UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

TIFFANY LAY and ROBERT LAY PLAINTIFFS

v. CIVIL ACTION NO. 3:19-CV-188-KHJ-LGI

UNITED STATES OF AMERICA DEFENDANT

MEMORANDUM OPINION AND ORDER

Plaintiffs Tiffany and Robert Lay sued the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.*, alleging Tiffany Lay was injured as a result of medical treatment Dr. Rachel Peery provided during a September 25, 2015 emergency room visit to the Veterans Administration ("VA") Medical Center. The Court held a bench trial from April 19, 2021 to April 22, 2021. In accordance with Federal Rule of Civil Procedure 52,[1] the Court makes the following findings of facts and conclusions of law. As explained below, the Court finds and concludes that the Lays have not established by a preponderance of the evidence that Dr. Rachel Peery breached her duty of care or that such breach proximately caused Mrs. Lay's injuries.

[1] "In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58." Fed. R. Civ. P. 52(a)(1).

I. Jurisdiction

Because the Lays sue under the FTCA, this Court has federal question jurisdiction. *See* 28 U.S.C. § 1331 (providing federal district courts with original subject matter jurisdiction over cases or controversies arising under the U.S. Constitution, laws, or treaties). This Court also has subject matter jurisdiction under 28 U.S.C. § 1346, which grants district courts "exclusive jurisdiction" over all civil actions against the United States arising from the negligence of a federal employee acting within the scope of employment. *Id.* § 1346(b)(1).

II. Findings of Fact

A. Cauda Equina Syndrome

The cauda equina is a collection of nerve roots located at the bottom of the spinal cord that affects bladder function, sphincter control, and sensation of the lower extremities, genitalia, and sexual organs. Cauda equina syndrome occurs when a spinal disk herniates into the spinal canal so that it compresses the cauda equina nerve roots. This compression creates a neurosurgical emergency because compressed nerves will eventually become necrotic from a lack of blood flow and cause permanent damage, including lack of bowel and bladder function, loss of sensation and sexual function, and chronic pain. The "red flag" symptoms that may cause a doctor to suspect cauda equina syndrome are sudden, acute low back pain; recent onset bladder and bowel dysfunction; saddle anesthesia (loss of sensation in the genital region, buttocks, and inner thighs); loss of reflexes; and loss of motor strength. These symptoms do not always present the same way and may vary in

intensity depending on where a patient is in the disease process. Early in the process, the symptoms are more subtle and less severe. As the disease progresses, the severity of symptoms increases. Cauda equina syndrome requires immediate surgery to remove the source of the compression and to prevent permanent damage due to nerve death. This disease is incredibly uncommon.

B. Mrs. Lay's Symptoms and Treatment Prior to September 25, 2015

Mrs. Lay served in the Army National Guard as a military police officer for several years and received an honorable discharge in 2012. She worked for the Veteran's Association ("VA") as a medical coder. Mrs. Lay has smoked cigarettes most of her life and has been very active. She married her husband in 2013, and two months later, she was pregnant with a daughter. Toward the end of her pregnancy, she reported back pain to her OB/GYN, Dr. Erica Ory. Mrs. Lay delivered her daughter via cesarian section ("C-section")[2] in April 2014 and saw Dr. Ory two months later for a follow-up visit. She did not report urinary leakage or incontinence during this visit but did report back pain. When this pain did not improve, Mrs. Lay reported it to her VA primary care physician, who prescribed medication and physical therapy. When the pain still did not improve,[3] the VA referred Mrs. Lay to outside neurologist Dr. Eric Amundson.

At her September 23, 2015 consult with Dr. Amundson, Mrs. Lay filled out a detailed review of systems form, reporting pain in her left buttock, the back of her

[2] Mrs. Lay testified she has been pregnant four times and delivered a baby vaginally prior to this C-section.

[3] In fact, Dr. Amundson's September 23, 2015 medical history note of Mrs. Lay shows her pain intensified two months before this appointment.

left thigh and leg, and numbness and tingling on the bottom of her left foot. Dr. Amundson reviewed this form and an MRI of Mrs. Lay's spine taken a month earlier, asked Mrs. Lay questions about her symptoms, and performed a physical examination. From this information, Dr. Amundson diagnosed Mrs. Lay with an S1 radiculopathy.[4] He increased her pain medication and scheduled her for surgery six weeks later.

