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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

WILLIAM M. SOLEM and ELLEN G. SOLEM,	**Cause No.: DV-2010-073**
	Dept. No. D
Plaintiffs,	
	Honorable Dan Wilson
vs.	
DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,	**MONTANA DEPARTMENT OF REVENUE'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT (DAMAGES)**
Defendant.	

COMES NOW, Defendant, State of Montana, Department of Revenue (Department) and responds to Plaintiff's Motion for Partial Summary Judgment and Brief in Support. For the reasons stated below, this Court must deny this Motion.

FACTUAL AND PROCEDURAL BACKGROUND

In 2010, Solems filed their original complaint. (Dkt. 1). Plaintiffs filed their Fourth Amended Complaint on March 26, 2013. (Dkt. 18). The Fourth Amended Complaint was

filed to address concerns raised by the Department by clarifying that Plaintiffs claims are pursuant to § 15-1-406, MCA, and by withdrawing claims for a writ of mandate and a jury trial. *See* (Dkt. 16). Subsequently, Plaintiffs moved to certify a class.

This Court granted class certification on May 2, 2016. (Dkt. 56). The class certified is "all lakefront property owners in Neighborhood 800 who have timely paid under protest any portion of their property taxes since the last assessment cycle beginning in 2009." *Id*. Neighborhood 800 is the Somers/Lakeside area in which the Solem's property is located. Between 2009 and 2015, approximately 200 taxpayers in Neighborhood 800 paid property taxes under protest.

A four-day trial on liability was held in March 2019. On October 15, 2019, the District Court issued its Findings of Fact, Conclusions of Law, and Order finding the Department liable. (Dkt. 128). This Court held that "while the base lot model is a generally accepted methodology for conducting mass appraisal, there was no persuasive evidence in the record that the particular hybridized variant of the base lot method devised by DOR and employed in Neighborhood 800 for the 2009 appraisal cycle encompasses a generally accepted methodology or approach to mass appraisal." *Id*., ¶ 18. Furthermore, the Court found that "the DOR manipulated its 2009 model for Neighborhood 800 to achieve the result of a lower value for its hypothetical base lot." *Id.*, ¶ 66. The District Court ultimately concluded that the Department "employed a non-uniform method of appraisal, failed to value similar properties in a like manner, and failed to appraise the subject properties in a manner that is fair to all taxpayers," and that by "adopting and imposing its 2009 base lot model in Neighborhood 800" it "violated and abridged" both equal protection and due process. *Id.*, ¶¶ 74-76. The matter has now moved to the damages phase.

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STANDARD OF REVIEW

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c), M.R.Civ.P. The moving party bears the initial burden of demonstrating both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Tin Cup County Water v. Garden City Plumbing & Heating, Inc.,* 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60, citing *Gliko v. Permann*, 2006 MT 30, ¶ 12, 331 Mont. 112, 130 P.3d 155. Once the moving party meets this burden, the burden then shifts to the nonmoving party to prove, by more than mere denial and speculation that a genuine issue does exist. If the court determines that genuine issues of fact do not exist, it must then determine whether the moving party is entitled to judgment as a matter of law. *Fielder v. Board of County Comm'rs*, 2007 MT 118, ¶ 12, 337 Mont. 256, 162 P.3d 67; *Xu v. McLaughlin Research Institute for Biomedical Science*, 2005 MT 209, ¶ 18, 328 Mont. 232, 119 P.3d 100 (internal citations omitted).

ARGUMENT

I. The cases cited by the Plaintiffs do not entitle them to the 2002 value of their property.

The Plaintiffs present an argument that the holdings from two cases – *Mont. Dept. of Revenue v. Barron,* 245 Mont. 100, 114-15, 799 P.2d 533, 542 (1990) and *DeVoe v. Dept. of Revenue of State of Mont*., 263 Mont. 100, 113, 866 P.2d 228, 236 (1993) – entitles class members to a value established in 2002 for the 2009 through 2014 tax years. As claimed by the Plaintiffs, "A plaintiff who bears the burden of litigation to expose the inaccuracy of the DOR's valuation is entitled to have the inaccurate valuation substituted for the valuation used during the prior tax appraisal cycle. *Barron*, 245 Mont. at 114, 799 P.2d at 541." (Dkt.

