IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC06-118

JILL MARSH,
Petitioner,

vs.

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

ON DISCRETIONARY REVIEW
FROM THE FIFTH DISTRICT COURT OF APPEAL
Fifth DCA Case No.: 5D03-188
Circuit Court Case No.: CIO-99-6377

ANSWER BRIEF OF RESPONDENTS ROBERT EARL VALYOU, JR. and DEBORAH A. VALYOU

[CORRECTED]

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

OTHER AUTHORITIES

Respondents, Appellees/Defendants below, Robert Earl Valyou, Jr., and Deborah A. Valyou (collectively "the Valyous") file this answer brief in opposition to the Initial Brief of Petitioner/Appellant/Plaintiff, Jill Marsh.

STATEMENT OF CASE AND FACTS

Because Petitioner's statement of the case and facts is inaccurate in material respects and argumentative, the Valyous submit the following statement:

Petitioner Jill Marsh filed the underlying automobile negligence action in July 1999, alleging injuries from four separate automobile accidents between August 1995 and January 1998. (R1.1-7).[1] In Count I, Plaintiff sued the Valyous based on a collision on August 3, 1995 involving a vehicle driven by Deborah Valyou and owned by Deborah and her father, Robert Earl Valyou.[2] In Count II, Plaintiff sued Respondents Donna and Thomas Burke ("the Burkes") based on an accident on April 14, 1996. In Count III, the Plaintiff sued Respondent PVC Holding Corp., d/b/a Avis Rent-a-Car ("Avis") based on a June 20, 1996 accident involving a rental car owned by Avis. In Court IV, Plaintiff sued Scott David Chillcut (who is no longer a party) based on a fourth accident on January 20, 1998.

During the course of discovery, the Defendants learned that Marsh was not merely seeking damages for soft tissue injuries arising from the accidents, but that she

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[1] Citations to the record on appeal in the Fifth District are designated "R" (for the record on appeal) or "RS" (for the supplemental record) or "2SR" (for the record on relinquishment of jurisdiction to the trial court), followed by the volume and page number. Citations to the record on review in this Court are designated "RSC" followed by the page number. Unless otherwise stated, all emphasis is supplied.

[2] Marsh's brief incorrectly states that Robert Earl is Deborah's "husband."

intended to present expert medical testimony that the accidents, individually or in combination, caused her to suffer "fibromyalgia syndrome." Fibromyalgia syndrome is a chronic painful muscular disorder of unknown etiology and pathophysiology. (R4.746). On November 5, 2001, Defendant Avis filed a motion to determine the admissibility of that expert testimony under Florida's *Frye* standard. (R3.562-567). The Valyous and the Burkes joined in that motion. (R4.742). Defendants contended that the underlying theory of a causal relationship between trauma and fibromyalgia is not generally accepted in the relevant scientific community.[3]

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[3] The Valyous object to Petitioner's vague, unsupported and argumentative statement that "at least four ...doctors would have given pure opinion testimony based solely upon their training, education and experience in reaching conclusions that Jill Marsh suffered from Fibromyalgia, Myofascial Pain, Chronic Pain Syndromes and/or other complex soft tissue injuries." (Petitioner's brief, at 3). To the extent Petitioner is claiming that such doctor(s) would testify that Marsh's auto accidents *caused* such condition(s), the only alleged conditions relevant to this petition are "Fibromyalgia Syndrome" and "Myofascial Pain Syndrome." The trial court's two *Frye* orders ***only*** addressed testimony pertaining to "Fibromyalgia Syndrome" and "Myofascial Pain Syndrome." (R4.742-47; R6.1384-88). Those orders did not purport to exclude any expert testimony regarding any other injuries or conditions. After the second *Frye* ruling, Marsh expressly waived all other claims so she could obtain an immediate appealable final order. (SR13.4559-63, 4567-68; R8.2548-49). As the Fifth District noted: "Marsh's counsel informed the court that Marsh had no claims to present apart from fibromyalgia and MPS; accordingly, the summary final judgment was entered by the court." *Marsh v. Valyou*, 917 So. 2d 313, 319 (Fla. 5th DCA 2005). Respondents strongly object to Marsh's misleading omission of this express unilateral waiver so as to imply that Judge Sprinkel's *Frye* rulings cut off testimony regarding other injuries – something she also did in her Fifth District brief (RSC.A3-4,22,23,25,40; *see* RSC.E3-5,7-10).

Further, any causation testimony by Marsh's experts regarding Fibromyalgia Syndrome and MPS is not "pure opinion testimony" but is based on the theory that trauma causes Fibromyalgia Syndrome and MPS. Additionally, Plaintiff's experts, Dr. Thomas J. Romano and Dr. Mark J. Pellegrino, are steeped in this scientific controversy, and were signatories to the "Additional Comments" minority report

The Valyous respectfully refer this Court to the factual statement in the answer brief of the Burkes filed in the Fifth District, at pages 3-13 (RSC.C3-13), which provides a detailed account of the submissions, arguments and proceedings before Judge Sprinkel on this *Frye* motion.

On November 6, 2001, at the close of the two day *Frye* hearing, Judge Sprinkel announced that he was granting the Defendants' *Frye* motion and would continue the trial. Judge Sprinkel indicated he had no doubt that the underlying theory that trauma can cause fibromyalgia was subject to *Frye* testing, and he was persuaded from reading the parties' submissions that the prevailing consensus among experts in the relevant field of rheumatology is that a causal relationship between trauma and fibromyalgia has not been demonstrated. (R4.774,818-821).[4] The court, thereafter on February 2, 2002, entered a six-page written order memorializing its ruling the Defendants' *Frye* motion. (R4.742-47).[5]

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stemming from the 1994 Vancouver Conference on Fibromyalgia (R5.1133, 1135); and Dr. James Madison, Marsh's treating orthopaedist, acknowledged that his opinion regarding fibromyalgia was based largely on his reading what was "beginning to appear in the literature." (SR4.3106).

[4] The trial court did *not* rule that Marsh's experts "would be excluded from offering pure opinion testimony that Petitioner's FM was caused by trauma of the multiple accidents," as Petitioner's brief states (at 4).

[5] Pursuant to the court's directive, the undersigned drafted a proposed order memorializing Judge Sprinkel's reasons for granting Defendants' *Frye* motion. (R4.819, 749). In her brief, at 4, Petitioner emphasizes that her counsel, Mr. Stemberger, "objected" to the language of that proposed order. However, as the correspondence to the court reveals, Mr. Stemberger never specified what his objections were, either to the court or to Defendants' counsel, despite having ample opportunity to do so. (R4.748-750).

At a hearing in mid-2002, Plaintiff's counsel announced that Plaintiff would be proceeding under a theory that the accidents caused her to suffer "myofascial pain syndrome" ("MPS"). (*See* R6.1359). On November 18, 2002, Avis, joined by the Valyous, filed a second motion to determine admissibility of expert testimony in support of Plaintiff's claim for MPS. (R6.1357-1368). A *Frye* hearing on this motion was held on November 18, 2002 (SR13 4570 - 4718). The Burkes' factual statement in their Fifth District answer brief reviews the submissions and arguments of the parties, and the trial court's consideration thereof. (RSC.C18-23).

On November 27, 2002, the trial court issued a five-page order granting Defendants' second *Frye* motion, precluding Plaintiff from introducing evidence or expert testimony of a causal link between Plaintiff's alleged trauma and MPS. (R6.1384-88). The court found that "there is even less of a scientific consensus regarding causes of and diagnostic procedures for MPS" than there was for fibromyalgia. (R6.1387). Noting that MPS was the announced theory of Plaintiff's claimed injuries, the court indicated that it would entertain a motion for summary judgment. (R6.1387).

Soon thereafter, on December 3, 2002, the trial court held a status hearing. (SR13.4555-69). Although not mentioned in Petitioner's brief, at the outset of that hearing, Judge Sprinkel asked Mr. Stemberger "where the Plaintiff stands" in light of the court's *Frye* order on MPS; and specifically whether it was Plaintiff's position that there were injuries as a result of the accident that Plaintiff had expert testimony to show causation on. (SR13.4558). Mr. Stemberger informed the court that Plaintiff had no claims to present apart from fibromyalgia and MPS. Mr. Stemberger

represented that "it is our position" that "there really are no other organic injuries that the Plaintiff can argue." (SR13.4558). Marsh's counsel indicated that Marsh wished to seek immediate appellate review of the *Frye* orders. (SR 13.4561-63, 4567-68). The trial court entered Final Summary Judgment on September 19, 2002. (R8.2548-50). That judgment expressly recites the two *Frye* orders together with Petitioner's stipulation at the December 3, 2002 hearing as the grounds upon which the court entered final summary judgment. (R8.2548-49).

Marsh appealed to the Fifth District on January 21, 2003 (RSC.1-3).

Subsequent to the filing of Appellees' Answer Briefs, but prior to the filing of Appellant's Reply Brief, the Second District issued its decision in *State Farm Mutual Auto. Ins. Co. v. Johnson*, 880 So. 2d 721 (Fla. 2d DCA May 12, 2004), which affirmed an order rejecting a *Frye* challenge to expert opinion testimony that the insured's fibromyalgia syndrome was caused by auto accident trauma.

On July 23, 2005, after Appellees' answer briefs had been filed, Marsh filed a Second Notice of Supplemental Authority, attaching a 2003 Canadian medical article entitled "Fibromyalgia Syndrome: Canadian clinical working cases definition, diagnostic and treatment protocols - a consensus document" by Jain, Anil Kumar, et al., *Journal of Musculoskeletal Pain*, Vol. 11, No. 4, 2003, pp. 1-107.[6] Because Marsh had previously moved successfully to strike Appellee Avis' Answer Brief and

[6] Marsh's "Second" notice was actually a re-filing of her first, which the Fifth DCA struck for failure to attach a copy of the authority. (*See* RSC.17 n.1). Marsh's statement that she learned about the 2003 article "after briefing was completed by all parties" (Petitioner's brief, at 8) is inaccurate at best, since Marsh filed her amended reply brief on August 10, 2004. (RSC.H).

