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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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.
_____/

CIRCUIT CIVIL DIVISION

CASE NO. 10-CV-22236-ASG

DEFENDANTS, HOWARD K. CROMPTON AND ANDREW L. SCHMIDT'S, MOTION FOR RECONSIDERATION AND/OR APPEAL OF COURT ORDER CONCERNING TEXT MESSAGES ON MICHAEL SCLAWY-ADELMAN'S CELLULAR TELEPHONE [DE 196]

The Defendants, HOWARD K. CROMPTON and ANDREW L. SCHMIDT, by and through the undersigned counsel, and in accordance with the Federal Rule of Civil Procedure 60(b)(2) and Southern District Magistrate Judge Rule 4(a)(1), hereby file this Motion for Reconsideration and/or Appeal of the Order Concerning Text Messages on Michael Sclawy-Adelman's Cellular Telephone [DE 196], and as grounds in support thereof, state as follows:

The 188 Text Messages Found on Michael Adelman's Cell Phone Constitute Data That Magistrate McAliley Ruled was Discoverable

1. On January 28, 2011, Magistrate McAliley entered an Order directing the extraction of the data on Michael's cellular telephone from May 8, 2009 and May 9, 2009, the day of the hike. The Order required the production of a written report of all of that data:

> The expert shall turn on the cellular telephone, retrieve any data from May 8, 2009 and May 9, 2009 and produce a report that identifies all data from those two days found on the telephone, and shall distribute his report to counsel for each party. [DE 118; p.2 of 4].

2. Carter Conrad, Jr., is the individual who performed the data extraction. He authored a report on March 3, 2011, which is attached hereto as Exhibit "A".

3. The report identifies 188 SMS History Items, which are text messages sent and received by Michael Adelman. They were stored on Michael's cell phone on the day that he went on the subject hike.

4. The report states "Examiner removed all text message content from SMS spreadsheet in order *to provide confidentiality to sender/recipient. . .*" (Emphasis added) (See Exhibit "A", page 3).

5. This Court's Order did not authorize Mr. Conrad to remove any content *to provide confidentiality to sender/recipient.* When Mr. Conrad removed the language of the text messages, he did so in violation of this Court's Order.

6. It is the understanding of the defense that Michael's phone was not used after May 9, 2009. It was taken into evidence by the Collier County Sheriff's Office, 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 stored in Michael's phone on May 9, 2009. All 188 text messages fall within the Court's Order because they constitute data on Michael's phone from May 9, 2009, which is exactly what Magistrate McAliley already ordered to be produced to the defense. [DE 182; ¶ 1].

7. It is clear from Mr. Conrad's report that all 188 text messages were on Michael Sclawy-Adelman's phone on May 8, 2009 and May 9, 2009. Regardless of the dates they were sent or received, Michael Sclawy-Adelman had saved them on his cell phone and they were available to him on May 9, 2009.

a. Newly discovered evidence consists of the attached record from T-Mobile for Michael's phone. There are text messages on May 7, 2009 and May 9, 2009. Indeed, there is a text message received on Michael's phone at 11:42 EST on May 9, 2009, which is during the hike. (See Exhibit "B").

8. Also contained on the phone is Michael Sclawy-Adelman's phone book, which – unlike the text messages – was produced in full in Mr. Carter's report. (Exhibit "A", page 6-8). Mr. Conrad disclosed the names of the individuals who correspond to the phone numbers. Michael had kept them on his phone and had access to them on May 8, 2009 and May 9, 2009.

9. Magistrate Judge McAliley has already determined the data from May 8, 2009 and May 9, 2009 relevant and material to the defense in this case:

> The expert shall turn on the cellular telephone, retrieve any data from May 8, 2009 and May 9, 2009 and produce a report that identifies all data from those two days found on the telephone, and shall distribute his report to counsel for each party.

Reconsideration/Appeal Should be Granted on a Procedural Basis

10. On January 28, 20112, Magistrate Judge McAliley ordered an independent forensic inspection of Michael Sclawy-Adelman's cellular telephone and the production of all data found on it from May 8, 2009 and May 9, 2009. [DE 118].[1]

11. Upon learning of the existence of the 188 text messages, these Defendants moved this Court to compel Mr. Conrad to comply with this Court's Order [DE 118], and to compel Mr. Conrad to produce the 188 text messages that he found during his court-ordered inspection of Michael Sclawy-Adelman's cellular telephone. [DE 177]. The *Motion to Compel [DE 177]* was based on Mr. Conrad's non-compliance with the Court's Order that he provide *all data*.[2] Magistrate McAliley had already ordered that data was discoverable and therefore should be provided by Mr. Conrad. [DE 118; p. 2 of 4].

12. Plaintiffs responded in opposition [DE 182] to the Defendants' *Motion to Compel [DE 177]* by arguing that an *in-camera* inspection should be undertaken in order to determine the relevancy of the text messages, based on Plaintiffs' conclusion 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.***" (Emphasis added) [DE 182; ¶

[1] 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 stored in Michael's phone on May 9, 2009. All 188 text messages fall within the Court's Order because they constitute data on Michael's phone from May 9, 2009. [DE 182; ¶ 1].

