IN THE SUPREME COURT OF THE STATE OF FLORIDA

JILL MARSH,

Petitioner, CASE NO.: SC06-118

v.

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

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases: Page

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner/Plaintiff, JILL MARSH (hereinafter AMarsh@), timely appeals from a decision of the Fifth District Court of Appeal, rendered December 23, 2005, in favor of Respondents/Defendants, ROBERT EARL VALYOU, JR. and DEBORAH A. VALYOU, THOMAS JONATHAN BURKE and DONNA E. BURKE, PV HOLDING CORP., d/b/a AVIS RENT-A-CAR, hereinafter (ARespondents@). The final judgment in this case arose out of the trial court=s ruling in two contested *Frye*[1] hearings, resulting in orders dated February 5, 2002 and November 27, 2002, respectively. The Petitioner herein challenges the Fifth District's affirmation of the trial court=s denial of each of the *Frye* motions, regarding the admissibility of expert testimony as to the causal link and or substantial contribution between trauma and Petitioner=s diagnoses of fibromyalgia and myofascial pain syndrome.

In early 1995, Jill Marsh was a 30 year old attractive and vibrant woman who was at the time engaged to be married to her high school sweetheart of 12 years (R5 891; SR1 255). Jill was starting her own business as an artist painting dog collars and enjoyed tap dancing, modeling and other sports and aerobics (R5 891; SR1 2605, 2625). On August 3, 1995, Petitioner was first injured when she was involved in an automobile accident with Respondent Deborah A. Valyou (the vehicle driven by

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Deborah Valyou was owned by she and/or her husband, Respondent Robert Earl Valyou, Jr.)(R1 3). On April 14, 1996, Petitioner was involved in a second accident, when the car in which she was riding as a passenger was struck by Respondent Thomas Jonathan Burke (the Burke vehicle was owned by Thomas Jonathan Burke and/or his wife, Donna E. Burke)(R1 4). On June 20, 1996, Petitioner was operating a motor vehicle when involved in a third accident with Bryan Arnold Blomker, who was driving a rental car owned by Respondent PV Holding Corp., d/b/a Avis Rent-A-Car (R1 5). Finally, on January 20, 1998, Petitioner was involved in fourth accident in which her automobile was struck by a vehicle owned by Scott David Chilcutt (who is not a party to this appeal)(R1 6). Petitioner was injured and/or re-injured in each accident, culminating in extraordinarily complex and debilitating injuries (R5 891).

Petitioner was treated by various physicians, each of whom opined that she suffered from Fibromyalgia and or myofascial pain or Myofascial Pain Syndrome. Fibromyalgia is a chronic musculoskeletal pain and fatigue disorder characterized by "tender points" at designated locations throughout the body which are painful and or tender. The effects of Fibromyalgia range from a mere nuisance to total disability even preventing the Fibromyalgia sufferer from getting out of bed (R5 891). The epidemiologic data indicates that as much as 2-5% of the population has Fibromyalgia. It is most common between the ages of 30 and 60 and women appear

to be five times more likely to be afflicted than men. While the precise etiology and exact pathological mechanisms are not fully understood, *there is no dispute among rheumatologists, the trial court, or the parties to this case, that fibromyalgia is a legitimate, potentially debilitating, and very painful condition* (R5 891).

Petitioner filed a four count complaint against Respondents on July 29, 1999, alleging negligence against the drivers and vicarious negligence of Respondent Avis (R1 1-7). Various answers and defenses were filed by Respondents (R1 8, 11, 13, 15, 21, 25). Trial was eventually set for November 6, 2001 (R1 70, 132).

Petitioner at trial would have had several medical experts and treating physicians testify. At least four of those doctors would have given pure opinion testimony based solely upon their training, education and experience in reaching conclusions that Jill Marsh suffered from severe Fibromyalgia, Myofascial Pain, Chronic Pain Syndromes and/or other complex soft tissue injuries.

On November 5, 2001, the day before trial, Respondent Avis filed a motion to determine the admissibility of expert testimony and sought a *Frye* hearing on the opinion testimony of Petitioner=s multiple experts and treating physicians (R3 562-567). Specifically, Respondents sought to exclude testimony of all Petitioner=s treating doctors and expert witnesses, from testifying that a causal link existed between the automobile collisions in this case and Petitioner=s claim for fibromyalgia

syndrome. In response, Petitioner filed a memorandum in opposition on November 6, 2001 (R3 568-576). A *Frye* hearing was thereafter conducted in two parts on November 5 and 6, 2001 (R4 763-831). Petitioner filed a second memorandum and supporting documents on November 6, 2001, addressing the issue of the experts= testimony relating to post-traumatic fibromyalgia from the standpoint of *Frye* (R2 290-446; R3 447-619; R3-568-576; R4 727-28).

Following the hearing, the court ruled *ore tenus* that Petitioner=s experts would be excluded from offering pure opinion testimony that Petitioner=s FM was caused by the trauma of the multiple accidents;[2] the trial itself was postponed prior to jury impanelment (R4 629-724, 725-726). Although Petitioner objected to the postponement, and requested to move forward with the trial, the court ruled that the trial of the case was so interwoven with the concept of post-traumatic fibromyalgia, prejudice would result to the Respondents if the case were permitted to move forward at that time (R4 629-724). Some time later, Respondents submitted a proposed order to the court regarding the *Frye* ruling; Petitioner objected to the language of this proposed order twice in letters to the court and requested a hearing to discuss the evidentiary problems with the way the order was worded (R4 729-730).

On January 8, 2002, Petitioner moved for rehearing, or in the alternative, for

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[2]Order not actually memorialized until February 5, 2002 (R4 742-747).

clarification of the court=s *Frye* ruling (R4 736-739). Petitioner=s motion was denied by order entered January 8, 2002 (R4 740-741). The trial court thereafter entered its written order granting Avis= motion to determine the admissibility of expert testimony on February 5, 2002 (R4 742-747). The court=s initial order stated in part s as follows:

> The Court initially rejects Plaintiff=s contention that the *Frye* test does not apply to her experts= testimony. The Court has no doubt, based upon the medical and legal submissions by the parties, that this underlying causal theory is Anew or novel@ within the meaning of the case law, and that the application of the *Frye* test is appropriate and necessary in this case. . . The Court, thus, finds and concludes that Plaintiff has failed to meet her burden of demonstrating by a preponderance of the evidence that the theory that trauma can cause fibromyalgia syndrome is generally accepted among fibromyalgia experts.

(R4 742-747). The Trial Court went on to find that, A[b]ecause this ruling effectively bars Plaintiff=s claim for damages for fibromyalgia, the Court will entertain a motion from Defendants for partial summary judgment on that claim@ (R4 747).

Thereafter, on March 19, 2002 and April 1, 2002, Respondents filed motions for partial summary judgment as to Petitioner=s claim for damages for fibromyalgia (R4 751-753, 759-761). In some desperation to obtain guidance from the court regarding the arising evidentiary problems created by the court=s ruling addressed in various letters to the court, Petitioner moved for a case management conference to address these issues (R4 748, 872, 729). An order was thereafter entered by the trial court on March 19, 2002, as to those issues to be addressed at the case management conference (R4 754-755). Both parties submitted memorandum of law on June 18, 2002 (R5

885-890, 891-1144).

The case management conference was conducted on August 1, 2002 (R5 1147-1212). At the case management conference, the court considered the problems and inequity resulting from Respondents= proposed language in the FM order and the court even suggested the order could even be rewritten or amended through additional orders. The trial court then requested the parties readdress the *Frye* issues by way of legal memorandum within 20 days from the date of that hearing. The case was then set for trial for the fourth time in October 2002.

On September 5, 2002, Petitioner filed an emergency motion for a case management conference on the impact of the language from the court=s fibromyalgia ruling/order, the trial status, and other issues (R5 1222-1223). In light of impending scheduled depositions of experts, an emergency hearing was conducted on September 9, 2002 and a second order was entered on September 12, 2002 addressing deficiencies in the earlier fibromyalgia order (R5 1224-1226). The court ruled in part:

> A. The Court adheres to its previous ruling that evidence and expert testimony that Plaintiff=s alleged fibromyalgia was caused by automobile accident trauma is inadmissible under Florida=s *Frye* rule.

(R5 1224-1226). The case was thereafter again set for the November trial docket by order entered October 22, 2002 (R5 1236-1240).

