

**We Are Not a *Daubert* State—But What Are We? Scientific Evidence in North Carolina after *Howerton***

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**I. Introduction**

In June of 2004, the North Carolina Supreme Court decided *Howerton v. Arai Helmet, Ltd.*,<sup>3</sup> which interpreted the standard for admitting expert testimony under Rule 702 of the North Carolina Rules of Evidence. The issue before the court was whether a North Carolina trial court's gatekeeping responsibility under Rule 702 is the same as that imposed on the federal courts by the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>4</sup> which requires an independent preliminary assessment of whether the proffered expert testimony is both reliable and relevant. The answer was an unequivocal "no."

In concept, the admissibility of expert testimony boils down to a single question: How do you *know* that? Historically, there have been two approaches to this question: the guild approach and the independent scrutiny approach. Under the former (the so-called *Frye*<sup>5</sup> standard), experts are allowed to constitute themselves as a guild and declare that their approach is "generally accepted" among its members. The latter, or *Daubert* standard, requires the trial court to go past the affirmations of guild members and determine on its own whether the expert's evidence is reliable.

In this state, the admissibility of expert testimony is governed by North Carolina Rule of Evidence 702, which dates

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<sup>3</sup> 597 S.E.2d 674 (N.C. 2004).

<sup>4</sup> 509 U.S. 579 (1993).

<sup>5</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

back to 1975. Its text does not resolve the guild/independent scrutiny question:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.<sup>6</sup>

The North Carolina rule is virtually identical to the version of Federal Rule of Evidence 702 in place when *Daubert* was decided:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.<sup>7</sup>

The official commentary to North Carolina Rule 702 underlines the obvious: “The rule is identical to Fed. R. Evid. 702, except that the words ‘or otherwise’ which appear at the end of the federal rule after the word ‘opinion’ have been deleted.”<sup>8</sup>

By itself, this near-identity of language might imply an intent on the part of North Carolina’s rulemakers to promote the same results in state and federal court. This inference is strengthened by the commentary to North Carolina Rule 102:

Uniformity of evidence rulings in the courts of this state and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical.<sup>9</sup>

As we shall see, however, those of us who had long drawn this apparently obvious inference about Rule 702 would be proven wrong.

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<sup>6</sup> N.C. R. EVID. 702.

<sup>7</sup> FED. R. EVID. 702 (prior to 2000 amend.).

<sup>8</sup> N.C. R. EVID. 702 cmt.

<sup>9</sup> N.C. R. EVID. 102 cmt.; *State v. Bogle*, 376 S.E.2d 745, 752 (1989) (making same point).

## II. The Federal *Daubert* Standard

In *Daubert*, the plaintiffs sued to recover for birth defects that allegedly resulted from pregnant women's ingestion of the anti-nausea drug Bendectin. The plaintiffs proffered eight experts to testify that, despite 30 published studies finding no connection between Bendectin and birth defects, Bendectin actually does cause birth defects if ingested by mothers in the first trimester. The district court and the Ninth Circuit evaluated and rejected this evidence<sup>10</sup> under the "general acceptability" standard of *Frye v. United States*, which had been decided in 1923 and was still followed in most federal and state courts.<sup>11</sup> Under *Frye*, in order for an expert's opinion to be admissible, "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*."<sup>12</sup> Thus, the proponent had to define a relevant field and then show that the expert's technique was generally accepted in that field.

The *Daubert* Court rejected the *Frye* standard in no uncertain terms: "That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials."<sup>13</sup> Instead, federal district judges would now be required to scrutinize expert evidence for reliability:

That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. . . . To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.<sup>14</sup>

The Court based the new standard on the "scientific knowledge"

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<sup>10</sup> 727 F. Supp. 570, 575-76 (S.D. Cal. 1989) (granting summary judgment), *aff'd*, 951 F.2d 1128, 1131 (9th Cir. 1991).

<sup>11</sup> See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); see also Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, in FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 9, 11 (2d ed. 2000).

<sup>12</sup> 293 F. at 1014 (emphasis added).

<sup>13</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).

