IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

MSC No. 158259
COA No. 336187
Trial Ct No. 14-018862-FC

ANTHONY RAY MCFARLANE JR.,
Defendant-Appellant.

BRIEF OF THE AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN, THE AMERICAN ACADEMY OF PEDIATRICS, AND THE MICHIGAN CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS AS AMICI CURIAE

FRANK VANDERVORT (P42938)
Child Advocacy Law Clinic
University of Michigan Law School
701 S. State Street
Ann Arbor, MI 48109
(734) 763-5000
vort@umich.edu

CHRISTOPHER R. NOYES
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 295-6823

MARK A. FORD
MIKE BROWN
ELIZABETH DRISCOLL
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Counsel for Amici Curiae American Professional Society on the Abuse of Children, American Academy of Pediatrics, and Michigan Chapter of the American Academy of Pediatrics

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION[1]

The American Professional Society on the Abuse of Children ("APSAC" or the "Society"), the American Academy of Pediatrics ("AAP" or the "Academy"), and the Michigan Chapter of the American Academy of Pediatrics ("MIAAP") respectfully appear as amici curiae so that APSAC, the AAP, and the MIAAP can provide the specialized viewpoints of their members relating to the Court's consideration of whether the prosecution's medical expert invaded the province of the jury by providing a diagnosis of "abusive head trauma". *People v McFarlane*, ___ Mich ___; 933 NW2d 692, 692 (2019) (Docket No. 66). For the reasons discussed herein, APSAC, the AAP, and the MIAAP submit that the prosecution's medical expert did not invade the province of the jury by using the phrase "abusive head trauma" to label her diagnosis.

"Abusive head trauma" ("AHT") is a well-accepted diagnosis in the global medical community. AHT is the product of a multifaceted, differential diagnostic process. While the diagnosis by definition excludes accidental causes of injury and provides that the injury was inflicted, it does not assign guilt to anyone for inflicting the injury nor does it address whether that person acted with knowledge, recklessness, or negligence. Because the AHT diagnosis is helpful to jurors to aid their understanding of medical evidence, the Court should continue to permit qualified experts to offer AHT diagnoses in cases where the medically accepted criteria

[1] In accordance with MCR 7.212(H)(3), the American Professional Society on the Abuse of Children, the American Academy of Pediatrics, and the Michigan Chapter of the American Academy of Pediatrics provide that counsel for no party to this action contributed, either in writing or through monetary contribution to the preparation of this brief. No party, aside from those listed on the signature page of this brief, has contributed to this filing.

for that diagnosis are met, including testimony that the condition is labeled "abusive head trauma."

II. INTEREST OF AMICUS CURIAE APSAC

The American Professional Society on the Abuse of Children is a not-for-profit organization focused on serving children and families impacted by child maltreatment, including both abuse and neglect. Founded in 1986, APSAC brings together professionals from across disciplines who focus on combating child maltreatment. The Society's members include nurses, physicians, attorneys, child protective service workers, law enforcement officers, researchers, teachers, psychologists, clergy, and administrators. APSAC's work includes conducting expert training, educational activities, and policy leadership. APSAC is focused on combatting child maltreatment through evidence-based principles. For example, APSAC routinely issues policy reports on various issues related to child welfare through which APSAC's professionals detail current research and propose policy outcomes.[2] APSAC regularly files amicus briefs in cases where child maltreatment is at issue. Specifically, the Society aims to participate in those cases where the knowledge and experience of APSAC's professional members can be of assistance to the courts in understanding how a particular discipline deals with issues of child welfare.

In this case, APSAC's leadership feels compelled to participate as an amicus because the Court is addressing the permissibility of expert testimony that a child has been medically diagnosed with "abusive head trauma". APSAC hopes to assist the Court's understanding of the process by which medical professionals, including those that are members of APSAC, diagnose AHT, and how qualified experts can and should be allowed to offer such a diagnosis to a jury.

---

[2] See APSAC, *Center for Child Policy*, <http://centerforchildpolicy.org/> (accessed January 2, 2020).

APSAC hopes this specialized viewpoint will aid the Court in answering the question on appeal of "whether the prosecution's medical expert invaded the province of the jury by using phrases like 'abusive head trauma'. . . to label her diagnosis[.]"[3] *McFarlane*, ___ Mich ___ ; 933 NW2d at 692.

III. INTEREST OF AMICUS CURIAE AAP

The American Academy of Pediatrics ("AAP" or the "Academy") is a national, not-for-profit organization dedicated to improving child and adolescent health. The AAP is a professional membership organization that represents over 67,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists nationwide. The Academy advances child and adolescent health through education, research, advocacy, and the provision of evidence-based policy and guidance.[4]

The AAP has worked with the federal and state governments, health care providers, and parents to support education and prevention efforts that reduce the frequency of child maltreatment. This includes the prevention and accurate medical diagnosis of AHT, a diagnostic term which the AAP has endorsed using since 2009.

