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.
_____/

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

District Ct. Judge: Alan S. Gold

Magistrate Judge: Jonathan Goodman

DEFENDANTS' MOTION TO DISMISS BASED ON SPOLIATION OF EVIDENCE

COMES NOW, Defendants, Boy Scouts of America ("BSA"), South Florida Council, ("SFC"), Howard Crompton ("Crompton"), Andrew Schmidt ("Schmidt") and Plantation United Methodist Church ("PUMC") by and through their undersigned counsel, and pursuant to Federal Rule of Civil Procedure 37, move this Honorable Court for an Order of dismissal with prejudice or other appropriate remedies on the basis that the Plaintiffs spoliated critical evidence which has unduly prejudiced the Defendants' ability to defend Plaintiffs' claims (to wit, the personal, informed decision to disallow an autopsy of Michael Sclawy-Adelman ("Michael" or ("Decedent")) and in support, state as follows:

SYNOPSIS

This is a wrongful death action stemming from a tragic incident that occurred on May 9, 2009, when Michael, then 17 years old, died on the Florida Trail while taking part in a 20 mile hike in the Big Cypress National Park in the Florida Everglades. One day after the incident, Dr. Manfred Borges, the Deputy Chief Medical Examiner for Collier County, sought an autopsy of Michael's body to conclusively determine the cause of death. Michael's parents, Judith Sclawy and Howard Adelman, were informed by doctors and a police detective that a conclusive cause of death could not be determined in the absence of an autopsy and that litigation would be problematic without a known cause of death. Armed with this knowledge, Michael's parents, who are Jewish, refused to permit the autopsy on religious grounds and claimed they had no intention to file suit. The Medical Examiner respected the wishes of The Adelman's, and no autopsy was performed. Two days later, however,

Howard Adelman began independently investigating the circumstances behind Michael's death. He expressed concerns about the way the hike was organized and conducted to Chief Ranger Ed Clark who investigated the incident. He questioned the preparation of the scout leaders and disapproved of the way in which they ran the troop. Three months later, Michael's parents decided to file suit, which was then filed approximately one year after the incident.

The refusal to allow the autopsy despite numerous requests by doctors and law enforcement officers was in bad faith. The Plaintiffs cannot be allowed to proceed in this case. The Adelmans made a conscious and informed decision to prevent the collection or creation of evidence by autopsy, which would have conclusively determined the cause of Michael's death. In otherwords, the cause of Michael's death is the central dispute in this case. The decision to block an autopsy, even if for legitimate religious reasons, has so severely prejudiced the Defendants by preventing them from conclusively proving a cause of death, that the most reasonable and appropriate remedy available is to dismiss this action. In the alternative, Defendants move to exclude all expert testimony on behalf of Plaintiffs concerning cause of death and/or request a jury instruction on spoliation, which raises a presumption against the Plaintiffs.

PLAINTIFFS' REFUSAL TO ALLOW AN AUTOPSY AND THE CRUCIAL NATURE OF THE EVIDENCE LOST AS A RESULT

1. The heart of this case turns on the determination of what caused Michael Sclawy-Adelman's death. Plaintiffs' theory is that Michael died as a result of heat stroke. Defendants retained medical experts who believe that the known evidence is not consistent with heat stroke and that death was likely caused by either a sudden cardiac event or a sudden central nervous system failure such as a spontaneous intracerebral hemorrhage. However, in the absence of an autopsy, the Defense experts cannot more conclusively opine as to the actual cause of death, which severely prejudices Defendants.
2. Michael's parents were told – one day after the incident – that without an autopsy, the cause of Michael's death could not be known with certainty. They were advised of the crucial nature of

autopsy results and that without knowing the cause of death, prosecuting a civil action would be problematic.

3. An autopsy would have determined cause of death. And, as more than two years has passed since Michael's death, evidence establishing his cause of death with medical probability is impossible under any circumstance. *See* Affidavit of Charles V. Wetli, M.D. attached as **Exhibit "A."**

4. Despite knowing the ramifications of the lack of autopsy, Michael's parents chose to abide by their religious beliefs and requested that the Medical Examiner forego the autopsy. Their wishes and beliefs were respected.

