EXPERT TESTIMONY Subject Matter

- The subject matter of expert testimony is governed by N.C.R.Evid. 702.
- Prior to 2011, the rule provided simply that expert testimony is admissible
  - If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

1

A little history – The *Frye* test

- Under a rule of law formerly in effect in North Carolina and most of the nation and still in effect in a significant minority of states, a scientific principle or discovery must be "sufficiently established to have gained general acceptance in the particular field to which it belongs."

2

The effect of the adoption of the Federal Rules of Evidence

- The adoption of the Federal Rules of Evidence in 1975, without a specific reference to the *Frye* analysis, led legal writers and some courts to speculate that *Frye* was no longer the law in the federal courts.
- Instead, writers and courts speculated that the matter was to be resolved based solely upon the helpfulness standard of the original language of Rule 702.

3

Daubert v. Merrell Dow Pharmaceuticals

- The landmark *Daubert* case rejected the application of *Frye* in the federal courts.
- *Daubert* substituted the requirement that the trial judge exercise a gatekeeping function under which the trial judge is to consider whether the evidence is sufficiently scientifically reliable to be helpful to the jury under Rule 702 and not unduly prejudicial under Rule 403.

4

Tests for reliability

- The Court in *Daubert* listed some non-exclusive guidelines for determining reliability of scientific principle or method. Among the things the court should look for in a principle or method are whether it:
  - Is capable of being tested
  - Has been subjected to peer review
  - Has an acceptably low rate of error
  - Has standards for its application
  - Is generally scientifically accepted.

5

Some other tests for reliability

- Since *Daubert*, other courts have added other factors to be included as guidelines for reliability including:
  - Whether the analysis was done for purposes of this litigation or independent scientific analysis
  - The credentials of the expert
  - Whether the expert applied the same standards in the application of the principles as in his or her scientific research.

6

Daubert hearings and new Rule 702

- Since the *Daubert* decision, federal courts frequently hold *Daubert* hearings in which the trial judge exercises the gatekeeping function of determining whether expert evidence is sufficiently reliable to be admissible.

7

Incorporating *Daubert* into Federal Rule 702

- Several new criteria were added to Federal Rule 702 in 2000 with the express purpose of incorporating *Daubert* into the rule. These criteria provide that the expert testimony is admissible only 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.

8

General Electric v. Joiner

- The *Joiner* case added to *Daubert* by holding:
  - Appellate court reviews of reliability determinations under *Daubert* are to be reviewed on an abuse of discretion basis.
  - The trial court should assess not only the expert's methodology but also the scientific validity of the result.

9

Kumho Tire Co. v. Carmichael

- The *Kumho Tire* case made clear that the Court intended the principles of *Daubert* to apply to all expert evidence whether or not it was classified as "scientific."
- Thus, amended Rule 702 applies the reliability test to "technical and other specialized knowledge,"

10

The difficulties of applying *Daubert*

- In practice, *Daubert* has made it more, rather than less, difficult to get expert testimony admitted.
- Federal judges often reject expert testimony under *Daubert*, and often grant summary judgment based upon a finding of lack of scientific merit in the plaintiff's experts' proposed testimony.
- *Daubert* and amended Rule 702 have frequently been criticized for attempting to turn a trial judge into a scientist or other expert in order to exercise a gatekeeping function.

11

State applications of *Daubert*

- Some states have adopted a *Daubert* approach to the subject matter of expert testimony.
- Other states, perhaps fearing that *Daubert* puts too great a burden on its trial court judges have rejected at least a strict application of the *Daubert* principles.
- States rejecting *Daubert* frequently either maintain a *Frye* analysis (e.g., California) or apply a less rigorous reliability standard (e.g., North Carolina, at least before 2011).

12

North Carolina rejects *Frye*

- In several cases in the 1980s and early 1990s, the North Carolina Supreme Court rejected the *Frye* test. See, e.g., *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984); *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990).
- The Court substituted a test asking the courts to consider the "reliability" of the scientific method.

13

The Howerton case

- Despite Court of Appeals decisions and some bold statements by law professors, the North Carolina Supreme court announced in *Howerton v. Anai Helmet, LTD*, 358 N.C. 440, 597 S.E.2d 674 (2004), that North Carolina is not a *Daubert* state.

