett, Esq. (*Admitted Pro Hac Vice*)  
Buchanan Ingersoll & Rooney  
20th Floor, One Oxford Centre  
301 Grant Street  
Pittsburgh, PA 15219  
(412) 562-3931

Robert V. Berthold, Jr., Esq. (W.Va. Bar 326)  
Christina L. Smith (W.Va. Bar 7509)  
Berthold, Tiano & O'Dell  
P.O. Box 3508  
Charleston, WV 25335  
(304) 345-5700

Counsel for Appellees, Harman Development  
Corporation, Harman Mining Corporation and Sovereign  
Coal Sales, Inc.

Appellees Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. (hereinafter, collectively "Harman"), by their undersigned counsel, request that Justices Maynard and Benjamin recuse themselves from any further participation in this appeal, and to withdraw their votes in this matter. Should Chief Justice Maynard and Justice Benjamin refuse to do so, Harman moves the remaining members of this Honorable Court to disqualify them from participating in further proceedings in this matter, and to withdraw their earlier votes in this matter, including their votes in favor of the Court's majority opinion.

In support of this Motion, Harman incorporates herein by reference and joins in Hugh M. Caperton's Motion and Amended Motion for Disqualification directed to Chief Justice Elliott E. Maynard. Counsel for Harman would note the request of Hugh Caperton and his counsel that they join in this Motion. Additionally, Harman states in support of its Motion the following:

1. Subsequent to the filing of Hugh M. Caperton's Amended Motion for Disqualification directed to Chief Justice Elliott E. Maynard, Chief Justice Maynard issued a statement (attached hereto as Exhibit "A") in which he disclosed his friendship with Mr. Don Blankenship, and that he had meetings with Massey's Chief Executive Officer on the French Riviera during the pendency of this appeal.
2. If the law of the State of West Virginia permits a sitting Supreme Court Justice to meet, dine with and take extravagant vacations with the CEO of a party during the pendency of a substantial appeal to the Court by the CEO's corporation, there will be an overwhelming perception of impropriety looming over the Supreme Court of West Virginia, and could encourage other parties to take similar actions.
3. On October 10, 2007, this Court held the long-awaited oral argument of Massey's appeal in this very substantial dispute.

4. In addition to the contacts, meetings and travel alleged in Caperton's Motions for Disqualification of Chief Justice Maynard, it was reported by movant, Hugh Caperton, that Justice Maynard had a private dinner meeting with Massey's CEO Don Blankenship on or about November 8, 2007, or approximately four weeks after the oral argument in this case, but before the written decision of this Court.

5. In the short time that has elapsed since the filing of Hugh M. Caperton's Amended Motion for Disqualification, additional information has been provided to the Appellees and their counsel revealing other significant contacts, dealings and interrelationships between Don L. Blankenship and Chief Justice Maynard which were never disclosed by Chief Justice Maynard.

6. Canon 3E(1) of the Judicial Code of Conduct states "A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned ..." (emphasis added). As Justice Maynard reiterated in his opinion in *West Virginia ex rel. Mantz v. Zakaib*, 216 W.Va. 609, 614, 609 S.E.2d 870, 875 (2004), quoting *In the Matter of Karr*, 182 W.Va. 221, 224, 387 S.E.2d 126, 129 (1989), "when the language of the canon ... is clear and unambiguous, the plain meaning of the canon is to be accepted and followed without resorting to interpretation or construction."

7. In *Mantz v. Zakaib*, Justice Maynard also cited to and quoted from an earlier decision of the Supreme Court, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. at 108, 459 S.E.2d at 385:

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 ... In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61, 108 S.Ct. 2194, 2203, 100 L.E.2d 855, 872-73 (1988), the 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...* To be clear, avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself.

(Emphasis added.)

8. Any reasonable and objective person, knowing what is now known about the contacts between Justice Maynard and Mr. Blankenship revealed by the photographs appended to Caperton's Amended Motion for Disqualification Directed to Chief Justice Elliott E. Maynard, would certainly harbor doubts about his ability to be impartial in this case, regardless of who paid for the alleged trip, while this case was pending before this Court.

**Justice Benjamin's Vote Should Also be Withdrawn and He Too Should Be Disqualified from Further Participation in the Appeal**

9. Harman moved for the disqualification of Justice Benjamin from any role in the appeal of this case on or about October 19, 2005. *See* Motion of Respondent Corporations for Disqualification of Justice Benjamin. In support of its Motion, Harman appended 84 exhibits, each relating to the unprecedented and massive amount of money spent by Mr. Blankenship in support of both the defeat of then sitting Justice Warren McGraw, and the election of the person who took Justice McGraw's place on the Supreme Court of Appeals, Justice Benjamin.

10. Harman alleged in its Motion that Mr. Blankenship invested nearly \$3 million in direct or indirect support of Justice Benjamin – more than any person, other than a person seeking his own election, had ever spent to effect the outcome of a state judicial race, certainly in West Virginia and perhaps in the United States. Upon information and belief, prior to the Harman verdict, Mr. Blankenship had never involved himself so deeply in a judicial campaign.

11. On April 7, 2006, Justice Benjamin issued a Memorandum to Rory L. Perry, II, Clerk of the Supreme Court of Appeals, indicating that he was declining to recuse himself, stating, "[N]o objective information is advanced to show that this Justice has a bias for or against

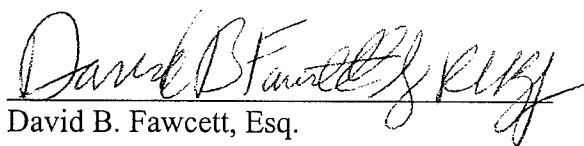
any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case."