On November 15, 2002, Respondent Avis filed an amended motion in limine as

to the admissibility of Petitioner=s expert testimony on for post traumatic myofascial pain syndrome, together with the supporting affidavit of Dr. John Rice (R6 1337-1340, 1341-1356). On November 18, 2002, Respondent filed a second motion to determine the admissibility of Petitioner=s expert testimony at trial, this time as to testimony of Petitioner=s experts regarding a causal relationship between trauma and Myofascial Pain Syndrome (MPS) (R6 1357-1367). Respondent Valyou joined in Respondent Avis= motion on November 19, 2002 and Respondent Avis filed a supporting memorandum of law on November 22, 2002 (R6 1368, 1371-1378). Petitioner filed a memorandum in opposition on November 22, 2002 (R6 1404-1412).

A *Frye* hearing was conducted on Respondent=s second motion to determine admissibility of expert testimony and summary judgment motions, on November 18, 2002 (SR13 4570-4718). The trial court entered a written order on November 27, 2002, on Respondents= second motion to determine the admissibility of expert testimony (R6 1384-1388). The court found in pertinent part as follows:

> This Court=s Order of February 5, 2002, barred expert testimony of a causal link between trauma and FM, because of insufficient general acceptance in the scientific community of that theory of causation. The Court finds that there is even less of a scientific consensus regarding causes of and diagnostic procedures for MPS; therefore, no testimony about Plaintiff=s alleged MPS will be admitted in this case.

(R6 1384-1388).

A hearing was thereafter conducted on December 3, 2002 at which time the

court granted final summary judgment in favor of Respondents with the acknowledgment by all parties and by the court that the Petitioner would immediately seek an appeal of the court=s rulings (SR13 4555-4569). Thereafter, a final summary judgment was entered on December 19, 2002 (RCC 2548-2549).[3] The final summary judgment states as follows:

> In the light of the Court=s two *Frye* rulings, Plaintiff=s counsel has represented that all evidence causally relating all of the Plaintiff=s organic injuries to the subject collisions has been excluded from presentation at Trial and that while Plaintiff continues to suffer from some secondary symptoms and injuries - including but not limited to myofascial pain, headaches, depression, sprain, strain, head trauma, etc. - such symptoms and injures arise from and are integrally part of the two conditions of Fibromyalgia Syndrome and Myofascial Pain Syndrome which this Court has excluded from consideration and any discussion at Trial in this case.

(RCC 2548-2549).

Marsh filed her notice of appeal in the Fifth District Court of Appeal on January 21, 2003 (5th DCA R 1-3). During the course of the appeal, and after briefing was completed by all parties, Marsh learned of a new and most recent consensus report on the issue of fibromyalgia, published while the case was on appeal, and entitled:AFibromyalgia Syndrome: Canadian Clinical Working Cases Definition, Diagnostic and Treatment Protocols B A Consensus Document,@ by Jain, Anil Kumar,

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3 Despite the stipulation of all parties as to entry of judgment and appeal, Respondents proceeded to file offer of judgment motions for attorney=s fees; said motions have been abated pending the outcome of this appeal.

et al.; co-published simultaneously in the Journal of Musculoskeletal Pain (The Haworth Medical Press, an imprint of the Haworth Press, Inc.), Vol. 11, No. 4, 2003, pp. 2-107 and in The Fibromyalgia Syndrome: A Clinical Case Definition for Practitioners [ed: I. Jon Russell] The Haworth Press, Inc., 2003, pp. 3-107. This report constituted the most exhaustive medical works to that date on fibromyalgia; the earlier 1996 Consensus Report was included in the record and had been heavily relied on by Respondents in both the circuit and district courts. In order to bring the new Consensus Report to the district court's attention prior to oral argument, Marsh filed a Second Notice of Supplemental Authority on July 23, 2004, attaching the articles thereto (Marsh Appendix to Initial Brief at 3). Respondents objected and moved to strike Marsh's supplemental authority; the Fifth District granted Respondent's motion and struck the supplemental authority on August 19, 2004 (5th DCA R 17-21, 30).

Marsh filed a motion seeking rehearing of the district court's order on September 1, 2004 and Respondents objected (5th DCA R 31-38, 39-45)[4]. On December 16, 2004, the Fifth District entered an order, *sua sponte*, relinquishing jurisdiction to the Circuit Court for Orange County, for a period of two months:

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4 Marsh relied on the cases of *Brim v. State*, 695 So. 2d 268 (Fla. 1997), and *Brim v. State*, 779 So. 2d 427 (Fla. 2nd DCA 2000), in which the parties were permitted to supplement the appellate record with a DNA report which updated an earlier report contained in the existing record, and which was not in existence at the time of Brim's trial.

> *[F]or 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 a revised order which shall be forthwith submitted to this Court. After receipt of the supplemental record, this court will conduct an expedited review and conclude the appeal. *See Brim v. State*, 695 So. 2d 268 (Fla. 1997).

(5th DCA R 46).

Initially status hearings were conducted before the original trial judge, George A. Sprinkel, IV, on January 5, 2004 and February 1, 2005, respectively (2SR 2758-18, 2819-45). Following these hearings, the court entered an order instructing the parties to submit any scientific/medical articles or material published since the filing of the appeal, together with supporting memorandum, prior to the next scheduled hearing on March 2, 2005 (2SR 2647-49). The parties thereafter filed Marsh's Memorandum of Law and Medicine dated February 2, 2005; Defendant's Compliance and Amended Compliance with Court Order Requesting Scientific Evidence to be reviewed, dated January 21 and 24, 2005; and Defendant's Memorandum of Law Submitted for Evidentiary Hearing on New Scientific Evidence on Fibromyalgia Syndrome, dated March 1, 2005 (2SR 2656-81, 2555-644, 2645-46, 2682-722).

At the hearing on March 2, 2005, the parties supplied the court with additional materials (2SR 2994-3117, 3118-3241, 3242-3671). At the start of the hearing, the court informed the parties:

> I think that *Johnson* is right on point. I think that the argument that was made, frankly, by Plaintiff that the *Frye* test did not apply to these treating physicians who, by…differential diagnosis…in this instance, the differential diagnosis is a clearly relied upon type of methodology. I have to tell you, it seemed to me like – the favorite saying I have in dealing with cases is sometimes we can't see the forest for the trees. Johnson was kind of like an epiphany to me…in fact, the Plaintiff was arguing this shouldn't even be a *Frye* test. This is not a *Frye* type situation, and that's what *Johnson* said.
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> It is a question of whether a treating physician talking about a specific patient can opine as to the causation of the injury and demonstrate to the court the reason to do that. It said over and over again in those cases, in *Henson* and *Johnson* and *Castillo*…[t]hat it's a question of fact for the jury. It's a question of weight of evidence and that if the court precludes the jury from hearing this testimony, then it precludes—it interferes with the trier of fact in their being given the information necessary to make a decision.

(2SR 2850-54). The court then instructed the parties to prepare memoranda addressing the trial court's jurisdiction to consider recent developments in case law, within the bounds of the Fifth District's December 16, 2004 order.

The parties thereafter submitted memoranda on the issue of jurisdiction. Respondents argued in Defendant's Memorandum of Law Concerning Jurisdiction of Trial Court Pending Appeal, that the trial court was limited to conducting an evidentiary hearing considering only issues of medicine and ignoring any changes in the law which may have taken place since the trial court=s order which was the subject of the appeal; Marsh disagreed, arguing in her Memorandum of Law on the Issue of Jurisdiction, that it was not the intention of the Fifth District to prohibit the trial court

from realizing the current state of the law, particularly where changes in the law could significantly affect the court=s ruling on the medical issues (2SR 2725-2731, 2732-2741).

A final "evidentiary" hearing was conducted on March 24, 2005 (2SR 2961-78). At the start of the hearing, the court informed the parties that after reviewing the memoranda, he was satisfied that he did not need to hear any argument and that he was "strictly limited to that which I'm instructed to review" (2SR 4). The court went on to hold:

> And I know you all have spent some time in preparation for this hearing, but…this is going to be very short, and that is, I don't need to hear any additional argument in this case…
>
> My decision remains the same. There is insufficient evidence. I don't see anything relatively compelling on the horizon to show that this would meet the *Frye* test, and the *Frye* standard is the appropriate standard to apply. I've read all the scientific evidence submitted, and I've read it, I want to say, in toto, but if there were pages that looked like, and I scanned them, that they didn't pertain to what I was looking for, then I didn't read all of those. But I read, to try and gain the tenor from the reports as well…and I don't think the scientific community's position has changed at all from the previous ruling that I made…
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> [I]n reading the defendant's memorandum of law, I think its right on the money as far as the Court's view of this. I'm going to direct that the defendants prepare a proposed finding of the Court based on the memorandum citing the – all of the treatises that have been provided…
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> My finding is that the defendant's memorandum of law was persuasive…and the order needs to follow the memorandum.

