66450-3

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.
_____/

CASE NO. 10-CV-22236-ASG

DEFENDANT, ANDREW L. SCHMIDT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF E-MAILS AND COMPLIANCE WITH MAGISTRATE'S ORDER DATED JULY 14, 2011

Plaintiffs moved to compel production of 32 e-mails objected to by Defendant Schmidt due to privilege, privacy, and relevancy objections. [DE 234]. Prior to the hearing on July 14th, 2011 before the Honorable Jonathan Goodman, Defendant Schmidt turned over 10 of the 32 original e-mails objected to by Defendant Schmidt. [DE 243]. Magistrate Goodman ordered Defendant Schmidt to file a post-hearing Memorandum of Law. [DE 247 and 251]. In compliance with the Court's Order, Defendant Schmidt hereby files this his Memorandum of Law and Argument.

INTRODUCTION

Plaintiffs served a Notice of Taking Deposition Duces Tecum for the deposition of Defendant, Andrew L. Schmidt. Defendant Schmidt was requested to bring e-mails to his deposition on March 7th, 2011. Prior to the deposition commencing, a privilege log was hand-delivered to counsel for the Plaintiffs, Robert Peltz, Esquire. [DE 161]. The deposition of Defendant Schmidt commenced at 10:25 a.m. and concluded at 7:21 p.m. (See Exhibit 1, condensed deposition transcript of Andrew Schmidt). Thirty separate exhibits or composite exhibits were attached to the deposition, including e-mails which were produced in compliance with the Plaintiffs' notice duces tecum. (See Exhibit 2, including "Schedule A.")

"Schedule A" of the notice made references to e-mail communications as follows:

1. All non-privileged correspondence, e-mails or other types of communication between this deponent and South Florida Council.

2. All non-privileged correspondence, e-mails or other types of communication between this deponent and Boy Scouts of America.

3. All non-privileged correspondence, e-mails or other types of communication between this deponent and Plantation United Methodist Church.

4. All correspondence, e-mails, or other types of communication between South Florida Council and/or Troop 111, and/or this deponent and Michael Sclawy-Adelman or the Plaintiffs in this case.

The first four paragraphs of "Schedule A" therefore requested Defendant Schmidt to produce "all non-privileged correspondence, e-mails or other types of communication …" At the deposition of Defendant Schmidt 30 separate exhibits were produced including over 45 e-mails before the deposition commenced. Mr. Peltz arrived shortly

after 9:00 a.m. and the deposition did not begin until 10:25 a.m. Between 9:15 a.m. and 10:25 a.m., Mr. Peltz was provided our privilege log as well as other documents responsive to his notice duces tecum. Defendant Schmidt's privilege log was provided on a timely basis. The privilege log identified with specific and requisite particularity the document or documents being asserted as privileged. Schedule A of the notice of taking deposition specifically requested the Defendant Schmidt to produce all "non-privileged correspondence, e-mails …" Schedule A did not require all e-mails to be produced but only those which were "non-privileged."

Plaintiffs' Motion to Compel Production from Defendant Schmidt [DE 234] was filed on June 24th, 2011. The Motion to Compel is untimely under the Local Rules of the Southern District of Florida. Rule 26.1.(h)(1) states:

> "*Time for filing*. All Motions related to discovery, including but not limited to Motions to Compel discovery and Motions for Protective Order, shall be filed within thirty (30) days of the occurrence of grounds for the Motion. Failure to file a discovery Motion within thirty (30) days, absent a showing of reasonable grounds for a later filing, may constitute a waiver of the relief sought."

Plaintiffs' Motion [DE 234] makes no such statement of reasonable grounds to justify filing this untimely Motion to Compel 3 months and 17 days after the privilege log was delivered. Moreover, counsel for the Plaintiffs did not terminate the deposition of Defendant Schmidt to seek relief from the Court, nor did Plaintiffs' counsel continue the deposition of Defendant Schmidt to seek relief from the Court on the documents found on the privilege log. Defendant Schmidt complied with Rule 26(b)(5)A by timely filing the privilege log and properly describing the documents contained therein.

After Plaintiffs' Motion to Compel [DE 234] this Court entered an Order [DE 235] including the following language:

> "…the parties are urged to take additional efforts to resolve their discovery disputes. The Court's practice is to award attorney's fees to the prevailing party on a Motion to Compel unless a party subject to discovery has provided substantial justification for his no-production position. If the parties resolve some or all of their disputes before the hearing, then they shall timely advise the Court, to avoid unnecessary preparation by the Court and its support staff."

