

A07-1388
NO. A07-1418

State of Minnesota
In Court of Appeals

International Brotherhood of Electrical Workers,
Local No. 292,

Appellant,

v.

City of St. Cloud,

Respondent,

and

Design Electric, Inc.,

Respondent.

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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I. IBEW IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEY'S FEES

Appellant International Brotherhood of Electrical Workers, Local 292, ("IBEW") is entitled to its reasonable attorney's fees and costs incurred in this litigation, pursuant to Minn. Stat. § 13.08, subd. 4. There is no issue regarding the reasonableness of the fees sought by IBEW. (A-110-111.)¹

There are only three remaining issues: (1) whether fees should be awarded; (2) the amount of fees that should be awarded; and (3) the parties who should pay the fees. The answers are: (1) a fee award should be made because of the "unreasonable" and "absurd" position asserted by Respondents; (2) IBEW is entitled to its full attorney's fees and costs of \$35,042.10; and (3) the fee award should be made against both the City of St. Cloud and Intervenor Design Electric, Inc.

II. THE STANDARD FOR A FEE AWARD IS SATISFIED

A. The fees were "reasonable"

As a threshold matter, there is no contention that the fees and costs incurred by Design Electric were inappropriate, unnecessary, or otherwise unreasonable. Although the fees and costs were large, more than the \$35,000, they were fully justifiable in light of the contentious nature of the case. (A-110-112.) Neither the

¹ "A-____" refers to Appellant's Appendix accompanying IBEW's Brief.

City nor Design Electric challenged the reasonableness of fees, and the Trial Court made no contrary determination.

The Trial Court has discretion under Minn. Stat. § 13.08, subd. 4(a), to award fees to the prevailing party in Data Practices litigation. Under the statute, a fee award may be granted if the party against whom the claim is brought took a position that was not reasonable. *Star & Tribune Co. v. University of Minnesota*, 2004 WL 3198625 (Minn. 2004). A different standard exists in awarding attorney's fees *against* a claimant who seeks access to documents and loses. Under the statute, a fee award may be made against a losing claimant only if the claimant's position was "frivolous and without merit and a basis in fact." Minn. Stat. § 13.08, subd. 4(a).

In other words, if a plaintiff prevails, a fee award is appropriate if the position espoused by the Defendants was "reasonable;" if defendants prevail, the fee award is limited to situations in which the claims were "frivolous" and baseless.

The claim by Design Electric that its position was "plausible" and not made in bad faith, is inapplicable in this case. *See Design Electric's Brief*, pp. 18-19. That standard only applies under § 13.08, subd. 4 when the claimant loses, which did not occur here. *W.D.S.I., Inc. v. County of Stearns*, 672 N.W.2d 617, 622-623 (Minn. Ct. App. 2003). Cases cited by Design Electric involved denials of fee awards when sought by prevailing defendants, which invokes the "frivolous"

standard. But, in this case, since IBEW prevailed, it is entitled to a fee award based upon the "reasonableness" standard.

In this case, the Trial Court specifically, and correctly, found that the position espoused by the City and Design Electric was both "absurd," and "unreasonable," describing it as one that, if adopted, would be "absurd and produced an unreasonable result." (A-16-17.) The Trial Judge was not alone in his view. Before the case started, the attorney for the City of St. Cloud, anticipating that Design Electric would try to obstruct production of the payroll records, did "question" the company's position, and warned it: "If your company insists on its position and this results in further litigation to which the City is a party, I would expect all the City's costs to be reimbursed." (A-81.)

Design Electric disregarded that admonition. The City ultimately joined it in opposing production of the prevailing wage records under the provision of the Data Practices Act granting enhanced rights to labor organizations, Minn. Stat. § 13.43, subd. 6. If the City was entitled to reimbursement of its legal expenses, as it claimed, while being on the *wrong* side of the case and *losing*, then surely IBEW, which was on the *right* side of the case and *won*, is entitled to its attorney's fees and costs.

B. The refusal to furnish the payroll documents was "unreasonable"

The Trial Court correctly found that the joint refusal by the City and Design Electric to produce the payroll documents under the "labor organization" provision of the statute was not only "unreasonable," but even "absurd." Prevailing wage records reflect how taxpayer funds are expended, an important type of data that the public has a right to know. State law requires that they be furnished to the Department of Labor & Industry upon demand. *See* Minn. Stat. § 177.43, subd. 6. These records, once turned over to the City, fall within the broad catch-all provision of the Act, which mandates that all data maintained by government entities "shall be public," unless specifically classified as otherwise. Minn. Stat. § 13.03, subd. 1.

