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Date: Feb. 15, 2008

Pages: 13, (including cover)

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Subject: Justice Starcher Recusal

COMMENTS:

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News

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Justice Starcher steps aside in Massey case

For immediate release February 15, 2008

CHARLESTON, W.Va. – West Virginia Supreme Court Justice Larry Starcher announced today that he is disqualifying himself from participating in the rehearing of the *Harman Mining Corporation v. A. T. Massey Coal Company* case. Oral arguments on the rehearing are set for March 12 at the Supreme Court.

Justice Starcher said, "I am stepping aside, hoping that Justice Benjamin does the same, so we can end the public controversy about the case and restore confidence in our Court by having five totally impartial justices hear the appeal."

The full text of Justice Starcher's statement is available on the West Virginia Supreme Court Web site, under the Press Page, as a pdf. The link is http://www.state.wv.us/wvsca/press/cover.htm

The document also is being sent as an attachment to this FAX.

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 15th day of February 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 Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of this Court of his voluntary disqualification from participating in the above-captioned proceeding, pursuant to Canon 3(E)(1) of the Code of Judicial Conduct.

A True Copy

Attest: _____
Clerk, Supreme Court of Appeals

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,

v. No. 33350

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

FILED
FEB 15 2008
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Very early in the appeal of this case the appellants, A. T. Massey Coal Company, Inc., et al., filed a Motion for the Disqualification of Justice Starcher. I responded in a manner much the same as I have responded to the many other requests for me to step aside in the numerous cases that Massey and its subsidiaries have had before this Court over the past several years. Consistently, I have taken the position that while I have personal thoughts about Massey's corporate behavior – I do read the papers – and the views and practices of Massey CEO Don Blankenship, I could still fairly judge any matter involving those parties presented to me in my judicial capacity. It is no different than judging drunk drivers, spousal abuse, criminal behavior of an individual, certain reprehensible behavior of tobacco companies or the conduct of predatory lenders – behavior which I personally abhor, yet professionally

pass judgment on regularly.

I believe that it is time for me to reconsider the request of the Massey appellants for me to recuse myself from participating in this Court's decision of the appeal in this case.

This case has been in litigation for years, and over this time it has taken on enormous public proportions. It has become a "problem case." It has become a case that is much talked about; a case in which three of the Court's five justices have been requested to step aside; a case in which, after multiple requests followed by evidence that was damning and undeniable, one of the three justices did step aside; and a case in which, over time, I have become part of the problem. The public rightfully might be of the opinion that all three of the justices, including me, could not be fair to one side or the other in this case, despite our best efforts or whatever we might say. There is, therefore, a reasonable appearance of impropriety.

Still, it is really the height of irony for the appellants to suggest that my public statements about certain views and practices by the appellant's CEO, Don Blankenship, should disqualify me from participating in the decision of the instant appeal.

In fact, it has been Mr. Blankenship who has gone out of his way to bring public attention to my views about his "one rich man buys an election" tactics.

Mr. Blankenship even sported a "Get Starcher" ball cap announcing me as his "next target" as he publicly celebrated spending millions to influence elections in our State. As a judge I am limited in my public comments, but I do have a constitutional right – and in fact a duty – to speak out on matters affecting the administration of justice. And let me be clear about this: I believe Mr. Blankenship's conduct does have an effect on the administration of justice, in that it has become a pernicious and evil influence on that administration.

Let me be more specific. Mr. Blankenship's companies have sued this Court in a federal court, alleging that *my* statements and *my* refusal to disqualify myself from hearing cases involving his companies violate their Constitutional rights. But nowhere in that lawsuit do they acknowledge that Mr. Blankenship, his money, and his friendship have far more egregiously tainted the perceived impartiality of this Court than any statement by me.

For example, when certain photographs were recently revealed as an attachment to a disqualification motion in this case, the public learned that Mr. Blankenship has enjoyed a longstanding and close relationship with another justice on this Court. The two vacationed in Europe together at the very time that this case was pending before the Court, and who knows what else? The details of that relationship and that vacation have still not been fully disclosed or independently

investigated – and they should be. Having never before acknowledged this close relationship, even when cases involving Mr. Blankenship's companies were before this Court, that justice did recently step aside in this case, but only after a second request and the release of the photos. That same justice has been voting on cases involving Mr. Blankenship's companies for years. What about all those previous votes? What are the consequences of these facts? Certainly Mr. Blankenship's asserted "partiality" arguments that focus solely on my recusal are of less consequence by comparison.

Moreover, that justice recently voted to remove two justices from the Chief Justice rotation order, materially affecting the appointment of replacement judges in cases involving Mr. Blankenship's companies.

Additionally, shortly before this case was appealed to this Court, another justice ran an election campaign in 2004 that was supported by somewhere around $4,000,000 from Mr. Blankenship and/or Massey associates. So-far that justice has refused to recognize that this fact has a bearing even on his *perceived impartiality*. That justice not only remains on this case, as well as other Massey cases before the Court, but that justice continues at this time to appoint replacement judges in all Massey cases.

Shortly after the 1996 primary election when I was nominated by my

party for a seat on this Court, I was in the process of trying (as a Monongalia County circuit judge) large numbers of asbestos cases. I had set a trial for August 19, 1996, for about 7,000 plaintiffs – simply to do my best at cleaning up my local docket, in anticipation of being on the Supreme Court in January, 1997. Several of the asbestos-producing defendants filed a "Motion to Disqualify Judge Larry V. Starcher." The Motion was signed by attorney Charles R. McElwee, then a senior partner in the Charleston law firm of Robinson & McElwee, the very law firm from which the justice whose election campaign was so generously supported by Mr. Blankenship came.