14

The *Howerton* holding

- In rejecting *Daubert*, the Supreme Court still maintained that the admissibility of expert testimony still depended on its "reliability"
- But "reliability" asssessments should not be made on summary judgment decisions
- Assessments of reliability, if they are to occur at all, must await the trial stage.

15

No rigorous review

- Under *Howerton* the trial court judge not to employ the "exacting standards of reliability" demanded in *Daubert*
- The proponent need only show that the expert used
  - Established techniques in his or her field
  - Had sufficient professional background in the field
  - Visual aids to enhance his or her testimony

16

A presumption of admissibility

- Without calling it that, the Court seemed to set up a presumption of reliability of scientific evidence, provided the expert is qualified to answer the questions asked and there is no adverse judicial precedent with regard to the scientific method.

17

Precedent

- Under *Howerton*, what other courts, especially North Carolina courts, did with regard to this kind of evidence was likely to be controlling:
  - If admitted, it will likely come in again
  - If excluded, it will likely be excluded again
  - The effect of precedent is likely to be overcome only by compelling new evidence of either reliability or unreliability.

18

Problems with *Howerton*

- But the Court's analysis creates the potential for admission of highly questionable and prejudicial evidence under the guise of science.
- The problems with the Court's analysis can be illustrated by reference to the 1984 decision in *State v. Bullard.*

19

State v. Bullard

- In *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984), the Court upheld the testimony of an expert who claimed that she could match footprints based upon their shape.
- The testimony met all of the criteria set forth in *Howerton* for admissibility of scientific evidence:
  - The expert was well-credentialed
  - She testified that her techniques were well established.
  - She used elaborate visual aids.

20

The expert was a fraud

- There were attacks on the expert's technique at the trial.
- Later evidence has made it clear that the expert was a well-credentialed fraud.

21

Testimony excluded under *Daubert*

- A careful analysis of the *Bullard* expert's testimony under *Daubert* would likely have excluded the evidence:
  - Her theories were never subjected to peer review.
  - There had never been blind testing of her claims.

22

Admissibility under *Howerton*

- The expert's testimony in *Bullard* would likely be admitted under *Howerton.*
- There is now precedent favoring its admissibility (the *Bullard* case itself).
- Even without precedent, the expert:
  - Was well credentialed
  - Could testify that she used "established techniques"
  - Used elaborate visual aids.

23

Cases after *Howerton*

- What did the cases after *Howerton* do with scientific evidence?
- Predictably, scientific evidence seems to have had an even easier path to admission than before *Howerton.*

24

State v. Campbell

- Perhaps the best example of the North Carolina courts attitude toward expert testimony is *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1 (2005).

25

The issue in *Campbell*

- Defendant was charged with capital murder. His defense was that he killed the victim as a result of panic in resisting a homosexual advance.
- The prosecution tendered Dr. Robert Brown as an expert in forensic psychiatry.
- Dr. Brown's credentials as a forensic psychiatrist were not in dispute.

26

Dr. Brown's testimony

- Dr. Brown testified, based upon the blood splatter in the house, that:
  - The attack occurred in two different areas of the residence;
  - Two areas of attack suggested intent on defendant's part;
  - Two areas of attack were inconsistent with acting in a state of panic;
  - Victim being attacked while lying prone on the floor was consistent with specific intent to kill;
  - Location of bloodied items in the house demonstrated that defendant had not panicked.

27

The Supreme Court Decision

- With regard to those objections that were preserved for appeal, the Court held that Dr. Brown's credentials as a forensic psychiatrist permitted him to testify
  - That there were two separate points of attack and that that finding suggested intent by defendant
  - That the position of the victim lying prone on the floor was consistent with specific intent by defendant.

28

The application of *Howerton*

- There was no analysis in the opinion of the scientific reliability of Dr. Brown's conclusions.
- The Court did not cite *Howerton.*
- However, its approach to the admissibility of the expert's testimony was consistent with the relaxed approach toward admissibility of such evidence articulated in *Howerton.*

29

Attacks apart from reliability

- Even assuming the relaxed reliability analysis announced in *Howerton*, Dr. Brown's testimony should have been excluded:
  - Dr. Brown was qualified as a forensic psychiatrist. There was nothing in the Court's opinion indicating that he had any expertise with regard to blood splatter evidence.
  - It is difficult to see that his particular expertise would assist the jury in reaching its conclusions as required by N.C.R.Evid. 702.

