

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-CV-22236-Civ-GOLD/GOODMAN

HOWARD ADELMAN and
JUDITH SCLAWY-ADELMAN, as
Co-Personal Representatives of THE
ESTATE OF MICHAEL SCLAWY-
ADELMAN,

Plaintiffs

vs.

BOY SCOUTS OF AMERICA, a foreign
corporation, THE SOUTH FLORIDA
COUNCIL, INC., BOY SCOUTS OF
AMERICA, PLANTATION UNITED
METHODIST CHURCH, HOWARD K.
CROMPTON, individually, and
ANDREW L. SCHMIDT, individually,

Defendants

DEFENDANT PLANTATION UNITED METHODIST CHURCH'S
MOTION FOR SUMMARY JUDGMENT

Defendant, Plantation United Methodist Church, through undersigned counsel and pursuant to Federal Rule of Civil Procedure 56 and Local Rules 7.1 and 7.5, moves this Court for an entry of summary judgment against the Plaintiffs. Summary judgment is appropriate in this case because the Plaintiffs executed a pre-incident release agreeing to hold harmless Defendants Boy Scouts of America, Howard Crompton, Andrew Schmidt, and Plantation United Methodist Church. Summary judgment is also appropriate on the Plaintiffs' claims of vicarious liability against Plantation United Methodist Church because there is no evidence that Howard Crompton and Andrew Schmidt were agents of Plantation United Methodist Church. Further, summary judgment is appropriate in this case on the Plaintiffs' claims of direct negligence against the

Church because there is no evidence that the volunteer leaders were employees of the Church, or that the Church owed the duty alleged by the Plaintiffs in their Amended Complaint.

I. BACKGROUND

This is a wrongful death case stemming from a tragic accident that occurred during a hike in the Big Cypress National Preserve. In May 2009, two volunteer leaders of Boy Scout Troop 111 took three boys on a twenty-mile hike to help the scouts earn their Hiking Merit Badge. Around the fifteen mile point, Michael Sclawy-Adelman passed out. Although first aid measures were immediately administered, he later died.

Michael Sclawy-Adelman's parents have brought this lawsuit alleging negligence on the part of the Boy Scouts of America, the South Florida Council of the BSA, the two volunteer leaders, Howard Crompton and Andrew Schmidt, as well as Plantation United Methodist Church. Troop 111 was chartered by Plantation United Methodist Church. Troop 111 has been in existence for over sixty-five years. The Troop has produced hundreds have Eagle Scouts, and is generally regarded as a high-quality Troop. The Troop is run by volunteers, some of whom are also members of the congregation of Plantation United Methodist Church.

II. LEGAL STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's

case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

“The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial . . . [o]nly when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.” *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Rule 56(e) “requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.” *Celotex*, 477 U.S. at 324 (internal quotation marks omitted). Thus, the nonmoving party “may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (internal quotation marks omitted); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1984) (stating “[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts”).

The Court must view the evidence in the light most favorable to the nonmoving party, and summary judgment is inappropriate where a genuine issue material fact remains. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). A court may not weigh conflicting evidence to resolve disputed factual issues; if a genuine dispute is found, summary judgment must be denied. *Skop v. City of Atlanta, Ga.*, 485 F.3d 1130, 1140 (11th Cir. 2007).

III. STATEMENT OF UNDISPUTED FACTS

1. On August 20, 2008, Michael Sclawy-Adelman's mother, Judith Sclawy, signed a "Parent Permission Form." (Sclawy Dep. 71:21-25 & Ex. 3, ECF No. 310-1.) The "Parent Permission Form" reads, in pertinent part, as follows:

My son, (please print) Michael Sclawy-Adelman has my permission to participate in the **ALL ACTIVITIES OF TROOP 111, BOY SCOUTS OF AMERICA BEGINNING AUGUST 20, 2008 AND ENDING AUGUST 31, 2009** I also release and hold harmless, Boy Scouts of America, Troop 111, it's [sic] leaders, committee members and chaperones or drivers and Plantation United Methodist Church from liability for mishaps or injury to him while participating in this activity.

(Sclawy Dep., Ex. 3, ECF No. 310-1.)

