

APPEAL NO. 12-2976

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UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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LORETTA RUNS AFTER, NEXT FRIEND AND  
LEGAL GUARDIAN OF T.M. (A MINOR CHILD),

Appellant,

v.

THE UNITED STATES OF AMERICA.

Appellee.

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Appeal from the United States District Court  
for the Central District of South Dakota

BRIEF FOR APPELLANT  
LORETTA RUNS AFTER

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October 4, 2012

## **SUMMARY OF THE CASE AND WAIVER OF ORAL ARGUMENT**

This case seeks to resolve disharmony between the Circuits regarding the presentment requirement of 28 U.S.C. § 2675(a), and to qualify the holding in Mader v. United States, 654 F.3d 794, 798 (8<sup>th</sup> Cir. 2011).

Loretta Runs After, elderly great-grandmother and legal guardian of minor child T.M., brought an administrative claim on his behalf under the Federal Tort Claims Act (“FTCA”) on June 17, 2009, for alleged injuries that had occurred at the Juvenile Detention Center in Eagle Butte.

When the administrative claim was filed through Form 95, the attorneys did not file any proof of their authority to represent T.M. When the Solicitor’s office requested that authority, they provided their representation agreement with Mrs. Runs After, mistakenly believing that was what the Solicitor was requesting. At all relevant times, Mrs. Runs After was the actual legal guardian of T.M.

After her administrative claim was denied in 2010, Mrs. Runs After filed in the District Court. In 2011, after the Mader decision, the U.S. Attorney filed a motion to dismiss based on lack of subject matter jurisdiction, which was granted.

Mrs. Runs After waives oral argument, because she believes that the legal and factual issues can be adequately presented through the pleadings, and because the undersigned counsel does not have the resources to take leave from work and travel to St. Louis for oral argument.

## TABLE OF CONTENTS

	PAGE NO.
Summary of the case and waiver of oral argument.....	i
Table of Authorities.....	iii
Jurisdictional Statement.....	4
Statement of the Issues.....	4
Standard of Review.....	5
Statement of the Case.....	5
Statement of the Facts.....	6
Summary of the Argument.....	8
Argument.....	9
Conclusion.....	12
Certificate of Compliance.....	13
Certificate of Service.....	14
Addendum (filed as a separate document)	

## TABLE OF AUTHORITIES

<b>CASES CITED:</b>	<b>PAGE NO.</b>
<u>Transco Leasing Corp. v. United States</u> , 896 F.2d 1435 (5 <sup>th</sup> Cir. 1990)	4
<u>Knapp v. United States</u> , 844 F.2d 376 (6 <sup>th</sup> Cir. 1988)	5
<u>GAF Corp. v. United States</u> , 818 F.2d 901 (D.C. Cir. 1987)	5
<u>Warren v. U.S. Dep't of Interior</u> , 724 F.2d 776 (9 <sup>th</sup> Cir. 1984)	5
<u>Forest v. United States</u> , 539 F.Supp. 171 (D. Mont. 1982)	5
<u>Mader v. United States</u> , 654 F.3d 794 (8 <sup>th</sup> Cir. 2011)(en banc)	i, 4, 5, 8, 9, 12
 <b>STATUTES CITED:</b>	
28 U.S.C. §§ 2671-2680	i, 4, 5, 7, 12
28 U.S.C. § 1291	4
28 U.S.C. § 2675(a)	i, 8, 12
P.L. 93-638	7
28 C.F.R. § 14.2(a)	4, 8, 9, 13
F.R.Civ.P. 12(b)(1)	5
 <b>OTHER AUTHORITIES CITED:</b>	
Gilbertson, D., Chief Justice. <u>State of the Judiciary Message, January 2009;</u> <a href="http://sdjudicial.com/Uploads/downloads/soj/2009_State_of_the_Judiciary_Message.pdf">http://sdjudicial.com/Uploads/downloads/soj/2009_State_of_the_Judiciary_Message.pdf</a>	10
Gilbertson, D., Chief Justice. <u>2011 State of the Judiciary Message;</u> <a href="http://sdjudicial.com/Uploads/downloads/ar/fy2010/2011StateofJudiciaryMessageFinal.pdf">http://sdjudicial.com/Uploads/downloads/ar/fy2010/2011StateofJudiciaryMessageFinal.pdf</a>	10

## **JURISDICTIONAL STATEMENT**

The jurisdiction of the District Court was based on 28 U.S.C. §§ 2671-2680. The basis for this Court's jurisdiction is 28 U.S.C. § 1291. The District Court entered a final judgment on July 19, 2012. Mrs. Runs After timely filed her Notice of Appeal on August 17, 2012.

