UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG/GOODMAN

HOWARD ADELMAN et al.,

Plaintiffs,

v.

BOY SCOUTS OF AMERICA, et al.,

Defendants.
_____/

PLAINTIFFS' RESPONSE TO BOY SCOUTS OF AMERICA'S MOTION FOR ORDER REGARDING RELEASE OF BLOOD SAMPLE FOR AMPHETAMINES TESTING

The Defendant's Motion is based upon deposition excerpts taken out of context, which portray an inaccurate picture of the record and facts in this case. Contrary to the impression sought to be conveyed by the motion, the Plaintiffs had agreed months ago to the specific blood testing recommended by Dr. Hearn on his deposition back on March 10, 2011. It was only after the Defendant Boy Scouts of America suddenly, 4 months later, sought to change the agreed upon testing without adequate reason or basis that the Plaintiffs objected. As discussed in more detail below, the Plaintiffs are still willing, as they have advised the Boy Scouts of America, to allow the specific testing which the parties agreed to back in March.

One of the misleading portions of the Defendants' motion is its discussion of the finding of phenylpropanolamine and pseudoephedrine in Michael's blood by Dr. Hearn. The Defendant goes to great lengths to raise the specter that Michael was taking some type of improper drugs or medication by arguing:

> 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 p. 9-13, ll 15-24 attached as Exhibit "1."
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> 8. Phenylpropanolamine a/k/a PPA was taken off the market years before the incident in question. An excessive number of adverse incidents of events were associated with the use of PPA including strokes and cardiac arrhythmias. *Id.* at p. 12, ll.1-12.

Defendant's Motion at ¶7, 8.

What the BSA has neglected to advise the Court is that the pseudoephedrine is a substance that is typically found in normal decongestants, such as the over the counter medication Claritin-D, which Michael had been known to take. Perhaps even more importantly, while phenylpropanolamine had been taken off the market years before as stated by the Defendant, the reason that it was found in Michael's blood was that it is a metabolite or byproduct of pseudoephedrine. Therefore, contrary to the misleading impression conveyed by the Defendant's motion, Dr. Hearn testified that the reason he found phenylpropanolamine in Michael's blood "within a reasonable scientific certainty" was "from the metabolism of the pseudoephedrine," "which would have been consistent with taking Claritin-D at some point." [Hearn deposition, pp. 41-5, see Exhibit "1"].

The BSA statement that "Dr. Hearn also testified that under normal circumstances he would test for the presence of amphetamines, but did not do so in this case," also is inaccurate and misstates his testimony, as reflected by a review of the very portion cited by the BSA in its motion. See Defendant's motion, ¶10. What Dr. Hearn in fact testified to was that he had performed "our routine panel" of testing on Michael's blood. Although "other tests [are] available, . . . we don't do them routinely unless there was a specific request." [Hearn deposition, pp. 25-6; see Exhibit "1"].

The Defendant's discussion of Dr. Borges' testimony is equally as misleading, attempting to make it appear as if Michael's parents arbitrarily refused to give permission to perform an autopsy for frivolous purposes. Once again, what the BSA fails to advise the Court is that Michael's parents objected to the autopsy based upon their Jewish religious beliefs.[1] [Borges' deposition, p. 82, Exhibit "2"]. Nevertheless, Dr. Borges went on to testify that based upon his examination of Michael, Dr. Hearn's blood tests, and his review of all of Michael's medical records that it was his opinion that "Michael had died of heat stroke within 75% probability." As a result, he had no professional difficulty in setting forth the official cause of death on Michael's death certificate as "probable heat stroke." [Borges deposition, pp. 48-50 and 107, Exhibit "2"].

Although the Defendant takes excerpts from Dr. Borges' deposition to argue that Michael had "an elevated blood pressure," unlike Dr. Bullard, Dr. Borges testified that he never took Michael's blood pressure, nor did he ever see him while he was alive. [Borges deposition, p. 113,

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[1] Dr. Borges testified that as part of an autopsy he would have removed Michael's heart, brain and organs from his body and then dissected the organs and brain. He further testified that the autopsies violate Jewish religious traditions by desecrating the body. [Borges deposition, pp. 105-107, see Exhibit "2"].

Exhibit "2"]. Dr. Borges' cited testimony in the motion was based upon defense counsel's request that he read one blood pressure reading contained in Michael's pediatric records out of context.[2] Instead, Dr. Bullard, who performed actual cardiac evaluations of Michael during the course of his examinations over the years testified that Michael never had any signs or symptoms consistent with hypertension or any other evidence of heart disease, irregular rhythms or other cardiac abnormalities. [Bullard deposition, II, pp. 21-28, Exhibit "7"]. He testified that Michael was "active," "strong," "healthy," and "a typical teenager." [Bullard deposition II, pp. 26-35, Exhibit "7"]. Dr. Fleigenspan, Dr. Bullard's partner, had similar assessments of Michael's condition when he had seen him. [Bullard deposition II, pp. 37-41, Exhibit "7"].