2. Defendant Andrew Schmidt was a volunteer leader of Troop 111 at the time of the subject hike. (*See* Schmidt Dep. 10:5-21; 26:13-15; Ex. 21, Mar. 7, 2011, ECF No. 310-2.) Mr. Schmidt was a Troop volunteer, and was not employed by Plantation United Methodist Church. (*See* Crist Dep. 113:6 – 114:8, Mar. 30, 2011, ECF No.310-3; *see also* Smiley Dep. 15:5-8, ECF No. 310-4.)

3. Howard Crompton was a volunteer leader of Troop 111 at the time of the subject hike. (*See* Crompton Dep. 5:21-23; 23:7-11, Ex. 31, Mar. 8, 2011, ECF No.310-5.) Mr. Crompton was a Troop volunteer, and was not employed by Plantation United Methodist Church. (*See* Crist Dep. 113:6 – 114:8, Mar. 30, 2011, ECF No.310-3; *see also* Smiley Dep. 15:5-8, ECF No. 310-4.)

4. The chartered organization representative of Troop 111 was a Troop volunteer and was not employed by Plantation United Methodist Church. (*See* Crist Dep. 113:6 – 114:8, Mar. 30, 2011, ECF No.310-3; Smiley Dep. 15:10-12, Mar. 10, 2011, ECF No. 310-4.)

5. The chartered organization representative of Troop 111 had no input into creating the Troop 111 hiking schedule for 2009. (Crompton Dep. 191:6-8, Mar. 8, 2011, ECF No.310-5.) Plantation United Methodist Church was not aware of the Troop's camping and hiking schedule, including the subject hike. (Smiley Dep. 17:9-14, Mar. 10, 2011, ECF No.310-4.)

6. The Troop Committee for Troop 111 was made up of volunteers of the Troop. (Crompton Dep. 192:23 – 193:3, Mar. 8, 2011, ECF No.310-5; Smiley Dep. 15:10-12, Mar. 10, 2011, ECF No. 310-4.)

IV. ARGUMENT

A. The Pre-Incident Release Signed By Judith Sclawy Is Effective To Release Plaintiffs Judith Sclawy and Howard Adelman's Claims Against Plantation United Methodist Church, Boy Scouts of America, Howard Crompton and Andrew Schmidt.

Judith Sclawy executed a pre-incident release, which was later ratified by Howard Adelman. The language of the release affirmatively agrees to release and hold harmless the Boy Scouts of America, Howard Crompton, Andrew Schmidt, and Plantation United Methodist Church from all liability. As a result of this release agreement, Judith Sclawy and Howard Crompton's claims for damages as survivor under Florida's Wrongful Death Statute are foreclosed.¹

It is undisputed that on August 20, 2008, Michael Sclawy-Adelman's mother, Judith Sclawy, signed a "Parent Permission Form." (Sclawy Dep. 71:21-25 & Ex. 3, ECF No. 310-1.)

¹ As a related issue, the Plaintiffs' claims for loss of net accumulations are not viable under Florida law because, at the time of his death, Michael Sclawy-Adelman was under twenty-five years old and had no surviving spouse or lineal descendants. Fla. Stat. § 768.21(6)(a) (2009); *see also Krouse v. Krouse*, 489 So. 2d 106, 109 n.6 (Fla. Dist. Ct. App. 1986) ("Section 768.21(6)(a) permits [] recovery [of net accumulations] only if, as is not the case here, the decedent has a surviving spouse or lineal descendants, or the decedent is not under the age of 25."). In any event, it appears that the Plaintiffs have withdrawn their pleaded claims for loss of net accumulations. (*See* Pls.' Answers to Def.'s First Set of Interrogs. ¶ 6, ECF No. 310-8.)

The "Parent Permission Form" reads, in pertinent part:

My son, (please print) Michael Sclawy-Adelman has my permission to participate in the **ALL ACTIVITIES OF TROOP 111, BOY SCOUTS OF AMERICA BEGINNING AUGUST 20, 2008 AND ENDING AUGUST 31, 2009** I also release and hold harmless, Boy Scouts of America, Troop 111, it's [sic] leaders, committee members and chaperones or drivers and Plantation United Methodist Church from liability for mishaps or injury to him while participating in this activity.

(Sclawy Dep., Ex. 3, ECF No. 310-1.) This release is sufficient to exculpate Defendants Boy Scouts of America, Howard Crompton, Andrew Schmidt, and Plantation United Methodist Church from liability for the claims for damages presented by Judith Sclawy and Howard Crompton as survivors under Florida's Wrongful Death Statute.

