UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG/GOODMAN

HOWARD ADELMAN AND JUDITH SCLAWY
as Co-Personal Representatives of the
ESTATE OF MICHAEL SCLAWY-ADELMAN,

Plaintiffs,

v.

BOY SCOUTS OF AMERICA et al.

Defendants.
_____/

MOTION TO COMPEL BETTER RESPONSES TO REQUEST FOR PRODUCTION

The Plaintiffs move for the entry of an order overruling the objections raised by Defendant Boy Scouts of America [hereinafter "BSA"] to the Plaintiffs' Sixth Request for Production specifically items: 6 (f), 22, 24, 26, 28, 33, 35, 37, 41, 42, 43, 44, 45 and 46.[1]

These requests arise from the thousands of cases of heat related injuries sustained by Scouts during the 2005 BSA Jamboree and BSA's subsequent analysis and response to the problem of protecting Scouts from such heat related injuries during BSA activities. A brief background of this case will help provide the context for this discovery.

Background

Seventeen-year-old Michael Adelman died on May 9, 2008, during a 20-mile Merit Badge hike conducted in the Big Cypress Preserve by Scout leaders, Howard Crompton and Andrew Schmidt. The U.S. Park Service Report of the incident shows that temperatures in the Preserve that day reached 100 degrees during the early afternoon. However, the humidity would have made the

[1] Counsel for the parties have had numerous conferences and communications in an effort to resolve BSA's objections to the Plaintiffs' Sixth Request for Production, which was served after the depositions of BSA's corporate representatives. As a result of these discussions, BSA has agreed to provide "better responses" to a number of requests to which it had previously objected, specifically items 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 19, 21, 23, 25, 27 and 40. While the Plaintiff is hopeful that the better responses will resolve any remaining issues with regard to those items, in the event that they do not, the Plaintiff reserves the right to seek additional relief, if necessary.

heat index even higher. See deposition of Detective O'Neil.

As the hike progressed, Michael began showing signs and symptoms of heat exhaustion and then of heat stroke. At approximately the 15-mile point of the hike, after Michael had previously begun to speak incoherently, stumbled and lost his balance, the adult Scout leaders stopped at a clearing for an hour and a half. During that time, Michael became unresponsive and began to make snoring like noises. Schmidt thereafter left with the other two Scouts to get additional water.

Approximately one and a half hours after stopping at the clearing, Michael suddenly stopped breathing. It was not until then that Defendant Crompton first called 911 for emergency assistance and attempted to administer CPR. By the time emergency helicopters arrived, Michael could not be resuscitated and was declared dead. An autopsy was not performed for religious reasons, but the Medical Examiner has testified that the most probable cause of Michael's death was heat stroke. See deposition of Dr. Manfred Borges.

An important event which has been the subject of discovery in this case is the 2005 BSA Jamboree, during which over 3,486 Scouts were reported by the CDC to have sustained heat related injuries. Of these, 1,624 were characterized by the CDC as constituting "heat exhaustion" and/or "heat stroke." The CDC report, which is attached hereto as Exhibit "1," states that many of the BSA policies and procedures in effect during the Jamboree were found to have been seriously deficient and responsible for the mass of heat related injuries.

Subsequent to the 2005 Jamboree, BSA investigated improving its policies and procedures to prevent future outbreaks. The seriousness and thoroughness of this investigation are in dispute in this case. Eventually, however, BSA adopted a heat flag index system for its 2010 Jamboree.

There are 5 categories under the heat flag index system, depending upon the heat index at the time. Each category is represented by a different colored flag, ranging from white to black. As the heat index progresses from one category to the next, activities become more limited and Scouts are instructed to increase their fluid intake. Under black flag conditions, Scouts are instructed to "limit activity [and] increase your fluids to one quart per hour with frequent rest periods, and stay in the shade." See summary of 2010 Jamboree flag system attached as Exhibit "2' hereto.[2]

The temperatures and humidity at the time of Michael's last hike would have constituted black flag conditions under the system adopted for the 2010 Jamboree. As reflected on Exhibit "2," these conditions would have required limited activity and the intake of fluids at the rate of at least 1 quart per hour. Although Schmidt testified that the hike was planned to take at least 9 hours, in

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[2] The BSA essentially copied the heat flag system which had been utilized by the U.S. Marines for many years. See Exhibit "3" hereto.

his pre-hike email to the Scouts, he advised them only to bring a total of 3 to 4 quarts of water. See Exhibit "4." Also see Schmidt deposition, page 137.

