Circuit Court for Carroll County
Case No. C-16-71811

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1297

September Term, 2017

ROBIN BARTLETT FRAZIER

v.

JAMES McCARRON, et al.

Leahy,
Shaw Geter,
Kenney, James A., III.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: December 17, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

On August 8, 2016, appellant, Robin Bartlett Frazier, filed a Complaint for Violations of the Open Meetings Act, in the Circuit Court for Carroll County. On July 31, 2017, and August 1, 2017, the court held a hearing and subsequently found appellee, the City of Taneytown, violated Maryland Code, General Provisions, §§ 3-302, 3-305(d)(2)(ii), and 3-306 of the Open Meetings Act.[1] The court, however, found the violations stemmed from negligence—not willfulness, and entered judgment in favor of the appellee. Appellant presents the following questions, which have been reordered for continuity, for our review:

1. Did the lower court err in holding that the element of willfulness requisite for the judgment of a penalty under § 3-402 of the Open Meetings Act is not met by actual knowledge and conscious action, but must include a nefarious motive?

2. Did the lower court conclude in error that the Taneytown City Council held an open meeting where the facts show that the meeting held did not meet [sic] definition of open meeting under the [Open Meetings Act] OMA?

3. Did the lower court conclude in error that the Taneytown City Council did not violate the [Open Meetings Act] OMA by holding a closed meeting with the city manager present, where the exception noticed under the statute was § 3-305(b)(7) and not § 3-305(b)(8)?

4. Did the lower court err by failing to address litigation reimbursement for [a]ppellant where findings of violations of the Act were found pursuant to § 3-402 of the Open Meetings Act?

For the reasons to follow we shall affirm the judgment of the Circuit Court.

[1] Effective October 1, 2018 §3-305(b)(13) and (14) were repealed and reenacted. None of the sections pertinent to this matter were impacted by the new legislation. 2018 Md. Laws, Ch. 304, codified at Md. General Provisions, §3-305.

BACKGROUND

In the Circuit Court from Carroll County, appellant filed a complaint alleging the Taneytown City Council held a closed meeting on June 22, 2016, in contravention of the Open Meetings Act, naming the mayor, the City, and the City Council as defendants. The complaint asserted the violations were willful since the City Attorney and City Manager "are fully aware of the provisions and were present and available before, during, and after the closed meeting to advise the [C]ouncil on the provisions of the Act." The Council filed an answer claiming that no relief exists for appellant's allegations and generally denied liability and damages. An amended complaint was subsequently filed by appellant amending the parties and echoing the same causes of action asserted in the original complaint.

Day One of the Hearing

All parties appeared for a hearing on July 31, 2017. Appellee appeared with counsel and appellant was self-represented. Both parties presented opening statements and appellant called her first witness Katherine Adelaide. While on the stand, Adelaide testified she "regularly" checks for council meeting notices and that she first saw notice for the meeting at issue "[o]n June 22 probably around noon." The court admitted a copy of the posted document, which announced the closed meeting, and Adelaide recounted what happened when she attempted to attend the meeting. She indicated that she was greeted at the door by the "[A]dministrative [A]ssistant, Lisa Harvey," who announced—"it's a closed session and you can't come in because it's not open."

Appellant's second witness, Lisa Harvey, the Administrative Assistant directly supervised by City Manager Henry Heine, noted she had no duties connected to Council meetings and that she had not taken a course on the Open Meetings Act. During cross-examination she also stated that she did not attend the June 22, 2016, assembly because she "was working on a project" late into the evening. Appellant asked Harvey if she "was assigned to open the door for those that needed to come in that night?" An inquiry to which Harvey responded, "[n]o."

The next witness called by appellant was Clara Kalman the "City Clerk." She detailed her responsibilities, stating that she gathers "all of the information for the council packets," and takes "the minutes" for both open and closed meetings. She described the required components of closed meetings notes, stating: the closed session report "would contain who attended the meeting, the reason for the closed meeting," and a record of any "vote taken." She also acknowledged having taken an "online course" regarding the Open Meetings Act. Kalman indicated she "did not" attend the June 22, 2016, meeting. She stated "[o]ur City Attorney [takes the minutes] and I simply type it into our template." Following that exchange, a copy of the minutes from the June 22, 2016, meeting was received into evidence.