C. Mrs. Lay's Symptoms and Treatment on September 25, 2015

Two days later, Mrs. Lay presented to the VA Emergency Room complaining of "increased back pain since Wednesday evening." Nurse Heather Forler included this complaint in her progress notes and wrote, "Pt has a herniated L5S1 with a scheduled surgery for same and states pain suddenly became worse with little relief from home meds. Pain is rated 6/10 after taking Norco. Provider to evaluate." Mrs. Lay testified that she reported urinary leakage. But Nurse Forler did not include this information in her notes and testified that she would have done so had Mrs. Lay reported this complaint. Nurse Forler did, however, put "x-ray" as a projected resource on the triage note because she thought Dr. Peery might order an x-ray or MRI to see if there had been a change in Mrs. Lay's disk herniation.

Dr. Rachel Peery examined Mrs. Lay. Dr. Peery reviewed Mrs. Lay's MRI from a month earlier and Nurse Forler's note. She asked Mrs. Lay questions about her symptoms and medical history. Although Dr. Peery admitted that she did not

[4] S-1 can refer to a vertebra or an individual nerve root. When the Court uses L5-S1, it refers to the spinal disk between the L5 and S1 vertebrae. When the Court uses S1 only (or S2, S3, and S4), it refers to the individual nerve root. For example, S1 radiculopathy refers to the compression of the S1 nerve root.

independently recollect much of this examination, she testified that her practice is to ask what brought the patient into the hospital and document the response in the first sentence of her notes. The first sentence of Dr. Peery's notes records Mrs. Lay's complaint as "increased back pain radiating down her left leg." Dr. Peery also testified that she asks her patients about their symptoms and medical history and documents only pertinent information. The rest of Dr. Peery's notes state,

> [Mrs. Lay] has a known herniation and was seen this past week by the neurosurgeon and has surgery planned for November. She got much worse and [ ] has pain with walking. She has no loss of control of bowel/bladder other than when she coughs/sneezes and has mild bladder leakage. She has been taking 2 hydrocodone at a time and cannot tolerate the muscle relaxer b/c she cannot hear her 16mo daughter at night if she takes them.

The meaning of the sentence, "She has no loss of control of bowel/bladder other than when she coughs/sneezes and has mild bladder leakage," was the source of much debate at trial. The Lays argue this sentence describes two types of bladder leakage: one occurring when Mrs. Lay coughed or sneezed and another occurring as Mrs. Lay sat in her bed on Friday morning. Mrs. Lay testified that she reported both kinds of leakage to Nurse Forler and Dr. Peery. But the United States disagrees and insists that this sentence refers only to mild leakage occurring when Mrs. Lay coughed or sneezed. Dr. Peery confirmed this interpretation. She testified that she intended for the phrase "and has mild bladder leakage" to describe the type of leakage Mrs. Lay reported when she coughed and sneezed.

The Court finds Dr. Peery's interpretation of her medical notes credible. Mrs. Lay testified that she came into the Emergency Room complaining of leaking urine,

but neither Nurse Forler nor Dr. Peery documented this as a chief complaint. And both said they would have documented this complaint if Mrs. Lay reported it. Dr. Peery further testified that Mrs. Lay only provided the information about the mild leakage when she coughed or sneezed in response to Dr. Peery asking, "Is there any dripping or dribbling, or anything like that?" Dr. Thomas Cullom's note from Mrs. Lay's treatment at Baptist Medical Center two days after Dr. Peery's visit states that Mrs. Lay "started to have some leakage" on Saturday (the day after her emergency room visit). The Court therefore finds that Mrs. Lay did not complain in the emergency room of leaking urine but only reported mild leakage when she coughed or sneezed.

Parties also contest whether Mrs. Lay told Dr. Peery that her urinary leakage was new. Mrs. Lay testified that this was one symptom that brought her to the emergency room and that she told both Nurse Forler and Dr. Peery that this symptom began Friday morning. As mentioned above, however, this symptom does not appear in the Nurse Forler's note and is not categorized as "new" in Dr. Peery's notes. Dr. Peery testified that it is her practice to ask patients when their symptoms started and especially here when Mrs. Lay reported urinary leakage because Dr. Peery was searching for signs and symptoms of cauda equina syndrome as a possible cause of Mrs. Lay's symptoms. She also testified that she would have documented if Mrs. Lay had reported this as a new symptom. Because she did not do this, Dr. Peery concluded Mrs. Lay did not tell her that it started that morning or at the same time as Ms. Lay's back pain.

