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

BOY SCOUTS OF AMERICA AND SOUTH FLORIDA COUNCIL'S MOTION FOR LEAVE TO AMEND AFFIRMATIVE DEFENSES

COMES NOW, Defendants, Boy Scouts of America ("BSA"), and South Florida Council, ("SFC"), by and through their undersigned counsel, and pursuant Local Rules 7.1(a) and 15.1 and Federal Rules 15(a)(2) and 16, move for leave to amend their respective Answers and *Second Amended* Affirmative Defenses to Plaintiffs' Amended Complaint and state as follows:[1]

1. This is a wrongful death/negligence action stemming from an incident that occurred on May 9, 2009 when Michael Sclawy-Adelman died while taking part in a 20-mile hike.

2. BSA and SFC's initial Affirmative Defenses filed in July of 2010 included the following defense:

> For its sixth affirmative defense, Defendant affirmatively avers that any alleged damages were the result of negligence on the part of Third Parties who were not under the care, custody or control of Defendant, and therefore the Plaintiffs are unable to recover as against this Defendant. [D.E. 3,4].

3. Both Defendants seek leave to amend their affirmative defenses to specifically name **Pediatric Associates** as a Fabre Defendant.

4. Before Michael Sclawy-Adelman was allowed to take part in the subject hike, a medical clearance form was required to be filled out by Michael's primary care physician. Dr. Jeffrey Fliegenspan, Michael's pediatrician who worked at Pediatric Associates, executed the "Class-3" form on May

[1] SFC's proposed Answer and *Second Amended* Affirmative Defenses to Plaintiffs' Amended Complaint is attached hereto as **Exhibit "A."** BSA's proposed Answer and *Second Amended* Affirmative Defenses to Plaintiffs' Amended Complaint is attached hereto as **Exhibit "B."**

17, 2008, which permitted Michael to participate in **all activities** for a period of one year. *See* Form attached as **Exhibit "C."**

5. Defendants assert that Michael Sclawy-Adelman should not have been permitted to take part in all outdoor activities due to his poor physical condition. Michael's primary care physicians, Pediatric Associates, knew more about his physical condition from a medical standpoint than did anyone else. Despite knowledge that Michael was obese, tachycardic and that his physical conditioning may have been indicative of diminished cardiac capacity, his pediatrician signed the medical authorization form.

6. Based on recent analysis done by expert witnesses, Defendants believe Pediatric Associates is contributorily negligent and at fault for some or all of Plaintiffs' alleged damages by medically clearing Michael despite numerous red flags as to his physical well-being. BSA and SFC seeks to assert the following Fabre affirmative defense:

> For its fifteenth affirmative defense, Defendant affirmatively avers that any alleged damages were the result of negligence on the part of the Pediatric Associates (which authorized Michael Sclawy-Adelman to participate in all outdoor activities), and which was not under the care, custody or control of Defendant; and therefore, the Plaintiffs are unable to recover in whole or in part as against this Defendant. *See* Fabre v. Marin, 623 So.2d 1182 (Fla. 1993).

7. The "Order Setting Pretrial and Trial Dates, Referring Discovery Motions, Directing Parties to Mediation, and Establishing Pretrial Dates and Procedures" indicated that all non-dispositive pretrial motions (including motions under Fed.R.Civ.P. 15) shall be filed by December 3, 2010. [D.E. 39].

8. There exists good cause for seeking leave to amend to specifically name this Fabre defendant at this time despite the deadlines imposed by the scheduling order.

MEMORANDUM OF LAW

A movant must show good cause to amend a scheduling order. F.R.C.P. 16(b); Sosa v. Airprint Systems, Inc., 133 F.3d 1417, 1418 (11th Cir. 1998). To establish good cause, the movant must show that the deadline could not have been "met despite the diligence of the party seeking the extension." Sosa 133 F.3d at Id. Delay alone, however, is an insufficient reason to deny a motion to amend under Rule 16 analysis. *See* Olsen v. Regions Bank, 2010 WL 2594288 at *3 (M.D.Tenn.); *see also* Mercantile Trust Co. Nat. Assoc. v. Gulf Tex Brokerage, Inc., 542 F.2d 1010, 1012 (8th Cir. 1976). Once a movant establishes good cause, a court will then consider whether the amendment is proper under Rule 15(a). Sosa 133 F.3d at 1419; Vazquez v. LCM Investment Group, Inc., 2006 WL 4835922 at *2 (M.D.Fla.). Rule 15 states in pertinent part: "[A] party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." F.R.C.P. 15(a)(2) (emphasis added).

