

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG
Magistrate Judge: Magistrate Judge Chris M. McAliley

HOWARD ADELMAN and JUDITH SCLAWY-
ADELMAN, as Co-Personal Representative of the
Estate of MICHAEL SCLAWY-ADELMAN,

Plaintiffs,

v.

BOY SCOUTS OF AMERICA, THE SOUTH
FLORIDA COUNCIL, INC.; BOY SCOUTS OF
AMERICA; PLANTATION UNITED
METHODIST CHURCH; HOWARD K.
CROMPTON, individually; and ANDREW L.
SCHMIDT, individually,

Defendants.

**DEFENDANTS', HOWARD K. CROMPTON AND ANDREW L. SCHMIDT,
MOTION FOR LEAVE TO AMEND AFFIRMATIVE DEFENSES TO
PLAINTIFFS' AMENDED COMPLAINT AND INCORPORATED
MEMORANDUM OF LAW**

Defendants, HOWARD K. CROMPTON and ANDREW L. SCHMIDT, by and through their undersigned counsel, in accordance with the Federal Rules of Civil Procedure and Florida law, pursuant to Local Rules 7.1 and 15.1 of the United States District Court for the Southern District of Florida, Rule 15(a)(2) of the Federal Rules of Civil Procedure and the Order Establishing Pretrial Dates and Procedures, hereby moves for leave to amend its affirmative defenses to the Plaintiffs' Amended Complaint, and in support thereof states as follows:

1. This is a wrongful death/negligence action stemming from an incident that occurred on May 9, 2009, when Michael Sclawy-Adelman passed away while taking part in a hike through The Florida Trail in the Big Cypress National Park of the Florida Everglades.

2. Plaintiffs filed their Amended Complaint on August 3, 2010. [DE 20].

3. HOWARD K. CROMPTON and ANDREW L. SCHMIDT filed their Answer and Affirmative Defenses to Plaintiffs' Amended Complaint on August 18, 2010. [DE 30].

4. HOWARD K. CROMPTON and ANDREW L. SCHMIDT pleaded as their second affirmative defense the following:

Plaintiffs' damages herein were partially or totally caused by non-parties or persons over whom these Defendants had no dominion or control and, therefore, Defendants seek entitlement to the defenses and privileges set forth in Section 768.81(3) Florida Statutes, with respect to apportionment of fault principles. Any judgment against these Defendants should be reduced by the apportionment of fault allocated on the verdict form at the time of trial to designated *Fabre* defendants and/or co-defendants in this action.

5. HOWARD K. CROMPTON and ANDREW L. SCHMIDT now seek leave to amend their affirmative defenses to specifically name a *Fabre* defendant, whose fault is alleged to have caused some or all of Plaintiffs' alleged damages, to wit: the U.S. Department of the Interior National Park Service.

6. Plaintiffs allege that using the Park trail on May 9, 2009 was one of the ways Defendants were negligent. HOWARD K. CROMPTON and ANDREW L. SCHMIDT seek to revise their Second Affirmative Defense, as follows:

Plaintiffs' damages herein were partially or totally caused by non-parties or persons over whom these Defendants had no dominion or control and, therefore, Defendants seek entitlement to the defenses and privileges set forth in Section 768.81(3) Florida Statutes, with respect to apportionment of fault principles. Any judgment against these Defendants should be reduced by the apportionment of fault allocated on the verdict form at the time of trial to designated *Fabre* defendants and/or co-defendants in this action. Specifically, Defendants affirmatively aver that any alleged damages were the result of negligence on the part of the U.S. Department of the Interior National Park Service which was not under the care, custody or control of Defendants; and therefore, the Plaintiffs are unable to recover in whole or in part as against this Defendant. See Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). Pursuant to Nash v. Wells Fargo Guard Service, Inc., 678 So.2d 1262 (Fla. 1996), this Defendant may seek amendment to identify other such non-parties or persons as they become known and with due notice to Plaintiff.

7. The U.S. Department of the Interior National Park Service controlled access to the trail on the day of the hike. The Amended Complaint alleges that temperatures on the trail that day were around 100 degrees Fahrenheit. See Amended Complaint at ¶¶ 6-10. The U.S. Department of the Interior National Park Service processed hiking permits for the subject trail and may be liable in whole or in part for, *inter alia*, permitting Michael Adelman to hike on May 9, 2009, despite the alleged high temperatures, which, upon information and belief, it monitored and recorded.

8. These Defendants will be severely prejudiced if they are not given leave of court to name the U.S. Department of the Interior National Park Service as a *Fabre* defendant.

9. This request is made in good faith and does not prejudice the Plaintiffs.

LR 7.1 CERTIFICATION

This Defendant has conferred in writing with Plaintiff's counsel in an attempt to resolve this issue without court involvement. A letter dated January 10, 2011 was sent to Plaintiffs' counsel requesting written notification of any opposition to the relief requested in this motion by January 14, 2011. To date, the undersigned counsel has not received any response from Plaintiffs' counsel.

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Federal Rule of Civil Procedure 15 states in pertinent part: "[A] party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." F.R.C.P. 15(a)(2) (emphasis added).

The decision whether to grant leave to amend is committed to the sound discretion of the trial court. Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618 (11th Cir.1983). However, " '[d]iscretion' may be a misleading term, for rule 15(a) severely restricts the judge's freedom, directing that leave to amend 'shall be freely given when justice so requires.' " Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594, 597 (5th Cir.1981). This policy of Rule 15(a) in liberally permitting amendments to facilitate determination of claims on the merits circumscribes the exercise of the trial court's discretion; thus, "[u]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." Id. at 598; Espey v. Wainwright, 734 F.2d 748, 759 (11th Cir. 1994).

WHEREFORE, Defendants, HOWARD K. CROMPTON and ANDREW L. SCHMIDT, respectfully request that this Honorable Court GRANT these Defendants

leave to file an Answer, First Amended Affirmative Defenses and Demand for Jury Trial to Plaintiffs' Amended Complaint, and for such other relief as this Court deems necessary and just.

I HEREBY CERTIFY that on January 20, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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