The documents sought in this case, certified payroll records of Design Electric, serve an important public purpose. They are required to be furnished to the City in order to ascertain compliance with the prevailing wage provision under State law, Minn. Stat. § 177.41, *et seq.* The City obviously has an interest, indeed a state-mandated-duty, to receive these documents, and so does the public.²

² Design Electric curiously asserts that no one has contended that it "did not correctly compensate the employees." *Design Electric's Brief*, p. 6. Since the documents have been withheld from public scrutiny, IBEW does not know if the wages were correctly compensated or not. Even if they were, that is not the issue in this case. This case concerns access to public documents reflecting expenditure of public funds, not whether the wages were "correctly" computed.

Design Electric used several ruses to try to conceal the prevailing wage records from public purview, notwithstanding the 2001 litigation in which the Stearns County District Court ordered similar documentation to be produced. *Design Electric, Inc. v. City of St. Cloud*, No. C1-01-734, 2001 WL 1402763 (Minn. App. Nov. 13, 2001) (unpublished). (A-73.) First, it stamped the documents "confidential" and "trade secrets" to misguide the City by imposing some type of cloak of secrecy over documents that should have been available to the public. *Design Electric's Brief*, p. 6. Obviously, a party cannot characterize documents for purposes of production under the Data Practices Act simply by stamping them any way it wants. If so, anyone could conceal documents by buying a 99¢ rubberstamp.

The City, which later joined Design Electric opposing production, was appalled at this tactic and warned the company, in no uncertain terms, that it would be responsible for paying legal costs to the City for taking such a position. (A-81.) Eager to enter the fray, Design Electric changed its tune after it intervened. Abandoning its "trade secrets" claim, it now asserts that the payroll records were off-limits under the provision of the Act that gives labor unions enhanced access to collective bargaining related data. This position was deemed by the Trial Court to be not only "unreasonable," but leading to an "absurd" result. (A-16-17.)

The Trial Court was correct in its analysis. *See IBEW's Brief*, pp. 16-22.

Simply put:

- The Data Practices Act may be utilized by any "person." Minn. Stat. § 13.02, subd. 10.
- The definition of "person" includes any "association ... or legal representative and organization." *Id.*
- Labor organizations are associations or organizations within the meaning of the Act. *See Minneapolis Federation of Teachers, AFL-CIO, Local 59 v. Minneapolis Public Schs., Special Dist. No. 1*, 512 N.W.2d 107, 109-110 (Minn. Ct. App. 1994) (labor union has standing to assert rights of members under Data Practices Act); *American Federation of State, County Municipal Employees, AFSCME Union Local 3456 v. Grand Rapids Public Utilities Comm'n*, 645 N.W.2d 470 (Minn. Ct. App. 2002) (holding that release of employee social security numbers permitted when related to drug testing under Minn. Stat. § 13.49, subd. 1).
- The statute requires that all government documents "shall be public," unless specifically classified otherwise. Minn. Stat. § 13.03, subd. 1.
- The prevailing wage records sought in this case were furnished to the City of St. Cloud, and maintained by it.

- There is no provision in the Data Practices Act that specifically, by implication or otherwise, classifies the documents as confidential, private, or non-public.
- The Personnel Data Provision, Minn. Stat. § 13.43, subd. 2, does not by its terms, bar access to Design Electric's prevailing wage records.
- The special provision, dealing with "labor organizations," § 13.43, subd. 6, does not, expressly or implicitly, limit a labor union's access to information which is "public."
- Design Electric's contention that a specific law generally trumps an inconsistent law of general applicability may be true, *Design Electric's Brief*, p. 16, but it has no applicability in this case because there is no conflict between subdivision 6, the labor organization provision, and the rest of the statute. Minn. Stat. § 13.43, subd. 6, provides enhanced rights for labor unions to obtain data that might otherwise not be public, if necessary for collective bargaining purposes. It does not conflict with a labor organization's rights as a statutory defined "person" under Minn. Stat. § 13.02, subd. 10, for access to all documents that may be "public" under the statute.

Not only did the Trial Court find Design Electric's argument "unreasonable," but the City deemed it repellant, too. The municipality, which acquiesced in the

position below, now discards it. *City's Brief*, p. 11, n. 5. Since the City no longer clings to that position, and it long ago felt the "trade secrets" claim was specious, it has no basis to refuse to produce the data. It has acknowledged that the prevailing wage records are "classified as public" data in its Answers to Interrogatories, (A-43), but it renounces the two arguments mounted below by Design Electric to keep the records concealed.