The Lays rely heavily on the fact that Mrs. Lay's previous medical records do not show that she had a history of urinary leakage. Dr. Peery testified that she did not have Dr. Ory's or Dr. Amundson's notes at the time of her visit, so she could not have known whether this symptom appeared in Mrs. Lay's medical history. Even though Mrs. Lay testified that she *did* tell Dr. Peery this symptom was new, neither Nurse Forler's nor Dr. Peery's notes support this testimony. And Dr. Cullom's notes explicitly state she "started to have some leakage" on Saturday. Medical notes from the triage nurse and treating physician at the VA emergency room and from the neurosurgeon at Baptist Medical Center on Sunday, September 27, 2015, further support this finding because each of these medical professionals note that Mrs. Lay reported her incontinence as "new." The Court therefore finds that Mrs. Lay did not tell Dr. Peery that this symptom was new.

After taking Mrs. Lay's history, Dr. Peery performed a physical examination. Dr. Peery testified based on her notes that she examined Mrs. Lay's sensation (using a light touch with her fingernails), motor skills, and deep tendon reflexes. Dr. Peery's notes reflect Mrs. Lay reported numbness in her upper left leg, which Mrs. Lay and Dr. Peery testify was on the front (or anterior) of her leg. Dr. Peery stated she did not believe this symptom related to cauda equina syndrome because it was not in the saddle area (described by several experts as the area that touches a saddle when seated). The notes also reflect Mrs. Lay's motor skills were normal and her tendon reflexes were only slightly diminished, but equal on the right and left sides. Because Mrs. Lay did not report her urinary symptoms as new and her

physical exam did not show signs of cauda equina syndrome, Dr. Peery concluded that Mrs. Lay's existing herniated disc caused her back pain. Dr. Peery also concluded that Mrs. Lay's past pregnancies caused her urinary leakage (known as stress incontinence), which is extremely common among women who are athletic, smoke, or have had children. She prescribed Mrs. Lay oxycodone, steroids, and ice and heat, and told Mrs. Lay to come back as needed. Dr. Peery also testified that it is her practice to tell patients with back pain and a herniated disc to come back immediately if there is any change in their bowels or bladder.

D. Mrs. Lay's Symptoms and Treatment Following September 25, 2015

Two days later, Mrs. Lay again presented to the VA Emergency Room, this time complaining of increased back pain with new-onset bladder incontinence and numbness in her pelvic and gluteal area. Nurse Carolyn Meredith noted that Mrs. Lay rated her pain as 9/10 and had a "stooped stance with slow movement to ambulate." When Dr. Fernando Daniels III examined Mrs. Lay, he took the following history:

> This is a 40 year old female veteran who was seen in the ED on 9/25 with LBP and worsening pain that was initially responded to the prescribed therapy however yesterday the pain got more severe and she now has a new problem of urinary incontinence and she states that she cannot feel her pelvic and gluteal area. She states she has no feeling from her waist downwards. She and her husband coorobates [sic] her story that she got up over 30 times last night because she had to use the bathroom. She states that nothing would come out and she urinated on herself in the bed last night and she did not feel it. Pt states she has been scheduled for back surgery in November however, she feels like she cannot wait that long now.

Dr. Daniels did not do a rectal exam but called a neurosurgeon at Baptist Medical Center immediately because he was worried Mrs. Lay had developed cauda equina syndrome.

Dr. Daniels transferred Ms. Lay to Baptist Medical Center later that day, where Dr. Thomas Cullom III evaluated her. Dr. Cullom noted that Mrs. Lay had seen Dr. Amundson the week before but "did not have any weakness or any bowel or bladder control problems" at that time. He also noted that Mrs. Lay experienced severe back pain Wednesday evening, presented to the VA Emergency Room on Friday, and "on Friday or Saturday significantly got increasing back pain." As for Mrs. Lay's other symptoms, Dr. Cullom recorded, "[S]ince Saturday, which is yesterday, has been having difficulty voiding and felt like she had to go, but could not go and then started to have some leakage. Since yesterday, she has had numbness from the waist on, down both legs." Dr. Cullom also performed a rectal exam and post-void residual, which showed decreased rectal tone and residual urine in the bladder. Based on Mrs. Lay's history and his exam findings, Dr. Cullom ordered another MRI, which showed a massive disc herniation into the spinal column compressing Mrs. Lay's cauda equina nerves. Dr. Cullom performed surgery that evening to decompress the nerves by removing the herniated disc fragments. Despite this surgery, Mrs. Lay continued to experience pain, weakness in her legs, inability to empty her bowels and bladder, numbness in her genital area, and a lack of sexual function and sensation.