Counsel for appellee cross-examined Kalman about her absence from the meeting and she indicated that a referendum petition was being processed that night, which required her attention since she was asked "to stay late." Kalman subsequently reflected on her duty to post notice for Council meetings. She stated both physical and digital notices were

posted for the June 22, 2016, session two days prior—declaring, "I have no reason to believe I wouldn't have done that."

Appellant then called the Mayor of Taneytown, James McCarron, who testified he had completed the "Academy of Excellence" program offered by the University of Maryland, which comprehensively covers the Open Meetings Act, and affirmed his familiarity with its requirements. When asked to describe the procedure for closing a Council meeting, Mayor McCarron indicated he first "consult[s] with the attorney to make sure that the reason for the closed meeting" complies with the statute. He has "staff announce the meeting according to the Maryland law" and once a quorum is present he "motion[s] to go into a closed session." Appellant asked, "[w]hen did you determine there would be a closed meeting on June the 22nd?" The mayor responded indicating the decision occurred:

> At the advice of counsel and he presented a letter that he wrote to your husband's lawyer concerning a suit that he was threatening to file against the town. Our counselor decided that we should probably have a closed meeting to discuss this matter. So it was notified.
>
> I don't remember the times or dates or hour or anything like that. I just know that's what prompted the need to have the closed meeting.

McCarron further addressed the emergent lawsuit stating:

> The letter from your husband's attorney seemed to indicate that we were trying to restrict Councilman Frazier's freedom of speech which, of course, was not the intent. The intent of the charter amendment that we filed was to add decorum and order to the meetings.
>
> Since Councilman Frazier was elected we had many disruptions in that order and decorum and it was an attempt to get a hold—of being able to conduct a meeting in a civil and productive way. It was not an attempt whatsoever to

> restrict freedom of speech.
>
> And, I think that's the—now that I've read the letter, that was the purpose of trying to get together in a closed session to decide, you know, how to react to a letter such as this.

Appellant then engaged in the following exchange with Mayor McCarron:

> [Appellant]: All right. Did you know when you set the date for the closed meeting that Councilman Frazier would be in Africa?
>
> [McCarron]: No.
>
> [Appellant]: Did you know that Councilman Frazier changed his schedule so that he could be at the regular meeting on June the 13th?
>
> [McCarron]: No, I didn't know that either. I know that our attorney was to recommend that he not be invited to attend. I did know that.

Mayor McCarron further stated he was "not aware" of the presence of any public citizens at the June 22, 2016, meeting. He stated the open meeting happened "[t]wo minutes before" the council's closed discussion.

On cross-examination, he confirmed a quorum was present at the June 22, 2016, meeting and that the public body proceeded to have a closed conference with their attorney to receive legal advice. While being questioned for the second time by appellant, the Mayor suggested the open meeting requirement was "simply a formality in order to go into closed session."

Councilmember Diane Foster was appellant's fifth witness. Foster explained she was well versed in the Open Meetings Act and that no open meeting was held before the closed session on June 22, 2016.

Councilmember Joseph Vigliotti also testified. He affirmed his familiarity with the

Open Meetings Act and the requirements for conducting closed meetings. Appellant asked Vigliotti if "the topic [was] the threatened litigation regarding the code of conduct?" He confirmed that was "[c]orrect." Appellant then asked if another subject discussed at the closed session related to the "referendum" and he indicated he did not "remember that at all." When questioned about public attendance at the vote leading up to the closed session, Vigliotti stated, "nobody can come watch us vote to go into a closed session." Appellant then interrogated Vigliotti on the council's motivation for having the June 22, 2016, closed meeting:

> [Appellant]: Were you aware that Councilman Frazier would be in Africa during the time of June the 22nd?
>
> [Vigliotti]: I knew he was going to be away but I didn't know exactly when he was going to be away.
>
> [Appellant]: Did you have a conversation with Councilman Frazier where he expressed concern that the [C]ouncil would meet when he was gone?
>
> [Vigliotti]: Councilman Frazier talks about secret meetings all the time.
>
> [Appellant]: So did he specifically talk about the fact that you may have one while he was away?
>
> [Vigliotti]: That I don't remember. But if, you know, as in the deposition if you're asking me if I ever went to him and said we would not have a closed session, no. I never went to Councilman Frazier and said we will not a [sic] closed session while you're away.

