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A PYTHON CAN SWALLOW A PIG, BUT NOT AN ELEPHANT -- IS *DAUBERT* NORTH CAROLINA'S PIG, ELEPHANT, OR NEITHER?

PREFACE

What is North Carolina law on expert witness testimony, at least before *Howerton v. ARAI Helmet* (hereafter *Howerton I)*, 158 N.C. App. 316, 581 SE 2d 816 (2003).

Professor Kenneth S. Broun, in his article in the Fall 2002 *North Carolina State Bar Journal Daubert is Alive and Well in North Carolina----In Fact, We Beat the Feds to the Punch*, states that:

> There is folk wisdom among some lawyers and judges in our state that the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc*, the case governing the admissibility of scientific evidence in the federal courts, are inapplicable in North Carolina. Some trial court judges with whom I have spoken are relieved not to be required to have the gatekeeping hearings with regard to scientific and technical evidence that have become endemic in the federal system. But, fortunately or unfortunately, the folklore is wrong.

If Professor Broun is right when he says that this folk wisdom is wrong, then of course learned academics will be in even taller cotton, law review articles will multiply, compulsory CLE programs will increase exponentially, and even more editions of *Brandis and Broun on North Carolina Evidence* will be forthcoming, perhaps as rapidly as the N.C. Court of Appeals Advance Sheets are published. But not all folk wisdom is wrong, or at least all wrong, even when debunked by the leading lights of the professorate.

From the actual current practice in North Carolina, and a reanalysis (a *Daubert* frowned upon type of review) of all the case law, I have reached two conclusions, which are the themes of this paper. They are:

(1) that the traditional North Carolina test, "Is this (expert) witness better

qualified than this jury to form (and express) an opinion from these facts?" is alive and well in the North Carolina state courts, and will remain so; and,

(2) that Professor Broun is half right (and therefore half wrong) when he categorically says that " the *Daubert* case, or something very much like it, is surely the controlling law in North Carolina." We can live with faux *Daubert* or *Daubert* lite (if we must), but no more.

The first Learned Treatise on North Carolina evidence law I know of is *Lockhart*, *Handbook of Evidence for North Carolina*, (1915). In *Lockhart* it states that:

> The judge decides who is an expert and when there is any evidence to sustain his finding it is not reviewable on appeal. § 34

And that,

> An expert must be qualified for the particular matter about which he proposes to testify. ...expert testimony is admissible on almost any subject if the witness qualifies himself to the satisfaction of the trial judge. §204

Then came *Stansbury*, *The North Carolina Law of Evidence* (1946).

> The question, then, in every case involving expert testimony, ought to be, Is this witness better qualified than this jury to form an opinion from these facts? (Emphasis in original text). §132.

And, further cites *Hardy v Dahl,* 210 N.C. 530 (1936):

> the test is to inquire whether the witness's knowledge of the matter in relation to which his opinion is asked is such, or so great, that it will aid the trier in his search.

Furthermore, *Stansbury's* treatise reiterates *Lockhart's* insistence that the trial judge determines the validity of an expert witness's credentials. § 133.

Then came the late great Dean Henry Brandis, Jr., author of several successive editions of *Brandis on North Carolina Evidence*. Dean Brandis, speaking of the new evidence code, now N.C.G.S. 8C, Rule 702 (identical to the then repealed N.C.G.S. 8-58.13) stated in § 132:

> Once expertise is demonstrated, [§ 133, by a showing of knowledge, skill, experience, training, or education] the test of admissibility is helpfulness.

He then makes it clear that any witness who is better qualified than the jury to form a particular opinion would satisfy the Rule [702].

The successor to *Brandis on North Carolina Evidence* is Professor Kenneth S. Broun whose various editions of *Brandis & Broun on North Carolina Evidence* will doubtless remain with us for decades to come, ably accompanied by *North Carolina Evidence* (a courtroom manual) by Blakey, Loven, and Weissenberger.

Brandis & Broun on North Carolina Evidence, 4th Edition (1993) (the year of *Daubert*), in § 184 (especially FN# 171 and 172) basically repeats and echoes all the previous language of *Lockhart*, *Stansbury*, and *Brandis*. In particular, Professor Broun states that:

> the accepted definition of an expert was 'one better qualified than the jury to draw appropriate inferences from the facts' . . . this definition has been recognized under the [North Carolina Evidence] Rules. *See, e.g., State v. West*, 317 N.C. 219 (1986); *State v. Evangelista*, 319 N.C. 152 (1987).

Even though this is a CLE paper prepared for an evidence seminar at a most august Law School (my alma mater) a certain amount of irreverent levity should be allowed. Ask any experienced trial lawyer or trial judge in North Carolina what the true shorthand definition of an expert was/is and they will reply, "A SOB, from out of town, carrying a briefcase, who said they were an expert." I respectfully submit that was/is much closer to the mark than *Daubert* / *Howerton I*.

In sum, what does all the foregoing show about the admissibility tests for expert witness testimony? It shows that there were but two tests, one the substance of the Learned Treatises evidence commentary, and one not, it being assumed "sub silentio." The one stated test is, is this witness better qualified than the jury to draw appropriate inferences from the facts. If so, the witness can give opinion testimony in the case, otherwise, not. The legal inquiry was cast upon the witness -- his/her qualification as an "expert." If so, they could testify, if not, not. These treatise writers did not speak of relevancy in the context of expert witnesses. Small wonder! Relevancy is not just a part of an evidence course, it is the way we think every day, it is a part of every law school class, and is usually quietly recognized and assumed. It is not difficult to grasp and accept that the world's greatest expert on aircraft design has little to say in a case involving land conservation. Relevancy was so obvious it wasn't commented on in the context of expert testimony. Only today, in the *Daubert* World, has it taken on a life of its own.

Intellectual honesty is not inconsistent with advocacy. Indeed it should be its hallmark. I acknowledge here and now that a number of recent North Carolina cases use *Daubert*ian-type language such as "helpfulness" (*Daubert* relevancy) to the jury. But trial lawyers and judges regarded that as so much appellate rhetoric, and the real law (Holmes, "What the Courts do in fact") was the above shorthand definition. It is like Prohibition, where the drys had their laws, and the wets had their liquors. Here the appellate cases may speak of "helpfulness," etc., in *Daubert* language; but the trial court law is, "is the witness an expert?" If so, let 'er rip!

Pre-*Daubert* North Carolina Case Law

Let us turn our attention now to the pre-*Daubert* North Carolina case law. Professor Broun says these cases:

> anticipated the *Daubert* holding by [at least] nine years by adopting an approval based upon principle remarkably similar to those expressed by the U.S. Superior Court in *Daubert*.

Let us see if that is accurate, or backward-looking wish fulfillment. The first case he discusses is the truly famous case of *State v. Bullard*, 312 N.C. 129 322 SE 2d 370 (1984). Indeed, virtually all the North Carolina expert witness cases since, quote it, cite it, and refer to it as the leading North Carolina case on expert witnesses and their testimony. As an anti-*Daubertian,* I do not flee from it, I embrace it. It is the pro-*Daubertaunts* who are embarrassed by it, and begrudgingly refer to it only in passing, much like the feeling one gets from the passing of a kidney stone.

The defendant *Bullard* was charged, tried and convicted of first degree murder. The murder was committed on a bridge where the killer left several bare bloody footprints which were photographed by the State Bureau of Investigation. The state's evidence was circumstantial, and included evidence of "bad blood" (motive and threats) between the defendant and deceased. Dr. Louise Robbins, a professor of physical anthropology at the University of North Carolina at Greensboro, testified that a bloody bare footprint found on the bridge was that on the defendant Bullard, based on ink and latex paint impressions of the defendant's feet and photographs of footprints left on the bridge. At trial there was an extensive voir dire, with evidence as to her proposed

testimony offered by both sides. She was, to use the current phrase, "well credentialed." She had been involved in "forensic anthropology which is the application of anthropological techniques and methods to problems pertaining to law enforcement." She testified to her background, qualifications, independent studies and her methodology for comparison. This included her publications and previous judicial determinations as to her expertise. Also, she utilized colored slides to show the jury how she examined unknown footprints for purposes of trying to determine if they were made by a particular individual.

She "testified that she is the only person in this country to attempt the kind of analysis undertaken to identify the footprints in question" although there were about four other people elsewhere in the world who did.

She was tendered as an expert in the comparison and identification of unknown footprints with known footprints, not on the basis of fingerprint like "ridge detail" which was recognized by case law, but rather on the comparison of footprints by size and shape.

