

2005

# Kathey Romero and estate of Betty Nichols v. Dan L. Chichester and First Affiliated OB-GYN, LLC : Brief of Appellant

Utah Court of Appeals

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Case No. 20050392

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 and Appellant**

**v.**

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

**Defendant and Respondant**

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

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**BRIEF OF APPELLANT**

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Oral Argument Requested

**FILED**  
**UTAH APPELLATE COURTS**  
**SEP 02 2005**

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**Oral Argument Requested**

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## **JURISDICTION**

This appeal is from a final judgment of the Third District Court, Honorable Judge Timothy Hanson. The Court of Appeals has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2a-3(j) following an order of the Utah Supreme Court in accord with Utah Code Ann. § 78-2-2(4). Summary judgment was entered in this matter on March 22, 2005. Appellant also appeals an earlier order of the court to strike the designation of an expert witness, dated October 6, 2003. Appellant's Notice of Appeal was timely filed on April 21, 2005.

## **ISSUES FOR REVIEW**

**Issue No. 1:** Did the trial court err in ruling deceased's out of court statement to plaintiff would not be inadmissible under the residual exception to the hearsay rule?

Preservation: See Supplemental Opposition to Second Motion for Summary Judgment Re; Out of Court Statement (TR 1730-1773).

Standard of Review: Summary judgment determinations are reviewed de novo for correctness, granting no deference to the trial court's legal conclusions. *Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25; 116 P.3d 271.

**Issue No. 2:** Did the trial court err in precluding one of plaintiff's medical experts from testifying at trial for alleged violation of the court's scheduling order?

Preservation: See Memorandum in Opposition to Defendant Chichester's Motion to Strike (TR 951-971).

Standard of Review: Whether a trial court has erred in granting or denying a motion to strike an expert is a legal question reviewed for correctness; however, the appellate court affords a trial court very broad discretion in ruling on such a motion. *Boice ex rel. Boice v. Marble*, 1999 UT 71; 982 P.2d 565.

### **DETERMINATIVE RULE 807**

A statement not specifically covered by Rule 803 or Rule 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule 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 purpose 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.

### **STATEMENT OF THE CASE**

This case was originally filed by Betty Nichols, Mrs. Romero's mother, who died of cancer after filing her claim. The basis of Mrs. Romero's case against defendant Dr. Chichester was his instruction to her mother she did not need an annual pap smear due to the fact she had had a previous hysterectomy. This instruction was



improper for a woman who had also had previous cervical cancer. Had Mrs. Nichols received proper instruction, and an annual pap smear, her cancer would have been detected and treated without being fatal. The trial court dismissed Mrs. Romero's claims finding the only evidence of Dr. Chichester's instruction, i.e. Mrs. Romero's testimony of what her mother told her, was hearsay.

### **SUMMARY OF ARGUMENT**

Mrs. Romero's testimony has sufficient guarantees of trustworthiness to be assessed by a jury. Mrs. Nichols discussed Dr. Chichester's instruction with her daughter soon after her visit in 1996. She had no reason to lie about the instruction at such time, being two years before her cancer diagnosis. The instruction also did not originate with Mrs. Romero. Rather, Mrs. Nichols included the instruction in her original complaint, before Mrs. Romero was forced to be a party to this action due to the death of her mother. Therefore, evidence of the instruction should have gone to a jury with all other objections made adequate subjects for cross-examination.

The trial court additionally erred in excluding the affidavit and testimony of Dr. William Matviuw on the standard of care. This issue is secondary to that discussed above but important if remanded. Dr. Matviuw's retention was necessitated only by appellee's stonewalling and, once designated, caused no prejudice to appellee nor delay to the proceedings. The trial court abused its discretion in excluding his

testimony.

### **ARGUMENT**

In 1996, Mrs. Betty Nichols visited her gynecologist, Dr. Dan Chichester. At that visit, Dr. Chichester instructed Mrs. Nichols she did not need annual pap smears. The instruction was wrong. Mrs. Nichols discussed the visit and instruction with her daughter but had no idea at the time Dr. Chichester's instruction was a breach of his standard of care.

In 1998 Mrs. Nichols was diagnosed with an inoperative cancer. She filed her original complaint in December of 1999 including the improper instruction she received from Dr. Chichester. Mrs. Nichols passed away in March, 2000 and her daughter, Mrs. Romero, became the plaintiff in this action. On Dr. Chichester's third motion for summary judgment, the trial court ruled Mrs. Romero could not tell the jury about Dr. Chichester's instruction and dismissed her case. This appeal followed.

