IN THE SUPREME COURT OF THE STATE OF FLORIDA

JILL MARSH,

Petitioner, CASE NO.: SC06-118

-vs-

ROBERT EARL VALYOU, JR. and DEBORAH A. VALYOU, THOMAS JONATHAN BURKE and DONNA E. BURKE, and PV HOLDING CORP. d/b/a AVIS RENT-A-CAR,

Respondents.
_____/

BRIEF OF AMICUS CURIAE
ACADEMY OF FLORIDA TRIAL LAWYERS
ON BEHALF OF PETITIONER, JILL MARSH

Fifth DCA Case No. 5D03-188
Circuit Court Case No. CIO-99-6377
On Discretionary Review from the Fifth District Court of Appeal

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INTRODUCTION

This case is before the Court on a Petition for Review to resolve an alleged conflict between different District Courts regarding the construction and application of the Frye analysis of expert testimony. The Academy of Florida Trial Lawyers is a state-wide voluntary association of more than 3,000 attorneys, whose practices emphasize litigation for the protection of personal and property rights of individuals. The issue before this Court is of state-wide significance, and involves a fundamental consideration in the provision of fair compensation to injured plaintiffs. Therefore, the Academy has requested leave to appear as Amicus Curiae in this case to address issues involved in this Court's consideration.

ARGUMENT

POINT I

THE OPINION THAT TRAUMA CAN CAUSE FIBROMYALGIA IS BASED ON GENERALLY ACCEPTED METHODS FOR INFERRING MEDICAL CAUSATION.

There is a legitimate medical controversy about whether trauma can cause fibromyalgia. A substantial number of distinguished medical experts believe trauma can cause fibromyalgia, while a substantial number believe that causation is not yet proven. Medical experts who believe that trauma can cause fibromyalgia base their opinion on case reports, clinical experience, and epidemiological research. These are generally-accepted forms of evidence from which experts infer medical causation. According to the *Frye* test adopted by this Court, expert opinion linking trauma to fibromyalgia is admissible because it is based on generally-accepted methodology. *Castillo v. E.I. DuPont De Nemours & Co.*, 854 So.2d 1264 (Fla. 2003). As the Court observed in *Castillo*:

> The court must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation…. It is important to emphasize that the weight to be given to stated scientific theories, and the resolution of legitimate but competing scientific views, are matters appropriately entrusted to the trier of fact.

Id. at 1275 *quoting Berry v. CSX Transportation, Inc.*, 709 So.2d 552, 569 n. 14 (Fla. 1st DCA 1998). In *Castillo*, this Court affirmed the admissibility of testimony by the plaintiff's expert that the pesticide, Benlate, could cause human birth defects.[1]

The plaintiff's expert based his opinion on a differential diagnosis of the plaintiff and his extrapolations from toxicological research. *Id*. at 1269. Even though the expert's causation opinion was *not* generally accepted by the scientific community and was unsupported by existing epidemiological research, the Court affirmed that "the disagreement between the parties was properly put before the jury to resolve." *Id*. at 1273.

[1] /The issue of whether something *can* be the cause of an illness is referred to in the case law as "general causation." The Fifth District held that general-causation evidence linking trauma to fibromyalgia was required as a prerequisite to admitting Marsh's expert testimony, and concluded that evidence of general causation was unreliable. This amicus brief addresses the reliability of general causation evidence under *Frye*, and does not address the court's rejection of the "pure opinion" exception to *Frye*. The Fifth District, however, appears to have confused the two issues. The "pure opinion" exception is based on the concept that juries will not attach an "aura of infallibility" to expert clinical opinion that does not explicitly rely on novel scientific tests or methods like DNA testing or psychological syndromes. In this case, Marsh's experts were prepared to offer pure clinical opinion. Evidence concerning general causation may be relevant to the trial court while conducting a *Frye* hearing, but it would *not* be presented to the jury. Nonetheless, the Fifth District mistakenly concluded that the experts' implicit reliance on evidence of general causation would somehow imply "the infallibility of the basis of the opinion." 917 So.2d at 327.

