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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0272

DA 17-0272

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 139

THE CITY OF MISSOULA, a Montana municipal corporation,

Plaintiff, Appellee, and Cross Appellant,

v.

MOUNTAIN WATER COMPANY, a Montana corporation,
and CARLYLE INFRASTRUCTURE PARTNERS, LP,
a Delaware limited partnership,

Defendants and Appellants.

THE EMPLOYEES OF MOUNTAIN WATER COMPANY,
(Shanna M. Adams, Heather M. Best, Dennis M. Bowman,
Kathryn F. Datsopoulos, Wayne K. Davis, Valarie M. Dowell,
Jerry E. Ellis, Greg A. Gullickson, Bradley E. Hafar,
Michelle Halley, Douglas R. Harrison, Jack E. Heinz,
Josiah M. Hodge, Clay T. Jensen, Kevin M. Johnson, Carla E. Jones,
Micky A. Kammerer, John A. Kappes, Susan M. Lowery,
Lee Macholz, Brenda K. Maes, Jason R. Martin, Logan M. McInnis,
Ross D. Miller, Beate G. Newman, Maureen L. Nicholas,
Michael L. Ogle, Travis Rice, Eric M. Richards, Gerald L. Schindler,
Douglas J. Stephens, Sara S. Streeter, Joseph C. Thul, Denise T. Tribble,
Patricia J. Wankier, Michael R. Wildey, Angela J. Yonce, and Craig M. Yonce),

Intervenors and Appellants.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-14-352
Honorable Karen Townsend, Presiding Judge

COUNSEL OF RECORD:

For Appellants Mountain Water:

William T. Wagner, Stephen R. Brown, Kathleen L. DeSoto, Garlington,
Lohn & Robinson, PLLP, Missoula, Montana

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Joe Conner, Adam Sanders, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Chattanooga, Tennessee

For Appellants Carlyle Infrastructure Partners, LP:

William W. Mercer, Kyle Anne Gray, Brian Michael William Murphy, Holland & Hart LLP, Billings, Montana

For Appellee:

Scott M. Stearns, Natasha Prinzing Jones, Randy Tanner, Boone Karlberg P.C., Missoula, Montana

William K. VanCanagan, Datsopoulos, MacDonald & Lind, P.C., Missoula, Montana

Harry Schneider, Jr., Perkins Coie LLP, Seattle, Washington

For Intervenor Montana Department of Transportation:

David L. Ohler, Valerie D. Wilson, Special Assistant Attorneys General, Helena, Montana

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Submitted on Briefs: January 31, 2018

Decided: June 4, 2018

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 This is another appeal concerning the proceeding initiated by the City of Missoula (City) to condemn the water system serving the City, previously owned by Mountain Water Company (Mountain Water) and its upstream holding company, Carlyle Infrastructure Partners, LP (Carlyle) (collectively, Property Owners). Property Owners appeal the District Court's orders resolving their claims for attorney and expert fees. The City cross appeals. We address the following issues:

1. *Did the District Court err by denying the facial and as-applied constitutional challenges to the definition under § 70-30-306, MCA, of the "necessary expenses of litigation" a prevailing party is constitutionally authorized to obtain, as the "customary" rate for attorneys and experts "in the county in which the trial is held?"*

2. *Did the District Court err by determining that Carlyle is a prevailing party and thus entitled to recover litigation expenses?*

3. *Did the District Court err in awarding attorneys' fees for out-of-state attorneys?*

We affirm in part, reverse in part, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In January 2014, the City made a final written offer of $50 million to purchase the water system, which was rejected by Property Owners. In February 2014, the City's Mayor made a public presentation introducing the legal team that would handle the City's condemnation lawsuit, which included specialized legal counsel from Seattle, Portland, and Spokane, and experts from New York, Seattle, and Minneapolis. Two Missoula law firms were also added to the City's legal team. In the City's *pro hac vice* motion, it stated "the City and its Montana counsel require the assistance and resources of a larger firm to

prosecute this action." Likewise, Carlyle stated its intention to hire "the most qualified lawyers," and Property Owners ultimately retained attorneys from Denver, Chattanooga, Billings, and Missoula. The parties acknowledge that specialized, out-of-town legal counsel and experts charge higher rates than is customary in Missoula County.

¶3 In April 2014, the City initiated condemnation proceedings against Mountain Water and Carlyle. Carlyle filed a motion to dismiss, and later a motion for summary judgment, seeking dismissal as a party on the ground it was not the owner of the assets for which condemnation was sought. Carlyle argued the action should be prosecuted only against its subsidiary, Mountain Water. The City opposed the motion, arguing that Carlyle, as the ultimate owner who made the integral decisions regarding the water system and sale, was a proper party to the action. The District Court denied the motions, ruling the City had sufficiently alleged that Carlyle was an owner and thus a proper party to the action.

¶4 In August 2014, the District Court issued a scheduling order that gave the parties six months to complete their discovery and pre-trial filings, and scheduled a trial date shortly thereafter. The parties acknowledge that the litigation schedule was demanding, even for the large legal teams employed by both sides. The District Court recognized that the abbreviated time before trial was "undoubtedly demanding and difficult." Ultimately, nearly 450,000 pages of discovery were exchanged, over 100 trial witnesses were identified, and 47 depositions were taken at locations across the country.