5. Michael's body was evidence that once existed that was crucial to the defense of this wrongful death action. Michael's parents engaged in an affirmative act by causing the evidence to be lost (i.e. precluding an autopsy). They did so being fully advised of the litigation-related ramifications of their choice. With this knowledge, the decision to preclude an autopsy was made in bad faith and dismissal is appropriate. The informed decision by the Adelmans has ramifications. The choice made has ramifications. The Adelmans cannot gain a litigation advantage by having prevented the autopsy from taking place.

Plaintiff, Judith Sclawy

Q. Okay. I think I know the answer to the question, but why is it that you refused to have an autopsy performed?

A. It's for religious reasons.

Deposition of Judith Sclawy at pp. 145-146, ll. 25-3 attached as **Exhibit "B."**

Q. Okay. When there was a discussion about an autopsy being a possibility, were you told that one of the things they could look for was to see whether or not there was any congenital abnormality in Michael's body? Were you told that?

A. I don't remember that specifically, but the medical examiner said that without it, he would not be able to have conclusive results or something like that, or something about testifying or something, that it was advisable, and I just couldn't do it.

Q. Okay. I'm just asking a specific question, and that question was, did they tell you that without doing the autopsy, they couldn't be certain about the cause of Michael's death?

A. Yes.

Q. And did they explain to you that one thing they could find is whether or not there was something that he was born with that was abnormal, that would be discovered on autopsy if it were present? Did they explain that to you?

A. He explained that it was my decision about the autopsy and that if he didn't do it, it would not be known if there was something, but I just couldn't let him be hurt anymore.

Judith Sclawy at pp. 146-147, ll. 24-22.

Dr. Manfred Borges, Deputy Chief Medical Examiner

6. On May 10, 2009, one day after the incident, Dr. Manfred Borges, the Deputy Chief Medical Examiner for the District 20 Medical Examiner's Office, examined Michael's body.
7. Michael Sclawy-Adelman was measured at 5 foot 6 and he weighed 225 pounds. He was a heavy kid. And as we saw, he had a high heart rate, and he had high cholesterol for his age." Deposition of Dr. Manfred Borges at p. 88, ll. 17-21 attached as **Exhibit "C."**
8. He adamantly requested that Judith Sclawy and Howard Adelman allow him to conduct an autopsy to determine the cause of death. His parents refused based on religious grounds. *See* Borges at pp. 9-10, ll. 24-19; p. 21, ll. 10-16; p. 83, ll. 22-24.

Q. Okay. Did you know on the 10th that you were not going to do an autopsy?

A. Well, by the time that I did this [external examination], I knew that I was not going to do an autopsy, because [sic] we had spoken to the parents, and we very much wanted to do an autopsy, and that was our recommendation to the parents that an autopsy should be done, but the parents were adamantly opposed to an autopsy. And we had extensive communication, both with the parents, as well as internally between myself and Doctor Mark Coburn, who you see on the wall there. That is the Chief Medical Examiner. And eventually, the parents were very adamant, and we advised them that if they had any inkling towards litigation that an autopsy would be recommended. And they were adamantly opposed, and at that time said that they were . . .

Q. You said if there was any inkling towards litigation . . .?

A. that we recommended an autopsy be done and they said "What litigation?," in quotation marks.

Q. And when did you find out there was going to be litigation?

A. Oh, I think we found out when we started getting requests for information. I can't tell you, I mean I would have to go through all of this to see when the first request for our file came in. And I was surprised, because I had been told that there wasn't going to be litigation.

Q. Who told you that?

A. Well, the parents. In fact, I think there was an exact quote from the mother that said, "What litigation."

Q. Yeah. Do you know what made them change their mind?

A. Well, I was advised by - - I forget your name, sir

MR. PELTZ: Bob Peltz

A. Bob Peltz, Mr. Peltz, that the family saw something in regard to the number of boy scouts that had passed away in different experiences, and that had made them decide that they wanted to file. . . Yeah, that is what I was told.

Dr. Borges at pp. 9-11, ll. 24-25.

Q. Because there was no autopsy, there was no opportunity to determine, from a pathophysiologic basis, if there was an abnormal heart in Michael's case, correct?

