UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION
Pierre, South Dakota

LORETTA RUNS AFTER, next friend and legal guardian of T.M. (a minor child),	)	Case No. 10-3019-RAL
Plaintiff,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

This memorandum opposes the Motion of Defendant, the United States, to dismiss Plaintiff's Complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure. In its motion and supporting memorandum, the United States argues that this Court should 1) interpret the holding of the recent, sharply divided *en banc* ruling in *Mader v. United States*, 654 F.3d 794 (2011), to mean that the United States can use an agency representative's ambiguous language in communications with a claimant under the Federal Tort Claims Act (FTCA) to later deny the claimant's right to access the federal courts despite the claimant's cooperation with the agency, and despite a full agency investigation and final administrative denial of the properly presented claim; and 2), to find that the claimant in this action, who, unlike the claimant in *Mader*, actually has legal authority to represent the injured minor, is barred from litigating her grandson's claim despite the fact that numerous documents providing evidence of her legal authority

as guardian to sue on behalf of T.M. have been in the government's possession since the beginning of the agency investigation. As these arguments are contrary to the holding in *Mader*, to previous opinions and orders of this Court in similar cases, to both the letter and the purpose of the FTCA and the regulations promulgated thereunder, as well as to the plain facts of this case, Defendant's motion to dismiss must be denied.

FACTUAL BACKGROUND

T.M. is an enrolled member of the Cheyenne River Sioux Tribe, whose date of birth is XXXXX, 1996. (Exhibit 1, Certified Degree of Indian Blood) Since he was an infant, he has lived with his grandmother Loretta Runs After, who is also a member of the Cheyenne River Sioux Tribe. (Exhibit 2, Affidavit of Loretta Runs After) Both T.M. and his grandmother reside on the Cheyenne River Sioux Indian Reservation. (Id.) Although she was his guardian and custodian under Tribal law and custom since shortly after his birth, on September 10, 2002 Loretta Runs After's custody was confirmed through a formal custody order of the Cheyenne River Sioux Tribal Court (Case Nos. 425-02 and 474-02 (2784)). (Exhibit 3, Order dated September 10, 2002) From 2002 to the present day, Loretta Runs After has been the legal guardian of T.M., as is shown by medical and legal records issued by the Cheyenne River Sioux Tribal Court and other government agencies, documents which have been in Defendant's possession since its initial investigation. (Exhibits 4-26)[1]

In 2008, when he was 12 years old, T.M. was placed in the Juvenile Detention Center in Eagle Butte, South Dakota. (Exhibit 2) On or about August 27, 2008 through

[1] Exhibits 4-49 were obtained from the Department of Justice via a CD-ROM entitled "Runs After v. United States, Civil No. 10-3019, Rule 26 Disclosures." These documents are subject to this Court's protection order and are submitted as sealed documents in accordance with that order. All attached documents have been redacted in accordance with Fed. R. Civ. P. 5.2.

September 15, 2008, while he was being detained, he was raped by an older juvenile, W. M., and received third degree burns from a brand in the shape of a letter "C" which W. and another juvenile burned onto his arm. (Id.) The suffering from these injuries, as well as T.M.'s subsequent emotional and mental distress, prompted his grandmother to initiate these proceedings on his behalf.

Shortly after the injuries occurred, when T.M. did not feel safe in Eagle Butte, Mrs. Runs After sent him to live with his grandfather, Gary Montreal Sr., in Rapid City, South Dakota, and transferred custody to him to support the placement. (Exhibit 27, Temporary Custody Order) The placement terminated after approximately six weeks, from September 18, 2008 to October 31, 2008, when Mr. Montreal gave T.M. back to Loretta Runs After. (Exhibits 28, Order for Temporary Release, and 29, Order for Continuance, Hearing and Detainment) From September 30, 2008, T.M. was a Ward of the Tribal Court which placed him with his mother and aunt while Mrs. Runs After underwent medical treatment in Rapid City. (Exhibits 30-33) Even during her treatment and recovery, Mrs. Runs After acted *in loco parentis* to T.M., and the Tribal Court temporarily released him into her custody in December 2008 and January 2009. (Exhibits 34-38) On January 23, 2009 the Tribal Court formally restored physical custody of T.M. to Loretta Runs After (Exhibit 39, Order of Disposition), and restored full legal custody to Mrs. Runs After when it extinguished its Wardship of T.M. on February 18, 2009 (Exhibit 40, Order of Dismissal). Since that time, Loretta Runs After has served as T.M.'s legal guardian, as she had done up prior to the trial placement with his father after he received the injuries which are the subject of this case. (Exhibits 41-48) After T.M.'s father, Gary Montreal Jr., abandoned an attempt to seek custody in the fall

of 2011, the Tribal Court noted in its Order of Dismissal that legal and physical custody of T.M. "shall remain vested with the Maternal Grandmother Loretta Runs After." (Exhibit 49)

