[Cite as *Chaffins v. Al-Madani* , 2004-Ohio-6703.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

KALEB CHAFFINS, A MINOR, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	
- vs -	:	**CASE NOS. 2002-P-0037 and 2003-P-0090**
DR. MOHAMED AL-MADANI,	:	
Defendant,	:	
ROBINSON MEMORIAL HOSPITAL,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 99 CV 0549.

Judgment: Affirmed.

Michael F. Becker and *John W. Burnett*, Becker & Mishkind Co., L.P.A., 134 Middle Avenue, Elyria, OH 44305 (For Plaintiffs-Appellants).

Thomas A. Treadon, Roetzel & Andress, 222 South Main Street, #400, Akron, OH 44308 (For Defendant-Appellee).

DONALD R. FORD, P.J.

{¶1} Appellants, Faydra Chaffins ("Faydra"), Patrick Chaffins ("Patrick") and Kaleb Chaffins ("Kaleb"), a minor, by and through his natural mother and next of friend, Faydra, appeal the April 9, 2002 and July 7, 2003 judgment entries of the Portage County Court of Common Pleas.

{¶2} In the April 9, 2002 entry, appellants appeal the trial court's decision to deny their motion for reconsideration. In the July 7, 2003 judgment entry, appellants appeal the trial court's denial of their motion for new trial and the entry of final judgment in favor of appellee, Robinson Memorial Hospital.

{¶3} On June 30, 1999, appellants filed a medical malpractice action against appellee and Dr. Mohamed Al-Madani ("Dr. Al-Madani"). In their complaint, appellants allege that Dr. Al-Madani and appellee were negligent in their care and treatment of Faydra and Kaleb during Faydra's delivery in December 1994.[1] Appellants claim that Kaleb suffered injuries as a result of Dr. Al-Madani's and appellee's nurses' negligence. Specifically, appellants assert that Faydra should have been offered a cesarean section as opposed to an attempt at a vaginal delivery because she suffered from cephalopelvic disproportion ("CPD"). CPD is a condition where the pelvis will not accommodate a child's head for vaginal delivery. On July 29, 1999, appellee filed its answer.

{¶4} On June 6, 2000, appellee filed a motion for partial summary judgment on counts two and three of the complaint because Faydra's and Patrick's loss of consortium (count two) and lack of informed consent (count three) claims were not filed until four and one-half years after Kaleb's birth. Appellants filed a motion in opposition on June 19, 2000. The trial court granted the motion on July 20, 2000, and concluded that the claims were time-barred pursuant to R.C. 2305.11(B)(1) because the cognizable event occurred no later than 1995, when Faydra and Patrick consulted with the first attorney, Attorney Hart, to investigate their suspicions.

1. The claim against Dr. Al-Madani was settled and dismissed, but the claim against appellee was tried to a jury.

{¶5} Appellants filed a motion for partial summary judgment on October 12, 2001. Appellee filed a motion in opposition to appellants' partial summary judgment motion and a brief in support of its own summary judgment motion on November 1, 2001. On January 29, 2002, the trial court ruled that appellee was "entitled to judgment as a matter of law on the issue of legality of R.C. 2744.05(C)(1) and (2), and that Kaleb is entitled to judgment as a matter of law on his right to recovery for past and future expenses related to his own medical treatment."

{¶6} On March 13, 2002, appellants filed a motion for reconsideration of the trial court's July 20, 2000 order granting partial summary judgment as to Faydra's and Patrick's claims. Appellee filed a motion for the trial court to reconsider its January 29, 2002 ruling that granted summary judgment in favor of Kaleb's claims for medical expenses. In a judgment entry dated April 9, 2002, the trial court denied appellants' and appellee's motions for reconsideration.[2] The matter proceeded to a jury trial which began on April 28, 2003, and concluded on May 6, 2003. On April 28, 2003, appellants filed an "Omnibus Motion in Limine" to exclude the testimony of a defense expert, Dr. Frederick Kraus ("Dr. Kraus"), because it was not scientifically reliable. However, the trial court allowed the testimony despite numerous objections during the trial.