IV. INTEREST OF AMICUS CURIAE MIAAP

The Michigan Chapter of the American Academy of Pediatrics ("MIAAP") is a diverse group of over 1,400 pediatricians. Members include general pediatricians, sub-specialists, and academicians. MIAAP members are dedicated to the attainment of the optimal physical, mental, and social health of Michigan's infants, children, adolescents, and young adults. MIAAP seeks

---

[3] APSAC, the AAP, and the MIAAP file this brief only to discuss the part of the Court's question that pertains to expert use of the diagnosis "abusive head trauma."

[4] See AAP, *American Academy of Pediatrics Five-Year Strategic Plan*, <https://www.aap.org/en-us/about-the-aap/aap-facts/Pages/Strategic-Plan.aspx> (accessed January 2, 2020).

to ensure that critical issues affecting children in the state of Michigan, such as AHT, are met with scientific, evidence-based policies that will improve the lives of affected children.

V. FACTUAL AND PROCEDURAL BACKGROUND

A. EXPERT OPINION AT TRIAL

Anthony Ray McFarlane ("McFarlane") appeals from a jury conviction for first-degree child abuse and from the Michigan Court of Appeals' decision affirming that conviction. *People v McFarlane*, 325 Mich App 507, 512; 926 NW2d 339 (2018). McFarlane's conviction arises from injuries sustained by his then nine-week-old child, referred to by the Court of Appeals and herein as "KM." *Id*.

At McFarlane's trial, one of the prosecution's witnesses was Dr. Sarah Brown. *Id*. at 515. Dr. Brown is a doctor of osteopathic medicine with a board certification in pediatrics and a subspecialty certification in child abuse pediatrics.[5] During her testimony, Dr. Brown described KM's injuries, including that blood had collected in the "subdural space" between KM's brain and her skull and that the blood was "all over both sides of her brain." *McFarlane*, 325 Mich App at 515. Dr. Brown also detected a possible tibia fracture and reported that an ophthalmologist had identified bleeding in the back inside portion of KM's eyes, a condition known as retinal hemorrhages. *Id.*

In addition to informing the jury of KM's symptoms, Dr. Brown offered her diagnosis of KM's injuries. *Id.* at 523-24. She testified that KM's injuries were indicative of "someone violently shaking KM or by throwing her onto a couch or other soft surface" and therefore that KM's injuries were inflicted, not accidental. *Id*. at 515, 524. According to the Court of Appeals,

---

[5] See Bronson Healthcare, *Sarah Brown*, <https://www.bronsonhealth.com/doctors/sarah-brown/> (accessed January 2, 2020).

"Brown acknowledged that KM had had a prenatal stroke, which caused the left hemisphere of KM's brain to shrink substantially. But she opined that KM's subdural hematomas and retinal hemorrhages were not attributable to her stroke." *Id.* at 515. Dr. Brown testified that her ultimate diagnosis was "abusive head trauma[.]" *Id.* at 524. She acknowledged, however, that she "could not say what actually happened" to the baby. *Id.* at 525.

In response to Dr. Brown's testimony, McFarlane offered the testimony of three experts who disagreed with Dr. Brown's diagnosis. *Id.* In evaluating the competing expert testimony and the other evidence in the case, the Court of Appeals concluded that "when [Dr.] Brown's testimony is considered with [KM's half-sister's] testimony that she saw defendant shake KM, a jury could reasonably[] infer that defendant violently shook KM and that his acts caused her to suffer the identified injuries." *Id.* at 515.

B. COURT OF APPEALS OPINION

McFarlane appealed his conviction, arguing in part that Dr. Brown's testimony was improper because it "amounted to an opinion that he was guilty." *Id.* at 517. The Court of Appeals wrote that "[t]his case involved whether defendant intentionally injured KM by inflicting trauma to her brain. Because there was no external evidence of injury, her injuries involved a classic diagnosis of shaken-baby syndrome or abusive head trauma." *Id.* at 520. The court then recognized that, to date, the Michigan Supreme Court has not "considered whether there are any limits on an expert's ability to diagnose abusive head trauma." *Id.* at 521. The Court of Appeals held that although an expert can offer testimony as to ultimate questions of fact for the jury, the expert cannot testify to requirements of law or legal conclusions. *Id.* at 519. The court further held that "[e]xpressing an opinion that the trauma was inflicted or not accidental does not impermissibly invade the province of the jury because the expert is not

expressing an opinion regarding the defendant's guilt or whether the defendant had a culpable state of mind, which the expert may not do." *Id*. at 523 (emphasis added). The Court of Appeals then held that when an expert witness tells the jury that her diagnosis is "abusive head trauma," however, that testimony invades the province of the jury because it speaks to "guilt or whether the defendant had a culpable state of mind." *Id*. Specifically, the Court of Appeals wrote:

> Notwithstanding the propriety of a diagnosis of inflicted trauma, we conclude that in cases involving allegations of abuse, an expert goes too far when he or she diagnoses the injury as "abusive head trauma" or opines that the inflicted trauma amounted to child abuse. The ordinary understanding of the term "abuse" – as opposed to neglect or carelessness – implies a level of willfulness and moral culpability that implicates the defendant's intent or knowledge when performing the act that caused the head trauma. An expert may not offer an opinion on the intent or criminal responsibility of the accused.
>
> . . . Brown's testimony that KM's injuries were caused by "abusive head trauma" or otherwise amounted to "child abuse" strongly suggested that it was her opinion that whoever inflicted the injuries on KM did so with culpable state of mind; that is, her testimony plainly implicated whether defendant "knowingly or intentionally" caused serious physical harm to KM within the meaning of MCL 750.136b(2). Because Brown was in no better position than the jury to assess the intent that defendant had when he acted, her belief that his actions were abusive or amounted to child abused were irrelevant and inadmissible as a matter of law.
>
> . . . Consequently, the trial court plainly erred to the extent that it allowed Brown to use the phrase "abusive head trauma" to label her diagnosis rather than a less prejudicial label, such as inflicted or nonaccidental head trauma . . .

