STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN Plaintiff-Appellant, v BRIAN KEITH ROBERTS Defendant-Appellee.	)	SUPREME COURT NO. _____ COURT OF APPEALS NO. 327296 CIRCUIT COURT FILE NO. 2014-0714 FC

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

NOTICE OF FILING

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STATEMENT OF APPELLATE JURISDICTION

Plaintiff-Appellant is seeking relief from an opinion issued by the Michigan Court of Appeals on June 6, 2017, vacating Defendant's first-degree felony murder and first-degree child abuse convictions and remanding for a new trial. Plaintiff-Appellant's application is timely filed. See MCR 7.305(C)(2)(a). This Court has the discretion to exercise jurisdiction over this matter pursuant to MCR 7.303(B)(1).

STATEMENT OF QUESTION PRESENTED

DID THE COURT OF APPEALS CLEARLY ERR WHEN FINDING THAT DEFENDANT WAS ENTITLED TO A NEW TRIAL ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PRESENT AN INDEPENDENT DEFENSE EXPERT ON CHILD ABUSIVE HEAD TRAUMA WHERE THE COURT (1) CONSIDERED THE ISSUE IN A VACUUM AND WITHOUT REFERENCE TO THE ACTUAL FACTS OF THE CASE; (2) OVERSTATED THE OPINIONS OF THE EXPERTS PROFFERED ON REMAND WITHOUT CONSIDERATION OF THEIR CREDIBILITY OR THE WEIGHT A JURY WOULD LIKELY GIVE THEIR TESTIMONY; AND (3) ARRIVED AT ITS DECISION WITHOUT MAKING A SINGLE REFERENCE TO THE TRIAL COURT'S FINDINGS OF FACT OR AFFORDING ITS DENIAL OF DEFENDANT'S MOTION ANY DEFERENCE?

Plaintiff-Appellant Answers: "YES"

Defendant-Appellee Would Contend: "NO"

STATEMENT OF FACTS

Defendant was convicted by a jury of first-degree felony murder, first-degree child abuse, and second-degree murder for the death of his two-year-old son Nehemiah Dodd. Nehemiah was born on October 3, 2011 to Angelene Dodd (JT II, 16).[1] In August 2013, Dodd relapsed with drugs and Nehemiah was placed in foster care under the care and supervision of Dodd's cousin, Pamela Kilpatrick Clay (JT II, 20, 21, 44). Dodd last saw Nehemiah in November 2013; her parental rights were terminated the following month (JT II, 25-26).

On September 5, 2013, at the suggestion of DHS, Nehemiah underwent an extensive physical examination by pediatrician Petra Sabala (JT II, 54; JT III, 34-35). Dr. Sabala diagnosed Nehemiah with macrocephaly, explaining that his head was unusually large for his stage of development, and ordered that a CT scan be done (JT III, 38, 41, 42; JT IV, 10). The CT was conducted on September 11, 2013, and deemed "normal" (JT III, 40). Dr. Ryan Duhn, a pediatric radiologist, reported that while Nehemiah's lateral ventricles were "kind of at the upper limit of

[1] For ease of reference, the transcripts in this case will be referred to as follows:

PRT	8/4/2014	Pretrial
MT I	10/6/2014	Motion (Re: Expert Witness Fees)
MT II	10/13/2014	Motion
SC	1/13/2015	Settlement Conference
PT	1/14/2015	Plea
ST I	2/17/2015	Sentencing/Plea Withdrawal
JT I	3/25/2015	Jury Trial (day one)
JT II	3/26/2015	Jury Trial (day two)
JT III	3/27/2015	Jury Trial (day three)
JT IV	3/31/2015	Jury Trial (day four)
JT V	4/1/2015	Jury Trial (day five)
JT VI	4/2/2015	Jury Trial (day six)
ST II	4/27/2015	Sentencing
EH I	6/29/2016	Evidentiary Hearing (on remand)
EH II	8/8/2016	Evidentiary Hearing (on remand), cont'd.

normal," they were not "pathologically enlarged" (JT IV, 15). Dr. Duhn found nothing unusual—adding, "certainly no intracranial hemorrhage" or blood inside the head (JT IV, 15). He recommended an MRI to get a better look at the soft tissues, but one was never completed (JT IV, 16, 17).

Approximately two weeks after the CT scan, Defendant assumed full custody of Nehemiah (JT II, 47). Clay testified that Nehemiah seemed happy with Defendant, but not long afterward, Defendant called her and wanted her to take Nehemiah back, explaining that he had no job and no place to live and it was just "too much" for him to handle (JT II, 48-49, 62). Four days later (now into November 2013), Defendant went to get Nehemiah—thinking he could do it (JT II, 49). Clay got a call from her sister in January 2014, informing her that Nehemiah was in the hospital (JT II, 51). When she inquired of Defendant what had happened, Defendant told her that "it was an accident," that Nehemiah fell down the stairs (JT II, 51-52). Clay noticed some bruises on Nehemiah's upper torso under his arms that were not there when she had him (JT II, 52, 54). She testified that Defendant provided no explanation for the bruises (JT II, 52, 58).

Defendant's girlfriend, Veronica Witherspoon, testified that on New Year's Eve 2013, she and Defendant, their three-month-old son, her five children, and Nehemiah were together for the first time at a home that she had just rented (JT II, 113). Late in the evening, the kids were playing upstairs, Defendant was laying down in the bedroom, and she was in the kitchen preparing food when her seven-year-old son yelled down that Nehemiah had wet his pants (JT II, 123-124). Approximately ten minutes later Defendant asked her where Nehemiah's change of clothes were (JT II, 125). A few seconds later, Defendant appeared in the doorway holding Nehemiah under his armpits and asking "what's wrong with him?" (JT II, 126, 146). Witherspoon stated that Nehemiah's head was back, his eyes were "rolling around," and he was "spitting a little bit" (JT

II, 127). She thought he was having a seizure (JT II, 127). When Defendant laid him down, Nehemiah's eyes "just looked straight up" (JT II, 127). Defendant attempted CPR and she immediately called 911 (JT II, 128). When the paramedics arrived, Defendant told them that Nehemiah fell down the stairs (JT II, 129).

After Defendant was arrested and taken into custody in May 2014, he commented to Witherspoon that he "finally told them what really happened" (JT II, 135). Defendant went on to tell her that he grabbed Nehemiah's ankles as he was coming down the stairs, thinking he would slide down on his butt, but he instead fell back and hit his head on the stairs (JT II, 135-136). Witherspoon added that she recalled hearing "a thump or two" (JT II, 135, 137, 153). Then, as the trial approached, some arguments ensued because Defendant insisted that Witherspoon misunderstood what he said—she insisted that she knew what she heard and had told the police that she heard two thumps (JT II, 161-162, 163).

Sergeant Brian Boyer testified that when he arrived at the scene on the night in question, Defendant was "unusually calm," hardly showing any emotion at all (JT II, 171, 184). Defendant reported that Nehemiah was approximately half way down the stairs when he stepped into the kitchen for a moment (JT II, 176-177). He heard a thump and discovered Nehemiah lying at the bottom of the stairs (JT II, 177-178). Defendant assumed that Nehemiah fell down the stairs on his back (JT II, 178).

Officer Dan Chenier described the scene as "odd," also testifying that Defendant was "calm" and that there was "no chaos" (JT II, 189, 191, 197). Chenier recalled Defendant stating that Nehemiah fell backwards from 3 to 4 steps from the floor (JT II, 193). Officer Joel VanZytveld testified similarly, noting that Defendant was "nonchalant" and rather "passive"—that they "had to pry to get things out of him" (JT II, 207, 209).

Detective Kristin Cole was the lead detective in this case (JT IV, 130). When she took over the investigation, the only account given to her was that Nehemiah had fallen down a couple steps and hit his head on a carpeted floor (JT IV, 132-133). Detective Cole examined the scene and indicated that the steps were "steeper than normal" and it felt like there was "thick padding" underneath the steps and the landing (JT IV, 147). Over the course of the investigation, Cole interviewed Defendant on three separate occasions (JT IV, 136). The first was the longest interview, the second was a couple days later, and the third interview took place several months later on May 22, 2014—the day Defendant was arrested (JT IV, 137).