{¶7} The following facts were revealed at the trial. Faydra treated with Dr. Al-Madani for her pregnancy with Kaleb in 1994. This was Faydra's first full term pregnancy.[3] Faydra is four feet, nine inches tall and has a contracted or unusually small pelvis. Faydra gained approximately fifty pounds during her pregnancy.

2. Appellant appealed from this judgment, but the appeal was stayed pending the trial of Kaleb's claim.

3. Faydra had been pregnant before, but that pregnancy ended in a miscarriage.

{¶8} Faydra testified that she did not fall nor did she injure herself in any way during her pregnancy. She further mentioned that she had spotting early on in the pregnancy, but the doctors reassured her not to be concerned. On cross-examination, Faydra was asked whether she recalled going to the hospital for a sharp pain and ache in her abdomen and being given antibiotics early in her pregnancy, but she did not remember. Dr. Al-Madani related that Faydra had a history of cone biopsy, which is a minor surgery on the cervix that puts her at risk for miscarriage or early labor. Other than that, he did not recall any complications during the pregnancy.

{¶9} Faydra reached her due date, which was November 28, 1994, but had not gone into labor so Dr. Al-Madani recommended induction. She was admitted to appellee on December 5, 1994, for induction of labor as she was past her due date. The induction began with the application of Prostaglandin gel on December 5, and proceeded to use of a hormone called Pitocin on the morning of December 6. Dr. Al-Madani testified that appellee's nurses informed him through telephone calls and bedside reports of Faydra's progress throughout the induction.

{¶10} At 11:30 a.m., on December 6, Dr. Al-Madani ruptured Faydra's membranes and found meconium.[4] As a result, Faydra's uterus was flushed with a clear fluid (this process is called amnioinfusion) to prevent the fetus from breathing the meconium. Amnioinfusion can result in the appearance of an artificially high uterine tone on the fetal monitoring strips. Dr. Al-Madani concluded that the amnioinfusion caused the appearance of the high uterine tone in Faydra's situation.

4. The presence of meconium indicates the passage of fetal stool into the amniotic sac before birth.

{¶11} A cesarean section was ordered around 11:40 p.m. on December 6 for CPD. Dr. Al-Madani related that this diagnosis cannot be made until after a trial of labor and after a period of time without progression of labor. The cesarean section was performed at approximately 12:30 a.m., on December 7, 1994, and shortly thereafter, Faydra delivered Kaleb.

{¶12} Later that morning, Kaleb began having seizures. He was transported to Akron Children's Hospital. The newborn nursery record reveals that when Kaleb left appellee's care, he was in stable condition and the seizures had stopped.

{¶13} Dr. Harlan Giles ("Dr. Giles"), a maternal fetal specialist, opined that appellee's nurses' management of the administration of Pitocin was substandard and that the nurses deviated from the appropriate standard of care by not recognizing Faydra's uterine hyperstimulation and by not discontinuing the Pitocin. He further stated that after measuring Faydra in January 2000, he "found that many of her measurements were abnormally small." In his opinion, Kaleb's complete injury would have been avoidable and preventable if an appropriate standard of care had been rendered. He indicated that hyperstimulation "was responsible for causing [Faydra] to dilate to almost complete cervical dilation. After that happened in the time frame of approximately 9:30 a.m., there was continued hyperstimulation and the cervix, now retracted, was no longer protecting his head against the bony pelvis. I think that that hyperstimulation continued until the delivery at 12:38, 12:39 the next morning. There was for a period of some three plus hours with the cervix essentially retracted and the head exposed, and as a result of which I think the child suffered direct head trauma and brain injury."

{¶14} Dr. Giles also opined "to a high degree of medical certainty that if a cesarean section had been carried out at 9:30 p.m. [on December 6], that the brain injury would have been completely avoidable." He stated that Kaleb did not aspirate meconium or suffer respiratory distress. Therefore, in his opinion, the cause of Kaleb's brain injury was "the continued forcing of the labor with hyperstimulation that resulted in almost complete cervical dilatation, followed by more than three hours of continued hyperstimulation and direct pressure molding forces on the baby's head against the bony pelvis." On cross-examination, Dr. Giles acknowledged that it was the decision of Dr. Al-Madani whether and when to do the cesarean section.