<sup>14</sup> *Id.*

language of Rule 702:

Proposed testimony must be supported by appropriate validation—*i.e.*, “good grounds,” based on what is known. In short, the requirement that an expert’s testimony pertain to “scientific knowledge” establishes a standard of evidentiary reliability.<sup>15</sup>

To guide the trial court in performing its new “gatekeeping” duties, the Court offered a list of four non-exclusive factors to be considered—now known universally as the “*Daubert* factors.” The first three are classic hallmarks of “hard” or “positivist” science, such as physics, while the fourth is a watered-down restatement of *Frye*:<sup>16</sup> (1) whether the expert’s technique or theory “can be (and has been) tested”; (2) whether the theory or technique “has been subjected to peer review and publication”; (3) the known or potential rate of error and the existence and maintenance of standards controlling the technique’s operation”; and (4) “[g]eneral acceptance’ can yet have a bearing on the inquiry.”<sup>17</sup> The case was remanded to the Ninth Circuit for review under the new standard, and the Ninth Circuit ultimately rejected the plaintiffs’ evidence again.<sup>18</sup>

Since *Daubert* dealt exclusively with the question of *scientific* expert testimony, it was unclear how the federal trial courts should deal with the Rule 702 categories of “technical or other specialized knowledge.” The Supreme Court addressed this issue in the 1999 case of *Kumho Tire Co. v. Carmichael*.<sup>19</sup> The Court held preliminarily that *Daubert*’s requirement of independent scrutiny—gatekeeping—extended to all forms of expert evidence. However, non-scientific evidence should be evaluated under a more flexible standard:

[T]he test of reliability is “flexible,” and *Daubert*’s

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<sup>15</sup> *Id.* at 590.

<sup>16</sup> For a discussion of *Daubert*’s choice of the positivist model, see John M. Conley & David W. Peterson, *The Science of Gatekeeping: The Federal Judicial Center’s New Reference Manual on Scientific Evidence*, 74 N.C. L. Rev. 1183, 1201–04 (1996).

<sup>17</sup> *Daubert*, 509 U.S. at 593–94 (internal citations omitted).

<sup>18</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1322 (9th Cir. 1995).

<sup>19</sup> 526 U.S. 137 (1999).

list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.<sup>20</sup>

The final installment in the federal story was an amendment to Rule 702 in 2000 that was intended to conform its language to the logic of *Daubert* and *Kumho Tire*. It now reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>21</sup>

### III. North Carolina Before *Howerton*

The North Carolina cases before *Howerton* can be described as “*Daubert* lite,” or perhaps “*Frye* heavy.” North Carolina courts talked the *Daubert* talk but often failed to walk the *Daubert* walk, leading to some—to these observers—unusual admissibility decisions. To be fair to the North Carolina courts, state trial courts generally are not well equipped to do the work that *Daubert* requires. Most federal courts that are faced with difficult Rule 702 decisions now conduct extensive “*Daubert*

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<sup>20</sup> *Id.* at 141–42.

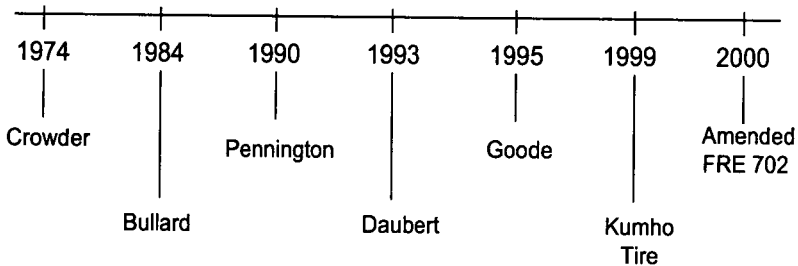
<sup>21</sup> FED. R. EVID. 702 advisory committee’s notes to the 2000 amendment (confirming that its purpose was to conform Rule 702 to the United States Supreme Court case law).

hearings,” often on motions in limine to exclude the evidence.<sup>22</sup> But federal district judges keep cases from beginning to end and have the assistance of full-time law clerks. North Carolina superior court judges, who often see a case for the first time during an all-comers motion session, have neither of these advantages. Because exclusion of expert testimony can be fatal to a plaintiff’s claim, North Carolina judges are understandably reluctant to sound the death knell of cases they barely know.

