IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-CA-01668-COA

EDNA SCOTT **APPELLANT**

v.

JACKSON NEUROSURGERY CLINIC PLLC AND ADAM I. LEWIS, M.D. **APPELLEES**

DATE OF JUDGMENT:	10/22/2018
TRIAL JUDGE:	HON. JEFF WEILL SR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT, FIRST JUDICIAL DISTRICT
ATTORNEY FOR APPELLANT:	WILLIAM W. FULGHAM
ATTORNEYS FOR APPELLEES:	L. CARL HAGWOOD JOHN MICHAEL COLEMAN
NATURE OF THE CASE:	CIVIL - MEDICAL MALPRACTICE
DISPOSITION:	AFFIRMED - 12/01/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

WILSON, P.J., FOR THE COURT:

¶1. Following neck surgery, Edna Scott developed a cerebrospinal fluid (CSF) leak. Scott sued her neurosurgeon, Dr. Adam Lewis, and his clinic, Jackson Neurosurgery Clinic PLLC (collectively, "the defendants"), for medical malpractice.[1] After the close of the evidence at trial, the trial judge granted the defendants' motion for a directed verdict. We find no error and affirm.

FACTS

[1] Scott's complaint named additional defendants, but Lewis and his clinic were the only remaining defendants at trial and are the only defendants at issue on appeal.

¶2. Scott sought treatment from Dr. Lewis for neck pain. Dr. Lewis initially ordered an MRI of Scott's neck, which showed issues at discs C4-5 and C6-7. Based on Dr. Lewis's recommendation, Scott tried various pain-management treatments. After those treatments failed to alleviate her neck pain on a long-term basis, Scott opted to have anterior cervical discectomy and fusion (ACDF) surgery. The procedure would remove disc material from Scott's neck and replace it with a bone graft. Dr. Lewis performed the surgery on November 21, 2011. Scott and Dr. Lewis discussed the risks of the surgery, including the possible formation of a hematoma, prior to the surgery.

¶3. When she was discharged from the hospital the day after her surgery, Scott signed a document acknowledging that she had been told to notify Dr. Lewis if she experienced certain symptoms. Scott further acknowledged that her discharge instructions directed her to call both her doctor and 911 if she experienced difficulty breathing or swallowing. After she left the hospital, Scott began to experience increased difficulty swallowing. Her daughter-in-law called Dr. Lewis's office, and Dr. Lewis or his nurse practitioner called in a steroid prescription for Scott. However, Scott's difficulty swallowing prevented her from taking the medication. As a result, on November 25, 2011, Scott's daughter-in-law called Dr. Lewis's office again. This time, Dr. Lewis's office directed Scott's daughter-in-law to take Scott to the emergency room.

¶4. When she arrived at the emergency room, Scott told hospital staff that she was having difficulty swallowing and breathing. Although hospital staff initially determined that Scott

was not experiencing any acute respiratory distress, they later upgraded Scott's condition to serious and admitted her to the critical care unit. The on-call neurosurgeon, Dr. Orhan Ilercil, examined Scott and determined that a hematoma had developed in her neck. Dr. Ilercil ordered a CT scan to confirm his diagnosis. After reviewing the results of the CT scan, Dr. Ilercil recommended immediate surgery to drain and evacuate the hematoma. Later that same day, Dr. Ilercil performed the surgery and successfully evacuated the hematoma.

¶5. Four days later, on November 29, 2011, Dr. Lewis was examining Scott when he began to suspect that she had developed a CSF leak. Dr. Lewis testified that Scott's neck was again swollen but that the swelling was not consistent with another hematoma. After relaying his findings to Scott, Dr. Lewis performed a lumbar puncture to siphon off some of the spinal fluid that had collected. After discussing how to best treat Scott, Dr. Lewis and Dr. Ilercil determined that a lumbar peritoneal (LP) shunt should be placed in Scott's lower back to alleviate the buildup of fluid around her spine. Because Dr. Ilercil had admitted Scott to the hospital and then performed her hematoma surgery, Dr. Ilercil performed the November 30, 2011 surgery to maintain Scott's continuity of care during her hospital stay. Once the fluid buildup around Scott's spine resolved, the LP shunt was removed.

¶6. In 2012, Scott sued Lewis and his clinic for medical malpractice. At trial, the parties stipulated that hematomas can occur after neurosurgery in the absence of negligence. However, Scott claimed that Dr. Lewis's actions during her ACDF surgery caused the CSF leak and that Dr. Lewis breached the standard of care by failing to inform her of the issue or

note the issue in his post-operative note.