PROCEDURAL HISTORY

On June 17, 2009, James Cerney submitted an administrative claim on behalf of T.M through the Standard Form 95, to the Bureau of Indian Affairs Superintendent in Eagle Butte, South Dakota and to the Office of the Field Solicitor in Fort Snelling, Minnesota. (See Affidavit of Sharon Pudwill, Exhibits A and B.) Jason C. Bramwell, a Paralegal Specialist for the Office of the Field Solicitor acknowledged receipt of the claim by letter mailed on November 23, 2009. (See Affidavit of Sharon Pudwill, Exhibit C.) The Agency's first letter of response and acknowledgement was sent out over five months after receiving the Standard Form 95 on June 19, 2009. In that letter, Mr. Bramwell requested "a copy of interviews, medical reports and additional evidence in support of T.M.'s claim," and further asked T.M.s attorneys, to whom the letter was addressed, to "submit evidence of your authority to represent T.M." (Id.)

Rather than not responding, as Defendant's motion and memorandum allege, Mr. Cerney's staff promptly began sending the requested records to Mr. Bramwell. (See, Plaintiff's Exhibits 50 and 51, letters of Amy Thue dated December 9, 2009 and January 4, 2010.) Internal emails between Mr. Cerney and his staff in early December 2009 demonstrate Plaintiff's diligence in providing Mr. Bramwell with everything he had requested, including the attorney client agreement to satisfy his request for "proof we are representing" T.M. (Exhibit 52, Email dated December 9, 2009)

On February 1, 2010, Mr. Bramwell sent a second letter acknowledging receipt of those materials but again requesting "evidence of your authority to represent T.M." (See

Affidavit of Sharon Pudwill, Exhibit D.) In response to this request, on February 5, 2010, Mr. Cerney's staff provided Mr. Bramwill with exactly what Mr. Bramwell had requested, evidence of Mr. Cerney's authority to represent T.M. in the form of his representation agreement with T.M.'s legal guardian, Loretta Runs After. (See Affidavit of Sharon Pudwill, Exhibit E.) Again, internal emails between Plaintiff's representatives demonstrate that because of the plain language of Mr. Bramwell's request, Plaintiff in fact thought he was requesting a copy of the attorney client representation agreement, and that Plaintiff did respond to his requests promply and meticulously. (Exhibit 53, Email dated February 3, 2010)

Mr. Cerney and his staff continued to cooperate with Mr. Bramwell's office, responding to his request as they received more information. (See, Plaintiff's Exhibit 54, letter of Amy Thue dated February 19, 2010.) Mr. Bramwell did not subsequently indicate that the representation agreement did not satisfy his request for Mr. Cerney's authority to represent T.M., nor did he make any requests for evidence of Loretta Runs After's authority as legal guardian of T.M.

On March 23, 2010, Field Solicitor Priscilla Wilfahrt issued a letter denying T.M.'s claim. (See Affidavit of Sharon Pudwill, Exhibit F.) The reason Ms. Wilfahrt listed for denying the claim was failure "to establish that a federal employee, or tribal employee covered by the FTCA extension, committed a negligent or wrongful act cognizable under the FTCA." Notably, the letter did *not* say that T.M.'s claim was deemed to have not been presented due to lack of compliance with 28 C.F.R. § 14.2(a). Instead, the letter indicates that the denial was an administrative determination under the

authority of the Federal Tort Claims Act, and notifies T.M., through his counsel of record, of his right to request a written reconsideration of said final determination. (Id.)

In the second footnote of her denial letter, Ms. Wilfahrt requests that *if* T.M chooses to submit a request for reconsideration [emphasis added], he should also provide evidence that Loretta Runs After is his legal custodian. (Id.) This footnote is the agency's first request for proof of Loretta Runs After's authority as legal guardian of T.M. beyond the legal and medical documents already in its possession. As Ms. Wilfahrt's denial letter demonstrates, such documentation was not necessary for the agency to make its final administrative determination of T.M.'s claim, and lack of such documentation was not the grounds given for the denial.

