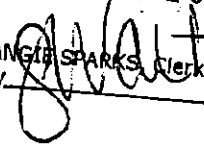


**FILED**

SEP 16 2022

ANGIE SPARKS, Clerk of District Court  
By:  Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT  
LEWIS AND CLARK COUNTY**

FORWARD MONTANA, LEO  
GALLAGHER, MONTANA ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS, and  
GARY ZADICK,

Plaintiffs,

v.

THE STATE OF MONTANA, by and through  
GREG GIANFORTE, Governor,

Defendant.

Cause No. ADV-2021-611

**ORDER ON MOTION FOR  
ATTORNEY FEES**

Before the Court is Plaintiffs' motion for attorney fees. Raph Graybill, Rylee Somers-Flanagan, and Constance Van Kley represent Plaintiffs Forward Montana, Leo Gallagher, Montana Association of Criminal Defense Lawyers, and Gary Zadick. Austin Knudsen, David M.S. Dewhirst, Brent Mead, and Emily Jones represent Defendant State of Montana, by and through Greg Gianforte, Governor.



## PRINCIPLES OF LAW

1  
2           Whether legal authority exists to support a grant of attorney fees is  
3 a question of law. *City of Helena v. Svee*, 2014 MT 311, P7, 377 Mont. 158, 161,  
4 339 P.3d 32, 35 (citing *Hughes v. Ahlgren*, 2011 MT 189, ¶ 10, 361 Mont. 319,  
5 258 P.3d 439). If legal authority exists, granting or denying attorney fees is a  
6 matter of the court’s discretion. *Id.*

7           Montana follows the “American Rule” as the default in awarding  
8 attorney fees. “Under the American Rule, a party in a civil action is generally not  
9 entitled to fees absent a specific contractual or statutory provision.” *Finke v.*  
10 *State ex rel. McGrath*, 2003 MT 48, ¶ 30-31, 314 Mont. 314, 324, 65 P.3d 576,  
11 582 (quoting *Matter of Dearborn Drainage Area* (1989), 240 Mont. 39, 42, 782  
12 P.2d 898, 899). The Montana Supreme Court has recognized several equitable  
13 exceptions to the American Rule, including the private attorney general doctrine.  
14 *Id.* at ¶ 30 (citing *Montanans for the Responsible Use of the School Trust v. State*  
15 *ex rel. Bd. of Land Comm’rs (Monitrust)*, 1999 MT 263, 296 Mont. 402, 989 P.2d  
16 800).

## ANALYSIS

### **The private attorney general doctrine**

19           Plaintiffs first argue they are entitled to attorney fees under the  
20 private attorney general doctrine. The private attorney general doctrine “is  
21 primarily used ‘when the government, for some reason, fails to properly enforce  
22 interests which are significant to its citizens.’” *Finke* at ¶ 31 (quoting *Dearborn*  
23 at 43). In determining whether to award attorney fees under the private attorney  
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1 general doctrine, the Court must consider three threshold factors: "(1) the  
2 strength or societal importance of the public policy vindicated by the litigation,  
3 (2) the necessity for private enforcement and the magnitude of the resultant  
4 burden on the plaintiff, (3) the number of people standing to benefit from the  
5 decision. *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2011  
6 MT 51, P20, 359 Mont. 393, 400, 251 P.3d 131, 137 (quoting *Montrust* at ¶ 62).  
7 If all three factors weigh in favor of awarding attorney fees, the Court must still  
8 consider "whether an award of fees would be unjust under the circumstances."  
9 *Western Tradition P'ship v. AG of Mont.*, 2012 MT 271, ¶ 14, 367 Mont. 112,  
10 117, 291 P.3d 545, 549.

11 The first factor may be satisfied "only in litigation vindicating  
12 constitutional interests." *Bitterroot River Protective Ass'n v. Bitterroot*  
13 *Conservation Dist.*, 2011 MT 51, P22, 359 Mont. 393, 401, 251 P.3d 131, 137  
14 (quoting *Montrust* at ¶ 66). In their motion for summary judgment, Plaintiffs  
15 challenged SB 319 on purely constitutional grounds and argued the bill interfered  
16 with Montana citizens' interest in transparency and public participation.  
17 Plaintiffs were successful and the Court found Sections 21 and 22 of SB 319 in  
18 violation of Article V, §§ 11(1) and (3) of the Montana Constitution. "It is the  
19 vindication of constitutional interests that demonstrates the societal importance of  
20 the litigation." *Burns v. Cty. of Musselshell*, 2019 MT 291, ¶ 21, 398 Mont. 140,  
21 150, 454 P.3d 685, 691. Plaintiffs have satisfied the first factor.

