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' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants Fluor Corporation ("Fluor"), A.T. Massey Coal Company ("A.T. Massey"), and Doe Run Investment Holding Corporation ("DRIH") (collectively "Defendants"), pursuant to Rule 72.01(b) of the Missouri Rules of Civil Procedure, jointly move the Court to set aside the

verdicts of the jury and to enter judgments in favor of Defendants in accordance with their Joint Motions for Directed Verdict.

I. Standard of Review

1. A motion for judgment notwithstanding the verdict ("JNOV") presents the same issues as a motion for a directed verdict. *See Wells v. Orthwein*, 670 S.W.2d 529 (Mo. App. 1984). JNOV is appropriate where the plaintiff failed to make a submissible claim. *Selmanovic v. Finney*, 337 S.W.3d 30, 35 (Mo. App. 2011); *Hutchens v. Burrell, Inc.*, 342 S.W.3d 399, 403 (Mo. App. 2011). To make a submissible claim, a plaintiff must offer "legal and substantial evidence for every fact essential to liability." *Finney*, 337 S.W.3d at 35; *see Hutchens*, 342 S.W.3d at 403. When one or more of the essential elements of the plaintiff's claim is unsupported by the evidence, JNOV is proper as a matter of law. *See Rhodes v. Marsh*, 807 S.W.2d 222, 223 (Mo. App. 1991).

2. Plaintiffs failed to make a submissible case that the partnership or these Defendants were negligent or caused any of Plaintiffs' injuries, either through direct acts or through partnership liability. Plaintiffs further failed to make a submissible case of any agency relationship between Fluor and any other entity, specifically including DRIH or Leadco Investments, Inc. ("Leadco"). There was no evidence presented of a single act committed by Fluor, A.T. Massey or DRIH that would satisfy the standard for submitting punitive damages to the jury. The Court should have entered a directed verdict in favor of Fluor, A.T. Massey and DRIH, on Plaintiffs' claims for compensatory and punitive damages and should set aside the verdict of the jury on the claims for both compensatory and punitive damages, and enter a judgment in favor of Fluor, A.T. Massey and DRIH.

II. "Direct Liability"

3. Throughout the trial, including the arguments on Defendants' joint motions for directed verdicts and the jury instructions conference, it never became clear what Plaintiffs meant when they claimed that Defendants, including Fluor, were "directly" liable for the damages allegedly suffered by Plaintiffs. To the extent that Plaintiffs were claiming that Defendants were "directly" liable for the time when they were partners, then that issue is addressed in the context of Fluor's, DRIH's and A.T. Massey's partnership liability. There was no evidence presented at trial for "direct liability" outside of that context. To the extent that Plaintiffs were claiming that Fluor was directly liable because of its relationship to DRIH, A.T. Massey, Leadco, and/or St. Joe Minerals Corporation ("St. Joe")[1], those are separate companies from Fluor, and Fluor could only be found liable for their actions through proof of an agency relationship or a piercing of the corporate veil. That is, as a matter of law, not "direct liability."

4. In order for Defendants to be liable for injuries allegedly resulting from the operation of the smelter, Defendants had to have a duty to these Plaintiffs. *See Blum v. Airport Terminal Services, Inc.*, 762 S.W.2d 67, 72 (Mo. App. 1988) (for a duty to exist there must be a legal relationship sufficient to impose upon the defendant a duty to prevent an injury); *Vonder Haar v. Six Flags Theme Parks, Inc.*, 201 S.W.3d 680, 684 (Mo. App. 2008) (to make submissible cause of negligence, plaintiff must first establish that the defendant had a duty to protect the plaintiff from injury); *Burrell v. O'Reilly Automotive, Inc.*, 175 S.W.3d 642, 655-56 (Mo. App. 2005). The question of whether a duty exists is a question of law for the Court. *Stein v. Novus Equities Company*, 284 S.W.3d 597, 605 (Mo. App. 2009). To establish a duty with

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[1] St. Joe later changed its name to The Doe Run Resources Corporation, a former defendant in this litigation.

regard to the operation of the smelter, Plaintiffs were required to prove that Defendants operated the smelter.

5. Plaintiffs failed to make a submissible case that Fluor, DRIH or A.T. Massey owed any duty to Plaintiffs. Plaintiffs failed to present any evidence that Defendants ever operated the smelter, or that Defendants exercised control over the operation of the smelter so as to create any duty with regard to Plaintiffs or make Defendants liable for any injuries allegedly resulting from the operation of the smelter. Thus, Defendants are entitled to JNOV on any claim that Defendants are liable as the owners or operators of the smelter.

6. The evidence at trial showed that, during the thirteen years that Fluor owned St. Joe, the smelter was operated by either St. Joe or the Doe Run Company ("Doe Run Partnership"), a Missouri partnership. During this period, Defendants did not operate or control the operation of the smelter; therefore, they have no direct liability for any injuries allegedly caused to Plaintiffs by the operation of the smelter during that time.

7. Fluor was a partner in the Doe Run Partnership for less than one day, May 25, 1990. It purchased the partnership interest of Homestake Lead Company of Missouri ("Homestake") and then immediately transferred it to a separate corporation, Leadco, that same day.[2] There was no evidence that Fluor committed any act during that one day that contributed or caused any of Plaintiffs' alleged injuries. There was also no evidence that there was anything Fluor could have done during the few hours that it held a partnership interest that would have prevented Plaintiffs' alleged injuries. Plaintiffs' expert Rodney O'Connor testified he could not say that any lead emitted on May 25, 1990 impacted any Plaintiff. There was no evidence to support the existence of a duty, a breach of any duty, or causation of damages during that one

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[2] Leadco, although mentioned in the jury instructions, was ***never*** a Defendant in the case.

day that would permit a jury to find Fluor directly liable for negligence. Plaintiffs failed to make a submissible case that Fluor was liable based on any theory of direct liability.

8. Plaintiffs repeatedly have pointed to the fact that Fluor employees were members of the Doe Run Partnership Committee as purported evidence that Fluor has direct liability for Plaintiffs' alleged damages. But Plaintiffs presented no evidence at trial that those Fluor employees on the partnership committee were anything other than St. Joe appointees (which they were), and Plaintiffs did not submit to the jury any claims against Fluor based on its employees' participation on the partnership committee. As a matter of law, any involvement of Fluor employees as St. Joe's representatives on the partnership committee not only is insufficient to support a finding of control over the operation of the smelter so as to make Fluor liable for its operation, but, based on the jury instructions pursuant to which the claims were submitted to the jury, also is irrelevant to that issue.

