

8-1-2014

Expensive Free Speech: Western Tradition Partnership And The Silencing Of The Private Attorney General Doctrine

Jesse Kodadek
Attorney; Missoula, MT

Follow this and additional works at: <https://scholarship.law.umt.edu/mlr>



Part of the [Election Law Commons](#), and the [First Amendment Commons](#)

Recommended Citation

Jesse Kodadek, *Expensive Free Speech: Western Tradition Partnership And The Silencing Of The Private Attorney General Doctrine*, 75 Mont. L. Rev. 275 (2014).
Available at: <https://scholarship.law.umt.edu/mlr/vol75/iss2/3>

This Comment is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

COMMENT

EXPENSIVE FREE SPEECH: WESTERN TRADITION PARTNERSHIP AND THE SILENCING OF THE PRIVATE ATTORNEY GENERAL DOCTRINE

Jesse Kodadek*

The executive branch—especially the Attorney General—is tasked with ensuring the laws and constitutional mandates of this State are faithfully executed.¹ But sometimes, the government fails to properly enforce the law or litigate constitutional issues significant to its citizens.² Acknowledging this problem, courts have recognized the concept of the “private attorney general.”³ A private attorney general is usually understood as a party litigating on behalf of the public interest, but on its own initiative, and “with no accountability to the government or the electorate.”⁴

But when a private party is compelled to litigate on behalf of the general public, who should fund the litigation? Recognizing the occasional necessity for private enforcement of public interests, some state courts have held that when a private party is forced to vindicate constitutional issues that would benefit the public at large, that party may be entitled to an award

* The author currently practices civil litigation in Missoula. This article began as a seminar paper during Montana Constitutional Law, which was taught by Justice James Nelson and Professor Anthony Johnstone in the spring of 2013. The author would like to thank them both for their input on this topic. Additional thanks to the editors and staff of the *Montana Law Review*.

1. Mont. Const. art. VI, § 4; Mont. Code Ann. § 2–15–501 (2013) (setting forth the duties of the Attorney General). See also Montana Constitutional Convention Verbatim Transcripts, vol. V, 866–870 (published 1972) (discussing whether the Attorney General should be appointed by governor or elected by popular vote).

2. See e.g. *Matter of Dearborn Drainage Area*, 782 P.2d 898, 900 (Mont. 1989).

3. See Jeremy A. Rabkin, *The Secret Life of the Private Attorney General*, L. & Contemp. Probs. 179 (1998) (discussing the history of the concept and term).

4. *Id.*

of attorney fees if it prevails.⁵ The award of fees on this basis is known as the “private attorney general doctrine.”⁶

The Montana Supreme Court first applied the doctrine in 1999.⁷ In the seminal *Montrust* case, the Court held it appropriate to award attorney fees when a private party is forced to vindicate constitutional issues of societal importance.⁸ Since that decision, the issue has been litigated a number of times, but the Supreme Court has rarely awarded fees under the doctrine, and *Montrust* remains the only time the Court has done so against the State.⁹

In November of 2012, the issue again came before the Court.¹⁰ There, the plaintiff, Western Tradition Partnership (“WTP”),¹¹ prevailed against the State at the Supreme Court of the United States in an unsurprising summary reversal.¹² On remand, the Montana Supreme Court addressed WTP’s claim for attorney fees under the private attorney general doctrine.¹³ Yet, after recognizing that the First Amendment “constitutional principles underlying this litigation cannot be doubted,” and despite alluding to the fact that WTP’s litigation met at least some of the factors sufficient to entitle it to an award under the doctrine, the Court nevertheless held that because the Montana Attorney General defended the statute in good faith, WTP was not entitled to an award of attorney fees.¹⁴

The problem with this holding is that the private attorney general doctrine—as previously defined by the Court and as defined by other states—does not consider bad faith. Indeed, nothing in the test for whether a party is entitled to fees under the doctrine requires or relates to bad faith on any level. More importantly, the bad faith statute¹⁵ relied upon by the Court

5. See e.g. *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977).

6. *Id.*

7. *Montanans for the Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Commrs.*, 989 P.2d 800 (Mont. 1999) [hereinafter *Montrust*].