(2SR 2964-65, 2911).[5]

Thereafter, Respondents submitted a proposed order to the trial court which incorporated portions of their Memorandum of Law on New Scientific Evidence. Respondents' proposed order was adopted by the court in its entirety and was rendered on April 1, 2005 (2SR 2979-89). The order was then submitted to the Fifth District on April 4, 2005 (5th DCA R 51-61).

The parties appeared at oral argument before the Fifth District on September 20, 2005. Three months later, on December 23, 2005, the Fifth District entered a 27 page opinion in *Marsh v. Valyou, et. al.*, 917 So. 2d 313 (Fla. 5th DCA 2005); the opinion affirmed the ruling of the trial court and certified conflict with *State Farm Mutual Auto. Ins. Co. v. Johnson*, 880 So. 2d 721 (Fla. 2d DCA 2004) (5th DCA R 82-108). In its opinion, J. Griffin presiding, the Fifth District held that the proposed testimony of Marsh's experts failed to satisfy the *Frye* test for the admissibility of scientific evidence, and was therefore properly excluded. Finding that, A[t]he Florida Supreme Court has distinguished causation testimony based on 'studies and tests' from 'pure

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[5] Prior to the close of the hearing, counsel for Marsh asked that the court take notice of the recently decided opinion of *Gelsthorpe v. Weinstein*, 897 So. 2d 505 (Fla. 2d DCA 2005); Marsh also filed a notice of supplemental authority as to this case on March 24, 2005 (2SR 2742-57, 2968).

opinion testimony' based on an 'expert's personal experience and training,'@[6] the Fifth District now takes the position in *Marsh* that in order to combat any implication of infallibility, the supreme court has further intended to Alimit *Frye* to cases in which the underlying basis of an expert's opinion as to causation has been based on scientific studies or tests.@ *Marsh*, 917 So. 2d at 320-21. Addressing the Second District's opinion in *Johnson*, which the *Marsh* court dubs, Athe only Florida court to consider the issue...hold[ing] that expert testimony that a patient's fibromyalgia was caused by trauma is pure opinion testimony that is admissible without regard to *Frye*, where that opinion is based solely on the expert's clinical experience, training and an examination of the plaintiff,@ the Marsh court takes an opposing position on the grounds that other courts Aoverwhelmingly@ have held that causative evidence linking trauma to fibromyalgia is inadmissible in the absence of a plaintiff's ability to demonstrate general acceptance in the scientific community of such a link. *Id*. at 322-23. Relying on a line of only *Daubert* cases, the Fifth District found these decisions to be Aconvincing and the weight of authority compelling,@ and the court expressed its opinion that:

> [W]e think the view that expert opinion testimony regarding the cause of a

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6 Relying on *Hadden v. State*, 690 So. 2d 573, 579-80 (Fla. 1997), *Marsh* finds that the supreme court has defined Apure opinion testimony@ as Athe 'testimony of an expert' based 'solely on the expert's training and experience' and as 'testimony personally developed through clinical experience.'" 917 So. 2d at 321.

> plaintiff's fibromyalgia is "pure opinion testimony" misapprehends the nature of the "pure opinion testimony" exempt from *Frye*. An expert's opinion that a defendant is a schizophrenic is pure opinion testimony, as it is based on a conclusion drawn by the expert from clinical experience without the need for making any underlying assumptions. An expert is taught the symptoms of this disease and, based on his training and experience and his examination of the defendant, is permitted to testify that the defendant has the disease. Likewise, an expert would be permitted to testify that, based on his training and experience, a plaintiff suffers from fibromyalgia.
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> This "pure opinion" testimony where the experts were being asked to testify that the plaintiff's fibromyalgia was caused by trauma requires, however, an underlying scientific assumption--that trauma can cause fibromyalgia--which is not involved in pure opinion testimony cases. The underlying scientific principle (sometimes referred to as the issue of "general causation") would appear to be subject to the tests established in *Frye* and/or *Daubert*. This type of opinion testimony also implies the infallibility of the basis of the opinion.

Id. at 324, 326-27. [Emphasis added]. While seeming to suggest that Marsh's experts could have properly testified that in their Apure opinion@ that she suffered from fibromyalgia, the Fifth District goes on to carve out an exception to conclusions drawn from underlying assumptions. *Id.* at 327. Denoting cases in which general causation was equated with Athe underlying scientific principle@ or Aassumption,@ the Fifth District noted that *Frye* had been applied by other district courts in Florida, including the Fifth, though this issue had not been discussed in any of those cases.[7]

Although the *Marsh* opinion cites with approval those *Daubert*/Fibromyalgia

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[7] Citing *Poulin v. Fleming*, 782 So. 2d 452 (Fla. 5th DCA 2001) and *Kaelbel Wholesale, Inc. v. Soderstrom*, 785 So. 2d 539 (Fla. 4th DCA 2001).

cases in which expert testimony is held inadmissible, Footnote 4 goes on to recognize other *Daubert*/Fibromyalgia cases in which expert testimony was admitted, puzzlingly holding that Athese cases are of little value here, since the *Daubert* test is different and generally considered to be more liberal than *Frye.*@ *Id*. at 324. The *Marsh* opinion would also appear to denounce the utility of the differential diagnosis or other general methodology as applied by the expert to render an opinion. *Id*. at 325. In response to what the court refers to as the Afallacy of post-hoc propter-hoc reasoning,@ the *Marsh* court would require that:

> The underlying predicates of any cause-and-effect medical testimony are that medical science understands the physiological process by which a particular disease or syndrome develops and knows what factors cause the process to occur. Based on such predicate knowledge, it may then be possible to fasten legal liability for a person's disease or injury.

Id. at 325. The court then goes on to hold that:

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

Id. at 327. The Marsh opinion went on even further to approve the trial court's ruling that there was Aeven less of a scientific consensus regarding causes of and diagnostic procedures@for myofascial pain syndrome,@ on the stated grounds that Athere is a substantial body of opinion among rheumatology experts that MPS is merely a form of fibromyalgia syndrome@ and therefore it is Aclear that there is no general acceptance@ in the scientific community regarding even the existence of MPS apart from fibromyalgia. *Id.*

Finally, the Fifth District rejected Marsh's argument that her case was an Aimpact@ case and not subject to *Frye*, pursuant to *Florida Power & Light v. Tursi*, 729 So. 2d 995 (Fla. 4th DCA 1999), and *Cerna v. South Florida Bioavailability Clinic, Inc.*, 815 So.2d 652 (Fla. 3rd DCA 2002). *Id*. at 328. The Marsh court explained that in *Tursi*, a plaintiff was injured when a chemical toxin dripped into his eye, causing him to later develop a cataract; on appeal, the court held that the expert testimony of the ophthalmologist was opinion testimony not subject to *Frye*:

> [B]ut was more in the nature of an orthopedist's testimony that a neck injury, which did not manifest itself with symptoms until four years after a rear-end collision, was caused by the accident. The court said that this latter type of evidence was admissible without reference to *Frye.*

The *Tursi* court explained:

> 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.
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> FP & L loses sight of the forest for the trees when it focuses on the narrow issue of whether PCB's can cause cataracts, rather than the broader issue of whether this type of trauma could have ultimately resulted in a cataract. Unlike the cases applying the *Frye* test relied on by FP & L, this case involves one incident of trauma, an immediate injury, and a more serious injury developing four years later, at the site of the trauma. The ophthalmologist's opinion on causation was not based on "novel scientific evidence," Hadden *v.* State, 690 So.2d 573, 578 (Fla.1997), but rather his experience and training. It was no more novel than an orthopedist testifying that a neck injury, which did not manifest itself with symptoms until four years after a rear-end collision, was caused by the accident. The trial court did not err in allowing him to testify.

Id. at 328; citing *Tursi*, 729 So.2d at 996-997 (footnotes omitted).

The Fifth District then abruptly concluded that the Marsh case was more like *Cerna*, in which a plaintiff orally ingested pharmaceutical drugs which caused him to go blind. The Fifth District concluded that Marsh was more like *Cerna* than *Tursi*.

Concurrent with its opinion on December 23, 2005, the Fifth District entered an order which denied Respondent Burke's motion for §57.105 attorney's fees, but provisionally granted motions by Burke and Valyou for attorney's fees under offer of judgment (5th DCA R 109). This appeal follows.