Councilmember Vigliotti confirmed City Manager Heine was present at the June 22, 2016, closed meeting along with other Councilmembers, the Mayor, and the City Attorney. When asked during cross examination about the purpose of the closed council conference

Vigliotti remarked that the meeting was urgent and addressed a perceived threat of litigation.

Appellant called Councilmember, Bradley Wantz, who testified he was "aware of" the Open Meetings Act although he never received any formal training on the law. He disclosed that he attended the June 22, 2016, meeting where the Mayor presided, he did not recall the reading of a statement before they entered a closed session, however, he remembered voting to close.

Councilmember Angelo Zambetti was appellant's final witness on the first day of trial. He testified that he received training on the Open Meetings Act via the Academy of Excellence program offered by the University Maryland. Zambetti indicated a vote was taken to close the meeting without the presence of any members of the public. Furthermore, he noted he "probably" did not know appellant was prohibited from attending the meeting and he indicated he did not know Councilman Frazier was out of town.

Day Two of the Hearing

The trial resumed the next day on August 1, 2017, and appellant called City Manager Heine, to the stand. He noted throughout his career he has acted as "a [C]ouncilman, [M]ayor pro tem, [and] [M]ayor," and indicated he participated in an Open Meetings Act online course. Heine stated he attended the meeting at issue and that he is "normally there present at all meetings" both "open and closed." While recounting what happened on June 22, 2016, he indicated that he told appellant, "this is a closed session" and "the public is not allowed at a closed session," effectively prohibiting her from attending. Furthermore,

he admitted no open meeting occurred. Heine discussed his role in managing the City Clerk. Indicating that "other than directing Clara Kalman" to post notices he has no other input in the process. Appellant then asked "[w]hy was there no notice sent for the meeting on June the 22[nd] inviting the public . . . ?" Heine responded, stating that, "[o]ver the course of time that I've been involved with the city, close to [thirty] years, in a closed session it's never been anyone from the public that wanted to come."

The City Attorney, Jack Gullo, began his testimony addressing his lengthy career in municipal government. Gullo stated he teaches at the Academy of Excellence program offered by the University of Maryland, he is aware of the mandates set forth by the Open Meetings Act, and he advises various towns on the statute. Appellant asked if "[t]here is a statement that is to be read at an open meeting before it's closed?" Gullo maintained that "[t]he presiding officer needs to make a statement as to why the meeting will be closed" and that it is necessary to cite "one of the exceptions in the statute."

Appellant then inquired about a letter sent by Gullo to Councilman Frazier's attorney regarding the closed session:

> [Appellant]: And so you prepared it and sent it based on your conversation?
>
> [Gullo]: With?
>
> [Appellant]: With the Mayor?
>
> [Gullo]: After I was told that there was going to be a closed session. That council had to be notified of that and when that happened, the issue that Mr. Frazier is represented by counsel came up and I informed him that the proper protocol the City follows is that counsel, meaning legal counsel, has counsel to counsel

contact.

So any notification to Mr. Frazier would need to go through his legal counsel if it came from me. So, therefore, the letter was prepared and I was in a quandary at that time because it is not usual that we have a city [C]ouncilman represented by private counsel.

So the Rules of Professional conduct require that I notify the counsel, the legal counsel, and not Mr. Frazier and, hence, the letter was sent out to notify them of the meeting.

[Appellant]: And the decision that Mr. Frazier should not be invited to the meeting was made by whom?

[Gullo]: As the letter clearly states I basically informed them as a courtesy of what the subject would be and the fact that it was adversarial to the City and as part of my job, even though Mr. Frazier is represented by counsel, legal counsel, is to inform them of the implications of ordinances in the town. The City has an ethics ordinance which basically states if a [C]ouncilmember has a conflict of interest because they're related to a party, which would be you, that they would be prohibited from participation.

So as my responsibility to Mr. Frazier as the City's attorney in pointing them that his participation would create a conflict of interest which would violate the ethics ordinance. All of that basically stating that he wouldn't be able to come to the meeting because it was going to be adversarial to him.

[Appellant]: Is that decision a decision that you as an attorney should make or that a [C]ouncilman should decide whether he thinks he has a conflict of interest?

