North Carolina Central Law Review

Volume 28
Number 1 *Volume 28, Number 1*

Article 7

10-1-2005

Howerton v. Arai Helmet, Ltd. Last Dance with the Daubert-Kumho Decisions: One Step Forward from Two Steps Back

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HOWERTON V. ARAI HELMET, LTD LAST DANCE WITH THE *DAUBERT-KUMHO* DECISIONS: ONE STEP FORWARD FROM TWO STEPS BACK

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I. INTRODUCTION

North Carolina has often been cited for its unpopular law and minority views. For example, it is one of only four states that still maintain a contributory negligence doctrine.[1] It recently added its voice to the tiny chorus of states that have expressly rejected the federal standards set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*[2] for determining the admissibility of expert testimony under Rule 702 of the Federal Rules of Evidence. The North Carolina Supreme Court soundly rejected *Daubert* and its progeny in its *Howerton v. Arai Helmet, Ltd.*[3] opinion, holding fast to its own earlier decision of *State v. Goode*[4] and finding that *Goode* presents a "more workable framework" for ruling on the admissibility of expert testimony.

Rule 702 of the North Carolina Rules of Evidence is titled "Testimony by Experts." Section (a) of the rule provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or 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.[5]

When read on its face, Rule 702 appears quite broad. Indeed, the U.S. Supreme Court case, *Daubert*, characterized the corresponding federal rule, which is not appreciably different, as "liberal." *Daubert* provided flexible guidelines to help trial courts determine the admissibility of scientific expert testimony.[6] Unfortunately, cases after *Daubert* did not hold true to this characterization and trial courts began to use the factors set forth in *Daubert* more like elements.[7] As

1. Steven Gardner, *Contributory Negligence, Comparative Negligence and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1 (1996).
2. Daubert v. Merrill Dow Pharm., Inc., 509 U.S. 579 (1993).
3. Howerton v. Arai Helmet, Ltd., 597 S.E.2d 674 (N.C. 2004).
4. State v. Goode, 461 S.E.2d 631 (N.C. 1995).
5. N.C. GEN. STAT. § 8C-1, Rule 702 (2005).
6. *Daubert*, 509 U.S. at 587-588.
7. *See, e.g.* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

argued below, this had a detrimental effect on parties seeking to bring their causes of action before juries. Parties' expert testimony on essential elements of their claims or defenses could be stricken more easily. Stripped of their expert testimony, some parties had no causes of action. By taking two steps back from *Daubert* and *Kumho*, North Carolina moved one step ahead in providing parties their right to trial.

Dr. Bruce Howerton was just such a plaintiff found to be at the trial court's mercy. This case note seeks to inform readers of the nature of N.C. R. Evid. 702 and the underlying evidentiary principles that surround it. It argues that *Howerton* reached the correct result based on two grounds: (1) that earlier North Carolina cases focusing on the liberal nature of Rule 702 do not comport with *Daubert* or its progeny; and (2) even well-meaning law that holds great potential for abuse in its application has no home in North Carolina.

II. THE CASE

Plaintiff, Dr. William Bruce Howerton, Jr., was "an experienced off-road motorcycle enthusiast" who enjoyed riding off-road motorcycles at a motocross practice track in western North Carolina.[8] On October 5, 1996, Dr. Howerton was executing a routine "table top" jump at the practice track when another rider inadvertently entered the landing area of the jump.[9] Dr. Howerton collided with the other rider; his motorcycle was forced to an abrupt halt which launched Dr. Howerton off his bike.[10] Dr. Howerton landed on the back of his head in the dirt and heard a popping or crunching sound directly before he felt pain in his neck.[11] He was immediately transported to the hospital by helicopter, where it was discovered that he had suffered fractures of his C5 and C6 cervical vertebrae.[12] As a result of his injuries, Dr. Howerton sustained immediate and irreparable quadriplegia.[13] On the day of his accident, Dr. Howerton was wearing an Arai "MX/a" helmet as well as other safety gear.[14]

Dr. Howerton subsequently brought suit against the other rider, the owners of the practice track, and Arai Helmet, Ltd.[15] Among other claims, Dr. Howerton alleged that "Arai negligently designed, manufactured, and promoted a helmet that was unreasonably dangerous" and that such negligence was a direct and proximate cause of his

8. *Howerton*, 597 S.E.2d at 677.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*

quadriplegia.[16] The chin guard of Arai's "MX/a" helmet was flexible, removable, and secured to the helmet by two nylon screws on each side.[17] By contrast, most motocross helmets are designed with a rigid, integral chin guard that is structurally molded into the helmet. Such helmets are often called "full face" helmets.[18] During Dr. Howerton's accident, the nylon screws holding the chin guard to the helmet sheared off at impact and the chin guard was pushed up into the visor of the helmet, allowing Dr. Howerton's head to crunch forward.[19] Dr. Howerton argued that a full face helmet with a rigid, integral chin guard would have stopped his chin before it reached his chest and would have prevented his neck from hyperflexing forward beyond its anatomical range.[20] Dr. Howerton and his experts contended that the hyperflexion of his neck was responsible for the cervical fractures and resultant paralysis.[21] Arai insisted that the MX/a's chin guard was intentionally designed to bend or break away on impact so as to minimize dangerous torquing of the neck.[22]

