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 AMENDED REPLY BRIEF ON THE MERITS

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## TABLE OF CONTENTS

Page

TABLE OF CITATIONS . . . . . iii

ARGUMENT. . . . . 1

I. THIS COURT'S HOLDING IN *CASTILLO v. E.I. DUPONT* , 854 So.2d 1264 (Fla. 2003), IS DISPOSITIVE OF THE ISSUES HEREIN . . . . . 1

A. Pure Opinion Expert Testimony is Not Subject to a *Frye* Analysis . . . . . 1

B. Differential Diagnosis is a Generally Accepted Diagnostic Methodology . . . . . 1

II. CONCLUSIVE EPIDEMIOLOGICAL FINDINGS ARE NOT REQUIRED TO INFER CAUSATION . . . . . 3

A. Tishler Study has a Number of Methodological Flaws and Limitations Typical of Most Epidemiological Studies . . . . . 3

B. Clinical Judgment is a Reliable and Generally Accepted Means for Inferring Causation in the Medical Community. . . . . 6

C. The Most Recent State Supreme Court Case on Post-Traumatic Fibromyalgia Holds that Evidentiary Admissibility Does Not Require "Absolute or Irrefutable" Scientific Knowledge . . . . . 7

III. *MARSH v. VALYOU, ET AL.*, 917 So. 2d 313 (Fla. 5th DCA 2005) AS AN IMPACT CASE, IS NOT SUBJECT TO A *FRYE* ANALYSIS . . . . . 8

IV. *STATE FARM V. JOHNSON,* 880 So. 2d 721 (Fla. 2nd DCA 2004), IS BOTH FACTUALLY AND LEGALLY SIMILAR TO THE INSTANT CASE AND IS DIRECTLY IN CONFLICT WITH *MARSH* . . . . . 10

A. Pursuant to this Court's January 25, 2006 Order Postponing its Decision on Jurisdiction, Respondents' Arguments on the Issue of Jurisdiction are Both Improper and Premature at this Time . . . . . 11

B. Contrary to Argument by Respondents, Plaintiff Johnson Did in Fact Raise Issues Identical to Those Raised by Petitioner in the *Marsh* case . . . . . 12

C. The Fifth DCA not only Certified Conflict with the Second DCA Pursuant to § 3(b)(4), but the *Marsh* Opinion Directly Conflicts on its Face with *Johnson* . . . . . 14

CONCLUSION . . . . . 14

CERTIFICATE OF SERVICE . . . . . 15

CERTIFICATE OF COMPLIANCE . . . . . 15

TABLE OF CITATIONS

Cases: Page

*Castillo v. E.I. DuPont De Nemours & Co., Inc. (Castillo II),* 854 So.2d 1264 (Fla. 2003) . . . . . *passim*

*Caufield v. Cantele,* 837 So.2d 371 (Fla. 2002) . . . . . 10

*Cerna v. South Florida Bioavailability Clinic, Inc.*, 815 So.2d 652 (Fla. 3d DCA 2002) . . . . . 9, 10

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) . . . . . 7, 8

*E.I. DuPont De Nemours & Co. v. Castillo, (Castillo I),* 748 So.2d 1108 (Fla. 3d DCA 2000) . . . . . 9

*Epp v. Lauby*, 715 N.W.2d 501 (Neb. 2006) . . . . . 7, 8

*Florida Power & Light v. Tursi*, 729 So.2d 995 (Fla. 4th DCA 1999) . . . . . 9

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

*Hocraffer v. Secretary of Health and Human Services*, 63 Fed. Cl. 765 (2005) . . . . . 2

*In re: Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir.1994), *affirmed in part, vacated in part,* 221 F. 3d 449 (3rd Cir. Pa. 2000) . . . . . 2