## **STATEMENT OF THE ISSUES**

I. Should the district court have created an extenuating circumstance exception to 28 C.F.R. § 14.2(a)'s presentment requirement, given:

- (a) the good faith efforts made by Mrs. Runs After's attorneys to comply with the presentment requirement;
- (b) the fact that Mrs. Runs After actually had legal guardianship of T.M. at all relevant times;
- (c) that strict application of the ruling in Mader will result harm to the rights of a minor child; and
- (d) the need to refrain from punishing T.M. for the honest mistake of his attorneys, especially considering the difficulty of obtaining legal counsel at all in T.M.'s rural community.

*Most relevant cases:*

1. Transco Leasing Corp. v. United States, 896 F.2d 1435 (5<sup>th</sup> Cir. 1990).

2. GAF Corp. v. United States, 818 F.2d 901 (D.C. Cir. 1987).
3. Warren v. U.S. Dep't of Interior, 724 F.2d 776 (9<sup>th</sup> Cir. 1984).
4. Forest v. United States, 539 F.Supp. 171 (D. Mont. 1982).

*Most apposite cases:*

5. Mader v. United States, 654 F.3d 794 (8<sup>th</sup> Cir. 2011)(en banc).

### **STANDARD OF REVIEW**

The standard of review for all issues in this case is *de novo*.

### **STATEMENT OF THE CASE**

T.M. is an enrolled member of the Cheyenne River Sioux Tribe whose legal guardian and great-grandmother initiated this action in District Court on his behalf on August 27, 2010 after receiving a letter denying his administrative claim on March 23, 2010. (A-28). The action was commenced under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 2671-2680, in the District Court for the District of South Dakota, Central Division, the Honorable Roberto A. Lange presiding, against the United States.

On February 12, 2012, the United States moved to dismiss the case under F.R. Civ. P. Rule 12(b)(1) for lack of subject jurisdiction. The main authority for the United States’ motion was the recently issued case Mader v. United States, 654 F.3d 794 (8<sup>th</sup> Cir. 2011)(en banc).

On July 19, 2012, the District Court entered an order granting the motion to dismiss. This appeal followed.

### **STATEMENT OF THE FACTS**

While the record frequently refers to Loretta Runs After as T.M.'s "grandmother," in the non-Indian way she is T.M.'s great-grandmother. T.M.'s mother, Buffy Handboy, is Mrs. Runs After's granddaughter. Mrs. Runs After, despite her advanced age, has cared for T.M. since 1996, when he was approximately three months old. (A-31). In 2002, the Tribal Court formalized Mrs. Runs After's custody of her "grandson" in a Tribal Court order. (A-35).

Since that time, Mrs. Runs After has been T.M.'s legal custodian with the exception of a one month period in 2008 (September 30-October 31) when she ceded custody of T.M. to his paternal grandfather in Rapid City following his injuries in the Juvenile Detention Center in Eagle Butte, and during the period immediately following, after the grandfather returned T.M. to her and the Tribal Court granted her physical custody but made T.M. a Ward of the Tribal Court (October 31, 2008 to February 18, 2009). (A-37 through A-43). From 2002 to September 30, 2008 and from February 18, 2009 to the present day, Mrs. Runs After has been T.M.'s legal custodian. (A-35 through A-44).

In 2008, when T.M. was twelve years old, he was incarcerated at the Juvenile Detention Center in Eagle Butte, South Dakota, on charges that were

eventually dismissed. (A-43). The Juvenile Detention Center is operated by the Cheyenne River Sioux Tribe through a contract under the Indian Self-Determination and Education Assistance Act (“ISDEAA”), P.L. 93-638, and therefore the United States is liable for the actions of the employees in that facility under the FTCA. (A-63).

While in the Detention Center, another incarcerated juvenile burned a “C” into T.M.’s upper arm, while a third boy held T.M. down. (A-31). On a separate occasion, the juvenile who burned T.M. pulled him into a secluded area and sodomized him. (A-32). T.M. reported these incidents to Mrs. Runs After when she visited him in the facility. (Id.)