Dr. Howerton proffered four experts to prove his theory of the defective chin guard. Three of those experts sought to testify to the helmet's causal connection to the injury. Arai stipulated to Professor Hugh H. Hurt, Jr.'s expertise in motorcycle accident reconstruction and motorcycle helmets.[23] At the time of his deposition, Professor Hurt was President of the Head Protection Research Laboratory of Southern California and Professor Emeritus of Safety Science at the University of Southern California.[24] For more than twenty-five years, Professor Hurt had researched motorcycle accidents and helmet safety and had published comprehensive and authoritative work on those subjects.[25] After conducting a Snell chin bar test and a hydraulic load test designed to determine when the nylon screws on the MX/a would fail, Professor Hurt opined that Arai's flexible chin bar and weak screws failed to limit the flexion motion of plaintiff's neck, resulting in Dr. Howerton's injury.[26] He further opined that a rigid, integral chin bar would have prevented the unlimited motion of Dr. Howerton's neck and therefore, his injury.[27]

16. *Id.* at 678.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Plaintiff-Appellant's New Brief at 10, Howerton v. Arai Helmet Ltd., 597 S.E.2d 674 (N.C. 2004) (No. 02-0612).
26. *Id.* at 11.
27. *Id.* at 10.

Dr. William Hutton was proffered as an expert in biomechanics and orthopedic biomechanics.[28] A colorful Scot,[29] Dr. Hutton had more than thirty-five years of experience in these fields and with spinal injuries and was the Professor and Director of Orthopaedic Research at Emory University School of Medicine.[30] Dr. Hutton opined that the flexible chin guard broke, allowing Dr. Howerton's head and neck to move beyond their normal anatomical range of motion.[31] Specifically, he determined that Dr. Howerton's paralysis resulted from both hyperflexive and compressive forces on the spine.[32] He concluded that the hyperflexion component caused bone fragments to be forced into Dr. Howerton's spinal canal, thereby injuring his spinal cord and causing his paralysis.[33]

James Randolph Hooper worked as a design engineer on off-road helmets during the same time Arai was developing its flexible chin guard design.[34] Although not holding a college degree, "Ran" Hooper had more than thirty years of personal experience in off-road motorcycle riding and had built three different off-road motorcycle helmets using his knowledge of design and manufacture of composite materials used in helmets.[35] As a member of the Helmet Industry Association, Mr. Hooper was familiar with the motorcycle helmet industry and opined that it was common knowledge in the industry at the time the MX/a helmet was designed that a rigid, integral chin bar significantly increased the overall protection afforded by the helmet.[36] He concluded that the MX/a's flexible nature created a considerable hazard and lacked the protective features typical of full-face helmets.[37] Unlike the other three experts, Mr. Hooper was not testifying on the issue of causation.

Dr. Charles Rawlings, who conducted his neurosurgery residency at Duke University Medical Center, was a board certified neurosurgeon with more than ten years of experience.[38] Although not Dr. Howerton's treating physician, Dr. Rawlings had conducted numerous spinal surgeries on patients with cervical fractures similar to Dr. Howerton's.[39] After reviewing Dr. Howerton's medical records and radiol-

28. *Howerton*, 597 S.E.2d at 679.
29. Interview with Richard T. Rice, Dr. Howerton's attorney, Womble Carlyle Sandridge & Rice, PLLC (Oct. 2004).
30. *Howerton*, 597 S.E.2d at 679.
31. *Id.*
32. *Id.*
33. Plaintiff-Appellant's New Brief at 17, *Howerton* (No, 02-0612).
34. *Id.* at 15.
35. *Id.*
36. *Id.*
37. *Id.* at 16.
38. *Id.* at 19.
39. Howerton v. Arai Helmet, Ltd., 597 S.E.2d 674 (N.C. 2004).

ogy films, Dr. Rawlings concluded that Dr. Howerton had suffered a hyperflexion-compression injury.[40] He opined that Dr. Howerton did not become paralyzed until after the moment his head rotated beyond its normal anatomical range.[41]

Arai timely moved for summary judgment and moved to exclude the expert testimony of Professor Hurt, Dr. Hutton, Ran Hooper, and Dr. Rawlings.[42] The trial court conducted a hearing on the admissibility of the experts' testimony.[43] Although it declined to hear live voir dire testimony from the experts, it considered arguments from counsel and reviewed the discovery and pleadings of the case.[44] The trial court subsequently granted Arai's motion to exclude the experts' testimony on the issue of causation and made findings of fact as to each of the four proffered experts.[45] Citing the earlier North Carolina case of *Goode*, the trial court concluded that North Carolina had adopted *Daubert* and that the experts' testimony as to causation was unreliable and inadmissible on the basis of the federal standard set forth in *Daubert*.[46] Since Dr. Howerton was then without any evidence to prove causation, the trial court determined that Dr. Howerton was unable to establish a prima facie claim that his injuries were caused by Arai's defectively designed MX/a helmet.[47] A fortiori, the trial court granted Arai's motion for summary judgment.[48]