9. Similarly, with respect to DRIH and A.T. Massey, Plaintiffs failed to make a submissible case on any claim based on direct negligence. A.T. Massey was a wholly owned subsidiary of St. Joe (a partner itself and ***not*** a Defendant at trial), and DRIH was a wholly-owned subsidiary of A.T. Massey. Neither A.T. Massey nor DRIH were involved in (much less controlled) the operations of the smelter or committed any act in association with the smelter. Plaintiffs actually presented evidence that these two entities had no contacts with anyone at Doe Run, and further that DRIH had no employees. When St. Joe transferred its partnership interest to A.T. Massey and A.T. Massey transferred that partnership interest to DRIH, it was expressly stipulated between St. Joe and Homestake that St. Joe (not A.T. Massey or DRIH) would still be considered as "in control" of that partnership interest. The partnership interest held by AT Massey and later by DRIH, was held "jointly" with St. Joe, and it was clear that those two

entities had no power or authority other than through or with St. Joe. The parties to the agreement also stipulated that St. Joe (not A.T. Massey or DRIH) would be entitled to appoint members to the Doe Run Partnership Committee.[3] St. Joe may have a duty to Plaintiffs as the operator of the smelter, but there was no evidence supporting a finding that A.T. Massey or DRIH (a) had a duty to Plaintiffs, (b) committed any act to breach a duty to Plaintiffs, (c) had the power to perform any act that would have prevented any alleged injuries to Plaintiffs, or (d) did anything during the time they were partners to cause or contribute to cause any injury to Plaintiffs.

10. Since April 7, 1994, the Herculaneum Smelter has been operated by Doe Run Resources Corporation ("DRRC"), the successor to St. Joe and a wholly owned subsidiary of DR Acquisition Corporation ("DRA"), in turn a wholly owned subsidiary of The Renco Group ("Renco"), with no involvement from Defendants. Neither the evidence nor the law supports any liability once DRRC took over.

11. Any general and conclusory opinion testimony (that should not have been admitted in the first place) that any of these Defendants controlled the operations of the smelter is not substantial evidence of control, and has no support in the record or the documents on which any witnesses allegedly relied in giving any opinions about control.

12. To the extent Plaintiffs are attempting to claim that Defendants operated or controlled the operation of the smelter, they were really asking the Court, and the jury, to pierce the corporate veil and impose a duty and liability on Fluor and the other Defendants because of the conduct of others. As discussed below with regard to alleged partnership liability, in their

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[3] In fact, in the context of agency liability, discussed below, this document clearly shows that it was St. Joe, not Fluor, that controlled DRIH's partnership interest.

Fluor "Control" verdict directors, Plaintiffs were improperly permitted to submit claims against Fluor based on piercing the corporate veil of Leadco (a subsidiary that was not named as a Defendant) and DRIH (a subsidiary of a subsidiary of a subsidiary). Plaintiffs explicitly and repeatedly denied that they ever were attempting to plead or prove such a claim. Even if they had made such a claim, Plaintiffs failed to make a submissible case against Fluor based on piercing the corporate veil.

13. In order to pierce the corporate veil and thereby make one corporation liable for the conduct of another, Plaintiffs were required to show (1) that the controlling corporation exercised such domination and control that the allegedly controlled corporation had no separate mind, will, or existence of its own, (2) that the "corporate cloak" was used as subterfuge to defeat public convenience, justify a wrong, or perpetuate a fraud, and (3) that plaintiffs were injured as a result of that fraudulent conduct. *Ritter v. BJC Barnes Jewish Christian Health Systems, Inc.*, 987 S.W.2d 377, 384 (Mo. App. 1999); *Mid-America Telephone Co. v. Alma Telephone Co.*, 18 S.W.3d 578, 582 (Mo. App. 2000).

14. Plaintiffs never pleaded a claim based on piercing the corporate veil. Indeed, they repeatedly disavowed any claim based on piercing the corporate veil, including during opening arguments and at the jury instruction conference. Further, even if Plaintiffs had pleaded such a claim, they did not present substantial evidence that would support any claim based on piercing the corporate veil such that Fluor could be considered liable for any actions or partnership status of St. Joe, A.T. Massey, Leadco or DRIH. Finally, Plaintiff did not claim or present any evidence that any alleged control over any other corporation was used to commit a fraudulent or dishonest purpose in contravention of Plaintiffs' legal rights, or that the control or legal duty proximately caused the injury or loss complained of. *Ritter,* 987 S.W.2d at 384; *Collet v.*

American Nat'l Stores, Inc., 708 S.W.2d 273, 283-84 (Mo. App. 1986); *Weitz Company v. MH Washington, et al.*, Nos. 09-3116/3649 (January 7, 2011).

15. Plaintiffs failed to prove that Fluor exercised the level or type of control over Leadco, DRIH, St. Joe, or A.T. Massey necessary to pierce the corporate veil, or that any control was exercised for a fraudulent purpose. Because Plaintiffs have not asserted or proved a claim based on piercing the corporate veil, and the evidence does not otherwise support any claims based on direct liability, Plaintiffs failed to make a submissible case against Fluor, DRIH or A.T. Massey based on theories of direct liability. The verdicts entered against Fluor, DRIH, and A.T. Massey should be set aside, and a judgment in favor of each Defendant should be entered.

III. Agency

16. The verdicts should also be set aside and a judgment entered in favor of Fluor to the extent Plaintiffs' asserted claims are based on alleged agency liability. [4] Plaintiffs failed to make a submissible case that Fluor is liable under an agency theory for the conduct or status of any other corporation or entity.

17. In Missouri, separate corporations constitute distinct legal entities, even if one corporation wholly owns all stock in the other. *Ritter*, 987 S.W.2d at 384; *Mitchell v. K.C. Stadium Concessions, Inc.*, 865 S.W.2d 779, 784 (Mo. App. 1993).

18. To establish a principal-agent relationship between corporations so as to make one corporation liable for the conduct of another, Missouri law requires that Plaintiffs must effectively pierce the corporate veil (addressed above) or prove "such domination and control that the controlled corporation has, so to speak, no separate mind, will or existence of its own

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[4] Although the Fluor "Control" Verdict Director appears to submit a claim based on piercing the corporate veil, at the instruction conference plaintiffs' counsel stated that the instruction was not submitting a claim based on piercing the corporate veil. However, counsel declined an invitation to clarify whether the instruction was intended to submit a claim based on agency.

and is but a business conduit for its principal." *Ritter*, 987 S.W.2d at 385. The control must be "actual, participatory and total," and relate directly to the conduct of the agent that gives rise to the plaintiffs' claim. *Id.* While in any corporate-subsidiary situation the parent company has ultimate control as an owner, the level of control necessary for establishing agency liability in this litigation must be far greater than a parent-subsidiary relationship. *Ritter*, 987 S.W.2d at 385; *United States v. Bestfoods,* 524, U.S. 51, 71-72 (1998) (activities consistent with the parents' investor status include "monitoring the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures").

19. Plaintiffs failed to make a submissible case based on any claim that Fluor exercised the degree of control over St. Joe, Leadco, A.T. Massey, DRIH, or any other corporation necessary under Missouri law to establish agency liability against Fluor. The evidence only reflected the typical relationship between a parent and subsidiary or separate and distinct affiliated corporations. That relationship is not sufficient to hold a parent liable for the conduct of a subsidiary. *Ritter*, 987 S.W.2d at 385; *Bestfoods,* 524 U.S. at 61-62.

