

IN THE CHANCERY COURT FOR HAMILTON COUNTY, TENNESSEE

HELEN BURNS SHARP AND THE STATE )  
OF TENNESSEE *ex rel.* HELEN BURNS )  
SHARP, ) NO. 13-0048  
)  
)  
Plaintiff, )  
)  
VS. )  
)  
)  
THE INDUSTRIAL DEVELOPMENT )  
BOARD OF THE CITY OF )  
CHATTANOOGA, THE CITY OF ) PART 1  
CHATTANOOGA AND HAMILTON )  
COUNTY, TENNESSEE )  
)  
Defendants, )

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CITY OF CHATTANOOGA AND )  
INDUSTRIAL DEVELOPMENT BOARD )  
OF CITY OF CHATTANOOGA )  
)  
Third Party Plaintiffs, )  
)  
VS. )  
)  
MBSC BLACK CREEK, LLC AND )  
IDB INVESTOR, LLC, )  
)  
Third Party Defendants. )

MEMORANDUM OPINION AND ORDER

This cause came on to be heard on September 3, 2014, upon "Plaintiff's Application for Award of Attorneys' Fees Pursuant to Rules 37.03 and 54.04 of the Tennessee Rules of Civil

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Procedure” and upon “Reply to Plaintiff’s Application for Award of Attorneys’ Fees” submitted by Defendant, The Industrial Development Board of the City of Chattanooga, and upon “Plaintiff’s Reply to Industrial Development Board’s Response to Plaintiff’s Application for Award of Attorneys’ Fees Pursuant to Rules 37.03 and 54.04 of the Tennessee Rules of Civil Procedure,” and upon argument of counsel for Helen Burns Sharp ( “Plaintiff”) and counsel for The Industrial Development Board of the City of Chattanooga, ( “Defendant” or “IDB”). Plaintiff’s application seeks discretionary costs and expenses, including attorney’s fees, that “she incurred in connection with establishing the truth of certain facts that Defendant, the Industrial Development Board of the City of Chattanooga (the “IDB”) denied in its Responses to Plaintiff’s Requests for Admission.” This Court took the matter under advisement.

#### **PERTINENT FACTUAL AND PROCEDURAL HISTORY**

On January 29, 2013, Plaintiff filed a “Petition for Access to Public Records” from the IDB and, in her prayer for relief, sought an award of her reasonable costs, including attorneys’ fees and other general relief. On February 28, 2013, Plaintiff filed a “First Amended Petition for Access to Public Records and Complaint in the Nature of Quo Warranto and for Declaratory Judgment” against the IDB, the City of Chattanooga and Hamilton County (“Defendants”) seeking, inter alia, a declaration that the actions of the IDB in granting a TIF loan relative to a proposed “Black Creek Development,” and the actions of the City of Chattanooga and Hamilton County in reliance thereon, should be declared null, void, and of no legal effect as such were in violation of the “Sunshine Law”, Tenn. Code Ann. 8-44-101, *et seq.* Plaintiff further sought an award of “attorneys’ fees, costs and expenses, all as may be

provided by law including, but not limited to, court costs and discretionary costs” as well as general relief. (Prayer for Relief to Amended Petition at Paragraphs p and q)

On April 26, 2013, Plaintiff served the IDB with Requests for Admission (hereinafter “RFA”). The IDB failed to file responses to the RFA, therefor under operation of Rule 36, the requests were deemed admitted. On August 15, 2013, the IDB then filed a Motion for Enlargement of Time or Alternatively to Withdraw Admissions. This Court granted IDB’s motion and allowed Defendant to file responses to Plaintiff’s RFA.

Plaintiff at RFA 76 requested that the IDB admit that:

After the IDB received the Second Qualified Masterson Letter, private meetings and deliberations occurred among and between the directors on the IDB and the IDB Attorney regarding the Unqualified Opinion Letter Requirement and whether additional public meetings would be conducted relative to closing discussion on the satisfaction of that Requirement (these private meetings and deliberations identified in this paragraph are collectively referred to herein as the “Secret IDB Meetings”).

The IDB denied RFA 76 but added, “However, it is admitted that the IDB attorney discussed relevant matters with IDB board members.”

Plaintiff at RFA 82 further requested that the IDB admit that:

The IDB conducted private meetings, during which the directors of the IDB decided to approve and/or execute the Loan Documents. <sup>1</sup>

The IDB denied RFA 82.

On June 20, 2013, Defendants filed a third-party action against MBCS Black Creek, LLC and IDB Investor, LLC.

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<sup>1</sup> The term “Loan Documents” was defined in Plaintiff’s RFA as the final documents providing a TIF loan to the Developer relative to the Proposed Black Creek Development.

