

IN THE FRANKLIN COUNTY COURT OF APPEALS

CAROLE R. SQUIRE :  
 :  
 Contestor, :  
 :  
 vs. : Case No. 06-APD-12-1285  
 :  
 CHRISTOPHER J. GEER :  
 :  
 Contestee. :

**CAROLE R. SQUIRE’S OBJECTION TO MAGISTRATE’S FINDINGS OF  
FACT AND CONCLUSIONS OF LAW**

In accordance with the provisions of Ohio Civil Rule 53(E)(3), Petitioner, Carole R. Squire (hereinafter “Petitioner”) hereby respectfully submits the following written objections to the Magistrate’s June 28, 2007 decision.

Petitioner objects to Findings of Fact numbers 4, 8, 15, 17, 21, 27 and 28. Petitioner also objects to Conclusions of Law 5, 6, 7, 9, 10 and 11. The grounds of the objections are set forth below:

**Findings of Facts:**

The Findings objected to are all contrary to the manifest weight of the evidence. Specifically, by reason of the allegations within the Complaint, concerning a recount on December 27, 2006, the Franklin County Court of Appeals issued the following order:

Intervenor shall [F]orthwith forward to the clerk of this court all ballot materials pertinent to the recount in the thirty-seven (37) Franklin County, Division of Domestic Relations, involving contestants, Carole R. Squire and Christopher J. Geer, including, but not limited to ballots, poll books, paper rolls, provisional ballots and/or books, and any other records necessary for this court to determine the merits of this contest action

1. Intervenor violated Ohio law by not impounding election materials as ordered. This is presumptive evidence of fraud. §3359.42 R.C.
2. Contrary to the Ohio Secretary of State's Recount Requirements and Procedures, as an aspect of the December 11, 2006 recount in this action, Intervenor did not compare the total votes cast in the recount precincts with the number of voters listed in the pollbook, poll list or signature poll book records. See, testimony of Matthew Damschroder Tr. Vol I, p. 41 and Petitioner's Exhibit 4(F)(1)(b) p. 4.
3. Contrary to the Ohio Secretary of State's Recount Requirements and Procedures, Intervenor, did not in the presence of two election officials of different political parties make the pollbooks, poll lists or signature poll book records available on December 11, 2006 for visual inspection by the recount witnesses. Id.
4. Contrary to the Ohio Secretary of State's Recount Requirements and Procedures, Intervenor did not check the public counters on direct record electronic voting machines for the recount precincts to verify that the numbers on those counters corresponded to numbers on the VVPAT, the pollbooks, poll lists or signature pollbook records. Id. and Petitioner's Exhibit 49, Damschroder deposition, p. 39.
5. Contrary to the mandate at the Ohio Secretary of State's Recount Requirements and Procedures, Intervenor failed to manually count 3% of the total optically scanned absentee votes for which a recount was requested. See, Joint Exhibit 2 and Tr. Vol. III, testimony of Dr. Mercuri, p. 545 Petitioner's Exhibit 36, and Petitioner's Exhibits 2 and 3.
6. Contrary to the mandate of the Ohio Secretary of State's Recount and Requirements and Procedures having failed to determine that the total recount

votes cast matched the signatures in the pollbooks, signature books and related election records, Intervenor failed to manually count the totals votes cast in the recount precincts. See, testimony of Matthew Damschroder, Tr. Vol. I, p. 47 and Petitioner's Exhibit 4 (F)(1)(b) p. 4.

7. Contrary to the mandate of the Ohio Secretary of State's Recount Requirements and Procedures, having failed to determine if the public counters on the DRE's in the recount precincts matched the number of signatures in the pollbooks, signature books and related election records, Intervenor failed to manually count the total votes cast in the recount precincts cast on DRE's. Petitioner's Exhibit 4(F)(4)(c), p. 6.
8. Contrary to the mandate of the Ohio Secretary of State's Recount Requirements and Procedures having failed to manually count 3% of the total recount vote cast on optically scanned absentee ballots, Intervenor failed to hand count all optically scanned absentee ballots for the recount precincts. See, Petitioner's Exhibit 36.
9. Notwithstanding the findings in paragraphs 2-8 above, Intervenor did not manually recount the votes cast in the recount precincts. There were 90,081 votes cast in the recount precincts on optically scanned absentee ballots and 13,835 votes cast on DRE's in the recount precincts for a total of 103,916 votes that should have been manually recounted. See, Petitioner's Exhibits 3 and 4, Joint Exhibit 2.
10. Among the precincts in which a recount was requested were precincts Columbus 7B, 42A, 72E, 82F, 86A, Reynoldsburg 2B, Westerville 2B and Westerville 4C. No other candidate, including candidates for the 15<sup>th</sup> Congressional District, prior

to Petitioner had requested a recount in these precincts. Notwithstanding no requirement to conduct a recount in the eight precincts listed above, Intervenor opened the containers containing ballots for these precincts outside the presence of recount witnesses and observers. See, Damschroder testimony, Vo. I, p. 62 and Petitioner's Exhibit 39.

