

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 BRIEF

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STATEMENT OF ISSUES

1. *Did the Trial Court err in denying reasonable attorney's fees and costs for the prevailing party who successfully sought access to "public" documents under the Minnesota Government Data Practices Act, when the Trial Court made a determination that the position taken by the parties opposing access to the documents was "absurd and produced an unreasonable result."*

The Trial Court held in the negative, denying a fee award to the prevailing plaintiff after determining that the position of the Defendants was "absurd and unreasonable."

APPOSITE AUTHORITIES:

In re Expulsion of E.J.W. from Ind. Sch. Dist. No. 500, 632 N.W.2d 775 (Minn. Ct. App. 2001);

Jadwin v. Kasal, 318 N.W.2d 844 (Minn. 1982);

Star Tribune Co. v. University of Minnesota, Nos. A03-124, A03-155, 2004 WL 3198625 (Minn. 2004) (unpublished);

Richard Knutson v. Westchester, Inc., 374 N.W.2d 485 (Minn. Ct. App. 1985);

Minn. Stat. §§ 13.01, 13.08.

2. *Is the prevailing plaintiff in Data Practices litigation seeking access to "public" data entitled to an award of reasonable attorney's fees and costs against an Intervenor who espoused a position that the Trial Court characterized as "absurd ... and unreasonable" in opposing production of the documents sought under the statute?*

The Trial Court held in the negative, denying a request for a fee award against the Intervenor, despite its ruling that the Intervenor's position was "unreasonable and produced an absurd result."

APPOSITE AUTHORITIES:

Diamond v. Charles, 476 U.S. 54 (1968);

Schweich v. Zeigler, Inc., 463 N.W.2d 722 (Minn. 1990);

Ramsey County v. Alvarado, No. C3-97-65, 1997 WL 309362 (Minn. Ct. App. 1997) (unpublished);

Johnson v. Schrunk, No. C7-94-26, 1995 WL 497428 (Minn. Ct. App. 1995) (unpublished).

STATEMENT OF THE CASE

This litigation arises under the Minnesota Government Data Practices Act, Minn. Stat. § 13.01, *et seq.* The action was brought by the International Brotherhood of Electrical Workers, Local 292 (“IBEW”), in Stearns County District Court. The lawsuit sought access to certified payroll records of public funds paid to Design Electric, Inc. (“Design Electric”), a contractor hired by the City to perform work on a utility improvement project in downtown St. Cloud. The City received the payroll records to ensure that the contractor complied with the State “prevailing wage” law, which requires government contractors to pay salaries consistent with wages paid in the surrounding area.

IBEW made three written requests late last year for access to the payroll records maintained by the City. The City denied all three requests. IBEW then brought this suit under the Act, claiming that the documents are “public” and must be furnished. The City refused to produce the documents. Design Electric sought, and was allowed, to intervene in the action as a defendant. Collectively, the City and Design Electric argued that the documents were not “public” under Minn. Stat. § 13.43, subd. 6, a special provision dealing with enhanced access by labor unions to information for collective bargaining purposes.

The Trial Court, the Honorable Thomas Knapp, granted summary judgment for IBEW. He held that the documents are “public” and must be produced, but he

stayed the ruling pending an appeal by Design Electric. The Judge, also, *sua sponte*, ordered that the City to pay IBEW \$500 for its attorney's fees.

IBEW then brought a formal Motion under Minn. Stat § 13.08, subd. 4, complying with Rule 119 of the General Rules of Practice of District Court, for an award of reasonable attorney's fees and costs, which had not previously been presented to the Court. The Motion sought a fee award of \$35,042.10 against both the City and Design Electric. The Trial Court denied the Motion, reiterating its *sua sponte* ruling that the City should pay only \$500 for attorney's fees and Design Electric should not have to pay any attorney's fees or costs.

Design Electric appealed the underlying determination that the documents are "public" and must be produced. The City did not appeal. IBEW filed this separate appeal challenging the denial below of its Motion for attorney's fees. The two appeals have been consolidated for argument and decision.

STATEMENT OF THE FACTS

A. Certified Payroll Records Maintained By City

Appellant IBEW is a labor union representing skilled electrical workers in various portions of Minnesota. (A-32.)¹ It has a vital concern in ensuring that government entities pay workers the "prevailing wages," for work performed on taxpayer-funded projects, as required by Minn. Stat. §§ 177.41-177.44.

¹ All references to Appellant's Appendix are referenced as "(A-____.)"

The Minnesota prevailing wage laws require contractors and subcontractors working on a project in which state funds are used to pay at least the prevailing wage. The prevailing wage is the most frequently occurring wage established based on a statewide survey and set forth in a schedule certified by the Department of Labor and Industry. (A-85.) The current prevailing wage rates for Stearns County are attached. (A-89.)

