UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

HOWARD ADELMAN et al.,
Plaintiffs,

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

v.

BOY SCOUTS OF AMERICA et al.
Defendants.
_____/

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS BASED ON SPOLIATION OF EVIDENCE

COME NOW, the Plaintiffs and file their response to BSA's Motion to Dismiss Based on Spoliation of Evidence and would show the Court as follows:

Synopsis

It is not a mere coincidence that the BSA has chosen to file its motion less than a week prior to the mediation scheduled in this case. The fact that the motion is a mere mediation tactic is obvious not only from the timing of the filing[1], but from the absolute and utter lack of merit contained in the motion itself.

The frivolous and desperate nature of the Defendant's motion is perhaps best demonstrated by its own words. As set forth in paragraphs 4 and 5 of the motion itself:

> 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.
>
> . . . with this knowledge, the decision to preclude an autopsy is made in bad faith and dismissal is appropriate.

D.E. 307-1, p.3 (emphasis added). The Defendant does not challenge the sincerity of the Plaintiff's beliefs or actions. Instead, the central basis of the BSA's motion is the truly incredible contention that the Adelman's decision to "abide by their religious beliefs" in objecting to an autopsy on their son constituted "bad faith."

Not only is the Boy Scouts' attack on the Adelman's choice to abide by their religious beliefs

[1] Under the Court's Pre-Trial Scheduling Order, dispositive motions are not due to be filed until December 19, 2011.

contrary to everything which the organization *claims* to stand for,[2] but their further decision to compare the Adelman's choice to a case "finding bad faith on the Plaintiff's behalf for allowing the vehicle - which was the very subject of the lawsuit - to be sold for salvage" is truly incredulous to say the least. D.E. 307-1, p. 15.

The Defendant's motion is patently frivolous from a legal standpoint as well, since it fails to establish any of the elements needed to give rise to a spoliation defense. As discussed in more detail subsequently, the elements of a spoliation defense in federal proceedings in the Eleventh Circuit require the moving party to establish: (1) there was a legal duty to preserve the evidence, (2) the evidence was crucial to the movant being able to prove a *prima facie* case or defense and (3) the party accused of spoliation acted in bad faith. *See e.g. Green Leaf Nursery v. E.I. Dupont De Nemours & Co.*, 341 F.3d 1292 (11th Cir. 2003). None of the required legal elements exist here.

Facts

I. Testimony of Michael's Parents

As expressly conceded by the BSA, the Plaintiffs' request to the Medical Examiner to not perform an autopsy on their son was based purely on religious reasons, since autopsies, which are viewed as a desecration of the body, are generally contrary to Jewish law.[3] The BSA does not challenge the sincerity of Michael's parents religious beliefs, but instead argues that the fact that they "chose to abide by their religious beliefs and requested that the Medical Examiner forego the autopsy," constitutes "bad faith." D.E. 307-1, p.3.

Among the many issues which Howard Adelman and Judith Sclawy were interrogated upon by the Defendants in their extensive depositions[4] regarding the loss of their only son was their

---

[2] Adherence to one's religious beliefs are so important to the BSA that this principle is featured in both the Scout Oath and Scout Law. See Excerpts from the BSA Handbook, attached as Exhibit "1." In fact, religion is so important to the BSA that atheists are excluded both as scouts and leaders. Deposition of Frank Reigelman, p. 48-50 attached as Exhibit "2."

[3] See D.E. 284, n.1. *Also see* United Synagogue of Conservative Judiasm *Guide to Jewish Funeral Practice*, §4.1 Autopsies, http://www.uscj.org/JewishLivingand Learning\Lifecycle/JewishFuneralPractice/GuidetoJewishFuneralPractice.aspx.

[4] Howard Adelman's deposition lasted for over 8 hours of actual testimony over two days and took up 382 pages of transcript. Judith Sclawy's deposition lasted for over 7 hours of actual testimony and was 302 pages long.

decision to request that the Medical Examiner respect their religious beliefs and forego an autopsy. During the interrogation challenging her decision not to agree to an autopsy, Judith Sclawy testified:

> Q: [Mr. Hasty] I think, I know the answer to the question, but why is it that you refuse to have an autopsy performed?
> A: It's for religious reasons.
>
> Q: Ok.
> A: One doesn't do it in my religion as a matter of respect.
> . . .
> A: . . . [and] "I just couldn't let [Michael] be hurt anymore."