### **STANDARD OF REVIEW**

This Court grants no deference to a trial court's legal conclusions, reviewing summary judgment determinations for correctness. *Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, ¶ 15. On the other hand, the admission of evidence is usually reviewed for an abuse of discretion. The abuse of discretion standard

should not, however, apply in this case. No witnesses appeared before the trial court. Rather, this Court has before it all the evidence the trial court had and is in the same position to determine whether or not the residual exception should apply. As stated in *Jensen v. Intermountain Power Agency*, 1999 UT 10, 977 P.2d 474, 477, “[t]he admissibility of an item of evidence is a legal question. However, in reviewing a trial court’s decision to admit or exclude evidence, we allow for broad discretion.”

Such discretion is appropriate where the trial court balances varying concerns. *Id.* (upholding trial court’s balancing of interests under Rule 403 not an abuse of discretion). The court’s discretion is not at issue, however, where this court is in just as good a position to assess the evidence as the trial court, such as whether a particular photograph is gruesome. *See e.g. State v. Dunn*, 850 P.2d 1201, 1222 n. 22 (Utah 1993)(stating threshold decision whether or not photograph is gruesome is a question of law).

Similarly, the hearsay determination in this case did not involve balancing, but only application of the law to undisputed facts. “To 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). So it is with whether or not plaintiff’s statement is admissible under the residual exception. Therefore, the trial

court's determination should be reviewed for correctness.

**I. MRS. NICHOLS'S OUT-OF-COURT STATEMENT IS ADMISSIBLE UNDER THE RESIDUAL EXCEPTION**

The legal basis for a residual exception to the hearsay rule was set out by the Fifth Circuit Court of Appeals in *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5<sup>th</sup> Cir. 1961). There the defendant sought to introduce an old newspaper article as evidence the county clock tower had suffered previous fire damage. The article was indeed hearsay and did not fit within any enumerated exception, but yet struck the court as evidence which would assist the jury in making its determination. The Circuit first looked at the basis for exclusion: "In the Anglo-American adversary system of law, courts usually will not admit evidence unless its accuracy and trustworthiness may be tested by cross-examination." *Id.* at 392.

Plaintiff argued it could not cross examine a newspaper article. "However," the Court reasoned, "the law governing hearsay is somewhat less than pellucid. And, as with most rules, the hearsay rule is not absolute; it is replete with exceptions. Witnesses die, documents are lost, deeds are destroyed, memories fade. All too often, primary evidence is not available and courts and lawyers must rely on secondary evidence." *Id.* The article was admitted. Congress subsequently approved a residual exception to the hearsay rule and Utah followed suit soon thereafter.

Mrs. Nichols's statement concerning Dr. Chichester's instruction is admissible under Utah's residual exception. To be admissible under this residual exception, the evidence must first have equivalent circumstantial guarantees of trustworthiness. *See* Utah R. Evid. 807. The Utah Court of Appeals set forth some factors in assessing the trustworthiness of the evidence: "(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." *State v. Webster*, 32 P.3d 976, 984 (Utah App. 2001). Mrs. Nichols's statement concerning Dr. Chichester's instructions is admissible under this residual exception because it has equivalent circumstantial guarantees of trustworthiness as other hearsay exceptions, it is evidence of a material fact, it is more probative than other available evidence, and the interests of justice would be served by its admission.

***Guarantees of Trustworthiness:***

This Court set forth some factors in assessing the trustworthiness of evidence offered under the residual exception: "(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." *Webster*, 32 P.3d at 984. In setting forth these factors, the Court properly focused on the circumstances of the declaration at the time it was made, not on subsequent events. As stated by the Seventh Circuit

Court of Appeals, “[t]he circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was and do not include those that may be added by using hindsight.” *Huff v. White Motor Corp.*, 609 F.2d 286, 292 (7th Cir. 1979).

In *Huff*, a truck driver who had been involved in a serious accident told a friend and relative visiting him in the hospital how the accident had occurred. The driver subsequently died from his injuries. The truck manufacturer sought to introduce these persons testimony at a trial to show the accident was a result of driver error, not a manufacturing defect. The Circuit ruled the evidence had sufficient guarantees of trustworthiness to be admitted where the driver was not being interrogated, had no current interest to support or refute, but merely related the incident to visiting close friends to whom he had no reason to lie. The evidence would similarly be admissible under *Webster*: the driver had no motivation to fabricate, he was having a private conversation with a friend and relative, and had personal knowledge of the events leading up to the accident. These *Webster* factors also favor the admission of Mrs. Nichols’ statement.

First, Mrs. Nichols had no motivation to fabricate Dr. Chichester’s statement. Mrs. Nichols told her daughter of Dr. Chichester’s instructions long before there was any indication Dr. Chichester had failed to provide adequate care. According to

plaintiff, following the 1996 visit to Dr. Chichester's office, Mrs. Nichols related to her daughter Dr. Chichester's instruction that she did not need annual pap smears following a hysterectomy. This was well before Mrs. Nichols was diagnosed with cancer or told of her terminal condition.