11. Franklin County Ohio has 835 election precincts. See, Testimony of Matthew Damschroder Tr. Vol. I, p. 54.
12. The public count on DRE's in every precinct should equal the number of signatures recorded in that precinct's poll book plus provisional votes cast minus cancelled votes. See, Testimony from Karen Cotton, Tr. Vol. II, p. 273.
13. For the November 7, 2006 general election, in 721 out of 835 Franklin County Ohio precincts the public count on DRE's did not equal the number of signatures in the pollbooks plus provisional votes minus cancelled votes. See, Testimony of Matthew Damschroder Tr. Vol. I, p. 54, Petitioner's Exhibit 41.
14. After the official canvass of elections is over it has been the practice of the Franklin County Board of Elections to not seal pollbooks, signature books and precinct workbooks, but to store them in an open area within the office accessible to all staff members. These records are not placed under seal. See, Testimony of Karen Cotton, Tr. Vol. II, p. 263 and 278.
15. After the official canvass of elections was completed on November 27, 2006, Intervenor staff members continued to make corrections and changes on precinct pollbooks, workbooks and signature books until mid January, 2007, two months

- after the official canvass of returns ended. See, Testimony of Karen Cotton, Tr. Vol. II, p. 284 and testimony of Matthew Damschroder, Tr. Vol. I. p. 53.
16. Changes or notations were made to precinct workbook, pollbooks and signatures following the official canvass of returns by Intervenor's staff, but no date was placed by the initials of the person making the change to indicate when the changes or notations were made. See, Testimony of Karen Cotton, Tr. Vol. II, ps. 279.
17. Two and a half months after the canvass of returns was completed, on the Saturday prior to the hearing in this action, February 17, 2007, Intervenor's staff members acting individually and without a representative from both the Republican and Democratic Party, went through precinct workbooks, signature books pollbooks and related election records, to attempt to reconcile/balance the records with the public count on DRE's. See, Testimony of Karen Cotton, Tr. Vol. II, p. 321.
18. Notwithstanding the December 27, 2006 court order to Intervenor to immediately send all election materials associated with the recount to the Franklin County Court of Common Pleas, Intervenor failed to comply with the order and Intervenor staff audited and corrected election records up until the week prior to the run of this action. Id.
19. The audit reflected in Petitioner's Exhibit 41, Intervenor's total County audit, was conducted over a period that ended in mid January 2007, two months after the official canvass of returns ended. See, Testimony of Matthew Damschroder, Tr. Vol. I., p. 53.

20. Intervenor's audit which ended in mid January 2007, two months after the official canvass of returns was completed and after Intervenor staff made changes and corrections to the precinct pollbooks, workbooks and signature books, determined a countywide imbalance between votes cast and signatures recorded in pollbooks of 2,834 votes. See, Testimony of Matthew Damschroder Tr. Vol. I, p. 127.
21. An audit of the number of votes cast to signatures in pollbooks conducted in 109 Franklin County precincts between December 13 and December 16, 2006, within two weeks of the official canvass, by Beverly Campbell revealed a vote discrepancy of 956 votes (hereinafter the "Campbell Audit"). See, Testimony of Beverly Campbell Tr. Vol. II, p. 367 and 374 and Petitioner's Exhibit 47.
22. During the audit conducted by Beverly Campbell, Ms. Campbell frequently observed unexplained and undated changes made in election records by Intervenor's employees and staff. See, Testimony of Beverly Campbell, Tr. Vol., II, p. 379 and Petitioner's Exhibit 47.
23. The total voter/signature imbalance countywide for the November 7, 2006 general election based upon the Campbell Audit is 7,323 votes. See, Petitioner's Exhibit 47.
24. A second audit of signatures versus votes cast was conducted by Rady Ananda. See, Testimony of Rady Ananda, Tr. Vol. II, pp. 425, *et seq.* and (hereinafter the "Ananda Audit").
25. The Ananda Audit was conducted during an eight day period from December 7, 2006 until December 15, 2006. See, Petitioner's Exhibit 40.

26. The Ananda Audit covered 206 Franklin County precincts and determined that the signature/vote imbalance over these 206 precincts audited was between 3,433 votes and 1,846 votes. See, Petitioner's Exhibit 40.
27. Based on the Ananda Audit of 206 Franklin County precincts, which was conducted within one week following completion of the official canvass of returns, the signature/vote imbalance countywide for the November 7, 2006 general election is between 7,482 and 13,915 votes. See, Petitioner's Exhibit 40.
28. Tereasa Dawson an observer during the Squire/Geer recount was also an observer during the November 7, 2006 general election in Gahanna Precincts 1B and 2E. See, Testimony of Tereasa Dawson, Tr. Vol. II, p. 333.
29. On November 7, 2006 Ms. Dawson observed iVotronic Voting Machines, DRE's, used during the November 7, 2006 continue to run when out of paper. See, Testimony of Tereasa Dawson, Tr. Vol. II p. 337 and Petitioner's Exhibit 48.
30. Ms. Dawson participated in the Ananda Audit and confirmed the accuracy of Rady Ananda's methodology and results. See, Testimony of Tereasa Dawson, Tr. Vol. II, p. 357.
31. Twenty two and 15/100 percent of voters who voted for governor in the November 7, 2006 election by absentee or paper ballot did not vote in the Squire/Geer contest. By contrast 33.81% who voted by DRE or electronic ballot for governor did not vote in the Squire/Geer contest. This is a disparity of 11.66% of the 292,391 voters who utilized electronic ballots in Franklin County or 34,092 votes. See, Joint Exhibit 2.