30

Howerton's carte blanche

- The *Campbell* case is illustrative of the treatment of expert testimony in the North Carolina appellate courts after *Howerton.*
- Although there were few cases rejecting such testimony before *Howerton*, the door now seemed wide open – at least in criminal cases.
- For other examples, see *State v. Taylor*, 165 N.C. App. 750, 600 S.E.2d 483 (2004)(alcohol concentration; *State v. Speight*, 166 N.C. App. 106, 602 S.E.2d 4 (2005)(accident reconstruction and blood testing); *State v. McVay*, 167 N.C. App. 588, 606 S .E.2d 145 (2004)(glass comparison).

31

Some limitations

- There are a few examples of limitations on the use of scientific evidence that give some small hope that there is something left in the reliability criteria.
- For example, *State v. Brunson*, 204 N.C. App. 357, 693 S.E.2d 390 (2010) (testimony identifying substance as cocaine based on visual inspection unreliable.

32

Has the picture changed?

- North Carolina's law on scientific and similar evidence may have changed radically in 2011.
- The General Assembly adopted an amendment to Rule 702 that incorporated the language of Federal Rule 702, which was intended to codify *Daubert.*

33

The New N.C. Rule 702 language

- The language of the rule now requires (identically to Fed. Rule 702) that the testimony admitted under Rule 702
- (1) is based upon sufficient facts or data,
- (2) 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.

34

The future?

- Based upon the adoption of identical language to that in Federal Rule 702, it would seem that North Carolina is now a *Daubert* state.
- But let's examine some cases since the Rule's adoption and see what has happened.

35

State v. McGrady

- In *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016), the Supreme Court seems to have taken the legislature seriously in turning North Carolina into a *Daubert* state.

36

State v. McGrady (2)

- The Court found that the trial court did not abuse its discretion in rejecting the testimony of a defense expert called in a self-defense case to testify that defendant's reactions were reasonable based on "pre-attack cues" and "use of force variables"

37

State v. Mcgrady (3)

- The Court found that the expert lacked sufficient expertise to testify to the defendant's nervous system reaction and that the testimony with regard to reaction times was based on speculation.

38

Other cases rejecting testimony

- Some other cases include State v. Walston, 369 N.C. 547, 798 S.E.2d 741 (2017) (no abuse of discretion to exclude testimony regarding repressed memory and suggestibility of child witnesses); State v. Daughtridge, 789 S.E.2d 667 (N.C. App. 2016) (forensic pathologist's testimony that death was a homicide not reliable where opinion based on statements from law enforcement rather than medical evidence).

39

Cases admitting testimony

- State v. Shore, 804 S.E/.2d 606 (N.C. App. 2016) (expert testimony regarding delay in reporting by child sexual abuse victims admissible); Pope v. Bridge Broom, Inc. 240 N.C. App. 365, 770 S.E.2d 702 (2015) (accident reconstruction expert's opinion sufficiently reliable). State v. Abrams, 789 S.E.2d 863 (N.C. App. 2016) (marijuana identification sufficiently reliable).

40

Prediction

- The Supreme Court and Court of Appeals are likely to follow the legislative intent behind the adoption of the new rule 702 language. **Be careful about the use of precedent earlier than 2011!**
- However, it is also possible that they will urge trial judges to be cautious in their application of *Daubert*, recognizing the concerns that have arisen in connection with the application of that rule in the federal courts: *i.e*, the need for the trial judge to become an expert in the field of science or technology (especially in light of the more limited resources available to state court judges) and the possible usurpation of the jury function.

41

What should the non-scientist judge do in the usual case?

- In most cases, with commonly used experts such as physicians (including shrinks), chemists, financial analysts, accident reconstruction experts, the credentials of the expert will be enough. Just make sure that the basis of the opinion is scientific or otherwise technically regular.

42

What about the unusual case?

- Where the subject matter is unusual, be more careful. For example, repressed memory, psychological evidence on self-defense. You may well be forced to learn something about the field. Make the lawyers support or attack the testimony based on evidence that you can understand. You don't have the time to become an expert. Make the lawyers work.

43