{¶15} Dr. Stephen R. Bates ("Dr. Bates"), a pediatric neurologist, testified that Kaleb's brain was traumatized, and as a result of that trauma, Kaleb had a brain injury. Dr. Bates related that "there was excessive pressure in the head of [Kaleb] in the last stages of labor, which in turn caused molding and elongation of the head, probably also caused some compression on the big blood vessels. So he sustained a hemorrhagic bleeding-type injury as well as some degree of ischemic injury to the brain."

{¶16} During Faydra's testimony, she explained that as a first time mother, she expected Kaleb to sit up on his own, but he could not. She indicated that he never crawled. He learned to walk with assistance when he was eighteen months old. At the time of the trial, Kaleb's speech was very limited. He had been seeing a pediatric neurologist, Dr. Ted Kulasekaran ("Dr. Kulasekaran"), since he was hours old. Dr. Kulasekaran put him on Phenobarbital to control his seizures. After he had been seizure-free for a year, Dr. Kulasekaran removed him from the medication, but the seizures started again when Kaleb was two so he was started on medications again.

{¶17} Faydra explained that Kaleb attended the Portage Happy Day School, which is a therapy school for children with special needs. While there, Kaleb learned to communicate with his hands if he could not verbalize what he wanted. In addition to the speech therapy, he also received physical and occupational therapy and life skills. Faydra testified that Kaleb entered Kindergarten at Garfield when he was just over eight years old. It was her opinion that his speech had gone backwards since then.

{¶18} Appellee presented the testimony of Dr. Jeffrey Pietz ("Dr. Pietz"), a neonatologist. Dr. Pietz opined that "[t]his baby was injured well before [Faydra] came into the hospital." He felt that Kaleb was in the uterus too long and the placenta could have started to fail. Kaleb was losing weight in utero and the incongruency in the circumference of Kaleb's head and his birth weight indicated postmaturity. Kaleb was estimated to be over eight pounds, but when he was born he was in the seven-pound range.

{¶19} Dr. Pietz further stated that Kaleb could have had a stroke before he was born. He did not feel that there was any mechanical trauma to his brain. It was for this testimony that appellants' counsel objected stating that this was a new opinion that was not articulated at his discovery deposition. The trial court overruled the objection.

{¶20} Dr. Ira Bergman ("Dr. Bergman"), a pediatric neurologist, took the stand and testified for appellee that Kaleb incurred the hypoxic ischemic injury to his brain prior to his birth. He stated that the injury must have occurred a few days or a few weeks prior to birth and was probably caused by placental insufficiency. Dr. Bergman explained that typically with a hypoxic ischemic injury at birth, most of the time, there will be an injury to not only the brain, but there are injuries to other organs.

{¶21} Dr. Frederick Kraus ("Dr. Kraus"), a pathologist who testified for appellee, related that there was evidence of acute chorioamnionitis and acute atherosis.[5] Dr. Kraus opined that the finding of acute chorioamnionitis in combination with other abnormalities produced a central nervous system injury in Kaleb.

{¶22} The jury returned a verdict in favor of appellee. Although the jury unanimously concluded that appellee's nurses were negligent in their care and treatment of Faydra and/or Kaleb for failing to follow one or more of the hospital policies or procedures, the jury did not believe that this negligence proximately caused Kaleb's brain injury.

{¶23} Appellants filed a motion for new trial on May 23, 2003, pursuant to Civ.R. 59(A)(6) and (9), claiming that the verdict was against the manifest weight of the evidence and that the trial court erred in allowing the causation testimony of Dr. Kraus. On June 5, 2003, appellee filed a motion in opposition to appellants' motion for new trial. In a judgment entry dated July 7, 2003, the trial court denied appellants' motion for new trial and entered final judgment on the verdict in favor of appellee and against Kaleb. Appellants timely filed the instant appeal and now assign the following as error:

{¶24} "[1.] The trial court erred by admitting causation testimony from Dr. Kraus.