*Marsh v. Valyou, et al.*, 917 So. 2d 313 (Fla. 5th DCA 2005) . . . . . *passim*

*State v. Dahood,* 148 N.H. 723, 814 A.2d 159 (N.H. 2002) . . . . . 8

*State Farm v. Johnson*, 880 So. 2d 721 (Fla. 2nd DCA 2004) . . . . . *passim*

*U.S. Sugar Corp. v. Henson*, 787 So. 2d 3 (Fla. 1st DCA 2000), *aff'd,* 823 So. 2d 104 (Fla. 2002) . . . . . 1

*Westberry v. Gislaved Gummi AB*, 178 F.3d 257 (4th Cir.1999) . . . . . 2

**Statutes, Rules, Etc.:**

Article V, § 3(b)-(4), Florida Constitution . . . . . 11, 14

9.030(a)(2)(A)(vi), F.R.A.P. . . . . 11

Rule 9.120(d), F.R.A.P. . . . . 12

Federal Judicial Center, *Reference Manual on Scientific Evidence* 70 n. 112 (2d ed.2000) . . . . . 2, 7

C. Hennekens & J. Buring, EPIDEMIOLOGY IN MEDICINE 34- 5. . . . . 5

S. McClean, et al., FIBROMYALGIA AFTER MOTOR VEHICLE COLLISION: EVIDENCE AND IMPLICATIONS 99 . . . . . 3

P. Padovano, *Florida Appellate Practice* . . . . . 11, 14

Tishler, et.al., "*Neck Injury and Fibromyalgia-Are They Really Associated*?". . . . . 3, 4, 5, 6

## ARGUMENT
## POINT I

**THIS COURT'S HOLDING IN *CASTILLO II* IS DISPOSITIVE OF THE ISSUES HEREIN.**

### A. Pure Opinion Expert Testimony is Not Subject to a *Frye* Analysis.

It is well-recognized that Florida=s courts do not subject an expert's Apure opinion@ testimony, based upon training and experience within a clinical setting, to a *Frye* analysis. *U.S. Sugar Corp. v. Henson*, 787 So.2d 3 (Fla. 1st DCA 2000), *aff'd*, 823 So.2d 104 (Fla. 2002). Florida recognizes instead that a jury may evaluate such testimony in the same way it evaluates other opinion testimony. It is clear that the Fifth DCA's ruling in *Marsh*, effectively rendering inadmissible the pure opinion testimony of Petitioner's experts, constituted reversible error.

### B. Differential Diagnosis is a Generally Accepted Diagnostic Methodology.

Respondents fail to acknowledge that their interpretation of Florida's *Frye* test is incompatible with this Court's ruling in *Castillo v. E.I. DuPont De Nemours & Co., Inc*, (*Castillo II*), 854 So.2d 1264 (Fla. 2003). In *Castillo II*, the medical opinion of plaintiff 's expert – that DuPont's fungicide could cause human birth defects – was *not* supported by epidemiological evidence and was *not* "generally accepted" by the scientific community. Yet this Court upheld admission of the expert's opinion in *Castillo* because, as in the instant case, the opinion was supported by generally-

accepted methods of inferring medical causation, including differential diagnosis.[1] *Castillo II* at 1275.

Contrary to Respondents' position in this appeal, this Court cannot now rule that a medical expert's theory of "general causation" must be generally accepted by the relevant scientific community without overturning or receding from its earlier ruling in *Castillo II*. Valyou would attempt to circumvent this Court's holding in *Castillo* by claiming that, "the underlying general causal principle – that 'benomyl is a teratogen' capable of causing … defects – was not genuinely disputed [in *Castillo*], and was in fact shown by Dupont's own animal studies and in vitro tests. 854 So.2d at 1269" (Valyou Answer Brief at 23, 25). Burkes similarly argue that "general causation was established" in *Castillo* (Burke AB at 27). Respondents are mistaken. Their flawed contention is based upon a fundamental misunderstanding of the

