RECEIVED by MSC 2/10/2023 8:12:24 AM

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-v-

MILTON LEE LEMONS,
Defendant-Appellant.

Supreme Court No. 163939
Court of Appeals No. 348277
Trial Court No. 06-004818-FC

DEFENDANT-APPELLANT'S SUPPLEMENTAL REPLY BRIEF

Michigan Innocence Clinic
University of Michigan Law School
David A. Moran (P45353)
Imran J. Syed (P75415)
Elizabeth J. Cole (PA Bar No. 327703)
Breezy Adams (Student Attorney)
Samuel Clougher (Student Attorney)
ATTORNEYS FOR DEFENDANT-APPELLANT
701 S. State Street
Ann Arbor, MI 48109
(734) 763-9353

RECEIVED by MSC 2/10/2023 8:12:24 AM

TABLE OF CONTENTS

INDEX OF AUTHORITIES..... ii

INTRODUCTION 1

RESPONSE TO PROSECUTION'S STATEMENT OF FACTS.....2

ARGUMENT.....4

I. The Prosecution Dramatically Overemphasizes the Probative Value of Ms. Lemons' Police Statement and Her Panicked Behavior. 4

II. The Prosecution Repeatedly Mischaracterizes Both The Science And The Expert Witnesses Presented At The Evidentiary Hearing. 7

III. The Prosecution Cannot Defend the Exclusion of the Defense Biomechanical Evidence Given That it Presented Similar Biomechanical Evidence And Used Less Qualified Experts In Doing So. 8

CONCLUSION.....10

RECEIVED by MSC 2/10/2023 8:12:24 AM

INDEX OF AUTHORITIES

Cases

Aleman v Village of Hanover Park, 662 F3d 897 (CA 7 2011) 4-6

Commonwealth v Epps, 474 Mass 743; 53 NE3d 1247 (2016) 8

JDB v North Carolina, 564 US 261; 131 S Ct 2394; 180 L Ed 2d 310 (2011) 4

People v Ackley, 497 Mich 381; 870 NW2d 858 (2015) ..... *passim*

People v Bailey, 144 AD3d 1562; 41 NYS3d 625 (2016) 7

People v Thomas, 22 NY3d 629; 8 NE3d 308 (2014) 4, 5

State v Edmunds, 308 Wis2d 374; 74 NW2d 590 (Wis App 2007) 8

Other Authorities

Narang, SK, et al, *Acceptance of Shaken Baby Syndrome and Abusive Head Trauma as Medical Diagnoses*, The Journal of Pediatrics (July 15, 2016) 7

RECEIVED by MSC 2/10/2023 8:12:24 AM

INTRODUCTION

The prosecution has created an alternative legal universe that stands in stark contrast to the one this Court established in *People v Ackley*, 497 Mich 381; 870 NW2d 858 (2015). *Ackley* recognized that there is a genuine controversy within the medical community as to Shaken Baby Syndrome (SBS) diagnoses and held that a contested SBS conviction cannot be sustained if the factfinder heard only one side of that controversy.

In the prosecution's alternative legal universe, it does not matter that the only medical expert to testify for either side at trial—**the medical examiner who conducted the autopsy—has retracted his SBS diagnosis and his finding of homicide** because he, like most forensic pathologists, now questions SBS diagnoses. According to the prosecution, it also does not matter that respected, qualified new experts (such as the head of Pediatric Neuroradiology at Stanford Medical School and the former chief medical examiner of Kentucky) reject the SBS diagnosis in this particular case. Instead, the prosecution purports, the trial judge can circumvent *Ackley* simply by excluding experts, no matter how qualified, who dare to challenge the SBS theory.

To put it simply, the prosecution's legal universe, where one side gets to slam the door on the other rather than confront legitimate scientific disagreement, is not one that ever existed, and it certainly does not exist after *Ackley*. Ms. Lemons is entitled to a new trial at which a jury can hear both sides of the SBS controversy and decide whether the prosecution can still prove beyond a reasonable doubt that Ms. Lemons' daughter died from abuse. This Court should reverse the trial court's decision and remand for a new trial.