In this case, the scientific literature provides far more extensive support for the causal opinion of the plaintiff's experts than existed in *Castillo*. As discussed below, numerous medical experts have opined in peer-reviewed journals that there is sufficient evidence to support a causal link between trauma and fibromyalgia. In disagreeing with this published scientific opinion, the Fifth District took sides in a legitimate medical controversy and essentially substituted the *Daubert* test for this Court's *Frye* test.

Scientific evidence on causation

Medical science relies on several forms of evidence to determine the possible causes of illness. These are summarized in the Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (2d ed. 2000), in its chapter entitled "Reference Guide on Medical Testimony." The REFERENCE MANUAL identifies these sources of evidence for determining general causation: "medical and scientific literature, epidemiological data, toxicological data, case reports and series, dose-response relationships, and clinical experience." *Id*. at 469. As the REFERENCE MANUAL emphasizes, "in any given case, much of the listed information is normally not available." *Id*. at 468. Further, "physicians must almost always use an element of judgment in determining the relationship between exposure and disease in a given patient." *Id*. at 470-71.

Several of these forms of evidence support the judgment of medical experts that trauma can cause fibromyalgia. Of greatest relevance are (1) case reports and clinical experience, (2) epidemiological data, and, (3) published opinion in the scientific literature.

Clinical experience

An extensive body of published medical opinion reports that many patients and their treating physicians attribute the onset of fibromyalgia to trauma.[2]

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[2] /*See, e.g.*, Lawrence A. Bradley & Graciela S. Alarcon, *Fibromyalgia*, *in* 2 ARTHRITIS & ALLIED CONDITIONS 1816, 1823 (William J. Koopman ed., 14th ed. 2000)(between 14% and 23% of patients with fibromyalgia report that their symptoms began following a physical injury or trauma such as surgery); KATRINA BERNE, CHRONIC FATIGUE SYNDROME, FIBROMYALGIA AND OTHER INVISIBLE ILLNESSES 35 (2002)(based on 2000 patient records of one rheumatologist, 65% of patients reported onset of fibromyalgia after trauma); Daniel J. Wallace & Janice Brock Wallace, ALL ABOUT FIBROMYALGIA 18 (2002)(reporting 30% nationwide incidence of post-traumatic fibromyalgia); Stuart Greenfield, Mary-Ann Fitzcharles, & John M. Esdaile, *Reactive Fibromyalgia Syndrome,* 35 ARTHRITIS & RHEUMATISM 678 (1992) (23% of fibromyalgia patients reported that trauma or illness preceded onset); Frederick Wolfe, *The Clinical Syndrome of Fibrositis,* 81 AM. J. MEDICINE 7 (1986) (24% of patients implicated trauma as causative factor for fibromyalgia); George W. Waylonis, Patrick Ronan, & Chrisanne Gordon, *A Profile of Fibromyalgia in Occupational Environments*, 73 AM. J. PHYSICAL MEDICINE & REHABILITATION 112 (1994) (38% of fibromyalgia patients describe onset of symptoms after a traumatic event); D.L. Goldenberg, M.G. Nadeau, & K. Kaplan, *Clinical Characteristics of 500 Patients with Fibromyalgia*, PROCEEDINGS OF THE AMERICAN COLLEGE OF RHEUMATOLOGY, Atlanta, Ga. (October 1992) (50% of patients reported onset of fibromyalgia after infectious disorder or trauma); George W. Waylonis & Robert H. Perkins, *Post-traumatic Fibromyalgia. A Long-Term Follow-up,* 73 AM. J. PHYSICAL MEDICINE & REHABILITATION 403 (1994) (over 10-year period, 773 patients diagnosed with post-traumatic fibromyalgia); David A. Fishbain & Hubert L. Rosomoff, *Posttraumatic*

Physical trauma is consistently found to be the *most* common factor preceding the onset of fibromyalgia, and this association is a particularly strong one.[3] The percentage of fibromyalgia sufferers reporting post-traumatic pain varies, but estimates between 25-50% are typical.

