

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT OF FLORIDA  
CASE NO. 1D07-11  
LT NO. 2006 CA 2973

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CHRISTINE JENNINGS,

*Petitioner,*

v.

ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA;  
SARASOTA COUNTY CANVASSING BOARD;  
KATHY DENT, as SARASOTA COUNTY SUPERVISOR OF ELECTIONS;  
KURT S. BROWNING, as SECRETARY OF STATE  
OF THE STATE OF FLORIDA;  
AMY K. TUCK, as DIRECTOR OF THE DIVISION OF ELECTIONS  
OF THE STATE OF FLORIDA;  
VERN BUCHANAN; and  
ELECTION SYSTEMS & SOFTWARE, INC.,

*Respondents.*

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REPLY BRIEF

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On Petition for a Writ of Certiorari to the Circuit Court  
of the Second Judicial Circuit, in and for Leon County  
Honorable William L. Gary

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## INTRODUCTION

Although they collectively consume nearly a hundred pages, Respondents' briefs are most notable for what they don't say:

- None of the Respondents disputes that “the primary consideration in an election contest is whether the will of the people has been effected.”<sup>1</sup>
- No one refutes the conclusion of ES&S's expert, Professor Herron, that “there is essentially a 100 percent chance the 13th Congressional District election result would have been reversed in the absence of the large Sarasota County undervote.”<sup>2</sup>
- No one refutes the shared conclusion of both sides' experts (Professors Herron and Stewart) that the Sarasota County undervote cost Christine Jennings between 3,000 and 4,000 more votes than it cost Vern Buchanan.
- No one refutes that statistics alone can never determine whether, or how much, the malfunctioning of the iVotronic electronic touch-screen voting system contributed to the Sarasota County undervote.
- No one refutes that the key to making those determinations is to comprehensively test the iVotronic hardware, software, and source code.

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<sup>1</sup> *Boardman v. Esteve*, 323 So. 2d 259, 269 (Fla. 1975).

<sup>2</sup> Michael C. Herron *et al.*, *Ballot Formats, Touchscreens, and Undervotes: A Study of the 2006 Midterm Elections in Florida*, at i, *available at* <http://www.dartmouth.edu/~herron/cd13.pdf> (accessed Feb. 20, 2007); *accord A 623* (reaffirming that conclusion).

- No one contends that Jennings or her attorneys or experts are business competitors of the trade secrets' owner, ES&S, or that they would abuse their access to those trade secrets by leaking them to ES&S's competitors in violation of a protective order.

So the key question in this case is not *whether* democracy failed the people of Florida's Thirteenth District, but *why*. Respondents claim that the ballot format confused the voters, who therefore failed to cast their intended congressional ballots. Jennings claims that the voters cast their intended congressional ballots but the machines failed to record them correctly. The only way to resolve this dispute is to allow *all* parties to independently test the iVotronic system's hardware and software, including its source code.

**I. The Trial Court's Order Created a Material Injury that Cannot Be Adequately Remedied on Appeal.**

Neither ES&S nor the County Defendants — who filed no response to this Court's show-cause Order, even though they are the target of Jennings's motion to compel production of the iVotronic hardware (and much of the software, too) — even attempts to claim that the injury inflicted by the order below can be adequately remedied on appeal from a final judgment. Alone among the Respondents, Buchanan and the State Defendants assert that “[m]ere delay” can never irreparably harm a litigant (Buchanan Br. at 26) and that even acknowledging the trial court's refusal to expedite this case is “improper” (State

Br. at 3-4). But those arguments ignore the fact that this is an election contest for a public office whose term lasts only 24 months. In a case like this, justice delayed is justice denied. *See* Pet. at 30-31.

