

2005

Kathy Romero, as personal representative of the estate of Betty Nichols and in behalf of the heirs of Betty Nichols v. Dan L. Chichester, M.D., and First Affiliated OB-GYN, L.L.C. : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

P. Keith Nelson, Brandon B. Hobbs, Zachary E. Peterson; Richards, Brandt, Miller & Nelson; counsel for Appellee.

Fred R. Silvester, Spencer Siebers; Silvester & Conroy; attorneys for appellant.

Recommended Citation

Brief of Appellee, *Romero v. Chichester*, No. 20050392 (Utah Court of Appeals, 2005).
https://digitalcommons.law.byu.edu/byu_ca2/5771

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

KATHY ROMERO, as personal
representative of the estate of BETTY
NICHOLS and in behalf of the heirs of
BETTY NICHOLS,

Plaintiff/Appellant,

vs.

DAN L. CHICHESTER, M.D., and
FIRST AFFILIATED OB-GYN, L.L.C.,

Defendant/Appellee.

App. No. 20050392

BRIEF OF APPELLEE

**Appeal from the Final Order of the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Timothy R. Hansen, District Court Judge**

FRED R. SILVESTER
SPENCER SIEBERS
SILVESTER & CONROY, L.C.
1371 East 2100 South, Suite 200
Salt Lake City, Utah 84105
Attorneys for Plaintiff/Appellant

P. KEITH NELSON [2391]
BRANDON B. HOBBS [8206]
ZACHARY E. PETERSON [8502]
RICHARDS, BRANDT, MILLER
& NELSON
50 South Main Street, Ste. 700
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506
Attorneys for Defendant/Appellee

IN THE UTAH COURT OF APPEALS

KATHY ROMERO, as personal
representative of the estate of BETTY
NICHOLS and in behalf of the heirs of
BETTY NICHOLS,

Plaintiff/Appellant,

vs.

DAN L. CHICHESTER, M.D., and
FIRST AFFILIATED OB-GYN, L.L.C.,

Defendant/Appellee.

App. No. 20050392

BRIEF OF APPELLEE

**Appeal from the Final Order of the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Timothy R. Hansen, District Court Judge**

FRED R. SILVESTER
SPENCER SIEBERS
SILVESTER & CONROY, L.C.
1371 East 2100 South, Suite 200
Salt Lake City, Utah 84105
Attorneys for Plaintiff/Appellant

P. KEITH NELSON [2391]
BRANDON B. HOBBS [8206]
ZACHARY E. PETERSON [8502]
RICHARDS, BRANDT, MILLER
& NELSON
50 South Main Street, Ste. 700
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506
Attorneys for Defendant/Appellee

TABLE OF CONTENTS

	<u>Pages</u>
JURISDICTIONAL STATEMENT	1
ISSUES	1
CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. THE TRIAL COURT'S DECISION TO EXCLUDE THE HEARSAY STATEMENT PRESENTS A MIXED QUESTION OF FACT AND LAW.	10
II. THE TRIAL COURT PROPERLY CONCLUDED THE OUT-OF- COURT STATEMENT WAS INADMISSIBLE HEARSAY BECAUSE PLAINTIFF FAILED TO DEMONSTRATE THE STATEMENT HAD THE REQUISITE GUARANTEES OF TRUSTWORTHINESS. ...	13
III. THE TRIAL COURT PROPERLY EXCLUDED PLAINTIFF'S UNTIMELY DESIGNATION OF HER EXPERT WITNESS.	26
CONCLUSION	28

TABLE OF AUTHORITIES

CASES

	<u>Pages</u>
<u>Arnold v. Curtis</u> , 846 P.2d 1307 (Utah 1993)	26, 28
<u>Boice v. Marble</u> , 1999 UT 71, 982 P.2d 565	2, 28
<u>Gerbich v. Numed Inc.</u> , 1999 UT 37, 977 P.2d 1205	26, 28
<u>Lee v. Peacock</u> , 404 S.E.2d 473 (Ga. Ct. App. 1991)	22
<u>State v. Allred</u> , 2002 UT App 291, 55 P.3d 1158	14
<u>State v. Sloan</u> , 2003 UT App 170, 72 P.3d 138	21
<u>State v. Webster</u> , 2001 UT App 238, 32 P.3d 976	1, 11, 14-16, 24-25
<u>State v. Workman</u> , 2005 UT 66, — P.3d —	1, 11, 13-15
<u>United States v. Bailey</u> , 581 F.2d 341, 349 (3rd Cir. 1978)	23
<u>United States v. Hall</u> , 165 F.3d 1095 (7th Cir. 1998)	12, 14-15, 21
<u>United States v. Kim</u> , 595 F.2d 755, 765 (D.D.C. 1979)	15-16
<u>United States v. Kladouris</u> , 964 F.2d 658 (7th Cir. 1992)	12
<u>United States v. Trujillo</u> , 136 F.3d 1388 (10th Cir. 1998)	14-16

STATUTES AND RULES

Utah R. Evid. 804(b)(5)	2, 13
Utah R. Evid. 807	2, 13
Utah Code Annotated § 78-2a-3(2)(j)	1

TREATISES

Norman H. Jackson, Utah Standards of Appellate Review, 12 Utah Bar J. 8 (1999) ..	11
---	----

JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j).