Prevailing wage laws were passed in order to prevent local wage standards from being undercut by the importation of labor from other communities. Kansas enacted the first such act in 1891. At the Federal level, the Davis-Bacon Act was enacted at the height of the Depression to prevent the undercutting of local wage rates on federal projects. Minnesota enacted its prevailing wage law, which applies to projects in which state funds are used, in 1973, in response to a project on which out-of-state workers were brought in and paid much less than local workers. (A-84.) To comply with the prevailing wage law, municipalities and other government bodies require contractors to furnish certified payroll records reflecting salaries paid with public funds, which are maintained by the government entities.

B. The Prior Production

In a previous case in 2001, the City of St. Cloud entered into a contract with Design Electric, a private contractor, for municipal improvement work. The City

required Design Electric to submit regular certified payroll records for payments made to its employees in order to ensure compliance with the “prevailing wage” law. (A-65.)

IBEW requested copies of the certified payroll records maintained by the City of St. Cloud. The City furnished the certified payroll records to IBEW at that time. Design Electric subsequently started a lawsuit challenging the production by the City of the documents, claiming they constituted “trade secrets.”

Judge Ahles of the Stearns County District Court ruled against Design Electric. (A-64.) He held that the documents were public under Minn. Stat. § 13.01, subd. 3; were not “trade secrets” under Minn. Stat. § 13.37, subd. 1(b); were not private under the common law; and that the issue was moot because the documents already had been released. (A-69-72.)

Design Electric appealed to this Court, which affirmed the ruling of Judge Ahles. (A-73-76.) It held that the case was moot because the documents already had been produced, but did not address the merits of the § 13.37 claim, which Judge Ahles had previously ruled inapplicable. *Design Electric, Inc. v. City of St. Cloud*, No. C1-01-734, 2001 WL 1402763 (Minn. Ct. App. Nov. 13, 2001) (unpublished). (A-73-76.)

C. The Current Data Practices Request

In 2006, the City entered into another contract with Design Electric for utility improvement work to be done in downtown St. Cloud, known as the “East St. Germaine Utility Project.” Late last year, IBEW wrote on three separate occasions asking for copies of the certified payroll records that the City received from Design Electric in connection with that project. (A-77, 79, 80.) The City declined, apparently concerned that Design Electric might resurrect a “trade secret” claim. (A-61, 78.)

But the City was dubious about that potential assertion. The City Attorney wrote to Design Electric on January 3, 2007, *before* this lawsuit began, expressing doubts about Design Electric’s position. He stated that because there was “no distinction” between the material produced in the earlier litigation, “I question the basis of your claims.” (A-81.)

The City Attorney feared that Design Electric’s obstruction of the Data Practices request of IBEW would result in costly legal fees. So, he warned Design Electric: “If your company insists on its position and this results in further litigation to which the City is a party, I would expect all of the City’s costs to be reimbursed.” (A-81.)

D. The Present Lawsuit

IBEW began this lawsuit in February 2007, claiming that the documents are “public” under the Data Practices Act, Minn. Stat. § 13.01, *et. seq.*, as previously decided by the Trial Court in the 2001 litigation. (A-32.) The City resisted, asserting that it would not produce the documents because Design Electric claimed they were private “trade secrets” under the Act, the same position Design Electric had taken in 2001. (A-36.)

While the City refused to produce the documents, Design Electric sought to intervene in the lawsuit. (A-48.) The Trial Court granted its Motion and allowed it to participate as a named defendant in the case. (A-22-27.) Meanwhile, Design Electric served Interrogatories upon the City. In its response, the City acknowledged that the documents sought by IBEW were “public.” The pertinent Interrogatory and response is as follows:

Interrogatory No. 2: Identify and describe the definition Defendant assigns to “Certified Payroll Records” with respect to the Minnesota Government Data Practices Act.

Answer: Data falling within the statutory provisions identified above are *classified as public*.

(A-43 (emphasis supplied).)

Having acknowledged the data to be “public,” the City took a 180° turn, joining Design Electric in resisting production. Together they abandoned the

“trade secret” exception underlying their initial resistance and conjured up a new one. (A-18-19, 53-54.) They substituted a new assertion, that the special provision for access by labor organizations to collective bargaining data, Minn. Stat. § 13.43, subd. 6, barred disclosure.

E. The Summary Judgment Motion

The parties made Cross-Motions for Summary Judgment. IBEW took the same position it consistently espoused since 2001, that the certified payroll records of tax-payer funded wage are “public” and should be produced, subject to redaction of Social Security numbers and child support obligations, pursuant to Minn. Stat. §§ 13.01, subd. 3 and 13.08, subd. 2, respectively. (A-13.)

The City and Design Electric formally opposed the Motion, but, oddly, concurred with IBEW that the primary information sought by IBEW is “public.” (A-13.) Design Electric, which earlier claimed that the documents were non-public as “trade secrets,” changed its tune. It now claimed that the documents were off-limits under Minn. Stat. § 13.43, subd. 6, a statutory provision that deals with enhanced access for labor unions to information for use for collective bargaining purposes. (A-14.)²

² The provision allows labor organizations access to data that would otherwise be private or “non-public” for purposes of conducting union elections, collecting dues, or other collective bargaining purposes.