Our Supreme Court said:

> The method of comparison employed by Dr. Robbins does not involve ridge detail, as does traditional fingerprint analysis. Instead, she relies upon a technique of comparison pertaining to the size and shape of the footprint in four areas: namely, the heel, arch, ball and toe regions. The footprint size and shape reflect the size and shape of the internal bone structure of the foot, so the bones indirectly play a major part in the analysis of the footprint, according to Dr. Robbins. Dr. Robbins explains that since each person's foot size and shape are unique, she can identify a footprint represented by a clearly definable print of whatever part of the foot touches the ground. By examining the sides, front, and rear ends of each region of the foot, Dr. Robbins explains that she can compare known footprints with unknown footprints and determine if they are made by the same person.

Dr. Robbins' testimony was challenged by two department of anatomy professors from Duke University Medical School, who, to use the phrase of today, called her professed evidence "junk science."

The opinion is lengthy and rich in applicable law. I'll present it hereinafter by quotes and paraphrases, lest I omit something significant.

> ...It is undisputed that expert testimony is properly admissible when such testimony can <u>assist the jury</u> to draw certain inferences from facts because the expert is better qualified ... G.S. 8C-1, Rule 702 ... [emphasis added]

It is not necessary that an expert be experienced with the identical subject area in a particular case or that the expert be a specialist, licensed, or even engaged in a specific profession. ...

Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge. ...

A finding by the trial judge that the witness possess the requisite skill will not be reversed on appeal unless there is no evidence to support it.

Dr. Robbins was clearly in a superior position and better qualified to compare the bloody bare footprint found on the bridge with those of the defendant. The expertise to make the comparisons involved a certain knowledge which was beyond...the realm of that of the average juror. ...

Certainly, Dr. Robbins' testimony assisted the jury in making certain inferences about the footprints on the bridge, which could not have been made without the testimony of someone with the qualifications of Dr. Robbins. ... [emphasis added]

The single fact that the application of the method employed by Dr. Robbins suffers a dearth of recognition does not *per se* prevent the admissibility of her testimony.

...Admittedly, the method utilized by Dr. Robbins has not been cited in any reported decision. ...

...the novelty of a chosen technique does not justify rejecting its admissibility into evidence.

...Plainly, our Court does not adhere exclusively to the *Frye* formula.

This Court is of the opinion, that we should favor the adoption of scientific methods of crime detection, where the demonstrated accuracy and reliability has become established and recognized. Justice is truth in action, and any instrumentality...which aids justice in the ascertainment of truth, should be embraced without delay.

..."Not every scrap of scientific evidence carries with it an aura of infallibility. Some methods, like bite mark identification (emphasis added), ... are demonstrable in the courtroom. Where the methods involve principles and procedures that are comprehensible to a jury, the concerns over the evidence exerting undue influence and inducing a battle of the experts have little force." *McCormick on Evidence*, 203, at 606 (3rd ed. 1984). ...

In matching threads among the cases and analogizing them to the present one, we

> determine that the method employed by Dr. Robbins is reliable. ...used scientifically established measurement techniques relied upon in the established field of physical anthropology to make her measurements. ...the extensive...professional achievements and endeavors of Dr. Robbins...(she) used photographs, models, slides, and overlays that were before the court and verifiable by the jury. ...Dr. Robbins did not ask the jury to sacrifice its independence by accepting her scientific hypotheses on faith. Rather, she explained in detail to the jury the basis of her measurements and the interrelationships of the various portions of the foot and how her visual comparisons enabled her to identify unknown footprints. ...We also have determined that Dr. Robbins' unique scientific method is reliable because of her explanatory testimony, professional background, independent research, and use of established procedures to make her visual comparisons of bare footprints.
>
> ...the Court here is dealing with a scientific method which can be considered reliable based on the testimony of the expert while displaying to the jury visual aids used in making observable visual comparisons. Dr. Robbins did rely upon established techniques in physical anthropology, according to her own testimony...
>
> After determining that this evidence is sufficiently reliable, the next question is whether it is also relevant. Relevant evidence is admissible if it "has any logical tendency however slight to prove the fact at issue in the case." *State v. Pratt*, 306 N.C. 673, 678... [*See*, Evidence Rule 401]

The Court's obvious answer to this last question was YES.

This opinion, like *Daubert* nine years later, has some discussion of reliability and relevancy. But, as I think one can easily see, comparing the legal and factual analysis, and the results therefore reached -- *Bullard-Pennington* and *Daubert* -- the cases compare, and mix, like oil and water.

The reason this case is now embarrassing to the Pro-Daubertantes is that Louise Robbins was, beyond any reasonable doubt, a fake, fraud and charlatan, and blatantly so. See, Professor Broun's article in Fall 2002, *N.C. St. Bar J.*

Professor Broun cites, as cementing (his view of) the North Carolina approach to the reliability of scientific evidence, *State v. Pennington*, 327 N.C. 89 (1990), three years before *Daubert.* The opinion is somewhat shorter than *Bullard*, as though the die was cast in *Bullard*, and most of what was said then need not be repeated.

Pennington arose from a particularly savage case of sexual assault and attempted murder, resulting in serious permanent injury. The state's case was both direct (victim

eyewitness identification) and circumstantial (some of which was a DNA comparison of blood left on the victim's bedspread and a blood sample taken from the defendant). This was apparently the first appellate case in North Carolina to address the admissibility of DNA evidence.

> The trial court conducted a lengthy voir dire hearing on the admissibility of evidence of deoxyribonucleic acid (DNA) analysis conducted by Cellmark Diagnostics, Inc. (Cellmark), a commercial clinical laboratory located in Germantown, Maryland. It concluded that the proffered evidence was reliable and based on established scientific methods generally accepted within the fields of microbiology and molecular biology, and allowed admission of evidence pertaining to the DNA analysis.
>
> The expert...testified that he performed the described procedures on the...bedspread cutting submitted in the present case. ...The bedspread cutting yielded a banding pattern which matched that obtained from the blood of defendant. ...The expert testified that in his opinion the DNA on the bedspread cutting came from defendant. ...

As to the applicable law, echoing *Bullard*, the Court said:

> A new scientific method of proof is admissible at trial if the method is sufficiently reliable. ...Reliability of a scientific procedure is usually established by expert testimony and the acceptance of experts within the field is one index, though not the exclusive index, of reliability. ...Believing...that the inquiry...is one of the reliability of the scientific method rather than its popularity within a scientific community, we have focused on the following <u>indices of reliability</u> [emphasis added by writer]: (1) the expert's use of established techniques, (2) the expert's professional background in the field, (3) 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," (4) and independent research conducted by the expert. ... [Numbers added by writer]

Then applying this applicable law to the evidence in the case, the opinion stated in summary that:

> ...The expert testimony was uncontradicted that the method of proof in question, DNA profiling, uses established techniques considered reliable within the scientific community... The expert who conducted the DNA profiling analysis in this case and testified before the jury, earned a Ph.D. in biochemistry with a specialty in molecular biology, which he defined as the study of DNA...post-doctoral research...in molecular biology...had conducted DNA profile testing on over one hundred samples and supervised the performance of testing on other samples. The expert had published over a dozen articles and abstracts in the field of molecular biology.

> The expert made every attempt to explain the DNA profiling process in simple language and used several visual aids to assist the jury in understanding the structure of DNA and the DNA profiling process...displayed the radiograph of the test results to the jury during his testimony. Thus the jury was not asked "to sacrifice its independence by accepting [the] scientific hypotheses on faith," *State v. Bullard*...but had a basis for evaluating the expert testimony. ...

Therefore, the Supreme Court agreed with the trial judge that:

> the expert testimony in this case established the reliability of the DNA profiling process...

Other North Carolina cases in that time frame were the same in sum and substance. Then came *State v Goode*, 341 N.C. 513, 461, S.E.2d 631 (1995). This case is the linchpin, and the sole support from the North Carolina Supreme Court, for the view that North Carolina has adopted *Daubert*. [The correct pronunciation of which is "Dow-Burt"; not the Frenchified Dough-Bear. See, *The Green Bag*, 2d Series, Vol. 7, No. 3, Spring 2004, p 204-5.] We will return to *Goode* shortly.

The Federal Triumvirate

DAUBERT

Since I have little love for *Daubert*, to the extent that it is said to Federalize North Carolina Evidence Law, I think I'll present it here as a scientific drama, kind of a poor play with bad actors.

ACT I

The Stage is Set

The curtain rose on June 28, 1993. In the first scene all nine justices stood together and announced that the old Federal *Frye* admissibility test of "general acceptability" in the pertinent science field had died (like Hamlet's father) in federal court on July 1, 1975, the effective date of the Federal Rules of Evidence.

