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Making Waves in a Sea of Uncertainty: Howerton Muddies the Waters of Expert Testimony Admissibility Standards in North Carolina

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Making Waves in a Sea of Uncertainty: *Howerton* Muddies the Waters of Expert Testimony Admissibility Standards in North Carolina

In *Howerton v. Arai Helmet, Ltd.*,[1] the Supreme Court of North Carolina expressly rejected the *Daubert* standard[2] for the admissibility of expert testimony, stating that "North Carolina is not, nor has it ever been, a *Daubert* jurisdiction."[3] Instead, the court adopted a purportedly more flexible test based upon the reliability and relevance of the evidence as well as the expert's qualifications.[4] This Recent Development argues that the *Howerton* decision is a step backward in the development of North Carolina evidence law. In addition to departing from precedent and policy and unnecessarily burdening the trier of fact, the decision removes the clarity from a workable admissibility test, rendering uncertain the standards for admitting expert testimony in North Carolina.

This Recent Development begins by briefly discussing the holdings in the *Daubert* and *Howerton* decisions. Next, this Recent Development discusses the inherent flaws in claiming to reject *Daubert* by discussing the *Howerton* court's departure from both North Carolina precedent that adheres to *Daubert*-like principles and well-established policies behind the North Carolina Rules of Evidence. Then, this Recent Development discusses additional implications that are likely to result from the decision, notably an undue burden on the trier of fact and decreased judicial efficiency. Finally, this Recent Development asserts that by rejecting *Daubert*, the *Howerton* decision not only removes a clear framework for admitting expert testimony, but also fails to assert a new one, providing lower courts with only an unclear and apparently overly permissive standard, leaving the future of expert testimony in North Carolina uncertain at best.

The United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, provided a new standard for evaluating proffered expert testimony under Federal Rule of

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1. 358 N.C. 440, 597 S.E.2d 674 (2004).
2. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592–97 (1993) (codified at FED. R. EVID. 702) (amended Dec. 1, 2000); *see infra* notes 5–14 and accompanying text.
3. *Howerton*, 358 N.C. at 469, 597 S.E.2d at 693.
4. *See id.* at 458–69, 597 S.E.2d at 686–93.

Evidence 702.[5] In *Daubert*, the plaintiffs sued a pharmaceutical company, claiming that their birth defects were caused by their mothers' ingestion of a prescription anti-nausea drug manufactured and sold by the defendant.[6] The district court granted the defendant's motion for summary judgment because the plaintiff sought to prove causation by introducing expert testimony that was not based upon generally accepted scientific principles.[7] The Court of Appeals for the Ninth Circuit affirmed,[8] citing *Frye v. United States*.[9] Reversing the Ninth Circuit and rejecting the previously controlling *Frye* "general acceptance" test,[10] the Supreme Court held that complying with Rule 702 instead requires an analysis based on the reliability and relevance of scientific evidence.[11] The analysis "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[12] *Daubert* also provided a non-exhaustive list of factors for courts to consider in making the reliability assessment, including whether the theory or technique can be or has been tested, whether the theory or technique has been subjected to peer review and publication, what the known or potential rate of error for the technique is, and whether the theory or technique has gained general acceptance within the scientific community.[13] Thus, by requiring examination of the methodology behind an evidentiary submission, *Daubert* entrusted federal judges with a gatekeeper role, charging them to let in only reliable and relevant evidence, consistent with the requirements of Rule 702.[14]

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5. *See Daubert*, 509 U.S. at 592–97; FED. R. EVID. 702.

6. *Daubert*, 509 U.S. at 582.

7. *See id.* at 583.

8. *See* Daubert v. Merrell Dow Pharms., Inc., 951 F.2d 1128, 1131 (9th Cir. 1991), *rev'd*, 509 U.S. 579 (1993).

9. 293 F. 1013, 1014 (D.C. Cir. 1923).

10. *See id.* (holding that to be admissible, expert testimony must be deduced from a principle or discovery "established to have gained general acceptance in the particular field in which it belongs").

11. *Daubert*, 509 U.S. at 590–91; *cf.* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149 (1999) (extending "*Daubert*'s general principles . . . to the expert matters described in Rule 702").

12. *Daubert*, 509 U.S. at 592–93.

13. *See id.* at 593–94.

14. *See id.* at 597.

Although *Daubert* has been criticized for its rigidity[15] and for giving judges too difficult a task,[16] the case has also been widely cited and treated as valid precedent for over a decade.[17] Rule 702 of the North Carolina Rules of Evidence[18]—modeled after the corresponding federal rule before its amendment[19]—governs the admissibility of expert testimony in North Carolina courts. Nevertheless, North Carolina had adopted principles very similar to those in *Daubert*—well before the federal standard emerged—and seemed to embrace those principles until the *Howerton* decision.[20]

In *Howerton v. Arai Helmet, Ltd.*, the plaintiff, Bruce Howerton, who suffered permanent injuries as a result of a motorcycle accident, sued the manufacturer of his motorcycle helmet, alleging manufacturing and design defects that proximately caused his injuries and breach of express and implied warranties.[21] Howerton sought to

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15. *See, e.g.*, Frank M. McClellan, *Bendectin Revisited: Is There a Right to a Jury Trial in an Age of Judicial Gatekeeping?*, 37 WASHBURN L.J. 261, 279 (1998) (asserting that the judicial gatekeeping role usurps the function of a jury of citizens to engage in the resolution of disputes).

16. *See, e.g.*, Shirley A. Dobbin et al., *Applying* Daubert: *How Well Do Judges Understand Science and Scientific Method?*, 85 JUDICATURE 244, 247 (2002) (explaining that trial judges may not possess the understanding necessary to assess the reliability and relevance of scientific evidence in order to make an educated decision about whether it has been obtained in a scientifically valid way and, therefore, is admissible in trial).

