

NO. 92975-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

HEIDI CHARLENE FERO, Respondent

FROM THE COURT OF APPELAS, DIVISION II
In the Matter of the Personal Restraint Petition of Heidi Fero
NO. 46310-5-II

AMENDED RESPONSE TO BRIEF OF AMICUS CURIAE
THE INNOCENCE NETWORK

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¹ Each of the articles referenced in this brief is contained in hard copy in the bound booklet the State has filed with the Law Librarian, pursuant to this court's letter of May 2, 2017.

IDENTITY OF PETITIONER AND AMICUS CURIAE

The State of Washington is the petitioner in the matter before the Court, caption *In re the Matter of the Personal Restraint of Heidi Fero*, No. 92975-1. The Innocence Network appears in this case as amicus curiae.

ARGUMENT IN RESPONSE TO THE INNOCENCE NETWORK AS AMICUS CURIAE

- I. The “debate” over the validity of abusive head trauma is a legal one, not a medical one. Abusive head trauma is a valid diagnosis, particularly where the care giver reports that the child was, in fact, assaulted.

The Innocence Network has filed an amicus brief arguing that abusive head trauma is not a valid diagnosis. At issue is the Court of Appeals’ opinion holding not only that the current opinions offered by Barnes and Ophoven demonstrate a paradigm shift in the medical field, but that the testimony on abusive head trauma such as was offered in this case (specific to Brynn’s injury) is inadmissible under *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923). (“The scientific explanations that were offered as evidence against Fero in her trial are no longer generally accepted in the medical community.” *In re Fero*, 192 Wn.App. 138, 165, 367 P.3d 588 (2016). This is an extraordinary holding, and the first appellate holding of its kind the State could find nationwide. In *In re*

Morris, 189 Wn.App. 484, 355 P.3d 355 (2015), Division I of this Court disagreed with that premise, holding:

Abusive head trauma as a diagnosis, and shaking as a cause of such injuries, are generally accepted theories in the relevant scientific community. At trial, the State offered position papers from the American Academy of Pediatrics, the Academy of Ophthalmology, and the National Association of Medical Examiners, as well as a publication from the Centers for Disease Control and Prevention. Each of these recognizes abusive head trauma and accepts shaking as a mechanism for injury. Further, the State now presents a 2011 article listing various international and domestic medical organizations “that have publicly acknowledged the validity of [abusive head trauma] as a medical diagnosis.” Among the 15 listed is the World Health Organization. The article further states that “it is virtually unanimous among national and international medical societies that [abusive head trauma] is a valid medical diagnosis.” And it states that while some courts have concluded that the diagnosis is based on inconclusive research, the vast majority have not.

In re Morris, 189 Wn.App. 484, 493-94, 355 P.3d 355, 360 (2015), as corrected (Sept. 3, 2015), citing Dr. Sandeep Narang, *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, 11 HOUS. J. HEALTH L. & POL’Y 505 (2011). The State avers that the reasoning employed by Division I of the Court of Appeals in *Morris* is persuasive for the proposition that abusive head trauma remains a valid diagnosis and there has been no “paradigm shift” which would render the testimony offered at Fero’s trial inadmissible under *Frye*.

Fero argued in her PRP, and the Court of Appeals accepted, that “the medical community’s now generally accepted understanding of brain trauma in children directly contradicts the medical theories that were relied upon to convict her...” *In re Fero* at 154. This argument presupposes a major paradigm shift in the way that the medical community generally thinks about abusive head trauma. This supposition is incorrect. Contrary to what Drs. Barnes and Ophoven declare, there has been no major paradigm shift in the way the medical community generally understands abusive head trauma and shaken baby syndrome and thus there is no newly discovered evidence.

The Court of Appeals relied heavily on the idea of a lucid interval, which Fero promoted in her PRP, as though this was a newly accepted medical theory. The idea and medical understanding of lucid interval, however, was available prior to Fero’s 2003 trial. Indeed, the Court of Appeals acknowledged this. *In re Fero* at 160-61. But the Court held that while the argument was available to Fero at the time of her trial, the argument had essentially *gotten better* in the years following her trial. *Id.* Thus, the argument is “newly discovered.” *Id.* The State could find no other case which interprets the term “newly discovered” in this fashion.