20. In *Ritter,* the court held that the critical consideration in Missouri is which corporation has day-to-day control ***of the conduct at issue in the case before it.*** *Ritter*, 987 S.W.2d at 385. Specifically, the court in *Ritter* determined that BJC, while involved in budget and other management activities, did not control the medical care of patients at Christian Hospital, and did not participate directly in patient care or the conduct related to the allegations of negligence at issue in the case. *Id.* Accordingly, the court determined that any "control" BJC had as a parent corporation was insufficient as a matter of law to establish a principal-agent

relationship or to attach agency liability to BJC for the alleged negligent acts of Christian Hospital. *Id.*

21. The same is true in this case. Plaintiffs' evidence established that the parent-subsidiary, corporate relationship between Fluor and St. Joe involved even ***less*** control by Fluor over St. Joe than BJC exercised over Christian Hospital in *Ritter*. The evidence failed to show that the relationship between Fluor and St. Joe was any different than a normal parent-subsidiary relationship or that Fluor had any role in, much less controlled, the day-to-day operations of St. Joe, Doe Run, or, more specifically, the smelter.

22. From 1981 until the formation of the Doe Run Partnership in 1986, St. Joe and its personnel had day-to-day management and operational authority and control over all of St. Joe's operations, including operation of the smelter. This is supported by testimony of all fact witnesses, including the St. Joe/DRRC employees during this timeframe (Vornberg, Lanzafame, Zelms and Walker) who testified that neither Fluor nor the other Defendants controlled the day-to-day operations of the smelter, and by Mr. McCraw, Fluor's CEO for a period of time. Plaintiffs' evidence showed only that, typical of parent corporations, Fluor was involved in budget review and reported the consolidated results of operations for its subsidiary St. Joe, as well as for other Fluor subsidiaries, in Fluor's annual reports. Any involvement by Fluor in the approval of any subsidiary's budgets is typical of the parent-subsidiary relationship and is insufficient to hold a parent liable for any alleged misconduct by a subsidiary. Perhaps recognizing this lack of proof, the verdict directing instructions as to Fluor did not submit any claim based on Fluor's control of St. Joe or the operations of the smelter.

23. The evidence showed that A.T. Massey was a subsidiary of St. Joe and that DRIH was a subsidiary of A.T. Massey. Plaintiffs' own expert Ordower agreed. There was no

substantial evidence showing the level of control that would be required to hold Fluor liable for the conduct of A.T. Massey as a subsidiary of St. Joe or for the conduct of DRIH as a subsidiary of A.T. Massey, or the conduct of any other corporation. There also was no substantial evidence showing the level of control necessary to make A.T. Massey or DRIH liable for the conduct of any other corporation. In fact, under Amendment One to the Partnership Agreement, St. Joe and both A.T. Massey and DRIH held shares jointly, with St. Joe remaining the responsible and controlling partner under the Partnership Agreement for the entire 57.5% share. The evidence, therefore, showed that, to the extent that anyone controlled A.T. Massey and DRIH, it was St. Joe and not Fluor.

24. There was no evidence that Fluor controlled the activities of Leadco or DRIH (a tertiary subsidiary) such that either could be considered an agent of Fluor. Indeed, there was practically no evidence presented at trial regarding Leadco, which was not even a party to the consolidated litigation. There was certainly no evidence supporting a claim that Fluor so controlled Leadco or DRIH that their status as separate corporations could or should be disregarded. This was insufficient, as a matter of law, for a jury to find control of or a principal-agent relationship between Fluor and Leadco or Fluor and DRIH.

25. There also was no evidence that DRIH or Leadco committed an act that could potentially have been controlled by Fluor such that Fluor could be considered responsible for that act. As made clear in *Ritter*, the principal-agent relationship creates the potential for liability of the principal if it controls the action of the agent at issue. Without an act committed by the agent, there can be no liability of the parent. As discussed above, pursuant to Amendment One St. Joe and Doe Run officers were responsible for operating the smelter and the decisions regarding environmental controls, not DRIH or Leadco, St. Joe had voting authority for DRIH

and A.T. Massey, and neither Leadco nor DRIH had any contact with Doe Run, in part because DRIH had no active employees. Because DRIH and Leadco did not commit any acts, and did not have the authority to commit any acts affecting the operations of the smelter or the implementation of environmental controls at the smelter, Plaintiffs failed to make a submissible case against Fluor based on any principal-agent relationship between Fluor and DRIH or Leadco.

26. Any conclusory or opinion testimony (especially purporting to state legal conclusions with respect to corporate liabilities, corporate relationships or contractual agreements) that Plaintiffs elicited in an attempt to support their claim that Fluor exercised the degree of control necessary to make it liable for the conduct of St. Joe or any other corporation did not constitute substantial evidence, was without foundation, and improperly invaded the province of both the Court and the jury. Such evidence was also inadmissible. *See* Defendants' Joint Motion for a New Trial, which Defendants incorporate by reference.

27. Although Plaintiffs did not submit any claims to the jury based on any alleged control by Fluor of St. Joe or the smelter, to the extent that the jury's verdict was based on any finding that Fluor was liable for the conduct of St. Joe, either when St. Joe was separately operating the smelter or when the smelter was being operated by the Doe Run Partnership, the Court should set aside that verdict and enter a judgment in favor of Fluor, because Plaintiffs have failed to prove through substantial evidence the level of control necessary to make Fluor liable for the conduct of another corporation, and because Plaintiffs failed to prove that St. Joe or the Doe Run Partners committed any act causing injury to Plaintiffs for which Fluor could be liable.

28. To the extent that the jury's verdict was based on a finding that Fluor was liable for the conduct or status of A.T. Massey, DRIH or Leadco when they were partners in the Doe Run Partnership, the Court should set aside that verdict and enter a judgment in favor of Fluor,

because Plaintiffs have failed to prove through substantial evidence the level of control necessary to make Fluor liable for the conduct of any of those corporations, and have failed to prove through substantial evidence that A.T. Massey, DRIH or Leadco committed any act for which Fluor could be found liable.

29. To the extent that the jury's verdict was based on Fluor being liable as a partner for the conduct of the partnership when Leadco and DRIH were partners in the Doe Run Partnership, the Court should set aside that verdict and enter a judgment in favor of Fluor because Plaintiffs failed to prove that Fluor exercised sufficient control over Leadco or DRIH so as to pierce the corporate veil or create a principal agent relationship. In addition, as discussed below, even if a principal-agent relationship had been established, Fluor as principal does not assume the partnership duty, status, or liability of Leadco and DRIH through them as agents.

30. For the same reasons, the verdicts against A.T. Massey and DRIH should be set aside and a judgment entered in their favor to the extent that the jury's verdict was based on a finding that those Defendants are liable under any agency theory of liability. Plaintiffs failed to make a submissible case that either A.T. Massey or DRIH exercised the level of control, discussed above, necessary to make either of those corporations liable for the conduct of another corporation with regard to the operation of the smelter.

IV. Partnership Liability

31. The jury's verdict should be set aside and a judgment entered in favor of Fluor, A.T. Massey and DRIH as to any claims based on alleged partnership liability. Plaintiffs failed to make a submissible case against Defendants on any claim based on partnership liability.