138, 6). This argument is flawed and must fail for numerous reasons as both cases are clearly distinguishable from the instant matter and do not support the Plaintiff's claim to a 2002 value for tax years 2009 through 2014.

First, the Plaintiffs' misrepresent what *Barron* stands for and, although the Plaintiffs generally capture the basic facts from the *Barron* decision in their brief, the Plaintiffs omit critical facts that led the *Barron* Court to the conclusion that Barron was entitled to the previous cycle's value. As recited by the Plaintiffs:

> [I]n *Barron* the plaintiff's residence was appraised at $28,019 prior to the new "stratified sales assessment ratio study" the DOR was planning to implement in 1990. After the study in 1990, the DOR determined that the plaintiff's area required an adjustment of 30%, increasing the appraised value of her property to $40,325. The plaintiff appealed the arbitrary increase and, similar to the situation we have here, the Montana Supreme Court held that the increase exacerbated inequality among taxpayers and unfairly discriminated against all the properties in the plaintiff's area. Id. at 108. Further, the Court held the disproportionate tax rate violated Art. II, § 4 of the Montana Constitution and the Equal Protection clause of the Fourteenth Amendment of the United States Constitution. Id. At 114-15. As a remedy, the Court replaced the 1990 valuation with the prior tax appraisal cycle's valuation for the purposes of tax assessment. Id. at 114."

(Dkt. 138, 6-7).

In *Barron*, the Court heard an original proceeding brought by the Department which petitioned for a writ of review, a writ of supervisory control, or other appropriate emergency writ for relief from an order of STAB dated August 3, 1990. The Court decided the matter on October 12, 1990. The *Barron* Court dealt specifically with the constitutionality of a statutory "stratified sales assessment ratio study" that the Department used to value Barron's property. There, the Court found:

> [t]he provisions of § 15-7-111, MCA, relating to stratified sales assessment ratio studies [***29] of the residential property situated in Area 2.1 (Great Falls Downtown) as conducted and applied by the DOR are invalid because they violate state constitutional and statutory provisions which require general and uniform appraisal, assessment and equalization of all taxable property in the state[.]

Barron, 245 Mont. at 114. In other words, the *Barron* Court's decision found an entire statutory scheme invalid. That is a markedly different situation to the instant matter dealing with one specific model and one neighborhood. As noted by the *Barron* Court:

> Because of the statewide effect of this decision, because of the short period of time remaining for state and county offices to perform their duties in connection with the collection of property taxes for the year 1990, and the extenuating exigencies which would otherwise be created by an immediate effect of this decision, we hereby delay the effective date of this decision, and make its effect prospective only to December 31, 1990, except for those cases now pending on appeal, or properly appealed by the property owners.

Barron, 245 Mont. at 115. Furthermore, unlike *Barron*, here, the Legislature's statutory requirements for value remain intact, and require that all taxable property is "appraised at 100% of its market value" and equalized using a number of different approaches, including the income and market approach. Sections 15-7-112 and 15-8-111(1), MCA; *Albright v. State*, 281 Mont. 196, 212, 933 P.2d 815, 822 (1997).

Albright is the seminal case where the Montana Supreme Court held that the Department's appraisal methods are the appropriate standard. For equalization of valuations, "[t]he same method of appraisal and assessment shall be used in each county of the state." Section 15-7-112, MCA (2009). "[T]he term 'method' refers to a consistent process for arriving at market value, the details of which may vary from place to place, depending on available data, and which will necessarily include a number of different approaches--e.g., the market data approach, the income approach, the cost approach--or some combination of these approaches, depending on the market in the area where appraisals occur." *Albright*, 281 Mont. at 208. Plaintiffs' request for 2002 values does not comport with *Albright* and the constitutional requirement to equalize.

