

**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 Sclaway-Adelman,

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

Plaintiffs,

District Ct. Judge: Alan S. Gold

vs.

Boy Scouts of America, a Foreign Corporation; Magistrate Judge: Chris M. McAliley
The South Florida Council Inc.,
Boy Scouts of America;
Plantation United Methodist Church;
Howard K. Crompton, individually; and
Andrew L. Schmidt, individually,

Defendants.

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**DEFENDANTS', SOUTH FLORIDA COUNCIL INC., BOY SCOUTS OF AMERICA AND
BOY SCOUTS OF AMERICA, MOTION FOR LEAVE TO AMEND THEIR
AFFIRMATIVE DEFENSES TO PLAINTIFFS' AMENDED COMPLAINT
AND INCORPORATED MEMORANDUM OF LAW**

COMES NOW, Defendants, South Florida Council Inc., Boy Scouts of America, ("South Florida Council") and Boy Scouts of America, by and through their undersigned counsel, hereby file their Motion for Leave to Amend Their Affirmative Defenses to Plaintiffs' Amended Complaint pursuant to Local Rules 7.1(a) and 15.1 of the United States District Court for the Southern District of Florida, Rule 15(a)(2) of the Federal Rules of Civil Procedure and the Order Establishing Pretrial Dates and Procedures. Defendants respectfully request that this Court enter an Order granting South Florida Council Inc., Boy Scouts of America, and Boy Scouts of America leave to file their respective Answers and *First Amended* Affirmative Defenses to Plaintiffs' Amended Complaint and state as follows:¹

¹ South Florida Council's proposed Answer and *First Amended* Affirmative Defenses to Plaintiffs' Amended Complaint is attached hereto as **Exhibit "A."** Boy Scouts of America's proposed Answer and *First Amended* Affirmative Defenses to Plaintiffs' Amended Complaint is attached hereto as **Exhibit "B."**

1. This is a wrongful death/negligence action stemming from an incident that occurred on May 9, 2009, when Michael Sclawy-Adelman allegedly died of a heat stroke while taking part in a hike through The Florida Trail in the Big Cypress National Park of the Florida Everglades.
2. Plaintiffs filed their Amended Complaint on August 3, 2010.
3. Boy Scouts of America filed its Answer and Affirmative Defenses to Plaintiffs' Amended Complaint on August 17, 2010.
4. South Florida Council filed its Answer and Affirmative Defenses to Plaintiffs' Amended Complaint on October 20, 2010 following a denial of its Motion to Dismiss.
5. Both Defendants pleaded as an affirmative defense the following: "*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.*"
6. Both Defendants now seek leave to amend their respective affirmative defenses to specifically name a Fabre defendant, which may be contributorily negligent and at fault for some or all of Plaintiffs' alleged damages, to wit: the U.S. Department of the Interior National Park Service.
7. Because the Plaintiffs allege that using the park trail on May 9, 2009 was one of the ways Defendants were negligent, both Defendants seek only to add the following affirmative defense:

For its fourteenth affirmative defense, Defendant affirmatively avers that any alleged damages were the result of negligence on the part of the U.S. Department of the Interior National Park Service (which processed a Backcountry Use Permit for the subject hike), 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).*

8. The U.S. Department of the Interior National Park Service processed a Backcountry Use Permit for the Troop to hike on the day in question. The Amended Complaint alleges that temperatures that day were around 100 degrees Fahrenheit. *See Amended Complaint at ¶¶ 6-10.* As the U.S. Department of the Interior National Park Service processes hiking permits for the subject trail, it is in the best position to determine if environmental factors on a given day pose a threat to hikers. The U.S. Department of the Interior National Park Service may be liable in whole or in part for permitting the group to hike on May 9, 2009 despite the alleged high temperatures. Therefore, The U.S. Department of the Interior National Park Service is an appropriate Fabre defendant.
9. Defendants will be severely prejudiced if the U.S. Department of the Interior National Park Service is not named as a Fabre defendant.
10. This request is made in good faith and does not prejudice the Plaintiffs in this matter.
11. In accordance with Local Rule 15.1 and 7.1, Federal Rule 15 and this Court's Order Establishing Pretrial Dates and Procedures, counsel for Boy Scouts of America and the South Florida Council has conferred with Plaintiffs' counsel in a good faith effort to resolve the issues but has been unable to resolve the issues.

MEMORANDUM OF LAW

Federal Rule of Civil Procedure 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.

Espey v. Wainwright, 734 F.2d 748, 759 (11th Cir. 1994).

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 the U.S. Department of the Interior National Park Service 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).

Because the Plaintiffs alleged that use of the park trail on May 9, 2009 was an act of negligence, defendants have a good faith belief that the U.S. Department of the Interior National Park Service may be liable in part or in whole for Plaintiffs' alleged damages in this case for permitting the Troop to hike on the day in question. Plaintiff claims that conducting a hike in 100 degree Fahrenheit weather was a proximate cause of the death of Michael Sclawy-Adelman. The U.S. Department of the Interior National Park Service first processed the permit that gave the group permission to conduct the hike. As the U.S. Department of the Interior National Park Service processes hiking permits for the subject trail, it is in the best position to determine if environmental factors on a given day pose a threat to hikers. Therefore, processing the permit may be a negligent action that contributed to Plaintiffs' damages.

Moreover, Defendants have already asserted that third parties not under the control or custody of the Defendants may be liable for Plaintiffs' alleged damages. Thus, it can certainly be argued that Defendants are not even asserting a "new" affirmative defense; rather, Defendants are clarifying an existing one. As the third party contributory negligence defense has already been asserted (and as Plaintiff is already aware of the permit processed by the U.S. Department of the Interior National Park Service for the hike on the day in question) 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).

WHEREFORE, Defendants, South Florida Council and Boy Scouts of America, respectfully requests that this Honorable Court GRANT the attached proposed Order granting 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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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed November 29, 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; Greg Gaebe, Esq., Devang Desai, Esq., Gaebe, Mullen Antonelli, Esco & DiMatteo, 420 S. Dixie Highway, Third Floor, Coral Gables, FL, 33146.

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