Then the nine split into a majority group of seven, led by Justice Blackmun, and a dissenting group of two, led by Chief Justice Rehnquist. Justice Blackmun, not content to simply announce the death of *Frye*, went on <u>in dicta</u> (emphasis added) to soliloquize at length on two requirements, RELIABILITY and RELEVANCY one being analyzed in

five non-exclusive "factors," that federal judges, now to be known as "gatekeepers," could use to determine the admissibility of scientific evidence in the future. He spoke on science and the scientific method much as Hamlet discoursed on poor Yorick's skull.

Chief Justice Rehnquist, as dissenters are wont to do, played the role of a nay saying Greek Chorus. He thought, since scientific "matters [were] far afield from the expertise of judges," that the court should have "proceed[ed] with great caution in deciding more than they [had] to, because their reach could so easily exceed their grasp." He seized upon one of the majority's new factors, "falsifiability," saying he was at a loss to know what is meant when the majority said that the scientific status of a theory depends on its "falsifiability." And he suspected that some of the lower federal judges would too. His parting shot was that he did not think Rule 702 imposed on federal judges "either the obligation or the authority to become amateur scientists" in order to perform their judicial role of expert evidence gatekeeping.

ACT II

The Play's The Thing

Daubert, as appellate opinions go, is not lengthy; the majority opinion covers eight pages and the dissent but two. But if you are closer to being a lost Luddite than an enthusiastic Einstein you had best read the majority opinion Part II, Sections B and C, very slowly and carefully, lest your eyes glaze over. As a side-bar note, I suggest you look at footnote 4 in *Daubert* where the Court said that:

> the debates over *Frye* are such a well-established part of the academic landscape that a distinct term -- "*Frye*ologist" -- has been advanced to describe those that take part.

With today's CLE program lodged in your thoughts, perhaps you are eligible to become a "*Daubert*ologist."

The dicta starts out by focusing on the two concepts contained in the first phrase of Rule 702.

> (1) "If scientific . . . knowledge . . ."
>
> (2) "Will assist [helpfulness standard] the trier of fact.
>
> As to the word "science," it implies a grounding in the methods and procedures of science, and the word "knowledge" means more than just subjective belief or unsupported speculation

The opinion flatly states that:

> in order to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. . . . The requirement that an expert's testimony pertain to scientific knowledge establishes a standard of evidentiary reliability.

So the first concept in Rule 702, "Scientific knowledge," found through the scientific method, equals reliability or trustworthiness. In later discussions the court makes this first concept into a first prong for the trial courts to utilize in making admissibility decisions. This first prong may be known as the "reliable" prong.

Trial judges are to make a preliminary assessment of whether the reasoning or methodology underlying the proposed evidence is "scientifically valid." Scientific validity will equal evidentiary reliability, says the court.

How does the trial court, assisted of course by counsel for all parties, determine the scientific validity (which equals evidentiary reliability) of a proffer of evidence? The trial court, pursuant to Rule l04(a), will conduct a *Daubert* hearing, either long before trial on a Rule 56 summary judgment motion, or at least "at the outset" of the trial itself because of a motion in limine (or perhaps, simply after an "objection" once jeopardy has attached in a criminal case). Many factors may bear upon this inquiry. The opinion did not presume to set out a definite checklist or test, but a number of general observations were made. The nature of the legal mind has led some courts after *Daubert* to elevate these general observations into a *Daubert* Checklist or Test, even though the opinion itself emphasized that the inquiry envisioned by Rule 702 is a flexible one.

A key question (or factor) is whether the theory or technique can be, or has been, TESTED. Has it been, or can it be, falsified? As I understand it, falsifiability means that the theory has been, or can be, empirically tested and either refuted or confirmed by such testing.

Another pertinent consideration was whether the theory or technique had been subjected to PEER REVIEW/PUBLICATION (Publication is but one element of peer review). While not a required factor (some innovative theories aren't published; some are too new and others are of too limited an interest) still, submission to the scrutiny of the scientific community is a component of "good science."

The trial court should ordinarily consider the known or potential RATE OF

ERROR as well as the existence and maintenance of STANDARDS controlling the techniques operation.

Lastly, GENERAL ACCEPTANCE like Hamlet's ghostly father, returns to the stage, this time not as the play itself, but only as a factor that can have a bearing on the inquiry. What about the lack of "general acceptance?" As to that, the opinion states that:

> a known technique that has been able to attract only minimal support within the [relevant scientific] community may properly be viewed with skepticism.

The proponent of what they contend is admissible scientific evidence may very well be able to kill two (or more) birds with one stone. A single well-done article in a prestigious publication like the *New England Journal of Medicine* may well establish by a preponderance of evidence, testing, peer review, low error rate, the existence and maintenance of standards, and general acceptance in the relevant scientific community.

If the RELIABILITY prong is satisfied, the proponent must still establish a second prong--RELEVANCY. Remember the second concept in the opening phrase of Rule 702, that the evidence:

> will assist the trier of fact to understand the evidence or to determine a fact in issue [helpfulness standard].

Put another way, it must "fit." The Court's example of "fit" used phases of the moon. Science would tell you, by phases of the moon, if a given night was dark or not. But, if the trial question was a person's behavior that night, then the evidence would not "fit;" it would not be helpful to the jury as fact finders. Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry.

ACT III

Daubert on Remand

Since the Supreme Court's reversal of *Daubert* (*Daubert I*) was premised on the lower courts having used the now invalid *Frye* test, the court simply vacated the judgment of the Court of Appeals and remanded for further proceedings consistent with its opinion and its newly announced "factors."

The Ninth Circuit, instead of remanding back to the trial court, simply kept the

case and re-decided it in *Daubert II*, *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 43 F.3d 1311 (9th Cir. 1995), *cert. denied* 116 S.Ct. 189 (1995). In so doing, in an opinion by Judge Kozinski, they treated the Supreme Court decision as an "off Broadway" production, recasting it considerably.

Part of *Daubert II*, entitled *Brave New World*, deals with the complex and daunting task that federal judges now face in ruling on admissibility questions as to expert scientific evidence. Does the evidence reflect "scientific knowledge," derived by the "scientific method," amounting all in all to "good science?" Is the evidence "relevant to the task at hand;" does it "fit?"

Pointing out the obvious, yet still important, Judge Kozinski states:

> Something doesn't become scientific knowledge just because a scientist utters it; nor can an expert's self-serving assertion that his conclusions were derived by the scientific method be deemed conclusive.

In a part of the opinion called *Deus ex Machina* the opinion states that a judge's task is not to analyze what the experts say, but what basis do they have for saying it.

As to the *Daubert I* factors, they are regarded as illustrative rather than exhaustive; they are not believed to be equally applicable (or applicable at all) in every case. Virtually all of the other post-*Daubert I* opinions are in agreement with these points.

While *Daubert II*, perhaps because of its dismissive approach to *Daubert I*, is not as widely cited, it is important for a new "factor" that it puts into play in evaluating the reliability of the alleged scientific knowledge under inquiry. This factor is whether the proposed expert opinion and underlying basis arose out of research conducted independent of the litigation (and perhaps before) or whether the expert developed his opinion expressly for purposes of testifying. With a bite to his words, Judge Kozinski states that:

> in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office.

This new factor (suggested by *Galileo's Revenge: Junk Science in the Courtroom* by Peter Huber (1991)) will be used time and again in the future. After its own reanalysis of the trial court record, the court found that the plaintiff's proposed expert evidence failed

to measure up to the *Daubert I* factors (and California substantive tort law) and again affirmed the district court's grant of summary judgment against the plaintiff. Of some interest is the fact that the U.S. Supreme Court denied certiorari in *Daubert II*.

JOINER

General Electric Company v Joiner, 522 U.S. 136, 139 L.Ed 2d 508, 118 S.Ct. 512 (1997) came four years after *Daubert*, and it resolved one question that had bedeviled the Federal Circuits since *Daubert*: What was the proper appellate review standard in passing upon the trial courts decision to admit, or to reject, proposed expert scientific testimony?

In reviewing the trial court's ruling that, under *Daubert*, the plaintiff's expert witness proposed expert testimony did not rise above "subjective belief or unsupported speculation," the Court of Appeals, while purporting to use the traditional "abuse of discretion" standard, had held that:

> . . . "[b]ecause the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony." . . .