> It also appears that doctors who specialize in the treatment of fibromyalgia believe that trauma can cause this illness. In a recent nationwide survey of Canadian physicians, 83% of practicing rheumatologists opined that trauma could precipitate fibromyalgia.[4] As has been observed, most clinicians are "comfortable with the idea

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Fibromyalgia at Pain Facilities Versus Rheumatologists' Offices, 77 AM. J. PHYSICAL MEDICINE & REHABILITATION 562 (1994) (70% of patients at pain center attributed onset of chronic pain to some form of trauma); D.J. Wallace, M. Linker-Israeli, D. Hallequa, S. Silverman, D. Silver, & M.H. Weisman, *Cytokines Play an Aetiopathogenetic Role in Fibromyalgia: A Hypothesis and Pilot Study*, 40 RHEUMATOLOGY 743, 744 (2001) (32% of patients related onset of fibromyalgia to trauma); Leon Chaitow, *Fibromyalgia Syndrome,* A PRACTITIONER'S GUIDE TO TREATMENT 103 (2000) (23% of fibromyalgia patients nationally reported physical trauma as trigger).

[3] /*See* Anil Kumar Jain *et al., Fibromyalgia Syndrome: Canadian Clinical Working Case Definition, Diagnostic and Treatment Protocols B A Consensus Document*, 11 J. MUSCULOSKELETAL PAIN 3, 44 (2003)("There is a strong consistency in documentation that physical trauma . . . can trigger FMS in some patients").

[4] /*See* Kevin P. White, Truls Ostbye, Manfred Harth, Warren Nielson, Mark Speechley, Robert Teasell, & Robert Bourne, *Perspectives on Posttraumatic Fibromyalgia: A Random Survey of Canadian General Practitioners, Orthopedists, Physiatrists, and Rheumatologists*, 27 J. RHEUMATOLOGY 790, 791-92 (2000). The researchers also found that approval of the diagnosis of post-traumatic fibromyalgia increased as the physician's experience with diagnosing the illness increased. *See id.* at 792.

> that fibromyalgia can . . . be triggered by physical or emotional trauma."[5]

The published clinical experience is shared by one of Marsh's leading medical experts. Dr. Mark Pelligrino, who has treated thousands of fibromyalgia patients and written numerous articles and books on the illness, testified that approximately sixty percent of the patients he treats develop fibromyalgia as the result of some form of trauma. *See Marsh v. Valyou,* Appellant's Second Amended Initial Brief 11 (brief filed in Fifth District).

Case reports and clinical experience do not provide conclusive proof of medical causation. They are not nearly as methodologically convincing, for example, as clinical experiments – which are not feasible in this case[6] – or epidemiological studies.[7] But the Fifth District's disregard of such extensive case and clinical evidence is inappropriate. *See* 917 So.2d at 327 ("To date, the relevant authorities have held that anecdotal evidence or clinical experience is insufficient

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[5] /*See* Don L. Goldenberg & H.S. Sandhu, *Fibromyalgia and Post-Traumatic Stress Disorder: Another Piece in the Biopsychosocial Puzzle*, 32 SEMINARS IN ARTHRITIS & RHEUMATISM 1 (2002).

[6] /As this Court observed in *Castillo*, it would be unethical to conduct a true clinical experiment which involved subjecting humans to a harmful exposure (like trauma). *See* 854 So.2d at 1270.