> The decision whether to grant leave to amend is committed to the sound discretion of the trial court. *Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F.2d 618 (11th Cir.1983). However, " '[d]iscretion' may be a misleading term, for rule 15(a) severely restricts the judge's freedom, directing that leave to amend 'shall be freely given when justice so requires.' " *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 597 (5th Cir.1981). This policy of Rule 15(a) in liberally permitting amendments to facilitate determination of claims on the merits circumscribes the exercise of the trial court's discretion; thus, "[u]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Id.* at 598.
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> Espey v. Wainwright, 734 F.2d 748, 759 (11th Cir. 1994).

A. GOOD CAUSE UNDER RULE 16

Good cause exists for this Court to allow Defendants to name Pediatric Associates as a Fabre defendant. The deadline to amend pleadings was December 3, 2010. However, the deposition of Dr. Ronald Bullard, Michael's pediatrician at Pediatric Associates, was not concluded until April of 2011. It was during Dr. Bullard's testimony that Defendants first became aware of the extent of Michael's health issues. The deadline to amend pleadings "could not have been met" by December of 2010;

rather, the first substantial evidence showing the potential negligence of Pediatric Associates was first complied in April of 2011. Sosa 133 F.3d at 1418.

However, it was not until the expert witnesses Defendants retained in various medical fields were able to synthesize Michael's medical records and the testimony of Michael's pediatrician, that Defendants felt comfortable naming Pediatric Associates as a Fabre Defendant. More specifically, not until this past month, upon discussion with medical experts, could Defendants sufficiently link Michael's physical issues, as noted by his pediatricians, with his cause of death. It is only now that Defendants feel medically supported in asserting that Pediatric Associates is comparatively at fault for Michael's death by improperly clearing him for all physical activities.

PEDIATRIC ASSOCIATES

Before any boy scout is permitted to participate in scouting physical activities, the scout's physician is required to sign a document called "Personal Health Medical Record Form—Class 3." This form indicates that a licensed health-care practitioner has evaluated the scout and approves him for either (1) Hiking and camping; (2) Water activities; (3) Competitive Sports and/or (4) All activities. Once the Class 3 form is filled out, it is effective for one year.

Dr. Jeffrey Fliegenspan, employed at Pediatric Associates, was Michael's pediatrician for many years. In 2009, Dr. Ronald Bullard took over as Michael's primary care pediatrician. Dr. Fliegenspan filled out a Class 3 Form (**Exhibit "C"**) approving Michael Sclawy-Adelman for "All activities" on May 17, 2008. Based on that form, Michael was allowed to participate in the subject hike on May 9, 2009.

Dr. Bullard's testimony, and the records in his possession, show that Michael was approximately 5 foot 6 inches and weighed approximately 221 pounds on March 27, 2009. *See* deposition of Dr. Ronald Bullard (March 17th) at pp. 19-20, ll. 21-2 and Michael Sclawy-Adelman's Growth Chart (exhibit #1 thereto) attached as **Composite Exhibit "D."** He was "off the chart for

weight." Dr. Bullard at pp. 24-25, ll. 20-8. His medical records revealed a resting heart rate of 114. Dr. Bullard at p. 34, ll. 19-25. Dr. Bullard testified that Michael was "significantly overweight" to the point of being "obese" for his age. Dr. Bullard at pp. 23-27, ll. 15-25; pp. 30-31, ll. 21-3 and Exhibit #4 to deposition of Dr. Bullard at p. 2 (records for Michael Sclawy-Adelman) and Exhibit # 5 at p. 2.[2] Michael's Body Mass Index ("BMI") was recorded at 31 in May of 2008 and 35 in March of 2009. Dr. Bullard at pp. 78-80, ll. 1-1. Dr. Bullard testified that a BMI greater than 30 is considered obese. Dr. Bullard at p. 75, ll. 22-24. Michael had been on weight watchers for quite some time and needed to work on his dietary intake. Dr. Bullard at p. 23, ll. 15-19, p. 48, ll. 19-23. Based on Michael's vital statistics, Dr. Manfred Borges, the Deputy Chief Medical Examiner for the District 20 Medical Examiner's Office who examined Michael's body, testified that Michael was not in any physical condition to hike 20 miles. *See* Deposition of Dr. Borges at p. 46, ll. 3-10; pp. 88-89, ll. 11-7 attached as **Exhibit "E."**

Despite these physical red flags, Dr. Fliegenspan gave Michael *carte blanche* to participate in **All outdoor activities including the hike in question.** Dr. Bullard testified that no physicians office would know more about Michael's physical limitations other than Pediatric Associates. Dr. Bullard (April 14th deposition) at p. 6, ll. 4-7 attached as **Exhibit "F."**

Even with the testimony from Dr. Bullard, however, the evidence in this case as to cause of death came primarily from Michael's death certificate, which listed death as probable heat stroke. It was not until Defendants retained medical experts who examined the deposition of Dr. Bullard and the medical records provided by Pediatric Associates, that opinions were definitively formed that Michael's cause of death was not from heat stroke.