¶5 After a three-week bench trial, the District Court entered a preliminary condemnation order in favor of the City, which this Court affirmed. *City of Missoula v.*

Mountain Water Co., 2016 MT 183, ¶ 103, 384 Mont. 193, 378 P.3d 1113. In the proceeding before the Condemnation Commissioners, Mountain Water sought compensation for the value of the water system, and Carlyle sought severance damages for unfunded pension liabilities. In November 2015, the Condemnation Commissioners determined the value of the water system was $88.6 million, awarding the entire amount to Mountain Water, and awarded no damages to Carlyle.

¶6 Because the value determined by the Commissioners was higher than the City's final offer of $50 million, Property Owners moved for reimbursement of their litigation expenses, arguing they were prevailing parties. Property Owners argued § 70-30-306(2) and (3), MCA, which cap reimbursement for attorney and expert fees to the customary rate in the county where the case is tried, is unconstitutional, both facially and as-applied. The City argued that Carlyle was not a prevailing party because it had received no damages from the Commissioners, that the statute is constitutional, and that Property Owners' expenses were largely unnecessary and poorly documented. In order to establish the necessity and reasonableness of their expenses, Property Owners sought to discover the City's legal bills for purposes of context and comparison.

¶7 The District Court held Mountain Water and Carlyle were both prevailing parties with a right to be reimbursed for their necessary litigation expenses. The District Court precluded discovery of the City's litigation costs, finding them irrelevant to whether Property Owners met the requirements under §§ 70-30-305 and -306, MCA, for compensation of their own litigation expenses, but received testimonial evidence of the

rates charged by the City's Missoula counsel in determining the statutory cap to be set for Property Owners' fees. The District Court found the statute constitutional facially and as-applied, and imposed a Missoula County customary rate on all hours billed by Property Owners' attorneys and experts.[1] The District Court further reduced the expense claim by 25% for Mountain Water and 35% for Carlyle, citing deficiencies in their billing records and concluding that "use of out of state counsel, overstaffing and duplication of effort result[ed] in attorney's fees that are not reasonable and necessary."[2] Consequently, the District Court reduced the approximately $7 million claimed by Mountain Water and Carlyle for attorney and expert fees to just over $3.9 million. Mountain Water was awarded approximately $1.8 million in attorney fees and $1 million in expenses, and Carlyle was awarded approximately $900,000 in attorney fees and $223,000 in expenses.

¶8 Property Owners appeal, raising the District Court's denial of their constitutional challenges to the statute. In response to their filing of a notice of constitutional challenge, the Montana Department of Transportation intervened on behalf of the Attorney General. The City cross appeals.

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[1] The statute was declared unconstitutional in *State v. Am. Bank of Mont.*, No. DV 04-474(B) (11th Judicial Dist. Mont. Oct. 25, 2012), which this Court overturned on other grounds in a memorandum opinion, *State v. Am. Bank of Mont.*, No. DA 13-0072, 2013 MT 330N, 2013 Mont. LEXIS 451 (*American Bank II*).

[2] The District Court did not hold that use of out-of-state counsel was *per se* unnecessary, but that Property Owners' legal coordination was poor and not well documented, resulting in attorney fees that "were not reasonable and necessary in producing work and in coordinating work within a large team."

STANDARD OF REVIEW

¶9 This Court exercises plenary review of constitutional issues. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131 (citations omitted). We review a district court's rulings on discovery matters for an abuse of discretion. *Draggin' Y Cattle Co. v. Addink*, 2013 MT 319, ¶ 17, 372 Mont. 334, 312 P.3d 451 (citations omitted). We review a district court's determination of whether a property owner prevailed in a condemnation action for abuse of discretion. *Wohl v. City of Missoula*, 2014 MT 310, ¶ 12, 377 Mont. 148, 339 P.3d 58 (*Wohl II)* (citations omitted). If legal authority exists to award attorneys' fees, we review a district court's grant or denial of fees for abuse of discretion. *Sullivan v. Cherewick*, 2017 MT 38, ¶ 10, 386 Mont. 350, 391 P.3d 62 (citations omitted). A district court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice. *Wohl II*, ¶ 12 (citations omitted).

DISCUSSION

¶10 *1. Did the District Court err by denying the facial and as-applied constitutional challenges to the definition under § 70-30-306, MCA, of the "necessary expenses of litigation" a prevailing party is constitutionally authorized to obtain, as the "customary" rate for attorneys and experts "in the county in which the trial is held?"*

¶11 The parties' arguments over the validity of the statute begin with whether Article II, Section 29 of the Montana Constitution is self-executing, or whether it requires legislative implementation. Article II, Section 29 provides:

> Eminent Domain. Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just

> compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

"To determine whether the provision is self-executing, we ask whether the Constitution addresses the language to the courts or to the Legislature . . . . If addressed to the Legislature, the provision is non-self-executing; if addressed to the courts, it is self-executing." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 16, 326 Mont. 304, 109 P.3d 257 (citing *State ex rel. Stafford v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 73, 132 P.2d 689, 700 (1942) ("A provision is self-executing when it can be given effect without the aid of legislation and there is nothing to indicate that legislation is contemplated in order to render it operative.") (citations omitted)). Property Owners argue the provision is self-executing, while the City argues it is not, "because, while it allows a condemnee to recovery 'necessary' expenses, it provides no guidance or measure as to what constitutes 'necessary.'"