The trial court, in its decision, stated Mrs. Romero's deposition was unclear as to when and in what context the conversation with her mother took place. That was because counsel for Dr. Chichester asked no follow up questions and did not show Mrs. Romero any medical records to assist her in ascertaining the date and context of the conversation. The entire exchange was thus:

A: . . . 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: Do you know who would have told her that?

A: Dr. Chichester.

(TR 1686). Counsel showed Mrs. Romero no medical records to try to confirm a date nor asked any follow-up question to elicit further detail. Mrs. Romero can provide that detail at trial. Any argument that Mrs. Romero's trial testimony is inconsistent

or more detailed than her deposition is adequate fodder for cross-examination, but would go to the weight of her testimony, not its admissibility. A jury must assess the credibility of her testimony, not the trial court.

Second, under the circumstances, there was no reason for Mrs. Nichols to fabricate Dr. Chichester's instructions. At the time of the conversation with her daughter there was no lawsuit - nor even any indication she was sick. Mrs. Nichols' cancer diagnosis was still two years off. Instead the conversation took place between a mother and her daughter discussing very personal issues that would normally not be shared with others and concerning which Mrs. Nichols had no reason to lie.

Finally, 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 trial court stated its concern, "[t]here 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." (TR 1801). Yet, the statement was included in Mrs. Nichols's initial complaint before her death, filed against Dr. Chichester on December 14, 1999. (TR 2). Dr. Chichester denied the statement in his Answer. (TR 34). Thus, shortly thereafter, on February 25, 2000, Mrs. Nichols submitted a Request for Admission and corresponding interrogatory asking Dr. Chichester to admit he told Mrs. Nichols in



1996 she did not need another pap smear. (TR 1763). Only days later, on February 28<sup>th</sup>, after many delays in arranging a date for her deposition, Mrs. Nichols's deposition had to be cancelled because she was too weak to testify. On March 24<sup>th</sup>, Dr. Chichester denied the request for admission and refused to answer the corresponding interrogatory claiming attorney-client privilege. (TR 1763). Mrs. Nichols passed away the next day. Only then was Mrs. Romero forced to be a party to this action.

A very similar case was presented in *Swain v. Citizens & Southern Bank of Albany*, 372 S.E.2d 423 (Ga. 1988). Plaintiff filed a medical malpractice and wrongful death action on behalf of her deceased husband who died from an anaphylactic reaction to penicillin. A key issue in the case was the doctor's notice of decedent's allergy to penicillin. The issue was complicated by the doctor having also passed away without testifying. The defendants filed a motion in limine to exclude the testimony of decedent's wife and son who would testify decedent told them both of his previous visits to the doctor when he specifically told the doctor he was allergic to penicillin. The trial court denied the motion but certified the question for interlocutory appeal.

The Georgia Court of Appeals stated the evidence should be excluded because its proponents stood the most to gain from its admission and it was therefore not

trustworthy. Three judges dissented. The Georgia Supreme Court overruled the Court of Appeals and expressly adopted the dissenting opinion which properly focused on the circumstances of when the statement was made, *not* the circumstances of the witness at the time of trial. “The statement was made three months before the fatal administration of penicillin. It was made in the ordinary course of telling his wife and visiting adult son what had transpired during this, his initial appointment with the new doctor about a bothersome problem. No factors appear which would cast a shadow over the threshold trustworthiness of this statement.” *Citizens & Southern Bank of Albany v. Swain*, 366 S.E.2d 191, 194 (Ga.App. 1988).

As in this case, the circumstances surrounding Mrs. Nichols’s statement at the time it was made have sufficient guarantees of trustworthiness to go to a jury; the witness (and her interest) will be adequately explored on cross-examination and the determination of credibility left to the jury. The *Swain* court explained, “[l]egal trustworthiness is not the same as factual trustworthiness.” *Id.* at 194. Rather, “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.” *Id.* Accordingly, the Court held, the decedent’s wife and son should be allowed to testify as to decedent’s statements. “The jury, of course, may

reject [the evidence] for any number of reasons . . . The point is, the ultimate trustworthiness can be left to the jury here. It is for the jury, under appropriate instructions, to determine the weight and credibility of the declarations.” *Id.*

There are sufficient guarantees of trustworthiness in this case to reach the threshold at which the evidence may be presented to the jury. The statement was made well before Mrs. Nichols was diagnosed with cancer or this litigation was commenced. The statement was included in Mrs. Nichols’s initial complaint before her death. Thus, the statement was put forth before plaintiff, Mrs. Romero, was even a party to this action. The statement was made in a private, confidential setting when Mrs. Nichols had absolutely no reason to lie. There is no evidence contradicting the statement. Rather, Mrs. Nichols’s conduct is tragically in line with Dr. Chichester’s instruction. The evidence, therefore, has sufficient guarantees of trustworthiness to be presented to the jury.

