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 MOTION FOR DISQUALIFICATION DIRECTED TO JUSTICE ELLIOTT E. MAYNARD


*Counsel for Massey Defendants:*

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
Post Office Box 2868
Huntington, WV 25728-2868
(304) 5290-2868

*Counsel for Hugh M. Caperton:*

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
(412) 288-7254

*Counsel for Corporate Plaintiffs:*

David B. Fawcett, Esq. (*pro hac vice*)
Buchanan Ingersoll & Rooney
One Oxford Center, 20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

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

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## HUGH M. CAPERTON'S MOTION FOR DISQUALIFICATION DIRECTED TO JUSTICE ELLIOTT E. MAYNARD

Hugh M. Caperton, by his undersigned counsel, and per Rule 29 of the West Virginia Rules of Appellate Procedure, moves Justice Elliott E. Maynard to disclose the nature of any meetings or discussions with Appellants, including Mr. Don L. Blankenship, during the pendency of this appeal and, if such meetings or discussions occurred, to disqualify himself from participating in any consideration of Appellee Caperton's Petition for Rehearing, and further requests that Justice Maynard withdraw his earlier vote in favor of the Court's majority opinion in this matter, stating in support thereof as follows:

1. Caperton has been advised that 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 Justice Maynard joined, overturning the judgment against A.T. Massey Coal Company, Inc. and the other Appellants.

2. While Caperton has been unable to independently verify such a dinner meeting, surely Justice Maynard can do so, and it is incumbent upon him, in order for the public to maintain its confidence in the appearance of the impartiality of this state's highest legal tribunal, of which Justice Maynard will be serving as the Chief Justice, to offer the full and complete details of the nature of his personal relationship with Mr. Blankenship, as well as the nature of the discussions had by them at this or any other meeting during the pendency of this matter before the Court.

The Case

3. On August 1, 2002, after a seven (7) week trial, a Boone County jury rendered a verdict in favor of the Plaintiffs on findings of tortious interference with contractual relations, fraudulent misrepresentation, and fraudulent concealment. *See* Amended Circuit Court Order on Jury Award of Punitive Damages, ¶ 2. The trial court found that there was sufficient evidence for a jury to conclude that "Plaintiffs were severely harmed by the conduct of the Defendants, as the corporate and individual Plaintiffs' mining business was destroyed, and the individual was precluded from working in the coal mining industry, thereby forcing the Plaintiffs into bankruptcy and further causing a loss of all rights in the reserves they formerly mined." Amended Circuit Court Order on Jury Award of Punitive Damages, at ¶ 6. The trial court also found that there was sufficient evidence to support the jury's finding that the Massey Defendants had committed the civil wrongs of tortious interference, fraudulent misrepresentation, and fraudulent concealment. Amended Circuit Court Order on Jury Award of Punitive Damages, at ¶ 8.

4. In finding sufficient evidence to support the jury's verdict, the trial court referenced acts Mr. Blankenship personally committed or personally directed others to commit. For example, the trial court specifically referenced the following evidence adduced at trial:

(a) The Defendants' Chief Executive Officer, without ever reading the applicable long term Coal Supply Agreement, directed that Wellmore Coal

Corporation (Wellmore hereinafter) threaten Harman with the declaration of "force majeure" under that Agreement;

* * * *

(f) At a meeting held in November, 1997 in West Virginia, the Defendants' CEO threatened Harman and Mr. Caperton with long and protracted litigation in the event Harman did not agree to give up its rights to its reserves;

* * * *

(i) After directing the declaration of "force majeure", the Defendants participated in settlement negotiations with Plaintiffs and Lessor of Plaintiffs' reserves, not with the intention of settling disputes, but for the purpose of placing the Plaintiffs, corporately and personally, in greater financial distress;

(j) The Defendants obtained confidential information at the meeting in November, 1997, and thereafter on the purported promise to purchase Caperton's interest in Harman's assets;

(k) The Defendants used that confidential information to acquire adjoining reserves, which the Defendants' own internal documents acknowledged would help insure that Harman would only be valuable to the Defendants;

* * * *

(p) The Defendants intentionally acted in utter disregard of Plaintiffs' rights and ultimately destroyed Plaintiffs' businesses because, after conducting cost-benefit analyses, the Defendants concluded it was in its financial interest to do so; and

(q) The Defendants consistently attempted to use the disparity of resources and bargaining power between the Defendants and the Plaintiffs to its advantage, with little or no regard to the outcome of the Plaintiffs, either corporately or personally.

Amended Circuit Court Order on Jury Award of Punitive Damages, at ¶ 10.