Deposition of Judith Sclawy at pages 145-7, Exhibit "3." In response to a similar inquiry, Howard Adelman also confirmed that the decision was based upon the family's Jewish beliefs. Deposition of Howard Adelman, page 43, Exhibit "4."

2. Testimony of Dr. Manfred Borges (Assistant Medical Examiner)

As acknowledged by the deposition testimony of M.E. Dr. Manfred Borges, the objection to an autopsy under Jewish law has nothing whatsoever to do with whether a Rabbi is able to be present during such a procedure, but instead is based upon the procedure's necessary desecration of the body. *See* Dr. Borges deposition, pages 107-8, Exhibit "5." Also see D.E. 284, n.1. Dr. Borges further described the degree of "desecration" that would occur during an autopsy:

> Q: . . .if someone is going to do an autopsy, as you were describing the process, would you have removed Michael's heart?
> A: Yes.
>
> Q: Would you have removed Michael's brain from his body?
> A: Yes.
>
> Q: Would you have taken out all of his organs?
> A: Yes.
>
> Q: What else would you have done in an autopsy?
> A: Well, in an autopsy I would have taken out all of the organs. This is how we do an autopsy. I would have examined the organs. I would have dissected the organs thoroughly, the brain would have to be examined . . .

Deposition of Dr. Borges, pages 105-6, Exhibit "5."

Contrary to the Boy Scouts suggestion, the ultimate decision of whether or not to perform an autopsy belongs to the Medical Examiner under the law, not Michael's parents. Florida Statutes §406.11. Therefore, the Medical Examiner has the right to perform an autopsy if he believes that

it is necessary in order for him to determine a cause of death.

Here, however, Dr. Borges testified that the lack of an autopsy did not prevent him from performing his official job duties as a Medical Examiner in reaching valid conclusions concerning Michael's cause of death and issuing the state mandated death certificate:

> Q: Now, with regard to the death certificate that has been marked as "Exhibit 1," is this an official state document?
> A: Yes, it is an official document.
>
> Q: And as part of your job as Medical Examiner, does that involve doing the studies or testing or examination that is necessary to be able to fill out the official state of Florida death certificate?
> A: Yes.
>
> Q: Is it important to you that, before you execute a death certificate, that you have sufficient information to allow you to be able to reach the conclusions that you reached --
> A: Yes.
>
> Q: -- within medical probability?
> A: Yes.

Deposition of Dr. Borges, pages 64-5, Exhibit "5."

Based upon his examination of Michael and his review of Michael's medical records, the Collier County Sheriff's investigation, the National Park Service Report, and the other materials which were compiled as part of his official investigation, Dr. Borges testified that he was able to determine that Michael's death was a result of heat stroke within 75% certainty, well in excess of the reasonable medical probability standard required for admissibility:

> Q: Was your opinion that Michael's death was the probable cause of heat stroke rendered within a reasonable medical probability?
> A: Yes, it was.
>
> Q: And if you had to quantify how certain you were on a scale of 1 to 100, how would you be able to?
> A: It would be more certain that not. It would be this side of 75 percent, if I had to. . . . without an autopsy, I wouldn't render my opinion to 100 degree certainty . . .
>
> Q: So is it your opinion that Michael had died of heat stroke within 75 percent probability?
> A: Something in that range, yes.

Deposition of Dr. Borges, pages 49-50, Exhibit "5."

As further reflected by Dr. Borges' testimony, the only individuals who have been

"prejudiced" by the decision not to perform an autopsy in the context of this litigation have been the Plaintiffs. The Defendants conveniently skipped over the portions of Dr. Borges' testimony when he was asked:

> Q: In your conversations with Michael's parents, you indicated that it might be more difficult for them if there was going to be litigation without an autopsy?
> A: Absolutely, that was repeatedly stressed to them.
>
> Q: And the response was that wasn't important to them.
> A: Absolutely.

Deposition of Dr. Borges, page 84 (emphasis added), Exhibit "5."

3. Testimony of Ranger Ed Clark

Ranger Clark's discussions with Howard Adelman have been taken out of context in an effort to *imply* that he was considering litigation shortly after his son died. Although the timing of this decision is irrelevant for purposes of determining the validity of the BSA's motion, the implication is completely inaccurate and unsupported by any actual evidence or testimony in this case.[5]

Both Howard and Judith have consistently testified that they did not even contemplate filing suit against the BSA until meeting with Park Rangers Shreffler and Clark at their home on August 13, 2009, more than 3 months after Michael's death, to discuss the results of their investigation. Although they did not provide a copy of their report, the Rangers showed them various statements, photographs and other materials which had been compiled during their investigation.

