



## THE EXPERT-WITNESS IMPACT OF JUDICIAL APPOINTMENTS BY ELECTED OFFICIALS

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### **Elections Matter: The Impact of Judicial appointments by elected officials on expert testimony**

*Nicole Walsh and Bob Fulton*

Most people remember the Presidential election of 2000 between Al Gore and George W. Bush and the impact the State of Florida had on the outcome of that contest. Hanging chads, recount monitors, lawyers for the candidates and a court battle that went all the way to the United States Supreme Court are etched in the minds of Floridians and many across the country when they think about Florida politics. However, this is not the first time (or sadly the last) that Florida has influenced national elections. Florida has long been at the epicenter of election politics. Court battles and recounts are par for the course when it comes to elections in the Sunshine State. One can venture all the way back to the presidential election between Rutherford B. Hayes and Samuel Tilden in 1876 where twenty votes from four states – including Florida – were disputed. The quarrel led to the formation of a commission who met for nine days and submitted their election results for Florida first, which virtually settled the election. A painting of the scene by artist Cornelia Fasset, “The Florida Case Before the Electoral Commission”, hangs in the U.S. Capitol Building to this day.<sup>1</sup>

Then, of course, the infamous 2000 presidential election and the resulting Supreme Court case that declared George W. Bush the 43rd president. One of the main problems with that election was the punch card ballot design, which resulted in many ballots being invalidated due to “hanging chads,” in which a voter’s selections

were not clearly punched through.<sup>2</sup>

Florida made history yet again in 2018 after Secretary of State Ken Detzner ordered a manual recount in the races for Senate and state agriculture commissioner and a machine recount for governor.<sup>3</sup> Under Florida state law, a machine recount is triggered if the margin of victory is equal or less than 0.5 percent, while a manual recount is triggered if it is less than 0.25 percent.<sup>4</sup> Ultimately, Ron DeSantis, the Republican nominee supported by President Trump, was elected Governor.<sup>5</sup>

While these narrowly decided political elections matter for many reasons, they also matter because they have a significant impact on the judiciary that in turn significantly affect litigants and trial attorneys. This is especially true in a state like Florida. In 2001, the Florida Legislature placed the authority to select who sits on Judicial Nominating Commissions entirely in the hands of the governor. The Judicial Nominating Commission is then responsible for providing names of judges to the governor for consideration as county, circuit and appellate judges. As a result, Judicial Nominating Commissions have become more political.<sup>6</sup>

The appointment of judges became a topic of discussion in Florida’s 2018 gubernatorial race, as three Florida Supreme Court Justices had reached

<sup>2</sup> <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting>

<sup>3</sup> <https://www.tampabay.com/florida-politics/buzz/2018/11/15/florida-orders-first-ever-statewide-hand-recounts-as-legal-fights-continue/>

<sup>4</sup> See Fla. Stat. §102.141(7) and §102.166. See also Fla. Admin. Code Rules 1S-2.027; 1S-2.031; and 1S-2.051.

<sup>5</sup> <https://www.nbcnews.com/politics/elections/gillum-officially-concedes-florida-governor-race-congratulates-desantis-winning-n936786>

<sup>6</sup> <https://progressfloridainstitute.org/sites/all/files/fajp-recs.pdf>

<sup>1</sup> [https://www.senate.gov/artandhistory/art/artifact/Painting\\_33\\_00006.htm](https://www.senate.gov/artandhistory/art/artifact/Painting_33_00006.htm)

their mandatory retirement. Thus, the new governor, whoever that turned out to be, would be appointing three new justices to the Court that could cause the Florida Supreme Court to lose its liberal majority.<sup>7</sup> If he won the election, Ron DeSantis' appointments were expected to make the bench the most conservative it had been in decades.<sup>8</sup> If Andrew Gillum won the election, it was expected that the court would not only keep but also expand its liberal majority. Ron DeSantis narrowly won the election and he ultimately appointed three new Justices that shifted the ideology of the Florida Supreme Court.