The City crafts circumlocutions to justify its resistance to produce the data it agreed were "public," praising itself for acting "prudently and cautiously" in refusing to furnish the records that it believes are "public" and without any legal basis to conceal them. *City's Brief*, p. 10. This insolence is coupled with self-pathos, viewing itself as between "a rock and a hard place." *Id.*, p. 11.

But neither its hubris nor its perceived victimization have merit. As the "responsible government authority," the City is obligated under State law to produce documents that are "public," as it agrees these records are. Minn. Stat. § 13.03, subd. 1. Since the City considered the prevailing wage records to be "public data," it was obligated by law to produce them. If Design Electric objected, the City could defend its position against the company's meritless position.

But, rather than carry out its statutory-prescribed duty, the municipality abdicated its responsibility. It vacillated, delayed, and acted as an irresponsible

government entity. Its self-proclaimed prudence and caution forced IBEW to ring up more than \$35,000 in legal fees to obtain documents that the City long ago conceded were "classified as public data." (A-43.) The City should pay for the privilege.

The position espoused by Design Electric, and accepted below by the City – that IBEW cannot obtain the "prevailing wage" records, but anyone else can – not only is unreasonable, but "absurd" as well. The restrictive gloss placed on the statute by Design Electric and the City would negate two broad provisions of the Act: (1) the mandate that all documents "shall be public," unless classified otherwise under Minn. Stat. § 13.03, subd. 1, as well as (2) the definition of "person" entitled to access under the Act, which extends to labor unions, under Minn. Stat. § 13.02, subd. 10.

It also would have the effect of allowing anyone in the State of Minnesota to obtain the certified payroll records under the prevailing wage act, except IBEW. This would emasculate the rights of labor unions, conflicting with the purpose of § 13.43, subd. 6, which is to enlarge the rights of labor unions with respect to access to collective bargaining data, in addition to their ordinary rights to data that is otherwise "public."

As the Trial Court acutely observed, preventing IBEW from having access to the payroll records would not only distort the language of the statute, but it

would be ineffectual because anyone else could make a request for the documents, be granted them, and then turn them over to labor unions. (A-16-17.) Since the Data Practices Act prohibits a government entity from asking a requestor of data to identify himself or herself or to state the reason for the data that is requested, the City could not screen for requests from union members and supporters. *See* Minn. Stat. § 13.05, subd. 12. Consequently, the Trial Court's determination that the position espoused by Design Electric and the City was "unreasonable," because it would cause an "absurd" result. Neither Design Electric nor the City has cited any authority imputing the position of IBEW or the ruling of the Trial Court.³

Thus, the certified payroll records sought by IBEW, thrice refused by the City, and opposed by Design Electric and the City, constitute "public" data and should have been produced. The characterization by the Trial Court of the opposing position as "unreasonable" and "absurd" was correct and warrants a fee award to IBEW.

³ Design Electric's assertion that this case raises an issue of "first impression" does not fortify its position. *Design Electric's Brief*, p. 16. The reason that its argument that labor unions have less right to "public" documents than any other "person" or organization by virtue of § 13.43, subd. 6, has not been adjudicated before, may be that no one has had the audacity to make such an unwarranted claim. That such an argument has not been litigated before does not mean it is reasonable, but may suggest it is so unfathomable that no one else conjured it up or had the temerity to litigate it.

C. The addresses are public, too

The purpose of this case was to obtain the certified payroll records submitted to the City by Design Electric under the prevailing wage statute. The litigation was primarily aimed at acquiring the names and wages of the payees. The issue of their home addresses, which Design Electric apparently included on the payroll records, was not central to the case.

The claim now raised by Design Electric, that the home addresses should not be produced, was an after-thought. It was not addressed by the parties in their Briefs on the Summary Judgment Motion. The issue arose spontaneously, during the course of oral argument at the Summary Judgment hearing, after being disregarded by the parties in the briefing. (A-102; Supp. App. 2-3.)⁴

The Trial Court correctly reasoned that home addresses of the Design Electric personnel are "public." (A-17.) The statute specifically states that home addresses of employees working in jails, prisons, or other correctional facilities are deemed non-public under the statute, Minn. Stat. § 13.43, subd. 5(a), because of potential security concerns of these employees. That provision, however, only extends to personnel at those facilities, and not to others who are paid by Design Electric and other private employers while working on publicly financed projects.

⁴ "Supp. App. _____" refers to Supplemental Appendix attached to this Brief.

