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

PRESTON ALEXANDER, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	Cause No: 052-09567 Division No. 12

EMILY PEDERSON, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	Cause No: 052-09856 Division No. 12

MATTHEW HEILIG, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	Cause No: 052-09866 Division No. 12

DEFENDANTS' ALTERNATIVE MOTION FOR REMITTITUR OF PUNITIVE DAMAGES

The Court should enter judgment for Defendants notwithstanding verdict or order a new trial for the reasons set forth in Defendants' other post-trial motions. If JNOV and/or a new trial are denied, in the alternative, the Court should order a new trial unless Plaintiffs agree to a

remittitur of the excessive awards of punitive damages in this case. In support of this motion, Defendants state as follows:

1. As an initial matter, this jury's award was improper because Defendants' behavior did not warrant an award of punitive damages. Even if punitive damages were appropriate in this case, which Defendants deny, the award is excessive and unreasonable, and requires reversal and a new trial unless Plaintiffs agree to a substantial remittitur of the punitive damages award. Defendants' motions for new trial and JNOV are incorporated herein by reference.

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 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. The Missouri punitive-damages statute specifically provides that remittitur "shall apply to punitive damage awards." § 510.263.6, RSMo.

4. When a jury errs by awarding a verdict that is simply too bounteous 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 punitive damages award "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. As explained separately, the punitive awards in this matter are so grossly excessive as to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, under principles articulated by the U.S. Supreme Court in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), and *State Farm Mutual Auto Insurance Co. v. Campbell,* 538 U.S. 408 (2003).

6. In reviewing a punitive damages award for excessiveness, due process and reasonableness requirements compel consideration of the degree of reprehensibility of the defendant's conduct, the relationship between the punitive damages award and the harm or potential harm suffered by the plaintiff, and the difference between the award and the civil penalties authorized or imposed in comparable cases. *Letz,* 975 S.W.2d at 178; *BMW,* 517 U.S. at 573–576. Missouri courts have considered the following additional factors in determining the propriety of a punitive award: (1) aggravating and mitigating circumstances surrounding the defendant's conduct; (2) the degree of malice or outrageousness of the defendant's conduct; (3) the defendant's character, financial worth, and affluence; (4) the age, health, and character of the injured party; (5) the nature of the injury; (6) awards given and approved in comparable cases; and (7) the superior opportunity for the jury and trial court to appraise the plaintiff's injuries and other damages. *Letz,* 975 S.W.2d at 178

7. In *Letz,* the plaintiffs obtained compensatory damages of $2.5 million and a punitive award of $67.5 million against companies that manufactured and installed a defective part on the engine of a helicopter, leading to the death of a 20-year-old mother of two small children. The evidence at trial disclosed top-level executives of the companies knew of the history of the part, its propensity to crack, and the risk of in-flight engine failures. They knew the part had failed during engine operation, causing the affected engines to cease functions, and they knew that helicopters had crashed because the engine had failed. Because they knew of the propensity of the part to fail, they developed and possessed a safe part to replace the defective one. The companies, however, did not recall helicopter engines to replace the defective part but, instead, delayed the retrofit until each engine was overhauled during regularly scheduled maintenance. Despite the companies' awareness of the defective part, the recommended length between overhauls was lengthened by the companies from 2,000 hours of engine use to 2,500 hours. The business decision not to immediately recall the helicopter engines for retrofit was influenced by the desire to save the companies millions of dollars. In *Letz*, despite these facts, the Missouri Court of Appeals held that the punitive award should be remitted by sixty percent, from $67.5 million to $26.5 million. *Id.* at 180.

8. *Barnett* was a companion case to *Letz* in which the family of the 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.* On appeal, based on the same facts as those in *Letz,* the Missouri Court of Appeals ordered a further remittitur of compensatory damages to $3.5 million and of punitive damages to $26.5 million, or 15 percent of the original punitive damage award. *Id.* at 669. *See also Alcorn v. Union Pacific*

R.R., 50 S.W.3d 226 (Mo. banc 2001) ($140 million punitive award remitted by trial court to $50 million and then reversed outright by Supreme Court).