The Innocence Network suggests in its brief that this case was “almost entirely dependent upon expert opinions.” This reflects a

fundamental misunderstanding of the basic facts of this case that pervades the entirety of the post-conviction litigation up to this point. The unfamiliarity with the trial record exhibited by Fero's counsel and amici is confounding and renders their arguments unhelpful to the court. As discussed in the State's Supplemental Brief of Petitioner and the State's response to WACDL, Fero took the position throughout the entire pre-trial proceedings and the trial (and the appeal) that Brynn Ackley was beaten, and suffered her injuries, at *Fero's house and while under Fero's care*. We know that Brynn was beaten at Fero's house not just based on Fero's statements, but from all of the other evidence introduced at trial. The other evidence includes, but is not limited to, testimony from Brynn's mother that Brynn was not injured or bruised when she arrived and walked into Fero's apartment that day (precluding the possibility that her leg was already fractured when she arrived); Fero's testimony that there was nothing unusual about Brynn's appearance when she arrived at Fero's apartment; the logical inference from the evidence that Brynn did not arrive at Fero's apartment that day bloody and bruised because no reasonable person would have received a child in that condition for babysitting and let it pass without comment; the testimony of Dr. Bennett that Brynn's fracture was recent, that it was the product of significant torsional twisting force, that Brynn could not have walked on it because

the fracture would have caused extreme pain, and that a four year-old child could not have inflicted either the fracture or Brynn's head injury; the repeated lies Fero told in an effort to explain away Brynn's injuries; and Fero's repeated claim both before and at trial that Brynn injuries were inflicted by her four year-old brother Kaed, while they were in Fero's care at her apartment on January 7, 2002. The claim that this case rested entirely on expert testimony is unsupported by the record and should be disregarded by this Court. Fero elected a trial strategy that was based on all the evidence and not simply the medical evidence regarding the head trauma.

Despite what Patrick Barnes and Janice Ophoven would have this Court believe, there is no controversy surrounding abusive head trauma. "Despite all the ballyhoo, there has been no paradigm shift in the scientific support for the diagnosis of AHT/SBS. The empirical evidence includes a continuously growing body of 'evidence-based, peer-reviewed medical literature with 40 years of contributions by pediatricians, neuroradiologists, clinical and forensic pathologists, ophthalmologists, and physiologists clearly supporting the construct of a medical diagnosis of AHT.'" Joelle Moreno and Brian Holmgren, *Dissent Into Confusion: The Supreme Court, Denialism, and the False 'Scientific' Controversy over Shaken Baby Syndrome*, 2013 UTAH L. REV. 153, 160 (2013). In fact,

AHT/SBS is an incredibly well-researched discipline comprising thousands of case studies, at least two treatises that comprise over 800 pages on the topic, 14 chapters, 700 peer-reviewed, clinical medical articles comprising thousands of pages of medical literature, published by over 1,000 different medical authors from at least 28 different countries. Dr. Sandeep Narang, *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, 11 HOUS. J. HEALTH L. & POL'Y 505, 539-40 (2011). This well-researched and generally accepted medical theory has been and continues to be supported and accepted by major accredited organizations including the World Health Organization, the Royal College of Paediatrics and Child Health, the American Academy of Pediatrics, the American College of Radiology, the American College of Surgeons, the American Association of Neurologic Surgeons, The American Academy of Family Physicians, and many others. *Moreno et al, surpa*, at 574-76. Given the abundance of support for AHT/SBS in the medical community, it is confusing to some as to why some Courts have been convinced that there is a “significant and legitimate debate in the medical community” as no such legitimate debate exists. *Id.* at 592.

One cause of this confusion may stem from the medical community’s shift from “shaken baby syndrome” to “abusive head trauma” to name this increasingly concerning type of child abuse.

American Academy of Pediatrics, *Understanding Abusive Head Trauma in Infants and Children*, June 2015, p. 2. This name change was the result of a policy statement “which has been mischaracterized in subsequent legal and medical literature and in court testimony to suggest that the AAP no longer recognizes shaken baby syndrome as a legitimate diagnosis.” *Id.* There is no legitimate medical debate among the majority of practicing physicians as to the existence and validity of AHT/SBS. *Id.* at p. 3. “The only real debate and controversy appear to be in the legal system and the media.” *Id.* As Christopher Spencer Greeley noted in *Abusive Head Trauma, A Review of the Evidence Base* at p. 971,

The debate surrounding AHT is neither scientific nor medical, but legal. Although some authors question the specificity of the clinical findings, there is near complete agreement, even among skeptics, that shaking an infant is dangerous and can be fatal. As in the anti-vaccine effort, many skeptics of AHT misrepresent or simply misunderstand the breadth of the published medical evidence and introduce this into courtrooms as so-called new science.