Design Electric's argument that the addresses of its employees are not public because they are not specifically enumerated within the "public" data provision of § 13.43, subd. 2 lacks merit. That provision deals with personnel data, and only applies to employees and independent contractors of the City. But Design Electric is neither. Its personnel were not employees of the City. Nor was Design Electric an "independent contractor," which only applies to "individuals," which are defined as a "natural person" and not as a business or corporation. Thus, the personnel data provision of § 13.43 does not pertain to Design Electric personnel.

Even if it did, there is nothing in the statute that indicates that addresses of personnel on documentation submitted by their employer to the City are non-public. There are specific provisions that expressly indicate that certain information is non-public, such as social security numbers, or, in some situations, child support withholding. Minn. Stat. §§ 13.355, subd. 1 and 518A.47, subd. 1(c). IBEW has not sought that data, but all other data contained in the documentation submitted by Design Electric is "public," since there is no statute specifically stating otherwise. Minn. Stat. § 13.03, subd. 1.

In sum, the argument that the addresses of Design Electric personnel are not "public," is equally unreasonable, like the rest of the arguments advanced for non-disclosure.⁵

Even if the addresses are non-public, *which IBEW disputes*, disposition of that issue does not negate a fee award for IBEW in this case. Design Electric is making a mountain out of a legal mole hill. The issue was a minor one, barely perceptible in the proceeding below, and far from the core of the case. The question was not briefed and only discussed in passing at the oral argument. Because the issue of the addresses was so miniscule any attorney's fees ascribed to it are non-existent or *de minimis*.

III. THE CITY IS LIABLE FOR A FEE AWARD

The City was well aware of the vapidness of the argument against disclosure of the payroll records. Its exhortation to Design Electric not to oppose production and its warning of the economic consequence of doing so, are unmistakable. Before litigation began, the City's attorney did "question" the position espoused by Design Electric and warned it that Design Electric would have to "pay" the City's costs of litigation if it did not relent. (A-81.)

⁵ Design Electric chose to include addresses of its personnel on certified payroll records submitted to the City. If it wishes to keep that data non-public in the future, it simply can omit addresses, provided it furnishes the names and wage rates, as required by law.

The City then went further, acknowledging in Answers to Interrogatories that the prevailing wage records "are classified as public." (A-43.) Nevertheless, it continued to deny IBEW access to the records. The City, therefore, finds itself in the bizarre position of questioning the validity of Design Electric's opposition to production of the prevailing wage records, admonishing it against doing so, warning it that it will be responsible for legal expenses if it persists, acknowledging that the documents are "public," discrediting Design Electric's position, but still refusing to produce the data. The City's position is not only "unreasonable," but is inconsistent and incomprehensible. Its vacillating positions warrant a fee award for, as the Trial Court noted, the City's conduct constituted a "violation of statute [and] ... caused Plaintiff [IBEW] to sustain damages in terms of attorney's fees...." (A-18.)

But the Trial Court's limitation of the fee award to \$500 was wrong. The Trial Judge reasoned that the City's position was no longer legitimate, after April 20, 2007, when Design Electric was allowed to intervene in the case. (A-6-7.) But he inexplicably awarded only \$500, a figure that lacked any basis, for the City's transgression.

The Court below stated that the award was made at "the Court's discretion," but made no effort to explain how – or why – that discretion was exercised to reach such an incomprehensible figure. The lack of findings or other explication renders

the award defective as a matter of law. *See IBEW's Brief*, pp. 22-25. The \$500 awarded *sua sponte* by the Trial Court, even before a Motion, briefing, and argument, was plainly inadequate.

The hourly rates for IBEW's counsel in Minneapolis range from \$130 to \$350 per hour. The \$500 gratuitously awarded by the Trial Court barely covered the time for a single round-trip to St. Cloud for a hearing before the Trial Court, and there were two such appearances in this case. Thus, the \$500 awarded below does not even cover half of the travel time, let alone the substantial amount of legal work actually performed in the case. While IBEW feels it should be entitled to all of its attorney's fees and costs, some \$35,000, even if the Trial Court was correct, IBEW is entitled, at a minimum, to \$9,670, which constitutes the undisputed fees and costs incurred after the April 20th tell-tale date. (A-126-131.)

IV. DESIGN ELECTRIC, AS INTERVENOR, IS LIABLE FOR A FEE AWARD, AS WELL

Design Electric sought to intervene in this case. Once allowed to intervene, it became a named party, a Defendant of equal status and stature as the City, and with all of the rights and obligations of a party. *See* Minn. R. Civ. P. 24.02. It then filed an Answer, as any defendant would. (A-38.)