Defendant Schmidt in an attempt to narrow the issues and resolve the discovery disputes and in good faith acting upon this Court's Order [DE 235] produced 10 of the 32 original e-mails in compliance with this Court's Order [DE 237] by delivering the 32 e-mails under seal for in-camera review by noon on July 7th, 2011. Defendant Schmidt complied by delivering the 32 e-mails for the Court's in-camera review. By delineating the 10 that had been produced in an effort to resolve the discovery dispute in compliance with the Order [DE 235], this Court was advised seven days before July 14th, 2011, the date of Oral Argument, that only 22 e-mails were at issue. This Court's Order [DE 237] appropriately offered Defendant Schmidt the opportunity of this Court conducting an in-camera inspection and the opportunity to demonstrate the basis for the privilege and/or relevancy asserted. Oral Argument was conducted on July 14th, 2011 at which point in time this Court instructed the parties to provide additional grounds, authorities, and memorandum of law to support each side's position.

Finally, 10 of the 32 e-mails were produced to Plaintiffs' counsel on July 1st, 2011. Of the remaining 22 e-mails which were not produced and which were on the privilege log created and provided to Mr. Peltz on March 7th, 2011, his Motion to Compel asserts

that he has already been able to discover 3 of the 22 e-mails (in the "not produced") contained on Defendant Schmidt's privilege log.

Of the 19 e-mails in dispute, 10 of them involve the topic of whether or not after Michael Adelman's death Troop 111 should make a recommendation to local counsel and the National Boy Scouts of America whether or not Michael should be awarded the rank of Eagle Scout even though it was clear Michael never completed all of the requirements to be qualified to become an Eagle Scout. Two of the e-mails are related to returning the personal property of Michael Adelman from the Collier County Sheriff's Department days after his death. One e-mail is to the mother of a Scout who participated in the subject hike on which Michael Adelman expired. Three e-mails are covered by the work-product privilege [DE 256] entitled "Notice of South Florida Council's Joinder." One e-mail relates to Scouts who signed up for a previous hike which Michael Adelman did not participate in and the remaining two e-mails relate to personal feelings expressed to or from the Scout leaders by others unrelated to the Adelman family. As will be demonstrated below, all of the e-mails on the privilege log were objected to in good faith.

WORK-PRODUCT EXCEPTION/PRIVILEGE TO E-MAILS 1, 7, 8 AND 9

The South Florida Council, Inc., (SFC) and the Boy Scouts of America (BSA) have filed a Notice of Joinder in the objection to the production of e-mails 1, 7, 8 and 9 [DE 256] outlining the requirement to report a serious incident to the Council which in turn relays the information to the National Office of the Boy Scouts of America. By and through their counsel, SFC and BSA have outlined the procedures and expectations which are and were in place in May of 2009 at the time of the death of Michael Adelman.

As pointed out in the hearing conducted before this Court on July 14th, 2011, Defendant Schmidt was required to report information about the incident to the offices of SFC/Jeff Hunt. It is clear from a review of the e-mails in question that there were communications going back and forth about the procedures and information about the circumstances of the hike which clearly are in part in anticipation of litigation. Therefore, the privilege asserted is work-product to e-mails 1, 7, 8 and 9.

E-mail number 1 even uses the word "incident" and the purpose of the e-mail was to inform SFC/BSA of information normally transmitted to an entity in anticipation of litigation, and e-mails 8 and 9 fall in the same category. In order for the work-product doctrine to apply, a party must show that the "primary motivating purpose" behind the creation of the document was to aide in possible future litigation. The name of the case is *Fojtasek v. NCL, 262 F.R.D. 650, 656 (S.D. Fla. 2009)*. As the Notice of Joinder [DE 256) filed by SFC/BSA clearly documents this batch of e-mails is considered information that is part of the process when serious incidents and/or accidents occur to Boy Scouts participating in Boy Scout activities. While Defendant Schmidt is a volunteer Scout leader, the Boy Scouts conduct their business through voluntary Scout leaders such as Defendant Schmidt.

PRIVACY RIGHTS UNDER ARTICLE 1 § 23 OF THE FLORIDA CONSTITUTION CREATE AN EXPECTATION/ZONE OF PRIVACY RIGHTS IN CITIZENS OF FLORIDA

This Court directed undersigned counsel to provide case law concerning the issue of privacy rights. In 1980 Florida voters approved Article 1 § 23 (not § 8 as mistakenly

suggested during the July 14th, 2011 hearing by undersigned counsel) which articulates the Constitutional Rights of Florida citizens to privacy. Section 23 reads as follows:

> Right of Privacy – Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This Section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

The United States Supreme Court has recognized the right of privacy even before the Florida Constitutional Amendment was passed in 1980. Therefore, there is a Federal expectation to the right of privacy which was recognized by Justice Brandeis in *Olmstead v. United States, 277 U.S. 438, 478 (1928)*. The Florida Supreme Court has articulated a general discussion of the rights of privacy under the Federal Constitution in an opinion found at *Winfield v. Division of Para Mutual Wagering, 477 So.2d 544 (Fla. 1985)* wherein the Court wrote:

> The United States Supreme Court has fashioned the right of privacy which protects the decision-making or autonomy zone of privacy interest of the individual. The Court's decisions include matters concerning marriage, procreation, contraception, family relationships, child rearing and education. *Roe v. Wade, 410 U.S. 113, 152, 153, (1973)*. Other privacy interest enunciated by the Court in *Nixon v. Administrator of General Services, 433 U.S. 425, (1977)* and *Whalen v. Roe, 429 U.S. 589 (1976)* involved one's interest in avoiding the public disclosure of personal matters. 477 So.2d at 546 and 547.

