

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG

HOWARD ADELMAN AND JUDITH SCLAWY
as Co-Personal Representatives of the
ESTATE OF MICHAEL SCLAWY-ADELMAN,

Plaintiffs,

vs.

BOY SCOUTS OF AMERICA;
THE SOUTH FLORIDA COUNCIL INC., BOY SCOUTS OF AMERICA;
PLANTATION UNITED METHODIST CHURCH;
HOWARD K. CROMPTON, Individually, and
ANDREW L. SCHMIDT, Individually,

Defendants.

PLAINTIFFS' MOTION FOR PRESERVATION OF EVIDENCE
AND/OR INJUNCTIVE RELIEF

Plaintiffs, by and through undersigned counsel, hereby respectfully request that this Honorable Court enter an Order requiring that material evidence in the instant case, namely a GPS device used on the Boy Scout Hike that claimed Michael Sclawy-Adelman's life, be preserved in an unaltered condition by a neutral third party. In support thereof, Plaintiffs state as follows:

1. This case is about the wrongful death of Michael Sclawy-Adelman, a Boy Scout who died of heat stroke on May 9, 2009, while on a 20-mile Boy Scout sanctioned and organized hike in the Florida Everglades.

2. The 20-mile hike was conducted by Defendant adult Scoutmasters Howard Crompton and Andrew Schmidt, on a day when temperatures in the Florida Everglades reached 100 degrees.

3. During the hike, Michael Sclawy-Adelman began showing signs of heat illness. Rather than providing reasonable care to Michael Sclawy-Adelman, the Defendant Scoutmasters continued the hike until Michael became dizzy, disoriented, delirious, and could go no further. Even then, the Defendant Scoutmasters allowed 1 ½ hours to pass before calling for help. By that time, it was too late. Michael Sclawy-Adelman died of heat stroke at mile 15 of the 20 mile Boy Scout sanctioned hike.

4. The National Park Service Rangers conducted a detailed investigation into the incident. As part of their investigation, they took possession of a GPS (Global Positioning System), device owned and used by Defendant Howard Crompton during the Hike.

5. The GPS device was a Garmin eTrex that works in conjunction with 27 satellites that orbit the Earth, allowing the device to pinpoint the users exact geographical location at a specific point in time. This GPS device has a number of features, including:

- (A) An automatic track log with the ability to save up to 10 tracks.
- (B) A trip computer that calculates current speed, average speed, maximum speed, direction of movement, bearing, elevation, time of sunrise/sunset, trip timer and a trip odometer.

6. This GPS device is accurate to within 15 meters¹, and is capable of being accurate to within 1-5 meters.

¹This level of accuracy is achieved when the Department of Defense Selective Availability is not turned on.

7. The data within this GPS device can be accessed by connecting the device to a computer, via cable, and downloading the information from the device onto the computer's internal memory.

8. During the investigation conducted by the National Park Service, Ranger Garner Tritt downloaded the information from Defendant Howard Crompton's GPS and compiled the information as part of the Report and Investigative File furnished by the United States Department of the Interior, National Park Service (*See Exhibit "A"*). The report includes:

- (A) A map of the Florida Trail, highlighting the specific track taken by Howard Crompton and the Scouts.
- (B) A detailed version of the map specifically highlighting miles 1-17 of the Florida Trail.
- (C) A detailed version of the specific track taken by the group.
- (D) A detailed version of the group's specific track, including the specific location of the incident, the specific location of the CPR stop, and the specific location of the helicopter landing spot.
- (E) A precise time stamped map, including the specific start time of the hike and the time of drop off after the helicopter returned to the Oasis Ranger Station.
- (F) A precise time stamped map, including individual track points, the specific time and location of their lunch stop, and the specific time and location of their southbound trip towards the Oasis Ranger Station.
- (G) A precise time stamped map, including individual track points, their position on the northbound track, the specific location of the group rest spot, the specific incident location, the specific location of the helicopter landing spot, and the time of the return flight to the Oasis Ranger Station.

9. The Report indicates that the subject Hike was stopped at mile 15 for approximately 1 ½ hours prior to the time that an emergency call was made to 911 for help. It was during this time

that Michael Sclawy-Adelman was dying of Heat Stroke, and when an emergency call should have been placed immediately, if not earlier on the Hike.

10. Initially, the Park Rangers of Big Cypress National Park retained custody and control of the subject GPS device pending the conclusion of their investigation; however, now their investigation is complete, and the Plaintiffs have been informed that the subject GPS device has been recently returned it to Defendant Howard Crompton and/or his representatives.

11. The subject GPS device represents material evidence in this case.

12. Plaintiffs believe that returning the subject GPS device to Defendant Howard Crompton and/or his representatives may lead to modification, alteration and/or destruction of material evidence.

13. The subject GPS device will automatically store up to 10 tracks within its internal memory. However, once that track limit is reached, the GPS device will begin overwriting older information. The number of “tracks” currently on the GPS device is unknown. With the automatic overwrite function in place, it’s highly probable that any use of the GPS device will result in the destruction of material evidence.

14. Furthermore, any unilateral testing of this device by the Defendants could result in the modification, alteration and/or destruction of material evidence.