During the first interview, Detective Cole brought up the topic of potty training and asked Defendant if he disciplined Nehemiah when he messed his pants (JT IV, 141-142). Although Defendant initially denied that he did, he later admitted that he sometimes spanked Nehemiah (JT IV, 142). Defendant stated that Nehemiah was acting normal all day—"he was fine, he was happy. He wasn't cranky" (JT IV, 143). When asked what happened, Defendant told Cole that he called Nehemiah down to change his pants and that when Nehemiah was about half way down the stairs (with only two or three steps left to go), he saw him fall backward and hit his head on the base of the stairs (JT IV, 151). When asked to clarify whether he actually saw Nehemiah fall, Defendant then said that he did not actually see him fall, but only saw him hit the landing at the bottom of the stairs (JT IV, 151). Defendant also told Detective Cole that he only saw Nehemiah falling out of the corner of his eye, and ultimately stated that he was in the kitchen and did not see the fall at all, but only heard the thump (JT IV, 151-152). Defendant stated that Nehemiah was lying face-up, that he did not make a sound, and that his eyes immediately rolled back (JT IV, 152). Defendant commented several times to Detective Cole that Nehemiah had a big head (JT IV, 153). Cole

described Defendant as "completely unemotional," showing "no emotion at all" while describing the moment when he discovered that his son was not breathing (JT IV, 157).

The second interview took place two days later on January 3, 2014, just one day after Nehemiah was declared brain dead (JT IV, 156). Defendant started crying and insisted that he did not hurt his son—that he fell down the stairs (JT IV, 158). When Detective Cole challenged Defendant, he got "very agitated" and the interview ended (JT IV, 158, 160).

After Defendant was arrested and charged with his son's death, he sat down for a third interview with Detective Cole (JT IV, 161). He was again crying and initially continued with his story that Nehemiah fell down the stairs (JT IV, 161). When Cole confronted him with her belief that the child's injuries did not result from a fall, mentioned the medical evidence revealing an old bleed, and brought up a statement from the mother of one of Defendant's other children [wherein she overheard Defendant cussing and verbally threatening Nehemiah on another occasion—something she testified to at trial (see JT III, 5, 9)], Defendant still insisted, "my son fell down some stairs, man" (JT IV, 162-163).

As Cole attempted to wrap up the interview, Defendant then gave her his "final version of what happened," stating that he was sitting on the second or third step from the bottom and Nehemiah was standing in front of him on the landing (JT IV, 164). Defendant claimed that he grabbed Nehemiah's feet and pulled them out, "intending for him to land on his butt so that [he] could change him out. And instead of him landing on his butt, he went straight back and hit his head on the carpet" (JT IV, 165). Defendant also admitted to Cole that he was "frustrated" when he did it, but insisted that it "was a pure accident" (JT IV, 165). Defendant actually said that he was "kind of pissed" (JT IV, 165). He explained that he initially lied because he panicked (JT IV,

166). Defendant also was "very clear" that Nehemiah hit his head one time on the carpet (JT IV, 166).

Dr. Robert Beck, a pediatric intensivist, testified that Nehemiah arrived at the hospital with "extremis and was comatose with no response to any stimulation" (JT IV, 19, 26). It appeared that he may have had blood in both the subdural space and the subarachnoid space of his brain (JT IV, 28-30). There was also "very obvious" retinal hemorrhaging that resulted in retinal detachment (JT IV, 33). And the postmortem examination revealed hemorrhaging to the optic nerve sheath (JT IV, 33).

Dr. Beck opined that these types of injuries are not typically seen with a single fall (JT IV, 32-33). He explained that a child's skull is more pliable and can be "somewhat bent or impacted without fracturing," depending on the height of the fall and the amount of acceleration (JT IV, 32). The types of injuries suffered by Nehemiah typically require repetitive acceleration and deceleration—something "you see in children who are riding bicycles hit by cars, who are in car seats and T-boned at high speeds,…in high-speed rollovers, [or] acknowledged shaken episodes" (JT IV, 33, 38). Because "there was not a mechanism of injury that could account for the severity of illness" (as it was reported that Nehemiah fell down two or three steps), Dr. Beck suspected that this was a case of child abuse (JT IV, 24, 38). He was particularly concerned with the "severity and the rapidity at which this child was symptomatic" and the fact that he presented with retinal hemorrhages—which Dr. Beck opined are "considered non-accidental unless you can have a witnessed proven mechanism of the injury" (JT IV, 39, 40). Something he did not believe was consistent with a fall down two or three steps (JT IV, 41). Dr. Beck agreed, though, that if the child was grabbed by the ankles as he was walking down the steps and hit his head more than once, these injuries could result depending on the rate of the fall and the speed at which the head is

moving when impact occurs (JT IV, 41). That scenario is "not out of the realm of possibility" (JT IV, 43).

On cross-examination, Dr. Beck was asked whether the injuries could have occurred if Nehemiah was in a standing position and his ankles were grabbed to put him on his butt and he instead, with a "whiplash motion," struck his head (JT IV, 44). He responded, that "[t]hat could be a mechanism. It's not one that I had entertained" (JT IV, 45). "What it boils down to is the speed and the force at which the head hits" (JT IV, 45). Dr. Beck added on redirect that "[t]he amount of force to provoke these injuries would have been significant" to get the external bruising and the internal bleeding (JT IV, 47).

Dr. Brandy Shattuck, the deputy medical examiner and forensic pathologist who conducted the autopsy of Nehemiah, testified there were "at least three" acute contusions or bruises on the back and top areas of the child's head (JT IV, 50, 51, 56, 61, 63). Underneath those bruises were acute subdural hemorrhages, which indicated to her that some type of force was applied to the head (JT IV, 69, 70, 71). When Nehemiah's brain was actually removed, Dr. Shattuck also discovered blood underneath the brain (JT IV, 72). She stated, "[t]hat tells me that there was a significant amount of force applied to the head. Normally, if I see things like this, I don't see them in little falls. I see them in car accidents. I see them in violent or angry or aggressive types of force" (JT IV, 72).

Dr. Shattuck also testified regarding the presence of an old bleed, noting that due to its adherence, it was anywhere from a few weeks to months old (JT IV, 74-75). She then added that because the September 2013 CT scan did not reveal the presence of blood, whatever trauma caused that bleed would have happened since September 11, 2013 (JT IV, 75). Dr. Shattuck opined that the old bleed was comparable to the new one, stating that it would have been significant enough

to cause Nehemiah to be symptomatic, but not severe enough to cause death (JT IV, 75-76). She added, "I don't know exactly what happened because I didn't witness either incident, but they would be of similar force. They would be of similar magnitude" (JT IV, 76). Dr. Shattuck did not believe that the injuries were the type one would expect to see if a child fell down two or three steps (JT IV, 77). When asked if those injuries could occur if the child's ankles were grabbed and he was pulled down the stairs, Dr. Shattuck responded, "[i]t depends with how much force you pull him" (JT IV, 77). She added, "the type of force needed to lead to that type of injury, it has to be significant" (JT IV, 78). Dr. Shattuck then explained that there was no way to measure how much force was needed—"we go from clinical experience"—but it was typically the level of force akin to a car accident (JT IV, 78). "I can't tell you how much force, but there is a significant injury here….There was a significant trauma….this is not a minor fall" (JT IV, 81). Dr. Shattuck classified the death as "non-accidental" or homicide (JT IV, 84).

Dr. Shattuck conceded on cross-examination that, depending on the force of the pull, Nehemiah's injuries could have resulted if his feet were pulled out from underneath him and he fell straight back and hit his head (JT IV, 89, 93, 96). And, that it was possible that these types of injuries could result from a whiplash motion (JT IV, 89). She also agreed that this trauma could be accidental, without a "violent or angry or aggressive type force," so long as the force was significant (JT IV, 90). Dr. Shattuck confirmed that her opinion regarding the manner of death had nothing to do with intent (JT IV, 91-92).

Dr. Rudolph Castellani, a professor and neuropathologist, testified that he reviewed Dr. Shattuck's autopsy photographs and conducted his own examination of Nehemiah's brain, eyes, and spinal cord (JT IV, 105, 111). Dr. Castellani first discussed the presence of an "old inflicted injury in the form of a subdural neomembrane" that he believed was consistent with child abuse—

considering that there was no explanation given for it (JT IV, 112, 114). He was not certain how long ago the injury was inflicted, but roughly estimated that it was somewhere between "weeks to months" old, adding that dating a bleed is an inaccurate science (JT IV, 113, 115). Dr. Castellani opined that Nehemiah was likely in a great amount of pain when that prior injury was sustained (JT IV, 114). He did not know the extent of the original hemorrhage, but noted that it was "covering a fairly substantial amount of the dura" (JT IV, 114).

