

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-CV-22236-ASG
Magistrate Judge: Magistrate Judge Chris M. McAiley

HOWARD ADELMAN and JUDITH SCLAWY-
ADELMAN, as Co-Personal Representative of the
Estate of MICHAEL SCLAWY-ADELMAN,

Plaintiffs,

v.

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.

**DEFENDANTS', HOWARD K. CROMPTON AND ANDREW L. SCHMIDT,
MOTION TO PRESERVE MATERIAL EVIDENCE AS TO MICHAEL
ADELMAN'S CELL PHONE, HIS FAMILY'S CELL PHONES, AND CELL
PHONE DOCUMENTS AND INFORMATION**

The Defendants, HOWARD K. CROMPTON and ANDREW L. SCHMIDT, by and through the undersigned counsel, and in accordance with the applicable Federal Rules of Civil Procedure and Local Rules of the Southern District of Florida, hereby file this Motion to Preserve Material Evidence as to Michael Adelman's Cell Phone, his Family's Cell Phones, and Cell Phone Documents and Information, as follows:

1. Plaintiffs allege these Defendants were negligent in their leading of a Boy Scout hike during which Plaintiffs' minor son passed away. [DE 20].

2. On September 15, 2010, Plaintiffs served their Initial Rule 26 Disclosures. It did not list the decedent's cellular telephone. It did not list as an exhibit or disclose to the Defendants that the cellular telephone was seized by the Collier County Sheriff's Department and released to Howard Adelman.

3. On November 24, 2010, the decedent's cell phone was found at Plaintiffs' counsel's office, during an inspection of the Rule 26 documents and things from Plaintiffs' initial Rule 26 disclosures. Before November 24, 2010 the Defendants were not aware Michael had a cellphone on the hike.

4. After the undersigned discovered that Plaintiffs' attorneys had possession of the decedent's cellular telephone, undersigned has written a letter to counsel for the Plaintiffs asking them to preserve the evidence. A request was made for the cell phone number of Michael Adelman individually, and the address and phone number of the cell phone provider.

5. From November 24, 2010, to date, none of this information has been provided by the Plaintiffs.

6. Michael Adelman was almost 18 years of age at the time of his death. This information, including text messages and phone calls is material evidence in this case which needs to be protected. The cellular telephone itself constitutes material evidence and must be preserved by this Court throughout the duration of this lawsuit.

MEMORANDUM OF LAW AND ARGUMENT

Plaintiffs' retention of Michael Adelman's cellular telephone should have been disclosed, because such an act constituted possession, custody and control of

electronically stored information, and a tangible thing, that may be used to support their claim that an emergency call was not placed immediately, or early, on the hike. *Fed. R. Civ. P. 26(a)(1)(A)(ii)*; [DE 55; ¶9].

“The Federal Rules of Civil Procedure strongly favor full discovery whenever possible.” *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). The existence, custody, condition and location of the cellular telephone, alone, bears direct relevance to Plaintiffs’ claims against these Defendants, and those facts alone constitute discoverable information. *Fed. R. Civ. P. 26(b)(1)*.

Florida definitely recognizes a duty to preserve evidence after a lawsuit has been filed, and in some cases, when litigation is anticipated. See *Silhan v. Allstate Ins. Co.*, 236 F. Supp. 2d 1303, 1311 (N.D. Fla. 2002). Because the cellular telephone is evidence that is causally connected to Plaintiffs’ claims and is vital to the Defendants preparation for trial, if Plaintiffs destroy or lose this evidence, spoliation of evidence would likely occur. *Id.*

The Advisory Committee Notes to Rule 26 indicate that “[t]he purpose of discovery is to allow a **broad** search for facts . . . which may aid a party in the preparation or presentation of his case.” Adv. Com. Notes, 1946 Amendment, R. 26, Fed.R.Civ.P. (citations omitted) (emphasis added). The discovery provisions of the Federal Rules of Civil Procedure, when properly used, prevent judicial surprises and are to be broadly and liberally construed. *Burns v. Thiokol Chem. Corp.*, 483 F.2d 300, 304 (5th Cir. 1973) (citations omitted).

Therefore, notwithstanding Plaintiffs' failure to properly disclose such items and information, they must preserve this evidence under Florida law and Federal law, and produce to these Defendants the requested information without any further delay.

LR 7.1 CERTIFICATION

This Defendant has conferred with Plaintiff's counsel in an attempt to resolve this issue without court involvement, but to date, has not been able to achieve compliance.

WHEREFORE, the Defendants, HOWARD K. CROMPTON and ANDREW L. SCHMIDT, respectfully request that this Honorable Court enter an Order granting this Motion, providing the relief requested in this Motion and the attached proposed Order, and, for any other relief this Honorable Court deems just and proper.

I HEREBY CERTIFY that on January 4, 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 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.

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By: /s/ Frederick E. Hasty, III

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