It was during this meeting that Howard and Judith learned for the first time that the temperatures had reached 100 degrees during the hike and that Michael had shown progressively worsening signs and symptoms of heat exhaustion leading to heat stroke as the hike went on. Michael's parents also learned for the first time that Crompton and Schmidt had waited over 1 ½ hours before calling for assistance after their son's condition had deteriorated to the point where they had to stop the hike.

Although the Rangers refrained from offering any opinions, both Howard and Judith testified that after learning these facts of the hike, they came to understand for the first time that Michael's

[5] Although the BSA states "[Howard] contemplated suing the Defendants almost immediately," it cites no evidentiary reference for this statement. D.E. 307-1, p.16. The reason is that none exists, because it is untrue.

death was preventable. Accordingly, it was as a result of this meeting that they decided to pursue this litigation. See deposition of Howard Adelman, pages 20, 52-5, 58-60, pages 129-138 and deposition of Judith Sclawy, pages 129-134, 138. It was not until after this meeting that they first sought legal counsel. *See* deposition of Judith Sclawy, page 131.

On his deposition, Ranger Clark testified that this meeting with the Adelmans had been delayed because the Rangers first met with the U.S. Attorney out of concern that the Scout leaders conduct had violated criminal statutes:

> Q: Was the purpose of this meeting to allow the Assistant U.S. Attorney's office in Fort Myers to determine whether there had been any criminal conduct in connection with the death of Michael Ademan?
> A: That's correct.
> . . .
>
> Q: When is it that the Park Service conducts meetings with the U.S. Attorneys Office to determine whether there was potential criminal conduct involved in an injury or death that occurs at the Big Cypress Preserve?
> A: When the investigating Ranger believes that there - some of the elements of criminality are present.
> . . .
>
> Q: What was the reason that Rangers from the Big Cypress Preserve met with the Assistant U.S. Attorney in Fort Myers concerning their investigation into the death of Michael Adelman.
> A: We had a concern, particularly about the length of time that took place between when Michael Adelman became incoherent and when 911 was called.
>
> Q: And what was that concern?
> A: It was a very long period of time, which impacted our ability to respond and provide aid.

Deposition of Ranger Clark, pages 69-71 and 73, attached as Exhibit "6"

Although the evidence is uncontroverted in this case that it was only after meeting with the Rangers and learning about the results of their investigation that the Plaintiffs decided to retain an attorney and bring this litigation, the BSA has attempted to disingenuously imply otherwise based upon the fact that Howard Adelman had spoke to Ranger Clark on May 11 and told him that "he had concerns about the way the hike was conducted." See D.E. 307-1, page 10. Omitted by the BSA in their motion was Ranger Clark's testimony that the Rangers wanted to speak to the Adelmans in order to obtain information for their investigation and accordingly, Clark did not know whether Howard had initiated the call to him or was simply returning a call that had been left by one of the

Rangers. Either way he indicated that the Rangers would have spoken to Howard as part of the Ranger's investigation.[6] See deposition of Ranger Clark, pages 81-2, Exhibit "6."

Ranger Clark described Howard as being very "emotional and upset" and "sad" during this call. The fact that Howard Adelman had "concerns" about the hike on which his only son died of heat stroke in a conversation several days later is hardly surprising. What would be surprising would be if any parent in the same situation didn't have such concerns.

Regardless, Ranger Clark clearly testified that there was nothing in the nature of this call or any other discussion which he had with Howard Adelman prior to their August 13, 2009 meeting that led him to believe that Michael's parents were intending on initiating litigation. Instead, he attributed his feeling to his own experience. In fact, Ranger Clark's testimony on this issue, including the portion omitted by the Defendant in its motion, read as follows:

> Q: When he called you on May 11, with - and told you he was critical of the hike, was that your first indication that a - a legal claim might result from this?
> A: No, not really.
>
> Q: Ok, when - when did you get that – feeling?
> A: The night of it.
>
> Q: The night of it; ok.
> A: Yeah.
>
> Q: So, immediately?
> A: Based on my experience.
>
> Q: Ok.
> A: Not on anything that someone said to me.
>
> Q: Ok, with what he said to you, Mr. Adelman, when did you get that - that feeling from him?
> A: No, not until months later.

