

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG

HOWARD ADELMAN AND JUDITH SCLAWY  
as Co-Personal Representatives 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.

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**PLAINTIFFS' APPEAL OF MAGISTRATE JUDGE'S ORDER FOLLOWING  
FEBRUARY 11, 2011 DISCOVERY CONFERENCE [D.E. 153]**

Plaintiffs, HOWARD ADELMAN and JUDITH SCLAWY, pursuant to Federal Rule of Civil Procedure 72(a) and Local Magistrate Judge's Rule 4(a), appeal in part the Order Following February 11, 2011 Discovery Conference dated February 17, 2011 (D.E.153) and state:

1. Following a discovery conference on February 11, 2011, the Magistrate Judge issued an Order dated February 17, 2011. [D.E. 153]. A copy of the Order is attached as **Exhibit 1**.
2. The Plaintiffs appeal the Magistrate Judge's denial of the Plaintiffs' Motion to Compel an answer to their Interrogatory Number 10 directed to the Defendant Boy Scouts of America ("BSA").
3. The February 17, 2011, Order dealt with the Plaintiffs' Motions to Compel Discovery

from the Boy Scouts of America and South Florida Council regarding their objections to interrogatories and requests for production, and Motions for Protective Orders filed by the same Defendants regarding depositions of corporate representatives which had been scheduled by the Plaintiffs. Although the Plaintiffs believe that certain of the rulings with respect to the Defendant's Motions for Protective Order were unduly restrictive under the applicable law, these matters were largely worked out during the course of the corporate representatives' depositions taken in Dallas, Texas. Accordingly, the Plaintiffs do not appeal *those* restrictive rulings here.<sup>1</sup>

4. In an effort to resolve this issue prior to filing the Motion to Compel, the Plaintiffs agreed to significantly narrow the scope of Interrogatory Number 10.<sup>2</sup> The Interrogatory as subsequently limited provided:

10. Please state whether Defendant Boy Scouts of America has ever been a party, either Plaintiff or Defendant, in a lawsuit other than the present matter, within the last five years relating to allegations of negligence resulting in injuries requiring medical care from third parties or death to a Boy Scout that stem from heat related illnesses from any outdoor BSA activity that involves physical exertion and/or elements of nature.

5. As further reflected by the correspondence attached as Exhibit "2" from the Defendant Boy Scouts of America's counsel, the Defendant was willing to answer Plaintiffs' Interrogatory Number 9 as "to litigation initiated in the past five years against Boy Scouts of America/South Florida Council that stem from serious heat related illnesses and heat related deaths

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<sup>1</sup> The Plaintiffs raise this issue solely for the purposes of asserting that they did not acquiesce as to the imposition of these limitations on future discovery, if this in fact becomes an issue as the litigation proceeds.

<sup>2</sup> See correspondence attached as **Exhibit 2** from Kevin Franz, counsel for the Defendant Boy Scouts of America, reiterating the parties' respective positions following various conferences and correspondence on outstanding discovery matters, specifically page 4.

from a Boy Scouts of America/South Florida Council hiking activity.”<sup>3</sup> Indeed, the Magistrate ruled that the Defendant must provide that information in response to Interrogatory Number 9.

6. In contrast, the Magistrate denied the Plaintiffs’ Motion to Compel an answer to Interrogatory Number 10 (as modified above), which is essentially the same interrogatory as number 9, but differs only in that it seeks information related to heat related deaths or illnesses requiring third party medical care arising from outdoor activities. There is no legal justification for the Magistrate Judge to restrict the Plaintiffs’ inquiry solely to *hiking* activities.

7. The Magistrate’s refusal to compel the Boy Scouts of America to answer Interrogatory Number 10 with respect to “outdoor activities” (not just hiking), is inconsistent with her recognition and ruling that heat related ailments outside the hiking purview are relevant to the Plaintiffs’ claims.

8. The Magistrate ordered the Boy Scouts of America to produce, over their objection, a corporate representative who could respond to the Plaintiffs’ inquiries regarding the experience of the BSA during their 2005 Boy Scout Jamboree. As reflected by the report of the Center for Disease Control, attached hereto as **Exhibit 3**, *over 3,486 Scouts were treated for heat related conditions during the 2005 Jamboree*, including at least 1,624<sup>4</sup> persons who “were treated specifically for heat related exhaustion/stroke.”

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<sup>3</sup> However, the Defendant balked at answering the interrogatory with respect to activities that involve physical exertion and/or elements of nature and the Judge sustained that objection.

<sup>4</sup> As reflected by the CDC report and acknowledged by the BSA corporate representative, Richard Courlan, this number is inaccurately low due to the fact that the incidents of heat related ailments was so high on one of the Jamboree days that the CDC reporting facilities were so overwhelmed that they just stopped reporting the incidents.