During his deposition, Dr. Hearn testified that the blood test which he performed was not "quantitative," in that it did not determine the amount of pseudoephedrine or phenylpropanolamine and as a result, it would not be possible to reach any conclusions as to what effect, if any, it might

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[2] Dr. Ronald Bullard and his partners treated Michael for literally his entire life, from the time he was 5 months old until his death. As a result, he testified that he had the medical context to best interpret the significance of isolated physical findings or vital signs, which might occur during a particular visit over a 17 year period. [Bullard deposition II, pages 6-10, Exhibit "7"].

He further testified that the attempted categorization of an individual based upon body mass index (BMI) as done by the BSA in its motion, is misleading, since it is merely a mathematical formula that looks at the combination of an individuals height and weight. As a result, an all pro football linebacker who is 6'2" and 280 pounds would have the same BMI as a 6'2" 280 pound couch potato. [Bullard deposition II, pages 10-11, Exhibit "7"]. Dr. Bullard described Michael as "a typical teenager who was moderately overweight, who didn't strike me as someone who was at risk for any particular disease, or was in any way ill, who could certainly be cleared for physical activities outdoor and he needed to work on his diet and his exercise." [Bullard deposition II, page 15, Exhibit "7"].

As reflected by the last picture taken of Michael prior to the subject hike, which is attached hereto as Exhibit "8," he was not some overly obese child unable to participate in BSA activities. In fact, Michael had undergone the specific medical examination required by the BSA and passed it with flying colors. [See Exhibit "9," and Bullard deposition II, pp. 43-4, Exhibit "7"].

Although Michael had a somewhat elevated cholesterol for several years between 2003 and 2005, Dr. Bullard testified that as a result of improved dietary choices and seeing a nutritionist, Michael's cholesterol was essentially normal during the summer of 2005 and thereafter neither he nor Dr. Fleigenspan felt the need to even continue testing his cholesterol. [Bullard deposition II, pp. 53-60, Exhibit "7"].

have had on his blood pressure at the time.[3] [Hearn deposition, pp. 31, 68-71, Exhibit "1"]. During his deposition, Dr. Hearn testified that testing could be performed at the NMS labs, which could provide such a quantitative analysis. [Hearn's deposition, p. 31, Exhibit "1"].

Accordingly, when counsel for the BSA discussed further testing with undersigned counsel shortly after Dr. Hearn's deposition, it was agreed by both parties that Michael's parents would execute the necessary authorization forms to allow Dr. Hearn's office to forward the remaining blood samples to the NMS laboratories for the quantitative testing specifically referred by Dr. Hearn. See correspondence confirming prior verbal agreement attached as Exhibit "4" hereto.

Subsequently, 4 months later, the Plaintiff received a new and different request from the BSA, seeking authorization to instead perform an "amphetamines panel." See Exhibit "5" hereto. Counsel for the Plaintiff thereafter wrote to counsel for the BSA and requested an explanation as to the basis for this new request, which significantly differed from the agreement reached between the parties month earlier. See Exhibit "6" hereto. Thereafter, the parties engaged in additional communications and correspondence to no avail.

Although the Plaintiffs are perfectly willing to abide by the agreement reached with the Defendant BSA for the examination referred to by Dr. Hearn, 4 months ago, they are not willing to the new examination requested by the Defendant for several grounds.

First, there is absolutely no evidence in the record of this case that Michael Adelman ever took amphetamines or any medication containing them nor has any such reference been cited by the Defendant. The fact that Michael may have been moderately overweight does not give rise to any basis to conclude that he had taken amphetamines or any appetite suppressants, or justify changing the testing regimen previously agreed to by the parties. In fact, the testimony of Michael's parents and sister have conclusively established that Michael never took any appetite suppressants.