¶12 Article II, Section 29 is addressed to the courts. "Just compensation" for property taken for public use must be "made to or paid into court for the owner." The right to just compensation to a prevailing property owner includes "necessary expenses of litigation to be awarded by the court." It is the task of the courts to determine just compensation when disputed, including the necessary expenses of litigation. While Article II, Section 29, does not define "necessary," legislative action is not required to understand and implement the term. Courts routinely apply terms such as "necessary" in the course of their duties. As such, the provision is self-executing and requires no further legislative action.

¶13 However, as the City notes, even when a constitutional provision is self-executing, the Legislature may pass "legislation for the better protection of the right secured, or legislation in furtherance of the purposes, or of the enforcement, of the provision." *Gen. Agric. Corp. v. Moore*, 166 Mont. 510, 514, 534 P.2d 859, 862 (1975) (citations omitted). Thus, "[w]hile the legislature is free to pass laws implementing constitutional provisions, its interpretations and restrictions will not be elevated over the protections found within the Constitution," which is a question we consider here. *In re Lacy*, 239 Mont. 321, 325, 780 P.2d 186, 188 (1989).

¶14 The Legislature has defined "[n]ecessary expenses of litigation" in this context to mean "reasonable and necessary attorney fees, expert witness fees, exhibit costs, and court costs." Section 70-30-306(1), MCA. Further, the Legislature has limited or capped these fees based upon the "customary" rates charged in the county in which the condemnation trial is held:

> (2) Reasonable and necessary attorney fees are the customary hourly rates for an attorney's services in the county in which the trial is held. Reasonable and necessary attorney fees must be computed on an hourly basis and may not be computed on the basis of any contingent fee contract.
>
> (3) Reasonable and necessary expert witness fees may not exceed the customary rate for the services of a witness of that expertise in the county in which the trial is held.

Section 70-30-306, MCA. These caps are challenged here. We have previously held that the term "customary hourly rates" requires "that 'reasonable and necessary attorney fees' are to be computed in a condemnation case based on hourly rates typical or common for a non-specific attorney's services in the county in which the trial is held." *State v. Am. Bank*

of Mont., 2008 MT 362, ¶ 14, 346 Mont. 405, 195 P.3d 844 (*American Bank I*). In *American Bank I*, ¶ 19, no constitutional challenge was made to § 70-30-306, MCA.

¶15 Property Owners contend the limits upon attorney and expert fees imposed by § 70-30-306, MCA, to the customary rates in the county in which the condemnation trial is held, violates their constitutional right to just compensation. While Property Owners raised both facial and as-applied challenges to the statute in the District Court, their appellate arguments fail to clearly delineate the two, and conceptually weave back and forth between the challenges. The analyses for these challenges are different, *Mont. Cannabis Indus. Ass'n*, ¶ 14 (citations omitted), and, thus, we take them up in turn.

Facial challenge

¶16 Property Owners argue that the capping of fees under § 70-30-306, MCA, to customary rates in the county facially violates the constitutional right of a prevailing property owner under Article II, Section 29, to recover necessary litigation expenses. They further argue that the clear intent of the Framers was to "award[] prevailing parties their *actual* litigation expenses," (emphasis in original) citing constitutional convention transcripts. They assert that "no reading" of Article II, Section 29, "would allow the condemnor (via the Legislature) to impose an artificial ceiling on the award of fees unrelated to the litigation expenses actually incurred," and that the statute thus "infringes on their constitutional right to full compensation . . . ." They argue that the right to reimbursement, located within the Constitution's Declaration of Rights, is a fundamental right requiring the application of strict scrutiny review of the statute.

¶17 We first note that Property Owners' arguments in support of their claim to expenses "actually incurred" misapply Article II, Section 29, by attempting to link "necessary expenses of litigation" found in the second sentence with "the full extent of the loss" found in the first sentence of the provision. These sentences embody distinct concepts. In the first sentence, the phrase "just compensation to the full extent of the loss" refers to the "[p]rivate property" taken or damaged for public use, and such compensation must be made to, or paid into court for, the owner. Payment of this compensation may or may not require litigation. The second sentence provides that, "[i]n the event of litigation," an owner who prevails is entitled to, in addition to payment for the full loss of the property taken or damaged, "necessary expenses of litigation" as part of "just compensation." *See K&R P'ship v. City of Whitefish*, 2008 MT 228, ¶ 52, 344 Mont. 336, 189 P.3d 593 ("The only requirement for an award of litigation expenses is that the condemnee prevail by *obtaining a judgment* in excess of the condemnor's pre-trial offer") (emphasis added) (citations omitted). Under the plain language of the provision, Property Owners are not entitled, as they argue, to reimbursement of the "full extent" of their litigation expenses, or the expenses they "actually incurred," but, rather, only the "necessary expenses of litigation" as determined "by the court." *See*, *e.g.*, *State by Dep't of Highways v. Helehan*, 186 Mont. 286, 289, 607 P.2d 537, 538 (1980) ("The award of attorney's fees in a condemnation case . . . . is only authorized after notice and a hearing before the District Court . . . . the amount to be paid is not decided by the defendant in a court condemnation action, but by the District Court."). An owner's "actually incurred" expenses may inform a court's

determination of what is "necessary," but do not control it. We agree with the District Court's stated disagreement with the proposition that "'reasonable and necessary' is synonymous with whatever a client will pay without balking."