[2] "Howard K. Crompton and Andrew L. Schmidt, respectfully request that this Honorable Court enter an Order compelling the production of the SMS files and History Items which were withheld by Mr. Conrad in his March 2, 2011 report, and, for any other relief this Honorable Court deems just and proper." [DE 177].

7]. Plaintiffs raised these issues even though Magistrate Judge McAliley had already ordered that all data from May 8, 2009 and May 9, 2009, was completely discoverable.

13. Nonetheless, Plaintiffs' suggestion of (and acquiescence to) an *in-camera* inspection prompted these Defendants to file a Reply. [DE 185]. The Reply was intended to identify the issues in this lawsuit to aid this Court in conducting the *in-camera* inspection of the 188 text messages. The Reply also was in response to Plaintiffs' suggestion of an *in-camera* inspection.

14. The next event that occurred was Magistrate Goodman entering an Order Striking Defendants' Reply.[3] [DE 188]. In addition to striking the Reply, this Court stated "it will not be considered." [DE 188]. Next, this Court *sua sponte* ordered an *in-camera* inspection of the 188 text messages. [DE 189].[4]

15. Therefore, Plaintiff suggested an *in-camera* inspection. The defense has been deprived an opportunity to suggest parameters for the *in-camera* inspection since the harsh language was that the Reply "will not be considered." Defendants Crompton and Schmidt have been denied the opportunity to be heard on what they consider topics of relevance in the text messages.

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[3] The basis was the Reply brief being not authorized and being too long in length.

[4] The Magistrate Judge's Order [DE 189] was named *Order Granting in Part and Denying in Part [177] Defendants' Motion to Compel Production of Text Messages,* but the Defendants' *Motion [DE 177]* did not request an *in-camera* inspection; it asked this Court to compel Mr. Conrad to comply with the pre-existing *Order Following Discovery Conference [DE 118].* Nevertheless, Magistrate Judge Goodman ordered the 188 text messages to be delivered by Mr. Conrad for this Court's review, that this Court conduct an *in-camera* review and to issue a ruling as to "whether any of the text messages would be subject to being turned over to defense counsel as part of discovery, and if so, which specific pages would be eligible for defense review." [DE 189]. No other directions were given by this Court pursuant to the *in-camera* inspection.

16. Prior to conducting the *in-camera* inspection, this Court did not request, order or give permission to the parties or counsel to supply, offer, provide and/or produce any additional argument or evidence regarding the potential relevancy and discoverability of the 188 text messages. [DE 189].

17. The Order following the *in-camera* inspection of the 188 text messages did not discuss or address the potential issues in this lawsuit and made undisclosed determinations of relevancy and discoverability. It is unclear whether the determinations of relevancy and discoverability were made without first establishing a basis to identify the parties' claims and defenses. It is clear that this Court did not consider the evidence and argument provided by these Defendants (in DE 185) to guide the Court in conducting the *in-camera* inspection and in identifying the various issues, claims and defenses in this lawsuit.

18. Relevancy is premised in part on a consideration of the parties' claims and defenses. *Fed. R. Civ. P. 26(b)(1)*. Without entertaining oral argument, briefs, the filing of deposition transcripts, and/or the filing of discovery responses exchanged between the parties (which are not ordinarily filed with the court), on the issue of discoverability and relevancy of the 188 text messages, it is unclear what basis was used by this Court to determine that none of the 188 text messages have any relevancy to the issues, claims and defenses in this lawsuit. [DE 188].

19. A Magistrate's Order should be made upon careful review of the record and consistent with the law of this Circuit. *Flushing Group, LLC., v. Stearns Weaver*, 2011 WL 1560928 (S.D. Fla.). A Magistrate's ruling on a discovery issue will not be

upheld in the absence of a sufficiently developed record in the papers submitted to the magistrate judge. See *MCC Management of Naples, Inc. v. Arnold & Porter, LLP.*, 2008 WL 4642835 (M.D. Fla.) (District Court found that the record was not sufficiently developed to allow magistrate judge to make determination of existence of privilege and waiver of privilege as to all relevant matters).

20. It is submitted that the defense had no opportunity to participate in the parameters of what would be "relevant" evidence. The 188 Text Messages on Michael Adelman's cell phone are discoverable under the federal rules if they are relevant to the issues, claims and defenses in this case.

Reconsideration/Appeal Should be Granted on a Substantive Basis

21. Notwithstanding this Court's prior Order that determined data on Michael Adelman's cell phone from May 8, 2009 and May 9, 2009 to be discoverable and to be produced to the defense, the text messages are otherwise discoverable under the Federal Rules of Civil Procedure and the law in the Eleventh Circuit.

Below is what was contained in the Reply which was "not considered" by Magistrate Judge Goodman:

22. There are many issues, topics and defenses to which the text messages would be relevant. 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." 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. 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. 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.