A pre-incident release is valid and "effective to preclude an action based on the releasee's subsequent negligence" as long as the release "clearly and specifically provides for a limitation or elimination of liability for such acts." *Fana v. Orkin Exterminating Co., Inc.*, 734 So. 2d 434, 435 (Fla. Dist. Ct. App. 1999). Exculpatory language in a pre-incident release will be enforced "to the extent that the intention to be relieved from liability was made clear and unequivocal in the contract." *Raveson v. Walt Disney World Co.*, 793 So. 2d 1171, 1173 (Fla. Dist. Ct. App. 2001). In other words, the "wording must be so clear and understandable than an ordinary and knowledgeable party will know what he is contracting away." *Id.*

Here, the pre-incident release specifically releases the Boy Scouts of America, the leaders of Troop 111, and Plantation United Methodist Church. The exculpatory language unambiguously relates to liability for accidents that occur while Michael Scalwy-Adelman is participating in a Troop 111 activity. *See* Merriam-Webster's Collegiate Dictionary 742 (10th ed. 2001) (defining "mishap" as "an unfortunate accident"); *cf. also The Josephine*, 37 F.2d 928 (E.D. Pa. 1930) ("mishap means negligence"). A reasonable person reading the plain language

of this release would understand that the specifically named individuals and entities, *i.e.*, the Boy Scouts of America, the leaders of Troop 111, and the Plantation United Methodist Church, were being released for any injury suffered by Michael Scalwy-Adelman for *any* reason, including their own negligence.

The release was signed by Judith Sclawy, and was ratified by Howard Adelman. (*See* Howard Adelman Dep. 9:25 – 10:9; 15:7-13; 55:9-12; 66:15-20, Feb. 8, 2011, ECF No. 310-7.) Since Howard Adelman allowed his son to continue to participate in Troop 111 Scouting activities, even after his wife signed the release, he is now estopped from arguing that Judith Sclawy did not have full authority to execute the release on behalf of both he and his wife. *Cf. Parrish v. Swearington*, 379 So. 2d 185, 186 (Fla. Dist. Ct. App. 1980) (explaining that the principle of estoppel may be invoked against a spouse who knowingly permits his or her spouse to deal with others so as to induce others to believe that he or she is acting as his or her authorized agent); *see also Matter of Warsh*, 29 B.R. 841, 846 (Bankr. M.D. Fla. 1983).

Accordingly, the Plaintiff's claims against the Defendants are barred, and summary judgment should be granted in favor of the Defendants and against the Plaintiffs, Judith Sclawy and Howard Crompton, as to their claims for damages as survivors under Florida's Wrongful Death Statute. This Court should find that the release in this case is a complete bar to all claims for damages asserted by or on behalf of Howard Adelman and Judith Sclawy in this matter.

B. Summary Judgment Should Be Granted In Favor of Plantation United Methodist Church on the Plaintiffs' Vicarious Liability Claims (Counts XII and XIII) Because Mr. Crompton and Mr. Schmidt Were Not Agents Of The Church.

In Counts XII and XIII of their Amended Complaint the Plaintiffs seek to hold Plantation United Methodist Church liable for the acts of Defendants Howard Crompton and Andrew Schmidt. However, the undisputed evidence reveals that Mr. Crompton and Mr. Schmidt were

volunteers. Given their volunteer status, the Plaintiffs' claims for vicarious liability fail as a matter of law because there is no evidence that Mr. Crompton and Mr. Schmidt were agents of the Church.

A claim of vicarious liability is predicated upon a principal being held responsible for the acts or omissions of its agents. *See Roessler v. Novak*, 858 So. 2d 1158, 1161 (Fla. Dist. Ct. App. 2003). "The elements of an agency relationship under Florida law are (1) acknowledgement by the principal that the agent will act for it, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent." *State v. Am. Tobacco Co.*, 707 So. 2d 851, 854 (Fla. Dist. Ct. App. 1998). The amount of control exercised by the principal over the agent must be "very significant." *Id.*

"An apparent agency exists only if all three of the following elements are present: (a) a representation by the purported principal; (b) a reliance on that representation by a third party; and (c) a change in position by the third party in reliance on the representation. *Roessler v. Novak*, 858 So. 2d 1158, 1161-62 (Fla. Dist. Ct. App. 2003). "[A]pparent authority exists only where the principal creates the appearance of an agency relationship." *Id.* While the issue of agency is sometimes a question of fact, where there is no contradictory evidence, the issue of agency should be decided as a matter of law. *Gillet v. Watchtower Bible & Tract Soc. of Pa., Inc.*, 913 So. 2d 618, 620 (Fla. Dist. Ct. App. 2005).