Design Electric argued, and the City acquiesced, that this provision is the sole and exclusive way for labor organizations to obtain documents under the Act and, because the documents were not sought for collective bargaining purposes, the provision barred production of documents. (A-14, 102-04.) However, both the City and Design Electric, in a bizarre tactic, agreed with IBEW that the names of employees and all their wages are “public” and accessible to IBEW, contesting only whether their addresses should be produced as well. (A-13.)

Thus, the City, which earlier averred that the data was “public,” and Design Electric now took the weird position that the “labor organization” provision might apply, but it does not bar release to IBEW of the names and wage records of Design Electric’s employees, the primary data sought by IBEW, and only prevents access to their addresses. (A-13-14.) Despite conceding that the names and payroll records are “public” and accessible, both the City and Design Electric refused to produce them and have, to this day, continued to conceal the very data – names and wages – that they both have agreed is “public.”³

³ Where a document contains both public and not public data, the government agency is to produce the public data. *See* Minn. Stat. § 13.03, subd. 3(c).

Farced with the rather strange positioning by the City and Design Electric, Judge Knapp ruled in favor of IBEW and required the documents to be produced. (A-20.) He reviewed the labor union provision of the Data Practices Act and concluded that it was not intended to restrict documents that are otherwise “public,” but simply gave additional rights and remedies to unions to obtain documents that are needed for collective bargaining purposes. He also reasoned that all of the information sought by IBEW, including the names and wage data, which the City and Design Electric concurred, as well as addresses, which they opposed, constitute “public” data and must be produced. (A-16-17.)

He also ordered, *sua sponte*, the City to pay \$500 to IBEW as reasonable attorney’s fees and costs incurred since April 20, 2007, the date of the hearing on Design Electric’s Motion to Intervene. By abandoning the “trade secret” defense at that time, Judge Knapp felt the City divested itself of any “legitimate” reason to withhold disclosure of the requested documents. (A-6-7.) The fee award was made even though IBEW had not made a request for any specific fees, expressly reserving its right to do so until after the Motion was heard and decided. (A-57-58.)

On the merits, the Judge noted that the Data Practices Act is broad and applies to “any person,” which includes labor unions. He pointed out that the labor union provision did not bar access because, if it did, anyone could make a request

for “public” documents, receive them, and turn them over to a labor union. He concluded that the position espoused by Design Electric, and acquiesced in by the City, was “absurd.” He characterized their joint stance as one that is “unreasonable” and “produce[s] an absurd result.” (A-16-17.) Knapp also noted that failing to produce the requested data constituted a “violation of the statute by the City ... [which] caused Plaintiff [IBEW] to sustain damages in terms of attorney’s fees....” (A-18.) The “damages” sustained as a direct result of the violation consisted of attorney’s fees and costs incurred by Plaintiff to commence and proceed with litigation in order to obtain the requested public documents. *Id.*

In short, the Trial Court found the position espoused by both the City and Design Electric to be meritless, twice terming it “absurd” and once “unreasonable.” It also found that IBEW suffered “damages” from the statutory “violation,” consisting of the costs and attorney’s fees of having “to commence litigation” and pursue it through Summary Judgment, and *sua sponte* awarded \$500 against the City.

F. Post Summary Judgment Proceedings

Design Electric was ordered to produce the documents within 5 days. (A-20.) An hour before the documents were to be produced, Design Electric brought a Motion for a stay pending appeal, which the Trial Court granted, conditioned upon posting a \$20,000 bond. (A-177.)

IBEW then sought its reasonable attorney's fees and costs. A Motion was brought against the City and Design Electric under Minn. Stat. § 13.08, subd. 4, which authorizes an award of attorney's fees and costs to a prevailing party, and pursuant to Rule 119 of the General Rules of Practice, which regulates requests for attorney's fees.

IBEW presented detailed information of the work by its attorneys in the case, reflecting 91 hours of work, at rates ranging from \$130 an hour to \$350 an hour, for a total of \$33,609, along with out of pocket costs and expenses of \$1433.10 for filing fees, service of process, and other disbursements. The total fees and costs were \$35,042.10. (A-113-18, 119-34.) The submission was supported by Affidavits of trial counsel and an expert witness, an experienced data practices litigator, who opined that:

In my opinion, with a reasonable degree of professional certainty, the work has been done on a *very efficient and economical basis*.... The time on the case seems to have been spent efficiently in light of the issues presented, and the opposition mounted by the defendants in this case.... In reviewing the file materials and the billing statements, *I do not detect any excessive or undue duplication or redundancy.*

(A-110-11 (emphasis added).)

The Trial Court denied the Motion for additional attorney's fees and costs against both parties, reiterating its \$500 *sua sponte* award entered earlier only against the City. (A-1.) The Trial Court reasoned that Design Electric, as intervenor, was not responsible for attorney's fees as a matter of law. (A-7-9.)

Judge Knapp stated the City was only liable for \$500 since it should have produced the documents after the “trade secret” defense was abandoned upon Design Electric’s intervention. (A-6-7.)

