

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. Chichester : Reply Brief

Utah Court of Appeals

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**Plaintiff and Appellant**

**v.**

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**Defendant and Respondent**

**Appeal from Third Judicial Court of Salt Lake County  
Honorable Timothy R. Hansen**

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**REPLY BRIEF OF APPELLANT**

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**Oral Argument Requested**

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**TABLE OF CONTENTS**

**I. BECAUSE THE FACTS WERE UNDISPUTED, THE TRIAL COURT’S HEARSAY RULING IS REVIEWED FOR CORRECTNESS ..... 4**

**II. MRS. ROMERO’S TESTIMONY HAS SUFFICIENT GUARANTEES OF TRUSTWORTHINESS TO GO TO A JURY ..... 5**

**III. JUSTICE AND FAIRNESS DICTATED ALLOWING THE DESIGNATION OF DR. MATVIUW AFTER THE DEADLINE ... 10**

**TABLE OF AUTHORITIES**

**Cases cited**

*Boice v. Marble*  
1999 UT 71; 982 P.2d 565 ..... 10

*Citizens & Southern Bank of Albany v. Swain*  
366 S.E.2d 191(Ga. App.1988) ..... 7

*Draper City v. Estate of Bernardo*  
888 P.2d 1097(Utah 1995) ..... 5

*Harmon City, Inc. v. Nielsen & Senior*  
907 P.2d 1162(Utah 1995) ..... 8

*Salt Lake City v. Williams*  
2005 UT App. 493 ..... 4

*State v. Bryant*  
965 P.2d 539(Utah App. 1998) ..... 4

*State v. Webster*  
2001 UT APP. 238; 32 P.3d 976 ..... 4

*State v. Workman*  
2005 UT 66; 122 P.3d 639 ..... 4

*Swain v. Citizens & Southern Bank of Albany*  
372 S.E.2d 423 (Ga. 1988) ..... 7

**Rules Cited**

Rule 807 ..... 5, 7, 9  
Utah R. Civ. P. 11(b)(1) ..... 11

**I. BECAUSE THE FACTS WERE UNDISPUTED, THE TRIAL COURT'S HEARSAY RULING IS REVIEWED FOR CORRECTNESS**

The trial court's hearsay determination in this instance is reviewed for correctness. This Court, in *State v. Webster*, recognized application of the rules of hearsay to a given fact situation is a legal determination. 2001 UT App. 238, ¶ 9; 32 P.3d 976, 979. However, since the determination is fact sensitive, the trial court is granted a measure of discretion to determine that factual predicate. *Id.* More recently, this Court ruled these "subsidiary factual determinations are reviewed for clear error." *Salt Lake City v. Williams*, 2005 UT App. 493, ¶ 10. Appellee thus argues review of this case requires a mixed standard, but such is not the case.

Here, the factual predicate was undisputed. The trial court was merely applying the law to the given set of facts. (TR 1798) Appellee did not identify any underlying facts in dispute nor any rulings of the trial court on underlying factual matters. Rather, the trial court made a purely legal determination. "We review the legal questions to make the determination of admissibility for correctness." *State v. Workman*, 2005 UT 66, ¶10; 122 P.3d 639, 642. As this Court stated, "[t]o the extent that there is no pertinent factual dispute, whether a statement is offered for the truth of the matter asserted is a question of law, to be reviewed under a correction of error standard." *State v. Bryant*, 965 P.2d 539, 546 (Utah App. 1998). The absence of an

underlying factual dispute compels review of the trial court's exclusion of Ms. Romero's testimony for correctness.

## **II. MRS. ROMERO'S TESTIMONY HAS SUFFICIENT GUARANTEES OF TRUSTWORTHINESS TO GO TO A JURY**

Mrs. Romero's testimony concerning the instruction of Dr. Chichester to her mother has sufficient guarantees of trustworthiness to be heard, and weighed, by a jury. The issue on summary judgment was whether or not Dr. Chichester told Mrs. Nichols she did not need another pap smear. Dr. Chichester argued there was no evidence of his fatally improper instruction. Mrs. Romero testified under oath it was Dr. Chichester who gave the instruction. (TR 1686) Under Utah law, "it only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact." *Draper City v. Estate of Bernardo*, 888 P.2d 1097, 1101 (Utah 1995)(citations omitted). Therefore, Dr. Chichester had to keep Mrs. Romero from testifying.