The impact of these three new Justices was seen clearly early in their terms when they *sua sponte* addressed the standard for the admissibility of expert testimony in Florida state courts. For decades, courts have evaluated the admissibility of expert testimony under either a Daubert standard<sup>9</sup> or a Frye standard.<sup>10</sup> Prior to 1993, the Frye standard for admitting expert testimony was the prevailing standard used to guide federal and state courts regarding the admissibility of scientific expert testimony at trial. The Frye standard required that the proponent of the evidence establish the general acceptance of the underlying scientific principle and the testing procedures. However, in 1993, following a revision to the Federal Rules of Evidence, the Supreme Court of the United States set forth a new standard governing admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* that was intended to be more focused on scientific principles and methodology rather than on conclusions. Under the Daubert test, when there is a proffer of expert testimony, the judge, acting as a gatekeeper, must make a preliminary assessment of whether the reasoning or methodology properly can be applied to the underlying facts at issue. Under Daubert, an expert witness can only testify if the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case. Since 1993, federal courts and the majority of state courts have adopted and followed Daubert, but Florida remained in a state of flux, moving between the Frye and Daubert standards.

Ten years after the United States Supreme Court rendered its decision on expert testimony, Florida passed legislation in 2013 to adopt Daubert.<sup>11</sup> That standard remained in effect until 2018 when the then-Florida Supreme Court

disagreed with the legislature and reverted to Frye.<sup>12</sup>

In October 2018, the Florida Supreme Court's narrow 4-3 opinion in *DeLisle v. Crane* proclaimed to have settled this long-standing debate by concluding the Frye standard governed in Florida state courts.<sup>13</sup> A year prior to *DeLisle*, the Florida Supreme Court had declined to adopt the legislature's 2013 revisions to the Florida Evidence Code codifying Daubert, citing constitutional concerns raised by the Florida Bar's Code and Rules of Evidence Committee members and commenters who opposed the amendments.<sup>14</sup> The return to the "generally accepted" standard was seen as a significant win for the Plaintiffs' bar as that standard was viewed as an easier standard to meet, especially in personal injury and product liability cases.

However, in May 2019, the Florida Supreme Court, with the three new Justices appointed by Governor DeSantis, agreed with Justice Polston's prior rebuke of the purported "grave constitutional concerns" surrounding the adoption of the Daubert standard.<sup>15</sup> In 2017, Justice Polston observed: "Has the entire federal court system for the last 23 years as well as 36 states denied parties' rights to a jury trial and access to courts? Do only Florida and a few other states have a constitutionally sound standard for the admissibility of expert testimony? Of course not."<sup>16</sup> The Supreme Court also explained that the Daubert amendments remedy deficiencies of the Frye standard: "Whereas the Frye standard only applied to expert testimony based on new or novel scientific techniques and general acceptance, Daubert provides that 'the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" Daubert, 509 U.S. at 589. The Court also noted that the Daubert amendments would "create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping."<sup>17</sup>

Thus, the Florida Supreme Court, which had turned over in January 2019 with the appointment of three new judges, ruled in May 2019 to replace the previously used Frye standard with the Daubert standard.<sup>18</sup> The decision was sharply criticized by the plaintiffs' bar while simultaneously being cheered by the defense bar. The

7 <https://www.orlandosentinel.com/politics/os-ne-scott-appoint-justices-20181015-story.html>

8 <https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-florida-supreme-court-20190122-story.html>

9 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

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

11 <https://www.flsenate.gov/Committees/bills/summaries/2013/html/489>

12 <https://www.insidemedicaldevices.com/2013/06/florida-adopts-daubert-standard-for-expert-testimony/>

13 *DeLisle v. Crane Co.*, 258 So. 3d 1221, 1229 (Fla. 2018).

14 <https://www.floridabar.org/the-florida-bar-news/court-declines-to-adopt-daubert/>

15 <https://www.insurancejournal.com/news/southeast/2019/06/05/528418.htm>

16 *In re Amendments to Florida Evidence Code*, 210 So. 3d 1231, 1239 (Fla. 2017).

17 *In re Amendments to the Florida Evidence Code*, No. SC19-107, May 23, 2019

18 <https://www.jdsupra.com/legalnews/florida-adopts-daubert-standard-for-56896/>

Court's new structure, created because of the results of the gubernatorial election, changed, on its own accord, the Florida standard for admissibility of expert testimony and did so in a matter of only about seven months from when the court had reverted to the "generally accepted" standard.<sup>19</sup>

The amendments to sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts) of the Florida Evidence Code became effective immediately with the Court's decision on May 23, 2019. Litigants on both sides of a case must again be guarded

against experts who do not have strong credentials or who do not use proper methodologies and analysis to support their opinions. Testimony by experts will be challenged and judges will be expected to act as gatekeepers so that juries only receive testimony that is well-founded and reliable. While there were issues that were certainly more controversial between the two Florida gubernatorial candidates, and judicial appointments likely did not decide the race, the result to litigants and attorneys reinforced yet again that elections matter for all involved in the judicial system.