{¶25} "[2.] The trial court erred in admitting 'new' opinions by appellee's expert witnesses.

5. Acute chorioamnionitis is an acute inflammatory process which is a reaction to a bacterial infection in the amniotic fluid. Acute artherosis is an abnormality in the maternal blood vessels as they are percolating through the wall of the uterus toward the intervillous space in the placenta, and those blood vessels may be narrowed or become narrowed and, therefore, are less functional under this condition, which is associated with the clinical condition known as preeclampsia.

{¶26} "[3.] The trial court erred by granting appellee summary judgment on the parents' claim.

{¶27} "[4.] The trial court erred in denying appellants' motion for new trial."

{¶28} Under the first assignment of error, appellants claim that the trial court erred by permitting the opinion testimony of expert witness, Dr. Kraus, on the issue of causation.

{¶29} "Rulings concerning the admissibility of expert testimony are within the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse of discretion." *Frank v. Vulcan Materials Co.* (1988), 55 Ohio App.3d 153, 155. An abuse of discretion implies an attitude by the trial court that is unreasonable, arbitrary, or unconscionable. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161. The trial judge is considered the gate keeper of evidence and must continue to have considerable discretion in deciding in a particular case how to go about determining whether particular expert testimony is reliable. See *Kumho Tire Co., Ltd. v. Carmichael* (1999), 526 U.S. 137.

{¶30} Appellants contend that the trial court erroneously admitted the testimony from Dr. Kraus on the issue of causation. The trial court permitted Dr. Kraus to testify about the cause of Kaleb's condition.

{¶31} Evid.R. 702 relates to testimony by experts and provides that:

{¶32} "A witness may testify as an expert if all of the following apply:

{¶33} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶34} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶35} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

{¶36} "(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

{¶37} "(2) The design of the procedure, test, or experiment reliably implements the theory;

{¶38} "(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

{¶39} In the case sub judice, there is no dispute that Dr. Kraus is a qualified expert who testified about subjects beyond the knowledge of lay persons. Evid.R. 702(A) and (B). Thus, our inquiry is whether the testimony complied with Evid.R. 702(C), i.e., the reliability of the testimony.

{¶40} In *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 611, the Supreme Court of Ohio designated the following four factors, adopted from *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 593-594, to be considered in evaluating the reliability of scientific evidence: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance. Both the United States Supreme Court in *Daubert* and the Ohio Supreme

Court in *Miller* emphasized that none of the factors is determinative: "[t]he focus is 'solely on principles and methodology, not on the conclusions that they generate.'" *Miller* at 611-612, quoting *Daubert* at 595. There is no requirement that an expert utter any "magic language," i.e., that his opinion was within the reasonable degree of certainty or reasonable degree of certainty within the particular knowledge of his professional experience.

{¶41} In *State v. Nemeth* (1998), 82 Ohio St.3d 202, 211, the Supreme Court of Ohio explained that "[r]elevant evidence based on valid principles will satisfy the threshold reliability standard for the admission of expert testimony. The credibility to be afforded these principles and the expert's conclusions remain a matter for the trier of fact." Thus, the reliability requirement under Evid.R. 702 "is a threshold determination that should focus on a particular type of scientific evidence, not the truth or falsity of an alleged scientific fact or truth." Id.

{¶42} Here, Dr. Kraus was called by appellee to testify as to an opinion after reviewing the pathology slides and medical records. He testified that there was evidence of acute chorioamnionitis and acute atherosis. He opined that the finding of acute chorioamnionitis in combination with other abnormalities produced the brain injury in Kaleb. Dr. Kraus proceeded to explain that the acute chorioamnionitis, the nucleated red blood cells, and the meconium resulted in Kaleb's injuries.

{¶43} Appellants refer to the deposition testimony of Dr. Raymond Redline ("Dr. Redline"), who stated that he was not aware of any literature that would support Dr. Kraus's inferences. Basically, it is this court's view that there was merely a difference of opinion between Dr. Redline and Dr. Kraus. The jury was presented with both

testimonies.[6] Furthermore, this is a situation where two experts disagree, and the jury could have chosen to believe Dr. Kraus's testimony.