The trial court erred in ruling Mrs. Romero's testimony was inadmissible hearsay. Mrs. Romero argued her mother's statement to her was admissible under Rule 807's residual exception. The trial court found Mrs. Romero's testimony met the factors for admission except for sufficient guarantees of trustworthiness.

### **Guarantees of Trustworthiness:**

On the most critical issue to the case, Mrs. Romero was unequivocal in identifying Dr. Chichester as the doctor who instructed her mother she did not need another pap smear. (TR 1686) Mrs. Nichols stated the date of Dr. Chichester's instruction in her Complaint, long before Mrs. Romero was ever a party:

9. On May 17, 1996, Dr. Chichester saw Mrs. Nichols on a routine office visit and performed a pap smear, which was negative.

10. At that time, Dr. Chichester advised Mrs. Nichols that, due to her uterus being previously removed, no further pap smears were necessary.

(TR 2).

Mrs. Romero further testified, "I remember the conversation." (TR 1686) The trial court ruled Mrs. Romero's testimony was untrustworthy, however, because she was not specific enough in her deposition as to the date of her conversation with her mother. In doing so, the trial court improperly encroached on the province of the jury.

A ruling on summary judgment and a ruling on the residual exception have in common they both determine what goes to the jury. On summary judgment, "a trial court should not weigh disputed evidence, and its sole inquiry should be whether material issues of fact exist." *Draper City*, 888 P.2d at 1100. "It is not the purpose

of the summary judgment procedure to judge the credibility of the averments of parties, or witnesses, or the weight of evidence.” *Id.* at 1101. Similarly, in meeting the requirements of admissibility under Rule 807, Mrs. Romero is entitled to rely on the same policies extant on summary judgment. The first is that the trial court’s sole inquiry is whether the elements of Rule 807 are met. The second is that it remains the exclusive province of the jury to weigh the evidence and determine the credibility of a witness.

In *Citizens & Southern Bank of Albany v. Swain*, Judge Beasley (whose dissent was adopted by the Georgia Supreme Court in *Swain v. Citizens & Southern Bank of Albany*, 372 S.E.2d 423 (Ga. 1988)) explained, “Legal trustworthiness is not the same as factual trustworthiness. To meet the legal trustworthiness criterion, the proponent need only show threshold trustworthiness. Are there sufficient indicia or circumstances present so that the jury may know of the statement and decide for itself whether it is trustworthy? It is the jury, of course, which primarily and ultimately determines credibility.” 366 S.E.2d 191, 194 (Ga. App. 1988).

Here, the trial court’s *only* proper inquiry was whether the elements of legal trustworthiness were present, not to rule on the credibility of Mrs. Romero’s testimony. Mrs. Romero testified she remembered the conversation with her mother, that her mother specifically identified Dr. Chichester as instructing her she did not

need another pap smear. This was an informal conversation between mother and daughter, long before a diagnosis of cancer or this lawsuit, discussing very personal issues that would normally not be shared with others and concerning which Mrs. Nichols had no reason to lie. Mrs. Nichols' statement was based on her own personal knowledge. She was one of two persons present during her conversation with Dr. Chichester discussing a matter of great personal concern. The timing of the instruction was provided by the complaint. By taking Dr. Chichester's instruction from the jury the trial court ruled Mrs. Nichols either was inaccurate in her reporting of the instruction or Mrs. Romero could not credibly testify as to its timing. These are jury questions.