III. Conclusions of Law

A. Standard for Medical Malpractice Under Mississippi Law

The FTCA authorizes suits for damages against the United States for personal injury caused by a federal government employee's negligence if "a private person would be liable under the law of the state in which the negligent act or omission occurred." *Hannah v. United States*, 523 F.3d 597, 601 (5th Cir. 2008) (citing 28 U.S.C. §§ 1367(b)(1), 2674). Dr. Peery's treatment of Ms. Lay occurred in Mississippi, so Mississippi state law applies.

Under Mississippi law, "to prevail in a medical malpractice action, a plaintiff must establish by expert testimony, [1] the standard of acceptable professional practice; [2] that the defendant physician deviated from that standard; and that [3] the deviation from the standard of acceptable professional practice was the proximate cause of the injury of which the plaintiff complains." *Austin v. Wells*, 919 So. 2d 961, 966 (Miss. 2006) (citation omitted). Mississippi providers are held to the national standard of care and must exercise reasonable and ordinary care in the treatment of their patients. *Mitchell v. Univ. Hosps. & Clinics-Holmes Cty.*, 942 So. 2d 301, 303 (Miss. Ct. App. 2006). This means providers must

> use his or her knowledge and therewith treat through maximum reasonable medical recovery, each patient, with such reasonable diligence, skill, competence, and prudence as practiced by minimally competent physicians in the same specialty or general field of practice throughout the United States, who have available to them the same general facilities, services, equipment[,] and options.

Id. (quoting *Hall v. Hilbun*, 466 So. 2d 856, 873 (Miss. 1985)). A breach of this duty will not be presumed, but rather it is presumed that a physician used ordinary care

in each case. *Kelly v. United States*, No. 3:14-CV-70-HTW-LRA, 2017 WL 5659962, at *6 (S.D. Miss. Mar. 13, 2017) (citing *DeLaughter v. Womack*, 164 So. 2d 762, 769 (Miss. 1964)). A physician breaches this duty when he or she fails to treat a patient with reasonable and ordinary care. *See Estate of Northrup v. Hutto*, 9 So. 3d 381, 384 (Miss. 2009) (emphasis in original) (quoting *Hilbun*, 466 So. 2d at 871) ("[P]hysicians incur liability only when the quality of care they render falls below *objectively ascertained* minimally acceptable levels.").

To show the breach proximately caused plaintiff's injuries, "the plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough." *Univ. of Miss. Med. Ctr. v. Littleton*, 213 So. 3d 525, 535 (Miss. Ct. App. 2016). In other words, a plaintiff must show that "proper treatment would have provided the patient 'with a greater than 50 percent chance of a better result than was in fact obtained.'" *Norman v. Anderson Reg. Med. Ctr.*, 262 So. 3d 520, 524 (Miss. 2019) (quoting *Ladner v. Campbell*, 515 So. 2d 882, 889 (Miss. 1987)). "Each element of medical malpractice must be demonstrated through medical-expert testimony, and the expert must articulate and identify the standard of care that was breached and establish that the breach was the proximate cause or the proximate contributing cause of the alleged injuries." *Id.*

B. Standard of Care and Breach

Both parties' standard of care experts agree that an emergency room physician has a duty to (1) take a detailed patient history, (2) perform a physical examination, (3) do a differential diagnosis based on the history and exam findings, and (4) create a treatment plan.[5] The Court will therefore consider whether Dr. Peery breached the standard of care as to these duties.