Id. at 523-25.

C. APPEAL TO THE MICHIGAN SUPREME COURT

On August 16, 2018, McFarlane filed his Application for Leave to Appeal. *Def Appellant's Appl Leave to Appeal* (Docket No. 54). McFarlane maintains that the Court of Appeals correctly held that Dr. Brown's use of the terms "abusive head trauma" and "definite pediatric physical abuse," along with her conclusion that KM suffered from "child abuse" were

irrelevant and inadmissible. *Id.* at 6-7. However, McFarlane argues that the Court of Appeals should have vacated his conviction as a result and remanded the case for a new trial. *Id.* at 5.

Two groups—the Innocence Network and the Prosecuting Attorneys Association of Michigan—initially filed amicus briefs in this case. *Brief of Amicus Curiae the Innocence Network* (Docket No. 62); *Brief of the Prosecuting Attorneys Association of Michigan as Amicus Curiae in Support of the People of the State of Michigan* (Docket No. 59). On October 17, 2019, this Court issued an order considering the case and directing the scheduling of oral argument. The Court requested briefing on the following questions:

> (1) whether the prosecution's medical expert invaded the province of the jury by using phrases like "abusive head trauma" and "definite pediatric physical abuse" to label her diagnosis; and
>
> (2) if so, whether the defendant has satisfied the plain error standard set forth in *People v Carines*, 460 Mich 750, 763 (1999).

McFarlane, ___ Mich ___ ; 933 NW2d at 692. The Court provided that "[o]ther persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae." *Id*. at 693.

As requested in the accompanying motion, APSAC, the AAP, and the MIAAP respectfully ask that the Court consider this amicus brief in determining the merits of the appeal. Specifically, APSAC, the AAP, and the MIAAP file this brief addressing in part the first of the Court's two questions on appeal. On that first question, it is amici's position that Dr. Brown's testimony regarding her diagnosis that KM suffered from AHT did not invade the province of the jury, and that any concern that juries may misinterpret such a diagnosis in future cases can be remedied by appropriate cross-examination and/or jury instruction.

VI. ARGUMENT

The Court of Appeals correctly held that the Michigan Rules of Evidence, and existing related precedent, allow experts to offer an opinion that relates to the ultimate issues in a case, but that they cannot offer an opinion in terms of a legal conclusion. *McFarlane*, 325 Mich App at 519. Medical experts go too far when they expand their testimony beyond their diagnosis and offer lay opinions as to the intent and criminal responsibility of the accused. *Id*. at 523.

However, when medical experts testify to having made a diagnosis of "abusive head trauma," they are offering a medical conclusion based on a sophisticated, interdisciplinary diagnostic process. The Court of Appeals therefore erred when it held that testimony about the medical diagnosis of AHT itself invades the province of the jury because it purportedly speaks to criminal intent. It does not. An AHT diagnosis provides no answer to the ultimate jury questions of state of mind or guilt of the defendant. Rather, the diagnosis conveys the medical professional's opinion that internal injuries were not caused by an accidental injury. The diagnostic term itself is not prejudicial because it conveys nothing about who inflicted those injuries, or what the mental impressions of the inflicting party were. Instead, the diagnosis offers factual evidence to the jury that a layperson would not be able to deduce from evidence of the symptoms alone because medical professionals combine observation of symptoms with exam results to reach the diagnosis. Therefore, the Court should hold that testimony by a qualified medical professional that a victim was diagnosed with AHT is admissible expert testimony.

A. WHEN DOCTORS TESTIFY TO A PROPERLY OBTAINED DIAGNOSIS OF AHT, THEY ARE OFFERING AN ADMISSIBLE EXPERT MEDICAL OPINION.

1. Abusive Head Trauma as a Preferred Term

AHT is "the current medical nomenclature for what used to be known as shaken baby syndrome," *Sissoko v State*, 236 Md App 676, 679; 182 A3d 874 (Md Ct Spec App, 2018), a

term originated from research published in the late 1980s. Choudhary et al., *Consensus Statement on Abusive Head Trauma in Infants and Young Children*, 48 Pediatric Radiology 1048, 1051 (2018), available at <https://doi.org/10.1007/s00247-018-4149-1> (accessed January 1, 2020) ("*Consensus Statement*"). In 2009, the American Academy of Pediatrics adopted the phrase "abusive head trauma" instead of shaken baby syndrome, concluding that the medical community's understanding of traumatic injuries in children had evolved. The Academy explained:

> Shaken baby syndrome is a term often used by physicians and the public to describe abusive head trauma inflicted on infants and young children. Although the term is well known and has been used for a number of decades, advances in the understanding of the mechanisms and clinical spectrum of injury associated with abusive head trauma compel us to modify our terminology to keep pace with our understanding of pathologic mechanisms.