With regard to the acute or recent subdural hemorrhage, Dr. Castellani opined that it was indicative of "a major trauma to the head" (JT IV, 118). He explained that a subdural hemorrhage is potentially survivable, but here "there was a cardiac arrest as a result of this hemorrhage" (JT IV, 120). And although "trying to quantify the force in producing…something like this is a matter of guesswork at some level," "it has to be sufficient force to cause a cardiovascular and neurological collapse of this individual" (JT IV, 120). A "trivial…bumping of the head does not induce cardiovascular arrest and a sudden neurological collapse" (JT IV, 121). Dr. Castellani went on to report that in addition to the subdural hemorrhage, Nehemiah also had bleeding in his subarachnoid space, as well as hemorrhages in both retinas and around the optic nerve sheaths (JT IV, 121-122, 123). He opined that any one of those findings was "highly suspicious" for child abuse, let alone the presence of all three (JT IV, 123). Dr. Castellani added that "[i]t takes a lot of force for someone to get blood into their subarachnoid space" (JT IV, 124).

On cross-examination, Dr. Castellani indicated that these types of injuries are typically seen in automobile accidents, but agreed (although "highly unlikely") that it could be consistent with "someone grabbing a child's ankles…pulling him, him accidently going all the way back and smacking his head in a whiplash mot[ion]" (JT IV, 127). He again noted that "the whole force

issue is a little bit guesswork," but certainly was enough in this case to cause "a complete neurological and cardiovascular shutdown of this child" (JT IV, 127).

Defendant was convicted by a jury of felony murder, first-degree child abuse, and second-degree murder. Defendant appealed to the Court of Appeals and moved to remand to raise a motion for new trial on the basis of ineffective assistance of counsel, claiming that his trial counsel failed to call an expert witness to support the defense theory that Nehemiah's head injury was the result of an accident rather than intentional abuse. The Court of Appeals granted Defendant's motion and the case was remanded to the trial court for an evidentiary hearing and a ruling on the motion for new trial (see 5/3/2016 Order). The hearing was held over two days. The trial court heard testimony from Defendant's trial counsel, Eusebio Solis, and two expert witnesses Defendant claimed should have been called at his trial.

Attorney Solis testified that he had approximately 30 years of experience—8 years serving as the chief assistant prosecutor for Calhoun County and the remaining years in private practice as a defense attorney (EH I, 36). Solis had never tried an abusive head trauma case, but was aware of cases that had been tried that involved the death of a child (EH I, 36-37). He did not believe that the abusive head trauma "controversy" was a viable defense in this case, noting that he had never seen a successful short-fall defense (EH I, 16-17). Solis further explained on cross-examination that this case was particularly difficult because he had to deal with the fact that Defendant made several different statements and admitted to the behavior that ultimately led to his son's death (EH I, 38-39, 50, 52).

Solis testified that he sought out an expert, but was not led to one that would say that a short fall could have caused Nehemiah's injuries (EH I, 18). He first consulted Dr. Stephen Guertin, an expert in child physical and sexual abuse (EH I, 19). Solis knew Dr. Guertin and

considered him to be fair and objective, stating that he did not always tell him what he wanted to hear (EH I, 42-43). Solis and Dr. Guertin reviewed the autopsy photographs together, including the visible physical injuries on Nehemiah's body, and Dr. Guertin gave Solis several articles to read regarding children and short falls (EH I, 21, 24). Dr. Guertin opined that the accident theory was "arguable," but he could not ignore the other signs of physical abuse—namely, what appeared to be bruises under Nehemiah's armpits and on his chest (EH I, 22, 24-25, 44).

Solis also consulted with Dr. Brandy Shattuck (the forensic pathologist in this case) more than once (EH I, 19-20). They reviewed the "short fall" articles from Dr. Guertin together and Solis concluded that it would turn on the issue of force (EH I, 29). He knew that Plaintiff's experts could not pinpoint the amount of force necessary to cause the injuries suffered by Nehemiah—that there was a wide spectrum of possibilities—and believed that he had good grounds to get some concessions from Plaintiff's experts, including that AHT was not an exact science and that accident could not be ruled out—that it could have happened as Defendant said it did (EH I, 26, 29, 30).

When asked why he chose to get concessions from Plaintiff's experts rather than calling his own, Solis explained that one could find an expert to say just about anything and it was important to consider what may come out from that expert on cross-examination (EH I, 40, 45-47). He thought it was better in this particular case to simply use the concessions of Plaintiff's experts to plant the seed of doubt in the jurors' minds (EH I, 47). Solis did not want to lose credibility with the jury (EH I, 52).

Dr. Ljubisa Dragovic, the chief forensic pathologist and chief medical examiner from Oakland County, then testified via video (EH I, 70). He first took fault in the manner in which Plaintiff's experts arrived at the cause of death in this case, stating that while "the autopsy itself was performed properly [and] everything was documented extensively," some additional things

could have been done (EH I, 78-80). Dr. Dragovic believed that the manner of death "lacked substantiation" (EH I, 79). He noted that there was evidence of a pre-existing subdural hemorrhage and opined that Nehemiah's "circulation might have been impaired and it might have been partial clotting within" (EH I, 82). Dr. Dragovic also noted that none of the reports addressed the condition of the superior sagittal sinus or the presence or absence of thrombosis (or clotting), "which might have played a role in subsequent injury" (EH I, 83). Dr. Dragovic conceded, though, that clotting occurs almost immediately after one is "brain dead" and that it was hard to determine with precision the actual age of blood organization (EH I, 85-86, 136).

Dr. Dragovic testified that the physical evidence revealed "several bruises" on Nehemiah's head—"a complex bruise or two bruises merging into each other" near the back part of the top of his head and a smaller bruise in the lower left side of the head (EH I, 90). Under each bruise was a corresponding area of bleeding under the scalp, which he stated was indicative of impact (EH I, 93). Dr. Dragovic went on to testify that a "subdural hemorrhage occurs with any fall" and that the medical evidence in this case was "consistent" with Defendant's story (EH I, 102-103). When asked if there was anything that suggested to him that Nehemiah's injuries were "necessarily intentionally inflicted," Dr. Dragovic responded that "there's one injury that is critical"—the bleeding in the subdural space that extended to the optic nerve sheets, leading to the diagnosis of retinal hemorrhages (EH I, 103).

Dr. Dragovic opined that the amount of force necessary to cause Nehemiah's injuries could not be measured and, while he thought it was "nonsense" that it was force comparable to an automobile collision, he could not exclude the possibility that Nehemiah's injuries were the result of child abuse (EH I, 104, 106). He added that "there may have been a greater opportunity for

reinjury…with far less force…than what would have happened if the kid did not have prior injury….” (EH I, 106).

On cross-examination, Dr. Dragovic stated that he never referred to Nehemiah’s death as an “accident,” he denied saying that the child’s bruises were the result of a single impact, and he denied that he said that a subdural hemorrhage occurs with every fall (EH I, 118, 142, 152, 155). He opined that the injuries were consistent with the scenario provided, but was clear that he did not know if the child was pushed or thrown (EH I, 143). Dr. Dragovic explained that it was “one possibility” that Nehemiah’s death resulted from an accident, but “I specifically said that I cannot exclude by any measure any other scenario” (EH I, 144). In the end, he insisted that because he was not there, he could not offer an opinion as to the manner of Nehemiah’s death—and that Plaintiff’s experts should have refrained as well (EH I, 143, 145). Dr. Dragovic insisted that if you do not know “exactly what happened,” you should simply indicate “we don’t know” and document the manner of death as “indeterminate” (EH I, 145). Finally, Dr. Dragovic reiterated that he was not saying that Nehemiah’s injuries were the result of an accident—only that they could have happened as described by Defendant (EH I, 155). He indicated that he was not factoring in the amount of force used, nor Defendant’s intent, and conceded that short falls typically do not result in the type of injuries present in this case (EH I, 155-156).

Dr. Julie Mack, a diagnostic radiologist working primarily with adult breast imaging, testified via video that Nehemiah’s September 2013 CT showed a “normal brain” with normal major (including sagittal) sinuses (EH II, 5, 29-30, 37). She explained that it was evident from the autopsy that the child had a chronic (or old) bleed and that the question has been posed whether it was present during the September 2013 CT scan and simply went undetected (EH II, 33). Dr. Mack indicated that “it’s possible…we don’t know” (EH II, 33). She believed that an MRI would

have assisted with determining if all the fluid outside of Nehemiah's brain was normal, but added that based on the 64 CT slides, "I think the majority of the fluid is where it's supposed to be" and if the old bleed was there, "it was small" (EH II, 32-33). Dr. Mack went on to state that if fluid is present outside the brain and begins to increase, it causes the bridging veins along the brain to stretch, making them more susceptible to injury with lesser degrees of trauma (EH II, 33-34). In those situations, a subdural hemorrhage may occur with little to no recognized trauma (EH II, 34). She agreed with the CT report that there was no acute (or recent) blood outside Nehemiah's brain in September 2013, but insisted that fluid may still exist, though, from a remote subdural hemorrhage—thus causing a "compromised interface" (EH II, 35).