¶7. Scott's neurosurgery expert, Dr. Isabelle Richmond, testified by video deposition. Dr. Richmond stopped performing surgery in 2000 but continued to teach surgical procedures at the Uniformed Services University of the Health Sciences in Bethesda, Maryland. Dr. Richmond opined that Dr. Lewis injured Scott's dura, which is a thin layer of tissue surrounding the spinal cord, during Scott's ACDF surgery. The dura contains CSF, and when a dural laceration occurs, a CSF leak results. Dr. Richmond opined that Dr. Lewis's laceration of Scott's dura resulted in a CSF leak during surgery. Dr. Richmond further asserted that Dr. Lewis attempted to repair the laceration with DuraGen—a synthetic graft or collagen-like sponge that can be used as a dural substitute and that is intended to be fully absorbed by the body after surgery.

¶8. Consistent with the parties' pretrial stipulation, Dr. Richmond testified that dural lacerations and CSF leaks can occur during neurosurgery in the absence of negligence. Dr. Richmond also agreed that if—as she contended—a dural laceration occurred during Scott's ACDF surgery, and if Dr. Lewis had documented and informed Scott and Dr. Ilercil about the injury and his use of DuraGen, then Dr. Lewis would not have breached the standard of care. Specifically, Dr. Richmond testified as follows:

> Q. It's my understanding of your testimony that if Dr. Lewis had somehow damaged the dura, or lacerated it, and put that in the op note, and that he had used DuraGen to repair it, there would be no criticism; correct?
>
> A. That's correct. And he informed his cross-covering physician and the family of the complication. All three conditions have to be met for him

to conform to the standard of care.

Q. Yes, ma'am, I understand. But your criticism, once again, regarding this, this standard of care breach as you've testified, is as what we've just stated, and, that is, is that if he had caused the leak, if he had used DuraGen to . . . help repair it, if he had put it in his op note, and if he had told the family about it and told the subsequent treating physician about it, there would be no breach?

A. No, there would be no breach.

Dr. Richmond maintained that Dr. Lewis violated the standard of care by failing to disclose the alleged dural laceration and his use of DuraGen to Scott and subsequent physicians. Dr. Richmond further testified that Dr. Lewis's failure to disclose the dural injury to Dr. Ilercil resulted in a "significant surgical complication" (a CSF leak) going "unrecognized for a period of time," a "prolonged hospitalization," and additional medical costs.

¶9. Dr. Richmond maintained that DuraGen could not be used prophylactically to strengthen thinned-out dura. Although DuraGen arrived on the market at the end of Dr. Richmond's surgical career and she had never used the product herself, Dr. Richmond insisted that the only application for DuraGen around Scott's surgical site was to repair a dural laceration. Thus, Dr. Richmond opined that Dr. Lewis's use of DuraGen during Scott's ACDF surgery definitively indicated that Dr. Lewis had lacerated Scott's dura.

¶10. Dr. Ilercil also testified by deposition. In his post-operative report following Scott's hematoma evacuation, Dr. Ilercil stated that he had discovered a large hematoma at the surgical site on Scott's neck that was compressing Scott's airway. Dr. Richmond had opined that Scott's hematoma "was most probably blood and CSF mixed together." However, Dr.

Ilercil disagreed. Dr. Ilercil testified that after he evacuated the hematoma, he asked the anesthesiologist to perform a Valsalva maneuver, which briefly increased the pressure to Scott's brain and neck, to see if he could find any active bleeding or spinal fluid leaks. Dr. Ilercil testified that he found no source of bleeding for the hematoma and that "[t]here was no clinical evidence of [a] spinal fluid leak" when he performed surgery on Scott.

¶11. Unlike Dr. Richmond, Dr. Ilercil testified that DuraGen had applications other than to repair a dural laceration. He testified that DuraGen could also be applied in the absence of an injury as "a belt and suspenders" to reinforce the dura. Dr. Ilercil stated that when he evacuated Scott's hematoma, he never observed the DuraGen that Dr. Lewis had applied to Scott's dura. Dr. Ilercil testified that he would have had to remove both the cervical plate and the bone graft to reach Scott's dura and that "there was no indication" for him to go to such lengths during the hematoma evacuation. Dr. Ilercil testified that if he used DuraGen, he would "usually" note it in his post-operative report, but he stated that "[e]veryone dictates their notes differently."

¶12. During his treatment of Scott, Dr. Ilercil never determined the source of the CSF leak that eventually developed. Dr. Ilercil stated that his "feeling was that [the CSF leak] occurred at the first surgery" performed by Dr. Lewis because that was "the only time the dura was manipulated." However, Dr. Ilercil also testified that "there very well could have been no leaking when [Dr. Lewis] closed the patient." Dr. Ilercil further testified that a CSF leak is "a known complication" of neurosurgery that "can happen in the best of hands and,

not infrequently, does."