Below is a timeline of critical North Carolina cases, against the background of the federal developments:

## The North Carolina Cases

### Timeline



The key facts in those North Carolina cases were as follows:

- *State v. Bullard*:<sup>23</sup> footprint comparison by a physical anthropologist *admissible*
- *State v. Pennington*:<sup>24</sup> DNA identification *admissible*

<sup>22</sup> See William W. Schwarzer & Joe S. Cecil, *Management of Expert Evidence*, in FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 39, 53–54 (2d ed. 2000).

<sup>23</sup> 322 S.E.2d 370 (N.C. 1984).

<sup>24</sup> 393 S.E.2d 847 (N.C. 1990).

- *State v. Crowder*:<sup>25</sup> “gunshot residue test” *admissible*
- *State v. Goode*:<sup>26</sup> forensic serologist’s “bloodstain pattern analysis” *admissible*<sup>27</sup>

In *Crowder*, *Bullard*, and *Pennington*, all of which were decided before *Daubert*, the North Carolina Supreme Court made three essential points: It (1) rejected *Frye*’s “general acceptance” test; (2) adopted reliability as the touchstone for admissibility; and (3) applied a nonexhaustive list of *Daubert*-like factors.

Each of the cases emphasized reliability. According to *Crowder*, for example, “[s]cientific tests . . . are competent only when shown to be reliable.”<sup>28</sup> *Bullard* stressed reliability where the technique in question had not previously been admitted: “In general, when no specific precedent exists, scientifically accepted reliability justifies admission of the testimony of qualified witnesses.”<sup>29</sup> Additionally, *Pennington* seemed to read reliability into the *Frye* test: “Believing that the inquiry underlying the *Frye* formula is one of the reliability of the scientific method rather than its popularity within a scientific community, we have focused on . . . indices of reliability.”<sup>30</sup>

But, despite its professed concern with reliability, *Pennington*’s “indices of reliability” seem to have little to do with *Daubert*’s independent determination of whether an opinion is based on scientific knowledge. Instead, the North Carolina

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<sup>25</sup> 203 S.E.2d 38, 46 (N.C. 1974), *vacated in part on other grounds*, 428 U.S. 903 (1976).

<sup>26</sup> 461 S.E.2d 631 (N.C. 1995).

<sup>27</sup> North Carolina courts have addressed the validity of expert testimony in a variety of fields. *Compare* *State v. Barnes*, 430 S.E.2d 223, 231 (N.C. 1993) (holding blood group testing for identification purposes admissible), *and* *State v. Rogers*, 64 S.E.2d 572, 577–79 (N.C. 1951) (finding fingerprint analysis admissible), *and* *State v. Temple*, 273 S.E.2d 273, 279–81 (N.C. 1981) (finding bite mark analysis admissible), *with* *State v. Hall*, 412 S.E.2d 883, 891 (N.C. 1992) (finding expert’s testimony that victim suffered from a form of post-traumatic stress disorder inadmissible as substantive evidence of rape) *and* *State v. Peoples*, 319 S.E.2d 177, 188 (N.C. 1984) (finding hypnotically refreshed testimony inadmissible) *and* *State v. Grier*, 300 S.E.2d 351, 361 (N.C. 1983) (finding results of polygraph testing inadmissible).

<sup>28</sup> 203 S.E.2d at 46.

<sup>29</sup> 322 S.E.2d at 381 (citation omitted).

<sup>30</sup> 393 S.E.2d at 852–53.

Supreme Court stressed

the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked "to sacrifice its independence by accepting the scientific hypothesis on faith," and independent research conducted by the expert.<sup>31</sup>

The final consideration—"independent research" versus that conducted as a "hired gun"—has been stressed by the federal courts, including the Ninth Circuit on remand in *Daubert* itself. But the "use of established techniques" seems right out of *Frye*, and the use of visual aids is difficult to understand as an indicator of reliability. Does something become more reliable if you put it on a PowerPoint slide?<sup>32</sup>

The North Carolina cases have also used specific analytical factors that resemble the first three *Daubert* factors, but with significant distinctions. With respect to testability (the first factor), for example, *Bullard* approved the admission of expert testimony where "the experts did not rely on untested methods, unproved hypotheses, intuition or revelation. Rather, they applied scientifically and professionally established techniques."<sup>33</sup> Is this *Frye* or *Daubert*? Concerning the second factor, peer-reviewed publication, *Crowder* considered the expert's professed experience in the field, the fact that the expert had "presented *technical papers on the subject to various associations of forensic scientists*," and the existence of independent research.<sup>34</sup> Is this scientific peer

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<sup>31</sup> 393 S.E.2d at 853 (citations omitted).