On June 5, 2014, Defendants filed a “Motion for Summary Judgment” that was subsequently adopted by the third-party defendants. On July 3, 2014 Plaintiff filed “Plaintiff’s Response to Defendants’ Statement of Undisputed Material Facts Pursuant to Tennessee Rule of Civil Procedure 56.03”. On July 9, 2014, Plaintiff filed “Plaintiff’s Response to Defendants’ Motion for Summary Judgment” and filed “Plaintiff’s Amended Response to Defendants’ Statement of Undisputed Material Facts Pursuant to Tennessee Rule of Civil Procedure 56.03”. This Court heard argument on Defendants’ motion for summary judgment on July 10, 2014.

On July 16, 2014, this Court entered an Order of Final Judgment in favor of Plaintiff and against the Defendants. In the Order the Court made, inter alia, the following findings:

*The opinion letter {Mr. Masterson’s} was not delivered to the board members in a public meeting nor did IDB vote in public to accept Mr. Masterson’s letter as an “unqualified” opinion letter. . . . The court holds that the Open Meetings Law was violated and the IDB’s action was “null and void.”*

*In the present case, Ms. Sharp “won.” The court has declared null and void IDB’s final approval of the EIP and TIF grant’s being funded by the note and other papers completing the process.*

*(7) The record is without dispute that IDB approved the note and final documents implementing the third-party Defendant’s IEP and TIF subject to approval by the attorney general or an unqualified opinion letter of counsel . . . IDB never had a public meeting to confirm and announce its prior decision based upon the condition subsequent being satisfied by Mr. Masterson’s letter . . . .*

*(8) Ms. Sharp had accused IDB of secret meetings in its consideration of the two opinion letters from Mr. Masterson and alleged such violated the open Meeting Law, which meant its action should be declared null, void, and of no effect and the court agrees with her;*

*(9) The court has sua sponte granted Ms. Sharp’s prayer and declared that IDB’s resolution granting TIF based upon the third-party Defendants’ EIP and approving the note and other documents is null and void and of no legal effect and the court takes this action because the*

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2 Chancellor Brown, who entered the Order of July 16, 2014, retired on August 31, 2014.

*same result would have occurred even after two and one-half (2 1/2) days of trial due to the violation of the Open Meetings Law . . . .*  
Order, 6-12.

On August 14, 2014, third-party defendants' MBSC Black Creek, LLC and IDB Investor, LLC filed a Notice of Appeal from this Order.

For purposes of the record, Plaintiff submitted as Exhibit C to her application for fees a copy of an audio recording of an August 15, 2014, IDB meeting. This Court did not consider the recording in ruling on this application as evidence obtained post-judgment.

## LEGAL ANALYSIS

### Jurisdiction

Plaintiff seeks an award of costs and fees pursuant to Tenn. R. Civ. P. 37.03 and 54.04. Defendant contends that this Court lost jurisdiction to entertain Plaintiff's Rule 37.03 application for attorneys' fees upon the filing of the Notice of Appeal. Defendant concedes that the Court retains jurisdiction to award discretionary costs pursuant to Rule 54.04. <sup>3</sup>

Tenn. R. App. P. 3(a) states:

In civil actions every final judgment entered by a trial court . . . is appealable as of right . . . if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable . . . .

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<sup>3</sup> A party requesting discretionary costs shall file and serve a motion within thirty (30) days after entry of judgment. The trial court retains jurisdiction over a motion for discretionary costs even though a party has filed a notice of appeal. Tenn. R. Civ. P. 54. The IDB further admits that this court has discretion to award costs for the deposition of Richard J. Ebersole.

Tenn. R. App. P. 4(d) states:

A prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof.

Thus the issue is whether the July 16, 2014, Order, that did not address Plaintiff's requests for fees is properly a "final" judgment for purposes of appeal.

In Wilkes v. Shaw Enterprises, LLC, No. M206-01014-COA-R3-CV, 2008 WL 695882 (Tenn. App. Mar. 14, 2008) plaintiffs sued their contractor for defective construction. The chancellor found that the defendant breached the contract and awarded Plaintiffs damages. The Plaintiffs filed a Notice of Appeal to challenge the amount of the damages. Three days later the Plaintiffs filed in the trial court a motion for costs which included a request for expert fees and attorney's fees. The chancellor awarded the costs for expert fees but denied the plaintiffs' request for attorney's fees finding that plaintiffs' filing of the Notice of Appeal waived their issue of attorney's fees and divested the court of jurisdiction. Plaintiffs filed an additional notice of appeal in which they appealed this second Order ruling on their attorneys' fees.