8. *Id.* at 811–812.

9. *W. Tradition Partn., Inc. v. Atty. Gen. of State*, 291 P.3d 545, 549 (Mont. 2012) [hereinafter *WTP II*]. But, as discussed below, the Court has remanded at least one other case for reconsideration of fees under the private attorney general doctrine “in light of *Montrust*,” and the State subsequently stipulated to a fee award of nearly \$500,000 in favor of the plaintiffs. See *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 264 (Mont. 2005). This is discussed more thoroughly below.

10. *WTP II*, 291 P.3d at 545.

11. WTP is now known as the American Tradition Partnership. But on remand, the Montana Supreme Court continued to refer to it as the Western Tradition Partnership, and in the interests of clarity, this article will do the same.

12. *W. Tradition Partn., Inc. v. Atty. Gen. of State*, 271 P.3d 1, 13 (Mont. 2011) [hereinafter *WTP I*] cert. granted, judgment rev’d sub nom. *Am. Tradition Partn., Inc. v. Bullock*, 132 S. Ct. 2490 (U.S. 2012). *WTP I* factual issues relevant to the discussion are addressed as necessary below.

13. *WTP II*, 291 P.3d at 547–548. The issue was not addressed in *WTP I* because the Court’s decision had rendered it moot. *WTP I*, 271 P.3d at 13.

14. *WTP II*, 291 P.3d at 549.

15. Mont. Code Ann. § 25–10–711. This statute is discussed in greater detail below.

does not require any analysis of the private attorney general factors. Put another way, the bad faith statute creates an *independent* basis for fee awards that is totally separate from the private attorney general doctrine.¹⁶ If the *WTP II* Court was correct, then the private attorney general doctrine has been rendered essentially meaningless—at least as it applies to actions against the State.¹⁷

The second problem with this holding is even more troubling. Because the Attorney General has an obligation to uphold the laws of the State,¹⁸ in most cases, *only* private enforcement can vindicate the public interest in a challenge to the constitutionality of a state law.¹⁹ Therefore, without the private attorney general theory, it is possible that—unless the plaintiff could recover a significant compensatory award or is funded by a large constituency with deep pockets—some important public interest litigation may never happen.²⁰

If the *WTP II* Court wanted to eliminate the private attorney general doctrine, it could and should have done so explicitly. Instead, it misapplied the bad faith statute, failed to properly analyze the relevant factors related to the private attorney general doctrine, and confused or conflated WTP's request for fees under the Uniform Declaratory Judgment Act with its alternative request for fees under the private attorney general theory. In doing so, the Court eviscerated the private attorney general doctrine and utterly confused an area of law the Court had previously applied consistently and methodically.

This comment has two parts. The first and most important part provides an overview of the private attorney general doctrine as previously applied in Montana, and looks at the Court's analysis of the doctrine in a variety of contexts. It also discusses the application of the bad faith statute as it relates to the private attorney general doctrine, and shows the Court has never conflated the two ideas, and in fact, has expressly repudiated the idea that bad faith has any relevance under the doctrine. The last part argues that—despite undeniably legitimate concerns about the actions and underlying motivations of the Western Tradition Partnership—the Montana Supreme Court got it wrong in *WTP II*, and suggests that, due to the societal importance of encouraging private litigation for the benefit of the public

16. See *WTP II*, 291 P.3d at 551 (Nelson, J., dissenting).

17. While not addressed by the majority, based on the extremely broad holding, the bad faith requirement may apply to the doctrine even when only private actions are implicated.

18. Mont. Code Ann. § 2-15-501 (setting forth the duties of the Attorney General).

19. The author recognizes the State does, on rare occasion, decline to defend the validity of certain statutes. See also Part II, *infra*.

20. William B. Rubenstein, *On What A Private Attorney General Is—and Why It Matters*, 57 Vand. L. Rev. 2129, 2141–2142 (2004).

interest, the Court should not apply a bad faith test to future claims for fees under the private attorney general doctrine.

To be clear, the point of this comment is not to recreate the dissent in *WTP II*, which reached the right result. Instead, it is more properly read as a supplement to that dissent, and a rebuttal to the majority's insertion of a bad faith analysis into the private attorney general doctrine, a conflation of two independent issues which silenced the private attorney general doctrine—ironically perhaps—in a case that is about fundamental First Amendment principles.