ISSUES

I. Did the trial court properly conclude that the out-of-court statement lacked sufficient indicia of reliability and guarantees of trustworthiness?

Standard of Review: The decision to admit or exclude hearsay presents a mixed question with the trial court afforded considerable discretion in making its evidentiary rulings. State v. Webster, 2001 UT App 238, ¶9, 32 P.3d 976; State v. Workman, 2005 UT 66, ¶10, — P.3d —.

II. Did the trial court abuse its discretion in not allowing plaintiff's untimely designation of one of her expert witnesses?

Standard of Review: A trial court is afforded considerable discretion in managing its cases and making decisions to admit or exclude evidence. Boice v. Marble, 1999 UT 71, ¶7, 982 P.2d 565.

**CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES AND REGULATIONS**

Rule 804(b)(5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant. Utah R. Evid. 804(b)(5) (1992) (now Utah R. Evid. 807 (2004)).

STATEMENT OF THE CASE

This is an appeal from a grant of summary judgment to defendant Dr. Chichester on the grounds that plaintiff could offer no admissible evidence to prove a breach of the standard of care. The claims in this case arise against multiple defendants for negligence associated with a pap smear for Ms. Betty Nichols in 1996. Ms. Nichols passed away during the pendency of this matter, and her estate was substituted as plaintiff, with her daughter, Kathy Romero, as the estate's representative.

Although the standard of care was a central issue to the claim of medical negligence, plaintiff elected to proceed with only Ms. Nichols' treating physicians as experts designated to provide testimony as to the standard of care and a breach of the standard of care. In preparing the case, plaintiff never attempted to preserve Ms. Nichols' testimony, although the case was pending since 1998. Nevertheless, Ms. Nichols' testimony was the sole evidence that plaintiff relied on to establish a breach of the standard of care.

Plaintiff attempted to introduce the evidence through testimony of Ms. Romero regarding what her mother had told several years prior to the litigation. When Ms. Romero was deposed, however, her recollection of the time of the out-of-court statement and the context in which it arose was less than clear. Because of the defects and lack of evidence surrounding the out-of-court statements, the trial court determined the statements lack any indicia of reliability or guarantees of trustworthiness. Because plaintiff was not able to meet the high burden set forth in Rule 804(b)(5), the trial court excluded the out-of-court statements. Without the out-of-court statements, the trial court granted Dr. Chichester's motion for summary judgment because plaintiff could not establish a breach of the standard of care.

STATEMENT OF FACTS

On December 14, 1998, Plaintiff initiated this action against Dr. Chichester, alleging medical negligence against Dr. Chichester and other defendants. (R. at 1-7). The trial court, in its last Minute Entry dated February 11, 2005, summarized plaintiff's claims against all defendants, stating: "The basis of the plaintiff's Complaint against Dr. Chichester is that he failed to obtain from Ms. Nichols in 1997 a follow-up pap smear which, according to the plaintiff, would have revealed the cancer from which Ms. Nichols ultimately died that had apparently been misread by one of the other co-defendants following a 1996 pap smear." (R. at 1798).

In March, 2000, plaintiff, Betty Nichols, passed away, and her daughter, Kathy Romero, was substituted as plaintiff. (R. at 63-71;133-34). After the estate was substituted, the parties conducted additional discovery. During this process, Dr. Chichester took Kathy Romero's deposition. During her deposition, Ms. Romero testified as follows regarding her recollection of conversations with her mother and the conversation's relation to certain events:

Q: Did you discuss with your mother any treatments she'd received from Dr. Chichester in 1992?

A: In 1992?

Q: Yes.

A: I believe what – I believe that was after her hysterectomy. I remember her telling me she didn't need to have a pap smear anymore, because of the hysterectomy.

Q: Was this in 1992?

A: I'm not sure.

* * *

Q: Did you know that your mother had a pap smear done in 1996?

A: No.

Q: No, you didn't know?

A: I don't recall.

Q: Okay. Do you know if she had a pap smear done in 1997?

A: Not that I recall.

Q: Let me go back and ask you about your mother's comment about pap smears not being necessary after her hysterectomy.

A: Right.

Q: Was that the only reason she gave you for not having another pap smear, that somebody had told her that?

A: Basically, yes.

* * *

[Referring to 1998:]

Q: What did she tell you about her visit?

A: She just told me that Jacquelyn, the nurse practitioner, had checked her, told her she just thought it was a blood blister. . . . and told mom that because she had had a pap smear over a year ago, that she probably wouldn't need another one and that she thought everything was okay.

Q: You said that she told you that she probably wouldn't need another one?

A: Because she had just had a pap smear, that she probably wouldn't need another one at this time.