Appendix on the ground that they referred to and included a new medical journal article that was not part of the record before the trial court, Appellees jointly moved to strike Marsh's Notice of Supplemental Authority on the same ground. (RSC.18-19). After the Fifth District granted Appellees' motion to strike (RSC.30), Marsh moved for rehearing of that order (RSC.31-38). Thereafter, on December 16, 2004, the Fifth District entered an order, *sua sponte*, relinquishing jurisdiction to the circuit court

> for an additional evidentiary hearing limited to consideration of new scientific evidence on Fibromyalgia Syndrome, that has been published during the pendency of the above-styled appeal. Upon conclusion of the relinquishment period, the lower court shall prepare and render an revised order which shall be forthwith submitted to this Court. After review of the supplemental record, the court will conduct an expedited review and conclude the appeal. *See Brim v. State*, 695 So. 2d 268 (Fla. 1997). (RSC.46)

The relinquishment proceedings were conducted by Judge Sprinkel, who directed the parties to file and serve all pertinent new scientific evidence on fibromyalgia syndrome for the court to consider. (2SR1.2647-49). Thereafter the Plaintiff and Defendants submitted separate binders containing relevant materials published during the pendency of the appeal. Plaintiff's submissions consisted of two articles, including the 2003 Canadian document. (2SR4.2994-3117). The Defendants' submission consisted of ten publications. (2SR5.3118-3241). The parties also jointly submitted a binder of materials previously considered by the court. (2SR6.3242-3671).

Early in the relinquishment, Marsh's counsel made clear that Marsh wished Judge Sprinkel to reconsider the *legal* basis of his *Frye* orders in light of the Second

DCA's opinion in *State Farm v. Johnson, supra.* (2SR2.2782). Defendants countered that the Fifth District's relinquishment of jurisdiction was expressly limited to consideration of new scientific evidence on Fibromyalgia Syndrome. (2SR2.2784). The court took the scope of its jurisdiction under advisement. (2SR2.2786).

On March 1, 2005, the parties submitted medical/legal memoranda setting forth their respective positions. (2SR1.2656-81, 2682-2722). Plaintiff's memorandum did not address any of the new medical/scientific submissions by either party. Plaintiff's memorandum argued that Plaintiff's expert causation testimony was not subject to *Frye* testing under this Court's decision in *Castillo v. E. I. DuPont De Nemours & Co., Inc.*, 854 So. 2d 1264 (Fla. 2003) and the Second DCA's decision in *Johnson*; and alternatively that only the experts' methodology was subject to *Frye* testing.

The Defendants' joint memorandum addressed in detail the new medical/scientific submissions by both the Plaintiff and the Defendants. (2RS1.2715-20,2713). Defendants noted that the 2003 Canadian document does not contain any new research, and the subsection entitled "Physical Trauma" does not refer to any study after 1997. (2RS1.2715-16). Defendants' memorandum also addressed the *Johnson* and *Castillo* cases along with other recent decisions from federal and state courts. With respect to the *Johnson* decision, Defendants argued that the case was distinguishable based on State Farm's concessions and improperly framed *Frye* challenge; and alternatively that if *Johnson* were read to hold that a mere showing of an "association between trauma and fibromyalgia" satisfies *Frye* so as to permit expert testimony of a *causal* relationship between trauma and fibromyalgia, such reasoning is fallacious and contrary to Florida law. Defendants noted that even the

two scientific studies which found evidence of an "association" expressly denied that their studies supported a finding of causality. (2SR1.2710-15).[7]

On March 2, 2005, the trial court conducted a two-hour evidentiary hearing in which the parties were given wide latitude in making presentations and giving legal and medical argument. (2SR2.2846-2960).[8] At the close of the hearing, the court directed the parties to submit memoranda addressing the scope of the court's relinquishment jurisdiction (2SR2.2949-52), which the parties filed on March 10 and 11, 2005. (2SR2.2725-31, 2732-43).

When the hearing reconvened on March 24, 2005, Judge Sprinkel held that his jurisdiction was strictly limited to reviewing new scientific evidence. He announced that he had read and considered all the materials submitted by the parties, and found that the subsequent scientific evidence was insufficient to change his prior *Frye* rulings. Judge Sprinkel gave a lengthy recitation of his reasons and directed the Defendants' to prepared a proposed order which addressed the submissions of both the Plaintiff and the Defendants. (2SR2.2963-2971).

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[7] Because the *Johnson* case was decided after Appellees filed their answer briefs in the Fifth District and the Fifth District denied Appellees' request to file supplemental briefs addressing *Johnson*, the undersigned, during oral argument, referred the Fifth District to this memorandum.

[8] Petitioner misleadingly quotes at length Judge Sprinkel's preliminary thoughts regarding the *Johnson* decision expressed at the outset of the hearing on March 2, 2005. (Petitioner's brief at 11, *quoting* 2SR2.2850, 2854). At the following hearing on March 24, 2005 – after he had heard the parties' arguments and considered their submissions – Judge Sprinkel, while concluding that the relinquishment order did not grant jurisdiction to consider new case law, expressed the opinion that *Johnson* is either distinguishable or wrongly decided. (2SR2.2964,2966-67).

On April 1, 2005, the trial court issued its Order on Evidentiary Hearing for Consideration of New Scientific Evidence on Fibromyalgia Syndrome, which was submitted to the Fifth District on April 4, 2005. (2SR2.2979-2989; RSC.51-61).[9] In the order, the court stated:

> The Court has read and considered all of the medical publications submitted by the parties and is persuaded that the state of medical research and the position of the relevant scientific/medical community regarding whether trauma may cause fibromyalgia syndrome has not changed since the Court's prior rulings....
>
> Taking the production given to this Court by both the Defendants and Plaintiff, it is clear that there has been no viable progress in medically linking trauma to the onset of fibromyalgia since the time this Court initially ruled. The commentators...have indicated either a lack of causation between trauma and fibromyalgia or have suggested that additional research needs to be done to help establish such a causal link.

In addressing Plaintiff's 2003 Canadian document, the Court observed:

> The bulk of the submission by Plaintiff consists of a Canadian document, "Fibromyalgia Syndrome: Canadian Clinical Working Case Definition, Diagnoses and Treatment Protocols - a Consensus Document." This document, published in 2003, does not contain "new" research, but merely attempted to gather together what was known about FMS as of that time. As noted in the "Conclusion" section, "It is intended that this document serve as a guide: to a better understanding of FMS; to a more reasoned approach to its management; and to further research on the clinical care of people with FMS."
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> On page 44 of the document, under the subsection "Physical Trauma," numerous citations to medical studies are mentioned. However, none of the seventeen cited

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[9] Petitioner emphasizes that the trial court's order was adopted from the proposed order submitted by Respondents. However, pursuant to Judge Sprinkel's directive, Petitioner's counsel Mr. Stemberger, was furnished an advanced copy of Respondents' proposed order, but declined to raise any objections or proposed revisions. (2SR2.2972).

> studies regarding trauma and fibromyalgia were published after 1997. Thus, the Consensus Document adds nothing to the argument on *Frye* before this Court, as this Court had previously reviewed and decided upon the nature of the medical evidence up through the year 2000 in its previous order.
>
> The many authors of the consensus document decided not to include in their cites the article by Buskila, reported in *Current Rheumatology Reports* entitled "Musculoskeletal Injury as a Trigger for Fibromyalgia/post Traumatic Fibromyalgia." (R.558-61) There, Dr. Buskila, who had published some of the articles most strongly relied upon by those seeking to show causal connection between trauma and FMS, concludes after a review of the current literature that "data are insufficient to indicate whether causal relationships exist between trauma and FM. The potential pathogenic mechanisms leading to FM after trauma are not clear."
>
> In the final section of the consensus report under the title "Future Directions" it is stated under the subsection "Research" that "further research is obviously needed on the pathophysiology of FMS. Targets should include:
>
> a. The etiology of FMS including genetic components and predomal events such as physical trauma.
>
> Thus, the consensus report submitted by the Plaintiff adds nothing to the question of causation, since it contains no references to medical literature generated since 1997.

The parties appeared at oral argument before the Fifth District on September 20, 2005. On December 23, 2005, the Fifth District entered a 27-page decision affirming the orders of the trial court. *Marsh v. Valyou, et al*, 917 So. 2d 313 (Fla. 5th DCA 2005) (RSC.82-108). The Valyous object to Petitioner's argumentative account of the Fifth District's opinion, which opinion speaks for itself. The Fifth District certified conflict with the Second District's decision in *Johnson.*

On January 23, 2006, Petitioner filed notice to invoke discretionary jurisdiction. This Court, by order of January 25, 2006, took the question of jurisdiction under advisement.

SUMMARY OF THE ARGUMENT

1. This Court should decline jurisdiction, despite certification of conflict, because the Second District's holding in *State Farm Mutual Auto. Ins. Co. v. Johnson*, 880 So. 2d 721 (Fla. 2d DCA 2004), was based on (1) State Farm's erroneous *Frye* challenge of the experts' "*opinions*" rather that the underlying principles and methods, which State Farm did not challenge, and (2) State Farm's "agreement" that there is a "recognized relationship or association between trauma and the onset of fibromyalgia."

2. Alternatively, the Court should affirm the *Frye* determinations of the circuit court and the Fifth District that Petitioner has not met her burden of proving that the testimony is based on generally accepted principles and methodology. The *Frye* test applies to medical causation testimony which is predicated on a new or novel scientific theory or methodology, and the proposed testimony of plaintiff's experts that her auto accident trauma caused fibromyalgia is necessarily founded upon a scientific theory that trauma is a potential cause of fibromyalgia. However, it is inescapable from the relevant medical literature that there is no such "general acceptance" of this underlying causal theory. To the contrary, the prevailing consensus among fibromyalgia experts is that the evidence and data are *in*sufficient to establish causality between trauma and fibromyalgia. Furthermore, the most recent and methodologically sound epidemiological study, the 2006 Tishler prospective study, found that there is not even an "association" – much less causation – between auto accident trauma and fibromyalgia. Likewise, the trial court correctly found that "there is even less of a scientific consensus regarding causes of and diagnostic procedures for MPS" than there were for fibromyalgia.

ARGUMENT

I. THIS COURT SHOULD DECLINE JURISDICTION, WHERE THE SECOND DISTRICT IN *JOHNSON V. STATE FARM* BASED ITS HOLDING ON DEFECTS AND CONCESSIONS BY STATE FARM NOT MADE BY RESPONDENTS IN THIS CASE.

This Court has, on numerous occasions, dismissed petitions for discretionary review based on a district court's certification of conflict, where the Court determined that review was improvidently granted. *E.g.*, *Renaud v. State*, 926 So. 2d 1241 (Fla. 2006); *Steele v. Kinsey*, 840 So. 2d 1023 (Fla. 2003); *Famiglietti v. State*, 838 So. 2d 528 (Fla. 2003); *Curry v. State*, 682 So. 2d 1091 (Fla. 1996); *Vega v. Independent Fire Ins. Co.*, 666 So. 2d 897 (Fla. 1996).

In this case, the Fifth District certified conflict with *State Farm Mut. Auto. Ins. Co. v. Johnson*, 880 So. 2d 721 (Fla. 2d DCA 2004)[10], which rejected a *Frye* challenge to expert opinion testimony that the insured's fibromyalgia syndrome was caused by auto accident trauma. However, there are significant procedural distinctions between *Johnson* and this case, which bear directly on the Second District's analysis and holding in *Johnson*.