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1 *See Hocraffer v. Sec.of Health & Human Services*, 63 Fed. Cl. 765, 777, FN 15: "[d]ifferential diagnosis, or differential etiology, is 'a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable is isolated.' *Westberry v. Gislaved Gummi AB,* 178 F.3d 257, 262 (4th Cir.1999)." S*ee also* Federal Judicial Center, *Reference Manual on Scientific Evidence* 470 n. 112 (2d ed.2000). The technique has 'widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results.' *Westberry,* [at 262] (quoting *In re Paoli,* 35 F.3d 717, 758 (3d Cir.1994)). Differential diagnosis or differential etiology has been accepted as reliable under the standards set forth in *Daubert* … by virtually every United States Court of Appeals to consider the issue. [Citations omitted]."

definition of medical causation. Further contrary to Respondents' arguments, differential diagnosis (used in both *Castillo* and *Marsh*) enjoys extensive and almost universal acceptance in both the legal and medical communities as a basis for diagnosing the cause of medical conditions.

## POINT II

## CONCLUSIVE EPIDEMIOLOGICAL FINDINGS ARE NOT REQUIRED TO INFER CAUSATION.

### A . Tishler Study has a Number of Methodological Flaws and Limitations Typical of Most Epidemiological Studies.

Both Petitioner and the Academy of Florida Trial Lawyers (amicus curiae herein) have previously summarized available evidence concerning the link between physical trauma and fibromyalgia. As formerly emphasized, numerous medical authorities – including a consensus scientific panel sponsored by the Canadian government – believe that trauma can cause and/or exacerbate FMS. This view is shared by many practicing physicians. In reaching this conclusion, medical experts rely on an extensive number of clinical reports, a limited number of epidemiological studies, and continuously emerging scientific evidence, all suggesting the biological plausibility of a link between trauma and fibromyalgia.[2]

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2 *See* Appendix to Petitioner's Amended Reply Brief at Tab 1; S. McClean, et al.,"*Fibromyalgia After Motor Vehicle Collision: Evidence and Implications*," TRAFFIC INJURY PREVENTION, 6:98-104 at 101: "There is no disagreement regarding

Respondents and the Florida Defense Lawyers Association (amicus herein) claim that the recent epidemiological study by Moshe Tishler and others "refutes" the results of the two earlier studies by Buskila and Al-Allaf, cited by Marsh (FDLA AB at 14).[3] They are again mistaken. In truth, the Tishler study, while a useful addition to the two prior studies, contains methodological flaws. More importantly, the conflicting findings of Tishler's study and those prior studies does ***not*** mean that the prior studies reach an invalid result. As the former editor of the New England Journal of Medicine has observed , "[i]nconsistency is common in medical research...[i]t is particularly common in epidemiology, because these studies are so difficult to do." *See* M.Angell, SCIENCE ON TRIAL, at 173.

Tishler's study is based on a small sample of 206 hospital patients, the majority of which were male. Like Buskila's study population of 161 patients, and Al-Allaf's study of 288 patients, Tishler's sample is simply too small to resolve the dispute about traumatically-induced fibromyalgia.[4]

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a close temporal association between an MVC and the development of FM...To summarize, there are abundant data suggesting that it is biologically plausible that physical trauma, acting as a stressor, could lead to the development of chronic widespread pain, as well as a number of other somatic symptoms."

[3]AFTL noted in its Brief the pending publication date of the "Tishler" study.

[4]Because FMS is believed to affect 2-4% of the population, more than 6 million Americans likely suffer from this illness. A sample of 206 Israelis drawn from a single hospital is not remotely representative of the true population of FMS sufferers.

Tishler's study also contains very obvious methodological flaws. First, the sample of "whiplash" injuries is highly suspect. Tishler offers no details regarding the magnitude of injury or the degree of pain experienced by the members of the study group; the reported findings suggest that the whiplash injuries were insubstantial. It is impossible to determine whether the group is representative of persons suffering accident injuries sufficiently severe to produce chronic pain. Second, Tishler did *not* diagnose the presence or absence of FMS by physical examination of the study group members. Physical examination and administration of the "tender point" test is the ***only*** recognized protocol for diagnosing FMS. Instead, Tishler took a shortcut and diagnosed subjects primarily through *telephone interviews*. Only when interviewees complained of "symptoms or signs suggestive of FM" were they "invited for actual physical evaluation" and administered the "tender point" test (Tishler at 1184). Ultimately, only 12 of 206 subjects were diagnosed through the accepted protocol.