9. The punitive damages awarded in this case, whether considered as a total of $320 million or as separate awards of $20 million for each Plaintiff regardless of the extent of the individual Plaintiff's alleged injury, are grossly excessive and should be substantially remitted. If considered separately, the sixteen punitive damage awards against each of the three Defendants means that each Defendant would have to pay sixteen punitive damage awards for the exact same conduct during the exact same time period. Plaintiffs are hard pressed to argue that the awards are not excessive, in light of the fact that the jury's punitive damages award is $112 million more than the amount Plaintiffs thought was appropriate and asked the jury to award. The factors supporting remittitur include the following.[1]

10. The first two factors – aggravating and mitigating circumstances and the degree of malice and outrageousness of the defendants' conduct – warrant a substantial remittitur. *Letz*, 975 S.W.2d at 178. The punitive damages assessed against Fluor, A.T. Massey, and DRIH were based solely on their status as partners. The instructions allowed the jury to find both Fluor and DRIH liable for punitive damages based on DRIH's partnership status. None of the punitive damage awards were or could be based on any actions in operating the smelter because it is undisputed that none of the Defendants operated the smelter. All witnesses with first-hand knowledge of the smelter operations (Zelms, Vornberg, Lanzafame, and Walker), as well as Plaintiffs' witness Fisher, testified that Fluor, DRIH, and A.T. Massey were not involved in the

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[1] As explained in Defendants' separate motion for a new trial, one obvious factor in the jury's decision to award Plaintiffs $112 million more than Plaintiffs even requested is the improper conduct of Plaintiffs' counsel during voir dire when he informed the jury that half of any punitive damage award would go to the state as part of the Tort Victim Compensation Fund.

day to day operations at the smelter. In their claims as submitted to the jury, Plaintiffs did not even assert that any of the Defendants had controlled the operation of the smelter or Doe Run. In addition, for more than three years of the partnership, Homestake held an equal role on the partnership committee, including the entire period when Paul Allen was writing his consultant reports. During the period of time when Homestake was a partner, none of the Defendants could take any unilateral action to control or usurp the power of Doe Run to function. Fluor was not in control of either Doe Run or the Committee. The only issue of control submitted to the jury, over Defendants' objection, was Fluor's alleged control of Leadco and DRIH, both of which were holding companies and neither of which played any role in operating the smelter. The claims against DRIH and A.T. Massey were based only on their status as partners and the conduct and knowledge of the partnership, not on their individual knowledge or conduct. Punitive damages were imposed on those Defendants without any requirement that they did anything or knew anything. The instructions permitted the jury to impose liability for punitive damages against Fluor not for engaging in conduct that caused Plaintiffs injury, but for "allowing" Plaintiffs to be injured by the conduct of St. Joe. Even if the evidence supported submitting claims for punitive damages against these Defendants, the evidence does not support punitive damage awards totaling $320 million.

11. In addition to the lack of evidence that Defendants were responsible for the operation of the smelter, these Defendants were partners for a very limited time. The smelter has been operating for over 100 years. Flour was a partner for less than a day in 1990 and was assessed $240 million in punitive damages. A.T. Massey was a partner for less than 5 months and was assessed $48 million in punitive damages. DRIH, which according to Plaintiffs was completely controlled by Fluor and had no employees, was a partner for approximately 5 years

was assessed $32 million in punitive damages. Like the lack of involvement in operating the smelter, the brief time Defendants had any ownership interest in the smelter calls for substantial remittitur.

12. The evidence, including evidence improperly excluded by the Court, also does not support Plaintiffs' claim that Defendants turned a blind eye to any potential risks associated with the operation of the smelter. To the extent Fluor had any role in the approval of budgets with regard to the smelter, the uncontradicted evidence was that every request for funding made by St. Joe with regard to control of lead emissions or other safety measures was approved. No environmental Authorization For Expenditure was rejected. The Doe Run Company partnership committee, which included some Fluor officers sitting as designated representatives of St. Joe, approved millions of dollars in environmental expenditures, both pursuant to and outside of SIPs, to deal with lead emission and pollution issues. At no time did the partnership committee, from November 1986 to May 25, 1990, decline or refuse to approve an Authorization for Expenditure for environmental and/or pollution control improvements. Subsequently, for the time period of May 25, 1990 through April 1994, Fluor approved each and every Authorization for Expenditure submitted by Doe Run for environmental improvements and pollution controls. Prior to and throughout the time period that Fluor owned St. Joe, was briefly a partner in the Doe Run Partnership, or owned other partners in the Doe Run Company partnership, either St. Joe or Doe Run were operating pursuant to and complying with State Implementation Plans prepared and approved by the State of Missouri and Environmental Protection Agency pursuant to provisions of the Clean Air Act and National Ambient Air Quality Standard promulgated for lead in 1978. Neither St. Joe nor Doe Run were ever found to be out of compliance with any of the three SIPs that were applicable during the 13-year time period of Fluor's interest in St. Joe/Doe Run.