The Florida Supreme Court articulated the concept that the Florida Constitution is even broader in terms of privacy protection to citizens of Florida in the same opinion in which the Florida Supreme Court found that by virtue of Article 1 § 23 and the Constitutional Amendment enacted as the will of the people is a broader right of privacy than even found under the Federal Constitution. The Court held:

> "The citizens of Florida opted for more protection from governmental intrusion when they approved Article 1 § 23 of the Florida Constitution. This amendment is an independent, freestanding Constitutional provision which declares the fundamental right to privacy. Article 1 § 23 was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or "unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this State exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution."

Therefore, there is a fundamental right and expectation of privacy under the Federal Constitution but an even broader fundamental right to privacy under the Florida State Constitution.

There are numerous examples of cases in which the privacy rights of persons have been protected. We begin with voluntary blood donors who donated blood to blood banks in Florida. In *Rasmussen v. South Florida Blood Service, Inc., 500 So.2d 533, 535, (Fla. 1987)*, their records were not discoverable in litigation against the South Florida Blood Service simply because a blood recipient had a transfusion that transmitted a disease through the blood transfusion. The Supreme Court found that there was a balancing interest that had to occur between the privacy rights of voluntary blood donors and the need of the Plaintiff to try to prove a case against the blood service. The Florida Supreme court in Rasmussen held as follows:

> "Moreover in Florida, a citizen's right to privacy is independently protected by our State Constitution. In 1980, the voters of Florida amended our State Constitution to include an expressed right of privacy. Article 5, § 23, Fla. Const., in approving the Amendment, Florida became the fourth State to adopt a strong, freestanding right of privacy as a separate section of its State Constitution, thus providing an explicit textual

> foundation for those privacy interest inherent in the concept of liberty which may not otherwise be protected by specific Constitutional provisions. …Although the general concept of privacy encompasses an enormously broad and diverse field of personal action and belief, there can be no doubt that the Florida Amendment was intended to protect the right to determine whether or not sensitive information about oneself could be disclosed to others at 536."

The Plaintiff was prevented from discovering the identity of voluntary blood donors even though the Plaintiff was intent on trying to determine which voluntary blood donor had transmitted HIV to the Plaintiff through blood transfusion. In denying the Plaintiff's request and balancing the interest of the voluntary blood supply versus the individual rights of the Plaintiff as a litigant, the Florida Supreme Court concluded that the "…disclosure sought here implicates constitutionally protected privacy interest." Therefore, the very identity of the blood donors was withheld from the Plaintiff under the privacy rights of the non-litigant voluntary blood donors.

An assisted living facility was named as a Defendant in a wrongful death case. The issue was whether or not the facility could assert the privacy rights of its employees when the personnel files of the employees were requested by the Plaintiff. The Florida Supreme Court in *Alterra Healthcare Corp., v. Estate of Shelley, 827 So.2d 936 (Fla. 2002),* specifically recognized that in considering relevancy objection to a discovery request, the trial Court could consider the constitutional rights of third parties who would be substantially affected by the outcome of the litigation. Citing, *Shaktman v. State of Florida, 553 So.2d 148 (Fla. 1989),* the Supreme Court commenting on Article 1 § 23 of the strong right of privacy in the Florida Constitution held as follows:

In Shaktman, the Court reasoned that the enactment of this provision "insures that individuals are able 'to determine for themselves when, how and to what extent information about them as communicated to others'" Id. at 150 (quoting from Alan F. Westin *Privacy and Freedom 7 (*1967)*."* There, we spoke of a "zone of privacy into which not even the government may intrude without invitation or consent" … because this power is exercised in various degrees by different individuals, the parameters of an individual's privacy can be dictated only by that individual. The central concern is the inviolability of one's own thought, person and personal action. The inviolability of that right assures its pre-eminence over 'majoritarian' sentiment, and thus cannot be universally defined by consensus.

While the Supreme Court ruled that the personnel files may be discovered, the fact of the matter is there was a recognition of the privacy rights of the employees and their expectation of privacy. The Court there determined that the facility did not have the standing to assert the privacy rights of the employees.

