Changes to Rule 702(a): Has North Carolina Codified *Daubert* and Does It Matter?

During the past legislative session, the General Assembly changed Rule 702(a) that deals with the admissibility of expert testimony. This change tracked, in pertinent part, an amendment to the same federal rule that was designed to codify the principles in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

Previously, the Rule 702(a) rule allowed a qualified person to testify in the form of an opinion "[i]f scientific, technical or other specialized knowledge" would "assist the trier of fact to understand the evidence or determine a fact in issue.[1] The amendment added the following language regarding when a qualified person may testify. Now, a witness could testify in the form of

> . . .an opinion, or otherwise, if all of the following apply:
> (1) The testimony is based upon sufficient facts or data.
> (2) The testimony is the product of reliable principles and methods.
> (3) The witness has applied the principles and methods reliably to the facts of the case.[2]

Despite the identical language of the federal and North Carolina versions of Rule 702, some confusion has surrounded whether North Carolina applies the

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[1]Former N.C. R. Evid. 702(a).

[2]N.C. R. Evid. 702(a), as amended effective 1 October 2011.

principles in *Daubert* to the admissibility of expert testimony. Indeed, in *Howerton v. Arai Helmet, Ltd.*, the Supreme Court of North Carolina declared, "North Carolina is not, nor has it ever been, a *Daubert* jurisdiction."[3]

But federal rule 702 was amended to codify *Daubert* and now the state rule 702(a) has been amended in a similar fashion. Indeed, the North Carolina Court of Appeals recently noted Rule 702(a) was amended "to adopt the standard for expert testimony set forth in *Daubert* . . ."[4] Assuming this observation accurately describes this amendment as codifying *Daubert*, and assuming *Howerton* meant what it said in stating North Carolina is not a *Daubert* state, the courts must now puzzle what this change to Rule 702(a) means for the admissibility of expert testimony in North Carolina.

This article offers some preliminary observations about this development. In doing so, it provides some historical perspective on expert testimony and *Daubert*, examines North Carolina's approach to expert testimony, and compares the new language of the rule to change with an eye toward explicating the effect of the amendment.

Reviewing the import of *Daubert* on expert testimony in federal court

Daubert worked a fundamental change in the approach to novel scientific

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[3]*Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004).

[4]*State v. Hudson*, No. COA11-444, slip op. at 5 n.1 (7 February 2012) (unpublished).

testimony in federal court. Essentially, *Daubert* decreed the *Frye*[5] test no longer applied after the adoption of Federal Rule 702. *Frye* explained expert testimony about novel scientific principles would only be admissible when there was a general acceptance of the underlying theory in the relevant scientific community.[6] *Frye* involved the admissibility of testimony about the results of a systolic blood pressure test. The court rejected the admissibility of this novel scientific testimony. In doing so, it noted the line between experimental and demonstrable stages is somewhat difficult to define. "Somewhere in this twilight zone the evidential force of the principle must be recognized . . . [and] 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."[7]

Long after the *Frye* decision, the federal rules of evidence of were adopted. Rule 702(a) provided, "if scientific, technical, or other specialized knowledge will assist the trier of fact to determine 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."

Daubert held Rule 702 superseded the *Frye* test with respect to novel

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

[6]*Id.* at 1014.

[7]*Id*.

scientific testimony.

Daubert made several essential points. First, the rules of evidence are designed to admit evidence whenever possible. Relevant evidence, which is any item that tends to make a material fact more likely than it would be without the evidence, is generally admissible.[8] Rule 702 follows this general principle of evidential admissibility. It allows expert testimony from any person who is appropriately qualified when the witness' opinion would assist the fact-finder in understanding the evidence or determining a material fact.

Daubert involved a situation where a trial court excluded expert testimony about the effect of a particular drug on birth defects in humans. Once the trial court excluded this expert testimony, the plaintiff was unable to establish causation. Accordingly, the trial court granted summary judgment for the defendant.

Daubert reversed this grant of summary judgment. It noted the *Frye* test was inconsistent with Rule 702. The trial court had erred in excluding this proffered expert testimony.