<sup>32</sup> Under *Pennington*, expert testimony is admissible only if it is reliable, i.e., only if it "will assist the trier of fact to understand the evidence or to determine a fact at issue." N.C. R. EVID. 702. But there is nothing intrinsic to a visual aid that guarantees that its content is reliable or will assist the trier of fact. Thus, relying on visual aids serves only to push the reliability inquiry back another layer. A particular visual aid that is proffered by an expert should be admissible under *Pennington* only if it is reliable, which cannot be established by the visual aid itself. See, e.g., *Leatherwood v. Ehlinger*, 564 S.E.2d 883, 889 (N.C. Ct. App. 2002) ("[U]nless an expert's testimony . . . is sufficiently reliable, it is not considered competent evidence and therefore should not be presented to the jury.").

<sup>33</sup> 322 S.E.2d at 381 (citations omitted; emphasis added).

<sup>34</sup> 203 S.E.2d at 46 (emphasis added).



review, or simply general acceptance by a mutually reinforcing guild? On rate of error (the third factor), *Crowder* approved of a gun shot residue test because, according to a contemporary manual, “[n]o false tests were obtained nor failure of tests to detect” the subject elements.<sup>35</sup> But is it really a zero error rate when a test—according to its proponents—*always* proves what the prosecution intends it to prove?

The final, and most controversial, pre-*Howerton* case was *State v. Goode*, in which the North Carolina Supreme Court allowed the testimony of a bloodstain pattern expert. To many observers (including, as we shall see, the Court of Appeals), *Goode* appeared to endorse *Daubert* as the North Carolina standard:

Thus, under our Rules of Evidence, when a trial court is faced with the proffer of expert testimony, it must determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to determine a fact in issue. *As recognized by the United States Supreme Court in . . . [Daubert]*, this requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue.<sup>36</sup>

#### IV. *Howerton*

Bruce Howerton, a dentist, was involved in a catastrophic motorcycle accident that resulted in a broken neck and left him in a quadriplegic condition. Dr. Howerton sued Arai, the manufacturer of his helmet, alleging negligent design. Specifically, he contended that a fixed (versus flexible) chin bar would have prevented the hyperflexion of his neck that caused the damage to

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<sup>35</sup> *Id.* (citation omitted; emphasis added).

<sup>36</sup> 461 S.E.2d at 639 (emphasis added). *Goode* also appeared to anticipate the holding in *Kumho Tire*, holding that reliability is the touchstone of admissibility “whether the expert is proposing to testify to scientific, technical, or other specialized knowledge.” *Id.*

his spinal cord. He proffered four expert witnesses to establish causation.<sup>37</sup>

Arai moved for summary judgment, arguing that the plaintiff's experts' opinions were unreliable and thus inadmissible and that the plaintiff could not make a prima facie case without them. After reviewing the transcripts of the experts' depositions, Superior Court Judge Wade Barber granted the motion in an exceptionally detailed and careful opinion (quoted at length by the Court of Appeals).<sup>38</sup> Judge Barber began with the legal proposition that *Goode* had confirmed North Carolina's adoption of *Daubert*. He then applied a *Daubert*-like analysis to the experts' opinions and rejected each in turn. The Court of Appeals, sharing Judge Barber's view of *Goode*, affirmed: "From a thorough review of our case law, it is eminently clear that North Carolina has adopted the *Daubert* analysis. This is not novel. *Daubert* has been the prevailing law in this state since *Goode*."<sup>39</sup>

The Court of Appeals then endorsed the trial court's analyses of the four experts. The first was Professor Hugh Hurt, a head safety researcher and emeritus professor at the University of Southern California, and an expert in motorcycle accident reconstruction and helmet design. His opinion that the absence of a fixed chin bar caused Dr. Howerton's injury was based on the reconstruction of three motorcycle accidents in which the respective riders had a "U" or "V" shaped mark on their chests and wore helmets with fixed (or integrated) chin bars. His testimony was deemed properly excluded because Professor Hurt (1) had not tested his hypothesis; (2) had not subjected it to peer review; (3) had published work contradicting his current theory; (4) could not quantify the extent, if any, to which a fixed chin bar would have prevented forward flexion of the neck; and (5) could not identify any published works supporting his hypothesis.<sup>40</sup>

<sup>37</sup> Howerton v. Arai Helmet, Ltd., 597 S.E.2d 674, 677–78 (N.C. 2004).

