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

Respondents.
_____/

FIFTH DCA CASE NO.: 5D03-188
CIRCUIT COURT CASE NO.: CIO-99-6377
ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT PV HOLDING CORP. d/b/a AVIS RENT-A-CAR

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STATEMENT OF CASE AND FACTS

Petitioner JILL MARSH (hereinafter "Marsh"), has invoked the discretionary jurisdiction of the Florida Supreme Court to review the decision in *Marsh v. Valyou*, 917 So. 2d 313 (Fla. 5th DCA 2005) (Avis Appendix Tab 1)

pursuant to Fla. R. App. P. 9.030(a)(2)(iv). In *Marsh*, the Fifth District affirmed a Final Summary Judgment entered against Marsh and in favor of Respondents ROBERT EARL VALYOU, JR. and DEBORAH A. VALYOU (hereinafter "VALYOU"), THOMAS JONATHAN BURKE and DONNA E. BURKE (hereinafter "BURKE"), and PV HOLDING CORP. d/b/a AVIS RENT-A-CAR (hereinafter "AVIS") in the Circuit Court of the Ninth Judicial Circuit and certified conflict with *State Farm Mutual Automobile Insurance Company v. Johnson*, 880 So. 2d 721 (Fla. 2d DCA 2004). (Avis Appendix Tab 11).

As alleged in the Complaint filed on her behalf in the Circuit Court (R1 1-7), Marsh was involved in four separate vehicular collisions between August 3, 1995 and January 20, 1998. The first of these occurred August 3, 1995 when a vehicle Marsh was operating collided with the Valyous' vehicle; the second of these occurred April 14, 1996 when a vehicle in which Marsh was a passenger collided with the Burkes' vehicle; the third of these occurred June 20, 1996 when Marsh's own vehicle collided with a motor vehicle owned by Avis and operated by Bryan Blomker (who is not a

party to this proceeding); and the last of these occurred January 20, 1998 when Marsh's vehicle collided with a vehicle owned and operated by Scott David Chilcutt (who is similarly not a party to this proceeding). The Complaint alleged that the Valyous, the Burkes, Avis, and Chilcutt were all liable to Marsh for her

damages due to purported negligence in the operation of their respective vehicles. The Valyous, the Burkes, and Avis timely served responsive pleadings admitting the occurrence of their respective collisions but generally denying all material allegations of liability and damages while raising various affirmative defenses (R1 8-12, 25-27); apparently, no pleadings or papers were ever served or filed on behalf of Chilcutt.

In the course of discovery, it was determined that Marsh had numerous subjective complaints of pain, discomfort, and injury throughout her body, all of which she claimed were attributable in whole or in part to one or more of the subject collisions, individually or collectively. Medical records produced through discovery documented Marsh received extensive treatment for her symptoms, complaints and claimed injuries, however, the sole issues pertinent to this proceeding are those related to what have been described as Fibromyalgia Syndrome and Myofascial Pain Syndrome.

Fibromyalgia Syndrome is not a disease but is rather a clinical construct to characterize a chronic pain syndrome. In 1990, the American College Of Rheumatology (hereinafter "ACR") published criteria developed by Frederick Wolfe, M.D. and others for classification of Fibromyalgia Syndrome for use in a clinical setting. The ACR classification criteria specify (1) presence of widespread pain for more than three months and (2) pain (not just tenderness) that can be

elicited by manual pressure of approximately 4 kg/cm² at 11 or more defined tender points. Use of the ACR criteria has been criticized because application in a clinical setting of necessity relies solely on self-reports from patients, because there are no exclusions, because application requires naive subjects for accuracy, and because they are subject to easy manipulation, especially where there are pending litigation or compensation claims. Significantly, the ACR criteria have not been validated in medicolegal and compensation settings. See "Pain In Fibromyalgia" by John B. Winfield, M.D. (Director, Thurston Arthritis Research Center and Chief, Division Of Rheumatology And Immunology, University Of North Carolina School Of Medicine), *Rheumatic Disease Clinics Of North America*, Vol. 25, No. 1, February 1999 (R3 577-578; Avis Appendix Tab 5).

In June 1994, a committee of experts was convened by Dr. Wolfe under the auspices of the Physical Medicine Research Foundation at the University Of British

Columbia in Vancouver, Canada to address issues pertaining to diagnosis, testing, assessment and prognosis of Fibromyalgia Syndrome. During a three-day conference,

this committee reviewed available data, including reliability and validity of diagnosis and assessment methods, after which the committee voted on and approved recommendations which were subsequently published in an article

entitled "The Fibromyalgia Syndrome: A Consensus Report On Fibromyalgia And Disability", *The Journal Of Rheumatology* 1996 23:3 (R8 2298-2301; Avis Appendix Tab 2). The Consensus Report noted in pertinent part that data were insufficient to indicate whether causal relationships exist between trauma and Fibromyalgia Syndrome; indeed, the very first recommendation listed in order in the Consensus Report was to eliminate the terms "reactive" and "post-traumatic" fibromyalgia (R8 2299-2300, Avis Appendix Tab 2). Significantly, Thomas J. Romano, M.D., Ph.D. (who was retained by Marsh's counsel as an expert witness to examine her and who would testify that her Fibromyalgia Syndrome was caused by the subject collisions) was a member of this committee, as was John Russell Rice, M.D. (a physician board certified in both internal medicine and rheumatology on the faculty of Duke University and staff of the Duke Private Diagnostic Clinic at Duke University Medical Center who was retained by Avis as an expert in this case).