Additionally, the *Barron* Court did not find, as the Plaintiffs contend here, that "the increase … discriminated against all the properties in the [Barron's] area." (Dkt. 138, 6-7). Rather, the *Barron* Court held that "the methodology prescribed by the legislature and

implemented by the DOR for yearly equalization between areas unfairly discriminates against property taxpayers in Area 2.1 *whose properties in 1989 were appraised at or above their market values*." *Barron*, 245 Mont. at 108 (emphasis added). This also differs from the Plaintiffs' rendition of *Barron*, as quoted above. The *Barron* Court's holding was not applicable to "all the properties in the plaintiff's area" but instead only to the "whose properties in 1989 were appraised *at or above* their market values." Compare, *Barron, p.* 108 and (Dkt. 138, 6-7). In fact, in this matter, the District Court determined:

> First, the DOR developed and adopted a base lot model for property valuation which, because it excluded various market-based property transactions from consideration in the model, contrived to decrease the value of the land owned by each taxpayer by approximately $50,000. As Mr. Williams explained at trial, if he had left various market-based, negative influence factors in the model, the result "would have increased everyone's value by roughly $50,000[.]" It is not lawful for the DOR, in developing a model for valuing real property, to set out to achieve a result other than the development of a model which values property at anything but its true market value.

(Dkt. 128, ¶ 71). The Department's model was found to be flawed for only the reasons articulated by the District Court. The District Court here did not find, nor did the Plaintiffs demonstrate that they were "appraised at or above their market values." To wit, the class members' property, as determined by this Court, was in fact undervalued, (Dkt. 128, ¶ 71), leading to the conclusion from *Barron* establishing that there was no discrimination against the Plaintiffs from the Department's model, but rather a benefit to the class as a whole.

Moreover, the *Barron* decision, made in 1990, to use the 1989 value for Barron's property was determined to be the appropriate remedy in light of the 1990 value being determined based on an invalid and unconstitutional statutory scheme. This is a markedly different situation than the Plaintiffs' claim of being entitled to apply a 2002 value to properties in the 2009 valuation cycle nearly two decades later and after numerous years of litigation. Further, the fallacy of this argument is borne out by following the claim to its logical conclusion: Any mistake made by the Department entitles a taxpayer to the previous

cycle's valuation. This argument fails to achieve the very standards that the Plaintiffs' present -- appraisal using two different points in time without equalization means that there will not be "general and uniform appraisal, assessment, and equalization of all property taxed" and presents a specific "method[s] of appraisal that require[s] certain taxpayers to pay a disproportionate share of property tax violat[ing] the Equal Protection clause of the Fourteenth Amendment of the United States Constitution and Art. II, § 4 of the 1972 Montana State Constitution and are therefore invalid." (Dkt. 138, 6). Indeed, this argument is contrary to the Montana Supreme Court's repeated statement that the Department must work to achieve equalization, but that perfection is not a reasonable expectation:

> We recognize that the Department's method of assessing property and estimating market values is by no means perfect, and will occasionally miss the mark when it comes to the Constitution's goal of equalizing property valuation. However, perfection in this field is, for all practical purposes, unattainable due to the logical and historical preference for a market-based method, and the occasional lack of market data.

Albright, 281 Mont. at 213, 933 P.2d at 826. As such, this Court must reject the Plaintiffs' reliance on *Barron* to set the market value of class member properties for the valuation cycle at issue.

The Plaintiffs' also cite to *DeVoe v. Dept. of Revenue of State of Mont*., 263 Mont. 100, 113, 866 P.2d 228, 236 (1993), as justification for their claims of entitlement to 2002 values. Unlike the situation presented in *DeVoe*, this matter has ample, substantial, and credible evidence in the record (including evidence presented by the Plaintiffs that supports a value other than the 2002 value) and evidence that will be presented by the Department during the damages phase of this litigation.

