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Heather L. Reinsch

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Reinsch: Reinsch: New Standard for Admissibility of Alcohol Consumption

# A New Standard for Admissibility of Alcohol Consumption by a Party and a Higher Standard of Proof for Punitive Damages

*Rodriguez v. Suzuki Motor Corp.*<sup>1</sup>

## I. INTRODUCTION

In *Rodriguez v. Suzuki Motor Corp.*, the Missouri Supreme Court changed two areas of law, greatly impacting civil litigation in Missouri. First, the court overruled the *Doisy* doctrine thereby increasing the admissibility of evidence of alcohol consumption by a party.<sup>2</sup> The *Doisy* standard had been inconsistently applied by the trial courts, resulting in unpredictability and making it difficult for litigators to plan their strategy.<sup>3</sup> While the new standard articulated by *Rodriguez* has the danger of prejudicing parties, this danger can be lessened if one shares the court's faith in limiting jury instructions.<sup>4</sup>

Second, the court increased the standard of proof for punitive damages to require "clear and convincing evidence."<sup>5</sup> This new standard will make it more difficult for plaintiffs to recover punitive damages in Missouri courts. While the Missouri Supreme Court followed many other states who also have increased this standard,<sup>6</sup> the manner in which the court adopted such a standard may result in controversy. Most of the other states adopted this higher standard through their legislatures, not the judiciary.<sup>7</sup> Also, the court seemed to set aside precedent with ease and without much analysis.<sup>8</sup>

## II. FACTS AND HOLDING

On February 11, 1990, Deborah Dubis was driving a Suzuki Samurai with two passengers, Kathryn C. Rodriguez and Lisa Nunnally.<sup>9</sup> The vehicle left the road on the right side of the road, went into a ditch, struck a fourteen-inch dirt

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1. 936 S.W.2d 104 (Mo. 1996).

2. *Id.* at 106-09. See *infra* notes 32-38 and accompanying text for an explanation of the *Doisy* doctrine.

3. *Rodriguez*, 936 S.W.2d at 107-08.

4. See *id.* at 108.

5. *Id.* at 109-11.

6. See *infra* notes 65-71 and accompanying text.

7. See *infra* notes 65-68 and accompanying text.

8. *Rodriguez*, 936 S.W.2d at 109-10. The issue of whether the court should have applied these two new procedural rules retroactively is not discussed in this Note.

9. *Id.* at 106. The car accident occurred in Warren County, Missouri. *Id.*

wall, and ultimately rolled over.<sup>10</sup> As a result of the accident, Rodriguez suffered serious, permanent injuries.<sup>11</sup>

There was evidence that the driver and passengers had been drinking alcohol prior to the accident.<sup>12</sup> A highway patrolman investigating the accident stated that he smelled alcohol on Dubis' breath at the hospital more than an hour after the accident.<sup>13</sup> Dubis admitted to drinking two full and three sampler glasses of wine before the accident.<sup>14</sup> Nunnally, one of the passengers, stated that Dubis may have had four or five sampler glasses of wine, instead of the three admitted by Dubis.<sup>15</sup> Rodriguez admitted drinking alcohol with Dubis before entering the vehicle, and her blood alcohol content was .11 at the time of the accident.<sup>16</sup>

Plaintiff Rodriguez filed a claim against Suzuki Motor Corporation (Suzuki) for strict products liability, negligence, breach of warranty, and punitive damages because of permanent, disabling injuries she sustained.<sup>17</sup> Rodriguez also filed a claim for negligence against the driver of the Samurai, Dubis.<sup>18</sup> Suzuki cross-claimed against Dubis for negligence.<sup>19</sup>

During the trial, Suzuki tried to admit the evidence of alcohol consumption to impeach Dubis and to prove the negligence or comparative negligence of both Dubis and Rodriguez.<sup>20</sup> Rodriguez objected to the admissibility of such evidence, and the trial court judge sustained the plaintiff's objection, thus excluding the evidence.<sup>21</sup>

The trial court instructed the jury to use the preponderance of the evidence standard of proof for the punitive damages award, as well as for the compensatory damages award.<sup>22</sup> The jury found Suzuki completely at fault,

10. *Id.* What happened after the vehicle hit the dirt wall was vigorously disputed. According to Dubis and the passengers, the vehicle returned to the road, crossed over the center line, and when Dubis tried to correct by turning sharply to the right, the vehicle rolled over. According to Suzuki, the vehicle never returned to the road but was launched into the air after the impact with the dirt wall, causing the Samurai to roll over into the ditch. *Id.*

11. *Id.*

12. *Id.* at 106-09.

13. *Rodriguez*, 936 S.W.2d at 109.

14. *Id.*

15. *Id.*

16. *Id.* The prima facie level of legal intoxication in Missouri is .10%. MO. REV. STAT. § 577.037 (1994).

17. *Rodriguez*, 936 S.W.2d at 106.

18. *Id.*

19. *Id.*

20. *Id.* at 106, 109.

21. *Rodriguez*, 936 S.W.2d at 109.

22. *Id.* at 106. The trial judge instructed the jury as to the proper standard of proof for punitive damages in Missouri, as the law existed at that time. The court stated that "in order to award punitive damages, the jury need only to believe 'more likely than not'

awarded Rodriguez compensatory damages of \$30 million, and returned punitive damages against Suzuki for \$60 million.<sup>23</sup> On remittitur, the circuit court reduced the compensatory damages to \$20 million and the punitive damages to \$20 million, for a total of \$40 million.<sup>24</sup>

On appeal, Suzuki argued that the trial judge erred in excluding all evidence of alcohol consumption.<sup>25</sup> Suzuki also contented that the Missouri Supreme Court should require clear and convincing proof as the standard for punitive damages.<sup>26</sup>

The Missouri Supreme Court declared two new standards for parties in civil cases. The first new standard pertains to the admissibility of alcohol consumption by a party.<sup>27</sup> The court overruled the longstanding *Doisy* standard,<sup>28</sup> and held that evidence of alcohol consumption by a party is admissible if otherwise relevant and material, whether or not the proponent alleges intoxication as an independent act of negligence.<sup>29</sup>

The second new standard announced by the court relates to punitive damages. The court increased the standard of proof for punitive damage awards to require clear and convincing evidence.<sup>30</sup> The court chose to apply these new standards to the *Rodriguez* case, thereby reversing the judgment of the trial court and remanding the case for a new trial.<sup>31</sup>

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the propositions of fact submitted in the instruction on punitive damages." *Id.* at 109-10 (quoting *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681, 685 (Mo. 1992)).