In this case, Troop 111 is composed of juveniles who are minors and whose expectation of privacy must be protected. During the deposition of Defendant Schmidt, the names of the Troop members who received e-mails about the subject hike on which Michael Adelman expired were identified by Defendant Schmidt and provided to Plaintiffs. Defendant Schmidt does not feel authorized to invade the privacy rights of individuals on the Troop Committee who provided personal opinions about whether or not Michael Adelman should be given the award of an Eagle Scout after his death which are e-mails 18 and 22-30. These were communications that were considered by the individuals at the time e-mailing to or from Defendant Schmidt private and confidential expressions of personal opinions with an expectation that these would not become public. Moreover, e-mails 15 and 21 are examples of Defendant Schmidt expressing personal opinions to a confidant which has nothing to do with the allegations of negligence made

against Crompton, Schmidt, the South Florida Council, Boy Scouts of America and/or Plantation United Methodist Church. Similarly e-mail 21 addressed to Defendant Schmidt is an expression by a South Florida Council member of emotional support which clearly was not done for purposes of publication. Once again, e-mail 21 has nothing to do with the allegations of negligence against the Defendants in this action. E-mail 21 is a private and confidential expression of personal feelings and/or other sentiments five days after the death of Michael Adelman. It is curious that Plaintiffs' counsel insisted on limiting text messages on Michael Adelman's phone to be limited to the day before the hike and the day of the hike which would have been May 8th and May 9th, 2009. Yet, Plaintiffs' counsel insists on trying to discover e-mails several days after the death of Michael Adelman which are the subject of the Motion to Compel.

In *Menke v. Broward County School Board, 916 So.2d 8 (Fla. 4th DCA 2005),* the issue was whether a school teacher's computer could be subpoenaed when the school teacher was accused of exchanging sexually explicit e-mails with students and making derogatory comments regarding school personnel. The issue before the Court was an Administrative Law Judge's Order to produce all the computers in the petitioner's household for examination by an expert witness for purposes of discovery. A protective Order was filed. The issue then became whether or not the privacy rights of the teacher or others in the household would be violated by such a disclosure.

E-mail 16 is an e-mail sent to the mother of a scout who participated on the hike in which Michael Adelman expired. Without divulging the content of the e-mail, clearly this was intended to be a personal, confidential and private e-mail to the mother, and the

content of the e-mail in question, e-mail 16, expresses concern for the wellbeing of the scout. The scout in question is a minor. The e-mail in question was sent three days after the death of Michael Adelman. Defendant Schmidt is fulfilling his obligation as an adult leader to inquire about the condition of the minor scout. Nothing in this e-mail was intended for public content. This is a private, confidential communication which should not be subjected to production. Certainly the mother of the scout in question has not waived any protection of her privacy rights on behalf of her son. In fact, the son has been deposed by the Plaintiffs for over four hours in this case. Therefore, the e-mail in question falls under the protection of the zone of privacy and the expectation of privacy rights of the scout and his family. It would be protected under the Federal Constitution, but certainly is protected under Article 1, Section 23 of the Florida Constitution.

Just as the victims of sexual abuse are protected from disclosure in the public even when they are plaintiffs and have filed suit under a pseudonym, the Court denied a request for the identity of other victims of sexual abuse by a Catholic priest in *Favalora v. Cidaway*, 996 So.2d 895 (Fla. 4th DCA 2008) denying a request for the identity of other victims of alleged sexual abuse. The Court squarely found that the names of other alleged victims should not be made known in public. That Court cited with approval *Rasmussen v. South Florida Blood Serv., Inc.,* supra, including the right of privacy. The same Court determined to cite *Alterra v. Shelley*, supra, finding that names, addresses and telephone numbers are forms of identity information that they considered private and confidential information. The same would hold true of e-mails without a specific authorization for release of the information by the senders or recipients of the e-mails or

the families who are not litigants to this litigation. They have not authorized Defendant Schmidt to release the e-mails which are in the batch of documents in the "not to be produced" e-mails numbering the 22 e-mails which are the subject of the Plaintiffs' Motion to Compel.

In *Publix Supermarkets, Inc. v. Johnson*, 959 So.2d 1274 (4th DCA 2007), the issue was whether or not the names, addresses and telephone numbers of alleged shoplifters to whom Publix Supermarket counsel had recommended the identities of other suspected shoplifters which request was denied. On page 1276, the Court held as follows:

> Further, these correspondence implicate privacy interests for the non-party suspected shoplifters. Article 1, Section 23, Florida Constitution, affords Floridians the right of privacy and ensures that each person has the right to 'determine for themselves when, how and to what extent information about them is communicated to others.' *Shaktman v. State*, 553 So.2d 148, 150 (Fla. 1989). Names, addresses and telephone numbers are forms of identity information that can be considered private and confidential information. *See, Alterra,* 827 So.2d 936. When a party seeks private or confidential information, courts must require the party seeking the information to "make a showing of necessity which outweighs the countervailing interest and maintain the confidentiality of such information." *Higgs v. Kampgrounds of Am.*, 526 So.2d 980, 981 (Fla. 3rd DCA 1988). This court has noted the release of names and telephone numbers, where irrelevant, would be an invasion of privacy for the third parties. *Haywood v. Samai*, 624 So.2d 1154 (Fla. 4th DCA 1993).