Dr. Howerton appealed his case on the grounds that the trial court erroneously relied on *Daubert* to exclude his expert testimony of causation.[49] The North Carolina Court of Appeals rejected Dr. Howerton's assignments of error and affirmed the order of the trial court in its entirety.[50] Specifically, the Court of Appeals ruled that the North Carolina Supreme Court had expressly adopted *Daubert* three years prior in its *Goode* and *Bates* decisions.[51] The Court of Appeals went on to evaluate the testimony of Dr. Howerton's four experts using the *Daubert* criteria and held that the trial court did not abuse its discretion in excluding the testimony.[52]

40. *Id.*
41. *Id.* at 681.
42. *Id.* at 679.
43. *Id.*
44. *Id.*
45. *Id.* at 679-680.
46. *Id.* at 683.
47. *Id.*
48. *Id.*
49. *Id.* at 684.
50. *Id.*
51. State v. Bates, 538 S.E.2d 597 (N.C. Ct. App. 2000) (asserting without discussion that *Goode* had adopted *Daubert*).
52. *Howerton*, 597 S.E.2d at 684.

Dr. Howerton subsequently petitioned the North Carolina Supreme Court for discretionary review, which was granted.[53] One of the issues it agreed to address was whether North Carolina had, in fact, adopted *Daubert* as the test by which to assess the admissibility of expert testimony.[54] The North Carolina Supreme Court reversed the holding of the Court of Appeals and vacated the decision of the trial court.[55] Emphasizing the fundamental distinction between the admissibility of evidence (as determined by the judge) and its weight (to be given by a jury), the Court remanded the case for an evaluation of the experts' testimony based on the 3-part inquiry outlined in *Goode*.[56]

III. BACKGROUND

Because this case involves the application of Rule 702 of the North Carolina Rules of Evidence, and because North Carolina modeled its Rule 702 after the federal rule, it is helpful to discuss the federal and state approaches to the admissibility of expert testimony to understand the backdrop against which *Howerton* was decided.

The federal approach to admissibility of expert testimony is largely guided by Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals*.[57] Prior to deciding *Daubert*, the federal courts had relied on the 1923 decision of *Frye v. United States*.[58] *Frye* held that scientific expert testimony was admissible only when it was based on sufficiently established principles that had gained general acceptance in the particular field to which it belonged.[59] This came to be known as the "general acceptance" test.[60] In 1975, Congress enacted Federal Rule of Evidence 702.[61] Rule 702 and *Frye* coexisted peacefully until 1993 when *Daubert* reached the U.S. Supreme Court.

In *Daubert*, the parents of two children born with serious birth defects sued a major pharmaceutical company, alleging that the mother's

53. *Id.*

54. *Id.*

55. *Id.* at 694.

56. *Id.* at 686-687.

57. Expert testimony is also guided by the interplay of FED. R. EVID. 403 and FED. R. EVID. 703, as well as established case law interpreting and applying those rules.

58. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (expert testimony in murder case regarding the systolic blood pressure deception test was properly excluded at trial because the test had not gained the required standing and scientific recognition from psychological and physiological authorities).

59. *Id.*

60. *Howerton*, 597 S.E.2d at 685.

61. The original FED. R. EVID. 702 read, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or 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."

ingestion of an antinausea drug caused the birth defects.[62] Based on animal studies, chemical structure analyses, meta-analyses, and literature review, the parents' well-credentialed expert concluded that the antinausea drug caused birth defects.[63] The pharmaceutical company provided its own expert who concluded otherwise and the trial court excluded the plaintiff's expert testimony, finding that the bases on which the plaintiff's expert relied did not meet the *Frye* "general acceptance" standard.[64] The appellate court affirmed.[65] After granting certiorari, the U.S. Supreme Court vacated the decisions of the lower courts and remanded the case, holding that the techniques upon which an expert bases his opinions do not have to be "generally accepted" to be reliable.[66] In addition to recognizing the potential shortsightedness of applying *Frye* to novel areas of scientific inquiry, the U.S. Supreme Court held in *Daubert* that Fed. R. Evid. 702 superseded *Frye*.[67]