BSA corporate representative, Richard Bourlan, testified that the flag system had been under consideration "as early as late 2007." See Bourlan deposition, page 242. Schmidt testified that as of the date of the subject hike on May 9, 2009, the BSA had not provided any information to the troop leaders "concerning the heat index flag system or its equivalent" to guide the local troops in carrying out their hikes and other outdoor activities. In fact, Schmidt testified that the troop leaders had not even been provided with any information regarding the prior heat index flag system that had been purportedly in place for the 2005 Jamboree.[3] **Schmidt further testified that if the BSA had conveyed the contents of the information contained in the 2010 heat flag system to him, he would have used it as a guideline in setting up troop activities that involved camping and hiking, including the subject hike. [Schmidt deposition, pages 247-256].**

Despite the obvious relevancy of the BSA's subsequent study and analysis of the literally thousands of heat related injuries that occurring during the 2005 Jamboree and its belated announcement of these new standards to reduce heat stroke from outdoor activities in 2010, the BSA has objected to providing any information regarding its research and development of heat related standards for the 2010 Jamboree whatsoever[4] on the grounds that "producing documents from 2010-2011 . . . are not likely to lead to the discovery of admissible evidence, are overbroad and are not limited in temporal scope." See objection to request 3 (b), which was repeated as the basis for the objection to each of the requests that form the subject matter of this motion.

Each of the disputed requests seeks information relating to the description of the new heat index system, its operation, and development. For example, Item No. 22 asks for a description of the heat index system, including the documents explaining its operation, the criteria and significance for each flag and the manner of communicating the system to troops prior to the Jamboree. Similarly, Nos. 33 and 35 request copies of documents which describe and/or define the criteria for

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[3] Bourlan testified in his deposition that he was not familiar with the details of the flag system in place for the 2005 Jamboree, since he was not hired until 2007. Although BSA originally objected to producing many documents concerning the 2005 Jamboree, much of the discovery that BSA has recently agreed to produce (see footnote 1) relates to this subject.

[4] The only documentation the Plaintiff has been able to obtain with regard to the heat index system used in 2010 is the brief summary contained in Exhibit "2," which was not produced by the Boy Scouts of America. BSA's corporate representatives were unable to provide any further details, which was the reason for the subsequent Request for Production, which forms the subject matter of this request.

the use of the specific flags, the application of each flag to specific activities and the resulting restrictions and response for each flag.

Item No. 43 requests copies of all reports, studies, articles, analysis and other documents utilized by BSA in making the determination to adopt the heat flag system used in the 2010 Jamboree. Mr. Bourlan testified that these studies and analysis had been going on since at least 2007 when he was first hired by the BSA. **These efforts pre-date the hike on which Michael died and clearly show the information available to BSA prior to this incident.**

Item No. 44 seeks reports, analysis and other documents generated by BSA regarding the heat flag index system and is relevant not only to show the status of BSA's knowledge and notice, but what information was communicated to the troops at the local level. Item No. 46 follows up on this point and seeks documents and information generated by BSA communicating the information and knowledge gleaned regarding the proper procedures for protecting scouts from heat related injuries during the performance of outdoor activities to "non Jamboree" activities.

This later point is particularly important, because Mr. Bourlan, although conceding that the flag system would "apply to individuals who were hiking during the course of [a] Jamboree, went on to state that it would be "almost . . . impossible to execute this on a hike in the Everglades." See Bourlan deposition, pages 319-21. There will, however, **be considerable testimony to the contrary at trial**, which will establish that either this exact system, or a substantial equivalent, could be easily implemented for hiking at the troop level.[5]

As noted above, the only objection made to these requests is the claim that the documents "are not likely to lead to the discovery of admissible evidence, are overbroad and are not limited in temporal scope." *In Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); the Supreme Court held:

> The key phrase in this definition-"relevant to the subject matter involved in the pending action"-has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. [citation omitted].
> Consistently with the notice - pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.

In applying this standard, it has been repeatedly held in this District that:

> The Federal Rules of Civil Procedure strongly favor a full and broad scope

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[5] The resolution of this dispute will be for the jury and is irrelevant to the Plaintiffs entitlement to this discovery at this time.

> of discovery whenever possible, allowing a party to obtain discovery of "any matter, not privileged, that is relevant to the claim or defense of any party." . . . Thus, ordinarily, discovery based on relevance should be allowed" unless it is clear that the information sought has no possible bearing on the claims and defenses of the parties or otherwise on the subject matter of the action."