E-mails 19 and 20 relate to efforts by Defendant Schmidt to retrieve the personal property acquired after Michael's death by the Collier County Sheriff's Department and making arrangements to have that returned to the Adelman family. E-mails 19 and 20 are

e-mailed four days after Michael Adelman's death. There is one recipient and one sender of each of the e-mails. The sender of the e-mail in 19 was a committee troop member. Nothing in 19 or 20 was intended for publication. There was an expectation of privacy and confidentiality about the communications. The sender of e-mail 19 has not authorized release of the information to the public. Neither 19 nor 20 are relevant, material or germane to the allegations of negligence made against the Defendant in this action. Defendants rarely have much to say about being hauled into Court. I doubt that they somehow waive all or most of their privacy privileges simply because someone – justifiably or not – files suit against them. *Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013, at 1017 (11th Cir. 1992). E-mails 19 and 20 it is submitted are as irrelevant as the text message which this Court described in [DE222] when reviewing the 188 text messages and determining that the text messages do not relate to the claims or defenses which the parties have asserted in this case. Similarly, e-mails 19 and 20 do not relate to the claims or the defenses which the parties have asserted in this case. [DE230].

Other examples of the protection of the right of privacy particularly for involvement of third parties or their identities is found in *Westco, Inc. v. Scott Lewis Gardening and Trimming, Inc.*, 26 So.3d 620 (Fla. 4th DCA 1010) and the records of residents in a nursing home, *Age Institute of Florida, Inc. v. McGriff*, 884 S0.2d 512 (Fla. 2d DCA 2004). When confidential information is sought from a non-party through discovery, the trial court must determine whether the requesting party establishes a need for the information that outweighs the privacy rights of the non-party. *Westco,* supra. The appellate court in *Westco* sent the trial court an order to conduct a hearing to balance

the equities between the need for confidentiality in disclosure and to conduct an *in camera* review of the documents at issue in that case. In *Westco*, a non-party claimed privilege under confidentiality invasion of the right of privacy and challenged a trial court's order compelling it to produce an asset purchase agreement.

Other examples of the application of the right of privacy and the expectation of privacy and confidentiality is found in *Berkley v. Eisen*, 699 So.2d 789 (Fla. 4th DCA 1997), holding that non-party investors have constitutional protected right of privacy in their telephone numbers which outweigh the need of suing investors to obtain such information through discovery. That court specifically found that an order compelling discovery constitutes state action that may impinge on constitutional rights including the constitutional right of privacy. Citing *South Florida Blood Service, Inc. v. Rasmussen*, 467 So.2d 798, 803 (Fla. 3rd DCA 1985) that the potential for invasion of privacy is inherent in the litigation process. This Court must conduct a balancing test to determine the need for the information versus the privacy rights of the persons who are not litigants to the action, have not authorized release of information which is otherwise protected under Article 1, Section 23, and have not indicated an authorization to release such information to Defendant Schmidt. In *Delta Health Group, Inc. v. Williams*, 780 So.2d 337 (Fla. 5th DCA 2001) the defendant objected to an interrogatory which sought the names and addresses of non-parties on the basis of being confidential and privileged as it pertained to those non-parties. The Court stated that the plaintiff had not shown there was an overriding need for such information that would override the privacy right of non-parties. Therefore, the court in *Delta Health Group, Inc.* specifically found that there was

confidential and privileged information in possession of the defendant of non-parties which was not required to be disclosed to the plaintiff even though the plaintiff asked for the information to be disclosed. *See*, *Community Psychiatric Centers of Florida v. Bevelacqua*, 673 So.2d 948 (Fla. 4th DCA 1996) (holding that the plaintiff's need for the identity of patients who witnessed an accident at the defendant's psychiatric facility would not outweigh the right of privacy of those non-party patients).

A similar result was reached in *Colonial Medical Specialties of South Florida, Inc. v. United Diagnostic Laboratories, Inc.*, 674 So.2d 923 (Fla. 4th DCA 1996), holding in a breach of contract action that the plaintiff did not meet its burden to show the need for the address and telephone numbers of approximately 300 patients of the defendant's medical office would override the privacy rights of those non-party patients and therefore the discovery was denied on the basis of the privacy rights of the non-party patients. All of these cases stand for the proposition of the recognition of the right of privacy and the entitlement to confidentiality and an expectation of privacy by non-litigants to actions.

