



# The Scourge of *Ipse Dixit*

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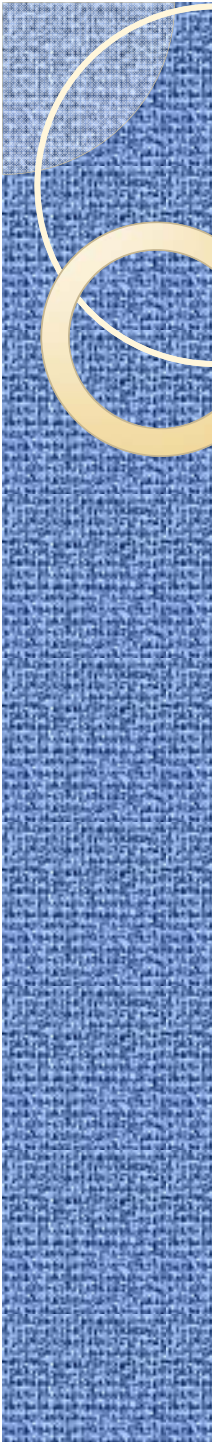


## “*Ipse Dixit*” Defined

- Literally, “he himself said it”
- Something asserted but not proved
- An unproven assertion resting on the bare authority of some speaker
- A dogmatic statement
- “Because I said so”

*See, e.g., United States v. Alabama Power Co.*, 730 F.3d 1278, 1285 n.6 (2013); *ePlus, Inc. v. Lawson Software, Inc.*, 764 F. Supp. 2d 807, 813 (E.D. Va. 2011).

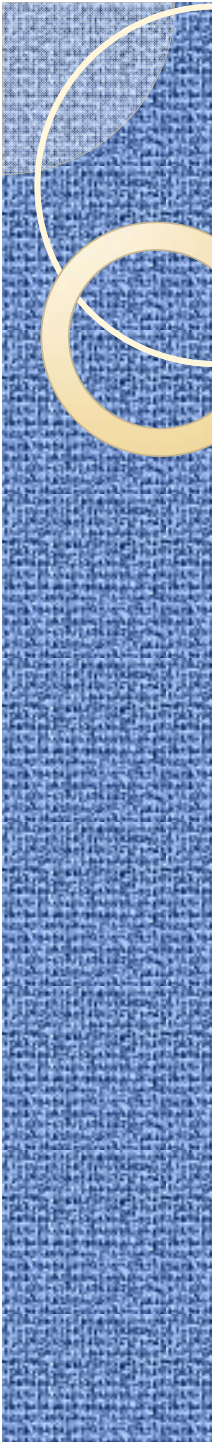
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- **The prohibition on *ipse dixit* testimony concerns the methodology used by the expert – not the expert’s qualifications.**



***Robert S. Stachon v. Dock W. Woodward, Jr., No. 2:12-cv-440, 2015 WL 5692109, at \*2 (N.D. In. Nov. 10, 2015)***

- “An expert who invokes my expertise rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term.”





***Alsip v. Wal-Mart Stores  
East, LP, No. 14-476-GM-M,  
2015 WL 7013546, at \*4  
(S.D. Al. Nov. 12, 2015)***

- “If Admissibility could be established merely by the *ipse dixit* of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong.”



***Paramount Media Group, Inc.  
v. Village of Bellwood*, No. 13-  
c-3994, 2015 WL7008132, at \*3  
(N.D. Ill. Nov. 10, 2015)**

- “An impressive resume is not a guarantor of relevancy. A court must ensure that the expert testimony at issue both rests on a reliable foundation and is relevant to the task at hand.”
- “Stephen Hawking would be a stunning witness in a case involving theoretical physics, but would never see the light of day in an accounting malpractice case.”



# **Experience alone usually is not an adequate foundation.**

“[A] district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.”

*Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996) (Posner, J.)