[Gullo]: I don't make [sic] decision. I just advise. I advise my client, which is Councilman Frazier, through his attorney, of the issue that was existing. If he chose to attend, then they would deal with it at that time. I just advise. I don't make decisions.

Gullo confirmed he recorded the notes for the June 22, 2016, private Council discussion

and noted the summary of the closed meeting was not in the minutes of the following three open sessions because "[t]hey weren't prepared." Appellant inquired about the mayor's absence from the notes and Gullo stated that "[i]t was an oversight."

On cross examination, Gullo explained that he gives the City Clerk, Clara Kalman, "the highlights" of what must be included in the notice and she then prepares the document. He further explained that he went on vacation after the closed meeting, which delayed the presentment of the notes.

Appellant then testified. She stated she attempted to attend the June 22, 2016, meeting, but was turned away by City Manager Heine who indicated the public could not appear at a closed session. A brief cross-examination was conducted, appellant rested her case, and thereafter appellee's attorney motioned for judgment. The motion was denied following brief argument from both parties. Appellee's lawyer declining the opportunity to call additional witnesses, renewed his motion for judgment. The court then heard final arguments.

The Trial Court's Decision

Ruling immediately following closing argument, the court held that an open meeting had occurred prior to the closed session as witnesses testified that "there was a vote prior to going into . . . closed session," reasoning that "by definition" the vote "had to be during an open session." The court found the Council violated § 3-302 of the Open Meetings Act when it failed to notify the public "that there was an open session at which they could

attend to hear the vote."[2] The court also found the Council did not adhere to the requirements under § 3-305(d)(2) since "there was no testimony that a written statement of the reason for closing the meeting including a citation of authority" was provided.[3] The

[2] "§ 3-302 Notice.

(a) Before a meeting in a closed or open session, a public body shall give reasonable advance notice of the session.
(b) Whenever reasonable, a notice under this section shall:
(1) be in writing;
(2) include the date, time, and place of the session; and
(3) if appropriate, include a statement that a part or all of a meeting may be conducted in a closed session.
(c) A public body may give the notice under this section as follows:
(1) if the public body is a unit of State government, by publication in the Maryland Register;
(2) by delivery to representatives of the news media who regularly report on sessions of the public body or the activities of the government of which the public body is a part;
(3) if the public body previously has given public notice that this method will be used:
(i) by posting or reposting the notice at a convenient public location at or near the place of the session; or
(ii) by posting the notice on an Internet Web site ordinarily used by the public body to provide information to the public; or
(4) by any other reasonable method.
(d) A public body shall keep a copy of a notice provided under this section for at least 1 year after the date of the session."

[3] "§ 3-305 Closed sessions.
. . . .
(b) Subject to subsection (d) of this section, a public body may meet in closed session or adjourn an open session to a closed session only to:
. . . .
(7) consult with counsel to obtain legal advice;
(8) consult with staff, consultants, or other individuals about pending or potential litigation[.]
. . . .

court stated the Council's protracted production of the June 22, 2016, meeting notes contravened the statutory mandate pursuant to § 3-306(c)(2).[4] Furthermore, the court found that no language in the Open Meetings Act prevented the City Council from including "members of its staff" at closed sessions and ruled that the presence of the City Manager was not a violation § 3-305(b).

Thereafter, the court heard arguments on the meaning of willful as applied in the statute. Appellant suggested that the Council's actions were willful and motivated by malice because they held a "meeting that the public was not aware of at a time when the councilman [her husband], who is the minority councilman, would not be there." The court rejected appellant's proposition, as no testimony or evidence was offered that the Council knew her husband could not be there on the day of the meeting. Appellant continued to

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(d)(1) Unless a majority of the members of a public body present and voting vote in favor of closing the session, the public body may not meet in closed session.

(2) Before a public body meets in closed session, the presiding officer shall:

(i) conduct a recorded vote on the closing of the session; and

(ii) make a written statement of the reasons for closing the meeting, including a citation of the authority under this section, and a listing of the topics to be discussed.

(3) If a person objects to the closing of a session, the public body shall send a copy of the written statement to the Board.

(4) The written statement shall be a matter of public record.

(5) A public body shall keep a copy of the written statement for at least 1 year after the date of the session."

[4] "§ 3-306 Minutes; tape recordings.

. . . .