{¶44} It is our position that the principles and methods employed by Dr. Kraus in reaching his opinion were reliable, his opinion certainly was relevant, and it assisted the jury in understanding the evidence relating to the pathology slides and medical records. "Furthermore, the reliability requirement of *Daubert* should not be used to exclude *** such evidence simply because the evidence is confusing." *Miller* at 614. According to Evid.R. 702(C), Dr. Kraus's testimony was based on his observations, training, and experience as a pathologist. He did not conduct any out of court experimentation. Thus, because all three of the following points were met under Evid.R. 702, Dr. Kraus was qualified to testify as an expert. Appellants' first assignment of error is meritless.

{¶45} In the second assignment of error, appellants allege that the trial court erred by allowing defense expert witnesses, Dr. Pietz and Dr. Bergman, to testify before the jury as to expert opinions that were not disclosed by the witnesses prior to the trial.

{¶46} We review a trial court's decision to admit or exclude evidence only for an abuse of discretion. *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 437.

{¶47} The rules of civil procedure require a party to seasonably supplement his responses to any questions directly addressed to the subject matter on which an expert is expected to testify. Civ.R. 26(E)(1). See, also, *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St.3d 367, 370. "This duty *** is necessary because preparation for effective cross-examination is especially compelling where expert

6. Dr. Kraus testified and Dr. Redline's videotape deposition was played for the jury.

testimony is to be introduced." Id. The trial court may exclude expert testimony as a sanction for the violation of Civ.R. 26(E)(1). Id.

{¶48} In the instant matter, appellants claim that Dr. Pietz, a neonatologist, and Dr. Bergman, a pediatric neurologist, offered new opinions at trial that they did not offer before. In the interrogatories submitted to appellee, appellants requested the identity of appellee's experts, the factual basis for appellee's affirmative defenses, and the textbooks, articles, guidelines or studies that support the opinions of appellee's experts. Dr. Pietz and Dr. Bergman were both deposed before the trial. In their depositions, they both opined that Kaleb was injured prior to the induction. At the trial, they again both testified that Kaleb's injuries occurred before his birth. However, at trial, they provided additional detail regarding the reasons for their opinions. In *Horton-Thomas v. Avva* (Feb. 9, 2001), 2d Dist. No. 18332, 2001 WL 109146, the Second Appellate District determined that the trial court correctly overruled the plaintiff's objection to the surprise testimony of the defendant's expert witness. The appellate court indicated that the allegedly new opinions were properly permitted because there was "[n]o evidence that [the expert's] explanatory testimony was a new opinion or that his previous opinion had changed ***." Id. at 6.

{¶49} After reviewing the depositions and trial testimony of both Dr. Pietz and Dr. Bergman, this court cannot conclude that either offered new opinions. The only testimony Dr. Bergman provided at trial that differed from his deposition was regarding the interpretation of an MRI scan. The MRI became available after Dr. Bergman's deposition was taken, and he testified that the MRI scan supported his previously expressed opinion as to the timing of Kaleb's injury. Hence, based on the record before

us, we cannot say that Dr. Pietz's or Dr. Bergman's testimony amounted to a surprise. In our view, it was explanatory testimony. Appellants were aware that Dr. Pietz and Dr. Bergman would present testimony that was contradictory to the testimony presented by their experts. Therefore, the trial court did not abuse its discretion in admitting this evidence. Accordingly, appellants' second assignment of error lacks merit.

{¶50} For the third assignment of error, appellants assert that the trial court erred in granting summary judgment on the parents' claim.

{¶51} Summary judgment is appropriate when the moving party establishes the following: (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come but to one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence construed most strongly in his favor. Civ.R. 56(C).

{¶52} If the moving party meets its initial burden under Civ.R. 56(C), then the nonmoving party has a reciprocal burden to respond, by affidavit or as otherwise provided in the rule, in an effort to demonstrate that there is a genuine issue of fact suitable for trial. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. If the nonmoving party fails to do so, the trial court may enter summary judgment against that party. Civ.R. 56(E).