22 The State argues Plaintiffs cannot satisfy the second factor, the  
23 necessity for private enforcement, because Plaintiff Leo Gallagher (Gallagher)  
24 "relie[d] on his official status [as County Attorney for Lewis and Clark County]  
25 to bring this lawsuit." The Court disagrees. The fact Gallagher is an elected

1 official does not mean he is representing a government entity through his  
2 participation in this lawsuit. The caption does not indicate Gallagher sued the  
3 State in his official capacity. To the extent Gallagher's elected position is  
4 relevant to this litigation, it is only because it requires him to appear in court  
5 consistently and Section 22 of SB 319 would have caused his personal campaign  
6 donations to interfere with his ability to fulfill his job duties efficiently. The  
7 record does not support the State's argument that Gallagher was acting as a  
8 public official in a way that would defeat Plaintiff's claim regarding the necessity  
9 of private enforcement.

10 As the Attorney General chose to defend the constitutionality of  
11 SB 319, private enforcement was necessary to prevent the unconstitutional  
12 sections of the law taking effect. The State does not argue Plaintiffs did not bear  
13 the financial burden of litigating this constitutional issue. Plaintiffs have satisfied  
14 the second factor.

15 The final factor requires the Court to consider the number of  
16 people who benefit from the vindication of the constitutional interest. The State  
17 concedes Plaintiffs satisfy the third factor because the litigation involves a  
18 statewide constitutional challenge. The Court agrees and the third factor is  
19 satisfied.

### 20 **Equity and Immunity**

21 Although all three factors of the private attorney general doctrine  
22 weigh in favor of Plaintiffs, the Court must still consider whether an award of  
23 fees would be equitable under the circumstances. Additionally, Defendants raise  
24 the issue of legislative immunity under Montana Code Annotated § 2-9-111. The  
25 Montana Supreme Court has stated, "The courts necessarily must use caution in

1 awarding fees against the State in a ‘garden variety’ declaratory judgment action  
2 that challenges the constitutionality of a statute that the Attorney General, in the  
3 exercise of his executive power, has chosen to defend.” *Western Tradition P’ship*  
4 at ¶ 17.

5           When the Montana Supreme Court adopted the private attorney  
6 general doctrine and the three-factor inquiry in *Montrust*, it did so in the context  
7 of a challenge to the constitutionality of fourteen statutes concerning Montana’s  
8 school trust lands. The *Montrust* court found the district court had abused its  
9 discretion in denying the plaintiff attorney fees under the private attorney general  
10 doctrine because the denial resulted in a “substantial injustice.” *Montrust* at ¶ 69.  
11 Although the *Montrust* court did not discuss legislative immunity, it clearly did  
12 not consider such statutory immunity a complete bar to an award of attorney fees.

13           In contrast, the court in *Finke* found the plaintiffs had met all three  
14 private attorney general factors yet declined to award attorney fees against the  
15 State. The court identified two reasons for denial of attorney fees. First, the  
16 plaintiffs in *Finke* asked for attorney fees against the county defendants but not  
17 the State. Second, the court found the only basis for attorney fees against the  
18 State:

19           . . . would lie for the actions of the Legislature in enacting an  
20 unconstitutional bill, as it is the enactment of [the bill] that prompted  
21 the filing of this action. However, § 2-9-111, MCA, provides that  
22 the Legislature, as a governmental entity, is immune from suit for  
any legislative act or omission by its legislative body.

23 *Finke* at ¶ 34.

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1 Despite both cases were grounded in constitutional challenges to statutes, the  
2 court did not attempt to distinguish its application of legislative immunity in  
3 *Finke* from its decision to award attorney fees in *Montrust*.

4 In *Western Tradition Partnership*, the court attempted to clarify the  
5 differing outcomes of the previous cases. The court concluded:

6 *Montrust*...was not a ‘garden variety’ constitutional challenge to a  
7 legislative enactment. It involved unique issues raising the State's  
8 breach of fiduciary duties imposed by the Montana Constitution and  
9 federal enabling laws...the statutes in question were held to violate  
the State's constitutional obligation and its duty of undivided loyalty  
to the trust beneficiary.

10 *Western Tradition P'ship* at ¶ 19 (internal citations omitted).

11 The court determined *Finke* was a “garden-variety” declaratory judgment action  
12 because the State’s only liability was from “the actions of the Legislature in  
13 enacting an unconstitutional bill.” *Id* (quoting *Finke* at ¶ 34).

14 Thus, the issues of equity and legislative immunity both depend on  
15 whether Plaintiffs’ action was a “garden-variety” declaratory judgment action or  
16 not. The Court determines this case is closer to *Finke* in that Plaintiffs raised  
17 straightforward constitutional challenges to a bill enacted by the Legislature.  
18 Unlike in *Montrust* where the Legislature violated additional fiduciary duties, this  
19 case involved no heightened duty to Montana citizens that would remove it from  
20 the realm of a “garden-variety” declaratory judgment action. The Court finds the  
21 legislature’s actions to be protected by Montana Code Annotated § 2-9-111 and  
22 thus Plaintiffs cannot collect attorney fees under the private attorney general  
23 doctrine.