<sup>19</sup> <https://www.druganddeviceblog.com/2019/05/florida-finally-does-daubert.html>

## THE IMPACT OF JUDICIAL APPOINTMENTS BY ELECTED OFFICIALS ON EXPERT WITNESSES



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## Florida's History of Close Elections

HEADLINES

A look at Florida, the 'Always-Close-Election State'



By Associated Press on November 7, 2016



## The Chad Controversy

**Hanging Chads: As the Florida Recount Implodes, the Supreme Court Decides Bush v. Gore**

As the Florida recount implodes, the high court decides Bush v. Gore

By Samantha Levine, Staff Writer Jan. 17, 2008, at 5:00 p.m.



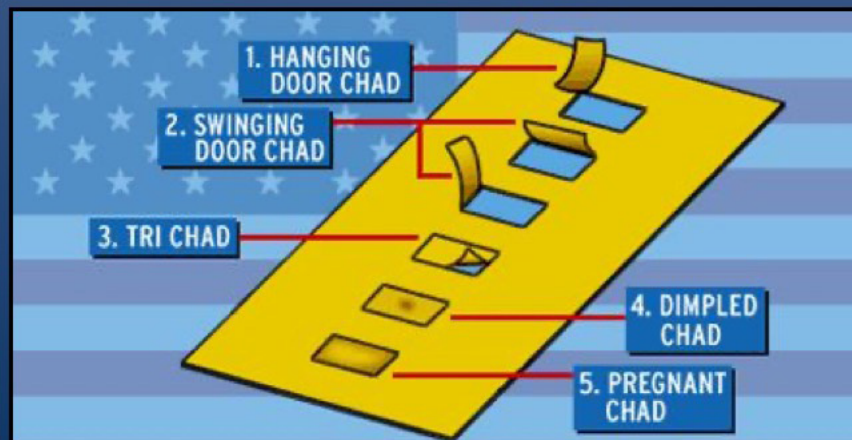
## The Chad Controversy



**Florida election official searching for “hanging chads” on a 2000 Presidential election ballot.**

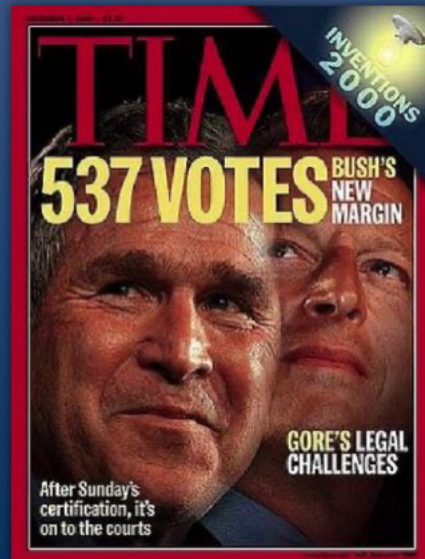


## The Chad Controversy





## Bush v. Gore (2000)



## Bush v. Gore (2000)



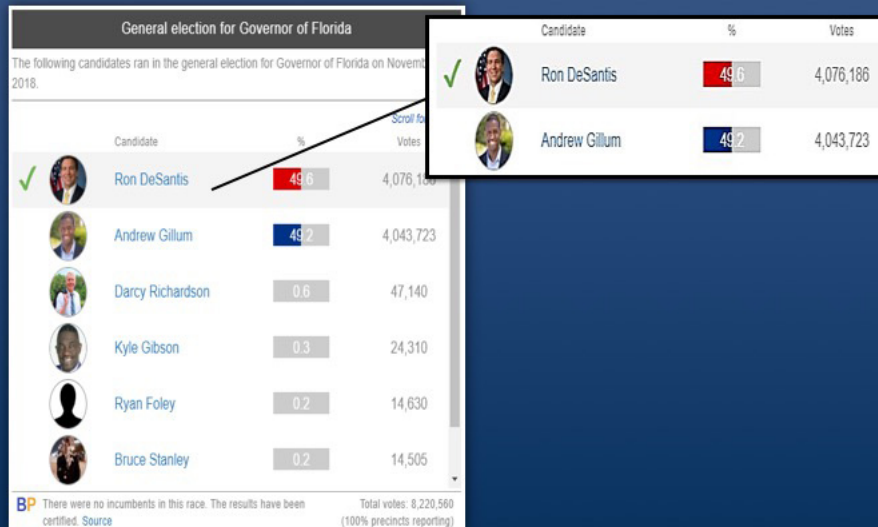
## Supreme Court's Intervention



## 2018 Florida Governor's Race: Ron DeSantis (R) vs. Andrew Gillum (D)



## Too Close to Call



## Elections Matter

### With Florida recount over, Andrew Gillum's last chance to become governor rests with the courts

Ledyard King, USA TODAY Published 5:09 p.m. ET Nov. 15, 2018 | Updated 9:43 p.m. ET Nov. 15, 2018