17. *See, e.g.*, Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–49 (1999) (extending *Daubert*'s holding to all expert testimony, not just scientific testimony); Gen. Elec. Co. v. Joiner, 522 U.S. 136, 139 (1997) (holding that an abuse of discretion is the proper standard for examining admissibility decisions under *Daubert*); State v. Goode, 341 N.C. 513, 527, 461 S.E.2d 631, 639–40 (1995) (citing the central holding in *Daubert*); Taylor v. Abernethy, 149 N.C. App. 263, 272–74, 560 S.E.2d 233, 239–40 (2002) (citing *Daubert* and acknowledging it as important precedent); *see also* Amy T. Schütz, Note, *The New Gatekeepers: Judging Scientific Evidence in a Post-*Frye *World*, 72 N.C. L. REV. 1060, 1084 (1994) (maintaining that "*Daubert* provides the new gatekeepers with a more accurate, effective and appropriate guide to determining the admissibility of scientific evidence"). In fact, *Daubert* has been followed and expanded upon by other Supreme Court cases, extending *Daubert*'s reach to non-scientific testimony.

18. N.C. R. EVID. 702(a) ("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.").

19. Kenneth S. Broun, Daubert *is Alive and Well in North Carolina—In Fact, We Beat the Feds to the Punch*, N.C. ST. B.J., Fall 2002, at 10, 11. The original text of Federal Rule of Evidence 702 reads as follows: "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." Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at FED. R. EVID. 702).

20. *Id.* at 12; *see infra* notes 54–58, 60–70 and accompanying text.

21. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 442–43, 597 S.E.2d 674, 677–78 (2004).

admit the scientific testimony of various experts to prove the existence of the alleged defects and, just as in *Daubert*, their causal link to the plaintiff's injuries.[22] Based on both the *Daubert* test, particularly its reliability factors, and North Carolina precedent, which the court held to be consistent with *Daubert*, the trial court excluded all of Howerton's causation experts as unreliable.[23] Left with no admissible evidence of causation, the trial court granted summary judgment in favor of the defendant,[24] and the Court of Appeals of North Carolina affirmed.[25] The Supreme Court of North Carolina reversed, expressly rejecting the *Daubert* standard[26] and instead adopting a "decidedly less mechanistic and rigorous" approach to the admissibility of expert testimony.[27] The court's approach emphasized a three-step test for evaluating the admissibility of proffered expert testimony: "(1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? [and] (3) Is the expert's testimony relevant?"[28] The *Howerton* test is a "preliminary, foundational inquiry" into the reliability of expert testimony,[29] and, contrary to *Daubert*, it does not require judges to look as deeply into the methodology used by the expert in reaching his conclusions.

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22. *See id.* at 444–52, 597 S.E.2d at 678–82 (detailing the testimony proffered, including that of experts in motorcycle accidents and motorcycle helmets, biomechanics and orthopedic biomechanics, the design and manufacture of composite materials, and neurosurgery).

23. *See id.* at 452–53, 597 S.E.2d at 683 (noting the following about the expert testimony in the case: none of the experts conducted testing or research relevant to establishing causation; none were peer-reviewed or published on these issues; none showed that their opinions were generally accepted within the field; the data relied upon had a high rate of error; and many of the experts' opinions were contrary to the existing state of research in their particular fields).

24. *Id.* at 453, 597 S.E.2d at 683.

25. *Id.* at 454, 597 S.E.2d at 684; Howerton v. Arai Helmet, Ltd., 158 N.C. App. 316, 581 S.E.2d 816 (2003), *rev'd*, 358 N.C. 440, 597 S.E.2d 674 (2004).

26. Although it purports to follow *State v. Goode*, *Howerton* expressly rejects the *Daubert* standard. *Howerton*, 358 N.C. 440, 469, 587 S.E.2d 674, 693 (2004) ("We therefore expressly reject the federal *Daubert* standard .... North Carolina is not, nor has it ever been, a *Daubert* jurisdiction."). Furthermore, the *Howerton* court notes that, "[w]hile [*Goode*, *Bullard*, *Temple*, and *Crowder*] share obvious similarities with the principles underlying *Daubert*, application of the North Carolina approach is decidedly less mechanistic and rigorous than the ... federal approach." *Id.* at 464, 597 S.E.2d at 690.

27. *Id.* at 464, 597 S.E.2d at 690. The Supreme Court of North Carolina remanded the case for proceedings consistent with its opinion. *Id.* It remains to be determined whether plaintiff's expert testimony will be admitted under the new, ultra-flexible standard.

28. *Id.* at 458, 597 S.E.2d at 686 (quoting State v. Goode, 341 N.C. 513, 528–29, 461 S.E.2d 631, 640–41 (1995) (citations omitted)).

29. *Id.* at 460, 597 S.E.2d at 687.

Because states are free to craft their own rules governing evidentiary admissions, *Daubert* is not binding on state courts.[30] Several states that have adopted rules similar to the Federal Rules of Evidence have rejected the *Daubert* standard,[31] while others have expressly adopted it.[32] While states can legally depart from *Daubert*, the Court of Appeals of North Carolina, following precedent prior to *Daubert*, has many times embraced both the reliability standard and the gatekeeper function that the United States Supreme Court set forth in *Daubert*, demonstrating that North Carolina has apparently not rejected *Daubert* but has instead made use of its central holding for decades.[33] The commentary to Rule 102 of the North Carolina Rules of Evidence makes it clear that when "[p]roblems of construction . . . arise . . . our courts should examine North Carolina cases as well as federal cases for enlightenment."[34] Instead of following the clear path of precedent as suggested by the North Carolina Rules, the Supreme Court of North Carolina deviated from a test that has guided decisions regarding the admissibility of expert testimony in this state for nearly twenty years.

The *Howerton* court gave modest guidance on how to navigate the "test," but what little it provided emphasizes some of *Howerton*'s key differences from *Daubert*, notably in the areas of reliability determination, expert qualifications, and relevance. First, when North Carolina courts evaluate whether an "expert's proffered method of proof [is] sufficiently reliable[,]"[35] they are urged to determine the reliability of the general *area* of testimony by seeking guidance from the case law, or when faced with novel theories, looking for the presence of various indices of reliability.[36] This reliability standard is quite different from the one set forth in

30. *See* Stan Kitzinger, Note, *The Supreme Court Waves Good-bye to* Frye: Daubert v. Merrell Dow Pharmaceuticals, Inc., 58 ALB. L. REV. 575, 604–05 (1994).

