

A07-1418
NO. A07-1388

State of Minnesota
In Court of Appeals

Design Electric, Inc.,

Appellant,

vs.

International Brotherhood of Electrical Workers,
Local No. 292,

Respondent.

APPELLANT'S REPLY BRIEF

Douglas P. Seaton (#127759)
Alec J. Beck (#201133)
Sara G. Sidwell (#330899)
SEATON, BECK & PETERS, P.A.
7300 Metro Boulevard, Suite 500
Minneapolis, MN 55439
(952) 896-1700

Attorneys for Appellant

Marshall H. Tanick (#0108303)
Teresa J. Ayling (#157478)
MANSFIELD TANICK
& COHEN, P.A.
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402
(612) 339-4295

Attorneys for Respondent

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ARGUMENT

I. THE CERTIFIED PAYROLL RECORDS ARE CONSIDERED PERSONNEL DATA UNDER MINN. STAT. § 13.43 AND NOT GENERAL PUBLIC DATA UNDER MINN. STAT. § 13.03, SUBD. 1

Minn. Stat. § 13.03, subd. 1 provides that “[a]ll government data collected, created, received, maintained or disseminated by a government entity shall be public unless classified by statute, or temporary classification pursuant to section 13.06, or federal law, as nonpublic or protected nonpublic, or with respect to data on individuals, as private or confidential.” Respondent International Brotherhood of Electrical Workers, Local No. 292 (IBEW) has repeatedly claimed that the certified payroll records at issue in this case are public records under Minn. Stat. § 13.03, subd. 1 and must, therefore, be disclosed.

The Minnesota Government Data Practice Act, Minn. Stat. § 13.01–.99 (2006) (MGDPA), however, defines some data maintained by the government as “personnel data.” “Personnel data” is “data on individuals collected because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a government entity.” Minn. Stat. § 13.43, subd. 1.

Here, Appellant Design Electric, Inc. (Design) subcontracted with the City of St. Cloud (City) to perform work on the City’s East St. Germain Utility Project. (AA - 95.)¹ At no point in this litigation has that fact ever been in dispute. Under

¹ All references to Appellant Design’s Appendix are denoted as “(AA - __).” All references to Respondent IBEW’s Appendix are denoted as “(RA - __)”

this contract, Design functioned as an independent contractor for the City. See *Terrwilliger v. Hennepin County*, 542 N.W.2d 675 (Minn. App. 1996), *aff'd*, 561 N.W.2d 909 (Minn. 1997) (showing general proposition that a government entity may contract the services of a company and that the company will be considered an independent contractor). In fact, at no point during the litigation has IBEW ever challenged Design's claim that as a company it performed services for the City as an independent contractor while working on the East St. Germain Project. (*IBEW's Brief*, p. 17) Instead, IBEW has simply claimed that while Design may have been an independent contractor, because Design is a corporation, not an "individual," Minn. Stat. § 13.43 cannot apply. (*Id.*) IBEW further argues that because Design's employees "did not, on an individual basis, act as an 'employee' or 'independent contractor' for the City, Minn. Stat. § 13.43 does not cover these individuals." (*Id.*).

IBEW has provided absolutely no support for its argument that Minn. Stat. § 13.43 does not apply because the data at issue concerns the employees of an independent contractor. Design's employees, as individuals, performed work on the project. To argue that Design's independent contractor status as it relates to its contract with the City is only applicable to Design as a corporation, and not Design's workers, is ridiculous. For example, it is well settled in Minnesota that an employer is liable for harm caused to a third party because of the negligence of its independent contractor. *Zimmer v. Carlton County Co-op. Power Ass'n*, 483 N.W.2d 511, 513 (Minn. App. 1992) (citing *Conover v. Northern State Power*,

Co., 313 N.W.2d 397, 404 (Minn.1981)). IBEW's argument in this case is akin to suggesting that in such cases involving the negligence of an independent contractor, an employer could avoid responsibility for harm to a third-party because that harm was inflicted by an *employee* of an independent contractor, not the "company" itself. To suggest that defies logic, as a company itself is inherently non-corporeal and cannot "act" or "inflect harm" for itself. A company's actions, therefore, must *always* be the actions of an employee of the company. IBEW cannot therefore argue that Design, as a corporate entity, serves as an independent contractor for purposes of Minn. Stat. § 13.43 but that its employees do not. That status as an independent contractor must also, logically, pass to its employees. Accordingly, Design's certified payroll records, which are the payroll records of an independent contractor's employees, must fall under the purview of Minn. Stat. § 13.43.

