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

CHRISTINE JENNINGS,

Petitioner,

vs.

ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA, et al.,

Respondents.
_______________________________________/

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JON S. WHEELER
Clerk District Court Of Appeal
1st District

RESPONDENT ELECTION SYSTEMS & SOFTWARE, INC.'S MOTION TO STRIKE UNAUTHORIZED NON-PARTY RESPONSE OF JUANITA MILLENDER-McDONALD

Respondent, Election Systems & Software, Inc. ("ES&S") moves for entry of an order striking the unauthorized, non-party response (the "Response") of Juanita Millender-McDonald, Chairwoman of the Committee on House Administration ("Millender-McDonald"), that was submitted in support of the Emergency Petition For A Writ of Certiorari ("Petition") filed by Petitioner, Christine Jennings ("Petitioner"). The Response must be stricken because Millender-McDonald has no standing to participate in the review of the trial court's order, and because the Response itself is an improper attempt to influence this Court by interjecting non-record matters into the proceeding and otherwise

fails to comply with the appellate rules. ES&S supports this motion with the following information.

1. On January 3, 2006, Petitioner filed an Emergency Petition for a Writ of Certiorari seeking review of the trial court's order (the "Order") which, among other things, denied Petitioner's motion to compel production of ES&S' trade secrets because Petitioner failed to demonstrate the reasonable necessity for this privileged information. The ES&S trade secrets at issue included the computer source codes for the electronic voting machines used in Sarasota County, Florida. Petitioner had made ES&S a defendant in the proceeding below in order to facilitate the discovery of its source code.

2. On January 4, 2007, this Court issued an order to show cause (the "Show Cause Order"). The Show Cause Order directed Respondents, including ES&S, to submit responses to the Petition within 20 days. The Show Cause Order did not authorize submissions by any other persons besides Respondents.

3. Contrary to the Show Cause Order, Millender-McDonald, who was not named as a respondent in the Petition and was not a party in the proceeding below, filed a Response in support of the Petition. Millender-McDonald purported to sign the Response (which was in the form of a letter to the Court dated January 4, 2007) in her capacity as Chairwoman of the Committee on House Administration for the United States House of Representatives. In fact, the

Response was submitted on what appeared to be the official letterhead of the Committee on House Administration with the certificate of service signed by the Committee's Counsel.

4. In the Response, Millender-McDonald advised that the House of Representatives had received a Notice of Contest from Petitioner Christine Jennings and that the Committee was "closely following the course of the litigation" because the "House customarily relies on state legal processes to provide a full and fair airing of contested election issues . . . ." As it related to the House's election contest, Millender-McDonald indicated her "concern" that the "lower court declined to order, the requested access to the hardware and software (including the source code) needed to test the contestant's central claim: the voting machine malfunction." (Response at 1) Millender-McDonald then suggested that the decision by this Court would directly affect the election contest in the House, with the implication being that the House was more likely to take action if the Court did not allow access to ES&S' trade secrets, stating:

> **My purpose here is <u>not</u> to express a position about the technical merits of the competing legal arguments in this evidentiary dispute.** My purpose is to point out that, in evaluating an election contest in the House, the House is well served in its own deliberations by having before it a complete record. Consequently, Florida law will facilitate the evaluation of the election contest pending before the House <u>to the extent that it provides access to relevant and critical evidence</u>. I am confident that this can be done in a way that accommodates the

> valid interests of the parties, and resolution of these issues may obviate the need for the House to address them.

(Response at 2) (emphasis added)

5. In further support of overturning the trial court's decision, Millender-McDonald advised the Court of "a serious and mounting concern about the reliability of paperless electronic voting equipment," adding that "I am aware that the voters of Sarasota County expressed their doubts on November 7th, when they approved a requirement for voter verified paper balloting and mandatory audits." (Response at 2) Notably, the House's view on what this Court should do, notwithstanding the "technical merits of the competing legal arguments in this evidentiary dispute," and the alleged public concern about the reliability of paperless electronic voting equipment, were not issues raised by Petitioner or part of the record before the trial court when it issued its Order.