[2] Dr. Bullard's deposition was taken in two parts (March 17th and April 14th). Exhibits 1-3 are attached to the March 17th transcript (**Exhibit "D"** to this Motion) and exhibits 4-12 are attached to the April 14th transcript (**Exhibit "F"** to this Motion.)

PURPORTED EXPERT OPINIONS

While the parties are not required to exchange expert reports until the end of this month, it is anticipated that Defendants' medical experts will testify that the cause of death was either from a sudden cardiac event or a sudden central nervous system failure such as a spontaneous intracerebral hemorrhage. Under these explanations, and given Michael's physical examination results, Defendants assert that Pediatric Associates was at fault for clearing Michael medically for all outdoor activities. Dr. James V. Hillman, a board certified medical doctor in Pediatrics, Emergency Medicine and Medical Toxicology, states that, based on Michael's documented physical deficiencies, Michael's pediatricians should never have medically cleared Michael to participate in all outdoor activities. In fact, by signing the Class-3 form without addressing Michael's significant health-related issues, Dr. Fliegenspan breached a standard of care. *See* Affidavit of Dr. Hillman attached as **Exhibit "G."** The following anticipated testimony shows that Michael should not have been cleared for the subject hike:

- Several exacerbating and/or contributing factors would have resulted in congestive heart failure including. Michael was 5'6" tall and 221 pounds, which constituted a BMI of 36 as of March 2009. His body habitus and physical conditioning may have been indicative of diminished cardiac capacity and reserve. Additionally, hypertension was documented in his pediatrician's medical records. Hypertension can result in cardiac enlargement and diminished cardiac function and output. In the records from Michael's last encounter with his Pediatrician, on March 27, 2009, the notation concerning Michael's cardiovascular risk is recorded in that medical record as "negative." This "negative" cardiovascular risk notation is in spite of a body weight of 221 and a height of 66 inches, which results in a BMI of 35.7, which is consistent with the definition of clinical obesity. The records also noted elevated blood cholesterol and elevated systolic blood pressure. Given these facts, a "negative" cardiovascular risk was not warranted. There is no documentation of any attempted intervention in regard to medically addressing these findings. Some diagnostic modalities that a treating physician might consider would be: nutritional counseling, lipid profile studies, cardiovascular evaluation either by referral to a Cardiologist or by having a chest X-ray (for cardiac size and lung pathology), an EKG and echocardiogram performed. Therapeutic interventions may then be appropriate to minimize cardiovascular risk. *See Affidavit of Dr. Hillman.*

- Michael's medical records indicate hypercholesterolemia (as high as 264mg/dl) and tachycardia of 114 bpm on two separate occasions prior to the hike. The reason for the tachycardia was never addressed by his physicians, no blood sugar results were obtained, and a glucose tolerance test or hemoglobin Alc level was never done. Sudden cardiovascular deaths in adolescents, particularly associated with exercise, are often attributable to hypertrophic

cardiomyopathy, coronary artery abnormalities (e.g. fibromuscular dysplasia), and myocarditis among other acquired and congenital abnormalities.

- Michael's weight exceeded the 95th percentile on every routine examination for the 5 years prior to his death and his blood pressure was 138/84 (pre-hypertensive range for adolescents and young adults) at his last visit to his pediatrician on March 27, 2009. According to the testimony of Dr. Bullard, it was likely that Dr. Fliegenspan advised Michael to join a formal weight reduction program, but there is no evidence that he did so. Laboratory studies done on various routine visits demonstrated an elevated screening cholesterol level. This combination constitutes the elements of "metabolic syndrome," which predicts an increased risk of cardiovascular disease, and events such as heart attack and stroke in adulthood. Michael's respiratory rate was elevated at 18/minute during his March 27, 2009 visit where his resting pulse rate was documented as 114 bpm. The chronicity of the pulse rate observation is attested to by the presence of the same elevation of his heart rate at the time of his prior visit on May 13, 2008. Persistently elevated heart rates are consistent with various pre-existing cardiovascular and metabolic disorders. However, no workup specific for cardiac or vascular diseases, such as electrocardiograms or echocardiograms were done at any time after the elevated pulse rate was notice by Pediatric Associates. The combination of some features of Michael's routine medical examinations in the period of time prior to his death suggest the possibility of a pre-existing cardiovascular disorder, such as cardiomyopathy.