(c)(1) The minutes shall reflect:

(i) each item that the public body considered;

(ii) the action that the public body took on each item; and

(iii) each vote that was recorded.

urge the court to find the Council willfully violated the Act and argued that the willfulness requirement is met when "[a party that] know[s] better . . . [acts] anyway." In response, appellee maintained that willfulness "is [a] knowing[] disregard[] [for] . . . the requirements of the Open Meetings Act, [an] intentional[] and deliberate[] violat[ion]."

The court finding for appellee explained its reasoning on the record, stating:

> So, the one definition of willful would mean I intended to do it, you know, or not do it. That would be a very broad definition and I think under that definition the Court would find that there were violations that should result in a fine under the statute.
> . . . .
>
> With regard to these various violations though, the 3-302 violation, you know, the Mayor testified, well, you know, we did—and I think the Mayor and Mr. Gullo testified, well you know, we did not think there was going to be any business that was going to be of any interest to anyone. We are just going to vote on whether to go into closed session.
>
> I disagree with the notion that that is not of public interest. I think it is of public interest but I believe that the definition of willful, as it should apply in this case, should be what I thought Ms. Frazier was going to do during this trial and that is pull out the smoking gun.
>
> Say, Judge, they did these for nefarious reasons. They had a second agenda in mind. This is just a cover-up for what they really wanted to do. And I do not find that these violations, again, not given [sic] the notice of the open session that should have occurred before the closed session, not giving the written statement, not listing the Mayor's name, I find that those are negligent actions . . . .

The trial court further stated:

> And, again, the testimony was from at least a couple of the witnesses that this was an extraordinary situation. That they do not generally do this. That they have an open meeting and they vote to go into closed session at the open meeting that is regular and scheduled and that is the way it is generally done.

> That this was an extraordinary action which was called for by Mr. Frazier's stated intent through his legal counsel if you pass this ordinance, I'm going to sue you. And you know, the Mayor thought it needed immediate actions so he called together this meeting and, again, there were technical violations [,]but I do not find that they are willful for the purposes of subverting the purpose of the statute which is to give notice to the people.
>
> As I said, the proof that notice was given was the fact that Ms. Frazier and Ms. Adelaide were actually there. Yes, they were turned away but what they were turned away, again, was the vote that was taken to go into closed session not the closed session itself. They would not have been able to attend that.
>
> . . . .
>
> It was an extraordinary circumstance and they just did not comply with all the technicalities of the rules they should have . . . .

The court ultimately held the actions of the Council were not willful. Despite its findings that the Council acted in violation of the Act on three occasions, the court entered judgment in favor of the appellee and this appeal followed.

STANDARD OF REVIEW

The applicable standard of review for non-jury trial litigation is governed by Maryland Rule 8-131(c), which states in relevant part:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witness.

We exercise *de novo* review in assessing the trial court's legal decisions, "to which we accord no deference and we review to determine whether they are legally correct." *Cattail Assocs. v. Sass*, 170 Md. App. 474, 486 (2006).

DISCUSSION

I. The court did not err when it held the Council did not willfully violate the Open Meetings Act.

Appellant argues the court erred when it determined the Councilmembers' technical violations of the Open Meetings Act were not willful and, thus, erred in failing to issue a penalty. In analyzing § 3-402 of the Open Meetings Act, appellant asserts that by using "such words as nefarious, the [c]ourt renders meaningless" the plain language of the law. Appellant contends the court ignored "the fact that when the General Assembly requires a finding of bad faith or intent, it knows how to employ appropriate language." Moreover, appellant relies on *Suburban Hospital, Inc. v. Maryland Health Resources Planning Commission*, to support her proposition that the definition of willful under the Act requires "intentional conduct" and nothing more. 125 Md. App. 579, 590–96 (1999).

Appellee argues the plain language of § 3-402 of the Open Meetings Act, which states that a public body must "willfully meet with knowledge" to be subject to a penalty, indicates "a mistake or mere negligence—is insufficient to satisfy the standard to impose penalties." Suggesting the "court was correct that 'willfully' as used in this case includes scienter," appellee maintains the standard at issue requires evidence of malicious intent. Appellee asserts that the purpose of the statute informs its meaning and contends that the law "is intended to be a guide for open government, not a mechanism for punishing mistakes."