Dr. Mack testified that the CT done shortly after Nehemiah was admitted to the hospital revealed denser blood in the sinus, which is indicative of a clot or hemorrhage (EH II, 38, 41-42). She explained that blood turns dense within an hour and can stay dense up to 7 to 10 days (EH II, 38). Dr. Mack could not confirm the presence of a clot from the CT alone—that was something that had to be confirmed by pathology (EH II, 41-42). She added, though, if there was a clot in the sinus that pre-dated the acute injury, "and we don't know that it did, but if it pre-existed the trauma," then yes, the child's brain would have been compromised (EH II, 43, 51, 53). Dr. Mack also testified that subdural hemorrhaging can occur with "relatively minor impact" (EH II, 45).

On cross-examination, Dr. Mack reiterated that there was no way to determine from the September 2013 whether an old bleed was present, but she was able to see that no clot of any kind existed at that time (EH II, 56, 59). She also conceded that it was unknown whether the dense blood (or clot) she observed in the January 2014 CT pre-dated the trauma, occurred with the trauma, or happened on the way to the hospital (EH II, 65). And while Dr. Mack believed that subdural hemorrhages do not always require significant trauma, she was not denying that there

was trauma in this case—noting that pathology revealed clear evidence of impact (EH II, 72-73). Also, Dr. Mack testified that this case did not involve a spontaneous re-bleed, explaining that the old bleed did not supersede the acute trauma—"The acute trauma caused the collapse in this case" (EH II, 75, 77). Her primary concern was to emphasize that evidence of a prior bleed is not necessarily indicative of abuse (EH II, 77-78, 91).

On November 4, 2016, the trial court issued a lengthy opinion and order denying Defendant's motion for new trial, differentiating this case with *People v Ackley*, 497 Mich 381 (2015), and finding that Defendant failed to meet his burden to establish that his trial counsel was incompetent in not calling an expert to testify at trial and/or that the absence of an expert affected the outcome of his case. The Court of Appeals reversed and remanded for retrial (see Attachment A). Plaintiff now seeks relief from that opinion.

ARGUMENT

THE COURT OF APPEALS CLEARLY ERRED WHEN FINDING THAT DEFENDANT WAS ENTITLED TO A NEW TRIAL ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PRESENT AN INDEPENDENT DEFENSE EXPERT ON CHILD ABUSIVE HEAD TRAUMA WHERE THE COURT (1) CONSIDERED THE ISSUE IN A VACUUM AND WITHOUT REFERENCE TO THE ACTUAL FACTS OF THE CASE; (2) OVERSTATED THE OPINIONS OF THE EXPERTS PROFFERED ON REMAND WITHOUT CONSIDERATION OF THEIR CREDIBILITY OR THE WEIGHT A JURY WOULD LIKELY GIVE THEIR TESTIMONY; AND (3) ARRIVED AT ITS DECISION WITHOUT MAKING A SINGLE REFERENCE TO THE TRIAL COURT'S FINDINGS OF FACT OR AFFORDING ITS DENIAL OF DEFENDANT'S MOTION ANY DEFERENCE.

PRESERVATION OF ISSUE

This issue was preserved by motion in the Court of Appeals and an evidentiary hearing on remand on Defendant's motion for new trial before the trial court. *People v Cameron*, 291 Mich App 599, 617-618; 806 NW2d 371 (2011).

STANDARDS OF REVIEW

Granting or Denying a New Trial. A trial court's decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *People v Armstrong*, 305 Mich App 230, 241; 851 NW2d 856 (2014). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse occurs when the trial court's decision falls outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

Ineffective Assistance of Counsel. Whether Defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). This determination requires a judge to first find the facts, then determine whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* This Court reviews the trial court's factual findings for clear error and its constitutional determination de novo. *Id.*

DEFENDANT IS NOT ENTITLED TO A NEW TRIAL

MCR 6.431(B) provides that "the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCL 770.1 similarly states that "[t]he judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done…." Finally, MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

No abuse was committed. The trial court properly determined that Defendant failed to sustain his burden of proof to establish that he was denied the effective assistance of trial counsel. The Court of Appeals erred in finding otherwise—giving absolutely no deference to the trial court's ruling.

A) NO SHOWING OF INCOMPETENCE; COUNSEL MADE SOUND STRATEGIC DECISION; *ACKLEY* DID NOT CREATE PER SE RULE THAT EXPERT IS REQUIRED IN EVERY ABUSIVE HEAD TRAUMA CASE

Relying in large part on this Court's decision in *Ackley*, Defendant argued in the courts below that he was denied his right to the effective assistance of counsel and a fair trial because his trial attorney neglected to call an expert to refute Plaintiff's theory that his two-year-old son died as a result of abusive head trauma inflicted by Defendant. He insisted that his trial attorney failed to investigate Plaintiff's medical evidence, was unaware of the controversy surrounding the diagnosis of abusive head trauma, failed to identify and present a substantial causation defense, and essentially "left the jury with the impression that it was undisputed that no accidental scenario short of a car crash could have caused Nehemiah's brain injuries." Defendant continued, "[i]n other words, trial counsel completely failed to present available expert testimony showing that Nehemiah's injuries could have resulted accidentally, in the manner described by Mr. Roberts."

Plaintiff countered, arguing that Defendant's claims were without merit—as they relied on assumptions wholly unsupported by the record, ignored very pertinent testimony and circumstances that differentiated this case from others of its kind, and purportedly found their strength in newly proffered expertise (i.e., the affidavit of Dr. Ljubisa Jovan Dragovic) that did nothing more than criticize the methodology of Plaintiff's experts and itself provided absolutely no opinion corroborating Defendant's theory that Nehemiah's injuries could have resulted *accidentally* in the manner he ultimately described to police.

As noted above, the Court of Appeals granted Defendant's motion and remanded the matter to the trial court for an evidentiary hearing. Hearings were held before the lower court on June 29, 2016 and August 8, 2016, during which the court heard testimony from Defendant's trial attorney,

Dr. Dragovic, and Dr. Julie Mack. The trial court was tasked with determining whether Defendant was entitled to a new trial on the basis of ineffective assistance of counsel.

To establish ineffective assistance of counsel, Defendant must prove that his trial counsel's performance was *objectively unreasonable* in light of prevailing professional norms, and that, but for counsel's error, it is *reasonably probable* that the outcome would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012); emphasis added. Effective assistance of counsel is presumed and Defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

To show an objectively unreasonable performance, Defendant must prove that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment, and that the proceedings were "fundamentally unfair and unreliable." *Strickland*, *supra* at 687, 694; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002). In doing so, Defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy. *Ackley*, *supra*, at 388. The appellate court neither substitutes its judgment for that of counsel regarding matters of trial strategy—even if that strategy backfired or was unsuccessful—nor makes an assessment of counsel's competence with the benefit of hindsight. *People v Mutuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *Rodgers*, *supra*, at 715. Keeping in mind, though, that "'a court cannot insulate the review of counsel's performance by calling it trial strategy'; counsel's strategy must be sound, and the decisions as to it objectively reasonable." *Ackley*, *supra*, at 388-389; quoting in part *Trakhtenberg*, *supra*, at 52.

Finally, where sufficient prejudice is not proven, there is no need to examine counsel's performance—Defendant's claim must simply be denied. *People v Reed*, 449 Mich 375, 400-401;

535 NW2d 496 (1995); *Strickland*, *supra* at 697. And to prove prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Strickland*, *supra*, at 693; internal citations omitted. Again, Defendant must show that there is a *reasonable* probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. at 694; *Trakhtenberg*, *supra*, at 51. "An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like"—the reviewing court should proceed on the presumption that "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Strickland*, *supra*, at 695. The appellate court must consider the totality of the evidence before the jury, as "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect." *Id*. at 695-696. "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id*. at 696. Ultimately, the "focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id*.

On appeal, the trial court's factual findings are supposed to be reviewed for clear error, see *Cline*, *supra*, 276 Mich App at 637, but here, the Court of Appeals arrived at its decision without a single reference to the factual findings of the trial court. The Court of Appeals also ignored significant differences between this case and *Ackley* (differences that the trial court opined were instrumental in assessing the competence of Defendant's trial counsel) and completely removed any professional deference once afforded to defense attorneys—essentially holding that if an

expert is not presented by the defense in an abusive head trauma case, it is per se error. Plaintiff questions the purpose of the Court of Appeals even ordering the trial court to hold an evidentiary hearing and rule on the issue.