***Materiality:***

Mrs. Nichols’s out-of-court statement was clearly material to this action. Without her testimony there is no other evidence of Dr. Chichester’s breach of the standard of care. (TR 1800).

***More Probative than Other Evidence:***

There is no other evidence. Dr. Chichester claims no memory of telling Mrs. Nichols she did not need annual pap smears nor of telling Mrs. Nichols the opposite - that she did need an annual pap smear. (TR 1746). Mrs. Nichols passed away before her testimony could be recorded, but her statement was known before her death. (TR 2). The most direct evidence is Mrs. Romero who discussed the matter with her mother years before this litigation and in the context of a private, personal conversation.

***Interests of Justice:***

As recently taught by this Court, “[t]he general purpose of the Utah Rules of Evidence provides that they ‘shall be construed to secure . . . promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.’” *N.D. v. A.B.*, 2003 UT App 215, P20; 73 P.3d 971, 976. The interests of justice would be served in this case by allowing the jury to determine the weight and credibility of Mrs. Romero’s testimony. It is still true “that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.” *Railroad Co. v. Stout*, 84 U.S. 657 (1873).

The Utah Supreme Court stated resort to the residual exception is justified “by

the inherent reliability of the statement and the need for its admission.” *State v. Nelson*, 777 P.2d 479, 482 (Utah 1989). The need of the statement is unquestioned. One participant to the conversation is dead and the other claims no memory one way or the other. The threshold reliability of the statement is established by the time it was made, its consistency throughout this litigation, including before Mrs. Romero was even a party, and the parties’ reasonable efforts to record it. These guarantees of trustworthiness are equivalent to the admission of this evidence under other exceptions such as present sense impression or excited utterance which invoke trustworthiness from the timing of the statement, when the declarant had no motive or time to fabricate the statement. The jury, therefore, may properly determine the legal significance, if any, of the statement at trial.

## **II. THE TRIAL COURT ERRED IN EXCLUDING MRS. ROMERO’S STANDARD OF CARE EXPERT**

The trial court improperly denied Mrs. Romero additional time to designate Dr. William Matviuw as an expert witness on the standard of care. Dr. Matviuw was designated to testify Dr. Chichester breached the standard of care by instructing Mrs. Nichols she was not required to return for annual pap smears. Dr. Chichester originally complained Dr. Matviuw’s designation was untimely, yet that was due to Dr. Chichester’s prosecution of his defense rather than any dilatory behavior of Mrs.

Romero. Because Dr. Matviuw's designation was only required by Dr. Chichester's stonewalling and did not result in any delay of proceedings or prejudice to Dr. Chichester, the trial court abused its discretion in excluding his testimony.

The standard of care Mrs. Nichols (and after her death Mrs. Romero) alleged was straightforward and uncontroversial: a woman with prior cervical cancer required annual pap smears. Accordingly, Mrs. Romero determined she would have Dr. Chichester establish the proper standard of care at trial based on the published guidelines governing his profession. On April 25, 2003, Dr. Chichester filed his second motion for summary judgment<sup>1</sup> claiming Mrs. Romero's claims were barred because she had not designated a standard of care expert. (TR 808-864). Four days before filing his motion, Dr. Chichester disclosed two standard of care experts but did not disclose their opinions despite prior agreement to do so. Mrs. Romero sent another interrogatory asking for their opinions. Dr. Chichester merely responded each expert was expected to testify "regarding the applicable standard of care and proximate cause of Plaintiffs' alleged damages." (TR 967-968). Because Dr. Chichester would not admit the obvious standard of care and refused to disclose his expert's opinions, Mrs. Romero determined she would be required to retain a rebuttal

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<sup>1</sup> Dr. Chichester filed his first motion for summary judgment claiming Mrs. Romero's claims were barred by the statute of limitations. This motion was rejected.

expert on the standard of care.

Within thirty days Mrs. Romero found a standard of care expert, had her mother's medical records reviewed, had an affidavit from the expert stating Dr. Chichester unequivocally breached the standard of care, and had filed a motion for an extension of time to designate Dr. Matviuw and his designation. (TR 985-1012; 1013-1038; 1042-1070).