23. *Id.* at 106.

24. *Id.*

25. *Rodriguez*, 936 S.W.2d at 106.

26. *Id.* at 109. The standard of proof for punitive damages in Missouri at the time of the initial trial was the preponderance of the evidence standard. *Id.* at 109-10.

27. *Id.* at 107-08. The court also reiterated that evidence of a non-party witness' alcohol consumption is admissible because it is relevant and material to a witness' ability to perceive the event. *Id.* at 106.

28. *Doisy v. Edwards*, 398 S.W.2d 846, 849 (Mo. 1966), overruled by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996). See *infra* notes 32-38 and accompanying text.

29. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 108 (Mo. 1996). If the proponent is not alleging intoxication as an independent negligent act, then the party may request a limiting jury instruction. *Id.* at 108.

30. *Id.* at 111.

31. *Id.*

### III. LEGAL BACKGROUND

#### A. Admissibility of Alcohol Consumption by a Party

Prior to *Rodriguez*, the *Doisy* doctrine articulated the test for admitting evidence of alcohol consumption by a party.<sup>32</sup> In a negligence action, evidence of a party's alcohol consumption only could be admitted if it was coupled with either evidence of erratic driving or "some other circumstance from which it might be inferred that the driver's physical condition was impaired at the time of the accident."<sup>33</sup>

The *Doisy* case arose from a head-on collision.<sup>34</sup> There was evidence that the defendant's car crossed the center line of a two-lane highway, drove on the wrong side of the road for one-hundred to three-hundred feet, and struck a car head on.<sup>35</sup> The patrolman at the scene of the accident testified that he smelled alcohol on defendant's breath.<sup>36</sup> On these facts, the Missouri Supreme Court found that there was "no evidence that defendant's drinking had anything to do with the accident," and that there was "no evidence of erratic driving by defendant or any other circumstance from which it might be inferred that defendant had an impaired physical condition at the time of the collision."<sup>37</sup> The court concluded that the evidence was properly excluded because such evidence was not coupled with evidence "tending to show that defendant was under the influence of intoxicating liquor."<sup>38</sup>

In *Daniels v. Dillinger*,<sup>39</sup> the Missouri Supreme Court followed the *Doisy* doctrine in holding that the trial court did not abuse its discretion in granting the plaintiff a new trial.<sup>40</sup> On cross-examination, defendant introduced evidence that plaintiff had consumed two alcoholic drinks prior to the accident.<sup>41</sup> The court relied on *Doisy* in reasoning that evidence of alcohol consumption, even if it proves lack of intoxication, can be so prejudicial to a party that it can justify a trial court's granting of a new trial.<sup>42</sup>

32. *Doisy*, 398 S.W.2d at 849-50.

33. *Rodriguez*, 936 S.W.2d at 106 (citing *Doisy*, 398 S.W.2d at 849-50).

34. *Doisy*, 398 S.W.2d at 848.

35. *Id.*

36. *Id.* at 849.

37. *Id.* at 849-50.

38. *Id.* at 850.

39. *Daniels v. Dillinger*, 445 S.W.2d 410 (Mo. 1969).

40. *Id.* at 418-19.

41. *Id.* at 415.

42. *Id.* at 418-19. See *Hawk v. Union Elec. Co.*, 798 S.W.2d 173, 174-75 (Mo. Ct. App. 1991). The *Hawk* court held that the trial court did not abuse its discretion by denying a new trial. The *Hawk* court, relying on *Daniels*, reasoned that the trial court's denial was within its discretion because the trial court "moved immediately to correct any prejudice from defendant's improper question." *Id.* at 175. See also *First Nat'l Bank v.*

Most post-*Doisy* cases based their decisions on whether the evidence showed “erratic” driving. Courts’ determinations of whether or not driving was “erratic” were inconsistent.<sup>43</sup> For example, crossing the center line was found to be “erratic” driving in one case, but not erratic driving in another.<sup>44</sup> A few

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Kansas City So. Ry. Co., 865 S.W.2d 719, 739 (Mo. Ct. App. 1993) (relying on *Doisy* for the general rule that evidence of a party’s alcohol consumption may be excluded because of its prejudicial effect).

43. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 107-08 (Mo. 1996). See also *Stojkovic v. Weller*, 802 S.W.2d 152, 154 (Mo. 1991) (driving was “erratic or worse” when driver ran a red light, sped into the intersection at fifty to fifty-five miles per hour hitting a car, then continued at high speeds, weaving in and out of traffic, struck another car, then slumping over his wheel when his vehicle finally came to a stop), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Hansen v. James*, 847 S.W.2d 476, 482 (Mo. Ct. App. 1992) (leaving the road, hitting a utility pole, and going down a hill was “erratic” driving); *Bilzing v. Wentzel*, 726 S.W.2d 787, 790 (Mo. Ct. App. 1987) (driving was “erratic” when driver’s foot was still on the accelerator when the collision took place in the intersection, and driver could have seen the other vehicle from approximately four-hundred feet away), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Jones v. Freese*, 743 S.W.2d 454, 457 (Mo. Ct. App. 1987) (backing his car over a police officer then driving off without stopping, despite the efforts of other officers to stop him was “erratic” driving), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Miller v. Easton*, 733 S.W.2d 31, 34 (Mo. Ct. App. 1987) (speeding on a narrow, curvy road was “erratic” driving), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Bohn v. James*, 573 S.W.2d 448, 449 (Mo. Ct. App. 1978) (driving seventy-five to eighty miles per hour, which was in excess of the speed limit, on a clear day, and rear-ending a car that had been driving fifty-five miles per hour when there were two alternate lanes available for passing was “erratic” driving); *Hager v. McGlynn*, 518 S.W.2d 173, 178 (Mo. Ct. App. 1974), *overruled on other grounds*, *State ex rel. Sims v. Sanders*, 886 S.W.2d 718, 721 (Mo. Ct. App. 1994) (running a red light and not applying the brakes was “erratic” driving).