23. 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. 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. Kris Leon testified that Mr. Schmidt taught the Scouts to always hydrate the day prior to a hike. The text messages will be reflective of Michael's preparation or lack of preparation for the hike.

24. 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

25. 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.

26. Plaintiffs suggested 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.

27. 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.

28. The newly-discovered evidence from T-Mobile confirms what the defense had suggested might be on Michael's phone. There was a text during the hike. These

messages should be discoverable and their admissibility should be determined later. (See Exhibit "B").

29. 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.

MEMORANDUM OF LAW

A. Reconsideration Based on Clearly Erroneous Standard

30. A motion for reconsideration is appropriate where the Court has patently misunderstood a party, made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning, but of apprehension. *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 477 (S.D. Fla. 2002). Here, if this Court made its decision outside of the adversarial issues presented to this Court by the parties, it has made an error not of reasoning, but of apprehension. This Court's *in-camera* inspection would be clearly erroneous and contrary to law if it was undertaken without a basis to identify which text messages were relevant to the issues, or potential issues, in this lawsuit.

31. An Order is clearly erroneous if "the reviewing court, after assessing the evidence in the entirety, is left with a definite and firm conviction that a mistake has been committed." *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1523 (11th Cir. 1997). Reconsideration is justified where there is a need to correct clear error or prevent

manifest injustice. *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 477 (S.D. Fla. 2002) (Gold, J.).

B. A Magistrate's Order Requires Review of the Pertinent Record and Papers Submitted by the Parties

32. A Magistrate's Order should be made upon careful review of the record and consistent with the law of this Circuit. *Flushing Group, LLC., v. Stearns Weaver*, 2011 WL 1560928 (S.D. Fla.). A Magistrate's ruling on a discovery issue will not be upheld in the absence of a sufficiently developed record in the papers submitted to the magistrate judge. See *MCC Management of Naples, Inc. v. Arnold & Porter, LLP.*, 2008 WL 4642835 (M.D. Fla.) (District Court found that the record was not sufficiently developed as to allow magistrate judge to make determination of existence of privilege and waiver of privilege as to all relevant matters).

C. Eleventh Circuit's Discovery Rules, Law and Principles Allow for Broad Development of Discoverable Subject Matter

33. It is fundamental that parties may obtain discovery regarding any nonprivileged matter that is *relevant to the subject matter involved in the pending action*; 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).* "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. See *Hickman v. Taylor*, 329 U.S. 495, 501, 67 St. Ct. 385, 388, (1947). Discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. *Id.*,

at 500-501, 67 S.Ct. at 388. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits. See *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351, 98 S.Ct 2380, 2389 (1978).

34. To make a determination of discoverability would therefore require this Court to create or identify a factual basis from which it could discern the issues, or potential issues, to which the 188 text messages could bear relevance. "Indeed, 'discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.'" *Rosenbaum v. Becker & Poliakoff, P.A.,* 2010 WL 623699 (S.D. Fla.) (citing *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 98 S.Ct 2380 (1978).

35. Because this Court's Order Concerning Text Messages on Michael Sclawy-Adelman's Cellular Telephone [DE 196] was lacking in a clear explanation of how all 188 text messages are not relevant, it is unknown why the text messages are not discoverable. Discovery 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." (Emphasis added). *Rosenbaum v. Becker & Poliakoff, P.A.,* 2010 WL 623699 (S.D. Fla.) (citing *Tate v. United States Postal Serv.,* No. 04-61509, 2007 W.L. 521848, at 1 (S.D. Fla. Feb.14, 2007), citing *Dunkin Donuts, Inc. v. Mary's Donuts, Inc.*, No. 01-0392, 2001 WL 34079319 (S.D. Fla. No. 1, 2001)).

36. To deny the production of the 188 text messages to the defense is contrary to the spirit of the Federal Rules of Civil Procedure, because "[t]he Federal Rules of Civil Procedure strongly favor full discovery whenever possible." *Farnsworth v. Procter &*

Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985). This Court's ruling prejudices these Defendants' ability to prepare their case. The Advisory Committee Notes to Rule 26 indicate that "[t]he purpose of discovery is to allow a **broad** search for facts . . . which may aid a party in the preparation or presentation of his case." Adv. Com. Notes, 1946 Amendment, R. 26, Fed.R.Civ.P. (citations omitted) (emphasis added). The discovery provisions of the Federal Rules of Civil Procedure, when properly used, are to be broadly and liberally construed. *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 304 (5th Cir. 1973) (citations omitted).

CONCLUSION

37. These Defendants request the reconsideration of the *ORDER CONCERNING TEXT MESSAGES ON MICHAEL SCLAWY-ADELMAN'S CELLULAR TELEPHONE [DE 196]*. The text messages constitute data on Michael Adelman's cell phone. Michael's messages are the only evidence of his state of mind, his relationship to his parents, to this hike, to the Scouts, to his friends, or to college. Reconsideration should be granted and/or this should constitute an appeal of the Order [DE 196].

I HEREBY CERTIFY that on May 16, 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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