In the case of *Gillet*, a Florida court determined that a church volunteer who was on her way to engage in religious activities on behalf of her church was not an agent of the church. *Gillet*, 913 So. 2d at 621. In *Gillet* the church volunteer struck another church member with her vehicle, following a church meeting at the volunteer's home. *Id.* at 619. The court in *Gillet* specifically noted that there was no evidence that the church had "instructed, advised or in any

manner controlled” the actions taken by the volunteer when the alleged negligent act occurred. *Id.* at 621 The court also explained that there was no evidence that the church knew precisely what the volunteer was doing at the time of the alleged negligence, or the manner in which she would be doing it. *Id.* Finally, the court noted that there was no evidence that the church asked the volunteer to perform the specific act which harmed the plaintiff, or attempted to control the volunteer’s actions in performing the specific act that harmed the plaintiff. *Id.*; *see also Davis v. Shelton*, 304 N.Y.S.2d 722 (N.Y. App. Div. 1969) (dismissing a Boy Scout troop’s sponsoring church because the church had nothing to do with the troop’s operations).

This case is factually similar to that of *Gillet v. Watchtower Bible & Tract Society of Pennsylvania, Inc.* Here, there is no evidence that Plantation United Methodist Church instructed, advised or in any manner controlled the activities of Troop 111. (*See, e.g.* Smiley Dep. 16:15 – 17:14, Mar. 10, 2011, ECF No. 310-4.) Plantation United Methodist Church has explained that it was not even informed of Troop 111’s activities that occurred off Church property, such as the hike at issue in this case. (Smiley Dep. 17:9-14, Mar. 10, 2011, ECF No.310-4.) There is no evidence in this case that the Church exhibited the required degree of control over the Troop leaders to transform these volunteer leaders into agents of the Church.

On the contrary, the Church simply provided Troop 111 with a meeting place, a place to store some camping equipment, and an opportunity to provide community-service. (Smiley Dep. 27:1-6, ECF No. 310-4.) Here, there is no evidence that Plantation United Methodist Church acknowledged that Mr. Crompton or Mr. Schmidt, or any leaders of Troop 111 would be agents for, or would act for, the Church. Plantation United Methodist Church specifically testified that the volunteer leaders involved in Troop 111 were not acting as representatives of the Church. (Smiley Dep. 25:13 – 26:1, ECF No. 310-4.)

The Plaintiffs are not able to establish that an apparent agency relationship existed between Mr. Crompton or Mr. Schmidt and the Church because there is no evidence of a representation by the Church, or of any reliance by the Plaintiffs. Reverend Tim Smiley testified that Plantation United Methodist Church was not involved at all in the selection, approval, or authorization of the volunteer Scout leaders of Troop 111. (Smiley Dep. 24:12-19, ECF No. 310-4.) The volunteers on the Troop 111 Committee selected the leaders of the Troop. (Sclawy Dep. 21:6-8, Feb. 7, 2011, ECF No. 310-1.) Since the Troop Leaders were not even selected or approved by Plantation United Methodist Church, there is no evidence that the Church ever represented that the Troop leaders were agents of the Church. Further, the Plaintiffs cannot argue that they relied on any purported representation because Mrs. Sclawy, as a member of the Troop 111 Committee, was aware that it was the Troop Committee and not the Church who was selecting and approving the Troop Leaders. (Sclawy Dep. 21:6-8, Feb. 7, 2011, ECF No. 310-1.)

In this case there is no evidence that Plantation United Methodist Church exhibited the required level of “very significant” control over the activities of Troop 111 so as to establish an agency relationship between Mr. Crompton and Mr. Schmidt and the Church. *See State v. Am. Tobacco Co.*, 707 So. 2d 851, 854 (Fla. Dist. Ct. App. 1998). Further, there is no record evidence that an apparent agency relationship existed between Mr. Crompton and Mr. Schmidt and the Church. Any argument to the contrary is refuted by Mrs. Sclawy’s admission that she was aware that the Troop Committee, and not the Church, selected the leaders of the Troop. (Sclawy Dep. 21:6-8, Feb. 7, 2011, ECF No. 310-1.) This admission is direct and uncontroverted evidence that there was no reliance by the Plaintiffs on any purported representation by the Church that the Scout leaders of Troop 111 were somehow agents of the Church.

