

MISSOURI CIRCUIT COURT  
TWENTY-SECOND JUDICIAL CIRCUIT  
(City of St. Louis)

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PRESTON ALEXANDER, *et al.*, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
FLUOR CORPORATION, *et al.*, )  
 )  
Defendants. )

Cause No: 052-09567

Division No. 12

CLERK

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EMILY PEDERSON, *et al.*, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
FLUOR CORPORATION, *et al.*, )  
 )  
Defendants. )

Cause No: 052-09856

Division No. 12

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MATTHEW HEILIG, *et al.*, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
FLUOR CORPORATION, *et al.*, )  
 )  
Defendants. )

Cause No: 052-09866

Division No. 12

**ALTERNATIVE MOTION FOR REMITTITUR OF COMPENSATORY DAMAGES**

The Court should enter judgment for Defendants Fluor Corporation, A.T. Massey Coal Company, and Doe Run Investment Holding Corporation notwithstanding verdict or order a new trial for the reasons set forth in Defendants' other post-trial motions. If the motion for judgment notwithstanding the verdict and/or the motion for new trial are denied, in the alternative, the

Court should order a remittitur of the excessive awards of compensatory damages in this action.

In support of this motion, Defendants state as follows:

1. As an initial matter, this jury's award was improper because Defendants' conduct did not warrant an award of compensatory damages. Even if compensatory damages were appropriate in this case, which Defendants deny, the awards are excessive and unreasonable, and require reversal and a new trial unless Plaintiffs agree to a substantial remittitur of the compensatory damage awards.

2. Under Missouri law, excessive verdicts arise in two circumstances: "(1) where the verdict is simply disproportionate to the proof of injury and results from an honest mistake by the jury in assessment of the evidence, and (2) where the verdict's excessiveness is engendered by trial misconduct and thus results from the bias and prejudice of the jury." *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 655 (Mo. App. 1997). As explained at length in Defendants' motion for a new trial, the record in this case reveals errors requiring a new trial. *See id.*

3. In contrast, a disproportionate verdict "may be corrected by an enforced remittitur and does not require a retrial." *Id.*; *see Knifong v. Caterpillar, Inc.*, 199 S.W.3d 922, 927 (Mo. App. 2006). Pursuant to the general remittitur statute, remittitur is appropriate "if, after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds fair and reasonable compensation for plaintiff's injuries and damages." § 537.068, RSMo.

4. When a jury errs by awarding a verdict that is simply too bountiful under the evidence, an injustice may be prevented by ordering a remittitur. *Knifong*, 199 S.W.3d at 927 (quoting *Lindquist v. Scott Radiological Group, Inc.*, 168 S.W.3d 635, 647 (Mo. App. 2005)).

Remittitur is an equitable remedy whereby a trial court may order a reduction of a damages award to produce “equitable compensation,” “to bring jury verdicts in line with prevailing awards” and “to eliminate the retrial of lawsuits.” *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 175 (Mo. App. 1997).

5. In *Barnett*, the family of a pilot who was killed in the helicopter crash obtained a verdict of \$175 million in actual damages and \$175 million in punitive damages. *Barnett*, 963 S.W.2d at 644. The trial court remitted the judgment to \$25 million in actual damages and \$87.5 million in punitive damages. *Id.* The Missouri Court of Appeals ordered a further remittitur of compensatory damages to \$3.5 million and of punitive damages to \$26.5 million. *Id.* at 669.

6. During closing arguments, counsel for Plaintiffs requested that the jury award each Plaintiff (1) the maximum future lost earnings calculated by Plaintiffs’ expert, Robert Johnson, which included a 30% adjustment for additional periods of unemployment due to ADHD, plus (2) \$1,000,000 per IQ point allegedly lost by the respective Plaintiff. The jury ultimately awarded, for each Plaintiff, the maximum amount testified to by Dr. Johnson, including the entire 30% adjustment, plus \$250,000 per IQ point allegedly lost.

7. The compensatory damages awarded to Plaintiffs were excessive and should be remitted to a reasonable amount. Even if some compensatory damage amount were appropriate, which Defendants deny, the awards here were (1) not justified by the testimony from Plaintiffs’ damage experts; (2) excessive due to the confusion caused by Plaintiffs’ request for duplicative damages; and (3) completely disproportionate to any harm that Plaintiffs’ claimed, let alone proved, at trial.