## **II. The Trial Court Departed from the Essential Requirements of Florida’s Three-Step Legal Test for Discovery Disputes Involving Trade Secrets.**

### **A. The Trial Court Did Not Apply the “Reasonable Necessity” Standard.**

In defending the order below, Respondents proclaim a novel version of the “reasonable necessity” standard that places the proverbial cart squarely in front of the horse, demanding that Jennings prove her case in order to win access to the evidence that is “reasonably necessary” to prove her case. Under this standard, no corporation would ever have to disclose a trade secret: At the discovery phase, either the plaintiff will be unable to prove her case, or her ability to prove it will eviscerate her claim that access to the trade secret is “reasonably necessary.”

So it is no surprise when Respondents find that Jennings has fallen short of their proposed standard. Seemingly oblivious to irony, they criticize Jennings’s computer-science expert, Professor Wallach, for “reach[ing] no conclusion as to the cause of the undervote.” ES&S Br. at 14; *see* Buchanan Br. at 16-17 (also complaining that he “reached no conclusion”). But the whole point of Professor Wallach’s testimony was that no one could sensibly reach such a conclusion without full access to the iVotronic system. A 558-63.

Respondents repeatedly fault Jennings's experts for having nothing but "theories" to explain the undervote. But at this stage of the litigation, nothing more is required. As noted in a case requiring disclosure of one of the most closely guarded trade secrets in history — the formula for Coca-Cola — "[t]he level of necessity that must be shown is that the information must be necessary for the movant to prepare its case for trial, which includes proving its theories and rebutting its opponent's theories." *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288, 293 (D. Del. 1985). Clearly, Jennings has met this standard.

Nonetheless, Respondents assert that the record lacks "any evidence supporting Jennings's claim of machine malfunction" or software bugs, that her complaint is "completely frivolous," and that her allegations are "groundless." State Br. at 7; ES&S Br. at 33-35. Those assertions are baffling. Jennings has at least 14,000 reasons to "suspect[] that the source code is tainted" and the machines malfunctioned. State Br. at 7. Both sides' experts testified that the number of congressional undervotes in Sarasota County exceeded the norm by at least 14,000 ballots. A 532-34, 549, 621-22. Both sides' experts testified that this undervote rate was at least six times what they would have expected. *Id.* And both sides' experts testified that any alleged voter revulsion with the candidates could not possibly explain this historically aberrational undervote rate. *Id.* at 536, 544, 554,

622. Contrary to the trial court’s findings (*id.* at 808), there was nothing “speculati[ve]” or “conjectur[al]” about this uncontroverted evidence.<sup>3</sup>

Respondents’ briefs repeatedly misrepresent the record. Just to take one example, they attack Jennings’s political-science expert, Professor Stewart, for “conclud[ing]’ that there was a machine malfunction based *solely* upon a newspaper article regarding individuals who reportedly had some voting problems.” Buchanan Br. at 14 n.10 (citing A 546) (emphasis added); *accord* ES&S Br. at 13 (calling the newspaper report “the sole basis” for his conclusion) (citing A 546). The actual trial transcript says nothing of the sort:

Q: Now, *in your declaration, there at page 36*, you support your conclusion of a possible cause of machine malfunction by relying on a newspaper report stating that most callers to the newspaper reported voting problems; correct?

A: That’s the citation in that paragraph, yes, sir.

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<sup>3</sup> Where the two experts diverged was over the issue of causation. Relying heavily on undervote data for each of Sarasota County’s 1,500 machines, Professor Stewart testified that machine failure *likely* caused the excess undervote. A 540-41, 553-54, 579-80. But ES&S’s expert, Professor Herron, testified that “voter confusion — not machine malfunction — *likely* caused the unusual undervote.” State Br. at 8 (emphasis added) (citing A 613, 620). He relied heavily on county-level data showing high undervote rates for the Attorney General’s race in Charlotte, Lee, and Sumter Counties, where the ballot format allegedly resembled that found in the congressional race in Sarasota County. A 694, 697. On cross-examination, however, Professor Herron conceded that there was another common thread connecting the four counties — they all used the same version of the iVotronic system, with the same type of hardware and the same source code. *See id.* at 624-25, 629-30.