31. *See, e.g.*, State v. Johnson, 922 P.2d 294 (Ariz. 1996); Flanagan v. State, 625 So. 2d 827 (Fla. 1993); State v. Traylor, 656 N.W.2d 885 (Minn. 2003); Krause, Inc. v. Little, 34 P.3d 566 (Nev. 2001); People v. Wesley, 633 N.E.2d 451 (N.Y. 1994); Grady v. Frito-Lay, Inc., 839 A.2d 1038 (Pa. 2003); State v. Council, 515 S.E.2d 508 (S.C. 1999); State v. Jones, 922 P.2d 806 (Wash. 1996).

32. *See, e.g.*, Farm Bureau Mut. Ins. Co. of Ark. v. Foote, 14 S.W.3d 512 (Ark. 2000); State v. Foret, 628 So. 2d 1116 (La. 1993); Miss. Transp. Comm'n v. McLemore, 863 So. 2d 31 (Miss. 2003); State v. Hofer, 512 N.W.2d 482 (S.D. 1994); Wilt v. Buracker, 443 S.E.2d 196 (W. Va. 1993).

33. *See infra* notes 73–84 and accompanying text.

34. N.C. R. EVID. 102 cmt.

35. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 458, 597 S.E.2d 674, 695 (2004) (alteration in original) (quoting State v. Goode, 341 N.C. 513, 529, 461 S.E.2d 631, 639 (1995)).

36. *Id.* at 459–60, 597 S.E.2d at 687.

Daubert. Under the federal standard, courts are urged to look to the methodology underlying the testimony itself,[37] rather than to the reliability of the general *area* under which the testimony falls. The federal standard ensures that the reliability determination will focus on the actual testimony involved in each particular case. *Howerton*'s indices of reliability, applied where precedent provides no guidance, also differ from those in *Daubert*. These indices include "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury . . . and independent research conducted by the expert."[38] These indices probe less deeply into scientific methodology than *Daubert*, indicating the court's desire to have any "questions or controversy" regarding reliability beyond a preliminary analysis "go to the weight of the testimony rather than its admissibility."[39]

On its face, the second part of the *Howerton* test, determining whether "the witness testifying at trial [is] qualified as an expert in that area of testimony,"[40] does not appear to differ significantly from anything that is required in *Daubert*.[41] After all, under both Federal Rule of Evidence 702 and North Carolina Rule of Evidence 702, a witness can qualify as an expert because of "knowledge, skill, experience, training or education" when that serves as a basis for the testimony.[42] The *Howerton* court, however, liberally construed the applicable part of Rule 702, noting that "[i]t is not necessary that an expert be experienced with the identical subject matter at issue or . . . even engaged in a specific profession."[43] The expert will be qualified as long as the court can find that "because of his expertise [the expert] is in a better position to have an opinion on the subject than is the trier of fact."[44] In addition, the *Howerton* court found no real difference between a proffered expert's formal academic credentials

37. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592–93 (1993) (codified at FED. R. EVID. 702) (amended Dec. 1, 2000).

38. *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687 (quoting State v. Pennington, 327 N.C. 89, 98, 393 S.E.2d 847, 853 (1990)).

39. *Id.* at 461, 597 S.E.2d at 688.

40. *Id.* at 458, 597 S.E.2d at 686 (quoting *Goode*, 341 N.C. at 529, 461 S.E.2d at 640).

41. *See id.* at 461–62, 597 S.E.2d at 688. Although not spelled out expressly in *Daubert*, implicit in the decision is the idea that an expert proffering testimony would qualify as an expert under Federal Rule of Evidence 702. *See Daubert*, 509 U.S. at 589 (quoting FED. R. EVID. 702) (noting that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue an expert 'may testify thereto' ").

42. FED. R. EVID. 702; N.C. R. EVID. 702(a).

43. *Howerton*, 358 N.C. at 461, 597 S.E.2d at 688 (quoting State v. Goode, 341 N.C. 513, 529, 461 S.E.2d 631, 640 (1995)).

44. *Id.*

and those obtained via practical experience.[45] Thus, the *Howerton* court's qualification requirement appears more flexible than what is implicitly required under *Daubert.*

Finally, in examining the relevance of an expert's testimony, the *Howerton* court held that "[t]he trial court must always be satisfied that the expert's testimony is relevant," but provided only the traditional definition of relevant evidence in the North Carolina Rules of Evidence for guidance in making this determination.[46] *Daubert* focuses not only on the general definition of relevance but also on the applicability of the expert's methodology or reasoning to the particular facts of the case.[47] The *Daubert* Court found that this determination of "fit[ness]" is necessary because "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes."[48] In addition, the *Daubert* Court notes that Rule 702 requires that evidence "assist the trier of fact to understand the evidence or to determine a fact in issue," giving further guidance.[49] Thus, *Howerton*'s examination of relevant testimony is more general, while the analysis in *Daubert* is highly fact-specific.

The Supreme Court of North Carolina attempted to justify its adoption of a more flexible test than the federal standard by expressing its concerns with the inherent difficulties in determining legal reliability in an ever-changing and complex scientific world.[50] The *Howerton* court did not want to impose those difficulties upon judges at the risk of increasing the expenditure of human resources.[51] The court reasoned that because of the stringent application of *Daubert*-like principles, parties could cleverly use pre-trial motions to exclude testimony as a way to prevail on otherwise out-of-reach motions for summary judgment.[52] Quoting a federal district court, the Supreme Court of North Carolina further expressed concern that a party might be "unable to present an essential element of his or her claim, or to proffer a defense . . . if *Daubert* [was applied] heavy-handedly" and the party's expert witnesses were barred from

45. *See id.* at 462, 597 S.E.2d at 688.

46. *Id. See generally* N.C. R. EVID. 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

47. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593 (1993) (codified at FED. R. EVID. 702) (amended Dec. 1, 2000).

48. *Id.* at 591.

49. *Id.* (quoting Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified as amended at FED. R. EVID. 702)).

50. *See Howerton*, 358 N.C. at 464–65, 597 S.E.2d at 690.