A. Correct.

Q. And you mentioned heart rate. What was it about heart rate that caught your attention?

A. Well, I noticed his heart rate was elevated.

Q. And what do you call "elevated"?

A. He was tachycardic. I don't recall offhand. I would have to go into the record, but I noticed it was elevated. From what I took that to mean, he might be somewhat deconditioned, he wasn't in the best of shape.

Q. Okay. The last office visit to his pediatrician his heart rate was 114 beats a minute, and is that what you are referring to as tachychardic?

A. Yes.

* * *

A. Oh, shoot, this is very, very poor. Heart rate is 114, blood pressure 133 over 84. So he was somewhat elevated blood pressure.

Borges at p. 18-20, ll. 3-18; p. 20, ll. 13-15.

Q. So the last two times he went to the pediatrician eight or nine months apart, his heart rate was 114 beats per minute?

A. Yes.

Q. That is abnormal; is it not?

A. Yes, it is

* * *

Q. So not only was it important to know what the cause of Michael's death was, it was important, if there was an abnormality, congenital abnormalities, for the parents to have that information from the postmortem examination.

A. Yes.

Q. And you told them that?

A. Yes, I did.

* * *

A. "She [Judith Sclawy] advised that her son had no medical problems, and in fact, had recently seen a doctor. She pleaded with me not to do an autopsy. I could hear her husband in the background stating that he did not want an autopsy. . . I advised that without an autopsy, I would not have a definitive cause of death. At best, I could be able to say probable on the death certificate. Without an autopsy, I could not find congenital or hereditary problems."

Dr. Borges at pp. 21-23, ll. 3-25. See also pp. 44-46, ll. 8-2.

Q. The reason you wanted to perform an autopsy and the reason you strongly recommended an autopsy to all the people you talked to, was what?

A. I always want to generate the more data that I can in a situation like this, as far as, you know, not being limited to just external and so forth. Had I done an autopsy, I would have had a good view of Michael's heart. I probably would have sent the heart to a cardio-pathologist. I could have excluded cardiac conditions that were occult. I could have also excluded neurological conditions. I would have sent the brain to a neuropathologist. I probably could have done a lot more toxicologic studies. I would have had access to the organs. I would have had access to microscopic examination of the tissues. So there would have been a considerable amount of more information. And rather than being limited to saying "probably heat stroke," because I still believe it is heat stroke. All of the terminal circumstances point to heat stroke. All of the features that we are saying point to heat stroke, but environmental circumstances point to heat stroke. So I believe that is the cause of death. But I would have been able to eliminate others. So that I would have, rather than saying probable, the death certificate would have said heat stroke, and we would have eliminated all of those things. I was not able to do that. I was precluded from doing that by not having done an autopsy.

Dr. Borges at pp. 96-98, ll. 23-1.

9. Dr. Borges testified that Michael's parents refused an autopsy for religious reasons. However, he has performed autopsies on Orthodox Jewish people in the past.

Q. Is it a policy of this office to respect the religious beliefs of those individuals, unless there is some compelling state interest in which not to do so?

A. We definitely, most definitely respect the objections. There are autopsies that are mandated, homicides and suicides are mandated. There are others that are recommended. This would fall under that category, and obviously, we would respect their objections. We have done autopsies on people who are Orthodox Jewish. We have the Rabbi present, and we try to remove as little blood and as little tissue as possible and return it to the body with the Rabbi present. It has been done and that could have been done in this case, but it wasn't.

Dr. Borges at p. 82, ll. 9-24.