I. A SHORT²¹ HISTORY OF THE PRIVATE ATTORNEY GENERAL DOCTRINE IN MONTANA

Montana follows the American Rule, and absent a specific statutory or contractual provision, a prevailing party—whether prosecuting or defending an action—is generally not entitled to attorney fees.²² Besides statutory²³ and contractual²⁴ exceptions, however, there are also several equitable exceptions to the American Rule. Montana recognizes at least three distinct categories of those equitable exceptions: the common fund or substantial benefit exception, which authorizes the spread of fees among individuals benefitting from litigation which creates, reserves, or increases a pool of money available to individuals who did not participate in the litigation;²⁵ a catchall equitable exception to make a party whole if forced to defend a frivolous or malicious action;²⁶ and finally, the private attorney general doctrine.²⁷

21. And non-exhaustive.

22. See e.g. *WTP II*, 291 P.3d at 548 (collecting cases). Indeed, the U.S. Supreme Court recognized the rule as far back as 1796, when overturning a decision granting attorney fees as part of damages on the ground that “[t]he general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.” *Arcambel v. Wiseman*, 3 U.S. 306, 1 (1796).

23. See e.g. Mont. Code Ann. § 30-14-133(3) (providing availability of fees for prevailing party in Consumer Protection Act case). There are many others.

24. *Id.* at § 28-3-704 (contractual right to attorney fees to be treated as reciprocal).

25. See e.g. *Mountain W. Farm Bureau Mut. Ins. Co. v. Hall*, 38 P.3d 828 (Mont. 2001). To establish the entitlement to fees under the common fund doctrine, a party must create, reserve, or increase a pool of money; the active beneficiary must incur legal fees attributable to the establishment of the fund; and the fund must benefit ascertainable and non-participating beneficiaries. *Id.* at 828-829.

26. See e.g. *Foy v. Anderson*, 580 P.2d 114, 116-117 (Mont. 1978); *Nat'l Cas. Co. v. Am. Bankers Ins. Co. of Florida*, 19 P.3d 223 (Mont. 2001) (collecting cases limiting *Foy* to actions where party asserting an entitlement to fees was “forced to defend against a wholly frivolous or malicious action”).

27. This article discusses only this category.

A. *Bean Lake II*

The Montana Supreme Court first recognized the private attorney general doctrine in *Bean Lake II*,²⁸ a 1989 case where an intervenor in a water rights adjudication successfully opposed a claim of the Department of Fish, Wildlife, and Parks.²⁹ After finding that the case was “precedent-setting” and significant to all water users in the state, the Water Court held that because the intervenor assumed “a burden which was disproportionate” to its specific interest in the case, the unique circumstances of the case justified an award of fees against the Department.³⁰

The Department appealed, arguing that the bad faith statute at § 25–10–711³¹ meant that the sole basis for an award of attorney fees against a state agency was if the claim or defense asserted by the agency was frivolous or pursued in bad faith.³² The Supreme Court, without directly addressing the Department’s arguments regarding the allegedly preclusive nature of the bad faith statute, reversed the award of attorney fees.³³ The Court first noted the Montana Water Use Act specifically contemplates that disputes will arise during the adjudication process, but—tellingly—the Act does not provide for an award of attorney fees to the prevailing party.³⁴ The Court also recognized that the Act charges the Department with the protection and enhancement of state resources, including advocating for the water rights necessary to ensure the well-being of fish, wildlife, and scenic values necessary to comply with its mandate, and therefore the Department was simply acting pursuant to its duties.³⁵

Further, the Court found that the dispute over *Bean Lake* was “really no more than an ordinary water rights dispute.”³⁶ It recognized that the intervenor—the Montana Stockgrowers Association—was a private organization representing approximately 3,000 farmers and ranchers across the

28. *Matter of Dearborn Drainage Area*, 782 P.2d 898 (Mont 1989) [hereinafter *Bean Lake II*].

29. *Id.* at 899.