Defendants have good cause for seeking leave to amend at this time. As indicated, Dr. Bullard's testimony was not completed until April of 2011. Moreover, Defendants could not – in good faith – point the finger at Pediatric Associates without significant medical expert witness support that Michael's cause of death was not heat-related, but rather, potentially related to cardiac or central nervous system failure. As such, a medical examination by his pediatricians should have raised red flags concerning his physical well-being. However, Defendants could not properly evaluate the possible negligence of Pediatric Associates until it retained expert medical witnesses to evaluate the medical records created by Pediatric Associates and the testimony given by Drs. Bullard, Borges and Hearn. *See* Eisai Co., LTD v. Teva Pharm. USA, Inc., 247 F.R.D. 445 (D. NJ 2007) (Fifteen month delay in amending affirmative defense did not result in undue delay where party needed to fully synthesize information available to them prior to moving for leave to amend). Now, Defendants possess information to support the conclusion that the cause of death was either from a sudden cardiac event or a sudden central nervous system failure such as a spontaneous intracerebral hemorrhage. Under either of those circumstances, Pediatric Associates was negligent in allowing Michael to

participate in all scouting activities, because Michael's documented physical limitations would likely lead to his cause of death. Based on Michael's vital statistics, the Class—3 form never should have been filled out authorizing Michael to participate in all scouting activities. *See* Affidavit of Dr. Hillman.

Due to the complex and uncertain nature of the cause of death in this wrongful death action, Defendants could not have met the December 2010 deadline. Defendants have established good cause for extending the deadline to amend its affirmative defense to add Pediatric Associates as a Fabre non-party.

B. RULE 15 – LEAVE TO AMEND

Unless there is undue delay, bad faith, futility, a dilatory motive or prejudice to the opposing party, "the leave sought should, as the rules require, be 'freely given.'" Allapattah Services, Inc. v. Exxon Corp., 61 F.Supp.2d 1326, 1333 (S.D.Fla. 1999) (internal citations omitted).

In the case *sub judice* there is no reason to deny Defendants' Motion for Leave to Amend their Affirmative Defenses to add Pediatric Associates as a Fabre defendant, which may be contributorily negligent. *See* F.R.C.P. 8(c); *see also* Tomlinson v. Landers, Slip Copy, 2009 WL 1456449 (M.D.Fla.) (granting leave to amend affirmative defenses to add specifically named Fabre defendants); Kay's Custom Drapes, Inc. v. Garrote, 920 So.2d 1168 (Fla. 3d DCA 2006) (holding that the trial court abused its discretion by denying defendant's motion for leave to amend to assert a Fabre defense).

This situation is similar to that in Walters v. Altec Indust., Inc., 2003 WL 22012046 (M.D.Fla.). There, Defendants moved for leave to amend an affirmative defense to specifically name a Fabre defendant. Id. at *1. The Motion for leave came 15 months after the Court entered its scheduling order, which did not set a specific deadline for amending pleadings, but referenced a disfavor of the same. Id. Defendants asserted that, "'as result of an overall evaluation of the existing evidence and discovery' it should be allowed to add the now specifically identified Fabre non-parties." Id. at *2.

While that Court notes that 16(b) did not govern its decision on the motion for leave, it gives no indication that a different ruling would have resulted. In granting the motion for leave, the Court noted that Plaintiff was placed on notice that Defendants may name *Fabre* defendants based on the initial answer and expert disclosures. Id. at *2. Moreover, the Court recognized that Florida law allows fault to be apportioned among all "potentially negligent parties." Id.