First, State Farm's *Frye* challenge in *Johnson* was erroneously directed to whether the experts' "*opinions* are generally accepted in the scientific community." *Id.* at 722 (*quoting* State Farm's motion). The *Johnson* court emphasized that "State

[10] *Johnson* was decided after the Respondents filed their answer briefs in the Fifth DCA.

Farm did not challenge the principles and methodologies that [Johnson's experts] did rely upon. Instead, State Farm challenged the opinions reached by the experts." *Id.* at 723. As this Court explained in *U.S. Sugar Corp. v. Henson*, 823 So. 2d 104, 110 (Fla.2002), the *Frye* inquiry "must focus only on the general acceptance of the scientific principles and methodologies upon which the expert relies in rendering his or her opinion. . . . The opinion of the testifying expert need not be generally accepted as well." 823 So. 2d at 110. Thus, emphasizing that State Farm's motion did not challenge the underlying "principles," the Second District affirmed the trial court's rejection of State Farm's *Frye* challenge, reciting this Court's holding in *Henson* that "the opinion of the testifying expert need not be generally accepted as well." Significantly, the *Johnson* opinion did not review or analyze any of the medical/scientific literature regarding trauma and fibromyalgia.

In the instant case, Defendants directed their *Frye* challenge to whether the *underlying scientific principle* that trauma can cause fibromyalgia is generally accepted in the relevant scientific community of rheumatology. Because that underlying causal theory is *not* generally accepted –as both the trial court and Fifth District found after an exhaustive review of the medical/scientific studies and literature – Plaintiff's expert testimony seeking to show that her fibromyalgia was caused by auto accident trauma was held inadmissible under *Frye*.

Second, in *Johnson* – in contrast with the Defendants' position in this case – State Farm "agree[d]" that "there is an established association between trauma and fibromyalgia" and that there is a "recognized relationship or association between trauma and the onset of fibromyalgia." 880 So. 2d at 723. Further, as noted above,

the Second District emphasized that "State Farm did not challenge the principles and methodologies that [Johnson's experts] did rely upon." *Id.* Thus, rather than making a specific determination, the Second District simply assumed, based on the parties' "agree[ment]," that the underlying scientific theory that trauma is a potential cause of fibromyalgia was established and generally accepted in the relevant scientific community.

In this case, Respondents have never "agreed" to anything relative to this underlying causal principle. Respondents have demonstrated that the medical literature and studies unmistakably show and that the underlying theory that trauma can cause fibromyalgia is *not* scientifically established or generally accepted. Furthermore, the 2006 study by Tishler, et al., discussed *infra*, which is the only truly prospective and methodologically sound epidemiological study to date, concludes that there is "no association" between road accident trauma and fibromyalgia.

The Second District's subsequent decision in *Gelsthorpe v. Weinstein*, 897 So. 2d 504 (Fla. 2d DCA 2005), supports the conclusion that the *Johnson* holding was based on State Farm's improperly framed motion and the perceived implications of State Farm's "agree[ment]" rather than a holding that *Frye* does not require general acceptance of the basic underlying theory of causation. In *Gelsthorpe*, the Second District, while reversing the trial court's exclusion of expert medical causation testimony, expressly emphasized that the defendants' *Frye* challenge was not directed at the underlying general causal principle:

> The defendants' approach, adopted by the trial court, erroneously treats a typical opinion on medical causation as a new principle, subject to *Frye* analysis, simply because

> some other experts disagree with it and because the challenged expert does not rely on any specific authority to support his particular opinion. **The trial court adopted this approach here even though the general principle that head compression can cause brain injury to infants is uncontroverted.** The defendants identified only the ultimate application of this general principle to a specific set of facts as the new and novel principle that allegedly required *Frye* review. This overly broad application of *Frye* ignored that under Florida law *Frye* analysis is concerned with the expert's methodology and reasoning only if it is based on a novel principle or procedure and that the specific "opinion of the testifying expert need not be generally accepted." *Henson*, 823 So. 2d at 110.

Gelsthorpe, 897 So. 2d at 512. Respondents submit that this acknowledgement that *Frye* analysis applies to novel general causal principles shows that the Second District did not intend to hold otherwise in *Johnson*.

II. THE CIRCUIT AND DISTRICT COURTS CORRECTLY APPLIED THE *FRYE* TEST TO EXCLUDE PETITIONER'S EXPERT CAUSATION TESTIMONY WHERE PETITIONER FAILED TO DEMONSTRATE GENERAL ACCEPTANCE OF THE UNDERLYING SCIENTIFIC PRINCIPLES THAT TRAUMA CAUSES FIBROMYALGIA SYNDROME AND MYOFASCIAL PAIN SYNDROME.

If this Court elects to proceed with review, the Valyous submit that the trial court's carefully-considered *Frye* rulings, and the Fifth District's well-reasoned decision affirming those rulings, are squarely compelled under this Court's *Frye* decisions. The medical/scientific evidence clearly shows that the basic predicate causal theories underlying Petitioner's proposed expert testimony – i.e., that trauma is causally related to Fibromyalgia Syndrome and MPS – are not generally accepted as established in the relevant scientific community. The most that Petitioner and her *amicus curiae*, AFTL, claim is that there is a "legitimate medical controversy" over

whether trauma can cause fibromyalgia, which is decidedly insufficient to satisfy the high "general acceptance" standard of reliability demanded under this Court's *Frye* decisions. (Petitioner's brief, at 23; AFTL's brief, at 1). Furthermore, the new 2006 Tishler prospective epidemiological study finding no association between road accident trauma and the onset of fibromyalgia, reinforces and confirms the holdings of the circuit court and the Fifth District.

A. APPLICABLE LEGAL STANDARDS

Petitioner's and AFTL's briefs – unlike the Fifth District's opinion they attack, *see Marsh v. Valyou*, 917 So. 2d at 319-20 – never systematically set forth the legal standards established by this Court for *Frye* challenges.

This Court has adopted and followed the test established in *Frye v. United States*, 293 F. 1013 (D. C. Cir. 1923), which requires that evidence or expert testimony based on a new or novel scientific principle or theory is inadmissible unless the proponent of the evidence proves that the underlying scientific principles and methodology are sufficiently established to have gained general acceptance in the particular field in which it belongs. *See, e.g., Castillo v. E. I. DuPont De Nemours & Co., Inc.*, 854 So. 2d 1264, 1268 (Fla. 2003); *United States Sugar Corp. v. Henson*, 823 So. 2d 104, 106 (Fla. 2002); *Ramirez v. State*, 810 So. 2d 836, 843-46 (Fla. 2001); *Brim v. State*, 695 So. 2d 268, 271-72 (Fla. 1997); *Ramirez v. State*, 651 So. 2d 1164, 1167-68 (Fla. 1995). "Despite the federal adoption of a more lenient standard in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), Florida has adhered to the higher standard of reliability dictated by *Frye.*" *Ramirez*, 810 So. 2d at 843 n.8; *Brim*, 695 So. 2d at 271-72; *Murray v. State*, 692 So. 2d 157, 163 (Fla.1997).

"Evidence based on a novel scientific theory is inherently unreliable and inadmissible in a legal proceeding in Florida unless the theory has been adequately tested and accepted by the relevant scientific community." *Ramirez v. State*, 810 So. 2d at 843. "This test requires that the scientific principles undergirding this evidence be found by the trial court to be generally accepted by the relevant members of its particular field." *Castillo*, 854 So. 2d at 1268, *quoting Hadden v. State*, 690 So. 2d 573-576 (Fla. 1997). The proponent of the evidence bears the burden of establishing by a preponderance of the evidence "the general acceptance of both the underlying scientific principle and the testing procedures used to apply that principle to the facts at hand" before the evidence may be admitted. *Brim*, 695 So. 2d at 272. The Florida Supreme Court has defined "general acceptance" to mean "acceptance by a clear majority of the members of the relevant scientific community with consideration by the trial court of both the quality and quantity of those opinions." *Hadden* 690 So. 2d at 576 n.2, *citing Brim*, 695 So. 2d at 272.

The standard of review of a *Frye* issue is de novo. *Castillo,* 854 So. 2d at 1268; *Brim*, 695 So. 2d at 275. In reviewing *Frye* issues, the court may consider expert testimony, scientific and legal writings and judicial opinions; and the determination of general acceptance is measured at the time of appeal, rather than the time of trial. *Castillo*, 854 So. 2d at 1268.

B. THE TRIAL COURT AND THE FIFTH DISTRICT CORRECTLY APPLIED THE *FRYE* STANDARD.

Applying these principles to the instant case, it is clear that the trial court and

the Fifth District correctly applied Florida law in excluding Petitioner's expert testimony in support of her claims for fibromyalgia and MPS. First, there is no question that the *Frye* test applies to medical causation testimony which is predicated on a new or novel scientific theory or methodology. *See Castillo v. E. I. DuPont De Nemours & Co., Inc.*, 854 So. 2d 1264 (Fla. 2003) (expert testimony involving cause of birth defects found properly admissible under *Frye*); *United States Sugar Corp. v. Henson*, 823 So. 2d 104 (Fla. 2002) (*Frye*-testing expert testimony that long-term exposure to pesticides caused the plaintiff's phrenic nerve mononeuropathy); *Poulin v. Fleming*, 782 So. 2d 452, 455 (Fla. 5th DCA) (expert testimony linking infant's schizencephaly to exposure to radiation excluded under *Frye*), *rev. denied*, 796 So. 2d 537 (Fla. 2001); *Cerna v. South Florida Bioavailability Clinic, Inc.*, 815 So. 2d 652 (Fla. 3d DCA 2002) (expert testimony linking drug ingestion to plaintiff's blindness excluded under *Frye*); *Kaebel Wholesale, Inc. v. Soderstron*, 785 So. 2d 539 (Fla. 4th DCA 2001) (expert testimony linking ciguatera poisoning from fish to plaintiff's Guillian-Barre Syndrome excluded under *Frye*); *Berry v. CSX Transportation, Inc.*, 709 So. 2d 552, 556 (Fla. 1st DCA 1998) (admitting under *Frye* expert testimony linking long-term exposure to organic solvents to toxic encephalopathy); *David v. National Railroad Passenger Corp.*, 801 So. 2d 223 (Fla. 2d DCA 2001) (case remanded for *Frye* hearing regarding expert testimony linking repetitive motion to carpal tunnel syndrome).

The proposed testimony of Plaintiff's experts that her auto accident trauma caused fibromyalgia is necessarily founded upon the scientific theory that trauma is a

potential cause of fibromyalgia, which even Petitioner and AFTL admit is a matter of "controversy."[11] Accordingly, such testimony is inadmissible unless this underlying theory has been adequately tested and generally accepted within the relevant scientific community. *Ramirez v. State*, 810 So. 2d at 843; *Brim v. State*, 695 So. 2d at 271-72.