30. *Id.* (The Water Court did not rely on the private attorney general doctrine in its fee award, so the Supreme Court did not reverse on that ground.)

31. Mont. Code Ann. § 25–10–711 (2011) (stating “(1) In any civil action brought by or against the state, a political subdivision, or an agency of the state or a political subdivision, the opposing party, whether plaintiff or defendant, is entitled to the costs enumerated in 25–10–201 and reasonable attorney fees as determined by the court if: (a) the opposing party prevails against the state, political subdivision, or agency; and (b) the court finds that the claim or defense of the state, political subdivision, or agency that brought or defended the action was frivolous or pursued in bad faith. (2) Costs may be granted pursuant to subsection (1) notwithstanding any other provision of the law to the contrary”).

32. *Bean Lake II*, 782 P.2d at 899.

33. *Id.* at 899–900.

34. *Id.*

35. *Id.*

36. *Id.*

state.³⁷ Because many of the members owned water rights, the group had “a distinct economic and philosophical interest in the uses and adjudication of the waters within the State” and also “represent[ed] primarily a private agricultural interest.”³⁸

Finally, the Court rejected the Stockgrowers’ assertion that it was entitled to fees under the private attorney general doctrine. The Court noted the doctrine is “normally utilized when the government, for some reason, fails to properly enforce interests which are significant to its citizens.”³⁹ The Court concluded the Department “acted in good faith and in accordance with constitutional and statutory mandates in making its claims at Bean Lake,” and therefore reversed the attorney fee award.⁴⁰ In sum, while the Court discussed the bad faith statute and briefly mentioned the private attorney general doctrine, it did not hold that an award under the private attorney general doctrine requires a showing that the opposing party acted in bad faith.

B. *Montrust*

Ten years later, the Court awarded fees under the private attorney general theory for the first time. In *Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Commissioners*⁴¹ (“*Montrust*”), the plaintiffs succeeded in their challenge to a statutory scheme they alleged violated the constitutional mandate requiring the Board to maximize income from school trust lands.⁴²

Despite concluding *Montrust* prevailed on its constitutional challenge, the district court denied its request for attorney fees, finding that because the action involved “neither frivolous conduct, extreme conduct, nor bad faith by the State,” § 25–10–711 precluded the grant of fees.⁴³ On cross-appeal, *Montrust* argued that, regardless of the bad faith statute, they were entitled to fees under the private attorney general doctrine.⁴⁴

The Court first recognized that a number of other jurisdictions had adopted the private attorney general doctrine.⁴⁵ It then turned to *Serrano v. Priest*,⁴⁶ a 1977 California case adopting the doctrine in that state. There,

37. *Id.*

38. *Bean Lake II*, 782 P.2d at 899–900.

39. *Id.* at 900.

40. *Id.*

41. *Montrust*, 989 P.2d 800.

42. *Id.* at 806, 808–809.

43. *Id.* at 810.

44. *Id.* at 810–811.

45. *Id.* at 811.

46. *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977). (In the first California legislative session following *Serrano*, California codified the private attorney general doctrine in Cal. Civ. Proc. Code § 1021.5

the California Supreme Court set forth three factors to be considered in such an award: “(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 plaintiff, (3) the number of people standing to benefit from the decision.”⁴⁷

The Montana Court repeated some of the California Court’s concerns, namely that courts could be “thrust into the role of making assessments of the relative strength or weakness of public policies furthered by their decisions and of determining at the same time which public policy should be encouraged by an award of fees, and which not—a role closely approaching that of the legislative function.”⁴⁸ Nevertheless, following the reasoning of *Serrano*, the Montana Supreme Court determined that concern was ameliorated by the public policy furthered by the litigation, and adopted the three-factor *Serrano* test.⁴⁹

Turning to the analysis of the test, the Court first determined that *Montrust* “litigated important public policies that are grounded in Montana’s Constitution.”⁵⁰ Second—and crucially—the Court noted that *the attorney general’s duty to defend the statutory scheme was precisely why private enforcement was required* to enforce constitutional interests vindicated in