The decision and rationale in *Gillet* should control in this case. Just as in *Gillet*, there is no evidence in this case that Plantation United Methodist Church instructed, advised or in any manner controlled the actions of Troop 111. There is no evidence that the Church was aware of the plans by Troop 111 to proceed on the hike that is the subject of this lawsuit. There is no evidence that the Church was aware of the manner in which the hike was planned or executed. There is no evidence that the Church asked Mr. Crompton and Mr. Schmidt to lead the subject hike, or in any way attempted to control these volunteer's actions in performing this hike. *Cf. Gillet*, 913 So. 2d at 621; *see also* Smiley Dep. 27:1-6, ECF No. 310-4 (explaining that the interaction between the Church and the Troop was limited to the Church providing a place for the Troop to meet, a place to store camping equipment, and an opportunity for the Troop to provide community service).

For these reasons, summary judgment should be granted as to Counts XII and XIII asserting claims of vicarious liability against Plantation United Methodist Church for the actions of Mr. Crompton and Mr. Schmidt. Since these claims for vicarious liability are necessarily predicated upon the Church being held responsible for the acts or omissions of its agents, and because there is no evidence that Mr. Crompton and Mr. Schmidt were agents of Plantation United Methodist Church, these Counts fail as a matter of law.

C. Summary Judgment Should Be Granted In favor of Plantation United Methodist Church on the Plaintiffs' Negligence Claims (Counts IX, X, and XI) Because The Church Did Not Owe a Duty To The Plaintiffs To Perform The Acts Asserted In the Amended Complaint.

The Plaintiffs allege that Plantation United Methodist Church owed a duty to the Plaintiffs to select, train, supervise, and retain Mr. Crompton and Mr. Schmidt. The Plaintiffs have alleged that this purported duty arose from the Charter Agreement between Plantation

United Methodist Church and the South Florida Council of the Boy Scouts of America. (Am. Compl. ¶¶ 25, 141, 144, 152-53, 159, 174, ECF No. 20.) The Plaintiffs' claims fail as a matter of law for two reasons. First, because under Florida law the tort of negligent selection, training, retention, and supervision is only viable where there is an employee/employer relationship. Second, because the Charter Agreement reveals that Plantation United Methodist Church did not have a duty to select, train, and supervise Troop 111 leaders. Rather, this was the role of an intermediary group of volunteers, who were not agents of the Church.

1. The Plaintiffs' claims for negligent selection, supervision, and training against the Church (Counts IX, X, and XI) are not viable because there was no employer-employee relationship between the Church and the volunteer troop leaders.

Under Florida law, claims for negligent selection, supervision, and training require the plaintiff to establish the existence of an employer-employee relationship. *Pycsa Pan. S.A. v. Tensar Earth Techs., Inc.*, 625 F. Supp. 2d 1198, 1255 (S.D. Fla. 2008) (Gold, J.), *aff'd*, 329 F. App'x. 257 (11th Cir. 2009) (citing *Behrman v. Allstate Ins. Co.*, 388 F. Supp. 2d 1346, 1350 (S.D. Fla. 2005), *aff'd*, 178 F. App'x. 862 (11th Cir. 2006)).

In this case, the evidence is uncontroverted that the volunteer scout leaders on the subject hike, Mr. Crompton and Mr. Schmidt, were not employed by Plantation United Methodist Church. (See Crist Dep. 113:6 – 114:8, Mar. 30, 2011, ECF No.310-3; see also Smiley Dep. 15:5-8, ECF No. 310-4.) Summary judgment should be granted against the Plaintiffs claims for direct negligence by the Church because these claims are predicated upon allegations of negligent selection, training, supervision, and retention. As a matter of law, these claims are not viable because there is no employer-employee relationship between the volunteer Troop leaders and the Church.

2. Summary judgment should be granted against the Plaintiffs' claims of direct negligence against the Plantation United Methodist Church (Counts IX, X, and XI) because the Church did not have a duty to select, train, supervise, or retain the volunteer leaders of Troop 111.