¶18 This conclusion is not contrary to the intentions expressed by the delegates to the Constitutional Convention. Property Owners quote a delegate's statement that, "[t]he committee intends, by 'necessary expenses of litigation,' *all costs* including appraiser's fees, attorney fees and court costs." Montana Constitutional Convention, Verbatim Transcript, March 9, 1972, p. 1825-26 (emphasis added). While it is unnecessary here to consult the convention transcripts, as we have determined the meaning of Article II, Section 29 from its plain language, *see Keller v. Smith*, 170 Mont. 399, 405, 553 P.2d 1002, 1006 (1976), the words "all costs" in the quote is a reference to *all categories* of costs, as evident by the language that follows, ". . . including appraiser's fees, attorney fees and court costs." Had the delegates intended for prevailing owners to be reimbursed for all "expenses of litigation" actually incurred, they would not have qualified the term with the word "necessary."

¶19 Property Owners further argue that this interpretation of Article II, Section 29, fails to make them whole and deprives them of the "net recovery" referenced in our opinions. *See K&R P'ship*, ¶ 51 (citing *State Dept. of Highways v. Olsen*, 166 Mont. 139, 148, 531 P.2d 1330, 1335 (1975) (Article II, Section 29 "make[s] the landowner whole . . . to the extent that the . . . judgment . . . would be a 'net recovery' . . . where the landowner prevailed.")). However, our holdings have never suggested making a land owner whole

will result in a net recovery that includes reimbursement of unnecessary litigation expenses. Property Owners' claim to all litigation expenses "actually incurred" is simply inconsistent with the plain language of Article II, Section 29, and fails as a facial challenge.

¶20 Resolution of this contention, which is the only basis on which Property Owners challenge the District Court's percentage reduction of their expense claim for failing, by inadequate recordkeeping and duplication, to be "reasonable and necessary," leads us to affirm these reductions. The District Court conducted the process contemplated by Article II, Section 29, to determine the "necessary expenses of litigation to be awarded by the court," and we affirm this part of its orders.

¶21 Turning to the remainder of Property Owners' facial challenge to § 70-30-306, MCA, including the limitation to "customary" rates in the county of trial, we have held that a facial challenge is a "difficult" task, requiring the challenger to demonstrate that "no set of circumstances exists under which the challenged sections would be valid . . . ." *Mont. Cannabis Indus. Ass'n*, ¶ 14 (brackets and citations omitted). In other words, it must be demonstrated "that the law is unconstitutional in all of its applications." *Mont. Cannabis Indus. Ass'n*, ¶ 14 (citations omitted). Statutes are presumed constitutional, and the challenger bears the burden of proving a conflict beyond a reasonable doubt. *Mont. Cannabis Indus. Ass'n*, ¶ 12. Facial challenges do not depend on the facts of a particular case. *Citizens for a Better Flathead v. Bd. of Cty. Comm'rs*, 2016 MT 325, ¶ 45, 385 Mont. 505, 386 P.3d 567 (citations omitted); *see also*, *e.g.*, *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 80, 296 Mont. 207, 988 P.2d 1236; *Ap, Inc. v. Mont. Dep't*

of Revenue, 2000 MT 160, ¶¶ 27-28, 300 Mont. 233, 4 P.3d 5; *Roosevelt v. Mont. Dep't of Revenue*, 1999 MT 30, ¶¶ 51-52, 293 Mont. 240, 975 P.2d 295. A statute found to be facially unconstitutional cannot be enforced under any circumstances. *Citizens for a Better Flathead*, ¶ 45 (citations omitted); *see also*, *e.g.*, *Mont. Envtl. Info. Ctr.*, ¶ 80; *Ap, Inc.*, ¶¶ 27-28; *Roosevelt*, ¶¶ 51-52.

¶22 To prevail on this claim, Property Owners must establish that no application of the statute can comport with Article II, Section 29. They fail to carry this difficult burden and, beyond their arguments discussed above, make little or no effort to do so. A condemnation case could involve a minor property for which the owner retains a local attorney and a local expert, for whom "customary" rates in the county of trial would provide an appropriate level of compensation upon prevailing, even if the "necessary" amount of the fees is disputed. Indeed, cases involving significant properties are so handled. In these scenarios, the statute could be constitutionally applied, defeating a facial challenge.

¶23 The City and intervenor Montana Department of Transportation argue vigorously that the right to reimbursement of litigation expenses is not a fundamental right for which strict scrutiny of § 70-30-306, MCA, is required. However, given our holding, we need not address the level of scrutiny applicable to the challenge. Under any level of scrutiny, the Property Owners have not, by their arguments here, established that the statute is either facially inconsistent with Article II, Section 16, or that it is "unconstitutional in all of its applications." *Mont. Cannabis Indus. Ass'n*, ¶ 14.

As-applied challenge

¶24 As mentioned, the District Court, in addition to imposing a percentage reduction of Property Owners' litigation expense claims on "reasonable and necessary" grounds, also reduced the claim by applying the caps imposed by § 70-30-306(2) and (3), MCA, on the rate of fees charged by Property Owners' attorneys and experts, limiting reimbursement to the "customary" rates in Missoula County, which were significantly lower than the actual fees charged to Property Owners.