32. In all past elections analyzed in this action, this phenomenon, “voter drop off” was always reversed. That is to say persons voting absentee tended to drop off at a higher rate than persons utilizing voting machines or voting in the precincts. Id.
33. The November 7, 2006 general election was the first general election in which Franklin County, Ohio utilized the Electronic Systems & Software (ES&S) iVotronic voting system. See, Petitioner’s Exhibit 38.
34. In December 2005, Franklin County purchased 4,208 iVotronic voting systems from ES&S. Id.
35. The electronic voting system deployed by Franklin County on November 7, 2006 consisted of the following software, firmware and modules:

<u>Module</u>	<u>Franklin Co. Version</u>
Election Data Manager	7.4.3.0*
Hardware Programming Manager	5.2.2.0*
Data Acquisition Manager	6.0.0.0
Election Reporting Manager	7.1.2.1.
iVotronic Image Manager	2.0.1.0
Ballot Image Manager	7.4.1.0
Audit Log Manager	7.3.0.0
Unity	3.0.1.1
iVotronic Firmware	9.1.6.4
M650	2.1.0.0
M100 Optical Scanner	5.2.0.0*

Petitioner’s Exhibit 35.

36. The electronic voting system certified by the Ohio Secretary of States and the United States Election Assistance Commission (USEAC), a federal independent testing authority, consisted of the following software, firmware and modules:

<u>Module</u>	<u>Certified Version</u>
Election Data Manager	7.4.4.0
Hardware Programming Manager	5.2.4.0
Data Acquisition Manager	6.0.0.0
Election Reporting Manager	7.1.2.1.



iVotronic Image Manager	2.0.1.0
Ballot Image Manager	unspecified
Audit Log Manager	7.3.0.0
Unity	3.0.1.1
iVotronic Firmware	9.1.6.4
M650	2.1.0.0
M100 Optical Scanner	5.2.1.0

37. The voting system certified by the Ohio Secretary of State and USEAC and the voting system utilized by Franklin County on November 7, 2006 varied in the relation to the following components.

<u>Module</u>	<u>Certified Version</u>	<u>Franklin Co. Version</u>
Election Data Manager	7.4.4.0	7.4.3.0*
Hardware Programming Manager	5.2.4.0	5.2.2.0*
M100 Optical Scanner	5.2.1.0	5.2.0.0*

See, Petitioner’s Exhibit 35.

38. The Election Data Manager (EDM) is a key component of ES&S’ proprietary Unity Election System. It is the foundation of the System. The EDM is a single-entry database that stores all a jurisdiction’s precinct, office and candidate information. Once an initial election’s information is properly entered, it can be recalled and edited for all following elections. See, Petitioner’s Exhibit 33.

39. The Unity Hardware Programming Manager (HPM) seamlessly programs the ES&S election tabulation hardware with election-specific information from the Unity Election Data Manager (EDM).

The Unity Hardware Programming Manager imports the ballot definition file created by the Unity Election Data Manager. The HPM is used for “burning” the election information onto the various Memory Devices used by the tabulation subsystems, including the Model 100 PCMCIA cards. The master election

database is created once for all precincts, districts, and precinct/district relationships through the EDM. This single database is used to program the Model 100, and – through an import/export procedure – the ES&S AutoMARK system. See, Petitioner’s Exhibit 33.

40. The Ohio Secretary of State and USEAC do not certify components, these agencies certify electronic voting systems. The Magistrate’s determination that modules were not certified is contrary to law. Here the system utilized was not certified. See, Petitioner’s Exhibit 51, Tr. Of deposition of Gary Weber, p. 15.

41. ES&S holds its electronic voting systems source codes as propriety and confidential information and will not release its source code. Id., at 43.

42. In order for the iVotronic voting system utilized in the Franklin County Ohio November 6, 2006 general election to not operate when it is out of paper it must be programmed properly. Id., at 48.

43. Dr. Rebecca Mercuri, President of and Chief Technology Officer of Notable Software was the only expert witness to testify in this action. See, Tr. Col. III at p. 496.