Q: That's *the sole basis in that section of your report* for a conclusion that there was a machine malfunction; correct, sir?

A: That is — *that's the citation, yes, sir.*

A 546 (emphasis added). So this testimony focused on a single citation on a single page of Professor Stewart's pre-hearing declaration. As Respondents well know, Professor Stewart's three hours of live, in-court testimony documented extensive statistical evidence pointing directly to a failure of the machines. *See* Pet. at 17-18 (citing, *e.g.*, A 540-41, 553-54, 579-80). Unfortunately, this instance of Respondents misrepresenting testimony is but one of many examples.<sup>4</sup>

Respondents' twisting of the record evidence cannot disguise what lies at the core of this dispute. ES&S's trade secrets are indispensable to ascertaining the truth about the 2006 election. At this point, Jennings's case is founded on allegations of machine malfunction that are backed by compelling expert testimony, much of which is undisputed. But to prepare her case for trial, Jennings needs access to the machines to prove her theories and to rebut Respondents'. Because denying her that access would "work [an] injustice," FLA. STAT. ANN. § 90.506, the trade-secret privilege must give way.

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<sup>4</sup> For example, in asserting that there is "no evidence" of a "physical" malfunction of the machines, Buchanan Br. at 13 (citing A 545 (Prof. Stewart)); ES&S Br. at 13 (same), Respondents take Professor Stewart's testimony wildly out of context. Professor Stewart was responding to counsel's specific question about pages 24 to 35 of his declaration and merely confirmed that he had made no mention of a "physical malfunction" in those particular pages. A 545.

## **B. The Trial Court Bypassed Florida’s Balancing Test.**

Misapplying the “reasonable necessity” standard led the trial court to depart from the essential requirements of law by refusing to conduct the proper balancing test. *See* Pet. at 32-34, 38-41. Contrary to Respondents’ contention (*see, e.g.*, State Br. at 8-9; ES&S Br. at 38-39), numerous Florida decisions expressly mandate this balancing test in all cases of reasonable necessity, requiring trial courts to weigh the plaintiff’s interest in production against the defendant’s interest in maintaining confidentiality.<sup>5</sup> Respondents plainly recognized this blackletter law when, at the hearing’s opening, *they* asked the trial judge to undertake a “balancing of interest[s],” weighing Jennings’s “necessity for this privileged information [against] the harm that disclosure will cause to the trade-secret owner.” A 528-29. The next day, however, Respondents made a tactical decision not to put on any evidence of such harm. Now they must live with that decision.

Respondents’ failure to adduce evidence of harm cannot be cured simply by highlighting the statutory definition of a “trade secret” as something that has “independent economic value.” State Br. at 9-10 (quoting FLA. STAT. ANN.

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<sup>5</sup> *See, e.g., Sheridan Healthcorp, Inc. v. Total Health Choice, Inc.*, 770 So. 2d 221, 222-23 (Fla. 3d DCA 2000); *American Express Travel Related Servs., Inc. v. Cruz*, 761 So. 2d 1206, 1208-09 (Fla. 4th DCA 2000); *Beck v. Dumas*, 709 So. 2d 601, 603 (Fla. 4th DCA 1998); *Inrecon v. Village Homes at Country Walk*, 644 So. 2d 103, 105 (Fla. 3d DCA 1994); *Freedom Newspapers, Inc. v. Egly*, 507 So. 2d 1180, 1184 (Fla. 2d DCA 1987); *Fortune Pers. Agency of Ft. Lauderdale, Inc. v. Sun Tech Inc. of S. Fla.*, 423 So. 2d 545, 546 n.6 (Fla. 4th DCA 1982).