SUMMARY OF ARGUMENT

The trial court erred in this case by conducting two *Frye* hearings and granting motions by Respondents to exclude the testimony of Petitioner=s expert witnesses, in effect foreclosing any testimony by Petitioner=s medical experts on causation and culminating in the entry of a final summary judgment as to all claims. The court ruled that Petitioner=s experts would not be permitted to testify regarding the link between the automobile collisions (trauma), and Petitioner=s Fibromyalgia and Myofascial Pain Syndrome, even though Petitioner was completely healthy prior to the accidents and fully disabled after the accidents; the court=s ruling further foreclosed Petitioner=s experts from offering any causal testimony at all of Petitioner=s organic injuries in this case.

First, the *Frye* standard should not have been applied in this case where the facts establish this to be an Aimpact@ case, i.e., where immediate injury occurred following initial (and subsequent) incidents of trauma. Petitioner would argue further that the testimony of her experts was not based on any Anew and novel@ scientific techniques (which would have brought the case under the purview of *Frye)*, and furthermore that the pure opinion testimony of treating doctors and expert witnesses, based solely upon their training, education and experience, as a matter of law, is not subject to a *Frye* inquiry when such opinions are based on the well established

methods and procedures of clinical medicine, namely of taking a history, reviewing medical records, examining the patient and making a differential diagnosis.

Further, the Fifth District erred in *Marsh* by misting the differences between the *Frye* and *Daubert* tests and in effect applying a *Daubert* analysis to make the facts of this case. Of particular importance, the Fifth District has improperly analyzed the conclusions of Respondents experts and not the methodology used to reach those conclusions.

Petitioner would argue in the alternative that, even if a *Frye* standard was appropriately applied in this case to all or part of the testimony of her experts, such testimony should nevertheless have been admitted where her experts based their opinions on generally accepted basic underlying principles and methodology of scientific evidence, even if the conclusions of her experts were not generally accepted. Petitioner would therefore contend that the court erred as a matter of law in concluding that her expert witnesses: conclusions, and not solely the underlying methodology from which the opinions derived, were subject to a *Frye* analysis.

ARGUMENT
POINT ONE

I. THE FIFTH DISTRICT ERRED IN AFFIRMING THE LOWER COURT'S RULING EXCLUDING THE TESTIMONY OF MARSH'S EXPERT WITNESSES.

A. Florida Has Adopted the *Frye* Test to Determine the Admissibility of New and Novel Scientific Testimony.

In determining the admissibility of expert testimony based upon new and novel scientific methods, Florida courts have adopted the test found in *Frye v. United States,* 293 F. 1013, 1014 (D.C. Cir. 1923), the seminal case setting forth the proposition that new scientific evidence must be generally accepted within the relevant scientific community to be admissible:

> Just when a *scientific principle* or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

This court in *Brim v. State*, 695 So. 2d 268, 274 (Fla. 1997), has held that a district court must review the admission of evidence under a *Frye* standard *de novo* and must review the trial court=s ruling as a matter of law rather than under an abuse of discretion standard. *See State v. Sercey*, 825 So. 2d 959 (Fla. 1st DCA 2002)(Florida Supreme Court in *Brim* has required reviewing court to reach a *de novo* determination

of whether there is general acceptance within the relevant scientific community of the novel science before it).

B. The Public Policy Rationale Behind *Frye* is to Weed Out "Junk Science" Based on New and Novel Tests and Innovative Scientific Techniques, Not to Challenge the Ultimate Result and Conclusion of Medical Experts and Treating Physicians.

The public policy rational behind the *Frye* test is to weed out Ajunk science@ based on new and novel tests and innovative scientific techniques found in the Atwilight zone@ of credibility, *not* to challenge the ultimate result and conclusion of every expert or treating physician. The *Frye* test is an exception[8] to the normal procedures of a jury trial, where cross examination and opposing expert testimony are relied upon to expose the weaknesses of an expert. *Frye* adds an additional layer of judicial screening when experts rely on novel scientific Atests@ or Atechniques." *U.S. Sugar Corp. v. Henson*, 787 So.2d 3. Florida=s A*Frye* test@ is concerned with the effect that *seemingly objective scientific* evidence can have on the jury. When an expert bases his opinion on scientific tests or techniques, Athe jury will naturally assume that the scientific principles underlying the expert=s conclusion are objective and valid evidence.@ *Flanagan v. State*, 625 So.2d 827, 828 (Fla. 1993). An expert=s direct reliance on scientific tests or techniques creates an aura of Ainfallibility@ around his

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8 As the Supreme Court observed in *U.S. Sugar v. Henson*, 823 So.2d 104, 109 (Fla. 2002), A in the vast majority of cases, no *Frye* inquiry will be required ....@

testimony. *Id.*

Most expert testimony does ***not*** require a *Frye* analysis. In fact, Florida courts have routinely admitted expert testimony that physical trauma from accidents causes permanent and complex pain syndromes including Fibromyalgia.[9] There is an abundance of sound, plausible and respected scientific theories and clinical evidence supporting a strong association and a robust correlation between trauma and fibromyalgia sufficient to infer causation in a legal setting. Just because there is a legitimate controversy within the medical community on a question does not prevent an expert from proffering testimony on that question. When a medical expert bases his or her opinion on clinical experiences, case reports and epidemiological research, such generally accepted forms of evidence are sufficient under Florida Law for an expert to infer a medical causation.

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9 *See, e.g., Zell v. Meek*, 665 So.2d 1048, 1049 (Fla.1996) (medical testimony that trauma led to fibromyalgia and depression); *James v. Humana Hospital-Brandon*, 644 So.2d 116 (Fla. 1st DCA 1994)(medical testimony that an industrial accident caused fibromyalgia); *Siegel v. AT&T Communications*, 611 So.2d 1345,1350(Fla. 1st DCA 1993)(medical testimony to determine whether a workplace accident caused fibromyalgia and depression); *Jennings v. Ray*, 484 So.2d 1267, 1268 (Fla. 5th DCA 1986) (chiropractic testimony that auto accident caused whiplash injury and permanent impairment); *Tampa Transit Lines, Inc. v. Smith*,155 So.2d 557, 558 (Fla. 2d DCA 1963)(medical testimony that whiplash injury caused permanent pain; *Crosby v. Tampa Elec. Co.*, 142 So.2d 722, 723-24 (Fla. 1962)(medical testimony that workplace accident caused pain and arthritis).

C. The Florida Supreme Court has Previously Held That Pure Opinion Testimony Is Not Subject To A *Frye* Analysis.

On July 10, 2003, this court decided *Castillo v. E.I. DuPont de Nemours & Co., Inc., et. al.*(*Castillo II*),854 So. 2d 1264 (Fla. 2003), a major *Frye* decision which directly on point to *Marsh* and which is dispositive to the issues in this appeal regarding both pure opinion testimony and differential diagnosis. In *Castillo II*, this court examined the issue of whether certain expert trial testimony was admissible under *Frye*. In doing so, the court addressed a conflict between the First and the Third District=s opinions of *Berry v. CBX Transportation, Inc.*, 709 So. 2d 552 (Fla. 1st DCA 1998) and *E.I. Dupont De Nemours & Co., Inc. v. Castillo (Castillo I)*, 748 So. 2d 1108 (Fla. 3rd DCA 2000). This court quashed the Third District=s holding in *Castillo I* and found the expert testimony was admissible under *Frye*.

Castillo II is products liability and negligence action filed by the Castillos against E.I. DuPont de Nemours, the manufacturer of Benlate (an agricultural fungicide), and Pine Island Farms, the owners of a farm in the Castillos= neighborhood. The plaintiffs alleged that while Mrs. Castillo was seven weeks pregnant, she was exposed to Benlate, and that as a result, benomyl entered her bloodstream and caused microphthalmia in her unborn child. The Castillos= medical expert testified that he believed fetal exposure to benomyl would cause microphthalmia in humans based on his conclusions from (1) rat gavage studies; (2)

lab experiments on human and rat cells; and (3) the results of dermal exposure testing done by DuPont's own scientists. *Id.* at 1267. A *Frye* hearing was conducted to determine whether Benlate could cause birth defects in humans. The defendants= motion in limine was denied and the expert testimony of the doctor was admitted. A jury verdict was ultimately entered for the child, holding DuPont strictly liable and finding both DuPont and Pine Island negligent. *Id.*

On appeal, defendants argued that the doctor=s expert scientific testimony was improperly admitted into evidence. The Third District agreed and reversed, finding that the testimony did not meet the *Frye* test. *Id.* In a lengthy and well-reasoned opinion, this Court quashed the ruling of the Third District, and held that the trial court *had* properly admitted the expert=s pure opinion testimony under a *Frye* analysis.