51. *Id.*

52. *See id.* at 467, 597 S.E.2d at 691–92.

testifying.[53] Although these concerns are valid, the remedy provided by the *Howerton* decision departs significantly from precedent and valid policy considerations and is more vague and unworkable than the framework set forth in *Daubert*. A consideration of each of these problems will reveal the significant deficiencies inherent in the *Howerton* decision.

The decision to reject the *Daubert* standard departs from significant North Carolina precedent. The Supreme Court of North Carolina anticipated the *Daubert* holding by nine years in adopting an approach based upon principles remarkably similar to those expressed by the United States Supreme Court in *Daubert*.[54] In *State v. Bullard*,[55] the Supreme Court of North Carolina considered the admissibility of a physical anthropologist's testimony as an expert in identifying a "bloody bare footprint."[56] In holding that the expert's opinion was correctly admitted, the court, as in *Daubert*, emphasized that reliability and relevance are the key factors in determining the admissibility of expert testimony.[57] The "common thread[s]" between *Daubert* and *Bullard* are the emphasis on reliability and the role of the trial judge as gatekeeper in determining reliability[58] rather than the previously used general acceptance test.[59] The Supreme Court of North Carolina likewise emphasized the importance of the reliability of the scientific method in its decision to admit DNA analysis evidence in *State v. Pennington*,[60] another pre-*Daubert* case. In *Pennington*, the court articulated indices of reliability similar to those

53. *Id.* (quoting Brasher v. Sandoz Pharms. Corp., 160 F. Supp. 2d 1291, 1295 n.12 (N.D. Ala. 2001)).

54. Broun, *supra* note 19, at 10 (citing State v. Bullard, 312 N.C. 129, 322 S.E.2d 370 (1984)); *id.* at 12 (noting that in State v. Pennington, 327 N.C. 89, 98, 393 S.E.2d 847, 852–53 (1990), the Supreme Court of North Carolina "used factors similar to those in *Bullard* to assess the trial court's determination of reliability"); *id.* at 14 ("In *Taylor* [*v. Abernethy*], 149 N.C. App. 263, 560 S.E.2d 233 (2002), the [c]ourt reaffirmed its adherence to the principles of both the *Daubert* and *Bullard* cases and set some reasonably clear parameters for their application.").

55. 312 N.C. 129, 322 S.E.2d 370 (1984).

56. *Id.* at 132, 322 S.E.2d at 372.

57. *See id.* at 147–54, 322 S.E.2d at 380–85.

58. Broun, *supra* note 19, at 12; *see also* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590–93, 597 (1993) (noting that compliance with Federal Rule of Evidence 702 requires admitting only reliable and relevant evidence and that judges are responsible for making the determination of reliability and relevance and admitting only evidence that meets these standards); *Bullard*, 312 N.C. at 148, 322 S.E.2d at 381 ("In general when no specific precedent exists, scientifically accepted reliability justifies admission of the testimony of qualified witnesses, and such reliability may be found either by judicial notice or from the testimony of . . . expert[s] . . . .").

59. *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

60. 327 N.C. 89, 98–100, 393 S.E.2d 847, 852–54 (1990).

set forth in *Bullard*.[61] The *Pennington* court also noted that although admissible in this case, DNA evidence may not be admissible in every case, depending on an analysis of the reliability of the methods used and the evidence's applicability to the facts of the particular case.[62] The *Pennington* court's approach was "entirely consistent with ... *Daubert* and other federal cases."[63] *Pennington* emphasized the methodology and applicability of methods used to the particular facts of the case, resounding with *Daubert* and differing significantly from the reliability test set forth in *Howerton*.

Since the United States Supreme Court's holding in *Daubert*, both the Supreme Court of North Carolina and the Court of Appeals of North Carolina have acknowledged *Daubert* and applied it in numerous opinions.[64] In *State v. Goode*, the Supreme Court of North Carolina appeared to expressly recognize *Daubert* as stating the proper test for the admissibility of expert testimony.[65] In *Goode*, a convicted defendant challenged the admissibility of expert testimony in the field of bloodstain pattern interpretation.[66] The court cited the central holding of *Daubert*: compliance with Rule 702 "requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether the reasoning or methodology can be properly applied to the facts in issue."[67] Although the *Goode* court discussed indicia of reliability that differed from the *Daubert* factors,[68] the court nevertheless embraced *Daubert*'s central requirement of reliability[69] in determining that the trial court had properly admitted the evidence.[70] Despite the *Howerton* court's position that it never adopted the

61. *Id.* at 98, 393 S.E.2d at 852–53 ("[W]e 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 ... and independent research conducted by the expert." (internal citations omitted)).

62. *See id.* at 101, 393 S.E.2d at 854.

63. Broun, *supra* note 19, at 14.

64. *See supra* note 54.

65. 341 N.C. 513, 461 S.E.2d 631 (1995).

66. *See id.* at 529–30, 461 S.E.2d at 641.

67. *Id.* at 527, 461 S.E.2d at 639 (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592–93 (1993)).

68. *See id.* at 527–28, 461 S.E.2d at 639–40; *cf.* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–95 (1993) (listing nonexclusive factors for determining reliability of scientific theories and techniques including "testability," extent of peer review and publication, rate of error, and general acceptance (internal citations omitted)).

69. *See generally Daubert*, 509 U.S. at 594–95 n.12 (noting that "[a] number of authorities have presented variations on the reliability approach, each with its own slightly different set of factors").

70. *See Goode*, 341 N.C. at 534–35, 461 S.E.2d at 643–44.

Daubert standard and that case law only "referenced [*Daubert*] . . . to underscore the generally acknowledged importance of . . . reliability,"[71] the *Goode* court's acceptance of *Daubert*'s holding is a clear indication otherwise. Furthermore, in *Howerton*, the court conceded that *Goode* "and other North Carolina cases share obvious similarities with the principles underlying *Daubert*,"[72] making the *Howerton* court's outright rejection of *Daubert* both surprising and confusing.