The Trial Court predicated the denial of a fee award against Design Electric on grounds that only a government entity is subject to a fee award under the Act. (A-9.) But the statute contains no such restriction. It provides that an "aggrieved

person ... may recover costs and disbursements, including reasonable attorney's fees, as determined by the Court." Minn. Stat. § 13.08, subd. 4. Fee awards are not restricted, expressly or implicitly, to government bodies.

In the cases cited by IBEW, intervenors have been held liable for attorney's fees in a variety of circumstances. *See IBEW's Brief*, pp. 29-30. As Design Electric points out, those cases did involve different "facts." *Design Electric's Brief*, p. 10-11. But that is true of nearly all case law, the facts may differ, but certain principles emerge and are applied in other factual settings. In the intervenor fee award cases, the common theme is that an intervenor may be liable for a fee award if there is a case that arises under a fee-shifting statute.⁶

Although arising in different context, those cases are on point. They stand for the proposition that when an intervenor becomes a part of litigation, it also is susceptible to a fee award under applicable statutory standards. In this case, as in those, the intervenor was a "party to the litigation." *Design Electric's Brief*, p. 12. Design Electric, like the other losing intervenors, is subject to a fee award, especially in the absence of any statutory language limiting fee awards under the Data Practices Act against only government entities.

⁶ Cases cited by IBEW arose under various fee-shifting statutes. One of them, *Diamond v. Charles*, 476 U.S. 54 (1986), even reached the U.S. Supreme Court, after a fee award against the intervenor below. Although the fee award issue was not addressed by the High Court, or the Appellate Court below, it was awarded by the Trial Court, and apparently not challenged on appeal.

IBEW is not the only party in this litigation that believes so. The City does, too, asserting that there is "a basis for attaching liability to the Intervenor" for a fee award. *City's Brief*, p. 6, n. 3.⁷

The travesty of this case is that IBEW had to go to such lengths – and costs – to obtain documents that unquestionably are in the "public" domain. The City thought so before the case began (A-81), but thrice denied IBEW's request; both the City and Design Electric thought so during the course of litigation, but continued to resist production. The Trial Court thought so upon reviewing the position of the City and Design Electric, concluding they were both "unreasonable" and leads to an "absurd" result; the "unreasonable resistance" to furnishing the data caused significant "harm" to IBEW, in the words of the Trial Court, thus necessitating substantial attorney's fees and costs in excess of \$35,000. Yet, for all this travail, the Trial Court awarded a pittance, \$500; barely enough to cover a round trip drive to St. Cloud for a single Court appearance.

Barring a fee award against a losing intervenor like Design Electric undermines the fee shifting provision of statute and thwarts the rights of claimants under the Data Practices Act. Litigation, unfortunately, is expensive, made even

⁷ The City, to its credit, has been consistent in recognizing that Design Electric should bear the cost for legal fees incurred due to its dubious positions. Even before the suit started, it warned the company that it would have to pay the legal expenses of the City. (A-81.) Since IBEW prevailed, that same reasoning dictates that Design Electric reimburse its legal expenses.

more so when parties advance "unreasonable" and "absurd" positions. Many Data Practices Act claimants, individuals and organizations alike, will be deterred from exercising their rights if they know they are unable to be reimbursed if someone intervenes and prevents production. Conversely, government entities and others are encouraged to deny access, forcing claimants to run up high legal bills in order to obtain access to "public" data, knowing that many claimants cannot, or will not, be able to do so. The real losers will be the public, who will be denied access to data that the legislature has declared "shall be public." Minn. Stat. § 13.03, subd. 1.

Imposing fee liability on Design Electric will not prevent parties from intervening in Data Practices litigation if they legitimately view their rights to be imperiled. It will simply carry out the statutory goal of shifting fees when a party obstructs access to "public data" by fostering an "unreasonable" position.

IBEW should not have to subsidize the "unreasonable" and "absurd" position taken by the City and Design Electric. But denial of a fee award, or limiting it to a \$500 pittance against the City, causes this unacceptable result. The ruling of the Trial Court denying attorney's fees, except for \$500 from the City, should be reversed. Because here are no disputes about the amount of unreasonableness of the attorney's fees and costs incurred by IBEW, this Court should enter judgment

in favor of IBEW for its full attorney's fees and costs, \$35,440.10, against both the City and Design Electric.⁸

CONCLUSION

For the above reasons, the judgment below denying attorney's fees to IBEW, except for a \$500 award against the City of St. Cloud, should be reversed, and the Court should enter judgment for IBEW for \$35,440.10.

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⁸ IBEW also would be entitled to award of its reasonable attorney's fees and costs incurred in this appeal, pursuant to proper Motion. *See* Rules 127 and 139.06, Minn. R. Civ. App. P.