12. As stated above, this is simply not the test against which Harman's Motion should have been decided. Rather, the test is whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality. Indeed, Justice Benjamin conceded as much when he committed shortly after his election to considering recusal in cases involving Mr. Blankenship and Massey. Justice Benjamin should also disclose the nature of his relationship with Mr. Blankenship, including private meetings, dinners, etc.

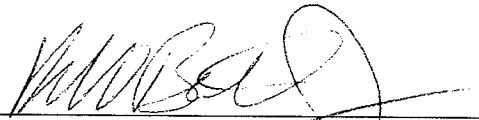
13. Application of the objective test mandated by this Court -- rather than Justice Benjamin's subjective belief about his impartiality -- requires that Justice Benjamin withdraw his vote in this matter and recuse himself from any further participation in the case, also.

WHEREFORE, Harman respectfully requests that Justices Maynard and Benjamin withdraw their respective votes in this matter and disqualify themselves from any further participation in the consideration of the appeal of this matter and, if they fail to do so, that the Court take such appropriate action as it deems necessary.

Respectfully submitted,



David B. Fawcett, Esq.  
Buchanan Ingersoll & Rooney  
One Oxford Center, 20<sup>th</sup> Floor  
301 Grant Street  
Pittsburgh, PA 15219



Robert V. Berthold, Jr., Esq. (W.Va. Bar 326)

Christina L. Smith (W.Va. Bar 7509)

Berthold, Tiano & O'Dell

P.O. Box 3508

Charleston, WV 25335

Counsel for Appellees, Harman Development  
Corporation, Harman Mining Corporation and  
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Supreme Court of Appeals  
State of West Virginia

# News

Information Services  
Director  
Jennifer Bundy  
Direct Phone - (304) 340-  
2305  
Kandi Greter - (304) 340-  
2306

Administrative Office  
1900 Kanawha Blvd., East  
Bldg. 1, Room E-316  
Charleston, West Virginia 25305  
Web Site:  
<http://www.state.wv.us/wvsca>

Email:  
[Jennifer.Bundy@courtswv.gov](mailto:Jennifer.Bundy@courtswv.gov)  
Email: [kandi.greter@courtswv.gov](mailto:kandi.greter@courtswv.gov)

FOR IMMEDIATE  
RELEASE:  
January 15, 2008

CONTACT: Jennifer Bundy  
(304) 340 - 2305

## Chief Justice Maynard issues statement

**CHARLESTON, W.Va.** – West Virginia Chief Justice Elliott "Spike" Maynard said today, "I will file a written response promptly to the motion filed yesterday, but first let me say I've been a prosecutor, Judge or Justice for more than 30 years and nothing is more important to me than the integrity of the Court.

"The suggestion I have done something improper is nonsense.

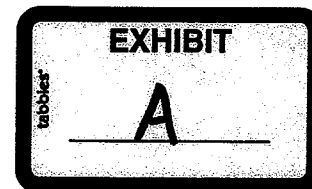
"Like most judges I don't reward my friends, or punish my enemies from the bench.

"I have never denied my friendship with Mr. Blankenship. Our friendship has never influenced any decision I've made for the Court.

"I'm going to address the specific allegations separately, but I want to be crystal clear that in the noted trip I paid my own way, paid for my travel expenses, paid my own hotel expenses out of my own pocket. I have receipts and records to prove it."

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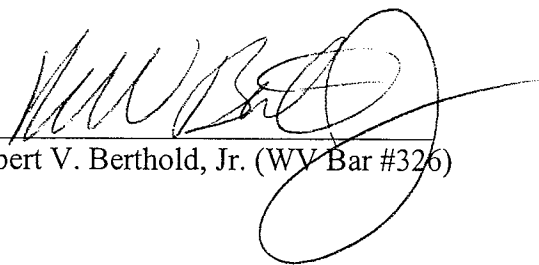
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HUGH M. CAPERTON,  
HARMAN DEVELOPMENT CORPORATION,  
HARMAN MINING CORPORATION,  
SOVEREIGN COAL SALES, INC.,

Appellees.

**VERIFIED CERTIFICATE**

I, Robert V. Berthold, Jr., pursuant to Rule 29(c) of the West Virginia Rules of Appellate Procedure, do hereby verify that I have read the foregoing Motion 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.

  
Robert V. Berthold, Jr. (WV Bar #326)



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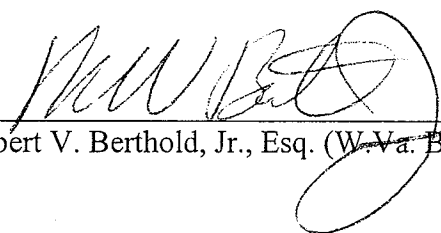
Appellees.

**CERTIFICATE OF SERVICE**

The undersigned counsel for the Corporate Plaintiffs-Respondents, do hereby certify that I have served the foregoing **Motion of Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. for Disqualification of Justice Maynard and Renewal of Motion for Disqualification of Justice Benjamin**, by U.S. Mail, this 17<sup>th</sup> day of January, 2008.

D.C. Offutt, Jr., Esq. (W.Va. Bar 2773)  
Stephen S. Burchett, Esq. (W.Va. Bar 9228)  
Perry W. Oxley, Esq. (W.Va. Bar 7211)  
David E. Rich, Esq. (W.Va. Bar 9141)  
OFFUTT, FISHER & NORD  
949 Third Avenue, Suite 300  
P.O. Box 2868  
Huntington, WV 25728-2868

Bruce E. Stanley, Esq. (W.Va. Bar 5434)  
Tarek F. Abdalla, Esq. (W.Va. Bar 5661)  
REED SMITH LLP  
435 Sixth Avenue  
Pittsburgh, PA 15219

  
\_\_\_\_\_  
Robert V. Berthold, Jr., Esq. (W.Va. Bar 326)