Since *Goode*, the Court of Appeals of North Carolina has recognized *Daubert* as the applicable standard in fourteen cases, which it cited in support of doing so again in *Howerton*.[73] In *State v. Underwood*,[74] the court embraced *Daubert* by adopting indices of reliability similar to the *Daubert* factors and applying those factors along with North Carolina precedent to admit mitochondrial DNA evidence presented by a qualified expert.[75] In *State v. MacCardwell*,[76] the court considered factors from both *Pennington* and *Daubert* to conclude that a chemical test used to determine the defendant's blood alcohol content was reliable and, thus, admissible.[77] In *State v. Stokes*,[78] the Court of Appeals of North Carolina cited both *Daubert* and *Goode* in recognizing that "the trial court has the duty to act as gatekeeper and to insure that expert opinion is properly founded on scientifically reliable methodology."[79] Most recently, in *Taylor v. Abernethy*,[80] the court of appeals cited *Daubert*, noting that "in its role as gatekeeper, the pertinent question for the trial court is . . . whether the testimony is sufficiently reliable."[81] In line with *Daubert*, *Bullard*, and *Goode*, the *Taylor* court held that the reliability question requires a preliminary assessment of the evidence's validity and application to the facts of the case.[82] In holding that evidence of handwriting analysis in a contract dispute was reliable and should

71. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 463, 597 S.E.2d 674, 689 (2004).

72. *Id.* at 464, 597 S.E.2d at 690.

73. *See* Howerton v. Arai Helmet, Ltd., 158 N.C. App. 316, 331–32, 581 S.E.2d 816, 826 (2003), *rev'd*, 358 N.C. 440, 597 S.E.2d 674 (2004).

74. 134 N.C. App. 533, 518 S.E.2d 231 (1999).

75. *Id.* at 542–44, 518 S.E.2d at 239–40.

76. 133 N.C. App. 496, 516 S.E.2d 388 (1999).

77. *See id.* at 505–06, 516 S.E.2d at 394–95.

78. 150 N.C. App. 211, 565 S.E.2d 196 (2002), *rev'd on other grounds*, 357 N.C. 220, 581 S.E.2d 51 (2003).

79. *Id.* at 225–26, 565 S.E.2d at 206 (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592–93 (1993) and State v. Goode, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995)).

80. 149 N.C. App. 263, 560 S.E.2d 233 (2002).

81. *Id.* at 272–73, 560 S.E.2d at 239.

82. *See id.* at 272–74, 560 S.E.2d at 239–40.

have been admitted,[83] *Taylor* is particularly significant as a recent civil case upholding the principles set forth in *Daubert* and its progeny.[84]

Not only does *Howerton* depart from applicable precedent, but it also departs from important policy considerations regarding expert testimony. Such considerations include: following the purpose inherent in the North Carolina Rules of Evidence, keeping matters of law distinct from questions of fact to be decided by the jury, and maintaining judicial efficiency. This Recent Development demonstrates that by failing to address these essential goals of the adversary system, *Howerton* negatively impacts practitioners by creating uncertainties in areas that were once clearly defined.

The *Howerton* decision significantly negates a stated advantage of the design of the North Carolina Rules of Evidence. The General Assembly intended the North Carolina Rules of Evidence to be read in a way that makes use of the large body of law surrounding the Federal Rules of Evidence.[85] The commentary to Rule 102 of the North Carolina Rules of Evidence provides that:

> The intent [in indicating whether each rule is identical to its federal counterpart] is to make applicable, as an aid in construction, the federal decisional law construing identical or similar provisions of the Federal Rules of Evidence .... A substantial body of law construing these rules exists and should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly in adopting these rules.[86]

Further commentary to Rule 102 declares that "[u]niformity 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."[87] Therefore, by drafting rules similar to the Federal Rules of Evidence, the General Assembly indicated its desire to employ federal decisions in construing the North Carolina rules.

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83. *See id.* at 273–75, 560 S.E.2d at 239–40.

84. *Taylor* is significant because it, like *Howerton*, is a civil case, while much of the other North Carolina precedent relates to the admissibility of expert testimony in criminal cases.

85. *See* Laura E. Crumpler & Gordon Widenhouse, *An Analysis of the New North Carolina Evidence Code: Opportunity for Reform*, 20 WAKE FOREST L. REV. 1, 3–4 (1984).

86. N.C. R. EVID. 102 cmt.

87. *Id.*

Additional support for this idea can be found in North Carolina case law. The Court of Appeals of North Carolina noted that "[t]he North Carolina Rules of Evidence mirror almost completely the Federal Rules of Evidence. Thus, decisions construing the Federal Rules of Evidence are often helpful."[88] Because the federal rule regarding expert testimony was fully interpreted in *Daubert* and subsequent cases,[89] the policy behind the North Carolina Rules of Evidence militates toward directing North Carolina courts to follow the federal position. Such a clear statement by the legislature with support from the court of appeals indicates that the North Carolina General Assembly adopted rules that model the Federal Rules of Evidence to provide North Carolina courts with increased certainty through an established body of case law. Therefore, by expressly rejecting the *Daubert* standard, the Supreme Court of North Carolina deviated from legislative design without adequate justification.

Those defending the *Howerton* decision may argue that while Federal Rule of Evidence 702 was amended to codify the holding in *Daubert*, the North Carolina rule remains unchanged,[90] suggesting that the North Carolina rule should not be construed in light of *Daubert*. This amendment, however, should not affect North Carolina's policy of following federal case law. Rule 702 of the North Carolina Rules of Evidence, governing the admissibility of testimony by experts, was identical to its federal counterpart at the time the United States Supreme Court set forth its interpretation of Federal Rule 702 in *Daubert*.[91] Furthermore, Professor Kenneth Broun, one of the drafters of the amendment to Federal Rule 702, maintains that the advisory committee did not intend to go beyond *Daubert*'s holding with the amendment and that there has been no real change in federal law as a result of it.[92] Professor Broun further notes that "the absence of a rule amendment [in North Carolina] should make no more difference here than it would have in the federal courts in the absence of the amendment."[93] Because *Daubert* was adopted when Rule 702 of both the Federal Rules and the North Carolina Rules of Evidence were identical and because the amendment to

88. State v. Lamb, 84 N.C. App. 569, 580 n.3, 353 S.E.2d 857, 863 n.3 (1987).

89. *See supra* note 17 (noting subsequent federal decisions that have extended the *Daubert* decision).