Florida's secretary of state has ordered a manual recount in the state's hotly contested U.S. Senate race. (Nov. 15) AP

The final tally, headed to certification next week, was 4,075,445 for DeSantis and 4,041,762 for Gillum.



# Elections Matter



NOVEMBER 6, 2018

## DeSantis wins Florida governor's race, defeating progressive Andrew Gillum

Down in the polls, the Republican hopeful followed President Trump's blueprint to a surprise victory.

# Elections Matter



ELECTIONS

## DeSantis (and Trump) wins the race for Florida governor as Republicans stay in power

BY DAVID SMILEY AND EMILY MAHONEY

NOVEMBER 06, 2018 11:01 PM, UPDATED NOVEMBER 07, 2018 11:55 AM



## Judicial Nominating Commission

- Appointed by the governor
- Nominees:
  - Justice Barbara Lagoa
  - Justice Robert J. Luck
  - Justice Carlos G. Muniz

## Appointments



[Justice Barbara Lagoa](#)

Justice Barbara Lagoa is the 87th Justice on the Supreme Court and the first Cuban American woman to serve. She was appointed in 2019 and faces a [merit retention](#) vote in 2020.



[Justice Robert J. Luck](#)

Justice Robert J. Luck is the 88th Justice on the Supreme Court. He was appointed in 2019 at an event held at Scheck Hillel Community School, where he attended classes as a child. He faces a [merit retention](#) vote in 2020.



[Justice Carlos G. Muñiz](#)

Justice Carlos G. Muñiz is the 89th Justice on the Supreme Court and now has worked in all three branches of state government as well as the U.S. Department of Education. He was appointed in 2019 and faces a [merit retention](#) vote in 2020.

## Judicial Appointments



### Governor Ron DeSantis Appoints New Supreme Court Justices



**Justice Barbara Lagoa**

- Appointed on January 9, 2019
- Received J.D. from Columbia University
- First Cuban-American woman to serve on FL 3<sup>rd</sup> DCA; appointed by Governor Jeb Bush in 2006
- First Hispanic female justice to serve in the Supreme Court of Florida

## Judicial Appointments



### Governor Ron DeSantis Appoints New Supreme Court Justices



**Justice Robert J. Luck**

- Appointed on January 14, 2019
- Received B.A. and J.D. from the University of Florida
- Previously served on FL 3<sup>rd</sup> DCA; appointed by Governor Rick Scott
- Former federal prosecutor assigned to the Appeals, Major Crimes, and Economic Crimes Sections of U.S. Attorney's Office

## Judicial Appointments



### Governor Ron DeSantis Appoints New Supreme Court Justices



**Justice Carlos G. Muniz**

- Appointed on January 22, 2019
- Received B.A. from the University of Virginia and J.D. from Yale Law School
- Previously served as general counsel to US DOE
- Deputy general counsel for Jeb Bush
- Deputy attorney general for Pam Bondi

## Daubert or Frye?

OCTOBER 19, 2018

**Florida Supreme Court Rejects Daubert Expert Standard, Returns to Frye**

by Leland Garvin

## Daubert or Frye?

OCTOBER 19, 2018

### Florida Supreme Court Rejects Daubert Expert Standard, Returns to Frye

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**UPDATE:** Since this writing, the Florida Supreme Court has done an about-face, deciding the more rigorous *Daubert* analysis will in fact be the new evidentiary standard in Florida cases, both civil and criminal. This will mean the bar to bring – and prevail – in Florida injury lawsuits is raised. In its May 23, 2019 decision *In re: Amendments to the Florida Evidence Code*, No. SC19-107, the court (now with three new governor-appointed justices since the last ruling) held Florida's evidence standard should align with that used by federal courts and most other states. The court previously rejected adoption of *Daubert* following a 2013 legislative amendment, citing procedural issues and “grave constitutional concerns.” In this 5-2 ruling, the court now says those concerns are unfounded.