Several Missouri courts have held that certain acts of driving are not erratic. See *Strycharz v. Barlow*, 904 S.W.2d 419, 424 (Mo. Ct. App. 1995) (failing to swerve or see plaintiff’s car entering the intersection was not erratic driving, because there was a car blocking plaintiff’s view and he could not steer once his brakes locked up); *Broderson v. Farthing*, 762 S.W.2d 548, 551 (Mo. Ct. App. 1989) (turning into the path of another car without yielding or “keep[ing] a careful lookout,” was not erratic driving), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Simpson v. Smith*, 771 S.W.2d 368, 372 (Mo. Ct. App. 1989) (driving was not erratic because it was very dark, the decedent was wearing dark clothes and lying in a fetal position in the road, and defendant was driving only thirty miles per hour when he first saw the decedent in the road thirty feet away); *Lauderdale v. Siem*, 725 S.W.2d 897, 900 (Mo. Ct. App. 1987) (debris from the accident located in plaintiff’s lane not sufficient evidence of erratic driving), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

44. *Diener v. Mid-American Coaches, Inc.*, 378 S.W.2d 509, 512 (Mo. 1964) (not erratic driving), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Bentley v. Crews*, 630 S.W.2d 99, 107 (Mo. Ct. App. 1981) (“erratic” driving), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

courts have based their decisions on the alternative prong of the *Doisy* doctrine—whether there were “other circumstances” from which an impaired physical condition at the time of the accident might be inferred. These results also were inconsistent.<sup>45</sup> In fact, the only ascertainable consistency is that the appellate courts affirmed nearly every trial court determination, whether that determination resulted in admission or exclusion.<sup>46</sup> As a result, the Missouri Supreme Court relied heavily upon these inconsistencies in overruling *Doisy*.<sup>47</sup>

### B. Standard of Proof for Punitive Damages

Punitive damage awards have been the subject of great controversy lately. Critics of punitive damages have suggested many ways of reforming punitive damages. One possible reform would be to eliminate punitive damages altogether, but because of their long history, this is not a likely method of reform. Evidence of the existence of punitive damages can be found as early as 2000 B.C. in the Babylonian Code of Hammurabi, and other ancient legal codes such as those of the Hindus and Hittites.<sup>48</sup> Authorization for punitive damages also existed in the Bible, as well as Greek and Roman law.<sup>49</sup> In England, the notion that punitive damages may be imposed to punish a defendant “for malice,

45. *Sewell v. MFA Mut. Ins. Co.*, 597 S.W.2d 284, 290 (Mo. Ct. App. 1980), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996). The *Sewell* court found no evidence of erratic driving, however, the court did find that there were sufficient “other circumstances” to admit evidence of the defendant’s alcohol consumption. These “other circumstances” were that the defendant could not recall the events leading up to the collision, and evidence that the defendant was intoxicated. *Id.* See also *McHaffie v. Bunch*, 891 S.W.2d 822, 831 (Mo. 1995) (The court did not conclude that the driving was erratic, but found that passing cars, fishtailing, weaving, and crossing the median when the road was not wet or icy, coupled with evidence that the driver smelled of alcohol were sufficient “other circumstances” to infer physical impairment.); *Krenski v. Aubuchon*, 841 S.W.2d 721, 727 (Mo. Ct. App. 1992) (speeding, swerving into oncoming traffic, and hitting a parked car was not “erratic” driving, but was enough to infer the driver was physically impaired at the time of the accident), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Ryan v. Parker*, 812 S.W.2d 190, 195 (Mo. Ct. App. 1991) (The court found no erratic driving of the boat nor “other circumstances” which would infer that the driver was physically impaired.); *Parry v. Staddon*, 769 S.W.2d 811, 813 (Mo. Ct. App. 1989) (failure to take “evasive action” before colliding with a truck was not sufficiently “erratic,” but it was sufficient “other circumstances” to infer that the driver was physically impaired), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

46. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 108 (Mo. 1996).

47. *Id.* at 107-08.

48. Steven L. Hobson, *Recent Developments Affecting Punitive Damages*, 50 J. MO. B. 225, 225 (1994).

49. *Id.*

oppression or gross fraud,” is credited to two related cases from 1763.<sup>50</sup> The United States quickly adopted this doctrine, and the United States Supreme Court considered it “well-established” in 1851.<sup>51</sup>

Some people have urged reform by criticizing the purposes for allowing punitive damages. The original justification for punitive damages was to compensate for mental anguish, but this justification diminished as courts allowed recovery for emotional distress.<sup>52</sup> Today, courts note two main purposes for punitive damages: punishment and deterrence.<sup>53</sup> Some commentators are concerned that punitive damages are quasi-criminal, without the same protection afforded to criminal defendants.<sup>54</sup> Especially in products liability cases, critics often are concerned that punitive damages have the effect of putting legitimate companies out of business.<sup>55</sup> Such critics believe that the legislature, not the judiciary, should determine whether a certain industry or product should be banned.<sup>56</sup>

One commentator responded to such criticisms by emphasizing the positive effects of punitive damages: society benefits from seeing wrongdoers punished, such punishment informs the wrongdoers of society’s legal values, such damages encourage wrongdoers to alter their behavior before any injury to society occurs, and wrongdoers cannot act maliciously by adding any predicted compensatory damages to the cost of their product or service.<sup>57</sup>

Many critics focus on the amounts of punitive damage awards in advocating reform. However, supporters of punitive damages point out that the courts keep punitive damage amounts reasonable. Courts have long been concerned with the amounts of punitive damages awarded. Courts often scrutinize punitive damage awards, evaluating them for “reasonableness” or excessiveness.<sup>58</sup> Courts also review cases on whether there was sufficient evidence to submit the issue of punitive damage awards to the jury.<sup>59</sup> One

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50. *Id.* See *Huckley v. Money*, 95 Eng. Rep. 768 (K.B. 1763); *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763).

51. *Hobson*, *supra* note 48, at 225 (citing *Day v. Woodworth*, 54 U.S. 363, 371 (1851)).

52. *Hobson*, *supra* note 48, at 225.