---

[6] The Defendant's motion disingenuously seeks to convert Howard's "emotional" and "sad" phone conference with Ranger Clark on May 11, 2009 into an "investigation." Ranger Clark testified that he did not discuss the results of the NPS investigation with Howard at the time, since it was still ongoing. He characterized this call as "primarily designed . . . for [Clark] to obtain information and then also as part of a discussion of Howard's grief and anguish." Deposition of Ranger Clark, pages 81-3.

Ranger Clark testified that after he reached out to Howard at Michael's funeral they spoke by phone on a number of other occasions, in which Howard sought "solace, as a result of the anguish and grief which he felt." He further testified that Howard was "extremely distraught over this period of time" and these calls were limited to Howard's anguish and not the Rangers investigation into the facts surrounding Michael's death. Deposition of Ranger Clark, pages 78-80.

Q: Ok, when was that?
A: Well, whenever he filed the suit.
. . .

Q: Ok, did he tell you that the day he decided to file suit was the day that you and Ranger Shreffler drove out of his driveway?
A: I believe he said that.

Deposition of Ranger Clark, pages 27-28 (emphasis added), Exhibit "6."

4. Testimony of Detective Kevin O'Neill

Detective O'Neill testified that he had no discussion with the Plaintiffs whatsoever about the potential for civil litigation or any intent to file a lawsuit. When questioned by defense counsel about the handwritten note of Dr. Coburn (who has not been deposed in this case), Detective O'Neill's response was simply that he preferred to have an autopsy done and that the focus of his concern was his investigation into determine whether there was a criminal case arising from Michael's death. Deposition of Detective O'Neill, pages 65-6, Exhibit "10."

Applicable Law

a. Bad Faith

As set forth by this Court in its recent decision in *Point Blank Solutions, Inc. v. Toyobo America, Inc.,* 2011 WL 1456029 (S.D. Fla. 2011), a case involving the much less significant sanction of an adverse inference jury instruction:

> In this Circuit, a court cannot give an adverse inference jury instruction - the primary, specific relief sought by Plaintiffs - as a sanction for spoliation of documents or other discovery information, including emails, unless there is evidence of *bad faith*.

Id. at *1 (emphasis in the original). The Boy Scouts contention that the refusal of Michael's parents to agree to an autopsy in the days immediately after his death, long before they had any thoughts of litigation, constitutes such bad faith is completely unprecedented, not only in this circuit, but anywhere else as well.

In fact, in the only case that the Plaintiff has been able to find directly on point, the court in *Walsh v. Caidin*, 283 Cal.Rptr. 326, 329 (Cal. App. 1991) expressly rejected this identical argument:

> To allow [defendant's] action would treat a dead body merely as another piece of evidence, ignoring the outrage to the surviving family members, to which our case law is sensitive.

> The trial court also opined that recognition of [defendants] cause of action could violate the surviving spouses freedom of religion. California law is also sensitive to this consideration . . .
>
> Because the surviving spouse's decision is so intensely private and personal, it would be difficult to prove that cremation was done for the improper purpose of destroying evidence.

In *Bashir v. Amtrak,* 19 F.3d 929 (11th Cir. 1997), the Eleventh Circuit concluded that "the unexplained absence of a speed tape," which would have conclusively established the train's speed in a collision case was not sufficient to give rise to even a adverse jury inference, much less a dismissal based upon spoliation,

> In this circuit, an adverse inference is drawn from the party's failure to preserve evidence only when the absence of that evidence is predicated on bad faith. [citation omitted]. "Mere negligence" in losing or destroying the records is not enough for an adverse inference, as "it does not sustain an inference of consciousness of a weak case." [citation omitted]. Thus, under the "adverse inference rule," we will not infer that the missing speed tape contained evidence unfavorable to appellees unless the circumstances surrounding the tape's absence indicate bad faith e.g., that appellees tampered with the evidence.

119 F.3d at 931. (emphasis added). In *Point Blank Solutions, Inc.*, this Court equated the type of bad faith necessary to impose sanctions with "litigation misconduct" or evidence "tampering." 2011 WL 1456029 at *8, 10. *See also Walter v. Carnival Corp.*, 2010 WL 2927962 (S.D. Fla. 2010)(mere fact that litigation may have been anticipated from accident did not render cruise line's failure to save allegedly defective chair a bad faith act giving rise to spoliation).

The BSA's attempt to establish the existence of such bad faith by reference to the Eleventh Circuit's opinion in *Flury v. Daimler Chrylser Corp.*, 427 F.3d 939 (11th Cir. 2005) is incredulous at best. The suggestion that a parent's decision to object to an autopsy on their deceased child for religious reasons is the equivalent of a car owner's decision to sell his damaged vehicle for scrap exceeds the realm of comprehension.

