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 TO AMEND JUDGMENT

The Court should enter judgment for Defendants notwithstanding verdict, order a new trial, or remit or reduce the compensatory and punitive damage awards for the reasons set forth in Defendants' other post-trial motions. In addition, Defendants request the Court to amend judgment as follows:

Form of the Judgment

1. If JNOV and a new trial are denied, the Court should enter one judgment in this consolidated case. The entry of sixteen judgments was improper because there was one consolidated action before the Court as shown by the consolidation order of December 20, 2010. The effect of the consolidation order was to combine several civil actions into one civil action. *Hudson v. DeLonjay,* 731 S.W.2d 922, 931-32 (Mo. App. 1987). Because there is only one action, there can be only one judgment entered, disposing of all claims of all parties. *Johnson v. Heitland,* 314 S.W.3d 777, 778 (Mo. App. 2010); *Sanders v. Hartville Milling Co.,* 14 S.W.3d 188, 217 (Mo. App. 2000); *Johnson-Mulhern Properties, LLC v. TCI Cablevision of Missouri, Inc.,* 980 S.W.2d 171, 172 (Mo. App. 1998); *M.F.A. Control v. Harrill,* 405 S.W.2d 525, 530 (Mo. App. 1966). After the consolidation, there was one case, and the Court should enter one final judgment in the consolidated case, not the sixteen judgments requested by Plaintiffs.

2. In the alternative, and without waiving Defendants' right to the entry of a single judgment, at most the Court should enter three judgments -- one for each of the three cause numbers that were assigned before the consolidation order. Indeed, in the proposed form of judgments sent by Plaintiffs to Defendants' counsel on August 4, 2011, Plaintiffs submitted three separate judgments under these three cause numbers.

Multiple Punitive Damage Awards for Identical Conduct

3. If JNOV, a new trial, remittitur, and/or reduction are denied, in the alternative, the Court should amend or modify the judgment or judgments in the following respects. Rule 75.01 permits the Court to "correct, amend, or modify its judgment" for good cause within the thirty-day period after entry of judgment. If a party files a motion for new trial or to amend the judgment within that thirty-day period, the trial court's authority to amend extends for an

additional ninety days. Rules 78.04, 78.06 & 81.05(a)(2)(A). A trial court may then modify its judgment to remediate a matter raised by a party in an authorized after-trial motion. *State ex rel. Missouri Parks Ass'n v. Missouri Dep't of Natural Resources,* 316 S.W.3d 375, 382 (Mo. App. 2010).

4. The conduct for which Defendants were found liable, both for compensatory and punitive damages, was identical with respect to each Plaintiff. Defendants cannot properly be punished sixteen times for the same conduct. The Court should amend or modify the judgment or judgments to reflect only a single award of punitive damages in the total amount of $15 million against Fluor Corporation, a single award of punitive damages in the total amount of $ 3 million against A.T. Massey, and a single award of punitive damages in the total amount of $2 million against DRIH, and/or apportioning those total amounts among the sixteen Plaintiffs. Otherwise, the punitive damage awards are unlawfully duplicative, punishing Defendants sixteen times, instead of once, for the identical conduct in violation of state and federal law and public policy.

5. The United States Supreme Court has stated that multiple punitive damages awards for the same conduct may be a due process violation. *See State Farm v. Campbell,* 538 U.S. 408, 423 (2003). This includes orders to pay punitive damages in successive cases based on the same conduct. *See Huu Nam Tran v. Metropolitan Life Ins. Co.*, 2006 WL 1437376 at * 2 (W.D. Pa. 2006); *Zachair, Ltd. v. Driggs*, 762 A.2d 991, 1002 (Md. Ct. App. 2000) (multiple punitive awards may be unlawfully duplicative if they "have their basis in one continuous course of conduct.").

6. As a matter of state law and public policy, Missouri mitigates the risk of unconstitutional multiple punitive damage awards by allowing a reduction of a current award by

the amount paid for prior punitive damage awards for the same conduct. *See* § 510.263.4, RSMo. This statute is an unequivocal statement of Missouri law and public policy that a defendant should not be held liable for multiple punitive damages awards for the same conduct. It avoids the unconstitutionality and unlawfulness of multiple punishments for identical conduct.