It is inescapable from the relevant medical literature, which both the circuit court and the Fifth District meticulously scrutinized, that there is no such "general acceptance" of this underlying causal theory. Just the opposite is true. The general consensus among fibromyalgia experts is that the evidence and data are *in*sufficient to establish causality between trauma and fibromyalgia. (R4.745-46). *See Marsh v. Valyou*, 917 So. 2d at 316-19, 323-29; *Grant v. Boccia*, 132 Wash. App. 1016, 2006 W.L. 775162 (Wash. App. Div. 3 Mar. 28, 2006) (expert testimony that auto accident trauma caused fibromyalgia inadmissible under *Frye* standard, where "[n]one of the authorities presented by either party has the effect of persuasively establishing acceptance in the relevant community as to the cause of fibromyalgia or the causal role of trauma in the development of fibromyalgia. Under *Frye*, the existence of such a consensus is necessary for admissibility of expert opinion testimony that trauma following a car accident caused Mr. Grant's fibromyalgia.")[12]; *Riccio v. S & T*

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[11] Petitioner's Brief, at 23; AFTL's brief, at 1.

[12] Petitioner cites *Grant v. Boccia* in footnote 11 of her brief (at 34), but fails to disclose that the case was decided after *Marsh* and that the court held that under Washington's *Frye* test, which appears to be the same as Florida's, expert testimony causally linking auto accident trauma to fibromyalgia was inadmissible.

Petitioner's citation to the California case of *Byrum v. Superior Court of Los Angeles County*, 2002 W.L. 243565 (Cal. App. 2d Dist. Feb. 20, 2002), is misplaced. Aside from being unreported and noncitable, it is clear from the *Byrum* opinion that

Contractors, 56 Pa. D. & C.4th 86, 2001 WL 1334202, at *4-14 (Pa.Com.Pl. Jun 22, 2001) (expert testimony that trauma from deck collapse caused fibromyalgia inadmissible under *Frye* standard, where "none of the authorities presented by the Plaintiff has the effect of refuting those marshaled by the Defendants and persuasively establishing the absence of a consensus in the relevant scientific community as to the cause of fibromyalgia syndrome generally or *a fortiori* the particular causal role of trauma in the onset or development of fibromyalgia. Under *Frye/Topa*, the existence of such a consensus is a necessary precondition to admissibility of expert evidence that Plaintiff's trauma following the deck collapse caused her fibromyalgia.").

Furthermore, Petitioner has *never* claimed, either in proceedings below or in her present brief, that the theory that trauma causes fibromyalgia meets the "general acceptance" test under *Frye.* The most Petitioner claims is that there is a "legitimate controversy within the medical community" on this question. (Petitioner's brief, at 23). Likewise, AFTL's Amicus Brief admits up front: "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

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California's "*Kelly*" rule, at least as applied in that opinion, contrasts with Florida's *Frye* rule in two fundamental respects: (1) the *Kelly* rule does *not* apply to test the "*underlying theory* asserted by the expert," *id.* at *1; and (2) it has *"never"* been applied to "expert medical testimony." *Id*. at *2. Thus, *Byrum* is of no guidance. Furthermore, the same appellate district in *Pflum v. Sears, Roebuck & Co.*, 2004 W.L. 348783 (Cal. App. 2d Dist. Feb 25, 2004), affirmed a trial court's exclusion under *Kelly* of expert testimony linking the plaintiff's auto accident to fibromyalgia on the ground that the plaintiff "failed to adduce evidence that established a reasonable degree of medical certainty that trauma can exacerbate fibromyalgia."

substantial number believe that causation is not yet proven." (AFTL's brief, at 1).

As noted above, this Court has held that "general acceptance" requires "acceptance by a clear majority of the members of the relevant scientific community, with consideration of both the quality and quantity of those opinions." *Hadden v. State*, 690 So. 2d 573, 576 n.2 (Fla. 1997); *Brim v. State*, 695 So. 2d at 272. This Court further explained in *Brim* that "two conflicting principles or theories cannot simultaneously satisfy the *Frye* test. In such situations, either one principle or theory satisfies the *Frye* test and the other does not or, in the alternative, both principles or theories failed to satisfy the *Frye* test." *Id.* *See also Grant v. Boccia*, 132 Wash. App. 1016, 2006 W.L. 775162 (2006) (under *Frye* standard, "[i]f there is significant dispute in the relevant scientific community about the validity of the scientific theory, it may not be admitted," *citing State v. Cauthron*, 120 Wash. 2d 879, 887, 846 P. 2d 502 (1993)). Obviously, the mere showing of a "legitimate controversy" as to whether trauma can cause fibromyalgia does not satisfy this high threshold of "general acceptance" under *Frye*. Thus, both Petitioner and AFTL effectively admit that the basic causal principle upon which Marsh's expert testimony is founded fails the *Frye* test.

The exclusion of Plaintiff's expert testimony on causation is wholly consistent with this Court's recent decisions in *United States Sugar Corp. v. Henson*, 823 So. 2d 104 (Fla. 2002), and *Castillo v. E. I. DuPont De Nemours & Co., Inc.*, 854 So. 2d 1264 (Fla. 2003). In *Henson*, the Court reaffirmed its adherence to the *Frye* standard, and held that the *Frye* test applies to worker's compensation cases. 823 So. 2d at 106-

108. The Court further affirmed the First District's analysis and holding that the *Frye* standard was satisfied in that case with respect to expert medical testimony that *Henson's* long-term exposure to pesticides caused his phrenic nerve mononeuropathy. *Id.* at 109-110. Crucially, the testimony was based upon the generally accepted scientific principle that "organophosphates are neurotoxic." *Id.* at 109 (citing *United States Sugar Corp. v. Henson*, 787 So. 2d 3, 16 (Fla.1st DCA 2001), which cites multiple textbooks and handbooks). This Court adopted the First District's holding that

> [*b*]*ecause of this generally accepted scientific foundation*, the "extrapolation" method utilized by the experts in concluding that chronic exposure to these pesticides caused claimant's condition is an acceptable scientific technique in this case.

823 So. 2d at 109 (*quoting* 787 So. 2d at 17). The Court emphasized that "when the expert's opinion is based upon generally accepted *scientific principles and methodology,* it is not necessary that the expert's deductions based thereon and opinion also be generally accepted as well." *Id.* at 109-10.

In the instant case, Petitioner's expert testimony on causation lacks the key ingredient that was present in *Henson* – namely, a "generally accepted scientific foundation." The differential diagnosis linking Henson's pesticide exposure to his neurological condition was founded upon the generally accepted scientific principle that "organophosphates are neurotoxic." *Id* at 109. In direct contrast, the underlying scientific theory that trauma causes fibromyalgia, espoused by Plaintiff's experts, is *not* generally accepted among rheumatology and fibromyalgia experts. Thus, the

testimony is based upon a scientific theory that does not satisfy the *Frye* standard and is therefore inadmissible.

Similarly, in *Castillo*, this Court reaffirmed the requirement under *Frye* that "[t]he proponent of the evidence bears the burden of establishing by a preponderance of the evidence the general acceptance of the *underlying scientific principles and methodology*." 854 So. 2d at 1268, *citing Murray v. State*, 692 So. 2d 157, 161 (Fla.1997). The Castillos' expert testified that Mrs. Castillo's exposure, when she was seven weeks pregnant, to benomyl, the active ingredient in the agricultural fungicide Benlate manufactured by Dupont, caused her unborn son to be born with microphthalmia, a birth defect involving severely underdeveloped eyes. The underlying general causal principle – that "benomyl is a teratogen" capable of causing microphthalmia and similar defects – was not genuinely disputed, and was in fact shown by Dupont's own animal studies and in vitro tests. 854 So. 2d at 1269. Rather, Dupont challenged the specific inferences, extrapolations and differential diagnosis made by the Castillo's experts to support the opinion that benomyl is a human teratogen at 20 ppb and that Mrs. Castillo's specific exposure to Benlate caused her unborn son's microphthalmia. The Court held that the use of differential diagnosis and extrapolations were generally accepted methodologies and that disputes over the validity of the specific inferences and opinions made by the Castillos' experts were matters going to the weight of the testimony, not admissibility. *Id.* at 1270-1276.

In the instant case, unlike *Castillo*, the parties' medical/scientific submissions demonstrate that the basic principle at the foundation of Marsh's expert testimony – that trauma is causally related to fibromyalgia – is *not* generally accepted among

fibromyalgia experts, and that the prevailing consensus is that the present data is insufficient to demonstrate causal relationships. Thus, because this basic underlying causal theory fails the *Frye* test, any purported inference, extrapolation or differential diagnosis by Plaintiff's experts to show causation in this case would have no generally accepted scientific basis, and is inadmissible.[13] *See, e.g., Cerna v. South Florida Bioavailability Clinic, Inc.*, 815 So. 2d 652, 655-56 (Fla. 3d DCA 2002) ("Expert causation theories based solely on the temporal proximity...are not methodologically sound. An opinion based on such methodology is akin to a rooster's belief that because dawn breaks shortly after he stands on the weathercock and sounds his morning crow, he, the rooster, causes the sun to rise each day."); *Kaelbel Wholesale, Inc. v. Soderstrom*, 785 So. 2d 539, (Fla. 4th DCA) ("While appellee's experts relied on temporal proximity in their causation opinion, mere reports in medical literature and the temporal proximity between the antecedent illness and GBS were insufficient bases for offering an opinion to a jury on causation."), *rev. denied*, 796 So. 2d 537 (Fla. 2001); *Riccio v. S & T Contractors*, 56 Pa. D. & C.4th 86, 2001 W. L. 1334202, at *8 (Pa. Com. Pl. June 22, 2001) (inference of causation based on a mere association is "an example of the classical logical fallacy of concluding causation from chronology alone known generally as *non causa pro causa* and more particularly as *post hoc ergo propter hoc.* We agree with the Court of Appeals' holding *Black v. Food Lion, Inc.*, 171 F.3d 308, 312 (5th Cir. 1999), that this fallacy 'is as unacceptable in science as in law.'").

[13] To the extent the Second District's *Johnson* decision is construed as holding otherwise, Respondents submit its reasoning is fallacious and contrary to law.

AFTL conspicuously avoids recitation of the actual *Frye* standard, and instead quotes out of context the following language from *Castillo*:

> The court must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon the 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.