Robert Schreiber, the head of MDNR's Missouri Air Commission testified that St. Joe or Doe Run never acted in bad faith or withheld information from him or MDNR. Moreover, neither the EPA nor MDNR ever identified Fluor, AT Massey, or DRIH as responsible parties for purposes of complying with the NAAQS or any other environmental regulations. Neither agency ever negotiated with Fluor, AT Massey or DRIH with respect to SIPs and pollution control issues. The evidence simply does not support any argument that Fluor or its subsidiaries were ignoring or flouting state or federal standards and regulations. Rather, the record is clear that air lead emissions were reduced by 70% during the 13-year period Fluor owned St. Joe, blood lead levels in the community dropped, and most of the air monitoring stations were brought into compliance with the standards. Plaintiffs' claim that Fluor should have done more does not support a $240 million punitive damages award against Fluor.

13. Plaintiffs introduced testimony from various retained experts regarding the history of lead, lobbying efforts (over objection from Defendants), and actions of industry groups prior to Fluor's acquisition of St. Joe in August 1981. This evidence cannot be considered in evaluating whether Defendants could be liable for punitive damages. Fluor had no interest in or involvement in the lead industry until it acquired St. Joe Minerals Corporation in August 1981 and no activity in the industry on its own at any time. Evidence of knowledge or conduct prior to August 1981 did not and could not have involved Fluor, nor could Fluor have been aware of the content of such evidence, and the Court should not consider that evidence in evaluating an appropriate level of punitive damages.

14. In evaluating the excessiveness of these awards, the Court should also consider the improperly excluded evidence of the 1994 Sale Agreement. Under that agreement, which the Court prohibited the jury from seeing, Fluor sold the entire lead business for $140 million and set

aside approximately $24.8 million in a reserve account to deal with environmental expenditures. This evidence is directly relevant not only to whether Fluor was liable for punitive damages but also to the amount of any award. The Court cannot reasonably uphold multiple awards (for the exact same conduct) totaling $240 million against Fluor when it sold the entire lead business for about $140 million, set aside $24.8 million for environmental reserves as part of that sale, and has not had involvement in any lead operations in Herculaneum or anywhere else since 1994.

15. The excessive punitive damages awarded against AT Massey and DRIH are also undercut by the undisputed evidence and Plaintiffs' own argument that neither corporation performed any actions or had any employees that were active in Doe Run's operations. There was no evidence, Plaintiffs did not claim, and the jury was not required to find that A.T. Massey or DRIH had any knowledge that the operations of the smelter created a high degree of risk of harm to Plaintiffs or that either of those Defendants showed complete indifference or conscious disregard for the safety of others. The punitive damage awards against A.T. Massey and DRIH were based solely on their status as partners in the Doe Run Company partnership. There was no malice or outrageousness associated with their actions. Punitive damages totaling $48 million against A.T. Massey and $32 million against DRIH, all based on their partnership status during the exact same time period, are patently excessive. All punitive damages assessed against AT Massey and/or DRIH should be remitted.

16. In addition, punitive damages were assessed against DRIH despite the fact that the Fluor "Control" instructions (*e.g.* Instruction No. 7), answered in the affirmative by the jury, required a finding that DRIH had no mind or will of its own and was totally controlled by Fluor. If Fluor totally controlled DRIH, assessment of punitive damages against both DRIH and Fluor

for the exact same partnership interest for the same time period is necessarily duplicative, excessive, and unsupported.

17. The awards against Fluor and A.T. Massey should also be remitted because they were based evidence that went beyond the scope explicitly authorized by Missouri statute. *See* § 510.263, RSMo. (explicitly limiting evidence of a defendant's financial condition to "net worth"). In addition to net worth, the plaintiffs, over Defendants' objection, presented evidence regarding Fluor's and Massey Energy's (1) total revenue; (2) cash on hand; (3) revenue generated per day; (4) net income; (5) dividends paid to shareholders; (6) free cash paid to certain parties; (7) cash flow data; (8) stock purchase prices; (9) capital expenditures; (10) available lines of credit; (11) stock market valuation; and (14) value of treasury stock. Based on this financial data, the plaintiffs' expert, Robert Johnson, testified as to what amounts Fluor and Massey Energy could lose without affecting the operations of their business. The amounts requested for punitive damages by the plaintiffs were based entirely on what it would take for Fluor and Massey Energy to take notice of the judgment in light of these financial figures. The irrelevant and prejudicial financial information offered by the plaintiffs inflamed the jury and led them to awarding excessive punitive damages.

18. The punitive damage award should also be remitted because it was improperly based on financial information for Massey Energy, the parent of A.T. Massey, which was admitted over Defendants' objections. The financial condition of a non-party parent corporation is irrelevant to the award of punitive damages. *See Liberty Fin. Mgmt. Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40, 52 (Mo. App. 1984) (it was error to admit evidence regarding the financial condition of a nonparty parent corporation).