Christian, Block, & the Committee on Child Abuse and Neglect, *Abusive Head Trauma in Infants and Children*, 123 Pediatrics 1409 (2009) ("*Academy Statement*") ("Although shaking an infant has the potential to cause neurologic injury, blunt impact or a combination of shaking and blunt impact cause injury as well.").

In recommending use of the terminology "abusive head trauma," the American Academy of Pediatrics recognized that "[f]ew pediatric diagnoses engender as much debate as AHT, in part because of the social and legal consequences of the diagnosis." *Id*. at 1410. The Academy explained that AHT should be used as opposed to the term shaken baby syndrome because "[m]edical terminology should accurately reflect the medical diagnosis" and ultimately provided that "for medical purposes, [it] recommends adoption of the term 'abusive head trauma' as the diagnosis used in the medical chart to describe the constellation of cerebral, spinal, and cranial injuries that result from inflicted head injury to infants and young children." *Id*. An October 2016 study published in the Journal of Pediatrics that surveyed 682 physicians demonstrated that

AHT has since become a widely accepted medical diagnosis. Narang, et al., *Acceptance of Shaken Baby Syndrome and Abusive Head Trauma as Medical Diagnoses*, 177 J Pediatrics 273, 273 (2016).

The Centers for Disease Control ("CDC") defines "Pediatric Abusive Head Trauma" as "an injury to the skull or intracranial contents of an infant or young child (<5 years of age) due to inflicted blunt impact and/or violent shaking." Parks, et al, *Pediatric Abusive Head Trauma: Recommended Definitions for Public Health Surveillance and Research*, Centers for Disease Control and Prevention (April 2012), p 10, available at <https://www.cdc.gov/violenceprevention/pdf/pedheadtrauma-a.pdf> (accessed January 2, 2020). The CDC adds that "[u]nintentional injuries resulting from neglectful supervision [and] gunshot wounds / stab wounds / penetrating trauma" are excluded from the AHT case definition. *Id*.

For the past decade, the American Academy of Pediatrics has continued to support the use of AHT as a medical diagnosis, including by endorsing the 2018 *Consensus Statement* that elaborated on the AHT diagnosis. *Consensus Statement* at 1048. The Statement stresses that "[t]he etiology of injury is multifactorial (shaking, shaking and impact, impact, etc.) so that the current best and most inclusive term is AHT, as advanced by the American Academy of Pediatrics." *Id*. at 1049. That *Consensus Statement* was prepared by an interdisciplinary team of professionals, including individuals from the medical and legal fields, to explain the use of AHT and to "reduce[] confusion by recommending to judges and jurors the tools necessary to distinguish genuine evidence-based opinions of the relevant medical community from legal arguments or etiological speculations that are unwarranted by the clinical findings, medical evidence and evidence-based literature." *Id*. In addition to the American Academy of Pediatrics,

the *Consensus Statement* is endorsed by APSAC, the Society for Pediatric Radiology, the European Society of Pediatric Radiology, the American Society of Pediatric Neuroradiology, the European Society of Neuroradiology, the Swedish Pediatric Society, the Norwegian Pediatric Association, and the Japanese Pediatric Society. *Id*.

2. The Diagnostic Process

"The diagnosis of AHT is made like any other medical diagnosis, by considering all the information acquired via clinical history, physical examination, and laboratory and imaging data." *Id*. at 1052. For the first step, evaluating a patient's clinical history, it is important to recognize that the symptoms of AHT are not coextensive with injuries from short falls. *Id*. With the benefit of the clinical history, doctors then perform a thorough physical examination, which include checks for external bruises and tenderness. *Id*. In performing the physical examination, there is no single set of symptoms that leads to a diagnosis of AHT. Rather, as explained in the *Consensus Statement*:

> No single injury is diagnostic of AHT. Rather the multiplicity of findings including evidence of intracranial and spinal involvement, complex retinal hemorrhages, rib and other fractures inconsistent with the provided mechanism of trauma, as well as the severity and age of the findings provide clues to the diagnosis. Subdural hematoma is the most frequently identified intracranial lesion but brain parenchymal injury [(i.e., tearing of the brain tissue)] is the most significant cause of morbidity and mortality in this setting.

Id. at 1049. "The clinical presenting features of AHT include severe head injury; death; less severe trauma with an unexplained mechanism; unsuspected finding on imaging or assessment for macrocephaly, developmental delay, seizures or other neurologic concerns; or discovery during the workup as a sibling of an abused child." *Id.* at 1051. As part of the physical exam, doctors should perform an eye exam within 24 to 48 hours of suspecting AHT. *Id.* at 1053. Findings from an eye examination supporting an AHT diagnosis include orbital and lid

ecchymosis (i.e., large, dark rings around the eyes resulting from injury or medical condition), subconjunctival hemorrhage (i.e., blood spots in the whites of the eye), unequal pupil sizes, disconjugate eye movements (i.e., eyes not aligning properly), and retinal hemorrhages. *Id*. Significantly, "[r]etinal hemorrhages are an important finding in AHT and when abuse is suspected, a prompt complete examination including full indirect opthalmoscopic examination through a dilated pupil should be obtained." *Id*.