32. This Court already held correctly that, under Missouri law, the liability of a partner runs only to claims that arise as a result of conduct during the time of that partner's

interest, not to claims that arise before or after that time. Order and Judgment, May 13, 2010, at 11 ("The Court finds that defendants can only be held liable for action of the partnership while they were partners."). Defendants cannot be held individually liable as partners for torts committed by the partnership before they became partners or following their withdrawal as partners. The judgments impose such liability and, as a result, cannot stand.

33. The Court's holding in its summary judgment order is consistent with Missouri law. Under the Missouri Partnership Act, partners may be jointly and severally liable for obligations of a partnership, with the tortious actions of one partner attributable to other partners. § 358.130, RSMo. This liability is restricted, however, to the claims based on partnership conduct occurring while each partner was a partner. Each time there is a change in the identity of the partners in a partnership, whether by a new partner joining or an existing partner withdrawing, the partnership dissolves and a new partnership is formed. § 358.290, RSMo; *see 8182 Maryland Associates, L.P. v. Sheehan*, 14 S.W.3d 576, 580-81 (Mo. banc 2000).

34. Incoming partners to an existing partnership are not individually liable for the tortious acts of the partnership that occur *before* the date the incoming partner joins the partnership. § 358.170, RSMo; *see Temple Stephens Co. v. Westenhaver*, 776 S.W.2d 438, 443 (Mo. App. 1989); *Williams v. Ely*, 668 N.E.2d 799, 808 (Mass. 1996); *Sheehan*, 14 S.W.3d at 580-81.

35. Similarly, partners that have withdrawn from a partnership, where the partnership's business reforms and continues on with other partners, are not liable for tortious acts of the partnership that occur *after* they withdraw as partners. *Wright v. Shapiro*, 37 A.D.3d 1181, 1183 (N.Y. 4 Dept. 2007); *Green v. Conciatori*, 26 A.D.3d 410, 411 (N.Y. 2 Dept. 2006); *see Sheehan*, 14 S.W.3d at 580-81.

36. The undisputed evidence was that Fluor held a partnership interest in Doe Run for part of one day on May 25, 1990. A.T. Massey held a partnership interest in Doe Run from October 31, 1988, to April 4, 1989. DRIH held a partnership interest in Doe Run, collectively and jointly with St. Joe, from April 4, 1989, to March 25, 1994. Once the sale of DRIH's partnership interest to St. Joe closed on March 25, 1994, St. Joe held all interests in the Doe Run Partnership. This effectively ended both the Doe Run Partnership and any potential for liability for future partnership actions because the partnership no longer existed. § 358.060, RSMo (a partnership requires multiple parties to have ownership interests). St. Joe also formally terminated the partnership. Fluor could only be potentially subject to liability for the operation of the smelter during the one day it owned a partnership interest. A.T. Massey could only be potentially subject to liability for the operation of the smelter during the five months it owned a partnership interest. DRIH could only be potentially subject to liability for the operation of the smelter during the five years it owned a partnership interest.

37. Before and after the entrance and withdrawal of each of these Defendants on the dates specified, Doe Run operated as a new, separate partnership, and the Court correctly held that none of these Defendants may be individually liable for the conduct of the partnership when they were not partners. Yet, based on the claims as submitted to the jury, the verdicts improperly impose individual liability for the conduct of the partnership before Defendants were partners, and should be set aside. *See also* Defendants' Joint Motion for New Trial (incorporated by reference).

38. Any testimony by Plaintiffs' witnesses that any of the Defendants may be held liable for the conduct of the partnership before that Defendant became a partner should be disregarded, because it is not competent evidence, improperly involves an application and

opinion of law, and simply misstates Missouri law. Indeed, the testimony is directly contrary to this Court's prior holding in this case that the Defendants can only be individually liable for partnership conduct occurring while they were partners. *See* Order and Judgment, May 13, 2010, at 11.

39. In addition to the law recognized by the Court on this issue, Fluor, A.T. Massey and DRIH cannot be held liable to Plaintiffs for prior acts of the partnership because they were not "obligations of the partnership" within the meaning of section 17 of the Uniform Partnership Act or the corresponding Section 378.170 of the Missouri Revised Statutes. Plaintiffs have claimed that Defendants are liable for what amounts to unasserted tort claims that preceded the Defendants' respective entrance into the partnership. The comments to Section 17 of the Uniform Partnership Act show that the purpose of limiting an incoming partner's liability for the prior acts of the partnership is to protect creditors who have extended credit to the partnership. An incoming partner can protect itself from obligations to such creditors by obtaining full knowledge of the partnership's business from its books and records and can insist on liquidation when it joins. This is obviously not true as to ***unasserted*** tort claims, of which the incoming partner could have no notice. There is no Missouri case referring to any obligations assumed by an incoming partner other than those that would arise under contract. This is consistent with the plain meaning of the term "obligation," which equates to a "formal and binding agreement or acknowledgement of a liability to pay a certain sum or do a certain thing." In this case, the relevant "obligation" did not arise until the entry of the judgment. *See Bromberg & Ribstein on Partnership*, § 7.18(b), p. 7:268.3.

40. Moreover, even if an incoming partner were deemed responsible for pre-existing obligations of the partnership, this liability could be imposed only against partnership assets.

Once a partner leaves the partnership (and necessarily leaves the partnership property behind), the partner has no further liability for those obligations that pre-dated the partner's entry into the partnership. *Sheehan*, 14 S.W.3d at 580-81. The limited liability permitted under section 378.170 does not even apply to a former partner – the statute only recognizes the liability of a current partner for pre-existing wrongs, and limits that liability to partnership assets. The statute does not permit any liability for former partners for claims based on conduct before they became partners. And, of course, a partner has no liability for breaches that occur after withdrawal. *Id.*

41. As to A.T. Massey and DRIH, unchallenged evidence (in the form of provisions in contractual agreements) establishes that both A.T. Massey and DRIH specifically agreed to acquire liabilities *only* for the period for which they held partnership interests in the Doe Run Partnership, and not for any historical liabilities pre-dating their acquisition of a partnership interest. *See e.g.* Amendment One to the Partnership Agreement.

42. With respect to Fluor, contract documents admitted into evidence and unchallenged by Plaintiffs establish that Fluor did not acquire any liabilities of former defendant Homestake when Fluor acquired Homestake's 42.5% partnership interest on May 25, 1990. Plaintiffs did not challenge contract documents establishing that, on May 25, 1990, Fluor transferred to Leadco (a non-party) the entirety of the partnership interest acquired by Fluor from Homestake. Accordingly, under the law and unchallenged evidence, Fluor was a partner in the Doe Run Partnership for one day only (May 25, 1990), never acquired any historical liabilities attendant to Homestake's former 42.5% partnership interest, and further transferred all rights and obligations attendant to Homestake's partnership interest to Leadco.

