

**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,

Plaintiffs,

vs.

Boy Scouts of America, et al.

Defendants.

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

District Ct. Judge: Alan S. Gold

Magistrate Judge: Jonathan Goodman

**DEFENDANTS' MOTION FOR LEAVE TO FILE  
16-PAGE MOTION TO DISMISS DUE TO SPOILIATION OF EVIDENCE**

COMES NOW, Defendants, Boy Scouts of America (“BSA”), South Florida Council, (“SFC”), Howard Crompton, individually, Andrew Schmidt, individually and Plantation United Methodist Church (“PUMC”) by and through their undersigned counsel, and pursuant to Federal Rule of Civil Procedure 72(a) and Judge Goodman’s Discovery Procedures [D.E. 190], hereby seek leave to file a 16-page Motion to Dismiss Based on Spoliation of Evidence. The Defendants state more fully as follows:

1. This is a wrongful death action stemming from an incident that occurred on May 9, 2009, when Michael Sclawy-Adelman died while taking part in a hike in the Big Cypress National Park of the Florida Everglades.
2. Howard Adelman and Judith Sclawy, Michael’s parents, refused to allow an autopsy to be done on Michael following his death due to religious reasons.
3. As a result, Dr. Manfred Borges, the medical examiner, could not determine cause of death with certainty.
4. Defendants intend to file a “Motion to Dismiss Based on Spoliation of Evidence” (“Motion to Dismiss”). *See* Motion to Dismiss attached hereto *with exhibits* as **Exhibit “1.”** *Exhibits to the Motion to Dismiss are attached as A-H.*
5. Defendants assert that Plaintiffs spoliated evidence and seek dismissal of Plaintiffs’ cause of action as a sanction. In the alternative, Defendants seek an Order striking all Plaintiffs’ expert witnesses who would be called to testify as to cause of death. In the alternative, Defendants seek an Order invoking an adverse inference (i.e. that Michael’s death was caused by a cardiac event or a central nervous system failure, wholly unrelated to heat stroke).

6. This Motion for Leave is filed in an abundance of caution, as Defendants are unsure whether leave is necessary to file a 16-page Motion on this issue.
7. The Motion to Dismiss seeks a dispositive ruling, which cannot be entered by a Magistrate Judge. *See* F.R.C.P. 72(a); *see also* 28 U.S.C. § 636(b)(1). However, as Judge Goodman has written, Magistrate Judges have authority to rule on a spoliation Motion if the sanction “*actually imposed*” (non-dispositive) is different from the sanction “*requested*” (dispositive). *See Point Blank Solutions, Inc. v. Toyobo America, Inc.*, Slip Copy 2011 WL 1456029 at \*2-4 (S.D.Fla.) (emphasis in original).
8. The Motion to Dismiss requests dismissal, but alternatively requests non-dispositive sanctions. Thus, it is unknown at this time whether Judge Gold or Judge Goodman will rule on the Motion to Dismiss.
9. Local Rule of the United States District Court for the Southern District of Florida, 7.1(c)(2), limits motions to 20 pages or less absent permission from the Court. F.R.C.P 7.1(c)(2). While undersigned is not aware of any page-limit restrictions specifically instituted by Judge Gold, Magistrate Judge Goodman’s Discovery Procedures [D.E. 190] clearly indicate a 5-page limit. In fact, several Motions have been stricken in this case due to violation of said Procedures.
10. Defendants reiterate that the Motion seeks dismissal as a sanction, which can only be ordered by Judge Gold. Under the Federal Rules (as the Motion is less than 20 pages and seeks dismissal as a dispositive ruling) Defendants do not believe leave *must* be granted in this circumstance. However, Defendants recognize the jurisdictional authority of Judge Goodman under a similar spoliation Motion, and respectfully request leave to file the 16-page Motion in an abundance of caution pursuant to his Discovery Procedures. *See* [D.E. 190]; *see also Point Blank Solutions* 2011 WL 1456029 at \*1-2 (ruling and Opinion by Judge Goodman on Plaintiffs’ Motion to Determine Spoliation of Evidence and Appropriate Sanctions).
11. The factual circumstances and issue raised in Defendants’ Motion to Dismiss– whether a lawsuit should be dismissed as a sanction for refusal to permit an autopsy amounting to spoliation of evidence – is one of first impression in this Circuit. A great deal of case law (both state and federal) on spoliation and autopsies is required to adequately present Defendants’ argument.
12. Moreover, the heart of this case turns on what caused Michael Sclawy-Adelman’s death. Plaintiffs’ theory is that it was a result of heat stroke. Defendants’ theory is that it was a result of either a cardiac event or a central nervous system failure such as a spontaneous intracerebral hemorrhage. A plethora of discovery was taken concerning his cause of death and circumstances

surrounding the decision to block an autopsy. This is such a crucial issue, that the Motion cannot be effectively written under 5 pages.

13. In fact, deposition testimony is so critical to understanding the spoliation issue, that the testimony and records of the following individuals must be included in the Motion: Plaintiff, Howard Adelman, Plaintiff, Judith Sclawy, Deputy Chief Medical Examiner, Dr. Manfred Borges, Chief Medical Examiner, Dr. Mark Coburn, Director of the Toxicology Laboratory, Dr. William Hearn, Chief Ranger Ed Clark and Detective in the major crimes unit of Collier County Sheriff's Office, Kevin O'Neill.
14. Good cause exists for seeking this relief. Based on the complexity of this issue, 11 pages of testimony and 5 pages of case law and argument is necessary to properly present the argument and protect the interests of the Defendants.

WHEREFORE, DEFENDANTS, respectfully request that this Honorable Court grant leave to file the 16-page Motion to Dismiss Based on Spoliation of Evidence.

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**CERTIFICATION OF GOOD FAITH**

Pursuant to Local Rule 7.1(a)(3) and Judge Goodman’s internal procedures, counsel for the movant has conferred with counsel for the Plaintiffs telephonically in a good faith effort to resolve the issues raised in the motion. Plaintiffs’ counsel does not agree to the requested relief.

**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true copy of the foregoing was sent October 7, 2011 to: Robert D. Peltz, Esq, Ira H. Leesfield, Esq., LEESFIELD & PARTNERS, P.A., 2350 South Dixie Highway, Miami, FL, 33133; Eric Kleinman, Esq., Kleinman & Arrizabalaga, P.A., 150 SE 2<sup>nd</sup> Avenue, Suite 1105, Miami, FL 33131; Greg Gaebe, Esq., Devang Desai, 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 154<sup>th</sup> Street, Suite 210, Miami Lakes, FL 33016.

By: \_\_\_\_\_s/Kevin D. Franz\_\_\_\_\_

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