

## Tragic Accident Does Not Always Equal Recovery

By **Esteban F. Scornik**

The case of *Archbishop Coleman F. Carroll High School, Inc. v. Maynoldi*, 30 So.3d 533 (Fla. 3d DCA 2010), is an example of an appellate court making a determination that undeniably tragic events do not always lead to a recoverable civil action. The 3rd DCA reversed

a trial court judgment in which the jury initially awarded damages in excess of \$55 million.

The events were as follows: Students at a parochial high school were planning an end-of-year “pool party” to take place at a private residence the afternoon of the last day of school. The school administrators, including the principal, be-

came aware that this party was being organized, and even conducted a parody skit over the intercom in which he warned the students that he may make a stop at the party.

Indeed, it turned out that the principal did arrive at the party, confirmed that a parent was at the

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## Social Networking and Discoverability

By **Kathryn A. Johnson**

Facebook and MySpace are social networking sites where people can share information about their personal lives, including posting photographs and sharing information about what they are doing or thinking. Facebook’s policy even states “it helps you share information with your friends and people around you,” and “Facebook is about sharing information with others.” MySpace describes itself as a “social networking service that allows members to create unique personal profiles online in order to find and communicate with old and new friends,” and as an “online community.”

As technology has evolved so have the principles of discovery. As the district court judge noted in *Equal Employment Opportunity Commission v. Simply Storage Management, LLC*, --- F.R.D. ---, 2010 WL 3446105 (S.D.Ind. 2010), 1110 Fair Empl.Prac.Cas.

(BNA) 49, “discovery of [social networking sites] requires the application of basic discovery principles in a novel context.”

Courts have held social media discoverable, but they have not given defendants carte blanche to view everything on a person’s website. When a plaintiff’s mental state is at issue in the case, such as a claim for emotional distress, the courts seem to allow more latitude since it can be argued that almost anything posted on a social media site, such as Facebook and MySpace, reveals something about one’s emotional state.

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## Damages For Future Medical Expenses Must Be Supported By Competent Substantial Evidence

By **Cindy A. Townsend**

The Third District Court of Appeal recently held in *Montesinos v. Zapata*, 35 Fla. L. Weekly D1736 (August 4, 2010), that an award of future economic damages is appropriate “when such damages are established with reasonable certainty.” Id. (citing *Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89, 91 (Fla. 1995)).

On appeal, the appellants argued that the trial court abused its discretion in denying their motion for new trial and motion for remittitur where the evidence presented at trial was insufficient to permit the jury to award future medical expenses. The Third DCA agreed and cited to the Supreme Court’s holding in *Loftin v. Wilson*, 67 So. 2d 185, 188 (Fla. 1953), which states that “[i]n every case, plaintiff must afford a basis for a reasonable estimate of the amount of his loss and only medical expenses which are reasonably certain to be incurred in the future are recoverable.”

While permanent injury is not a prerequisite to such an award, “it is a significant factor in establishing the reasonable certainty of the future damages.” Id. Thus, it is a plaintiff’s burden to establish that future medical expenses will more probably than not be incurred. *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 552, 556 (Fla. 3d DCA 2000). “That burden will only be met with competent substantial evidence.” Id.

In the instant case, the court found that the plaintiff had failed to meet his burden and that while there was evidence in the record from which a jury could conclude that Zapata suffered a permanent injury, the \$93,000.00 awarded to Zapata for future medical expenses was not supported by competent substantial evidence. As such, the court reversed for a new trial on the issue of future medical expenses. Alternatively, it ruled that the trial court could enter order a remittitur as to the amount of future medical expenses.

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For example in *Romano v. Steelcase, Inc.*, 907 N.Y.S. 2d 650, 2010 N.Y. Slip Op. 20388, a New York trial court found that a personal injury plaintiff’s Facebook and MySpace pages were relevant to her claim that “she can no longer participate in certain activities or that [her] injuries have affected her enjoyment of life.” Despite her claim that she was largely confined to her house and bed, her profile pictures showed her “smiling happily outside the confines of her home,” in addition to having

an active lifestyle and traveling to Florida and Pennsylvania during the time period she claimed that her injuries prohibited such activity. The court ordered the plaintiff to execute an authorization form for both Facebook and MySpace, specifying that the production include “records previously deleted or archived,” thus eliminating the possibility that the plaintiff could sanitize her pages prior to production. Since the plaintiff placed her physical condition in controversy, the material could not be shielded from disclosure as it was necessary

to the defense of the action.

By posting status updates and photographs on social media sites, plaintiffs are inadvertently conducting surveillance on themselves by recording on the Internet the true nature and extent of their conditions and activities. This type of information can be used to impeach a plaintiff as to the extent of his or her injuries and damages, and may be useful in attacking a plaintiff’s credibility.