(2014) which provides, in part: “Upon motion, a court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.” As this statute shows, the California Legislature not only embraced the *Serrano* formulation of the doctrine, but actually broadened it to include potential awards for one public entity against another *and* clarified that an award of compensatory damages need not limit or offset fee awards under the statute. In contrast to California, other state legislatures have enacted statutes barring recovery under the private attorney general theory. For example, in a 1994 decision where a private party in Utah successfully challenged the Utah Public Service’s rate-setting scheme, the Utah Supreme Court awarded the plaintiffs fees under the doctrine. *Stewart v. Utah Pub. Serv. Comm’n*, 885 P.2d 759, 783–784 (Utah 1994). In 2009, Utah barred any further awards under the private attorney general doctrine. Most states, however, have left it to the courts to determine whether the private attorney general is a proper basis for fee awards. As a limited example, the following decisions have affirmed the viability of the doctrine: *Arnold v. Arizona Dep’t of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989); *Yes on Prop 200 v. Napolitano*, 160 P.3d 1216 (Ariz. Ct. App. Div. 1 2007); *Sierra Club v. Dep’t of Transp. of State of Hawai’i*, 202 P.3d 1226 (Haw. 2009); *In re Lopez*, 109 P.3d 1021 (Colo. Ct. App. 2004), *cert. denied*, 2005 WL 823684 (Colo. 2005); *Hoke County Bd. of Educ. v. State*, 679 S.E.2d 512 (N.C. Ct. App. 2009). In contrast, the doctrine has been judicially rejected in a number of other states. *See e.g. Doe v. Heintz*, 526 A.2d 1318 (Conn. 1987), *appeal after remand*, 579 A.2d 37 (Conn. 1990); *State Bd. of Tax Com’rs v. Town of St. John*, 751 N.E.2d 657 (Ind. 2001); *Pearson v. Board of Health of Chicopee*, 525 N.E.2d 400 (Mass. 1988); *New Mexico Right to Choose/NARAL v. Johnson*, 986 P.2d 450 (N.M. 1999); *Fordice v. Thomas*, 649 So.2d 835 (Miss. 1995).

47. *Montrust*, 989 P.2d at 812 (quoting *Serrano*, 569 P.2d at 1314).

48. *Id.* at 811–812 (quoting *Serrano*, 569 P.2d at 1314).

49. *Id.* at 812.

50. *Id.*

the action.⁵¹ Finally, the Court concluded that Montrust's litigation "clearly benefitted" "all Montana citizens interested in Montana's public schools."⁵² Based on these three factors, the Court held the district court abused its discretion by ignoring "recognized principles" in denying Montrust attorney fees, resulting in a "substantial injustice."⁵³ The Court therefore determined Montrust was entitled to attorney fees under the private attorney general theory.⁵⁴

C. *Finke*

The next time the doctrine was seriously⁵⁵ addressed was in *Finke v. State ex rel. McGrath*.⁵⁶ The plaintiffs were three individuals and six municipalities who challenged the constitutionality of SB 242.⁵⁷ The proposed statute involved the scope of county jurisdiction over building codes, and would have limited voting on the geographic applicability of those codes to "record owners of real property."⁵⁸ The defendants were the State through the Attorney General, the Department of Labor and Industry, and the counties in which the six municipalities were located.⁵⁹

The plaintiffs challenged the election provisions on a number of constitutional grounds, including violations of Article II, sections 4 (equal protection), 13 (unencumbered right of suffrage), and 17 (due process); Article V, section 11(3) (mandating every legislative bill to contain only one subject) of the Montana Constitution; and the Fifth (due process) and Fourteenth Amendments (equal protection) of the U.S. Constitution.⁶⁰

In sum, the Court agreed with all of the plaintiffs' challenges, and found SB 242 "disenfranchise[d] constituents" under both the Montana and U.S. Constitutions.⁶¹

Next, the Court turned to the plaintiffs' assertion they were entitled to fees under the private attorney general doctrine. The Court first recited the three factors established in *Montrust*, and did not disagree that the plaintiffs

51. *Id.*

52. *Id.*

53. *Montrust*, 989 P.2d at 812.

54. *Id.*

55. As previously mentioned, this survey is not exhaustive. For example, on cross appeal, the prevailing plaintiff in the case establishing a stand-alone cause of action for violation of state constitutional rights argued he was entitled to fees under the doctrine. But because he failed to raise the issue below, the Court declined to consider it on appeal. *Dorwart v. Caraway*, 58 P.3d 128 (Mont. 2002).