The *Daubert* court sought to provide some flexible guidelines for lower courts to follow in the future when determining the admissibility of expert testimony.[68] Before launching into its flexible factors that would comport more readily with the liberal intent of Fed. R. Evid. 702, the *Daubert* court cautioned, "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test."[69] The factors listed were: (1) whether the scientific theory or technique upon which the expert's opinion is based can be or has been tested; (2) whether the theory or technique employed by the expert has been subjected to peer review and publication; (3) the known or potential rate of error of the scientific technique; (4) the existence and maintenance of standards controlling the technique's operation; and (5) whether the theory or technique is generally accepted within its relevant scientific community.[70] The Court labeled this preliminary assessment by the trial court as the judge's "gatekeeping role."[71] The dissent predicted that forcing federal judges to don the hats of amateur scientists would result in a lot of conflicting law.[72]

Subsequent cases have hemmed in the foundations laid by *Daubert*. *Kumho Tire Co. v. Carmichael* extended the effect of *Daubert* beyond

62. Daubert v. Merrill Dow Pharm. Inc., 509 U.S. 579, 582 (1993).
63. *Id.* at 583.
64. *Id.* at 583.
65. *Id.* at 584.
66. *Id.* at 589, 598.
67. *Id.* at 589.
68. *Id.* at 593-594.
69. *Id.* at 593.
70. *Id.* at 593-594.
71. *Id.* at 597.
72. *Id.* at 600 - 601.

scientific expert testimony[73] by holding that any specialized testimony offered under Fed. R. Evid. 702 may be put through the flexible factors analysis.[74] However, a concurring opinion by Justice Scalia suggested that it might be an abuse of discretion for a trial court to fail to apply one of the *Daubert* factors.[75] Moreover, in *Weisgram v. Marley Co.* the U.S. Supreme Court took the position that an appellate court may reverse or direct the entry of judgment as a matter of law when a trial court incorrectly admits expert testimony under *Daubert.*[76]

Daubert and its progeny have since prompted the revision of Fed. R. Evid. 702. In 2000, the rule was amended to state, additionally, that experts may testify in the form of 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."[77] Although this appears to be the state of the law in the federal arena at the present time,[78] North Carolina has taken a different route in establishing the application of its now-less-similar Rule 702.

Rule 702 of the North Carolina Rules of Evidence was promulgated in 1983.[79] At the time, it was almost indistinguishable from its federal counterpart, omitting only the words "or otherwise" at the end of the rule. This rule was also identical to an earlier North Carolina statute, which was repealed when the rule became effective.[80] Rule 702 of the North Carolina Rules of Evidence is titled "Testimony by Experts." Section (a) of the rule provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or 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.[81]

Prior to Rule 702, North Carolina appears to have been friendly to expert testimony, even when the field of expertise was in its "infancy."[82] The state has liberally interpreted who can be an expert, what it takes to qualify as an expert, and what are proper subjects

73. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 151 (1999).
74. *Id.*
75. *Id.* at 159.
76. Weisgram v. Marley Co., 528 U.S. 440 (2000).
77. FED. R. EVID. 702.
78. The Seventh Circuit recently decided in United States v. Parra, 402 F3d 752 (7th Cir. 2005), that the 2000 amendments to FED. R. EVID. 702 which were prompted by *Daubert* now supersede *Daubert.*
79. N.C. GEN. STAT. § 8C-1, Rule 702 (2005).
80. N.C. GEN. STAT. § 8-58.13, derived from Laws 1981, c. 53, §§ 1 to 3.
81. N.C. GEN. STAT. § 8C-1, Rule 702. The subsequent subsections of Rule 702 specifically address medical malpractice cases and are therefore beyond the scope of this case note.
82. *See e.g.*, State v. Rogers, 64 S.E.2d 572 (N.C. 1951) (allowing expert analysis of bare footprints); State v. Crowder, 203 S.E.2d 38 (N.C. 1974) (allowing expert analysis of gunshot

about which an expert may testify.[83] North Carolina has never adhered to the view that expert testimony must be based exclusively on generally accepted methods, i.e., the *Frye* test.[84] On the contrary, it is enough that the expert witness "because of his expertise is in a better position to have an opinion on the subject than is the trier of fact."[85] True to the language of the rule, it is enough that the testimony can assist the trier of fact because the witness has helpful knowledge, skill, experience, training or education which the jurors do not.[86] As to what subjects are proper for expert testimony, the guiding principle is helpfulness – whether the particular issue in the case is one on which the expert can be helpful to jurors.[87]

After North Carolina enacted Rule 702, one of its first opportunities to address the admissibility of expert testimony came in *State v. Bullard*.[88] The defendant, Mr. Bullard, was accused of murdering Pedro Hales and dumping his body in the South River.[89] The case against Mr. Bullard was largely circumstantial, and the North Carolina Supreme Court's inquiry was centered on whether to admit Dr. Louise Robbins' expert testimony relating to the identification of the perpetrator through the bloody footprints found in the sand near the bridge over South River.[90] Dr. Robbins was a physical anthropologist employed at the University of North Carolina in Greensboro.[91] During a lengthy voir dire hearing she testified as to her background, qualifications, and independent studies in bare footprint comparisons.[92] She explained her methodology and conceded that she was the only person in the country to attempt to identify footprints based on four particular measurements taken of foot impressions, citing only two other experts in England and Germany who routinely engaged in the same kind of footprint analysis.[93] Dr. Robbins opined, based on her measurements and experience, the bloody footprints in the sand belonged to Mr. Bullard.[94] The trial court admitted the testimony of Dr. Robbins, and Mr. Bullard was subsequently sentenced to life im-

residue test utilizing flameless atomic absorption spectrophotometry); State v. Temple, 273 S.E.2d 273 (N.C. 1981) (allowing expert analysis of bite mark identification).