As this court itself further pointed out in *Point Blank Solutions, Inc.*, *Flury* was also a case decided under Georgia law, which differs in material aspects from Florida spoliation law.[7] 2011 WL

[7] As this court noted in *Point Blank Solutions, Inc.*, federal law governs the imposition of spoliation sanctions in a diversity lawsuit because they constitute an evidentiary matter. Nevertheless, the court may look to state law for guidance to the extent that it is consistent with federal law. 2011 WL 1456029 at *8.

1456029 at *9 (and cases cited therein). Just as importantly, the facts in *Flury* are completely opposite to those in the present case.

Flury immediately hired a lawyer, who just 13 days after the accident placed the car manufacturer on notice of his client's intent to pursue a crashworthiness claim. The manufacturer thereafter promptly responded by formally requesting the opportunity to inspect the vehicle. Plaintiff's counsel never responded to this request. Many months later the vehicle was sold for scrap by the Plaintiff's insurer. None of those facts, which were all critical to the court's holding, exist in this case.

In *Britton v. Wal-Mart Stores East L.P.*, 2011 WL 3236189 (N.D. Fla.) at *13 (emphasis added), one of the cases cited by the BSA, the court concluded that in order to show the type of bad faith necessary to give rise to a spoliation remedy, the moving party must establish that the party's "reasons given for not preserving the critical evidence are suspiciously irrational." *See also Pointblank Solutions, Inc.*, 2011 WL 1456029 at *29 (the act "cannot be credibly explained as not involving bad faith"). Here, even if one was to make the unconvincing argument that parents, who have traumatically suffered the loss of their only son, were in a position to make a reasoned and calculated decision over whether an autopsy should be performed immediately upon learning of their son's death, it is not possible to credibly argue that Howard and Judith's decision to oppose an autopsy based upon religious grounds is "suspiciously irrational."

b. Duty to Preserve Evidence

As recognized by this Court in *Point Blank Solutions, Inc.*, in order for spoliation to exist, there must also be a legal duty to preserve the evidence at the time that it was destroyed. 2011 WL 1456029 at *9. In defining the elements of a spoliation claim, the Eleventh Circuit has held that there must be "a legal or contractual duty to preserve evidence which is relevant to the potential civil action." *Green Leaf Nursery v. E.I. Dupont DeNemours & Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003) *aff'g* 165 F.Supp.2d 1345 (S.D. Fla. 2001)(Gold). In *Electric Machinery Enterprises, Inc. v. Hunt Construction Group, Inc.*, 416 B.R. 801 (N.D. Fla. 2009); the court went on to elaborate:

> The second pre-requisite to spoliation sanctions is that there was an underlying duty to preserve evidence. In Florida, "[a] duty to preserve evidence can arise ***by contract, by statute, or by a properly served discovery***

> ***request*** (after a lawsuit has already been filed)." *Royal & Sunalliance v. Lauderdale Marine Center,* 877 So. 2d 843, 845 (Fla. 4th DCA 2004). The majority of Florida courts have held that there is no common law duty to preserve evidence ***before*** litigation has commenced. [citation omitted].

416 B.R. at 873 (emphasis added). *Also see Gayer v. Fine Island Construction & Electric, Inc.*, 977 So.2d 424 (Fla. 4th DCA 2008); *Silhan v. Allstate Ins. Co.*, 236 F.Supp.2d 1303 (N.D. Fla. 2002).

Even more strict rules have been applied by the courts to determine whether there has been a spoliation of evidence, when a party has attempted to apply it to the treatment of the human body. For example, in *Vega v. CSCS International, NV*, 795 So.2d 164 (Fla. 3d DCA 2001), another case cited by the Defendant, the court rejected the contention that there had been spoliation of evidence by a seaman who had chosen to undergo surgery for a purported disc injury *after* receiving a written request from his employer to first allow it to have him examined for purposes of potential litigation. Contrary to the suggestion by the Defendant that Vega standards for the proposition that "the doctrine of spoliation arises when it has been alleged that a crucial piece of evidence is unavailable," the Third District in fact held:

> CSCS argues that Vega's herniated disc was "evidence" in the litigation, but there is no precedence to support such an argument. The only case cited by the parties to deal with this issue determined that the treatment of injuries cannot constitute spoliation of evidence.
>
> Even if we were to hold that Vega's back was evidence, which we do not, CSCS has not established all the necessary elements for spoliation of evidence. Missing from the facts of this case is any "legal or contractual duty to preserve evidence which is relevant to the potential civil action." *Continental Ins. Co. v. Herman*, 576 So.2d 313, 315 (Fla. 3d DCA 1990). There is absolutely no obligation to preserve the status quo of a litigant's body for future examination by the opponent, except as provided in the rules of procedure or is otherwise ordered by the court. CSCS made no attempt to obtain a court order prior to the surgery.