§ 688.002(4)); *see* ES&S Br. at 26-28; Buchanan Br. at 11 n.6. That argument confuses the fact of injury with the degree of harm. For a court to “balance” the *amount* of harm to a defendant against the *amount* of benefit to a plaintiff, it must assess not only whether the defendant would be harmed, but also how much it would be harmed — specifically, how much it would be harmed by disclosure *pursuant to a protective order*.

In the hope of skirting that assessment, Respondents repeatedly paint this as an “all or nothing” case, pretending that the issue here is full, unfettered, public disclosure of ES&S’s trade secrets. *See, e.g.*, State Br. at 6 n.4 (warning against “full disclosure”); ES&S Br. at 2 (“unfettered possession of the source code”). But unconstrained access is not at stake here. Jennings has voluntarily agreed to be bound (and to have her attorneys and experts bound) by a stringent protective order. Courts routinely hold that a protective order can adequately accommodate a party’s interest in confidentiality. *See Federal Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 n.24 (1979) (“Actually, orders forbidding any disclosure of trade secrets or confidential commercial information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel.”).

But Respondents apparently are concerned more with reputation than confidentiality. They argue that ES&S’s trade secrets should not be disclosed to

Professor Wallach, even pursuant to the protective order (which they concede he would comply with), because, as a foe of paperless voting systems, he might draw on “[t]hat information — consciously or otherwise — [in] his future advocacy undertakings to the detriment of ES&S.” State Br. at 10; *see* ES&S Br. at 32. But a “claim that public disclosure of information will be harmful to a defendant’s reputation is not ‘good cause’ for a protective order,” much less for blocking discovery altogether. *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297, 301 (N.D. Ill. 1993).<sup>6</sup>

**C. Trade-Secret Precedents Involving Defective Products Uniformly Reject Respondents’ Arguments.**

Because this case is about defective machines, the analogy to products-liability cases is instructive. Those cases rebut Respondents’ arguments in two respects.

*First*, Respondents suggest that Jennings should be content so long as the State Defendants can conduct their own tests of the iVotronic system. That is absurd. In a products-liability action involving a machine malfunction, it would be unthinkable to require a plaintiff to proceed to trial without equal access to the

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<sup>6</sup> ES&S also frets that Petitioners will “tear apart the machines” and seize “actual electronic ballots cast which are contained in the [machines’] memory.” ES&S Br. at 2. But by adopting a charter amendment last fall, the people of Sarasota County already have banned these machines from future use. A 214. And by design, it is impossible to defeat ballot secrecy and trace “actual electronic ballots” back to particular voters because the electronic ballots are “stripped of any identifying information.” ES&S Br. at 2, 17.

machines. *See, e.g., Sponco Mfg., Inc. v. Alcover*, 656 So. 2d 629, 630-31 (Fla. 3d DCA 1995) (entering a default judgment for plaintiff because the allegedly defective product was damaged or destroyed during testing by the defendant); *Rockwell Int'l Corp. v. Menzies*, 561 So. 2d 677, 679 (Fla. 3d DCA 1990) (same); *DePuy, Inc. v. Eckes*, 427 So. 2d 306, 308 (Fla. 3d DCA 1983) (same).

Here, Respondents contend that Jennings should be denied access to the iVotronic system precisely because the State Defendants have been given access to it. That is backwards. In *National Healthcorp Limited Partnership v. Close*, 787 So. 2d 22 (Fla. 2d DCA 2001), the court noted that defendants “absolutely” were barred from “introducing evidence to which the plaintiff had been denied access during discovery.” *Id.* at 25 (quoting trial court). Indeed, the court could not “imagine that [defendants] would think otherwise.” *Id.* Yet here, that is exactly what has happened. Respondents have been permitted to introduce “evidence” from their own tests of the machines — the Parallel Test Summary Report — while plaintiffs have been denied access to those same machines.