56. *Finke v. State ex rel. McGrath*, 65 P.3d 576 (Mont. 2003). Due to the cross-governmental parties, the case began as an original proceeding in the Supreme Court.

57. *Id.* at 579.

58. *Id.* at 578–579.

59. *Id.* at 579.

60. *Id.* at 579–580.

61. *Id.* at 581.

had established a successful result under each factor.⁶² But the Court noted a significant problem: it would be unjust to force the county defendants to pay for the unconstitutional actions of the legislature.⁶³ In other words, the private attorney general theory is an equitable doctrine, and it would be inequitable to award fees against counties “who neither fashioned nor passed the unconstitutional law.”⁶⁴

The Court then determined the only other party against whom fees could be assessed was the State.⁶⁵ But the Court held that two separate issues barred a recovery against the State. First, the plaintiffs did not specifically seek fees against the State, and in any case, the injunction sought by plaintiffs “simply [did] not provide a basis” for an award of fees.⁶⁶ Second, and more importantly, because the only proper basis for a fee award would lie in the actions of the Legislature in enacting an unconstitutional bill (because the Attorney General had not actually enforced it yet), and the Legislature is immune from suit for any legislative act or omission, there was no avenue whereby fees could be awarded against the State.⁶⁷

Here again, just as in *Montrust*, the Court did not engage in any discussion of bad faith regarding the defendants’ conduct. Nor did it even raise the issue of the bad faith statute. Instead, it focused on the equitable issues surrounding the plaintiffs’ requests for fees, and determined that, because the equities did not support an award of fees, the private attorney general doctrine was inapplicable.

D. *American Cancer Society*

In *American Cancer Society v. State*,⁶⁸ the plaintiffs sued the State, alleging the Legislature’s attempt to void municipal ordinances barring smoking in certain public establishments was unconstitutional.⁶⁹ The Court concluded the doctrine of implied preemption could not apply, but that, instead of being unconstitutional, the statute instead merely had “no force and effect.”⁷⁰ The plaintiffs also requested attorney fees pursuant to the private attorney general doctrine, but the Court held that, because the statute was “ineffectual rather than unconstitutional,” the plaintiffs had vindicated no constitutional interest and therefore no fees under the doctrine were war-

62. *Finke*, 65 P.3d at 582–583.

63. *Id.* at 582–583.

64. *Id.*

65. *Id.* at 583.

66. *Id.*

67. *Id.*

68. *Am. Cancer Socy. v. State*, 103 P.3d 1085 (Mont. 2004).

69. *Id.* at 1087 (like in *Finke*, the Court assumed original jurisdiction).

70. *Id.* at 1090.

ranted.⁷¹ Once again, the Court did not discuss bad faith, nor did it discuss legislative immunity as it had in *Finke*.

E. *Columbia Falls*

In *Columbia Falls Elementary School District No. 6 v. State*,⁷² the Court affirmed the district court's decision that the funding system and educational product of the public school system was constitutionally infirm.⁷³ In district court, the plaintiffs had pursued attorney fees under the private attorney general doctrine, but the district court denied the request.⁷⁴ On cross appeal, and with almost no analysis, the Supreme Court vacated the denial, and remanded for consideration of attorney fees "in light of *Mon-trust*."⁷⁵

Less than six weeks after the case was remanded and prior to any judicial determination in that context, the parties stipulated to a fee award of over \$499,000 in favor of the plaintiffs.⁷⁶ Thus, while the Supreme Court's language did not expressly award fees in this case, the practical effect of its decision resulted in such an award. *Columbia Falls* therefore became the second time the Supreme Court had directed an award against the State under the private attorney general doctrine.