Chief Medical Examiner, Dr. Mark Coburn

10. Dr. Coburn took written notes on May 10, 2009 about the necessity of conducting an autopsy.

> Parents have told Michelle that they are Orthodox Jews and are adamantly opposed to an autopsy and wish to speak directly to Dr. Borges. I asked Dr. Borges to fully explain to the family why we recommend that an autopsy be done and that without one we are not able to definitively determine if the child died of heat/dehydration except [sic] symptoms, terminal event and lack of other medical history. I also asked that they be made aware that hereditary disorders or congenital heart problems would not be diagnosed, which may be important for the family to know for the sake of other children, if they have any others, or will have. Finally, without an autopsy, litigation may be problematic.
>
> Dr. Borges called back after speaking to family. **He told me what he told the family regarding litigation – to which mom asked? What litigation?** – and also about congenital and hereditary disorders – to which she answered "I don't care."
>
> I spoke to Det. O'Neil and federal agent Dave _____(spelling) I explained why we are not able to perform an autopsy over the family's objections. The concern is now whether the scout master is negligent and culpable for making the by hike 20 miles –
>
> **Det. O'Neill is concerned that the parents will later want to sue** the Scout master or will want him prosecuted criminally and we may not have enough information without an autopsy to determine certain things. I told him that his concerns were valid and that while that may become an issue, at this point in time I had no statutory right to hold the body further or to perform an autopsy above the family's objections and he understood.
>
> *See* Notes of Dr. Coburn dated 5-10-2009 and 5-11-2009 attached as **Exhibit "D."**

Dr. William Hearn, Director of the Toxicology Laboratory

11. Dr. Hearn, the Director of Toxicology at the Miami Dade Medical Examiner Department, testified that Dr. Borges attempted, but was unable to extract urine from Michael during the examination.

See Deposition of Dr. William Hearn at p 15, ll. 2-7 attached as **Exhibit "E."**

> **Q. So for whatever reason the ME's office in Collier County determined not to do ocular fluid, not to do urine, not to do gastric contents, liver, bile, brain or other?**

A. Well, not exactly. Let me explain. Since there was no autopsy they couldn't obtain some of these samples. There was an objection to an autopsy. He drew the blood by sticking a needle in through the skin and penetrating the femoral vein. As far as urine he tried to get urine, although the normal procedure would be to expose the urinary bladder and then stick a needle into it and draw urine out, but that would have required an autopsy so he had to again stick a needle through the stomach or the abdomen and into the bladder and try to get some urine.

Dr. Hearn at p. 23, ll. 3-17

Q. Why is an autopsy the preferred way to investigate a death?

A. It's because you may not be able to see something that would be obvious if you were looking at the actual tissue, the organs and so forth. You may not be able to see it if you don't open up the body and examine those tissues. You can't weigh the organs, for example. You can't detect a hemorrhage in the brain if the person is already dead. .

Dr. Hearn at p. 55, ll. 10-20

Q. If Dr. Borges felt that an autopsy was necessary to perform his official duties, does he have the authority to go ahead and order the autopsy to be done?

A. He has the authority if, like, for example if it were a homicide, then it would be essential . . . but it's not required in cases where there's not going to be any kind of potential criminal litigation or something like that. It would have been better for all of you if he had done an autopsy because he then would have more thoroughly documented what was present, but –

Dr. Hearn at p. 86, ll. 7-22.

Detective Kevin O'Neill

12. Detective Kevin P. O'Neill, detective in the major crimes unit of the Collier County Sheriff's Office, investigated the subject incident. *See* deposition of Kevin O'Neill at p. 5, ll. 10-16 attached as **Exhibit "F."**

13. Shortly after the incident, he was informed that no autopsy would be done on Michael.

Q. Were you trying to get an autopsy?

A. I preferred to have an autopsy done.

Q. And why is that?

A. Because it advances to exactly what the cause of death was.

* * *

Q. Okay. And then you contacted the park special agency and told them about that decision?

A. Yes, I did.

Q. What was his response?

A. He preferred to have an autopsy done too.

* * *

Q. And this is again a section where there's a - - it talks about whether or not there should be an autopsy?

A. Correct. At the time I just - - I didn't think I had probable cause to get a court order to force an autopsy to be conducted, and I concurred with the State Attorney's Office with my facts that I had and they concurred that it did not have probable cause at that time to force an autopsy.

O'Neill at pp. 39-42, ll. 13-16.

Q. Okay. Now, on the next page of the same note, it says: . . . Det. O'Neill is concerned the parents will later want to sue the Scout Master or want him prosecuted criminally and we may not have enough information without an autopsy to determine certain things. I told him [Dr. Coburn] that his concerns were valid and that while that may become an issue, at this point in time I had no statutory right to hold the body further or to perform an autopsy above the family's objections, and he understood. Do you remember that conversation with Dr. Coburn?