53. James R. McKown, *Punitive Damages: State Trends and Developments*, 14 *REV. LITIG.* 419, 422 (1995). See *State ex rel. Smith v. Green*, 494 S.W.2d 55, 60 (Mo. 1973) (punitive damages are “imposed for the purpose of punishment and deterrence”). Some courts and commentators have given other purposes for punitive damages, for example, rewarding private citizens for enforcing laws and providing additional recovery to help with attorney’s fees. See *Hobson*, *supra* note 48, at 225.

54. McKown, *supra* note 53, at 422 n.7.

55. McKown, *supra* note 53, at 423-24.

56. McKown, *supra* note 53, at 425.

57. *Hobson*, *supra* note 48, at 225-26.

58. *Hobson*, *supra* note 48, at 226.

59. *Hobson*, *supra* note 48, at 227.



commentator reported that in Missouri, from 1981 to 1994, "only one products liability case [was] found . . . in which a punitive damages verdict was affirmed on appeal," and "in the vast majority no [punitive] damages were allowed."<sup>60</sup>

A popular means of reforming punitive damages is to raise the standard of proof needed to establish the conduct on which punitive damages are based. The United States Supreme Court has articulated constitutional limitations on several aspects of punitive damages,<sup>61</sup> but the only Supreme Court case addressing the standard of proof for punitive damages is *Pacific Mutual Life Insurance Co. v. Haslip*.<sup>62</sup> In *Haslip*, the Court considered, and explicitly rejected, the idea that the Due Process Clause required a burden of proof for punitive damages higher than "preponderance of the evidence."<sup>63</sup> The Court did, however, acknowledge the strengths of a higher burden of proof, such as "clear and convincing evidence" or "beyond a reasonable doubt."<sup>64</sup>

Many states have increased the burden of proof for punitive damages above the preponderance of the evidence. Twenty-four states require, by statute, a clear and convincing evidence standard of proof.<sup>65</sup> Florida limits the amount of punitive damages to three times the amount of compensatory damages, unless the party can prove a higher amount by clear and convincing evidence.<sup>66</sup> Colorado requires an even higher standard for punitive damages, beyond a reasonable doubt.<sup>67</sup> In South Dakota, the trial court must determine by clear and

60. Hobson, *supra* note 48, at 227. See *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868 (Mo. Ct. App. 1991). For the list of cases referred to by Hobson as the "majority" where no punitive damages were allowed, see Hobson, *supra* note 48, at 227 n.49.

61. See *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

62. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

63. *Id.* at 23 n.11.

64. *Id.*

65. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 n.1 (Mo. 1996). See ALA. CODE § 6-11-20 (1993); ALASKA STAT. § 09.17.020 (Michie 1996); CAL. [CIV.] CODE § 3294(a) (West 1997); GA. CODE ANN. § 51-12-5.1(b) (Supp. 1997); 735 ILL. COMP. STAT. ANN. 5/2-1115.05(b) (West Supp. 1997); IND. CODE ANN. § 34-4-34-2 (Michie 1986); IOWA CODE ANN. § 668A.1 (West 1987); KAN. STAT. ANN. § 60-3701(c) (1994); KY. REV. STAT. ANN. § 411.184(2) (Michie 1992); MINN. STAT. ANN. § 549.20.1(a) (West Supp. 1997); MISS. CODE ANN. § 11-1-65(1) (a) (Supp. 1996); MONT. CODE ANN. § 27-1-221(5) (1997); NEV. REV. STAT. § 42.005.1 (1995); N.J. STAT. ANN. § 2A:15-5.12(a) (West Supp. 1997); N.C. GEN. STAT. § 1D-15(b) (1995); N.D. CENT. CODE § 32-03.2-11.1 (1996); OHIO REV. CODE ANN. § 2315.21(C) (3) (Anderson 1995); OKLA. STAT. ANN. tit. 23, § 9.1.B (West Supp. 1998); OR. REV. STAT. § 18.537(1) (1995); S.C. CODE ANN. § 15-33-135 (Law. Co-op. Supp. 1996); TEX. [CIV. PRAC. & REM.] CODE ANN. § 41.003(a) (West 1997); UTAH CODE ANN. § 78-18-1(1) (a) (1996).

66. *Rodriguez*, 936 S.W.2d at 110 n.1. See FLA. STAT. ANN. § 768.73(1) (b) (West Supp. 1996).

67. *Rodriguez*, 936 S.W.2d at 110 n.1. See COLO. REV. STAT. § 13-25-127(2)

convincing evidence that there is a reasonable basis to believe the defendant's conduct was malicious, willful, or wanton, before the issue of punitive damages is submitted to the jury; however, this does not necessarily mean the jury must apply anything more than a preponderance of the evidence standard in determining punitive damages.<sup>68</sup> Six states and the District of Columbia require clear and convincing proof as a result of case decision.<sup>69</sup> Nebraska does not allow punitive damages at all,<sup>70</sup> and New Hampshire and Washington do not allow punitive damages in most civil actions.<sup>71</sup>

In addition to the states who have raised the standard of proof, Congress also attempted to do so through the proposed Product Liability Reform Act.<sup>72</sup> This Act would have raised the standard of proof to clear and convincing evidence for punitive damages in product liability actions filed in a federal court.<sup>73</sup> "Although apparently still in the proposal stage, some courts have also noted the existence of a Proposed Uniform State Product Liability Act, which imposes a 'beyond a reasonable doubt' standard of proof as to the conduct underlying punitive damages in products liability actions."<sup>74</sup>

Prior to *Rodriguez*, Missouri applied the preponderance of the evidence standard of proof for punitive damages.<sup>75</sup> The Missouri Supreme Court articulated this standard in *Menaugh* when it specifically rejected a suggestion that clear and convincing evidence should be required.<sup>76</sup> The court did not provide much analysis on the issue except to state that such a requirement would be "contrary to [its] normal requirements in the submission of civil cases."<sup>77</sup> In his concurrence, Judge Robertson thought a "strong case" could be made for

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(1989).

68. *Rodriguez*, 936 S.W.2d at 110 n.1. See S.D. CODIFIED LAWS § 21-1-4.1 (1987); *Flockhart v. Wyant*, 467 N.W.2d 473, 475 (S.D. 1991).