9. The Magistrate recognized the relevancy of the heat related ailments occurring during the **multiple different Jamboree activities** in the February 17, 2011, Order by directly allowing the Plaintiffs to inquire of the Boy Scouts of America Corporate Representatives:

The facts and circumstances surrounding and related to all incidents in which Scouts died or required third party medical assistance, as a result of exposure to heat while performing **any outdoor Boy Scout activities from the 2005 Jamboree to the present**. As to the 2005 Jamboree, the witnesses shall not be required to testify to the individual injuries or circumstances for each Scout who suffered a heat related injury.”<sup>5</sup> (Emphasis added)

10. The remaining dispute and the issue for this appeal is whether the Plaintiffs are only entitled to the requested information regarding prior lawsuits arising from heat related deaths or illnesses occurring during hikes, as ruled by the Magistrate, or whether they are entitled to the same information occurring during other Boy Scouts of America outdoor activities. If non-hiking activities at the 2005 Jamboree are relevant and discoverable, then the same information regarding all other outdoor activities is discoverable. The record evidence shows why the Plaintiffs are entitled to an answer to Interrogatory Number 10.

11. It is too well settled to require extensive citation or argument that the scope of the discovery extends to:

Any non-privileged matter that is relevant to any party’s claim or defense . . . Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1).

There is no question that the limited information the Plaintiffs seek with respect to “outdoor”

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<sup>5</sup> This last sentence was added due to the overwhelming number of individuals who sustained heat related injuries.

activities is highly relevant to the Plaintiffs claims and is likely to lead to the discovery of admissible evidence.

12. At the recent depositions of Frank Reigelman and Richard Courlan, who were selected by the Defendant Boy Scouts of America to testify as corporate representatives on various issues, the Defendant produced the printout attached hereto as **Exhibit 4** (Exhibit #27 of the depositions). This document is a spreadsheet/chart listing “heat related incidents” arising from Boy Scout *hiking* activities.

13. Significantly, there is no undue burden upon the Defendant to provide the information with respect to “outdoor” activities as compared to providing the same information with respect to hiking activities. In fact, the information is readily obtainable by the Boy Scouts of America without any difficulty or burden.

14. The corporate representative testified that the Boy Scouts of America keep an electronic data base of all reported incidents, regardless of whether they reach the litigation stage or not. **Testimony further revealed that this data base is easily searchable by using key word inquiries, such as “heat related incidents on hikes.” The witnesses also indicated that it would be very easy to simply change the search parameters to identify other types of incidents, such as “heat related incidents from other outdoor activities.”**<sup>6</sup>

15. As reflected in the pleadings in this matter, the Plaintiffs’ only son, Michael, died as a result of heat stroke during the course of a 20 mile Boy Scout sanctioned hike in the Big Cypress National Preserve on a day when temperatures approached and/or exceeded 100 degrees. The Plaintiffs contend, among other things, that the Boy Scouts of America failed to establish proper

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<sup>6</sup> Since these depositions were just taken last week, they have yet to be transcribed.

rules, regulations, guidelines and policies for the planning, preparation and conduct of outdoor Boy Scout activities in which children, such as Michael, were exposed to an unreasonable risk of harm through heat related ailments, and dehydration, and by the failure to require proper hydration, appropriate pace and rest during such activity when conducted in extreme heat conditions.

16. BSA corporate representative, Frank Reigelman, holds the position of “Team Leader Outdoor Programs” in the Boy Scouts of America’s national office which is a supervisory position involving all outdoor programs. Mr. Reigelman acknowledged during his deposition that the risk of injury to scouts from heat exposure leading to heat exhaustion or heat stroke is the same in all Boy Scouts of America outdoor activities involving exposure to the sun.

17. Mr. Reigelman’s admission regarding the same risk of injury due to heat exposure in all outdoor activities is also reflected in the Boy Scouts of America’s official manuals. For example, the BSA *Fieldbook* which was identified by Mr. Reigelman and Mr. Bourlan as setting policies, procedures and guidelines applicable to all outdoor BSA activities provides:

The contents of the *Fieldbook*, based on nearly a century of Boy Scouts of America experience will help you to become a good leader and to care for the environment with hands on stewardship efforts. You will also find information about many trek adventures, from back packing and camping to caving, cross country skiing, kayaking, rafting and mountain travel.

BSA *Fieldbook*, p.viii.

18. The *Fieldbook* sets forth BSA policies and procedures regarding *numerous* different types of outdoor scouting activities as reflected by the index attached hereto as **Exhibit 5**.

19. Another example is the BSA’s *Guide to Safe Scouting for Unit Activities*, about which the BSA’s corporate representatives also testified. The *Guide* is also applicable to all outdoor BSA activities, not just hiking. A copy of the table of contents showing all the different activities

to which this manual applies is attached as **Exhibit 5**.

20. Based upon information available in the media, the Plaintiffs believe that at least 32 scouts and Scout leaders have died in the past five years in various outdoor activities, including deaths from heatstroke, falls, lightening, drowning, electrocution and burns, among other causes. The Boy Scouts zealously try to guard and keep secret information regarding these deaths, and non-death injuries. Complaints regarding those incidents, and those involving injuries, not necessarily deaths, are highly relevant to the Boy Scout Defendants' subsequent implementation of safety policies, procedures and training, or the lack thereof, and thus, are discoverable.

WHEREFORE, the Plaintiffs respectfully request that the Court enter an Order setting aside the portion of the Magistrate Judge's February 17, 2011, Order which denies the Plaintiffs' Motion to compel an answer to Interrogatory Number 10, as modified herein.

Respectfully submitted,

/s/ Robert D. Peltz

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on March 3, 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 or pro se parties 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.

/s/ Robert D. Peltz  
ROBERT D. PELTZ



**SERVICE LIST**

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VS.  
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**UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA**

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