A. I remember having that conversation with Dr. Coburn that I preferred to have the autopsy done to answer many questions.

O'Neill at p. 65, ll. 2-19.

Howard Adelman and Chief Ranger Ed Clark: Investigation and the Decision to Sue

14. Despite Judith Sclawy responding to inquiries into potential litigation with, "What litigation?" Howard Adelman began investigating the incident on May 11, 2009. He spoke with Chief Ranger Ed Clark that day and expressed significant concerns about the preparation, organization and execution of the subject hike.

Q. When did you first talk to either Mr. Adelman or the mother, Ms. Sclawy-Adelman?

A. It would have been either the very next day or the day after that. Shortly after that, because I was contacted by Mr. Adelman.

Q. Okay.

A. He had concerns about the – the way the hike was conducted

See Deposition of Chief Ranger, Ed Clark at p. 17, ll. 5-12 attached as **Exhibit "G."**

* * *

A. He expressed concerns about the way the hike had been organized, and he offered to send me an e-mail that had to do with how the hike was organized - - which he did.

* * *

A. But his concerns were that he thought that the hike – that not a lot of preparation had gone into the hike. He thought that one of the scout leaders was – I'm not sure of the terminology that he used, but – tended to just wing it.

Chief Ranger Clark at pp. 18-19, ll. 9-2.

* * *

Q. Okay, did they leave you with the impression – did he leave you with the impression that he disapproved of the way that these two men were running their troop?

A. Yes.

Chief Ranger Clark at p. 38, ll. 1-4.

Q. Okay. Okay. In the one and only e-mail that Mrs. Adelman sent you that we marked as Exhibit number 2, he essentially just forwarded you an e-mail that he received in relation to this hike?

A. Yes.

Q. Okay, did you consider this e-mail to be part of your – part of the ranger's investigation of what happened to Michael?

A. Yes.

Chief Ranger Clark at p. 60, ll. 8-16.

15. Even before Howard Adelman expressed his concerns about the organization and preparation of the hike, Ranger Clark believed that litigation would ensue.

Q. When he called you on May 11th, with – and told you he was critical of the hike, was that your first indication that a – legal claim might result from this?

A. No, not really.

Q. Okay, when – when did when did you get that – that feeling?

A. The night of it.

Q. The night of it; okay.

A. Yeah.

Q. So, immediately?

A. Based on my experience.

Chief Ranger Clark at p. 27, ll. 3-14.

16. Chief Ranger Ed Clark also informed Howard Adelman that a lack of autopsy could negatively impact the investigation.

Q. During your conversations with Mr. Adelman, did you ever inform him that a lack of autopsy could impact the investigation?

A. Yes.

Q. Okay, what did you tell him in that regard?

A. Just that – the lack of a – of an autopsy could have a result on the investigation.

Q. And did he have a reaction to that statement?

A. Yeah, I think if – if I remember right, he was fall – he had to fall back on his beliefs.

Q. Okay.

A. And if I remember correctly, he made mention that he believed that his wife was more conservative in those beliefs than he was, that he probably would have allowed that to happen, but she did not want to and he honored her wishes.

Chief Ranger Clark at pp. 106-107, ll. 21-11.

17. Chief Ranger Ed Clark and Ranger Gary Shreffler met with the Adelman's on August 13, 2009 and summarized the Rangers' entire investigation. This convinced the Adelman's to file suit.

Q. Okay, and what was said to them that – that you think convinced them to file a lawsuit against the two fathers that were out of there – out in the hike, and the rest of the defendants? . . . what was – what was said to the Adelmans by Gary [Shreffler] that you believe led them to file a lawsuit?

A. We summarized the entire investigation.

Chief Ranger Clark at pp. 47-48, ll. 19-3.

18. Michael's parents decided to sue following on August 13, 2009 following the Rangers' visit.

Q. Okay. Before you retained any lawyers, when did you and/or your wife determine that you were going to proceed with the lawsuit? Just when in time was that?