Plaintiff has consistently argued that this case is quite different from *Ackley* and other abusive head trauma cases in that Defendant admitted to conduct that caused Nehemiah to strike his head—and it was immediately thereafter that the child stopped breathing, suffered cardiac arrest, and entered into a comatose state (JT II, 126-127, 135, 163; JT IV, 37, 43, 164-166). Unlike many of its kind, this case did not involve an unwitnessed injury nor a complete denial of any culpability on behalf of the child's parent or caregiver. To the contrary, as the trial court found, "[w]hile *Ackley* resembles the instant circumstances, there are a number of distinct and important differences worth mentioning. First, there is no factual dispute that Defendant actually triggered Nehemiah's injuries. Defendant confessed to being the only one present when Nehemiah was injured and admitted to conduct which led to the fatal injuries" (11/4/2016 Opinion & Order Denying Defendant's Motion for New Trial, p 8; Attachment B).

"Second," the trial court held, "Defendant's veracity was a crucial aspect of the instant matter. Defendant's trial counsel was acutely aware that he had to address his client's multiple conflicting versions of what transpired….Here, defense counsel had to embrace an equivocal client as part of his overall strategy. Such a factor was nonexistent in *Ackley*, as Mr. Ackley's consistency about the event was not an issue." *Id.* Indeed, while initially claiming that he witnessed Nehemiah fall down the stairs, Defendant later told police (several months after the incident, at the time of his arrest) that he pulled Nehemiah's feet out from underneath him, believing he would fall on his bottom so Defendant could change his pants, but he instead fell back and hit his head on the floor (JT II, 129, 175-178, 193; JT IV, 151, 164-166).

There was actually a third version of events that was even more incriminating—a story never given to the police and a part of the record that opposing counsel completely omitted from Defendant's request for remand in the Court of Appeals and his brief in support of his motion for a new trial before the trial court. As mentioned above, Defendant's live-in girlfriend, Veronica Witherspoon, testified that Defendant told her that he grabbed Nehemiah's ankles as he was coming down the stairs, thinking he would "slide down" on his butt, but he instead fell backwards and hit his head on the stairs (JT II, 135-136, 163). Witherspoon added that she recalled hearing "a thump or two" (JT II, 135, 137). And the autopsy revealed three distinct, acute (recent) bruises on the back of Nehemiah's head (JT IV, 56, 61-63). Again, unlike other cases (and specifically, *Ackley*), the injury was witnessed and corroborated by physical evidence—something the jury in this case heard and certainly considered when determining Defendant's credibility and guilt.

These particular facts weighed heavily on Defendant's trial counsel's assessment of the case and the course he chose with regard to presenting a theory of defense that would not run the risk of being completely incredible to the jury. While it is true that a defendant is presumed innocent and need not present any evidence, if he chooses to do so—and takes a swing and misses—that decision can prove to be more detrimental to his case than simply taking the indirect approach of creating reasonable doubt by attacking the strength of Plaintiff's evidence through cross-examination. Trial counsel testified that when considering a trial strategy, he had to deal with the fact that Defendant had made several different statements, all of which put him there as a witness, and two that included an actual admission that he was the one responsible for causing the fall that resulted in Nehemiah's death (EH I, 38-39, 51-52). Solis was aware that experts are generally available on nearly every topic and that he could find one to say just about anything (EH

I, 40). He wanted to be cautious, though, knowing that part of what goes into the decision whether to call an expert is considering how he or she will stand up to cross-examination (EH I, 45-46).

The trial court acknowledged trial counsel's conundrum and found that he acted reasonably—that he "actually performed some research on the subject matter," consulted with a pediatric child abuse expert and the medical examiner, and "[b]ased on a calculated assessment," he "made a prudent decision not to open up a potentially damaging issue" and rather than presenting his own expert, "sought to obtain concessions from, not one, but two of the government's experts that one of his client's three versions of causation was, indeed, possible." *Id*. at 9, 12. The trial court added:

> …[T]rial counsel spent some time with one of the government's witnesses, Dr. Shattuck, in advance of trial and obtained what he believed was a valuable concession; that is, it was possible that Nehemiah suffered injuries due to accidental conduct…He testified that at the conclusion of their meeting, he understood that she would agree that his theory was at least a possibility….*Ackley's* trial counsel enjoyed no such indulgence from any of the government's five expert witnesses. [*Id*. at 10.]

Again, Solis testified that he started his investigation by exploring the victim's macrocephaly (i.e., large head) and whether that condition may have made him more susceptible to injury (EH I, 20). He contacted Dr. Guertin—an expert in child abuse with whom he had an established relationship (EH I, 19, 42-43). Solis had used Dr. Guertin both as a prosecutor and as a defense attorney; he considered Guertin to be fair and objective (EH I, 42-43). Dr. Guertin reviewed the autopsy photographs with Solis and they also discussed the "short fall" theory (EH I, 21, 24, 29). Guertin ultimately opined that the theory was "arguable," indicating that he could not "rule out accident," but he would not be a favorable witness because of the "other signs of abuse" that he observed (EH I, 22, 24-25, 44). Dr. Guertin then provided Solis with a number of

articles on short-fall head injuries in children (EH I, 21, 29). Solis read those articles and contacted Dr. Shattuck, the forensic medical examiner that conducted the autopsy in this case (EH I, 20-21).

Solis stated that he met with Dr. Shattuck more than once—and also considered her a fair and unbiased witness—noting that she was "very open and helpful" (EH I, 21, 43). He discussed the articles with Shattuck (EH I, 21). And based on their discussions, he believed that he had "good grounds" to get some concessions from Plaintiff's experts that this area of medicine was "not an exact science," that accident could not be ruled out, and that it could have happened as Defendant said (EH I, 26). Solis stated that he knew before trial that Dr. Shattuck would make concessions that supported his theory of defense, including the fact that experts cannot pinpoint the amount of force required to cause injuries like those seen in Nehemiah (EH I, 29-30). And he recalled that he did in fact get such concessions from at least two or three of Plaintiff's expert witnesses (EH I, 27, 48-49). When asked if he believed there was any benefit to gaining concessions from Plaintiff's experts rather than presenting his own expert, Solis explained that he thought it was an effective way of planting the seed of doubt in the jurors' minds without exposing your own witness to cross-examination (and perhaps having the whole theory defeated) (EH I, 46-47).

As the trial court determined, trial counsel's strategy was sound and reasonable. Plaintiff presented five expert witnesses during trial. Only three of them testified regarding the victim's injuries. And of those three, Dr. Shattuck and Dr. Beck conceded on cross-examination that Nehemiah's injuries (depending upon the amount of force used) could have resulted in the manner described by Defendant. The third expert, Dr. Castellani, testified that although it was "highly unlikely," he could not say for certain.

On cross-examination, Dr. Shattuck testified that she could not tell the jury exactly what "kind of force" would be required and conceded that when she spoke of a force akin to a car or train accident, that included accidents of variable (or low) speeds (JT IV, 87). Defendant's trial counsel pressed her, inquiring whether similar injuries could occur at speeds as low as 10 miles per hour, or 15 miles per hour (JT IV, 87). Dr. Shattuck replied, "It could be almost any number. I don't actually know because we don't have a standard for children" (JT IV, 87). She explained that it often depends on what the child hits and if it has its own velocity (JT IV, 87). All Dr. Shattuck could tell the jury was that the force was "significant" (JT IV, 88). Counsel continued:

> Q: You had testified that if a child's legs had been held by the ankles and pulled back, he had fell [sic] straight back, it could have caused these injuries?
>
> A: *Depending upon the force of the pull, yes*.
>
> Q: And that perhaps he struck that side or something still could have caused the same injuries, true?
>
> A: *Yes*….
>
> Q: You know he had some macrocephaly. I mean his head was enlarged.
>
> A: Yes, his head was on the larger end of normal for his age….
>
> Q: Okay. And in your previous testimony, you had talked about sometimes these injuries are caused by a whiplash motion.
>
> A: *It's possible, yes*.
>
> * * *
>
> Q: Okay. And so given Nehemiah's dimensions, if he was in fact grabbed and pulled and fell back, perhaps it caught him by surprise, this injury could have resulted?
>
> A: *Depending on the force of the pull, yes*. [JT IV, 89-90; emphasis added. See also, JT IV, 93. 96.]