On cert. to the U.S. Supreme Court, General Electric stated their position was that:

> the phrase "particularly stringent" announced no new standard of review. It was simply an acknowledgment that an appellate court can and will devote more resources to analyzing district court decisions that are dispositive of the entire litigation. All evidentiary decisions are reviewed under an abuse-of-discretion standard. [Arguing, however, that it is perfectly reasonable for appellate courts to give particular attention to those decisions that are <u>outcome determinative</u>. [emphasis added]
>
> . . . We have held that abuse of discretion is the proper standard of review of a district court's evidentiary rulings. . . .Indeed, our cases on the subject go back as far as *Spring Co. v. Edgar*, 99 U.S. 645, 658, 25 L.Ed. 487 (1879), where we said that "[c]ases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous." The Court of Appeals suggested that *Daubert* somehow altered this general rule in the context of a district court's decision to exclude scientific evidence. But *Daubert* did not address the standard of appellate review for evidentiary rulings at all. It did hold that the "austere" *Frye* standard of "general acceptance" had not been carried over into the Federal Rules of Evidence. But the opinion also said:

> "That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony of evidence admitted is not only relevant, but reliable." 509 U.S., at 589, 113 S.Ct. at 2794-2795.

Chief Justice Rehnquist straightened out the 11th Circuit forthwith, in an opinion for seven justices, with Breyer concurring and Stevens dissenting in part, holding the traditional abuse of discretion (abuse of discretion is a rare creature -- AKA "Big Foot" -- often referred to but rarely seen), and no more, was the only applicable standard for appellate review. He also added:

> ... Respondent points to *Daubert's* language that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." ... He claims that because the District Court's disagreement was with the conclusion that the experts drew from the studies, the District Court committed legal error and was properly reversed by the Court of Appeals. But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. ... That is what the District Court did here, and we hold that it did not abuse its discretion in so doing. ...

Note well that the *Daubert* pledge that the "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate" is abandoned in favor of the newer (more generous to trial judges) hedge that "conclusion and methodology are not entirely distinct from one another."

We could move on now from *Joiner* to *Kumho Tire*, but I think it preferable to stay put long enough to deal with the opinions of Breyer and Stevens, since they say a lot about what is really going on in *Daubert* World.

Justice Breyer, in joining the Court's opinion, says it:

> . . . emphasized *Daubert's* statement that a trial judge, acting as "gatekeeper," must " 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.' " . . . This requirement will sometimes ask judges to make subtle and sophisticated determinations about scientific methodology and its relation to the conclusions an expert witness seeks to offer--particularly when a case arises in an area where the science itself is tentative or uncertain, or where testimony about general risk levels in human beings or animals is offered to prove

individual causation. Yet, as *amici* have pointed out, judges are not scientists and do not have the scientific training that can facilitate the making of such decisions. See, e.g., Brief for Trial Lawyers for Public Justice as *Amicus Curiae* 15; Brief for New England Journal of Medicine et al. as *Amici Curiae* 2 ("Judges . . . are generally not trained scientists").

Of course, neither the difficulty of the task nor any comparative lack of expertise can excuse the judge from exercising the "gatekeeper" duties that the Federal Rules of Evidence impose--determining, for example, whether particular expert testimony is reliable and "will assist the trier of fact," Fed. Rule Evid. 702, or whether the probative value" of testimony is substantially outweighed by risks of prejudice, confusion or waste of time, Fed. Rule Evid. 403. To the contrary, when law and science intersect, those duties often must be exercised with special care.

He then goes on to say that:

. . . Today's toxic tort case provides an example. . . . And it may, therefore, prove particularly important to see that judges fulfill their *Daubert* gatekeeping function, so that they help assure that the powerful engine of tort liability, which can generate strong financial incentives to reduce, or to eliminate, production, points toward the right substances and does not destroy the wrong ones. It is, thus, essential in this science-related area that the courts administer the Federal Rules of Evidence in order to achieve the "end[s]" that the Rules themselves set forth, not only so that proceedings may be "justly determined," but also so "that the truth may be ascertained." Fed. Rule Evid. 102.

I therefore want specially to note that, as cases presenting significant science-related issues have increased in number, see Judicial Conference of the United States, Report of the Federal Courts Study Committee 97 (Apr. 2, 1990) ("Economic, statistical, technological, and natural and social scientific data are becoming increasingly important in both routine and complex litigation"), judges have increasingly found in the Rules of Evidence and Civil Procedure ways to help them overcome the inherent difficulty of making determinations about complicated scientific, or otherwise technical, [obviously foretelling *Kumho Tire*, two years/Terms in the future] evidence. Among these techniques are an increased use of Rule 16's pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks. See . . . Charles E. Wyzanski, Jr., 100 Harv.L.Rev. 713, 713-715 (1987) (discussing a judge's use of an economist as a law clerk in *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (Mass.1953), aff'd, 347 U.S. 521 74 S.Ct. 699, 98 L.Ed. 910 (1954)).

In the present case, the *New England Journal of Medicine* has filed an *amici* brief "in support of neither petitioners nor respondents" in which the Journal writes:

> "[A] judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make greater use of their inherent authority . . . to appoint experts . . .. Reputable experts could be recommended to courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science." Brief, *supra*, at 18-19.

Cf. Fed. Rule Evid. 706 (court may "on its own motion or on the motion of any party" appoint an expert to serve on behalf of the court, and this expert may be selected as "agreed upon by the parties" or chosen by the court); see also Weinstein, supra, at 116 (a court should sometimes "go beyond the experts proffered by the parties" and "utilize its powers to appoint independent experts under Rule 706 of the Federal Rules of Evidence"). Given this kind of offer of cooperative effort, from the scientific to the legal community, and given the various Rules-authorized methods for facilitating the court's task, it seems to me that Daubert *'s* gatekeeping requirement will not prove inordinately difficult to implement, and that it will help secure the basic objectives of the Federal Rules of Evidence, which are, to repeat, the ascertainment of truth and the just determination of proceedings. Fed. Rule Evid. 102.

All of this is simply breathtaking in its Utopian View of the role and powers of a [Federal] trial judge, and, of course, the allotted resources necessary and available to ascertain "truth" and to "justly" determine proceedings. Tolerable, perhaps, at the Federal level, intolerable at the North Carolina state level. To swallow *Daubert* hook, line, and sinker is to swallow *Joiner* likewise. A python can swallow a pig, but not an elephant. *Daubert-Joiner* clearly have taken on elephantine proportions. And we're not finished yet.

Justice Stevens, dissenting in part, focused on the District Court ruling that *Joiner's* experts' opinions were "unreliable," stated that:

> . . . The reliability ruling was more complex and arguably is not faithful to the statement in *Daubert* that "[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." . . . *Joiner's* experts used a "weight of the evidence" methodology to assess whether *Joiner's* exposure to transformer fluids promoted his lung cancer. . . . They did not suggest that any one study provided adequate support for their conclusions, but instead relied on all the studies taken together (along with their interviews of *Joiner* and their review of his medical records). The District Court, however, examined the studies one by one and concluded that none was sufficient to show a link between PCB's and lung cancer. 864 F.Supp., at 1324-1326. The focus of the opinion was on the separate studies and the conclusions of the experts, not on the experts'

methodology. *Id*., at 1322 ("Defendants . . . persuade the court that Plaintiffs' expert testimony would not be admissible . . . by attacking the **conclusions** that Plaintiffs' experts draw from the studies they cite"). [emphasis added]

. . . Unlike the District Court, the Court of Appeals expressly decided that a "weight of the evidence" methodology was scientifically acceptable. . . . To this extent, the Court of Appeals' opinion is persuasive. It is not intrinsically "unscientific" for experienced professionals to arrive at a conclusion by weighing all available scientific evidence--this is not the sort of "junk science" with which *Daubert* was concerned. . . .

. . . The Court of Appeals' discussion of admissibility is faithful to the dictum in *Daubert* that the reliability inquiry must focus on methodology, not conclusions. Thus, even though I fully agree with both the District Court's and this Court's explanation of why each of the studies on which the experts relied was by itself unpersuasive, a critical question remains unanswered: when qualified experts have reached relevant conclusions on the basis of an acceptable methodology, why are their opinions inadmissible?

Daubert quite clearly forbids trial judges to assess the validity or strength of an expert's scientific conclusions, which is a matter for the jury. . . . Because I am persuaded that the difference between methodology and conclusions is just as categorical as the distinction between means and ends, I do not think the statement that "conclusions and methodology are not entirely distinct from one another," *ante* at 519, is either accurate or helps us answer the difficult admissibility question presented by this record.

. . . In any event, it bears emphasis that the Court has not held that it would have been an abuse of discretion to admit the expert testimony. The very point of today's holding is that the abuse-of-discretion standard of review applies whether the district judge has excluded or admitted evidence. *Ante*, at 517. And nothing in either *Daubert* or the Federal Rules of Evidence requires a district judge to reject an expert's conclusions and keep them from the jury when they fit the facts of the case and are based on reliable scientific methodology.

Kumho **Tire Company**

Kumho Tire Co. v Carmichael, 526 U.S. 137, 143 L.Ed 2d 238, 119 S.Ct. 1167 (1999) is the third case in what is called by some writers the *Daubert* Trilogy (or perhaps Trinity). For my own reasons, I prefer the appellation, "The *Daubert* Triumvirate."