854 So. 2d at 1275 *quoting Berry v. CSX Transportation, Inc.*, 709 So. 2d 552, 569n.14 (Fla. 1st DCA 1998). (AFL's brief, at 1). This quote plainly does not refer to the basic "underlying scientific principles," which *Castillo* expressly holds must satisfy the *Frye* "general acceptance" test as a *prerequisite* to admissibility. 854 So. 2d at 1268. Rather, it refers to the expert's inferences, deductions, extrapolations, differential diagnosis and conclusions founded on those basic principles.[14] The Court held that such inferences and extrapolations from basic principles were not subject to *Frye* testing so long as the expert followed generally accepted methodology, but went to weight rather than admissibility. *Castillo*, 854 So. 2d at 1275-76. *See also Brim v. State*, 695 So. 2d at 272-73 ("It certainly is true that two conflicting principles or theories cannot simultaneously satisfy the *Frye* test. In such situations, either one

[14] Both *Castillo* and *Berry* involved *Frye* challenges to expert causation testimony in complex toxic tort actions. In both cases, the plaintiff demonstrated that the basic causal principle underpinning the expert testimony was generally scientifically accepted, and the defendants' challenges went to the experts' inferences and extrapolations from the underlying principle. In *Berry*, the basic underlying scientific principle was that long-term exposure to organic solvents can cause toxic encephalitis. The plaintiff clearly demonstrated that this was the general and indeed overwhelming consensus among toxicologists, epidemiologists and occupational physicians, and was overwhelmingly supported in the literature. 709 So. 2d at 560-62, 568.

principle or theory satisfies the *Frye* test and the other does not or, in the alternative, both principles or theories fail to satisfy the *Frye* test. *In a case such as this, however, more conservative modifications to the principle or theory found to satisfy the Frye test may also be admitted....We may allow multiple reasonable deductions when all are based on generally accepted principles.... "*).

Furthermore, AFTL *knows* the quoted language from *Castillo* is not applicable to the general causation issue in this case, as footnote 1 of its brief reveals. There AFTL acknowledges that the issue of general causation regarding whether trauma is causally related to fibromyalgia is subject to *Frye* testing by the judge, and is <u>not</u> something for the jury to resolve. AFTL states:

> 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*.... 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.

(AFTL's brief, at 2 n.1, emphasis in original). Obviously if "evidence concerning general causation... would not be presented to the jury" then it cannot be a "matter appropriately entrusted to the trier of fact." AFTL is arguing out of both sides of its mouth. It acknowledges that the basic principle of whether trauma can cause fibromyalgia is a *Frye* question for the court, while at the same time arguing that it is a question for the jury and that a showing of "general acceptance" is not required,

merely a showing that there is a "legitimate controversy."[15]

C. THERE IS NO GENERAL ACCEPTANCE WITHIN THE RELEVANT SCIENTIFIC MEDICAL COMMUNITY OF THE UNDERLYING PRINCIPLE THAT TRAUMA CAN CAUSE FIBROMYALGIA SYNDROME.

AFTL asserts that the Fifth District violated this Court's *Frye* test when it "took sides in a legitimate medical controversy." (AFTL's Brief, at 3). To the contrary, the *Frye* test expressly requires the court to determine whether the proponent of the evidence has shown that the "underlying scientific principle" is "generally accepted in the relevant scientific community." The determination of "general acceptance" required the court to consider "both the quality and quantity of those opinions." *Hadden v. State*, 690 so. 2d 573, 576n.2 (1997), *citing Brim v. State,* 695 So. 2d 268, 272 (Fla. 1997). Both the trial court and the Fifth District properly applied this standard. As the Fifth District explained:

> To date, the relevant authorities have held that anecdotal evidence or clinical experience is insufficient to establish a (general) causal connection between trauma and

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[15] In the same footnote, AFTL argues from a third side of its mouth, glibly suggesting that this case should be treated as one of "pure opinion" irrespective of the general causation issue because "juries will not attach an 'aura of infallibility' to expert clinical opinion that does not explicitly rely on novel scientific tests or methods." As this Court observed in *Ramirez v. State*: "The trustworthiness of expert scientific testimony is especially important because oftentimes the jury will naturally assume that the scientific principles underlying the expert's conclusion are valid." 810 So. 2d at 844, *quoting Flanagan v. State,* 625 So. 2d 827, 828 (Fla.1993). In this case, if plaintiff's experts were permitted to testify that Marsh's auto accident trauma caused her fibromyalgia (based on "pure clinical opinion" or "differential diagnosis" or whatever), the jury would naturally assume that the underlying principle that trauma can cause fibromyalgia is scientifically valid and accepted. Preventing such prejudice is the very purpose of the *Frye* test.

> fibromyalgia without further testing. Epidemiological studies are not always required to show general acceptance in the scientific community, *see Castillo*, 854 So. 2d at 1270; *Henson*, 823 So. 2d at 104, but in this case the experts have agreed that the studies are necessary before a connection can be recognized. The trial court correctly decided this issue.

Marsh, 917 So. 2d at 327. The mere fact that some experts have urged a lower standard of scientific proof does not suffice to show general acceptance under *Frye.*

AFTL next contends that the Fifth District's recognition of the generally accepted need for epidemiological studies is "inappropriate," and vaguely suggests that such studies are "not feasible" or "unethical." (AFTL's brief, at 6 and n.6, *citing Castillo*, 854 So. 2d at 1270). This suggestion is meritless. While concerns over feasibility and ethics have obvious application in toxic exposure cases such as *Henson* and *Castillo*, they have virtually no relevance here, given the abundance and frequency of traumatic road accidents. There is nothing preventing methodologically-sound controlled prospective epidemiological studies of the relationship of trauma to fibromyalgia (as was recently done by Tishler, et al., discussed *infra*).

AFTL invokes two epidemiological studies which were both considered by Judge Sprinkel and the Fifth District. These are (1) the 1997 Buskila study;[16] and (2) the 2002 Al-Allaf study.[17] AFTL admits that both studies have "methodological shortcomings" (AFTL's brief, at 9).

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[16] Dan Buskila, et al., *Increased Rates of Fibromyalgia Following Cervical Spine Injury,* 40:3 Arthritis & Rheumatism 446, 451 (1997) (R2.441-446).

[17] A.W. Al-Allaf, et al., *A Case-Control Study Examining the Role of Physical Trauma in the Onset of Fibromyalgia Syndrome,* 41:4 Rheumatology 450, 451, 453 (2002) (2SR5.Article 8).

The 1997 study by Buskila, et al., has been reviewed in numerous decisions, including the *Frye* decisions of *Marsh*, *Grant*, and *Riccio*. Patients chosen for the study were attending an occupational injury clinic for work-related nonspecific "neck injuries." Most were involved in road accidents, while others were injured in the workplace. The control group had leg fractures sustained in the workplace. Significantly, patients involved in the study were already claiming insurance or social security. The authors found that 21.6 % of the patients with neck injury developed fibromyalgia, and versus 1.7% of the control group with leg fractures. This study, while stating that trauma may cause fibromyalgia, acknowledged that "[t]he present data in the literature are insufficient to indicate whether causal relationships exist" and called for further research. The study was not followed by others (prior to the 2006 Tishler study, discussed *infra*).

AFTL fails to cite the 2000 meta-study by Buskila and Neumann,[18] considered by the lower courts. There the authors state that "'Fibromyalgia (FM) syndrome is a chronic, painful musculoskeletal disorder of unknown cause. Despite extensive research, the etiology and pathophysiology of FM are still unclear." The authors go on to draw a clear distinction between "association" and "cause," stating: "Fibromyalgia obviously is associated with trauma. The question is whether trauma can cause FM or whether other factors, such as pain behavior, societal enhancement, or psychosocial factors, are the overwhelming causes." The authors conclude: "Reviewing the current literature reveals that data are insufficient to indicate whether

[18] "Muscoloskeletal Injury as a Trigger for Fibromyalgia/Post Traumatic Fibromyalgia," *Current Rheumatology Reports*, 2000 (R3 558-561).

causal relationships exist between trauma and FM."

The 2002 Al-Allaf study is even more defective than the 1997 Buskila study, being merely a *retrospective* questionnaire study. Indeed, Defendants, not Plaintiff, included it in their binder of new materials for Judge Sprinkel to examine during the relinquishment. While the study concluded that the results "suggest that physical trauma is significantly associated with the onset of fibromyalgia," the authors acknowledged that their study *did not* provide a basis for finding that reliable evidence exists linking trauma to fibromyalgia. Rather, they pointed out that "[f]urther prospective studies are needed to confirm this association and to determine whether trauma has a causal role...in the development of [fibromyalgia]."

Thus the only two epidemiological studies AFTL points to have fundamental flaws and, by the authors' own acknowledgment, do not constitute evidence of causation.

AFTL also cites a 2000 Canadian physician survey by Kevin P. White, et al.[19] (AFTL's brief, at 5 n.4). However, AFTL blatantly misstates the results of the survey, which Respondents submitted to Judge Sprinkel during relinquishment. (2SR5.Article 9). AFTL even sets off its misstatement making it look like a quote. AFTL declares: "In a recent nationwide survey of Canadian physicians, 83% of practicing rheumatologists opined that trauma could precipitate fibromyalgia." (AFTL's brief, at 5). In fact, the survey only found that 83% of practicing rheumatologists "agreed with the diagnosis of FM" for the hypothetical patient

[19] Kevin P. White, et al., Perspectives on Posttraumatic Fibromyalgia: A Random Survey of Canadian General Practitioners, Orthopedists, Physiatrists, and Rheumatologists, 27 J. RHEUMATOLOGY 790-96 (2000).

described in the survey – not that the trauma could precipitate fibromyalgia. (2SR5.Article 9, at 792). To be sure, when those same rheumatologists were asked whether they considered "trauma related factors" and/or other factors to be "important" in the development of chronic, widespread pain following motor vehicle related trauma, the rheumatologists listed "trauma related factors" ***less*** than every other specific factor listed on the survey. Further, when the rheumatologists were asked whether they considered "trauma related factors" or other factors to be "most important" in the development of chronic, widespread pain following motor vehicle related trauma, only a total of 3.8% listed "trauma related factors." (*Id.* at 793, Tables 2-3). In other words the results of the survey were pretty much the *opposite* of what AFTL represents.

Even more importantly, the survey authors flatly declare: "To date, the arguments both for and against a causal role of trauma in [fibromyalgia] are weak." (*Id.* at 794). The authors attribute preconceived attitudes among specialists and specialty clinics as potential bias factors which must be controlled for in future epidemiological studies. The article goes on to emphasize that "our study is … not an attempt to estimate the true association between trauma and FM." It makes methodological recommendations for such a study which closely describe what Tishler, et al, did in their 2006 study, discussed *infra*.

This Court has made clear that "general acceptance" is not determined by a "nose count." *Ramirez*, 810 So. 2d at 844; *Brim*, 695 So. 2d at 272. "Rather, the court may peruse disparate sources – e.g., expert testimony, scientific and legal publications, and judicial opinions and decide for itself whether the theory in issue has

been sufficiently tested and accepted by the relevant scientific community." *Ramirez*, 810 So. 2d at 844, *quoting Brim*, 695 So. 2d at 272.