As discovery and final trial preparations were being completed, Avis filed a Motion To Determine Admissibility Of Expert Testimony expected to be offered on behalf of Marsh (R3 562-567, Avis Appendix Tab 6). In this motion, Avis sought to have the Circuit Court determine the issue of whether underlying concept that Fibromyalgia Syndrome could be directly and proximately caused by trauma was sufficiently established to have gained general acceptance in the relevant

scientific field. Avis noted that this issue had not previously been addressed by any Florida court and was thus appropriate for consideration under the test articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), as adopted in Florida in *Ramirez v. State*, 651 So. 2d 1164 (Fla.1995) and *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993), and in accordance with Florida Statutes §90.702. The Valyous and Burkes joined in this motion. Cases from other jurisdictions as well as supporting medical literature were cited and provided to the Circuit Court for consideration. Thereafter, Marsh filed a Memorandum Of Law Regarding *Frye* Hearing On Testimony Relating To Post-Traumatic Fibromyalgia (R3 620-628) and submitted voluminous materials in support of her position (R2 291-446).

After reviewing materials submitted on behalf of the parties, the Circuit Court entertained oral argument on Avis' motion (R4 763-831). In support of the motion,

counsel for Avis, the Valyous, and the Burkes argued that the issue of supposed causation of Fibromyalgia Syndrome by trauma was hotly contested within the relevant scientific medical community and that there was an absence of any general

acceptance of this concept as required under the *Frye* standard to permit Marsh's experts to testify on this issue. In addition to the materials previously submitted in support of the motion, counsel provided the Circuit Court with a 2000 study by

Drs. Buskila and Newman (principal authors of a 1997 study relied upon by Marsh) which stated in pertinent part that there was insufficient data to establish causal relationships between trauma and Fibromyalgia Syndrome and further stating that additional research on this issue was needed (R4 811-812), as well as two newly-discovered cases, *Riccio v. S & T Contractors*, 2001 WL 1334202 (Pa. Co. Pl. June 22, 2001) and *Jones v. Conrad*, 2001 WL 1001083 (Ohio App. September 4, 2001) in which the courts held testimony similar to that being offered by Marsh should properly be excluded. Marsh's counsel responded that Avis, the Valyous, and the Burkes had presented no study establishing that trauma could not cause fibromyalgia and asserted that what few studies existed indicated there was evidence that trauma could lead to or cause in some way, fibromyalgia. After hearing argument of counsel, the Circuit Court determined that based upon everything presented Avis' motion should be granted. Thereafter, the Circuit Court entered its Order On Defendant's Motion To Determine Admissibility Of Expert Testimony confirming its granting of Avis' motion (R4 742-747; Avis Appendix Tab 7).

Following this ruling, Marsh's counsel sought rehearing or clarification (R4 736-739), however, Marsh's motion was denied (R4 740).

Marsh next sought to proceed with her case under the theory that she had developed Myofascial Pain Syndrome as a direct and proximate result of one or

more of the subject collisions.

Myofascial Pain Syndrome has been defined as a regional pain syndrome accompanied by trigger points. A trigger point is stated to have characteristics of localized tenderness, presence of a taut band, twitch response, and referred pain on palpation of a trigger point site. Myofascial Pain Syndrome has also been called fibromyoscitis, myofibrositis, myofascitis, myogelosis, and fibrositis. The concept of myofascial pain syndrome was largely promoted by Janet G. Travell, M.D. (more prominently known as President John F. Kennedy's personal physician during his years in the White House) and her followers. Although criteria for determining Myofascial Pain Syndrome have been published, reliability has not been validated for

those criteria. See "Fibromyalgia Syndrome and Myofascial Pain Syndrome: Clinical Features, Laboratory Tests, Diagnosis, and Pathophysiologic Mechanisms" by Muhammad B. Yunus, M.D. (R7 1638 - 1652; Avis Appendix Tab 3) and "The Fibromyalgia and Myofascial Pain Syndromes: A Preliminary Study of Tenderpoints and Trigger Points in Persons With Fibromyalgia, Myofascial Pain Syndrome and No Disease", *The Journal Of Rheumatology* 1992 19:6 (5th DCA RG33-40; Avis Appendix Tab 4).

Coinciding with completion of additional discovery and trial preparation, Avis filed its Second Motion To Determine Admissibility Of Expert Testimony

seeking

to have the Circuit Court apply the *Frye* standard to preclude Marsh's experts from providing trial testimony to the effect that Myofascial Pain Syndrome can be directly and proximately caused by trauma (R6 1393-1403; Avis Appendix Tab 8). The Valyous and the Burkes joined in this motion. Avis argued in its motion that Myofascial Pain Syndrome, like Fibromyalgia Syndrome, is an unsettled area within the practice of medicine and the subject of many opinions but little critical scientific research; Avis further asserted that there was an absence of any generally accepted and scientifically valid criteria for Myofascial Pain Syndrome or even any general

acceptance as to whether Myofascial Pain Syndrome and Fibromyalgia Syndrome were separate and distinct conditions. Avis cited in its motion numerous articles and studies on these issues, as well as the Affidavit Of John Russell Rice, M.D. (R6 1341-1356) filed in support of its motion. A Memorandum Of Law In Support Of Defendants' second *Frye* Motion was filed (R6 1371-1378) and the Circuit Court was provided with numerous additional supporting articles (R7 1511-1781).