Defendant Schmidt was deposed from 10:25 a.m. until 7:21 p.m. During the course of his deposition, he provided e-mails, he provided other documents in compliance with the notice duces tecum, he produced documents in response to the Plaintiff's request for the production of documents (for which there has been no dispute nor any motion to compel filed against Defendant Schmidt) and the identity of scouts invited to go on this subject hike, and hundreds of troop documents have already been produced by Plantation United Methodist Church. Far more e-mails were produced than objected to by Defendant Schmidt. As Schedule A indicated in the Notice or Taking Deposition to

Defendant Schmidt, all "non-privileged communications, e-mails…." Florida courts recognize the privacy rights and expectation of confidentiality by third parties who are not litigants in the action, have not asserted a claim or defense in the action, and are thrust into the vortex of discovery disputes simply by being a parent of a scout involved in the troop such as Troop 111.

Perhaps the best example of the assertion of the protection of the privacy of an individual and his family comes from Mr. Peltz. We reference the Court to [DE 182] page two of six, paragraph five, wherein Mr. Peltz wrote as follows:

> At the hearing on the Defendants' Motion directed to the inspection of Michael's cell phone, counsel for Compton and Schmidt requested the Court permit the examination and analysis of the cell phone for an extensive period of time. The Plaintiffs objected to this request on a variety of grounds, including that it was not reasonably calculated to lead to the discovery of admissible evidence and **constituted an invasion of privacy of Michael as well as his family as friends. The Court agreed and narrowed the inspection to the two day period of May 8th and May 9th, 2009**

While Mr. Peltz advocated that Michael's privacy rights, his family's privacy rights and the privacy rights of his friends must be protected and must be limited to the two day period of the day before and the day of the hike, Mr. Peltz has moved to compel e-mails from third persons more than two days after the hike whose e-mails have nothing to do with the allegations of negligence made against the Defendants and yet he seeks to have unlimited access to thoughts, personal opinions, expressions, expressions of sentiment, comfort and condolence to the Defendants in this case. The Plaintiffs wish to compel and wish to invade the privacy and confidential communications of third persons

who stand in the same shoes as Michael's family and/or friends by discovering irrelevant and otherwise clearly confidential expressions of personal feeling, sentiments, thoughts, emotions and opinions such as whether or not posthumously the Boy Scouts could over look his failure to complete all of his requirements to obtain the rank of Eagle Scout and still be awarded an Eagle Scout rank after his death. Such expressions of personal interest or opinions do not bear on the claims or the defenses of the allegations of negligence against the Defendants in this case. Just as Justice Edmondson opined in *Brown v. Advantage Engineering,* supra, the Defendants do not waive all or most of their privacy privileges simply because someone – justifiably or not – filed suit against them.

As for the decisions held, Florida is the fourth state as of 1980 to adopt a state amendment for the right of privacy. California did it in 1974 by passing Article I §1 which states: "All people are by nature free and independent and have inalienable rights. Among those are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy." California refers to its "qualified constitutional privacy privilege" that blocks civil discovery that impinges upon privacy concerns of recipients of discovery demands. *Britt v. Superior Court* (1978) 20 Cal. 3d 844. Examples of this constitutional privacy privilege are found in decisions such as *Hinshaw v. Superior Court*, 51 Cal. App. 4th 233 (a party's confidential settlement with a non-party); *Estate of Gallio* (1995) 33 Cal. App. 4th 592 (involving a person's living will); *Lantz v. Superior Court*, (1994) 28 Cal. App. 4th 1839 (involving medical records); *Harding Lawson Association v. Superior Court*, (1992) 10 Cal. App. 4th 7 (involving third party personnel records); *Denari v. Superior*

Court, (1989) 215 Cal. App. 3d 1488 (involving names and addressees of fellow arrestees); *Binder v. Superior Court*, (1987) 196 Cal. App. 3d 1893 (involving photographs of defendants non-party patients); and *Mitchell v. Superior Court*, 37 Cal. 3d 268 (involving a reporter's sources of information). In all of these cases, the California courts interpreting and construing the state right to privacy recognized there is a constitutional privacy privilege. The analogy to Florida is that Florida courts construe and apply the provisions of Article 1, Section 23 by treating the privacy rights as a privilege as has been amply demonstrated in the decisions and authorities cited above. That is why *in-camera* inspection of documents, balancing of competing interests, protection of the identities of persons who are third parties and non-litigants occur in a variety of contexts such as protecting the identity of sexual abuse victims, the names and identities of voluntary blood donors, the telephone numbers and/or addresses of employees, the protection of the medical records linked to specific patients, the protection of users of the computer in a family home even when a family member is charged with sending pornography over the internet, and the other examples cited above. There is a recognized expectation or zone of privacy under both the Federal and Florida Constitutions which is recognized in decisional law. Delineating the zone of privacy protected by the Florida Constitution begins with the subjective expectations of the individual which are protected provided they are not spurious or false. *Mozo v. State*, 632 So.2d 623, 632-633 (Fla. 4th DCA 1994), affirmed at 655 So.2d 1115 (Fla. 1995).

