

FILED

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Maynard, Justice, concurring, in part, and dissenting, in part:

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I do not agree with the majority that an award of attorney’s fees of \$8,617 constitutes an abuse of discretion under the facts of this case. However, I agree that counsel should not receive the statutory fees in addition to the 40% contingency fee.

Under our traditional rule, one of the factors considered in determining a reasonable attorney’s fee is the result obtained. The majority opinion goes a step further and declares that, “[i]n reviewing the submitted fees on remand, the trial court should take note that *the most critical of all the factors looked to in determining a statutory award of attorney’s fees is the degree of success obtained.*” Slip op. at 20 (citations omitted) (emphasis added). Essentially, says the majority, and I agree, the amount of attorney fees should be reasonable in relation to the result obtained. I believe that application of this rule to the instant case indicates that the attorney’s fee award of \$8,617 is not unreasonable.

The facts show that the jury awarded Appellant the relatively small sum of only \$12,300. In other words, Appellant’s counsel had a very limited degree of success. Given this small award, I believe that a statutory fee award of \$8,617, which is 70% of the total jury

award obtained by Appellant, is not so unreasonable that the majority can properly conclude that the circuit court abused its wide discretion.

Although the majority finds that the circuit court arrived at the sum of \$8,617 by using improper methodology, our law provides that, “[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.” Syllabus Point 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965). Thus, despite the fact that the circuit court’s application of a percentage reduction based on the ratio of claims pursued to claims prevailed arguably is improper under the instant facts, I believe that the statutory fee award of \$8,617 bears a reasonable relationship to the \$12,300 jury award.

An additional problem I have with the majority opinion is its ambiguity on the issue of the distribution of a statutory attorney’s fee award once the contingency fee has been deducted. The majority opinion holds, and I concur, that “[w]hile fee structures that involve a contingent-fee arrangement are clearly enforceable despite the existence of a fee-shifting statute, attorneys are not entitled to receive both the statutory fee award and the full amount of the contingent fee.” Syllabus Point 6, slip op. The majority opinion then explains in a footnote that it prefers using the statutory fee award to offset the amount the plaintiff owes to counsel under the contingency fee award. Additionally, the majority opinion provides that

“any amount of a statutory fee award that is over and above the amount of the contractual obligation to remunerate counsel is properly an amount that can ultimately be awarded to the attorney.” Slip op. at 16 (footnote omitted). Does the majority opinion intend to say that counsel always receives the remainder of the statutory fee after the contingency fee is deducted? Is the complainant ever to receive any of the remainder of the statutory fee award? Can the statutory fee award ever be split 50/50 between the complainant and his or her attorney? Or, should this matter be decided by an agreement between the complainant and counsel that addresses the issue? Unfortunately, the majority opinion gives little guidance and thus raises more questions than it answers. As a result, circuit courts are left almost completely without guidance.

Accordingly, for the reasons set forth above, I respectfully concur, in part, and dissent, in part, to the majority opinion.