The court of appeals noted that it was undisputed that the plaintiffs had requested attorney's fees in their complaint. *Id.* at 11. The appellate court also noted that the chancellor failed to address the issue of attorneys' fees in its original Order. *Id.* at 12. Therefore the court of appeals held that under Tenn. R. Civ. P. 3(a) the Order, which appeared to be a final judgment, was in fact not the final judgment and not yet appealable. The court further held that the chancellor's order would not be an appealable final judgment until resolution of all the claims, rights and liabilities of the parties. *Id.*

In the instant case, as in Wilkes, it is undisputed that Ms. Burns sought her reasonable costs, including attorneys' fees, court costs and discretionary costs in her amended petition. The factual basis for Plaintiff's Rule 37 claim for attorneys' fees did not arise until July 16, 2014, when this Court ruled that the IDB had violated the Open Meetings Law. As in Wilkes, this Court did not address Ms. Burns' attorneys' fee issue in that Order. Plaintiff had not filed her application for award of attorneys' fees prior to third-party defendants filing their Notice of Appeal. Presently, Ms. Burns' claim for expenses and attorney's fees remains adjudicated. As such, pursuant to Tenn. R. Civ. P. 3(a) the July 16, 2014, Order is not in fact a "final" order, and is not appealable until resolution of all the claims, rights and liabilities of the parties. Therefore, the filing of the Notice of Appeal does not divest this Court of its jurisdiction to adjudicate Ms. Burns' fee request. In fact this Court not only has jurisdiction to entertain both Plaintiff's Rule 37.03 application for award of attorney's fees and her Rule 54.04 application for discretionary costs, but must rule on these matters before the judgment may be properly appealed.

As to Plaintiff's application for costs, Tenn. R. Civ. P. 54.04 provides, costs not included in the bill of costs prepared by the clerk are allowable in the court's discretion. On July 16, 2014, this Court ruled, "In the present case, Ms. Sharp "won." The court has declared null and void IDB's final approval of the EIP and TIF grant's being funded by the note and other papers completing the process. Order, 6. As prevailing party, this Court holds that Plaintiff is entitled to her discretionary costs.

**Plaintiff's Rule 37.03 Request**

Plaintiff seeks an award pursuant to Tenn. R. Civ. P. 37.03 of the costs, including attorneys' fees, that she incurred, "in connection with establishing the truth of certain facts that Defendant, the Industrial Development Board of the City of Chattanooga (the "IDB") denied it is Responses to Plaintiff's Requests for Admission."

Tenn. R. Civ. P. 37.03(2) states:

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making the proof including reasonable attorney's fees.

Rule 37 continues, "The court *shall* make the order" requiring the other party to pay the requesting party unless it finds that (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (4) there was other good reason for the failure to admit. (emphasis added)

Further Tenn. R. Civ. P. 26.05(2) states:

A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which the party (a) knows that the response was incorrect when made; or (b) knows that the response thought correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

IDB asserts that Chancellor Brown's ruling was a novel first impression interpretation of the requirements of the Open Meetings Act. As such IDB argues it should not be held liable to Plaintiff for attorney's fees for failing to admit a violation of the Open Meetings Act, because it had reasonable grounds to believe it might prevail on the matter, citing Himmelfarb v. Allian, 2014 WL 411655 (Tenn. Ct. App. Jan. 31, 2014).



In Himmelfarb, the plaintiffs in a malicious prosecution action denied that a voluntary nonsuit is not a termination on the merits. On appeal the Tennessee Supreme Court determined that a voluntary nonsuit is not a termination on the merits. However, because it was a case of first impression on that issue, the plaintiffs were not sanctioned for their denial.

Here however, IDB denied it violated the Open Meetings Act. Whether a violation of the Open Meetings Act occurred is not a novel question of first impression.<sup>4</sup> Numerous cases interpreting the statute are cited in the annotations following Tenn. Code Ann. Section 8-44-101 et seq. Moreover, whether a violation of the Open Meetings Act occurred is not a complex issue of law. A valid open meeting, requires that the public be given advance notice, that minutes of the meeting be recorded and available for public inspection, and, that if any votes are taken, the votes shall be by public ballot or by vocal expression of “aye” or “nay” and the result of those individual votes are to be recorded. Tenn. Code Ann. Section 8-44-102, 103, and 104. It is not difficult to determine whether an open meeting occurred or whether a secret meeting in violation of the act occurred. It is simply a question of fact.

IDB’s correctly cites Himmelfarb for the proposition that a party can deny a request to admit if its denial was made on a good faith belief based on case law existing at the time of the response. Here, however, IDB cites no existing case law for the proposition that IDB could approve a necessary requirement to Tax Increment Financing, in this case an unqualified opinion letter,

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<sup>4</sup> Black’s Law Dictionary (Thompson Reuters, 9<sup>th</sup> ed. 2009) defines case of first impression as a case that presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction.

without public notice of the meeting to vote on the Masterson opinion, without record of the minutes of the meeting, without a public vote on the opinion and without a record of the individual votes on the opinion. Hence the IDB's reliance on Himmelfarb is misplaced.