Diagnosis by telephone interview raises obvious concerns. One important concern is the possible effect of "observation bias." Another concern is that study results may be skewed by the subjects' inaccurate reporting.[5] Tishler's "Fibromyalgia Impact Questionnaire" (FIQ), inquired into the impact of a person's "general health"

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Further, more than *60%* of the subjects in Tishler's study group are male, even though researchers acknowledge that FMS "occurs mainly in women."

[5]*See* EPIDEMIOLOGY IN MEDICINE, at 147 (discussing subjects' recall bias).

on his or her ability to perform tasks like shopping, laundry, walking, or yard work. The FIQ did ***not*** purport to assess the extent of chronic pain experienced by the subject.

In fairness to Tishler, his study does not attempt to attribute the sweeping conclusions to his research that Respondents suggest. Tishler's article concludes, "[b]ecause of its wide medicolegal implications, well controlled multinational studies with large cohorts of patients are needed to resolve this complex issue." *Id*. at 1185. Like Buskila and Al-Allaf, Tishler also acknowledges that the limited evidence prevents reaching ultimate conclusions on causation under the fastidious standards applied by epidemiologists.[6] Finally, contrary to Respondents' argument herein, a single, small epidemiological study does not carry authoritative weight simply because it has a more recent publication date.

**B. Clinical Judgment is a Reliable and Generally Accepted Means for Inferring Causation in the Medical Community.**

[6]Respondents claim Tishler's study is presumptively more valid than Al-Allaf's because it is "prospective" in nature (i.e., it "prospectively" measures the incidence of FMS arising after exposure to trauma). The conspicuous methodological problems with Tishler's study, however, render suspect its findings. "Retrospective" studies (like Al-Allaf's) provide useful, and undoubtedly superior, medical causation evidence. The seminal study by R. Doll and A. Hill, linking smoking and lung cancer, is perhaps the most famous example of the retrospective study. Doll and Hill's case-control study, (in many ways similar to Al-Allaf's), led researchers to conclude as early as 1950 that smoking was a cause of lung cancer. *See Smoking and Carcinoma of the Lung: A Preliminary Report*, BRITISH MED. J. 2:739 (1950).

There is a legitimate scientific controversy concerning the link between trauma and FMS. Quite distinguished authorities take very different positions. Authorities who believe trauma causes FMS rely on the extensive number of clinical reports, the limited epidemiological research, an emerging understanding of the biology of chronic pain, and, quite often, their own medical experience in treating FMS patients. The Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, recognizes the generally accepted sources for inferring medical causation as set forth above. Contrary to Respondents' crabbed vision of the medical evidence in this case, medicine does not require airtight, conclusive epidemiological findings before working opinions on causation may be reached.

### C. The Most Recent State Supreme Court Case on Post-Traumatic Fibromyalgia Holds that Evidentiary Admissibility Does Not Require "Absolute or Irrefutable" Scientific Knowledge.

On June 2, 2006, the Nebraska Supreme Court decided *Epp v. Lauby*, 715 N.W.2d 501 (Neb. 2006), a case nearly identical to *Marsh.* Nora Epp was involved in a three-car collision involving multiple rear-end impacts. The physical impacts from the collision caused her to suffer cervical and lumbar strains which developed into myofascial pain; over a year later, she was diagnosed with FMS. After conducting a *Daubert* hearing, the trial court determined that expert testimony linking trauma to FMS was inadmissible at trial. The Nebraska Supreme Court reversed, finding that the

lower court erred in excluding the expert's testimony. Although a *Daubert* state, the Nebraska Court's recent holding is instructive:

> The *Daubert* test does not stand for the proposition that scientific knowledge must be absolute or irrefutable. See *State v. Dahood,* 148 N.H. 723, 814 A.2d 159 (2002). ***"[I]t would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science."*** [Citation omitted.] . . .Thus," ***'[c]ontroversy within the scientific community is not necessarily a ground for exclusion of scientific evidence. In deciding whether to admit scientific evidence, a court need not resolve disputes between reputable experts; the evidence may be admissible even though a dispute exists***···· [T]he witness who testifies to an expert opinion is subject to cross-examination concerning how he or she arrived at that opinion, and ··· in eliciting testimony to vitiate the opinion.'"[Citations omitted.] ***Although the issue is disputed, there is support in the medical literature for the theory that physical trauma can cause fibromyalgia. That support, while controverted, is the result of peer-reviewed research conducted pursuant to appropriate methods of scientific inquiry***… If proffered scientific evidence rests on sound scientific reasoning or methodology and properly can be applied to the facts in issue, it meets the *Daubert* requirements for admissibility, even if the conclusion is novel or controversial. . . .We, therefore, conclude that the evidence was sufficient to support the theory of a causal relationship between physical trauma and fibromyalgia and the trial court abused its discretion in concluding otherwise."

*Id.* at 650-651 [emphasis added].

## POINT III

## *MARSH v. VALYOU,* AS AN IMPACT CASE, WAS NOT SUBJECT TO A *FRYE* ANALYSIS.

Petitioner has maintained throughout both appeals that she was originally injured in an automobile collision (the initial "impact") and that her injuries became progressively worse after subsequent automobile impacts. Because the *Frye* standard

has been determined inapplicable to "impact" cases, she has argued that such an analysis was inappropriate in her case.[7] Respondents argued below that *Marsh* is not an impact case and that the issue had not been preserved for appellate review. The Fifth DCA, disregarding Respondents' procedural arguments in their entirety, ruled instead that the instant case more closely resembled *Cerna v. South Florida Bioavailability Clinic, Inc.*, 815 So.2d 652 (Fla. 3d DCA 2002), in which a plaintiff claimed that he became legally blind after ingesting two pharmaceuticals while participating in a study sponsored by Pfizer. The *Cerna* court determined that pursuant to *Frye*, testimony by a treating ophthalmologist should have been excluded where drugs were never previously linked to Plaintiff's illness and because the scientific evidence failed to show general acceptance of the proffered theories. *Marsh*, 917 So. 2d at 329. In propounding its opinion that Florida courts in pharmaceutical and chemical ingestion cases uniformly test under *Frye*, the Fifth DCA cited with approval, *E.I. DuPont De Nemours & Co. v. Castillo* (*Castillo I*), 748 So.2d 1108 (Fla. 3d DCA 2000), a chemical ingestion case which has since been reversed by this Honorable Court and which Petitioner submits is now dispositive of the instant case. This Court, in reversing *Castillo I*, determined that an expert's pure opinion testimony

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7*Cf. FP&L v. Tursi*, 729 So.2d 995, 996 (Fla. 4th DCA 1999)(court properly admitted treating ophthalmologist's opinion testimony-not subject to *Frye*- testimony was, "no more novel than an orthopedist testifying that a neck injury, which did not

***is*** admissible, which has been Marsh's position from the start.

Respondents would argue that the "impact" issue was not preserved for appellate review. Petitioner would point out now, as she did below, that the term "impact" was coined by the *Cerna* court to describe cases in which an immediate injury occurred following an initial incident of trauma, with a more serious injury developing later and that "impact" is simply a descriptive term to describe a type of injury, rather than a legal claim or concept which must be preserved for review. Although she would disagree with the lower court's ultimate ruling on the impact issue, she would nevertheless agree that the court properly rejected and dismissed Burkes' argument that this issue was not preserved for review. *See Caufield v. Cantele*, 837 So. 2d 371 (Fla. 2002)(once the Supreme Court accepted conflict jurisdiction, Court could consider other issues decided by lower court which were raised and argued before the Court).