In *DeVoe*, the Montana Supreme Court affirmed the district court's finding that the DOR arbitrarily increased the valuation of the plaintiff's property by more than 100% between the 1985 and 1986 tax years, based on a new appraisal cycle. *Id.*at 113. The

district court concluded that the state tax appeal board's decision to uphold the DOR's valuation was not supported by substantial credible evidence and was clearly erroneous. *Id*. at 103. The district court restored the DOR's appraisal of the petitioner's properties for all of the years in the 1986 appraisal cycle (which went from 1986 to 1993) to the 1985 appraised value. *Id.* at 103, 107.

The Plaintiffs' interpretation of *DeVoe*[1] is flawed as it fails to consider the issue before the *DeVoe* Court and the issue decided by the District Court in this matter. The Plaintiffs' argument critically fails to present *why* the *DeVoe* Court made this finding. Specifically, the *DeVoe* Court stated:

> In this case, the District Court did not impose its own opinion regarding taxable valuation. The District Court held that, as a matter of law, the DOR presented no credible evidence to justify increasing the appraised value of DeVoe's property by an amount in excess of 100 percent from one appraisal cycle to the next. The District Court held that neither did the DOR offer evidence that the appraised value of DeVoe's property should be increased at any other rate, and therefore, that the appraised value should remain at the amount previously established by the DOR based on its own appraisal.

Id. at 113. In the instant matter, this Court has made no such finding. Instead, and specifically, this Court held that "while the base lot model is a generally accepted methodology for conducting mass appraisal, there was no persuasive evidence in the record that the particular hybridized variant of the base lot method devised by DOR and employed in Neighborhood 800 for the 2009 appraisal cycle encompasses a generally accepted methodology or approach to mass appraisal." (Dkt. 128, ¶ 18). This is not the same as the District Court holding that "STAB's decision to uphold the DOR's valuation was not supported by substantial credible evidence and was clearly erroneous. *Id*. at 103." (Dkt.

[1] "The Supreme Court found the district court did not err when it followed Barron in holding that the plaintiff's properties should be valued at the amount they were valued during the 1985 tax cycle and those values should remain in effect through the present date – in 1993. Id. at 114." (Dkt. 138, 7).

138, 7). In other words, the *DeVoe* opinion made a specific valuation decision; this Court did not make a valuation decision (though logically following the Court's ruling on the correct methodology, values will indeed increase). Indeed, any findings relating to the market valuation of the subject properties is necessarily contained to the second phase of this litigation, and the Department intends to present evidence of market value based upon actual sales information from Neighborhood 800. *See* Department's Witness Disclosure, Ex. WWW.

Here, in the liability phase of the litigation, the issue before the Court was "whether the methodology employed by the Department to value waterfront property is unlawful or illegal." (Dkt. 128, 2). The Court bifurcated these proceedings between liability and damages. (Dkt. 79). Evidence as to the value of the class members property and the issue of valuation has not yet been directly considered by the Court. Indeed, the Department intends to present an updated model taking into account this Court's critiques from the liability phase of this matter using actual sales data from NBHD 800. *See* Department's Witness Disclosure. It is noteworthy that during the liability phase, the Plaintiffs introduced evidence that supports a value that is substantially higher than the 2002 value they are arguing for here. *See* Tr. Ex. I. Once again, it appears that the Plaintiffs have changed positions to fit the exigent circumstances of the litigation. Right up until trial, they claimed the DOR overvalued property. At trial, that strategy changed to argue that the property was actually undervalued. This Court accepted that argument and determined the model was flawed because the DOR did not use all the sales in its model, which results in undervaluing of the class members' property. Similarly, the Plaintiffs put forth an appraisal prepared for the litigation which valued their property at a less value that the DOR, but significantly greater than the 2002 value. Taken for nothing else, the Solems' own appraisal that the Plaintiffs relied upon as a part of the liability proceedings stands to supersede the Plaintiffs'

claims here, as well as the plain language of this Court's Order. It will be relatively easy to calculate the values of each class member's lot, which will not result in a decrease of valuation or a refund of taxes paid. The results of this litigation thus far are a windfall to the class in that they previously avoided greater tax liability.