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1 **Montana Code Annotated § 25-10-711**

2 Montana Code Annotated § 25-10-711(1) entitles prevailing  
3 parties in a civil suit against the State to reasonable attorney fees if the court  
4 determines the State’s defense was frivolous or pursued in bad faith. “A claim or  
5 defense is frivolous or in bad faith under § 25-10-711(1)(b), MCA, when it is  
6 ‘outside the bounds of legitimate argument on a substantial issue on which there  
7 is a bona fide difference of opinion.’” *Jones v. City of Billings*, 279 Mont. 341,  
8 344, 927 P.2d 9, 11 (quoting *Armstrong v. State, Dept. of Justice* (1991),  
9 250 Mont. 468, 469-70, 820 P.2d 1273, 1274). The court may award costs in  
10 such situations “notwithstanding any other provision of the law to the contrary.”  
11 Mont. Code Ann. § 25-10-711(2).

12 Plaintiffs argue the State proceeded in bad faith by continuing to  
13 challenge Plaintiffs’ standing even after the Court denied the State’s motion to  
14 dismiss for lack of standing. However, the State’s standing argument is  
15 secondary to the constitutional issues. Although the Plaintiffs ultimately  
16 prevailed, the Court would not go so far as to say the State’s substantive  
17 arguments were frivolous or in bad faith.

18 **Montana Code Annotated § 27-8-313**

19 Under Montana’s Uniform Declaratory Judgments Act, the court  
20 may grant further relief, such as attorney fees, based on a declaratory judgment  
21 “whenever necessary or proper.” Mont. Code Ann. § 27-8-313. The Montana  
22 Supreme Court has repeatedly made it clear that “the availability of attorney fees

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1 is not presumed...As a threshold question, the equities must support a grant of  
2 attorney fees.” *Abbey/Land v. Glacier Constr. Partners, LLC*, 2019 MT 19, ¶ 66,  
3 394 Mont. 135, 162, 433 P.3d 1230, 1248 (citing *United Nat’l Ins. Co. v. St. Paul*  
4 *Fire & Marine Inc.*, 2009 MT 269, ¶ 38, 352 Mont. 105, 214 P.3d 1260). If the  
5 threshold equity requirement is met, courts must then apply three “tangible  
6 parameters” to determine whether attorney fees under Montana Code Annotated  
7 § 27-8-313 are “necessary and proper”:

8 (1) the other party “possesses” what the party filing the declaratory  
9 judgment sought in the litigation; (2) the party filing the declaratory  
10 judgment action needed to seek a declaration showing that it is  
11 entitled to the relief sought; and (3) the declaratory relief sought was  
12 necessary in order to change the status quo.

13 *Id.* at ¶ 67 (citing *Renville v. Farmers Ins. Exch.*, 2004 MT 366, 324 Mont.  
14 509, 105 P.3d 280; *Trs. of Ind. Univ. v. Buxbaum*, 2003 MT 97, 315 Mont.  
15 210, 69 P.3d 663).

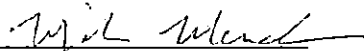
16 Although Plaintiffs were successful in their declaratory judgment  
17 action, the Court finds an award of attorney fees under Montana Code Annotated  
18 § 27-8-313 does not meet the threshold requirement of equitability. “It is the  
19 duty of the Attorney General ‘to prosecute or defend all causes in the supreme  
20 court in which the state or any officer of the state in the officer’s official capacity  
21 is a party or in which the state has an interest.’” *Western Tradition P’ship* at ¶ 17  
22 (quoting Mont. Code Ann. § 2-15-501(1)). Absent extraordinary circumstances,  
23 it is inequitable to award attorney fees against the State for choosing to defend  
24 the constitutionality of a statute. This case does not present extraordinary  
25 circumstances. As the Court does not believe an award of attorney fees would be  
equitable in this matter, application of Montana Code Annotated § 27-8-313 fails  
on the threshold question and it is unnecessary to apply the tangible parameters.

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**ORDER**

**IT IS HEREBY ORDERED** Plaintiffs' motion for attorney fees  
is **DENIED**.

DATED this 16<sup>th</sup> day of September 2022.

  
\_\_\_\_\_  
MIKE MENAHAN  
District Court Judge

cc: Raph Graybill,(via email to: rgraybill@silverstatelaw.net  
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MFM/sm/ADV-2021-611 Forward Montana, et al. v. State of Montana - Order on Motion for Attorney Fees