Next, "[a]lthough the history and physical examination are paramount, appropriate use of laboratory studies and imaging is vital for accurate diagnosis and treatment." *Id.* A "[s]keletal survey following current guidelines should be performed for all children with potential AHT." *Id*. For some patients, a CT scan or MRI is also recommended. *Id*. Thus, when done properly, diagnosing AHT is a multi-step process that includes experts in multiple medical fields. "The diagnosis of AHT is a medical diagnosis made by a multidisciplinary team of pediatricians and pediatric subspecialty physicians, social workers and other professionals based on consideration of all the facts and evidence." *Id.* at 1049.

Finally, but importantly, diagnosing AHT requires the careful elimination of alternative causes for any presenting symptoms. In their 2009 Statement, the American Academy of Pediatrics published the following guidance:

> Pediatricians [] have a responsibility to consider alternative hypotheses when presented with a patient with findings suggestive of AHT. A medical diagnosis of AHT is made only after consideration of all the clinical data. On some occasions, the diagnosis is apparent early in the course of the evaluation, because some infants and children have injuries to multiple organ systems that could only be the result of inflicted trauma. On other occasions, the diagnosis is less certain, and restraint is required until the medical evaluation has been completed.

Academy Statement at 1410. In addition, the Academy instructs that "[s]ubspecialists in radiology, ophthalmology, neurosurgery, neurology, and other fields should also be consulted when necessary to ensure a complete and accurate evaluation." *Id*.

When properly diagnosed through the above multi-step process, AHT is the accepted medical term for "the constellation of cerebral, spinal, and cranial injuries that result from inflicted head injury to infants and young children." *Id*. It is clear from that definition that the term "abusive" is the adopted medical term to convey that the harm was inflicted rather than accidental. The term does not convey who inflicted the harm, by what method the harm was inflicted, or with what level of intent the harm was inflicted. Like any other generally accepted medical diagnosis, AHT conveys the conclusion of a medical professional that a specific individual is suffering from a particular medical condition.

B. THE COURT OF APPEALS CORRECTLY HELD THAT DR. BROWN COULD SHARE HER MEDICAL, BUT NOT PERSONAL OR LEGAL, OPINION.

The Michigan Rules of Evidence allow for medical experts to share their medical opinions as testimony. An expert is permitted to testify if "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." MRE 702. Moreover, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." MRE 704. However, not all testimony as to ultimate issue is permitted. As the Court of Appeals explained:

> Although the ultimate issue rule no longer stands in the way of expert testimony stating opinions on crucial questions to be decided by the trier of fact, it is important that the expert witness not be permitted to testify about the requirements of law which apply to the particular facts in the case or to phrase his opinion in terms of a legal conclusion. In

> the former case, the claim is that the province of the judge is invaded, while in the latter, the contention is that the province of the jury is invaded.

McFarlane, 325 Mich App at 519, quoting *People v Drossart*, 99 Mich App 66, 75; 297 NW2d 863 (1980); see also *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 123; 559 NW2d 54 (1996) ("[I]t is error to permit a witness to give the witness' own opinion or interpretation of the facts because doing so would invade the province of the jury.").

A determination of what expert testimony is permitted will naturally depend on the nature of the crime alleged and the specific expertise of the witness. "[W]here a jury is as capable as anyone else of reaching a conclusion on certain facts, it is error to permit a witness to give his own opinion or interpretation of the facts because it invades the province of the jury." *Drossart*, 99 Mich App at 80. "The critical inquiry with regard to expert testimony is whether such testimony will aid the factfinder in making the ultimate decision in the case." *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (1986). This Court has distinguished between those expert opinions that are properly based on expertise and physical findings, and those on the other hand that come dangerously close to speculation on legal issues. *Id.* at 112 ("His opinion that the complainant had been sexually assaulted was based, not on any findings within the realm of his medical capabilities or expertise as an obstetrician/gynecologist, but, rather, on the emotional state of, and the history given by, the complainant."). The Advisory Committee Note to FRE 702 provides a helpful guide:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

FRE 702, Advisory Committee Notes (1972), quoting Ladd, *Expert Testimony*, 5 Vand L Rev 414, 418 (1952) (internal quotations omitted). Thus, expert medical opinions are warranted where they aid the jury in understanding facts that require expert medical training and experience.

The Court of Appeals was therefore correct in holding that "a physician may properly offer an opinion that, when the medical evidence is considered along with the child's history, the child's injuries were inflicted rather than caused by accident or disease because a jury is unlikely to be able to assess the medical evidence." *McFarlane*, 325 Mich App at 522. The Court of Appeals also correctly held that:

> Expressing an opinion that the trauma was inflicted or not accidental does not impermissibly invade the province of the jury because the expert is not expressing an opinion regarding the defendant's guilt or whether the defendant had a culpable state of mind, which the expert may not do . . . Instead, the expert is interpreting the medical evidence and offering the opinion that the trauma was caused by human agency, and the jury is free to reject that opinion on the basis of the evidence adduced at trial, including a contrary opinion by another expert.

