

**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,

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.

**SOUTH FLORIDA COUNCIL INC., BOY SCOUTS OF AMERICA'S AND BOY SCOUTS
OF AMERICA'S, MOTION FOR PRESERVATION OF EVIDENCE 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 Preservation of Evidence Concerning Michael Sclawy-Adelman's Cell Phone and all other physical/tangible evidence. Defendants respectfully request that this Court enter an Order requiring that Michel Sclawy-Adelman's cell phone and all other physical/tangible evidence be preserved in an unaltered condition and order that all destructive or non-destructive testing of any such evidence be permitted only by written agreement between all parties and state more fully as follows:

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. Physical/tangible evidence in the form of electronic devices has been discovered, which may prove relevant in the instant case. Two of those devices include a GPS Device and a cell phone in the possession of the decedent at times material to the subject incident. Other physical/tangible evidence pertaining to the subject incident has been identified through discovery as well for which this Motion applies.
3. The cell phone is in Plaintiffs' possession at this time.
4. Plaintiffs previously moved for preservation of evidence and/or injunctive relief concerning the GPS Device. [DE 55]. Plaintiffs argued that any unilateral testing of the device could result in modification, alteration and/or destruction of material evidence. Id. at ¶ 14. Plaintiffs argued during the telephonic status conference with Magistrate McAliley on November 12, 2010 that turning the electronic device on could potentially result in a destruction of the evidence. Therefore, Plaintiffs requested that the GPS device be preserved in an unaltered condition and further requested that specific protocol be established for testing the GPS Device.
5. Following the telephonic status conference, this Court ordered that the GPS Device remain in a sealed evidence bag pending an agreement on protocol for inspection of the evidence. The parties were to submit a joint supplemental status report indicating whether the inspection issues were resolved. [DE 60].
6. Counsel could not agree on the protocol for inspection, which was evidenced by the separate memoranda filed by Plaintiffs and filed by Howard Crompton and Andrew Schmidt. [DE 70, 73 and 74].
7. One reason the parties could not agree on a Joint Report was because Plaintiffs would not include a preservation of evidence/injunctive relief agreement concerning Michael Sclawy-Adelman's cell phone, which defense counsel asserted should be subject to the same

restrictions and regulations as the GPS Device. Defendants assert that any start-up and access procedures in effect for the GPS device should be identical to that in effect for the cell phone.

8. Plaintiffs have indicated that they will agree that all parties will preserve cell phones, records and computers of their respective clients related to this incident. However, Plaintiffs have not consented to an Order that requires the preservation of such evidence and provides for specific inspection protocol. *See also* [DE 69 at ¶ 4].
9. In point of fact, Plaintiffs filed their Response to Court Order Dated 12/13/10 Related to GPS Device *without* including agreed upon procedures related to the cell phone or all other evidence related to the incident. [DE 70].
10. Counsel on behalf of Howard Crompton and Andrew Schmidt wrote a detailed letter to Plaintiffs' counsel pertaining to the inspection and preservation of the GPS Device. Counsel also indicated that the same process be used to inspect the cell phone and that a Motion for preservation of the same would be forthcoming.
11. As evidenced by Howard Crompton and Andrew Schmidt's Notice of Filing GPS Memorandum, the protocol for inspection had not been agreed to by all counsel. [DE 73].
12. Defendants maintain that an agreement as to **all** physical/tangible evidence (including but not limited to the GPS Device and the cell phone) and should be codified in a Court Order so that no misunderstanding occurs concerning the evidentiary responsibilities and limitations of all parties.

MEMORANDUM OF LAW

“Florida definitely recognizes the duty to preserve evidence *after* a lawsuit has been filed.”

Silhan v. Allstate Ins. Co., 236 F.Supp.2d 1303, 1311 (N.D.Fla. 2002). Just as the parties agreed that a duty exists to preserve the GPS Device, the same duty exists not only to preserve the cell

phone used by Michael Sclawy-Adelman, but to preserve any and all physical/tangible evidence related to this case. Plaintiffs seek an Order requiring the preservation of the GPS Device and requests specific protocol be established to conduct destructive and non-destructive testing. What's good for the goose is good for the gander. Defendants seek an Order requiring the preservation of evidence and request that specific protocol be established to conduct destructive and non-destructive testing concerning any and all physical/tangible evidence in this case, including, but not limited to the cell phone used by Michael Sclawy-Adelman.

WHEREFORE, Defendants, South Florida Council and Boy Scouts of America, respectfully request that this Honorable Court enter an Order holding (1) that all physical/tangible evidence, including but not limited to the GPS Device and Michael Sclawy-Adelman's cell phone in his possession at and around the time of the incident, shall be preserved and (2) that no non-destructive or destructive testing for all such physical/tangible evidence be permitted unless and until written protocol for such testing is agreed upon, and enter such other relief as this Court deems necessary and just.

By: _____s/Kevin D. Franz _____
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Attorneys for Defendants, Boy Scouts of
America and The South Florida Council, Inc.

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that counsel for South Florida Council and Boy Scouts of America has conferred 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 the Plaintiffs has indicated that Plaintiffs object to this Motion.

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America and The South Florida Council, Inc.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was sent January 4, 2011 to: Ira H. Leesfield, 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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