At the damages stage in this matter, the Court must consider the appropriate valuation of class member properties and must heed the statutory and constitutional requirements for value. "All taxable property must be appraised at 100% of its market value." Section 15-8-111(1), MCA. Market value is "the value at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." Section 15-8-111(2), MCA. "The same method of appraisal and assessment shall be used in each county of the state to the end that comparable property with similar true market values and subject to taxation in Montana shall have substantially equal taxable values at the end of each cyclical revaluation program hereinbefore provided." Section 15-7-112, MCA. The constitutional framers did not intend for equalization to require the use of a single approach to estimating market value. *Albright*, 281 Mont. at 212. Rather, the framers anticipated and intended that the Department could use a number of different approaches, including the income approach and the market data approach. *Id*. The Department's method of assessing property and estimating market value is by no means perfect, but the interdisciplinary method is a reasonable attempt to equalize appraisal of real property, comports with the most modern and accurate appraisal practices available, and meets the constitutional requirement for equalization of property values. *Id.* at 213.

The Court has sufficient information before it in the form of actual sales information from Neighborhood 800 to reach a conclusion as to market value and to ensure values are equalized. Furthermore, the Department intends to present an updated model taking into

account this Court's critiques from the liability phase of this matter. *See* Department's Witness Disclosure. Clearly, despite their argument in the liability phase that the Department's model undervalued properties in NBHD 800 and presentation of a fee appraisal, the Plaintiffs intend to present the 2002 market values as evidence of market value of the properties at issue for the 2009 valuation cycle. As there is undeniably a dispute of material fact (the market value of class member properties), this Court must deny the motion for summary judgment.

II. The Plaintiffs are not entitled to recover interest.

The undisputed facts demonstrate that the Plaintiffs are not entitled to interest pursuant to § 15-1-402(6)(b), MCA (2009). Section 15-1-402(6)(b), MCA (2009) provides that

> If the action is finally determined adversely to the governmental entity levying the tax, then the treasurer of the municipality, county, or state entity levying the tax shall, upon receipt of a certified copy of the final judgment in the action and upon expiration of the time set forth for appeal of the final judgment, refund to the person in whose favor the judgment is rendered the amount of the protested portions of the property tax or fee that the person holding the judgment is entitled to recover, together with interest from the date of payment under protest.

The Department has demonstrated that the market value of the class member properties is disputed and summary judgment cannot be granted, therefore this Court cannot award the recovery of interest. *Supra*, 3-11. However, the Department recognizes that if this Court ultimately orders refunds, interest is required by the plain language of the statute. This acknowledgement of statutory interest on refunds in no way concedes the Class has actually now been determined to have suffered any injury or incurred damages.

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III. The Solems are not entitled to attorney fees under the private attorney general doctrine

Montana follows the American Rule, which provides that "a party in a civil action is generally not entitled to [attorney] fees absent a specific contractual or statutory provision." *Bitterroot River*, ¶ 20 (citations omitted). The Montana Supreme Court has adopted the private attorney general doctrine as an equitable exception to this Rule. *Id*., ¶ 20 (citing *Montanans for the Responsible Use of the School Trust v. State ex rel. Bd. Of Land Comm'rs*, 1999 MT 263, 296 Mont. 402, 989 P.2d 800 (*Montrust*)). The private attorney general doctrine is invoked sparingly. *Western Tradition P'ship, Inc. v. AG of Mont*., 2012 MT 271, ¶ 13, 367 Mont. 112, 291 P.3d 545. In fact, "since first recognizing the doctrine in 1989 [this Court has] only twice used it to award or uphold the award of fees, and just once to a party prevailing against the State." *Id*. (citations omitted).

