

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

SHANI MADDEN,

Plaintiff,

v.

No. D-202-CV-2019-06567

KEN ORTIZ, in his official capacity as
Secretary of the New Mexico General Services
Department, and RAUL TORREZ, in his
official capacity as Second Judicial District
Attorney,

Defendants.

COMPLAINT

Plaintiff Shani Madden, by and through counsel, Stalter Law LLC (Kenneth H. Stalter) and FitzPatrick Law, LLC (Sean M. FitzPatrick) brings this complaint for declaratory relief, injunctive relief, and attorneys' fees, and for her cause of action states as follows:

Nature of the Case

1. Plaintiff Shani Madden, a private citizen who has settled a claim against an agency of the State of New Mexico, brings this action to challenge the constitutionality of NMSA 1978, Section 15-7-9(C) (1981). As interpreted by the Risk Management Division ("RMD") of the State of New Mexico, Section 15-7-9(C) makes it crime for *any person* (even private citizens not employed by the State of New Mexico) to reveal a settlement agreement to which a state entity is party within 180 days after the settlement is reached.

2. Section 15-7-9(C) reads:

Any person who reveals records protected pursuant to Subsection A of this section to another person in violation of this section is guilty of a misdemeanor

and shall, upon conviction, be fined not more than one thousand dollars (\$1,000). The state shall not employ any person so convicted for a period of five years after the date of conviction.

3. Subsection (A) defines certain records “created or maintained” by RMD and “pertaining to claims for damages or other relief against any governmental entity or public officer or employee” as confidential for 180 days after the latest of several triggering events, including settlement, final judgment, or RMD closing the case.

4. By effectively imposing a 180-day gag order on private claimants, even those who have not agreed to any confidentiality provision, Section 15-7-9(C) violates free-speech clauses of the First Amendment of the United States Constitution and Article II, Section 17 of the New Mexico Constitution.

Parties

5. Plaintiff Shani Madden is a private citizen and resident of Bernalillo County, New Mexico.

6. Secretary Ken Ortiz is the cabinet secretary of the New Mexico General Services Department (“GSD”), an executive agency of the State of New Mexico. Secretary Ortiz oversees all divisions of GSD, including the RMD, which handles claims made against the State of New Mexico, its agencies, branches, and subdivisions, including claims made by private citizens.

7. District Attorney Torrez is the elected district attorney for New Mexico’s Second Judicial District, which includes Bernalillo County, Plaintiff’s place of residence. The Second Judicial District Attorney’s Office is a branch or agency of the State of New Mexico. District Attorney Torrez is the chief law enforcement officer of his district and has primary prosecutorial authority for all criminal violations of state law, including Section 15-7-9(C), within his district.

Jurisdiction and Venue

8. This Court has personal jurisdiction over the named parties.
9. This Court has subject matter jurisdiction over this matter.
10. Venue is proper in this Court.

Madden's Case against GSD

11. On January 9, 2019, Madden, through counsel, made a written request to GSD under the Inspection of Public Records Act. Madden specifically sought certain billing records related to the work of private law firms contracted with RMD. Madden sought these records to investigate an undisclosed judicial conflict of interest in her divorce case, *Madden v. Smith*, D-202-DM-201200703.
12. By April 30, 2019, GSD had failed to produce the requested records and had failed to issue a valid denial of the request.
13. Madden brought suit against GSD, alleging violations of the Inspection of Public Records Act. *Madden v. New Mexico General Services Department*, D-101-CV-2019-01185. Madden sought release of the records, the imposition of statutory penalties, and attorney fees for this violation.
14. In response to the suit, GSD produced the requested records and agreed to settle Madden's claims for a monetary payment.
15. Neither GSD nor Madden requested any confidentiality requirement as part of the settlement.
16. The release executed by Madden does not contain any confidentiality provision or reference to Section 15-7-9(C).
17. Madden has not agreed to keep her case against GSD confidential in any respect.

18. Madden has a desire to reveal and discuss her case and its outcome with friends, with family, on social media, and if there is interest, with the news media.

Secretary Ortiz's Position in Public Media

19. On July 5, 2019, the Albuquerque Journal published an opinion editorial by Secretary Ortiz entitled "NM agency shines light on settlements."

20. Secretary Ortiz wrote:

Beginning in August, the department will begin the first-ever online posting of settlements entered into by Risk Management on behalf of state agencies, higher education institutions, local governments and others insured by Risk Management for claims alleging civil rights violations, whistleblower retaliation, medical malpractice and other damages.

The settlements will be posted on the New Mexico Sunshine Portal once they become available for public inspection under state law. Members of the public, including the news media, will no longer have to file requests to see Risk Management settlements.

[. . .]

In the meantime, the General Services Department, unlike the previous administration, will not exploit possible loopholes in the 180-day rule and agree to longer confidentiality periods that negotiate away the public's right to know.

Exhibit A.

