

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

April 26, 2011

Elisabeth A. Shumaker
Clerk of Court

ABBY TISCARENO; and GUILLERMO
TISCARENO,

Plaintiffs–Appellees,

v.

No. 09-4238

RICHARD ANDERSON, in his
individual capacity and official capacity,

Defendant–Appellant,

LORI FRASIER; MARION WALKER;
and WILLIAM BEERMAN, in their
individual capacities; and
INTERMOUNTAIN HEALTH CARE,
INC., in its individual capacity,

Defendants.

ORDER GRANTING PANEL REHEARING IN PART

Before **LUCERO**, **HARTZ**, and **HOLMES**, Circuit Judges.

Abby and Guillermo Tiscareno seek panel rehearing on both their federal and state claims against Richard Anderson. With respect to the Tiscarenos' state claim, we **GRANT** rehearing by the panel. Section IV of the panel's March 21, 2011, opinion is

VACATED and replaced with the order issued herewith. We **DENY** panel rehearing on all other issues raised in the Tiscarenos' petition for rehearing.

Entered for the Court

Carlos F. Lucero
Circuit Judge

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Defendants.

No. 09-4238
(D.C. No. 2:07-CV-00336-CW-DN)
(D. Utah)

ORDER AND JUDGMENT*

Before **LUCERO, HARTZ, and HOLMES**, Circuit Judges.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

In light of the Utah Supreme Court’s decision in Jensen v. Cunningham, 2011 UT 17, No. 20090277 (Mar. 29, 2011), we vacated our earlier judgment as it pertained to Abby and Guillermo Tiscareno’s claim under the Utah Constitution. We now affirm the district court’s denial of Richard Anderson’s motion to dismiss the state law claim for lack of notice.

I

The facts and procedural background of this case are summarized in our earlier opinion. See Tiscareno v. Anderson, 2011 WL 971338, *1-2 (10th Cir. Mar. 21, 2011). Shortly after our opinion was filed, the Utah Supreme Court decided Jensen. 2011 UT 17. That case held without qualification or reservation that “the Utah Governmental Immunity Act does not apply to claims alleging state constitutional violations.” Id. at ¶ 51. We decline Anderson’s invitation to read this statement as limited to the facts in Jensen. Instead, we conclude that the Utah Supreme Court meant precisely what it said, and determine that the Tiscarenos’ state law claim, alleging a violation of the Utah Constitution, is not barred by her failure to file a notice of claim.

II

Accordingly, we **AFFIRM** the district court’s denial of Anderson’s motion to dismiss the Tiscarenos’ state claim for lack of notice. We **REMAND** the matter to the

district court for proceedings consistent with our earlier opinion and this order.¹

Entered for the Court

Carlos F. Lucero
Circuit Judge

¹ We note that it is within the district court's discretion to continue to exercise jurisdiction in this pendant state matter, or the district court may dismiss the claim without prejudice. See United Intern. Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1220 (10th Cir. 2000).