83. *See generally*, 2-7 KENNETH S. BROUN, BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE §§ 184-185 (6th ed. 2005).

84. State v. Bullard, 322 S.E.2d 370 (N.C. 1984).

85. State v. Wilkerson, 247 S.E.2d 905, 911 (N.C. 1978).

86. *Id.*

87. Broun, *supra* note 83.

88. *Bullard*, 322 S.E.2d at 370.

89. *Id.*

90. *Id.* at 374.

91. *Id.* at 373.

92. *Id.*

93. *Id.* at 374.

94. *Id.* at 373.

prisonment.[95] The North Carolina Supreme Court heard Mr. Bullard's appeal and decided that the trial court did not err in allowing Dr. Robbins to testify to the novel scientific theory embodied in her opinions.[96] It determined that based on its reasoning in other cases involving novel scientific theories, Dr. Robbins' methodology was reliable.[97] The Court noted that, contrary to the defendant's assertion that North Carolina had adopted the *Frye* general acceptance test, North Carolina had not.[98] Although finding that general acceptance was certainly a factor to be examined in deciding whether to admit expert testimony, North Carolina did not adhere exclusively to the *Frye* formula.[99]

In *State v. Pennington*, a subsequent case involving the admissibility of an expert's DNA analysis to implicate the accused, the Court further expounded on the *Bullard* court's analysis:

> 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 the following indices of reliability: 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 hypotheses on faith," and independent research conducted by the expert.[100]

The *Pennington* court cited other state courts' analyses that unless the evidence is so tainted that it is "totally unreliable," it should be allowed.[101] Opponents of expert testimony were encouraged to use traditional challenges against the evidence, such as relevancy, prejudice, chain of custody, or contamination.[102] The court suggested that such issues should go to the weight of the evidence, not its admissibility.[103]

Five years later in *State v. Goode*, the Court was called upon to assess the reliability of a proffered expert's testimony regarding bloodstain pattern interpretation.[104] The court first cited *Daubert* for the proposition that addressing the admissibility of expert scientific testimony required "a preliminary assessment of whether the reasoning or methodology underlying the testimony [was] sufficiently valid

95. *Id.*
96. *Id.* at 385.
97. *Id.* at 384.
98. *Id.* at 380.
99. *Id.*
100. State v. Pennington, 393 S.E.2d 847, 852-853 (N.C. 1990).
101. *Id.* at 854.
102. *Id.*
103. *Id.*
104. State v. Goode, 461 S.E.2d 631 (N.C. 1995).

and whether [such] reasoning or methodology can be properly applied to the facts in issue."[105] The court cited both *Bullard* and *Pennington* and specifically analyzed the same four criteria applied in *Bullard* and outlined in *Pennington,* and *not* the five flexible factors of *Daubert.* [106] It analyzed the expert's use of established techniques, his professional background in the field under inquiry, his independent research, and whether he used visual aids to assist jurors in making their own determinations rather than merely asking the jury to accept his hypothesis on faith.[107]

The court first concluded that the technique of bloodstain pattern interpretation was a subject matter appropriate for expert testimony; the court had already impliedly accepted bloodstain pattern interpretation as a scientific method of proof and deemed it to be therefore reliable.[108] The court next found that the expert was qualified by virtue of his education and experience in that field.[109] Third, it found the expert's testimony relevant because he had reviewed the case evidence and applied it accordingly. Overall, the *Goode* court seemed to establish its own criteria.[110] It reiterated the distinction between admission of testimony and the weight it is to be accorded by the jury[111] and decided the defendant's assignment of error was without merit, particularly because he had been afforded an opportunity to cross-examine the expert and had even elicited favorable information from that expert.[112] This appeared to be the state of the law in North Carolina at the time Dr. Howerton's experts were excluded by the trial court.