Defendant's trial counsel also got Dr. Shattuck to concede that although there may typically be some type of emotion involved, i.e. anger and/or aggression, it will depend on the circumstances (JT IV, 91). And, more importantly, when opining that the manner of death was "homicide," she simply meant that it was caused by someone else—agreeing that "[i]t is no reflection on the intent that went behind it" (JT IV, 91-92). Dr. Shattuck stated, "I have nothing to do with intent…That's not my area" (JT IV, 92). She went on to agree two more times that, with the appropriate amount of force, Nehemiah's injuries (including the retinal hemorrhaging and sheath detachment) were "[c]onsistent with the method that [defense counsel] described of pulling one's feet and having the individual fall back in a whiplash motion and hit his head" (JT IV, 93, 96).

Dr. Beck made similar concessions—both to the prosecutor and to the defense. When asked by the trial prosecutor if Nehemiah's injuries were consistent with having his ankles grabbed as he was walking down the steps and hitting his head, he responded that it "[d]epends on the rate of the fall and depends on the speed that the head is moving when the impact happens" (JT IV, 41). He continued, "There's no real time data in children to say how much or how little. There's data from the 1990's looking at how far children have to fall to be critically injured in the *Journal of Trauma*. And what they found was that children who fell less than four feet that were unwitnessed or only had one witness were at higher risk of dying than children who fell more than ten feet who had multiple witnesses" (JT IV, 41). Defendant's trial attorney pressed further during cross-examination:

> Q: …[A]ccording to his pediatrician, his head is larger than—well, he's off the charts but he's got a large head.
>
> A: He's got a large head.
>
> Q: Okay. He's in a standing position and his ankles are grabbed to put him on his butt but he goes all the way back. He's caught off

> guard. There's a whiplash motion and he strikes his head. Could that have caused this injury?
>
> A: *That could be a mechanism.* It's not one that I had entertained….*What it boils down to is the speed and the force at which the head hits.*
>
> Q: So it could have happened that way, couldn't it?
>
> A: *I could not refute you with a hundred percent.* [JT IV, 44-45; emphasis added.]

Dr. Beck also agreed with defense counsel that "the whiplash motion and the striking of the head" could have potentially been the "acceleration-deceleration" that caused Nehemiah's retinal injuries (JT IV, 46). And finally, that the definition of "accident" is that "[a] person does something, may not intend it, but it occurs" (JT IV, 46).

Finally, while Dr. Castellani believed it was "highly unlikely" that Nehemiah's injuries could have been caused as described by Defendant, he conceded that "the whole force issue is a little bit guesswork" (JT IV, 127). And while "that easily takes substantial force," "we can't put a number on that unfortunately" (JT IV, 127).

These concessions were significant—and helpful to Defendant's theory of the case. Solis had consulted with two experts, he educated himself on the topic of abusive head trauma, and he touched on the relevant issues during cross-examination, drawing out concessions from Plaintiff's experts that this was by no means an exact science. Counsel also honed in on other issues that made this case different, i.e., the size of Nehemiah's head and evidence of an old subdural bleed, and used all the information to argue (rather convincingly) not only that Defendant's version of the events was plausible, but that the resulting injuries were accidental and unforeseeable. This was not, as Defendant portrays (or the Court of Appeals opines) a one-sided case like Ackley.

Counsel got exactly what he wanted from the evidence (see counsel's closing argument at JT V, 139-142, 147).

The Court of Appeals discounts the sufficiency of these concessions, but it is important to keep in mind that Defendant did not bear the burden of proof at trial. Indeed, to succeed in his defense, he needed only to create a reasonable doubt in the jurors' minds regarding his guilt. And strategically, he chose to do that by eliciting concessions from Plaintiff's experts—both those supporting the theory of defense and those exposing weaknesses and/or limitations in their respective opinions—rather than calling an expert of his own. As the Court of Appeals noted, but then seemingly ignored, counsel must be given some latitude regarding what evidence to present and whether to call a particular witness. See *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994); *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The fact remains that these decisions are matters of trial strategy and, again, although not arbitrarily shielded from appellate review as such, they do enjoy a *heavy* or *strong* presumption of reasonableness under state and federal law. *Ackley*, *supra*, at 388-389. And here, the trial court correctly determined that Defendant failed to overcome that presumption.

> Reduced to its core, Defendant reasons that not calling an expert to counter a government expert in an abusive head trauma case is *per se* ineffective assistance of counsel. This court does not agree that this is the standard announced in *Strickland*, *supra*, nor in *Ackley*, *supra*….Was the overall strategy here objectively reasonable? The court holds that in this instance, it was. [11/4/2016 Opinion & Order, p 12.]

The Court of Appeals erred in determining that Solis' representation fell below an objective standard of reasonableness.

B) NO REASONABLE PROBABILITY OF A DIFFERENT OUTCOME; COURT OF APPEALS OVERSTATES OPINIONS OF PROFFERED EXPERTS

With regard to prejudice, Defendant asserted that his trial counsel failed to identify and present a *substantial* defense. He specifically faulted trial counsel for failing to present "critical expert testimony" that he believed would have "directly undermined" Plaintiff's causation theory, and provided testimony that Nehemiah's injuries could have resulted accidentally, in the manner described by Defendant. However, as the trial court determined, the expert testimony Defendant presented on remand provided no more support for his theory of defense than the concessions trial counsel was able to glean from Plaintiff's experts during trial. Neither Dr. Dragovic nor Dr. Mack provided a *substantial* defense for Defendant. Both experts testified about "possibilities" rather than probabilities, both conceded that Defendant caused the injuries that ultimately led to Nehemiah's death, and while Dr. Dragovic testified that Nehemiah's injuries *could* have resulted in the manner described by Defendant (just as Dr. Shattuck and Dr. Beck had), he agreed that it depended on the amount of force used and that he could not rule out other possible scenarios, i.e., child abuse. The trial court held that, "[a]t best, if believed, the sum total of the evidence would have created an environment where the jury would have been given more of what it already heard." *Id.* at 15. Accordingly, the trial court was "not convinced…that it is reasonably likely the trial result would have been different if his counsel had acted otherwise" and denied Defendant's motion for new trial. *Id.*

Here again, the Court of Appeals completely ignored the findings of the trial court and afforded it no deference regarding its ruling. The Court of Appeals also overstated the opinions of Defendant's proffered experts—ignoring their testimony on cross-examination—and assumed that their testimony could have affected the outcome in this case, without regard to the other evidence presented.

Case law holds that defense counsel's failure to present evidence will constitute ineffective assistance of counsel only if it deprived a defendant of a substantial defense. *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). Here, though, unlike the proffered expert in *Ackley*, neither Dr. Dragovic nor Dr. Mack would "provide[] the jury with another *viable* and *impartial* perspective on the facts of the case while contradicting the prosecution's theory of how the child died." *Ackley*, *supra*, at 394; emphasis added. Consequently, Defendant did not sustain his burden.

Dr. Dragovic's primary focus was to fault the means by which Dr. Shattuck and Dr. Castellani conducted their examination of the victim. He testified that "the autopsy itself was performed properly, everything was documented extensively"—that it "was performed following the standard patterns"—but "some of the things *might* have been done in addition to what needed [to be done]" (EH I, 78, 131; emphasis added). He also stated that some additional steps "could" have been taken in the neuropathological examination of the brain (EH I, 79). Specifically, Dr. Dragovic explained that he would have liked to have seen "a complete photographic documentation" from the neuropathologist and "multiple sampling" of the brain tissue during the autopsy in an effort to determine the age of the neomembrane (or "old" bleed), as well as whether there was any clotting in the superior sagittal sinus (EH I, 79-80, 83, 85, 135). Dr. Dragovic went on to testify that because there was evidence of a pre-existing subdural hemorrhage, "circulation *might* have been impaired and it [sic] *might* have been partial clotting within" (EH I, 82; emphasis added). He added that none of the reports addressed the condition of the superior sagittal sinus or presence or absence of thrombosis—"which *might* have played a role in subsequent injury" (EH I, 83; emphasis added; see also, EH I, 135).