Mrs. Runs After engaged a local attorney, Margaret Bad Warrior (the undersigned), who, having no experience litigating under the FTCA, partnered with James Cerney, a personal injury attorney based in Mobridge, South Dakota. Using Form 95, Mr. Cerney filed an administrative claim on T.M.’s behalf. When the Solicitor requested proof of Mr. Cerney’s authority to represent T.M., Mr. Cerney in good faith provided the representation agreement signed by Mrs. Runs After. (A-26). Neither attorney for T.M. understood that the Solicitor was requesting proof of Mrs. Runs After’s guardianship of T.M., until they received the letter denying the administrative claim, which in a footnote explicitly requested proof “that Mrs. Runs After is the legal custodian



of T.M.” (A-28).

Mrs. Runs After then filed T.M.’s claim in the District Court on August 27, 2010. (A-60). After one and a half years of litigation, and following the issuance of this Court’s decision in Mader v. United States, the United States moved to dismiss this action, which motion was ultimately granted due to the rule interpreting 28 C.F.R. § 14.2(a) set forth in that case. (A-56).

### **SUMMARY OF ARGUMENT**

Congress mandates that claims for money damages against the United States be presented at the agency level first. 28 U.S.C. § 2675(a). Only if the claim is denied by the agency can the claimant then file in District Court. Id. The purpose of this statute is to allow the agency to assess the claim against it, respond, and hopefully resolve the matter without resorting to litigation.

Pursuant to that statute, the Department of Justice issued a regulation stating that a claim is only presented if accompanied by evidence of the authority of the person signing to present a claim on behalf of the claimant. 28 C.F.R. § 14.2.

Different federal circuits have interpreted the impact of that regulation differently. Mrs. Runs After respectfully refers the Court to the District Court’s discussion of relevant case law in its opinion granting the motion to dismiss. (A-67, A-71) In Mader, this Court adopted the strict interpretation that the

presentment requirement as defined in 28 C.F.R. § 14.2(a) was jurisdictional, meaning that if the person signing the agency claim form did not provide their authority to represent the claimant at the agency level, then the District Court may not hear the claim, whether or not the person signing had actual authority to represent. Mader at 798.

Given the realities of life and litigation in the rural communities and Reservations in the Central District of South Dakota, Mrs. Runs After asks this Court to create an extenuating circumstance to the “jurisdictional” interpretation of 28 C.F.R. § 14.2(a), particularly when the signing party had actual authority, and particularly when the rights of a minor child are at stake.

### **ARGUMENT**

- I. The District Court should have created an extenuating circumstance exception to 28 C.F.R. § 14.2(a)’s presentment requirement because doing so would fulfill Congress’ purposes in enacting the Federal Tort Claims Act, and because justice so requires.

It would be hard for any urban attorney to imagine practice in rural South Dakota. Both attorneys for Mrs. Runs After have full-time employment outside of private practice, which must fit into the interstices of their work schedules. Attorney access to online legal research subscription services is not common. The undersigned, like many rural lawyers, does not have an assistant, or

paralegal, or any other “staff,” and has sometimes accepted unusual items, such as hay or beadwork, in lieu of a cash retainers and fees. Of course, educational lenders do not accept payment in hay, or beadwork. Because of these and other obstacles, fewer and fewer attorneys choose to practice in rural areas, and access to legal services in rural South Dakota, as in many rural areas within the Eighth Circuit, is getting more and more difficult.

In both 2009 and 2011, David Gilbertson, Chief Justice of the South Dakota Supreme Court, addressed this crisis. In his 2009 “State of the Judiciary” address, Chief Justice Gilbertson noted that two thirds of all attorneys in the state are located in just three of sixty-six counties. He noted: “We are heading for a state which contains islands of justice in a sea of empty rural courthouses.” Gilbertson, D., Chief Justice. State of the Judiciary Message, January 2009.<sup>1</sup> In his 2011 address he emphasized his alarm at the continuing trend of the “vanishing” rural lawyer. Gilbertson, D., Chief Justice. 2011 State of the Judiciary Message.<sup>2</sup>

Mrs. Runs After lives close to the bottom of that sea of empty rural courthouses. Eagle Butte, on the Cheyenne River Sioux Indian Reservation, is