The Trial Court did not explain why the \$500 figure was selected as a fee award or how it was calculated. Nor did Judge Knapp modify or retreat from his prior determination that the position asserted by the City and Design Electric was “absurd” and “unreasonable” and that the City’s action caused “damage” to IBEW in forcing it to “commence litigation” to seek “public” documents that still, to this day, have not been produced.

G. The Appeals

Design Electric obtained a stay and appealed the Trial Court’s decision. (A-30). The City did not appeal.

IBEW filed a separate appeal on the judgment denying attorney’s fees and costs. (A-28.) The Court consolidated the appeals for argument and decision.

THE LEGAL STANDARD

Under the Data Practices Act, a fee award may be granted if the position of the losing party is not reasonable. *Star Tribune Co. v. University of Minnesota Board of Regents*, Nos. A03-124, A03-155, 2004 WL 3198625 (Minn. 2004). (A-178-179.) The Trial Court below found that the position advanced by both the City and Design Electric was both “absurd” and “unreasonable.” This finding of

unreasonableness is entitled to deference and is subject to review under the abuse of discretion standard. *Becker Alloy Hardfacing & Eng'g Co*, 401 N.W. 2d 655, 661 (Minn. 1987); *Farm Bureau Mut. Ins. Co. v. Northstar Mut. Ins. Co.*, No. A05-851, 2005 WL 3112014, * 1 (Minn. Ct. App. Nov, 22, 2005) (unpublished). (A-168-170.)

The Trial Court must “provide a concise but clear explanation of its reasons for the fee award.” *Anderson v. Hunter, Keith Marshall & Co.*, 417 N.W.2d 619, 629 (Minn. 1988). Absent findings and permissible reasons, the denial of the fee award is subject to reversal and remand. *Correll v. Distinctive Dental Services, P.A.*, 636 N.W.2d 578, 584 (Minn. Ct. App. 2001); *Scott v. Minneapolis Public Schools, Special School District No. 1*, No. A05-649, 2006 WL 997721 (Minn. Ct. App. 2006) (unpublished). (A-138-146.)

The susceptibility of Design Electric, as Intervenor, to a fee award is a question of law, subject to *de novo* review. See *Star Tribune Co. v. University of Minnesota*, 683 N.W.2d 274, 279 (Minn. 2004) (“[s]tatutory interpretation is a legal issue which we review *de novo*”); *In re L-Tryptophan Cases*, 518 N.W.2d 616, 619 (Minn. Ct. App. 1994).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING A FEE AWARD AFTER STATING THAT THE POSITION ESPOUSED BY DEFENDANTS WAS “UNREASONABLE AND ... ABSURD”

A. The Trial Court Correctly Held that the Data is Public

The Court may award attorney’s fees to an “aggrieved person seeking to enforce the person’s rights” under the Data Practices Act. Minn. Stat. § 13.08, subd. 4. The Trial Court held that IBEW was so aggrieved. (A-10, 20.) As the Court explained, the Government Data Practices Act “establishes a presumption that government data are public and accessible by the public for both inspection and copying unless there is a federal law, a state statute, or a temporary classification of data that provides certain data are not public.” Minn. Stat. § 13.01, subd. 3. (A-14.) The Trial Court noted that this broad access to government data is reiterated in Minn. Stat. § 13.03, subd. 1, which provides:

All government data collected, created, received, maintained or disseminated by a state agency, political subdivision, or statewide system 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.

Id. (A-14.)

The Trial Court explained the procedure for requesting data under the Act. (A-14-15.) Minn. Stat. § 13.03, subd. 3(a) permits “a person ... to inspect and

copy public government data....” “Person” is defined under Minn. Stat. § 13.02, subd. 10 as “any individual, partnership, corporation, association, business trust, or legal representative of an organization.” The definition of “person” does **not** exclude labor unions from those organizations that have access to data.

Under Minn. Stat. § 13.05, subd. 12, the City is prohibited from asking or considering the motive of the entity requesting the document. Minn. Stat. § 13.05, subd. 12 provides:

Unless specifically authorized by statute, *government entities may not require persons to identify themselves, state a reason for, or justify a request to gain access to public government data.*

Id. (emphasis supplied). (See A-15.)

The City *agreed* that all information that would be public in regard to a City employee is public data accessible to IBEW. (A-42-43.) The City further stated: that the “Certified Payroll Records” sought by Plaintiff in this case is “Data falling within the statutory provisions identified above [and] are classified as public.”

In seeking to intervene in this case, Design Electric conceded that “*wage information itself* and possibly the names of the employees ... *fall within* the definitions of ‘*public data*’ under the Data Practices Act.” (A-48 (emphasis supplied).) Design Electric objected only to the provision of employees’ addresses. *Id.*

The Court below held that Design Electric's position that home addresses cannot be released is not supported by the Act. (A-16.) The Court reasoned that Minn. Stat. § 13.43, subd. 5(a) prohibits release of home address only with respect to employees working in jails, prisons or other corrections facilities to inmates or certain others associated with the corrections facility. (A-17.) The Court concluded "this exclusion clearly establishes that home addresses of other employees not excluded are public information." (A-17.)