69. *Rodriguez*, 936 S.W.2d at 110 n.2. See *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 681 (Ariz. 1986); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 932 (D.C. 1995); *Masaki v. General Motors Corp.*, P.2d 566, 575 (Haw. 1989); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 (Wis. 1980).

70. *Rodriguez*, 936 S.W.2d at 111 n.3. See *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975).

71. *Rodriguez*, 936 S.W.2d at 111 n.4. See N.H. REV. STAT. ANN. § 507:16 (1996); *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 726 P.2d 8, 23 (Wash. 1986).

72. S. 2760, 99th Cong. (1986).

73. S. 2760, 99th Cong. § 303(a) (1986).

74. Lee R. Russ, Annotation, *Standard of Proof as to Conduct Underlying Punitive Damage Awards—Modern Status*, 58 A.L.R. 4th 878 (1987) (citing *Wangen v. Ford Motor Co.*, 294 N.W.2d 437 (Wis. 1980)).

75. *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo. 1990), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

76. *Id.* at 75.

77. *Id.*

requiring clear and convincing evidence to “reduce[ ] the possibility of factual error.”<sup>78</sup> However, because the state legislature had recently passed a law regarding punitive damages and had remained silent on the issue of the burden of proof, Robertson believed the court should defer to the legislature’s policy choices.<sup>79</sup>

Three years later, in *Kansas City v. Keene Corp.*,<sup>80</sup> three members of the court expressed their view that the standard of proof for punitive damages should be raised to a clear and convincing evidence standard.<sup>81</sup> In fact, Judge Holstein explicitly invited parties to raise this issue on appeal in the near future.<sup>82</sup> He stated that plaintiffs occasionally filed for punitive damages inappropriately because a defendant seemed to have “deep pockets.”<sup>83</sup> In these cases, a corporate defendant would be punished because it was in business for profit and did not “cease all operations when confronted with an inconclusive . . . study involving its product.”<sup>84</sup> Judge Holstein expressed concern that juries were less likely to return a punitive damages verdict against an individual than a business defendant, which meant that juries occasionally were abusing punitive damages as a means of “redistributing wealth.”<sup>85</sup>

After *Menaugh* and *Keene*, the Missouri legislature enacted statutes providing for a bifurcated trial where actual and punitive damages are sought, providing for remittitur and additur of punitive damages awards, and requiring that half of punitive damages awards be paid to the tort victims’ compensation fund.<sup>86</sup> However, the statutes are silent on the issue of the burden of proof standard to be applied to punitive damages.<sup>87</sup>

In *Rodriguez*, the court received its opportunity to address the issue of the standard of proof for punitive damages head on, as well as to make new law regarding the admissibility of alcohol consumption by a party.<sup>88</sup>

78. *Id.* at 76 (Robertson, J., concurring).

79. *Id.* Judge Robertson specified that the court did, however, have the authority to address the issue. *Id.*

80. *Kansas City v. Keene Corp.*, 855 S.W.2d 360 (Mo. 1993).

81. *Id.* at 376 (Holstein, J., concurring). Judge Robertson and Judge Benton concurred in Judge Holstein’s opinion.

82. *Id.* at 378-79.

83. *Id.* at 376.

84. *Id.* at 377.

85. *Id.* For a critique of Judge Holstein’s reasoning, see Hobson, *supra* note 48, at 227-28 (no empirical data suggests that there is widespread pleading abuse in Missouri, that juries award excessive punitive damages, or are inclined to redistribute wealth).

86. MO. REV. STAT. §§ 510.263, 537.675 (1994).

87. MO. REV. STAT. §§ 510.263, 537.675 (1994).

88. *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

#### IV. INSTANT DECISION

##### *A. Admissibility of Alcohol Consumption by a Party*

The court began its analysis with the issue of whether the trial court erred in excluding evidence of alcohol consumption by non-party witnesses.<sup>89</sup> The court stated the general rule that evidence of alcohol consumption is relevant and material to a witness' ability to perceive the event,<sup>90</sup> and that such evidence may be admitted by cross-examination or independent testimony.<sup>91</sup> The court also stated that "[a]ny possible impairment of a witness's ability to recall is relevant to her credibility."<sup>92</sup> Therefore, because Suzuki's offer of proof included evidence of alcohol consumption by several non-party witnesses before the accident, the court held that the trial court erred in excluding such evidence.<sup>93</sup>

Next, the court discussed whether the trial court erred in excluding evidence of the parties' alcohol consumption.<sup>94</sup> The court stated that previously, in negligence actions, the courts admitted evidence that a driver had consumed alcohol prior to the accident only if coupled with evidence of "erratic" driving or some other evidence that the physical condition of the driver was impaired at the time of the accident.<sup>95</sup> The court reasoned that the apparent rationale was that evidence of drinking may improperly prejudice the jury.<sup>96</sup>

The court gave two reasons for abandoning the *Doisy* standard: (1) because it was no longer needed under Missouri's comparative fault system, and (2) because trial courts inconsistently and unpredictably applied the standard.<sup>97</sup> The court explained that while *Doisy's* logic made sense under a contributory negligence system,<sup>98</sup> it did not make sense under Missouri's current comparative

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89. *Id.* at 106.

90. *Id.* (citing *Johnston v. Conger*, 854 S.W.2d 480, 483 (Mo. Ct. App. 1993)).

91. *Id.* (citing *State v. Caston*, 509 S.W.2d 39, 41 (Mo. 1974)).

92. *Id.* (citing *Johnston*, 854 S.W.2d at 484; *Sanders v. Armour & Co.*, 292 S.W. 443, 446-47 (Mo. Ct. App. 1927)).

93. *Rodriguez*, 936 S.W.2d at 106.

94. *Id.*

95. *Id.* (citing *Doisy v. Edwards*, 398 S.W.2d 846, 849-50 (Mo. 1966), *overruled* by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996)). *See also* *McHaffie v. Bunch*, 891 S.W.2d 822, 831 (Mo. 1995); *Boehm v. St. Louis Pub. Serv. Co.*, 368 S.W.2d 361, 372 (Mo. 1963), *overruled* by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Cheatham v. Chartrau*, 176 S.W.2d 865, 868 (Mo. Ct. App. 1944). For examples of "erratic" driving see *supra* notes 43-44.