Q: Okay. Did you recommend to your mother that she go ahead and get a pap smear?

A: I did.

Q: What did your mother say?

A: She trusted Chichester's opinion, and said she'd give it a couple of weeks and see what happened.

Q: Did she actually see Dr. Chichester in January of 1998?

A: No.

(R. at 1771-73)

On May 5, 2003, Dr. Chichester moved for summary judgment, arguing that Plaintiff had not timely designated any expert who could opine regarding the applicable standard of care, whether a breach of that standard had occurred, and that any breach was the proximate cause of the injuries. (R. at 808-64, 871-73). This Court denied Dr. Chichester's motion for summary judgment. (R. at 1301, 1350-51). The Court ruled in part from the bench that Dr. Chichester had presented no affirmative evidence in the form of expert testimony that the standard of care was not breached. (R. at 1823, pp. 25-28).

Dr. Chichester next moved to strike Plaintiff's "designation" of Christopher Jolles, M.D., as a witness who would render expert testimony. (R. at 1302-04, 1308-46). In opposition to Dr. Chichester's motion to strike, Plaintiff's counsel argued that he would elicit the requisite testimony from Ms. Nichols' treating physicians, including Dr. Chichester, as experts who may opine regarding the standard of care or causation in this case. (R. at 1352-1409). With regard to causation, Plaintiff stated that Dr. Christopher

Jolles would opine regarding the proximate cause of Ms. Nichols' death and Plaintiff's damages. (R. at 1352-1409).

Although the Court later denied Dr. Chichester's motion to strike Dr. Jolles, the Court also ruled that Plaintiff's late designation of William Matviuw, M.D.—an expert who Plaintiff claimed would testify regarding the standard of care—was untimely and therefore barred. Consequently, Plaintiff was limited to Ms. Nichols' treating physicians and Dr. Yao-Shi Fu to establish her prima facie case of medical negligence. (R. at 1526-32).

Because plaintiff failed to timely designate an expert establishing the standard of care or a breach of the standard, Dr. Chichester again moved for summary judgment. (R. at 1537-39, 1540-1615). In opposition to Dr. Chichester's Motion for Summary Judgment, plaintiff filed her a Memorandum in Opposition. (R. at 1619-1688). In opposing Dr. Chichester's motion, plaintiff did not properly rebut the facts set forth by Dr. Chichester (R. at 1690-91) and set forth her own facts (R. at 1622). In so doing, plaintiff alleged in paragraph 6 of her opposition memorandum: "Betty Nichols was told by Dr. Chichester she did not need annual pap smears because she had a hysterectomy." (R. at 1622). In objecting to this fact, Dr. Chichester requested the court to strike paragraph 6 and not consider it because it was hearsay. (R. at 1692).

The trial court heard oral argument on the motion on September 27, 2004. At the hearing, the court expressed concern regarding the question of the admissibility of Betty Nichols' out-of-court statement about what Dr. Chichester had told her. (R. at 1729). Due to plaintiff's reliance on Ms. Nichols' treating physicians to establish the standard of care and the nature of the testimony provided by these physicians, the court concluded plaintiff's entire case hinged on the admissibility of the statement. (R. at 1729) Because of the importance of the issue, the trial court requested further briefing from both sides on the admissibility of the statement. (1729). Both sides submitted supplemental briefs on the issue of whether the statement was admissible. (R. at 1730-1773, 1774-1783).

The trial court heard additional oral argument on the issue of the admissibility of the statement on February 7, 2005. (R. at 1796, 1824). After oral argument, the trial court took the matter under advisement. (R. at 1796, 1824). The trial court issued a Memorandum Decision dated February 11, 2005 in which it found the statement was inadmissible and granted Dr. Chichester's Motion for Summary Judgment. (R. at 1797-1804).

In its analysis of this issue, the trial court first determined the statement was being offered for the truth of the matter asserted (i.e. that Dr. Chichester told plaintiff she

did not need to return for annual pap smears) and that it was admissible only through the residual exception to the hearsay rule. (R. at 1799-80). The trial court then determined the statement lacked the requisite guarantees of trustworthiness because the statement was unclear as to when it was said and in what context the statement was made. (R. at 1781). Accordingly, the trial court concluded the double hearsay statement was inadmissible. (R. at 1781-82). Without the double hearsay statement, the trial court concluded plaintiff could not establish a breach of the standard of care and granted Dr. Chichester's Motion for Summary Judgment. (R. at 1782-83).

A final Order was entered on March 22, 2005. (R. at 1805-12). From the final Order, plaintiff appealed the trial court's decision. (R. at 1813-14).

SUMMARY OF ARGUMENT

The claims in this case are for medical negligence. Accordingly, plaintiff has always had the burden of demonstrating the applicable standard of care and a breach of that standard of care. For tactical reasons, plaintiff made the decision not to designate experts to establish the standard of care and to demonstrate that Dr. Chichester breached this standard. Instead, plaintiff designated Ms. Nichols' treating physicians, which included Dr. Chichester, on the issue. The testimony of the treating physicians, including Dr. Chichester, was set forth in deposition testimony.