¶25 Property Owners argue that the statutory caps, as applied to them in this case, violate their right under Article II, Section 29, to reimbursement of their "necessary expenses of litigation" as part of just compensation. An as-applied challenge alleges that a particular application of a statute is unconstitutional and depends on the facts of a particular case. *Citizens for a Better Flathead*, ¶ 45 (citations omitted); *see also*, *e.g.*, *Mont. Envtl. Info. Ctr.*, ¶ 80; *Ap, Inc.*, ¶¶ 27-28; *Roosevelt*, ¶¶ 51-52. When a court holds a statute unconstitutional as applied to particular facts, the statute may be enforceable in different circumstances. *Citizens for a Better Flathead*, ¶ 45 (citations omitted); *see also*, *e.g.*, *Mont. Envtl. Info. Ctr.*, ¶ 80; *Ap, Inc.*, ¶¶ 27-28; *Roosevelt*, ¶¶ 51-52.

¶26 Property Owners argue that the caps not only imposed reimbursement rates that were substantially lower than their actual rates, but did so arbitrarily without "an assessment of the actual necessity of the litigation expenses" they incurred, by what they deem are "artificial limitations." Property Owners contend that the unique circumstances of this case, including the complex size and nature of the asset being condemned, the City's

approach in prosecuting the case using out-of-state lawyers and experts with specialties in the field, the large amount of discovery, and the District Court's imposition of a tight trial schedule made it "necessary" for them, in order to properly defend the action, to consult and hire attorneys and experts who charged rates above the customary rate within the county.

¶27 At the center of Property Owners' as-applied challenge to the statutory caps, and of their demonstration of necessity, was a comparison of the costs of their legal defense efforts with the costs of the City's effort in prosecuting the action. Property Owners sought to discover information concerning the City's hiring of out-of-state counsel and the fees that were charged to represent the City in the action. However, despite acknowledging cases wherein "a comparison of rates provide[] a helpful guide in determining whether similarly high rates and hours requested were reasonable," the District Court prohibited such discovery by Property Owners, stating "it is up to [Property Owners] to construct their argument for costs and fees . . . without shifting the burden to the City." The District Court thereafter held that Property Owners had failed to carry their evidentiary burden on summary judgment, reasoning they had failed to prove that "local counsel was either unwilling or lacked the special expertise to litigate the case . . . . Missoula has a large supply of skilled attorneys who routinely handle complex cases, including eminent domain cases."

¶28 On appeal, Property Owners argue, "[l]ike the City, the Property Owners recognized that they, too, needed the experience and resources provided by large firms outside

Missoula." Citing newspaper articles speculating on the City's legal bills, they contend that they have "good reason to believe" that the City's expenses equated with or exceeded their claimed litigation expenses.

¶29 We have described the requirement that prevailing property owners be awarded their "necessary expenses of litigation" as a "constitutional directive" which "cannot be frustrated" by statute. *Olsen*, 166 Mont. at 147, 531 P.2d at 1334; *see also Wohl v. City of Missoula*, 2013 MT 46, ¶ 61, 369 Mont. 108, 300 P.3d 1119 (*Wohl I*). Thus, the critical question is whether it was "necessary" for Property Owners to incur attorney and expert fees above the customary rate within the county. In a uniquely complex Montana case, wherein out-of-state counsel played prominent roles in both prosecuting and defending the action, we think Property Owners were entitled to limited discovery about a relevant consideration to their necessity claim—the approach taken by the City to prosecute the action and the corresponding expenses incurred by the City. Property Owners' defense of the litigation was framed, first, by the approach taken by the City in prosecuting the litigation. Indeed, Property Owners lost their initial lead counsel, a Montana firm, several months after the litigation began, and made the decision, with a view toward the City's efforts, to substitute an out-of-state firm as lead counsel. Few other sources or cases, besides this one, can provide a satisfactory comparison or context for the defense decisions made, and the expenses incurred, by Property Owners. While we take no position on the ultimate validity of an as-applied challenge, we conclude Property Owners were entitled to gather this relevant information in an effort to lay an evidentiary foundation in this unique

case, and that the District Court's denial of that opportunity was an abuse of discretion. We emphasize that this does not call for a discovery "fishing expedition" by Property Owners, but is a narrow opportunity to obtain basic information about the City's legal costs, including the specialties or expertise of the outside counsel retained, and the rates and cost of representation related to the condemnation proceeding.

¶30 While we have not defined "necessary," we have extensively defined "reasonable" in the context of litigation expenses, which, though not conclusive, would be instructive in determining what is "necessary." In *American Bank I*, ¶ 14, we concluded that the non-exclusive, seven-factor test, sometimes referred to as the "*Forrester* factors,"[3] was inapplicable to the determination of fees under § 70-30-306, MCA, because compliance with the statute required consideration of only the customary charges in the county of trial. However, in view of the constitutional challenge here, these factors would be relevant considerations in the determination of necessary expenses and of the ultimate legal conclusion of whether the statute works to inhibit the constitutional award of such expenses. This ruling does not overturn the rejection of the *Forrester* factors by *American Bank I* in cases involving application of § 70-30-306, MCA, but merely permits their use in making an as-applied constitutional challenge to the statute.

¶31 Again, the parties argue over what level of scrutiny to apply to the statute. However, given that reimbursement of "necessary" expenses is a "constitutional directive," *Olsen*,

[3] *Forrester v. Bos. & Mont. Consol. Copper & Silver Mining Co.*, 29 Mont. 397, 409, 74 P. 1088, 1093 (1914); *see also Chase v. Bearpaw Ranch Ass'n*, 2006 MT 67, ¶ 38, 331 Mont. 421, 133 P.3d 190 (citations omitted).