96. *Rodriguez*, 936 S.W.2d at 107 (citing *Strycharz v. Barlow*, 904 S.W.2d 419, 425 (Mo. Ct. App. 1995)).

97. *Id.*

98. *Id.* Under a contributory negligence system, liability is "all or nothing." *Id.* (citing *Gustafson v. Benda*, 661 S.W.2d 11, 28 (Mo. 1983) (Billings, J., concurring)). Any finding of contributory negligence barred recovery completely. *Id.* (citing *Walsh v.*

fault system.<sup>99</sup> Comparative fault is based on a fairness principle, and is more “equitable and just,” allowing a jury to decide the issue of relative fault among the parties and assess appropriate percentages for liability.<sup>100</sup> The court reasoned that because determining relative fault is factual in nature, a jury should be as informed as possible to make such a determination fairly.<sup>101</sup> Thus, the court concluded that “[a] comparative fault system can better accommodate evidence of alcohol consumption than a contributory negligence system.”<sup>102</sup>

The court also found that the trial courts applied the *Doisy* doctrine inconsistently, rendering the standard unpredictable.<sup>103</sup> The court noted that the inconsistencies emerged primarily in two areas.<sup>104</sup> One area of inconsistency arose when trial courts determined what constituted “erratic” driving.<sup>105</sup> The court found that trial courts were not consistent regarding whether evidence of blood alcohol content above the legal level was admissible on the issue of whether the driving was erratic.<sup>106</sup> The court pointed out that the *Doisy* decision

Southern Motors Co., 445 S.W.2d 342, 348 (Mo. 1969)). Therefore, an improper focus on evidence of alcohol consumption could unfairly bar plaintiff recovery, or even penalize blameless defendants. *Id.*

99. *Rodriguez*, 936 S.W.2d at 107. See *Gustafson*, 661 S.W.2d at 16.

100. *Rodriguez*, 936 S.W.2d at 107 (citing *Gustafson*, 661 S.W.2d at 28).

101. *Id.* See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 470 (5th ed. 1984).

102. *Rodriguez*, 936 S.W.2d at 107.

103. *Id.* See *supra* notes 43-45.

104. *Rodriguez*, 936 S.W.2d at 107.

105. *Id.* The court cited *Strycharz v. Barlow*, 904 S.W.2d 419, 424 (Mo. Ct. App. 1995) (failure to swerve or see the plaintiff who was visible for 900 feet), and *Broderson v. Farthing*, 762 S.W.2d 548, 550-51 (Mo. Ct. App. 1989) (pulling into the path of another vehicle), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996), as examples of trial courts finding driving *not* “erratic,” thus excluding the evidence of alcohol consumption.

In comparison, the court cited *Boehm v. St. Louis Public Service Co.*, 368 S.W.2d 361, 371 (Mo. 1963) (driving a motor scooter through a stop sign at 20 m.p.h. without stopping and with no headlight burning), *Hansen v. James*, 847 S.W.2d 476, 482 (Mo. Ct. App. 1992) (inexplicably leaving the road, striking a utility pole, and going down an embankment), *Bohn v. James*, 573 S.W.2d 448, 449 (Mo. Ct. App. 1978) (speeding and failure to keep a proper lookout), *Hager v. McGlynn*, 518 S.W.2d 173, 178 (Mo. Ct. App. 1974) (running a red light and not applying brakes), *overruled on other grounds by State ex rel. Sims v. Sanders*, 886 S.W.2d 718, 721 (Mo. Ct. App. 1994), and *Cheatham v. Chartrau*, 176 S.W.2d 865, 868 (Mo. Ct. App. 1944) (driving in a zig-zagging and wobbling manner), as examples of trial courts finding driving “erratic,” and thus admitting the evidence of alcohol consumption.

106. *Rodriguez*, 936 S.W.2d at 107. See *Diener v. Mid-American Coaches, Inc.*, 378 S.W.2d 509, 512 (Mo. 1964) (evidence of blood alcohol content above the legal limit was admissible because crossing the center line was erratic driving), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Lauderdale v. Siem*, 725 S.W.2d 897, 900 (Mo. Ct. App. 1987) (evidence of blood alcohol content above the legal

itself contributed to the confusion of the lower courts' determinations of erratic driving, because it held that crossing the center line and continuing on the wrong side of the road for one-hundred to three-hundred feet, until finally colliding with the plaintiff's car on the opposite shoulder, was not erratic driving.<sup>107</sup>

The second area of inconsistency arose with the trial courts' application of *Doisy's* "other circumstances" exception to the erratic driving requirement for admissibility.<sup>108</sup> In fact, the court contended that the only consistency is that "almost every trial court determination on admission or exclusion has been affirmed on appeal, despite the wide factual variances."<sup>109</sup>

For the above reasons, the court declared that "alcohol consumption is admissible, if otherwise relevant and material."<sup>110</sup> The court further explained how this new standard would apply in two situations.<sup>111</sup> If the proponent of the

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limit excluded because "the accident debris located in plaintiff's lane was not evidence of erratic driving"), *overruled by* *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Miller v. Easton*, 733 S.W.2d 31, 34 (Mo. Ct. App. 1987) (evidence of blood alcohol content above the legal limit was admissible "because speeding on narrow, curving rural roads was erratic driving"), *overruled by* *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Bentley v. Crews*, 630 S.W.2d 99, 106-07 (Mo. Ct. App. 1981) (evidence of blood alcohol content above the legal limit was excluded "because crossing the center line was not erratic driving"), *overruled by* *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

107. *Rodriguez*, 936 S.W.2d at 108 (citing *Doisy v. Edwards*, 398 S.W.2d 846, 849-50 (Mo. 1966)).