Courts must consider the following factors when determining whether to award fees under the private attorney general doctrine: (1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement and the magnitude of the resultant burden on the Plaintiffs; and (3) the number of people standing to benefit from the decision. *W. Tradition*, ¶ 14 (citations omitted). This Court has declined to apply the doctrine when the litigation primarily served a party's own pecuniary interests. *Id.*, *citing Sunburst Sch. Dist. No. 2 v. Texaco, Inc*., 2007 MT 183, ¶ 91, 338 Mont. 259, 165 P.3d 1079. Courts must also consider whether an award of fees would be unjust under the circumstances. *Id.*, *citing Finke v. State ex rel. McGrath*, 2003 MT 48, ¶ 33, 314 Mont. 314, 65 P.3d 576. "While not dispositive, [§ 25-10-711(1)(b), MCA] also serves as a guidepost in analyzing a claim for fees under the private attorney general doctrine." *W. Tradition*, ¶ 18. For example, the Montana Supreme Court could not conclude that equitable considerations required the district court to award fees against the State where the State's

defense was made in good faith. *Id*., ¶ 21. Furthermore, the Court reversed a fee award where, notwithstanding the ruling's potential "far reaching" effects, the State, through the Department of Fish, Wildlife and Parks, had "acted in good faith and in accordance with constitutional and statutory mandates" in representing the public's recreation use rights in the waters of Bean Lake. *Dearborn Drainage Area*, 240 Mont. at 43, 782 P.2d at 900.

Although the Department recognizes Montana's constitutional and statutory requirements for equalization, the Court cannot presently make a finding that this litigation has significant societal importance. The Plaintiffs, without citation, claims that its members "paid a disproportionate share of taxes compared to other property owners." (Dkt. 138, 12). However, this is a disingenuous claim, as this Court has not yet ruled on damages, including whether any class members are entitled to a refund of taxes paid under protest. However, the Court's order found specifically that the Class members valuation was lower than required Montana law, not higher as initially claimed. Indeed, at trial on liability, Class Representatives argued, inconsistent with the interests of the Class, that the Department's methodology was wrong because it undervalued the property. This Court determined that the Department's methodology undervalued the properties. (Dkt. 128, ¶¶ 30, 41, 66 and 71). As such, this Court cannot find that this litigation has significant societal importance based upon the Plaintiffs' unsupported claim.

The Plaintiffs claim that, without this litigation, the Department would likely continue to appraise properties using the same "flawed model without change." This is patently false as the Department is required by statute to reappraise property periodically and the Department uses new models considering current sales for each subsequent reappraisal cycle for each discrete neighborhood, including Neighborhood 800. Section 15-7-111, MCA, and Aff. of Scott Williams, ¶¶ 4-5, Ex. VVV. The model at issue has not been used in

subsequent reappraisal cycles as it does not represent market value for properties valued in later cycles. Aff. of Scott Williams, ¶ 6.

With respect to the third factor, the number of people standing to benefit from the decision is finite--the enumerated Class. This matter is unlike *Montrust* (the only case in which this Court upheld the award of attorneys' fees against the State under the private attorney general doctrine), where the litigation benefited a large class; namely, all Montana citizens interested in Montana's public schools. *Montrust*, ¶ 67. This case is more like *Gateway Vill., LLC v. Dep't of Envtl. Quality*, 2015 MT 285, 381 Mont. 206, 357 P.3d 917, wherein this Court upheld the district court's decision not to award fees because only a limited number of people stood to benefit from Plaintiffs' efforts. Here, only those property owners who own lakefront property in NBHD 800 and paid under protest "benefit" from this litigation, if having a determination that their valuations were too low is indeed a benefit. In support of its claim, the Plaintiffs argue that this factor is satisfied because all landowners are subject to property taxation and appraisal by the Department. However, this Court's findings related to the Department's NBHD 800 land value model are limited to this area and time period. The Court has not invalidated the methodology used in each neighborhood and for each cycle but found the specific model for the 2008 valuation undervalued property. The Plaintiffs have not demonstrated that any of the Department's other models used in a multitude of Montana communities contain the same deficiencies identified by the Court. This matter is limited to the class members at hand and the properties valued by this specific model for the 2009 reappraisal cycle. Thus, this Court cannot find that this litigation benefits all Montana property owners.