Vega, 795 So.2d at 166-7.

While undersigned counsel is appreciative of the fact that Defendant's counsel read one of his law review articles entitled *The Necessity of Redefining Spoliation of Evidence Remedies in Florida*,[8] he would have preferred that it not be misquoted or mis-cited. As pointed out in this article, the court's ruling in *Hammer v. Rosenthal Jewelers Supply Corp.*, 558 So.2d 460 (Fla. 4th

[8] Vol. 29, Florida State University Law Review (Summer 2002), p. 1289.

DCA 1990) was not based upon spoliation of evidence sanctions, but instead the case was dismissed as a sanction for failure to comply with a discovery order. *Id.* at 1294. In fact, the court's opinion does not even mention the word spoliation.

Mr. Hammer had filed a personal injury action while he was still alive, alleging that he had contracted lung cancer due to a prolonged occupational exposure to asbestos from products manufactured by the defendant. After the filing of his complaint, Mr. Hammer died. The defendant immediately filed an emergency motion to enjoin burial and to compel autopsy. Following several hearings, the court entered an order directing an autopsy. As reflected by the court's opinion, the trial court's decision to dismiss the case was based upon the subsequent refusal to comply with its discovery order. Therefore, the court's discovery order created a legal duty on the part of the Plaintiff to comply with its terms, absent a reversal by a higher court. The issue in this case is not whether an autopsy might have been ordered if requested, but whether the Plaintiffs are guilty of spoliation of evidence. Since no such order existed in the present case, there accordingly could have been no legal duty on the part of the Plaintiffs to preserve evidence, which was violated.[9]

c. Inability to Make a Prima Facie Case

A third essential element for establishing spoliation as pointed out by this Court in *Point Blank Solutions, Inc.* is "the requirement to demonstrate that the spoliated evidence was *crucial* to the movant's ability to prove its prima facie case or defense, it is not enough that the spoliated evidence would have been relevant to a claim or defense." 2011 WL 1456029 at *8 (emphasis in the original). Accordingly, where the moving party can still prove a ***prima facie*** defense through other evidence, spoliation sanctions are inappropriate.

The Defendant's argument that the lack of an autopsy prevents its experts from "more conclusively opin[ing] as to the actual cause of death,"[10] [D.E. 307-1, p.2] has already been rejected by the Eleventh Circuit as forming a sufficient basis for the entry of spoliation sanctions. In

[9] Hammer certainly does not stand for the proposition claimed that "sanctions are appropriate if one refuses to allow an autopsy when cause of death is at issue" in the absence of a court order compelling the autopsy. D.E. 307-1, p.16.

[10] The Defendant repeatedly confuses the concept of "prima facie" with "absolute certainty" and "conclusively" in its motion. See D.E. 307-1, p.1, 2, 13 and 14.

Greenleaf Nursery, 341 F.3d at 1309, the Eleventh Circuit held that it is not enough to merely prove that one is injured in some fashion, but they must prove that they are completely unable to establish their claim or defense. Accordingly, the court went on to conclude:

> Plaintiffs merely argued that "[w]ithout the withheld [,] altered, and destroyed evidence, appellants cannot effectively rebut *Dupont's* 'better science' evidence." [Appellants BR. at 36-37].
>
> Plaintiff's inability to rebut a defense theory is not "significant impairment" of the Plaintiff's ability to prove its case. Plaintiff cannot show that the actual destruction of the test plants in Costa Rica led to their inability to prove their lawsuit.

Id. at 1309. *Also see Pointblank Solutions, Inc.*, 2011 WL 1456029 at *27.

Unlike virtually every case cited by the Defendant, there was in fact an examination of the claimed evidence-Michael's body-carried out by the Medical Examiner, a neutral government official, whose job duties included performing such examinations and determining a cause of death. As part of this examination, a blood sample was obtained, which was not only tested by the Medical Examiner's office, but a laboratory chosen by the Defendant as well. See D.E. 284.