On May 12, 2004, the Second District decided *State Farm Mutual Automobile Insurance Company v. Karen S. Johnson*, 880 So.2d 721 (Fla. 2d DCA), *rehearing den*. (Fla. 2004), a case with nearly identical facts to this appeal. *Johnson* squarely ruled that pure opinion testimony linking trauma from an auto collision to fibromyalgia was not subject to a *Frye* analysis. The reason *Frye* was found not to apply is because the testimony proffered was based upon the experts= training, education, experience and a differential diagnosisB-and not upon any new or novel scientific techniques.

The Second District held that A[b]y definition, the *Frye* standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques.@ *Johnson*, *citing Henson* at 109. The *Johnson* court further held:

> AHere the medical experts rendered their opinions based upon their clinical experiences, Mrs. Johnson=s history, and the recognized relationship or association between trauma and the onset of fibromyalgia. State Farm did not challenge the doctors examination methods, their clinical practices, or Mrs. Johnson=s history. Nor would it have been successful. >Differential diagnosis is the standard scientific technique of identifying the cause of a medical problem by eliminating likely causes until the most probable one is isolated. This technique has been found to have widespread acceptance in the medical community, to have been subjected to peer review, and to not frequently lead to incorrect results.=@ *U.S. Sugar Corp. v. Henson*, 787 So. 2d 3, 19 (Fla. 1st DCA 2000), *aff=d*, 823 So. 2d 104 (Fla. 2002).

The *Johnson* court went on to quote the Florida Supreme Court=s ruling in *Henson, supra*, that, A[t]herefore in the vast majority of cases, no *Frye* inquiry will be requiredB-because no innovative scientific techniques will be at issue."

As the Fifth District recognized in *Rickgauer v. Sarkar*, 804 So. 2d 502 (Fla. 5th DCA 2001), most expert testimony is not subject to the *Frye* test. In *Rickgauer*, a medical malpractice case, the Fifth District noted that the purpose of the *Frye* test is to guarantee the reliability of new or novel scientific evidence through its general acceptance by the relevant scientific community. The court went on to point out, however, that the Apure opinion testimony of expert witnesses does not have to meet

the *Frye* test because it is based on the expert=s personal opinion.@ *Id.* at 504. In determining that *Frye* did not apply, (even though no error was found in the exclusion of the expert=s testimony) the court noted that the expert was permitted, Ato testify by way of expert opinion, in support of the essential elements of the Petitioner=s malpractice case.@ Specifically, the Fifth District recognized in Footnote 4:

> A distinction exists between factual evidence or testimony and opinion testimony and as a general rule, factual evidence cannot be rejected unless it is contrary to law, improbable, untrustworthy, unreasonable or contradictory. Opinion testimony is not subject to the same rule. [Citations omitted].

Id. at 505. Clearly, under *Frye*, it is *not* the expert=s opinion that must be generally accepted, it is the underlying principle **C** Athe thing from which the deduction is made.@ 293 F. at 1014.

It is well-recognized that Florida=s courts do not apply *Frye* to Apure opinion@ testimony based on the expert=s training and experience in the clinical setting. *Flanagan v. State, supra; U.S. Sugar Corp. v. Henson,* 787 So.2d 3. This state recognizes instead that a jury can evaluate such testimony in the same way it evaluates other opinion testimony. When an expert has developed his opinions based on clinical experience, Athe trial court must determine admissibility [based] on the qualifications of the expert and the applicable provisions of the evidence code,@ not on the *Frye* test. *Hadden v. State,* 690 So.2d at 580. It is clear that the ruling by the Fifth District in *Marsh*, effectively finding that the pure opinion testimony of Petitioner's experts was

inadmissible, was in error.

Id. at 1275. The court concluded therefore that the challenges of DuPont to the Castillos' experts' conclusions went to the weight of that testimony at trial, not to the admissibility at a *Frye* hearing.

In *Henson*, expert opinion testimony was offered to explain a causative link between injury and a plaintiff=s medical condition, the court held that plaintiffs= experts= testimony about the cause of plaintiff=s paralysis was admissible because it was based on scientific principles such as differential diagnosis, that were generally accepted in the relevant scientific community. Similarly, in the instant case, Dr. Madison and Dr. Pellegrino both used a differential diagnosis to make their fibromyalgia diagnosis. AThose generally accepted principles are not required to be as narrow as the claimant=s precise condition. The role of the expert witness is to apply the generally accepted principles to the facts relating to the plaintiff=s condition.@ 787 So.2d at 20. Thus, *Frye* applies only to the underlying principles on which the experts opinions are based. It does not apply to exclude the end conclusions or "assumptions" of an expert, merely because other experts disagree with them.

Respondents herein do not challenge the Petitioner=s experts= basis for their opinions. Respondents cannot seriously challenge the experts' opinions, or the use of clinical and objective findings, to reach a conclusion about the cause of a patient=s

problem. Nor can the Respondents seriously contest the fact that the insult from trauma or injury can lead to FM because *their own expert admitted* that trauma can Aindirectly cause Fibromyalgia@ as in his deposition and in a text book he co-authored (see Deposition of Dr. John Rice, SR Vol. 6, pp 3414-15, 3418-19, 3447; Depo. pp. 129-30, 133-34, 162).

Respondents in the instant case are in reality challenging Petitioner=s experts= conclusions and Petitioner submits that the validity of those conclusions are a question for a jury, not for the court. *See generally Munoz v. South Miami Hospital, Inc.*, 764 So.2d 854, 857 (Fla. 3d DCA), *rev. denied* 789 So. 2d 348 (Fla. 2000) (A[t]he determination of whether any of these perfectly permissible conclusions is accurately drawn from the circumstances is ... not the job of judges@); *Osburn v. Anchor Lab, Inc.*, 825 F.2d 908, 915 (5th Cir. 1987), *cert. denied*, 485 U.S. 1009, 108 S.Ct. 1476, 99 L.Ed.2d 705 (1988)(Aan expert=s opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative in support of a jury finding@).

POINT II

III. THE FIFTH DISTRICT HAS INCORRECTLY APPLIED A DEFACTO *DAUBERT* ANALYSIS TO EXCLUDE EXPERT MEDICAL TESTIMONY IN *MARSH.*

In excluding the testimony of Marsh's medical experts, the Fifth District used

an unaccountably strict analysis to examine the basis of their conclusions, and found a "lack of scientific support" for the "reliability of [the] theory that fibromyalgia is caused by trauma." 917 So. 2d at 326. In its opinion, the court emphasized the holding in *Vargas v. Lee*, 317 F. 3d 498, 501-503 (5th Cir. 2003), that:

> We do not…purport to hold that trauma does not cause fibromyalgia…Medical science may someday determine with sufficient reliability that such a causal relationship exists. As the Supreme Court recognized in Daubert: "[I]n practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations." [509 U.S. at 597, 113 S. Ct. at 2786].

Id. at 326. While an analysis of the *Marsh* opinion makes clear that the Fifth District incorrectly applied a *Daubert* analysis, rather than a *Frye* analysis, in *Marsh, Daubert* remains a case not binding on the states, where it interpreted *Federal Rule of Evidence 702*, rather than the Constitution. *Castillo*, 854 So. 2d at 1276.

A. The Fifth District Failed to Recognize that *Daubert* is Now Widely Regarded as a Stricter Test than *Frye*.

The Fifth District asserts in *Marsh* that *Daubert* is a more "liberal" test than *Frye*. 917 So.2d at 323, n.4. The court reasons that, because certain federal courts applying the "liberal" *Daubert* test have excluded evidence of traumatically-induced fibromyalgia, Florida courts applying the more "strict" *Frye* test must also exclude this evidence.

The Fifth District is simply mistaken in their assertion. Despite the fact that

some early news reports announced that *Daubert* involved a more "liberal" analysis of the evidence, this view has now been widely rejected.[10] Indeed, this court has again explained in *Castillo* that *Daubert* is a two-prong test*:*

> The first prong of Daubert is the Frye test, which is the test followed in Florida. [Citations omitted]. The second prong requires the court to consider everything from the methodology to the extrapolation of data, all the way to the ultimate conclusion.

Id. at 1276. Because the *Daubert* test imposes the additional restriction on the basic *Frye* test by allowing courts to "consider everything from the methodology to the … ultimate conclusion," the resulting analysis under *Daubert* becomes considerably more rigorous. 854 So.2d at 1276. *Daubert* is certainly more, not less, restrictive than *Frye*, and the Fifth District erred in applying and following a more *Daubert*-like analysis in *Marsh.*

This court in *Castillo* also cited the Third Circuit=s explanation in the case of *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 746 (3d Cir.1994):

> [T]hat a challenge to the *second prong* of *Daubert* >is very close to a challenge to the expert's *ultimate conclusion* about the particular case.=

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

The decision of the Third District was quashed finding that the court=s ruling was well beyond the scope of *Frye*. This court explained:

> *Frye does not require the court to assess the application of the expert's raw data in reaching his or her conclusion*. We therefore conclude that the Third District erroneously assessed the Castillos' expert testimony under *Frye* by considering not just the underlying science, but the application of the data generated from that science in reaching the expert's ultimate conclusion. At least one commentator has pointed this out, calling the Third District's analysis "essentially a *Daubert* analysis" because it focused on the expert's methodology and reasoning. Bert Black, Expert Evidence in the Wake of the *Daubert-Jones-Kumho* Tire Trilogy, SE01 ALI-ABA 125, *169 (1999).