Again, *Daubert* focused on two important principles in rejecting the *Frye* test and in reversing the grant of summary judgment for the defendant. First, the rules of evidence are designed to allow the jury or the fact-finder to consider all

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[8]Fed. R. Evid. 401.

relevant evidence. That is, evidence should generally be freely admitted. Second, Rule 702 is similarly designed to admit expert testimony when it would assist the jury or the fact-finder in its consideration of relevant evidence or in its determination of the issues.[9]

Daubert explained that Rule 702 is broad. The pertinent inquiry for a trial court regarding the admission of expert testimony is "flexible." A trial court should examine whether a particular theory has been tested; whether it has been subjected to peer review; whether there is a potential or known error rate; and whether there is a level of acceptance within the relevant scientific community.

Aside from its analysis of Rule 702, *Daubert* established a "gatekeeping role" for trial judges. Trial judges must screen proffered expert testimony and determine whether it is admissible within the context of the rules of evidence.

Although *Daubert* rejected the *Frye* test and indicated that expert testimony should generally be admitted, its assignment of "a gatekeeping role" for trial judges proved somewhat problematic. Indeed, several subsequent decisions created a situation in the federal courts where trial judges continued to exclude proffered expert testimony and prevented plaintiffs from taking their cases to a jury trial. For example, a trial court was permitted to exclude proffered expert testimony if the linkage to the applicable data was provided only by the *ipse dixit*

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[9] *Daubert*, 509 U.S. at 489-95.

of the expert.[10] *Daubert* was later extended to all expert testimony, not just novel scientific techniques.[11] Finally, the procedure under *Daubert* expanded to allow an appellate court to find a trial court abused its discretion in admitting certain expert testimony and remand the matter for entry of judgment as a matter of law rather than merely remand for reconsideration.[12] Despite the breadth of *Daubert* in touting the general admissibility of expert testimony, the post-*Daubert* practice in federal court saw the tendency toward excluding expert testimony and granting summary judgment.

Reviewing what *Howerton* did to expert testimony in North Carolina

Howerton was the important post-*Daubert* decision in North Carolina. In *Howerton*, the trial court excluded four experts proffered by the plaintiff. It based this exclusion on its determinations of unreliability given the methodology used by the experts and the experts lack of qualifications. After the trial court's ruling was affirmed by the Court of Appeals, the Supreme Court of North Carolina reversed.[13]

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[10]*See General Electric Company v, Joiner*, 522 U.S. 136 (1997). *General Electric* involved testimony about a study of the impact of PCBs on baby mice and an extrapolation to their effect on humans. The linkage between this study and the effect on humans came only from the opinion of the expert.

[11]*See Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999). *Kumho Tire* approved the use of the *Daubert* analysis by a trial judge to exclude non-novel expert testimony about the design defects of tires based solely on a visual examination by the expert.

[12]*See Weisgram v. Marley Company*, 528 U.S. 440 (2000).

[13]*Howerton*, 358 N.C. at 458-69, 597 S.E.2d 686-93, *reversing*, 158 N.C. App. 316, 581 S.E.2d 816 (2003).

Howerton included a lengthy discussion and analysis of *Daubert* and its aftermath with respect to federal practice and procedure. This analysis surmised a primary result of *Daubert* in the federal courts was a reduction in jury trials in civil cases, stemming in large part from the tendency of trial judges to exclude expert testimony in the exercise of their "gatekeeping role." It found this "gatekeeping approach" to be "troublesome" and unduly "mechanistic."[14] Unquestionably, *Howerton*'s displeasure with this development played a significant role in the ruling.

In supporting its declaration that "North Carolina is not, nor has it ever been, a *Daubert* jurisdiction," *Howerton* examined North Carolina's longstanding jurisprudence regarding expert testimony. At the outset, it explained North Carolina has never used the *Frye* test. It discussed numerous decisions in which proffered expert testimony, both involving routine science and novel science, had been evaluated for admissibility based upon the essential criterion of reliability. It did so by underscoring North Carolina's stated preference for juries being allowed to hear relevant expert testimony and decide how to apply it to the facts of a case.