-Memorandum of Law-

A. Spoliation of Evidence

Florida courts have held that a legal duty to preserve evidence arises not only when litigation begins, but also when litigation is anticipated. *See Hagopian v. Publix Supermarkets Inc.*, 788 So.2d 1088 (Fla. 4th DCA 2001); *St. Mary's Hospital, Inc. v. Brinson*, 685 So. 2d 33 (Fla. 4th DCA 1996).

In order to emphasize the importance of preserving evidence, Florida recognizes a separate and specific cause of action for spoliation of evidence. Spoliation is defined as “[t]he intentional destruction, mutilation, alteration, or concealment of evidence” BLACK’S LAW DICTIONARY (9th ed. 2009). The elements of a spoliation claim are (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit; and (6) damages. *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003). In the instant case, there exists a duty to preserve the subject GPS device. To ensure that the subject GPS device is preserved in an unaltered condition, the Plaintiffs hereby file this motion to preserve evidence and/or for injunctive relief.

B. Injunctive Relief

The purpose of a preliminary injunction is not to decide the merits of case, but rather, to preserve the status quo *until* a final hearing can be held and full relief granted at that time. *Michele Pommier Models, Inc. v. Diel*, 886 So. 2d 993 (Fla. 3rd DCA 2004). A preliminary injunction is necessary in this case to prevent the destruction of material evidence. The subject GPS device contains information as to the exact time and location of the hiking party in the hours leading up to Michael Sclawy-Adelman’s death.

For a movant to succeed in obtaining a preliminary injunction, they must show (1) there is a substantial likelihood of success on the merits, (2) irreparable injury will be suffered unless the injunction issues, (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party, and (4) the injunction, if issued, would not be adverse to

the public interest. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir.2000); *McDonalds's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)(citing *All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.*, 887 F.2d 1535, 1537 (11th Cir.1989).

“A substantial likelihood of success on the merits is shown if good reasons for anticipating that result are demonstrated,” and requires that the plaintiff “demonstrate a prima facie, clear legal right to the relief requested.” *City of Jacksonville v. Naegele Outdoor Advertising Co.*, 634 So.2d 750, 753 (Fla. 1st DCA 1994). The Plaintiffs certainly have good reason to believe that they will succeed on the merits of this case. First, all of the Defendants named in the current litigation owed Michael Sclawy-Adelman a duty of reasonable care. Second, the Defendants in the current litigation breached that duty in a multitude of ways, including the failure to uphold nationally recognized hiking safety guidelines, their failure to adequately supervise Michael Sclawy-Adelman while on the Hike, and their failure to render emergency medical aid once it became clear that Michael Sclawy-Adelman was in distress. Because of these failures, Michael Sclawy-Adelman died while on the Hike.

The Plaintiffs in this action will suffer irreparable harm if the subject GPS device is not preserved in an unaltered condition. The information currently stored within the subject GPS device shows that Scoutmasters Howard K. Crompton and Andrew L. Schmidt were negligent, as there is a clear 1 ½ hour time frame where Michael Sclawy-Adelman was in severe distress with no emergency medical aid, or even an attempt to contact emergency medical aid. If the subject GPS device is not preserved in an unaltered state, the Plaintiffs would be prejudiced, despite the fact that any alteration or modification of the device may constitute spoliation of evidence.

The threatened injury to the movant heavily outweighs any possible damage to Defendant Howard K. Crompton. Without preservation of the subject GPS, Plaintiffs will lose a material piece of evidence in this case. With the preservation of the subject GPS device, Defendant Howard K. Crompton will not suffer any damage other than the inability to use the subject GPS for the duration of litigation. This loss of personal property for a temporary time period is minimal and inconsequential compared to the harm that will be suffered by the Plaintiffs.

Finally, this request is not adverse to the public interest. Florida allows for a separate cause of action for spoliation, showing that the preservation of evidence and the integrity of the discovery process is an important part of the legal system. Granting an injunction in this action would allow for the preservation of material evidence, as well as only placing a minimal burden on Defendant Howard K. Crompton. In addition, an injunction could prevent the filing of a spoliation action, thus conserving judicial resources and expediting the litigation in this action.

15. Counsel for Defendant Howard Crompton has responded and indicated that the Defendant does not agree to turn the subject GPS device over to a mutually agreeable third party, nor does counsel for the Defendant agree not to conduct unilateral testing of the subject GPS device.

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter an Order requiring that material evidence in the instant case, namely, the subject GPS device used on the Boy Scout Hike that claimed Michael Sclawy-Adelman's life, be preserved in an unaltered condition by a neutral third party. A proposed order has been attached hereto as Exhibit "B."

GOOD FAITH CERTIFICATE

I HEREBY CERTIFY that counsel for the Plaintiffs has made an attempt to confer with all parties who may be affected by the relief sought in this motion in a good faith effort to resolve the

issues, and counsel for Defendant Howard Crompton has responded and indicated that the Defendant does not agree to turn the subject GPS device over to a mutually agreeable third party, nor does counsel for the Defendant agree not to conduct unilateral testing of the subject GPS device.

Dated: November 5, 2010
Miami, Florida

Respectfully submitted,

s/Mark A. Sylvester
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 5, 2010, 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/ MARK A. SYLVESTER
MARK A. SYLVESTER

SERVICE LIST

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VS.**

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CASE NO.: 10-CV-22236-ASG**

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

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