Because of plaintiff's decisions, she was left with only a double hearsay statement which could not be fixed in time or context to establish a breach of the standard of care. Because plaintiff produced no evidence to show the double hearsay had sufficient indicia of reliability and to show guarantees of trustworthiness in order to meet the heavy burden under the residual exception, the trial court excluded the double hearsay statement finding Ms. Romero's testimony less than clear as to context in which the alleged statement was made. The trial court's ruling was correct and should be affirmed.

ARGUMENT

I. THE TRIAL COURT'S DECISION TO EXCLUDE THE HEARSAY STATEMENT PRESENTS A MIXED QUESTION OF FACT AND LAW.

Although plaintiff is appealing from a grant of summary judgment, plaintiff is not appealing whether the decision to grant summary judgment was in error. Rather, plaintiff is appealing the trial court's decision to exclude evidence. Because the trial court determined the evidence was inadmissible, the trial court went on to grant defendant's motion for summary judgment. In other words, plaintiff has not argued that summary judgment was still improper if the evidence was properly excluded. As such, the issue on appeal is an evidentiary question rather than whether the trial court properly granted summary judgment.

As discussed in State v. Webster, the standard of review governing whether an out-of-court statement is admissible implicates both factual and legal conclusions. Specifically, "[t]his determination involves applying the law expressed in the rule to the hearsay statement and the circumstances under which it is made." State v. Webster, 2001 UT App 238, ¶9, 32 P.3d 976. In Webster, the standard of review was discussed in the context of Rule 804(b)(3) for statements against interest. See id. Although the residual exception was also addressed, the issues concerning the residual exception were resolved on the technical grounds of the notice requirement of the rule which is a pure question of law. See id. at ¶10. In Webster, the court noted the deference given to the trial court's application of facts regarding the circumstances under which the out-of-court statement was made to the rule. See id. at ¶9.

Consistent with Webster, the Utah Supreme Court recently stated: "Our standard of review on the admissibility of hearsay evidence is complex, since the determination of admissibility 'often contains a number of rulings, each of which may require a different standard of review.'" State v. Workman, 2005 UT 66, ¶10, — P.3d — (not yet released for publication) (quoting Norman H. Jackson, Utah Standards of Appellate Review, 12 Utah Bar J. 8, 38 (1999)). In Workman, the Utah Supreme Court noted three different standards which may apply: (1) legal questions on the determination

of admissibility are reviewed for correctness; (2) questions of fact for clear error; and (3) the district court's ruling on admissibility for abuse of discretion. See id.

Interpreting the residual exception under the identical federal rule of evidence, the federal circuit courts have held that a trial court's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. See United States v. Kladouris, 964 F.2d 658, 663 (7th Cir. 1992). Importantly, a trial court "is afforded 'considerable discretion, within the parameters of the Rules of Evidence, in determining whether the hearsay statements contain the necessary circumstantial guarantees of trustworthiness.'" Id. (citation omitted). Based on the considerable discretion afforded to the trial court, the Seventh Circuit stated: "[W]e 'will find an abuse in circumstances only where the trial court committed a clear and prejudicial error of judgment in determining whether a statement met the conditions for the application of the residual exception.'" United States v. Hall, 165 F.3d 1095, 1110 (7th Cir. 1998).

Based on the foregoing Utah and federal authorities, this court should reject plaintiff's arguments that the issue is a pure question of law. It is clear from the cited authorities that the standard of review is a mixed question. Both the Utah and federal authorities agree that typically the trial court's decision to admit or deny hearsay under the residual exception invokes some measure of discretion by the trial court. Accordingly,

the standard of review should be for abuse of discretion with respect to whether the statement has sufficient guarantees of trustworthiness, and the trial court's legal interpretation of the rule should be reviewed for correctness.

II. THE TRIAL COURT PROPERLY CONCLUDED THE OUT-OF-COURT STATEMENT WAS INADMISSIBLE HEARSAY BECAUSE PLAINTIFF FAILED TO DEMONSTRATE THE STATEMENT HAD THE REQUISITE GUARANTEES OF TRUSTWORTHINESS.

The out-of-court statement and circumstances surrounding the statement do not rise to the exceptional circumstances contemplated by the residual exception to the hearsay rule. Under Rule 804(b)(5) (now Utah R. Evid. 807 (2004)), a statement not covered by any of the enumerated exceptions to the hearsay rule may be admissible if the following are demonstrated: (1) the statement has equivalent circumstantial guarantees of trustworthiness [as compared to the enumerated exceptions]; (2) the statement is offered as evidence of a material fact; (3) the statement is more probative than other evidence available to the proponent; and (4) the general purpose of the rule and the interests of justice are served by admitting the statement. Utah R. Evid. 804(b)(5); see also Workman, 2005 UT 66 at ¶11. As the Utah Supreme Court has indicated: "The residual hearsay exception is to be used rarely and construed strictly." Id. at ¶12. In Workman, the Utah Supreme Court indicated that "we only allow the admission of hearsay evidence

under the residual exception when the high requirements of rule 804(b)(5) are met." Id.; see also State v. Webster, 2001 UT App 238, ¶26, 32 P.3d 976.