As to the first element, the United States' expert Dr. Thomas A. Sweasey testified that a doctor takes an appropriate history when she gets information about the patient's symptoms, previous treatment, and medication. The Lays' expert Dr. Gayle A. Galan similarly testified that a doctor takes an appropriate history when she asks the right questions and gets the pertinent information. When Mrs. Lay presented to the VA Emergency Room on Friday, September 25, 2015, she complained of a sudden increase in low back pain since Wednesday evening. Dr. Peery asked Mrs. Lay several questions and discovered Mrs. Lay had a herniated disc at L5-S1, had seen a neurosurgeon two days earlier, and had scheduled surgery for November. Dr. Galan said Dr. Peery did not ask Mrs. Lay about her bowels on

[5] Although none of the Lays' experts explicitly adopted this standard of care, Dr. Gayle A. Galan testified that an emergency room doctor must obtain an appropriate history. She believed Dr. Amundson did not need to order a new MRI on September 23, 2015, because Mrs. Lay's history (step one) and the results of her physical examination (step two) suggested an S1 radiculopathy (step three). Dr. Carlos A. Bagley, also an expert for the Lays, explained that doctors must rely on symptoms (from patient history) and signs (from doctor's examination) when making a diagnosis. Both experts therefore admit the standard of care requires that the doctor take a history, perform an examination, and come up with a differential diagnosis and treatment plan based on the history and exam findings. The United States' expert Dr. Thomas Sweasey testified that these four elements comprise the standard of care for an emergency room physician.

Friday. But Dr. Peery testified that it is her practice to ask patients with severe back pain whether they have had trouble "pooping or peeing," incontinence, or "dripping and dribbling." And Mrs. Lay admitted that she did not report any loss of control of her bowel or bladder because she was not "pooping on [herself]." Mrs. Lay did report mild bladder leakage when she coughed or sneezed in response to Dr. Peery's questions but did not report this symptom as new or beginning with her increase in back pain. Dr. Peery also asked Mrs. Lay about her medication and learned Dr. Amundson prescribed a double dose of hydrocodone. Because Dr. Peery thoroughly questioned Mrs. Lay about her past treatment and symptoms, the Court finds she conducted an adequate history.

Dr. Peery then performed a physical examination of Mrs. Lay. The Lays argue the standard of care required Dr. Peery to do a pinprick exam, post-void residual, digital rectal exam, and MRI; to call Dr. Amundson; and to educate Mrs. Lay about cauda equina based on her history and symptoms alone. The United States argues the standard of care did not require these actions because the results of Mrs. Lay's history and physical examination did not show any signs of cauda equina syndrome.

Parties' experts disagreed as to whether Dr. Peery breached the standard of care, yet all agreed that the tests a doctor must perform is based on the circumstances. Dr. Galan testified that the standard of care required Dr. Peery to order a post-void residual, pinprick sensation exam, digital rectal exam, and MRI; to call Dr. Amundson; and to educate Mrs. Lay about cauda equina syndrome based

on these signs and symptoms: a known herniated disk at L5-S1, sudden increase in lower back pain, mild urinary leakage, numbness in Mrs. Lay's upper leg. The Lays' expert Dr. Carlos A. Bagley also relied on Mrs. Lay's sudden increase in back pain and urinary leakage, but he testified the standard of care only required an MRI if the results of the post-void residual and digital rectal exam were abnormal. He also stated he would take a patient into surgery without an MRI if he could not get one right away and if the patient's symptoms and test results clearly indicated cauda equina syndrome. The Lays' expert Dr. Bruce D. Janiak stated that a doctor could perform an MRI (without the post-void residual and digital rectal exam) or could perform a sensation exam, post-void residual, and rectal exam, and only do an MRI if she saw any abnormalities. Dr. Janiak also testified that the standard of care requires calling Mrs. Lay's neurosurgeon only when a doctor has relevant concerns that relate to the doctor's specialty.

Each of these experts, however, relied heavily on Mrs. Lay's medical records from Dr. Ory and Dr. Amundson to show Mrs. Lay's urinary leakage was a new symptom. Dr. Peery did not have these records when she treated Mrs. Lay, so she had to rely on Mrs. Lay to report this symptom as new. And this Court has already found that Mrs. Lay did not do so. Rather, the record shows that Mrs. Lay reported a sudden increase in lower back pain and a herniated disk at L5S1 but did not report any recent onset constipation or incontinence. This is relevant because urinary dysfunction is only a symptom of cauda equina syndrome if it is connected

to the patient's sudden increase in back pain.[6] But even if she had reported the symptom as new, the Court is not convinced that the standard of care required Dr. Peery to order more testing because the results of Mrs. Lay's physical examination did not show any "red flag" symptoms of cauda equina syndrome. The Lays' experts also ignore the fact that Dr. Peery *did* perform a sensation exam, though with her fingernails instead of a pin for safety reasons. Only Dr. Sweasey relied on the complete facts in giving a standard of care opinion—that Mrs. Lay did not report her mild urinary leakage as a new symptom and that Dr. Peery performed a sensation exam. Based on these facts, Dr. Sweasey concluded that the standard of care did not require Dr. Peery to perform a post-void residual, digital rectal exam, or MRI (or to call Dr. Amundson or educate Mrs. Lay about cauda equina syndrome) because nothing in Mrs. Lay's history or physical examination warranted these tests.