{¶53} An appellate court reviews a trial court's granting of summary judgment de novo. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. The *Brown* court stated that "*** we review the judgment independently and without deference to the trial court's determination." Id. An appellate court must evaluate the

record “in a light most favorable to the nonmoving party.” *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 741. In addition, a motion for summary judgment must be overruled if reasonable minds could find for the party opposing the motion. Id.

{¶54} The statute of limitations for a medical malpractice action is one year. R.C. 2305.11. The Ohio Supreme Court has determined “that a cause of action for medical malpractice accrues and the R.C. 2305.11 limitations period begins to run either (1) when the patient discovers or, in the exercise of reasonable care and diligence should have discovered, the resulting injury, or (2) when the physician-patient relationship for the condition terminates, whichever occurs later.” *Akers v. Alonzo* (1992), 65 Ohio St.3d 422, 424-425, citing *Oliver v. Kaiser Community Health Found.* (1983), 5 Ohio St.3d 111, syllabus. “A patient ‘discovers’ or ‘should have discovered’ his or her injury upon the happening of a ‘cognizable event.’” *Carpenter v. Kindig* (Mar. 5, 2002), 3d Dist. No. 1-01-128, 2002 WL 359380, at 2.

{¶55} A cognizable event is one “which does or should lead the patient to believe that the condition of which the patient complains is related to a medical procedure, treatment or diagnosis previously rendered to the patient and where the cognizable event does or should place the patient on notice of the need to pursue his possible remedies.” *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, syllabus. However, a “patient need not be aware of the extent of the injury in order for the cognizable event to occur.” *Carpenter*, supra, at 2. “It is enough that some noteworthy event, the ‘cognizable event,’ has occurred which does or should alert a reasonable person-patient that an improper medical procedure, treatment or diagnosis has taken place.” *Allenius*, 42 Ohio St.3d at 134. These standards indicate that the determination of when a cause

of action accrues and the statute of limitations begins to run involves an analysis of the facts on a case-by-case basis. *Shadler v. Purdy* (1989), 64 Ohio App.3d 98, 103.

{¶56} This court would also note that "[l]egal theories are not ordinarily within the province of the average layman. Likewise, the causes of medical problems and the effects of prescribed treatments are not within the realm of a layman's knowledge." *Herr v. Robinson Memorial Hosp.* (1990), 49 Ohio St.3d 6, 9. Patients are entitled to rely on the judgment of their doctors. Id. To suggest that this reliance is unreasonable would impair the doctor-patient relationship. Id.

{¶57} Moreover, consulting an attorney to investigate a medical malpractice claim may constitute a cognizable event as a matter of law. *Burris v. Romaker* (1991), 71 Ohio App.3d 772, 775. However, it is our position that there are other facts that also need to be considered. In *Burris*, the plaintiff was the mother of a child who died at age three. She sought recovery under various tort claims on the grounds that her child was allegedly injured by her physician improperly using forceps during the delivery. The following events were pertinent in deciding the accrual date for the statute of limitations.

{¶58} On July 23, 1982, the mother gave birth to her daughter, and due to complications during delivery, the child remained in the hospital for nearly two months. On September 30, 1982, approximately two months after the birth, the mother notified an attorney regarding a possible medical malpractice claim. Consequently, the attorney advised the mother that she probably would not have a cause of action. Id. at 773.

{¶59} On December 8, 1985, the child died. Subsequently, the mother became pregnant again. During a prenatal visit with another physician in December 1987, her

physician advised her that he believed the child's complications during and after birth might have been due to an improper forceps delivery. Id. at 774.

{¶60} Thereafter, on December 5, 1988, the mother filed a complaint against the physician for medical malpractice, fraudulent misrepresentation, negligent infliction of emotional distress, and wrongful death. The trial court determined that the plaintiff's claims were barred by the statute of limitations since the statute of limitations began to run on September 30, 1982. Id.