Although "out-of-court statements are generally inadmissible because they are presumed to be unreliable," see United States v. Hall, 165 F.3d 1095, 1110 (7th Cir. 1998), the Utah Rules of Evidence contain 29 separate exceptions to the hearsay rule allowing certain statements to be admitted into evidence. See State v. Webster, 2001 UT App 238, ¶20, 32 P.3d 976. Each of these exceptions exists, however, because the nature of the context in which the hearsay statement is made provides some guarantee or indicia of trustworthiness. See State v. Allred, 2002 UT App 291, ¶22, 55 P.3d 1158 ("Exceptions to the hearsay rule are based on factors that provide assurances of testimonial reliability sufficient to dispense with usual means of purging testimony of error and falsehood."). Because certain circumstances are inherently trustworthy, the Utah Rules of Evidence allow a statement's admission into evidence under the enumerated exceptions.

In addition to the enumerated exceptions, the Rule provides a residual or catch-all exception for those statements that do not meet one of the 29 exceptions. The residual exception, however, is not meant to be a broad exception, and applies only in rare and exceptional circumstances. See Webster, 2001 UT App 238 at ¶26; United States v.

Trujillo, 136 F.3d 1388, 1395-96 (10th Cir. 1998). In other words, "the purpose of this residual exception rule is to allow trial judges to admit certain hearsay statements that do not fall within any of the specific exceptions, but which have "equivalent circumstantial guarantees of trustworthiness." United States v. Kim, 595 F.2d 755, 765 (D.D.C. 1979). "Accordingly, the party offering the evidence bears a heavy burden of presenting the trial court with sufficient indicia of trustworthiness to trigger application [of the residual exception]." Id. at 1396; see also Workman, 2005 UT 66 at ¶12; Webster, 2001 UT App 238 at ¶26.

In Webster, the Utah Court of Appeals adopted the factors used by the Seventh Circuit to determine whether to admit or exclude out-of-court statements under the residual exception. See Webster, 2001 UT App 238 at ¶27. Accordingly, in determining whether a hearsay statement is sufficiently reliable to be admitted, "a court should examine, among other factors: (1) the probable motivation of the declarant in making the statement; (2) the circumstances under which it was made; and (3) the knowledge and qualifications of the declarant." Id. (quoting United States v. Hall, 165 F.3d 1095, 1110-11 (7th Cir. 1999)).

Additionally, the Court of Appeals went on to set forth additional considerations from the Seventh Circuit: "[W]e have identified several additional factors

that may be considered in determining whether hearsay testimony has sufficient 'guarantees of trustworthiness' . . . (1) the character of the declarant for truthfulness and honesty and the availability of evidence on the issue; (2) whether the [statement] was given voluntarily, under oath, subject to cross examination and a penalty for perjury; (3) the extent to which the [declarant's statement] reflects his [or her] personal knowledge; (4) whether the [declarant] ever recanted his [statement]; and (5) whether the declarant's statement was insufficiently corroborated.'" Id.

a. Plaintiff Produced No Evidence to Demonstrate the Statement Was Trustworthy.

Plaintiff had the burden of meeting the high standard which governs admissibility of hearsay statements under the residual exception. In this case, the trial court determined Kathy Romero's statement did not have any indicia of trustworthiness to make it admissible. In fact, plaintiff provided the trial court with little on which it could have determined that the proffered statement was trustworthy. See, e.g., Trujillo, 136 F.3d at 1397 (counsel made no showing that the statement was reliable or trustworthy); Kim, 595 F.2d at 766 ("the burden is on the proponent to produce evidence of trustworthiness"). In opposing Dr. Chichester's Motion for Summary Judgment, plaintiff did not provide an affidavit or any other admissible evidence to meet the heavy burden under the residual exception. (R. at 1619-88). Rather, plaintiff argued that it was Dr.

Chichester's obligation to elicit further testimony from Kathy Romero to bolster her double hearsay statement. Dr. Chichester, however, does not have the burden of proving plaintiff's case or that the double hearsay statement is admissible.

Plaintiff argues the statement occurred following the visits to Dr. Chichester in 1996 and that "Mrs. Romero can provide that detail at trial." (Plaintiff's Brief at pp. 11-12). In opposing the motion for summary judgment and in response to the trial court's request for supplemental briefing, plaintiff did not come forward with any evidence regarding when the conversation occurred or the context in which the conversation occurred. (R. at 1730-73). For this reason, the trial court determined the out-of-court statement lacked sufficient guarantees of trustworthiness. Specifically, the trial court stated: "The testimony in Ms. Romero's deposition while reasonably clear on what she claims she was told by her mother, is substantially less clear as to when that conversation took place and in what context." (R. at 1781). The trial court continued to note that it had "not been directed to any medical records where Ms. Nichols, in her subsequent treatment, made the allegation that her daughter now attributes to her. There is nothing in the court record that would be admissible as evidence as to such a statement being made to Ms. Nichols that comes from Ms. Nichols' own mouth." (R. at 1781).