RECEIVED by MSC 2/10/2023 8:12:24 AM

RESPONSE TO PROSECUTION'S STATEMENT OF FACTS

Ms. Lemons relies on the facts stated in her application and her supplemental brief.

The prosecution's supplemental brief is rife with misleading and unsupported "facts," and it would be impossible to address all of them in a 3,200-word reply brief. Thus, the discussion here is limited to a few representative examples.

The prosecution's brief unfairly denigrates the expert witnesses Ms. Lemons called at the evidentiary hearing. For example, the prosecution refers to Dr. Patrick Barnes' qualifications, *in total*, as "a neuroradiologist, who also claimed specialty as a pediatric radiologist, but lacked the corresponding certificate." Pros. Supp. Brf. 17-18.

The prosecution neglects to mention that Dr. Barnes was **Chief of Pediatric Neuroradiology at Boston Children's Hospital** for 14 years while he was an **associate professor at Harvard Medical School**, and that he was **Chief of Pediatric Radiology at the Packard Children's Hospital** for 17 years while he was a **professor at Stanford Medical School**. 357b-358b. As for the supposed lack of certification in pediatric radiology, Dr. Barnes explained that the subject was covered in his original 1977 certification in diagnostic radiology. 433b. Dr. Barnes had testified as an expert hundreds of times and had never, to his knowledge, been excluded from doing so. 362b.

Similarly, the prosecution labels Dr. George Nichols as merely a retired forensic pathologist and medical examiner, Pros. Supp. Brf. 17, while failing to mention that he was the **chief medical examiner for Kentucky for 20 years, a former board member of the National Association of Medical Examiners, and a professor at the University of Louisville for 40 years.** 298b-299b.

According to the prosecution, Dr. Chris Van Ee is merely a "biomechanical engineer at a local design firm" who "simply was called to point out the utility of biomechanical engineering."

RECEIVED by MSC 2/10/2023 8:12:24 AM

Pros. Supp. Brf. 18. The prosecution neglects to mention that **Dr. Van Ee has published extensively on pediatric head injuries for 25 years and has testified 70 to 80 times before, including at least 15 to 25 times in cases involving alleged shaking of infants, and has never been excluded from doing so.** 794b-804b.

These attempts to downplay the quality of Ms. Lemons' expert witnesses are critical to the prosecution's central claim that all of the defense experts are "fringe" figures and that the trial judge was correct to hold that all of their testimony would be excluded on *Daubert* grounds. This Court should not be misled: Ms. Lemons presented highly qualified witnesses, each of whom challenged the reliability of SBS diagnoses in general and/or in this case in particular. If the experts Ms. Lemons presented (including the pathologist who testified for the prosecution at trial) are not qualified to critique SBS diagnoses, this Court's unanimous decision in *Ackley* is a dead letter because no defendant could ever find more qualified experts.

The prosecution's brief also contains a section "explaining" why Ms. Lemons' experts are supposedly mistaken about their conclusions regarding hypoxic ischemic encephalopathy. Pros. Supp. Brf. 61-66. This section contains dozens of purportedly scientific assertions such as "[h]ypoxic-ischemic encephalopathy is nearly always seen in abusive shaking cases, as a result of the brain damage suffered by the victimized infant." *Id.* at 61 n. 123. But **there is not a single cite to medical authority in this entire five-page section.** Rather, the prosecution simply asserts its adversarial position as fact. **However, most of these assertions were contradicted by Ms. Lemons' experts at the evidentiary hearing.** Similarly, the prosecution provides its own critique of the Ommaya article, again without citation to any supporting authority. *Id.* at 48-50.

Ms. Lemons cannot catalog here all of the scores of unsupported scientific and medical assertions found in the prosecution's supplemental brief. This Court should not accept any such assertions simply because the prosecutor says so.

RECEIVED by MSC 2/10/2023 8:12:24 AM

ARGUMENT

I. The Prosecution Dramatically Overemphasizes the Probative Value of Ms. Lemons' Police Statement and Her Panicked Behavior.