[7] /*See, e.g.,* David Egilman, Joyce Kim, & Molly Biklen, *Proving Causation: The Use and Abuse of Medical and Scientific Evidence Inside the Courtroom "An Epidemiologist's Critique of the Judicial Interpretation of the Daubert Ruling*, 58 Food & Drug L.J. 223, 225, 246 (2003); Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U.L. Rev. 1563, 1605 (2000).

to establish a (general) causal connection ….") As one leading expert on law and scientific evidence has commented, "especially in the medical field, extensive, collective experience can suffice to validate a proposition even when the experience cannot be precisely quantified."[8]

Courts which apply the more demanding *Daubert* test, as the Fifth District seemingly did in this case, continue to disagree about the weight to be given clinical experience.[9] But as this Court observed in *Castillo*, such legitimate

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[8] /See Edward J. Imwinkelried, *The Meaning of "Appropriate Validation" in Daubert v. Merrell Dow Pharmaceuticals, Inc., Interpreted in Light of the Broader Rationalist Tradition, Not the Narrow Scientific Tradition,* 30 F.S.U.L. Rev. 735, 747 (2003). As observed by Egilman, *supra* note 7, the principal tool used routinely by physicians to assess causation is the Physician's Desk Reference, which is based primarily on case reports. *Id*. at 224 n.5. Similarly, the Reference Manual observes that "causal attribution based on case studies must be regarded with caution. However, such studies may be carefully considered in light of other information available …." *Id.* at 475. S*ee also* Richard Clapp & David Ozonoff, *Environment and Health: Vital Intersection or Contested Territory?* 30 Am. J. L. & Medicine 189, 200 (2004)("The use of case reports in medicine is longstanding and important, as evidenced by the continued appearance of such reports in the literature.") As is the case with traumatically-induced fibromyalgia, case reports are often confirmed by systematic research. *See generally* Paul Glasziou, Jan Vandenbroucke, Iain Chalmers, *Assessing the Quality of Research*, 328 BRITISH MED. J. 39 (2006)(noting that more than half of adverse drug reaction reports were confirmed by more detailed research).

[9] /*See* Carl Cranor, *Scientific Inferences in the Laboratory and the Law*, 95 Am. J. Public Health, S121 (2005)(discussing the "mixed record" of federal courts applying *Daubert*). A recent illustration of Daubert courts disagreement about the value of case reports and clinical experience is provided by litigation involving ephedra. *Compare McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233, 1253-54 (11th Cir. 2005)(rejecting reliance on case reports in the absence of other forms of proof) *with In re Ephedra Products Liability Litigation,* 393 F.Supp.2d 181, 197-

scientific disputes about the conclusions to be drawn from scientific evidence are "appropriately entrusted to the trier of fact." *Id.* at 1275. As one *Daubert* court recently observed in admitting medical testimony based on case reports, "the inferences are of a kind that physicians and scientists reasonably make from good but inconclusive science when faced with practical decisions of importance."[10]

Epidemiological evidence

There are two published epidemiological studies exploring the relationship between trauma and fibromyalgia. These are (1) Dan Buskila, Lily Neumann, Genady Vaisberg, Daphna Alkalay, & Frederick Wolfe, *Increased Rates of Fibromyalgia Following Cervical Spine Injury,* 40 ARTHRITIS & RHEUMATISM 446 (1997), and (2) A. W. Al-Allaf, K.L. Dunbar, N.S. Hallum, B. Nosratzadeh, K.D. Templeton, & T. Pullar, *A Case-control Study Examining the Role of Physical Trauma in the Onset of Fibromyalgia Syndrome,* 41 RHEUMATOLOGY 450 (2002). The "Buskila" study is a cohort study of patients in Israel who had suffered either workplace or auto-accident injury. This study found that the rate of fibromyalgia

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98 (S.D.N.Y. 2005)(admitting evidence based on published case reports despite absence of epidemiological evidence).