7. With or without section 510.263, the imposition of two penalties for the same wrongful act violates basic fairness and due process of law. *Bumgarner v. Bumgarner*, 862 P.2d 321, 334 (Idaho Ct. App. 1993) (citing 22 AM. JUR. 2D *Damages* § 817 (1988)). In ascertaining whether the awards are duplicitive, the proper focus of inquiry is not whether the plaintiff obtained a double recovery, but whether the defendant has incurred multiple penalties for the same wrongful act. *Id.*

8. In this case, Defendants are being unlawfully penalized sixteen times, instead of once, for the same conduct, in violation of their rights to procedural and substantive due process and equal protection under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 19, and 21 of the Missouri Constitution.

9. If JNOV, a new trial, remittitur, and reduction as sought by Defendants' other post-trial motions are denied, the Court should amend the judgment or judgments to reflect punishment in the form of a single punitive award of $15 million against defendant Fluor, a single punitive award of $3 million against A.T. Massey, and a single punitive award of $2 million against DRIH, subject to the additional elimination of the duplicative $2 million award against Fluor and DRIH as noted below. This would be most equitably accomplished by apportioning the single punitive damages award proportionately among the sixteen Plaintiffs.

Duplicative Damages

10. If JNOV, a new trial, remittitur, and/or reduction are denied, in the alternative, the Court should amend or modify the judgment or judgments to either eliminate the $2,000,000 punitive damages award for each Plaintiff against DRIH or change the $15,000,000 punitive damages award for each Plaintiff against Fluor to $13,000,000, because the sum of $2,000,000 is reflected both in the award against DRIH and in the award against Fluor and therefore is unlawfully duplicative.

11. The facts show that the awards of punitive damages are duplicative. The jury instructions for each Plaintiff contained a verdict director for a finding of negligence liability against Fluor on the theory of DRIH and Leadco Investments, Inc. being partners of Doe Run Company Partnership, the partnership's allegedly imputed knowledge that the Herculaneum community was contaminated with unsafe lead levels from smelter operations, and Fluor's alleged exercise of total control over DRIH and Leadco. Instruction Nos. 8, 17, 26, 35, 44, 53, 62, 71, 80, 89, 98, 107, 116, 125, 134 & 143.

12. The pertinent portion of each instruction stated:

> Fourth, with respect to the Doe Run Company partnership, defendant Fluor Corporation had actual, participatory, and total dominion and control of partners DRIH and Leadco Investments, Inc. and **exercised such dominion and control so DRIH and Leadco Investments, Inc. had no separate mind, will or existence of their own but were mere conduits for defendant Fluor Corporation**, and
>
> Fifth, defendant Fluor Corporation, in the exercise of that dominion and control, allowed plaintiff . . . , a resident of Herculaneum, to be exposed to unsafe levels of lead which originated from the smelter operations before March 26, 1994,
>
> Sixth, defendant Fluor Corporation was thereby negligent.

Id. (emphasis added).

13. The next instruction in each sequence was a second verdict director for a finding of negligence liability against Fluor based only on its own status as a partner of the Doe Run Company Partnership. Instructions Nos. 9, 18, 27, 36, 45, 54, 63, 72, 81, 90, 99, 108, 117, 126, 135 & 144.

14. The next jury instruction in each sequence concerned Fluor's potential liability for punitive damages. Instruction Nos. 10, 19, 28, 37, 46, 55, 64, 73, 82, 91, 100, 109, 118, 127, 136 & 145. This instruction required a finding in favor of each Plaintiff on the preceding two verdict directors (*e.g.*, Instructions 8 & 9 for Preston Alexander) along with a finding that Fluor allowed Plaintiff to be exposed, knew or should have known that its conduct created a high probability of injury and showed complete indifference to or conscious disregard for the safety of others. *Id.*.

15. Fluor's liability for punitive damages therefore was based necessarily on the jury finding that Fluor exercised "total dominion and control" over DRIH such that DRIH had "no separate mind, will or existence" of its own. Thus, under the instruction, Fluor and DRIH were one and the same -- they were a single entity for the purposes of assessing punitive damages liability.

16. The instructions contained a verdict director for each Plaintiff on the liability of DRIH for negligence, based on its partnership in the Doe Run Company Partnership. Instruction Nos. 13, 22, 31, 40, 49, 58, 67, 76, 85, 94, 103, 112, 121, 130, 139 & 148. The next instruction in sequence for each Plaintiff concerned DRIH's liability for punitive damages, requiring a finding in favor of Plaintiff on the preceding verdict director along with a finding that the Doe Run Company Partnership allowed plaintiff to be exposed, knew or should have known that its conduct created a high probability of injury, and the partnership showed complete indifference to

or conscious disregard for the safety of others. Instruction Nos. 14, 23, 32, 41, 50, 59, 68, 77, 86, 95, 104, 113, 122, 131, 140 & 149.