IV. ANALYSIS

Arai's argument for excluding Dr. Howerton's experts rested squarely on its implied assertion that North Carolina had adopted *Daubert* as the controlling analysis for determining admissibility of expert testimony.[113] Arai argued that Dr. Howerton's four experts: (1) had not performed testing relevant to the causation issues of the case; (2) had not undertaken independent research to support their hypotheses; (3) had not subjected their hypotheses to peer review; (4) had not published their hypotheses; (5) had relied on inadequate and non-

105. *Id.* at 639.
106. *Id.* at 639-640.
107. *Id.* at 640.
108. *Id.* at 641, *citing* State v. Daughtry, 459 S.E.2d 747 (N.C. 1995); State v. Willis, 426 S.E.2d 471 (N.C. Ct. App. 1993).
109. *Id.* at 642.
110. *Id.* at 643 - 644.
111. *Id.* at 645.
112. *Id.* at 644.
113. Howerton v. Arai Helmet, Ltd., 597 S.E.2d 674, 679 (N.C. 2004).

existent data to form their opinions which necessarily meant the opinions were subject to a high rate of error; and (6) had not demonstrated that their opinions were generally accepted within their own fields.[114] These attacks made by Arai almost exactly follow the multiple, "flexible" criteria established by *Daubert.*

In response, Dr. Howerton argued that *Daubert* had been neither impliedly nor expressly adopted by North Carolina and that his experts' testimony was admissible under general North Carolina evidentiary principles, including *Goode.*[115] Dr. Howerton further argued that even if *Daubert* were the law of North Carolina, his experts' testimony would still be admissible if the flexible multi-factored test was applied to each one.[116]

The North Carolina Supreme Court rightly rejected *Daubert* and its progeny on two grounds. First, contrary to the lower courts' assertions, the court found that *Daubert* and its related cases did not comport with North Carolina's earlier line of cases with respect to expert testimony.[117] Second, the court recognized the potential for abuse when applying *Daubert* and its progeny to the detriment of parties' claims or defenses.[118]

After reviewing earlier case law, the court agreed with Dr. Howerton's position that *Goode* was controlling and had set forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) whether the expert's method of proof was sufficiently reliable as an area for expert testimony; (2) whether the witness qualified as an expert in that area of testimony; and (3) whether the expert's testimony was relevant.[119]

The court correctly noted that *Goode's* first requirement of reliability was "nothing new" and pre-dated the federal courts' adoption of

114. *Id.*

115. Plaintiff-Appellant's New Brief at 25-28, Howerton v. Arai Helmet Ltd., 597 S.E. 2d 674 (N.C. 2004) (No. 02-0612).

116. *Id.* at 37-40.

117. *Howerton*, 597 S.E.2d at 689 ("Contrary to the conclusion of the Court of Appeals, it is not 'eminently clear' that North Carolina adopted the *Daubert* standard. Such a bold proposition is neither confirmed by the case law of this Court nor buttressed by the 'express holding' of the lower court in *State v. Bates* (citation omitted), which was nothing more than a passing citation parenthetical suggesting without more analysis or discussion that this Court had adopted *Daubert* in the *Goode* opinion.").

118. *See id.* at 692 ("In such instances, we are concerned that trial 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.").

119. *Id.* at 686.

the *Daubert* analysis.[120] In assessing reliability, the court cited its liberal approach in earlier cases[121] and cautioned:

> This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence. In this regard, we emphasize the fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury.[122]

The court did not purport to analyze Dr. Howerton's experts and admit their testimony.[123] It instead vacated the trial court's findings.[124] However, the cautionary conclusion reached by the court on this count proved correct. Professor Hurt expected to testify to motorcycle accident reconstruction analysis, Dr. Hutton to the biomechanics of the human spine, and Dr. Rawlings to his medical opinions as to the cause and effects of an injury. As the plaintiff's brief to the Court

120. *Id.*

121. *Id.* at 687. *See, e.g.,* State v. Williams, 565 S.E.2d 609 (N.C. 2002) (recognizing the admissibility of DNA evidence and upholding its use as the basis of an opinion by a properly qualified expert in forensic DNA analysis), *cert. denied*, 537 U.S. 1125 (2003); State v. Goode, 461 S.E.2d 631 (N.C. 1995) (reliability of bloodstain pattern interpretation supported in part by prior appellate acceptance of such technique in North Carolina and other jurisdictions); State v. Barnes, 430 S.E.2d 223, 231 (N.C. 1993) (recognizing the long established admissibility of results of blood group testing for identification purposes), *cert. denied*, 510 U.S. 946 (1993); State v. Pennington, 393 S.E.2d 847 (N.C. 1990) (finding persuasive authority in other jurisdictions' acceptance of DNA profiling); State v. Rogers, 64 S.E.2d 572, 578 (N.C. 1951) (recognizing that fingerprint evidence is an established and reliable method of identification) *overruled on other grounds by* State v. Silver, 213 S.E.2d 247 (1975). Conversely, the court noted that other fields of inquiry were inherently unreliable. *See e.g.,* State v. Hall, 412 S.E.2d 883, 890 (N.C. 1992) (concluding that 'evidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admitted for the substantive purpose of proving that a rape has in fact occurred' because of the unreliability of underlying psychiatric procedures used to diagnose the condition); State v. Peoples, 319 S.E.2d 177, 188 (N.C. 1984) (holding that 'hypnosis has not reached a level of scientific acceptance which justifies its use for courtroom purposes'); State v. Grier, 300 S.E.2d 351, 361 (N.C. 1983) (holding that polygraphs are inadmissible in any trial, even if otherwise stipulated to by the parties).