44. Dr. Mercuri has her full-time position at Notable Software, Inc., following two years as a Harvard University Fellow, first at the John F. Kennedy School of Government, and then at the Radcliffe Institute for advanced Study. Prior to the Harvard Fellowships, she had been an Assistant Professor of Computer Science at Bryn Mawr College in Pennsylvania. She has spent over twenty-five years as an employee and consultant to industry and government agencies, with much of her work in the area of real-time microprocessor-based systems (of which ballot

tabulation equipment is an example). She is fluent in over a dozen computer languages, ranging from assembly to object-oriented programming, and is also a skilled Microsystems (board-level) designer and computer systems analyst.

Dr. Mercuri holds a Doctor of Philosophy degree in Computer and Information Science from the School of Engineering and Applied Science at the University of Pennsylvania, where she successfully defended her dissertation “Electronic Vote Tabulation: Checks and Balances” in October 2000. In addition to her PhD., she has two Master’s degrees and a Bachelor’s degree in Computer Science and Engineering. She is the sole author or primary co-author of over 40 published technical papers, nearly of which have pertained to electronic balloting or vote tabulation. She is currently also a contributing editor and columnist for the Communications of the Association for Computing Machinery.

Dr. Mercuri’s expert witness clients have included: The New Jersey Public Defender’s Office, The New Jersey Office of Attorney Ethics and numerous private law firms. Cases in which she has been involved have pertained to: criminal investigations, civil and municipal matters, product performance claims, and patent reviews. Often her expert witness work involves forensic collection and examination of physical evidence (such as data media, computer hardware, and software), and review and reconstruction of damaged or deleted files and data records. Her expert witness c.v. is at Petitioner’s Exhibits 8, 9 and 26.

Dr. Mercuri has been involved in investigating electronic vote tabulation since 1989, primarily as a research scientist, but also in the capacity of an expert witness. Her writings on this subject have been cited in the U.S. Congressional

Record and on the floor of the Irish Parliament. She has also delivered comments upon request to the U.S. House Science Committee, the U.S. Commission on Civil Rights, the U.K. Cabinet's Office of the e-Envoy, the Federal Election Commission, the U.S. General Accounting Office, State Legislative Committees in Connecticut, Pennsylvania and North Carolina, the New York State Board of Elections, and numerous municipal boards. She had a direct role in influencing the wording pertaining to paper ballot records that appears in the Help America Vote Act and many State Elections Laws. She served for three years as a member of the Institute for Electrical and Electronics Engineers' working group that provided material incorporated into the current draft of the Election Assistance Commission's HAVA voting system standards. During the course of her investigations and research she has cast sample votes on a wide range of balloting systems (including use of accessibility and voter verified audit trail features), been briefed on the operation and set-up of this equipment, communicated with numerous election company officials, technical and sales personnel, and reviewed equipment certification reports, election laws and standards from various States (including Ohio). See, Testimony of Dr. Rebecca Mercuri, Tr. Vol. III, p. 498, *et seq.*

45. Dr. Mercuri attended most of the December 11, 2006 recount that was conducted for the Squire/Geer race at the Franklin County Board of Elections Warehouse at 1719 Alum Creek Drive, Columbus, Ohio. On December 12, 2006, she assisted in the counting of signatures and voting authorizations recorded in the Franklin County poll books for the November 7, 2006 election. Additionally, she reviewed

recount and records request correspondence (received through one of the public records requests made by the undersigned to the Ohio Secretary of State's office) dated between April 6, 2005 and October 3, 2006, pertaining to the certification of ES&S voting systems in the State of Ohio and the purchase of the ES&S system by Franklin County. She also reviewed various pertinent Ohio State election laws and election-related litigation via the Lexis-Nexis system. She read a copy of the redacted interim report, dated November 30, 2005, prepared by the Election Science Institute (ESI) examining the security of the Franklin County's iVotronic Touch Screen Voting System, which had been provided to the undersigned by Matthew Damschroder, Director of the Franklin County Board of Elections. See, Testimony of Dr. Rebecca Mercuri, Tr. Vol. III, p. 592.

46. Dr. Mercuri stated that during the recount she observed that hundreds of RTAL paper rolls were sitting out on various tables. She stated it seemed that they had been grouped together by precinct, and also stacked and organized by machine. She stated it had been her understanding that sealed containers holding the rolls would be opened only in the presence of the observers, but this apparently had already been done, and the rolls extracted, prior to the observers arrival. Many of the rolls had a white sticker (the size and shape of an address label, certainly not a tamper-proof or tamper-evident tape) with numbers printed on it that was holding the loose end to the roll. Some of the rolls did not have a sticker, and others had a sticker with handwritten initials on it the one of the election workers said was put there if a roll was replaced by a service person during the election day. The warehouse facility appeared to be shared by other agencies, as there was a large

SWAT team truck behind some of the rows of voting machines, so even though the building may have been secured, it certainly was accessible to individuals beyond the Board of Elections, so this raised security as well as procedural concerns with regard to proper handling of the election materials.