# **Experience alone usually is not an adequate foundation.**

- No *per se* rule against relying primarily on experience.
- But if an witness will rely primarily on experience, the witness must explain:
  - (1) how that experience leads to the conclusion reached;
  - (2) why that experience is a sufficient basis for the opinion; and
  - (3) how that experience is reliably applied to the facts.



# Example #1: Reliance on experience alone

*United States v. Frazier*, 387 F.3d 1244 (11th Cir. 2004) (*en banc*)

- Defendant accused of kidnapping and repeatedly raping victim.
- Defendant denied having sex with the victim and offered testimony from forensic investigator that if sexual intercourse had occurred, it “would be expected” that hair and body fluids would have been recovered; however, no incriminating hairs or fluids were recovered.
- Expert claimed that his opinion was based on his experience and on various texts; however, he identified only a single investigation he worked on in which hair evidence was recovered, and he was unable to “offer any hard information concerning the rates of transfer of hair or fluids during sexual conduct.” 38 F.3d at 1265.
- Eleventh Circuit affirmed exclusion of opinion because the forensic investigator failed to establish that his opinion was methodologically reliable or sound.



# Example #2: Reliance on experience alone

*Oddi v. Ford Motor Co.*, 234 F.3d 136 (3d. Cir. 2000).

- Crashworthiness case in which Plaintiff suffered catastrophic injuries after truck wreck.
- Plaintiff's expert testified that Plaintiff's injuries were the result of design defect in truck bumper.
- Based his opinion on his own "experience" and "training", but conducted no testing and was unable to identify any particular literature to support his opinion.
- "Although there may be some circumstances where one's training and experience will provide an adequate foundation to admit an opinion and furnish the necessary reliability to allow a jury to consider it, this is not such a case."



# An extreme example

*Cooper v. Marten Transport, Ltd.*, No. 13-10920, 2013 WL 5381152 (11th Cir. Sept. 27, 2013)

- Plaintiffs hired biomechanical engineer to testify that a truck collision caused their injuries.
- Engineer had over 40 years' experience and had published extensively.
- Opinion excluded because his methodology was confined to 5 hours reviewing case materials, and conducted no testing.
- Plaintiff had preexisting injury and pain and expert relied on *ipse dixit* temporal connection between collision and “new” pain for opinion that “new” pain was caused by collision.





# Differential Diagnosis

Common to see expert's rely on *ipse dixit* in explaining causation in product liability and medical malpractice cases when employing differential diagnosis

- Akin to process of elimination: the expert determines the possible causes for the patient's symptoms and eliminates each cause until one remains.
- Differential diagnoses requires that the expert "rule in" potential causes and then "rule out" others.





## Example: Failure to “rule in” the purported cause

*Hendrix v. Evenflo Co.*, 609 F.3d 1183 (11th Cir. 2010)

- Plaintiff alleged that a car seat manufactured by the defendant failed to protect her infant son in a car crash, and that as a result of injury to his brain, the child developed autism.
- Plaintiff’s experts used differential diagnosis to conclude that the child’s autism was caused by head and spinal injuries the child suffered in the crash.
- Experts excluded because they failed to show how brain injuries could ever be a cause of autism—*i.e.*, the expert ruled in brain injury as a cause of autism based on *ipse dixit*.
- Purported basis of expert’s opinion was medical textbooks and studies. After exhaustive review of literature, court concluded that it did not support the reliability of the opinion.



# Example: Failure to “rule out” other potential causes

*Guinn v. Astrazeneca Pharm. LP*, 602 F.3d 1245 (11th Cir. 2010)

- Plaintiff retained expert to opine that a drug manufactured by the defendant caused her to gain weight and caused the onset of diabetes.
- Plaintiff had numerous risk factors for diabetes when she started taking the drug, including her age, battles with obesity throughout her life, a sedentary lifestyle, a poor diet, and a family medical history of health problems.
- Expert determined that the drug caused the plaintiff’s weight gain based solely on medical literature showing that the drug can cause weight gain and the fact that the plaintiff gained weight after taking the drug (*i.e.*, general causation).
- Expert did nothing, however, to rule out other factors that may have caused diabetes (*i.e.*, specific causation). She further conceded that she could not rule out the drug any more than she could any other risk factors.