So why do some experts say such a debate exists and is new after 2003? Some believe self-interest driven “experts” are to blame for this “false controversy.” *Moreno et al., supra*, at 159. Most of these who fuel the false controversy “base their assertions on selective or improper citation to outlier medical papers that: (1) rely on unscientific methods; (2) are written almost exclusively by self-interested and highly-paid defense

witnesses; and (3) ignore the vast quantity of valid, easily accessible, evidence-based medical research and the many public and professional statements that substantial AHT/SBS as a clinically valid diagnosis.” *Id.*

It is important to note that the existence of opinions from people who have earned impressive degrees does not, by itself, render an opinion valid. Not all opinions are equal and not all medical journals are equal. Publication in one journal is not a determination that the author has used scientifically sound methods and reached valid conclusions. *Moreno et al, supra*, at 163. Indeed, articles published by both NPR and The Guardian documented the experience of a journalist at for the publication *Science*, a leading journal, in which a “sting operation” of sorts was conducted on unscrupulous scientific journals. The journalist, John Bohannon, sent a “deliberately faked” research article to 305 online journals. *Some Online Journals Will Publish Fake Science, For a Fee*, Shots—Health News, NPR, October 2, 2013. More than half of the journals to whom Bohannon sent the article went on to publish the fake paper. *Id.* Bohannon said the sting revealed “the contours of an emerging Wild West in academic publishing.” *Id.* Further, an article in *The Economist* recently said “Nor are elite journals the guardians of quality that they often claim to be. The number of papers so flawed that they need to be retracted has risen sharply

in the past two decades.” *The Shackles of Scientific Journals*, *The Economist*, March 25, 2017.

Often, judges are unaware of the fact that many of these papers or articles have encountered overwhelming evidence-based critique from a broad range of medical professionals and are generally seen as having been written for the purpose of maintaining the authors’ lucrative careers as defense witnesses. *Moreno et al., supra*, at 177. For example, one such article authored by Fero’s expert, Patrick Barnes, received significant critique. His 2008 article, “Rickets vs. Abuse: A National and International Epidemic” was not a peer-reviewed article, but instead was a “comment” which received significant critique including one that noted “that several cases presented by Drs. Barnes and Keller contained significant omissions including findings not seen by several other radiologists who reviewed the films and the authors’ failure to disclose their role as defense experts who routinely testify in cases where this defense is advanced.” *Moreno et al., supra*, at fn. 48. Those seeking to advance the “false controversy” surrounding AHT/SBS have been forced to rely upon the same handful of defense-employed witnesses who regularly testify for the defense, including Patrick Barnes. *See Id.* at 176.

The Court of Appeals relied entirely upon the decision in *State v. Edmunds*, 308 Wis.2d 374, 746 N.W.2d 590 (2008) to support its

conclusion that there has been a paradigm shift and a “fierce debate” and a “legitimate and significant dispute within the medical community” regarding AHT/SBS. *In re Fero*, 192 Wn.App. 138, 158, 367 P.3d 588 (2016). “*Edmunds* marks the tipping point for the new false controversy.” *Moreno et al., supra* at 174. *Edmunds* is not evidence of a paradigm shift. It is simply one state court finding a small group of doctors, only one of whom was actually engaged in the diagnosis of child abuse, credible. (It must be noted, also, that the test for granting a new trial based on newly discovered evidence is quite different in Wisconsin than it is in Washington). This is not evidence of a paradigm shift, but rather one court’s decision which “is contradicted by four decades of scientific consensus on the AHT/SBS diagnosis across a wide range of pediatric medical subspecialties and countless physicians who are more credible because they actually diagnose abuse as part of their medical practice.” *Moreno et al., supra*, at 173.

Claims of a paradigm shift over AHT/SBS “completely mischaracterize the existing medical evidence.” *Id.* at 161. For over four decades, the medical acceptance of AHT/SBS has been significantly documented in thousands and thousands of pages of medically accepted journals, articles, texts, treatises and chapters. This well-recognized theory, like all well-recognized medical theories (such as that vaccines do

not cause autism) have those who seek to challenge it. Such challenges do not create a paradigm shift which significantly changes the generally accepted medical science that was presented in Fero's trial. The science remains valid. Fero chose to blame Brynn's assault on a child who was present at her home during the time of the beating rather than present the already available defense that she arrived at the house at the tail end of a "lucid interval," having already sustained her injuries. Not only has there been no paradigm shift, but the evidence against Fero was strong and well-accepted in the medical community then, and remains well-accepted now. Fero did not show newly discovered evidence in the form of a paradigm shift which would probably change the result of the trial.

In addition to the extensive literature debunking the opinions of Barnes and Ophoven, their declarations fail to meet the high burden for the award of a new trial. It is important to reiterate that the declarations do not state which materials Barnes and Ophoven reviewed in rendering their opinions. They merely state they reviewed the "materials provided." Did that include the pictures of Brynn? Barnes and Ophoven's statements that it cannot be determined that the injuries sustained by Brynn were not accidental, and that the bruising could have been from "normal play" and were possibly "normal toddler bruises" demonstrates that these new experts did *not* review the pictures of Brynn. Normal toddler bruises? Is