It was Dr. Mercuri's understanding that the RTAL rolls are supposed to consist of a printed record of all of the transactions that occurred on the voting machine during the election process. At the beginning of the roll is a list of pre-election testing diagnostics. Then, there is an indication of the polls being opened. This is followed by individual sets of transactions consisting of the selections made by each voter. Each voter's session is ended with a printed barcode that presumably could be used to electronically scan the ballots, but this method was not used by the Court for the recount. The end of the roll often had a printed tally of the votes for each candidate and ballot issue. It was not clear what should have been printed at the end of a roll if the paper had run out, although some of the largest rolls had a pink stripe, indicating that it was the end of the paper. Id. at 535 and 594.

47. During the recount process, it was noted that a considerable number of the rolls were incomplete, possible because the paper roll had run out or been changed, although for some, it was evident that the end of the paper roll had been damaged or ripped. It seemed that between five and ten percent of the machines had either not printed an end tally, or that it was missing. Some of the machine numbers that were called out and noted as missing their end tally printout included 5152130, 5157287, 5153310, 5153871 and 5159550. Also, 5151765 was identified as

being blank, and 5155228 was observed as having printed all zeros. A few of the rolls appeared to have already been rewound and were at their beginning. For certain machines, an end tally had apparently been printed earlier (the date on one such printout that I saw indicated December 2, 2006, a Saturday). For those rolls that appeared to have been damaged or the end tally was missing, it was not clear whether votes printed at the end of the roll were also missing. For some of the rolls, during the recount, a worker would go in the back of the warehouse to a machine, by himself, and then come out with an end tally printout. The end tallies, whether from the intact or later-printed rolls, all had four blank lines printed at the bottom for signatures, Karen Cotton, the Board of Elections Administrator explained that some of the rolls may not have been signed because the “paper may have jammed,” although I did not observe any that were signed at all. Id.

48. Dr. Mercuri testified that although information brochures, Petitioner Exhibit 5, distributed by Franklin County’s Board of Elections state that the “new voting machines are federally certified and have passed three independent software audits, including a first-in-the-nation source code review commissioned by your Franklin County Board of Elections” this is actually untrue. First of all, it appears that some critical components of the voting system, namely the ES&S Unity Management System (version 3.0.1.1) and the ES&S iVotronic firmware (version 9.1.6.4) had only received federal “provisional certification [that] applies only to the specific version and release of the product in its evaluated configuration and only for the duration of the EAC Interim Certification Program.” In fact, the

federal and subsequent Ohio state certification for these versions specified certain component version numbers that varied from the ones that were used by the County. Specifically, the certified version of the Election Data Manager that was required for this configuration was 7.4.4.0 by the County used 7.4.3.0; for the Hardware Programming Manager it was 5.2.4.0 and the County used 5.2.2.0; and from the M100 Optical Scanner it was 5.2.1.0 and the County used 5.2.0.0. (Note that these earlier versions had been federally and state certified, but only for earlier Unity and iVotronic versions, and not as configured with the Unity and iVotronic versions that were used by Franklin County in the November 7, 2006 election.) The use of mismatched components violates certification requirements and also runs the risk of exposure to programming errors (bugs) or security vulnerabilities that could compromise the integrity of the election and result in the loss or mistabulation of votes. Also, and importantly, the County never appears to have received or passed a source code review on the voting equipment. The redacted preliminary Election Science Institute report, Petitioner's Exhibit 6, that the County provided, clearly states that there are 1.471 million lines of source code in the iVotronic configuration, and that further work and funding ("from philanthropists") is needed in order "to complete this extensive task." In particular, the incomplete work includes the "line by line code analysis of the 1.4 million lines of code within the iVotronic and other components of the ES&S Unity 3.0 system" and "validation of technical mitigations being implemented" among other unfinished tasks. The preliminary report did indicate that various iVotronic code security analysis tasks would be performed and that a code



analysis report would be issued on January 30, 2006. Despite many unsuccessful requests from the undersigned for the full, unredacted ESI report, it appears that this either was never issued to Franklin County or it is being withheld. Yet even the redacted report indicates that numerous significant risks were identified, and were recommended to be mitigated through the use of operational and technical strategies that ESI provided. Requests by the undersigned that the County identify these documented risks, and provide proof as to whether or not the recommended mitigations were put into place for the November 7, 2006 election, have not produced any useful response. Franklin County had been informed that there were risks. They did not follow through in obtaining documentation from the examiners or the vendor to ensure that these were mitigated. Id. at 578.

49. Dr. Mercuri testified that the use of an uncertified voting system actually places all votes cast including these counted with the M100 Optical Scanner in question. See, Testimony of Dr. Mercuri, Tr. Vol. III at 592.