Dr. Chichester argues additional detail cannot be produced at trial. Yet, in *Harmon City, Inc. v. Nielsen & Senior*, 907 P.2d 1162, 1172 (Utah 1995), the Supreme Court found an expert's affidavit sufficient to overcome summary judgment, "although we expect that [the expert's] testimony at trial will be more developed and include further specifics." Likewise, Mrs. Romero's testimony was sufficient on the critical issue, i.e. it was Dr. Chichester who instructed Mrs. Nichols she did not need further pap smears. The detail of precisely when Mrs. Nichols told Mrs. Romero of the instruction could be developed at trial with reference to Mrs. Nichols' prior assertions and reference to Mrs. Nichols' medical records.

None of this is to say the jury would then have to accept Mrs. Romero's testimony, but rather it is the jury that must be allowed to assess the testimony. "If we are to rely on juries to try the facts and ascertain the truth . . . then we should be chary to keep from them bits and pieces of evidence which may assist in the process, in however small a way, particularly when they relate to the crucial factual question in the case." *Citizens & Southern Bank*, 366 S.E.2d at 195.

Nor is this saying all hearsay should be admissible and allow the jury to sort it out. Testimony is properly excluded when it does not meet the "high requirements" of the residual exception. Here, however, Mrs. Nichols' own assertion of the instruction before her death in her complaint (and other discovery as set forth in the initial brief) is an indicia of trustworthiness. Mrs. Romero's memory of her conversation with her mother long before she became a party to this action is another indicia. The personal nature of the conversation and lack of any reason to fabricate the instruction are more indicia. Mrs. Nichols' fatal compliance with Dr. Chichester's instruction is a compelling indicia of trustworthiness. (TR 1693). That the testimony met the other requirements of Rule 807 is undisputed. Therefore, Mrs. Romero's testimony was sufficiently reliable to go to the jury and the jury could assess its weight and credibility.

### III. JUSTICE AND FAIRNESS DICTATED ALLOWING THE DESIGNATION OF DR. MATVIUW AFTER THE DEADLINE

The remaining issue before this Court is Mrs. Romero's designation of Dr. Matviuw after the expert designation deadline. The Utah Supreme Court recognized, "[o]n occasion, justice and fairness will require that a court allow a party to designate witnesses, conduct discovery, or otherwise perform tasks covered by a scheduling order after the court-imposed deadline for doing so has expired." *Boice v. Marble*, 1999 UT 71, ¶ 10; 982 P.2d 565, 568. In her initial brief, Mrs. Romero set forth for this Court (as she did for the trial court) the stonewalling of Dr. Chichester in avoiding to state the universally accepted standard of care which demonstrated his negligence.<sup>1</sup> It was only Dr. Chichester's refusal to admit this plain fact that compelled Mrs. Romero to hire her own expert. The trial court abused its discretion in not allowing Dr. Matviuw's testimony where justice and fairness dictated such a result.

Dr. Chichester assumes "each of the tactics which plaintiff accuses Dr. Chichester of perpetrating was true" but avers such is no basis for extending the deadline. Yet, what Dr. Chichester casually adopts as tactics is that conduct forsaken by Utah courts as intended "to cause unnecessary delay or needless increase in the

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<sup>1</sup> *See* (TR 1798) where the trial court found: "It does not appear that any of the medical personnel who have opined on the subject in this case dispute the fact that a person with Mrs. Nichols' prior medical history should have an annual pap smear."

cost of litigation.” See Utah R. Civ. P. 11(b)(1). Dr. Chichester’s tactics are precisely those that warrant “justice and fairness” to “require that a court allow a party to designate witnesses . . . after the court-imposed deadline for doing so has expired.” Accordingly, Mrs. Romero did state the proper standard for extending the deadline to designate Dr. Matviuw. There was no trial date to delay, no prejudice to Dr. Chichester, and no holding of the Utah appellate courts depriving the trial court of its discretion. The trial court erred in not allowing Mrs. Romero to designate Dr. Matviuw.

Respectfully submitted this 22<sup>nd</sup> day of December, 2005.

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## CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of December, 2005, I caused to be mailed via U.S. Mail, postage prepaid, ~~one~~ (1) copy of the foregoing **REPLY BRIEF OF APPELLANT** to the following:

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