108. *Id.* The court acknowledged that most courts do not even discuss the exception. *Id.* However, the court mentioned a few cases which have invoked the "other circumstances" exception, which has contributed to the inconsistent application of the *Doisy* doctrine. *Id.* See *Krenski v. Aubuchon*, 841 S.W.2d 721, 727 (Mo. Ct. App. 1992) (evidence of drunkenness was admitted because speeding, swerving into oncoming traffic, and hitting parked car was not erratic driving, but evidence which inferred impaired physical condition), *overruled by* *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Parry v. Staddon*, 769 S.W.2d 811, 813 (Mo. Ct. App. 1989) (evidence of blood alcohol content below the legal limit was admitted because failure to take evasive action was not erratic driving, but was other circumstances inferring impairment), *overruled by* *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996); *Sewell v. MFA Mut. Insur. Co.*, 597 S.W.2d 284, 290 (Mo. Ct. App. 1980) (no erratic driving, but evidence of alcohol consumption was admitted because the driver could not remember the events before the collision, which inferred physical impairment), *overruled by* *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

109. *Rodriguez*, 936 S.W.2d at 108. For examples of trial court determinations not upheld see *Stojkovic v. Weller*, 802 S.W.2d 152, 154 (Mo. 1991), *overruled by* *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996), *Bilzing v. Wentzel*, 726 S.W.2d 787, 790 (Mo. Ct. App. 1987), *overruled by* *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996), and *Jones v. Freese*, 743 S.W.2d 454, 456-57 (Mo. Ct. App. 1987), *overruled by* *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

110. *Rodriguez*, 936 S.W.2d at 108.

111. *Id.*

evidence does not allege intoxication as an independent act of negligence, the alcohol consumption evidence may be presented as proof of other negligent acts alleged.<sup>112</sup> However, the party against whom such evidence is admitted may request a limiting jury instruction emphasizing the limited use of the evidence.<sup>113</sup> In the second situation, where intoxication is alleged as an independent negligent act, there are methods available to reduce undue prejudice.<sup>114</sup>

The court then turned to Suzuki's cross-claim against Dubis for negligence, which alleged intoxication as an independent negligent act.<sup>115</sup> The court concluded that Suzuki met its burden of proof by introducing evidence of alcohol consumption by Dubis,<sup>116</sup> and that Suzuki also offered evidence of alcohol consumption as a legal cause of the damages.<sup>117</sup> Therefore, the court held that the trial court should have granted Suzuki's request for a verdict-directing jury instruction on Dubis' intoxication.<sup>118</sup>

The court also held that the trial court erred in excluding evidence of Rodriguez' alcohol consumption on the issue of her comparative negligence.<sup>119</sup> Suzuki based its comparative negligence claim on Rodriguez' negligence in choosing to enter and remain in a vehicle operated by an intoxicated driver.<sup>120</sup> The court noted that Suzuki met its burden of production for comparative fault with the evidence that Rodriguez' blood alcohol content was above the legal limit and that Rodriguez admitted drinking alcohol with Dubis before the accident.<sup>121</sup> Finally, the court noted that it was up to the jury to determine the

112. *Id.* In this situation, alcohol consumption as an independent act cannot be submitted. *Id.* See *Bowman v. Heffron*, 318 S.W.2d 269, 274 (Mo. 1958).

113. *Rodriguez*, 936 S.W.2d at 108.

114. *Id.* The Court stated that intoxication is a basis for the verdict directing jury instruction, parties can ask potential jurors about their views of alcohol during voir dire, and attorneys at trial can place the alcohol consumption in context for the jury. *Id.* (citing M.A.I. 17.21 [1993 New]).

115. *Id.* at 109.

116. *Id.* See *infra* note 117, listing the specific evidence Suzuki offered of alcohol consumption by Dubis.

117. *Rodriguez*, 936 S.W.2d at 109. Specifically, Suzuki's expert noted that: (1) there was a lack of steering prior to colliding with the dirt wall; (2) the trooper found no evidence of steering prior to hitting the dirt wall; (3) Dubis admitted driving for nearly one-hundred feet off the side of the road without trying to stop or slow down prior to hitting the dirt wall; (4) Dubis admitted not trying to turn back onto the road until she hit the dirt wall; (5) an eyewitness stated Dubis had left the road once prior to the time when she hit the wall; (6) there was no impediment or traffic on the road which may have caused Dubis to swerve to avoid collision; and (7) a medical expert testified that the physical evidence was consistent with an impaired driver. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* See *McHaffie v. Bunch*, 891 S.W.2d 822, 832 (Mo. 1995) (citing *Miller v. Easton*, 733 S.W.2d 31, 34 (Mo. Ct. App. 1987)).

121. *Rodriguez*, 936 S.W.2d at 109.

weight of the evidence of alcohol consumption by Rodriguez with respect to her decision to travel with an intoxicated driver. However, the court added that Rodriguez may request a limiting instruction since her intoxication was not alleged as an independent act of negligence.<sup>122</sup>

### *B. Standard of Proof for Punitive Damages*

The court then turned its attention to the burden of proof required for punitive damages, since the issue was likely to recur on retrial.<sup>123</sup> The court began by discussing the current standard in Missouri for punitive damages, the preponderance of the evidence standard.<sup>124</sup> The court noted that this standard is the minimum standard in civil cases and is all that has been required for an award of punitive damages in Missouri thus far.<sup>125</sup> The court acknowledged that “with little discussion and citing no precedent” it had specifically rejected increasing the standard of proof for punitive damages in *Menaugh v. Resler Optometry, Inc.*<sup>126</sup>

The court turned to the functions of the standard of proof and of punitive damages.<sup>127</sup> The standard of proof’s function is “to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”<sup>128</sup> The court explained that the clear and convincing evidence standard is already used in several types of civil cases in Missouri, specifically fraud or quasi-criminal wrongdoing cases.<sup>129</sup> The court stated that because punitive damages are imposed to punish and deter, they are similar to those cases which use the clear and convincing evidence standard of proof: “the remedy is so extraordinary and harsh that it should be applied only sparingly.”<sup>130</sup> The court also pointed out that a growing majority of states already uses a clear and convincing evidence standard of proof for punitive damage awards.<sup>131</sup>

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 110. See *Santosky v. Kramer*, 455 U.S. 745, 755 (1982); *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681, 685 (Mo. 1992).

126. *Rodriguez*, 936 S.W.2d at 110 (citing *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. 1990), *overruled by Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996)).

127. *Id.*

128. *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

129. *Id.* (citing *Addington*, 441 U.S. at 423; *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 377 (Mo. 1993)).

130. *Id.* (citing *Keene*, 855 S.W.2d at 378).