8. Plaintiffs' experts Robert Johnson and Dr. Carl Hansen both provided testimony in support of Plaintiffs' alleged damages. Their testimony conflicted as to the proper measure of damages for each of Plaintiffs at issue. Their testimony was also contradictory to the ultimate opinions they each expressed at trial. For the reasons discussed in Defendants' motion for a new trial, the unsupported, inconsistent and contradictory nature of Johnson's and Dr. Hansen's opinions necessitate a new trial. For purposes of this motion, however, even if their opinions were given the benefit of every doubt, they do not support the compensatory damages awarded by the jury.

9. Johnson and Dr. Hansen added a 15 to 30% "adjustment" to each of Plaintiffs' damage figures.<sup>1</sup> The 15 to 30% adjustment lacked any scientific, expert, or evidentiary foundation, and was simply a percentage pulled out of thin air. For that reason alone, the "adjustment" is inappropriate for purposes of evaluating an appropriate compensatory damage figure for each Plaintiff and contributes to an excessive award.

10. Even if it did have some appropriate basis, however, Johnson and Dr. Hansen also agreed that an average person would be expected to be employed about 77% to 82% of time during his or her working life. Both experts agreed that the damage figures would need to be adjusted to account for this expected unemployment rate. Despite this, however, counsel for Plaintiffs requested, and the jury awarded, the entire purported damage figure based on the expectation of constant employment throughout each Plaintiff's working life.

11. The inconsistent and contradictory testimony from Johnson and Dr. Hansen, clearly lead to confusion on the part of the jury as to the damage amounts actually supported by

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<sup>1</sup> With respect to Austin Manning, Hansen and Dr. Johnson offered no damage testimony. In fact, there was no evidence presented by any witness at trial in support of a damage amount for Austin Manning.

the evidence. Even ignoring the unsupported 30% “adjustment,” the compensatory damage awards would need to be reduced by at least 18%, and as much as 23%, in order to be consistent with Johnson’s and Dr. Hansen’s testimony regarding expected unemployment rates for an average person.

12. Plaintiffs’ request for \$1,000,000 per IQ point also engendered confusion amongst the jury and led them to award damages far in excess of that supported by the evidence. Johnson’s and Dr. Hansen’s opinions regarding Plaintiffs’ alleged damages already included the assumption that each Plaintiff would have a decreased mental capacity due to lead exposure. Their opinions assumed the inability to obtain high-school and college degrees, the inability to obtain higher paying jobs, and the inability to otherwise function as a “normal” person throughout their lives. Their opinions, therefore, took into account all of the theoretical consequences that Plaintiffs might possibly suffer as a result of their loss of IQ points.

13. Setting aside the fact that the evidence in support of the loss of IQ points had no basis in reality, awarding damages for all the consequences that could potentially be suffered as a result of the loss of IQ points, *plus* damages for the loss of IQ points, is duplicative. The jury awarded Plaintiffs damages for their allegedly lost IQ points twice. This duplication should be eliminated in order for the compensatory award to be proportionate to the evidence. Accordingly, the compensatory damages amount for each Plaintiff should be reduced by the \$250,000 per IQ point awarded by the jury.

14. The compensatory awards were also disproportionate to the evidence of actual harm suffered by Plaintiffs or, more accurately, the lack thereof. The evidence established that Plaintiffs did not have grossly excessive blood lead levels, that Plaintiffs were doing well in light of their family history and circumstances, and that, as of the present time, Plaintiffs had suffered

no adverse effects that could be linked to lead exposure. Awards of millions of dollars per Plaintiff in the absence of any evidence of excessive blood lead levels, long term health problems, or lost employment or economic opportunities are excessive and should be remitted.

15. As a general matter, with the exception of one, all of the adult Plaintiffs graduated high school. The one exception, Patrick Blanks, obtained his GED, despite the fact that neither of his parents had ever obtained a high school diploma. In fact, the majority of adult Plaintiffs came from homes where at least one parent failed to graduate high school. Only one of the adult Plaintiffs' parents – the father of Bryan and Tiffany Bolden – was a college graduate. However, he had virtually no involvement in his children's upbringing from a very early age.

16. With only a few exceptions, all of the adult Plaintiffs are either employed or attending college or both. Preston Alexander had been laid off from a construction job due to a downturn in the economy, but remained in line to be called back to work. Patrick Blanks had been off work for nearly a year due to injuries sustained in a car accident, but also anticipated returning to work. Ashley Shanks Getty is a stay-at-home mother caring for her young son, and will likely continue doing so until he is school age. It is anticipated that each of the younger Plaintiffs will graduate from high school and that the majority will attend and graduate from a two-year or four-year college. In short, each Plaintiff has the capability to achieve and live a life much like the majority of the overall population. Plaintiffs are doing just that.