Moreover, the Montana Supreme Court has admonished that the private attorney general doctrine "*was not designed as a method for rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest*." *Sunburst*, ¶ 91

(quoting *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 632, 635 (Cal. App. Dist. 1998) (emphasis in original)). Here, the Plaintiffs' litigation did not protect the public interest. There is no conclusion other than the Plaintiffs were motivated by their own pecuniary interests – initially that the refund of taxes paid under protest based upon their original claim that the Department's values in NBHD 800 were too high, and, now, more accurately they Plaintiffs were motivated to find a way to "win" in order make a fees recovery.

Finally, the Department's defense has been pursued in good faith and in accordance with its statutory mandates. In *Kruse v. Cascade County*, 244 Mont. 126, 796 P.2d 568 (1990), the Montana Supreme Court found that the taxpayers were not entitled to attorneys' fees pursuant to § 25-10-711, MCA. Importantly, the Court found that "[w]here a State agency has a legal duty to provide a defense, there can be no finding of bad faith or a frivolous defense under the statute." *Id*. at 130 (citing *Matter of Dearborn Drainage Area*, 240 Mont. 39, 782 P.2d 898 (1989)). Here, like in *Kruse*, the Department has a legal duty to defend this matter under § 15-8-115, MCA, and, as such, there can be no finding of bad faith or a frivolous defense. Accordingly, an award of attorneys' fees under the private attorney general doctrine is unwarranted.

IV. The Solems are not entitled to costs under the narrow insurance exception.

The Court should not award costs[2] based upon the narrow insurance exception to the American Rule. Montana follows the American Rule, which provides that "a party in a civil action is generally not entitled to [attorney] fees absent a specific contractual or statutory provision." *Bitterroot River*, ¶ 20 (citations omitted). The Montana Supreme Court recognizes several narrow exceptions to the American Rule. *King v. State Farm Mut. Auto.*

[2]Solems are not entitled to costs under § 25-10-711, MCA, as they have not established the statutory requirements.

Ins. Co., 2019 MT 208, ¶ 11, 397 Mont. 126, 447 P.3d 1043. In *King*, the Court reiterated "the insurance exception to the American Rule allows for an insured to recover both taxable and nontaxable costs from an insurer when the insured is forced to assume to burden of legal action to obtain the full benefit of his or her policy." *Id*. at ¶ 16. As this is a narrow exception to the American Rule, this Court should find that costs are not appropriate under the insurance exception because this is not an action for an insured to recover costs from an insurer and should not extend this narrow exception to cases outside of insurance actions. As such, an award of costs under the insurance exception is unjustified.

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CONCLUSION

For the foregoing reasons, the Department respectfully requests this Court deny Plaintiffs' Motion for Partial Summary Judgment. As it relates to damages and interest, there is clearly a dispute of material fact relating to the market value of class member properties and summary judgment is not appropriate. Furthermore, this Court must deny Plaintiffs' claim for attorney fees under the private attorney general doctrine because the number of people standing to benefit from the decision is finite and the Department's defense has been pursued in good faith and in accordance with its statutory mandates. Finally, this Court should find that costs are not appropriate under the insurance exception because this is not an action for an insured to recover costs from an insurer.

Dated this 11th day of September 2020.

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CERTIFICATE OF SERVICE

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