For the first time and on appeal, plaintiff indicates that she can provide the necessary detail at trial. Plaintiff had two opportunities to come forward with evidence to prove the out-of-court statement was admissible. Plaintiff could have filed a sworn affidavit in opposing the motion for summary judgment or in conjunction with the supplemental briefing. Instead, plaintiff provided the court with nothing. Assuming plaintiff's memory was now refreshed as to the time and context of the conversation, plaintiff had the obligation to provide that evidence to the trial court. Plaintiff's attempt to provide the evidence cannot occur for the first time on appeal. Because plaintiff wholly failed to meet her heavy burden, this Court should affirm the trial court's ruling excluding the evidence.

- b. Notwithstanding Plaintiff's Statement That She Can Now Provide Details of the Conversation, Plaintiff Was Questioned Under Oath and Testified She Could Not Recall the Details.

Kathy Romero was questioned and given the opportunity to provide details regarding the alleged statement by her mother that Dr. Chichester had told her she did not need annual pap smears. When questioned, however, Kathy Romero's statement was less than clear, and she stated that she did not know when her mother made the statement. Specifically, Kathy Romero testified as follows:

Q: Did you discuss with your mother any treatments she'd received from Dr. Chichester in 1992?

A: In 1992?

Q: Yes.

A: I believe what – I believe that was after her hysterectomy. I remember her telling me she didn't need to have a pap smear anymore, because of the hysterectomy.

Q: Was this in 1992?

A: I'm not sure.

* * *

Q: Did you know that your mother had a pap smear done in 1996?

A: No.

Q: No, you didn't know?

A: I don't recall.

Q: Okay. Do you know if she had a pap smear done in 1997?

A: Not that I recall.

Q: Let me go back and ask you about your mother's comment about pap smears not being necessary after her hysterectomy.

A: Right.

Q: Was that the only reason she gave you for not having another pap smear, that somebody had told her that?

A: Basically, yes.

* * *

[Referring to 1998:]

Q: What did she tell you about her visit?

A: She just told me that Jacquelyn, the nurse practitioner, had checked her, told her she just thought it was a blood blister. . . and told mom that because she had had a pap smear over a year ago, that she probably wouldn't need another one and that she thought everything was okay.

Q: You said that she told you that she probably wouldn't need another one?

A: Because she had just had a pap smear, that she probably wouldn't need another one at this time.

Q: Okay. Did you recommend to your mother that she go ahead and get a pap smear?

A: I did.

Q: What did your mother say?

A: She trusted Chichester's opinion, and said she'd give it a couple of weeks and see what happened.

Q: Did she actually see Dr. Chichester in January of 1998?

A: No.

(R. at 1771-73). From the above testimony, it is unclear when the alleged conversation between Ms. Romero and her mother occurred. Specifically, Ms. Romero refers to events in 1992, 1996 and 1998 and provides testimony that the statement may have been made at any of those times. By way of contrast, the Complaint refers to a 1996 office visit when Dr. Chichester allegedly told Ms. Nichols she did not need annual pap smears. (R. at 2). The allegations of a breach of standard of care is premised on Dr. Chichester's alleged failure to tell Ms. Nichols she needed annual pap smears in 1996.

With respect to the critical 1996 office visit with Dr. Chichester, Ms. Romero testified she was not even aware if her mother had a pap smear in 1996. (R. at 1771). On the other hand, Ms. Romero discussed medical events in 1992 and 1998 when her mother may have made the statement. (R. at 1770-73). If the statement was made at either of these times, plaintiff's negligence claim against Dr. Chichester fails. As to each of the time frames, Ms. Romero was unable to provide any specific recollection of when

the statement was made or in what context. Without those details, the out-of-court statement is unreliable and properly excluded by the trial court.

Without any time or context for the statement, the trial court determined the statement did not have sufficient reliability or trustworthiness to satisfy the residual exception. (R. at 1797-1804). Kathy Romero's inability to fix Betty Nichols' statement to a certain date severely undercuts the trustworthiness of the statement. In United States v. Hall, the Seventh Circuit determined a witness's inability to recall when a statement was made was a factor leading the court to conclude the statement was not trustworthy. See Hall, 165 F.3d 1095, 1111 (7th Cir. 1998). Specifically, the court noted that only if the statement was made before the body was discovered and publicity of the event occurred would the declarant have independent knowledge unaffected by other accounts. See id. As to additional hearsay statements, the Seventh Circuit again noted the "statements cannot be established with any degree of reliability in relation" to a critical date. See id. at 1112.