In addition, extensive investigations into the circumstances surrounding Michael's death were also carried out by other neutral government agencies-the Collier County Sheriff's Department and the National Park Service. Not only did both government agencies render extensive reports, but they made their investigators available for depositions in this case.[11]

The Defendant simply cannot establish that it is unable to prove a ***prima facie*** defense due to the lack of an autopsy in this case.[12] As noted above, the Medical Examiner has testified that

---

[11] In addition to Medical Examiner Dr. Borges, Detective Kevin O'Neill of the Collier County Sheriff's Department and NPS Rangers Gary Shreffler, Ed Clark, Wynn Carney, Drew Gilmour and Garnett Tritt have been deposed.

[12] The BSA's reliance upon the fact that Michael was the only one to die from heat stroke during a 20 mile hike in the wilderness on a day when temperatures reached 100° is merely sophistry, not a basis for awarding spoliation sanctions. D.E. 307-1, p.14. Moreover, as Dr. Borges pointed out:

> Q: You were asked some questions by Mr. Summers about why one person involved in an incident may die and other people may not. Have you been involved in cases, as a Medical Examiner, where there is an auto accident, and there would be multiple people in the car and only one person will die in the car?
>
> A: Oh, absolutely or cases where a boat crashes and people in the boat, only one drowns and they are the same exact – let's put it this way– they are in the same boat.

based upon the evidence available it is medically possible to determine the cause of Michael's death within 75 percent certainty, well above the reasonable medical probability threshold of 51 percent.

Both of the Plaintiffs' medical experts, Dr. Francis O'Connor and Dr. Stephen Lipshultz, have also indicated by affidavits that it is not only possible to determine Michael's cause of death from the available evidence within reasonable medical certainty, a higher standard, but that the evidence overwhelmingly establishes that it was due to heat stroke. See Exhibits 7 and 8 hereto. Dr. Lipshultz, a pediatric cardiologist, who is the Chairman of Pediatrics at the UM School of Medicine, has indicated that even without an autopsy, there is "more than sufficient evidence available for a properly qualified medical doctor to weight the medical possibility and to exclude other potential causes of death, such as pre-existing cardiac abnormalities and brain lesions, within reasonable medical probability." Dr. O'Connor, who is a nationally recognized expert in military and emergency medicine concurs in his affidavit.[13]

The Defendants have identified a total of 6 medical experts on their expert witness disclosures.[14] The fact that they have been able to obtain an affidavit from 1 of these experts indicating that <u>he is unable</u> to render an opinion as to Michael's cause of death within reasonable medical probability, clearly does not establish either that the <u>Defendants</u> are unable to establish a

---

Q: Literally and figuratively.
A: Literally and figuratively.
. . .
Q: Would it be reasonable for people that are in relatively normal shape, who are in a 20 mile hike in 100 degree weather, to die of heat stroke or heat exhaustion?
A: Certainly.
. . .
Q: If an individual suffers from heat exhaustion, does that if it is not treated, would that progress to heat stroke?
A: Yes.

Deposition of Dr. Borges, pages 113-114, Exhibit "5."

[13] Although Dr. O'Connor signed his affidavit, he was unable to have it notarized in time for the filing of this response. Accordingly, a notarized copy will be filed hereinafter.

[14] Although there are 3 groups of Defendants represented by 3 different law firms, the defense of <u>all</u> the defendants in this case is being provided for and paid by the Defendant BSA, which has also agreed to indemnify each of the other Defendants. This is further apparent by virtue of the fact that counsel for the BSA filed this motion on behalf of all of the Defendants. Therefore, there is clearly a unity of interest among the defendants carrying over to their experts.

prima facie case or even that their other 5 medical experts have the same opinion. Nor does it establish that other more capable experts can render opinions on cause of death as reflected by the testimony of the Medical Examiner or the affidavits of Plaintiff's experts. All the BSA has accomplished is to establish that Dr. Wetli will be unable to testify as an expert in this case.[15]

Conclusion

Nearly 2 ½ years after Michael's death, following over 16 months of litigation, during which 34 depositions have been taken, literally thousands and thousands of pages of documents produced and multiple hearings conducted by this Court, BSA is now moving to dismiss this case for spoliation of evidence 4 days prior to mediation based upon an act that occurred on the day following Michael's death. The timing clearly evidences the lack of good faith behind this motion and the real reason for its filing.