Marsh in turn served a Memorandum In Opposition to Defendants' Second *Frye* Motion To Exclude Expert Testimony (R6 1404-1412), as well as an affidavit from Thomas J. Romano, M.D. (R6 1390-1392).

Hearing was held on Avis' motion (SR13 4570-4718). Counsel for Avis, the Valyous, and the Burkes reiterated the argument set forth in the motion and, in addition, noted that at least three of the experts previously cited by Marsh as authoritative had stated in writing that they believed Myofascial Pain Syndrome could not be distinguished from Fibromyalgia Syndrome. In response, Marsh's counsel conceded that there was disagreement as to whether Fibromyalgia Syndrome and Myofascial Pain Syndrome were separate entities, however, went on to assert that under *Frye* and its progeny only the issue of general acceptance of underlying

scientific principles and methodology could be addressed, relying upon *United States*

Sugar Corp. v. Henson, 823 So. 2d 104 (Fla. 2002).

After considering argument of counsel and the voluminous materials presented by the parties in support of their respective positions, the Circuit Court ultimately granted Avis' motion and entered its Order On Defendants' Second Motion To Determine Admissibility Of Expert Testimony (R6 1384-1388; Avis Appendix Tab 9) stating in pertinent part that the *Henson* case relied upon by Marsh in fact required that novel expert opinion testimony must be established to have a "predicate of reliability" which was lacking in Marsh's case.

In light of its rulings excluding Marsh from presenting expert trial testimony

to the effect that Fibromyalgia Syndrome and Myofascial Pain Syndrome could be caused by trauma, the Circuit Court sought to determine the extent to which Marsh contemplated further pursuit of her claims. In response to this inquiry, Marsh's counsel stated in open court that there were no other organic injuries upon which Marsh intended to present testimony, taking the position that her symptoms "don't make sense" apart from the context of Fibromyalgia Syndromes and Myofascial Pain Syndrome (SR13 4558). Based upon the representations of Marsh's counsel, Avis, the Valyous, and the Burkes moved *ore tennus* for entry of summary final judgment (SR13 4560). Final Summary Judgment was thereafter entered by the Circuit Court (R8 2548-2459; Avis Appendix Tab 10).

Marsh subsequently appealed the Circuit Court's rulings to the Fifth District Court Of Appeal. Given the *de novo* review required, the Fifth District, *sua sponte*,

relinquished jurisdiction to the Circuit Court during the pendency of the appeal for the limited purpose of considering any new scientific evidence on Fibromyalgia Syndrome (5^{th} DCA R 46).

Pursuant to the request of the Circuit Court, counsel for each of the parties submitted materials and memoranda regarding new medical literature concerning trauma and Fibromyalgia Syndrome which had come to light since the Circuit Court's earlier rulings prior to the appeal (SSR2555-2646, 2656-2722).

In the course of the subsequent proceedings at the Circuit Court level, Marsh's counsel argued that the scope of the proceedings should include application of the *State Farm Mutual Automobile Insurance Company v. Johnson* case (decided subsequent to the Circuit Court's prior rulings), however, counsel for the Valyous, the Burkes, and Avis argued that if the Circuit Court were to do so it would be exceeding the limited scope of jurisdiction relinquished by the Fifth District. After reviewing memoranda submitted on behalf of the parties (SSR2725-2741), the Circuit Court determined that its jurisdiction was limited to review of new scientific evidence and declined to consider any new case law including the *Johnson* case, then held that none of the scientific evidence submitted by any of the parties was sufficient to cause it to revise its prior *Frye* rulings and entry of Final Summary Judgment (SSR 2961-2978). Thereafter, the Circuit Court entered its Order On Evidentiary Hearing For Consideration Of New Scientific Evidence On Fibromyalgia Syndrome (SSR 2979-2989; Avis Appendix Tab 12) and forwarded this order to the Fifth District. (5th DCA R51-61).

Upon completion of the Circuit Court's evidentiary review and subsequent to oral argument, the Fifth District rendered its decision in the aforementioned opinion.

Subsequent to Marsh's Notice To Invoke Discretionary Jurisdiction (5th DCA R 111-112) this Court acknowledged receipt of this case and entered its order postponing its decision on jurisdiction and directing the parties to submit briefs on

the merits.

SUMMARY OF ARGUMENT

Although the issues of whether trauma can cause Fibromyalgia Syndrome or Myofascial Pain Syndrome has been the subject of numerous published opinions in the medical literature, there has been little in the way of peer-reviewed scientific research on point and, as has been acknowledged by the Petitioner and her Amicus Curiae, legitimate medical controversy continues to exist. While some within the relevant scientific community have suggested that trauma may play a causal role in development of Fibromyalgia Syndrome or Myofascial Pain Syndrome in some individuals, most if not all of these proponents have acknowledged that there is at best only anecdotal support for describing an "association" and that their data were insufficient to establish an actual causal link. Others have disputed the legitimacy of evidence supporting this supposed causal relationship, including the authors of the most current study known to this Respondent who concluded that whiplash injury and road accident trauma were not associated with an increased rate of Fibromyalgia Syndrome. Within this context, it is clear that while controversy concerning this issue continues to exist, there has to date been no general acceptance within the relevant scientific medical community of the underlying principle that trauma can indeed cause development of Fibromyalgia Syndrome or Myofascial Pain Syndrome.