19. The punitive damages award should also be remitted because they are necessarily duplicative. As discussed above, the punitive damage awards against all three Defendants were based on the same partnership conduct during overlapping time periods. As submitted to the jury, the jury was directed (improperly) to find Defendants liable for lead emitted prior to 1994. Based on the instructions, there was necessarily overlapping liability for punitive damages for the same conduct. In addition, as noted, Fluor's liability for punitive damages was necessarily based on its alleged control of DRIH and its assumption of DRIH's partnership status, duty, and liability during the time DRIH was a partner. It is wholly improper to assess DRIH for punitive damages solely because it was a partner in the Doe Run Company partnership and then also assess punitive damages against Fluor based on DRIH's exact same partnership status.

20. The nature of Plaintiffs' alleged injuries also supports substantial remittitur of these punitive damage awards. Even accepting as true Plaintiffs' characterization of their own injuries, the objective evidence established that Plaintiffs are healthy, well-functioning members of society who have not suffered any debilitating injuries as a result of any Defendants' conduct.

21. The highest punitive damages award affirmed in a reported case in state or federal court in Missouri since 2003 was $15 million in a wrongful death case that involved a $12 million compensatory damages award. *Martin v. Survivair Respirators, Inc.*, 298 S.W.3d 23 (Mo. App. 2009). The defendant in *Survivair* had received multiple reports of problems with a product that was used by firemen in dangerous circumstances, and yet the company did not recall the products or fix the problems. Here, Defendants are facing punitive damage awards totaling $20 million per Plaintiff even though (a) their liability is based on their status as partners, (b) none of them was involved in the operation of the smelter or responsible for its day-to-day operations, and (c) in an attempt to establish liability based on knowledge and conduct as of

1994, Plaintiffs relied on studies published years after the partnership ended. Fluor is faced with a total of $240 million in punitive damages based on one day as a partner, the partnership status of a subsidiary, and a subsidiary of a subsidiary of a subsidiary. A.T. Massey faces a total of $48 million in punitive damages and DRIH a total of $32 million in punitive damages for being holding companies with no involvement in the operation of Doe Run.

22. Other recent reported punitive damage awards were:

Case Name	Citation	Court	Year	Punitive	Remitted
Martin v. Survivair Respirators, Inc.	298 S.W.3d 23	Mo. App. E.D.	2009	$15,000,000	
Lynn v. TNT Logistics North America, Inc.	275 S.W.3d 304	Mo. App. W.D.	2008	$6,750,000	$3,750,000
JCB, Inc. v. Union Planters Bank	539 F.3d 862	8th Circuit (MO)	2008	$1,087,500	$108,750
Kelly v. Bass Pro Outdoor World	245 S.W.3d 841	Mo. App. E.D.	2007	$2,800,000	Remanded
Krysa v. Payne	176 S.W.3d 150	Mo. App. W.D.	2005	$500,000	
Diesel Machinery, Inc. v. B.R. Lee Industries, Inc.	418 F.3d 820	8th Circuit (SD)	2005	$4,335,000	$2,660,000
Conesco Finance Servicing Corp. v. North American Mortgage Co.	381 F.3d 811	8th Circuit (MO)	2004	$18,000,000	$7,000,000
US v. Veal	365 F. Supp. 2d 1034	USDC WD MO	2004	$1,055,000	

23. These cases further demonstrate that the punitive damages awarded against these Defendants are excessive and should be remitted.

24. In closing argument, Plaintiffs' counsel asked the jury to award a total of $208 million in punitive damages, including $160 million from Fluor, and divide it up among the Plaintiffs. For the reasons discussed above, punitive damages awards totaling $208 million would have been excessive and would have justified a substantial remittitur. The jury awarded $320 million in punitive damages, more than 50% more than plaintiffs' requested, and double the amount requested as to Fluor. The fact that the jury awarded Plaintiffs $320 million -- $112 million more than they asked for -- compels the conclusion that the punitive damage awards in

this case are patently excessive. The fact that the punitive damage awards are excessive on this record is also supported by a juror's acknowledgment that the improper statement during voir that half of any award would go to the state was a factor in the jury's decision to award $112 million more than plaintiffs requested. *See* Affidavit of John H. Quinn, filed in support of defendants' motion for new trial. The punitive damages awarded in this case are patently excessive and should be substantially remitted.

25. Defendants incorporate by reference the arguments and authorities presented in their motion for reduction of punitive damages awards as excessive under federal and state constitutional law.

WHEREFORE, Defendants pray for the Court to order a new trial on the issues of liability and damages unless Plaintiffs agree to a remittitur of punitive damages. As to Fluor, punitive damages for each Plaintiff should be remitted to no more than the ultimate amounts of compensatory damage awards as reduced by the amounts of settlements with other defendants and as further reduced in accordance with Defendants' motion for remittitur of compensatory damages. As to A.T. Massey and DRIH, punitive damages should be remitted to zero for each Plaintiff, as the award of punitive damages is duplicative of the award as to Fluor.

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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