90. *See* FED. R. EVID. 702; *cf.* N.C. R. EVID. 702(a).

91. Howerton v. Arai Helmet, Ltd., 158 N.C. App. 316, 328, 581 S.E.2d 816, 824–25 (2003), *rev'd*, 358 N.C. 440, 597 S.E.2d 674 (2004).

92. *See* Broun, *supra* note 19, at 11.

93. *Id.* at 11–12.

Federal Rule 702 does not materially alter its effect, North Carolina's policy of interpreting identical rules similarly remains applicable.

Taking into account legislative design both in the language of Rule 702 itself and the commentary to the rule, as well as precedent in the Court of Appeals of North Carolina, policy strongly favors construing North Carolina Rule of Evidence 702 in light of federal case law, including *Daubert*. Therefore, to maintain evidentiary policy and the guidelines that practitioners follow in their evidentiary decisionmaking, *Daubert* and its progeny should articulate the proper test for admitting expert testimony in North Carolina. Instead of following principles guiding the construction of the North Carolina Rules of Evidence, which directed years of North Carolina case law, the *Howerton* court abandoned them without providing sufficient explanation.

In addition to straying from legislative design and evidentiary policy, the *Howerton* test may burden the adversary process by leaving matters of law for the trier of fact to determine. In other words, by rejecting *Daubert* in favor of an ultra-flexible test expected to admit significantly more testimony, the jury instead of the judge will be charged with making determinations of reliability in each particular case. This is not the intent of Rule 702, and it is presumably one thing the Supreme Court sought to avoid via the *Daubert* decision. In fact, the *Daubert* Court recognized the "limits on the admissibility of purportedly scientific evidence,"[94] commenting on the "wide latitude" an expert is allowed to offer opinions, especially on items that are *not* based on personal observation.[95] "[T]his relaxation of the usual requirement of firsthand knowledge . . . is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline."[96] To make this determination, the *Daubert* Court entrusted to the trial courts the responsibility of "ensur[ing] that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[97] *Daubert* refers to this as the "gatekeeping role" of the judge.[98] In addition to sorting reliable and relevant evidence from that which is

94. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993) (codified at FED. R. EVID. 702) (amended Dec. 1, 2000).

95. *Id.* at 592.

96. *Id.*

97. *Id.* at 589.

98. *See id.* at 597.

not, the gatekeeper function also helps maintain public confidence in the courts.[99]

Moreover, Rule 104(a) of the North Carolina Rules of Evidence requires that trial courts decide preliminary questions of the admissibility of expert testimony.[100] The admissibility of expert testimony is a matter of law to be determined by the trial court, not limited by the confines of the North Carolina Rules of Evidence.[101] A clearly defined gatekeeping function ensures that decisions are applied similarly throughout the state.[102] The *Howerton* decision, in rejecting *Daubert*, removed the clarity from the gatekeeping role, decreasing the likelihood that the standard will be applied uniformly across the state. Although in *Howerton* the Supreme Court of North Carolina expressed concern that an enlarged gatekeeper function would lead to improperly granted summary judgment motions in favor of the defense,[103] the fact remains that initial admissibility decisions are a matter for the judge, *not* for the jury.[104] Thus, the court cannot unduly place its decision into the hands of an unqualified jury for the sake of avoiding abuse of the standard.

The *Howerton* court also voiced concern that the gatekeeper role in *Daubert* forces trial judges into "passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion."[105] On the contrary, all that *Daubert* required is a "preliminary assessment of whether the reasoning or methodology

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99. *See* Brief of Amicus Curiae Product Liability Advisory Council, Inc. at 8, Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 597 S.E.2d 674 (2004) (No. 383PA03).

100. *See* N.C. R. EVID. 104(a) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . .").

101. *See id.*

102. *Daubert* provides a clear definition of what the gatekeeper function should look like. The Court held that the trial judge has to determine whether the expert will testify to scientific knowledge that will assist the trier of fact in determining issues of consequence. *Daubert*, 509 U.S. at 592. "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592–93. The Court goes on to discuss various factors that can help in the reliability determination. *Id.* at 593–94.

103. *See Howerton*, 358 N.C. at 467–68, 597 S.E.2d at 691–92. An in-depth discussion of *Daubert* hearings and their repercussions is beyond the scope of this Recent Development. For more information, see generally JoEllen Lind, *"Procedural Swift": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 772 (2004) (discussing *Daubert* hearings as designed to attack the admissibility of expert evidence before trial and have it excluded on the grounds that it lacks relevance or reliability).

104. *See* N.C. R. EVID. 104.

105. *Howerton*, 358 N.C. at 464, 597 S.E.2d at 690.

underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[106] This is intended to be a flexible standard that focuses "solely on principles and methodology, not on the conclusions that they generate."[107] Thus, the court's characterization of the *Daubert* standard as looking to the merits of scientific testimony is misdirected. Instead, *Daubert* required the trial court judge to remain confined to her proper role of making preliminary admissibility determinations. *Howerton* blurs this distinction by paring down the judge's role and pushing the reliability determination to the jury.

By failing to preserve the role of the judge in making admissibility decisions based upon clearly articulated standards of reliability and relevance, *Howerton* risks burdening juries with this difficult task. Jurors do not have the requisite legal knowledge to sort reliable and relevant evidence from that which is not.[108] This is especially true with the complex, technical information that expert testimony entails. At least one state court has found that juries more willingly accept expert opinions as the truth solely because of their designation as experts.[109] Proponents of tightening restraints on the admissibility of expert testimony suggest that overvaluation of scientific evidence is a very real juror tendency.[110] Furthermore, although the opposing party's expert can point out scientific defects in an expert's opinion, cross-examination remains the only way for the other side to emphasize the retaining attorney's influence as a reason for those shortcomings.[111] The bottom line is that testimony should come before a jury, whose function is to weigh that evidence, only when the testimony has been determined—via a clear standard—to be reliable and relevant.

