

FAX TRANSMISSION

WV SUPREME COURT OF APPEALS
Administrative Office
1900 Kanawha Blvd., East, Bldg. 1 Room E-100
Charleston, WV 25305
VOICE: 304-340-2306
TTY: 304-558-4219
FAX: 304-558-1212

To:

Date: *Feb 21, 2008*

Fax #:

Pages: *12*, (including cover)

From: Kandi L. Greter
Information Services Specialist

Subject: *Justice Benjamin*

COMMENTS:

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 21st day of February 2008, the following order was made and entered:

Wheeling Pittsburgh Steel Corp. and
Mountain State Carbon, LLC, Plaintiffs Below,
Respondents

vs.) Nos. 080182 & 080183

Central West Virginia Energy Company and
Massey Energy Company, Defendants Below,
Petitioners

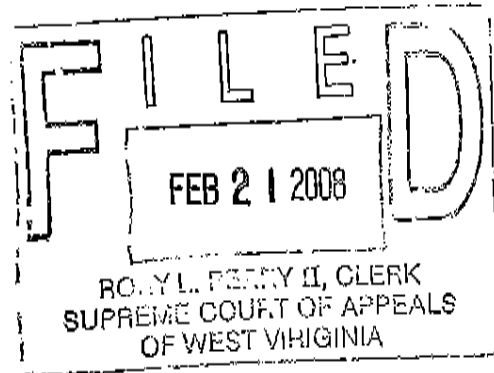
On this day, to-wit, February 21, 2008 came the Honorable Brent D. Benjamin, Justice of the Supreme of Court of Appeals of West Virginia, and notified the Clerk of this Court of his refusal to disqualify himself from participating in the above-captioned proceedings, pursuant to Canon 3(E)(1) of the Code of Judicial Conduct.

A True Copy

Attest: 
Clerk, Supreme Court of Appeals

MEMORANDUM

To: Rory L. Perry, II, Clerk
From: Brent D. Benjamin, Justice *BD*
Date: February 21, 2008
Case: *Wheeling Pittsburgh Steel Corp. et al. v. Central West Virginia Energy, et al.*
Pending: Motion seeking disqualification of Justice Benjamin



Currently pending for consideration is a motion and accompanying memorandum filed February 13, 2008, seeking my disqualification in the above-referenced matter. Having duly considered the motion and accompanying memorandum, the motion for disqualification is denied for the reasons more fully set forth in the attached memoranda (Attachments 1 and 2). I would further observe that inaccuracies and innuendo do not serve as a proper basis for seeking the disqualification of a judicial officer in West Virginia. By way of example of such an inaccuracy contained within the said motion is the recitation that the rotation of Chief Justice was not followed recently with respect to Justice Albright. To the contrary, it was. At the moment Justice Albright moved to the top of the seniority rotation in 2005 (in my first year on the Court) and assumed the position of Chief Justice, I moved to the bottom of the rotation. At the end of his term of Chief Justice, Justice Albright moved to the bottom of the rotation, *not somewhere in the middle of the rotation*. At that moment, I moved up one level in the rotation. There is no precedent for Justice Albright to have moved anywhere but back to the bottom of the rotation after his 2005 term ended. The established practice and procedure which was followed by the Court in this matter is furthermore exemplified by the Court's rotation history in which no justice has served on the

Supreme Court more than four years before becoming Chief Justice in his or her fifth year. I will have finished serving four years on the Court when I am scheduled to assume the position of Chief Justice in 2009, which will be my fifth year on the Court. Justice Albright was not skipped. The motion is denied.

cc: J. Robin Davis
Justice Larry Starcher
Justice Joseph Albright
Senior Status Judge Frank Joliffe

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th day of April 2006, the following order was made and entered:

Hugh M. Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales, Inc.
Plaintiffs Below, Petitioner

vs.) No. 05-167

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., Defendants Below, Respondents

This day came the Honorable Brent D. Benjamin, Justice of the Supreme of Appeals of West Virginia, and notified the Clerk of this Court of his refusal to disqualify himself from participating in the above-captioned proceeding.