Id. at 523. To the extent that Dr. Brown's testimony included interpretations of medical evidence as to the causes of KM's injuries, her testimony was permissible. That type of medical evaluation is exactly how experts help the jury understand concepts unknown to those outside the medical field. However, as explained herein, the Court of Appeals should have included Dr. Brown's diagnosis of AHT in this category of permissible testimony. Dr. Brown's diagnosis that KM suffered from AHT is a professional interpretation of physical evidence that was appropriately offered to assist the jury's understanding of medical facts.

C. EXPERT TESTIMONY DIAGNOSING AHT IS NOT UNFAIRLY PREJUDICIAL AND DOES NOT COMMENT ON THE DEFENDANT'S GUILT OR STATE OF MIND.

The Court of Appeals incorrectly held that an expert's use of the term AHT "implies a level of willfulness and moral culpability that implicates the defendant's intent or knowledge when performing the act that caused the head trauma." *Id.* The Court of Appeals incorrectly relied on the "ordinary understanding of the term 'abuse'" to decide that testimony diagnosing AHT offers "an opinion on the intent or criminal responsibility of the accused." *Id.* Based on this flawed interpretation of AHT, the Court of Appeals held that the trial court should have excluded such testimony because it invades the province of the jury when an expert expresses "an opinion regarding the defendant's guilt or whether the defendant had a culpable state of mind." *Id.*

The Court of Appeals erred when it conflated the ordinary term "abuse" with the medical diagnosis of "abusive head trauma." When a qualified expert offers an AHT diagnosis, the expert is explaining that the medical evidence is consistent with cases in which injuries were inflicted, and inconsistent with injuries attributed to accidents. That testimony is helpful to lay jurors to understand the implications of the symptoms presented and the scientific causes of those symptoms. When an expert testifies that a child suffered from AHT, the expert is not identifying who inflicted the injury, or whether that person acted knowingly (as required for a first-degree child abuse conviction), recklessly, or negligently. Those issues remain in the exclusive province of the jury. Accordingly, expert testimony regarding the AHT diagnosis does not unfairly prejudice the defendant at trial because it only explains the medical evidence to help the jury reach its own conclusion about the identity of a perpetrator and culpability. Such

testimony regarding a standard, generally accepted medical diagnosis is not intended to, and does not, address the legal issues in the case.

1. Michigan Case Law

Although this Court has not addressed the admissibility of an AHT diagnosis specifically, the Court's recent pronouncement in *People v Thorpe*, 504 Mich 230; ___ NW2d ___ (2019), squarely supports admissibility. In *Thorpe*, the Court explained that "an examining physician, if qualified by experience and training relative to treatment of sexual assault complaints, can opine with respect to whether a complainant had been sexually assaulted when the opinion is based on physical findings *and* the complainant's medical history." *Id.* at 255 (emphasis in original). In contrast, "[a]n examining physician's opinion is objectionable when it is solely based on what the victim . . . told the physician" because a "jury is in just as good a position to evaluate the victim's testimony as the doctor." *Id*. (internal citations and quotations omitted). Diagnoses of AHT, when properly conducted, do not turn on a physician's assessment of a victim's or accused's credibility.[6] Instead, the diagnosis falls within the set of permissible expert testimony as defined by this Court in *Thorpe* because it is the result of a thorough, multi-faceted diagnostic process that includes both a physical exam and a review of the patient's medical history. Therefore, this Court's analysis in *Thorpe* supports the admissibility of expert testimony that a victim suffered from AHT to help the jury properly consider objective medical information.

The Court of Appeals decision preceded *Thorpe* and conflicts with the Court's subsequent guidance in that case. The court below instead relied on cases that are

---

[6] Indeed, many victims of abusive head trauma are too young to speak. See *Consensus Statement* at 1048 ("Abusive Head Trauma (AHT) is the leading cause of fatal head injuries in children younger than 2 years.").

distinguishable from the case at bar. *McFarlane,* 325 Mich App at 522-23, citing *People v Bynum*, 496 Mich 610, 630-31; 852 NW2d 570 (2014) (holding that an expert suggested the defendant was "guilt[y] in the underlying crime" when he "specifically connected" the defendant's actions to the behaviors of gang membership); *People v Peterson*, 450 Mich 349, 373-74; 537 NW2d 857 (1995) (prohibiting the expert from testifying that a child's behavior is consistent with that of a sexually abused child because in such cases when a jury has to decide "whom to believe" the jury will improperly rely too heavily on the expert); *People v Christel*, 449 Mich 578, 591; 537 NW2d 194 (1995) (concluding a medical expert "cannot opine that complainant was a battered woman, may not testify that defendant was a batterer or that he is guilty of the crime, and cannot comment on whether complainant was being truthful"); *Smith*, 425 Mich at 109, 114 (holding that an expert cannot testify that a complainant has been sexually assaulted if the "conclusion [is] nothing more than the doctor's opinion that the victim had told the truth.").