Respondent's and AFTL's attempts to disparage and cast suspicion on the 1994 Vancouver Conference and the 1996 "Consensus Report" are baseless and meritless. The conference was organized by the nonprofit Physical Medicine Research Foundation in association with the Division of Rheumatology and the Division of Infectious Diseases, University of British Columbia, and supported by Health and Welfare Canada and the Government of British Columbia.[20] The conference assembled a broad spectrum of experts from around the world who were signatories to the consensus report. Unlike, the 1997 "Additional Comments" Group and the Canadian 2003 "Consensus Document" group, emphasized by Respondent and AFTL, participants were not chosen based on which side of this controversy they stood. Thus, the Vancouver Conference "Consensus Group" included outspoken proponents of the theory that trauma causes fibromyalgia, such as Dr. Romano and Dr. I. Jon Russell.

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[20] AFTL's throws out a rabbit-punch innuendo that the Vancouver Conference was "sponsored by insurance-based interests." AFTL's only support for this assertion is the unexplained citation to "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)." While the undersigned has only been able to obtain an abstract of this article, that abstract only addresses the two initiatives listed in the title and says nothing about the 1994 Vancouver Conference on Fibromyalgia. Furthermore, the only reference to "London Life Insurance Co.," emphasized in Petitioner's brief (at 44), is an attendee expressly listed as "nonvoting." (R5.1143). Not even Dr. Romano's 2001speech criticizing the conclusions of the "Consensus Report" asserts this argument. (R2.301-306)

The "Consensus Group" was chaired by Frederick Wolfe, M.D., a foremost expert on fibromyalgia who chaired the 1990 American College of Rheumatology group which developed the ACR criteria for the classification of fibromyalgia. The report stated:

> Evidence that trauma can cause FM, a potential (or It Can) causal proposition, comes from a few case studies or case reports and is insufficient to establish causal relationships. That trauma might cause FM sometimes, a predictive (or It Will) causal proposition, can only be addressed by epidemiological studies that measure the risk of potential exposures on the development of FM. Epidemiological studies of trauma and FM needed to address potential or predictive causality are currently not available. The FM causality issue, as in other putative work and injury related syndromes, may be further complicated by the potential influence of the availability of compensation for the syndrome. In settings where compensation is widely available, illnesses similar to FM have been shown to increase in apparent prevalence, as measured by physician visits, then to fall when compensation availability declines.
>
> Overall, then data from the literature are insufficient to indicate whether causal relationships exists between trauma and FM. The absence of evidence, however, does not mean that causality does not exist, rather that appropriate studies have not been performed.

(2SR.515-516). Petitioner argues that the Consensus Report was not endorsed by the American College of Rheumatology. (Petitioner's Brief, at 44). However, the American College of Rheumatology evidently agrees with its assessment, because its Fact Sheet on Fibromyalgia (February/June 2005) states: "No one knows what causes fibromyalgia."[21]

AFTL prefers the "Consensus Group: Additional Comments" article signed by

[21] The ACR's Fact Sheet on Fibromyalgia is available online at http://www.rheumatology.org/public/factsheets/fibromya_new.asp?aud=pat

11 members of the Vancouver Conference "Consensus Group" (including Petitioner's expert, Dr. Romano), and numerous non-attendees (including Petitioner's expert, Dr. Pellegrino). This document on its face acknowledges that there is a controversy and that this is in the nature of a minority report. The "Additional Comments" report urges the recognition of causality between trauma and fibromyalgia based on a "51% likely" model, which is a wholly inappropriate standard for establishing reasonable medical/scientific certainty. *See Riccio v. S & T Contractors*, 56 Pa. D. & C.4th 86, 2001 W. L. 1334202, at *7 (Pa. Com. Pl. June 22, 2001) ("Evidentiary preponderance is not a test of admissibility and the conclusion derived from this premise by the authors of the Additional Comments must be disregarded."). It cautions that "those using this Report should be aware of its controversial nature, its finite time line, and its inherent limitations."

Next, Petitioner and AFTL emphasize a 2003 Canadian "Consensus document," in which their expert, Dr. Romano, participated. AFTL speculates that because the Fifth District's opinion does not refer to this document, it was not considered. To the contrary, the Fifth District relinquished jurisdiction to the circuit court for the specific purpose of considering this and other new scientific evidence on fibromyalgia syndrome published during the pendency of the appeal. (RSC.46, *citing Brim v. State*, 695 So. 2d 268 (Fla. 1997)). The trial court's order from the relinquishment discusses the 2003 Canadian "consensus document" at length (2SR1.2983-84, quoted in the Valyous' statement of facts, *supra*), but finds that "none of the seventeen cited studies regarding trauma and fibromyalgia were published after 1997." (*Id.* at 2493). Judge Sprinkel concluded: "Thus, the Consensus Document

adds nothing to the argument on Frye before this Court, as this Court had previously reviewed and decided upon the nature of the medical evidence up through the year 2000 in its previous order." (*Id*.).

Petitioner and AFTL assert that the Fifth District misunderstood the "cautious rhetoric often used by researchers" and asserts that such researchers use the word "association" to mean "cause." Whatever truth that assertion may have in connection with toxicological research, *see Berry*, 709 So. 2d at 567, a fair reading of the studies and literature regarding trauma and fibromyalgia reveals that the authors are mindful of the societal and medicolegal implications of a finding of causality, and are drawing an express and conscious distinction between the term "association" and the term "cause," such that they are *not* using the word "association" to mean "cause" or as a basis for inferring "cause."

D. THE 2006 TISHLER PROSPECTIVE EPIDEMIOLOGICAL STUDY FOUND "NO ASSOCIATION" BETWEEN TRAUMA AND FIBROMYALGIA SYNDROME.

During the pendency of this review,[22] a new truly-prospective epidemiological study has been released which directly contradicts the contention that there is even an "association" between trauma and fibromyalgia. The study, by Moshe Tishler, et al, entitled "Neck Injury and Fibromyalgia – Are They Really Associated?" is published in the June 2006 *Journal of Rheumatology,* at 1183-1185. In that study, 153 emergency room patients with a diagnosis of whiplash injury were examined. The

[22] As noted previously, this Court reviews the issue of "general acceptance" based on the time of appellate review, not the time of trial. *Castillo*, 854 So. 2d at 1268; *Hadden*, 690 So. 2d at 579.

control group included 53 patients hospitalized with fractures of the limbs, spine, and ribs due to road accidents. The study and control groups were interviewed shortly after presenting and then followed prospectively. Patients complaining of musculoskeletal symptoms during follow-up were examined for fibromyalgia under the accepted ACR criteria. During the follow-up period of approximately 14.5 months for the study group and 9 months for the control group, only one patient in the study group and no patients in the control group developed signs and symptoms of fibromyalgia. The study concludes that: **"Whiplash injury and road accident trauma were not associated with an increased rate of fibromyalgia..."** In the "Discussion" section, the authors are critical of the Al-Allaf retrospective study and the 1997 Buskila study, stating:

> The issue of trauma and FM [fibromyalgia] remains controversial. As rheumatologists we are frequently asked by patients and/or lawyers to clarify the clinical and medicolegal situation of physical trauma preceding chronic pain disorders. The answers to such questions are complex and problematic and must be based on solid epidemiologic and controlled prospective studies. Several studies in the past, most of them retrospective, have reported that up to 50% of patients with FM can recall an event, most often physical trauma, that immediately preceded their symptoms. An extensive review of the literature failed to yield solid conclusions concerning this issue. The only prospective study that found a causative link between trauma and FM is by Buskila, et al. In this study, which was not followed by others, the authors found that 21.6% of patients with neck injury developed FM shortly after a work accident. These data are impressive since in their control group of patients with leg fractures, the rate of FM was much lower (1.7%, $p = 0.001$). **We could not confirm these earlier findings**; after a mean followup of 14.5 months, only one out of 153 patients with whiplash injury developed FM. **We believe our study is more accurate and its methodology makes our results more solid.** We chose a group of patients diagnosed with whiplash injury

> after a car accident and followed them prospectively starting immediately after discharge from the emergency room. This is in contrast to patients chosen by Buskila, et al who were attending an occupational injury clinic, a fact that can bias the results, since these people were already claiming their insurance/social security and were not representative of the whole injured group. Our study group did not include patients with various occupational injuries as in the previous study, but only those diagnosed with whiplash injury following a road accident. Furthermore, our results were strengthened by the absence of FM in our controls, despite their severe injuries and hospitalization.
> The cultural and socioeconomic background of our study population was not different from the group studied by Buskila, et al and thus could not be responsible for the differences between our 2 studies. Moreover, our control group issued more insurance claims (16%) than the study group (2%), none of which was associated with FM. Only one patient refused to cooperate on the advice of his lawyer.
> **In conclusion, the results of our prospective study do not support earlier observations about a link between neck trauma and FM.** Because of its wide medicolegal implications, well controlled multinational studies with large cohorts of patients are needed to resolve this complex issue.

The same issue of the Journal of Rheumatology contains an editorial by Canadian rheumatologists Yoram Shir, John X. Pereira, and Mary-Ann Fitzcharles entitled "Whiplash and Fibromyalgia: An Ever-Widening Gap." In discussing the significance of the Tishler study, the authors state:

> With regard to a traumatic causation in FM, pathophysiological explanations are plausible, and retrospective evidence has suggested a link between a precipitating event and persistent widespread pain. However, **evidence-based medicine requires more definitive proof**. Physiologic similarities and retrospective studies should not be used as cause and effect, but should rather complement prospective study. **We now have a single, but large and well designed prospective study with a surprising conclusion. Taking into account all the above factors, Tishler's conclusion should be**

> **upheld. WLI [whiplash injury] should not be considered a clinically important risk factor for the development of FM at the present time.**
> The results of this study have significant clinical, social, and medicolegal implications. The debate is, however, not completely settled for an association of a triggering event and the onset of FM, but requires further study in order to reach a final conclusion. **Any definitive study will have to be large and prospective, and match the high standard set by Tishler and colleagues.**

The Valyous submit that this new prospective controlled study by Tishler, et al., which is demonstrably the most methodologically sound epidemiological study to date, reinforces the findings of the Fifth District and Judge Sprinkel that the underlying causation theory is not generally accepted in the medical scientific community, and requires affirmance. Furthermore, it debunks the assumption made in the Second District's *Johnson* opinion that there is an "established association" between trauma and fibromyalgia, much less a legitimate basis for inferring medical causation.

E. THERE IS NO GENERAL ACCEPTANCE WITHIN THE RELEVANT SCIENTIFIC MEDICAL COMMUNITY OF THE UNDERLYING PRINCIPLE THAT TRAUMA CAN CAUSE MYOFASCIAL PAIN SYNDROME.