50. Contrary to Magistrate's findings 27 and 28, Dr. Mercuri expressed the following opinions:

- a) That an uncertified electronic voting system was deployed by Intervenor for the November 2006 general election, not the system certified by the Ohio Secretary of State of the federal EAC;
- b) That use of an uncertified system effected the tabulation of votes in the Squire/Geer election contest;

- c) That use of an uncertified system effected drop off in the Squire/Geer contest, effecting over 90,000 votes, and effecting the outcome of the race so as to make it uncertain;
- d) That a logic and accuracy test is inconclusive of whether an electronic voting system functioned properly;
- e) That given the failure to use a certified voting system coupled with the numerous irregularities that occurred in this election, there is no way to accurately ascertain the actual outcome of the Squire/Geer contest; and
- f) That the November 7, 2006 Franklin County general election was the most poorly administered election she had ever observed in her career, including Bush vs. Gore.

See, Testimony of Dr. Rebecca Mercuri, Tr. Vol. III, P. 592, *et seq.*

51. The outcome of the Squire/Geer November 7, 2006 general election is uncertain by reason of the above issues discussed by Dr. Mercuri. Id.

### CONCLUSIONS OF LAW

The Magistrate's Conclusions of Law 5, 6, 7, 9, 10 and 11 are erroneous for the following reasons:

1. Election laws are mandatory and require strict compliance. *Crane v. Perry County Board of Elections, et al.*, (2005) 107 Ohio St. 3d 287;
2. Under Ohio law:
  - a.) Except as otherwise provided in *section 3599.39 of the Revised Code*, whoever violates any provisions of Title XXXV [35] of the Revised Code, unless

otherwise provided in such title, is guilty of a misdemeanor of the first. See, §3599.40, R. C.

- b) No official upon whom a duty is imposed by an election law for the violation of which no penalty is otherwise provided shall knowingly disobey such election law.

Whoever violates this section is guilty of a misdemeanor of the first degree. See, §3599.32, R.C.

- c) A violation of any provision of Title XXXV [35] of the Revised Code constitutes a prima-facie case of fraud within the purview of such title. See, §3599.42, R.C.

- 3. The following acts are violations of §3515.04, Ohio Revised Code, “Procedure for Recount”:

- a) Intervenor not selecting the 3% sample of DRE precincts to be counted;
- b) Intervenor failing to compare vote totals with precinct pollbooks, workbooks and signature books;
- c) Intervenor failing, in the presence of two election officials from different political parties to make precinct pollbooks, available for inspection of the recount;
- d) Intervenor failing to check public counters on DRE’s against vote totals on precinct workbooks;
- e) Intervenor failing to count 3% of the optically-scanned absentee ballots;
- f) Intervenor failing to break the seal on RTAL’s and remove them from sealed containers in the presence of observers at the commencement of the recount;

- g) Having failed to accomplish subparagraphs 5(a)-5(f) above Intervenor failed to manually or hand count the votes cast in the 37 recount precincts.
4. Intervenor's violations of §3515.04, Ohio Revised Code outlined in Paragraph 5 above are prima facie evidence of fraud under §3599.42, Ohio Revised Code and a violation of §3599.40, Ohio Revised Code.
  5. Intervenor's violation of §3515.04, Ohio Revised Code, in connection with the recount renders all 103,916 votes cast in the 37 recount precincts uncertain, as a matter of law.
  6. Intervenor's failure to forward all recount data to the Franklin County Clerk of Courts as instructed by the Court of Appeals on December 27, 2006, and under the provisions of §3515.13, Ohio Revised Code, is a violation of §3599.32 and §3594.40, Ohio Revised Code, and prima facie evidence of fraud under §3599.42, Ohio Revised Code.
  7. Intervenor's failure to comply with the December 27, 2006 court order and §3515.13, Ohio Revised Code, warrants preclusion of any evidence by Intervenor related to the recount precincts, including RTAL's pollbooks, signature books, precinct workbooks, ballots or any record of any nature whatsoever, and denial of Intervenor's motion to admit Intervenor's Exhibit P.
  8. The statutory power given to a board of elections by *RC* §3505.32 to correct errors it discovers while conducting a canvass does not extend to the counting of ballots at any time after the election certification and does not suggest the board has the power to correct errors weeks after the canvass has been completed: See,

*State ex rel. Byrd v. Board of Elections, 65 Ohio St. 2d 40, 417 N.E.2d 1375 (1981).*

9. Under §3505.31, Ohio Revised Code:

In addition to the statutory provisions concerning the sealing of the pollbooks and the use of pollbooks by boards of elections in the ten-day period immediately following the election in which they were used, the General Assembly has imposed upon boards of elections additional duties concerning the safeguarding of pollbooks. As described, in part by *R.C. 3505.31*:

The board *shall carefully preserve* the pollbook, poll list or signature pollbook, and tally sheet delivered to it from each polling place *until it has completed the official canvass of the election* returns from all precincts in which electors were entitled to vote at an election, and has prepared and certified the abstracts of elections returns, as required by law. The board *shall not break*, or permit anyone to break, the *seals upon the pollbook*, poll list or signature pollbook, and tally sheet, *or make*, or permit any one to make *any changes or notations in these items, while they are in its custody*, except as provided by [R.C. 3505.32].

