

**THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Miami Division

Howard Adelman and Judith Sclawy,
as Co-Personal Representatives of
The Estate of Michael Sclawy-Adelman,

CASE NO. 1:10-cv-22236-ASG

Plaintiffs,

District Ct. Judge: Alan S. Gold

vs.

Boy Scouts of America, et al.

Magistrate Judge: Jonathan Goodman

Defendants.

**BOY SCOUTS OF AMERICA and SOUTH FLORIDA COUNCIL'S MOTION FOR ORDER
AUTHORIZING RELEASE OF MICHAEL SCLAWY-ADELMAN'S BLOOD SAMPLE TO NMS
LABS TO CONDUCT AN "AMPHETAMINES" TEST**

DEFENDANTS, Boy Scouts of America ("BSA") and The South Florida Council, Inc. ("SFC") by and through its undersigned counsel, hereby move for an Order (1) authorizing the Miami Dade County Medical Examiner Department to release the blood sample of Michael Sclawy-Adelman, which is currently in its possession and provide it to NMS Labs for "amphetamine" testing and (2) compelling Plaintiffs to execute Affidavits for release of the sample for "amphetamine" testing, and state as follows:

1. This action stems from an incident on May 9, 2009, when Michael Sclawy-Adelman died while taking part in a hike through the Big Cypress National Preserve. The cause of death is in dispute.

Dr. Manfred Borges, Deputy Chief Medical Examiner

2. Dr. Manfred Borges, the Deputy Chief Medical Examiner for the District 20 Medical Examiner's Office, drew blood from the decedent the day after the incident.
3. Dr. Borges adamantly requested that the decedent's parents allow him to conduct an autopsy to determine the cause of death; they refused. *See* Deposition of Dr. Manfred Borges at pp. 9-10, ll. 24-19; p. 21, ll. 10-16. attached as **Exhibit "A."**
4. "I advised that without an autopsy, I would not have a definitive cause of death." *Id.* at pp. 23-24, ll. 21-21.

5. Dr. Borges testified that the decedent had an elevated blood pressure, but as there was no autopsy, there was no opportunity to determine if the cause of death was cardiac related. Id. at p. 18, ll. 3-6; 20, ll. 13-15.

Dr. William Hearn, Director of the Toxicology Laboratory

6. The blood sample was then sent to the Miami Dade County Medical Examiner Department where Dr. William Hearn, the Director of Toxicology, authorized limited testing.
7. Dr. Hearn testified that Michael's blood contained Phenylpropanolamine and Pseudoephedrine, but the limited testing could not determine the quantities. *See* Deposition of Dr. William Hearn at pp. 9-13, ll. 15-24 attached as **Exhibit "B."**
8. Phenylpropanolamine a/k/a PPA was taken off the market years before the incident in question. An excessive number of adverse events were associated with the use of PPA including strokes and cardiac arrhythmias. Id. at p. 12, ll. 1-12.
9. Dr. Hearn testified that *Phenylpropanolamine and Pseudoephedrine can be found in "diet drugs."* Id. at pp. 18-20, ll. 24-5.
10. Dr. Hearn also testified that under normal circumstances he would test for the presence of amphetamines, but he did not do so in this case. Id. at pp. 25-26, ll. 17-3.
11. A major issue in this case surrounds the medication the decedent was taking prior to and during the hike. Defendants assert that such medication – and the chemical impact it had on his body – contributed to or caused his death.

NMS Labs

12. Dr. Hearn recommended that the decedent's blood be tested further by NMS Labs in Pennsylvania.
13. NMS Labs told the undersigned that based on the amount of blood taken an "ephedrine panel" could be utilized to test for quantity levels of Phenylpropanolamine and Pseudoephedrine.
14. Counsel for BSA/SFC contacted Plaintiffs' counsel and requested that the ephedrine test by NMS Labs be approved. Plaintiffs' counsel agreed.

Amphetamine Panel

15. While making arrangements, NMS Labs recommended that it employ an “amphetamines” test and advised that there was sufficient blood (2 mL) to perform the broader testing.
16. Defense expert, Dr. Charles Wetli agrees with NMS Labs that since the broader testing is a viable option, the “amphetamine” test should be performed.
17. The amphetamine test is necessary, because it tests for **appetite suppressants**, which is one category not encompassed in the ephedrine test.
18. Michael’s pediatrician testified that Michael was “significantly overweight” to the point of being “obese” for his age. *See* Deposition of Dr. Ronald Bullard at pp. 23-27, ll. 15-25; pp. 30-31, ll. 21-3 attached as **Exhibit “C.”** Michael had been on weight watchers for quite some time and needed to work on his dietary intake. *Id.* at P. 23, ll. 15-19 p. 48, ll. 19-23. Because Dr. Hearn did not test for amphetamines, and because no autopsy was conducted, Defendants have no idea whether Michael was taking appetite suppressants (a/k/a “diet drugs”), which could be a contributing factor to his death. Because the cause of death is one of the most significant disputed issues in this case, the defense would be prejudiced were it not permitted to test for amphetamines.
19. Moreover, there is no prejudice to the Plaintiffs. The amphetamine test encompasses the ephedrine test. *See* NMS ephedrine test versus amphetamine test attached as **Composite Exhibit “D.”** The only additional “category” under the amphetamine test is “appetite suppressants.” Thus, because Plaintiffs have already agreed to the ephedrine panel, there is no legitimate reason to force Defendants to move to compel to add a test that only has one additional category, especially since Michael’s medication intake is critical to the defense in this case and is unquestionably relevant to the cause of death. Plaintiffs’ only reason for objecting is because the amphetamine test may reveal additional substances found in the decedent’s blood at the time of death, which could hurt their case. The Defendants must be permitted to use what little physical evidence does exist (2 mL of blood) to determine possible causes of death.

