

IN THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE

Robert Crotty and Jennifer Crotty,

Plaintiffs,

v.

Mark Flora, M.D.,

Defendant.

**Case No: 17C614
JURY DEMAND**



**ORDER ON PLAINTIFFS' MOTION TO EXCLUDE TESTIMONY REGARDING
ALLEGED FAULT OF NONPARTY PHYSICIANS**

THIS CAUSE came on for hearing on the 9th day of July 2021, before the Honorable Joe Binkley, Judge of the Fifth Circuit Court of Davidson County, Tennessee upon the *Plaintiffs' Motion to Exclude Testimony regarding Alleged Fault of Nonparty Physicians.*

It appears to the Court that the primary injury claimed in this case is the loss of Mr. Crotty's right kidney after the development of a kidney stone in the right ureter. It further appears to the Court that the Defendant intends to present proof that the events that likely caused the loss of the kidney occurred during treatment subsequent to that of the Defendant Dr. Flora and likely occurred during the treatment of Mitchell Wiatrak, M.D. who is not a party to this case. Plaintiffs insist that offering expert opinion that Dr. Wiatrak, rather than Defendant, caused Mr. Crotty's injuries is tantamount to "blame shifting" and thus pursuant to *George v. Alexander*, 931 S.W.2nd 517 (Tenn. 1996), a specific

allegation of comparative fault should have been plead in the answer to the complaint. There being no allegations of comparative fault in the Answer, Plaintiffs move to exclude evidence that Dr. Wiatrak caused Mr. Crotty harm or in any way contributed to the loss of his kidney.

Defendant counters that he is not asserting negligence or any departure from the acceptable standards of professional practice by Dr. Wiatrak but only that a known complication occurred during Dr. Wiatrak's treatment that led to the ultimate loss of the right kidney. Defendant further asserts that there is no expert testimony to support that Dr. Wiatrak deviated from the acceptable standards of professional practice as required to assert fault under the Health Care Liability act, T.C.A. 29-26-122 (b). Defendant also insists that without specific expert testimony of such a departure, he could not comply with the certificate of good faith requirement that is a prerequisite to the assertion of negligence of a health care provider. Lastly, Defendant asserts that there must be a "tortfeasor" or "wrong-doer" to assert "fault" and that the events causing the loss of Mr. Crotty's kidney were due to complications that occurred without negligence on the part of Dr. Wiatrak.

The Court finds that the proffered expert proof that the events causing the loss of Mr. Crotty's Kidney occurred during the subsequent treatment by Dr. Wiatrak constitutes blame shifting and thus required a specific assertion of comparative fault by Defendant.

Therefore, the expert opinion that the harm or injury to Mr. Crotty occurred during the treatment of Dr. Wiatrak will be excluded.

Realizing the importance of this ruling, the Court will entertain a request for an interlocutory appeal by the Defendant.

Judge Joe Binkley, Jr., Fifth Circuit

Approved for entry:

THE HIGGINS FIRM, PLLC

s/ Benjamin J. Miller

RICHARD D. PILIPONIS (#16249)

BENJAMIN J. MILLER (#25575)

525 4th Ave S

Nashville, TN 37210

(615) 353-0930

rdp@higginsfirm.com

ben@higginsfirm.com

Attorneys for Plaintiffs

NORTH, PURSELL & RAMOS, PLC

s/ Brent A. Kinney (by BJM with permission)

PHILLIP NORTH (#2407)

RENEE LEVAY STEWART (#18768)

BRENT A. KINNEY (#24548)

414 Union Street

Bank of America Plaza, Suite 1850

Nashville, TN 37219

(615) 255-2555

north@nprattorneys.com
rstewart@nprattorneys.com
bkinney@nprattorneys.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2021 this document was e-filed and served via the e-filing notification system on:

Phillip North
Renee Levay Stewart
Brent A. Kinney
NORTH, PURSELL & RAMOS, PLC
414 Union St Ste 1850
Nashville TN 37219-1783
north@nprattorneys.com
rstewart@nprattorneys.com
bkinney@nprattorneys.com

s/ Benjamin J. Miller
BENJAMIN J. MILLER



Case Title: CROTTY V FLORA

Case Number: 17C614

Type: ORDER- GENERAL

The foregoing is hereby ORDERED, ADJUDGED
AND DECREED:

Judge Joe Binkley, Jr., Fifth Circuit