Under § 3-402, "a public body that willfully meets with knowledge that the meeting

is being held in violation of this subtitle is subject to a civil penalty."[5] Here, we are tasked with analyzing the statute to "discover and effectuate the actual intent of the legislature" by examining the meaning of willful in the context of the Act. *Deville v. State*, 383 Md. 217, 223 (2004).

According to Black's Law Dictionary, "[a] voluntary act becomes willful, in law, only when it involves conscious wrong or evil purpose on the part of the actor, or at least inexcusable carelessness, whether the act is right or wrong." (10th ed. 2014). Black's Law Dictionary indicates "[t]he term *willful* is stronger than voluntary or intentional; it is traditionally the equivalent of *malicious, evil,* or *corrupt*." *Id.* Moreover, Maryland case law further elucidates the way willfulness operates in the Open Meetings Act and its meaning as employed in that specific context. For example, in *Community and Labor United for Baltimore Charter Committee (CLUB) v. Baltimore City Board of Elections*, the Court of Appeals held the Baltimore City Council willfully violated the Open Meetings Act when the Council President "deliberately omitted" information customarily provided

[5] "§ 3-402 Penalty.

(a) In accordance with § 3-401 of this subtitle, a public body that willfully meets with knowledge that the meeting is being held in violation of this subtitle is subject to a civil penalty not to exceed:
    (1) $250 for the first violation; and
    (2) $1,000 for each subsequent violation that occurs within [three] years after the first violation.
(b) When determining the amount of a fine under subsection (a) of this section, the court shall consider the financial resources available to the public body and the ability of the public body to pay the fine."

to the media, failed to give notice to the public, and held a closed meeting without a vote. 832 A.2d 804, 810–12 (2003) (finding that the "council effectively prevented members of the public from observing most of the deliberations on the issue, in direct contravention to the expressly stated policy of the Open Meetings Act").

In *Suburban Hospital, Inc.*— cited and inaccurately relied on by appellant— Suburban Hospital alleged its governing commission improperly presented and considered an amendment to a proposed open-heart surgery regulation at a closed meeting. 125 Md. App. 579, 583–86 (1999). There, we analyzed SG § 10-511—the previous version of § 3-402 of the Open Meetings Act. *Id.* at 592–94. We distinguished SG § 10-510 from SG § 10-511 noting that in the context of the former, "'willfully,' . . . is more accurately defined as 'non-accidentally.'" *Id.* at 592. Whereas in the context of the latter, we recognized that § 10-511 "requires a higher standard of violative conduct than § 10-510, which has no scienter requirement." *Id.* Specifically, we found the dual requirement that a member of a public body "willfully participates in a meeting of the body *with knowledge* that the meeting is being held in violation of [the Act]," demonstrates that § 10-511 requires a specific intent to violate the law. *Id.* at 592–96 (internal citations and quotations omitted). Thus, our analysis in *Suburban Hospital* is contrary to appellant's contention that the language, "willful" and "with knowledge," appearing in § 3-402 of the Open Meetings Act refers to merely intentional conduct. Moreover, *Suburban Hospital, Inc.*, was vacated subsequently as moot and resultingly has no precedential value.[6] *See Preston v. State*, 444

[6] 125 Md. App. 579, 590–96 (1999).

Md. 67, 88 (2015) (finding that a vacated decision of the Court of Special Appeals has "utterly no precedential value") (quoting *Dep't of Health & Mental Hygiene v. Kelly,* 397 Md. 399, 446, 918 A.2d 470, 497–98 (2007) (Wilner, J., concurring)). We hold that "willful" in the context of § 3-402 requires a finding of scienter, i.e. that the accused party acted knowing that the action violated the Open Meetings Act.

In the matter before us, the trial court found the Taneytown City Council acted "negligently," in conducting the June 22, 2016, meetings. The court further held there was no evidence or testimony suggesting the Council had a "nefarious" or improper motivation. The court heard testimony from Katherine Adelaide, City Clerk Kalman, and the appellant which proved notice, albeit deficient notice, was posted advertising the closed meeting. Administrative Assistant Harvey, who turned away Adelaide, testified that she was not trained in the Open Meetings Act. City Manager Henry Heine, who prohibited the appellant from attending, had extensive experience with the Open Meetings Act, but told the court "it's never been anyone from the public that wanted to come," attributing his unfamiliarity with the Act in that context to the lack of public interest in procedural votes. Mayor McCarron, Councilman Vigliotti, and Councilman Zambetti maintained the June 22, 2016, meeting date was scheduled because of the urgent nature of the potential litigation, the immediate need to consult with legal counsel, and denied being motivated by Councilman Frazier's absence. The court further heard testimony from City Attorney Jack Gullo that Councilman Frazier was barred from attending the closed meeting on June 22, 2016, because his presence would have been a conflict of interest since he was a party