17. These instructions directed the jury to find Fluor liable for punitive damages based on its total control of DRIH such that Fluor and DRIH were one and the same. They also directed the jury to find DRIH liable for punitive damages based on its status as a partner. Verdicts AA through PP. The basis on which Fluor was found liable for punitive damages (DRIH's status as a Doe Run partner) was the same basis on which DRIH was found liable for punitive damages (DRIH's status as a Doe Run partner). The acts, omissions or conduct of Defendants were otherwise identical with respect to each Plaintiff.

18. The judgment or judgments should be amended to remove the duplication of punitive damages against Fluor and DRIH. Duplicative damage awards are appropriately remedied by an amended judgment. *See Senu-Oke v. Modern Moving Systems, Inc.*, 978 S.W.2d 426, 432 (Mo. App. E.D. 1998) (upholding trial court's amended judgment to eliminate duplicative damages).

19. Under Missouri law, when the plaintiff pierces the corporate veil[1], two otherwise separate corporate entities are "treated as one." *Grease Monkey Intern., Inc. v. Godat*, 916 S.W.2d 257, 262 (Mo. App. E.D. 1995). The instructions directed the jury to find Fluor liable for punitive damages on the basis that Fluor so dominated and controlled DRIH that DRIH had no separate existence. Fluor and DRIH therefore were a single party under Plaintiffs' own theory of recovery.

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1 While plaintiffs deny that their jury instructions embody this doctrine, the language of plaintiffs' "total dominion and control" verdict director contains elements reflective of a "corporate veil" theory. The disregard of corporate separateness making two parties into one is the end result of any finding that the "corporate veil" has been pierced, regardless of variations in phraseology or description and regardless of whether it is premised upon fraud, disregard of corporate formalities, alter ego or the "mere instrumentality" theory.

20. When two parties are "treated as one," this precludes an award of punitive damages against each of the two parties separately. *See Glass Design Imports, Inc. v. Rastal GmbH & Co. KG*, 672 F. Supp. 419 (W.D. Mo. 1987) (a partner and the partnership entity could not both be liable for punitive damages because the partnership was not a separate legal entity); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 1997 WL 756602, * 6, n. 5 (D. Kan. 1997) (when a court pierces the corporate veil to make one entity liable for control or ownership of a second company, a punitive damages award against both entities amounts to an improper double recovery).

21. An award of punitive damages against both Fluor and DRIH constitutes an unlawful double penalty against the same entity for the same conduct in violation of Defendants' rights to procedural and substantive due process and equal protection under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, 19, and 21 of the Missouri Constitution.

22. Judgment for punitive damages should not have been entered against both Fluor and against DRIH. The award of $15 million against Fluor and $2 million against DRIH as to each Plaintiff constitute unlawful, duplicative damages in the amount of $2 million per Plaintiff. If DRIH has no existence separate from Fluor, as Plaintiffs claimed, the punitive damages assessment of $2 million against DRIH should be eliminated or subtracted from the amount assessed against Fluor.

WHEREFORE, Defendants request the Court to amend or modify the judgment or judgments as follows:

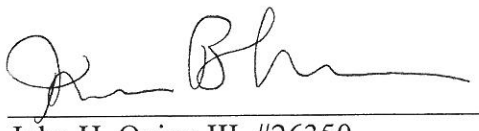
(a) if JNOV and a new trial are denied, the Court should enter one judgment in this consolidated case, or at most three judgments, and

(b) if JNOV, a new trial, remittitur, and/or reduction are denied, the Court should amend or modify the judgment or judgments to reflect a single award of punitive damages collectively as to all Plaintiffs of $15 million against Fluor, $3 million against A.T. Massey, and $2 million against DRIH, subject also to the requested $2 million duplicative reduction, and

(c) if JNOV, a new trial, remittitur, and/or reduction are denied, amend or modify the judgment or judgments by eliminating as to each Plaintiff the duplicative award of $2 million against both Fluor and DRIH, and 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 delivered by email and first class mail to counsel of record this 14th day of September, 2011, to:

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