RMD's Position in Private Negotiations

21. While Secretary Ortiz has committed to publishing settlements upon the expiration of the 180-day period, RMD has taken the position that private citizens can be criminally prosecuted for revealing settlements before the expiration of the 180-day period.

22. Douglas Gardner is a private attorney contracted by RMD to represent state entities, including RMD and the University of New Mexico, which is a branch of the State and insured by RMD.

23. On August 12, 2019, Gardner wrote the following to counsel in connection with another case:

RMD's position is that 15-7-9(C) applies to "Any person who reveals records." This would include Plaintiff, so far as the settlement amount and the release itself, it automatically applies and does not require Plaintiff to "agree" to it, rather, they contend that they are informing Plaintiff of the consequences should she violate State statute. We can modify the language to reflect this, but we need a record that Plaintiff was informed.

Exhibit B.

24. Thus, RMD's position is that Section 15-7-9(C) imposes a duty on all persons, even private citizens, to maintain the confidentiality of settlement agreements for 180 days, regardless of whether the claimant has agreed to confidentiality as part of the settlement.

25. Unfortunately, the text of Section 15-7-9(C), covering "[a]ny person" supports this interpretation.

26. A strict reading of Section 15-7-9(C) suggests it would also apply to records related to a claim—even if that claim has not yet settled or never does. This seems to be the position taken in Secretary Ortiz's discussion of tort claim notices:

I also want to clarify my department's position on the public release of tort claim notices – the notices that we receive when someone intends to sue. Tort claim notices are public records until a lawsuit or other actual claim is filed. Then, as state law now stands, all "records pertaining to claims" are confidential until the 180 days run. At that point, they again become public.

Exhibit A.

27. Section 15-7-9(C) therefore has a substantial chilling effect on the free speech of private individuals like Madden who have pursued claims against state entities.

28. Section 15-7-9(C)'s chilling effect is exacerbated by the fact that one of the triggering events—RMD's closing of the claim—is an internal procedure and its date may be unknown to private citizens.

29. Section 15-7-9(C) violates the United States and New Mexico Constitutions.

30. Upon information and belief, District Attorney Torrez has not disavowed enforcement against of Section 15-7-9(C).

31. Based on RMD's position, as expressed in the August 12, 2019 Gardner email, Madden has an objectively justifiable fear of real consequences should she discuss her case against GSD and its outcome or reveal the amount of her settlement. Madden therefore has standing to bring this suit, and this suit is ripe for adjudication.

COUNT I: Declaratory Relief – United States Constitution

32. Plaintiff incorporates all previous allegations.

33. The right to speak about the functioning of government is at the heart of the free-speech clause of the First Amendment of the United States Constitution.

34. Section 15-7-9(C) prohibits speech about the functioning of government based on its content, irrespective of time, place, and manner.

35. Section 15-7-9(C) violates the First Amendment of the United States Constitution because it burdens and chills protected speech about the functioning of government without adequate justification and because it is not narrowly tailored to advance a compelling government interest.

36. Section 15-7-9(C) is unconstitutional both on its face and as applied to Madden.

37. The issues in this lawsuit meet the requirements for which declaratory relief is appropriate under NMSA 1978, Sections 44-6-1 through -15, including construction of a

statute or constitution under NMSA 1978, Section 44-6-13. Under Section 44-6-13, suit is proper against “the state of New Mexico, or any official thereof.”

38. Plaintiff is entitled to a declaratory judgment that Section 15-7-9(C) is unconstitutional and that she may freely speak about her case without fear of prosecution.

39. Plaintiff brings this claim under 42 U.S.C. § 1983 and seeks to recoup her attorneys’ fees and other costs under 42 U.S.C. § 1988.

COUNT II: Declaratory Relief – New Mexico Constitution

40. Plaintiff incorporates all previous allegations.

41. For the same reasons that Section 15-7-9(C) violates the First Amendment of the United States Constitution, it also violates Article II, Section 17 of the New Mexico Constitution, which reads, in part: “Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.”

42. The issues in this lawsuit meet the requirements for which declaratory relief is appropriate under NMSA 1978, Sections 44-6-1 through -15, including construction of a statute or constitution under NMSA 1978, Section 44-6-13. Under Section 44-6-13, suit is proper against “the state of New Mexico, or any official thereof.”

43. Plaintiff is entitled to a declaratory judgment that Section 15-7-9(C) is unconstitutional and that she may freely speak about her case without fear of prosecution.

COUNT III: Injunctive Relief

44. Plaintiff incorporates all previous allegations.

45. Plaintiff requests that this Court preliminarily and permanent enjoin the Defendants from enforcing Section 15-7-9(C).

46. A preliminary injunction is justified on the following grounds: (1) The loss of First Amendment freedoms, even temporarily, in an irreparable injury; (2) This constitutional injury outweighs any possible damage to the Defendants if they are prevented from enforcing Section 15-7-9(C); (3) An injunction is not adverse to the public interest in this case; and (4) Plaintiff has a substantial likelihood of prevailing on the merits.