As Florida's courts, including this Court, have articulated in numerous published opinions, the test established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) is to be applied to new or novel scientific evidence to be offered by an expert in order to determine whether the scientific principle, theory, or methodology upon which the expert's testimony is based has been generally accepted in the field in which it belongs. As such, a trial judge has been recognized as having a "gatekeeper" role to insure that testimony to be offered at trial by an expert is founded upon scientific principle, theory, or methodology recognized to be scientifically reliable.

In this case, the Circuit Court correctly determined that the *Frye* test should be applied to determine the issue of whether the underlying scientific principle that trauma can cause Fibromyalgia Syndrome or Myofascial Pain Syndrome was generally accepted within the relevant scientific medical community before admitting into evidence testimony from Marsh's experts that she was indeed suffering from Fibromyalgia Syndrome and Myofascial Pain Syndrome caused by the subject accidents, either individually or collectively. In considering this issue, the Circuit Court reviewed voluminous materials submitted by all parties, correctly concluded that there had not been general acceptance within the relevant scientific medical

community that trauma can cause either Fibromyalgia Syndrome or Myofascial Pain Syndrome, granted each of the two *Frye* motions, and, upon representation from Marsh's counsel that there was no further basis upon which she could maintain her claims in light of these rulings, properly entered Final Summary Judgment against her.

Upon appeal of the Final Summary Judgment, the Fifth District Court Of Appeal correctly affirmed the Circuit Court's rulings, after first relinquishing jurisdiction to the Circuit Court to determine whether there was any pertinent newly published scientific evidence, and articulated in its detailed and well-reasoned opinion both the scientific and legal grounds which led it to reach its decision.

Although the Fifth District did certify conflict between its decision and that of the Second District Court Of Appeal in *State Farm Mutual Automobile Insurance Company v. Johnson*, this Respondent would respectfully submit that it appears questionable whether there is true conflict between the Fifth District's ruling in *Marsh* and the Second District's ruling in *Johnson* inasmuch as it appears that each of these courts addressed application of the *Frye* test in a different factual setting. In *Johnson*, the Second District considered whether the *Frye* test was applicable to the methodology and opinions of Johnson's experts and State

Farm apparently did not

seek to apply the *Frye* test to the underlying principle of whether trauma can cause Fibromyalgia Syndrome; conversely, in *Marsh*, the Fifth District reviewed application of the *Frye* test to the issue of whether there was general acceptance within the relevant scientific medical community of the underlying principle that trauma can cause Fibromyalgia Syndrome or Myofascial Pain Syndrome. Close reading of the opinions in these two cases thus reveals that, while both addressed the admissibility of testimony causally relating Fibromyalgia Syndrome to the subject accident(s), the facts and issues pertinent to each decision were different and, arguably, the decision could be viewed as correct and not in conflict with the other. Even if conflict is viewed to exist, the decisions in *Marsh* and *Johnson* are certainly distinguishable both factually and legally.

ARGUMENT

POINT I

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

As reflected in the record before this Court, volumes of material were provided to both the Circuit Court and the Fifth District Court Of Appeal concerning Fibromyalgia Syndrome and, to a lesser extent, Myofascial Pain Syndrome.

As noted in "The Fibromyalgia Syndrome: A Consensus Report On Fibromyalgia And Disability", *The Journal Of Rheumatology* 1996 23: 3 (R515-520),

Fibromyalgia Syndrome is a modern construct to describe a syndrome of widespread pain, decreased pain threshold, and characteristic symptoms, including non-restorative sleep, fatigue, stiffness, mood disturbance, irritable bowel syndrome, headache, paresthesias, and other less common features. Criteria for the modern construct of Fibromyalgia Syndrome were first described in 1975 and in the ensuing years descriptive studies and controlled clinical trials enlarged understanding of the syndrome. In 1990 the American College Of Rheumatology (ACR) published its

criteria for the classification of Fibromyalgia Syndrome for use in a clinical setting;

the criteria have not been validated, particularly in a litigation or compensation setting, however, they have become the *de facto* standard for diagnostic classification. The cause(s) of Fibromyalgia Syndrome are incompletely understood and data regarding causality are largely absent; some authors have proposed that trauma can cause Fibromyalgia Syndrome based upon a few case series or reports, however, it has also been generally recognized that data from literature are insufficient to indicate whether causal relationships exist between trauma and Fibromyalgia Syndrome; it has been generally recognized that the absence of evidence does not mean that causality does not exist but rather that appropriate studies have not been performed to sufficiently establish causal relationships. Within this context, the experts comprising the Vancouver Fibromyalgia Consensus Group, which included Thomas J. Romano, M.D. (the principal expert retained by Marsh) and John Russell Rice, M.D. (the principal expert retained by Avis), recommended that use of the terms "reactive" and "post-traumatic" fibromyalgia be eliminated.

