THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Miami Division

Howard Adelman and Judith Sclaway-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.
_____/

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

District Ct. Judge: Alan S. Gold
Magistrate Judge:

SOUTH FLORIDA COUNCIL'S REPLY TO PLAINTIFFS' RESPONSE TO SOUTH FLORIDA COUNCIL'S MOTION TO DISMISS COUNTS VII AND VIII OF THE AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, Defendant, South Florida Council Inc., Boy Scouts of America, by and through its undersigned counsel, hereby files its Reply to Plaintiffs' Response to South Florida Council's Motion to Dismiss Counts VII and VIII of the Amended Complaint, and states more fully as follows:

1. The South Florida Council, as a matter of law, does not hire, retain, supervise or control local Scoutmasters, such as Howard K. Crompton or Andrew L. Schmidt. Without such an employer/employee relationship between the local Scoutmasters and the South Florida Council, Counts VII and VIII fail as a matter of law and should be dismissed.
2. Nothing in Plaintiffs' Response changes the fact that the Amended Complaint does not allege facts that took place ***during*** the course of employment, which should have caused the South Florida Council to take action concerning Howard K. Crompton or Andrew L. Schmidt. Thus, Counts VII and VIII fail to state a claim for which relief can be granted.

MEMORANDUM OF LAW

Standard of Review

Plaintiffs' statement of the standard of review is not entirely accurate. The standard has become slightly more stringent. Until recently, dismissal was deemed inappropriate unless it appeared beyond a doubt that the plaintiff could not prove any set of facts to entitle him to relief. The United States Supreme Court held in 2007,

> [T]o survive a motion to dismiss, a complaint must now contain factual allegations which are "enough to raise a right to relief above the speculative level" . . . While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.
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> Clarke v. Weltman, Wienberg & Reis, Co., L.P.A. Slip Copy, 2010 WL 2803975 at *1 (*quoting* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

1. THERE IS NO EMPLOYER/EMPLOYEE RELATIONSHIP BETWEEN THE SOUTH FLORIDA COUNCIL AND THE SCOUTMASTERS AS A MATTER OF LAW

The South Florida Council does not ask this Court to look beyond the four corners of the Amended Complaint concerning the relationship between it and Howard K. Crompton and Andrew L. Schmidt. The South Florida Council does not need to contest the facts or merits of this case. As a matter of law, there is no employer/employee relationship between the South Florida Council and the Scoutmasters. Critically, "employment is a necessary predicate to a claim for negligent hiring, training, and supervision." Behrman v. Allstate Ins. Co., 388 F.Supp.2d 1346, 1350 (S.D.Fla. 2005). Your Honor has held that without such a relationship, claims for negligent hiring and negligent supervision fail as a matter of law. Pysca Panama, S.A. v. Tensar Earth Technologies, Inc., 625 F.Supp.2d 1198, 1254-1255 (S.D.Fla. 2008).[1]

The relationship between a scout council, such as the South Florida Council, and Scoutmasters (in terms of agency and employment) was extensively reviewed in the seminal case of Young v. Boy Scouts of Am., 51 P.2d 191, (Cal.App.4th 1936): a case that continues to be cited concerning this relationship.[2] That Court dismissed Plaintiff's complaint finding as a matter of law that local scoutmasters are not under the control of Boy Scouts of America or local council. Id. at 194.[3] Young took judicial notice that "The Boy Scouts of America was organized under an act of Congress, June 15, 1916 (36 USCA § [30901] et seq.)." Young at 193. Its purpose is only to "promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and

[1] "It is a question of law for the court to determine whether there is a duty of care owed by one party to another in a negligence action." Weissman v. Boating Magazine, 946 F.2d 811, 814 (11th Cir. 1991).

[2] *See* Alessi v. Boy Scouts of Am. Greater Niagara Frontier Council, 668 N.Y.S.2d 838, 839 (4th Dep't 1998) (finding neither Boy Scouts of America nor council have control over the activities of scoutmasters); McGarr v. Baltimore Area Council, Boy Scouts of Am., Inc., 536 A.2d 728, 835 (Md. Ct. Spec. App. 1988) (finding that the council does not choose or directly supervise scoutmasters); and Hobbs v. Boy Scouts of Am., Inc., 152 S.W.3d 367, 369 (Mo.Ct.App.2004).

[3] *Disapproved of by* Malloy v. Fong, 232 P.2d 241, 246 (Cal. 1951) (recognizing the abolition of the doctrine of charitable immunity). The South Florida Council is not pursuing dismissal on that ground; rather it cites Young for the proposition that the relationship between Boy Scouts of America, local council and Scoutmasters is established as a matter of law.

others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance and kindred virtues…" 36 U.S.C.A. § 30902. The Court in Young, discussing the scouting movement stated:

> The national organization [Boy Scouts of America] and local council furnish a program, train leaders in boys' work, and encourage individuals in the various communities to carry on certain work of local benefit, but these organizations do not directly carry out these activities. The local councils assist along these lines, but **the actual work in the respective communities is performed by local scoutmasters under the direction of local troop committees**. A scoutmaster is appointed on the recommendation of this troop committee and not on the recommendation of the local council, and he is responsible solely to this local committee. **The troop committee and the scoutmaster are volunteer workers whose services are given to the community rather than to the organization which is, in practical effect, merely an adviser rather than an employer.**
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> Id. at 194. (emphasis added). *See also* Mauch v. Kissling, 783 P.2d 601, 605 (Wash.Ct.App.Div.3 1989) (affirming the dismissal of vicarious liability and negligence claims against the Fort Simcoe Area Council of Boy Scouts of America under the rationale of Young v. Boy Scouts of Am., supra).