Rather than request reconsideration of his claim, T.M., through his legal guardian Loretta Runs After, filed this law suit on August 25, 2010. On March 14, 2011, the Court issued a Rule 16 Scheduling Order, and the parties began the process of discovery. On August 19, 2011, depositions of the named Defendants were taken, and Plaintiff's deposition was scheduled. On September 7, 2011, the *Mader* decision issued. On December 8, 2011, the United States requested a copy of the Tribal Court Order appointing Loretta Runs After legal guardian for T.M., noting that her authority to sue on his behalf was "jurisdictional." On December 16, 2011, Plaintiff provided the United States with a certified copy of the November 30, 2011 Order of Dismissal confirming Mrs. Runs After's authority as legal guardian. The United States then requested a prior order, so on December 21, 2010, Plaintiff provided it with a copy of Mrs. Runs After's 2002 Order of Custody. In the course of this case, Plaintiff has provided the United States with two Tribal custody orders (in addition to the numerous Tribal Court and other

governmental documents already in its possession acknowledging Mrs. Runs After to be T.M.'s guardian) proving not only that Mrs. Runs After was his legal guardian, but that she had possessed such legal authority from at least 2002 including at all relevant times during T.M.'s injury, the administrative claim and determination, and this law suit.

Despite this, Defendant's moves to dismiss based on arguments that 1) the United States was not in possession of evidence of Ms. Runs After's authority to sue on behalf of T.M. at the time of the administrative determination, 2) that T.M. refused to provide the authority which the agency requested during the administrative claim, and 3) that therefore T.M.'s administrative claim did not satisfy the presentment requirements of 28 U.S.C. § 2675(a). On all points, the United States is in error, and this Motion to Dismiss must therefore be denied.

ARGUMENT

A. The Office of the Solicitor possessed ample evidence of Loretta Runs After's status as legal guardian of T.M .

All of the government records attached to this Memorandum and numbered Exhibits 4-49 were obtained from the Department of Justice via a CD-ROM entitled "Runs After v. United States, Civil No. 10-3019, Rule 26 Disclosures." These documents provide ample evidence that Loretta Runs After has acted *in loco parentis* to T.M. for most of his young life, including at all relevant times during this case. Both the Tribal Court, which exercises proper jurisdiction over Mrs. Runs After and her grandson, who are Indians residing on the Reservation, and other governmental agencies such as the South Dakota Human Services Center have recognized her authority as T.M.'s legal guardian in these documents. That evidence was in the agency's possession at the time of its investigation, and should have been sufficient to satisfy any regulatory requirement for

evidence of Mrs. Runs After's authority to sue on behalf of her grandson. Indeed, the only time the Office of the Field Solicitor requested evidence of Mrs. Runs After's authority was in a footnote to their administrative denial letter, and was qualified by the statement that such evidence should only be submitted should the claimant choose to request reconsideration of the denial.

The facts in *Mader* are inapposite. In that case, when the agency requested authority of Mrs. Mader's status as personal representative of her deceased husband, neither Mrs. Mader nor her attorney replied, both to written requests and to at least four phone calls. *Mader v. United States*, 654 F.3d 794, 799 (8th Cir. 2011). Here, Mr. Cerney and his staff stayed in close contact with Mr. Bramwell, and made every effort to provide him with all of the evidence he requested.

Further, in *Mader*, Mrs. Mader did not have authority to act as personal representative, see *Mader* at 802. The Court found that Mrs. Mader had actually concealed her lack of authority from the agency. *Id*. Whereas here, Loretta Runs After has had actual authority as T.M.'s legal guardian from at least September 10, 2002 to September 18, 2008, and from February 18, 2009 to the present day, and neither she nor T.M.'s representatives concealed anything from the agency. Instead they responded promptly and cooperatively to all of Mr. Bramwell's requests.

Finally, the agency in *Mader* had no indication of Mrs. Mader's authority besides her own representation. *Id*. In this instance, the agency had in its possession at least 45 governmental and court records providing supportive evidence that Mrs. Runs After was indeed T.M.'s legal guardian during all of the relevant time periods.

B. In addition to official government records showing Loretta Runs After's status as legal guardian of T.M., T.M.'s counsel provided the authority requested by the agency, that is, proof of his authority to act as T.M.'s attorney.