<sup>38</sup> Howerton v. Arai Helmet, Ltd., 581 S.E.2d 816, 820–22 (N.C. Ct. App. 2003), *rev'd*, 597 S.E.2d 674 (N.C. 2004).

<sup>39</sup> *Id.* at 826.

<sup>40</sup> *Id.* at 819–20. Professor Hurt probably did not advance his cause by testifying in deposition, "Like Bo knows baseball, Hurt knows motorcycle accidents." The Court of Appeals noted this statement but disclaimed any reliance on it. *Id.* at 827 n.9.

The plaintiff's second expert was Dr. William Hutton, an Emory University orthopedist and expert in biomechanics. He, too, opined that Arai's flexible chin guard design caused Dr. Howerton's neck to enter into a state of hyperflexion, which caused his quadriplegia. Dr. Hutton's testimony was excluded because Dr. Hutton (1) never researched, tested, or published his hypothesis; (2) had never dealt with a similar injury and could not cite medical or scientific literature that supported his hypothesis; and (3) stated that the injury could have occurred in the absence of hyperflexion.<sup>41</sup>

The next witness was Dr. Charles Rawlings, an expert in neurosurgery. A Duke University medical graduate, he had served a ten-year residency at Duke during which he performed many surgical procedures. At the time of his deposition, he was a law student at Wake Forest University. He testified that Dr. Howerton did not suffer any cervical injuries, including his paralysis, until his head rotated forward beyond the normal range of motion. Dr. Rawlings's testimony was excluded because he (1) had not tested his hypothesis; (2) had not subjected it to peer review; (3) conceded that there were no objective criteria that could be used to affirm his hypothesis; and (4) conceded that one could not determine the degree of flexion without knowing the amount of force in the accident and that he did not know the amount of force.<sup>42</sup>

Finally, the plaintiff offered James Hooper, a design engineer and expert in helmet design. He also proposed to testify that a full face helmet with an integrated chin bar would have prevented Dr. Howerton's quadriplegia. Mr. Hooper's testimony was excluded because he (1) admitted that he did not have the expertise to opine that an integrated chin bar would have prevented the injury and (2) could not, therefore, establish a reliable foundation for his opinion.<sup>43</sup>

The Court of Appeals affirmed the rejection of all four experts. It held that the trial judge had properly exercised his

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<sup>41</sup> *Id.* at 820–21.

<sup>42</sup> *Id.* at 821.

<sup>43</sup> *Id.* at 821–22.

gatekeeping function under *Daubert/Goode*<sup>44</sup> and that his specific application of the *Daubert* factors had been a proper exercise of his “wide discretion.”<sup>45</sup>

In reversing, the North Carolina Supreme Court conclusively rejected the idea that North Carolina is a *Daubert* state: “Contrary to the conclusion of the Court of Appeals, it is not ‘eminently clear’ that North Carolina adopted the *Daubert* standard.”<sup>46</sup> It found no warrant for that assertion in *Goode*<sup>47</sup> or any other case. On the contrary, the Supreme Court concluded, “the North Carolina approach is decidedly less mechanistic and rigorous than the ‘exacting standards of reliability’ demanded by the federal approach.”<sup>48</sup> As a policy matter, the court expressed particular concern about cases that depend on scientific evidence being decided at the motion stage—exactly what happened in *Howerton*:

As a consequence of these stringent threshold standards for admitting expert testimony, we are concerned with the case-dispositive nature of *Daubert* proceedings, whereby parties . . . may use pre-trial motions to exclude expert testimony under *Daubert* to bootstrap motions for summary judgment that otherwise would not likely succeed.<sup>49</sup>

So serious is the problem, the court wrote, that it threatens to reach

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<sup>44</sup> Specifically, the Court of Appeals held that

In *Goode*, our Supreme Court, relying on *Daubert*, expressly held that the first inquiry a trial court must make in determining the admissibility of expert testimony is whether “the method of proof is sufficiently reliable.” This makes sense, because “unless an expert’s testimony . . . is sufficiently reliable, it is not considered competent evidence and therefore should not be presented to the jury.”