Barnes serious? If Barnes and Ophoven did review the photographs, then we can reliably conclude that a jury will not credit their testimony at retrial. It also must be noted that nowhere in Barnes' declaration does he say that his opinions are generally accepted within the relevant scientific community. The declarations contain generalities about many doctors who agree with them, but they don't give numbers or names. How many doctors now hold the opinion that you cannot diagnose abusive head trauma conclusively? Who are they? The declarations also grossly overstate the State's evidence. The doctors in Fero's trial did not all testify that Brynn would have become immediately unconscious. This is an exaggeration of the testimony presented. From the declarations, all the State can discern is that there are two experts, one of whom has been declared not credible by at least one published decision (see *In re Interest of Gavin S.*, 23 Neb.App. 401, 416, --N.W.2d-- (2015)), and another of whom has been found to have given an opinion that was both internally inconsistent and unsupported by the evidence (see *People v. Schuitt*, 67 N.E.3d 890, 920 (2016)), who state that the "new paradigm" is generally accepted in the *relevant* scientific community. As Narang, et al. noted in *A Daubert Analysis of Abusive Head Trauma/Shaken Baby Syndrome*, *supra*, at 574, "There is but one simple question for these assertions: Where is the

evidence/data for these assertions (other than the opinions of known defense experts)?" There is none.

It is important to note what is *not* refuted or undercut by the "new" medical evidence put forth by Fero and which allegedly forms the basis of the claim of "paradigm shift." The "new evidence" does not refute the evidence showing that Brynn received the fracture to her leg while at Fero's home and under her care on January 7, 2002. It does not refute the testimony of several of the State's experts that a four year-old child could not have inflicted that injury. It does not refute the inescapable inference from the evidence that the head injury did not occur on a separate occasion, and in a different place, than the leg fracture. This would require the jury to believe that after fifteen months of incident-free existence, Brynn became the unluckiest child in the world and coincidentally sustained two separate severe injuries in the span of a few days, in unrelated incidents caused by unrelated actors. It would also require the jury to believe either that Brynn arrived at Fero's apartment looking like she'd lost a boxing match and Fero said nothing about it, or that the bruises were, in fact, sustained at Fero's house but were wholly unrelated to her head injury. Such claims are silly beyond words, and Fero's counsel knew better than to argue them. It bears repeating that this is *not* exclusively an abusive head trauma case.

In relying on *State v. Edmunds, supra*, the Court of Appeals stated that it presented facts similar to this case. *In re Fero, supra* at 157. This is not accurate. The facts of this case are nothing like the facts in *Edmunds*. In *Edmunds*, there were no outward signs of injury to the child other than the extremely severe brain trauma and a bruise on her scalp from an impact injury. *State v. Edmunds*, 229 Wis.2d 67, 598 N.W.2d 290 (1999). There wasn't extensive, recent bruising on the child's face, torso, and groin. There wasn't a vaginal laceration likely caused by a hard kick or stomp on the groin. There wasn't a significantly displaced long bone fracture caused by violent twisting. *Edmunds* was exclusively an abusive head trauma case. This case, unlike *Edmunds*, involved a brutal, full-body assault. It involved an accompanying long bone fracture. Finally, and most importantly, this case involved a report by the caregiver (Fero) that Brynn had, in fact, been assaulted at her home while in her care. The reasoning in *Edmunds* does not support the conclusion that the result of this trial would probably be different if the information contained in the Barnes/Ophoven declarations were presented to a jury. Moreover, it is important to understand that Wisconsin employs a different test for awarding a new trial on the basis of newly discovered evidence. Importantly, Wisconsin's test contains no bar for evidence that is merely impeaching. *Id.* The reliance on *Edmunds* is both puzzling and misplaced.

Finally, the Innocence Network's brief contains a section which argues that biomechanical research refutes shaken baby syndrome as a diagnosis. See Brief of Amicus Curiae The Innocence Network at page 7. These arguments are *not* newly discovered. The argument that a person cannot employ enough force to shake a baby to the degree required to cause the head trauma of the sort associated with abusive head trauma has been in use for decades. Fero investigated such a defense at trial by retaining a biomechanical expert. March 4, 2003 VRP at p. 3. In fact, the State's file in this case contains the transcript of the interview of Fero's biomechanical expert conducted by deputy prosecutor Katie Hart and defense counsel Mark Muenster, which was transcribed by a court reporter retained by Muenster and which transcript was provided to the State by Muenster.² Mr. Muenster elected not to call this expert to testify at trial. Not only is this argument not newly discovered, but it played no part in the decision of the Court of Appeals in this case. See *In re Fero, supra*. Rather, the Court of Appeals relied entirely on "lucid interval" in awarding Fero a new trial. *Id.* As such, this Court should disregard the entirety of this argument and the citations upon which it relies.

² Had Fero's current counsel requested a copy of the State's file in this matter or researched the trial record they would have discovered this transcript.

CONCLUSION

The Innocence Network's arguments are unpersuasive and unhelpful to this Court for the reasons set forth above. This Court should reverse the Court of Appeals.

DATED this 25th day of May 2017.

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