Relief Requested

WHEREFORE Plaintiffs pray for judgment against Defendants as follows:

- A. Declaratory judgment that Section 15-7-9(C) violates the United States Constitution and the New Mexico Constitution;
- B. A preliminary injunction preventing Defendants from enforcing Section 15-7-9(C) during the pendency of this action;
- C. A permanent injunction preventing Defendants from enforcing Section 15-7-9(C);
- D. An award to Plaintiff of costs and reasonable attorneys' fees; and
- E. Such further relief as the Court deems proper.

Respectfully submitted,

STALTER LAW LLC

/s/ Kenneth H. Stalter

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and

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Attorneys for Plaintiff

Guest Columns

NM agency shines light on settlements

By Ken Ortiz / Cabinet Secretary, New Mexico General Services Department

Friday, July 5th, 2019 at 12:02am

I am writing in response to (the Journal's) editorial Wednesday, July 3, titled, "Risk Management needs a healthy dose of sunlight."

I certainly agree with the headline. That's why I am taking unprecedented steps to shine more light on the business conducted by the Risk Management Division of the New Mexico General Services Department.

Beginning in August, the department will begin the first-ever online posting of settlements entered into by Risk Management on behalf of state agencies, higher education institutions, local governments and others insured by Risk Management for claims alleging civil rights violations, whistleblower retaliation, medical malpractice and other damages.

The settlements will be posted on the New Mexico Sunshine Portal once they become available for public inspection under state law. Members of the public, including the news media, will no longer have to file requests to see Risk Management settlements.

Posting the settlements on the Sunshine Portal will be one of the most significant steps in years by state government to make the business it does on behalf of taxpayers more open and transparent. The New Mexico Foundation for Open Government has called it a "victory for open government."

As (the Journal) noted in the editorial, state law prohibits public disclosure of risk settlements until 180 days after the latest of four possible dates. One of those dates is when a lawsuit is brought to final judgment; another is when a case is fully settled.

I agree that the law is subject to abuse by public officials who want to prevent taxpayers from learning about settlements. That's why the General Services Department supported legislation this year to narrow and clarify the law.

Unfortunately, the legislation, sponsored by Sen. Sander Rue and Rep. Linda Trujillo, failed to win lawmakers' approval. However, the General Services Department and Gov. Michelle Lujan Grisham are committed to reintroduction of the legislation in 2020. The department also is open to a discussion on whether the 180-day rule makes sense.

In the meantime, the General Services Department, unlike the previous administration, will not exploit possible loopholes in the 180-day rule and agree to longer confidentiality periods that negotiate away the public's right to know.

I also want to clarify my department's position on the public release of tort claim notices – the notices that we receive when someone intends to sue. Tort claim notices are public records until a lawsuit or other actual claim is filed. Then, as state law now stands, all "records pertaining to claims" are confidential until the 180 days run. At that point, they again become public.

I look forward to the support of the Journal and the New Mexico Foundation for Open Government as the General Services Department walks the walk when it comes to further lifting the blinds on how state government is doing its job.

Auto Racing

Kenneth Stalter

From: Sean FitzPatrick <sfitzpatrick@fitzpatricklawllc.com>
Sent: Monday, August 12, 2019 12:21 PM
To: Kenneth Stalter
Subject: Fwd: [REDACTED]

[REDACTED]
-Sean

----- Forwarded message -----

From: Douglas E. Gardner <douglas@roblesrael.com>
Date: Mon, Aug 12, 2019 at 11:24 AM
Subject: [REDACTED]
To: Sean FitzPatrick <sfitzpatrick@fitzpatricklawllc.com>
Cc: Cheri Melkus <cheri@roblesrael.com>

Sean,

I heard back from my client regarding the proposed revisions to the settlement/release. Their position is as follows:

1. Releasees will provide proof of the outstanding balances that are being forgiven prior to lawsuit dismissal. UNM and RMD contend that they have provided this information in the release, and there is nothing more to provide.
2. Requiring notification prior to indemnification costs being incurred by Releasees as well as cap on indemnity. I think that I can get them to agree to tender the defense for indemnification to you. As far as the cap, how about I propose to them that the cost of the indemnification will not exceed the total amount of the settlement? If that is okay, I will propose it to them.
3. Elimination of the confidentiality provision. RMD's position is that 15-7-9(C) applies to "Any person who reveals records." This would include Plaintiff, so far as the settlement amount and the release itself, it automatically applies and does not require Plaintiff to "agree" to it, rather, they contend that they are informing Plaintiff of the consequences should she violate State statute. We can modify the language to reflect this, but we need a record that Plaintiff was informed.

4. Removing Plaintiff counsel's signature from the release. Both UNM and RMD are okay with you just signing as "approved to form".

Let me know which ones work for you, which ones we need to work on, and which ones we may need to litigate. I am optimistic that we can work through this without the need for wasting time and money on motion practice.

Douglas E. Gardner

Partner

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