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10. The statutory scheme governing the use of pollbooks in an election provides for a board of elections' use of pollbooks in executing its duties under R.C. 3505.32, *i.e.*, correcting certain errors and canvassing election returns. During such process, a board of elections may actually correct or use information contained in the pollbooks. The election process does not, thereafter, require a board of elections otherwise to make use of such pollbooks. Thus, following the canvass of elections returns, a board of elections retains the duty to “carefully preserve” the pollbooks under such reasonable regulations that the board must adopt. n19

This duty does not, however, require the board members to retain personal care and control *i.e.*, “custody,” of such pollbooks, but merely to keep such pollbooks safe, in an unaltered condition, as they were used in the election process. We conclude, therefore, that the prohibition in *R.C. 3501.31* against breaking the seal on a pollbook applies only to the period in which a board of elections has custody of the pollbooks for purposes of carrying out its duties under *R.C. 32505.32*, and not to the [\*33] entire two-year period following the election in which the pollbooks were used.

n19 As with the safeguarding of ballots, the safeguarding of the contents of a pollbook is a matter that should be addressed by each board of elections in the rules of inspection they must adopt under *R.C. 3501.13*. We strongly advise, therefore, that boards of elections include in such regulations reasonable safeguards to protect against the destruction, loss, or alteration of pollbooks throughout the entire period the board must preserve them. *Id.* (Emphasis added.)

11. It is a violation of §§3505.37, Ohio Revised Code, and 3505.32, Ohio Revised Code, for Intervenor to:

- a) Not place pollbooks, signature books and precinct workbooks under seal;
- b) Make changes and corrections to pollbooks more than two months after the conclusion of the official canvass returns;
- c) Permit employers acting unilaterally to handle pollbooks for the ostensible purpose of auditing more than two months after the official canvass;

- d) To maintain RTAL's in a location that is not under the exclusive control of Intervenor'
  - e) To break the seals or containers for RTAL's involved in a recount in advance of the recount and outside the presence of recount observers;
  - f) To maintain pollbooks, precinct workbooks and signature books in an open location, not under seal, where all staff has access to them;
  - g) To fail to comply with a court directive to immediately forward election records to the Clerk of Courts.
12. Intervenor's actions set forth in Paragraph 11 above and under §3599.42, Ohio Revised Code, constitute prima facie evidence of fraud and render the countywide audit conducted by Intervenor reflected in Petitioner's Exhibit 41 untrustworthy and entitled to no evidentiary weight.
13. In light of Intervenor's acts set forth in Paragraph 11 above, the best evidence of the vote vs. signature comparison for the November 7, 2006 election are the Campbell and Ananda Audits.
14. Based upon the Campbell and Ananda Audits, during the November 7, 2006 general election, between 7,323 and 13,915 more voters voted than signed signature books or signed signature books and did not have their votes recorded.
15. The Electronic Systems & Software (ES&S) iVotronic voting system deployed by Intervenor for the November 7, 2006 general election was not certified by the Ohio Secretary of State and United States Election Assistance Commission, (USEAC), an independent testing authority within the meaning of Ohio Administrative Code §111:3-3-01.

16. Failure to deploy a certified voting system is a violation of §3506.05 D & H, Ohio Revised Code.
17. The duty to deploy a certified voting system is mandatory under §3515.06, Ohio Revised Code. See, Dr. Mercuri testimony, *Supra*.
18. Failure to deploy a certified voting system gives rise to strict liability.
19. Contrary to Magistrate's Conclusion No. 8 the Ohio Secretary of State and USEAC only certify voting systems not independent components or modules.
20. Under Ohio law strict liability is liability without fault. See, *Sikora v. Wenzel*, 88 Ohio St. 493 (2000).
21. Section 3506.05, Ohio Revised Code, imposes liability per se. There are no defenses or excuses which permit the deployment of an uncertified electronic voting system during an election in Ohio. Id. also see *Montgomery County v. Microvote Corporation*, 320 F.3d 440 (3d Cir. 2003), where an uncertified electronic voting system was deployed and found to be violative of the warranties of merchantability and fitness for a particular purpose.
22. Section 3506.05, Ohio Revised Code, and §111:3-3-01 O.A.C. impose strict liability for the reason it has been determined under Ohio law when a statute reads no person shall... without reference to the requisite mental state, the statute is clearly indicative of a legislature intent to impose strict liability. See, *State of Ohio v. Foxx* 2007 Ohio 663 (February 7, 2007, Highland County App. Ct.),, *State of Ohio v. Workman*, 126 Ohio App 3d, 422, 426 (State County App.Ct. 1998); *State of Ohio v. Chesaro*43 Ohio App.3d, 221, 223, 540 N.E. 2d 3599.12,



which specifically held that violation of provisions in Title 35 that state “no person shall” indicate a legislative intent to impose strict liability.