In summary, Plaintiffs' counsel asserts that Michael and his family and his friends have an expectation of privacy. Defendant Schmidt asserts that he too has an expectation

of privacy even though he is a party Defendant. He also asserts that the parents and Scouts who are not litigants have an expectation of privacy as well as Volunteers who serve Troop 11 as Committee Members and/or as Adult Leaders have the same expectation of privacy and should be treated with equal fundamental rights of privacy guaranteed by Article 1, Section 23 of the Florida Constitution.

> E-mails 31 and 32 were objected to on the basis of relevancy, materiality, confidentiality and privacy. Under Rule 26(b), the scope of discovery permits parties to "obtain discovery regarding any non-privileged matter that is relevant to any parties' claim or defense - including the existence, description, nature, custody, condition and location of any documents and other tangible things and the identity and location of persons who know of any discoverable matter. …Relevant information need not be admissible at the trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence."

The Plaintiffs have consistently objected to producing communications of text messages belonging to Michael Adelman and/or his communicators/friends limited to the day before the hike and the day after the hike. The Plaintiffs have consistently argued that the relevant time period would not even include the Scout meeting that happened on Wednesday evening before the Saturday morning hike on which Michael Adelman expired.

In the "Schedule A" the Plaintiffs did not ask for e-mails from the 10 mile hike performed in April of 2009 specifically. Defendant Schmidt filed his objections and privilege log which is the subject of Plaintiffs' Motion to Compel. A review of "Schedule A" paragraph 4 asks for communications to Troop 111 and/or Michael Adelman. In an abundance of caution because of the over-breadth of the request to Defendant Schmidt a decision was made to place e-mails 31 and 32 on the privilege log

rather than simply not producing the documents at all. Upon information and belief Michael Adelman did not go on the 10 mile hike on April 4th, 2009. Therefore, e-mails 31 and 32 are not relevant and/or material to "Schedule A" and to the notice propounded to Defendant Schmidt. Almost all of the paragraphs on "Schedule A" relate to the May 9th hike. Paragraph 7 requests all documents, materials, or tangible things which this deponent and/or Plantation United Methodist Church and/or South Florida Council and/or Boy Scouts of America sent or caused to be sent to members or parents of members of Troop 111. Again, Michael Adelman's e-mail address is not on e-mail 31 or 32. But because of the over-breadth of the request, Defendant Schmidt filed a privilege log and objected to producing e-mails 31 and 32. It is the position of Defendant Schmidt that e-mails 31 and 32 are not subject to being relevant and material to the allegations pertaining to the hike that occurred on May 9th, 2009.

Plaintiffs' counsel states in his Motion to Compel that he obtained e-mail 31 "through discovery" but is unknown how he obtained the e-mail in question. Nonetheless, the objection was made because the request was overbroad and not time specific consistent with all the other requests in "Schedule A" and consistent with the limited timeframe found in "Schedule A." E-mails 31 and 32 are not relevant to the claims against the Defendants in this case. It should be pointed out that no expert witness disclosure including opinions of experts were made as of March 7th, 2011 when the objections and the privilege log were created.

It is up to the Court to determine when an objection is made whether or not the information is relevant to the parties' claims and defenses or at least "reasonably

calculated to lead to the discovery of admissible evidence." *City of Walthan v. U.S. Postal Service, 11 F.3rd 235, 243 (1st Cir. 1993)*. The over-breadth of paragraph 7 in "Schedule A" is obviously burdensome and oppressive. In making a ruling to an objection, the Court need not address the other requirements of Rule 26 if the party seeking the discovery "cannot demonstrate the relevance of the information sought" because "relevance serves as the gate through which all discovery requests must pass." *Stern v. O'Quinn, 253 FRD 663, 670 (Southern District of Florida 2008).*

The April 4th, 2009 hike was a 10 mile hike in a different location and Michael Adelman did not agree to go on the hike. As this Court held in *Great Lakes Transportation Holding, LLC v. Yellow Cab Service Corp., 2011 WL 465507 (S.D. Fla.),* when a person from whom discovery is sought challenges the relevance of the requested information, the Court must determine whether the information is relevant to the parties' claims and defenses or at least reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's Motion to Compel asserts that the information is relevant but it does not make the case for it other than making a bold assertion that it is relevant. The Defendants contend that this information about the prior hike is not relevant and is up to the Court to make such a determination whether or not it is or is not relevant, just like this Court determined which issues were or were not relevant in terms of the 188 text messages as found in this Court's Order [DE 230]. It is up to the Court to make a determination once the objection on relevancy and materiality has been made. There are genuine issues of dispute concerning the scope of discovery, the relevance and

materiality of e-mails 31 and 32, and in the final analysis how e-mails 31 and 32 are relevant to the claims asserted against the Defendants in this case.