Howerton noted the applicable standard in North Carolina had been articulated in *State v. Goode*.[15] *Under Goode*, the requirement for reliability of

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[14]*Id*. at 464, 597 S.E.2d at 690.

[15]*State v. Goode*, 341 N.C. 221, 321 S.E.2d 224 (1998).

expert testimony added nothing new to the law of scientific and technical evidence in North Carolina. A trial court should initially look to precedent for guidance in determining whether a particular scientific technique has been accepted or rejected. In the absence of specific precedent, a trial court should look for "indices of the liability," including estimated techniques, the expert's background, visual aids for the jury, and the expert's independent research.[16]

Howerton distilled the inquiry delineated in *Goode* and fashioned a three-step process a trial court should use in determining whether to admit expert testimony:

1. Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony?
2. Is the witness qualified as an expert in that area of testimony?
3. Is the expert's testimony relevant?[17]

This three-step process from *Howerton* and *Goode* is essentially an inquiry to the relevancy and reliability of the evidence. The evidence must, of course, be relevant under Rule 401. It must make a material fact at issue more or lass likely than it would be without the evidence. Then it must be reliable. A trial court should look at whether the expert used established techniques. The trial court should look at whether the expert has a professional background in the field. The

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[16]*Howerton*, 358 N.C. at 461, 597 S.E.2d 687.

[17]*Id*. at 459-64, 597 S.E.2d at 686-89.

trial court should look at whether the expert did independent research. The trial court should look at whether the expert has visual aids so the jury does not have to accept the expert's hypothesis at face value.

At bottom, *Howerton* noted Rule 702 should be read liberally, as the drafters intended, to admit expert testimony so long as it is both relevant and reliable. That is what *Daubert* said. In many ways, *Howerton* was no different than *Daubert*, except for *Howerton*'s displeasure with the manner in which federal trial judges had exercised their "gatekeeping role" to increase the cases in which summary judgment was granted and thereby decrease jury trials.

Reviewing how Rule 702(a) compares to *Daubert* and *Howerton*

Rule 702(a) now requires three things. First, the proffered expert testimony must be based upon sufficient facts or data. Second, the proffered expert testimony must be the product of reliable principles and methods. Third, the proffered expert must have applied the principles and methods reliably to the facts of the case. These three steps are essentially what *Daubert* and, to a great extent, *Howerton* and *Goode* require.

Rule 702(a) now specifies two things not explicitly delineated in *Daubert* or *Howerton*: the expert's testimony must be "based upon sufficient facts or data" and the expert must have "applied the principles and methods reliably to the facts of the case." These notions may well have been implicit in *Howerton* and *Goode*,

as it is unclear how proffered expert testimony could have been deemed "reliable" under these cases if it was not "based upon sufficient facts or data" through "principles and methods" applied "reliably to the facts of the case."

One aspect of *Howerton* and *Goode* that should not survive this amendment is the binding force of precedent. *Howerton* expressly directed trial courts to look to "precedential guidance" in deciding whether to admit expert testimony.[18] Applied rigidly, this notion would freeze scientific testimony or at least make it more difficult for trial courts to revisit areas of expert testimony despite changes in scientific understanding. In light of recent scientific understanding of techniques heretofore accepted in criminal cases, such as blood spatter analysis and other types of novel or "junk science," Rule 702(a) should provide for reexamination of admissibility.

One aspect of *Howerton* that should survive this amendment is North Carolina's preference for jury trials. In many ways, *Howerton* could be interpreted as an indication that North Carolina is not a "summary judgment state," as opposed to North Carolina is not a "*Daubert* state." Trial courts should remain vigilant in affording parties the opportunity to have a trial on the merits and resist the temptation to resolve disputes through summary judgment.

Conclusion

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[18] *Id*. at 460, 597 S.E.2d at 687.

The essential teaching of *Daubert*, *Goode*, and *Howerton* is expert testimony should be liberally and freely admitted so long as it is relevant and reliable. Although reliability may be in the eye of the beholder, both *Daubert* and *Howerton* strongly suggest a preference admitting expert testimony so the trier of fact can consider it.