

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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

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' REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO
COMPEL PRODUCTION OF MICHAEL SCLAWY-ADELMAN'S TEXT
MESSAGES**

The Defendants, HOWARD K. CROMPTON and ANDREW L. SCHMIDT, by
and through the undersigned counsel, and in accordance with the applicable Federal
Rules of Civil Procedure and the Southern District of Florida, hereby file this Reply to
Plaintiffs' Response to Motion to Compel Production of Michael Sclawy-Adelman's Text
Messages, as follows:

1. Plaintiffs concede that an *in-camera* inspection needs to be done. The
defense agrees. Plaintiffs suggest that the person who was designated to retrieve the
information off Michael's phone, Mr. Carter Conrad, should do the inspection – but he is
not familiar with the case or the issues in it. Nor is he the proper person to do an *in-*

camera inspection. The defense submits that the inspection should be done by a Magistrate of this Court.

2. The text messages are original evidence for which there is no substitute. Plaintiffs conclude that “there is no showing that any of them have anything whatsoever to do with the Boy Scouts, hiking or any other potential issue in this case.” [DE 182; ¶ 7]. While counsel for Plaintiffs assure this Court that the messages are not relevant, such a determination cannot be made without reading the text messages.

3. The defense has not obtained the text messages and is entitled to conduct discovery. According to Plaintiffs, Mr. Conrad cannot match the text messages with dates. That cannot be the basis for withholding discoverable information. There are many issues, topics and defenses to which the text messages would be relevant.

4. Michael’s state of mind, his physical condition leading up to the hike, whether he wanted to go on the hike, and whether he didn’t want to go on the hike are relevant and material issues in this lawsuit and would be in these messages. Mr. Adelman told the Collier County Sheriffs Office that his wife “pushed Michael, who did not want to go on the hike, into going.” [See Exhibit “A”]. Mrs. Sclawy-Adelman testified at her deposition that Michael wanted to sleep-in the morning of the hike because he did not want to go on the hike. [See Exhibit “B”]. Kris Leon, another Scout on the hike, testified that when Mrs. Sclawy-Adelman pulled up to drop Michael off, he saw Michael and his mother fighting and yelling with each other inside their car. [See Exhibit “C”]. There may be text messages about this dispute and Mrs. Adelman’s insistence on Michael going on the hike. The text messages will be reflective of Michael’s state of mind, his physical

condition leading up to the hike, whether he wanted to go on the hike, and whether he didn't want to go on the hike.

5. Michael's preparation or lack of preparation for the hike is a relevant issue in this lawsuit. Counsel for Plaintiffs questioned Defendants Mr. Crompton and Mr. Schmidt extensively at their depositions about prior hikes for Troop 111, the preparation of other hike by Troop 111, the planning and preparation for other hikes by Troop 111, the planning of other hikes for Troop 111, and any adverse incidents or disputes with Scouts or their parents on other hikes before May 9, 2009. These topics have been raised as issues in this case by Plaintiffs. Mr. Adelman testified that the week leading up to the hike, Michael came home late at night because he was studying for Advanced Placement Tests and was tutoring another student. [See Exhibit "D"]. Mr. Adelman testified that he and his wife each had discussions over several days with Michael earlier in the week before the hike regarding Michael's participation in the hike. [See Exhibit "D"]. Kris Leon testified that Mr. Schmidt taught the Scouts to always hydrate the day prior to a hike. [See Exhibit "C"]. The text messages will be reflective of Michael's preparation or lack of preparation for the hike.