43. As discussed above, in their Fluor "Control" verdict director, Plaintiffs asked the jury to find that Fluor exercised control over Leadco and DRIH so completely that Fluor assumed the partnership status of Leadco and DRIH. Through this instruction, Plaintiffs sought to extend Fluor's partnership liability from one day to the duration of the time Leadco and DRIH were partners. In effect, Plaintiffs were asserting a claim based on piercing the corporate veil, a theory of liability and claim, as discussed above, they neither pleaded nor proved, and explicitly disavowed for years.

44. Even if the Fluor "Control" verdict director were deemed to submit an agency claim, proof of a principal-agent relationship between Fluor and DRIH or Leadco would not make Fluor a *de facto* partner in the Doe Run Partnership, impose any duty on Fluor, or subject Fluor to expanded partnership liability. If Plaintiffs had proven the level of control necessary to create a principal-agent relationship between Fluor and Leadco or DRIH, that relationship would not mean that Fluor assumed the partnership status of Leadco and DRIH, or assume any duties or liabilities of a partner, so as to make Fluor liable as a partner for partnership conduct occurring while Leadco and DRIH were partners. A principal does not assume the partnership status, duty, or liability of its agent. Moreover, the existence of a principal-agent relationship between corporations does not impose a direct duty or liability on the principal, but only exposes the principal to potential liability for the conduct of the agent. As discussed above, neither Leadco nor DRIH engaged in any wrongful conduct for which Fluor could be held liable as principal. Indeed, Plaintiffs' Fluor "Control" verdict directors do not require the jury to find that Leadco or DRIH engaged in wrongful acts. They instead refer to Fluor's alleged negligence. *See* Defendants' Motion for New Trial, incorporated herein.

45. The jury's verdict should be set aside and a judgment entered in favor of Fluor for any injuries allegedly caused by the operation of the smelter prior to May 25, 1990, the one day Fluor held a partnership interest in the Doe Run Partnership; in favor of A.T. Massey for any injuries allegedly caused by the operation of the smelter prior to October 31, 1988, when A.T. Massey acquired its partnership interest in the Doe Run Partnership; and in favor of DRIH for any injuries allegedly caused by the operation of the smelter prior to April 4, 1989, when DRIH acquired its partnership interest in the Doe Run Partnership.

46. The jury's verdicts should be set aside and a judgment entered in favor of Fluor to the extent the verdict against it was based on the operation of the smelter after May 25, 1990; a judgment entered in favor of A.T. Massey to the extent the verdicts against it were based on the operation of the smelter after April 4, 1989; and a judgment entered in favor of DRIH to the extent that the verdict against it were based on the operation of the smelter after March 25, 1994.

47. The verdicts against Defendants are void and should be set aside because they include liability for alleged pre-existing or "historical" wrongs or liabilities, and because, under the statute and common law, Defendants can be liable for pre-existing or historical wrongs only to the extent of the partnership assets, and there are no partnership assets. Indeed, as stated above, Defendants have no liability under Section 378.170 because they are no longer incoming partners, or partners at all, and any potential liability to the extent of partnership assets ended when they left the partnership in 1994.

48. This Court has already recognized that Plaintiffs are required to prove causation as to each Defendant. Order and Judgment, May 13, 2010, at 11. To meet their burden of proving causation as to each Defendant based on partnership liability, Plaintiffs were required to present substantial evidence that they suffered injuries as a result of the conduct of the

partnership during the time each Defendant held its partnership interest. Plaintiffs failed to meet this burden. The verdicts entered against Fluor, A.T. Massey and DRIH, therefore, should be set aside, and a judgment should be entered in their favor.

49. With regard to Plaintiffs' claims against Fluor based on partnership liability (*see, e.g.,* Instruction 9), Plaintiffs failed to make a submissible case that Fluor was negligent on the one day that it was a partner or that any alleged negligence caused any injury to Plaintiffs.[5] There was no evidence that Fluor engaged in any negligent conduct during the one day that it was a partner or that any Plaintiff was injured by Fluor's conduct during the one day Fluor was a partner.

50. For example, Plaintiffs did not present any evidence of the amount of lead emitted during the one day that Fluor held a partnership interest in the Doe Run Partnership, or that the amount of lead emitted during that one day was sufficient to have caused any injury to any Plaintiff. In fact, Plaintiffs' expert O'Connor testified *unequivocally* that he could not state that any Plaintiff was exposed to any lead emitted on May 25, 1990, the one day that Fluor owned a partnership interest in the Doe Run Partnership. Plaintiffs also failed to present any other evidence that any Plaintiff suffered any injury as a result of any other conduct of Fluor on May 25, 1990. There is no evidence that on the one day it was a partner, Fluor could have bought out any Plaintiff's property, warned any Plaintiffs, or remediated any contaminated soil, so as to avoid "allowing" any Plaintiffs – including those who had not yet been born – to be exposed to unsafe levels of lead. Even assuming a duty, which Plaintiffs did not establish, there is no basis

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[5] Plaintiffs' other verdict director as to Fluor was based on piercing the corporate veil so that Fluor assumed partnership liability for the time that Leadco and DRIH were partners. As discussed above, plaintiffs neither pleaded nor proved any claim based on piercing the corporate veil. To the extent the "Control" verdict director intended to submit an agency or control instruction, it was not supported by sufficient evidence and sought to impose a status, duty, and liability on Fluor not recognized under Missouri law.

for claiming that, on the one day it was a partner, Fluor was negligent in failing to do anything with regard to any Plaintiff's exposure to allegedly unsafe levels of lead. The verdict against Fluor should be set aside and a judgment entered in Fluor's favor as to all claims of all Plaintiffs, because Plaintiffs failed to present any evidence that any of them was injured as a result of the operation of the smelter during the one day that Fluor owned a partnership interest.

51. In summary, Plaintiffs submitted two verdict directors against Fluor, both based on partnership liability. One sought to impose liability on Fluor based on its alleged control over Leadco and DRIH while they were partners of the Doe Run Company partnership. If the instruction submitted a claim based on piercing the corporate veil, it submitted a claim that was not pleaded or proved. If it submitted a claim based on agency, or some other unstated theory based on control, it submitted a claim that was not supported by sufficient evidence of control and not supported by or recognized under Missouri law. The other verdict director sought to impose liability on Fluor based on its one day as a partner. Plaintiffs failed to present sufficient evidence that any conduct by Fluor or the partnership on that one day was negligent or caused injury to any plaintiff. Plaintiffs failed to make a submissible case against Fluor under either of its verdict directors, and the verdicts against Fluor should be set aside and judgment entered in Fluor's favor.

52. The verdicts entered against DRIH and A.T. Massey should also be set aside and a judgment entered in their favor because Plaintiffs failed to make a submissible case that the partnership was negligent during the time DRIH and A.T. Massey were partners. Plaintiffs failed to present substantial evidence that they suffered any injury as a result of the conduct of the partnership, including the release of lead, during the four months A.T. Massey was a partner or the five years DRIH was a partner.