131. *Id.* The court summarized that twenty-four states have adopted the clear and convincing standard by statute, six states and the District of Columbia have adopted the standard by judicial decision, one state does not allow punitive damages at all, and two others do not allow punitive damages in most civil cases. See *supra* notes 65-71 and



The court specifically overruled the portion of *Menaugh*<sup>132</sup> that dealt with punitive damages, and increased the standard of proof for all common law punitive damage claims to a clear and convincing standard.<sup>133</sup> It found that this standard will apply prospectively, and would include the case at bar on retrial.<sup>134</sup> The court reversed the trial court's judgment and remanded the case for a new trial.<sup>135</sup>

## V. COMMENT

The Missouri Supreme Court did the people of Missouri a favor by overruling the *Doisy* standard. The court persuasively showed that the *Doisy* standard was inconsistently applied.<sup>136</sup> This inconsistent application prevented civil litigants from predicting whether evidence of alcohol consumption by a party would be admitted. In fact, the one thing that litigants could reasonably predict was that the trial court's decision on admissibility would most likely be affirmed.<sup>137</sup> By overruling this ambiguous standard and replacing it with a clearer rule, the court ensured that litigants can now better plan their strategies around whether this potentially damaging evidence will likely be admitted.

The new standard articulated by the court in *Rodriguez* admits evidence of alcohol consumption by a party, so long as it is material and relevant.<sup>138</sup> The court opted for this clearer rule on the premise that a limiting jury instruction will correct any unfair prejudice to the party.<sup>139</sup> The court obviously has faith in the effectiveness of limiting jury instructions in preventing juries from using this evidence improperly. Perhaps a standard where the trial judge is asked to balance the benefits of such evidence against the potential prejudice to the party would have been a safer approach. However, the benefit of this new standard is its predictability. Even though evidence of alcohol consumption may prejudice a party, at least litigants now can plan their strategies accordingly.

accompanying text.

132. *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71, 75 (Mo. 1990), overruled by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo. 1996).

133. *Rodriguez*, 936 S.W.2d at 111.

134. *Id.* The new standard applies to all cases in which trial begins after February 1, 1997, and all pending cases in which proper objection has been preserved. *Id.* Judge White disagreed with the majority's decision to apply the new rules retroactively. *Id.* at 112-13 (White, J., dissenting). Judge White pointed out that the majority stated that the change in the common law standard for punitive damages "relate[d] to requirements at trial, which [were] procedural and appl[ied] prospectively only," but then went on to apply the new rules retroactively anyway. *Id.* at 113.

135. *Id.* at 111.

136. See *supra* notes 103-09 and accompanying text.

137. See *supra* note 46 and accompanying text.

138. See *supra* note 110 and accompanying text.

139. See *supra* note 113 and accompanying text.

The more suspect holding of *Rodriguez* is the new higher standard for punitive damages. In five short paragraphs, the court overruled longstanding precedent and increased the standard of proof for punitive damages to require clear and convincing evidence.<sup>140</sup> The court based its decision on the “extraordinary [and] harsh” nature of punitive damages and on the “growing majority of states” that now requires the higher standard.<sup>141</sup> While the court clearly had the authority to increase this standard of proof, it seems unusual that the court would overrule such precedent without a more detailed analysis.

The court’s opinion already has been criticized for failing to defer to the state legislature on this issue.<sup>142</sup> The state legislatures, not the courts, were responsible for adopting a clear and convincing evidence standard for punitive damages in the majority of states that now require this higher standard.<sup>143</sup> The legislature might have been in a better position to evaluate the empirical data and hear from interested parties on this complex issue.<sup>144</sup> If the court considered and analyzed such competing interests, it did so behind closed doors; there is no mention of such analysis in its opinion.<sup>145</sup>

The opinion also can be criticized for failing to articulate the reasons for the court’s belief that a higher standard of proof was needed in Missouri, aside from its brief reference to the “extraordinary [and] harsh” nature of punitive damages. Had the “lower burden of proof resulted in excessive awards in the past?”<sup>146</sup> The fact that many states have increased the standard of proof required for punitive damages does not itself explain why Missouri needs such an increased standard. The Missouri legislature passed statutes relating to punitive damages in 1987, but did not increase the standard of proof.<sup>147</sup> In addition, the empirical data available does not support the contention that there is a punitive damages crisis in Missouri.<sup>148</sup>

There is widespread endorsement of such a higher standard nationwide.<sup>149</sup> In fact, the United States Supreme Court found “[t]here [was] much to be said in favor of . . . a standard of ‘clear and convincing evidence’” even though the

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140. See *Rodriguez*, 936 S.W.2d at 109-11.

141. See *supra* notes 130-31 and accompanying text.

142. *Weak Decision from Missouri Supreme Court*, ST. LOUIS POST-DISPATCH, Dec. 31, 1996, at B10.

143. See *supra* notes 65, 69 and accompanying text.

144. See Hobson, *supra* note 48, at 227-28 (discussing the complexity of the empirical data available).

145. *Rodriguez*, 936 S.W.2d at 109-11.

146. *Weak Decision from Missouri Supreme Court*, ST. LOUIS POST-DISPATCH, Dec. 31, 1996, at B10.

147. MO. REV. STAT. §§ 510.263, 537.675 (1994). See also *supra* notes 86-87 and accompanying text.

148. See Hobson, *supra* note 48, at 227-28 (discussing the Institute of Civil Justice Rand study and an American Bar Association study).

149. See *supra* notes 65-69 and accompanying text.

Due Process Clause did not require such a higher standard of proof.<sup>150</sup> In response to those who were surprised by the court's decision, three members of the court opined in an earlier case that the court should raise the standard of proof for punitive damages.<sup>151</sup> They expressly invited a party to raise the issue on appeal.<sup>152</sup> Therefore, the major criticism of *Rodriguez* is that the court raised the standard of proof without engaging in much analysis.

## VI. CONCLUSION

The Missouri Supreme Court has made civil litigation more predictable in its articulation of a clearer standard for admissibility of evidence of alcohol consumption by a party. However, it would have been helpful if the court had more completely explained its analysis in concluding that a higher standard of proof for punitive damages was needed in Missouri.

HEATHER L. REINSCH

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150. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

151. *See supra* notes 80-85 and accompanying text.

152. *See supra* notes 80-85 and accompanying text.