*Id.* at 825.

<sup>45</sup> *Id.* at 827 (citations omitted). The United States Supreme Court had previously held that a trial court’s *Daubert* gatekeeping decision should be reviewed under the abuse of discretion standard. *See* *General Electric Co. v. Joyner*, 522 U.S. 136 (1997).

<sup>46</sup> *Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674, 689 (2004).

<sup>47</sup> *Id.* (including “but one reference to *Daubert*”).

<sup>48</sup> *Id.* at 690.

<sup>49</sup> *Id.* at 691.

constitutional status:

[T]rial courts asserting sweeping pre-trial “gatekeeping” authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence.<sup>50</sup>

In place of *Daubert*, the Supreme Court prescribed a three-step admissibility test that, it said, is rooted in *Pennington* and *Goode*: (1) “Is the expert’s proffered method of proof sufficiently reliable?”; (2) “Is the witness . . . qualified as an expert in that area?”; and (3) “Is the expert’s testimony relevant?”<sup>51</sup>

With respect to reliability, trial courts should seek to follow precedent. But where the court is “without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives,” it should look to “nonexclusive ‘indices of reliability.’” These indices, derived from *Pennington*, include the “use of established techniques,”<sup>52</sup> the “expert’s professional background in the field,”<sup>53</sup> the “use of visual aids,”<sup>54</sup> and “independent research conducted by the expert.”<sup>55</sup> As noted earlier, the first of these is the old *Frye* test, minimally reworded.<sup>56</sup> Professional background is a matter of qualifications—but qualifications to do what? Do qualifications in, say, neurosurgery, necessarily lend reliability to an opinion about the biomechanical effect of a helmet design in a particular accident? The significance of visual aids remains something of a mystery to these authors, while independent (versus hired-gun) research seems a reasonable proxy for reliability. Turning to what the court did *not* say, it is unclear whether a trial judge could properly add the specific *Daubert* factors to this list of non-exclusive indices. Nor is it clear whether the trial court can follow *Goode* and consider whether the proffered expert’s “reasoning or methodology can be properly

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<sup>50</sup> *Id.* at 692.

<sup>51</sup> *Id.* at 686.

<sup>52</sup> *State v. Pennington*, 393 S.E.2d 847, 853 (1990).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *See supra* notes 29–30 and accompanying text.

applied to the facts in issue.<sup>57</sup> Moreover, the court did not have occasion to consider the role of Rule 403, which balances probative value against potential prejudice, in deciding on the admissibility of expert evidence.<sup>58</sup>

Because the two lower courts had acted under a misapprehension of the applicable legal standard, the Supreme Court remanded the case “for further proceedings not inconsistent with this opinion.”<sup>59</sup> The hard question is what those proceedings should look like.<sup>60</sup> A few things are clear. First, North Carolina trial judges should *not* get into the habit (as their federal counterparts are often accused of doing) of routinely disposing of civil cases at the pre-trial stage. Summary judgment against civil plaintiffs has always been disfavored in North Carolina, and it should remain so. Rule 702 is not to be treated as a command to alter that balance.

Nonetheless, trial judges *should* examine the reliability of expert witnesses; the assumed mantle of expertise does not confer the right to say anything at all. But that said, the *Howerton* approach is clearly much more deferential to experts than *Daubert* has proved to be. Under *Howerton*, qualifications are an indication of the reliability of an expert’s opinion. It is difficult to read this as other than a directive to give more latitude—in all directions—to experts with impressive credentials. Moreover, courts should respect precedent with respect to particular categories of opinions. While it makes sense not to require overworked and poorly supported trial judges to reinvent the wheel, this rule is an invitation to keep making the same mistake over and over again.

In the federal courts, long-established forensic techniques like handwriting analysis have been successfully attacked on the

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<sup>57</sup> 461 S.E.2d at 639.

<sup>58</sup> N.C. R. EVID. 403.

<sup>59</sup> 597 S.E.2d at 694. In an interesting partial dissent, Justice Parker agreed that North Carolina is not a *Daubert* state. She believed, however, that the trial judge’s analysis should stand as an appropriate exercise of discretion under the correct *Pennington* standard. *Id.* at 694–95.