to the lawsuit against the Council—the very lawsuit which the council sought to discuss at the closed meeting. After consideration of all the testimony and evidence presented the court held "that there were these technical violations," but found the Council's actions were not willful.

On review, we defer to the trial court's finding of fact because the trial court, being in the original position, "had the opportunity to view the witnesses, observe the parties, and weigh the evidence presented throughout the proceeding." *Barton v. Hirshberg*, 137 Md. App. 1, 21 (2001). Here, the court carefully judged the credibility of the witnesses and made its factual findings based on those observations. We therefore affirm the trial court's factual findings as to willfulness.

II. The court erred when it found the City Council held an open meeting prior to the closed session.

Appellant asserts the court erred when it found an open meeting occurred after hearing testimony that members of the public were prohibited from attending. Appellant argues that an open meeting occurs only when members of the public are present. She cites § 3-102(c) of the Open Meetings Act, which states "it is the public policy of the State that the public be provided with adequate notice of the time and location of meetings of public bodies." Appellant also suggests the court misinterpreted the definition of an open meeting since § 3-301 indicates, "[e]xcept as otherwise expressly provided in this title, a public body ***shall*** meet in open session." Appellee maintains the "record supports the trial court's finding that an open meeting in fact took place on June 22, 2016," prior to the closed session.

The definitional clause of the Open Meetings Act, § 3-101(g), specifies that a meeting is the "conven[ing] of a quorum of a public body to consider or transact public business."[7] However, the statute does not ascribe a meaning to the term "open." But, § 3-102 requires "public business [to] be conducted openly and publicly," provides that "the public be allowed to observe the performance of public officials," and affirms the public's right to view "the deliberations and decisions that the making of public policy involves."[8]

[7] "§ 3-101 Definitions.

. . . .

(g) 'Meet' means to convene a quorum of a public body to consider or transact public business."

[8] "§ 3-102 Legislative policy.

(a) It is essential to the maintenance of a democratic society that, except in special and appropriate circumstances:
(1) public business be conducted openly and publicly; and
(2) the public be allowed to observe:
(i) the performance of public officials; and
(ii) the deliberations and decisions that the making of public policy involves.

(b) (1) The ability of the public, its representatives, and the media to attend, report on, and broadcast meetings of public bodies and to witness the phases of the deliberation, policy formation, and decision making of public bodies ensures the accountability of government to the citizens of the State.

(2) The conduct of public business in open meetings increases the faith of the public in government and enhances the effectiveness of the public in fulfilling its role in a democratic society.

(c) Except in special and appropriate circumstances when meetings of public bodies may be closed under this title, it is the public policy of the State that the public be provided with adequate notice of the time and location of meetings of public bodies, which shall be held in places reasonably accessible to individuals who would like to attend these meetings."

Thus, it is clear ensuring public access to local government is the overarching purpose of the Act, and it follows that an open meeting is a meeting that the public is entitled to attend.

In the matter before us, the court erred in its conclusion regarding the testimony about the open meeting. The court stated "[a]ll of the witness [sic] testified, yeah, we went into open session and we voted to go into closed session." However, that statement did not accurately reflect the testimony given. Councilmember Foster and City Manager Heine stated no open meeting took place. Mayor McCarron indicated he believed the open meeting requirement, which mandates that a vote occur to enter was simply a formality. Other members of the council confirmed that a vote to enter a closed session took place at a non-public open meeting. The court ruled that "based on the evidence presented to it here there was an open meeting," stating since witnesses testified a vote to enter the closed meeting occurred "by definition that could only have occurred during an open session."

The court mischaracterized the testimony as uncontroverted. That is not supported by the record. We find the court's error was harmless and non-prejudicial because the statute requires willful conduct. Appellant failed to prove willfulness or present any evidence that the violations of the statute were anything other than carelessness.

