

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FILED

August 27, 2026

**DIANA T. WHITE,
Plaintiff Below, Petitioner**

ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

v.) No. 25-ICA-431 (Cir. Ct. Kanawha Cnty. Case No. CC-20-2025-C-1118)

**LYNN A. FISH, in her capacity as
Executrix of the Estate of Joanna I. Tabit,
Defendant Below, Respondent**

MEMORANDUM DECISION

Petitioner Diana T. White appeals the October 8, 2025, order of the Circuit Court of Kanawha County. The circuit court dismissed petitioner's complaint with prejudice and awarded reasonable attorney's fees and costs to Respondent Lynn A. Fish, in her capacity as Executrix of the Estate of Joanna I. Tabit. Respondent filed a response.¹ No reply was filed. The sole issue on appeal is whether the circuit court erred by awarding respondent her reasonable attorney's fees and costs.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2024). After considering the parties' arguments, the record on appeal, and the applicable law, this Court finds that there is error in the circuit court's decision, but no substantial question of law. For these reasons, a memorandum decision vacating the circuit court's order and remanding the matter to the circuit court is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure.

Because the only issue on appeal concerns the circuit court's award of reasonable attorney's fees and costs, the factual recitation is brief. The decedent passed away on September 29, 2023, and pursuant to her will, respondent was nominated to serve as executrix of the estate. The probate court ratified respondent's appointment in October 2023. Since August 2024, petitioner has initiated several unsuccessful attempts to remove respondent as executrix. Before this case, petitioner pursued separate actions before the circuit court, the fiduciary commissioner, and the West Virginia Offices of the Insurance Commissioner. In every instance, petitioner's allegations against respondent were unsubstantiated.

¹ Petitioner is represented by Hoyt Glazer, Esq. Respondent is represented by John F. Hussell IV, Esq., and Sarah D. Keffer, Esq.

Regarding this case, petitioner filed a complaint and motion for injunctive relief on September 19, 2025. She sought to enjoin respondent from continuing to serve as executrix because respondent was unwilling to file a wrongful death action on behalf of the estate. Petitioner asked the court to appoint an alternative qualified personal representative who would have standing to pursue a wrongful death action before the applicable two-year statute of limitations expired around September 29, 2025. In response, respondent moved the court to deny injunctive relief, dismiss the action with prejudice, impose sanctions under Rule 11 of the West Virginia Rules of Civil Procedure, and award her reasonable attorney's fees and costs.

The circuit court held a hearing on October 6, 2025, and according to the transcript, the parties and court engaged in colloquy about the case. This ultimately led to petitioner's counsel acknowledging that the statute of limitations had lapsed without petitioner filing a complaint alleging a wrongful death action or claim under the Medical Professional Liability Act ("MPLA"). As a result, petitioner withdrew her complaint and motion for injunctive relief. Respondent's counsel reiterated its request for Rule 11 sanctions and an award of attorney's fees and costs. The circuit court denied the motion for sanctions because petitioner withdrew her case. However, the court then noted its concern over the estate expending funds to appear at the hearing and declared in short order that it was "going to award costs and fees to be reimbursed to the estate for the purposes of today's hearing." The court did not provide further explanation for its award of fees and costs to respondent. Thereafter, the hearing adjourned.

The court memorialized the hearing in the order now on appeal. In that order, the court sets forth the relevant facts and procedural history, including a specific finding regarding petitioner's repeated efforts to remove respondent as executrix through a series of complaints filed before the circuit court and different administrative tribunals. However, the court makes no explicit finding that petitioner's repeated actions exhibited bad faith, vexatious, wanton, or oppressive conduct.

Next, the order recounts that petitioner withdrew her complaint and motion for injunctive relief, based on the expiration of the applicable statute of limitations.²

² The court's order exclusively treats the causes of actions discussed in petitioner's complaint as MPLA claims. However, this is inconsistent with the record. It sets forth that petitioner sought relief to raise wrongful death claims, which are governed by separate statute. *See State ex rel. Morgantown Operating Co., LLC v. Gaujot*, 245 W. Va. 415, 419-29, 859 S.E.2d 358, 362-72 (2021) (discussing the interplay between the MPLA and the Wrongful Death Act, including in the context of the statute of limitations). We also observe that the court's applicable statute of limitations analysis is insufficient. While petitioner withdrew her claims and does not challenge the issue on appeal, we note this disparity as a reminder to courts to ensure that their orders not only contain thorough analysis, but also accurately reflect the record.

Addressing respondent's award of attorney's fees and costs, the order cited Syllabus Point 3 of *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986), which states: "There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." *Id.* at 49, 365 S.E.2d at 247, syl. pt. 3. Thereafter, the court summarily concluded that respondent was entitled to her reasonable attorney's fees and costs. The court dismissed the matter with prejudice and this appeal followed.

"This Court reviews an award of costs and attorney's fees under an abuse of discretion standard." Syl. Pt. 2, *Auto Club Prop. Cas. Ins. Co. v. Moser*, 246 W. Va. 493, 874 S.E.2d 295 (2022). On appeal, petitioner contends that the court abused its discretion because its order lacks sufficient findings and analysis to support its determination that an award of attorney's fees and costs was appropriate under *Sally-Mike*. Conversely, respondent argues that the court's limited finding regarding petitioner's prior litigation establishes a proper factual basis for the award. We disagree with respondent's position and instead find that petitioner's argument has merit.

It is widely understood that an award of attorney's fees is left to the circuit court's discretion. *See Justice Highwall Mining, Inc. v. Varney*, 249 W. Va. 1, 11, 890 S.E.2d 685, 695 (Ct. App. 2023) (collecting cases). However, this discretion is not necessarily infallible to scrutiny on appeal. In fact, appellate courts do not give deference to a circuit court's discretionary determination where it fails to make appropriate findings of fact and conclusions of law to support its ruling and provide for meaningful appellate review. *See Tri-State Petroleum Corp. v. Coyne*, 240 W. Va. 542, 564, 814 S.E.2d 205, 227 (2018) (citation modified) (stating that discretion is not given to a circuit court's decision that lacks proper findings because "in the absence of adequate findings of fact and conclusions of law, we are unable to intelligently discharge our limited appellate role to determine that the circuit court did not abuse its discretion.").

While respondent contends that the findings in the court's order detailing the litigation history between the parties are sufficient to justify its award of fees and costs, that contention is undermined by the fact that neither the record nor the order on appeal contains an express judicial determination, required under *Sally-Mike*, that petitioner's actions were in bad faith, vexatious, wanton, or oppressive, nor does either identify the specific facts supporting such a determination. Instead, the hearing transcript reflects only a summary award of fees and costs, and the court's written order merely cites the *Sally-Mike* standard and grants relief to respondent without providing the necessary findings or analysis to support its ruling. As a result, meaningful appellate review is not possible.

Therefore, we must vacate the court's award of attorney's fees and costs to respondent and remand the matter to the circuit court for entry of an order containing

detailed findings sufficient to permit proper appellate review should either party elect to pursue a subsequent appeal.

Accordingly, we vacate the court's October 8, 2025, order and remand the matter for entry of a new order consistent with this decision.

Vacated and Remanded.

ISSUED: August 27, 2026

CONCURRED IN BY:

Chief Judge Daniel W. Greear
Judge Charles O. Lorensen
Judge S. Ryan White