## POINT IV

## ***STATE FARM v. JOHNSON*** IS BOTH FACTUALLY AND LEGALLY SIMILAR TO THE INSTANT CASE AND IS DIRECTLY IN CONFLICT WITH THE *MARSH* OPINION.

Burke and Valyou argue initially in their Answer Briefs that, "this Court should decline to exercise its discretionary jurisdiction [to review the instant case] because

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manifest itself until four years later, was caused by auto accident." *Marsh* at *328.*

there is no conflict between the [*Marsh* and *Johnson*] decisions" (Burke AB at 12). PV Holding Corp. argues that *Johnson* does not "truly conflict" with *Marsh*, but "if conflict is perceived, [it] is distinguishable" (PV Holding AB at 32). Petitioner would reply that Respondents have seriously misinterpreted and misstated the Second DCA's holding in *Johnson*. A proper review of *Johnson* illustrates clearly that, as recognized by the Fifth DCA, *Johnson* and *Marsh* are conflicting opinions. Furthermore, certification of a case under § 3(b)(4) of the Fla. Const., serves to establish the jurisdiction of the Florida Supreme Court. *See* Rule 9.030(a)(2)(A)(vi), F.R.A.P.; Padovano, Philip J., *Florida Appellate Practice*, *supra* note 27, § 27.2.

**A. Pursuant to this Court's January 25, 2006 Order Postponing its Decision on Jurisdiction, Respondents' Arguments on the Issue of Jurisdiction are Both Improper and Premature at this Time.**

Petitioner would submit that Respondents' arguments on the issue of jurisdiction appear to be both inappropriate and premature at this stage of the appeal. A certificate of conflict provides a jurisdictional basis for further appellate review. Padovano at § 27.2. On January 25, 2006, this Honorable Court entered an order stating: "[t]he Court has postponed its decision on jurisdiction…Petitioner's initial brief *on the merits* shall be served on or before February 20, 2006; respondent's answer brief *on the merits* shall be served twenty (20) days after…" [italics added]. Pursuant to this Court's order, Petitioner limited argument in her Initial Brief to the

merits of the case; and made no argument addressing the issue of jurisdiction. However, because Respondents have included jurisdictional arguments in their answer briefs, and have urged this court to decline to exercise its discretionary jurisdiction in this case, Petitioner has felt compelled to at least briefly reply to these arguments in this Amended Reply Brief (Burke at 11-13; Valyou at 12-15; PV Holding at 32-33). Petitioner has made no attempt, however, to appropriately and sufficiently address the issue of jurisdiction under rule 9.120(d), F.R.A.P.

**B. Contrary to Argument by Respondents, Plaintiff Johnson Did in Fact Raise Issues Identical to Those Raised by Petitioner in the *Marsh* case.**

Plaintiff Johnson, in *State Farm v. Johnson*, raised a number of different issues, including the admissibility of testimony under *Frye*, the admissibility of pure opinion testimony, and the general acceptance of differential diagnosis as an approved scientific methodology. Burkes argue in their brief that there is no "actual" conflict between the *Marsh* and *Johnson* opinions; Burkes and Valyou both interpret *Johnson* as having "rejected a *Frye* challenge to the admissibility of expert testimony that the plaintiff's [FMS] was caused by auto accident trauma" (Burke AB at 12, 19; Valyou AB at 12). Valyou on the other hand, finds it 'significant' that the "*Johnson* opinion did not review or analyze any of the medical/scientific literature regarding trauma and [FMS]" while the court in *Marsh* conducted "an exhaustive review of the medical/scientific studies and literature." Valyou goes on to suggest that State Farm

in *Johnson* 'agreed' that "there [was] an established association"… and a "recognized relationship between trauma and the onset of fibromyalgia," and that the Second DCA "simply assumed, based on the parties' 'agree[ment],' that the underlying scientific theory that trauma is a potential cause of FMS was established and generally accepted in the relevant scientific community" (Valyou AB at 13-14). Perhaps most astonishing, though, is PV Holding's undocumented assertion that, "neither side argued whether *Frye* was applicable but instead….whether scientific community's failure to reach a generally accepted understanding of the physical mechanism that cause [sic] fibromyalgia required exclusion of expert opinion testimony that Johnson's fibromyalgia resulted from the subject accident" (PV Holding AB at 32). Respondents statements are both contradictory and simply false.