The Court of Appeals correctly held that the trial court erred in treating Dr. Cassin's retraction of his SBS diagnosis as if it were a lay recantation, and it correctly held that the trial court erred in excluding all of Ms. Lemons' experts. However, the Court of Appeals concluded none of those errors mattered because Ms. Lemons made an incriminating statement during a custodial police interrogation the day her daughter died and because she did not call 911 immediately upon discovering her baby unconscious, instead taking her to a neighbor's house for help. The prosecution doubles down on the Court of Appeals' position in its supplemental brief.

As Ms. Lemons pointed out in her supplemental brief at 25-29, we better understand today that a "frighteningly high percentage of people [can be induced] confess to crimes they never committed," *JDB v North Carolina*, 564 US 261, 269; 131 S Ct 2394; 180 L Ed 2d 310 (2011).[1] And the new medical and scientific evidence further calls into question Ms. Lemons' police statement by casting doubt on whether it is even possible for shaking to cause the particular symptoms Nakita had without also causing other injuries that were not present.

As for Ms. Lemons' decisions in the minutes after she found Nakita unconscious, this Court unanimously recognized in *Ackley*, where the father's behavior was also claimed to prove guilt, "Had counsel provided a different lens through which to view his client's behavior, those same 'peculiar' actions by the defendant might have instead been perceived as the missteps of a

[1] Two cases cited in Ms. Lemons' leave application and supplemental brief, *People v Thomas*, 22 NY3d 629, 643; 8 NE3d 308 (2014), and *Aleman v Village of Hanover Park*, 662 F3d 897, 906 (CA 7 2011), apply this principle specifically to the context of a distraught parent being aggressively interrogated in light of a dubious medical diagnosis of abuse. *See* Supplemental Brief at 26-27.

RECEIVED by MSC 2/10/2023 8:12:24 AM

panicked, but nonetheless innocent, caretaker." 497 Mich at 395 n. 8.

The prosecution demonstrates how extreme its position is with a hypothetical where a person confessed to murdering a victim by shooting him and also behaved suspiciously after the shooting. Pros. Supp. Brf. at 25-26. The prosecution argues that the defendant should not receive a new trial even if new evidence surfaces showing that the victim was stabbed, not shot. *Id.* at 26.

Ms. Lemons disagrees. If new evidence shows that the victim died from a different mechanism than the one given in the defendant's confession, then that new evidence strongly undermines the probative value of the confession.

Exactly the same point applies here. New medical and scientific evidence establish that Nakita likely died from choking on formula and that shaking strong enough to cause her brain symptoms would likely cause severe injuries, such as a neck fracture, which were absent. This new evidence strongly undermines the probative value of Ms. Lemons' police statement.

The prosecution also repeatedly claims that Ms. Lemons confessed to her wife that she abusively shook Nakita. Pros. Supp. Brf. 28-29, 30. But Lori Lemons clearly testified that Ms. Lemons told her that she "shook [Nakita] awake **because she wasn't responding**." 38b-39b (emphasis added). Ms. Lemons most certainly did not confess to Lori that she had abused Nakita, and shaking an infant in an attempt to revive her is not abuse.

The only time Ms. Lemons suggested that she excessively shook her daughter in a non-resuscitative manner was after Chief Williams confronted her with Dr. Cassin's supposedly incontrovertible (but now retracted) conclusion that Nakita died of SBS. But the *Thomas* and *Aleman* cases cited in Ms. Lemons' supplemental brief make clear that such admissions of a distraught parent confronted with supposedly incontrovertible medical evidence are not reliable and should not be given much, if any, weight—especially where new evidence undermines them.

RECEIVED by MSC 2/10/2023 8:12:24 AM

The prosecution tries to distinguish *Aleman* by claiming it applies only when the investigators intentionally deceive the defendant or otherwise violate his *Miranda* rights. Pros. Supp. Brf. 28. But *Aleman* is far simpler than that, as the Seventh Circuit explained, "[i]f a question has only two answers—A and B—and you tell respondent that the answer is not A, and he has no basis for doubting you, then he is compelled by logic to 'confess' that the answer is B." 662 F2d at 907. This scenario is exactly what Ms. Lemons faced: Chief Williams presented the autopsy as proof that Nakita was shaken to death, thereby compelling Ms. Lemons to "confess."