Indeed, the only "red flag" symptom from her history was low back pain and a herniated disc. Dr. Peery testified that it is her practice to check for saddle anesthesia in patients with low back pain and that she does so by performing a sensation exam using her fingernails. Her medical note states that she found numbness in Mrs. Lay's "upper leg," which both Mrs. Lay and Dr. Peery say

[6] Even the Lays' expert, Dr. Janiak, testified that a doctor who has a patient that has leaked urine when she coughs or sneezes for a prolonged period can be "pretty sure that's not cauda equina" but rather a "pelvic floor issue," which is extremely common in women who have been pregnant, are athletic, and smoke.

occurred on the front, left thigh.[7] The front left thigh is not in the saddle area, which is defined as the inner thighs close to the groin, genital area, and buttocks. Dr. Peery did not document any numbness in Mrs. Lay's saddle area. Because Dr. Peery testified that she documents pertinent positive results and examined Mrs. Lay specifically for cauda equina syndrome, the Court finds Mrs. Lay did not report any numbness in her saddle region during her examination. Dr. Sweasey explained that the lack of numbness in this region eliminated the need to do a post-void residual because the saddle area and bladder are controlled by the same nerves. He stated that if Mrs. Lay did not experience saddle anesthesia, she likely would not experience urinary leakage from overflow incontinence, which occurs when someone cannot feel his or her bladder. Furthermore, Dr. Peery tested Mrs. Lay's motor skills and deep tendon reflexes – both were normal and symmetrical.

Based on this evidence, the Court holds that the standard of care did not require Dr. Peery to order a post-void residual, digital rectal exam, or MRI. Dr. Peery testified that she was no longer concerned about cauda equina syndrome after examining Mrs. Lay, and the Court cannot find that a doctor must call a specialist or educate a patient on diseases she is no longer concerned about after taking a detailed history and examination. Neither can the Court find that the standard of care requires a doctor who is no longer concerned about a neurological disease to call that patient's neurosurgeon or educate the patient about the disease. Rather,

[7] Dr. Peery and Dr. Sweasey testified that the dermatomes on this area of the leg correspond with an area of the spine that was higher up than Mrs. Lay's injury (L2 or L3) and not associated with the cauda equina portion of the spinal cord.

the standard of care only requires a doctor to perform tests that are necessary to confirm or rule out possible causes of a patient's signs and symptoms. Because Dr. Peery ruled out cauda equina syndrome, she did not breach the standard of care in not doing more testing. The standard of care only required her to adequately treat the remaining possible causes of Mrs. Lay's symptoms. And Dr. Peery did just that.

Dr. Peery concluded that Mrs. Lay's existing herniated disc was the source of her lower back pain and that Mrs. Lay's recent pregnancy was the source of her mild urinary leakage when she coughed or sneezed, also known as stress incontinence. The Court heard testimony that increased back pain in patients with herniated disks and stress incontinence in women are extremely common. Knowing Mrs. Lay had surgery scheduled, Dr. Peery sought to help Mrs. Lay manage the pain until the surgery. To this end, she switched Mrs. Lay's medication to oxycodone because it contained less Tylenol than the dosage of hydrocodone Dr. Amundson prescribed. Dr. Peery also prescribed a short course of steroids and a heat pack. She testified that it is her practice to tell patients with lower back pain to come back immediately if they have any changes in their bowel or bladder function.

Given this evidence, the Court finds that Dr. Peery did not breach the standard of care in her treatment of Mrs. Lay. She took an appropriate, detailed history of Mrs. Lay, performed a general and neurological examination looking for signs of cauda equina syndrome, ruled this disease out of her differential diagnosis

based on Mrs. Lay's history and physical examination, and treated the remaining possible causes of Mrs. Lay's pain.