The issue of whether a defendant owed a duty to a plaintiff is a “matter of law,” to be determined by the court under the facts of the particular case. *Aircraft Logistics, Inc. v. H.E. Sutton Forwarding Co., LLC*, 1 So. 3d 309, 311 (Fla. Dist. Ct. App. 2009). In this case, the Charter Agreement – the alleged source of the duty owed by the Church – reads, in pertinent part, that Plantation United Methodist Church agrees to:

Select a unit committee of parents and members of the chartered organization (minimum of three) who will screen and select unit leaders who meet the organization's standards as well as the leadership standards of the BSA. **(The committee chairman must sign all leadership applications before submitting them to the chartered organization for approval.)**

(Smiley Dep. Ex. 3, ECF No. 310-4.) The Charter Agreement also reads that the leadership applications may be approved by either the chartered organization head or the chartered organization representative. (Smiley Dep. Ex. 3, ECF No. 310-4 (“The chartered organization head or chartered organization representative must approve all leader applications.”); *see also* Crompton Dep., Ex. 31, Mar. 8, 2011, ECF No. 310-5; Schmidt Dep., Ex. 21, Mar. 7, 2011, ECF No. 310-2). The chartered organization representative is a volunteer position, and is selected by the Troop 111 Committee – not by the Plantation United Methodist Church. (Smiley Dep. 13:15-17, ECF No. 310-4.)

Based on the Charter Agreement, the Church's duty was to select a committee of Troop volunteers, made up of parents and members of the chartered organization. The leadership applications referenced in the Charter Agreement, may be approved by another Troop volunteer, who in this case was selected by other Troop volunteers on the Troop Committee. Here, there is

no dispute that the leadership applications of Mr. Crompton and Mr. Schmidt were in fact signed by the volunteer chartered organization representative, and not by Plantation United Methodist Church. (Crompton Dep., Ex. 31, ECF No. 310-5 (signed by Dean Kubler); Schmidt Dep., Ex. 21, ECF No. 310-2 (signed by Linda Vedsted).)² The undisputed testimony is that the volunteers on the Troop 111 Committee, including the chartered organization representative, were not authorized to act in a representative capacity by Plantation United Methodist Church. (Smiley Dep. 25:13 – 26:1, ECF No. 310-4.)

There is no evidence to support the allegations that the Church was required to select, train, and approve Troop 111 leaders because the Charter Agreement establishes that the selection and approval is handled completely by volunteers of the Troop. (*Cf.* Am. Compl. ¶¶ 143, 157, 175, ECF No. 20.) In other words, since the Plaintiffs have alleged that the duty owed to them was created by the Charter Agreement, their claims against Plantation United Methodist Church necessarily fail because there is no evidence to support their assertions that the Church owed them any duty to select, supervise, or train Troop 111 leaders. The facts are clear that the Church's only obligation was to select the committee of volunteers.³ The Plaintiffs have never alleged that the Church was negligent in the selection of this committee.

While not accurately or adequately pleaded, the Plaintiffs' claims for direct negligence against Plantation United Methodist Church (Counts IX, X, and XI) appear to be veiled claims

² The past two chartered organization representatives associated with Troop 111 have been Linda Vedsted and Dean Kubler. (Kubler Dep. 12:10 – 13:10, Sept. 14, 2011, ECF No. 310-6.)

³ *See, e.g., Infant C. v. Boy Scouts of Am., Inc.*, 391 S.E.2d 322, 324 (Va. 1990) (“A chartered organization desiring to form a boy scout troop designates a group of volunteers, consisting of organization members and parents, as a troop committee. The troop committee is responsible for the operation of the troop, designates its program, selects its leaders, and provides its meeting place. It is the committee's responsibility to select the scoutmaster and assist him in providing a sound program for the troop.”).

for vicarious liability based on the actions or omissions of other Troop volunteers. Summary judgment in favor of the Church should be granted as to these claims since there is no evidence that the volunteer members of the Troop 111 Committee or the volunteer chartered organization representative are agents of Plantation United Methodist Church.

The facts here are again substantially similar to those in *Gillet v. Watchtower Bible & Tract Society of Pennsylvania, Inc.*, 913 So. 2d 618, 620 (Fla. Dist. Ct. App. 2005). Plantation United Methodist Church has testified that the volunteer leaders of Troop 111 were not acting in a representative capacity on behalf of the Church. (Smiley Dep. 25:13 – 26:1, ECF No. 310-4.) Reverend Smiley testified that the Church was only generally aware of the Troop's activities, and that he would have occasional and informal interactions with the chartered organization representative, to the effect of "How are things going?" (Smiley Dep. 16:2 – 17:14, ECF No. 310-4.)