6. The list below contains even more issues, topics and defenses to which the 188 text messages may bear relevance. These Defendants respectfully request that this Court conduct an *in-camera* inspection of the 188 text messages so this Court may determine the relevance of this evidence as relating to the following topics, issues and defenses:

-Whether anyone texted Michael about the 20 mile hike

- Whether Michael texted during the 20 mile hike
- Whether Michael sent a text message asking for help during the hike
- Whether Michael's friends texted him during the hike
- Whether Michael commented about the Florida Trail
- Mrs. Sclawy's and/or Mr. Adelman's insistence on Michael hiking the 20 mile hike
- Mrs. Sclawy's and/or Mr. Adelman's insistence on Michael obtaining Eagle Scout status by participating in the 20 mile hike
- Michael's studying for and schedule of Advanced Placement Tests over the weekend when he died
- Michael's tutoring of other students the week before the hike
- Michael's friends and his plans for the weekend of the hike
- Michael's travels and participation on the Debate Team
- Communications about hiking to Michael's friends and/or family
- Communications about hiking the 20 mile hike to other Scouts and/or the Scout Leaders
- Michael's pursuit of becoming an Eagle Scout
- Troop 111 activities
- The Adult Leaders
- Michael's plans during Spring of 2009

7. The Defendants submit that this is a discovery request and they should be permitted the opportunity to evaluate evidence that is relevant to the potential issues in this case. It is the court that should evaluate the text messages to determine their relationship to the allegations and potential issues in this lawsuit.

8. The Defendants cannot and do not agree to have Mr. Conrad be the Magistrate and review the messages in a substantive manner and make determinations of relevancy. To do so would be improper. An *in-camera* inspection by this Court is proper.

9. Plaintiffs suggest that the telephone numbers listed in Michael's phone book/log can be cross-referenced with the telephone numbers associated with the text messages which were withheld. The Defendants note that Plaintiffs have apparently cross-referenced the telephone numbers associated with the text messages and found that at least some of the messages were sent to or received by friends of Michael. [DE 182; ¶ 7]. If the messages were sent to or received by friends of Michael, and the subject matter of the text messages touch on the issues referenced above, the messages are relevant to issues, topics and defenses in this lawsuit.

10. Plaintiffs state that none of the text messages have a date associated with them but that they date back to 2007 [DE 182; ¶ 3]. Plaintiffs do not produce any documents or information that might currently be in their possession on which they rely for their assertion that even though none of the text messages have a date associated with them, the 188 text messages contained on Michael's phone date back to 2007 at the time that it was purchased. [DE 182; ¶ 4]. It is not clear how all 188 text messages would have been on Michael's cell phone on the date it was purchased and thus there is no basis for such an assertion.

11. It is the understanding of the defense that Michael's phone was not used after May 9, 2009. It was apparently taken into evidence, placed into a sealed evidence bag, and after it was returned to Mr. Adelman's possession, the Plaintiffs did not allow it

to be used again. Therefore the 188 text messages were on Michael's phone on May 9, 2009. All 188 text messages fall within the Court's Order because they constitute data found on Michael's phone on May 9, 2009. [DE 182; ¶ 1].

12. Notwithstanding the defense's position that all of the text messages fall under the purview of this Court's Order on the inspection, at the hearing on the Defendants' motion directed to the inspection of Michael's cell phone, counsel for the Defendants requested that the Court permit the examination and analysis of Michael's cell phone for data covering a longer period of time. At that time, there was no understanding that any text messages would not have dates.

13. This Court limited the inspection to data from the two-day period, but it is the belief and recollection of the undersigned counsel that this Court did not intend to preclude a subsequent request for reconsideration of the time period. The Defendants respectfully submit that there are proper grounds to request such a reconsideration, and that an *in-camera* inspection would allow the Court to determine new parameters for the disclosure of the requested information. Under the circumstances, the defense urges this Court to govern the disclosure of the 188 text messages by using subject-matter parameters to be determined with the mindset that the Federal Rules of Civil Procedure allow for broad discovery and that this evidence is original evidence for which there is no substitute.

CONCLUSION

These Defendants request the Court to direct Mr. Conrad to print the precise content of the text messages and deliver to chambers of this Court for an in-camera inspection.

I HEREBY CERTIFY that on April 4, 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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