166 Mont. at 147, 531 P.2d at 1334, a limitation upon reimbursement of litigation expenses proven to be necessary would violate Article II, Section 29, under any level of scrutiny.

¶32 *2. Did the District Court err by determining that Carlyle is a prevailing party and entitled to recover litigation expenses?*

¶33 The Legislature has defined when a private property owner prevails:

> In the event of litigation and when the condemnee prevails either by the court not allowing condemnation or by the condemnee receiving an award in excess of the final written offer of the condemnor that was rejected . . . the court shall award necessary expenses of litigation to the condemnee.

Section 70-30-305(2), MCA.

¶34 On cross appeal, the City argues that because the Commissioners awarded Carlyle no damages, Carlyle is not a prevailing party. We cannot conclude the District Court's determination that Carlyle is a prevailing party entitled to litigation expenses is arbitrarily, lacks conscientious judgment, or exceeds the bounds of reason. The District Court reasoned that Carlyle was a prevailing property owner under the statute because the City had argued, and the District Court determined, that Carlyle was the ultimate property owner and thus should not be dismissed from the action; that Carlyle itself received a final written offer to purchase the water system from the City; and that the final offer of $50 million was less than the $88.6 million awarded. The District Court reasoned that the Commissioners directing the award to Mountain Water as opposed to Carlyle was inconsequential, because at trial, Carlyle allowed its subsidiary Mountain Water to argue for the value of the assets, while Carlyle only argued for severance damages related to unfunded pensions. The District Court reasoned that Carlyle not prevailing on its

severance damages claim does not diminish the fact that, through its subsidiary, Carlyle prevailed on the valuation claim. The District Court did not abuse its discretion.

¶35 *3. Did the District Court err in awarding attorneys' fees for out-of-state attorneys?*

¶36 On cross appeal, the City argues that Property Owners are not entitled to fees for their out-of-state attorneys, "*pro hac vice* or otherwise," citing § 37-61-215(1), MCA:

> It is unlawful for any court within this state to allow attorney fees in any action or proceeding before the court in which attorney fees are allowed by law to either party to an action or proceeding *when the party is represented by anyone other than a duly admitted or licensed attorney at law.*

(Emphasis added.) Originally, we interpreted this language to mean that an attorney who is not licensed in Montana may not recover attorney's fees. *Vaill v. N. Pac. Ry. Co.*, 66 Mont. 301, 304-05, 213 P. 446, 447-48 (1923). However, we subsequently overruled this holding, noting:

> An opposing view [from *Vaill*] has evolved . . . wherein it was held that an attorney licensed in one state may recover for services rendered in a state in which he is not duly licensed, if he initially discloses that fact to his client and further informs him of the necessity to associate with local counsel. This is a rule which, in all fairness, we feel impelled to adopt. We find that such an interpretation is better suited to the modern practice of law and in the interests of promoting comity between the states. Such a rule is particularly appropriate in cases such as the instant one, where the attorney in question is a member in good standing of the California Bar. Under these circumstances, neither the spirit nor the intent of [§ 37-61-215(1), MCA], regulating the right to practice law in this state, has been violated.

Winer v. Jonal Corp., 169 Mont. 247, 252, 545 P.2d 1094, 1097 (1976). Thus, in *Winer*, we broadly approved reimbursement of fees for an out-of-state attorney (there, from California), noting such a rule was "particularly appropriate" where the subject attorney

was a member in good standing of the California Bar. *Winer*, 169 Mont. at 252, 545 P.2d at 1097.[4]

¶37 The City argues that Property Owners are not entitled to out-of-state attorneys' fees because allowing "dozens of out-of-state attorneys to work in the shadows on a Montana case and make claims for attorney's fees" does not fall within the spirit of the law. However, we cannot conclude the District Court made a legal error or otherwise acted arbitrarily, lacked conscientious judgment, or exceeded the bounds of reason when it applied *Winer*, the controlling precedent here, which clearly provides that, when certain requirements not here contested are met, attorneys' fees can be awarded for out-of-state counsel.

CONCLUSION

¶38 We affirm the denial of Property Owners' facial constitutional challenge to § 70-30-306, MCA, and accordingly, their claim to expenses "actually incurred" in the litigation. Given this sole basis for their challenge to the District Court's percentage reductions of their claims for inadequate bookkeeping and duplication, we affirm the District Court's reductions and its determination of "necessary" expenses in this regard. Regarding Property Owners' as-applied constitutional challenge to § 70-30-306, MCA, we reverse and remand for further proceedings to permit Property Owners to conduct limited discovery upon which to lay the factual foundation for their claim.

[4] *Winer* was decided prior to this Court's adoption of *pro hac vice* rules of admission in 1986, although, since 1895, *pro hac vice* admission had been governed by statute. There is no argument here that *Winer* conflicts with any of the *pro hac vice* rules.

¶39 Affirmed in part, reversed in part, and remanded for further proceedings consistent herewith.

/S/ JIM RICE

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR

Justice Laurie McKinnon, concurring in part and dissenting in part.

¶40 I concur with the Court's resolution of Issues 2 and 3. I dissent from the Court's failure to definitively resolve the as-applied constitutional challenge Property Owners raise against § 70-30-306, MCA.[1] The issue is center and forefront in this appeal and Property Owners provided a factual foundation sufficient to address the limited nature of their claimed error. I would affirm the District Court's orders in their entirety and conclude that § 70-30-306, MCA, as it pertains to Property Owners' claim, is constitutional.