A True Copy

Attest:


Clerk, Supreme Court of Appeals

MEMORANDUM

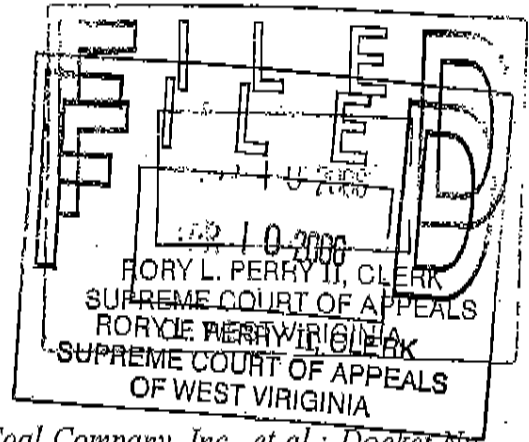
To: Rory L. Perry, II, Clerk

From: Brent D. Benjamin, Justice

Date: April 7, 2006

Case: *Hugh M. Caperton, et al. v. A.T. Massey Coal Company, Inc., et al.*; Docket No. 060936.

Pending: Underlying Plaintiffs' Motion to Disqualify Justice Brent D. Benjamin



Pending are motions by plaintiffs below ["movants"] in this case currently pending in the Circuit Court of Boone County, Civil Action No. 98-C-192, seeking my disqualification, or recusal, in matters related to this case. No response has been received from any of the defendants below. With an issue for determination now before this Court, the said motions are now ripe for consideration.

Recusal motions serve an important role in the administration of justice. Each consideration of disqualification must be determined by the specific facts present in the case, and not by generalized subjective preconceptions, conclusions or speculations. A consideration thus necessarily must focus on objective bases specific to a given case and a given jurist, *i.e.*, whether there is a proper basis based on objective factors to believe that a given jurist will be unable to render a fair and impartial decision in a given case. I have therefore carefully considered the bases and accompanying exhibits proffered by the movants.

Despite the amount of materials filed, little if any relates to this Justice and no 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. What is amply present in the materials filed is surmise, conjecture and political rhetoric.¹

Consideration of a motion seeking disqualification should not be undertaken lightly. As well-stated by Judge John Sirica, "(t)here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *U.S. v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), at FN 360.² The proper purpose of such a motion is to preserve, not inhibit, the administration of justice. The measure of whether a Justice should or should not recuse himself necessarily is not the bias or prejudice which a litigant may have regarding the Justice. Our judicial system requires more. A litigant's subjective belief that a Justice may be more or less favorable to his position is therefore an insufficient basis for disqualification.

The instant motions are denied.

¹ Movants include within their exhibits campaign finance reports apparently filed by this Justice's campaign committee. Such exhibits were not reviewed by this Justice as such would be inappropriate.

² In the *Haldeman* case, the District of Columbia Circuit Court of Appeals wisely observed in dicta that, "(i)n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision." *Id.* Recusal motions serve an important role in the administration of justice. However, when such motions are instead interposed by litigants in an attempt to predetermine the outcome of cases in their favor or to further subjective stereotypical preconceptions about a judge or justice, such motions may be condemned as an assault upon the administration of justice.

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 18th day of January 2008, the following order was made and entered:

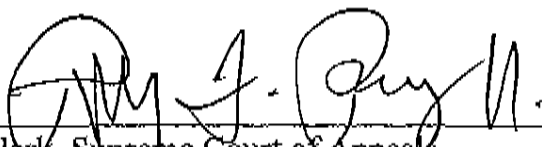
A. T. Massey Coal Company, Inc.,
Elk Run Coal Company, Inc.,
Independence Coal Company, Inc.,
Marfork Coal Company, Inc.,
Performance Coal Company, Inc.,
Massey Coal Sales Company, Inc.,
Appellants

vs.) No. 33350

Hugh M. Caperton,
Harman Development Corporation,
Harman Mining Corporation,
Sovereign Coal Sales, Inc.,
Appellees

This day came the Honorable Brent D. Benjamin, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of his refusal to disqualify himself from participating in the above-captioned proceeding

A True Copy

Attest: 
Clerk, Supreme Court of Appeals

MEMORANDUM

To: Rory L. Perry, II, Clerk

From: Brent D. Benjamin, Justice *GBB*

Date: January 18, 2008

Case: *Hugh M. Caperton, et al. v. A.T. Massey Coal Company, Inc., et al.*; Docket No. 33350.