With respect to the second *Frye* order, the trial court and the Fifth District both correctly concluded that "there is even less of a scientific consensus regarding causes of and diagnostic procedures for MPS" than there was for fibromyalgia. *Marsh*, 917 So. 2d at 327 (*quoting* R6.1387). Defendants' rheumatology expert, Dr. John Russell Rice of Duke University Medical Center, averred that there is no scientific evidence, as opposed to hypothesis and opinion, to suggest that MPS and fibromyalgia

syndrome are discrete clinical disorders, distinct from one another, or of known pathophysiology or causation; that, unlike fibromyalgia syndrome which has ACR approved classification diagnosis criteria, there are no criteria validated by controlled scientific studies for even a classification diagnosis of MPS; in the absence of validated criteria for MPS, meaningful scientific investigation of the condition could not take place; there are also no valid scientific publications establishing a causal relationship between trauma and MPS; and any belief of such a causal relationship is based solely on opinion or hypothesis and not on credible epidemiological or scientific data. (R6.1416-17).

The evidence shows that a substantial body of opinion among rheumatology experts holds that MPS is merely a form of fibromyalgia syndrome, including Plaintiff's own expert, Dr. Pellegrino, and at least two other experts Plaintiff cited to the trial court as authoritative, Dr. Yunus and Dr. Goldenberg. (R7.1462, 1474, 1607, 1611, 1624, 1638). Marsh did not adduce any valid epidemiological or scientific studies showing a causal relation between trauma and MPS. Furthermore, Dr. Thomas J. Romano,[23] Plaintiff's expert who diagnosed Plaintiff with MPS, testified that he used the diagnostic criteria of Dr. Travell and Dr. Simons. (SR8.3835). However, recent studies, including a 1992 study of Wolff, Simons, et al., have demonstrated that those diagnostic criteria are unreliable and invalid. (R7.1474-82, 1641). This infirmity is compounded by the fact that Dr. Romano made the novel diagnosis of "multi-regional myofascial pain syndrome" which Romano admits is a

[23] As she did in the Fifth DCA, Marsh makes no specific reference in her brief to Dr. Romano, who can be reached at crazydoc49@aol.com. (2SR4.3100).

term he coined and is not a generally accepted or peer-reviewed term. (SR9.3899-3900, R6.1417). As the Fifth District concluded, "[b]ecause it is clear that there is no general acceptance in the scientific community regarding even the existence of MPS apart from fibromyalgia, let alone the criteria used for its diagnosis and the relationship between the disease and trauma, this evidence was properly excluded." 917 So. 2d at 327-28.

F. THE FIFTH DISTRICT DID NOT APPLY A *DAUBERT* STANDARD.

Petitioner and AFTL both advance the inane argument that simply because the Fifth District cited a number of *Daubert* decisions in its opinion, it therefore applied "the *Daubert* test." To support this assertion, Petitioner and her *amicus* overlook the Fifth District's explicit cogent *Frye* analysis, its extensive recitation and discussion of this Court's *Frye* precedent, and its discussion and invocation of the well-reasoned Pennsylvania *Frye* decision in *Riccio,* which addressed most of the medical studies and publications cited by the parties and held that the *Frye* "general acceptance" requirement barred expert testimony founded on the theory that trauma causes fibromyalgia. Instead, Petitioner and AFTL have both misleadingly taken excerpts of a lengthy quote from the Fifth Circuit's decision in *Vargas v. Lee*, 317 F. 3d 498, 502-503 (5th Cir. 2003), and tried to pass it off as the Fifth District's own language and analysis. (Petitioner's Brief, at 29-30; AFTL's Brief, at 15). Most outrageous is the AFTL's Brief, which never acknowledges that the quotations come from the *Vargas* opinion, and then declares that *"by its own admission,* the Fifth District's [sic] applied a *Daubert* gate-keeping rule to exclude Marsh's medical evidence." (AFTL's Brief, at 15).

Having made this misleading assertion, AFTL then declares: "Rather than inquiring whether Marsh's medical experts based their opinion on generally accepted methodology, the Fifth District scrutinized the expert's 'ultimate conclusion' as courts do under a *Daubert* analysis." (AFTL Brief, at 15). First, contrary to AFTL's repeated misstatement, the *Frye* test does not focus solely on "methodology"; rather it requires that *both* "the underlying scientific principles and the methodology" be generally accepted. *Castillo*, 854 So. 2d at 1268; *United States Sugar Corp. V. Henson*, 823 So. 2d 104, 109-110 (Fla. 2002) ("We commend and approve the thoughtful analysis performed by the District Court below evaluating the general acceptance of the *methodology and scientific principles* supporting Henson's expert's opinions..... We conclude that under *Frye* and its Florida progeny, when the expert's opinion is based upon generally accepted *scientific principles and methodology*, it is not necessary that the expert's deduction based thereon and opinion also be generally accepted as well."); *Ramirez v. State*, 810 So. 2d 836, 844 (Fla. 2001)("In utilizing the *Frye* test, the burden is on the proponent of the evidence to prove the general acceptance of *both the underlying scientific principle and the testing procedures* used to apply that principle to the facts of the case at hand"; *quoting Ramirez v. State*, 651 So. 2d 1164, 1168 (Fla. 1995)); *Murray v. State*, 692 So. 2d 157, 161 (Fla. 1997) (same); *Brim v. State*, 695 So. 2d 268, 272 (Fla. 1996) (same). Here, Petitioner has not met her burden under *Frye* of showing general acceptance of the basic underlying theory that trauma is causally related to fibromyalgia. The most she claims to show is a "legitimate controversy," which does not satisfy the strict "general acceptance" requirement under *Frye*.

Secondly, the Fifth District did not scrutinize Marsh's experts' "ultimate conclusion." AFTL emphasizes this Court's holding in *Castillo* that the lower court committed error by "considering not just the underlying science but the application of the data generated by the science in reaching the expert's ultimate conclusion." (AFTL's Brief, at 15-16, quoting *Castill*o 854 So. 2d at 1276). That holding simply doesn't fit. The *Frye* analysis of both the trial court and the Fifth District focused solely on the issue of whether the underlying theory that trauma causes fibromyalgia is generally accepted in the relevant scientific community. Because it is not generally accepted, Petitioner's expert testimony based on that theory is inadmissible. In this case, the "ultimate conclusion" proffered by Marsh's experts was that one or more of the specific automobile accidents alleged in this case caused Jill Marsh's specific case of fibromyalgia. Neither the trial court nor the Fifth District ever addressed this "ultimate conclusion" because the underlying theory that trauma causes fibromyalgia is not generally accepted, and because the expert's "ultimate conclusion" is not what is *Frye* tested. *Henson*, 823 So. 2d at 109-110.

Furthermore, while the *Marsh* court found the Fifth Circuit's analysis in *Black v. Food Lion, Inc.*, 171 F. 3d 308 (5th Cir. 1999), and *Vargas* to be persuasive, neither of those decisions focused on the experts' "ultimate conclusion." Rather, they focused on the scientific reliability – including the "general acceptance" – of the theory that trauma causes fibromyalgia.

More fundamentally, this Court has repeatedly held that courts deciding *Frye* issues may rely upon "judicial decisions." *Castillo*, 854 So. 2d at 1268; *Hadden*. 690 So. 2d at 576. Obviously, because federal courts and many state courts follow a

Daubert standard, many decisions involving factually comparable issues will be *Daubert* cases. Our state trial and appellate courts must be presumed to possess sufficient judgment and reasoning capacity to be able to cite a *Daubert* case without being accused of applying "the *Daubert* test."[24]

AFTL's and Petitioner's reason for leveling this accusation is their repeated harping throughout their briefs that the *Daubert* standard is "stricter" and "more demanding" than the *Frye* standard. They invoke this blanket assertion, as a substitute for specific analysis, so they can condemn the Fifth DCA for citing various *Daubert* cases, while they themselves freely cite *Daubert* cases and authorities throughout their Briefs where it suits their purposes. AFTL, for example, prefaces its entire presentation with liberal quotations from the Federal Judicial Center Reference Manual on Scientific Evidence (2d ed. 2000) – the *Daubert* Bible for federal judges (AFTL's Brief, at 3, 7 n.8, 9 n.13) – and thereafter cites and quotes almost exclusively *Daubert* cases and commentaries.

AFTL and Petitioner both proclaim that the announcement "that *Daubert* inaugurated a more 'liberal' approach to the admissibility of scientific evidence" came from "early media reports." (AFTL Brief, at 16; Respondent's Brief, at 31). To the contrary, it was announced directly by the Supreme Court in *Daubert.* There the Court, in interpreting Rule 702 of the Federal Rules of Evidence, explained:

> The drafting history [of Rule 702] makes no mention of *Frye*, and **a rigid "general acceptance" requirement**

[24] On Petitioner's and AFTL's logic, it might also be argued that *this Court* has applied a *Daubert* standard since it has cited *Daubert* decisions with approval in many of its *Frye* decisions. *E.g.*, *Ramirez*, 810 So. 2d at 851 n.46, *quoting Kumho Tire Company Ltd. v. Carmichael*, 526 U.S. 137, 155 (1999).

> **would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony."**

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 588 (1993), *quoting Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988).

Conversely, this Court has repeatedly declined to switch from *Frye* to *Daubert* because it considers *Daubert* to be a "more lenient standard" and prefers *Frye's* "higher standard of reliability":

> Despite the federal adoption of a more lenient standard in [*Daubert*], we have maintained the higher standard of reliability dictated by *Frye*.

Ramirez v. State, 810 So. 2d 836, 843 n.8 (Fla. 2001); *Brim v. State*, 695 So. 2d 268, 271-272 (Fla. 1997); *Murray v. State*, 692 So. 2d 157, 163 (Fla. 1997). Contrary to AFTL's wishful thinking, this Court did not repeatedly reject *Daubert* in favor of *Frye* for the purpose of relaxing the standards of reliability and admissibility. As this Court explained in *Hadden*:

> [W]e firmly hold to the principle that it is the function of the court to not permit cases to be resolved on the basis of evidence for which the predicate reliability has not been established. Reliability is fundamental to issues involved in the admissibility of evidence... In sum, we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community, to do otherwise would permit resolutions based upon evidence which has not been demonstrated to be sufficiently reliable and would thereby cast doubt on the reliability of the factual resolutions.