Id. [Emphasis added]. This court reiterated throughout its opinion that *Frye* was not to be used as a vehicle to attack the *conclusions* of experts, particularly where the *underlying methodology* was generally accepted in the relevant scientific community. On at least four separate occasions in *Castillo*, it is stated that where the *underlying methodology* was sound, the findings and conclusions of the experts were not only admissible, but the weight to be accorded to them was a matter to be considered by the trier of fact.

Although Petitioner herein recognizes that Florida follows the *Frye* standard and not the *Daubert* standard, under *Castillo, Daubert* has been found to be a much more stringent standard than *Frye.* Therefore, Petitioner would submit that if such expert testimony has been found admissible by one court under *Frye* even under a much more stringent standard than that existing in Florida, the lower court in the

instant case surely erred in failing to permit Petitioner=s treating physicians to testify that the automobile accidents caused, contributed to, or triggered Petitioner=s *fibromyalgia.*

B. The Fifth District Relied Primarily Upon *Daubert* Fibromyalgia Cases from Other Jurisdictions in Deciding *Marsh.*

The Fifth District cited to and relied upon a number of fibromyalgia cases from jurisdictions other than Florida and upon cases decided under a *Daubert* analysis in their *Marsh* opinion. *See, Vargas v. Lee*, 317 F.2d 498 (5th Cir. 2003); *Allison v. McGhan Medical Corp*., 184 F.3d 1300 (11th Cir. 1999); *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999); *Wynacht v. Beckman Instruments, Inc*., 113 F. Supp.2d 1205 (E.D. Tenn. 2000); *Gross v. King David Bistro, Inc.*, 83 F.Supp.2d 597 (D. Md. 2000); *Schofield v Laboscam, Inc.*, 2002 WL 1335867 (Me. June 6, 2002); *Jones v. Conrad,* 2001 WL 1001083 (Ohio Ct. App. Sept. 4, 2001); *Bushore v Dow Corning-Wright Corp*., 1999 WL 1116920 (M.D. Fla. Nov. 15, 1999); *Minner v. American Mortgage & Guar. Co.*, 791 A.2d 826 (Del. Supr. Ct. 2000); *Hultberg v. Walmart,* 1999 WL 244030 (E.D. La. Apr. 22, 1999). Thus practically every case relied on in *Marsh,* which were held by the Fifth District to be Aconvincing and the weight of authority compelling,@ were decided under a standard stricter than that required by Florida legal precedent.

The Fifth District treated the only Florida *Frye* case directly on point as almost

an anomaly. It held, "[a]s far as we can determine, *Johnson* is the only reported decision *in the United States* allowing evidence linking fibromyalgia to trauma under *Frye*." [Emphasis added]. In fact, not only are there a number of cases in other jurisdictions where a *Frye* test ***was*** applied to examine the admissibility of post-traumatic fibromyalgia testimony,[11] but there are even state supreme court cases, alluded to in passing by the Fifth District in footnote 4, in which the *Daubert* test was applied, and the testimony ***was found to be admissible***. *See, Alder v. Bayer Corp., AGFA Div.*, 61 P. 3d 1068 (Utah 2002); *Reichert v. Phipps*, 84 P. 3d 353 (Wyo. 2004).

C. By Ostensively Applying *Frye* to an Expert's "Assumptions" Rather than to the Basis for the Expert Opinions, the Fifth District Inappropriately Scrutinized the Expert's "Ultimate Conclusions" – in Effect, Applying a *Daubert* Analysis to Exclude Evidence.

In *Marsh,* Petitioner=s experts= pure opinion testimony is based upon generally accepted methods and principles of diagnosis (and differential diagnosis) which include physical examination, medical record reviews and taking a history of the patient **B not** upon any new or novel tests or unfounded methodologies.

In *United States Sugar Corporation v. Henson, (Henson I),* 787 So. 2d 3 (Fla. 1st DCA 2001), an employer appealed from an order of the Judge of Compensation Claims finding the claimant to be permanently disabled due to pesticide exposure in

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11 *McCabe v. Big Lots Stores, Inc.,*; *Grant v. Bocca*, 2006 WL 775162 (Wash.App. Div. 3); *Byrum v. Superior Court*, 2002 WL 243565 (Cal.App. 2 Dist.)

the workplace. The First District affirmed and certified the question, and the Supreme Court held, as a matter of first impression, that *Frye* was applicable to workers= compensation cases.

The appeal in *Henson I* arose after the petitioner filed a motion *in limine* one day before the pretrial hearing, objecting to the claimant=s expert testimony based upon a lack of general acceptance for his theory of causation under *Frye.* Without conducting a separate evidentiary hearing, the JCC accepted the expert=s testimony and ultimately found a permanent disability. In deciding *Henson,* this court has emphasized that:

> [U]nder *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. Certainly, the 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 simply be the recitation of recognized scientific principles to the fact finder. We reaffirm our dedication to the principle that once the *Frye* test is satisfied through proof of general acceptance of the basis of an opinion, the expert's opinions are to be evaluated by the finder of fact and are properly assessed as a matter of weight, not admissibility. (Emphasis added).

Henson, 787 So. 2d at 5. This court has clearly held that it is only the *basis* of the expert=s opinions and deductions which must be found to be generally accepted as a predicate to admissibility, and not the opinions themselves. *See also, Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1433 (5th Cir. 1989), *cert. denied sub nom, Dow Chem. Co. v. Greenhill,* 483 U.S. 935, 110 S.Ct. 328, 107 L.Ed.2d 318 (1989)(as long as expert=s

methodologies are well-founded, the nature of his conclusion is generally irrelevant, even if it is controversial or unique).

Marsh would submit that *Frye* is not a test for challenging an expert=s conclusions. *Frye* is, rather, properly addressed to the methods underlying those conclusions. *See, e.g.*, *Ramirez v. State*, 651 So.2d at 1167 (principle inquiry under *Frye* is Awhether the scientific theory or discovery from which an expert derives an opinion is reliable@); *Hyundai v. Ferayorni*, 795 So.2d 126 (Fla. 4th DCA) (*Frye* does not require acceptance of the expert=s deduction, but only of Athe thing from which the deduction is made@); *Berry v. CSX Transp., Inc.*, 709 So.2d at 567 (A[I]t is not necessary for the expert=s opinion to be generally accepted as well@). *Frye* cannot be used to exclude an expert=s opinions merely because other experts may disagree with them. The Fifth District has erred in *Marsh*, not only in relying so heavily on *Daubert* cases, in effect applying a defacto *Daubert* analysis, but by then compounding its error by misinterpreting the *Daubert* test itself.

POINT III

III. *MARSH* IS AN "IMPACT" CASE AND THEREFORE NOT SUBJECT TO A *FRYE* ANALYSIS

The Fifth District also analyzes the impact rule argued by Marsh in this case by comparing the case of *Cerna v. South Florida Bioavailability Clinic, Inc.*, 815 So.2d 652 (Fla. 3rd DCA 2002) and *Florida Power & Light Co. v. Tursi*, 729 So.2d 995 (Fla.

4th DCA 1999). The term Aimpact@ has been coined by the court in *Cerna v. South Florida Bioavailability Clinic, Inc.*, 815 So. 2d 652 (Fla. 3rd DCA 2002), to describe a case in which an immediate injury occurred following some initial incident of trauma, with a more serious injury developing later.

Cerna involved a Plaintiff who claimed he went legally blind after consuming and ingesting two pharmaceutical drugs taken while participating in a study sponsored by a drug company. In *Tursi*, an electrical transformer leaked fluid containing a harmful toxin made contact with Plaintiff's eye, causing an immediate injury and later causing a cataract to develop resulting in blindness. The *Cerna* court determined that while *Tursi* was an "impact case," involving Aone incident of trauma, an immediate injury, and a more serious injury developing four years later, at the site of the trauma,@ *Cerna,* which was a pharmaceutical ingestion case, was not an impact case. *Tursi* at 997; *Cerna* at 653. In *Tursi*, therefore, the testimony of ophthalmologist that a cataract was caused by transformer fluid making impact with the Plaintiff's eye, was properly based on the doctor's knowledge and experience, rather than any "scientific principle or test," and was therefore pure opinion testimony not subject to *Frye. Tursi* at 997. *Cerna,* on the other hand, concerned the testimony of an expert witness that internal ingestion of pharmaceutical drugs, never previously linked to Cerna's medical condition, had resulted in his blindness, and such testimony would necessarily be

subject *to Frye*.