Although dismissal of a lawsuit is the most severe sanction and limited to those circumstances "where the offending party is found to have exhibited 'flagrant bad faith,'" the Defendant asks this Court to enter this sanction for what the BSA itself terms as "Michael's parents [choice] to abide by their religious beliefs." *See Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 131 (S.D. Fla. 1987)(default properly entered where corporate officers willfully ordered destruction of records for the intended purpose of destroying evidence and obstructing discovery).

Although the Defendant also requests lesser sanctions in the form of striking the Plaintiffs' experts or the use of an adverse inference instruction, it is nevertheless clear that in this Circuit even these sanctions are not applicable, where the elements of spoliation have not been established and there has been a lack of showing of bad faith. *See Pointblank Solutions, Inc.*, 2011 WL 1456029 at *2. Moreover, even where the elements of spoliation exist, the courts have generally concluded that the remedy must logically be responsive to the resulting prejudice.

For example, in *Graff v. Baja Marine Corp.*, 310 Fed.Appx. 298 (11th Cir. 2009)(unpublished), the court refused to allow a party's expert to testify concerning the results of

[15] The defendants have identified another pathologist besides Dr. Wetli – Dr. Baden. Since it is unlikely that the Court will permit the defendants to call duplicative experts, Dr. Wetli is most likely what is known in the practice as a "throwaway expert."

testing he performed on a product, where the testing destroyed the product and prevented the Defendant from conducting its own tests. Despite the expert's destruction of evidence he was not excluded from testifying on this ground, but only precluded from presenting the results of his testing. Here, there is clearly no basis to even consider the Defendants request to exclude the Plaintiffs' experts from testifying. Not only has their been a lack of spoliation of evidence as discussed above, but the Plaintiff's experts have not destroyed any evidence or had the opportunity to perform any testing or examination that was unavailable to the Defendant as in *Graff*.

The same is true with regard to the Defendant's request for an adverse jury instruction. Not only has the BSA failed to meet the standards required for such instruction, but such instruction is only proper where the party's action in destroying the evidence is done under circumstances to give rise to the inference that the party was disposing of unfavorable evidence. *See Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997); *Calixto v. Watson Bohman Acme Corp*., 2009 WL 3823390 (S.D. Fla. 2009) at *15 (and cases cited therein). There is absolutely no suggestion whatsoever in this case that the Plaintiffs opposed an autopsy for any reason other than that it was contrary to their religious beliefs and their desire to avoid letting Michael "be hurt anymore" by the desecration of his body. There is absolutely no evidence to suggest that the Plaintiffs had any reason to believe that an autopsy would produce unfavorable evidence in a case, which they had no intention of even bring at the time.[16]

---

[16] The Defendant claims that Michael had high blood pressure based upon having Dr. Borges, the Medical Examinerm read several blood pressure readings taken out of context from the records of Michael's pediatricians. D.E. 307-1, p. 4. This claim was refuted by the testimony of Dr. Bullard, their son's board certified pediatrician, who actually examined Michael while he was alive. More importantly, the evidence is undisputed that Dr. Bullard had advised Michael's parents that he was a completely normal and health young man and that he was fully capable of participating in Boy Scout activities. See deposition of Dr. Bullard, pages 6, 7, 15, 26-31, 33-34, 39, 89-90, Exhibit "9." The Adelmans had no reason to believe anything different at the time, nor is there any reason to believe anything different today.

Therefore to suggest with absolutely no evidence, that the Plaintiffs were seeking a "litigation advantage," by refusing an autopsy is completely spurious. Since the Medical Examiner did not even execute Michael's death certificate until May 21, 2009, the Plaintiffs did not even know what his conclusions and findings would be until well after the decision not to do an autopsy was made and Michael buried.

Dated: October 13, 2011

Respectfully submitted,

/s/ Robert D. Peltz
ROBERT D. PELTZ (Fla. Bar No. 220418**)**
E-mail: peltz@leesfield.com
LEESFIELD & PARTNERS, P.A.
2350 S. Dixie Highway
Miami, Florida 33133
Telephone: (305) 854-4900
Facsimile: (305) 854-8266
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **October 13, 2011**, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Robert D. Peltz
ROBERT D. PELTZ

SERVICE LIST

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

ERIC S. KLEINMAN
Email: esk@ka-law.net
KLEINMAN & ARRIZABALAGA, P.A.
150 SE 2nd Avenue, Suite 1105
Miami, FL 33131
Telephone: 305-377-2728
Facsimile: 305-377-8390
Attorneys for Howard K. Crompton and Andrew L. Schmidt

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

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

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