

IN THE UTAH COURT OF APPEALS

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Kathy Romero, as personal	)	MEMORANDUM DECISION
representative of the estate	)	(Not For Official Publication)
of Betty Nichols and in behalf	)	
of the heirs of Betty Nichols,	)	Case No. 20050392-CA
	)	
Plaintiff and Appellant,	)	F I L E D
	)	(May 25, 2006)
v.	)	
	)	2006 UT App 203
Dan L. Chichester, M.D.; and	)	
First Affiliated Ob-Gyn,	)	
L.L.C.,	)	
	)	
Defendants and Appellees.	)	

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Third District, Salt Lake Department, 990912348  
The Honorable Timothy R. Hanson

Attorneys: Fred R. Silvester and Spencer Siebers, Salt Lake City, for Appellant  
P. Keith Nelson, Brandon B. Hobbs, and Zachary E. Peterson, Salt Lake City, for Appellees

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Before Judges Davis, Orme, and Thorne.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record[,] and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under applicable law.

"The residual hearsay exception is to be used rarely and construed strictly." State v. Workman, 2005 UT 66, ¶12, 122 P.3d 639. See generally Utah R. Evid. 804(b)(5) (2004).<sup>1</sup> "[W]e only

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<sup>1</sup>As of November 1, 2004, what was formerly rule 804(b)(5) of the Utah Rules of Evidence is now rule 807. See Utah R. Evid. 807 advisory committee note. Although the new rule is the same  
(continued...)

allow the admission of hearsay evidence under the residual exception when the high requirements of rule 804(b)(5) are met." Workman, 2005 UT 66 at ¶12. Of those high requirements, the one most pertinent to this case is the "high standard of trustworthiness" that a proponent's hearsay evidence must have in order to be admissible. Id. at ¶14. Indeed, the residual exception is only "intended for use in those rare cases where . . . [the statement's] admission is justified by the inherent reliability of the statement." State v. Nelson, 777 P.2d 479, 482 (Utah 1989).

This court "has identified a number of factors that courts should consider in determining whether a hearsay statement has sufficient circumstantial guaranties of trustworthiness to be admitted." State v. Webster, 2001 UT App 238, ¶27, 32 P.3d 976. Considering such factors, the trial court in this case was not persuaded that "the circumstances under which [the statement] was made" provided sufficient guaranty of its trustworthiness to merit admission under the residual exception. Id. (internal quotations and citation omitted). We agree.

Romero's deposition testimony concerning what her mother told her in a conversation--though clear about what her mother had apparently said regarding Dr. Chichester's instruction--provided no detail or information about when the conversation actually occurred or in what context it took place. Nor did Romero make corrections to her deposition or submit an affidavit supplying that information. Yet, to have the type of circumstantial guaranties of trustworthiness necessary to allow the statement to be admitted to support the allegation that Dr. Chichester was negligent because of an instruction he gave her mother in 1996, and given the absence of corroborating evidence, it is vital to know when and under what circumstances Romero's mother told her about Dr. Chichester's alleged instruction. Without such information, it is impossible to say that the statement about Dr. Chichester's instruction meets the "high standard of trustworthiness" required for such hearsay evidence to be admitted under the residual exception to the hearsay rule. Workman, 2005 UT 66 at ¶14. And of course, as the proponent of

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<sup>1</sup>(...continued)  
in substance, we cite to rule 804(b)(5) because it is the iteration of the rule cited to and relied on by the trial court.

the hearsay statement, the burden of establishing admissibility was Romero's. The trial court therefore ruled correctly in excluding the hearsay statement.<sup>2</sup>

Affirmed.

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Gregory K. Orme, Judge

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WE CONCUR:

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James Z. Davis, Judge

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William A. Thorne Jr., Judge

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<sup>2</sup>As Romero notes in her brief, the trial court's exclusion of Dr. Matviuw's affidavit and testimony is a secondary issue that would be important only if we reversed the admissibility determination and the summary judgment, and remanded the case for trial. Because we affirm the trial court's evidentiary ruling, we do not address this secondary issue.