<sup>60</sup> The authors have been advised orally that *Howerton* has been settled on undisclosed terms.

basis of new, independent assessments of reliability.<sup>61</sup> Such attacks, which clearly advance the interests of justice, seem far less likely in this state after *Howerton*. The anthropologist who testified about footprints in *Bullard* was subsequently exposed as utterly unreliable,<sup>62</sup> and anyone who has ever heard a blood spatter expert testify might suspect that such evidence (as in *Goode*) was ripe for rigorous independent scrutiny. Under the logic of *Howerton*, however, it will be difficult to persuade trial courts to reach different results.

## V. Conclusion

Overall, North Carolina has become more *Frye*-like after *Howerton*, adhering more closely to the guild approach. General acceptance—by credentialing authorities, by other experts, and by the courts—now seems almost conclusive on the issue of reliability. University of North Carolina professor Kenneth Broun has predicted that *Howerton* will create a “presumption of admissibility,” arguing that “the North Carolina Supreme Court may have effectively shifted the burden of demonstrating reliability on the part of the proponent of the evidence [as under *Daubert*] to a burden of demonstrating unreliability on the opponent.”<sup>63</sup> We believe that he is correct. All of the signals in *Howerton* trend in favor of admissibility: the trial courts should not mimic their federal counterparts; summary judgment should not become routine; judges should not encroach on the jury’s province, confusing admissibility with weight; qualifications should be respected; and established rules of admissibility for particular categories of evidence should generally be followed. Professor Broun is correct to characterize these signals as a reversal of the burden. It is a burden that, we predict, opponents of scientific evidence will rarely be able to meet.

It is an interesting hypothetical exercise to apply the rules

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<sup>61</sup> See, e.g., 2 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE § 22-1.4 (1997) (discussing challenges to handwriting evidence).

<sup>62</sup> Kenneth S. Broun, *Scientific Evidence in North Carolina After Howerton—A Presumption of Admissibility*, N.C. ST. BAR J. 8, 12 (Spring 2005).

<sup>63</sup> *Id.* at 11.

of *Howerton* to the facts of the same case—the task for the remand that has been rendered moot. We believe that the testimony of the three experts with “Doctor” before their names would have been admitted easily. All were abundantly qualified to testify about something like that on which they opined. Their general qualifications would have overwhelmed any reservations about the link between those qualifications and the specifics of their opinions. In the instances of the two medical doctors, this state’s longstanding respect for physicians’ ability to testify about the causes of disease and injury would have been a powerful additional factor. Even “Mr.” Hooper would almost certainly have survived. Given Rule 702’s emphasis on the broad range of possible qualifications—“knowledge, skill, training, experience, or education”—his practical engineering background would likely have persuaded the court to give him fairly free rein to opine. The only basis for excluding any of these experts would be to apply the *Daubert* factors rigorously, as the trial court did. Without this option, it seems most unlikely that the defendant could have overcome Professor Broun’s presumption.

It is thus tempting to conclude that *Howerton* will be read as a mandate to admit almost anything, in both civil and criminal cases. (As an aside, *Howerton* created a conflict between two groups that are usually aligned: the civil plaintiff’s bar, who opposed a *Daubert* standard, and the criminal defense bar, who favored it.)<sup>64</sup> One alternative possibility is that trial judges will take up the invitation in Justice Parker’s separate *Howerton* opinion to conduct rigorous, *Daubert*-like scrutiny of expert testimony under the rubric of *Pennington*.<sup>65</sup> Because such scrutiny was so rare even when it appeared that North Carolina had adopted *Daubert*, we think it unlikely as a practical matter. And because no other Justice signed Justice Parker’s opinion, we think it equally unlikely that a trial judge who did so would get away with it. The law of North Carolina is, in our judgment, that all but transparent

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<sup>64</sup> See *Howerton*, 597 S.E.2d at 677 (noting that North Carolina Academy of Trial Lawyers, North Carolina Conference for District Attorneys, and North Carolina Association of Defense Attorneys all filed amicus briefs, the latter joining with the North Carolina Citizens for Business and Industry).

<sup>65</sup> See *supra* note 59.



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quacks are to be given the benefit of the doubt and left to the critical faculties of juries.