Next IDB argues that although Ms. Sharp claims that a "secret meeting" occurred, Chancellor Brown's opinion is limited to the fact that there was no "public meeting." IDB's interpretation of the Order is not well-founded. Contrary to Defendant's assertion, this Court did not merely hold that there was no public meeting to approve the TIF. Instead after applying the requirements of the Open Meetings Act to the facts of this case this Court ruled,

*The record is without dispute that . . . IDB never had a public meeting to confirm and announce its prior decision based upon the condition subsequent being satisfied by Mr. Masterson's letter. . . The opinion letter {Mr. Masterson's} was not delivered to the board members in a public meeting nor did IDB vote in public to accept Mr. Masterson's letter as an "unqualified" opinion letter. . . . The court holds that the Open Meetings Law was violated and the IDB's action was "null and void.*

Order, 10. This Court further held that, "**Ms. Sharp had accused IDB of secret meetings** in its consideration of the two opinion letters from Mr. Masterson and alleged such violated the open Meeting Law, which meant its action should be declared null, void, and of no effect **and the court agrees with her.**" Order, 11. (emphasis added) Thus this Court clearly ruled that the IDB held secret meetings in consideration of the Masterson opinion letter and as a result, declared the IDB's resolution granting TIF to be null, void, and of no legal effect.

Notwithstanding the clarity of this Court's Order, Defendant cites Tenn. Code Ann. Section 8-44-102(b) (2) for the definition of "meeting" as the convening of a governing body of a public body for

which a quorum is required and argues that “[t]here is no evidence of a “secret meeting” in the record of this cause.” The totality of the evidence before this Court and the relevant precedent do not support IDB’s argument.

The court in Johnston v. Metropolitan Government of Nashville & Davidson County, 320 S.W.3d 299, 309-312. (Tenn. App. 2009), held that a violation of the Open Meetings Act can occur even inadvertently if emails between members have the effect of circumventing the spirit of the requirements of the Act. The court in Johnston noted that it is Tennessee state policy that the formation of public policy and decisions is public business and shall not be conducted in secret. *Id.* While not every encounter among members of a public body will be considered a meeting, the encounters are not to be used to circumvent the requirements of the Act. *Id.* (citing Tenn. Code Ann. 8-44-101(a)). The Johnston court added that “[t]he consequences of a violation of the Open Meetings Act are harsh: Any action taken at a meeting in violation of this part shall be void and of no effect.” *Id.* (citing Tenn. Code Ann. 8-44-105).

Here, in addition to the evidence presented in open court in this case, this Court also reviewed *in camera* certain documents for which the Defendant asserted a privilege. This Court determined that the totality of the evidence in this case was so compelling that it *sua sponte* granted Ms. Sharp’s prayer and declared that IDB’s resolution granting TIF based upon the third-party Defendants’ EIP and approving the note and other documents is null and void and of no legal effect” and this Court took the action “because the same result would have occurred even after two and one-half (2 ½) days of trial ***due to the violation of the Open Meetings Law . . . .***” Order, 12 (emphasis added). The Court held that the Open Meetings Law was violated, the IDB’s action

was “null and void,” and declared, “In the present case, Ms. Sharp “won”. Order 6, 10.

Thus it is clear from this Court’s Order of July 16, 2014, that this Court determined that secret meetings, in violation of the Open Meetings Act, occurred in IDB’s granting the TIF, and as a result of the violation, this Court declared the IDB’s resolution granting TIF null, void, and of no legal effect. Therefore Plaintiff is entitled, pursuant to Rule 37.03, to the reasonable expenses incurred, including her reasonable attorneys’ fees, for establishing the truth of the IDB’s denial that it violated the Open Meetings Act when granting the TIF.

**THEREFORE it is ORDERED:**

1. That Plaintiff, as prevailing party, is hereby awarded discretionary costs as allowable pursuant to Tenn. R. Civ. P. 54.04;
2. That Plaintiff is entitled, pursuant to Tenn. R. Civ. P. 37.03, to the reasonable expenses incurred, including her reasonable attorneys’ fees, for establishing the truth of the IDB’s denial that it violated the Open Meetings Act; and
3. That Plaintiff is hereby allowed to submit proof as to the fees, expenses, and discretionary costs herein awarded.

**ENTER:**



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**Chancellor - Part 1**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and exact copy of this Order has been sent by email and placed in the United States Mail addressed to the following person (s):

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This the 19 day of September, 2014.

**Robin L. Miller, Clerk and Master**

By: mm SW  
Deputy Clerk and Master