F. *Sunburst*

In *Sunburst School District No. 2 v. Texaco, Inc.*,⁷⁷ the plaintiffs (which included numerous private property owners) sued Texaco over extensive and widespread contamination of their properties. The plaintiffs won a multi-million dollar judgment, and the district court awarded fees pursuant to the private attorney general doctrine.⁷⁸ On cross appeal, the plaintiffs maintained the district court was correct, and the private attorney general doctrine compelled a fee award.⁷⁹ The plaintiffs argued: (1) the litigation vindicated important public policy regarding the proper measure of damages for contamination, benefitting property owners throughout the state; (2) private enforcement was necessary due to DEQ's inaction in failing to properly monitor Texaco's facilities and mandate cleanup; and (3)

71. *Id.* at 1090–1091.

72. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257 (Mont. 2005).

73. *Id.* at 262–263.

74. *Id.* at 264.

75. *Id.*

76. *See Stip. Or. Awarding Atty. Fees*, Mont. First Judicial Dist., Cause No. BVD-2002-528 (May 12, 2005).

77. *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007).

78. *Id.* at 1097.

79. *Id.* at 1097–1098.

their litigation efforts caused them significant financial burden.⁸⁰ Texaco argued that because Sunburst won a substantial money judgment, an award of attorney fees was unnecessary.⁸¹

The Court agreed with Texaco, noting that one of the purposes of the private attorney general doctrine is to incentivize “public interest related litigation that might otherwise be too costly to bring.”⁸² The Court added 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.”⁸³ Because the plaintiffs’ case resulted in a multi-million dollar judgment, they “needed no additional incentive” to litigate the matter.⁸⁴ The Court therefore held that the district court abused its discretion when it awarded fees to the plaintiffs under the private attorney general doctrine, and vacated the award.⁸⁵

G. *Baxter*

Another important case in the development of the doctrine is *Baxter v. State*,⁸⁶ where a terminally ill patient and a number of doctors brought an action challenging the applicability of the homicide statutes to doctors who provided aid in dying to terminal patients.⁸⁷ On cross motions for summary judgment, the district court ruled in favor of the plaintiffs, holding the constitutional rights to dignity and privacy, when taken together, protect physicians who provide aid in dying.⁸⁸ Following a post-judgment motion, the district court also awarded the plaintiffs attorney fees under the private attorney general doctrine.⁸⁹

On appeal, the Court affirmed the district court’s determination that physician-assisted aid in dying is not contrary to public policy, but did so on statutory instead of constitutional grounds.⁹⁰ Therefore, because the private attorney general doctrine only applies “when constitutional interests are vindicated,” the Court held that its statute-based holding could not support a fee award under the private attorney general doctrine.⁹¹

80. *Id.*

81. *Id.*

82. *Id.*

83. *Sunburst*, 165 P.3d at 1097–1098 (quoting *Flannery v. California Highway Patrol*, 71 Cal. Rptr. 2d 632, 635 (Cal. App. 1st Dist. 1998)).

84. *Id.*

85. *Id.*

86. *Baxter v. State*, 224 P.3d 1211 (Mont. 2009).

87. *Id.* at 1214.

88. *Id.*

89. *Id.* at 1221.

90. *See e.g. id.*

91. *Id.* at 1221. Additionally, the Court declined to uphold the award on alternate grounds. This decision, while seemingly providing an important clarification regarding when fees are available, suffers

H. *Bitterroot River Protective Association*

*Bitterroot River Protective Association v. Bitterroot Conservation District*⁹² is the most complex treatment of the private attorney general doctrine, and remains the only time the Court has affirmed an award under the private attorney general doctrine against a private party. Plaintiffs Bitterroot River Protective Association (“BRPA”), a local group dedicated to public access and environmental protection, sought attorney fees from defendant landowners after the Supreme Court held the Mitchell Slough was part of a natural, perennially flowing stream (the Bitterroot River) and was therefore subject to the “310 Law” and open to public access under the Stream Access Law (“SAL”).⁹³

On remand from *BRPA II*, the district court conducted a hearing on fees, and awarded over \$300,000 in favor of the BRPA and against the private landowners, but not against the Bitterroot Conservation District (“BCD”) itself.⁹⁴ The district court based the award on both the private attorney general doctrine and the Uniform Declaratory Judgment Act (“UDJA”).⁹⁵ The landowners appealed from that order.⁹⁶ BRPA did not contest the denial of fees against the BCD, and argued only that a fee award against the landowner defendants was justified.