A legitimate concern is that even judges may not possess the scientific knowledge necessary to adequately perform the gatekeeper

106. *Daubert*, 509 U.S. at 592–93.

107. *Id.* at 594–95.

108. *See* John W. Osbourne, Note, *Judicial/Technical Assessment of Novel Scientific Evidence*, 1990 U. ILL. L. REV. 497, 530 (1990) (noting that "one finds it hard to imagine that lay jurors are somehow transformed from people who view science as a 'black box' into people who understand what is in the box simply because they were called to serve on a jury").

109. *See* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 553 (Tex. 1995).

110. Osbourne, *supra* note 108, at 530; *see also* Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 480 (2000) (noting that "when the judge announces that a witness is an 'expert,' she is telling the jurors that the witness, and the testimony she will present, are more important than the testimony of 'ordinary' fact witnesses").

111. Easton, *supra* note 110, at 506.

function;[112] however, judges are certainly more qualified to address the legal standards involved than are juries. The United States Court of Appeals for the Eleventh Circuit commented that:

> Although making determinations of reliability may present a court with the difficult task of ruling on matters that are outside of its field of expertise, this is "less objectionable than dumping a barrage of scientific evidence on a jury, who would likely be less equipped than the judge to make reliability and relevance determinations."[113]

It seems only reasonable that giving the decision to judges, who are better equipped to understand the legal method for distinguishing the reliable and relevant from the unreliable and irrelevant, will lead to a more efficient and accurate resolution of disputes.

The *Howerton* court also expressed the concern that "sweeping" use of the judge's gatekeeping function could "unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence."[114] Although this concern is valid, the *Daubert* test is aimed at the admissibility of evidence rather than its weight.[115] In other words, judges are to determine the reliability and relevance of the evidence rather than its credibility.[116] By holding that judges should merely make preliminary admissibility rulings, *Daubert* did not intend for judges to usurp the jury function. Furthermore, *Daubert* was designed to be flexible, with its focus on methods rather than conclusions. The *Daubert* Court even suggested ways in which advocates opposing the admission of

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112. *See* Dobbin et al., *supra* note 16, at 244–47. This Recent Development does not fully explore the issue of the difficulty judges face in determining the reliability of scientific or technical testimony. The issue has been examined in numerous articles. *See, e.g.*, Lind, *supra* note 103, at 773–74 (noting that judges have "little or no technical training" and are thus no more capable than juries of separating real science from "junk science"); George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291, 292 (1998) (suggesting that scientific and technological issues arising in litigation are becoming more complex, and judges are having to do outside research on which to base their decisions).

113. Rider v. Sandoz Pharms. Corp., 295 F.3d 1194, 1197 (11th Cir. 2002) (quoting Allison v. McGhan Med. Corp., 184 F.3d 1300, 1310 (11th Cir. 1999)).

114. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 468, 597 S.E.2d 674, 692 (2004).

115. *See generally* Shelley Storer, Note, *The Weight Versus Admissibility Dilemma: Daubert's Applicability to a Method or Procedure in a Particular Case*, 1998 U. ILL. L. REV. 231 (1998) (discussing weight versus admissibility and whether the analysis of a particular application of a technique goes to the weight of the evidence or its admissibility under *Daubert*).

116. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 594–95 (1993) (codified at FED. R. EVID. 702) (amended Dec. 1, 2000).

more expert testimony could assist the jury in determining the credibility of expert testimony.[117] This implies that the test was intended not to keep out potentially reliable testimony, but rather, to ensure that only reliable expert evidence is admitted. The problem with *Howerton* is that by removing the framework established in *Daubert* and purporting to be more flexible, it risks letting in evidence that is unreliable or irrelevant in a particular case, thereby depriving judges and burdening juries with critical admissibility decisions. Although *Daubert*, too, is subject to criticism, it maintains a more distinct separation between matters of law and fact than does *Howerton*, thus maintaining the delicate balance between the functions of the judge and jury by allocating to them their proper roles.

Daubert also has additional advantages over *Howerton*, notably in the area of judicial efficiency. The *Daubert* Court conceded that even with a flexible gatekeeping role, the jury will occasionally be deprived of hearing about a valid discovery or insight; however, the United States Supreme Court further explained that the benefits of such an approach outweigh the costs because "there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory."[118] While scientific conclusions evolve over time, the judicial system has to "resolve disputes finally and quickly."[119] Although the *Howerton* approach may remedy the *Daubert* Court's concession by diminishing the slight possibility that valid evidence will be barred before it reaches the jury, the judicial system is designed for *efficiently* resolving legal issues, which means that some evidentiary sacrifices may have to be made to achieve that end. "That ... is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes."[120] In fact, the stated purpose of the North Carolina Rules of Evidence provides that "[t]hese rules shall be construed to secure ... elimination of unjustifiable expense and delay,"[121] demonstrating that judicial efficiency is an important policy consideration in making evidentiary rulings. Further, "[i]f the dominant consideration is administrative or

117. *See id.* at 596 (noting that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence").

118. *Id.* at 596–97.

119. *Id.* at 597.

120. *Id.*

121. N.C. R. EVID. 102.

transaction costs, *Daubert* clearly wins. *Daubert*'s gatekeeping saves considerable judicial resources."[122]

While the primary concern is by no means always judicial efficiency, one would hope that any approach to the admissibility of expert testimony would preserve a modest amount thereof. Nevertheless, the *Howerton* approach threatens to remove any sense of efficiency the evidentiary system was designed to achieve by requiring an ultra-flexible gatekeeping function. The *Howerton* court seems to indicate that one of the main reasons for its decision is to save "*human* resources required to delve into complex scientific and technical issues,"[123] but the court simultaneously turns a deaf ear to the additional *judicial* resources that will be expended under the more permissive standard articulated.

Accordingly, the Supreme Court of North Carolina's decision in *Howerton* deviates from important policy considerations by straying from the purposes behind the North Carolina Rules of Evidence, giving much of the reliability determination to the jury instead of the judge, and working against the goal of judicial efficiency. Failure to acknowledge these significant policy concerns further supports the contention that the court's decision in *Howerton* is inherently deficient.