¶13. Dr. Lewis testified that there was no CSF leak when he completed Scott's ACDF surgery. Dr. Lewis testified that he used DuraGen during Scott's ACDF surgery because he wanted to reinforce Scott's "thinned out dura." Dr. Lewis explained that he would not have used DuraGen if he had observed any spinal fluid during Scott's surgery. Dr. Lewis testified that DuraGen is not a watertight substance and that he never used it to repair CSF leaks. Dr. Lewis stated that he used another product, DuraSeal, to repair CSF leaks because DuraSeal is a watertight substance.

¶14. Dr. Lewis acknowledged that he did not mention DuraGen in his post-operative note or inform Scott that he had used DuraGen during her surgery. He testified that it was not necessary to mention DuraGen because that information would not be important to a subsequent physician and would not impact Scott's subsequent course of treatment. He testified that it was important for a subsequent physician, such as Dr. Ilercil, to know the specific types of hardware and screws he used in the procedure. That information was included in Dr. Lewis's post-operative note.

¶15. Dr. Kevin McGrail testified for Dr. Lewis as an expert in neurosurgery and neurobiology. Dr. McGrail is the chair of the neurosurgery department at Georgetown University Hospital and performs 50 to 100 ACDF surgeries annually. Dr. McGrail opined that Dr. Lewis did not breach the standard of care in his treatment of Scott.

¶16. Dr. McGrail testified that DuraSeal is used to seal spinal fluid leaks while DuraGen

is a synthetic product with many uses. He testified that it is common to use DuraGen as a dural substitute or to reinforce the dura. Dr. McGrail testified that neurosurgeons use DuraGen for that purpose during surgery even when there is no injury to the patient. While Dr. McGrail agreed that Dr. Lewis would have been required to disclose any known dural injury, he testified that Dr. Lewis was not required to make a note of his use of DuraGen to reinforce Scott's thinned-out dura.

¶17. Dr. McGrail testified that Dr. Lewis's use of DuraGen to reinforce Scott's dura "was completely unrelated" to Scott's hematoma and had no effect on Dr. Ilercil's ability to evacuate the hematoma. Dr. McGrail also testified that Dr. Lewis's alleged failure to document an alleged injury to the dura made no difference to Scott's subsequent course of treatment in the hospital. Dr. McGrail was asked, "If Dr. Lewis had caused an injury to the dura, and he used some DuraGen to fix it . . . , and then he told [Ms. Scott and] Dr. Ilercil about it—and all that happened, like Dr. Richmond says should have happened—what would Ms. Scott's medical course have been?" Dr. McGrail's response was that "it would have been exactly the same as it was."

¶18. Dr. McGrail further stated that Dr. Lewis's use of DuraGen and the subsequent development of a CSF leak did not indicate that Dr. Lewis injured Scott's dura. Dr. McGrail testified that he saw nothing in Scott's medical records to indicate that a dural laceration actually occurred during the ACDF surgery. Because Scott had thin dura at the surgical site, Dr. McGrail explained that she likely had thin dura in other locations and that a spontaneous

dural leak could have developed after surgery due to vigorous coughing or vomiting. Dr. McGrail testified that if Dr. Lewis had injured Scott's dura during the ACDF surgery on November 21, 2011, he would have expected to see evidence of the leak prior to November 29, 2011. Dr. McGrail stated this was especially true in the present case since Scott's neck was reexplored during the hematoma surgery by Dr. Ilercil, who had the Valsalva maneuver performed but observed no evidence of spinal-fluid leakage.

¶19. At trial, the defendants moved for a directed verdict at the close of Scott's case-in-chief. The trial judge took the motion under advisement. After both sides finally rested, the defendants renewed their motion. After considering the evidence and the parties' arguments, the trial judge granted the defendants' motion.

ANALYSIS

¶20. "Mississippi Rule of Civil Procedure 50(a) requires the trial court to take a case from a jury and grant a directed verdict if any verdict other than the one directed would be erroneous as a matter of law." *Malouf v. Evans*, 267 So. 3d 272, 276 (¶19) (Miss. 2019) (quotation marks omitted). "We review a ruling granting a directed verdict motion de novo." *Butler v. Chadwick Nursing & Rehab. Ctr.*, 223 So. 3d 835, 841 (¶28) (Miss. Ct. App. 2017). We view the evidence "in the light most favorable to the non-moving party, with all reasonable inferences granted in favor of that party." *Id.* "However, a 'trial court should submit an issue to the jury only if the evidence creates a question of fact concerning which reasonable jurors could disagree.'" *Id.* (quoting *Vines v. Windham*, 606 So. 2d 128, 131

(Miss. 1992)).

