

<b>CHRISTINE BARTLETT</b> , individually )	IN THE
and as Personal Representative of the estate )	
of <b>CHRISTOPHER D. BARTLETT</b> , et al )	CIRCUIT COURT
)	
Plaintiffs )	FOR
)	
v. )	FREDERICK COUNTY
)	
<b>DAVID A. CHARLES, M.D.</b> et al )	Case No. 10-C-14-000122
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Defendants )	
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**MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY  
CONCERNING WITNESS CREDIBILITY**

Christine Bartlett et al, Plaintiffs, through counsel, as their Motion in limine to exclude expert testimony concerning witness credibility, respectfully says:

1. Defendant David A. Charles, M.D. asserts in his defense that during a telephone encounter with *Mrs. Bartlett* on 2/5/2013, he instructed *her* to take Mr. Bartlett to the ER immediately for urgent evaluation for possible pulmonary embolism. Dr. Charles further asserts that Mrs. Bartlett refused to comply with his instructions because Mr. Bartlett was supposedly “feeling better”. Dr. Charles adamantly denies that he spoke to *Mr. Bartlett* at any time on 2/5/2013 [Ex. A, David A. Charles, M.D. Depo., 55:5 – 56:13 (“I affirmly (*sic*) state for the record, I never spoke with Chris Bartlett”). Mrs. Bartlett denies that she spoke to Dr. Charles at any time on 2/5/2013 [Ex. B, Christine Bartlett, Depo. 178:16 – 20]. She has testified that Dr. Charles called Mr. Bartlett on 2/5/2013 in the afternoon. As a result of that conversation, Dr. Charles scheduled a CT scan of the chest for the next day, on 2/6/2013 at 10:30 a.m., at the Community Radiology facility in Rockville, Md. [Ex. B, Christine Bartlett Depo., 120:8 – 123:21; 177:6 – 178:5].

2. Dr. Umosella, Defendant's standard of care expert, is expected to testify that Dr.

Charles did, in fact, instruct either Mrs. or Mr. Bartlett to call 911 on 2/5/2013:

Q. So you will be testifying that Dr. Charles' testimony that he instructed Mrs. Bartlett to take Mr. Bartlett to the emergency room is credible?

A. *Absolutely.* I would think that – and this is from medical experience, that when you have a patient who you are involved with and has an acute issue that is catastrophic, and I think you classify this as that, those events, those memories don't get lost. You remember those verbatim, what you did, who you spoke to.

And I would certainly believe that Dr. Charles just like any other physician remembers those details as if it were yesterday. And that there would be no reason for him not to tell this patient as the patient was told multiple times by other family members, let's go to the hospital. He didn't want to go.

It all fits that he – a commonsense thing for any doctor. There would be no reason for him to give any other advice. Go to the emergency room. I can't do anything at my office for you. Go to the emergency room. If I had to weigh those possibilities, I would put more weight on the actual conversation and the recommendations.

I can't say for sure whether it was Mr. or Mrs. Bartlett that he spoke to, but I can be reasonably sure that that was the recommendation.

Q. You will testify that – you intend to testify that Dr. Charles' testimony is more believable than Mrs. Bartlett's testimony, that she didn't talk to Dr. Charles at all?

A. I didn't say that. There's no argument that the conversation took place with either Mr. or Mrs. Bartlett. There's no controversy that there was a phone call and a discussion. We know that. The controversy you're bringing up whether he spoke to Mr. or Mrs. Bartlett, it doesn't matter to me. I think the conversation took place. *And that it was advised that he call 911. I think that's without debate in my mind.*

[Ex. C, Charles Umosella, M.D. Depo., 111:14 - 113:10].

3. Dr. Charles has also identified Philip Buescher, M.D. as a standard of care expert.

Like Dr. Umosella, Dr. Buescher is expected to vouch for Dr. Charles's credibility:

Dr. Buescher is expected to testify that he is fully supportive of the providers' recommendation to Mr. and/or Mrs. Bartlett that Christopher Bartlett go to the ER related to his symptoms in February 2013. Further, Dr. Buescher is expected to testify that proper testing for the potential causes of Mr. Bartlett's symptoms could not be done in a primary care physician's office and that such testing can only be carried out in a hospital. Dr. Buescher is also expected to testify that based upon Mr. Bartlett's history, clinical

course and symptoms, he could have been suffering from several different conditions, including heart attack, pulmonary embolus or pneumothorax, and therefore, he needed to be evaluated in a hospital as advised.