Kumho Tire presented the issue whether or not *Daubert's* "gatekeeping" obligation, requiring the trial court to inquire into both relevance and reliability of "scientific" testimony, applied also to the "technical, or other specialized knowledge"

phrases of Federal Evidence Rule 702. This, of course, was one of the questions raised by Chief Justice Rehnquist's dissent in *Daubert* itself. Pushing *Daubert* tirelessly (pun intended) the Court, in an opinion by Justice Breyers, concluded that:

> . . . We conclude that *Daubert's* general holding--setting forth the trial judge's general "gatekeeping" obligation--applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. . . . We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination. See *General Electric Co. v. Joiner*.

In Part II, A of the opinion the Court went on to further say:

> . . . the evidentiary rational that underlay the Court's basic *Daubert* "gatekeeping" determination [is not] limited to "scientific" knowledge. *Daubert* pointed out that Federal Rules 702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the "assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." . . . (pointing out that experts may testify to opinions, including those that are not based on firsthand knowledge or observation). The Rules grant that latitude to all experts, not just to "scientific" ones.
>
> . . . it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge. Pure scientific theory itself may depend for its development upon observation and properly engineered machinery. And conceptual efforts to distinguish the two are unlikely to produce clear legal lines capable of application in particular cases.
>
> . . . Neither is there a convincing need to make such distinctions. Experts of all kinds tie observations to conclusions through the use of what Judge Learned Hand called "general truths derived from . . . specialized experience." Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L.Rev. 40, 54 (1901). And whether the specific expert testimony focuses upon specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, the expert's testimony often will rest "upon an experience confessedly foreign in kind to [the jury's] own." . . .

And, in Part II, B the opinion added:

> . . . We do not believe that Rule 702 creates a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts. Life and the legal cases that it generates are too complex to warrant so definitive a match. . . . To say this is not to deny the importance of *Daubert's* gatekeeping requirement. The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. . . . must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. . . .

And, lastly in Part II, C the opinion says that:

> . . . The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable. Our opinion in *Joiner* makes clear that a court of appeals is to apply an abuse-of-discretion standard when it "review[s] a trial court's decision to admit or exclude expert testimony." . . . That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises. Indeed, the Rules seek to avoid "unjustifiable expense and delay" as part of their search for "truth" and the "jus[t] determin[ation] of proceedings. . . . Fed Rule Evid 102.

When you read the *Daubert* - *Joiner* - *Kumho* cases -- and the cases relying on them, and the law review articles extolling them, one gets the impression that these three cases are kind of a legal three musketeers. The *Daubert* Triumvirate are three brave virtuous merry souls who go about saving the federal court system (and by extension, state court systems) from "junk science" and other bad thoughts. Well, let's look this gift horse in the mouth.

Weisgram

The Three Musketeers Morph into the Four Horsemen of the Apocalypse

Weisgram v Marley Company, 528 U.S. 440, 120 S.Ct. 1011, 145 L.Ed 2d 958

(2000), casts the *Daubert* Triumvirate in their correct light.

> Do you remember in *Daubert* where Justice Blackmun spoke soothingly of the:
>
> rigid "general acceptance" requirement [*Frye* Rule] would be at odds with the "liberal thrust" of the Federal [Evid} Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony."?

And, that:

> The Rules were designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts?

And:

> [The] Rules' permissive backdrop?

And:

> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one?

And:

> The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate? [Whoops! Pardon me -- this bait already being switched out in *Joiner*]

And lastly, but importantly:

> [The] respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous 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.

Do you remember all that? Well, forget-about-it and read *Weisgram*, a unanimous decision of the U.S. Supreme Court.

The facts are not complicated. Ms. Bonnie Weisgram died of carbon monoxide poisoning during a fire in her home. A wrongful death action ensued. The plaintiff alleged that a defect in an electric baseboard heater, manufactured by the Marley Company, caused both the fire and the death. At trial the plaintiff offered, and the federal trial court received in evidence, the testimony of three (expert) witnesses, to prove to the jury that there was a defect in the heater and that it caused the fire and the death. The defense objected, maintaining that this expert testimony, essential to prove the plaintiff's case, was unreliable, hence inadmissible under Federal Rule of Evidence 702, as

elucidated by *Daubert*.

On appeal to the Eighth Circuit, a three judge panel divided 2 - 1. The majority held that the plaintiff's expert testimony on causation was speculative, had not been shown to be scientifically sound and was inadmissible. Since expert evidence on causation was necessary to prove the plaintiff's case, the Eighth Circuit court simply directed a verdict for the defendant, electing not to remand back for a new trial. The dissenting judge disagreed on both points, concluding (1) that the expert evidence was properly admitted, and (2) that the appropriate remedy for improper admission of expert testimony is the award of a new trial, not judgment as a matter of law.

The U.S. Supreme Court granted *cert*. only on the second point, as to what action the Court of Appeals could take after their ruling that the trial court verdict could not be sustained due to error in admission of evidence.

In the Court's opinion, Justice Ginsburg said:

> **Since *Daubert* . . . parties relying on expert evidence have had notice of the EXACTING STANDARDS OF RELIABILITY such evidence must meet,** (emphasis added)

citing the *Daubert* - *Kumho* - *Joiner* axis.

Thus you can see that the *Daubert* smooth level road has become a daunting uphill obstacle course for expert testimony. The gatekeeper has become, by court edict, St. Peter at the Admissibility Gate, where all may come, but few may enter.

If I were a conspiracy buff, I could make even more of this. I don't believe *Weisgram* was cited or referred to in any of the briefs filed in the North Carolina Supreme Court for their review of *Howerton v Helmet I*, nor in the *Howerton* trial court order/decision, nor in the *Howerton* North Carolina Court of Appeals decision. What is the significance of that? Well, if the Supreme Court of North Carolina swallows the North Carolina Court of Appeals having swallowed *Daubert* (and its elephantine proportions) hook, line and sinker then *Weisgram* will be sprung on the North Carolina bench and bar, no longer a stealthy bombshell. Cassandra would say that, in adopting *Daubert,* we have adopted all the cases from the U.S. Supreme Court further construing it. When you are in for a dime, you are in for a dollar.

> *See* N.C. R. Evidence 102, commentary (1988) ("[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."); *State v. Bogle*, 324 N.C. 190, 202-03, 376 S.E. 2d 745, 752 (1989) (same).

What trial judge, faced with the stark language of Weisgram would be willing/able to say that **YOUR** expert evidence meets the required EXACTING STANDARDS OF RELIABILITY? Particularly since they can say that, in their "discretion," **YOUR** evidence fails the scientific (1) reliability or (2) relevancy test.

NOTE WELL: In all four of these federal cases it was the plaintiff's expert evidence that was barred, either at the trial or appellate level, and the result was that the plaintiffs lost all four cases, none at the hands of a jury, the jewel and bedrock of our common law system of justice.

Anyone notice a trend here?

Post-*Daubert*

North Carolina Case Law

State v. Goode, 341 N.C. 513 (1995) is the case that the North Carolina *Daubert*-ologists maintain holds that North Carolina has swallowed *Daubert* hook, line and sinker. But instead of just asserting that as fact, let us take a long look at the case and the decision. What took the case to the Supreme Court were guilty jury verdicts in Phase I of two separate counts of first degree murder, and a jury verdict in Phase II of two death sentences. These death penalty sentences required the North Carolina Supreme Court to hear the appeals.

In the Phase I Guilt-Innocence proceedings the defendant's first assignment of error, and; therefore, the first point taken up in the opinion, was the expert testimony by an SBI Agent on "bloodstain pattern interpretation" [i.e., blood splatter]. His testimony may have been of extreme importance (we don't know, of course, what the jury talked about in the jury room or what they thought important). Though other evidence for the state tended to show that each victim, a husband and wife, had been stabbed multiple times (the wife twenty-three times), the defendant when taken into custody shortly thereafter had no visible bloodstain on his coveralls, hat, boxer shorts, or boots; though a chemical test indicated the presence of blood on the boots, the type of which could not be determined. This would appear to support the defendant's story, which was that while he was present at the time the murders were committed (by some other dudes); he did not

participate in these stabbing deaths. The defendant, and his story, may have been undone when the trial judge allowed the State Bureau of Investigation bloodstain pattern interpreter to testify as follows:

> Q. Agent Deaver, do you have an opinion satisfactory to yourself based on your experience and examination of the items that you've seen in this case whether or not you would necessarily exclude a certain individual as a participant in a stabbing type of assault simply because such person did not have any visible blood stains on his clothing?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> A. Yes, I do have an opinion to that.
>
> Q. What is the basis for your opinion?
>
> A. The basis for my opinion first, in general terms would be my experience. My experience comes from having looked at a great number of scenes and also from having done testing involving beatings, shootings...and those type of things. And so my experience generally would be [sic] I would be able to answer that question...in general terms. What I need [sic] to do in this specific case was to look at the specific circumstances surrounding this case to see what one might expect to find. What types of stain who might have the stains on them or what might they be on in order to form an opinion as to this specific case.
>
> Q. To your satisfaction, have you been able to examine all those areas?
>
> A. Yes, I have.
>
> Q. Agent Deaver, I then ask your opinion about whether you could necessarily exclude someone simply because they did not have blood on them?
>
> A. Generally, I would not. I have seen enough cases where I have been able to reconstruct the circumstances that were given to me and was able to determine that bloodstain did not occur as one might expect from an individual involving those circumstances. Specifically, in this case, after having looked at these items of evidence, the crime scene and the autopsy, again my opinion would be that one could not be excluded from having inflicted at least some of the injuries on these individuals simply because they do not have blood staining on their clothes.