When asked on cross-examination what "standards" he was referring to, or what he meant by "best practice," Dr. Dragovic retorted, "I'm expressing my professional opinions….[b]ased on my experience and my professional knowledge" (EH I, 130). And when asked whether those standards were published anywhere, Dr. Dragovic referred to a chapter he authored in a textbook entitled, "Essential Forensic Neuropathology" (EH I, 130; see also, Defendant's "Exhibit N"—Attachment C). Dr. Dragovic was then specifically asked about "multiple sampling" and whether it was a standard utilized by the National Association of Medical Examiners ("NAME") (EH I, 131-132). He again retorted, "It's the standard of finding the truth" and that he did not know whether it was included in the standards published by NAME (EH I, 132). And with regard to dating the old bleed, Dr. Dragovic conceded that while one could make "inferences" about the actual age of a subdural hemorrhage based on the degree of organization or healing, that process is "not precise" (EH I, 85-86, 137). He insisted, though, that doctors should still try and faulted Plaintiff's experts for failing to do so (EH I, 137).[2] Dr. Dragovic was then confronted with a quote from the textbook chapter he authored, wherein he wrote "[e]stablishing the precise age of a subdural hemorrhage has its limitations, thus, determining the precise timing of the actual trauma is a rather unrealistic expectation of a neuropathologist. Relying completely on the techniques of microscopic examination as a precise diagnostic tool is ill-advised. The degree of organization of a subdural hemorrhage is helpful, but not definitive" (EH I, 140; Attachment C, 189). He simply responded, "Absolutely and that's correct. I stand by what I have written there and by what I have said anywhere at any time" (EH I, 140). Finally, when asked why the age of the old bleed would

[2] It is important to note that Dr. Castellani did in fact offer an opinion regarding the age of the old subdural hemorrhage. He testified that based on his gross observation, he would estimate (noting that "dating this is an inaccurate exercise") that the injury was anywhere from weeks to months old (JT IV, 113, 115). Dr. Castellani also testified that due to the size of the old bleed, the child would have been in a "tremendous amount of pain" (JT IV, 114).

even matter in this case, Dr. Dragovic answered, "I don't know because I don't have the evidence to evaluate it" (EH I, 140-141).

Dr. Dragovic was also back-and-forth on whether he believed Nehemiah's injuries were indicative of abuse or simply an unforeseen accident. When asked by defense counsel, "is the medical evidence from the autopsy consistent with Mr. Roberts' statement that he was sitting on the bottom of the stairs, facing Nehemiah who was [ ] standing, and that…he pulled Nehemiah's ankles intending to bring his butt to the ground so that he could change him but instead Nehemiah fell straight back, hit his head, and was immediately unresponsive?," Dr. Dragovic responded, "Yes, it is" (EH I, 103). Immediately following that question, he was asked whether there was anything in the autopsy "that suggests to you that these injuries were necessarily intentionally inflicted?," and he went on to state that "there's one injury that is critical and that injury is the head injury that resulted in bleeding into the subdural space creating the problems with the swelling of the brain, creating the extension of the subdural bleeding in the optic nerve sheaths…creating the diagnosed retinal hemorrhages…." (EH I, 103). Dr. Dragovic continued, "So it is one injury. Now, this kid has two bruises on the back or two merging bruises there and one smaller bruise in the back of the head. It's one impact of the head flying through the air that resulted in this complication and this deadly outcome" (EH I, 104). Based on these comments, it appears that Dr. Dragovic was concerned not only with the extent of the injuries from a single impact (as described by Defendant), but also with the fact that Nehemiah had multiple bruises. Dr. Dragovic confirmed that bruising is indicative of impact and that behind each bruise on Nehemiah's head was found a corresponding area of bleeding (EH I, 90, 93; see also, EH I, 141-142). And on cross-examination he emphatically denied ever suggesting that all three bruises resulted from a single impact (EH I, 94, 142). Dr. Dragovic also denied ever referring to this incident as an "accident" and admonished

Plaintiff's attorney to "[not] confuse things that [he] supposedly said that run through [her] mind" (EH I, 118).

Dr. Dragovic was also asked by defense counsel whether there was anything about the medical evidence that "necessarily" proved this was child abuse (EH I, 104). Dr. Dragovic responded, "No, of course not," but went on to add, "I mean, I can't exclude that as a possibility because throwing for example or pushing or something like that would be [a] purposeful act. And I cannot exclude that and I wasn't there. However, the scenario that you provided is consistent with occurrence of this type of trauma and these complications" (EH I, 104). When later asked about the amount of force that was necessary to create such injuries, Dr. Dragovic stated, "I don't have the opinion about the force because I cannot measure the force because I was not there to observe it" (EH I, 106). He did note, though, that it was "nonsense" to insist that the force necessary to cause these injuries was comparable to an auto collision" (EH I, 106).

Dr. Dragovic added that "there *may* have been a greater opportunity for reinjury…with far less force" due to Nehemiah's prior injury—one that he opined would have occurred from a similar mechanism or in a similar fashion (EH I, 106, 107; emphasis added). This statement was made after Dr. Dragovic earlier opined that "any injuries healed or not healed do not make any difference in this situation. This is one mechanism causing one set of circumstances that evolve into this child's death" (EH I, 104). Such statements—even if not contradictory—would certainly be difficult for a jury to sort out.

Even more confusing was Dr. Dragovic's testimony regarding the manner of death, and his criticism with it being deemed a "homicide" in this case. He testified on cross-examination that he could not offer an opinion as to the manner of death because he was not present when the injury took place (EH I, 143). He continued by stating that "if they [referring to Dr. Shattuck and Dr.

Castellani] don't know exactly what happened they should have said we don't know because that's the fair answer for everyone….we don't guess if we don't know" (EH I, 145). Dr. Dragovic then added that a medical examiner must know "beyond a reasonable doubt," otherwise he or she should indicate that the manner of death is "indeterminate" (EH I, 145-146).

Plaintiff's attorney repeatedly questioned Dr. Dragovic whether it would be true, then, that in every case of child head trauma, he (as the medical examiner) would indicate that the manner of death was indeterminate, absent a confession or eye-witness account (EH I, 145-152). And rather than answering the question, Dr. Dragovic instead insulted Plaintiff's attorney—ridiculing her for her choice of words (i.e., using "inconclusive" rather than "indeterminate" and "injuries" rather than "findings"), telling her that she first needed to gain an understanding about the issues before they could discuss them—and then offered to explain them if she had the time, insisting that he was "trying to answer questions, but you got to learn how to ask the questions, ma'am" (EH I, 145, 151, 152-153). Dr. Dragovic answered only that "[w]henever I have enough evidence I will call something a homicide but not unless I've reached the level of feeling or understanding that I am convinced beyond a reasonable doubt (EH I, 150). Notably, in his chapter in "Essential Forensic Neuropathology," Dr. Dragovic wrote that only "[i]n rare circumstances, it will not be possible to determine with certainty the cause or manner of death" (see Attachment C, 194). "We believe that in the great majority of these cases, it is possible to arrive at a sound conclusion on the basis of a comprehensive investigation of the death scene, clinical history, and general and neuropathology autopsies" (Attachment C, 194). And Dr. Dragovic conceded in this case that he did not have all the facts—he was unaware of what Defendant told the police or what his girlfriend testified to at trial, he had little to no information regarding the scene or the purported location of impact, and he knew nothing about the reports of the first-responders (EH I, 160-161).

Dr. Dragovic was asked by Plaintiff's attorney whether it was his opinion that these injuries, as severe as they were, could result from a "short fall" (EH I, 153). The doctor responded, "What do you mean short falls?...Fall from a short distance?" and continued by stating that "[a] fall from any distance can result in anything like this that we have in this case" (EH I, 153). In the explanation that followed, Dr. Dragovic provided an example of someone being pushed into a wall by another individual (EH I, 153-154). He went on to indicate that the scenario provided here (i.e., Defendant pulling Nehemiah's feet out from underneath him) was "plausible," *but that he was not factoring in the amount of force used* (EH I, 154). Dr. Dragovic stated, "I don't know how much force because I was not there. It may be a little force or it may be a lot of force" (EH I, 154, 155). He then agreed that he was not saying that it indeed happened as a result of an accident, just that it *could* have happened as described by Defendant (EH I, 154-155; emphasis added). And notably, although the transcript reveals that Dr. Dragovic testified on direct-examination that "[s]ubdural hemorrhage occurs with any fall" (as quoted in part by the Court of Appeals in its opinion), he adamantly denied on cross-examination that he said subdural hemorrhaging happens with "every fall" (and actually accused Plaintiff's counsel of "badgering" him and "misrepresenting the facts") (EH I, 102, 152). Dr. Dragovic ultimately agreed that short falls often to *not* result in the type of injuries present in this case (EH I, 156).