At the hearing on Dr. Chichester's second motion for summary judgment (which was again denied) the trial court also took up Dr. Chichester's motion to strike the designation of Dr. Matviuw. The trial court was concerned the Supreme Court had ruled it could not allow the designation of Dr. Matviuw beyond the scheduled date for designation. Such is not the case. The Supreme Court has encouraged trial courts to control their dockets and has upheld such courts in enforcing scheduling orders to that end. *See Arnold v. Curtis*, 846 P.2d 1307 (Utah 1993). The Court has also emphasized, however, all parties are entitled to a fair trial.

Thus, in *Arnold v. Curtis*, the Supreme Court disallowed the late designated expert because counsel presenting an affidavit in opposition to summary judgment had previously represented to the trial court all discovery was complete and the case ready for trial. *Id.* at 1309. In addition, the *Arnold* Court found, "Arnold did not request a change in the trial court's scheduling order." *Id.* at 1309. In contrast, in

*Boice v. Marble*, the Supreme Court cautioned, “unforeseen circumstances do arise. On 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.” 1999 UT 71 at ¶ 10, 982 P.2d at 568. There, the defendant’s counsel argued he would not have enough time to depose the new expert. The Supreme Court found, “even if it were true that Marble could take depositions of three other witnesses before trial but not of the new expert, the trial court could have obviated any prejudice by granting a motion for continuance.” *Id.* The *Boice* Court held it was an abuse of discretion to exclude the substitute expert.

In this case, not even a continuance would have been necessary as no trial date was set, or had ever been set. The case had never been certified as ready for trial. Further, unlike *Arnold*, Mrs. Romero specifically moved the court for an extension of time to designate Dr. Matviuw. (TR 1267-1270).

Dr. Chichester refused to disclose his expert’s opinions forcing Mrs. Romero to designate a rebuttal expert. That designation was delayed only because of Dr. Chichester’s conduct, not any dilatoriness of Mrs. Romero. The designation did not delay any proceedings nor prejudice Dr. Chichester. Therefore, upon remand of this case, Mrs. Romero’s expert should be allowed to testify.



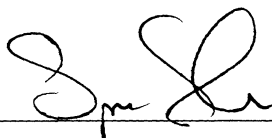
## **CONCLUSION**

Mrs. Romero's testimony concerning the improper instructions her mother received from Dr. Chichester should be presented to a jury. Dr. Chichester may cross examine her and the jury, not the trial court, could make the determination what weight and credibility to give to her testimony. It was error for the trial court to usurp the jury's function in this regard.

Therefore, appellant asks this case be remanded to the trial court with instruction to allow Mrs. Romero's testimony to be presented to a jury. Further, Dr. Matviuw's designation and testimony should not be excluded.

Respectfully submitted this 1<sup>st</sup> day of September, 2005.

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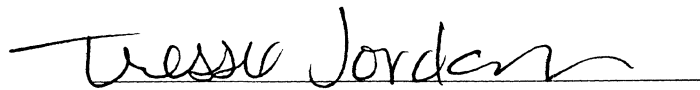
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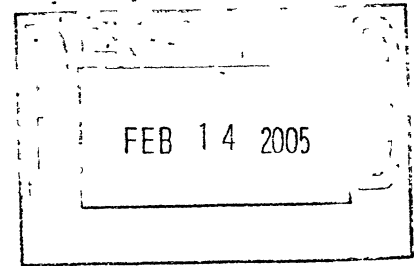
Attorneys for Plaintiff-Appellant

## CERTIFICATE OF SERVICE

I hereby certify that on the 29 day of September, 2005, I caused to be mailed via U.S. Mail, postage prepaid, one (1) copy of the foregoing **BRIEF OF APPELLANT** to the following:

P. Keith Nelson  
Holly B. Platter  
RICHARDS, BRANDT, MILLER & NELSON  
Attorneys for Defendants Chichester and  
First Affiliated OB-GYN, L.L.C  
Key Bank Tower, Seventh Floor  
50 South Main Street, Suite #700  
Salt Lake City, UT 84110-2465

Tressie Jordan



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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KATHY ROMERO, as personal	:	MEMORANDUM DECISION
representative of the estate of	:	
BETTY NICHOLS and in behalf of	:	CASE NO. 990912348
the heirs of BETTY NICHOLS,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
DAN L. CHICHESTER, M.D., and	:	
FIRST AFFILIATED OB-GYN, L.L.C.,	:	
	:	
Defendants.	:	

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**FILED DISTRICT COURT**  
Third Judicial District

**FEB 11 2005**

By 15/ SALT LAKE COUNTY  
Deputy Clerk

This matter is before the Court on the defendant, Dr. Dan L. Chichester, M.D.'s, Motion for Summary Judgment. The matter was first before the Court on September 27, 2004, and after oral argument, the Court allowed counsel the opportunity to file additional Memoranda on the hearsay rule issues that came up during the course of oral argument. Counsel filed their respective briefs on the question of the admissibility of certain perceived hearsay statements, and the Court put the matter back on the calendar, hearing oral argument again on the Motions on February 7, 2005. At that hearing, counsel for the plaintiff and counsel for the defendant, Chichester, were present and argued their respective positions. Following oral argument, the Court took the matter under advisement to consider not only the original briefing by the

parties, but the briefing and arguments submitted by counsel in connection with the supplemental briefing on the hearsay issue.