In discussing this assignment of error the opinion starts off by setting forth Evidence Rules 401 and 402, then Rule 104(a). The opinion then paraphrases our evidence code as follows:

> Thus, under our Rules of Evidence, when a trial court is faced with a proffer of expert testimony, it must determine whether the expert is proposing to testify to scientific, technical, or other specialized knowledge that will assist the trier of fact to determine a fact in issue. As recognized by the United States Supreme Court in its most recent opinion addressing the admissibility of expert scientific testimony, this requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue. *See Daubert v. Merrell Dow Pharmaceuticals, Inc*. ...

Next, the Court turned to *Bullard, supra*, and said:

> ...this Court, addressing the reliability of footprint identification, gave a comprehensive review of the law concerning the determination of whether a proffered method is sufficiently reliable. Speaking for the Court, Justice Frye restated the following rule, which is applicable in assessing the reliability issue:
>
> > 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 scientists who are expert in the subject matter, or by a combination of the two.

Our Court would appear to do no more than to equate *Daubert* with *Bullard*, with *Daubert* (and Rule 702) being a restatement of *Bullard*, and no more. Certainly the opinion lumps them together, and does not even purport to differentiate them in the slightest. ***Bullard* lives!**

Next, the opinion takes up *State v. Pennington*, the next (and perhaps the last North Carolina Supreme Court) significant scientific evidence case, and said:

> In *State v. Pennington* ... Justice Whichard also examined the reliability of a scientific method of proof setting out the following principles:
>
> Reliability of a scientific procedure is usually established by expert testimony, and the acceptance of experts within the field is one index, though not the exclusive index, of reliability. *See State v. Bullard*, ... Thus, we do not adhere exclusively to the formula, enunciated in *Frye v. United States*, ... and followed in many jurisdictions, that the method of proof "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. at 1014. 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 <u>indices of reliability</u> [emphasis added]: (1) the expert's use of established techniques, (2) the expert's professional background in the field, (3) 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," (4) and independent research conducted by the expert. *State v. Bullard*, ... [numbers added by writer]

Again, the opinion appears to do no more than to equate *Bullard* with *Pennington*, they are lumped together, and there is no indication that our Court purports to differentiate them in the slightest. ***Pennington* lives!**

> Browsing through the remainder of the opinion, I pick out the following:
>
> Once the trial court has determined that the method of proof is sufficiently reliable as an area for expert testimony, the next level of inquiry is whether the witness testifying at trial is qualified as an expert to apply this method to the specific facts of the case. "It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." ...("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.'") [emphasis added]...Further, "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert...testimony." ...
>
> Finally, once qualified, the expert's testimony is still governed by the principles of relevancy. As previously stated, relevant evidence is defined as 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." N.C.G.S. § 8C-1, Rule 401. Further, in judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences. *Bullard,* . . .

If I count correctly, being mathematically challenged, I find *Bullard*, in one way or another, being cited, referred to, or quoted at least nine times, *Pennington* four times, and *Daubert* only once, as "*See Daubert v. Merrell Dow Pharmaceuticals, Inc*., . . .

That one "See *Daubert* . . ." is mighty thin gruel to feed the theory that *Daubert* has supplanted and replaced the case law and holdings of *Bullard*, *Pennington* and progeny. Using the *Daubert* rigorous testing, it is apparent that their theory is scientifically invalid.

If *Bullard* is an embarrassment to the would be North Carolina *Daubert*ologist, there is even greater embarrassment in *State v Helms*, 348 N.C. 578, 504 SE 2d 293 (1998).

In *State v Helms,* 127 N.C. App 375, 490 SE 2d 565 (1997) the Court of Appeals

held that:

> (1) horizontal gaze nystagmus (HGN) test is scientific test requiring proper foundation to be admissible, and
> (2) admission of arresting officer's testimony concerning results of HGN test without proper foundation was (harmless error).

The North Carolina Supreme Court granted cert and sustained the Court of Appeals on the first issue, that the trial court committed error in allowing in the HGN test through the officer's testimony, but reversed on the second issue, holding that it was reversible error, not harmless error.

An examination of the Court of Appeals opinion is quite interesting. In its discussion of the HGN test the Court of Appeals not only cites *Daubert* (as does a number of Court of Appeals' decisions, some before *State v Helms* and some after), it relies upon it in reaching its decision.

Our Court of Appeals, said:

> . . . The United States Supreme Court, interpreting the Federal Rules of Evidence, has stated there is a presumption inherent in Rule 702 that "the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert* . . . Under this state's rules of evidence, "[a] new scientific method of proof is admissible at trial [only] if the method is sufficiently reliable," *Pennington* . . . if "the reasoning or methodology underlying the [method] is sufficiently valid," *State v. Goode* . . . See also *Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481 n.9 (defining "reliability" in a legal context-- "evidentiary reliability" is based upon *scientific validity*"). The court's "gatekeeping" function in this regard is made necessary by the heightened credence juries tend to give evidence perceived as scientific. *State v. O'Key*, 899 P.2d 663, 672 (Or. 1995) (court must insure persuasive appeal of scientific evidence is legitimate). If reliable, the reasoning or methodology must then be determined to be "properly appli[cable] to the facts in issue." *Goode* . . .

If there was ever a chance for the North Carolina Supreme Court, three years after *Goode*, to lay to rest any lingering doubts as to the definitive status of *Daubert* in our state evidence jurisprudence, this was it! What did they say? No, Nada, Nothing (about *Daubert*). It wasn't even cited. Not even a "See *Daubert* . . ."

In its entirety on this point, the Court said about the HGN test:

> Under the North Carolina Rules of Evidence, "new scientific method[s] of proof [are] admissible at trial if the method is sufficiently reliable." . . . (special agent's testimony on bloodstain pattern interpretation admissible after voir dire testimony showing reliability). This Court has stated that, " '[i]n 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 scientists who are expert in the subject matter, or by a combination of the two.' " *State v. Bullard*, 312 N.C. 129, 148, 322 S.E.2d 370, 381 (1984) (quoting *1 Henry Brandis, Jr., Brandis on North Carolina Evidence* § 86 at 323 (2d ed. 1982)). We find nothing in the record of the case before us to indicate that the trial court took judicial notice of the reliability of the HGN test. Further, while Officer Bradley testified that he had taken a forty-hour training course in the use of the HGN test, the State presented no evidence and the court conducted no inquiry regarding reliability of the HGN test. Until there is sufficient scientifically reliable evidence as to the correlation between intoxication and nystagmus, it is improper to permit a lay person to testify as to the meaning of HGN test results. Accordingly, in this case the admission of Bradley's testimony regarding the results of the HGN test administered to defendant was error. . . .

That was it. One cite each to *Goode*, *Pennington*, and *Bullard*. The flat failure to even "See *Daubert*" I take to be an admission by silence (Brandis § 211) -- certainly the silence is deafening. I like to think there is a reason for this silence.

A Personal Aside

I had followed *Daubert* on its course through the federal courts as a matter of academic interest only, knowing that the issue was whether or not the *Frye* Rule had survived the enactment of the *Federal Rules of Evidence*, and also knowing that, since North Carolina had never adopted the *Frye* Rule, that *Daubert* was inapplicable to North Carolina and so it should have remained.