Thus, councils, such as the South Florida Council are not in the type of relationship (i.e an employer/employee relationship), which would permit them to select, retain or supervise Scoutmasters as a matter of law. Notably, whether a legal duty exists is for a Court to determine. Plaintiffs' citations to its complaint wherein they attempt to establish the legal responsibility owed by the South Florida Council cannot create a valid cause of action in this case. *See* Clarke at *1. Whether there exists a relationship between parties as to impose a legal obligation upon one of them is a question of law to be determined by the court. Am. Bus. Interiors, Inc. v. Haworth, Inc. 798 F.2d 1135, 1146 (8th Cir. 1986); *see also* Pycsa Panama at 1252-1255 (finding no employer/employee relationship between two parties as a matter of law and fact.).

Plaintiffs attempt to distinguish cases cited in the Motion to Dismiss and assert that the issue of control, which was paramount in those cases, is not in the present matter.[4] That argument is misplaced. Control is an essential element of an employer/employee or an agency relationship. Glover, supra at

[4] *See* Glover v. Boy Scouts of Am., 923 P.2d, 1383, 1385-1388 (Utah 1996); Wilson v. United States, 989 F.2d 953, 959 (8th Cir. 1993); Wilson v. Boy Scouts of Am., 784 F.Supp.1422, 1425-26 (E.D. Mo. 1991); Wilson v. St Louis Area Council, 845 S.W.2d 568, 570-572 and Anderson v. Boy Scouts of Am., 589 N.E.2d 892 (Ct.App.Ill. 1992).

1385; Pysca Panama at 1252. Without such relationship, negligent hiring and supervision claims fail as a matter of law. Pysca Panama at 1254-1255. Thus, the fact that control is absent from the relationship between Scoutmasters and scout council as discussed in the aforementioned cases, is significant.

Plaintiff's argument surrounding foreseeability is unavailing, because absent an employee/employer relationship, the South Florida Council cannot be liable as a matter of law under Counts VII or VIII. In point of fact, Anderson Trucking Serv., Inc. v. Gibson, 884 So.2d 1046, 1052 (Fla. 5th DCA 2004), cited by Plaintiffs, requires an employer/employee relationship to exist to permit a claim for negligent hiring. The question of whether an employee acts outside the scope of his/her employment, an issue in Gibson, is not at issue in the present matter.

Finally, Lourim v. Swensen, 328 Or. 380, 977 P.2d 1157 (1999) is distinguishable as that case dealt with a sexual assault by a volunteer who used his position to gain the trust of children and their families; it did not concern mere negligence. Id. at 383. It did not concern negligent retention, negligent selection or negligent hiring. Id. at 388. It did not concern a cause of action against a scout council, nor did Lourim review the relationship between a council and scoutmasters. Furthermore, Lourim is in the minority and is the sole case cited by Plaintiffs' throughout the United States, which does not fall in line with Young and its successors concerning the structure of the scouting movement.[5]

Therefore, because of the organizational structure of the scouting movement, no employer/employee relationship exists between the South Florida Council and Mr. Crompton and Mr. Schmidt, Plaintiffs' claims for negligent, retention, hiring and supervision fail as a matter of law. Counts VII and VIII should be dismissed with prejudice.

[5] One of the reasons for this minority view may be due to Oregon's interpretation of child abuse law. The question of whether child abuse (an intentional tort) is committed within the course and scope of one's employment is a factual question for the jury. *See* Fearing v. Bucher, 977 P.2d 1163, 1166 (Or. 1999); *see also* Or.Rev.Stat. § 12.117 (2010).

2. THE COMPLAINT FAILS TO ALLEGE ISSUES SURFACING "*DURING*" THE COURSE OF EMPLOYMENT

Plaintiffs' Response does not argue that the Amended Complaint states any circumstance, which arose ***during*** the employment of Howard K. Crompton or Andrew L. Schmidt that would require the South Florida Council to take any action. The Response lists numerous reasons why Crompton and Schmidt were not fit, but does not allege that these deficiencies surfaced during the employment. The difference between negligent hiring and negligent retention/supervision "concerns the time at which the employer is charged with knowledge of the employee's unfitness." *See* Malicki v. Doe, 814 So.2d 347, 362 (Fla. 2002) The Amended Complaint cannot survive the dismissal stage, because it does not allege facts sufficient to show that "during the course of employment," the South Florida Council became aware or should have become aware of problems indicating the unfitness of Howard K. Crompton or Andrew L. Schmidt. Garcia v. Duffy, 492 So.2d 435, 438-439 (Fla. 2d DCA 1986). As such, the Amended Complaint fails to state a claim for negligent retention and negligent supervision and should be dismissed.

WHEREFORE, Defendant, The South Florida Council, Inc. Boy Scouts of America, respectfully requests that this Honorable Court dismiss Count VII and Count VIII, and award such other relief as this Court deems necessary and just.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed September 8, 2010 to: Mark A. Sylvester, Esq., LEESFIELD & PARTNERS, P.A., 2350 South Dixie Highway, Miami, FL, 33133; Frederick E. Hasty, Esquire, Wicker, Smith, O'Hara, McCoy, Graham & Ford, P.A., Grove Plaza Building, 5th floor, 2900 Middle Street, Miami, FL, 33133.

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