6. Because Millender-McDonald was not a party below, she is not a party here, and has no standing to participate in this Court's review of the trial court's Order. *See* Fla. R. App. P. 9.020(g) (defining "petitioner" to be "[a] party who seeks an order under rule 9.100" and "respondent" to be "[e]very other party in a proceeding brought by a petitioner"). *See also Morrell v. National Health Investors, Inc.*, 876 So. 2d 580 (Fla. 1st DCA 2004) ("[a]s David E. Morrell was not a party to the proceedings below, he cannot participate in appellate review");

Penabad v. A.G. Gladstone Associates, Inc., 823 So. 2d 146 (Fla. 3d DCA 2002) (petitioner for certiorari had no standing where petitioner was not a party to the motion in the trial court that was the subject of appellate review); *Stas v. Posada*, 760 So. 2d 954 (Fla. 3d DCA 1999) (dismissing persons from appeal who were not parties below); and *Orange County v. Game and Fresh Water Fish Commission*, 397 So. 2d 411 (Fla. 5th DCA 1981) (county that was not party in lower tribunal could not maintain appeal).

7. In fact, the "exclusive method of presenting an argument on behalf of a person or entity not a party to the proceedings in the lower tribunal is to request permission to file an amicus curiae brief" under Florida Rule of Appellate Procedure 9.370. Philip J. Padovano, *Florida Appellate Practice*, § 11.5 n. 7 at 225 (2007 ed.) (emphasis added). *See* Fla. R. App. P. 9.370 ("[a]n amicus curiae may file a brief only by leave of court") (emphasis added). However, in this case, Millender-McDonald failed to seek or obtain the leave of this Court. Because Millender-McDonald has no standing to participate as a party, and her Response was not authorized by Rule 9.370, the Response should be stricken.

8. Even if Millender-McDonald had standing to submit the Response, it should still be stricken because it improperly attempts to interject non-record matters into this proceeding and otherwise fails to comply with the appellate rules. *Matthews v. City of Maitland*, 923 So. 2d 591 (Fla. 5th DCA 2006) ("a certiorari

proceeding is limited to review of the matters before the lower tribunal at the time the order to be reviewed was resolved"); *Dade County v. Marca S.A.*, 326 So. 2d 183 (Fla. 1976) ("'certiorari is in the nature of an appellate process'"). *See also Altchiler v. Department of Professional Regulation, Division of Professions, Board of Dentistry*, 442 So. 2d 349 (Fla. 1st DCA 1982):

> When a party includes in an appendix material outside the record, or refers to such material or matters in its brief, it is proper for the court to strike the same. [Citations omitted] That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.

9. Not only does the Response fail to limit itself to the record below, it makes no attempt to even address the testimony and exhibits that were offered to the trial court during a two-day hearing. Nor does the Response offer any legal argument germane to the sole issue in this proceeding, which is whether Petitioner met her burden to show reasonable necessity for discovery of ES&S' trade secrets. To the contrary, Millender-McDonald expressly states that the purpose of the Response is "not to express a position about the technical merits of the competing legal arguments in this evidentiary dispute." (Response at 2) However, because this Court must confine its review to the "technical merits of the competing legal arguments," the Response is impertinent and should be stricken. *Williams*, 548 So. 2d at 830 (striking brief containing "matters immaterial and impertinent to the

controversy between the parties"); *Acton v. Ft. Lauderdale Hospital*, 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982) ("[a]mici do not have standing to raise issues not available to the parties, nor may they inject issues not raised by the parties").

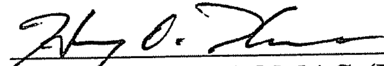
10. In short, the Response is a thinly veiled attempt by one member of Congress to intimidate this Court and unduly influence its deliberations in order to give Petitioner, a member of Millender-McDonald's political party, an unwarranted advantage in this election contest. This alone is cause for giving no consideration to and striking this illicit Response. The fairness of the election will be assured by following the due process of law, not by tactics or threats that are intended to interfere with the independence of the judiciary.

BASED ON THE FOREGOING, ES&S respectfully requests that this Court strike the unauthorized, non-party Response of Millender-McDonald.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by facsimile and U.S. Mail to Charles Howell, Counsel, Committee on House Administration, 1309 Longworth House Office Building, Washington, D.C. 20515 and by electronic transmission and U.S. Mail to all counsel of record on the attached mailing list, on this 9th day of January, 2006.

RADEY THOMAS YON & CLARK, P.A.



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