This is a case that was originally initiated by Betty Nichols. During the course of this case pending, Ms. Nichols died of cancer and Kathy Romero, her daughter, was substituted as party plaintiff, acting in her capacity as personal representative of the estate of Ms. Nichols.

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.

Plaintiff's contention is that a person with Ms. Nichols' medical history is required to have an annual pap smear. With that contention, 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 Ms. Nichols' prior medical history should have an annual pap smear.

It is undisputed that Ms. Nichols did not return to Dr. Chichester in 1997 for a follow-up pap smear, and did not return until she was suffering from symptoms as her cancer developed.

The case has principally been reduced to a question of whether or not the proffered testimony of Kathy Romero (plaintiff's daughter) that she was told by her mother that Dr. Chichester, after the 1996 pap smear, told Ms. Nichols (her mother) that Ms. Nichols did not need to return for follow-up pap smears because she had had a hysterectomy, is admissible at trial to establish that Dr. Chichester was negligent in his care of Ms. Nichols.

Nothing was produced for the record on that subject from Ms. Nichols herself prior to her passing away, as stated above. Ms. Romero now wants to testify that she was told by her mother that Dr. Chichester told her mother that she did not need an annual pap smear.

The defendant, Dr. Chichester, has objected to the proposed testimony of Ms. Romero, suggesting that it is double hearsay. Counsel for the plaintiff argues that it is not hearsay, inasmuch as the statement is not offered to prove the truth of the matter asserted. Further, the plaintiff argues that if it is hearsay, it is admissible under the residual hearsay provision found in Utah Rule of Evidence 804(b)(5).

This Court is of the opinion that the statement which is offered, that is, that Dr. Chichester told Ms. Nichols that she did not have to return for an annual pap smear is offered for the truth of the matter asserted. If the plaintiff is to prevail on the

plaintiff's theory that Dr. Chichester was negligent because he failed to advise Ms. Nichols that she did need to return for an annual pap smear, then clearly that statement goes to the plaintiff's principal allegation regarding the negligence of Dr. Chichester. This Court can reach no other conclusion than that the statement of Ms. Romero as to what her mother told her as to what her mother was told by Dr. Chichester is clearly hearsay and to be admissible, must be admissible under one of the exceptions to the hearsay rule.

Having determined that the statement proffered by Ms. Romero is hearsay, the Court turns to whether or not it is admissible under Rule 804(b) (5) of the Utah Rules of Evidence. This exception is commonly referred to as the "residual" or "catchall" hearsay exception. The rule allows hearsay in certain circumstances where there is no other exception, assuming that certain criteria are met.

The Court must first determine that the statement is offered as evidence of a material fact. Clearly, in this case it is a material fact, if it is a fact, that Dr. Chichester told Ms. Nichols that she did not have to return for an annual pap smear as alleged by the plaintiff. Secondly, the Court must find that the statement is more probative on a point for which it is offered than any other evidence which the proponent can procure through

reasonable efforts. It does not appear that there is any other evidence which the proponent, in this case the plaintiff, can procure to support the allegation that Dr. Chichester told Ms. Nichols that she did not have to return for an annual pap smear. Finally, the rule requires that the Court must make a finding that the general purpose of the Rules of Evidence and the interests of justice will be served by the admission of the statement into evidence. The appellate courts on this issue have generally held that the Court must consider whether or not there are guarantees of trustworthiness.

There is nothing in the record, other than Ms. Romero's testimony that she was told by her mother that Dr. Chichester told her mother that she did not need to return for annual pap smears. 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. The Court has 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.

In considering all of the above, the Court is compelled to reach the conclusion that there is insufficient guarantee of

trustworthiness in the double hearsay sought to be offered by Ms. Romero which would support the plaintiff's claim that Dr. Chichester breached the standard of care by telling Ms. Nichols that she did not need to return for an annual pap smear. The Court, absent those guarantees of trustworthiness, cannot reach the conclusion as required by Rule 804(b)(5) that the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

As Ms. Romero's statement cannot be admissible as evidence, because it is barred by the hearsay rule, this Court is left with the expert testimony of defendant's experts and the defendant himself, that the standard of care was not breached, inasmuch as the only avenue for the plaintiff to recover in this matter would be to establish that Dr. Chichester told Ms. Nichols that she did not need to return for an annual pap smear, which would constitute a violation of the standard of care required for physicians such as Dr. Chichester in circumstances such as those related to Ms. Nichols.