## Daubert or Frye?

### Timeline:

- **2013** – Florida passes legislation to adopt *Daubert* standard
- **2017** – Florida Supreme Court declined to adopt legislature's 2013 revisions to FL Evidence Code
- **2018** – Florida Supreme Court ruled that *Frye* standard governs
- **2019** – Florida Supreme Court ruled that *Daubert* standard governs



## Daubert or Frye?

### Daubert vs. Frye: Navigating the Standards of Admissibility for Expert Testimony

by *Anjelica Cappellino* - July 17, 2018



THE EXPERT INSTITUTE

- Frye – Novel issue only; general accepted standard
- Daubert – All scientific issue; judge as gate keeper
- Frye – Plaintiff friendly
- Daubert – Defense friendly

## Daubert or Frye?

LAW.COM | dbr DAILY BUSINESS REVIEW

News

### 'Daubert' Evidence Standard Takes Immediate Effect in Florida After High Court Turnaround

In a case that attracted many onlookers, the Florida Supreme Court Thursday adopted the "Daubert" standard for expert testimony.

By *Raychel Lean* | May 23, 2019 at 05:55 PM

- Sua Sponte
- Revived Daubert Motion practice
- Defense cheered
- Plaintiffs cried foul

## Daubert or Frye?

### Florida Finally Does Daubert

By **Bexis** on May 24, 2019

Court composition matters.

Yesterday, the Florida Supreme Court reversed a ruling from only last year and decided that the legislature was right (or at least within its authority) after all – henceforth the standards created in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), will govern the admissibility of expert testimony in the Sunshine State. Specifically:

“**The Court, according to its exclusive rulemaking authority . . . adopts chapter 2013-107, sections 1 and 2, Laws of Florida (Daubert amendments) . . . to replace the Frye standard for admitting certain expert testimony with the Daubert standard.**

## Daubert or Frye?

### How Daubert Standard Could Impact Florida Industry, Judicial Climate

By Amy O'Connor | June 5, 2019

**INSURANCE  
JOURNAL**



#### *Daubert vs. Frye*

The *Daubert* standard was adopted by the U.S. Supreme Court in 1993 from the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* It replaced the *Frye* standard adopted federally after the 1923 case of *Frye v. United States*.

# Elections Matter

FLORIDA POLITICS / THE BUZZ

## Two Florida Supreme Court justices appointed by Trump to federal appeals court

Justices Barbara Lagoa and Robert Luck have been serving on Florida's highest court since January.



Florida Supreme Court Justices Barbara Lagoa, left, and Robert Luck, right, were appointed to the 11th U.S. Circuit Court of Appeals in Atlanta by President Trump. (Florida Supreme Court)



## **ROBERT M. FULTON**

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Bob is a Shareholder in the firm's Litigation Group and the Practice Co-Chair for the Products Liability and Personal Injury Litigation Groups. His practice primarily involves the defense of products liability and complex tort claims. For the past several years, Bob has defended national and international clients in numerous automotive, aviation, trucking, consumer products and power tool products liability cases throughout Florida.

Bob also represents clients in the pharmaceutical and medical device industries. He has also represented commercial carriers, automobile dealerships, and other entities in automotive and trucking accident cases.

Bob is active in both professional and Bar-related activities. He is a member of Product Liability Advisory Council (PLAC), Federation of Defense and Corporate Counsel (FDCC), Defense Research Institute (DRI), and Florida Defense Lawyers Association (FDLA).

Active in the community, Bob remains involved with the University of Florida Alumni Association. He was Outstanding Alumnus in 2002 for the Department of Criminology at the University of Florida and for the College of Liberal Arts and Sciences in 2003. Bob was Project Care Volunteer of the Year for Big Brothers/Big Sisters in Hillsborough County for 2001. Bob is active with the American Heart Association, Lawyers with Heart.

### **Practice Areas**

- Products Liability
- Consumer Products
- Industrial/Commercial Products
- Drug & Medical Device
- Personal Injury
- Automotive Liability Litigation
- Commercial Litigation

### **Honors and Recognitions**

- AV Preeminent - Martindale Hubbel Lawyer Rankings
- Florida Legal Elite 2017
- Best Lawyers 2018
- Super Lawyers 2018

### **Education**

- University of Florida, B.A., 1991 - Phi Beta Kappa
- Duke University School of Law, J.D., 1994, Honors - Moot Court Board