Further, IBEW did not challenge at the district court level Design's claims that the certified payroll records were maintained by the City as a function of Design and its employees' work as an independent contractor for the City. In fact, IBEW's attorney clearly stated at the summary judgment hearing that

[t]he payroll data which is at the heart of this case is specifically made public.[.] Not only is there no statute that makes them nonpublic, but there's a specific provision of the Data Practices Act that says that that kind of information is public. Minnesota Statute 13.43, that's the personnel data provision of the act, states that for employees as well as independent contractors, independent contractors who contract with a governmental entity are covered by the Data Practices Act, so what the statute says is the name, the

actual gross salary, the fees that are paid . . . that's specifically set forth[.] (*Transcript*, p. 9-10.)

At no time did IBEW's attorney, either in oral argument or in IBEW's written motion for summary judgment, ever raise the issue that Minn. Stat. § 13.43 could not apply because only Design, not Design's employees, are independent contractors for purposes of Minn. Stat. § 13.43. Accordingly, IBEW may not now raise that issue on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that an appellate court generally will not consider matters that were not argued and considered in the district court).

II. WHETHER OR NOT PAYROLL RECORDS ARE GENERALLY PUBLIC IN NATURE IS IRRELEVANT FOR PURPOSES OF INTERPRETING MINN. STAT. § 13.43

Plaintiff has repeatedly referred to and taken issue with both Design and the City's statements that the certified payroll records are typically public data. (*IBEW's Brief*, pp. 9-10.) Design has never denied that fact that certified payroll records, with the exception of social security numbers and home addresses, turned over to a government entity as part of work done for the government entity as an independent contractor, would generally be considered public personnel records under Minn. Stat. § 13.43. Design's position, however, has been and continues to be that as a labor organization, IBEW is barred from requesting these records unless it is for one of the purposes authorized under Minn. Stat. § 13.43, subd. 6. And while Design did, prior to arguing the summary judgment motion, offer to provide portions of the payroll records to IBEW, that was for settlement purposes

only, and cannot be construed as an admission that Minn. Stat. § 13.43, subd 6 does not restrict a labor organization's access to these records. Minn. R. Evid. 408.

III. THERE IS NO SUPPORT FOR IBEW'S ARGUMENT THAT MINN. STAT. § 13.43, SUBD. 6 PROVIDES A LABOR ORGANIZATION WITH ENHANCED ACCESS TO NONPUBLIC DATA

IBEW has repeatedly argued that Minn. Stat. § 13.43, subd. 6 grants a labor organization "enhanced access to data that would not otherwise be considered 'public' for purposes of carrying out their collective bargaining obligations." (*IBEW's Brief*, p. 19). There is no legislative history which supports this interpretation of the statute, a fact that IBEW admits. (*Id.*). And the plain language of the statute does not in any way suggest such a reading. In general, when interpreting a statute, courts "must adhere to the statute's clear language unless doing so would be inconsistent with the legislature's manifest intent." *Pathmanathan v. St. Cloud State Univ.*, 461 N.W.2d 726, 728 (Minn. App. 1990). Because the clear language of Minn. Stat. § 13.43, subd. 6 does not contain any reference to providing a labor organization with "enhanced access" to personnel data, nor is there any indication that this is what the legislature intended, IBEW's argument that Minn. Stat. § 13.43, subd. 6 enhances, rather than limits, its access to personnel data must fail.