Having determined that Ms. Romero's proposed hearsay statement cannot be admitted, the Court need not deal with the claims of the defendant regarding lack of evidence on the part of the plaintiff regarding a breach of the standard of care and/or the question of the nature and extent of Dr. Golles' testimony and its propriety.



Defendant's Motion for Summary Judgment, therefore, must be granted and for the reasons set forth in this Memorandum Decision, along with those advanced by the defendant on the subject of the admissibility of hearsay.

Counsel for the defendant, Dr. Chichester, should prepare the appropriate Order Granting Summary Judgment, all in accordance with this Memorandum Decision, insuring that the provisions of Rule 52(a) of the Utah Rules of Civil Procedure which require setting forth the basis in the body of the Order for granting the Motion for Summary Judgment are included, and then submit the matter to the Court for its final review and, if appropriate, signature.

Dated this 11 day of February, 2005.

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TIMOTHY R. HANSON  
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 11 day of February, 2005:

Fred R. Silvester  
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Salt Lake City, Utah 84105

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151

P. KEITH NELSON [2391]  
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Telephone: (801) 531-2000  
Fax No.: (801) 532-5506

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

<p>KATHY ROMERO, as personal representative of the estate of BETTY NICHOLS and in behalf of the heirs of BETTY NICHOLS,</p> <p>Plaintiff,</p> <p>vs.</p> <p>DAN L. CHICHESTER, M.D., and FIRST AFFILIATED OB-GYN, L.L.C.,</p> <p>Defendants.</p>	<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF SUMMARY JUDGMENT</b></p> <p>Civil No. 990912348</p> <p>Judge Timothy R. Hanson</p>
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Defendants' Renewed Motion for Summary Judgment was submitted to this Court on or about June 1, 2004. Plaintiff filed a response to Defendants' Motion on or about June 22, 2004, and Defendants then filed a Reply Memorandum on or about June 29, 2004. Oral argument on the matter was first heard on September 27, 2004, and, after oral argument, the Court allowed counsel the opportunity to file additional Memoranda on the hearsay rule issues that came up

during the course of oral argument. Counsel filed their respective briefs on the question of the admissibility of certain perceived hearsay statements, and the Court once again heard oral argument on the Motions on February 7, 2005. The Court, now having reviewed all the relevant pleadings and documents, and otherwise being fully advised, now makes and enters the following Findings of Fact, Conclusions of Law, and Order:

### **FINDINGS OF FACT**

1. The Court finds that the material facts of this case are undisputed and that there are no genuine issues of fact supported by admissible evidence that preclude summary judgment as to the claims asserted by Plaintiff against Defendants.
2. This case arose from the care and treatment provided by Defendants for Betty Nichols, Plaintiff's mother who is now deceased.
3. Plaintiff's mother, Betty Nichols, saw Defendant Dan L. Chichester in 1996 for an examination and pap smear. She was seen at Dr. Chichester's clinic, First Affiliated OB-GYN, L.L.C.
4. Ms. Nichols did not return to Dr. Chichester in 1997 for a follow-up pap smear.
5. Ms. Nichols did not return to see Dr. Chichester until 1998, when she was suffering from symptoms as her cancer developed.

6. Plaintiff's claims for medical negligence against Defendants revolves around Plaintiff's allegation that Dr. Chichester failed to obtain from Ms. Nichols in 1997 a follow-up pap smear which, according to Plaintiff, would have revealed the cancer from which Ms. Nichols ultimately died.

7. The Court finds, and Plaintiff has acknowledged, that the only avenue for Plaintiff to recover in this matter would be to establish that Dr. Chichester told Ms. Nichols that she did not need to return for an annual pap smear because she had undergone a hysterectomy. Such counsel would constitute a violation of the standard of care required for physicians such as Dr. Chichester in circumstances such as those related to Ms. Nichols.

8. No direct testimony was produced from Betty Nichols before she passed away to prove that Dr. Chichester told her that she did not need an annual pap smear. Instead, Plaintiff wishes to proffer her own testimony at trial that she was told by her mother (Ms. Nichols) that Dr. Chichester told Ms. Nichols that she did not need an annual pap smear.

### **CONCLUSIONS OF LAW**

1. In order to establish cause of action for medical negligence resulting in wrongful death, a plaintiff must prove with competent evidence, (1) the requisite standard of care, (2) defendant's failure to comply with that standard of care, (3) injury, and (4) that defendant's acts or omissions proximately caused the plaintiff's injuries. *See Dalley v. Utah*

*Valley Reg'l Med. Ctr.*, 791 P.2d 193 (Utah 1990), *Diekeou v. Osborn*, 881 P.2d 943, 946 (Utah Ct. App. 1994).