III. The court did not err when it found the City Council did not violate the Act by holding a closed meeting with the City Manager present.

Appellant argues that § 3-305(b)(7) of the Open Meetings Act, which allows public bodies to meet in a closed meeting when obtaining legal advice, was violated because City Manager Heine participated in the June 22, 2016, meeting. According to her, "the

exception claimed in the 'Notice of Closed Meeting'. . . was only (b)(7)," which permits the Council to only "consult with counsel to obtain legal advice." In response, appellee contends there is no authority supporting the proposition that the presence of a staff member at a closed session violates the Act.

It is uncontroverted that the Council posted notice regarding the June 22, 2016, meeting and the record of the closed session stated it was pursuant to § 3-305(b)(7). However, the City Manager was also present for the closed session. The court asked appellant to establish how the mere presence of the City Manager was a violation of the Act. Appellant pointed to the definition of a public body under § 3-101, which states a body "consists of at least two individuals" and is created by the "Maryland constitution" or "a State statute." The court found appellant's claim was not substantiated and did "not find a violation there."

We affirm the court's finding that no violation occurred when the City Manager attended the closed meeting simply because the notice referred to subsection (b)(7), which did not include staff. Moreover, §3-305(b)(8) specifically provides for the presence of staff at closed meetings. No statutory provision exists under the Open Meetings Act which prohibits staff members from attending closed sessions unless notice is provided and no case law supports that proposition. We find the court correctly applied the law and made no erroneous factual determinations.

IV. The court did not err by failing to address litigation reimbursement.

Appellant contends the court erred by neglecting to discuss "[a]ppellant's requests to recover the costs of litigation." Pointing to § 3-401 of the Open Meetings Act, appellant asserts the court should assess litigation reimbursement since "violations under §§ 3-301, 3-302, 3-303, 3-305, or 3-306(c)" may result in an award. Moreover, appellant indicates "this remedy does not require a finding of 'willfulness.'"

Appellee argues this issue "is not preserved for this [c]ourt's review" because appellant failed to raise the issue regarding litigation reimbursement during trial. We agree. Maryland Rule 8-131 states an "appellate court will not decide [an] issue unless it plainly appears by the record to have been raised in or decided by the trial court." The record is devoid of any mention of litigation reimbursement by either party. We can find nothing in the record to support appellant's argument.

Even if the issues were preserved, the trial court did not err in failing to address litigation reimbursement. Section 3-401 of the Open Meetings Act, states in relevant part that, "[a] court may. . . as a part of its judgment assess against any party reasonable counsel fees and other litigation expenses that the party who prevails in the action incurred." Thus, the Act, through the use of the permissive verb "may," allows courts to use their discretion in awarding litigation expenses. *See Board of Physician Quality Assurance v. Mullan*, 381 Md. 157, 166 (2004) (finding "[t]he word 'may' is generally considered to be permissive, as opposed to mandatory, language"). In *Malamis v. Stein*, we held "the legislature intended that trial judges determine, in their discretion, whether the circumstances warrant the award of attorney's fees" under the Open Meetings Act. 69 Md. App. 221, 227 (1986).

Moreover, in *Armstrong v. Mayor and City of Council of Baltimore*, the Court of Appeals reaffirmed the proposition "that discretion remains with trial judges" when "awarding attorney's fees" in the context of the Open Meetings Act. 409 Md. 648, 693 (2009).

Further, the fundamental principle behind an award of attorney's fees presumes the existence of an attorney-client relationship. *See Frison* at 109 ("[r]equiring that an attorney-client relationship exist before allowing the recovery of attorney fees avoids the public perception of unfairness in the legal system"). A litigant must have employed an attorney to receive fees for legal services; a self-represented litigant "has not 'incurred' any actual expenses in the nature of attorney's fees." *Frison v. Mathis*, 188 Md. App. 97, 103 (2009). Here, appellant is not entitled to attorney's fees as she did not employ an attorney and she has not identified here or in the previous proceeding the nature of any other type of litigation expenses. Moreover, § 3-401(d)(5)(i) of the Open Meetings Act states the prevailing party may obtain the fees they have "incurred." Appellant was neither the prevailing party nor presented expenses incurred. We hold the court did not abuse its discretion in failing to make such an award.

JUDGMENTS OF THE CIRCUIT COURT FOR CARROLL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.