# Example: Assuming facts not in evidence

*Southern Grouts & Mortars, Inc. v. 3M Co.*, 575 F.3d 1235 (11th Cir. 2009)

- Plaintiff-owner of the trademark Diamond Brite, alleged that 3M cybersquatted on the diamondbrite.com domain name.
- To show that 3M had a bad faith intent to profit from the domain name, the plaintiff hired an expert to testify that 3M had the ability through the domain name to monitor the viability and value of internet traffic and see where the hits were coming from, all of which could be used to determine strategic commercial information.
- The expert based his opinion primarily on the ability 3M to log and analyze statistics from its servers – despite the fact there was no evidence that 3M actually did this.
- Opinion excluded because it was connected to the data only by “*ipse dixit*” assertion” regarding what expert assumed 3M did. 575 F.3d at 1245.



## Example: Danger of unfounded and unexplained assumptions

*Kipperman v. Onex Corp.*, 411 B.R. 805 (N.D. Ga. 2009)

- Plaintiff hired an expert to testify that a debtor was insolvent at a specific time.
- Due to numerous deficiencies, the court excluded plaintiff's expert's opinions and granted summary judgment to defendants on the majority of claims.
- The expert's opinions failed the "fit" test and thus were unreliable:
  - 1.) Testimony was not based on sufficient facts and data.
    - Expert could not explain why he chose certain facts, data, and variables on which to base his opinions.
  - 2.) Testimony was not the product of reliable principles and methods.
    - Expert's opinion was based on a subjective judgment call and was not capable of being tested.
    - Expert's methodology had no support in the expert's field of expertise or in any relevant article or treatise.





# ***Kipperman v. Onex Corp., cont'd***

- 3.) The expert failed to apply the principles and methods reliably to the facts of the case.
  - “An expert who applies a principled model but uses unprincipled variables in that model is akin to a magician who creates a distraction so the audience cannot see what he is really doing.” 411 B.R. at 848.
- **Additional Problems**
  - Expert was not qualified to testify on certain subjects.
  - Plaintiff failed to account for the possibility of a *Daubert* challenge.
    - Some subjects do not require expert testimony.
    - Ask yourself: If you rely solely on your expert to establish an issue, what will you be left with if your expert is excluded?
    - The plaintiff in *Kipperman* put forth no additional evidence of insolvency, and the court had no choice but to grant the defendants’ summary judgment motion.





# Example: Establishing Standard of Care & Breach

*Anderson v. Atlanta Gas Light Co.*, 2013 WL 6052730 (Ga. Ct. App. Nov. 18, 2013).

- Plaintiffs injured in mobile home explosion that resulted from accumulation of natural gas.
- Plaintiffs offered expert on applicable standard of care and that gas company breached the standard by failing to place a lock or a warning sticker on a master meter and failing to train mobile home park's landlord as a master meter operator.
- Court excluded testimony and granted summary judgment to gas company.



# ***Anderson v. Atlanta Gas Light Co., cont'd***

- Held that expert's opinions were inadmissible because they were based solely on his own assertions and unsupported by *Daubert* factors or any other reasonable reliability criteria.
  - Failed to cite any treatise or authority to support contentions.
  - Failed to demonstrate that similar companies meet the standard of care that he advocated.
  - Failed to show that gas company violated any statutes or regulations. Court further noted that the a regulatory agency concluded that there was no violation of standards.
  - No experience with warnings on natural gas meters, locks on such meters, or master meter operators.



## ***Key Points:***

- To the extent possible, avoid *ipse dixit* testimony by your experts at all costs.
- If you must rely on *ipse dixit*, make sure your expert can point to numerous, documented examples in his career where the assertion has been correct.
- If you see other side's expert relying on *ipse dixit*, move to exclude.



# Bibliography

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