First, in *Peterson* and *Smith*, the Court held that medical experts could not testify when their testimony was based only on the experts' own opinion of the victim's credibility unaccompanied by any physical findings. *Smith*, 425 Mich at 109; *Peterson*, 450 Mich at 373-74. As explained above, AHT is a differential diagnosis that is based on a patient's history, a thorough physical exam, additional testing, as well as a ruling out of possible alternate causes. The diagnosis of AHT, when based on those physical findings and medical testing, is exactly the type of testimony permissible under *Smith* and *Peterson*. Medical experts properly testifying to a diagnosis of AHT are not providing their personal opinion that abuse occurred, but instead are explaining the physical evidence that they have examined.

Second, in both *Christel* and *Bynum*, the Court determined that an expert cannot testify in a way that specifically connects the defendant with the alleged crime or discusses the defendant's state of mind. In *Christel*, the Court assessed the admissibility of testimony regarding battered woman syndrome "in the minority of situations in which the evidence is offered to help evaluate the credibility of the complainant instead of exculpating the accused." *Christel*, 449 Mich at 589. The Court explained that "the expert may, when appropriate, explain the generalities or characteristics of the syndrome . . . [but] cannot opine that complainant was a battered woman, may not testify that defendant was a batterer or that he is guilty of the crime, and cannot comment on whether complainant was being truthful." *Id*. at 591. Unlike the prohibited testimony in *Christel*, expert testimony regarding a diagnosis of AHT is offered to explain a medical condition, not to opine on the credibility of either party, not to link the accused to the infliction of the injury, and not to assign guilt to any individual.

In *Bynum*, the Court held that an expert exceeded the limits of permissible testimony when he "actually and clearly opined on [the defendant's] character traits as a gang member to link him to the particular conduct at issue when he explained what he saw on the surveillance video." *Bynum*, 496 Mich at 632. In contrast, the term AHT relates only the nature of the child's injuries and provides no information linking those injuries to the identity of any person. A diagnosis of AHT could only connect the defendant with a charge of abuse if other evidence or testimony showed that he or she inflicted the child's injuries. A medical professional cannot make that identification, and does not attempt to do so when testifying that a child suffered from AHT. Moreover, when viewed in its proper medical context, AHT does not carry with it any suggestion of any party's state of mind. It only proposes that the injuries themselves were

nonaccidental. Therefore, the use of the term AHT does not create the risk of prejudice that this Court was concerned about in the cases cited by the Court of Appeals.

2. Other Jurisdictions

Other jurisdictions have addressed testimony regarding AHT or a diagnosis of child abuse, and each has held such testimony is admissible. See *Nielsen v State*, 430 P3d 740, 743-46, 752; 2018 WY 132 (2018); *People v Rector*, 248 P3d 1196, 1199, 1203 (Colo, 2011); *People v Weeks*, 369 P3d 699, 714; 2015 COA 77 (Colo App, 2015); *Revilla v State*, 877 P2d 1143, 1150 (Okla Crim App, 1994). These courts have properly distinguished the use of "abuse" in a medical diagnosis from its legal use and recognized that such medical testimony does not speak to a defendant's guilt or state of mind. E.g., *Nielsen*, 430 P3d at 752.

The Wyoming Supreme Court, like this Court, has held that certain expert witness testimony is improper when it discusses a defendant's guilt. *Nielsen*, 430 P3d at 749, citing *Stephens v State*, 774 P2d 60, 66 (Wy, 1989) (holding witness testimony that a defendant sexually assaulted a victim improper because it "amount[ed] to an opinion that the defendant [was] guilty"); *Bennett v State*, 794 P2d 879, 882 (Wy, 1990) (holding that an officer's conclusion that the defendant was a drug dealer went far beyond the facts of the officer's investigation and improperly concluded that the defendant was guilty). Nonetheless, the Wyoming Supreme Court held that testimony from medical experts diagnosing AHT does not fall into this impermissible category. It declined to exclude this testimony because the experts "'merely informed the jury about the meaning and significance' of medical evidence" and made no determination on the defendant's guilt. *Nielsen*, 430 P3d at 749 (internal citation omitted). The Wyoming Supreme Court also held that the experts were using the term AHT in the context of a medical diagnosis and not as a conclusion on the underlying legal issue. *Id.* at 752. It held

that the experts "used accepted methods of observation, multi-disciplinary information gathering, and inferential and deductive reasoning to arrive at their diagnoses." *Id*. "That those diagnoses happened to contain terms with distinct legal meanings does not equate to expressing an opinion as to [a defendant's] guilt." *Id*.