Rosenbaum v. Becker & Poliakoff, 2010 WL 623699 (S.D. Fla. Feb. 23, 2010).*1-2. Accordingly, it has repeatedly been held that in order to sustain an objection based upon relevancy, the objecting party must, therefore, show that the requested discovery at issue has no possible bearing on the claims and defenses in [the] case. *Tate v. United States Postal Serv.*, 2007 WL 521848 (S.D. Fla. Feb. 14, 2007)(and cases cited therein)*2. *See also Panola Land Buyers Assoc., v. Shuman,* 762 F.2d 1550 (11th Cir. 1985)(a party resisting discovery must show specifically how each request is irrelevant or overly broad, burdensome and oppressive. This is clearly a burden which the Defendant cannot meet in this case.

Even though the 2010 Jamboree occurred the year after Michael's death, the testimony of the BSA's own corporate representative establishes that BSA had been analyzing changes to the flag system since at least 2007.[6] Nevertheless, even if this were not the case, the law is well settled that subsequent accidents and actions are not only discoverable, but often even admissible as well. *See e.g. Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613 (5th Cir. 1977)(evidence of subsequent accidents). As pointed out in *Weeks v. Remington Arms Co.*, 733 F.2d 1485 (11th Cir. 1984) in citing *Dollar* with approval in a case involving prior incidents, such incidents "might be relevant to the defendant's notice, magnitude of the danger involved, the defendant's ability to correct a known defect, the lack of safety for intended uses, strength of a product, the standard of care and causation." 733 F.2d at 140. The same is true here. As the Eleventh Circuit held unless the material was required to be produced in the first instance, it would be impossible to determine whether there was sufficient substantial similarity for it to be admissible at trial.

Dated: May 5, 2011.

Respectfully submitted,

/s/ Robert D. Peltz
ROBERT D. PELTZ (Fla. Bar No. 220418)

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[6] It is also significant to note that Judge McAliley had previously overruled the Defendants objections to the Plaintiffs inquiry regarding the 2005 Jamboree and further repeatedly overruled objections to discovery of matters occurring subsequent to Michael's death. See [DE 153].

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **May 5, 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 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
E-mail: peltz@leesfield.com
LEESFIELD & PARTNERS, P.A.
2350 S. Dixie Highway
Miami, Florida 33133
Telephone: (305) 854-4900
Facsimile: (305) 854-8266
Counsel for Plaintiffs

SERVICE LIST

IRA H. LEESFIELD
ROBERT D. PELTZ
E-mail: leesfield@leesfield.com
peltz@leesfield.com
LEESFIELD & PARTNERS, P.A.
2350 S. Dixie Highway
Miami, Florida 33133
Telephone: 305-854-4900
Facsimile: 305-854-8266
Attorneys for the Plaintiffs

FREDERICK E. HASTY, III
Email: fhasty@wickersmith.com
WICKER, SMITH, O'HARA, MCCOY, GRAHAM & FORD, P.A.
2800 Ponce de Leon Blvd.
Suite 800
Coral Gables, Florida 33134
Telephone: 305-448-3939
Facsimile: 305-441-1745

Attorneys for Howard K. Crompton and Andrew L. Schmidt

Ubaldo J. Perez, Jr., Esq.
Email: uperez@uperezlaw.com
Law Office of Ubaldo J. Perez, Jr., P.A.
8181 NW 154th Street, Suite 210
Miami Lakes, FL 33016
Telephone: (305) 722-8954
Facsimile: (305) 722-8956
Co-Counsel for Howard K. Crompton

WILLIAM S. REESE
WILLIAM SUMMERS
KEVIN D. FRANZ
Email: wreese@lanereese.com
kfranz@lanereese.com
wsummers@lanereese.com
LANE, REESE, SUMMERS, ENNIS & PERDOMO, P.A.
2600 Douglas Road
Douglas Centre, Suite 304
Coral Gables, Florida 33134
Telephone: 305-444-4418
Facsimile: 305-444-5504
Attorneys for Boys Scouts of America and The South Florida Council, Inc.; Boy Scouts of America

GREG M. GAEBE
Email: ggaebe@gaebemullen.com
GAEBE, MULLEN, ANTONELLI & DIMATTEO
420 South Dixie Highway, 3rd Floor
Coral Gables, FL 33146
305-667-0223
305-284-9844 – Fax
Attorneys for Plantation United Methodist Church