53. Even if the Court does not set aside all verdicts against Fluor, it should set aside the verdicts entered against Fluor based on partnership liability as to any Plaintiff who was born or moved to Herculaneum after May 25, 1990. The evidence established the following birthdates for Plaintiffs:

Preston Alexander - 6/9/1989
Patrick Blanks - 7/12/1990
Tiffany Bolden - 5/22/1990
Bryan Bolden - 6/20/1989
Nathan Davis - 11/20/1987
Gabriel Farmer - 1/27/1986
Sydney Fisher - 7/18/2000
Heather Glaze - 8/8/1987
Jeremy Halbrook - 11/23/1984
Matthew Heilig - 8/3/1994
Austin Manning - 3/5/1997
Jesse Miller - 3/14/1998
Jonathon Miller - 8/29/1995
Ashley Shanks (Getty) - 9/10/1986
Lauren Shanks - 10/16/1990
Isaiah Yates - 9/29/1992

It is undisputed that Ashley Shanks (Getty) did not move into Herculaneum until August 1991, and that Nathan Davis did not move into Herculaneum until May, 1989.

54. Fluor is not liable for any conduct of the partnership after Fluor relinquished its partnership interest. Fluor also had no duty with regard to any Plaintiff who was born or moved to Herculaneum after Fluor's partnership interest ended, and Plaintiffs failed to present substantial evidence that any Plaintiff who was born or moved to Herculaneum after May 25, 1990, suffered any injury as a result of the operation of the smelter during the one day Fluor was a partner.

55. Even if the Court does not set aside all verdicts against Fluor, and holds that the Fluor "Control" Verdict Directors (*e.g.*, Instruction 8) were supported by the evidence and the law, it should set aside the verdicts entered against Fluor based on partnership liability as to any

Plaintiff who was born or moved to Herculaneum after March 25, 1994, when DRIH's partnership interest ended. Even if Fluor somehow assumed partnership status during the time DRIH was a partner, (a) Fluor is not liable for any conduct of the partnership after DRIH relinquished its partnership interest, (b) Fluor had no duty with regard to any Plaintiff who was born or moved to Herculaneum after DRIH's partnership interest ended, and (c) Plaintiffs failed to present substantial evidence that any Plaintiff who was born or that moved to Herculaneum after March 25, 1994, suffered any injury as a result of the operation of the smelter during the time DRIH was a partner.

56. Even if the Court does not set aside all verdicts against A.T. Massey, it should set aside the verdicts entered against A.T. Massey based on partnership liability as to any Plaintiff who was born or moved to Herculaneum after April 4, 1989. A.T. Massey is not liable for any conduct of the partnership after it relinquished its partnership interest. A.T. Massey also had no duty with regard to any Plaintiff who was born or moved to Herculaneum after A.T. Massey's partnership interest ended. Plaintiffs failed to present substantial evidence that any Plaintiff who was born or that moved to Herculaneum after April 4, 1989, suffered any injury as a result of the operation of the smelter during the time A.T. Massey was a partner.

57. Even if the Court does not set aside all verdicts against DRIH, it should set aside the verdicts entered against DRIH based on partnership liability as to any Plaintiff who was born or moved to Herculaneum after March 25, 1994. DRIH is not liable for any conduct of the partnership after it relinquished its partnership interest. DRIH also had no duty with regard to any Plaintiff who was born or moved to Herculaneum after the DRIH partnership interest ended. Plaintiffs failed to present substantial evidence that any Plaintiff who was born or moved to

Herculaneum after March 25, 1994, suffered any injury as a result of the operation of the smelter during the time DRIH was a partner.

58. The verdicts entered against Fluor, DRIH and A.T. Massey should be set aside, and a judgment should be entered in their favor as to each Plaintiff born after March 25, 1994, when the Doe Run Partnership ended, because Defendants are not liable any injuries allegedly caused by the operation of the smelter after the Doe Run Partnership terminated, defendants had no duty with regard to any plaintiff who was born or moved to Herculaneum after the partnership ended, and Plaintiffs failed to present substantial evidence that any Plaintiff born after March 25, 1994, suffered any injury as a result of the operation of the smelter during the times Defendants were partners.

V. Punitive Damages

59. The jury's verdicts against Fluor, DRIH, and A.T. Massey for punitive damages should be set aside and a judgment should be entered in Defendants' favor.

60. As discussed above, a judgment should be entered in favor of Fluor, DRIH and A.T. Massey on the compensatory claims. Without compensatory damages, there can be no punitive damages, and punitive damages can only be awarded to plaintiffs whose injuries were proximately caused by the particular defendant at issue. *Vaughn v. North American Systems, Inc.*, 869 S.W.2d 757, 758-60 (Mo. banc 1994). To the extent that the Court does set aside the verdict against any of these Defendants for compensatory damages, the punitive damage award also should be set aside as to that Plaintiff's claim against that Defendant.

61. The Fluor Punitive Damages Verdict Director (*e.g.* Instruction 10) required the jury to find Fluor liable under both of the Fluor verdict directors with regard to compensatory damages (*e.g.* Instruction 8 and 9). For the reasons discussed in this motion and in Defendants'

motion for new trial, Plaintiffs failed to make a submissible case against Fluor under either of the Fluor verdict directors, and Fluor is entitled to judgment as a matter of law. Even if the court concludes that Plaintiffs made a submissible case under one of the Fluor verdict directors, Fluor is still entitled to judgment notwithstanding the verdict on Plaintiffs' claim for punitive damages because, as submitted in Instruction 10, Plaintiffs' claims for punitive damages required a finding of liability under both verdict directors. If Plaintiffs failed to make a submissible case under either verdict director, then they failed to make a submissible case on their claims for punitive damages.

62. Even if the compensatory damage awards are not set aside, the punitive damage verdicts should be set aside because Plaintiffs failed to present clear and convincing evidence supporting an award of punitive damages against Fluor, DRIH or A.T. Massey. Plaintiffs failed to prove by clear and convincing evidence that any of these Defendants knew or had information from which they, in the exercise of ordinary care, should have known that any conduct created a high degree of probability of injury, or that they showed complete indifference to or conscious disregard for the safety of others. For the reasons discussed above with regard to the limited scope of partnership liability, in assessing whether Plaintiffs made a submissible case as to any Defendant, the Court may consider only the conduct which occurred when that Defendant was a partner. The Court also may not hold a Defendant liable for the conduct of another partner

63. Ordinarily, punitive damages are not recoverable in actions for negligence, because negligence, a mere omission of the duty to exercise care, is the antithesis of willful or intentional conduct. *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*, 700 S.W.2d 426, 435 (Mo. banc 1985); MAI 10.07 (instructing jurors that they may impose punitive damages in a negligence action only if they find that defendant knew or had reason to know about a high

probability of injury, and "thereby showed complete indifference to or conscious disregard for the safety of others").

64. Missouri law is clear: "A submissible case for punitive damages requires clear and convincing proof that the defendant intentionally acted 'either by a wanton, willful or outrageous act, or reckless disregard for an act's consequences (from which evil motive is inferred).'" *Howard v. City of Kansas City*, 332 S.W.3d 772 (Mo. banc 2011) (*quoting Werremeyer v. K.C. Auto Salvage Co.*, 134 S.W.3d 633, 635 (Mo. banc 2004)); *see also, e.g.*, *Brand v. Kansas City Gastroenterology & Hepatology*, __ S.W.3d __, Nos. WD 71061, WD 71078, 2011 WL 135010, at *8 (Mo. App. W.D. Jan. 18, 2011) ("Because punitive damages are an extraordinary and harsh punishment, 'the evil motive or reckless indifference must be proven by clear and convincing evidence.'") (*quoting Blue v. Harrah's N. Kansas City, LLC*, 170 S.W.3d 466, 477 (Mo. App. 2005)).