17. With respect to each of Plaintiffs, individually:

a. Plaintiff Sydney Fisher is in the fourth grade. Up to the present time, she has received straight A's in school, requires no extra help on her schoolwork, and is able to pay attention to the same extent as any other fourth grader. Sydney Fisher also has no

reported behavior problems, and is socially well adjusted, with an extensive group of friends.

b. Plaintiff Bryan Bolden graduated high-school and attended college for three semesters. The testimony established that he left college because he was homesick, and not because of an inability to handle the schoolwork. Bryan Bolden currently has a job as an account representative with GC Services, and is able to support both himself and assist in providing for his two-year-old son.

c. Plaintiff Tiffany Bolden graduated high school with a 3.0 grade point average and received a scholarship for college. She is currently a student at Jefferson College, where she is obtaining her associates degree. Tiffany Bolden is employed in a job that allows her to support herself and is reportedly doing well with that job.

d. Plaintiff Jeremy Halbrog is a high school graduate. He has been able to obtain jobs with multiple employers and has been successful at each of those jobs. His movement from one job to another was not the result of any behavioral or performance issues, but instead was the result of a down economy. In fact, he has been promoted by more than one of his employers based on his performance.

e. Plaintiff Preston Alexander graduated high-school with a 2.7 GPA and received an athletic scholarship to attend college. The testimony established that he left college because of a broken leg and the birth of his daughter, who is now three. He is a union apprentice making a wage of \$19.40 an hour. He has not had any disciplinary or performance issues with his employers, and the only factor currently affecting his earning capacity is the general lack of work for laborers during the economic downturn.

f. Plaintiff Austin Manning was in the fifth grade when he died for reasons entirely unrelated to lead or the operation of the lead smelter. At the time, he was making A's and B's in school and had no reported behavioral problems. Austin Manning was never diagnosed with ADD while he was alive. That diagnosis did not occur until approximately one year prior to trial, in 2010.

g. Plaintiff Nathan Davis managed to graduate high school despite significant family issues. He was home-schooled and then left homeless at a young age by his parents. Despite this, Nathan Davis is now married and has a steady job making \$11.85 an hour, with no reported job performance issues.

h. Plaintiff Lauren Shanks graduated high school with a 3.2 grade point average. There was a period of time when Lauren Shanks suffered from depression and some behavioral issues. The testimony showed a family history of depression and linked her depression to the same time period when she was exposed to significant family turmoil. After counseling related to the family turmoil, Laruen Shanks went on to attend college, and is currently obtaining her associates degree, while maintaining a job.

i. Plaintiff Ashley Shanks Getty is a high-school graduate. Like her sister, Lauren Shanks, there was some testimony regarding treatment for depression. Also like her sister, the testimony showed a family history of depression and linked her depression to the same time period when she was exposed to significant family turmoil. After receiving counseling, Ashley Shanks Getty went on to attend some college and receive training as a Nurse's Aid. She is currently married and raising her two-year-old son. She was not diagnosed with ADD or any lead-related issues, until 2010, when she mentioned the upcoming trial to her doctor.



j. Plaintiff Jesse Miller is currently in the fifth grade. He did have some early difficulties in school. This was exacerbated by home-schooling without proper supervision. Ultimately, Jesse Miller is expected to be able to obtain a job as a laborer, which is what we wants to do, and to match his parent's earning capacity. Jesse Miller was born four years after the Doe Run Company Partnership had ended.

k. Plaintiff Jonathan Miller, as of trial, had completed the ninth grade. Throughout most of his academic career, he received primarily A's and B's in his classes. Although he had recently had a few poor semesters, his family members testified that this was due to a lack of effort on Jonathan's part, and that he was capable of succeeding in school whenever he applied himself. Jonathan Miller is expected to graduate high school and have an earning capacity exceeding that of his parents.

l. Plaintiff Matthew Heilig, as of trial, had completed the tenth grade. He is expected to graduate high school and have an earning capacity similar to that of his parents. He is capable of and has assisting in caring for his younger sister. Matthew Heilig did have issues with depression. He relayed to his counselors that this depression was the result of abandonment issues caused by his father's absence.