[10] /*See In re Ephedra Products Liability Litigation*, *supra*, at 197. A recent illustration of the value of case reports is the FDA's decision to recommend a "black box" warning for stimulant drugs used to treat ADHD based on a few dozen "adverse event" reports. *See* Steven E. Nissen, *ADHD Drugs and Cardiovascular Risk*, 354 NEW ENGLAND J. MED. 1445 (April 6, 2006). While public health policy presents distinct reasons to rely on small numbers of reports, the point is that such reports provide relevant evidence that medical experts consider in inferring cause.

was substantially greater among persons who suffered injury to the neck than to the leg, and also reported a fibromyalgia rate much higher than is commonly estimated to occur in the general population.[11] The second study, a case-control study conducted in Great Britain, found that fibromyalgia patients reported substantially greater incidence of physical trauma in the months preceding development of the illness than non-fibromyalgia patients.[12]

Both of these epidemiological studies have methodological shortcomings, as is true of most studies, but that is no reason to disregard their relevance.[13] Such studies are generally accepted as a basis for inferring medical causation. *See Castillo supra* at 1269. Further, this epidemiological evidence is consistent with

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[11] /Almost 22% of persons suffering a neck injury developed fibromyalgia, which compares to a much smaller rate of fibromyalgia in the general population. Compare *id. with* Anil Kumar Jain *et al., Fibromyalgia Syndrome: Canadian Clinical Working Case Definition, Diagnostic and Treatment Protocols B A Consensus Document*, 11 J. MUSCULOSKELETAL PAIN 3, 5 (2003)(studies estimate population prevalence of fibromyalgia between 2-10%).

[12] /A more recent cohort study of widespread bodily pain, not fibromyalgia specifically, also reported a significant association between low-impact trauma and pain. S*ee* Elaine F. Harkness, Gary J. Macfarlane, Elizabeth Nahit, Alan J. Silman, & John McBeth, *Mechanical Injury and Psychosocial Factors in the Work Place Predict the Onset of Widespread Chronic Pain*, 50 ARTHRITIS & RHEUmatism 1655 (2004). Recent research replicating the Buskila study appeared to find no significant association between whiplash injury and fibromyalgia. *See* Levy et al., *The Effect of Whiplash Injury on the Appearance of Fibromyalgia*, 52 Arthritis & Rheumatism S78 (2005). Because the research findings have not yet been published in Arthritis & Rheumatism, no assessment of its validity or interpretation is offered.

[13] /S*ee* REFERENCE MANUAL, *supra* at 337 ("It is important to emphasize that most studies have flaws").

the widespread clinical experience that trauma is significantly linked to fibromyalgia. As discussed below, numerous medical authorities interpret these clinical and epidemiological findings to support the conclusion that trauma can cause fibromyalgia.

Medical and scientific literature

There is extensive medical literature opining on the causes of fibromyalgia, including numerous books, articles, letters to medical journals, and web-site commentaries. The most relevant literature consists of three reports which convey the collective consensus of participating experts. These include: (1) Frederick Wolfe, *The Fibromyalgia Syndrome: A Consensus Report on Fibromyalgia and Disability*, 23 JOURNAL OF RHEUMATOLOGY 534 (1996)(the "Consensus Report"); Muhammad B. Yunus, Robert M. Bennett, Thomas J. Romano, I. Jon Russell, *et al., Fibromyalgia Consensus Report: Additional Comments*, 3 J. CLINICAL RHEUMATOLOGY 324 (1997)("Additional Comments Report"); and Anil Kumar Jain *et al., Fibromyalgia Syndrome: Canadian Clinical Working Case Definition, Diagnostic and Treatment Protocols (?) A Consensus Document*, 11 J. MUSCULOSKELETAL PAIN 3 (2003) ("2003 Consensus Report").

The earliest statement of collective opinion on traumatically-induced fibromyalgia was issued in 1994 as the result of a private conference of physicians

and researchers sponsored by insurance-related interests.[14] This self-styled "Consensus Report" concluded that "data from the literature are insufficient" to indicate whether trauma can cause fibromyalgia. The Consensus Report, issued before publication of the Buskila and Al-Allaf studies, explicitly called for "epidemiological studies to address the issue of causation." This report was relied on by the Fifth District and has greatly influenced the opinion of other courts applying *Daubert* to exclude evidence of traumatically-induced fibromyalgia. *See, e.g., Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999).