Finally, the prosecution's argument that Ms. Lemons' actions when Nakita collapsed showed a consciousness of guilt is wrong for several reasons besides the fact that a panicked parent is very likely to make suboptimal decisions. *See Ackley*, 497 Mich at 395 n. 8. First, **Ms. Lemons never tried to hide what was happening with Nakita** and instead, immediately went to her next-door neighbor and sought help. A guilty person presumably would not seek immediate help from a neighbor, a spouse, and a mother-in-law, as Ms. Lemons did. The fact that Ms. Lemons did not herself call 911 during her panicked search for assistance proves very little.

In denying relief, the trial court only mentioned Ms. Lemons' police statement on the last page of a 25-page opinion. 126a. And the trial court never once mentioned the supposed consciousness of guilt. The police statement and Ms. Lemons' actions while trying to obtain aid do not overcome the fact that the prosecution's only medical expert at trial has withdrawn his opinion and that new, highly qualified medical experts have concluded that Nakita probably died from choking on formula, not abusive shaking. A new trial is warranted where a jury can hear all of the evidence.

RECEIVED by MSC 2/10/2023 8:12:24 AM

II. The Prosecution Repeatedly Mischaracterizes Both The Science And The Expert Witnesses Presented At The Evidentiary Hearing.

The prosecution claims that Dr. Cassin, the forensic pathologist who retracted his SBS diagnosis, actually "destroyed [Ms. Lemons'] case" with his testimony at the evidentiary hearing. Pros. Supp. Brf. 32. While it is true that Dr. Cassin affirmed the **symptoms** he found in the autopsy, he acknowledged that those symptoms are no longer diagnostic of Shaken Baby Syndrome and, therefore, he would now describe Nakita Lemons' death as "indeterminate," not homicide. 231a-233a. He also agreed that choking on formula was a plausible alternative cause of death. *Id.*

The prosecution also claims that physicians never diagnosed SBS by relying on a triad of symptoms and that anyone who says otherwise is "conspiracy-oriented" and promoting a "fringe theory." Pros. Supp. Brf. 56-58. **But that is precisely what Dr. Cassin did in this case, as he admitted on the stand**. Twice in his trial testimony Dr. Cassin specifically mentioned that the triad informed his diagnosis. 62a, 73a ("The essential findings in shaking are the subdural hemorrhages, and the nerve sheet hemorrhages, and the retinal hemorrhage and a swollen brain.").

Years later at the evidentiary hearing, Dr. Cassin admitted again that he had relied on the triad of symptoms to diagnose SBS in Nakita, 225a-226a, and he agreed that pathologists had formerly nearly universally accepted the triad as diagnostic of SBS. 247a. The prosecution simply ignores this testimony.

Despite the prosecution's apparent belief that SBS is a virtually infallible diagnosis,[2] this Court settled that issue in *Ackley*, as have courts in many other jurisdictions.[3] *Ackley* explicitly

---

[2] A survey conducted by Dr. Sandeep Narang in 2016 showed that only a minority of pathologists such as Dr. Cassin still believed SBS was a valid diagnosis. Narang, SK, et al, *Acceptance of Shaken Baby Syndrome and Abusive Head Trauma as Medical Diagnoses*, The Journal of Pediatrics (July 15, 2016). 907b.

[3] *See, e.g., People v Bailey*, 144 AD3d 1562, 1564; 41 NYS3d 625, 627 (2016) (explaining "a significant and legitimate debate in the medical community has developed in the past ten years over whether infants . . . can be fatally injured through shaking alone" and whether other causes

RECEIVED by MSC 2/10/2023 8:12:24 AM

held that defense counsel in a contested SBS case must consult experts in order to present the "prominent controversy within the medical community regarding the reliability of SBS/AHT diagnoses" and that this duty is specifically heightened in SBS cases which involve "such substantial contradiction in a given area of expertise." 491 Mich at 391-92.