The Data Practices Act reflects "a fundamental commitment to making the operations of our public institutions open to the public." *Prairie Island Indian Community v. Minnesota Dep't of Public Safety*, 658 N.W.2d 876, 884 (Minn. Ct. App. 2003). "In recognition of this policy, the Courts construe such laws in favor of public access." *Id.* (citing *Demers v. City of Minneapolis*, 468 N.W.2d 71, 73 (Minn. 1991)).

In recognition of this principle, the Court of Appeals in *In re Expulsion of E.J.W. from Ind. Sch. Dist. No. 500*, 632 N.W.2d 775, 779-80 (Minn. Ct. App. 2001), held that the names of students who witnessed an alleged bomb threat and spoke to law enforcement officials about it, constituted public data under the Minnesota Data Practices Act. The Court rejected the argument that the information was private, educational data because the data referred to school children concerning an incident which occurred at school. The Court, however,

held that the broader law enforcement provision of the Minnesota Data Practices Act applied because the data was collected by law enforcement officials and the more restrictive educational data provision did not prevent disclosure of the information. *Compare* Minn. Stat. § 13.82, subd. 7 and 13.32, subd. 1.

B. Labor Unions Are Not Restricted

Design Electric contention that the data may not be disclosed to labor unions under Minn. Stat. § 13.43, subd. 6, was soundly rejected by the Trial Court as well. (A-16.) The statute provides that certain data not otherwise public can be disclosed to labor unions to assist them in their work. The Trial Court firmly rebuffed Design Electric claims that a labor union's access to information is *more restrictive* than that of other members of the general public, under Minn. Stat. § 13.43, subd. 6. (A-16-17, 25.)

Minn. Stat. § 13.43, subd. 6 provides:

Personnel data may be disseminated to labor organizations to the extent that the responsible authority determines that the dissemination is necessary to conduct elections, notify employees of fair share fee assessments, and implement the provisions of chapters 179 and 179A. Personnel data shall be disseminated to labor organizations and to the Bureau of Mediation Services to the extent the dissemination is ordered or authorized by the commissioner of the Bureau of Mediation Services.

The statute does not indicate it is the sole and exclusive way for labor organizations to seek data under the statute. This provision enhances, rather than detracts from, the data which a labor union may have access to under the Act. The

need to provide labor organizations enhanced access to data under the Act becomes obvious when considering access to disciplinary data. Disciplinary data, including reasons for disciplinary action, does not become accessible to the public until there is a final disposition of the disciplinary action. Minn. Stat. § 13.43, subd. 2(a)(5) and (b). For a labor union to effectively represent its members in the disciplinary process, it must have access to documents and information relating to the proposed discipline. Minn. Stat. § 13.43, subd. 6, therefore, enhances the access of a labor organization to data so they can fully represent their members. Likewise, the enhanced availability of personnel data to allow a labor union to more easily disseminate information to employees in regard to elections, fair share fee agreements and other union business also is an enhancement to the availability of documents and data, rather than a limitation on the ability of a labor union to access public data.

Minn. Stat. § 13.43, subd. 2 specifically lists as public data “personnel data on current and former employees, volunteers, and independent contractors of a government entity....” There are no provisions in the Data Practices Act which provide, suggest, or imply that public documents are not available to labor unions. Minn. Stat. § 13.03, subd. 1; 13.02, subd. 10 and 15. Indeed, such a dichotomy would raise serious Due Process and Equal Protection considerations.

Moreover, as the Trial Court held, prohibiting labor unions from directly obtaining documents which other members of the public may obtain would “produce an absurd result because an employee of the labor union, or any other person, could simply request the documents in his or her name as an individual in order to obtain the documents, and then provide them to the labor union.” (A-16).

The Trial Court, citing Minn. Stat. § 645.17, subd. 1, “assume[d] that the legislature did not intend to enact legislation that is unreasonable and produces an absurd result.” (A-17.)

Having correctly found that IBEW had a right to the requested data which was withheld by the City at the behest of Design Electric, IBEW was entitled to reimbursement for its costs and attorney’s fees at the discretion of the Trial Court, under Minn. Stat. § 13.08, subd. 4.

C. The Attorney’s Fees and Costs Are Reasonable

Neither the City nor Design Electric contested below the reasonableness of the attorney’s fees and costs sought by IBEW. The fees and costs were verified as reasonable by trial counsel and an independent expert. (A-109-17.) There was no challenge to those assertions, and the Trial Court made no contrary finding.

By not challenging the fee award below, the City and Design Electric have waived any objection to their reasonableness here.⁴ *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (Appellate Court generally should not consider matters not raised below); *Dacotah Properties--Richfield, Inc. v. Prairie Island Indian Community*, 520 N.W.2d 167, 171 (Minn. Ct. App. 1994).