122. *Howerton*, 597 S.E.2d at 687, *citing* Queen City Coach Co. v. Lee, 11 S.E.2d 341, 343 (N.C. 1940).

123. However, with respect to Dr. Howerton's unfair trade practices claim, Justice Wainwright observed that "it is not the function of this Court, or the trial court for that matter, to weigh conflicting evidence of record. Rather, in cases such as this, when there are genuine issues of material fact that are legitimately called into question, summary judgment should be denied and the issue preserved for the jury." *Id.* at 694. Justice Wainwright further stated that "the record reveals deposition testimony by Professor Hurt that clearly supports Howerton's claim that Arai's flexible chin bar was inadequately designed . . . ." *Id.* He thus concluded that a legitimate conflict of evidence raised by Professor Hurt's deposition testimony created a genuine issue of material fact. *Id.* On remand, it was improbable that a trial court would be comfortable reanalyzing and re-striking Dr. Howerton's experts on the issue of causation in light of Justice Wainwright's implied instruction that the unfair trade practices claim must go to the jury. The same evidence of causation would be needed by Dr. Howerton to support his unfair trade practices claim.

124. *Howerton*, 597 S.E.2d at 694.

noted,[125] each of these areas is recognized by North Carolina law as an appropriate field for expert testimony as required by *Goode*.[126] Moreover, the expert testimony of Ran Hooper was intended not to prove causation, but to give weight to plaintiff's other arguments of negligent design and unfair and deceptive trade practices.[127]

In assessing the second criterion of *Goode*, the Court again focused on the liberal definition of who may qualify as an expert:

> As pertains to the sufficiency of an expert's qualifications, we discern no qualitative difference between credentials based on formal, academic training and those acquired through practical experience. In either instance, the trial court must be satisfied that the expert possesses "scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue."[128]

The *Howerton* court cited *Goode* again: "[i]t is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' "[129] Given the education, experience, and other qualifications of Professor Hurt, Dr. Hutton, Randolph Hooper, and Dr. Rawlings, the trial court apparently agreed that these parties were "in a better position to have an opinion on the subject" than the jury because the case subsequently went to trial in October of 2004 and these experts were allowed to testify.[130] Further, neither the Court of Appeals nor Arai had objected to the qualifications of Professor Hurt, Dr. Hutton or Dr. Rawlings.[131]

The last *Goode* criterion called for relevance. The relevance standard is a low threshold set by Rule 401 of the North Carolina Rules of Evidence as reigned in by Rule 403. Rule 403 states that evidence which is substantially more prejudicial than probative may be excluded.[132] Evidence is relevant simply if it has any tendency to make the existence of a material fact more or less probable than it would be

125. Plaintiff-Appellant's New Brief at 34, *Howerton*, (No. 02-0612).

126. *See* Zarek v. Stine, No. 01-0033, slip op. at 10 (N.C. Ct. App. Apr. 2, 2002) (unpublished opinion admitting accident reconstruction expert); Floyd v. McGill, 575 S.E.2d 789 (N.C. Ct. App. 2003) (permitting biomechanics expert testimony); *see also* Cherry v. Harrell, 353 S.E.2d 433 (N.C. Ct. App. 1987) (permitting medical expert testimony as to causation).

127. Plaintiff-Appellant's New Brief at 35, *Howerton*, (No. 02-0612).

128. *Howerton*, 597 S.E.2d at 688.

129. *Id.* at 461, *citing* N.C. GEN. STAT. § 8C-1, Rule 702(a) (2005).

130. Interview with Richard T. Rice, Dr. Howerton's attorney, Womble Carlyle Sandridge & Rice, PLLC (Oct. 2004). The trial lasted four weeks, and the jurors deliberated for almost four days before declaring to the judge an informal impasse with a 6-6 split. When the judge instructed the jurors to continue their deliberations, the parties succeeded in settling the case for an undisclosed amount – no doubt strongly motivated by the prospective costs associated with having to retry the case.

131. Plaintiff-Appellant's New Brief at 35, *Howerton*, (No. 02-0612).

132. N.C. GEN. STAT. § 8C-1, Rules 401 and 403 (2005).

without the evidence.[133] Whether Professor Hurt could reconstruct how the helmet broke, whether Dr. Hutton could testify about how biomechanical forces could cause Dr. Howerton's neck to fracture, or whether Dr. Rawlings could testify as to how cervical fractures can result in quadriplegia are all certainly relevant to Dr. Howerton's case. They were so relevant, in fact, that without them, the trial court determined that Dr. Howerton would have no case. The trial court recognized this on remand and the case proceeded to trial.