The Court of Appeals was correct to find that the trial court erred in disregarding Dr. Cassin's retraction of his SBS diagnosis in this case, and the Court of Appeals was correct again to hold that the trial court erroneously ruled that all of Ms. Lemons' expert testimony would be inadmissible at a retrial. The retraction of Dr. Cassin's original diagnosis standing alone requires a new trial, and all of the new medical and scientific evidence presented in this case makes it even more clear that Ms. Lemons has met her burden to obtain a new trial.

III. The Prosecution Cannot Defend the Exclusion of the Defense Biomechanical Evidence Given That It Presented Similar Biomechanical Evidence And Used Less Qualified Experts In Doing So.

Ms. Lemons relies primarily on her supplemental brief, at 13-22, for the proposition that the trial court erred in holding that her highly qualified biomechanics expert, Dr. Chris Van Ee, could not testify at a retrial as to the biomechanical critique of SBS.

The prosecution tries its best to discredit Dr. Van Ee's use of various models and methods to calculate the forces produced in an infant brain by shaking, but never mentions that he was a **rebuttal** witness at the evidentiary hearing. He was called to rebut the testimony of the prosecution's witness, pediatrician Dr. Cindy Christian who, despite not being a biomechanical

---

"may mimic the symptoms traditionally viewed as indicating shaken baby or shaken impact syndrome"); *State v Edmunds*, 308 Wis2d 374, 385–386; 74 NW2d 590, 596 (Wis App 2007) (same); *Commonwealth v Epps*, 474 Mass 743, 764; 53 NE3d 1247, 1264 (2016) (overturning a conviction based on ineffective assistance of counsel for failing to obtain an expert to challenge an SBS/AHT diagnosis and noting that new research "casts doubt on the view that shaking alone can cause serious head injury").

RECEIVED by MSC 2/10/2023 8:12:24 AM

engineer, testified about biomechanical studies she believed supported the SBS hypothesis. 658b, 672b, 671b-676b. And Dr. Van Ee also rebutted the testimony of prosecution witness, Dr. Dan Davis, a forensic pathologist (also not a biomechanical engineer), who testified extensively about a model of an infant brain he had created in order to demonstrate his beliefs about the biomechanics of SBS. 583b-657b.

As Ms. Lemons explained in her supplemental brief, Dr. Van Ee is a highly qualified biomechanical engineer who has published, experimented, and testified extensively about infant brain injuries, including injuries caused by shaking and falls. If he is not qualified to testify to the biomechanical critique of SBS, then no one would be—least of all the prosecution's witnesses who have no expertise in biomechanics.

The problem with the Court of Appeals' conclusion that a biomechanics engineer cannot use animal, biofidelic dummy, and computer modeling studies to draw conclusions about infant brains in SBS cases is that it proves far too much. It issued that holding despite the fact that biomechanics experts do precisely that in designing car seats, bike helmets, and many other forms of safety equipment necessary to our everyday lives.

Dr. Van Ee should be permitted to testify at a retrial in this case.

RECEIVED by MSC 2/10/2023 8:12:24 AM

CONCLUSION

For the reasons set forth above and explained in more detail in her application for leave to appeal and in her supplemental brief, Ms. Lemons respectfully requests that this court vacate her conviction and order a new trial.

Respectfully Submitted,

s/ David A. Moran (P45353)
Attorney for Defendant-Appellant

s/ Elizabeth J. Cole (PA Bar No. 327703)
Attorney for Defendant-Appellant

s/ Samuel Clougher
Student Attorney for Defendant-Appellant

MICHIGAN INNOCENCE CLINIC

s/ Imran J. Syed (P75415)
Attorney for Defendant-Appellant

s/ Breezy Adams
Student Attorney for Defendant-Appellant

Dated: February 10, 2023

RECEIVED by MSC 2/10/2023 8:12:24 AM

STATEMENT REGARDING WORD COUNT

This brief contains 3095 countable words, which is within the 3200-word limit set by MCR. 7.212(G).