IV. HOME ADDRESSES ARE PRIVATE DATA UNDER MINN. STAT. § 13.43

IBEW has argued that because Design's employees are neither employees nor independent contractors for purposes of Minn. Stat. § 13.43, that the statute is

inapplicable for determining if employees' home addresses are public data. However, as previously argued, Design's employees *are* independent contractors for purposes of Minn. Stat. § 13.43 and their addresses are not, therefore, public information because they are not specifically enumerated as public under Minn. Stat. § 13.43. *See In re Common Sch. Dist. No. 1317*, 263 Minn. 573, 575, 117 N.W.2d 390, 391 (1962) (invoking “[e]xpressio unius est exclusion alterius,” meaning the expression of one thing is the exclusion of another). Because the legislature has specifically expressed which types of data will be considered public and because home addresses are not on that list, the home addresses of Design's employees remain private data.

IBEW further argues that Design's employees' home addresses should be public because under other portions of the MGDPA, home addresses are public. IBEW specifically points to Minn. Stat. § 13.82, subd. 2(j), which authorizes the release of law enforcement arrest data, including the “name, age, sex and last known address of an adult person or the age and sex of any juvenile person cited, arrested, incarcerated or otherwise substantially deprived of liberty.” Minn. Stat. § 13.82, subd. 2(j) is, however, irrelevant to the classification of home addresses in this case because, unlike Minn. Stat. § 13.43, subd. 2, Minn. Stat. § 13.82, subd. 2(j) *specifically* provides that the address of an arrestee is public. Minn. Stat. § 13.43, subd. 2 contains no such provision.

V. FACTUAL INACCURACIES

A. Design has never asserted a “trade secret” argument in the current litigation.

IBEW has repeatedly argued the fact that Design originally asserted and then abandoned a “trade secret” argument in this litigation. (*IBEW Brief*, p. 8.) When Design originally submitted the certified payroll records to the City, it did stamp the records as “confidential, private and trade secret information.” (AA – 96; RA – 13.) And the City does appear to have originally relied upon that stamp as the basis for denying IBEW’s request for the records. (RA – 13.) However, at no point in the current litigation, including within its original motion to intervene, has Design ever asserted or relied upon a trade secret argument.

B. The District Court did not find Design’s position “absurd” or “unreasonable.”

IBEW continues to state that the District Court characterized Design’s position as “unreasonable” and “absurd.” (*IBEW Brief*, p. 12.) IBEW’s argument takes the District Court’s use of those two terms out of context. The District Court *did not* conclude that Design acted unreasonably in relying on Minn. Stat. § 13.43, subd. 6. but rather concluded that the argument would produce an absurd result and that the legislature would not have enacted a law that would produce an absurd result. (AA – 16.)

CONCLUSION

For the reasons stated above, the District Court erred by granting summary judgment in favor of IBEW and the judgment should be reversed.

Dated: October 18, 2007

SEATON, BECK & PETERS, P.A.

By A12
Douglas P. Seaton (#127759)
Alec J. Beck (#201133)
Sara G. Sidwell (#330899)
Attorneys for Appellant
7300 Metro Boulevard – Suite 500
Minneapolis, MN 55439
952-896-1700

STATE OF MINNESOTA
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**CERTIFICATION OF
BRIEF LENGTH**

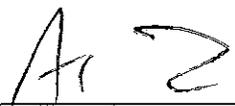
Respondent.

TO: Clerk of the Appellate Courts
Minnesota Judicial Center
St. Paul, Minnesota 55155

I hereby certify that this reply brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 1,848 words. This brief was prepared using Microsoft Word 2000 (9.06926 SP-3).

Dated: October 18, 2007

SEATON, BECK & PETERS, P.A.

By 

Douglas P. Seaton (#127759)

Alec J. Beck (#201133)

Sara G. Sidwell (#330899)

Attorneys for Appellants

7300 Metro Boulevard – Suite 500

Minneapolis, MN 55439

952-896-1700

ATTORNEYS FOR
INTERVENOR/DEFENDANT