Further, Dr. Buescher will opine that a true STAT study can not be performed anywhere but a hospital, and that the definitive diagnosis and treatment of a heart attack, pulmonary embolus or pneumothorax can not be accomplished in a primary care physician's office. *Given all of these factors, he has no reason to doubt that Dr. Charles advised that the patient needed to go to the ER for evaluation of his symptoms....*

[Ex. D, Defendant David A. Charles, M.D.'s Supplemental Expert Witness Designation].

4. The law is well established that no witness, expert or otherwise, may give an opinion concerning the truthfulness or veracity of another witness's testimony. A court must reject such testimony as a matter of law. In *Hall v. State*, 107 Md. App. 684, 692, 670 A.2d 962 (1996), the court explained this rule of law as follows:

Every witness is prohibited from testifying that, in his or her opinion, the testimony given by another witness is true [citation omitted]. Every witness is prohibited from testifying that, in his or her opinion, the testimony given by another witness is false. This prohibition applies during cross examination as well as direct examination [citation omitted]. It applies in civil cases as well as criminal cases [citation omitted]. It applies to non-expert testimony as well as to expert testimony [citation omitted].

107 Md. App. At 692, 670 A.2d at 966. See *Bentley v. Carroll*, 355 Md. J312, 734 A.2d 697 (1999); *Bohnert v. State*, 312 Md. 266, 539 A.2d 657 (1988)( no witness qualifies as "expert in credibility", no matter what his experience or expertise); *Hutton v. State*, 339 Md. 480, 503, 663 A.2d 1289, 1300 (1995)("[N]o matter how learned in his or her field of expertise, no expert is in a better position to assess the credibility of a witness than is the jury"); *Globe Sec. Systems Co. v. Sterling*, 556 A.2d 731, 79 Md.App. 303 (Md. App., 1988)(opinion as to appellee's veracity

“cloaked in mantle of expertise” inadmissible); *Memc Elec. Materials Inc. v. Bp Solar Int'l Inc.*, 9 A.3d 508, 196 Md. App. 318 (Md. App., 2010).<sup>1</sup>

5. The rationale for excluding expert opinions concerning the credibility of other witnesses is that such opinions encroach on the jury's function to weigh the testimony and judge the credibility of witnesses. *Bohnert*, 312 Md. at 278. It is not the function of an expert to “take sides” and resolve conflicting evidence. Because expert opinions concerning witness credibility are inadmissible as a matter of law, the trial court has no discretion to admit such testimony. The admission of such testimony constitutes reversible error. *Id.* at 279.


6. In the case *sub judice*, there is a factual dispute whether Dr. Charles on 2/5/2013 instructed Mr. or Mrs. Bartlett to go to the ER immediately for urgent evaluation of his respiratory symptoms. Defendant's medical experts, including but not limited to Drs Umosella and Buescher, intend to testify that in their opinion Dr. Charles did, in fact, advise either Mr. or Mrs. Bartlett to seek immediate medical attention on 2/5/2013. In effect, Defendant's experts intend to assert their belief in the truthfulness of Dr. Charles's testimony. Their testimony, either directly or indirectly, will assert their belief that the conflicting testimony of Mrs. Bartlett and all of the witnesses who will testify on her behalf based on their personal knowledge is not credible. Maryland law is settled that Defendant's experts are not permitted to vouch for Defendant's credibility. Because they are not "experts in credibility", Defendant's medical experts may not testify that Dr. Charles is telling the truth, and that Mrs Bartlett and the witnesses who testify on her behalf are not telling the truth.

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<sup>1</sup> An expert's opinion which assumes the truth of another witness's testimony is permissible, so long as the opinion does not assert the expert's belief in the truthfulness of such testimony. *Hall*, 107 Md. App. 693.

**WHEREFORE**, Plaintiffs respectfully request that this Court pass an order in limine which precludes any of Defendant's expert witnesses from giving any testimony, opinion or otherwise, that the testimony of another witness is true or false, or that endorses or disparages directly or indirectly the credibility of another witness, including without limitation any such testimony concerning either party's version of events which occurred on 2/5/2013, and for such other and further relief as justice may require.

Date: 5/11/15

  
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