Finally, Dr. Dragovic stated that it was true that he did not know if the "old bleed" had any effect on the acute subdural hemorrhaging, and indicated that he was not disputing the fact that something happened on December 31, 2013 that caused Nehemiah's death (EH I, 162, 164). He also agreed with literature that the majority of the systematic subdural hemorrhaging identified in infants and toddlers is the result of child abuse, and likewise, that "[l]ike subdural hemorrhaging, robust literature supports the association of severe retinal hemorrhaging and abusive head trauma"

(EH I, 167-168). And, more importantly, that "there is no published literature that refutes the association of severe retinal hemorrhaging and abusive head trauma" (EH I, 168).[3]

So again, as the trial court determined, Dr. Dragovic spoke primarily about possibilities and by no means provided Defendant with a definitive or substantial defense. Moreover, he did not present well as a witness, with his disparaging remarks and confrontational style. It is doubtful whether the jury would even give him any credence. It was hard to deny his bias as well. Dr. Dragovic has been involved in several cases of this kind across the State of Michigan and has testified against various medical examiners, faulting them for the exact reasons he does Dr. Shattuck and Dr. Castellani in this case (EH I, 122, 127, 128). In fact, Dr. Dragovic was consulted by the defense in an abusive head trauma case charged in Wexford County and prepared a report wherein he specifically challenged the findings of Dr. Castellani (also the neuropathologist in that case) (EH I, 127, 170-171). After the case was dismissed by the Wexford County Prosecutor's Office, the law firm of Sommers Schwartz (of which Dragovic's son is a share-holding member) filed a civil law suit against Dr. Castellani and Dr. Joyce DeJong (the medical examiner), among others (EH I, 172). Dr. Dragovic denied being involved in the civil suit and insisted that he was unaware that the complaint specifically relied on the report he prepared for the defense in the Wexford case (EH I, 172, 174). Moreover, despite his vast experience, Dr. Dragovic has not published a single peer review article on child abuse or pediatric head trauma and has performed less than six autopsies on infants or toddlers with head trauma in the past five years (EH I, 117,

[3] Dr. Dragovic wrote in his textbook chapter that "[r]etinal hemorrhages are common (65% to 95%) in cases of inflicted head injury in infants." And while "the diagnosis of inflicted head injury cannot rest on the finding of retinal hemorrhage alone, [ ] the finding of severe bilateral retinal hemorrhage with retinal folds or detachments is particularly suggestive of the diagnosis" (see Defendant's Exhibit N, 183). In this case, Dr. Castellani observed bilateral retinal hemorrhaging, as well as hemorrhaging around the optic nerve sheath (JT IV, 122-123). And an ophthalmology examination revealed retinal detachment (JT IV, 33).

119). When consulted by attorneys on this topic, those inquiries come solely from the defense bar (EH I, 123).

All things considered, it is unlikely that had Defendant's trial counsel presented Dr. Dragovic as a witness at trial, that the outcome would have been different. Not only would the jury have to find his testimony convincing (any more so than the concessions of Plaintiff's experts), it must also believe that the scenario offered by Defendant to the police was indeed what happened—which is questionable given the fact that Defendant told three different stories—the most incriminating of which he never shared with the police. Truly, it is unknown whether the jury even believed that Nehemiah was indeed injured as a result of a "short fall." As noted above, "[i]t is not enough for the defendant to show that the errors had some *conceivable* effect on the outcome of the proceeding." *Strickland, supra*, at 693; emphasis added.

Next, the defense presented Dr. Julie Mack—an expert whose practice consisted of adult breast imagining, teaching, and a consultation business that was utilized solely by defense attorneys and other physicians in suspected cases of child abuse (EH I, 5, 7, 82, 85). And although she admittedly presented much better than Dr. Dragovic, her testimony, too, consisted primarily of possibilities.

Dr. Mack's first line of attack was to question whether Nehemiah's "old bleed" may have occurred before Defendant assumed custody of him near the end of September 2013—presumably to refute the argument from the prosecution that Nehemiah was healthy and that Defendant had likely abused his son on more than one occasion. She testified that the CT scan conducted on September 11, 2013 revealed a "normal" brain and sagittal sinus, and that the majority of the fluid around the brain appeared to be "where it's supposed to be" (EH II, 29-30, 32, 37). Dr. Mack stated, though, that "it's *possible*" that the old bleed was present at the time the September 2013

CT scan was taken, but "we don't know" because an MRI was needed to reveal that (EH II, 33, 59; emphasis added). Even so, Mack added that "*if* it was present, it was small" and was not bleeding at the time of the CT—as there was no evidence of an acute hemorrhage (EH II, 33-34, 56, 66; emphasis added).

Dr. Mack also testified that the existence of a neomembrane (or the remains of an old bleed)—something that was confirmed by pathology—*may* increase one's susceptibility for re-injury (EH II, 51; emphasis added; see also, EH II, 33-35). She then opined that subdural hemorrhages do not always require a significant amount of force or trauma (EH II, 34, 45, 72). Mack confirmed, however, that she was not denying that there was trauma in this case—"pathology shows clear evidence of impact" (EH II, 73). Nor was she suggesting that this was a "spontaneous re-bleed" of a previous injury (EH II, 75). She stated, "I don't think the old membrane supersedes the acute trauma. The acute trauma caused collapse in this case" (EH II, 77, 80). Dr. Mack explained that she was concerned about the old bleed primarily because it was inferred at trial (by Dr. Beck) that the old bleed was indicative of abuse—and she disagreed, stating that that cannot be determined and that Dr. Beck was categorically wrong (EH II, 77-78, 91). The record shows, however, that Dr. Beck did *not* testify (as Mack assumed) that the old bleed was evidence of prior abuse. Instead, he was asked, "How do you get an old bleed, Doctor? Is that consistent with previous head trauma?" and answered, "That would be the assumption" (JT IV, 34).

Lastly, Dr. Mack testified that the first CT scan taken at the hospital (approximately one hour after Nehemiah was injured) revealed what she believed looked like a clot in the sagittal sinus (EH II, 37, 41-42). And *if* there was a clot in the sinus that pre-dated the acute or recent injury, the brain would be compromised and a lesser degree of injury *may* cause it to cease functioning

(EH II, 43). Dr. Mack stated that she wished that pathology had checked the sinus and attempted to date the clot because, again, "*if* the clot pre-existed, and we don't know that it did, but *if* it pre-existed the trauma, then yes, this brain was compromised" (EH II, 53; emphasis added). Mack noted more than once that she could not confirm from the CT scan that a clot in fact existed—she saw what appeared to be denser fluid, but would defer to pathology (EH II, 41-42, 63; see also, EH II, 11). She also conceded that what she observed could have been acute or occurred shortly before the CT scan (EH II, 64). And, if even a clot at all, Dr. Mack did not know whether it "occurred with the trauma or pre-dated it or occurred…in the ambulance on the way to the hospital" (EH II, 65). The record reveals that no venous sinus thrombosis was found during the pathology examination (see Autopsy Report, p 5, wherein Dr. Shattuck reported that "the dural sinuses are free of thrombi").

So again, Defendant failed to present what would be a *substantial* defense. He merely presents possibilities to suggest that the condition of his son's brain *may* have been compromised before he caused the acute trauma that (as both Dr. Dragovic and Dr. Mack opined) ultimately caused Nehemiah's death. But if the jury rejected Defendant's theory of the case (which seems more likely) and instead believed what his live-in girlfriend testified to—that Defendant told her that he pulled Nehemiah by his feet as he was coming down the stairs (which would explain the multiple bruises on the back of his head), such conduct (regardless of any pre-existing injury or the possibility of a compromised brain) would alone be sufficient to satisfy the minimum amount of malice required to establish both first-degree child abuse and felony murder—i.e., that Defendant "knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be the likely result of his actions" and he "either knowingly or intentionally caused serious physical harm to Nehemiah" (JT V, 160-161).

Once more, *Ackley* does not stand for the proposition that an attorney is per se ineffective if he or she fails to present an independent defense expert in an abusive head trauma case. Relief will only be granted where counsel's performance is objectively unreasonable—deficient to the point that it undermines confidence in the outcome of a defendant's trial. *Ackley*, *supra*, at 388-389. That determination will depend on the circumstances present in each case. In *Ackley*, the proffered expert opined that the child's head injuries were *likely caused by* an accidental, mild impact (see *Id*. at 387)—that was not the opinion of the experts proffered in this case. At most, Defendant's proffered experts opined that the evidence was *consistent* with Defendant's theory, without regard to the amount of force used. The same concessions were made by Plaintiff's experts. Accordingly, as the trial court correctly determined, not only did Defendant fail to establish that his trial attorney's performance was objectively unreasonable, he likewise failed to prove that had counsel presented the evidence proffered on remand, there is a reasonable probability that the outcome of his trial would have been different. The Court of Appeals erred in holding otherwise.

RELIEF

WHEREFORE, the People of the State of Michigan, Plaintiff herein, respectfully request that this Honorable Court grant leave to appeal or, in lieu of granting leave, reverse the Court of Appeals' June 6, 2017 opinion based on the arguments presented herein.

Respectfully submitted,

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