The Colorado Supreme Court also rejected arguments that it is plain error to allow a medical expert to testify that the child's injuries "were the result of abuse." *Rector*, 248 P3d at 1199, 1203. The Colorado Supreme Court held that the use of the term "abuse" alone does not speak to the "primary issue" of whether the defendant inflicted the injuries or committed the abuse. *Id*. at 1203. This precedent has been followed by the Colorado Court of Appeals to properly distinguish between the legal use of the term "abuse" and the term in the context of a medical diagnosis. *Weeks*, 369 P3d at 714. The Colorado Court of Appeals held that as long as a jury is properly instructed on the difference between the two terms, "a medical expert may testify in a child abuse case regarding whether a child's injuries constitute *medical* child abuse so long as . . . he or she does not give an opinion on whether or not the defendant inflicted the injuries or whether the injuries fit the *legal* definition of child abuse." *Id*. (emphasis in original).[7]

---

[7] The final jurisdiction to address this issue was the Oklahoma Court of Criminal Appeals. In *Revilla v State* the defendant argued that an expert witness's testimony was prejudicial because it cited a study concluding that in cases with severe head injuries "maybe ninety five percent . . . represented some form of child abuse." 877 P2d at 1150. The Court of Criminal Appeals held that there was no prejudice to the defendant because "the testimony was an opinion on the cause of the decedent's injuries, not on Appellant's guilt." *Id*. This holding was addressed by the Tenth Circuit Court of Appeals, which reviewed this testimony, among other alleged errors, and found no grounds to grant the defendant's habeas petition because the "broad statistical finding related by [the expert] did not translate into a statement of [the defendant's] probable guilt." *Revilla v Gibson*, 283 F3d 1203, 1213 (CA 10, 2002).

As these cases demonstrate, although the term "abuse" is often used colloquially in connection with a legal conclusion, that alone should not prevent juries from hearing helpful and proper expert testimony about the medical diagnosis of "abusive head trauma."

VII. ROLE OF CROSS-EXAMINATION AND JURY INSTRUCTIONS

A medical expert's testimony that a victim suffered from AHT assists the jury in understanding the victim's injuries in medical context, including that they were inflicted and not accidental. To the extent the Court remains concerned about potential prejudice resulting from the use of the word "abusive" in the AHT diagnosis, the necessary protections to ensure that a defendant is not unfairly prejudiced by expert witness testimony are already present during trial. See *Rector*, 248 P3d at 1203 (considering whether expert "testimony was clarified on cross-examination" when deciding whether an expert has usurped the jury's function). Testimony that a victim was diagnosed with AHT, like any other expert testimony, can be put in its proper context on direct examination and can be scrutinized on cross-examination. The prosecution's expert testimony can also be challenged by defense expert witnesses. Indeed, these safeguards were present in McFarlane's trial. Dr. Brown testified that KM suffered from AHT but "she conceded that she could not say what actually happened to KM." *McFarlane*, 325 Mich App at 525. Additionally, McFarlane called three physicians as witnesses who all disagreed with Dr. Brown's diagnosis and "informed the jury that they did not believe that a medical professional could diagnose abuse." *Id*.

To further ameliorate any concern of unfair prejudice from the effect of presenting the words "abusive head trauma" on the jury, the Court could offer a jury instruction on the matter. See *Weeks*, 369 P3d at 714 (discussing jury instruction regarding AHT diagnosis). If the Court is

inclined to direct the drafting of such an instruction, APSAC, the AAP, and the MIAAP propose the following model jury instruction for consideration:

Proposed Limiting Instruction on Expert Testimony
(in Child Physical Abuse Cases)

(1) You have heard [name of expert]'s opinion about the diagnosis of abusive head trauma.

(2) You should consider that evidence only as a medical diagnosis.

(3) That evidence cannot be used as an opinion regarding the legal elements of the crime charged. It is your responsibility to determine whether the elements of the charged offense have been proven.

APSAC developed the above proposed instruction by using as an example Michigan's standard criminal jury instruction for expert witnesses (M Crim JI 5.10) and for expert testimony in child criminal sexual conduct cases (M Crim JI 20.29). Amici would recommend that any jury instruction created for AHT cases be read in connection with the existing instruction for expert witnesses (M Crim JI 5.10).

VIII. CONCLUSION

For the foregoing reasons, APSAC, the AAP, and the MIAAP respectfully request that this Court permit them to appear as amici curiae and consider APSAC, the AAP, and the MIAAP's arguments in addressing the admissibility of expert testimony regarding the medical diagnosis "abusive head trauma." Such testimony should be allowed.

Dated: January 6, 2020

Respectfully submitted,

/s/ Frank Vandervort
FRANK VANDERVORT (P42938)
Child Advocacy Law Clinic
University of Michigan Law School
701 S. State Street
Ann Arbor, MI 48109
(734) 763-5000
vort@umich.edu

CHRISTOPHER R. NOYES
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 295-6823

MARK A. FORD
MIKE BROWN
ELIZABETH DRISCOLL
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Counsel for Amici Curiae American Professional Society on the Abuse of Children, American Academy of Pediatrics, and Michigan Chapter of the American Academy of Pediatrics

CERTIFICATE OF SERVICE

On this 6 day of January, 2020, I filed the foregoing brief electronically using the Court's MiFILE system, which will send copies by e-mail to all counsel of record.

/s/ Frank Vandervort

FRANK VANDERVORT (P42938)
Child Advocacy Law Clinic
University of Michigan Law School
701 S. State Street
Ann Arbor, MI 48109
(734) 763-5000
vort@umich.edu