**Second**, Respondents ignore the fact that Jennings is not a business competitor and that the whole point of trade-secrecy law is to protect confidential materials from competitors. When sued by non-competitors, products-liability defendants who invoke the trade-secret privilege almost invariably lose. *See, e.g., Bridgestone Americas Holding, Inc. v. Mayberry*, 854 N.E.2d 355, 363-64 (Ind. Ct.

App. 2006) (requiring defendant to disclose its proprietary formula for making tires because the formula was “reasonably necessary for [the plaintiff] to have a fair opportunity to develop and prepare her case for trial” and would be disclosed only “to a party who is not in competition with the holder of the trade secret”); *Culligan v. Yamaha Motor Corp., USA*, 110 F.R.D. 122, 125 (S.D.N.Y. 1986) (requiring defendant to disclose product-design information after finding the balance of interests weighed in favor of plaintiff because “the plaintiff is not a competitor, and has no interest in the research data except as it relates to this case” and “an appropriate confidentiality order can fully protect [the manufacturer’s] interest in shielding its research information from its competitors”); *Snowden ex rel. Victor v. Connaught Labs., Inc.*, 136 F.R.D. 694, 699 (D. Kan. 1991) (requiring defendant to disclose the formula for a vaccine where plaintiffs had “no other source for this particular information” and any “harm to defendants can and will be lessened by the entry of a protective order”). Here, the trial court simply ignored that the purpose of the privilege is to prevent disclosure of proprietary information to business competitors and Jennings is no competitor to ES&S. Moreover, the trial court did not even consider whether a protective order could adequately accommodate ES&S’s interests.

### **III. The Trial Court Departed from the Essential Requirements of the Florida Evidence Code.**

Respondents do not even agree among themselves about what might have been a proper basis for admitting the Parallel Test Summary Report. The State Respondents claim that the Report is a public record “setting forth the activities of the office or agency,” within the meaning of Section 90.803(8) of the Evidence Code. State Br. at 11. But that exception to the hearsay rule is limited to “records of a simple factual nature,” such as “records showing the receipts and disbursements of a governmental department or official reports of a statistical nature.” CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 803.8 (2006 ed.) (citing cases involving tax receipts, land-sales records, dates and check numbers of payments, and index cards assigning numbers to filed claims); *see also Dykes v. Quincy Tel. Co.*, 539 So. 2d 503, 505 & n.3 (Fla. 1st DCA 1989) (applying this exception, and refusing to admit records that set forth findings of fact).

Implicitly rejecting the State Respondents’ argument, ES&S instead claims that the Report falls within a different hearsay exception, for public records setting forth “matters observed pursuant to duty imposed by law as to matters which there was a duty to report.” FLA. STAT. ANN. § 90.803(8).

Tellingly, the State — which should know best which matters it is duty-bound to observe and report upon — does not argue that the Report falls within this exception. Nor could the State make such an argument because there is simply

no statutory duty to conduct post-election parallel testing and report on it. The statute that ES&S cites (Br. at 40) as creating this duty — Section 101.58(1), Florida Statutes — does no such thing. Rather, Section 101.58(1) simply requires the Department of State to provide official observers and reports *upon the petition of the electorate or candidates*. See FLA. STAT. ANN. § 101.58(1). That was not the basis for the Department of State’s audit here.

It is well-established that “[i]f there is not a duty both to observe and to make the report, the document is not admissible.” EHRHARDT, *supra*, § 803.8; see *University of N. Fla. v. Unemployment Appeals Comm’n*, 445 So. 2d 1062, 1063 (Fla. 1st DCA 1984) (refusing to admit documents absent a statutory duty “that they be made or maintained”). Here, none of the Respondents can point to a statute creating a duty to conduct parallel testing and report on it.

The Parallel Test Summary Report is exactly the type of “evaluative report” meant to be excluded under Section 90.803(8). “The drafters felt that the results of official investigations lacked sufficient reliability to offset the prejudice that would result to the party against whom an unreliable report is introduced.” EHRHARDT, *supra*, § 803.8. That is why “[i]n Florida, rather than offering this type of record, a witness must be called who has personal knowledge of the facts.” *Lee v. Department of Health & Human Servs.*, 698 So. 2d 1194, 1201 (Fla. 1997) (citation omitted).