65. Plaintiffs' only claim against Defendants was for negligence. Even assuming Plaintiffs proved actionable negligence (which they did not), they failed to adduce any evidence, let alone *clear and convincing* proof, that any of these Defendants willfully engaged in a wanton or outrageous act knowing that its conduct created a high probability of injury to these Plaintiffs.

66. Like the compensatory damage claims, the punitive damage awards were based on Fluor's partnership status. With regard to the claim submitted under the Fluor Partnership verdict director, there is no basis in law or logic for finding Fluor liable for any punitive damages, much less $240 million in punitive damages, based on its conduct during the one day it was a partner. The evidence does not support the required finding that Fluor knew that its conduct during that one day created a high probability of risk of injury or that it acted during that

day with complete indifference to or conscious disregard for the safety of the class of persons of which Plaintiffs are members.

67. Plaintiffs also failed to make a submissible case with regard to the claim submitted under the Fluor "Control" verdict director. As discussed above, the Fluor "Control" verdict director submitted a claim that is not support by or permitted under Missouri law. Plaintiffs also failed to prove that Fluor "allowed" Plaintiffs to be exposed to unsafe levels of lead knowing that there was a high degree of probability that its conduct would result in injury or that Fluor acted with complete indifference or conscious disregard for the safety of others. The evidence was that, throughout the 1981 to October 31, 1986 time period, St. Joe, and throughout the November 1, 1986 to March 25, 1994 time period, officers of the Doe Run Partnership, were responsible for determining what environmental control measures were necessary, determining what monitors should be put in place, how monitoring information should be reported to the MDNR and EPA, what information should be provided to the MDNR and EPA, what communications should be made to the public, and what, if any, efforts should be made to attempt to acquire homes in the surrounding area. There was no evidence adduced indicating that St. Joe or officers of the Doe Run Partnership informed Fluor of the details of the decisions that St. Joe made prior to making said decisions, or the details of what communications were being made to the MDNR and EPA, or the details of why certain homes were being purchased or the rate at which that would occur. The only evidence in this case is that St. Joe or officers of the Doe Run Partnership informed Fluor of the general nature of the issues and that, when St. Joe or officers of the Doe Run Partnership recommended a direction and requested money to pay for environmental controls or buyouts, Fluor authorized every request and provided the necessary

funding for St. Joe between 1981 and October 31, 1986, and May 25, 1990, through April of 1994.

68. In addition, with respect to environmental projects occurring at or close to the time of the sale of St. Joe/DRRC to DRA, this Court prohibited Defendants from offering evidence that Fluor set aside a reserve of $24.8 million for DRA to use for post-sale environmental projects, which would have shown Fluor's continuing practice of ensuring that environmental projects were always funded. Particularly considering the changing standards and knowledge regarding the effects of lead exposure and blood lead levels, this evidence precludes a finding that Fluor acted with complete indifference or conscious disregard for the safety of Plaintiffs.

69. With respect to A.T. Massey and DRIH, there was no evidence that they acted with the knowledge or state of mind required for punitive damages. Indeed, the punitive damage verdict directors did not require the jury to find that A.T. Massey or DRIH engaged in any wrongful conduct, had any knowledge that any conduct created a high degree of probability of injury, or showed complete indifference or conscious disregard for the safety of others. The undisputed evidence showed that they played no part in the operation of the smelter or the implementation of environmental controls at the smelter. The undisputed evidence showed that St. Joe maintained all voting powers in the partnership for A.T. Massey and DRIH and that St. Joe retained all authority within the partnership for determining how the plant should be operated and what environmental controls should be implemented. Punitive damages can only be imposed on an ***active*** partner, and, even then, only when that partner personally participated in the wrongdoing or ratified it. *See* 14 ALR 4th 1335, 1339-40; *Bromberg & Ribstein*, § 4.07(e), p. 4:125 and n. 54. There was no evidence presented at trial that A.T. Massey or DRIH were active

partners or that they personally participated or ratified any wrongdoing with respect to the smelter. The evidence adduced at trial regarding DRIH was that it had ***no*** employees at all.

70. Indeed, there was no clear and convincing evidence that would support the award of punitive damages against any entity, including St. Joe or the Doe Run Partnership in general, let alone Fluor, A.T. Massey, or DRIH. The evidence shows that St. Joe and the Doe Run Partnership officers negotiated and ultimately complied with every State Implementation Plan ("SIP") formulated by the MDNR and approved by the EPA pursuant to the Clean Air Act ("CAA") and National Ambient Air Quality Standard for lead ("NAAQS"), and all stipulations and requirements mandated by each SIP.

71. Notably, Plaintiffs' biggest point of contention in this respect has to do with whether St. Joe reported monitoring results to the EPA or the MDNR in 1979 and 1980 – prior to the time that Fluor even acquired St. Joe, and more than eight years before either A.T. Massey or DRIH acquired partnership interests in the Doe Run Partnership. During the pre-partnership time period when Fluor owned St. Joe, and throughout the Doe Run Partnership period, the evidence shows that neither St. Joe nor the Doe Run Partnership were hiding anything from the EPA or MDNR and that both entities did everything that the EPA or the MDNR asked pursuant to SIPs and other directives. Pursuant to the CAA and NAAQS, it was not legally possible to be in violation of the NAAQS while the SIPs, each of which provided for an anticipated attainment date, were pending. The EPA and MDNR were ultimately responsible for determining the location of monitors, whether citizens could be forced to sell their homes, or whether the smelter should be shut down.

72. Certainly Defendants could not be subject to punitive damages when, to their knowledge, St. Joe and/or the Doe Run Partnership were doing everything that was required by

MDNR and the EPA. *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 249 (Mo. banc 2001) (plaintiff failed to present a submissible case for punitive damages where the evidence showed that defendant had complied with applicable regulations, reasoning that "conformity with the regulatory process does negate the conclusion that the railroad's conduct was tantamount to intentional wrongdoing"); *Lopez v. Three Rivers Elec. Coop.*, 26 S.W.3d 151, 160 (Mo. banc 2000) (factors that weigh against submission of punitive damages include that "the defendant did not knowingly violate a statute, regulation, or clear industry standard designed to prevent the type of injury that occurred"); *State ex rel. Patterson v. Randall*, 637 S.W.2d 16, 17 (Mo. banc 1982) ("[P]unishment of a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'"); *Hostler v. Green Park Dev. Co.*, 986 S.W.2d 500, 507 (Mo. App. 1999) ("Where a party acts in good faith and honestly believes that his act is lawful, he is not liable for punitive damages.").