In response to the Consensus Report, numerous medical researchers and doctors – including many participants in the Consensus Report conference – published the Additional Comments Report.[15] This rejoinder to the Consensus Report concluded that "trauma does play a causative role in some [fibromyalgia] patients," a conclusion based on "a consistent clinical pattern . . ., case-control or descriptive studies . . ., and biologic plausibility."[16]

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[14] /*See* Robert W. Teasdell & Harold Merskey, *The Quebec Task Force on Whiplash-Associated Disorders and the British Columbia Whiplash Initiative: A Study of Insurance Industry Initiatives*, 4 PAIN RESEARCH & MANAGEMENT 141 (1999).

[15] /This response was endorsed by more than forty prominent researchers and clinicians, including medical faculty from the University of Wisconsin, the University of Washington, the University of Illinois, Brown University, UCLA, Georgetown University, and Ohio State University. *See id.* at 326.

[16] /*See* Muhammad B. Yunus, Robert M. Bennett, Thomas J. Romano, I. Jon Russell, *et al., Fibromyalgia Consensus Report: Additional Comments*, 3 J.

More recently, a group of medical researchers, medical school faculty, and physicians issued the 2003 Consensus Report. This latest report concludes that, based on existing epidemiological, clinical and biological evidence, there is "a compelling argument that trauma does, in fact, play an etiological role in the development of FMS in some, but not all patients."[17]

These three reports of collective medical opinion illustrate that there is a legitimate scientific controversy concerning whether trauma can cause fibromyalgia. No report qualifies as a true "consensus" report of an authoritative medical organization. But the Additional Comments Report and the 2003 Consensus Report reveal that numerous medical researchers and physicians find that the clinical and epidemiological evidence make a compelling case for the existence of traumatically-induced fibromyalgia. This includes many scientists

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CLINICAL RHEUMATOLOGY 324 (1997). The "biologic plausibility" of a link between trauma and fibromyalgia is discussed more fully in Michael Finch, *Law and the Problem of Pain*, 74 U. Cin. L. Rev. 285, 325-26(2006) (forthcoming)(discussing the emerging biological model of chronic pain as the product of abnormalities in the central nervous system which can be activated by disease and trauma).

[17] /*See* Anil Kumar Jain et al., *Fibromyalgia Syndrome: Canadian Clinical Working Case Definition, Diagnostic and Treatment Protocols B A Consensus Document*, 11 J. MUSCULOSKELETAL PAIN 3, 44-45 (2003)("There is strong consistency in documentation that physical trauma such as a fall or motor vehicle accident ... can trigger FMS in some patients").

from distinguished American and Canadian medical schools,[18] whose opinion is based on clinical experience with thousands of patients.[19] Significantly, these experts have published their opinion not for purposes of litigation, but "for professional purposes completely independent of litigation."[20]

The fact that several courts applying the *Daubert* test have been willing to discard the relevance of such distinguished medical opinion and extensive clinical experience highlights the growing divide between *Frye* and *Daubert* jurisdictions. Applying *Daubert*, several courts have taken sides in a legitimate medical controversy based on based on their own judgment of what is "good science."

In applying the *Daubert* test to exclude the testimony of Marsh's medical experts, the Fifth District rejected substantial, published opinions of leading medical researchers who find the evidence of traumatically-induced fibromyalgia to be reliable.[21] The court also rejected an impressive body of clinical experience,

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[18] /For example, signatories to the Additional Comments Report include faculty members at leading medical schools like Georgetown University, Ohio State University, UCLA, the University of Illinois, the University of Washington, and the University of Wisconsin. Signatories of the 2003 Consensus Report include faculty members at the University of British Columbia, the University of Texas, the University of Toronto, and the University of Wisconsin.

[19] /*See 2003 Consensus Report* at 5 (consensus panelists have diagnosed or treated "more than twenty thousand [20,000] FMS patients").

[20] /*In re Ephedra Products Liability Litigation*, 393 F.Supp.2d 181, 195 (S.D.N.Y. 2005).