C. Causation

Even if Dr. Peery's treatment of Mrs. Lay had breached the standard of care, the Lays fail to show that "proper treatment would have provided the patient 'with a greater than 50 percent chance of a better result than was in fact obtained.'" *Norman*, 262 So. 3d at 524. The Court heard testimony that herniated disks are unstable and can progress rapidly and that the amount of nerve damage depends on the amount and duration of the compression. The Lays' experts, however, testified that the "window of opportunity" to operate is anywhere from 12 to 48 hours after a patient's symptoms start.[8] With cauda equina, a patient's symptoms start with a sudden increase in back pain, which suggests a re-herniation or further herniation of the spinal disc into the spinal canal. This herniated disc compresses on the nerve roots and prevents blood flow, which "starts the clock" for how much time a patient has before the nerves die.

Mrs. Lay reported two instances of increased back pain—one on Wednesday evening and one on Saturday morning. When Mrs. Lay presented to the VA Emergency Room on Friday morning complaining of the first increase in pain, she

[8] Dr. Bagley testified that a patient's "clock would have started" (meaning a doctor must operate within 12 to 48 hours) with urinary incontinence. Dr. Galan and Dr. Janiak, however, testified that the first concerning "red flag" symptom for cauda equina syndrome is a sudden increase in back pain because that pain signifies the change in the spinal disk that results in urinary dysfunction. Dr. Bagley confessed his conclusion that Mrs. Lay's clock started ticking on Friday morning relied on his assumption that she began leaking urine Friday morning.

did not report any trouble emptying her bladder or numbness in her genital area and did not tell Dr. Peery her urinary leakage was new. If the 12 to 48-hour window of opportunity starts with the onset of symptoms, and Mrs. Lay experienced a sudden increase of back pain on Wednesday night, her "window" would have closed as early as Thursday morning and as late as Friday evening. Dr. Galan, however, testified that Mrs. Lay did not need immediate surgery at this time based on her symptoms and physical examination but likely could have waited for 24 to 36 hours, which falls outside that window of opportunity.

When Mrs. Lay presented to the VA Emergency Room on Sunday, she reported another sudden increase in back pain the day before, numbness in her genital area, and an inability to empty her bladder. Dr. Daniels immediately called Dr. Cullom, and Dr. Cullom scheduled Mrs. Lay for immediate surgery. This indicates that Mrs. Lay's "clock" could have started ticking on Saturday morning, when she experienced a sudden increase in back pain, urinary dysfunction, and numbness. Despite this change in symptoms, Mrs. Lay did not return to the emergency room or otherwise seek medical treatment. Based on the 12 to 48-hour time frame, Mrs. Lay would have needed to undergo surgery on Saturday night or Sunday morning to prevent permanent nerve damage. But even then, Dr. Bagley testified that Mrs. Lay likely still would have had some residual issues, though less severe.

As the Court mentioned, the amount of nerve damage depends on the amount and duration of the compression, and Mrs. Lay had a massive amount of

compression on her cauda equina according to the MRI taken Sunday. Dr. Cullom's surgical note shows "the nerve root was completely filled with disk material," including disc fragments that had broken off into the spinal canal. The amount of uncertainty surrounding the development of cauda equina syndrome and the timeframe in which Mrs. Lay needed surgery to prevent permanent nerve damage does not support a finding that Dr. Peery's treatment of Mrs. Lay caused her injuries.

The Court therefore finds that the Lays have failed to establish that any such breach was the proximate cause of Mrs. Lay's injuries.[9]

IV. Conclusion

For these reasons, the Court finds that the Lays have failed to prove by a preponderance of the evidence that the United States breached the standard of care required by an emergency room physician on September 25, 2015. The Court also finds that the Lays have failed to prove by a preponderance of the evidence that Dr. Peery's treatment of Mrs. Lay was the proximate cause of her permanent nerve damage. The United States is therefore entitled to judgment in its favor with prejudice.

IT IS FURTHER ORDERED that this case is closed, and court costs are taxed against the Lays in favor of the United States. A separate judgment shall issue this day.

[9] Because Robert Lay's loss of consortium claim is derivative of the malpractice claim, the Court dismisses that claim too.

SO ORDERED AND ADJUDGED this the 11th day of August, 2021.

s/ *Kristi H. Johnson*
UNITED STATES DISTRICT JUDGE