Throughout this case, Marsh, through her counsel, has cited several publications in which the authors have suggested evidence supports an

"association" between trauma and Fibromyalgia Syndrome; more recently, the Academy Of Florida Trial Lawyers as her Amicus Curiae has adopted her position (Marsh IB 42; AFTL

B 4-6, 8-13). Review of the briefs submitted by Marsh and AFTL reflects they appear to primarily rely upon three sources for their stated position.

Marsh and AFTL rely upon a 1997 article authored by some members of the Vancouver Fibromyalgia Consensus Group entitled "Fibromyalgia Consensus Report: Additional Comments", *Journal Of Clinical Rheumatology*, Vol. 3, No. 6 (R2 292-295), purporting to offer some additional perspectives on several issues, including causality. In this article, the authors suggested that causal propositions are rarely established with absolute certainty in the realm of medicine and, that as an alternative, other factors should be considered, including consistency of association, strength of association, and biologic plausibility; the authors went on to state that biologic plausibility seemed to suggest it was more likely than not that trauma does play a causative role in some patients diagnosed with Fibromyalgia Syndrome. Significantly, the authors noted that it was not their purpose to repudiate the Consensus Report but instead to draw attention to several aspects of the report that appeared likely to be misinterpreted; they went on to state that their opinions were offered in the spirit of promoting scientific progress through civil

discussions of controversial issues, that their opinions should not be viewed as being “cast in stone”,

and that one must keep an open mind to new ideas and options as they emanate from

ongoing research. While the comments of these authors may be of some general interest on the issue of whether trauma can cause Fibromyalgia Syndrome, these opinions in no way reflect general acceptance of the underlying principle that trauma can cause Fibromyalgia Syndrome.

Marsh and AFTL also rely upon a study by Dan Buskila, M.D. and others entitled “Increased Rates Of Fibromyalgia Following Cervical Spine Injury”, *Arthritis & Rheumatism*, Vol. 40 No. 3, March 1997 (R2 441-446) as an authoritative

study supporting the general proposition that trauma can cause Fibromyalgia Syndrome. Close review of this study in fact reveals only that the authors determined through study that their patients who reported traumatic neck injuries more frequently experienced symptoms of Fibromyalgia Syndrome than their patients who had lower extremity injury, leading the authors to suggest that soft tissue trauma to the neck can result in an increased incidence of Fibromyalgia Syndrome compared with other injuries. Significantly, the authors noted that the

present data were insufficient to indicate whether causal relationships in fact exist between trauma and Fibromyalgia Syndrome and further stated that future studies addressing the issue of trauma and documenting the chronology of symptoms following trauma were needed to clarify

the relationship between trauma, biomechanical problems, and Fibromyalgia Syndrome.

Interestingly, neither Marsh nor AFTL have cited in their briefs the subsequent article by Dr. Buskila and his colleague entitled "Muscoloskeletal Injury as a Trigger for Fibromyalgia/Post Traumatic Fibromyalgia," *Current Rheumatology Reports*, 2000 (R3 558-561). There the authors stated that while Fibromyalgia Syndrome appeared to be associated with trauma, the question remained whether trauma can cause it or whether other factors (such as pain behavior, societal enhancement, or psychological factors) are the overwhelming causes. The authors concluded that current data were insufficient to indicate whether causal relationships exist between trauma and Fibromyalgia Syndrome.

During the Circuit Court's review of newly published scientific evidence during the period in which jurisdiction was relinquished by the Fifth District, Marsh cited a study by A.W. Al-Allaf, M.D. and others entitled "A Case-Controlled Study Examining the Role of Physical Trauma in the Onset of Fibromyalgia Syndrome", *Rheumatology*, Vol. 41, 2002; this study has

subsequently been cited by AFTL in its brief as noted above. In this study, the authors stated that fibromyalgia patients reported substantially greater incidents of physical trauma in the preceding months

than did non-fibromyalgia patients, leading them to conclude that the results of their study suggest that physical trauma is significantly associated with the onset of

fibromyalgia, however, and most significantly, the authors went on to acknowledge that their study did not provide a basis for finding that reliable evidence existed linking trauma to Fibromyalgia Syndrome and stated that further prospective studies were needed to confirm any association and to determine whether trauma has a causal role in the development of Fibromyalgia Syndrome.

Marsh previously and AFTL more recently have cited with approval one or more articles by a group of authors led by Kevin P. White, M.D., including"Perspectives on Post Traumatic Fibromyalgia: A Random Survey of Canadian General Practitioners, Orthopedists, Physiatrists, and Rheumatologists," *The Journal of Rheumatology*, Volume 27, 2000. Interestingly, they have omitted reference to the article authored by Dr. White and his colleagues entitled "Trauma and Fibromyalgia: Is There An Association and What Does It Mean?", *Seminars in Arthritis and Rheumatism*, Vol. 29, No. 4 February 2000 (R3 534-550) in which the authors stated there was limited evidence either to support or refute an

association between trauma and Fibromyalgia Syndrome; the authors went on to state that there remained a question of whether an association exists between trauma and Fibromyalgia Syndrome and noted that further studies were needed to replicate the results of the 1997 Buskila study.