The second reason the court rejected *Daubert* and its progeny was because it correctly recognized the easy potential for abuse by parties arguing, and trial courts applying, *Daubert* with *Kumho*. Not only are the *Daubert-Kumho* decisions not in keeping with North Carolina evidence law, the *Howerton* court noted that the *Daubert-Kumho* decisions have received heavy criticism by many courts for their potential for abuse in excluding otherwise admissible expert testimony.[134] Although originally intended to convey the liberal thrust of Rule 702 in determining the admissibility of such testimony, *Daubert* and its progeny have been cited as grounds for barring plaintiffs' experts in civil cases, ultimately causing plaintiffs to be unable to present essential elements of their claims. As the *Howerton* court stated:

> When the United States Supreme Court jettisoned the "rigid 'general acceptance' requirement of *Frye*, it did so in order to further the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.'" (Citations to *Daubert* omitted). We believe that in practice, however, application of the "flexible" *Daubert* standard has been anything but liberal or relaxed and that trial courts, such as the one in the present case, have often been reluctant to stray far from the original *Daubert* factors in their analysis of the reliability of expert testimony.[135]

133. N.C. GEN. STAT. § 8C-1, Rule 401.

134. *Howerton*, 297 S.E.2d at 691. *See* Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335, 341 (1999); *see also* State v. Goeb, 615 N.W.2d 800, 812-14 (Minn. 2000) (rejecting *Daubert* on grounds that, among other things, *Daubert* has not achieved its stated intention of relaxing the barriers to the admissibility of expert testimony); 2 Michael H. Graham, *Handbook of Federal Evidence* § 702.5, at 461-62 (5th ed. 2001) ("*Daubert* is a very incomplete case if not a very bad decision. It did not, in any way, accomplish what it was meant to, i.e., encourage more liberal admissibility of expert witness evidence. In fact, *Daubert* overall in practice actually created a more stringent test for expert evidence admissibility especially in civil cases."); David Crump, *The Trouble with Daubert-Kumho: Reconsidering the Supreme Court's Philosophy of Science*, 68 MO. L. REV. 1, 40 (2003) ("As often happens, a premature pronouncement that was intended to be flexible has become an established set of criteria. It was foolhardy for the Court to ignore what was going to happen, which was that trial judges would consider the four *Daubert* factors to be legal principles established by the Supreme Court." (footnotes omitted)).

135. *Howerton*, 597 S.E.2d at 691 (quoting *Daubert*, 509 U.S. at 588).

By applying the *Daubert* factors as a checklist for admission of expert testimony, contrary to *Daubert's* express charge not to do so, trial judges could easily dispense with otherwise admissible evidence. The *Kumho* concurring opinion by Justice Scalia, suggesting that a trial court could abuse its discretion if it failed to apply one of the *Daubert* factors, further prompted trial courts to apply the factors as a checklist.[136] In the absence of expert testimony to support a plaintiff's case, trial judges could essentially force a plaintiff to take a voluntary dismissal or settle out of court for a nominal sum.

The Court made another disquieting observation. Unlike motions for summary judgment, preliminary motions to exclude expert testimony are resolved under Rule of Evidence 104(a). Rule 104(a) does not contain the procedural safeguards of, for example, requiring the trial court to view the evidence in the light most favorable to the nonmovant:

> Taking advantage of these procedural differences, a party may use a *Daubert* hearing to exclude an opponent's expert testimony on an essential element of the cause of action. With no other means of proving that element of the claim, the non-moving party would inevitably perish in the ensuing motion for summary judgment. By contrast, a party who directly moves for summary judgment without a preliminary *Daubert* determination will not likely fare as well because of the inherent procedural safeguards favoring the non-moving party in motions for summary judgment.[137]

Most disturbing of all, as the *Howerton* court noted when it cited one federal trial judge,[138] trial judges applying *Daubert* in a heavy-handed manner could lighten their own caseloads considerably. *Howerton* destroyed those conflicts of interest inherent in the *Daubert*-driven judicial system.

V. Conclusion

North Carolina recently joined a minority of states in expressly refusing to apply the *Daubert-Kumho* factors for judging the admissibility of expert testimony. The North Carolina Supreme Court soundly rejected *Daubert* and its progeny in *Howerton v. Arai*, holding that the 3-part inquiry established in its own earlier case of *Goode* presented a "more workable framework" for ruling on the admissibility of expert testimony.

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136. *Kumho*, 526 U.S. at 159.

137. *Howerton*, 597 S.E.2d at 692.

138. *Id.* at 691 (quoting Brasher v. Sandoz Pharm. Corp., 160 F.Supp. 2d. 1291 (D. Ala. 2001)).

By expressly clinging to its earlier inquiry established in *Goode*, North Carolina ensured that trial judges would not apply the *Daubert* factors so rigidly as to oust cases with merit from the courtroom. *Howerton* rightly emphasized the distinction between the admissibility of expert testimony and the weight it should be accorded by the jury. *Howerton* represents a further assurance to those who are wronged that they will have their deserved "day in court." By taking two steps back from *Daubert* and *Kumho*, North Carolina moved one step ahead in providing parties their right to trial.