A. Probably about the time the rangers drove out of our parking in front of the house.

Q. You're talking about Clark and Shreffler?

A. Shreffler and Clark, yes.

Deposition of Howard Adelman at p. 20, ll. 6-12; *see* p. 50, ll. 18-20 attached as **Exhibit "H."**

MEMORANDUM OF LAW

Spoliation of Evidence

"A litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action. Sanctions may be imposed upon litigants who destroy documents while on notice that they are or may be relevant to litigation or potential litigation . . ." Banco Latino, S.A.S.A. v. Gomez Lopez, 53 F.Supp. 1273, 1277 (S.D.Fla. 1999) (emphasis added).

"Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in a pending or reasonably foreseeable litigation." Graff v. Baja Marine Corp., 310 Fed.Appx. 298 at *2 (11th Cir. 2009) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d, 776, 779 (2nd Cir. 1999)); *see* Green Leaf Nursery v. E.I. DuPont de Nemours & Co., 341 F.3d 1292, 1308 (11th Cir. 2003). Federal Courts possess an inherent power to impose sanctions for spoliation. *See* Flury v. Daimler Chrysler Corp., 427 F.3d 939, 943-945 (11th Cir. 2005); *see also* Banco Latino at 1277. Federal law governs the imposition of spoliation sanctions. Flury, at 944.

"The Eleventh Circuit has held that appropriate sanctions for spoliation may include, among other things, (1) dismissing the case; (2) excluding expert testimony; or (3) instructing the jury that spoliation of evidence raises a presumption against the spoliator." Doe v. Miami-Dade County, --- F.Supp.2d ---, 2011 WL 2790201 at n.7 (S.D.Fla.) (citing Flury, 427 F.3d at 945); Managed Care Solutions, Inc. v. Essent Healthcare, Inc., 736 F.Supp.2d 1317, 1323 (S.D.Fla. 2010); Britton v. Wal-Mart Stores East, L.P., 2011 WL 3236189 at *10 (N.D. Fla.); Point Blank Solutions, Inc. v. Toyobo Am., Inc., 2011 WL 1456029 at *9 (S.D.Fla.).

To establish spoliation, the movant must show: (1) "that the missing evidence existed at one time; (2) that the spoliator had a duty to preserve the evidence and (3) that the evidence was crucial to the movant being able to prove its prima facie case or defense." Managed Care at 1322.

In this Circuit, failure to preserve evidence rises to the level of sanctionable spoliation when it is predicated on bad faith.[1] No showing of malice is necessary to establish bad faith. Mann v. Taser

[1] *But see* Flury, 427 F.3d at 945 (stating that "bad faith" is one of a handful of factors to consider when determining whether sanctions should be imposed for spoliation) and Managed Care Solutions, 736 F.Supp.2d at 1328, n.16 (recognizing the Flury factors and evaluating the instant facts under those factors).

Intl., Inc., 588 F.3d 1291, 1310 (11th Cir. 2009). One example of bad faith is "when a party purposely loses or destroys relevant evidence." Doe 2011 WL 2790201 at *5 and Managed Care Solutions 736 F.Supp.2d at 1322 (citing Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997)).

While federal law governs spoliation sanctions, this Court may look to state law for guidance. Managed Care Solutions 736 F.Supp.2d at 1322. "Florida law on spoliation is consistent with federal law." Id. (internal citations omitted). "The doctrine of spoliation arises when it is alleged that a crucial piece of evidence is unavailable due to one of the parties' actions" Vega v. CSCS Intl., N.V., 795 So.2d 164, 166 (Fla. 3d DCA 2001) (internal citation omitted).

The Fourth District Court of Appeal has held that **dismissal of a lawsuit as a sanction for spoliation of evidence is appropriate when a Plaintiff refuses to give permission to exhume her husband's body for an autopsy based on her religious beliefs.** Hammer v. Rosenthal Jewelers Supply Corp., 558 So.2d 460, 461 (Fla. 4th DCA 1990) *see also* Robert D. Peltz, The Necessity of Redefining Spoliation of Evidence Remedies in Florida, 29 Fla. St. U. L. Rev. 1289, 1295-1295 (2002). Even though the refusal of an autopsy was based on religious grounds, the Hammer Court stated that the case would be dismissed with prejudice unless Plaintiff consented to an autopsy, which would establish causation of death. Hammer 558 So.2d at 461. As Mr. Peltz points out, the decision to preclude an autopsy can equate to spoliation of evidence under Florida law.