73. Plaintiffs also pointed to the failure of St. Joe or Doe Run Partnership officers (not employees of any of the Defendants) to go door-to-door telling everyone to get out of town or to acquire individual homes as evidence in favor of punitive damages. There was no evidence adduced at trial that Defendants were involved in any direct communications with the Herculaneum community, or in determining what, if any, warnings should be provided to the Herculaneum community. There was evidence adduced at trial that some warning and lead related information was provided to the Herculaneum community. Missouri courts have held that punitive damages are unavailable even where a warning given was insufficient to fully apprise the public of the risk of the danger at issue. *See, e.g., Jone v. Coleman Corp.*, 183 S.W.3d 600, 610-11 (Mo. App. 2005) (warnings were inadequate but nevertheless "indicate[d] that Coleman did not willfully or consciously disregard the safety of consumers of its propane

canisters"). Having provided some warning, punitive damages should not have been awarded here, and the verdict for punitive damages should be set aside.

74. Plaintiffs also pointed to evidence of conduct that indisputably did ***not*** cause their injuries as evidence in favor of punitive damages. Plaintiffs, over the objection of Defendants, were permitted to provide evidence regarding the actions of the Lead Industries Association ("LIA"), International Lead Zinc Research Organization ("ILZRO"), acts of St. Joe proceeding the time period in question and actions of the lead industry in general none of which involved any of the Defendants. Plaintiffs also continually cited the actions of St. Joe in conjunction with communications with the EPA, communications with the MDNR, and communications with the public. Plaintiffs argued that these actions harmed the Herculaneum community as a whole, and that the actions of the lead industry harmed the nation as a whole. Fluor was indisputably not involved in these acts or communications. Evidence showed Fluor was never a member of either the LIA or ILZRO.

75. Injuries allegedly suffered by the Herculaneum community or the nation *as a whole* were not at issue here. The Constitution does not permit punitive damages calculated to punish a defendant for harm allegedly suffered by any parties other than the plaintiffs themselves. *Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007). Permitting a jury to base a punitive award in part upon its desire to punish a defendant for harming persons who are not before the court would amount to a taking of property from the defendant without due process. *Id.*

76. In the absence of any bad acts actually committed by Fluor, A.T. Massey or DRIH, a verdict for punitive damages entered against them simply on the basis of their ownership of a partnership interest also violates the law. *Werremeyer*, 134 S.W.3d at 635.

Punitive damages can only be awarded where the defendant has notice that its conduct can subject it to such punishment. *Id.* There was no evidence presented at trial that Fluor, A.T. Massey or DRIH knew that joining an existing partnership would automatically subject them to liability for punitive damages. There is no "right" to punitive damages, and so it could not be considered an "obligation" of the partnership when Defendants joined. Imposing punitive damages in this context would also violate the due process rights of Fluor, A.T. Massey and DRIH.

77. Awarding punitive damages in this case violates due process requirements for other reasons. The undisputed evidence showed that Defendants had every reason to believe that the activities of St. Joe and the Doe Run Partnership were lawful. There was no information that Defendants were shown to have received that would cause anyone to conclude other than that St. Joe and the Doe Run Partnership's actions were in compliance with what the EPA and MDNR were requiring pursuant to the SIPs under the auspices of the CAA and NAAQS. Imposing punitive damages to punish conduct that Defendants had every reason to believe was lawful at the time it was committed "is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."); *Alcorn*, 50 S.W.3d at 249.

78. As a matter of law, Plaintiffs failed to meet their burden of showing that Defendants' conduct toward these Plaintiffs was "willful, wanton, malicious, [or] reckless." *McClelland v. Highland Sales & Inv. Co.*, 484 S.W.2d 239, 242 (Mo. banc 1972). There is no evidence that Fluor, DRIH, or A.T. Massey had actual or constructive knowledge that their conduct, or even the conduct of the Doe Run Partnership, created a high degree of probability of

injury to the class of persons of which Plaintiffs were members. The award of punitive damages against Fluor, A.T. Massey and DRIH falls far short of clear and convincing evidence of the requisite knowledge and conscious disregard or reckless indifference required for punitive damages. The punitive damage verdicts entered against Fluor, A.T. Massey and DRIH as to each Plaintiff should be set aside and a judgment should be entered in favor of Fluor, A.T. Massey and DRIH.

VI. Other Grounds for Setting Aside the Verdicts

79. Plaintiffs failed to present substantial evidence that Defendants Fluor, A.T. Massey, or DRIH breached any duty of care with regard to the operation of the smelter by failing to exercise reasonable care or take necessary precautions with regard to the operation of the smelter.

80. The verdicts were based on claims against Defendant for the conduct of other corporations or person under either a piercing the corporate veil, agency, or partnership theory and Plaintiffs failed to prove that any other corporation or person was negligent in the operation of the smelter.

81. Plaintiffs failed to prove any basis for Plaintiffs' apparent claim that Defendants had a duty, power or authority to purchase Plaintiffs' homes, or that any claimed failure by Defendants to purchase Plaintiffs' homes constituted a breach of any duty owned to Plaintiffs or was in any other way negligent.

82. Plaintiffs failed to prove that Defendants had a duty to warn Plaintiffs with regard to any risks associated with the operation of the smelter, that Defendants breached any alleged duty to warn Plaintiffs with regard to any risks associated with the operation of the smelter, or that any alleged failure to warn caused or contributed to cause any injury to Plaintiffs.

83. Plaintiffs failed to present substantial evidence that Defendants knew or should have known that emissions from the smelter created a risk of harm to Plaintiffs or that it was reasonably foreseeable that emissions from the smelter created a risk of injury to Plaintiffs.

84. Plaintiffs failed to prove that any alleged failure to warn Plaintiffs of risks associated with the operation of the smelter was negligent.

85. Plaintiffs failed to prove that Defendants knew or should have known that lead emissions could cause the types of injuries for which Plaintiffs are seeking damages.

86. Plaintiffs failed to prove that any allegedly negligent conduct of Defendants caused or contributed to cause any injuries or damages to Plaintiffs.

87. Plaintiffs failed to present substantial evidence that the alleged injuries for which they sought recovery were caused by exposure to lead.

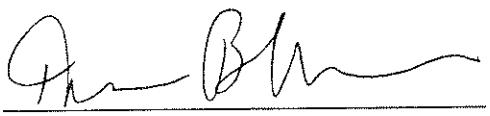
88. Defendants are entitled to judgment notwithstanding the verdict because, for the reasons stated in defendants' motion for new trial, plaintiffs failed to prove their damages by competent evidence. A defendant in a personal injury case is entitled to judgment as a matter of law if the plaintiff fails to prove damages by competent evidence.

89. For the reasons stated in Defendants' motion for new trial, Plaintiffs failed to offer any competent proof of damages.

WHEREFORE, Defendants Fluor, A.T. Massey and DRIH collectively and/or individually request that this Court set aside the verdicts entered in favor of each Plaintiff for compensatory and punitive damages and enter a judgment in favor of Fluor, A.T. Massey and DRIH collectively and/or individually as to all claims stated against them in this action, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

ARMSTRONG TEASDALE LLP

BY: 

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CERTIFICATE OF SERVICE

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

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