{¶61} In Burris, the Third Appellate District rejected the plaintiff's argument that the accrual date was in December 1987, the date she became aware that her daughter's complications might have been caused by an improper forceps delivery. Id. at 775. Instead, the court held that the statute of limitations commenced on September 30, 1982, when the plaintiff acted on her suspicion and notified an attorney about a possible cause of action. Id. The court reasoned that a plaintiff cannot wait until she has obtained information confirming her beliefs or suspicions to initiate an action.

{¶62} In the case at bar, by seeking legal advice from Attorney Hart in February 1995, appellants showed their awareness of potential malpractice claims surrounding Kaleb's birth. If any material facts had been concealed at that time, appellants knew or should have known them and certainly could have discovered them. Attorney Hart sent a letter to appellee asking for a copy of Faydra and Kaleb's medical records. Attorney Hart indicated that he did not believe that appellants had a case. Appellants then consulted with Attorney Becker.

{¶63} Furthermore, appellants by their own admission had believed that improper treatment took place during her 1994 delivery immediately after Kaleb's birth.

They continued to believe this even after they consulted with Attorney Hart, and he informed them that they did not have a medical malpractice claim. During her deposition, Faydra testified that after her meeting with Attorney Hart regarding a potential medical malpractice action, where he said there was no case, she was not satisfied with the answer. She stated that "[she] went and got [her] own medical records." She claimed that she read them and kept them. She further explained that she did not contact any other attorney after she met with Attorney Hart and before she met with Attorney Becker because she had had her hands full with Kaleb. Patrick also related in his deposition that "[a]lways in [his] mind there was malpractice committed." It is our view, based on *Burris*, supra, and the foregoing facts, that appellants' act of consulting with Attorney Hart about a suspected claim related to a medical procedure, no matter what the advice may have been, constituted a cognizable event since appellants continued to believe that malpractice occurred.

{¶64} Based on appellants' testimony, they were aware that Kaleb had problems shortly after his birth. However, they did not file their complaint until June 30, 1999. This was well outside the one-year statute of limitations. Applying the case law to the facts of this case and construing the evidence in appellants' favor, we conclude that there is no question of fact regarding the lapsing of the statute of limitations. Thus, the trial court did not err in granting the partial summary judgment in favor of appellee. Appellants' third assignment of error is without merit.

{¶65} For their fourth and final assignment of error, appellants contend that the trial court erred when it overruled their motion for a new trial.

{¶66} The decision to grant or deny a motion for a new trial under Civ.R. 59(A) is within the sound discretion of the trial court. *Sharp v. Norfolk & W. Ry. Co.* (1995), 72 Ohio St.3d 307, 312. Absent a showing of an abuse of discretion, the trial court's decision will not be disturbed on appeal. *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, 184. An abuse of discretion connotes more than an error of law or judgment; rather it implies that the judgment can be characterized as unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When determining whether the trial court has abused its discretion, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶67} Appellant argues that the trial court erred by denying his motion for a new trial. Appellant bases his argument on Civ.R. 59(A)(6) and (9), which provide:

{¶68} "(A) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

{¶69} "***

{¶70} "(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

{¶71} "***

{¶72} "(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application[.] ***"

{¶73} When ruling on a motion for a new trial predicated on the weight of the evidence, the trial court must weigh the evidence and pass on the credibility of

witnesses. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 91. While the jury has substantially unlimited power to assess weight and credibility, the trial court's consideration of such matters is more restricted since the trial court must make a broad-based determination regarding whether a manifest injustice has been done because the verdict returned by the jury is against the weight of the evidence. Id. at 92; *Padden v. Herron* (Dec. 24, 1998), 11th Dist. No. 97-L-223, 1998 WL 964545, at 3. In other words, the trial court "'does not undertake to judge the credibility of the evidence, but only to judge whether it has the semblance of credibility.'" *Kitchen v. Wickliffe Country Place* (July 13, 2001), 11th Dist. No. 2000-L-051, 2001 WL 799750, at 3, quoting *Verbon*, 7 Ohio App.3d at 183.