The *Johnson* opinion and Plaintiff Johnson's actual Answer Brief, demonstrate that the very first issue Johnson raised was whether *Frye* applied to the pure opinion testimony of her experts (IB App. at Tab 2; ARB App.at Tab 4). Clearly, the issues in *Johnson* were contested by the parties, particularly whether pure opinion testimony was subject to *Frye* and if so, whether the soundness of an expert's methodology, rather than the underlying theory, must be accepted. In point of fact, Plaintiff Johnson submitted a scientific appendix of 18 medical/science articles and book excerpts in support of this very issue (ARB App.at Tab 4, pp iii-v). Like Petitioner Marsh,

Johnson argued that her expert's opinion on specific causation was based on the generally accepted methodology of differential diagnosis (ARB App. at Tab 4, p. 30).

### C. The Fifth DCA not only Certified Conflict with the Second DCA Pursuant to § 3(b)(4), but the *Marsh* Opinion Directly Conflicts on its Face with *Johnson.*

Contrary to Respondents' argument, it is Petitioner's belief that the *Johnson* and *Marsh* cases conflict on their faces; even if the cases did ***not*** directly conflict, however, because *Marsh* was certified by the Fifth DCA as being in "direct conflict" with *Johnson* pursuant to § 3(b)(4), a conflict need not be apparent in the court's opinion. A decision certified in direct conflict under § 3(b)(4), "need not expressly conflict with another appellate decision…[e]ven a summary type decision, made on the basis of a single citation, in the absence of any stated legal reasoning, will qualify for review if it is certified to be in conflict." *See* Padovano, note 9, §3.11; §2.27.

## CONCLUSION

Wherefore, Petitioner Marsh would respectfully request that based upon the law, arguments, and evidence set forth both in her Initial Brief and in this Amended Reply Brief, this Honorable Court quash the Fifth DCA'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 Amended Reply Brief has been furnished via U.S. Mail this ____ day of October, 2006 to: Elizabeth C. Wheeler, Esquire, Elizabeth C. Wheeler, P.A., P.O. Box 2266, Orlando, FL 32802-2266; Robert W. Mixson, Esquire and Emmett Peyton Hodges, Esquire, Cameron, Hodges, Coleman, et al., 15 W. Church Street, Ste. 301, Orlando, FL 32801-3351; Joseph C. Brock, Esquire, 545 Delaney Ave, Ste 5, Orlando, FL 32801-3866; Steven W. Igou, Esquire, 545 Delaney Ave, Ste 5, Orlando, FL 32801-3866; Jane H. Clark, Esquire, 2739 South Maguire Rd, Ocoee, FL 34761-4797; Michael S. Finch, Esquire, Stetson University College of Law, 1401 61st Street S, St. Petersburg, FL 33707-3246; Philip M. Burlington, Esquire, Burlington & Rockenbach, P.A., 2001 Palm Beach Lakes Blvd., Ste 401, West Palm Beach, FL 33409-6516; Tracy Raffles Gunn, Esquire, Fowler, White, Boggs, Banker, P.A., P.O. Box 1438, Tampa, FL 33601-1438.


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## CERTIFICATE OF COMPLIANCE OF FONT

The undersigned, on behalf of Petitioner, hereby certify that this document is submitted in Times New Roman 14-point font, in compliance with the font requirements contained in Rule 9.210(a)(2), FL Rules of Appellate Procedure.


_____ _____

JOHN T. STEMBERGER, ESQUIRE SHANNON L. AKINS, ESQUIRE