Consequently, the \$35,042.10 sought by the IBEW in this case constitutes reasonable attorney's fees and costs as a matter of law.⁵

**D. The Trial Court Improperly Exercised Its
"Discretion"**

The Data Practices Act states that a Trial Court "may" award attorney's fees to the prevailing party. Minn. Stat. § 13.08, subd. 4. A fee award is discretionary. The Trial Court abused its "discretion" in denying the award. When Trial Courts are clothed with discretion, they must explain the basis for their decisions. *Anderson v. Hunter, Keith Marshall & Co.*, 417 N.W.2d 619, 629 (Minn. 1988) (the Trial Court must "provide a concise but clear explanation of its reasons for the fee award"). An award of the attorney's fees "is within the trial court's discretion

⁴ Design Electric objected generally to the portion IBEW's fees opposing intervention, but did not specifically point to any fees or costs it deemed excessive, unreasonable or subject to challenge.

⁵ If it prevails here, IBEW would be entitled to seek a fee award on appeal. See Rule 139.06, Minn. R. Civ. App. P.

exercised after due consideration of the evidence presented on the issue and of the trial court's observations of the services rendered." *Richard Knutson, Inc. v. Westchester, Inc.*, 374 N.W.2d 485, 490 (Minn. Ct. App. 1985). The factors to be considered in an award of the attorney's fees are:

time and effort required, novelty or difficulty of the issues, skill and standing of the attorney, value of the interest involved, results secured at trial, loss of opportunity for other employment, taxed party's ability to pay, customary charges for similar services, and certainty of payment.

Jadwin v. Kasal, 318 N.W.2d 844, 848 (Minn. 1982).

The failure to make findings justifying the reasons for the exercise of discretion constitutes reversible error. *Correll*, 636 N.W.2d at 584 (matter remanded for determination of attorney's fees because the ALJ failed to make findings concerning the reasonableness of the fees); *Scott*, 2006 WL 997721, *9 (unpublished). (A-138-146.)

In *Scott*, the jury entered a damage award against the school district for improperly safeguarding a student's educational data under the Data Practices Act. The Court also ordered the school district to pay \$47,824 of the student's \$68,848 of attorney's fees. The Court, in reducing the fee award, noted that it was limiting the award to time spent by lead counsel, and did not include time of an associate attorney who also worked on the case. The Court of Appeals reversed that determination because the Trial Court "did not address the standard of

reasonableness, and its explanation for reduction of attorney's fees, while concise, provides no basis for granting fees only for lead counsel." *Id.* at *8-9 (A-145.)

Likewise, in *Baldwin v. Ind. Sch. Dist. No. 2687*, No. C3-98-92, 1998 WL 389072 *1 (Minn. Ct. App. July 14, 1998 *rev. den'd* (Sept. 22, 1998)), the Trial Court categorically denied attorney's fees based on a successful Data Practices litigation. This Court reversed and remanded the matter to the Trial Court so that it could exercise its discretion and base its determination on the required factors.

In the exercise of discretion, Trial Courts must not only explain their reasons, but must also make findings that support their discretion. The findings are necessary in order to allow for meaningful appellate review. In *Richard Knutson, Inc.*, the parties had not submitted any evidence of attorney's fees during the trial, believing that it had reserved the issue pending a determination of liability at trial. In its findings, the Court awarded a small amount of attorney's fees. Subsequently, *Richard Knutson, Inc.* sought an award of fees, presenting relevant evidence. The Trial Court did not alter its award. *Richard Knutson, Inc.*, 374 N.W.2d at 490. The Appellate Court remanded the matter to the Trial Court for proper consideration of the criteria under *Jadwin*, 318 N.W.2d at 848, because the Trial Court had made its determination of the award of attorney's fees before any evidence had been submitted regarding the fees. The Court held: "under particular circumstances of this case, we are not able to determine whether the Trial Court

applied the appropriate factors in *Jadwin....*” *Richard Knutson, Inc.*, 374 N.W.2d at 490.

The circumstances are the same here. IBEW moved for summary judgment on the merits, reserving its fee request for a later motion if successful. (A-57-58.) The Trial Court, *sua sponte*, awarded \$500 in fees before any evidence had been submitted about fees and costs, just like in *Jadwin*. When IBEW properly moved for its fees and costs, the Trial Court stuck to its original decision, without making findings under the *Jadwin* criteria. (A-1). The failure to make findings alone here warrants reversal and remand.

E. A Fee Award Should Have Been Made Below

Not only was there insufficient basis to deny a fee award, but the record below warrants the granting of a fee award.

In some circumstances, a fee award may be denied if the actions of the losing party were reasonable. *See Star Tribune*, 2004 WL 3198625 at *1. But unreasonableness is not a necessary element for fee award. In *Star Tribune*, which involved access to names of the candidates for the University presidency, a fee

award was denied to successful claimants on three grounds: that the case involved a “Constitutional” issue; that it was a matter of significant public policy; and, lastly, the position of the University in opposing access seemed reasonable. It was the first two factors, not the reasonableness of the University’s position that seemed most salient in denial of a fee award.⁶

In *WDSI, Inc. v. County of Steele*, 672 N.W.2d 617 (Minn. App. 2003), this Court denied a fee award against a plaintiff, who unsuccessfully sought access to documents, on grounds that the lawsuit was not “frivolous or without merit.” That case also differs from the present one because the purpose of the fee award generally is to encourage prevailing plaintiffs and deter delinquent defendants. It is highly unusual for awards under “fee shifting” statutes to be given to defendants. Meanwhile, the consideration that might be applicable if a defendant prevails differs from this case, where a plaintiff prevailed when seeking access to “public” data under the statute.