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<[http://sdjudicial.com/Uploads/downloads/soj/2009\\_State\\_of\\_the\\_Judiciary\\_Message.pdf](http://sdjudicial.com/Uploads/downloads/soj/2009_State_of_the_Judiciary_Message.pdf)>

<sup>2</sup>

<<http://sdjudicial.com/Uploads/downloads/ar/fy2010/2011StateofJudiciaryMessageFinal.pdf>>

91 miles from the capital city of Pierre, 167 miles from Rapid City, and 312 miles from Sioux Falls. In order to meet with an attorney who actually practices law full-time, in a law firm, Mrs. Runs After, who is elderly and indigent, would first have to locate a working, registered vehicle, a sober and trustworthy individual with a South Dakota driver's license willing to drive her, and enough money to pay for fuel and food for her and her driver to get to and from one of these cities. Faced with that daunting task, Mrs. Runs After chose to put her faith in the undersigned, a professor at the local community college, and in Mr. Cerney, one of the five attorneys remaining in the "border town" of Mobridge, South Dakota who is employed full-time in Ft. Yates, North Dakota.

While the undersigned would like to posit that rural attorneys are just as capable and reliable as urban attorneys, the lack of resources does make a difference. In this case, Mrs. Runs After's counsel, while attempting in good faith to comply with the agency's request for "your authority to represent" T.M., provided their representation agreement, but not Mrs. Runs After's 2002 custody order. (A-22, A-26). Mrs. Runs After had her custody order, and provided it to the U.S. Attorney after filing in the District Court, but it was not provided at the agency level because of an honest mistake made not by T.M. or Mrs. Runs After, but by their counsel. (A-35).

These facts are very different than those in Mader. In Mader, the claimant was non-responsive to agency requests for her authority to represent the decedent, and in fact did not have any such authority. Mader at 802. Here, Mrs. Runs After's counsel complied promptly to every request from the Solicitor's office, they simply misread the regulation and the correspondence to think that what was required was their representation agreement. (A-26, A-46, A-47, A-48, A-50).

Truly, both T.M. and Mrs. Runs After embody the most vulnerable of the most vulnerable of the population this Court serves. In a society that distributes its legal, social, economic and political resources most unequally, Mrs. Runs After and her great-grandson are without power, utterly invisible.

The ruling in Mader would leave T.M. without remedy. Considering his youth and the severity of the injuries he alleges, such a result is inapposite to the Congressional intent behind the Federal Tort Claims Act: to protect individuals from the negligent acts of government employees. It is not the result Congress intended when it enacted 28 U.S.C. § 2675(a).

## **CONCLUSION**

For the reasons stated herein, Loretta Runs After respectfully requests that this Court vacate the District Court's Order Granting the United States' Motion to Dismiss, define a limited exception to the "jurisdictional" nature of

the presentment requirement of 28 C.F.R. § 14.2(a) and remand for appropriate proceedings.

Respectfully submitted this 4th day of October, 2012.

/s/ Margaret E. Bad Warrior  
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### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this brief complies with Fed.R.App.P. 32(a)(7)(B) and Eighth Cir.R. 28A(h). It contains fewer than 3,000 words, and has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. The brief and addendum are in PDF format, have been scanned for viruses and are virus-free.

This 4<sup>th</sup> day of October, 2012.

/s/ Margaret E. Bad Warrior  
Margaret E. Bad Warrior

## CERTIFICATE OF SERVICE

I hereby certify that on this 4<sup>th</sup> day of October, 2012, I served the foregoing Appellant's Brief by electronic transmission on:

Robert Gusinsky  
[robert.gusinsky@usdoj.gov]

Further, I hereby certify that on October 1, 2012, a true and correct copy of the JOINT APPENDIX to this brief was duly served by first-class mail, postage pre-paid, on:

ROBERT GUSINZKY  
Assistant U.S. Attorney  
515 Ninth Street, Suite 201  
Rapid City, SD 57701  
Attorney for the APPELLANT

Additionally, on October 1, 2012, three copies of JOINT APPENDIX were sent by first-class mail, postage pre-paid, to:

CLERK OF THE COURT  
U.S. Court of Appeals for the Eighth Circuit  
111 South 10<sup>th</sup> Street, Room 24.329  
St. Louis, MO 63102

This 2nd day of October, 2012.

/s/ Margaret E. Bad Warrior  
Margaret E. Bad Warrior