In contrast, the Utah Court of Appeals in State v. Sloan noted that although a significant amount of time had passed in between when an event occurred and when certain statements were made, the trial court could still identify the time frame in which the statements were made. See State v. Sloan, 2003 UT App 170, ¶17, 72 P.3d 138.

Because of this fact, the court concluded the statement had some indicia of reliability. In certain instances, the ability to fix the statement to a particular date is critical to establishing the reliability of the statement. See also Lee v. Peacock, 404 S.E.2d 473, 474 (Ga. Ct. App. 1991) (statement made well after event was not sufficient connected to incident to free from suspicion of afterthought).

In this case, Ms. Romero was unable to state when her mother told her that the doctor had told her that she did not need annual pap smears. With respect to the medical negligence claim, the time the out-of-court statement was made is critical in establishing a breach of the standard of care. The allegation was the statement was made in 1996. Yet, Ms. Romero was unable to verify this in her deposition testimony. Further, she provided no additional evidence or sworn testimony to assist the trial court. This Court should affirm the trial court's ruling that the statement lacks sufficient reliability based on Ms. Romero's less than clear testimony about the time and context of its making.

c. When the Statement Was Made in Relation to Events at Issue Affects the Reliability of the Statement Because of Witness Bias and Distorted Recollections.

In this case, Kathy Romero was unable to testify that her mother had made the statement after her examination with Dr. Chichester in 1996, but prior to being diagnosed with cancer. If the statement was made after her diagnosis for cancer, the

truthfulness of the statement is in doubt because Betty Nichols would then have a motive to fabricate the statement.

Although much of the focus is on the circumstances surrounding the declarant who made the statement, "consideration should be given to the factors bearing on the reliability of the reporting of the hearsay by the witness." United States v. Bailey, 581 F.2d 341, 349 (3rd Cir. 1978). In Bailey, the Third Circuit determined statements made by an accomplice which implicated his cohort were inadmissible because they were made during negotiations for a reduction in charge and were not made under oath. See Bailey, 581 F.2d at 351. In its analysis, the Third Circuit reviewed other cases in which grand jury testimony was held inadmissible because of the bias of the witness who made the hearsay statements. See Bailey, 581 F.2d at 349-50.

In this case, the same considerations as raised in Bailey affect the admissibility of the statements in this case. Specifically, Kathy Romero is not an unbiased witness who can be counted on to convey information objectively. More importantly, Kathy Romero provided the trial court with no other information about when the statement was made or any other context for the statement. On appeal, however, Ms. Kathy Romero now states that she could provide the necessary detail at trial. Because Kathy Romero was unable to offer these details to the trial court, the reliability of her

proffer on appeal regarding the time and context of her mother's statement is not reliable. Accordingly, this Court should affirm the trial court's ruling to exclude the double hearsay statement.

d. Ms. Nichols' Statement Was Not Made Under Oath and Affords Dr. Chichester No Opportunity for Cross Examination.

The statement regarding what Dr. Chichester told Ms. Nichols goes to whether Dr. Chichester breached the standard of care. Plaintiff seeks to have Ms. Romero offer testimony that her mother told her that Dr. Chichester told her mother that she did not need annual pap smears. As set forth in Webster, "whether the [statement] was given voluntarily, under oath, subject to cross examination and a penalty for perjury" is an important factor in determining the reliability. See Webster, 2001 UT App 238 at ¶27.

For example, the importance of being able to cross examine the person making the statement is highlighted by this case. First, Dr. Chichester was not Ms. Nichols' regular physician. In fact, Ms. Nichols saw other physicians from 1992 through 1998. Ms. Romero has not indicated she can offer any additional testimony regarding what exactly was discussed between Dr. Chichester and Ms. Nichols. All Ms. Romero is prepared to testify to is the statement that Dr. Chichester told her mother that she did not need annual pap smears. Any qualifications or additional discussions that may have

occurred in conjunction with the alleged statement are not available. In short, Ms. Romero is prepared only to offer testimony favorable to her claims. As to the context and other discussions between Dr. Chichester and Ms. Nichols, she will not be able to testify. In fact, Ms. Romero stated under oath she did not know that her mother had a pap smear in 1996. (R. at 1771).

The lack of information regarding the context in which the statement was made calls into question the reliability of the bare statement itself where the declarant is unavailable to be cross examined as to the circumstances that accompanied the statement. For this reason, the Utah Court of Appeals noted the importance of having the statement be made under oath with the declarant available for cross examination. See Webster, 2001 UT App 238 at ¶27. Because Ms. Nichols did not make the statement under oath and Dr. Chichester had no opportunity to cross examine the declarant, the statement lacks the indicia of reliability or trustworthiness needed to admit the statement into evidence.

Related to this, the statement by Ms. Nichols does not reflect her personal knowledge about whether or not she needed annual pap smears. Rather, the statement is Ms. Nichols' understanding of what Dr. Chichester told her in 1996. In this respect, the circumstances and context in which the statement is made is important. It is entirely possible that Ms. Nichols misunderstood what Dr. Chichester told her. Because the

statement was not made under oath or with the opportunity for cross examination, the trial court properly excluded the hearsay statement.