ATTORNEY'S FEES AND SANCTIONS

The Court has requested the parties to address the issue of attorney's fees and/or sanctions. As it has been demonstrated, the privacy rights of the individuals involved and the amount of production of evidence and documents not objected to by Defendant Schmidt clearly indicate good faith on the part of undersigned counsel representing Defendant Schmidt. Plaintiffs' Motion to Compel violates the local Rules because it was untimely and does not have a Memorandum of Law in violation of the local Rules. Rule 7.1(a)(1) requires a Memorandum of Law. As outlined above, the Motion to Compel itself is untimely under local Rule 26.1(h)(1). Nor did the Motion to Compel comply with Rule 26 by explaining good cause to permit the Motion to Compel be filed three months and 17 days after the objections and privilege log was filed to excuse why within 30 days the Plaintiffs did not move for this relief. The objections and privilege log were provided to Plaintiffs' counsel on March 7th, 2011 before the deposition of Defendant Schmidt. Plaintiffs' counsel maintains that the objections and the privilege log on its face does not have valid basis for the objections and privileges asserted.

A fair reading of the matters in dispute clearly indicate bona fide disputes on the scope of discovery, the timing of the discovery, and the existence of the rights of third parties who are not litigants to this action and whose privacy rights are fundamental rights which cannot be violated in the State of Florida. *In Stores v. Island Water Association, 2011 WL 174 2003 (M.D. Fla.),* the Defendant withheld documents on the

basis of privilege. The Magistrate ruled that the documents were not privileged. Even though the Magistrate granted six of Plaintiff's Motions to Compel, she denied Plaintiff's request for costs and attorney's fees.

Here, there was no prayer for attorney's fees made by Plaintiffs in Plaintiffs' Motion to Compel. Nor did Plaintiffs ask for sanctions in their Motion to Compel. Before the hearing on July 14th and after receiving the Court's initial Order, Defendant Schmidt released 10 e-mails in an attempt to resolve the discovery disputes with Plaintiffs. In spite of the fact that the Plaintiffs assert they sent e-mails to request all of the objected to documents, at no time did the Plaintiffs demonstrate any willingness to accept anything less than all documents objected to in this case on our objections and/or privilege log. The fact of the matter is there is ample demonstrated basis for each objection that was made both in law and in fact and such objections were made in good faith. It is the duty of the Magistrate Judge to rule on discovery matters which is why the Parties have consented in part to the use of a Magistrate to handle discovery disputes.

Because there are genuine issues of disputed facts and law, it is submitted this Court should make an appropriate ruling on the objections and the privilege log, but this Court should not sanction either the Plaintiffs for filing an untimely a Motion to Compel without a Memorandum of Law, nor sanction the defense because the defense timely and appropriately filed objections and a privilege log.

The Court has directed undersigned counsel to produce the e-mails sent to undersigned counsel by Plaintiffs' counsel which are attached as a separate Exhibit.

WE HEREBY CERTIFY that on July 29th, 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:

Respectfully submitted,

/s/ Frederick E. Hasty III
Frederick E. Hasty III, Esquire
Florida Bar No. 260606
WICKER, SMITH, O'HARA,
McCOY & FORD, P.A.
Attorneys for Howard K. Crompton and
Andrew L. Schmidt
2800 Ponce de Leon Boulevard, Suite 800
Coral Gables, FL 33134
Phone: (305) 448-3939
Fax: (305) 441-1745
E-mail: FHasty@WickerSmith.com

Service List

Ira H. Leesfield, Esquire
Leesfield & Partners, P.A.
2350 South Dixie Highway
Miami, FL 33133

Robert D. Peltz, Esquire
Leesfield & Partners, P.A.
2350 South Dixie Highway
Miami, FL 33133

William S. Reese, Esquire
Lane, Reese, Summers, Ennis & Perdomo
Douglas Centre, Suite 304
2600 Douglas Road
Coral Gables, FL 33134

Greg M. Gaebe, Esquire
Gaebe, Mullen, Antonelli, Esco & DiMatteo
420 South Dixie Highway, 3rd Floor
Coral Gables, FL 33146

William L. Summers, Esquire
Lane, Reese, Summers, Ennis & Perdomo
2600 Douglas Road, Suite 304
Coral Gables, FL 33134

Ubaldo J. Perez, Jr., Esquire
Law Office of Ubaldo J. Perez, Jr., P.A.
8181 N.W. 154 Street, Suite 210
Miami Lakes, FL 33016

Horace Clark, Esquire
U.S. Department of the Interior
Office of the Regional Solicitor
Southeast Region
75 Spring Street, S.W., Suite 304
Atlanta, GA 30303