In the absence of any evidence of any nature to support the suggestion that Michael had taken amphetamines, such testing not only is unwarranted, but raises the danger of confusing the issues this case at this time. Dr. Hearn has testified in another case in which he had been retained as an expert that "an amphetamine test can give a false positive by a number of things including pseudoephedrine." In that case, *Valdez v. Optimist Club of Sunniland, Inc.*, Dr. Hearn had in fact

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[3] It is important to note that there are no warnings on either the Claritin-D package or accompanying insert, which advise against using it while performing either outdoor or exertional activities. See "3." Therefore, whether or not Michael even took this over the counter medicine for typical allergies at some point before the hike is irrelevant.

been retained as an expert for the sole purpose of testifying that a positive toxicology test for amphetamines of a young man who had collapsed while playing roller hockey in the heat was a false positive, because he had taken Tylenol Cold, which contained pseudoephedrine, such as the Claritin-D taken by Michael. [Hearn deposition from *Valdez*, pp. 58-64, 73-76, Exhibit "10"].

Accordingly, the proposed testing will create a significant risk of raising a new phantom issue at the last moment without any factual basis in the record, which would not only result in potential confusion to the jury, but necessitate even more new discovery and experts, without any factual basis in the record. It should be noted that the lay discovery cut off, which has so far been extended several times, is August 31, 2011. To allow the Defendants to raise this new issue at the last moment is therefore prejudicial to the Plaintiffs. By allowing such last minute testing, the Plaintiffs may be required to seek to add new experts and take additional discovery at this late date, which will in turn open the door to the need for additional discovery for all parties. If the Defendants had raised this issue back months ago at the time of the original agreement by the parties, these matters could have been dealt with at that time without opening the door to the need for additional discovery after the deadlines agreed to by the parties have already lapsed.

Although the scope of discovery is liberally construed under Federal Rules of Civil Procedure, there are limits. For example, the Defendant's request to test Michael's blood for amphetamines in the absence of any evidence in the record whatsoever to even suggest that he had ingested any substance containing amphetamines, would be no different than the Plaintiff subpoenaing Crompton's and Schmidt's medical records on the off chance that there might be something in the records to show that they had a medical condition, which made them unfit to lead the hike on the day of Michael's death.

Therefore, there is no valid basis to order such new testing which differs from what the parties previously agreed to months ago.

The Plaintiffs have already agreed to execute the authorization form for the agreed upon testing and the Court should therefore deny the Defendants request to change the agreed upon testing or to require the Plaintiffs to execute the new proposed authorization form.

Dated: August 15, 2011.

Respectfully submitted,

/s/ Robert D. Peltz
ROBERT D. PELTZ (Fla. Bar No. 220418)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **August 15, 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 or pro se parties 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.

/s/ Robert D. Peltz
ROBERT D. PELTZ
E-mail: peltz@leesfield.com
LEESFIELD & PARTNERS, P.A.
2350 S. Dixie Highway
Miami, Florida 33133
Telephone: (305) 854-4900
Facsimile: (305) 854-8266
Counsel for Plaintiffs

SERVICE LIST

IRA H. LEESFIELD
ROBERT D. PELTZ
E-mail: leesfield@leesfield.com
peltz@leesfield.com
LEESFIELD & PARTNERS, P.A.
2350 S. Dixie Highway
Miami, Florida 33133
Telephone: 305-854-4900
Facsimile: 305-854-8266
Attorneys for the Plaintiffs

FREDERICK E. HASTY, III
Email: fhasty@wickersmith.com
WICKER, SMITH, O'HARA, MCCOY, GRAHAM & FORD, P.A.
2800 Ponce de Leon Blvd.
Suite 800
Coral Gables, Florida 33134
Telephone: 305-448-3939
Facsimile: 305-441-1745

Attorneys for Howard K. Crompton and Andrew L. Schmidt

UBALDO J. PEREZ, JR., ESQ.
Email: uperez@uperezlaw.com
Law Office of Ubaldo J. Perez, Jr., P.A.
8181 NW 154th Street, Suite 210
Miami Lakes, FL 33016
Telephone: (305) 722-8954
Facsimile: (305) 722-8956
Co-Counsel for Howard K. Crompton

WILLIAM S. REESE
WILLIAM SUMMERS
KEVIN D. FRANZ
Email: wreese@lanereese.com
kfranz@lanereese.com
wsummers@lanereese.com
LANE, REESE, SUMMERS, ENNIS & PERDOMO, P.A.
2600 Douglas Road
Douglas Centre, Suite 304
Coral Gables, Florida 33134
Telephone: 305-444-4418
Facsimile: 305-444-5504
Attorneys for Boys Scouts of America and The South Florida Council, Inc.; Boy Scouts of America

GREG M. GAEBE
Email: ggaebe@gaebemullen.com
GAEBE, MULLEN, ANTONELLI & DIMATTEO
420 South Dixie Highway, 3rd Floor
Coral Gables, FL 33146
305-667-0223
305-284-9844 – Fax
Attorneys for Plantation United Methodist Church