¶41 Property Owners claim a constitutional and fundamental right to "necessary expenses of litigation," which entitles them to full reimbursement of attorney fees at rates higher than the customary county rate. More specifically, Property Owners assert it was necessary for them to "match" the City's retention of out-of-state counsel with their own

[1] I agree with the Court's analysis, Opinion, ¶ 22, and that the statute survives a facial constitutional challenge.

out-of-state counsel and, accordingly, Property Owners seek from the City, the condemnor, payment for that choice. Thus, the question presented is whether the caps contained in § 70-30-306, MCA, are unconstitutional as applied to these facts and Property Owners' claim because they limit Property Owners' choice and preference of counsel to the extent counsel is reimbursed only at the customary county rate.

¶42 In my opinion, we should resolve the constitutional challenge. It is unnecessary to remand to allow "limited discovery" of the City's attorney fees, which clearly exceed the customary county rate, unless we determine that the choice and preference of counsel, to the extent not fully reimbursed, renders § 70-30-306, MCA, unconstitutional. Clearly the condemnor is free to employ counsel at rates above those customarily charged in the county; the condemnor is not seeking reimbursement nor entitled to its litigation expenses. Additionally, Property Owners already established factually that they retained out-of-state counsel at rates higher than the customary county rate. Thus, whether both parties sought out-of-state counsel that charge higher rates than those charged in the county does not inform the as-applied challenge here. Property Owners have not claimed they were *unable* to secure competent local counsel or that, other than their choice and preference, retention of out-of-state counsel was *necessary* for some other reason. Moreover, Property Owners are not entitled to assert a new basis for what was "necessary" after they conduct "limited discovery." The District Court essentially concluded that "choice and preference" do not amount to "necessary." Although the amount of money in dispute is large and the underlying fundamental principles and doctrine significant, when Property Owners' claim

is closely considered, our inquiry thankfully is guided by basic, well-established constitutional analysis. After applying the appropriate constitutional analysis to Property Owners' claim, the dust settles and the constitutionality of § 70-30-306, MCA, under these facts is apparent.

¶43 To begin, I am not convinced that "necessary," as contained in Article II, Section 29 is self-executing.[2] Opinion, ¶ 12. Article II, Section 29 does not provide a means to measure or assess what "necessary expenses of litigation" are, so the Legislature enacted § 70-30-306(2) and (3), MCA. The Legislature has a long history of enacting and amending statutes to further Article II, Section 29's purpose. These enactments include a definition of public uses for which private property may be taken, §§ 70-30-102, -103, and -104, MCA; establishing the date of valuation, § 70-30-302, MCA; establishing fair market value, § 70-30-302, MCA; providing statutory interest, § 70-30-302, MCA; defining a prevailing party, § 70-30-305(2), MCA; and defining reasonable and necessary attorney fees and expenses, § 70-30-306, MCA. Further, this Court specifically recognized that a condemnee's constitutional rights "are protected by statutes providing the procedures for eminent domain and by the constitutional provision for just compensation." *City of Bozeman v. Vaniman*, 264 Mont. 76, 79, 869 P.2d 790, 792 (1994). In my opinion, Article II, Section 29 does not provide a method for assessing or measuring what "necessary expenses of litigation" are and the Legislature was therefore free to enact § 70-30-306(2)

[2] It is clear that "necessary" qualifies "expenses of litigation," such that a condemnee is not automatically entitled to payment of any and all litigation expenses actually incurred.

and (3), MCA, in order to implement Article II, Section 29. Nonetheless, even when a right is self-executing, the Legislature is free to enact legislation for the better protection of the right secured, to further the purposes of the right, or to enforce the provision. Opinion, ¶ 13 (quoting *Gen. Agric. Corp.*, 166 Mont. at 514, 534 P.2d at 862).

¶44 The first consideration in addressing a constitutional challenge to a statute is to establish the appropriate basis for review. If a statute regulates a fundamental right or involves a suspect class, its constitutionality is subject to strict scrutiny review. *Jaksha v. Butte-Silver Bow Cnty.*, 2009 MT 263, ¶ 17, 352 Mont. 46, 214 P.3d 1248 (quoting *Reesor v. Mont. State Fund*, 2004 MT 370, ¶ 13, 325 Mont. 1, 103 P.3d 1019). We apply intermediate scrutiny if "the law affects a right conferred by the Montana Constitution, but is not found in the Constitution's Declaration of Rights." *Jaksha*, ¶ 17 (quoting *Reesor*, ¶ 13). If a statute does not regulate a fundamental right and is not subject to intermediate scrutiny, we apply rational basis review. *Jaksha*, ¶ 17 (quoting *Reesor*, ¶ 13).