When Mr. Bramwell wrote to T.M.'s attorneys requesting "your authority to represent T.M." the attorneys very reasonably thought that Mr. Bramwell wanted to see exactly what he said he wanted to see: a representation agreement, and they promptly provided that to Mr. Bramwell. If Mr. Bramwell had wanted to see a court order vesting Loretta Runs After with legal custody of T.M., then he should have said that plainly, and T.M.'s representatives would have provided that document to him, as they provided it to Defendant when Defendant made that request. Mr. Bramwell's request was not even ambiguous; it was a plainly worded request to see the attorney's authority as signatory to represent the injured claimant.

This understanding of Mr. Bramwell's letter is consonant with a number of the cases involving the regulation at issue in *Mader:* 28 C.F.R. § 14.2(a), as the majority of these cases involve attorney-client contracts. See, for example, *Warren v. United States Dept. of the Interior Bureau of Land Mgmt.*, 724 F.2d 776 (9th Cir. 1984), a wrongful death case where an attorney did not submit additional documentation to indicate his status as the claimant's representative beyond the appropriate claim form. Or see, *Kanar v. United States*, 118 F.3d 527, 530 (7th Cir. 1997), where again, an attorney did not submit evidence of his authority to represent the individual beyond the claim form. In this case, Judge Posner created a "harmlessness test" for administrative demands under the FTCA that did not follow every "jot and tittle" of the regulations for presenting a claim. *Id.* Even the Court in *Mader* acknowledges that much of their concern about the "representation problem" arises from absent attorney-client agreements, noting that in the

half-million FTCA claims resulting from Hurricane Katrina some claimants have "up to four lawyers" attempting to present claims on their behalf. *Mader* at 803.

Therefore it is reasonable that Mr. Cerney responded to Mr. Bramwell's request for "your authority to represent the claimant" with a copy of the representation agreement. Indeed, it is possible that Mr. Bramwell was in fact requesting the representation agreement. In any event, T.M.'s counsel was appropriately responsive to Mr. Bramwell's request.

C. T.M.'s completely executed the Standard Form 95 and supplied all material requested by the Government, thus satisfying the presentment requirements of 28 U.S.C. § 2675(a).

The instructions printed on Standard Form 95 echoes the language of 28 C.F.R. § 14.2(a). "The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative." (Affidavit of Sharon Pudwill, Exhibit A)

The plain language of the instructions indicates that whoever signs for the claimant must prove their authority to sign. On T.M.'s claim form, Loretta Runs After did not sign as claimant. James Cerney signed for the claimant T.M., and listed "Attorney for Minor Child," to show his relationship to the claimant. When asked to produce proof his authority, he produced the attorney client representation agreement, and did so well within the two years allowed "to completely execute this form or to supply the requested

material." The Government was apparently satisfied by production of the attorney-client agreement, as it did not request any further material and instead proceeded to make a final administrative determination.

Therefore, the administrative demand in this case entirely satisfied the presentment requirement of 28 U.S.C. § 2675(a), and the motion to dismiss must be denied.

This case is inapposite to Mader v. U.S. There, the agency did not have any proof of Mrs. Mader's authority, Mrs. Mader concealed the lack of proof from the agency by total nonresponsiveness to agency requests for information, and the actual evidence showed that, in fact, she lacked the requisite authority to bring a claim on behalf of her husband. Here, T.M.'s representatives provided everything that was requested by the agency, made every effort to promptly provide the agency with all requested materials, and did in fact provide the agency with their authority to represent T.M., in the form of the representation agreement. When the United States asked for a court order showing Loretta Runs After's status as T.M.'s guardian, Plaintiff provided it, and those orders show that Mrs. Runs After was and is T.M.'s legal guardian. T.M.'s administrative claim was therefore properly presented to the agency, and the requirements of 28 U.S.C. § 2675(a) have been met.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court to deny Defendant's motion to dismiss.

Dated this 26th day of January 2012

Respectfully submitted,

LORETTA RUNS AFTER, next friend and legal guardian of T.M, a minor child.

/s/ Margaret Bad Warrior
ZUYA SICA LAW OFFICE, PLLC
Margaret Bad Warrior
P.O. Box 453
Eagle Butte SD 57625
telephone: 605-200-0670

James C. Cerney
CERNEY LAW OFFICE, PLLC
PO Box 505
Mobridge, South Dakota 57601
telephone: 701-854-2367

Attorneys for Loretta Runs After, next friend and legal guardian of T.M, a minor child.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2012, I served foregoing memorandum of law in opposition to the United States' Motion to Dismiss, by electronic transmission on:

Robert Gusinsky
[robert.gusinsky@usdoj.gov]

/s/ Margaret Bad Warrior
Margaret Bad Warrior