Within a month or so of the *Goode* decision I had occasion to visit the North Carolina Supreme Court building to have lunch with a justice who served with me on a North Carolina Bar Association project. Before we went to lunch, at least three other justices came by his office where we all conversed on the topics of the day (all have since left the Court). Being a sometimes pushy person, I pushed the subject around to evidence law, my longstanding professional interest area. One of the justices asked me what I thought of their recent *Goode* decision. That was my opening. I told them not much. Further I told them I was satisfied that they had not read *Daubert*. If they had, they never would have referred to it, since it was 180° at variance with actual North Carolina law. I suggested that one of their law clerks who had set at the foot of an evidence professor who radiated the view that all things federal were great, and had told their justice that

Daubert was like unto existing North Carolina case law (i.e., *Bullard* and *Pennington*), and that its citation of, "See *Daubert* . . ." would not only be harmless, it would show how the court had "grown." I told them that they had now opened Pandora's Box, and eventually they would have to deal with it. There was no response. I take that as yet another "admission by silence." Well, *Howerton v. Arai Helmet* has come and we'll soon enough see how they deal with it.

Howerton v. Arai Helmet I

Since I have little love for *Daubert* to the extent that it is said to federalize North Carolina Evidence Law, clearly I have less love for *Howerton I*, to the extent that it says North Carolina has swallowed *Daubert*, hook, line and sinker.

Before we discuss *Howerton I*, the North Carolina Court of Appeals decision, let us say a word of mitigation for the North Carolina Court of Appeals. It is not all their fault. From the time the North Carolina Supreme Court cited *Daubert* in a throw away line, "See *Daubert* . . ." the North Carolina Supreme Court has been conspicuous by their absence from this doctrinal affray. Nature abhors a vacuum and the North Carolina Supreme Court abetted one by their refusal to deal with (or even mention) *Daubert* in *State v Helms, supra*. In this vacuum, without higher guidance, the North Carolina Court of Appeals had to labor on uncertain terrain. In short, they did the best they could. In *Howerton I*, in my view, that was not good enough. Let's look at their opinion.

Dr. Howerton, DDS, was involved in a motorcycle accident that resulted in his becoming a quadriplegic. Arai Helmet, Ltd., was the manufacturer of the helmet that Howerton was wearing at the time of the accident. The plaintiff contended that the helmet was negligently designed -- that it did not have an integrated chin bar (full-face helmet), but rather only a chin guard attached to the helmet with nylon screws (open-face helmet), which allowed the chin guard to breakaway during the accident. Howerton further contended that in his accident, the chin guard broke away, allowing unlimited hyper flexion of his neck, and proximity causing his catastrophic neck injury.

To support his contention, plaintiff had four expert witnesses, all of whom were deposed and their depositions were offered on the defense pre-trial summary judgment motion. The trial court apparently read the four depositions, heard arguments, read the

parties briefs, and found that the proposed testimony of all four experts, in his discretion, failed his *Daubert* Test, and, in his discretion, all four were rejected. Eliminating all of the plaintiff's causation experts, he then granted the defense motion for summary judgment.

On appeal, the North Carolina Court of Appeals, in a unanimous panel of three, upheld the summary judgment court. The opinion asked the question:

II Has North Carolina Adopted *Daubert*? Yes, according to the Court of Appeals. The opinion cites and relies heavily upon Professor Broun's article in the *North Carolina State Bar Journal* (Fall 2002), (which also doesn't cite *Weisgram!)*. The opinion is not short and will not be replicated here. I strongly recommend you read it carefully. If it is affirmed by the North Carolina Supreme Court in its upcoming *Howerton II* opinion, it will provide you with all the *Daubert* factor's buzz words and *Daubert* rote conclusions for the order you will draft and the summary judgment judge will sign (in his discretion, of course) in your next case.

One thing the Court of Appeals did note (and so should you): Of the four expert defense witnesses, all ruled out by the summary judgment judge "in his discretion"; as to three of the four, there was in the record evidence supporting a contrary conclusion, which the summary judgment judge, in his discretion, could have adopted and allowed in evidence, thus causing a jury trial.

As the smoke clears from your reading of this opinion, what is the bottom line result? It means, contra to all that North Carolina case law has ever held, that today in *Daubert* guise, North Carolina has substituted summary judgment trial (in the lower court's "discretion") for jury trial. This is a North Carolina *Brave New World.*

Forensics

Since *Daubert* announced it's new rule, a two-pronged Relevancy plus Reliability test for the admissibility of expert evidence, that automatically opened the door to an assault on all forms and types of heretofore accepted expert evidence. There were (and are) re-evaluations of not only the new -- DNA, but also the old -- fingerprint and handwriting comparisons, and everything else too. Every day is a new day. Even a quick look should show that where *Daubert* has been loosed upon the land, chaos and

confusion have followed.

One example will have to suffice to show the whole. It is the sad saga of Judge Louis H. Pollak. Now, Judge Pollak was not just a run-of-the-mill federal district judge. Not hardly, Judge Pollak had formerly been the Dean of two prestigious law schools (Yale and the University of Pennsylvania).

The issue before Judge Pollak in *U.S. v Carlos Plaza I*, 179 F. Supp. 2d 492 (2002), arose on the defendant's motion to exclude the Government (FBI) latent fingerprint identification evidence. One might blink. Despite the fact that fingerprint evidence has been an accepted mainstay of criminal trials for at least one hundred years, Judge Pollak's opinion stated:

> . . . even 100 years of "adversarial" testing in court [you know by the now secondary means of truth testing -- cross examination, proper jury instructions, contra evidence, and jury argument -- emphasis added] cannot substitute for scientific testing when the proposed expert testimony is presented as scientific in nature. . . .

He went on to say:

1. The fingerprint's experts theory or techniques cannot be (and has not been) "tested" in the Daubert sense because ultimately the determination as to whether there is a match between the latent print and the known rolled print is a subjective decision, based on knowledge, experience, and ability. But there is no objective standard that has been used and tested.
2. It is a misnomer to call fingerprint examiners a "scientific community" in the Daubert sense. The very best examiners have learned their craft on the job and without any concomitant advanced academic training. The numerous writings that discuss fingerprint identification techniques do not constitute "submission to the scrutiny" of the scientific community in the Daubert Sense.
3. The Court said the applicable error rate was "the practitioner error rate." Practitioners are human; they make mistakes. The court looked at a study and said its results fell far short of establishing a "scientific" rate of error. The study was only (modestly) suggestive of a discernable level of practitioner error.
4. General acceptance by the fingerprint examiner community does not meet the standard because such examiners, while respected professionals, do not constitute a "scientific community" in the Daubert sense.

Judge Pollak further said, after comparing the *Daubert* Factors against the methodology of fingerprinting, that:

> . . . Accordingly, this court will permit the government to present testimony by fingerprint examiners who, suitably qualified as "expert" examiners by virtue of

> training and experience, may (1) describe how the rolled and latent fingerprints at issue in this case were obtained, (2) identify and place before the jury the fingerprints and such magnifications thereof as may be required to show minute details, and (3) point out observed similarities (and differences) between any latent print and any rolled print the government contends are attributable to the same person. What such expert witnesses will not be permitted to do is to present "evaluation" testimony as to their "opinion" (Rule 702) that a particular latent print is in fact the print of a particular person. The defendants will be permitted to present their own fingerprint experts to counter the government's fingerprint testimony, but defense experts will also be precluded from presenting "evaluation" testimony. Government counsel and defense counsel will, in closing arguments, be free to argue to the jury that, on the basis of the jury's observation of a particular latent print and a particular rolled print, the jury may find the existence, or the non-existence, of a match between the prints. . . .

Switching from fingerprints to handwriting comparison, Judge Pollak explained that:

> . . . In arriving at this disposition of the competing government and defense motions and supporting memoranda, this court has derived substantial assistance from the thoughtful approach taken by Judge Gertner, of the District of Massachusetts, in dealing with the comparable problem of handwriting evidence. In *United States v. Hines*, 55 F.Supp.2d 62 (D.Mass.1999), Judge Gertner wrote as follows:
>
> > . . . the government is obliged to offer the testimony of "experts" who have looked at, and studied handwriting for years. These are, essentially, "observational" experts, taxonomists--arguably qualified because they have seen so many examples over so long. It is not traditional, experimental science, to be sure, but *Kumho*'s gloss on *Daubert* suggests this is not necessary. I conclude that Harrison can testify to the ways in which she has found Hines' known handwriting similar to or dissimilar from the handwriting of the robbery note; part 1 of her testimony. Part 2 of the Harrison testimony is, however, problematic. There is no data that suggests that handwriting analysts can say, like DNA experts, that this person is "the" author of the document. There are no meaningful, and accepted validity studies in the field. No one has shown me Harrison's error rate, the times she has been right, and the times she has been wrong. There is no academic field known as handwriting analysis. This is a "field" that has little efficacy outside of a courtroom. There are no peer reviews of it. Nor can one compare the opinion reached by an examiner with a standard protocol subject to validity testing, since there are no recognized standards. There is no agreement as to how many similarities it takes to declare a match, or how many differences it takes to rule it out. ...
> >
> > I find Harrison's testimony meets Fed.R.Evid. 702's requirements to the extent that she restricts her testimony to similarities or dissimilarities between the known exemplars and the robbery note. However, she may not render an ultimate conclusion on who penned the unknown writing. ...