The Fifth District ruled that while Florida courts uniformly test a proposed expert's opinion under *Frye* in pharmaceutical and chemical ingestion cases, *Marsh* is not an impact case because, "whatever the merit of the *Tursi* decision, this case is more like *Cerna* than *Tursi*." *Marsh* at 329. While the Fifth District may be correct in asserting that "[i]n pharmaceutical and chemical ingestion cases, Florida courts uniformly test a proposed experts opinion under *Frye,*" citing *I.E. Dupont DeNemours & Co. v. Castillo*, 748 So.2d 1108 (Fla. 3rd DCA 2000), *Marsh* does not involve pharmaceutical or chemical ingestion. Instead, as Petitioner pointed out below, this case involves the impact of trauma, in the form of an automobile accident, upon Marsh's physical person, much in the same way that the toxic chemical made contact with Tursi's physical person. As the court in *Cerna* reasoned, because "*Tursi* involved one incident of trauma with an immediate injury, and a more serious injury developing four years later at the trauma site, its result was no more novel than allowing an orthopedist to testify that a neck injury, which did not manifest itself with symptoms." Though the *Marsh* facts differ from those in both *Cerna* and *Tursi*, this case is clearly more like *Tursi* as it relates to the concept of instant impact as even the analogy in *Tursi* was that of an auto collision like the fact pattern in *Marsh*.

POINT IV

IV. THE FIFTH DISTRICT ERRED BY IN EFFECT HOLDING THAT A COMPLETE UNDERSTANDING OF THE PHYSIOLOGICAL PROCESSES OF A CONDITION MUST BE ACCEPTED BY THE RELEVANT SCIENTIFIC AND/OR MEDICAL COMMUNITY BEFORE AN EXPERT MAY OFFER CAUSATION TESTIMONY.

The Fifth District's ruling in *Marsh* appears to now require a new level of exacting knowledge and understanding of both the biological and physiological processes including the precise pathogenesis of a medical condition, by the relevant scientific and/or medical community before an expert may render an opinion regarding causation. Quoting the stricter *Daubert* case of *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999), the court states that "[t]he underlying predicates of any cause-and-effect medical testimony are that medical science understands the physiological process by which a particular disease or syndrome develops and knows what factors cause the process to occur. Based upon such predicate knowledge, it may then be possible to fasten legal liability for a person's disease or injury." *Marsh* at 325.

Should the *Marsh* decision stand as it is written, a standard will be imposed on the admissibility of expert testimony which is so rigorous that it would require virtual exacting and exhaustive scientific knowledge of all of the biological processes that go into any relationship between an aggravating agent and a resulting medical condition.

Such standard has never been required under Florida law and would serve only to prevent the admissibility of otherwise legitimate testimony from being weighed by a jury.

Virtually every intellectually honest scientist will cautiously qualify his or her studies with appropriate language on our relatively limited knowledge of a given discipline. In *Berry v. CSX Transportation, Inc.*, 709 So.2d 552, 567-68 (Fla. 1st DCA 1998) the First District recognized that researchers commonly qualify their conclusions in any given study:

> "[T]he fact that a epidemiological study calls for further research does not indicate uncertainty on the part of the researchers. . .Almost all genres of research articles in the medical and behavioral sciences conclude their discussion with qualifying statements such as "there is still much to be learned." . . . Uncertainty is never completely abolished . . . Therefore, conclusions must be defined in terms of "suggestions" or "associations" rather than causes.

Of particular interest to this issue, two recent out-of-state courts have held that simply because the pathological mechanism of Fibromyalgia is not fully understood, an expert should not be prevented from testifying as to causation issues related to trauma. The case of *Rawls v. Coleman-Frizzell, Inc.*, 653 N.W.2d 247 (S.D.2002), which dealt with fibromyalgia, held:

> AWe are not here implying that we would require a complete understanding of the etiology of fibromyalgia to hold that, in a given case, a work-related injury was a contributing factor to that affliction. A finding that a disease is work-connected will not be reversed as being based on speculation and conjecture merely because the medical profession does not fully understand the etiology of

> the disease.@ *Certi-Serve, Inc. v. Industrial Comm=n,* 101 Ill.2d 236, 78 Ill. Dec. 120, 461 N.E. 2d 954, 958 (1984) (quoting A. Larson, Workmen's Compensation '' 80.31(c) (1983)).

Similarly, in the case of *Waldorf Corp. v. Industrial Com'n,* 708 N.E.2d 476 (Ill.App. 1 Dist.1999), it was held that the finding of a causal connection between claimant's fibromyalgia and her employment was not against the manifest weight of evidence, despite the lack of certainty in the medical community as to the cause of the condition. The *Waldorf* court stated, Awhile the etiology of fibromyalgia is unknown, that fact does not compel the conclusion that the claimant was incapable of proving a causal connection.@ 708 N.E. 2d at 481.

In *Henson II*, this court recognized that, "it is well settled that a lack of epidemiological studies does not defeat submission of expert testimony and opinions as expressed in this case. *See, e.g., Kennedy,* 161 F. 3d at 1230, ("The fact that a cause-effect relationship… has not been conclusively established, does not render Dr. Spidler's testimony inadmissible")." *Henson II,* 823 So. 2d at 109. While, [t]he Court . . . must assure itself that the opinions are based on relevant scientific methods, processes, and data, and not upon an expert's mere speculation . . . it is important to emphasize that the weight to be given to stated scientific theories, and the resolution of legitimate but competing scientific views, are matters appropriately entrusted to the trier of fact." *Castillo II,* 854 So. 2d at 1275, quoting *Berry,* 709 So.2d at 569.

> Despite the Fifth District's holding in *Marsh* that "no scientifically recognized connection between trauma and fibromyalgia exists," numerous medical experts have opined in peer review journals that plausible and sound scientific evidence exists supporting a causal link between trauma and fibromyalgia. While there may not exist some uncertainty as to all of the scientific and physiological mechanisms underlying this condition it is **clear** that there is both a robust and consistent correlation, and a strong association between physical and/or emotional trauma and the fibromyalgia syndrome.

POINT V

V. EVEN IF A *FRYE* ANALYSIS WERE PROPERLY DIRECTED TO CERTAIN ASPECTS OF EXPERT TESTIMONY IN *MARSH*, WHERE UNDERLYING METHODOLOGIES USED WERE GENERALLY ACCEPTED BY SCIENTIFIC COMMUNITY, PETITIONER WOULD PREVAIL.

If an expert renders a pure opinion with a conclusion based solely upon the facts or raw data, which is not purely speculative, *and* is specific to the patient involved, then such opinion is *not* subject to a *Frye* analysis. However, if the expert, in rendering the conclusion of such opinion, *also* relied upon some new or novel objective test, case report, diagnostic test, epidemiological study or novel technique, then those methodologies *would* be subject to *Frye*.

Petitioner would argue in the alternative that, if the *Frye* standard was appropriately applied in this case as to only a portion or as to all causation testimony of her experts, such testimony should nevertheless have been admitted where her experts based their opinions on generally accepted basic underlying principles, accepted methodology, and plausible scientific evidence; even if the conclusions of

her experts were not generally accepted.

Florida courts clearly recognize that not all aspects of the expert=s opinion will necessarily need to be A*Frye*-tested.” Petitioner would submit that an examination under *Frye* of her experts= testimony on causation should be limited only to that portion of testimony directly related to Anew and novel@ scientific techniques.

One of the latest diagnostic tests used to diagnose *fibromyalgia* is a computerized brain scan technique known as a Single Photon Emission Computed Tomography (SPECT) scan which measures regional blood flow and detects high levels of ASubstance P@ which is present in persons suffering from fibromyalgia. Had Petitioner Marsh had a SPECT scan of her brain and then had her experts relied upon such a new diagnostic test, this would have been precisely the type of new and novel test or technique that would be subject to a *Frye* hearing. Reliance on such new and seemingly objective tests give the appearance of objective science and the Aaura of credibility@ which would trigger the policy rationale behind the *Frye* test.

A. The Legitimacy of the First Vancouver Consensus Report Birthed in 1994, Must Be Viewed in Light of the 1997 Second Fibromyalgia Consensus Report and the Most Recent 2003 Consensus Report.