The *Howerton* court purportedly rejected the *Daubert* standard despite departing from both precedent and policy concerns; however, the main flaw in *Howerton* is that it fails to replace the *Daubert* standard with a real test for North Carolina courts to use in making the admissibility determination. As discussed, North Carolina case law pertaining to North Carolina Rule of Evidence 702 developed with a reliability test as the key determinant of when to admit expert testimony.[124] Cases such as *Bullard* and *Pennington* elaborated on that standard and began setting forth factors to help courts with the determination.[125] More recent cases cited *Daubert* in their analyses, adopting the "gatekeeping" function articulated by the Supreme Court.[126] Over time, North Carolina courts had built a clear and workable test based not only upon the federal test set forth in *Daubert*, but also on the state's own unique precedent.

122. McClellan, *supra* note 15, at 270.

123. Howerton v. Arai Helmet, Ltd., 358 N.C. 440, 465, 597 S.E.2d 674, 690 (2004) (emphasis added).

124. *See supra* notes 54–84 and accompanying text.

125. *See supra* notes 55–63 and accompanying text.

126. *See supra* notes 64–84 and accompanying text.

The law had progressed as such until cut short abruptly by the Supreme Court of North Carolina's decision to reject the clear—though admittedly imperfect—*Daubert* test. Although the *Howerton* court dismissed *Daubert* as too "mechanistic and rigorous,"[127] it nevertheless held that reliability is the paramount consideration in the decision whether to admit expert testimony.[128] *Daubert* presented a virtually identical principle in requiring a preliminary assessment of the reliability of methodology. The *Howerton* court even admitted that North Carolina cases "share obvious similarities with the principles underlying *Daubert*."[129] Although the indices of reliability that developed in North Carolina were not identical to the *Daubert* factors, this did not by any means mandate rejection of the entire standard prescribed in the case.[130] It appears that the Supreme Court of North Carolina disagrees more with *how Daubert* is applied rather than the crux of the holding itself—that admitting expert testimony requires a preliminary determination of reliability. The *Howerton* court's decision to reject the entire *Daubert* standard instead of applying it more flexibly leaves North Carolina courts with no clear framework for making admissibility determinations for expert witnesses.

As mentioned, the standard proffered by the *Howerton* court purports to examine reliability in terms of the *area* of the testimony rather than the reliability of the particular methods used.[131] Furthermore, the new test no longer connects the applicability of the methods used to the particular facts of the case but instead uses a more general definition of relevance.[132] Both of these differences detract significantly from the workable reliability of the methodology

127. *Howerton*, 358 N.C. at 464, 597 S.E.2d at 690.

128. *See id.* at 459, 597 S.E.2d at 686–87.

129. *Id.* at 464, 597 S.E.2d at 690.

130. In fact, the Court in *Daubert* intended for the test to be a flexible one, seemingly to allow various jurisdictions to apply it somewhat differently. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 594 (1993) (codified at FED. R. EVID. 702) (amended Dec. 1, 2000). The Court also clearly stated that "we do not presume to set out a definitive checklist or test." *Id.* at 593. Other jurisdictions have developed variations on the reliability approach presented in *Daubert*, each with its own slightly unique list of factors. *Id.* at 594 n.12 (citing United States v. Downing, 753 F.2d 1224, 1238–39 (3d Cir. 1985)). This Recent Development does not explore the current consensus among courts in other states regarding acceptance, rejection, or modification of *Daubert*.

131. *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687–88; *see supra* notes 35–39 and accompanying text.

132. *See Howerton*, 358 N.C. at 462, 597 S.E.2d at 668; *supra* notes 46–48 and accompanying text.

developed under *Daubert* and North Carolina law, which took a deeper, more fact-specific approach to admissibility decisions.[133]

Because the new test described in *Howerton* removes the clarity that the *Daubert* framework provided and gives little guidance on how to determine reliability other than a few shallow indices of reliability, the *Howerton* decision is a step backward in the development of North Carolina evidence law. The court provides only that "reliability is . . . a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony."[134] How this differs from *Daubert*'s holding is unclear, and the only guidance the court gives is to say that the analysis does not "require the expert's testimony to be proven conclusively reliable or indisputably valid . . . ."[135] This nebulous declaration provides little certainty for North Carolina under *Howerton* in the absence of assistance from the federal body of law previously available. Now, North Carolina courts are left with only the reliability buzzword that suggests a foundational inquiry into methodology that really has little to do with methodology and precludes the use of familiar factors to help determine reliability.

A superficial reliability "test" that lacks clarity, coupled with an abrupt end to the precedent and policy that began before *Daubert* and grew stronger after the decision, leaves the admissibility of expert testimony in North Carolina in a state of uncertainty. It is unclear what types of testimony will be admitted under the new standard and what, if anything, will be excluded. Because it only allows a minimal examination of reliability, the new test creates a risk that trial courts will presume expert evidence to be admissible rather than perform their appropriate gatekeeping function. As a result of the permissive nature of the *Howerton* "test," juries will be burdened with testimony, the methods of which they are not fully equipped to analyze and the veracity of which they are likely to readily accept. In addition, the court system itself will be burdened with lengthier proceedings and a considerable loss of judicial efficiency. If promoting additional flexibility was a goal, the *Howerton* court should have emphasized this, while still leaving *Daubert* as a resource and a guide to the lower courts. This would have allowed the body of North Carolina evidence law under Rule 702 to continually develop as it had been even before *Daubert*. To combat the potentially detrimental effects of the

133. *See supra* notes 5–19, 54–84 and accompanying text.
134. *Howerton*, 358 N.C. at 460, 597 S.E.2d at 687.
135. *Id.*

decision, it will be up to practitioners to aggressively pursue their cases on the merits by attacking qualifications of proposed experts, via extensive cross-examination, and through the presentation of reliable contrary evidence.[136] Finally, it will be left to the state courts to determine the future of the law under Rule 702 and to redevelop clear standards through precedent in order to clear the muddy waters surrounding the admissibility of expert testimony in North Carolina.

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136. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 596 (1993) (codified at FED. R. EVID. 702) (amended Dec. 1, 2000).