2. In medical malpractice actions which involve technical issues not susceptible to proof by means of lay opinion, a plaintiff must procure expert medical testimony in order to establish each element of the *prima facie* case. *See Robb v. Anderton*, 863 P.2d 1322, 1325-26 (Utah Ct. App. 1993).

3. The medical issues in this case filed by Plaintiff are technical and beyond the experience and knowledge of laypersons; Plaintiff is therefore required to come forward with expert testimony to establish that Defendants' care and treatment of Betty Nichols breached any applicable standard of care and was a proximate cause of Plaintiff's alleged damages.

4. No admissible evidence supports Plaintiff's only contention that Dr. Chichester breached the applicable standard of care—to wit, that Dr. Chichester told Betty Nichols after her 1996 pap smear that she did not need to return for follow-up pap smears because she had undergone a hysterectomy.

5. The proposed testimony of Plaintiff that she was told by her mother that Dr. Chichester told Ms. Nichols that she did not need yearly pap smears is hearsay. The statement is offered to prove the truth of the matter asserted because it goes to Plaintiff's principal allegation regarding the negligence of Dr. Chichester.

6. In order for the proposed testimony of Plaintiff to be admissible, it must be admissible under one of the exceptions to the hearsay rule.

7. The Court concludes that none of Plaintiff's proposed exceptions to the hearsay rule under Rule 803, U.R.E., applies in this instance.

8. Under the "residual exception" of Rule 804(b)(5) of the Utah Rules of Evidence, the proposed testimony must concern a material fact, must be more probative on a point for which it is offered than any other evidence which can be reasonably procured, and must also serve the general purpose of the Rules of Evidence and the interests of justice. Generally, the proposed evidence must carry with it sufficient guarantees of trustworthiness to satisfy this final prong.

9. Plaintiff's proposed testimony concerns a material fact—if it is a fact—that Dr. Chichester told Ms. Nichols that she did not have to return for an annual pap smear, as alleged by Plaintiff.

10. No other evidence can be reasonably procured to support the allegation that Dr. Chichester told Ms. Nichols that she did not have to return for an annual pap smear.

11. Nevertheless, Plaintiff's proposed testimony lacks sufficient guarantees of trustworthiness. Although Plaintiff in her deposition testimony was reasonably clear on what she claims she was told by her mother, her testimony is substantially less clear as to when that conversation took place and in what context. Moreover, the Court has not been directed to any

medical records in which Ms. Nichols, in her subsequent treatment, made the allegation that her daughter now attributes to her. Therefore, the Court cannot reach the conclusion as required by Rule 804(b)(5) that the general purposes of the evidentiary rules and the interests of justice will best be served by admission of the statement into evidence.

12. Because Plaintiff's proposed testimony is barred by the hearsay rule and cannot be admissible as evidence, Plaintiff, as a matter of law, cannot show that Dr. Chichester breached the applicable standard of care.

#### **ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, Defendants' Renewed Motion for Summary Judgment is GRANTED. The Court expressly determines that there is no just reason for delay in entering a final judgment in this matter and directs that final judgment by virtue of this Order be entered dismissing with prejudice Plaintiff's claims and causes of action against Defendants Dan L. Chichester, M.D., and First Affiliated OB-GYN, L.L.C., in their entirety and on the merits. Each party is to bear their own costs.

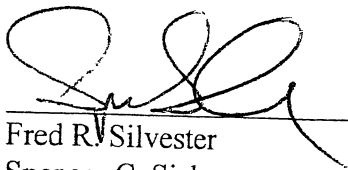
DATED this 22 day of March, 2005.

BY THE COURT:

/s/  
Honorable Timothy R. Hanson  
Third Judicial District Court



APPROVED AS TO FORM:

A handwritten signature in black ink, appearing to read 'Fred R. Silvester', written over a horizontal line.

Fred R. Silvester

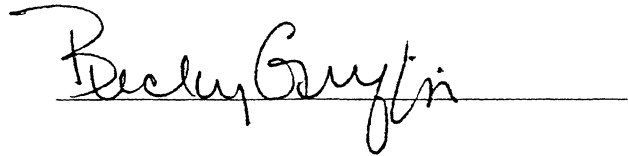
Spencer C. Siebers

Attorneys for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 21 day of March, 2005, to the following:

Fred R. Silvester  
Spencer C. Siebers  
SILVESTER & CONROY  
1371 East 2100 South, Suite 200  
Salt Lake City, Utah 84105  
**Attorneys for Plaintiff**

  
\_\_\_\_\_

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