The weakness of Respondents' arguments is demonstrated by the lengths to which they go to provide "alternative" arguments. For example, ES&S contends that the Rules of Evidence do not "strictly apply" here because this was "a hearing on a preliminary question dealing with discovery and the existence of a privilege." ES&S Br. at 39-40. That is bizarre. Florida's Rules of Evidence apply to *all* judicial proceedings "[u]nless otherwise provided by statute," and no statutory exception applies here. FLA. STAT. ANN. § 90.103(1).

Furthermore, as the Petition explains (Pet. at 41, 46-50), the trial court clearly erred when it found that Jennings had "presented no evidence" demonstrating the Report's invalidity. A 808. Professor Wallach testified that, although he did not doubt the "accuracy" of the State's audit, he did doubt its "completeness" and thus viewed its results as untrustworthy. A 600; *see* Pet. at 45-50 (citing A 559, 563, 586-89, 594-96, 600-02 (cataloging six key shortcomings that rendered the audit's parallel test incomplete and untrustworthy)).

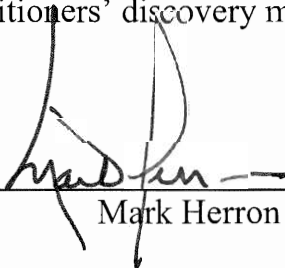
#### **IV. Florida's Election Laws Do Not Preclude the Requested Discovery.**

Recognizing the weakness of its position on the trade-secrets privilege, ES&S asserts that Florida's election laws somehow independently bar Jennings from discovery in this case. *See* ES&S Br. at 46-50. To the contrary, in election contests Florida courts routinely have allowed plaintiffs to access and examine voting machines and ballots. For example, in *Wikler v. Haber*, 277 So. 2d 51 (Fla.

3d DCA 1973), by court order, “[p]etitioner, his attorney and his representatives” were allowed to “examine[] all the voting machines” used in key precincts where problems allegedly had arisen. *Id.* at 52. After the petitioner’s “check, recheck, and tabulation” of those machines showed no error, the court dismissed the election contest. *See id.*; *see also, e.g., Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 726 (Fla. 1998); *McLean v. Bellamy*, 437 So. 2d 737, 750 (Fla. 1st DCA 1983); *Barber v. Moody*, 229 So. 2d 284, 286-87 (Fla. 1st DCA 1969); *Spradley v. Bailey*, 292 So. 2d 27, 30 (Fla. 1st DCA 1974). ES&S’s interpretation of the election statutes is simply erroneous and, tellingly, is not shared by those charged with enforcing and administering the statutes — the State Respondents.

#### CONCLUSION

This Court has long held that “the purpose of the statutes permitting election contests is to prevent the thwarting of the will of the electors either by fraud or by common mistakes honestly made.” *Barber*, 229 So. 2d at 286. To effectuate that purpose, the Court should grant the writ of certiorari on an expedited basis and quash the trial court’s order denying Petitioners’ discovery motions.

  
\_\_\_\_\_  
Mark Herron

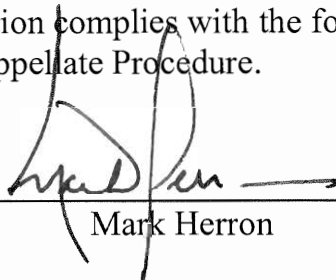
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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Petition complies with the font requirements of Rule 9.100(1) of the Florida Rules of Appellate Procedure.



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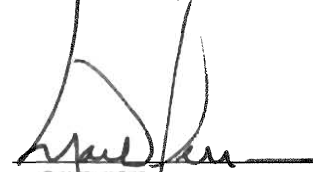
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