5. In applying the *Garnes* factors to the jury's award of punitive damages, the trial court also noted that the "Defendants expressed little interest in settling this matter on reasonable terms and instead appear to have settled on a strategy (consistent with the statements Mr. Blankenship made to Mr. Caperton in November 1997) designed to wear down the Plaintiffs and their counsel in the hope that eventually they would be unable to pursue this matter to a more favorable conclusion." Amended Circuit Court Order on Jury Award of Punitive Damages, at ¶ 18.

6. This Court's opinion necessarily involved a review of evidence regarding Mr. Blankenship's conduct and motives, and in its majority opinion, this Court affirmed that the Appellants had engaged in conduct deserving of the type of verdict awarded by the jury.

The Legal Standard and Analysis

7. Rule 29(b) 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 ...."

8. 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).

9. 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).

10. 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.

11. 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). In addition to Justice Maynard participating in a reported private meeting with Blankenship during his consideration of this Appeal, he has confirmed in the past that he "know(s) Mr. Blankenship personally." Maynard Memo, November 30, 2004. His private meetings with Blankenship during the pendency of another case in which some of Massey's subsidiaries were defendants were described as "cozy," leading observers to believe that Justice Maynard and Blankenship were "close personal friends." Ken Ward, *Flood Lawyer Wants Maynard Off Case*, Charleston Gazette, November 12, 2004. Clearly, the long history of this relationship and the pattern of meeting during the pendency of cases before the Court only strengthen the appearance of partiality here.

12. 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).

13. Finally, 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).

14. If Justice Maynard engaged in private meeting(s) with the Appellant's CEO in this case shortly before joining in an opinion that greatly favored that Appellant in the face of the

Court's declaration that the Appellants had violated the law and that the jury's verdict against the Appellants had been justified, such a combination could reasonably cause an observer to surmise that any such ex parte meeting(s) included discussions regarding the pending proceeding, and would lead one to question Justice Maynard's capacity to act impartially in this case.

15. Justice Maynard, at a minimum, is duty-bound to disclose the scope, nature and content of any meetings or other communications with Mr. Blankenship during the pendency of this appeal before the Court. 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.

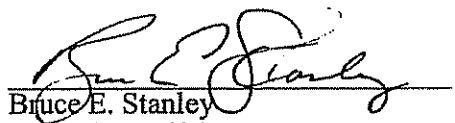
16. "The legal system will endure only so long as members of society continue to believe that our courts endeavor to provide untainted, unbiased forums in which justice may be found and done. ... [F]undamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings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

17. Given the foregoing, Caperton requests that Justice Maynard disclose the nature of any meetings or communications with representatives of Appellants, including Mr. Blankenship, during the pendency of this appeal. Caperton respectfully submits that if such meetings or communications occurred, a reasonable person, knowing all of the relevant facts, would harbor doubts about Justice Maynard's ability to be impartial and that disqualification is necessary in order to develop and maintain the public's confidence in West Virginia's judiciary.

WHEREFORE, Movant Caperton respectfully requests that Justice Elliott E. Maynard disclose the nature of any meetings or communications with Mr. Blankenship during the pendency of this appeal. Caperton further requests that, if such meetings or communications

occurred, that Justice Elliot E. Maynard disqualify himself from further participation in any aspect of the Petition for Rehearing, and further, that he withdraw his vote in support of the Majority Opinion in this matter.

Respectfully submitted,



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

Counsel for Hugh M. Caperton

Dated: January 4, 2008

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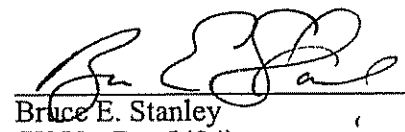
## VERIFIED CERTIFICATE

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 Motion for Disqualification Directed to 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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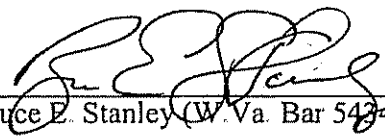
## CERTIFICATE OF SERVICE

I, Bruce E. Stanley, the undersigned counsel for Appellee Caperton, do hereby certify that I have served the foregoing Motion for Disqualification Directed to Justice Elliott E. Maynard, by United States Mail, first class and postage prepaid, this 4th 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
Post Office Box 2868
Huntington, WV 25728-2868

David B. Fawcett, Esq. (*pro hac vice*)
Buchanan Ingersoll & Rooney
One Oxford Center, 20th Floor
301 Grant Street
Pittsburgh, PA 15219
(412) 562-3931

Robert V. Berthold, Jr., Esq. (W.Va. Bar 326)
Berthold, Tiano & O'Dell
P.O. Box 3508
Charleston, WV 25335



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