Because plaintiff produced no evidence to show the double hearsay is reliable and trustworthy, the trial court properly excluded the evidence. The residual hearsay exception is used only in rare and exceptional circumstances where the proponent of the statement can meet the heavy burden set forth in the rule. The plaintiff has not met her burden in this case.

III. THE TRIAL COURT PROPERLY EXCLUDED PLAINTIFF'S UNTIMELY DESIGNATION OF HER EXPERT WITNESS.

It is well settled that “[w]hether a trial court has erred in granting or denying a motion to designation a substitute expert is a legal question, which we review for correctness; however, we afford a trial court very broad discretion in ruling on such a motion.” Boice v. Marble, 1999 UT 71, ¶7, 982 P.2d 565. On appeal, the Utah Supreme Court has emphasized the broad discretion to be given to trial courts, holding: “[t]his court will overturn a trial court ruling excluding a proffered witness if the appellant demonstrates that the trial court has overreached the broad discretion granted it and thereby affected the appellant’s substantial rights.” Gerbich v. Numed Inc., 1999 UT 37, ¶16, 977 P.2d 1205; see also Arnold v. Curtis, 846 P.2d 1307, 1310 (Utah 1993) (holding that trial court did not “abuse its discretion in refusing” to allow expert witness to present

affidavit in opposition to motion for summary judgment where expert was not timely designated during discovery).

On this issue, plaintiff's argument that she should have been allowed to designate an expert in an untimely fashion is premised on her claim that Dr. Chichester's "prosecution of his defense," "stonewalling," refusal to "admit the obvious standard of care," and refusal to disclose his expert's opinions caused her to designate her expert untimely. (Plaintiff's Brief at pp. 18-19). Dr. Chichester, however, did nothing to prevent plaintiff from designating her expert witness, Dr. Matviuw, in a timely manner. Plaintiff was at all times aware of the nature of her claim and the necessity of establishing the standard of care and a breach of the standard. The trial court afforded plaintiff several opportunities to designate experts on these issues. Assuming each of the tactics which plaintiff accuses Dr. Chichester of perpetrating was true, nothing Dr. Chichester could have done prevented plaintiff from timely designating an expert witness on the central issue in the case.

More importantly, plaintiff has not demonstrated the trial court overreached in its decision to deny the untimely designation. Plaintiff concedes the designation was not in time. Plaintiff merely argues that no prejudice would occur given the untimely designation. This is not the standard. Trial courts have considerable discretion in

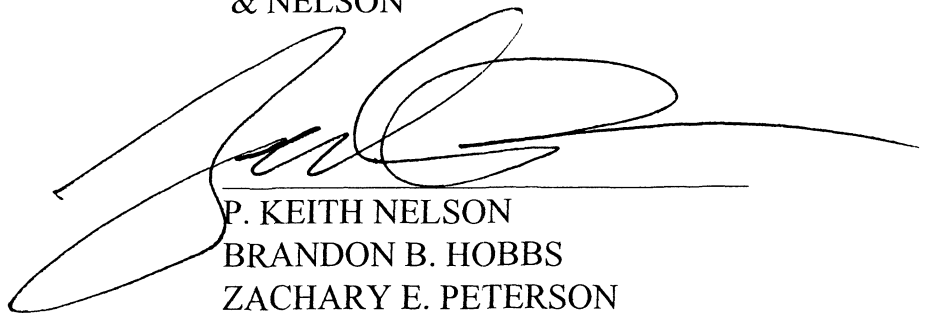
managing their dockets. See Gerbich v. Numed Inc., 1999 UT 37, ¶16, 977 P.2d 1205; see also Arnold v. Curtis, 846 P.2d 1307, 1310 (Utah 1993). The trial court did not abuse its discretion when it did not allow plaintiff to designate a standard of care expert after the expert designation cut off. Because plaintiff can demonstrate no abuse of discretion, the trial court's decision should be affirmed.

CONCLUSION

Based on the foregoing facts and authorities, Dr. Chichester requests this Court affirm the trial court's rulings in this case excluding the double hearsay statement from evidence in the case and excluding plaintiff's untimely designation of an expert on the standard of care. The trial court's grant of Summary Judgment on plaintiff's claims should be affirmed.

DATED this 28 day of October, 2005.

RICHARDS, BRANDT, MILLER
& NELSON

A large, stylized handwritten signature in black ink, likely belonging to P. Keith Nelson, is written over a horizontal line.

P. KEITH NELSON
BRANDON B. HOBBS
ZACHARY E. PETERSON
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing brief were mailed, first-class, postage prepaid, and as otherwise indicated below, on this 28 day of October, 2005, to the following:

FRED R. SILVESTER
SPENCER SIEBERS
SILVESTER & CONROY, L.C.
1371 East 2100 South, Suite 200
Salt Lake City, Utah 84105
Attorneys for Plaintiff/Appellant

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Electronic Facsimile

Sandra Telkin