23. Under Ohio law a supplier may be found strictly liable for placing into the stream of commerce a defective product, if the supplier markets the product under its own brand. See, §2307.78, Ohio Revised Code.
24. Here Intervener stands in the shoes of a supplier of ES&S’s iVotronic voting machine. Although Intervenor did not place a defective product in the stream of commerce within the meaning of §2307.78, R.C., and §402(A) of the Restatement of Torts, Intervenor did foist a defective product on the public then misrepresented its status. See, Petitioner’s Exhibit 5 and Mercuri Testimony.
25. Intervenor selected the ES&S iVotronic from the electronic voting machines available through the State of Ohio and published material to the public attesting to the iVotronic’s reliability and proper functioning. See, Petitioner’s Exhibits 5, 38 and testimony of Dr. Rebecca Mercuri Tr., Vol. III at p. 592.
26. Intervenor claims in PX 5 concerning the status of the iVotronic voting machine were false inasmuch as all lines of source code had not been tested and the system ultimately deployed was not federally certified by USAEC. See, Petitioner’s Exhibit 28, declaration of Mr. Mercuri.
27. Claims against manufacturers of electronic voting machines are actionable in Ohio under theories of breach of implied warranties of merchantability and fitness for a particular purpose. See, *Montgomery County, Supra*.

28. An uncertified voting system is not fit for the particular purpose for which it was purchased, designed and marketed. See, Testimony of Dr. Rebecca Mercuri, Tr. Vol. III, p 592, et seq. and *Montgomery, supra*.
29. An unsuccessful voting system can not be proved to have reliability tabulated, recorded and counted votes during an election, particularly where as here central components of the system such as the optical scanner, election data manager, and the election hardware manager are not the components for which the system had been certified. Id.
30. The only votes that can be said to have been accurately counted during the November, 2006 general election in Franklin County, Ohio are the hand counted votes from the Price/Kilroy, Squire/Geer, and Campbell recounts. See, Mercuri Testimony.
31. The historical drop-off in DRE votes in the 2006 election is evidence of machine malfunction. See, Dr. Mercuri testimony and Id.
32. Evidence that DRE's continued to run without paper is evidence of machine malfunction. See, Dawson testimony.
33. The failure to deploy a certified voting system gives rise to strict liability under Ohio law and renders the outcome of the November 7, 2006 general election for Judge of the Court of Common Pleas in Franklin County, Ohio uncertain and incapable of determination.
34. The evidence of fraud under §3599.42, Ohio Revised Code, numerous irregularities during the recount, failure to balance and reconcile election records in relation to the number of voters casting votes versus votes recorded on

electronic voting machines, the absence of required policies and procedures to safeguard ballots; pollbooks, precinct workbooks, signature books, lack of exclusive access to Intervenor's warehouse, failure of Intervenor to comply with the Court's December 27, 2006 Order and §3515.13, Ohio Revised Code, and strict liability arising from the deployment of an uncertified voting system renders the outcome of the November 7, 2006 general election for the Franklin County Court of Common Pleas term commencing January 7, 2007 uncertain.

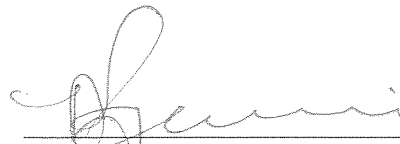
35. The November 7, 2006 election should be set aside.

36. Contestee's certificate of election shall be cancelled.

37. Petitioner's previous term should be extended pending conduct of a new election.

Petitioner requests a hearing de novo, the setting aside of the Magistrate's decision, setting aside of the November 7, 2006, election and an injunction against the use of the Franklin County electronic voting system until the system has been properly certified as required under Ohio law.

Respectfully submitted,



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Percy Squire, Esq. (0022010)  
Percy Squire Co., LLC  
514 S. High Street  
Columbus, Ohio 43215  
614-224-6528 Telephone  
614-224-6529 Facsimile  
[psquire@sp-lawfirm.com](mailto:psquire@sp-lawfirm.com)

CERTIFICATE OF SERVICE


I hereby certify that a true and correct copy of the foregoing was served via  
facsimile or electronic mail this 5<sup>th</sup> day of July, 2007, upon:

Christopher J. Geer  
261 S. Front St.  
Columbus, Ohio 43215  
[Chris\\_Geer@fccourts.org](mailto:Chris_Geer@fccourts.org)

Patrick Piccininni  
Ohio Prosecuting Attorney  
373 South High Street - 13th Floor  
Columbus, OH 43215  
[pjpiccin@franklincountyohio.gov](mailto:pjpiccin@franklincountyohio.gov)

Nick Soulas  
Assistant Ohio Prosecuting Attorney  
373 South High Street - 13th Floor  
Columbus, OH 43215  
[nasoulas@franklincountyohio.gov](mailto:nasoulas@franklincountyohio.gov)

Magistrate Sacco  
[joelsacco@sbcglobal.net](mailto:joelsacco@sbcglobal.net)

  
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Percy Squire, Esq. (0022010)