Pending: Motion of Disqualification of Justice Brent D. Benjamin filed by Appellees Harman Development Corporation, *et al.* on January 17, 2008

Pending is a renewal of a motion seeking my disqualification in this case filed by appellees, Harman Development Corporation, Harman Mining Corporation, and Sovereign Coal Sales, Inc. [collectively referred to herein as "movants"]. This case is currently pending before this Court on motions by appellees for a rehearing related to this Court's November 21, 2007 decision which reversed the lower court decision (with Justices Starcher and Albright dissenting and myself concurring).

A review of the instant motion reveals the motion to essentially be identical to an earlier motion filed by movants in which I issued a memorandum on April 7, 2006 denying the prior motion, finding:

Despite the amount of materials filed, little if any relates to this Justice and no *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. What is amply present in the materials is surmise, conjecture and political rhetoric. [Footnote omitted.]

[Emphasis added.] It is observed that movants present no new information, objective or otherwise, to support their contentions. It is furthermore noted that this motion was not filed until after the decision contrary to the positions of movants in this matter was rendered and after the undersigned filed his concurring opinion to that majority opinion. Finally, it is noted that the motion contains no specific legal precedent for the position advanced by movants.

The motion seeking disqualification comes over three years after the 2004 election and focuses entirely on that election. It contains nothing about this Justice's record on the Court. There are no allegations that this Justice has or has had any relationship with Mr. Blankenship or any party in this litigation, or that he ever represented Mr. Blankenship or any Massey company in his twenty-plus years of private practice. Nor is this Justice aware of any basis by which this Justice should disqualify himself.

It is noted that in over three years of service on this Court involving a number of decisions involving the interests of Massey Coal and/or its subsidiaries, no other litigants have sought this Justice's disqualification, including the Office of the Attorney General of West Virginia, Darrell V. McGraw, Jr. Furthermore, it is also observed that, according to a November 3, 2005 article by Ken Ward, Jr., in The Charleston Gazette, state environmental regulators saw "no grounds" to ask this Justice to be disqualified. According to the article, Perry McDaniel, chief of the Department of Environmental Protection's Office of Legal Services, related that DEP Secretary Stephanie Timmermeyer told him that she "would not have entertained" the idea of seeking this Justice's disqualification in a matter involving Massey. According to McDaniel, "There are clearly

no grounds here for us to ask a Supreme Court justice elected by the people to step down in this matter.”

Disqualification of a publically-elected judge is appropriate only when the motion is supported by a factual basis, and when the facts asserted provide what an objective, knowledgeable person would find to be a reasonable basis for doubting the judge's impartiality. As demonstrated in the preceding paragraph, the instant motion fails this test. Indeed, the need for a proper factual basis to support a motion for disqualification is necessary to ensure that popularly-elected judges are not subject to media-driven attacks from which they cannot defend themselves, from campaigns to generate a veto power over judges by the creation and maintenance of public controversy in media outlets, and from attempts to engage in “judge-shopping” – a practice universally condemned. A review of my earlier memorandum demonstrates that movants then, as now, fail to advance any objective evidence which may serve as a proper basis for this Justice's disqualification in this matter.

Simple conclusory accusations and assumptions are plainly insufficient to support a motion for disqualification. To interpret the term “impartiality might reasonably be questioned” in such a subjective and partisan manner as the movants seem to suggest, particularly after this Justice voted in the Majority against their legal positions in this case, would create a system where there would be almost no limit to recusal motions and popularly-elected courts of this State would be open to “judge-shopping” under the guise of litigation strategy.

As referenced in my earlier decision, the District of Columbia Circuit Court of

Appeals wisely observed, in dicta, that, “[i]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision” is appropriate to this motion. *U.S. v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) at FN 360. In that case, involving matters related to the Nixon Administration, attorneys sought the disqualification of Judge John Sirica. Lacking a proper factual basis for such an attempt, they failed. Therefore, a litigant’s subjective belief, without more, that a Justice may be more or less favorable to his position is an insufficient basis for disqualification.

The instant motion is denied.