

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG
Magistrate Judge: Magistrate Judge Jonathan Goodman

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' RESPONSE IN OPPOSITION TO PLAINTIFFS' RENEWED
MOTION FOR REHEARING OR MODIFICATION OF ORDER ON MOTION
FOR RECONSIDERATION [DE 222]**

The Defendants, HOWARD K. CROMPTON and ANDREW L. SCHMIDT, by and through the undersigned counsel, and in accordance with Magistrate Judge Goodman's local rules, hereby file this Response in Opposition to Plaintiffs' Renewed Motion for Rehearing or Modification of Order on Motion for Reconsideration [DE 222], and in support thereof, state as follows:

1. This Court ruled that the disclosure of all 188 text messages would ensure production of the two received by Michael Sclawy-Adelman (hereinafter "Michael") during the hike. Those two text messages, as well as all of the others, could potentially

lead to the identity of witnesses with admissible information on Michael's physical condition and state of mind both before and during the hike. [DE 222].

2. Each and every text message is original evidence for which there is no substitute. And, because Michael cannot be deposed and cannot answer discovery related to his physical condition and state of mind both before and during the hike, these Defendants are limited to the content of these text messages for discoverable information – the identity of witnesses with admissible information on Michael's physical condition and state of mind both before and during the hike. There is no evidentiary equivalent to this information. The balance must swing to disclosure.

3. Michael's physical condition and state of mind (both before and during the hike) are relevant and discoverable topics which have been interjected into this lawsuit by Plaintiffs. Mr. and Mrs. Selawy-Adelman testified that Michael traveled out-of-state the prior weekend, was busy the week of the hike studying and tutoring, returned home late at night more than once, and wanted to sleep-in instead of going on the hike. They also testified that the hike, and Michael's willingness to attend it, was a family topic of conversation the entire week. The T-Mobile records received only go back two (2) days before the hike. They show Michael was using his cell phone to communicate via text messages with his sister and father during that same time frame.

4. Trying to correlate the messages to phone numbers does not reveal the senders, the persons or things referenced in the text messages, and other information which would shed light on Michael's world.

5. Even though Plaintiffs suggest that “Sam K.” is “Sam Kent”, the truth is that the identities of the persons who were communicating with Michael prior to and during the hike cannot be ascertained by Michael’s “phone book”, or Mr. Conrad’s “entire report”, or the T-Mobile records for Michael’s phone number. The identity of these individuals can only be in the text messages themselves which should be disclosed with the parameters of the privacy safeguards this Court imposed.

6. This Court has made it clear that the identities of the persons communicating with Michael prior to the hike could lead to admissible evidence and the text messages are the only way to ascertain the identities of these persons. Neither the Court nor Mr. Conrad nor Plaintiffs can “date” the 188 text messages.

7. Plaintiffs still do not show a *technologically viable* way to ascertain date information within the Conrad data. Plaintiffs suggest a comparison be made to identify text messages from certain phone numbers, but the Defendants cannot establish the identities of the individuals communicating from those phone numbers or the witnesses referenced in the messages. Plaintiffs’ proposed method does not change the fact that Mr. Conrad cannot determine which text messages were actually received by Michael Adelman on May 9, 2009.

8. Plaintiffs have not interposed any new objection warranting further protections related to the content of the messages, and this Court has already stated that Plaintiffs’ grounds for prior resistance did not justify limiting these Defendants access to this material. [DE 222]. Plaintiffs do not propose that any of the other 186 text messages are worthy of some additional type of protection.

WHEREFORE, these Defendants respectfully request that Plaintiffs Renewed Motion for Rehearing or Modification of Order on Motion for Reconsideration be denied and that Carter Conrad, Jr., produce all text messages to the parties.

I HEREBY CERTIFY that on June 14, 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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