Now, the basis for Mr. McElwee saying I should step aside in that trial court asbestos litigation was that several lawyers had contributed as much as $1,000 each to my primary election campaign – and the total complained of was $36,500.

I think that it is fair to say at this point that Mr. McElwee is no longer a lawyer at the Robinson & McElwee law firm. He currently is a $90,000/annually law clerk for the justice to whom Mr. Blankenship was so benevolent. And, although Mr. McElwee "came to the Court" at the same time the justice came, he has neither an office nor a phone at the Court.

Let me quote some of the language from Mr. McElwee's (now that justice's current senior law clerk) "Memorandum in Support of the Motion to

Disqualify Judge Larry V. Starcher" dated July 24, 1996:

> The standard for determining [the judge's] disqualification is whether a reasonable and objective person knowing of such campaign contributions . . . would harbor doubts about [the judge's] impartiality. . . . Under this standard, the proper finding is manifest. A reasonable and objective person knowing the timing and the amounts of such large campaign contributions . . . would indeed harbor doubts about [the judge's] impartiality. . . . Judges are reluctant to recuse themselves. . . . The goal of courts is to avoid even the appearance of impropriety for, as the Court explained in *Tennant* [*v. Marion Health Care Foundation, Inc.*, 459 S.E.2d 374, 385 (W.Va. 1995)], "avoiding the appearance of impropriety is as important in developing public confidence in our judicial system as avoiding impropriety itself. . . ." and "A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willing." Commentary, Canon 2, Code of Judicial Conduct.

I voluntarily stepped aside in that 1996 case.

My point is this: In 1996, my campaign finance committee accepted individual contributions from lawyers in amounts up to $1,000 apiece for the benefit of my campaign, and – except in this one 1996 case – in a dozen years since no one has asked me to step aside as a result of those contributions. That recusal request was based on my campaign receiving a total of $36,500 from lawyers in a mass tort case involving thousands of plaintiffs. And I repeat – I did step aside in that case. I

believe that $36,500 pales in comparison to $4,000,000. I also believe that there is a significant difference between campaign contributions from lawyers who have a vested interest in a fair, impartial and efficient judiciary, and a very active litigant who had lawsuits pending in the Court at the very moment he made huge amounts of money available to support a justice's election, and whose only vested interest in the Court is "winning his cases." I believe John Grisham got it right when he said that he simply had to read *The Charleston Gazette* to get an idea for his next novel.

Just think about it – $4,000,000! I know hardly a soul who could believe that a justice who benefitted to this extent from a litigant could rule fairly on cases involving that litigant or his companies – or appoint judges to sit on those cases. This is the very definition of "appearance of impropriety." While the huge amount of money alone speaks volumes, how it was used speaks even louder – distortions and smears were the focus of the campaigns supported by this money.

I would be remiss if I did not point out that this type of "big money" – special interest expenditures – has been directed at furthering an agenda that only partly involves influencing the composition of the Court. It also has been and continues to be directed at wounding our State's judiciary with false claims portraying West Virginia as a "judicial hellhole," false claims that facts do not support and false claims that have been refuted by academic researchers at West

Virginia University. These claims are simply false, but truth and accuracy mean nothing to people who want to skew the justice system in their favor.

The simple fact of the matter is that the pernicious effects of Mr. Blankenship's bestowal of his personal wealth, political tactics, and "friendship" have created a cancer in the affairs of this Court.

I was born a poor boy in an old farm house in West Virginia. I was the first in my family to graduate from high school and then college; I was fortunate to receive a good education. I came to the practice of the law and the judiciary with an idealism rooted in the belief that big money should never be permitted to buy, or be seen to buy, justice. That idealism is the sole reason that I have spoken out against Mr. Blankenship's views and practices, as they relate to our State's judiciary.

Those distorted views and practices allow Mr. Blankenship to secretly cavort on the Riviera with a justice of this Court, while he had a $60,000,000 case pending before the Court – and see nothing improper. Those views and practices allow him to claim no appearance of impropriety in presenting his case to a justice whose election he supported with something around $4,000,000. And those views and practices allow him to claim that the only "partiality" problems he has with this Court are *my* statements criticizing *those* very views and practices.

As I said in my dissent to the majority opinion in this case when the

"first decision" was released in November 2007: "I am one judge voting on this case who can say that I owe nothing to Mr. Blankenship one way or the other – he did nothing to hinder or hurt my election. He did not fund my campaign, nor am I a social friend of his. It has been amusing for me to see Mr. Blankenship trying with all his might to create circumstances where I can be forced to step aside and let him have *in toto* the kind of Court he wants . . .. Fortunately, the public can see through this kind of transparent foolishness, just as a West Virginia jury saw through his lies in court."

I repeat – the pernicious effects of Mr. Blankenship's bestowal of his personal wealth and friendship have created a cancer in the affairs of this Court. And I have seen that cancer grow and grow, in ways that I may not fully disclose at this time. At this point, I believe that my stepping aside in the instant case *might* be a step in treating that cancer – but only if others as well rise to the challenge. If they do not, then I shudder to think of the cynicism and disgust that the lawyers, judges, and citizens of this wonderful State will feel about our justice system.

And I reiterate that unless another justice also steps aside in this case, my replacement on the Court will be selected by the justice whose campaign was supported by something close to $4,000,000 from monies that came from one side of the case. Perhaps, a serious read of the United States Supreme Court case, *Aetna*

Insurance Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed. 2d 823 (1986), is in order before such a decision is made.

For the foregoing reasons, in the interest of justice, on this 15th day of February, 2008, I recuse myself in the above-styled case.

Justice Larry V. Starcher