¶45 When determining whether a statute implicates a fundamental right, the question is whether the *claimed* right is fundamental. *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶¶ 20-21, 24, 32, 366 Mont. 224, 286 P.3d 1161 (*Mont. Cannabis Indus. Ass'n 2012*). Thus, in *Montana Cannabis Industry Association 2012*, we held that while individuals had a fundamental right to health care, their claimed right to a particular drug was not fundamental. *Mont. Cannabis Indus. Ass'n 2012*, ¶ 24. In *Wiser v. State*, 2006 MT 20, ¶¶ 24-25, 331 Mont. 28, 129 P.3d 133, we held that while denturists had a fundamental right to pursue employment, their claimed right to pursue unregulated employment was not

fundamental. Here, Property Owners' claimed right to "necessary expenses of litigation" is conditioned upon several occurrences: there must be litigation; the condemnee must prevail; and the condemnee incurred necessary costs. Here, I would conclude that while condemnees have a fundamental right to just compensation, that right does not create a fundamental right to a particular measure of "necessary expenses of litigation." Nor does allowing "necessary expenses of litigation" create a right to have a court consider jurisprudential "*Forrester* factors" when the provisions of § 70-30-306(2) and (3), MCA, provide otherwise and establish the specific measure to be applied. Until a challenge is made that establishes the constitutional invalidity of § 70-30-306, MCA, jurisprudential factors should not be considered. *See American Bank I*, ¶¶ 16, 19.

¶46 Accordingly, because § 70-30-306(2) and (3), MCA, do not implicate a fundamental right, we apply rational basis review and the statute must be rationally related to a legitimate government interest.[3] Importantly, here, rational basis review requires Property Owners to bear the burden of demonstrating beyond a reasonable doubt that § 70-30-306, MCA, is not related to a legitimate government interest. *Goble v. Mont. State Fund*, 2014 MT 99, ¶ 15, 374 Mont. 453, 325 P.3d 1211. In assessing whether a legitimate government purpose or interest exists, the Court's "role is not to second guess the prudence of a legislative decision." *Satterlee v. Lumberman's Mut. Cas. Co.*, 2009 MT 368, ¶ 34, 353 Mont. 265, 222 P.3d 566. "The purpose of the legislation does not have to appear on the

[3] Neither Property Owners nor the City argue that intermediate scrutiny applies and we therefore do not address whether it applies.

face of the legislation or in the legislative history, but may be any possible purpose of which the court can conceive." *Stratemeyer v. Lincoln Cnty.*, 259 Mont. 147, 152, 855 P.2d 506, 509-10 (1993).

¶47 The District Court found that Property Owners did "not address the rational basis test," which left the District Court to "conclude that [they] have not carried their burden of showing the challenged statute is unconstitutional under the proper standard of review." On appeal, Property Owners likewise fail to develop a rational basis argument and choose instead to rely upon strict scrutiny and their claim that there is a fundamental right to "necessary expenses of litigation." Thus, our inquiry could end because a specific measurement for "necessary expenses of litigation" is not a fundamental right invoking strict scrutiny review and Property Owners failed to meet their burden of proof under rational basis review. Nonetheless, a brief discussion of the eminent domain doctrine and its relationship to the government's interest in ensuring community welfare is helpful.

¶48 This Court recognized long ago that the power of eminent domain is rooted in the community's welfare, which is, unquestionably, a legitimate government interest. We explained:

> [T]he state has an inherent political right, pertaining to sovereignty and founded on what has been expressed to be a "common necessity and interest," to appropriate the property of individuals to great necessities of the whole community where suitable provision is made for compensation. . . . The public welfare is therefore the particular base upon which must be laid the correct application of the doctrine itself.

Butte, Anaconda & P. Ry. v. Mont. Union Ry., 16 Mont. 504, 536-37, 41 P. 232, 243 (1895). Without further elaboration, I would conclude the statute is rationally related to the

legitimate government purpose of ensuring that the public, in this case the community of Missoula, should not be forced to shoulder litigation expenses at rates higher than the customary county rate based solely on Property Owners preference to secure out-of-state counsel. Both Property Owners and the community responsible for paying Property Owners' litigation expenses are located in Missoula. Property Owners represented to the District Court that it was necessary to hire out-of-state counsel because the City hired out-of-state counsel. Property Owners' choice to "match" the City's retention of out-of-state counsel does not, by itself, render § 70-30-306, MCA, unconstitutional or otherwise conflict with the requirements of Article II, Section 29; that is, that they receive "just" compensation, including their "necessary" litigation costs. Here, one conceivable purpose of § 70-30-306, MCA, is to ensure that the public is not forced to pay exorbitant litigation costs for property that the District Court determines is necessary for the community to own. The Court's role "is not to second guess the prudence of a legislative decision," but to conceive of a purpose that supports the legislation. *Satterlee*, ¶ 34.

¶49 I disagree with the Court's decision to prolong these proceedings; with its failure to address and reject Property Owners' as-applied constitutional challenge; with its decision to remand for further discovery and to apply jurisprudential factors (which we specifically rejected in *American Bank I*); and with its failure to conduct an appropriate constitutional review in order to finally resolve this matter. Property Owners have never asserted, for example, that there is an absence of attorneys in Montana who are capable of handling condemnation proceedings; that the forum county is rural with inexperienced counsel and

significantly reduced rates; or any other inability to obtain competent counsel at Missoula County's customary county rate. Property Owners assert only their claimed right to "match" the City's out-of-state counsel. While an as-applied challenge may not be precluded under different circumstances and claims, here, Property Owners failed to meet their burden of demonstrating § 70-30-306(2) and (3), MCA, is not rationally related to a legitimate government purpose.

¶50 I dissent from the Court's resolution of Issue One.

/S/ LAURIE McKINNON

Chief Justice Mike McGrath and Justice Beth Baker join in the dissenting Opinion of Justice McKinnon.

/S/ MIKE McGRATH
/S/ BETH BAKER