{¶74} Thus, it falls within the province of the jury to weigh the evidence, and the trial court may not assume that function. *Rohde*, 23 Ohio St.2d at 92. Nevertheless, when presented with a motion for a new trial under Civ.R. 59(A)(6), the trial court must engage in a limited weighing of the evidence. The trial court may not set aside a verdict based upon a mere difference of opinion with the jury as to the weight of the evidence. However, when the trial court finds a verdict manifestly against the weight of the evidence, the court is under a duty to set aside the judgment. Id.

{¶75} A reviewing court must view the evidence favorably to the trial court's action rather than to the jury's verdict. *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, 448; *Rohde* at 94. This deference to the trial court's decision stems from the recognition that a trial judge is better situated than an appellate court to pass on questions of witness credibility and the surrounding circumstances of the trial. *Malone* at 448; *Rohde* at 94. Thus, the trial court is in the best position to ultimately

pass on the correctness of a jury's verdict. *Antal v. Olde Worlde Products, Inc.* (1984), 9 Ohio St.3d 144, 146. In *Antal*, the Supreme Court stated that:

{¶76} "The question remains as to how specific must a trial court be when granting a new trial on the ground that the verdict is against the weight of the evidence. The record of the case at bar reveals that the trial court articulated no reasons whatsoever, other than stating generally that the jury's verdict was not 'sustained by the weight of the evidence.' While the determination of whether a trial court's statement of reasons is sufficient should be left to a case-by-case analysis, we can say with a reasonable degree of certainty that such reasons will be deemed insufficient if simply couched in the form of conclusions or statements of ultimate fact. [Citation omitted.]

{¶77} "Consequently, we hold that, when granting a motion for a new trial based on the contention that the verdict is not sustained by the weight of the evidence, the trial court must articulate the reasons for so doing in order to allow a reviewing court to determine whether the trial court abused its discretion in ordering a new trial." Id. at 147.

{¶78} In the case at bar, several experts rendered different causation theories, but none agreed on precisely when and how Kaleb was injured. All experts rendered their opinions to a reasonable degree of medical certainty. Thus, it is our view that the jury had ample evidence to evaluate the issues and conclude that appellants failed to meet their burden of proof. There was competent, credible evidence to support the jury's decision that there was no harm to Kaleb as a result of appellee's nurses' negligence. The jury concluded that even though appellee's nurses failed to follow one or more of the procedures, this did not cause Kaleb's injuries. Appellants' own expert,

Dr. Giles, opined that the decision to perform the cesarean section was Dr. Al-Madani's not the nurses working for appellee.

{¶79} Furthermore, in the July 7, 2003 entry, the trial court stated that:

{¶80} "In this nine day trial, the jury received competent and credible evidence to support [appellants'] claims, and it received competent and credible evidence to deny those claims. The only issue for which there was no real dispute was the serious nature of Kaleb's brain damage. The jury reasonably found from all the evidence that [appellants] failed [their] burden to prove by the greater weight of the evidence that any [of appellee's] employee's negligence proximately caused that damage."

{¶81} We conclude that the trial court did not err in determining that there was no manifest injustice because the verdict returned by the jury was not against the weight of the evidence. The trial court did not abuse its discretion in overruling appellants' motion for new trial on this ground.

{¶82} Appellants also assert that they were entitled to a new trial under Civ.R. 59(A)(9),which permits a trial court to grant a new trial when it commits an error of law that was brought to its attention at trial. In applying this rule, this court has held that a new trial should be granted when, as a matter of law, the trial court has committed an error of law that was prejudicial to the moving party. *Willoughby v. On-The-Greens Condominium Co.* (Sept. 6, 1996), 11th Dist. No. 95-L-170, 1996 WL 535159, at 6.

{¶83} Here, there was no error of law that was prejudicial to appellants. Hence, we are unable to conclude that this ruling constituted an error of law or an abuse of discretion.

{¶84} Accordingly, it is our position that the trial court did not err in overruling appellants' motion for new trial under Civ.R. 59(A)(6) or (9). Appellants' fourth assignment of error is overruled.

{¶85} For the foregoing reasons, appellants' assignments of error are not well-taken. The judgment of the Portage County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J.,

ROBERT A. NADER, J., Ret.,
Eleventh Appellate District,
sitting by assignment,

concur.