There is no evidence that the Church ever instructed, advised, or in any manner controlled the actions of the volunteer members of the Troop 111 Committee. There is no evidence that the Church every instructed, advised, or in any manner controlled the actions of the volunteer chartered organization representative. There is no evidence that the Church knew precisely what the Troop Committee or the chartered organization representative was doing at the time when the alleged negligence occurred. There is also no evidence that Plantation United Methodist Church ever directed the actions of the Troop Committee or of the chartered organization representative, or attempted to control the committee or the chartered organization representative in performing the alleged negligent act. *See Gillet*, 913 So. 2d at 621.

Summary judgment should be granted as to the Plaintiffs' claims of direct negligence against Plantation United Methodist Church because the Plaintiffs have failed to establish, as a

matter of law, that the Church had a duty to perform the allegedly negligent acts, namely the selection, training, and retention of Troop 111 volunteer leaders. At the essence of their claims, the Plaintiffs are seeking to hold the Church liable for the actions of Troop volunteers. These claims must fail because the evidence is uncontroverted that the Church did not have, nor did it exercise, the requisite control required to transform these Troop volunteers into agents of the Church.

V. CONCLUSION

For the reasons set out in this Motion, summary judgment is warranted in this case on several grounds. First, summary judgment should be granted in favor of Defendants Plantation United Methodist Church, Boy Scouts of America, Howard Crompton, and Andrew Schmidt as to the Plaintiffs' claims for damages as survivors under Florida's Wrongful Death Statute because Judith Sclawy and Howard Adelman executed a valid pre-incident release. Second, summary judgment should be granted in favor of Plantation United Methodist Church and against the Plaintiffs on the counts for vicarious liability because the Troop volunteer leaders were not agents of the Church. As a matter of law, the Church cannot be held liable for the acts of the Troop volunteers. Finally, summary judgment should be granted in favor of Plantation United Methodist Church and against the Plaintiffs on the counts alleging direct negligence by the Church because the Plaintiffs have failed to establish that the volunteer Troop leaders were employed by the Church, and because the Church did not owe the Plaintiffs the duty alleged in the Complaint. As pleaded by the Plaintiffs, the Charter Agreement sets out the responsibilities of the Church. A plain reading of the Charter Agreement reveals that the Church was not obligated to select, supervise, and train Troop leaders. Instead an intermediary group of Troop volunteers, none of whom were agents of the Church, selected, approved, trained, and retained

Troop leaders. Again, as a matter of law, the Church cannot be held liable for the acts of the Troop volunteers.

WHEREFORE, Defendant Plantation United Methodist Church, respectfully requests this Court:

- 1) Grant summary judgment in favor of Defendants Plantation United Methodist Church, Boy Scouts of America, Howard Crompton, and Andrew Schmidt as to the claims for damages presented by Judith Sclawy and Howard Adelman based upon the pre-incident release signed by the Plaintiffs;
- 2) Grant summary judgment in favor of all Defendants as to the putative claims by the Plaintiffs for damages in the form of loss of net accumulations to the Estate of Michael Sclawy-Adelman on the basis that these claims have been withdrawn, and/or on the basis that these claims are not recoverable as a matter of law;
- 3) Grant summary judgment in favor of Defendant Plantation United Methodist Church as to the Plaintiffs claims for vicarious liability (Counts XII and XIII) on the basis that the volunteer leaders of Troop 111 are not agents of the Church;
- 4) Grant summary judgment in favor of Defendant Plantation United Methodist Church as to the Plaintiffs claims for vicarious liability (Counts IX, X, and XI) on the basis that the Plaintiffs have failed to establish the existence of an employee-employer relationship between the Church and the volunteer leaders of Troop 111, and/or because Plantation United Methodist Church did not owe the Plaintiffs the duty alleged in the Amended Complaint; and
- 5) Grant any further relief this Court deems just and proper.

Dated: October 13, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion for Summary Judgment was served by transmission of Notice of Electronic Filing generated by CM/ECF on October 13, 2011 on all counsel of record on the Service List below.

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