ESTABLISHING SPOLIATION

1) The Existence of Evidence

It is undisputed that Michael's body was available for an autopsy the day after he died. Dr. Borges, the medical examiner, pleaded with Howard Adelman and Judith Sclawy to allow him to conduct an autopsy. He informed them that, through an autopsy, he would be able to determine the cause of death with absolute certainty.

2) Michael's Parents had a Duty to Preserve the Evidence

It is undisputed that Judith Sclawy and Howard Adelman knew, or reasonably should have known that the results from Michael's autopsy would be relevant in a wrongful death action. *See* Banco Latino at 1277. They were told this by Dr. Borges, Dr. Hearn and Detective O'Neill. Sanctions

may be imposed on litigants who spoliate evidence while on notice that such evidence may be relevant to potential litigation. Id. *See also* Graff 310 Fed.Appx. at 301. (holding that the district court did not abuse its discretion when it imposed sanctions for spoliation, because it was undisputed that "plaintiffs destroyed evidence when litigation was reasonably foreseeable."). Therefore, Michael's parents owed a duty to preserve his body for an autopsy.

3) An Autopsy of Michael Would have Been Crucial to Establishing Cause of Death

Cause of death is one of, if not the most hotly disputed issues in this case. Why did Michael die that day when he carried more water than anyone else and no one else in their group had any medical issues during or after the hike? Dr. Borges, Dr. Coburn and Detective O'Neill all state that an autopsy would have established cause of death with certainty. All three cautioned the Plaintiffs that without an autopsy, litigation would be problematic. Because causation is en element this wrongful death, negligence action, it is indisputably crucial to the Plaintiffs' case and the defense. The statement by the 11th Circuit in Flury applies equally to the present matter: "This case hinges upon the significance of the evidence destroyed, and upon the extreme prejudice the defendant suffered as a result." Flury 427 F.3d at 943. The most crucial and reliable evidence as to Michael's cause of death available was an autopsy. *See* Flury at Id. *See also* Esgro v. Trezza, M.D., 492 So.2d 422, 423 (Fla. 1st DCA 1986) (authorization for exhumation for an autopsy was appropriate where medical examiner stated there was a "good possibility" that the autopsy would be revealing).

4) Bad Faith

Bad faith must be established prior to imposition of a sanction. Bad faith may be founded on direct evidence or on circumstantial evidence under the following criteria:

1. Evidence once existed that could fairly be supposed to have been material to the claims at issue
2. The spoliating party affirmatively acted so as to allow the evidence to be lost
3. That party did so while it knew or should have known of its duty to preserve the evidence and
4. The affirmative act causing the loss cannot be credibly explained as not involving bad faith

Doe, 2011 WL 2790201 at *5; FTC v. First Universal Lending, LLC, 773 F.Supp.2d 1332, 1353-1354 (S.D.Fla. 2011).

"'[B]ad faith' depends in large part upon the importance of the evidence to a fair trial and the extent to which the spoliation had notice of that importance and of the need to preserve the evidence."

Britton, *supra* at *12. As stated above, malice is irrelevant in terms of establishing bad faith. Bad faith, in terms of sanctionable spoliation, can occur **"when a party purposefully loses or destroys relevant evidence"** or **"engage[s] in an intentional affirmative act causing [evidence] to be lost."** Doe, 2011 WL 2790201 at *4 (emphasis added); *see also* Walter v. Carnival Corp., Slip Copy, 2010 WL 2927962 at *3 (S.D. Fla.) (finding no bad faith due to lack of evidence showing that Carnival engaged in an "intentional affirmative act" causing the evidence to be lost). The Britton Court even states that bad faith spoliation can be the result of "deliberate or reckless indifference" for the preservation of evidence. Britton, 2011 WL 3236189 at *13 at n. 3. Plaintiffs may argue that the religious-based decision to preclude the autopsy cannot be considered "bad faith." The Hammer, decision, *supra*, already spoke to this delicate issue:

> The trial court was faced with a difficult balancing decision between the rights of appellees to have access to medical information with which to attempt to defend the claim and perhaps promote settlement, which could only be obtained by exhumation and autopsy, against Mr. Hammer's well-founded religious objections. Although the medical opinions were inconclusive, as they tended to show an autopsy would likely provide relevant information, the ordering of the autopsy was warranted. *Esgro v. Trezza*, 492 So.2d 422 (Fla. 4th DCA 1986), *rev. denied*, 501 So.2d 1281 (Fla. 1986). We therefore affirm the trial court's order. At that point, Mrs. Hammer chose to value protection of her husband's memory and her religious beliefs over going forward with the suit.
>
> Hammer, 558 So.2d at 461.[2]

Here, Judith Sclawy and Howard Adelman chose to value the protection of Michael's memory and their religious beliefs over filing suit despite being warned of the legal implications of refusal to submit to an autopsy. They were made fully aware that an autopsy would be necessary for litigation purposes. *Cf.* Flury, 427 F.3d at 945 (finding bad faith on the plaintiffs' behalf for allowing the vehicle – which was the very subject of the lawsuit – to be sold for salvage knowing full well that defendant wished to examine the vehicle.) "Defendant could not have prevented spoliation, nor could any such action have been expected, because defendant was never informed of the vehicle's location and plaintiff did not file suit until years after the vehicle's removal." Flury at Id. Here, Defendants

[2] "The *exhumation* or the *autopsy of a corpse*, when useful to ascertain facts in litigation, should of course be performed. Reverence for the memory of those who have departed does not require us to abdicate the high duty of doing justice to the living . . ." Esgro v. Trezza, M.D., 492 So.2d 422, 423 (Fla. 4th DCA 1986) (internal quotations omitted).

could not have prevented spoliation of Michael's body, since Plaintiffs did not file suit until one year after the decision not to conduct an autopsy. We are not concerned here with "mere negligence" on behalf of Judith Sclawy and Howard Adelman.[3] We are concerned with an affirmative act (refusing to allow an autopsy) which caused evidence to be lost. *See* Managed Care Solutions, at 1332 and Doe 2011 WL 2790201 at *4. The decision was made despite the fact that Howard Adelman was concerned about the adult leaders and the hike itself soon after hearing of the incident. He contemplated suing the Defendants almost immediately. His concerns as expressed to Ranger Clark (on or about May 11, 2009) manifested into claims of liability through this lawsuit. The affirmative act of preventing an autopsy, knowing that litigation would be forthcoming, constitutes spoliation.

CONCLUSION

Judith Sclawy and Howard Adelman made faith based choices after being informed that such choices would impact the ability to conclusively determined the cause of their son's sudden death. Such choices have ramifications when suit is later brought and cause of death is a central issue. The decision to block an autopsy was made with full knowledge of its implications on foreseeable litigation. It was made with full knowledge of the duty to preserve his body for an autopsy based on the advice of two doctors and one law enforcement officer. While Plaintiffs' religious reasons will not be questioned here, that cannot be used as a shield in terms of spoliation of evidence.

The factual circumstance here (spoliation for prevention of an autopsy) presents a case of first impression in the 11th Circuit. Federal Courts can look to Florida law for guidance. One Florida Court – Hammer v. Rosenthal Jewelers Supply Corp, - addressed this precise issue and held that sanctions are appropriate if one refuses to allow an autopsy when cause of death is at issue. The loss of evidence here was a result of an affirmative act, which constitutes bad faith and warrants a strict sanction.

WHEREFORE, DEFENDANTS, request that this Court dismiss Plaintiffs' lawsuit with prejudice as a sanction for spoliation of evidence. In the alternative, Defendants respectfully request that this Honorable Court strike all Plaintiffs' expert witnesses who would be called to testify as to cause of death. In the alternative, Defendants respectfully request that this Honorable Court invoke 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) and enter such other relief as this Court deems necessary and just.

[3] "Mere negligence" in losing or destroying evidence is not sufficient for a finding of bad faith spoliation of evidence. *See* Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997).

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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 2nd 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 154th Street, Suite 210, Miami Lakes, FL 33016.

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