But even under a standard of reasonableness, that objective criterion has not been met here. The City took shifting positions in the case, first denying access, then averring in an Interrogatory Answer that the documents were “public” data (A-43), and repeating that the data was “public” at the summary judgment hearing.

⁶ The media claimant in *Star Tribune* was seeking more than \$300,000 in fees and costs, a gargantuan figure that may have played a role in the denial.

(A-13.) In spite of those admissions, it continued to refuse to produce the documents.

Design Electric's position also flip-flopped. Initially, the Intervenor intimated that it would argue "trade secrets" in order to dissuade the City from producing the documents. (A-81.) It shifted its position when it sought to intervene on April 17, 2007, now arguing that the "labor organization" provision of the statute, Minn. Stat. § 13.43, subd. 6, applies. (A-53-54, 14.) But even then, it agreed with IBEW (and the City) that the names of employees and their wages are "public," contesting only their addresses. (A-13, 14.)

The City disowned Design Electric's new position, apparently finding that it was unreasonable, and the Court shared that view. (A-14.) The statute, as the Trial Court held, does not explicitly or implicitly, restrict labor unions from access to "public data," but merely constitutes an additional provision supplementing the rights of labor unions to material for collective bargaining purposes. The Trial Court saw through Design Electric's argument, pointing out that anyone could obtain access to "public" data and then give it to a labor union, which made Design Electric's argument "absurd." (A-16.) The Court then went on to castigate the defense as one that "is unreasonable and produces an absurd result." (A-17.)

Thus, Design Electric proffered, and the City acquiesced in, an argument that the Court below found to be both "absurd" and "unreasonable...." This

represents a determination, as a matter of law, that the reasons asserted below for refusing access does not come close to meeting the “reasonableness” threshold.

The Trial Court found that the City should have produced the documents sought by IBEW as of April 20, 2007, when Design Electric intervened and retreated from the “trade secret” defense, which had been discredited in the prior litigation over five years ago. For this transgression, the Court imposed a \$500 fee award, without explaining how it arrived at that figure. Apparently, the Trial Judge simply plucked that number out of the air, without any reference to the record.

But, if April 20, 2007, is the operative date as the Trial Court indicated in its *sua sponte* ruling, it should have awarded all of the fees incurred by IBEW after that date. The record, consisting of itemized billing statements submitted to the Trial Court, shows that IBEW incurred legal fees and costs of \$9,670 after April 20, 2007, the date that the Court below viewed as the operative date for the \$500 *sua sponte* fee assessment. (A-126-31.) Thus, even accepting the Trial Court’s reasoning for its *sua sponte* ruling, the fee award should minimally be \$9,670, consisting of all attorney’s fees and costs incurred after April 20, 2007.⁷

But IBEW actually deserves all of its fees and costs. As the Trial Court noted, the statutory “violation” in failing to furnish the documents requested

caused “harm” to IBEW. That “harm” consisted of requiring it to “commence litigation” to obtain what it — and the public— is rightly entitled to from the City.

In sum, the attorney’s fees and costs sought by IBEW are indisputably reasonable. The amount of the fees and costs was not contested below or found to be unreasonable by the Trial Court. But the arguments advanced by the City and Design Electric to oppose production of documents were deemed “unreasonable” and “absurd...” Therefore, IBEW is entitled to all of its attorney’s fees arising out of the “unreasonable” position taken by the other parties below.

II. INTERVENOR DESIGN ELECTRIC IS LIABLE FOR FEES, TOO

The City, as the “responsible authority,” is liable for attorney’s fees under § 13.08, subd. 4. But Design Electric, as the intervenor, is responsible, too. Its dogged insistence that the documents not be produced caused and prolonged this litigation, even though it was barking up a couple of wrong trees.

Intervenors can be liable for a fee award when they are the catalyst for the fees and costs that are incurred in litigation, as Design Electric was in this case. *See Diamond v. Charles*, 476 U.S. 54 (1968). In *Diamond*, a group of physicians brought an action against the State of Illinois, challenging the Constitutionality of the Illinois abortion statute. A pediatrician intervened as a defendant in support of

⁷ The Trial Court’s *sua sponte* award of \$500 against the City may be credited against a total fee award.

the statute. The Court only found portions of the statute unconstitutional and attorney's fees were awarded against the intervening pediatrician and the state, jointly and severally. The fee award, entered by the Trial Court, apparently was not disturbed on appeal before the Seventh Circuit or the Supreme Court.