[21] /While the 2003 Consensus Report was provided to the Fifth District as Supplemental Authority by Marsh's counsel, it was not mentioned in the Court's

apparently based on the belief that the clinical experience and judgment of physicians who routinely treat fibromyalgia sufferers has no evidentiary value. This is an unfortunate conflict between medical practice, and judicial interpretation of that practice, that *Daubert* increasingly invites. As two of the growing number of medical critics of *Daubert* have recently remarked:

> The courts appear to be asserting standards that they attribute to the medical profession, but that are inconsistent and sometimes more demanding than actual medical practice. . . . Courts are misled if they think they are representing medical practice.[22]

This Court should reaffirm, yet again, the position it stated in *Castillo:* this state's *Frye* test does not empower courts to take sides in legitimate scientific controversies and deprive litigants of their right to trial by jury.

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opinion. While that Consensus Report was published after the trial court's ruling in the case *sub judice*, this Court stated in *Hadden v. State*, 690 So.2d 573, 579 (Fla. 1997), that *Frye* issues are reviewed *de novo* based on the scientific evidence existing at the time of the appeal, rather than at the time of trial.

[22] /Jerome P. Kassirer & Joe S. Cecil, *Inconsistency in Evidentiary Standards for Medical Testimony: Disorder in the Courts*, 288 J. AM. MEDICAL ASS'N 1382 (2002). *See also* David Michaels, *Scientific Evidence and Public Policy*, 95 Am. J. Public Health S5 (2005) ("What began as a well-intentioned attempt to improve the quality of evidentiary science has had troubling consequences. The picture is disturbing: on the basis of a lay judge's ruling, respected scientists have been barred from offering expert testimony in civil cases, and corporate defendants have become increasingly emboldened to cavalierly accuse any adversary of practicing "junk science").

POINT II

THE FIFTH DISTRICT MISTAKENLY APPLIED THE *DAUBERT* TEST WHEN IT EXCLUDED MEDICAL TESTIMONY BASED ON ITS OWN INTERPRETATION OF SCIENTIFIC EVIDENCE.

The Fifth District Court of Appeal excluded the testimony of Marsh's medical experts because it found a "lack of scientific support" for the "reliability of [the] theory that fibromyalgia is caused by trauma." 917 So.2d at 326. The Fifth District emphasized that,

> We do not . . . purport to hold that trauma does not cause fibromyalgia. . . . Medical science may someday determine with sufficient reliability that such a causal relationship exists. As the Supreme Court recognized in *Daubert*: "[I]n practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury form learning of authentic insights and innovations" [citation omitted.]

By its own admission, the Fifth District's applied a *Daubert* gatekeeping role to exclude Marsh's medical evidence. Rather than inquiring whether Marsh's medical experts based their opinion on generally accepted methodology, the Fifth District scrutinized the experts' "ultimate conclusion" as courts do under a *Daubert* analysis. *See Castillo* at 1276. But as this Court emphasized in *Castillo*, the *Frye* test applied in Florida does not permit this. *See id.* (the lower court committed

error by "considering not just the underlying science but the application of the data generated by that science in reaching the expert's ultimate conclusion").

The Fifth District's misapprehension of the *Frye* test was compounded by other misunderstandings. First, in relying overwhelmingly on *Daubert* precedent and rejecting Marsh's case support,[23] the Fifth District proceeded on the assumption that *Daubert* is a more "liberal" test. 917 So.2d at 323 n.4. The court appears to have assumed that, because many federal courts applying the "liberal" *Daubert* test exclude evidence of traumatically-induced fibromyalgia, Florida courts applying the less-liberal *Frye* test should also exclude this evidence.

The Fifth District is mistaken. Even though some early media reports announced that *Daubert* inaugurated a more "liberal" approach to the admissibility of scientific evidence, this interpretation is now overwhelmingly rejected.[24] This Court recognized the more exclusionary effect of *Daubert* in *Castillo*, when it

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[23] /Marsh cited to both *Daubert* and *Frye* precedent finding evidence of traumatically-induced fibromyalgia admissible, *see, e.g., Reichert v. Phipps*, 84 P.3d 353 (Wy. 2004), but the Fifth District found these cases "of little value" based on its incorrect belief that "the *Daubert* test is different and generally considered to be more liberal than *Frye*." 917 So.2d at 323 n.4.