During the trial court’s *Frye* hearings, all Respondents cited to and relied heavily upon only the earliest of three AConsensus Reports@ concerning fibromyalgia. This original Vancouver report, introduced below, was also relied upon by the Fifth

District in the cases cited in *Marsh*.[12] The origin and history behind the Consensus Report is important to an understanding of the report=s final outcome. In 1994, a private foundation invited a group of fibromyalgia experts to attend a conference in Vancouver, Canada. Attendees reviewed existing studies and adopted a number of reports by majority vote.[13]

Of interest, neither the Vancouver Conference nor the Consensus Report itself was ever endorsed by any official medical academy such as the American College of Rheumatology (ACR) or the American Medical Association (AMA). It was never published in the ACR official journal, *Arthritis and Rheumatism*. The conference was also sponsored by special interest groups with an arguable economic interest in its outcome including Canada=s socialized medicine industry such as the ANational Social Insurance Hospital,@ and AHealth and Welfare Canada@ and other members of the insurance industry such as ALondon Life Insurance Co.@ The focus of the initial paragraphs of the report reveal the motivation for calling the conference together was

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12 *Black v. Food Lion, Inc.*, 171 F.3d 308 (5th Cir. 1999); *Riccio v. S & T Contractors*, 2001 WL 1334202, 56 Pa. D & C 4th 86 (Pa. Com. Pl., June 22, 2001); *Jones v. Conrad*, 2001 WL 1001083 (Ohio App. 2001).

13 The report, the AA Consensus Report on Fibromyalgia and Disability,@ adopted by a *majority* of the *34* attendees actually voting, stated: A[e]vidence that trauma can cause *Fibromyalgia* ... comes from a few case series or case reports and is in- sufficient to establish causal relationships.... The absence of evidence, however, does not mean that causality does not exist, rather that appropriate studies have not been performed.@

over Asettling of injury claims, work disability, and disability assessment,@ Afibromyalgia-related injury and disability@ and Adisability payments for the syndrome.@ The above factors must be considered in weighing the credibility of this Vancouver Consensus Report.

One year after publication of the original self-styled AConsensus Report,@ *40* experts B including *13* who participated in the AConsensus@ Conference B took the exceptional step of publishing their disagreement with positions taken in the first Consensus Report. The AFibromyalgia Consensus Report: Additional Comments@ was published in the Journal of Clinical Rheumatology in 1997. In it, the Vancouver Consensus Report=s conclusion about the lack of evidence supporting post-traumatic fibromyalgia was disputed. The Additional Comments Consensus Report stated:

> Based on a consistent clinical pattern, case control or descriptive studies, and biologic plausibility ... it seems more than 51% likely that trauma does play a causative role in some Fibromyalgia patients, as agreed by other independent observers.

(R 2322-2325).[14]

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14 Though inartfully phrased (A51% likely@), the intent of the signatories of the Additional Comments Report is clearBthe Consensus Report=s interpretation of the clinical evidence does not reflect the Aconsensus@ of experts who actually *do* believe there is an association or causal link between trauma and fibromyalgia within a reasonable degree of medical probability (51% likely). Indeed, when one subtracts from the Consensus group those 13 members who later dissented in the Additional Comments Report, the published vote is: **Consensus Report:21, Additional Comments report:40**! Nonetheless, the Consensus Report has been mistakenly

In 2003, a gathering of physicians, researchers and medical school facility members released the most recent consensus report. The report was entitled: AFibromyalgia Syndrome: Canadian Clinical Working Cases Definition, Diagnostic and Treatment Protocols B A Consensus Document,@ by Jain, Anil Kumar, et al.; co-published simultaneously in the Journal of Musculoskeletal Pain (The Haworth Medical Press, an imprint of the Haworth Press, Inc.), Vol. 11, No. 4, 2003, pp. 2-107 and in The Fibromyalgia Syndrome: A Clinical Case Definition for Practitioners [ed: I. Jon Russell] The Haworth Press, Inc., 2003, pp. 3-107. Based upon the latest scientific research, epidimological studies, clinical reports, and biological evidence available, the consensus document now concluded that "a compelling argument that trauma, does, in fact, play an etiological role in the development of FMS in some, but not all patients."[15]

All three of these consensus reports must be evaluated with the greater weight being assigned to the more recent ones. No one report (and certainly not the first Vancouver report) should be taken as the authoritative "consensus report" which represents the collective position of the discipline of rheumatology and other medical

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interpreted as a true Aconsensus@ by several courts, while the prevailing views in the Additional Comments Report have been styled as if a numeric minority dissent.

15 *See* Anil Kumar Jain *et al.*, *Fibromyalgia Syndrome: Canadian Clinical Working Case Definition, Diagnostic and Treatment Protocols – A Consensus Document*, 11 J. MUSCULOSKELETAL PAIN 3 (2003).

professionals studying fibromyalgia. Unfortunately, a number of courts have either ignored or are unaware of the most recent consensus document in the application of the *Daubert* test to post-traumatic fibromyalgia testimony.

C. This Court's Decision in *Castillo II* is Dispositive to the Question of Whether Differential Diagnosis is a Generally Accepted Methodology Upon Which an Expert May Rely in Rendering His Opinion.

In the *Castillo II* case, this court examined the issue of whether differential diagnosis was a generally accepted methodology upon which an expert could rely on when rendering his opinion. The expert in *Castillo* relied in part on a differential diagnosis in concluding that Benlate exposure had caused microphthalmia in the plaintiff's unborn child. On appeal, this court disagreed with the defendants' assertion that the expert improperly relied on differential diagnosis, citing *U.S. Sugar v. Henson*, 787 So.2d at 19 (*citing Berry*, 709 So.2d at 571): "[i]t is well-settled that an expert's use of differential diagnosis to arrive at a specific causation opinion is a methodology that is generally accepted in the relevant scientific community." *Id.* at 1271.

In its analysis, this court went on to explain:

> The underlying methodology is not so much the testing as it is the use of the test results from the methodology to bridge the gap from raw data to a conclusion.
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> ***
>
> The court ... must assure itself that the opinions are based on relevant scientific methods, processes, and data, and *not upon an expert's mere speculation*.... [I]t

> 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.* [Emphasis added].
>
> *Berry*, 709 So.2d at 569 n. 14 (*quoting McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn.1997).

Marsh's medical experts opinions herein were not based on new or novel methods like the primitive lie detector in *Frye* or the DNA population frequency statistics in *Brim.* Rather, they are based on the examination of the patient, the clinical history of the patient, review of the medical records, and the background, training and clinical experience of physicians who have examined thousands of Fibromyalgia patients who were asymptomatic for Fibromyalgia prior to experiencing physical trauma. This issue has been previously and unequivocally addressed by the highest court in Florida, and the Fifth District erred in suggesting in its opinion that differential diagnosis was is simply "an exercise in the fallacy of post-hoc propter hoc reasoning." *Marsh* at 325.

CONCLUSION

The proffered opinions of Petitioner=s treating doctors and experts in this case were not based upon raw speculation or Ajunk science@ in the Atwilight zone@ of credibility intended to be excluded by the *Frye* test. Instead the experts based their opinions on their experience, epidemiological data, medical and scientific literature, clinical experience, and the generally accepted methodology of differential diagnosis. The underlying science, furthermore, of Marsh=s post-traumatic fibromyalgia and myofascial pain syndrome is based upon both plausible scientific theories and generally accepted methodologies. These generally accepted forms of evidence are used by experts every day to infer medical causation, whether the expert is treating a patient or testifying in a courtroom, and Marsh would submit that the Court has erred in ruling otherwise. Wherefore, Petitioner Marsh would respectfully request that based upon the law, arguments, and evidence set forth in the above brief, this Honorable Court quash the Fifth District=s decision in *Marsh v. Valyou,* reverse the award of attorney's fees to Respondents, and remand the case for a jury trial in which Petitioner=s experts are permitted to offer their testimony in its entirety or pursuant to any limitations this court may find appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail this 6th day of April, 2006 to: Joseph Currier Brock, Esquire, 545 Delaney Ave., Bldg. 7, Orlando, FL 32801, Attorney for Valyou; Elizabeth C. Wheeler, Esquire, Elizabeth C. Wheeler, P.A., P.O. Box 2266, Orlando, FL 32802-2266, Attorney for Thomas and Donna Burke; E. Peyton Hodges and Robert W. Mixson, Esquire, 15 West Church Street, Orlando, Florida 32801, Attorneys for Avis;

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CERTIFICATE OF COMPLIANCE OF FONT

The undersigned, on behalf of Petitioner, hereby certify that this 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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