Subsequent to the "Trauma and Fibromyalgia" article by White and others, an article by Moshe Tishler, M.D. and others entitled "Neck Injury and Fibromyalgia – Are They Really Associated?" has been published in the current issue of *The Journal Of Rheumatology*, Vol. 33, June 2006 (Avis Appendix Tab 13). As reflected in this article, the authors sought to investigate whether whiplash injury may be a trigger for the onset of Fibromyalgia Syndrome through a control study. Significantly, the subjects of this study had been diagnosed with whiplash injury after a vehicular accident and were followed prospectively starting immediately after their discharge from the emergency room (in contrast to the study conducted by Buskila and his colleagues involving patients who were attending an occupational injury clinic and were already making claims for compensation); the cultural and socioeconomic background of the study populations in each of these study groups was not appreciably different. During the period that Tishler and his colleagues followed both the study and control groups, only one patient in the study group developed signs and symptoms of

Fibromyalgia Syndrome; while 2% of the patients in the study and 16% of the patients in the control group filed claims for compensation, none was associated with Fibromyalgia Syndrome. Based upon the results of their study, Tishler and his colleagues concluded that whiplash injury and road accident trauma were not associated with an increased rate of Fibromyalgia Syndrome.

The June 2006 issue of *The Journal of Rhuematology* also includes an editorial entitled "Whiplash and Fibromyalgia: An Ever-Widening Gap" from Yoram Shir, M.D. and colleagues reviewing the Tishler study (Avis Appendix Tab 14). In this editorial, the authors note that, while the concept that trauma can be an initiating factor in Fibromyalgia Syndrome has been supported by subjective information and seems plausible, evidence-based medicine requires more definitive proof, and state that, taking into account all relevant factors, the conclusions of Tishler and his colleagues should be upheld. The authors of the editorial go on to suggest that the results of the Tishler study have significant clinical, social, and medicolegal implications; although they note that the debate is not completely settled regarding association of a triggering event and the onset of Fibromyalgia Syndrome and recommend further study in order to reach a final conclusion they suggest that any definitive study will have to be large, prospective, and match the high standard set by Tishler and his colleagues.

As reflected in the record before this Court, it is apparent that from the time

of the rulings of the Circuit Court and the Fifth District Court Of Appeal through the current month there has remained a significant controversy regarding the issue of whether trauma can cause Fibromyalgia Syndrome. Although some authors have stated their opinion that there appears to be some "association", the most current published controlled study raises significant and serious questions regarding the legitimacy of such an association. Even assuming for purposes of argument that such an association exists, the vast majority of authors supporting this contention have acknowledged that mere association is insufficient to establish causation and it is abundantly clear that there is still no general acceptance of the underlying principle that trauma can cause Fibromyalgia Syndrome in the relevant scientific medical community.

Turning to Myofascial Pain Syndrome, Avis would note that Marsh and AFTL have really not addressed to any appreciable extent in their briefs Marsh's earlier contention that the Circuit Court erred in granting the *Frye* motion excluding testimony of her experts to the effect that she was suffering from Myofascial Pain Syndrome due to one or more of the subject accidents. As the record reflects, both the Circuit Court and the Fifth District found there was even less support for the proposition that there has been a general acceptance within the relevant scientific medical community that Myofascial Pain Syndrome can be caused by trauma (R6 1384-1388; *Marsh* at 327-328).

Inasmuch as neither Marsh nor AFTL have cited any new scientific evidence supporting Marsh's position, and as Avis is similarly unaware of any new pertinent scientific evidence, it is also clear that there continues to be an absence of any general acceptance within the relevant scientific medical community of the underlying principle that trauma can cause Myofascial Pain Syndrome.

POINT II

BOTH THE CIRCUIT COURT AND THE FIFTH DISTRICT COURT OF APPEAL CORRECTLY APPLIED *FRYE* TO EXCLUDE OPINION TESTIMONY OF MARSH'S EXPERTS THAT ONE OR MORE OF THE SUBJECT ACCIDENTS CAUSED FIBROMYALGIA SYNDROME OR MYOFASCIAL PAIN SYNDROME.

Initially, it must be noted that all parties to this proceeding have acknowledged that Florida courts, including this Court, have repeatedly recognized and approved the test established in *Frye v. United States* as controlling law in this state. The dispute between the Petitioner and her Amicus Curiae on the one hand and the Respondents on the other hand involves whether or not the *Frye* test was correctly applied by the Circuit Court and the Fifth District Court Of Appeal.

Marsh and AFTL argue that the *Frye* test should not have been applied to exclude the testimony of Marsh's experts because these experts based their opinions on generally accepted methodology. Even assuming, for purposes of argument, that the opinions of these experts were in fact based upon generally accepted methodology, that fact does not preclude application of the *Frye* test to the principle underlying their opinions. As this Court has repeatedly recognized, methodology is but one prong of the *Frye* test, and the underlying scientific principle or theory upon which an expert's opinion is based must also be shown to be generally accepted. See *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993);

Ramirez v. State, 651 So. 2d 1164 (Fla. 1995); and *Brim v. State*, 695 So. 2d 268 (Fla. 1997).

Marsh and AFTL argue that this Court's decisions in *United States Sugar Corp. v. Henson*, 823 So. 2d 104 (Fla. 2002) and *Castillo v. E.I. DuPont DeNemours & Co., Inc.*, 854 So. 2d 1264 (Fla. 2003) support their argument that where an expert's opinions are based upon generally accepted methodology the *Frye* test is satisfied. Close reading of these decisions reveal that they do not stand for the proposition asserted by Marsh and AFTL.