¶21. To establish a prima facie case of medical malpractice, Scott was required to come forward with proof sufficient for a jury to find (1) that Dr. Lewis had a duty to conform to a specific standard of care, (2) that Dr. Lewis breached that standard, and (3) that Dr. Lewis's "breach . . . proximately caused an injury to [her]." *Thomas v. Lewis*, 289 So. 3d 734, 739 (¶10) (Miss. 2019) (quoting *Miss. Baptist Med. Ctr. Inc. v. Phelps*, 254 So. 3d 843, 845 (¶6) (Miss. 2018)). "Expert testimony is required to establish all three elements." *Id.* at (¶11). Indeed, "[e]xpert testimony is essential in medical malpractice cases" to prove "how the required standard of care was disregarded" and to prove "that the defendant's failure was the proximate cause, or proximate contributing cause, of the injury." *Id.* (quotation marks omitted). "For the proximate-cause element, 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 (¶29) (Miss. Ct. App. 2016) (quotation marks omitted).

¶22. There is no dispute that Dr. Lewis had a duty to inform Scott and make a post-operative note if he actually lacerated her dura and caused a CSF leak during the ACDF surgery. Dr. Richmond opined that Dr. Lewis lacerated Scott's dura during her surgery and

then used DuraGen in an attempt to repair the injury.[2] Dr. Richmond acknowledged such injuries can occur during an ACDF surgery even if there is no negligence. However, Dr. Richmond opined that Dr. Lewis breached the standard of care by failing to disclose the alleged dural laceration and DuraGen use to Scott and Dr. Ilercil.

¶23. But even if we assume that Dr. Lewis injured Scott's dura and failed to inform Scott and Dr. Ilercil of it, Scott failed to establish that the alleged non-disclosure caused her any injury. Following her ACDF surgery, Scott's discharge instructions directed her to notify Dr. Lewis and call 911 if she experienced any difficulty breathing and swallowing. Scott followed those instructions. The same day that Scott returned to the hospital, Dr. Ilercil examined her, determined that she had a hematoma, ordered a CT scan to confirm his diagnosis, and performed surgery to evacuate the hematoma. There is no evidence that the hematoma resulted from any non-disclosure of a dural laceration or use of DuraGen during Scott's ACDF surgery. While Scott was still in the hospital recovering from her hematoma evacuation, Dr. Lewis examined her and noted new swelling in her neck. Dr. Lewis performed a lumbar puncture to drain the spinal fluid that had collected, and Dr. Ilercil subsequently placed the LP shunt in Scott's lower back, which successfully alleviated the buildup of fluid around her spine. There is no evidence that the alleged non-disclosure by

[2] As noted above, Dr. Richmond assumed that Dr. Lewis lacerated Scott's dura because he used DuraGen. That assumption conflicts with all other testimony in the case. In any event, for the reasons explained below, the defendants were entitled to a directed verdict even if we accept Dr. Richmond's assumption.

Dr. Lewis had any impact on Scott's subsequent course of treatment.

¶24. Dr. Richmond made a vague claim that Scott had a "prolonged hospitalization" because of Dr. Lewis's alleged non-disclosure. However, she failed to offer any specific facts to support this opinion, and she failed to explain how the hospitalization was prolonged. Dr. Ilercil testified that when Scott returned to the hospital, he promptly went forward with emergency surgery to evacuate her hematoma. Dr. Ilercil did not identify anything that he would have done differently had he been aware of a dural laceration or use of DuraGen, and Dr. McGrail confirmed that Scott's treatment and the course of her hospitalization were "exactly the same" as they would have been with additional disclosures.

¶25. In summary, Scott failed to present any evidence that "affords a reasonable basis for the conclusion that it is more likely than not that [Dr. Lewis's alleged non-disclosure] was a cause in fact" of any injury to Scott. *Littleton*, 213 So. 3d at 535 (¶29). Rather, the evidence at trial showed that the alleged non-disclosure had no impact on Scott's subsequent treatment or hospitalization. Therefore, the trial judge did not err by granting the defendants' motion for a directed verdict.

¶26. **AFFIRMED.**

BARNES, C.J., CARLTON, P.J., GREENLEE AND LAWRENCE, JJ., CONCUR. WESTBROOKS AND McDONALD, JJ., DISSENT WITHOUT SEPARATE WRITTEN OPINION. McCARTY, J., NOT PARTICIPATING.