In the present matter, Defendants concede that leave for amend is sought 9 months after the original deadline. However, there is no prejudice to the Plaintiffs, who are certainly aware that causation is one of, if not the biggest issue in this case. *See* [D.E. 260, 284 (Blood Testing Motion/Order)]. Plaintiff is aware that Defendants claim non-parties are at fault for Michael's death. See *Initial Affirmative Defense number 6, supra.* Defendants' expert witness disclosure also put Plaintiffs on notice that cause of death would be challenged. Defendants collectively listed Dr. Charles Wetli (former Chief Medical Examiner), Dr. Robert Myerburg (Professor in the Departments of Medicine and Physiology, and the American Heart Association Chair in Cardiovascular Research at the University of Miami Miller School of Medicine) and Dr. James Hillman (board certified medical doctor in Pediatrics, Emergency Medicine and Medical Toxicology). Plaintiff is also aware that Michael's pre-existing physical condition and aptitude to complete a 20-mile hike was questioned by Defendants. *See* BSA's response to Third Request for Production attached as **Exhibit "H"** (documents in support of affirmative defense that death was caused by pre-existing or unrelated medical conditions, including Michael's own statement *[at pg. 12]* regarding his "weakest component of physical fitness"). Thus, there is no prejudice to Plaintiffs, since they were clearly put on notice early on that cause of death would be at issue. As a result of the overall existing discovery and expert witness opinions, Defendants seek leave to amend to name Pediatric Associates as a Fabre non-party.

As the third party contributory negligence defense has already been asserted (and as Plaintiff is already aware the medical issues surrounding Michael Sclawy-Adelman's physical fitness) there is no

prejudice to permitting this requested amendment. Conversely, Defendants would be prejudiced if leave to amend in this case was denied, since generally, " . . . when a party fails to raise an affirmative defense in the pleadings, that party waives its right to raise the issue at trial." Hassan v. U.S. Postal Service, 842 F.2d 260 (11th Cir. 1988).

Moreover, Defendants are not even asserting a "new" affirmative defense; rather, Defendants are clarifying an existing one by specifically naming Pediatric Associates as a Fabre defendant. In Kohler v. Johnson Controls-Hill, LLC, Slip Copy 2009 WL 152899 (M.D.Fla.), Defendant moved for leave to amend its affirmative defense to specifically name a Fabre defendant. Id. at *1. Plaintiffs argued they were prejudiced by the late amendment, which represented an "entirely new" affirmative defense. Id. The Court disagreed finding that the Fabre defense is not entirely new, since it was alleged in the original answer and affirmative defenses. Id. at *2. The only new part was specifically naming the Fabre party, which Defendant is required to do "any time before trial." Id. at *1; Fla.Stat.Ann. §768.81(3)(a). As in Kohler, Defendants here "placed Plaintiffs on fair notice regarding Defendant's intention to assert a *Fabre* defense." Kohler 2009 WL 152899 at *2. Defendants here simply seek to identify the originally asserted Fabre defendants pursuant to §768.81. *See* Id.

In fact, at least one court has allowed a defendant to name a Fabre defendant at trial. In Mirabilis Ventures, Inc. v. Rachlin Cohen & Holtz, LLP, Slip Copy 2011 WL 2292167 at *4 (M.D.Fla.), Defendants sought to introduce evidence as to the fault of non-parties at trial. Plaintiff objected claiming that Defendants did not properly plead comparative fault as an affirmative defense. Id. That Court disagreed. Defendants' affirmative defense alleged that **(unidentified)** third parties over whom Defendants had no control contributed to Plaintiff's damages. Id. The Court found that the identity of the unnamed parties was known to the Plaintiffs prior to trial and knew that Defendants sought to impose fault on said nonparties. As such, the Court found that Defendants' pleadings were sufficient to permit them to assert a comparative negligence defense at trial. Id.

CONCLUSION

Under Rule 16, Defendants have good cause for seeking leave to amend its Fabre affirmative defense. Defendants did not know the severity of Michael Sclawy-Adelman's lack of physical well-being until mid-April of 2011 following the deposition of his pediatrician, Dr. Bullard. Defendants did not have sufficient medical support to link his physical problems to his death until medical experts synthesized Dr. Bullard's deposition, Michael's medical records and the circumstances surrounding his death to opine that Michael's death was not heat-related. Thus, until this month, the deadline to amend pleadings could not have been met.

Under Rule 15, there is no undue delay, bad faith, futility, a dilatory motive or prejudice in permitting BSA and SFC to identify Pediatric Associates as a Fabre Defendant based on the reasons listed above. Finally, Pediatric Associates is a proper Fabre Defendant. Pediatric Associates medically cleared Michael Sclawy-Adelman to participate in all scouting activities, including the 20-mile hike when Pediatric Associates should have known that his physical condition was poor and that serious injury or death could result given his physical limitations.

WHEREFORE, Defendants, SFC and BSA, respectfully requests that this Honorable Court GRANT leave for Defendants to file the attached proposed pleadings (Exhibits A and B), and deem the same filed as of the date of the Court's Order, and for such other relief as this Court deems necessary and just.

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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 13, 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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