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house and that everything was okay, and left. About 30-45 minutes later, Gabriel Maynoldi and a friend left the party. Their vehicle struck a tree, killing the friend and rendering Gabriel a quadriplegic. At the time, Gabriel's blood alcohol level was .09%. His parents brought the lawsuit against the school and others.

The appellate court considered the following issues: (1) Did the school have legal responsibility for the party as a "school sponsored or school related" event? (2) Did the school have a legal responsibility under the Undertaker's Doctrine? (3) Did section 768.36 apply? The court answered the first two questions in the negative and the last in the affirmative.

The Court rather quickly dismissed the issue of whether a private party was school sponsored or school related, noting that there were simply no facts supporting the notion that the school sponsored or even condoned the party. The party was not related to any of the school's academic or extracurricular programs, and the sponsors of the party did not request the school's consent.

The Undertaker's Doctrine was detailed in the recent Florida Supreme Court case of *Wallace v. Dean*, 3 So.3d 1035 (Fla. 2009). For this doctrine to apply, one must undertake to render services for the protection of another, must fail to use reasonable care to render such services, and such failure must have increased

the risk of harm or caused harm to the person whose services were rendered. In the instant case, the plaintiffs argued that the principal's decision to stop by the party invoked the duty to investigate further to determine whether alcohol was being consumed, to call the police, etc. The 3rd DCA stated that the principal's short visit did not invoke any such duty.

Finally, the trial court ruled that the alcohol defense of Florida Statute section 768.36 did not apply because the minor student was not the actual plaintiff. This statute states that a plaintiff may not recover in a civil action if his blood alcohol level was .08% or higher; and as a result of such influence he was more than 50% at fault for the accident.

The Court cited *Griffis v. Wheeler*, 18 So.3d 2 (Fla. 1st DCA 2009), in which the 1st DCA ruled that the statute can apply to wrongful death cases. Similarly, in the instant case the 3rd DCA held that the statute should apply as the interpretation of this statute "cannot be stretched to an absurd result."

The Court concluded by noting that despite the sympathy felt for the plaintiffs, "our legal system requires more than heartfelt sympathy and demonstrable damages as predicates for the compensation of injured persons."

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**Friday, November 5, 2010  
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Ryan C. W. Hall, M.D.

Lawrence Halperin, M.D.

Farhad Booeshaghi, Ph.D., P.E.

## *Firm Successes*

Joseph Tessitore and Kathryn Johnson obtained a summary judgment in *Remy v. J&B Commercial Floors, Inc.* In this case, Plaintiff alleged that the general contractor was liable for the alleged negligent acts of the subcontractor. However, the judge ruled that the general contractor owed no duty to the Plaintiff where the general contractor did not control the time or manner of the subcontractor's work, did not supervise the work, did not instruct on how to perform the work, did not inspect the work, did not own the premises, and did not have any employees on the property during the work performed by the subcontractor.

Additionally, Joseph Tessitore and Kathryn Johnson obtained a summary judgment in *Crowe v. Venturino and Enterprise Leasing Company, et al.* In this case, Brevard County was brought in as a Third-Party Defendant by Venturino and Enterprise Leasing Company for a claim of contribution. This is a property maintenance cause of action arising out of a vehicular ac-

cident. Venturino struck the Plaintiff while he was exiting a median on SR 520. Venturino alleged that pursuant to a contract with FDOT, the County breached its duty to maintain the height and condition of the grass in the median, thereby creating a dangerous condition that caused the above-referenced accident. We moved for summary judgment on the contribution claim, which was granted. Venturino and Enterprise then moved to amend their Third-Party Complaint to add a claim for indemnification. We moved for summary judgment on the indemnification claim and served Venturino and Enterprise with a Motion for Sanctions pursuant to §57.105, Florida Statutes. Before a hearing on the second summary judgment motion, Venturino and Enterprise dismissed the indemnification claim against the County to avoid being sanctioned under §57.105, Florida Statutes. Since the statute of limitations has run in this action, it is a dismissal with prejudice.

Lastly, Joseph Tessitore and

Kathryn Johnson have obtained a summary judgment in *Mitchell and Jeannette Saavedra v. Rizzetta & Company, Inc.*

This is a premises liability case where an eleven year old girl was digging a tunnel with friends when the tunnel collapsed burying and killing her.

This incident occurred on property owned by a CDD where Rizzetta & Company was the CDD manager. Plaintiffs alleged that Rizzetta & Company's failure to maintain common areas, correct dangerous conditions, failure to supervise or inspect work done in the common area, negligent hiring and retention of employees, and failure to exercise reasonable care resulted in the wrongful death.

However, the Court granted summary judgment and found that Rizzetta & Company had no duty because Rizzetta & Company had no ownership or authority to control the property, and was merely an administrative arm of the CDD, without any direct responsibility for the property.

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AUGUST/SEPTEMBER 2010

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