The *Henson* case dealt with a worker's compensation claim by an agricultural mechanic employed for 28 years by U.S. Sugar who claimed that he had been rendered permanently and totally disabled to pesticide exposure in the work place. In support of his position, four physicians offered expert opinion testimony that the cumulative effect of his pesticide exposure had caused phrenetic nerve mononeuropathy. The Court recognized that the opinions of these experts were based upon well-settled biological conclusions published in scientific literature regarding the effects of insecticides upon humans; the Court then went on to hold that the "extrapolation" method utilized by these experts in concluding that chronic exposure to these pesticides caused Henson's condition was an acceptable scientific technique,

thus meeting the *Frye* test. Clearly, the facts in *Henson* are different from this case; here, there is no general acceptance of the underlying scientific principle as there was in *Henson*. Indeed, this Court in *Henson* again reiterated that under *Frye* the inquiry must focus only on the general acceptance of the scientific principles and methodologies upon which an expert relies in rendering his or her opinion; see *Henson* at 110.

Similarly, in *Castillo* this Court specifically acknowledged that the proponent of evidence bears the burden of establishing by a preponderance that the underlying scientific principles and methodology are generally accepted; see *Castillo* at 1268. From a factual standpoint, DuPont did not contest the underlying principle that its fungicide could cause birth defects such as those suffered by young Castillo but instead asserted that the methodology employed by the minor child's experts was not generally accepted. Again, the facts in *Castillo* are markedly different than those in

this case where there is no general acceptance of the underlying scientific principle upon which the opinions of Marsh's experts are based.

Marsh and AFTL further argue that the *Frye* test is inapplicable to the opinions of Marsh's experts because the opinions qualify as "pure opinion", again relying upon the *Henson* and *Castillo* cases for support. Marsh goes on to erroneously suggest

through her counsel that the Respondents have not challenged the basis for the opinions expressed by her experts but instead are in reality challenging the conclusions themselves. Quite frankly, this assertion lacks any factual basis whatsoever; review of the record before this Court (including the two *Frye* motions, the memoranda filed in support of the motions, the transcripts from the two *Frye* hearings and other related hearings, and the briefs submitted to the Fifth District) establishes that the Respondents have consistently asserted that the underlying principle upon which the opinions of Marsh's experts is of necessity based are not generally accepted, not that the opinions themselves must be generally accepted. Furthermore, the "pure opinion testimony" exception, as noted by the Fifth District in *Marsh*, is inapplicable to the issue of "general causation", i.e. the underlying scientific principle which is clearly subject to the *Frye* test. As the Fifth District stated in its opinion:

> To us it is counterintuitive to permit an expert to ignore scientific literature accepted by the general scientific community in favor of the expert's personal experience to reach a conclusion not generally recognized in the scientific community and then allow testimony about that conclusion on the basis that it is "pure opinion." *Marsh* at 327.

Finally, Marsh and AFTL argue that in reaching its decision the Fifth District employed some form of *Daubert* analysis rather than the *Frye* test in affirming the exclusion of testimony from Marsh's experts regarding causation.

Apparently this argument is based upon the Fifth District's discussion of *Vargas v. Lee*, 317 F. 3d 498 (5th Cir. 2003), a case in which evidence linking injuries suffering in an automobile accident to fibromyalgia was held inadmissible under *Daubert* because it was not sufficiently reliable. The quoted portion from the *Vargas* opinion addressed by the Fifth District in *Marsh* is as follows:

> We do not...purport to hold that trauma does not cause fibromyalgia...Medical Science may someday determine with sufficient reliability that such as causal relationship exists. As the Supreme Court recognized in *Daubert*: "[I] In practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations." *Marsh* at 326.

Contrary to the contentions of Marsh and AFTL, it is clear from reading the full opinion in *Marsh* that in this quoted portion of its opinion the Fifth District was addressing *Vargas* and other *Daubert* cases, as well as other *Frye* cases on the issue of reliability, which is fundamental to issues involving admissibility of evidence as noted by this Court in *Hadden v. State*, 690 So. 2d 573 (Fla. 1997), not from the standpoint of applying a *Daubert* standard to this case. This is demonstrated by the Fifth District's statement at the beginning of its discussion on this issue which reads as follows:

Overwhelming, the courts that have considered the issued under *Frye*

> or under *Daubert*...have held that causative evidence linking trauma to fibromyalgia is inadmissible because of the Plaintiff's inability to demonstrate a general acceptance in the relevant scientific community of a causative link between the two. *Marsh* at 323.

The Fifth District's analysis in this regard is well-taken, particularly light of the fact that both Marsh and AFTL in their briefs have seen fit to compare these to standards (adding little heat and no light to the pertinent issues) and engage in a semantic discussion of whether the *Frye* standard or the *Daubert* standard is more restrictive. In reality, as the Fifth District has noted, the overwhelming majority of courts have excluded evidence linking trauma to Fibromyalgia Syndrome because there is an absence of any general acceptance in the relevant scientific community of any causal link, regardless of whether those courts have considered the issue under *Frye* or under *Daubert*.