Memorandum of Law

20. The information gained from the “amphetamine” test is relevant and discoverable. Discovery should ordinarily be permitted based on relevancy “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, 708 F.Supp.2d 1304, 1306 (S.D.Fla. 2010) (quoting Tate v. United States Postal Serv., 2007 WL 521848 at *1 (S.D.Fla.)).
21. In fact, Federal Rule of Civil Procedure, specifically provides for this type of examination as to **blood work**. “The court where the action is pending may order a party whose mental or physical condition – including blood group – is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner.” Fed.R.Civ.P. 35(a)(1). “[T]he [1970] amendment expressly includes blood examination within the kinds of examinations that can be ordered under the rule.” Fed.R.Civ.P.35(a) advisory committee’s note, 1970 Amendment; *see also* Beach v. Beach, 114 F.2d 479, 481-483 (D.C.Cir. 1940).
22. As discussed above, the decedent’s physical condition at the time of the incident is in controversy. Good cause has been shown for why it is necessary to test his blood for the concentration of ephedrines and amphetamines. *See* Schlagenhauf v. Holder, 379 U.S. 104, 118-119 (1964).

Red Tape Necessary to Conduct Blood Testing

23. Previously, undersigned filled out the appropriate paperwork and submitted a check to NMS Labs. Undersigned also wrote to the Dade County Medical Examiner Department requesting the release of the blood sample to NMS. The Medical Examiner Department responded with a letter indicating that it could not release the blood unless the Sample Request Procedure was followed. *See* Sample Request Procedure attached as **Exhibit “E.”**
24. Number 2 of the Sample Request Procedure requires An Affidavit or Court Order: That authorizes the Medical Examiner Department to release the sample for testing by an independent laboratory. You will need to do one of the following:

- If the decedent is, your minor child and you are the legal guardian a notarized affidavit verifying your identity and authorization to release the sample will be sufficient.
- If you are the legal spouse of the decedent, a notarized affidavit verifying your identity and authorization to release the sample will be sufficient.
- If the decedent is an unmarried adult, you must provide a court order stating your legal guardianship, verifying your legal right to represent the decedent **and a court order** authorizing the release of the sample.”

25. This Motion seeks an Order authorizing the release of the blood sample for purposes of an amphetamines test. However, because Michael was a minor at the time of the incident, BSA and SFC also request an Order compelling Howard Adelman and Judith Sclawy to provide a notarized affidavit verifying their identity and authorization to release the sample for that purpose. *See* proposed Affidavits attached as **Exhibit “F.”**

26. Whatever test this Court decides to allow, BSA and SFC request that this Court enter an Order authorizing the release of the blood sample for purposes of that test and compel Howard Adelman and Judith Sclawy to provide a notarized affidavit verifying their identity and authorization to release the sample.

WHEREFORE, DEFENDANTS, Boy Scouts of America and The South Florida Council, Inc. respectfully request that this Honorable Court (1) enter an Order authorizing the Miami Dade County Medical Examiner Department to release the blood sample of Michael Sclawy-Adelman to NMS Labs for the purpose of conducting an “amphetamine test” and (2) Order that Howard Adelman and Judith Sclawy provide a notarized affidavit verifying their identity and authorization to release the sample to NMS Labs for the purpose of conducting an “amphetamine test.”

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CERTIFICATION OF GOOD FAITH

Pursuant to Local Rule 7.1(a)(3), and the internal discovery procedures for the Honorable Judge Goodman, counsel for the movant has conferred in writing and telephonically with counsel for the Plaintiffs who would not agree to allowing NMS to conduct the amphetamines test.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was sent August 2, 2011 to: Robert D. Peltz, Esq, Ira H. Leesfield, Esq., LEESFIELD & PARTNERS, P.A., 2350 South Dixie Highway, Miami, FL, 33133; Frederick E. Hasty, Esquire, Wicker, Smith, O'Hara, McCoy, Graham & Ford, P.A., 2800 Ponce de Leon Boulevard, Suite 800, Coral Gables, FL 33134; Greg Gaebe, Esq., Gaebe, Mullen Antonelli, Esco & DiMatteo, 420 S. Dixie Highway, Third Floor, Coral Gables, FL, 33146; Ubaldo J. Perez, Jr., Esq., LAW OFFICES OF UBALDO J. PEREZ, JR., P.A., 8181 NW 154th Street, Suite 210, Miami Lakes, FL 33016.

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