I'm guessing that Judge Pollak thought, since he had spun out the new *Daubert* so well, that he would receive applause in the legal circles and publications he traveled in. That did not happen. Instead his opinion was harshly received and indeed ridiculed.

But the Government took him off his own petard by filing a motion to reconsider. And in *U.S. v Carlos Plaza II*, 188 F.Supp.2d 549 (2003), he shifted gears from "not admit" to "admit." This time he said it was Technical Evidence (not scientific evidence), and a definitive opinion was admissible on that basis. If a distinguished Article III Federal Judge can't get *Daubert* straight in federal court, how can a state judge, in a more hurley burley setting, be expected to.

Echoes of this subject matter will persist. In *U.S. v Crisp*, 324 F.3d 261 (4th Cir), *cert denied*, 124 S.Ct. 220 (2003), by a 2-1 decision, it was held that the age-old law on fingerprints and handwriting being admissible was followed. There was a most spirited dissent by Judge Michael, on the basis that while such items might pass muster (but he doubted it) under *Daubert*, the record in this case didn't show that.

The result here, and I suspect in North Carolina and most other places, is that such forensic evidence, if previously accepted, will now simply be "grandfathered in." See *Taylor v Abernathy*, 149 N.C. App. 263 (2002) (handwriting/document examiner).

Necessary Resources

In the War Between the States the North won in part because it had a much larger population and manufacturing base. In World War II the United States won over Germany and Japan, at least in part, because of our overwhelming and unbombable manufacturing base. We swamped them logistically.

What resources do we, at the North Carolina state level, have in comparison with the Federal Courts, to deal with *Daubert*?

In that vein, I remember two years ago being on a panel in Chapel Hill with several law professors, some of whom are involved in today's program. As an emergency superior court judge I tried to explain that North Carolina totally lacked the resources to deal with *Daubert*. The professors agreed with me and simply said the state legislature would have to increase the court's budget and provide the additional needed

resources. What I remember most were the peals of laughter that spontaneously erupted from the practicing lawyer audience. Nothing has changed in these past two years except *Howerton I*, including the total lack of resources.

It is true that the state and federal courtrooms have some surface similarities, a judge, counsel tables, a court reporter, a clerk, even a jury box (perhaps superfluous in civil cases after *Daubert*). But huge underlying differences remain. We will discuss but three -- case assignments, circuit riding, and law clerks. The first two are intertwined.

It is my understanding that in the federal courts there is a system whereby every case, civil and criminal, is by blind selection automatically assigned to a district federal judge at its filing in the clerk's office, and remains with that judge from filing to final completion. Obviously that enables the judge to be familiar with that case and all its nuances as it moves through (on that judge's schedule) the federal district court. The judge will not be taken unawares by any motion or maneuver, and he will be prepared, usually well in advance, for any questions or proceedings. In general, the federal district court judge will direct the matter rather than being run over by it.

Contrast that with the plight of the North Carolina superior court judge. He arrives on Monday morning, having driven one hundred miles to get there, he is all by himself (even the Lone Ranger had Tonto) without a clue as to what is on his calendar, much less any knowledge about the cases themselves. His first inkling as to what is afoot may come from such things as the assistant clerk handing him three to five overflowing file folders, all for the same case. Or it may come from the platoon of lawyers, each with a paralegal trucking behind with a cart loaded to the gunnels with "banker boxes," each of course, filled to the busting point with briefs, depositions, etc. The judge, perhaps at calendar call, is informed that their case, *JARNDYCE V. JARNDYCE*, has a few pre-trial motions in limine, some dealing with evidence questions (i.e., *Daubert-Howerton I*), and a summary judgment motion. The clerk tells you that two hundred jurors (voters) are sequestered in the jury room, and want to know when "their" case will be tried under the "one case, one day" rule, so they don't have to come back tomorrow. And, to top it off, the lawyers tell you that it will take all day (and perhaps the night) for you to read and familiarize yourself with all the depositions, briefs, etc., so as to be able to deal tomorrow with all the pre-trial matters. A *Daubert-Howerton I* style summary judgment ruling, in

your discretion, of course, begins to look mighty inviting.

The North Carolina State constitution refers to our circuit-riding, rotation system of judges as "salutary." I completely agree. The hardships that used to be very real for superior court judges (before the four judicial divisions were split in half to form eight divisions) were, in my view, completely outweighed by the benefits to the court system and the general public. To put it bluntly, one benefit was the avoidance of "home cooking"; something that can happen if a judge holds court in one place too long -- he can either get to close to some lawyers, or develop a bias against some layers. Either way, the scales of justice can become unbalanced.

But it is equally clear the court system pays a price for this salutary constitutional command. Motel rooms look dreary by Thursday night, personal cars wear out, a six-month rotation in a long commute district can leave the judge even more worn out than his car and his family out of patience. And, of course, circuit riding means that judges almost never stay with a case once they leave the courthouse it was filed in.

Law clerks, or rather the lack thereof, is but one clear example of the chasm difference between North Carolina state and federal courts. Justice Breyer, concurring in *Joiner* assumed that (federal) judges had at their beck and call such essentials as:

- specially trained law clerks (perhaps being economists too)
- appointment of special masters
- appointment of the court's own experts, recommended by established scientific organizations such as:

    1. National Academy of Sciences
    2. American Association for the Sciences

If I were holding court in, say, Bladen or Clay County, would one of these eleemosynary organizations parachute in a neutral, well-credentialed expert by the end of lunch on the case's first court day? Justice Breyer forgot to include the addresses and telephone numbers so that any federal district court judge, or a state court judge in a state that had adopted *Daubert*, could call and arrange for such a "drop in."

***Howerton II* - What Will the Supreme Court Say**?

I'd rather bet on a stock car race than try and predict what an appellate court is

going to do. On the rare occasion I try, I'm usually wrong. So, I won't do it here either. But the possible outcomes (with a lot of variations) are, perhaps, foreseeable.

1. The Supreme Court could reverse, saying their mention of *Daubert* in *Goode* was a mistake, probably a printing mistake. Not likely, for a host of reasons.
2. The Supreme Court could affirm across the board saying that they deliberately, with full knowledge, meant *Goode* to adopt *Daubert* for North Carolina. Presumably that would include all the U.S. Supreme Court cases construing Rule 702 and *Daubert* thereafter, including *Weisgram*. I don't think this is likely either.
3. The Supreme Court could reverse *Howerton I*, saying that when they cited *Daubert* in *Goode* they meant no more than they approved of its general emphasis on "reliability," insofar as they had clearly laid such reliability down in *Bullard* and *Pennington*, and no more. That way North Carolina lawyers and judges could continue to cite *Daubert*, but it would be harmless, since it would mean *Bullard* and *Pennington*, but nothing more. This would be faux *Daubert* or *Daubert* lite. To the extent that *Howerton I* exceeded *Bullard* and *Pennington*, they could say in good faith it was in error. As you can tell from this paper, I believe that this would be the most accurate and honest thing they could say, and I think that is what happened in *Goode*, no more.

In closing, I think that that would be the best obtainable result for North Carolina and its judicial system.

APPENDIX A

Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue **and (c) not based on scientific, technical or other specialized knowledge within the scope of Rule 702**. (Bold added to Rule by the Federal Advisory Committee and the U.S. Congress to fit with *Daubert*.)

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, **if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case**. (Bold added to Rule by the Federal Advisory Committee and the U.S. Congress to fit with *Daubert*.)

Acknowledgements

I had the good fortune to receive and read a number of other CLE papers on this general subject. They included Janet Ward Black, Brian Vick, Professor William A. Woodruff, Jay Trehy, Mark Montgomery and Lisa Miles (other papers are now lost in the mountains of materials I accumulated for this paper. To the extent that any writer finds something in this paper they agree with, I thank them for giving me that to include; to the extent they disagree, then simply assume that:

1. I didn't understand what they wrote, or
2. I did understand, but I'm still wrong.

Special thanks also goes to Mr. Tom Davis (and his loyal staff) Law Librarian for the North Carolina Supreme Court. No request to find something, no matter how obscure, copy it and send it, was ignored. If a law office worked like they do, the attorneys would all be rich.

A portion of this paper was adopted from an earlier paper I presented to the Conference of Superior Court Judges in March 1998. It was entitled, *North Carolina's Dalliance with Daubert: Are the Ides of March upon Us?*