As reflected by the record before this Court, application of the *Frye* test to the underlying issue of whether there is a general acceptance within the relevant scientific medical community that trauma can cause Fibromyalgia Syndrome or for that matter Myofascial Pain Syndrome, the issue underlying the opinions of Marsh's experts was properly applied by both the Circuit Court and the Fifth District as a matter of law.

POINT III

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY V. JOHNSON DOES NOT TRULY CONFLICT WITH MARSH V. VALYOU OR, IF CONFLICT IS PERCEIVED, IS DISTINGUISHABLE.

While the Fifth District in *Marsh* certified conflict with *Johnson*, close reading of the *Johnson* case reflects that the facts and issues addressed in that case by the Second District are significantly different from those addressed by the Fifth District in *Marsh*. While both cases dealt with admissibility of expert opinion testimony linking Fibromyalgia Syndrome to one or more vehicular accidents, in *Johnson* State Farm asserted that the testimony of Johnson's experts linking fibromyalgia to the accident "should be stricken under the *Frye* test as none of these experts' scientific opinions are generally accepted in the scientific community"; neither side argued whether *Frye* was applicable but instead their arguments concerned whether scientific community's failure to reach a generally accepted understanding of the physical mechanism that cause fibromyalgia required exclusion of expert opinion testimony that Johnson's fibromyalgia resulted from the subject accident. Citing *Henson,* the Second District held that as State Farm did not challenge the underlying principles

or methodology upon which Johnson's experts' based their opinions, could not

properly be excluded under *Frye*. Quoting from *Henson*, the Second District stated as follows:

> Inquiry must focus only on the general acceptance of the scientific principles and methodologies upon which an expert relies in rendering his or her opinion...[T]he opinion of the testifying expert need not be generally accepted as well. Otherwise, the utility of expert testimony would be entirely erased and 'opinion' testimony would not be opinion at all – it would be simply be the recitation of recognized scientific principles to the fact finder. *Johnson* at 722 - 723.

Inasmuch as the *Johnson* case dealt with whether the *Frye* could be applied to exclude experts' opinions themselves, the issue in that case is materially different from the issue addressed by the Fifth District in *Marsh* which dealt with application of the *Frye* test to determine whether the underlying scientific principle upon which experts' opinion testimony was based had been generally accepted.

As such, this Respondent respectfully suggests that, notwithstanding the Fifth District's certification of conflict, no true conflict indeed exists or, alternatively, that the *Johnson* and *Marsh* issues and decisions are distinguishable from both a factual and legal basis.

CONCLUSION

Based upon the foregoing authorities and argument, this Respondent respectfully submits that the record before this Court establishes that there is an absence of any general acceptance within the relevant scientific medical community of the underlying principle that trauma can cause Fibromyalgia Syndrome or Myofascial Pain Syndrome, that the Circuit Court and the Fifth District Court Of Appeal correctly applied the *Frye* test in excluding that the testimony of Marsh's experts that her Fibromyalgia Syndrome and Myofascial Pain Syndrome were caused by one or more of the subject accidents, and that there is either an absence of any true conflict between the *Marsh* decision and *Johnson* decision or, alternatively, that the issues and decisions in these two cases are distinguishable both factually and legally. In light of these considerations, the decision of the Fifth District in *Marsh* should be allowed to stand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Answer Brief with attached Appendix has been furnished to John T. Stemberger, Esquire, 4853 South Orange Avenue, Suite C, Orlando, Florida 32806 and Shannon L. Akins, Esquire, 25 South Magnolia Avenue, Orlando, Florida 32801, counsel for Petitioner Jill Marsh; Steven W. Igou, Esquire and Joseph C. Brock, Esquire, 545 Delaney Avenue, Bldg. 9, Orlando, FL 32801, counsel for Respondents Valyou; Elizabeth C. Wheeler, Esquire, Post Office Box 2266, Orlando, Florida 32802-2266 and Jane H. Clark, Esquire, 2739 South Maguire Road, Ocoee, Florida 34761 counsel for Respondents Burke; Philip M. Burlington, Esquire, Professional Building, 2001 Palm Beach Lakes Blvd., Suite 410, West Palm Beach, FL 33409 and Michael S. Finch, Esquire, Stetson University College Of Law, 1401 61st Street South, Gulfport, Florida 33707, counsel for Amicus Curiae Academy Of Florida Trial Lawyers; and Tracy Ruffle Gunn, Esquire, 501 East Kennedy Boulevard, Suite 1700, Tampa, FL 33602, counsel for Amicus Curiae Florida Defense Lawyers Association by U.S. Mail delivery on June 26, 2006.

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CERTIFICATE OF COMPLIANCE OF FONT

I hereby certify, on behalf of Respondent PV Holding Corp. d/b/a Avis Rent-A-Car that the type size and style of this Answer Brief is submitted in Times New Roman 14-point font, in compliance with the font requirements contained in Rule 9.210(a) (2), Florida Rules of Appellate Procedure.

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

Respondents.
_____/

FIFTH DCA CASE NO.: 5D03-188
CIRCUIT COURT CASE NO.: CIO-99-6377
ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

APPENDIX TO ANSWER BRIEF OF RESPONDENT PV HOLDING CORP. d/b/a AVIS RENT-A-CAR

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