In *Ramsey County v. Alvarado*, No. C3-97-65, 1997 WL 309362 (Minn. Ct. App. 1997) (unpublished) (A-149-52), a county brought an action against defendant. The children's grandmother intervened, seeking custody or visitation. The Court awarded attorney's fees to the children's mother against the intervening grandmother. Similarly, in *Johnson v. Schrunk*, No. C7-94-2614, 1995 WL 497428 (Minn. Ct. App. 1995) (A-153-158.) *rev. den'd* on other grounds, 1995 WL 681106 (Minn. Oct. 19, 1995) (A-159-163), an insurance company that intervened in a declaratory judgment action concerning the insured's coverage was held liable for attorney's fees. *See also Schweich v. Zeigler, Inc.*, 463 N.W.2d 722, 735 (Minn. 1990) (insurer that intervened to protect its subrogation interest for workers' compensation benefits, held liable for the other side's taxable costs and disbursements because "through intervention, the intervenor-third party becomes a party in the pending lawsuit ... the results of which may be favorable or unfavorable, depending on the outcome").

The same reasoning applies here. Design Electric claimed an interest in documents sought by IBEW. The original defendant, the City of St. Cloud,

maintained that it held back the documents only at the insistence of the intervenor. Design Electric chose to become a party in the action, entered the case as a named defendant, and became the main obstacle to IBEW's claim. By doing so, it subjected itself to an award for attorney's fees.⁸

The Trial Court brushed aside liability for the intervenor by discussing the above-cited cases and pointing out that all of them involved different facts. That is so, as is true of most litigation. While the facts in each case differ, the thrust of those cases, and others like it, is that an intervenor who participates in litigation, and is the catalyst for large legal fees of others, is subject to an attorney's fee award in the same manner as a defendant would be.

Otherwise, any claimant for documents under the Data Practices Act could face one or more intervenors, even if the government entity wanted to furnish the documents. This could create extensive and expensive litigation, as occurred here. Parties will be deterred from spending their time and money to pursue Data Practices litigation if they know that they cannot be reimbursed for their legal costs and fees. It is bad enough when a government entity refuses to produce the documents, as here, but when an interloper participates in the case, raises

⁸ It is noteworthy that the position taken by Design and acquiesced in by the City was not only deemed "unreasonable" and "absurd," by the Trial Court, but it was abandoned by the City and Design Electric, too. Both of them argued that the names and payroll data are "public," notwithstanding the labor organization provision, but still refused to disclose them. (A-16-17, 171-172, 173-177.)

“unreasonable” and “absurd” positions, and causes large fees to be expended, it should be liable for attorney’s fees incurred by the prevailing party.⁹ The case law in other circumstances recognizes this reality and this verity is within the purview of the Data Practices Act as well. This is a very unfortunate and unnecessary piece of litigation. IBEW plainly was entitled to the data about wages paid by taxpayer funds and to whom. Indeed, both the City and Design Electric agreed, after shifting their positions from time-to-time. Yet, the data still has not been produced. Moreover, their obstinacy has produced high legal fees in a case that should never have been necessary.

The purpose of the Data Practices Act is to encourage and expedite access to “public” data, especially about expenditure of public funds. The purpose of this attorney’s fees provision is to encourage claimants to pursue their right of access to public documents and to deter others from obstructing access. These statutory goals are thwarted if parties have to spend so much money – \$35,000 or more – to obtain access to “public” data about names and wages paid by taxpayer funds that the Defendants even concede are “public,” but refuse to furnish.

⁹ Even the City, which did Design Electric’s bidding by withholding the data, recognized the economic inequity. It warned Design Electric, before the litigation began, that it would be seeking reimbursement for its legal expenses. (A-81.) IBEW, as the prevailing party, has an even stronger claim to be compensated for its fees.

The decision below, denying fees and costs, was plainly wrong as a matter of fact and law. The attorney's fees and costs were reasonable, which is not disputed. Design Electric, as intervenor, should be liable, jointly and severally with the City, for payment of those fees as a matter of fact and law. There is no need to remand this case because the amount of the fees has been established and not disputed. That sum, \$35,042.10, consisting of fees and costs, should be awarded to Appellant in this case, without the need for protracting it any further.¹⁰

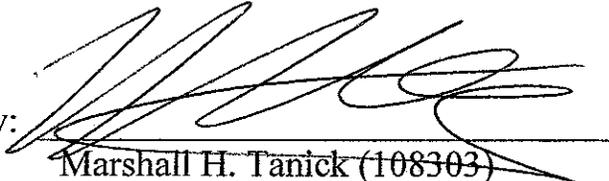
¹⁰ Appellant IBEW also should be entitled to an award of its reasonable attorney's fees and costs incurred in this appeal, pursuant to Motion under Rule 127 of Rules of Civil Appellate Procedure. *See* Rule 139.06, Minn. R. Civ. App. P.

CONCLUSION

For the above reasons, the judgment below denying the Motion for reasonable attorney's fees and costs should be reversed and an award of \$35,042.10 be entered for IBEW against the City and Design Electric jointly and severally.

Dated: August 21, 2007

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