[24] /*See* Joseph Sanders & Julie Machal-Fulks, *The Admissibility of Differential Diagnosis Testimony to Prove Causation in Toxic Tort Cases: The Interplay of Adjective and Substantive Law*, 64 L. & CONTEMPORARY PROBLEMS 107, 129 (2001)("Almost everyone agrees that the admissibility threshold under *Daubert* is higher than it was under *Frye* …."); Margaret Berger, *What Has a Decade of Daubert Wrought?* 95 AM. J. PUBLIC HEALTH S59 (2005)(*Daubert* has led to greater exclusion of expert testimony, particularly that of plaintiffs).

observed that *Daubert* adds an additional screening standard to the *Frye* test by permitting courts to "consider everything from the methodology to the . . . ultimate conclusion." 854 So.2d at 1276. Thus, the *Daubert* test is more restrictive than *Frye*, and the Fifth District erred in concluding that *Daubert* precedent was the proper guide.

The Fifth District's willingness to discard the scientific conclusions of Marsh's experts was facilitated by its misunderstanding of the cautious rhetoric often used by scientific researchers. The court repeatedly rejected the research findings showing a significant association between trauma and fibromyalgia because of the researchers' unwillingness to reach conclusions about the ultimate "cause" of the illness. *See, e.g.*, 917 So.2d at 316 (research data are "insufficient to indicate whether causal relationships exist between trauma and FM"); *id.* at 317 (case reports are "insufficient to establish causal relationships"); *id.* at 326 ("further studies are required to verify the Buskila Study's statement that trauma may cause fibromyalgia").

The Fifth District misconstrued the cautious rhetoric of medical research and so discounted research findings. As Judge Van Nortwick has remarked about the interpretation of scientific findings that are "equivocal about causation,"

> [T]he fact that an epidemiological study calls for further research does not indicate uncertainty on the part of researchers. . . . Almost all genres of research articles in

> the medical and behavioral sciences conclude their discussion with qualifying statements such as "there is still much to be learned". . . . Uncertainty is never completely abolished . . . . Therefore, conclusions must be defined in terms of "suggestions" or "associations" rather than causes.[25]

In sum, the Fifth District applied the wrong legal standard, and misconstrued scientific literature, in concluding that Marsh's expert opinion linking trauma to fibromyalgia was "unreliable."

CONCLUSION

This Court, like the supreme courts of many states, continues to follow the *Frye* test. This case illustrates why the Court's approach is sound. Trial courts should not take sides in a legitimate medical debate and deny litigants the right to a jury trial. Therefore, if this Court concludes that the *Frye* test applies to Marsh's expert testimony linking trauma to fibromyalgia, the Court should affirm the admissibility of this testimony.

[25] /*Berry v. CSX Transp., Inc.*, 709 So. 2d 552, 567-68 (Fla. 1st DCA 1998) (quoting testimony of expert witness). In reversing the trial court, the First District found that "the trial court ultimately misunderstood the nature of epidemiological studies and was unnecessarily concerned that the studies did not prove causation."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to JOHN T. STEMBERGER, ESQ., 4853 S. Orange Ave., Ste. C, Orlando, FL 32806; SHANNON L. AKINS, ESQ., 25 S. Magnolia Ave., Orlando, FL 32801; JOSEPH CURRIER BROCK, ESQ., 545 Delaney Ave., Bldg. 9, Orlando, FL 32801, ELIZABETH C. WHEELER, ESQ., P.O. Box 2266, Orlando, FL 32802-2266, E. PEYTON HODGES, ESQ. and ROBERT W. MIXSON, ESQ., 15 West Church St., Orlando, FL 32801, by mail, on April 13, 2006.

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