690 So. 2d at 578.

Petitioner's and AFTL's "one-size-fits-all" assertion that *Daubert* is "stricter" and "more demanding" than *Frye* does not withstand scrutiny. The Supreme Court devised the *Daubert* test as an interpretation of Rule 702, which focuses on the

scientific validity and reliability of the principles and methodology which underlie proposed expert testimony. *Daubert*, 509 U.S. 579, 594-595. The Supreme Court emphasized that a *Daubert* inquiry is "a flexible one." *Id.* at 594. However, the *Daubert* Court – in almost identical language as that used by this Court in *Henson* and *Castillo* – expressly held that "the focus, of course, *must be solely on principles and methodology, not on the conclusions that they generate*." *Id.* at 595. It cannot be simply assumed, as AFTL and Petitioner assert, that all courts applying *Daubert* simply ignore this holding. In any event, the *Daubert* cases cited by the Fifth District as persuasive focus solely on the underlying causal theory.

The *Daubert* Court listed four non-mandatory and non-exclusive factors for assessing scientific reliability, the last of which was the *Frye* standard, i.e., whether the theory or technique has gained general acceptance of the relevant scientific community. *Id*. at 593-94. With respect to this "general acceptance" factor, the Court held that a "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an expressed determination of a particular degree of acceptance within that community." *Id.* at 594. In the subsequent case of *Kumho Tire Company Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court held that the Rule 702 inquiry under *Daubert* applies to all expert testimony, not merely scientific testimony, and emphasized that the factors listed in *Daubert* were not a definitive check list or test and that those factors may or may not be pertinent in assessing reliability, depending on the particular facts and issues involved. The *Kumho* Court further held that both a trial court's decisions to admit or exclude expert testimony, as well as the trial court's decisions about how to determine

reliability, are reviewable only for "abuse of discretion." The Court held that trial judges have "broad latitude" in determining which factors to consider. *Id.* at 152-153.

In comparing the *Frye* test with the *Daubert* test, one thing is certain: The Florida *Frye* test is definitely stricter and more demanding than *Daubert* with respect to the "general acceptance" test. Whereas a showing of "general acceptance" of underlying novel scientific principles and methods is always required under *Frye* for admissibility, it is merely an optional factor which the trial judge has broad discretion to consider or disregard under *Daubert*.[25]

As to whether "overall" *Daubert* is a stricter test than *Frye*, the *Daubert* and *Kumho* decisions have been applied and interpreted in thousands of lower federal court decisions, and the *Daubert* standard has been adopted by numerous states in various forms and degrees. More generally, given the flexible nature of the *Daubert* test, the extent to which a *Daubert* inquiry is perceived as "stricter" or "more liberal" will turn on a host of factors, including the nature of the testimony being offered, the facts and issues involved, as well as the particular court and judge making the determination.[26]

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[25] This Court's statement in *Castillo* that "[t]he first prong of *Daubert* is the *Frye* test" is incorrect. 854 So. 2d at 1276.

[26] Even AFTL is compelled to acknowledge the "mixed record" and "disagreement" among federal courts applying *Daubert*. (AFTL's brief at 7). And for that matter, there are significant differences among states that purport to adhere to a *Frye* standard. For example, in *Donaldson v. Central Illinois Public Service Co.*, 313 Ill. App. 3d 1061, 730 N.E. 2d 68 (2000), the so-called "*Frye*" test applied by the court differs from Florida and other *Frye* states such as Pennsylvania and Washington, in that (1) the trial judge's *Frye* rulings are only reviewable for abuse of discretion; and (2) the *Frye* "general acceptance" test is merely an alternative basis for

Thus, the relevance and persuasiveness of a particular *Daubert* decision to a Florida *Frye* analysis must be evaluated on a case-by-case basis. The Fifth District correctly invoked the Fifth Circuit's *Daubert* decisions in *Black* and *Vargas,* in addition to the Pennsylvania *Frye* decision of *Riccio,* because those decisions focused on the scientific reliability – including the "general acceptance" – of the underlying theory that trauma is causally related to fibromyalgia.

Likewise, the Fifth District correctly held that the state court *Daubert* decisions of *Alder v. Bayer Corp., AGFA Div.,* 61 P. 3d 1068 (Utah 2002), and *Reichert v. Phipps*, 84 P. 3d 353 (Wyo. 2004), were "of little value here," because those cases applied a *Daubert* test which was plainly more liberal than the "general acceptance" test under *Frye.*

G. THE EXCLUDED TESTIMONY IS NOT "IMPACT" OR "PURE OPINION" TESTIMONY.

Petitioner makes little if any attempt to show that the *Frye* standards for admissibility are satisfied. Rather, she advances theories that the *Frye* test is not applicable. These theories do not withstand scrutiny.

Petitioner first suggests that *Frye* is not applicable because testimony linking accident trauma to fibromyalgia was admitted in previous cases, *citing Zell v. Meek*, 665 So. 2d 1048 (Fla. 1995). (Petitioner's brief, at 23 n.9). Petitioner's reliance on *Zell* is misplaced. Although that case involved medical testimony linking trauma to fibromyalgia, no *Frye* objection was raised or considered. A *Frye* challenge is waived

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admissibility of novel scientific evidence; "evidence, otherwise reliable, need not meet the *Frye* standard." *Id.* at 74, 77.

if not raised and preserved. *McDonald v. State*, 743 So. 2d 501, 506 (Fla. 1999). Because Respondents properly raised and preserved their *Frye* challenges, *Zell* has no bearing on this case.[27] Furthermore, the fact that no *Frye* challenge was raised in *Zell* cannot deprive Respondents of their *Frye* challenge in this case. As Professor Ehrhardt states in his treatise on Florida Evidence:

> Simply because the test or theory has existed for some period of time or because evidence based upon that theory has been admitted in other legal actions does not mean that the evidence possesses the level of reliability demanded by *Frye*. The better view, which has been adopted by the Florida Supreme Court, is that until the principle, test, or methodology has been subjected to the thorough *Frye* analysis in Florida, it should be subject to *Frye* testing.

Ehrhardt, Florida Evidence §702.3 (2006 ed.), at 717, *citing Hadden v. State*, 690 So. 2d 573, 576 (Fla. 1997).

Plaintiff also argues that the *Frye* test does not apply because this is an "impact" case. (Petitioner's brief, at 28-30). Expert causation testimony with respect to "impact" injuries, such as sprains or strains, is not subject to *Frye* testing because the causal relationship between impacts and such injuries is too well established and understood to be considered a "new or novel" scientific theory. In contrast, the

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[27] The other cases cited in Petitioner's footnote 9, likewise, did not involve *Frye* challenges. Additionally, the two worker's compensation cases predated this Court's holding in *Henson* that the *Frye* test applies in worker's compensation cases. *James v. Humana Hospital-Brandon*, 644 So. 2d 116 (Fla. 1st DCA 1994); *Siegel v. AT&T Communications*, 611 So. 2d 1345 (Fla. 1st DCA 1993). Even more misplaced is Petitioner's reliance on out-of-state cases which did not involve a *Frye* challenge. *See* Petitioner's Brief, at 40-41, *citing Rawls v. Coleman-Frizzell Inc.*, 653 N.W. 2d 247 (S.D. 2002) and *Waldorf Corp. v. Industrial Commission*, 708 N.E. 2d 476 (Ill. App. 1 Dist. 1999). Furthermore, in *Rawls* the court affirmed the denial of workers' compensation benefits for fibromyalgia and myofascial pain despite the fact that the employer offered no contrary testimony.

medical studies and reports exhaustively reviewed by the trial court show that it is not clinically established or generally accepted that fibromyalgia and myofascial pain syndrome are "impact" injuries.

The Fourth District's opinion in *Florida Power & Light Co. v. Tursi*, 729 So. 2d 995 (Fla. 4th DCA 1999), upon which Marsh relies, points up the distinction between that case and this one. In *Tursi* the defendant challenged the testimony of an ophthalmologist that electrical transformer fluid that fell into the Plaintiff's eye ultimately caused a cataract in that eye. In holding that the ophthalmologist's testimony was not based upon "novel scientific evidence" which would be subject to *Frye* testing, the court observed:

> The ophthalmologist, who has treated thousands of cataract patients, testified that there are many causes of cataracts, including aging, congenital, x-rays, radiation, exposure to chemicals, and other trauma. He testified that chemical agents can cause cataracts, and that, depending on the concentration, the cataracts can take from weeks to years to develop. He was able to rule out a number of other causes of cataracts, such as exposure to sunlight, because of the fact that plaintiff only had the cataract in one eye. He testified based on his knowledge and experience that, considering the relatively young age (60) of the plaintiff, the cataract was, within a reasonable medical certainty, caused by the transformer liquid.

Id. at 996-97. In contrast, the causes of fibromyalgia and myofascial pain syndrome are unknown and the theory that they may be caused by accident trauma is not established or generally accepted.

Petitioner also seeks to evade *Frye* by asserting that her experts' proposed causation testimony is "pure opinion testimony." Respondents submit that expert medical or scientific testimony on *causation* can legitimately be considered "pure opinion testimony" only when the underlying causal principle upon which the opinion

is founded is not new or novel, but is well understood and established and generally accepted in the relevant scientific community. Merely labeling expert causation testimony "pure opinion" is not a legitimate vehicle for evading *Frye* testing where the underlying causal principle would not otherwise pass the *Frye* "general acceptance" test. To hold otherwise would violate the principle at the heart of *Frye* that "[n]ovel scientific evidence must...be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion." *Hadden,* 690 So. 2d at 578. Moreover, it would be doubly prejudicial because the jury would likely assume that the expert's causation testimony, founded on nothing but *post hoc* reasoning, was in fact founded on valid scientific principles. *See Ramirez v. State,* 810 So. 2d at 844.

CONCLUSION

Based on the foregoing reasons and authorities, the Valyous respectfully submit that this petition should be dismissed, or alternatively that the decision of the Fifth District Court of Appeal should be affirmed.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true and correct copy of the foregoing corrected answer brief, which corrects the answer brief served June 26, 2006, has been furnished by mail this 28th day of June, 2006, to: Shannon L. Akins, Esquire, 25 S. Magnolia Avenue, Orlando, FL 32801; John T. Stemberger, Esquire, 4853 South Orange Avenue, Suite C, Orlando, FL 32806; Elizabeth C. Wheeler, Esquire, Post Office Box 2266, Orlando, FL 32802-2266; Jane Clark, Esquire, 2739 South Maguire Road, Ocoee, FL 34761; Robert W. Mixson, Esquire, 15 West Church Street, Suite 301, Orlando, FL 32801; Michael S. Finch, Esq., 1401 61st Street South, Gulfport, Florida 33707; Philip M. Burlington, Esquire, 2001 Professional Building, Suite 410, 2001 Palm Beach Lakes Blvd., West Palm Beach, FL 33409; and Tracy Raffles Gunn, Esquire, 501 East Kennedy Boulevard, Suite 1700, Tampa, Florida 33602. I certify that this petition complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P.

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JOSEPH CURRIER BROCK