

66450-3

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.

**DEFENDANT, ANDREW L. SCHMIDT'S RESPONSE TO PLAINTIFFS'
MOTION TO COMPEL PURSUANT TO COURT ORDER [DE 234 and 235]**

Defendant Andrew L. Schmidt files this Response outlining the basis for the objections made to production in connection with a Notice of Taking Deposition Duces Tecum served on Defendant Schmidt. Schedule A is the Duces Tecum and is attached as Exhibit A.

1. As will be demonstrated below, some e-mails were objected to and a privilege log was prepared and filed. After the Court's Order, additional e-mails were provided to the Plaintiffs in an effort to resolve this dispute. A cursory examination of Exhibit A reflects several paragraphs which are overbroad, well beyond the allegations contained in

the Complaint, and certainly not time specific by design.¹ Defendant Schmidt filed a Privilege Log - Exhibit B. Exhibit C is a list of allegations against Schmidt.

2. Exhibit 1 is a privileged document created by Defendant Schmidt and sent to Annette Hungler at the South Florida Council/BSA. It is the position of Defendant Schmidt that Exhibit 1 is an incident report relating to the events of the hike and transmitted to Annette Hungler to provide to Jeff Hunt also of the South Florida Council for the Boy Scouts of America. Therefore, this is a privileged communication between the Defendant and the Co-Defendants. Exhibits 7, 8 and 9 are also privileged documents exchanged between Defendant Schmidt and representatives of the South Florida Council. These clearly reveal that this information is not communicated to persons who do not have a need to know the information, nor to the parents of the scouts in Troop 111, nor to the Co-Defendant Church. They occurred on Monday after the hike. The communications themselves are internal communications made in anticipation of potential litigation and as a result of the request for information to Schmidt about the incident.

3. Exhibit 15, three days after the hike, was sent to a Troop 111 Committee member. It is a private communication sent by Defendant Schimdt. Exhibit 15 is not relevant or material to the allegations of negligence made against Defendant Schmidt or the Co-Defendants. Exhibit 16 is neither relevant nor material to the allegations of alleged negligence against Defendant Schmidt. It is a personal and private message to the

¹ See Schedule A paragraphs 2, 3, 18, 22 and 23. Such overbroad requests are burdensome to Schmidt. The requests precede Michael's death by as much as seven

parent of a scout about her son. The scout in question has already been deposed for over four hours by the Plaintiffs' counsel. It has no relevance to the allegations against any Defendant in this case.

4. Exhibit 18 was sent by Defendant Schmidt to a former assistant scout master in Troop 111 four days after the subject hike. It involves issues about urging by some parents in Troop 111 to award Eagle Scout rank to Michael even though he had not completed the requirements. Exhibit 18 is not relevant or material to any allegation of negligence by Schmidt nor to any proximate cause or any other legal theory in this case. It is a private communication between Defendant Schmidt and a former assistant scout master who has now been declared to be an expert witness in the case. The timing of the Motion to Compel the e-mails coincides to disclosure of this witness as a retained expert for the defense, but Exhibit 18 sheds no light whatsoever on whatever Defendant Schmidt did or failed to do which the Plaintiffs maintain was negligent. Nor is it calculated to lead to admissible evidence at the time of trial of negligence against any Defendant.

5. Exhibits 19 and 20 are likewise four days after the hike. They do not relate to any allegations of negligence, causation, or the death of Michael Adelman. Neither Exhibits 19 or 20 are relevant to any issues in the case.

6. Exhibits 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 relate to the discussion if not expressions of personal opinions by members of the Troop Committee and/or representatives of the South Florida Council as it relates to the suggestion of awarding the rank of Eagle Scout to Michael after his death. None of these e-mails relate to

years.

allegations in the Complaint made against Defendant Schmidt for negligence under even the broadest of interpretations. These e-mails are days after Michael's death. These e-mails are not sent to or from Michael's family. The e-mails express personal opinions by members on the Troop Committee and were made with an expectation of privacy as part of the ongoing business of the Troop. None of them pertain to any perceived allegations or written allegations against Defendant Schmidt as contained in the pending Complaint. The privacy rights of people communicating with Defendant Schmidt have to be respected as part of the ongoing business of the Troop Committee. There is no information which is relevant, admissible, or likely to lead to admissible evidence at the time of trial.

7. Exhibits 31 and 32 relate to an entirely different hike. The Plaintiffs allege in their Motion that they already have Exhibit 31. Therefore, Exhibit 31 is moot. The basis for the objection to 31 is relevancy and materiality because Exhibit 30 has no relevance to the 20 mile hike at issue in this case. Michael did not participate in that hike. There is no predicate to make this e-mail admissible at the time of trial.

8. Counsel responds to the Court's request concerning page 185 of Schmidt's deposition. First, counsel asked for the questions and answers to be read back for his benefit and for the benefit of his client. The deposition had been in progress since 10:25 and it was about 3:40 because the video reflects the tape was changed then. At no time did counsel suggest an answer to a question or make a speaking objection. It is not improper to request a client to listen to the question and answer to provide the appropriate, complete, and truthful response. Finally, a review of the pages before 184

reflects the answers were provided. A review of pages 185 – 190 demonstrates there was no “coaching.” See Exhibit D.

WE HEREBY CERTIFY that on July 6th, 2011, I electronically filed the foregoing with the Clerk of the Courts by using the ECF system, which will send a notice of electronic filing to the parties on the attached service list. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-ECF participants:

/s/ Frederick E. Hasty III

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