m. Plaintiff Patrick Blanks did not graduate high school, but instead obtained his GED at the age of sixteen. He attended some college for electrician training. He dropped out because he lost interest in pursuing that type of career. This was significantly better than the educational history of either of his parents. While currently off of work, Patrick Blanks has been able to successfully hold down a job at Midwest Containers. There is no evidence that Patrick Blanks currently suffers from any ADHD symptoms.

n. Plaintiff Gabriel Farmer graduated high school with a 2.8 grade point average. He was a successful athlete in high school and obtained a scholarship to college based on his academics. Gabriel Farmer attended some college but ultimately dropped out because of significant family stresses to which he was subjected at the time. He is currently an Animal Control Officer earning \$12.25 per hour. He has done significantly better than either of his parents.

o. Plaintiff Heather Glaze graduated high school with a 2.6 grade point average. She subsequently obtained licenses to be a certified nurse assistant and a cosmetologist. Heather Glaze currently is employed by the Missouri Department of Corrections and is self-sufficient. Any evidence of behavioral disorders has been attributed to family stresses to which she was subjected. Her blood lead levels were always recorded below the level of concern for the period in which the tests were taken.

p. Plaintiff Isaiah Yates is a high school senior. He currently has a 3.3 grade point average and is in the top ten of his class. He is planning for and expects to attend college, where he also hopes to play basketball. Any evidence of behavioral disorders has been attributed to a traumatic childhood event and a family history of anxiety, panic attacks, and alcoholism. Despite the trauma and family history, Isaiah Yates has done better than not just his parents, but most of the other people in the Herculaneum community.

18. Most of these Plaintiffs are very successful, regardless of the standard applied. Certainly, Plaintiffs have shown that they are capable of obtaining an education and holding down a job that would place them in an educational and economic position equal to or greater than their parents. To the extent that any of these Plaintiffs have had alleged mental health

issues, those mental health issues are tied to significant and traumatic life events or family stresses. Based on this evidence, millions of dollars in damage awards were not appropriate. The compensatory damage awards should be remitted to a level that is proportionate to the harm actually suffered, if any.

19. Between the contradictory damage testimony from Johnson and Dr. Hansen, the duplicative damage awards for lost IQ points, and the general nature of the testimony with respect to the harms allegedly suffered by Plaintiffs, remitting the compensatory damage awards to 18% of the maximum damage figure testified to by Dr. Johnson – thus, excluding the \$250,000 awarded per IQ point and accounting for Johnson’s and Dr. Hansen’s testimony regarding expected unemployment rates – would be more than appropriate.

20. As to Austin Manning, there was no evidence presented by any of Plaintiffs’ damage experts and no particular amount requested by Plaintiffs’ counsel during closing arguments. Given the fact that, prior to his death from an incident wholly unrelated to lead, Austin Manning was a successful and well-behaved student that had not been diagnosed with ADD, an award of \$100,000 would be more than appropriate to conform to the evidence.

21. Accordingly, in the event that this Court does not grant their motion for judgment notwithstanding the verdict and/or their motion for new trial, Defendants request that the compensatory damage awards be adjusted to the following amounts:

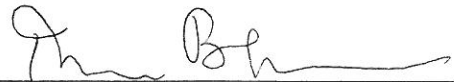
- a. Preston Alexander - \$1,231,168.50;
- b. Patrick Blanks - \$804,772.60;
- c. Bryan Bolden - \$1,101,383.82
- d. Tiffany Bolden - \$1,092,643.44
- e. Nathan Davis - \$782,079.10

- f. Gabriel Farmer - \$1,249,368.40
- g. Sydney Fisher - \$1,120,616.92
- h. Heather Glaze - \$894,037.80
- i. Jeremy Halbrook - \$907,863.82
- j. Matthew Heilig - \$803,067.00
- k. Ashley Shanks Getty - \$728,817.64
- l. Laruen Shanks - \$1,076,537.00
- m. Jesse Miller - \$859,073.82
- n. Jonathan Miller - \$1,162,010.52
- o. Isaiah Yates - \$1,175,520.84
- p. Austin Manning - \$100,000.00

WHEREFORE, Defendants respectfully pray that, if the motion for judgment notwithstanding the verdict and/or the motion for new trial are denied, this Court, in the alternative, order a remittitur of the excessive awards of compensatory damages in this action in the manner and to the amounts described above, and for such other and further relief as this Court deems just and proper under the circumstances.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was delivered by email and first class mail to counsel of record this 14th day of September, 2011, to:

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