The Supreme Court’s decision began with the applicable standard of review, which landowners asserted was a question of law, while only the amount was reviewed for abuse of discretion.⁹⁷ The Court disagreed, holding that abuse of discretion was the proper standard—the same standard as an award under the UDJA.⁹⁸ The Court therefore moved on to the landowners’ claim that the district court abused its discretion when it awarded fees under the private attorney general doctrine.⁹⁹

from a very limited examination of the difference between statutory and constitutional interests when, as often happens, the two are interrelated.

92. *Bitterroot River Protective Assn. v. Bitterroot Conservation Dist.*, 251 P.3d 131 (Mont. 2011). This was the third time the case reached the Supreme Court and is therefore commonly referred to as *BRPA III*.

93. *Id.* at 134–135. The “310 Law” is the Natural Streambed and Land Preservation Act. If a stream qualifies as a natural and perennially flowing stream, then the local Conservation District controls all projects within the bed and immediate banks. Here, the BCD had attempted to abrogate its jurisdiction over the Mitchell Slough because it believed the Slough did not fall within the definition of a natural and perennial stream. *BRPA I* and *II* held otherwise.

94. *Id.* The BCD is a governmental entity.

95. *Id.* (citing the UDJA “supplemental relief” statute at Mont. Code Ann. § 27–8–313).

96. *Id.*

97. *Id.*

98. *Bitterroot River Protective Assn.*, 251 P.3d at 134–135.

99. *Id.* at 137.

The Court applied the three-factor test *Montrust* adopted from *Serrano*,¹⁰⁰ and added the *Finke* consideration of “whether an award would be unjust under the circumstances.”¹⁰¹ The landowners contested the award under each of the four factors.¹⁰²

Under the first factor, landowners argued the decision in *BRPA II* “was primarily one of statutory interpretation,” did not vindicate constitutional interests, and therefore could not satisfy the first *Montrust* factor, which is the “strength or societal importance of the public policy vindicated by the litigation.”¹⁰³ *BRPA* responded that the doctrine does not require a direct constitutional challenge, and even if the challenge was only statutory, it nevertheless implicated important constitutional interests.¹⁰⁴ The Court did note the landowners were correct that, since *Baxter* and *American Cancer Society* were decided on statutory grounds, those cases did not support an award under the doctrine due to the concern that the first factor not become judicial “assessments of the relative strength or weakness of public policies furthered by their decisions . . . a role closely approaching that of the legislative function.”¹⁰⁵ But the Court nonetheless found the statutes at issue in *BRPA II* “directly implicated constitutional provisions,” and the holdings of that case were “expressly premised upon [the statute’s] constitutional purpose.”¹⁰⁶ Therefore, because the statutes at issue directly implicated the explicit constitutional rights to a clean and healthful environment,¹⁰⁷ the preservation of water rights,¹⁰⁸ and the preservation of the harvest heritage,¹⁰⁹ the Court concluded the case was distinguishable from *Baxter* and *American Cancer Society*, and thus satisfied the first factor.¹¹⁰

Turning to the second factor,¹¹¹ the Court noted that BCD’s and FWP’s cross-governmental involvement complicated the issue.¹¹² But more importantly, the landowners had intervened in January of 2004, and it was largely due to *their* ongoing actions that *BRPA* was forced into prolonged and extensive litigation with up to 23 separate intervenors.¹¹³ Therefore,

100. *Id.*

101. *Id.* (citing *Finke*, 65 P.3d at 583).

102. *Id.*

103. *Id.*

104. *Bitterroot River Protective Assn.*, 251 P.3d at 137–138.

105. *Id.* (citing *Serrano*, 569 P.2d at 1314, and *Montrust*, 989 P.2d at 812).

106. *Id.* at 138 (citing Mont. Const. art. IX §§ 1, 3).

107. Mont. Const. art. II, § 3.

108. Mont. Const. art. IX, § 3.

109. Mont. Const. art. IX, § 7.

110. *Bitterroot River Protective Assn.*, 251 P.3d at 138–139.

111. *Id.* at 139 (“The necessity for private enforcement and the magnitude of the resultant burden on the plaintiff.”).

112. *Id.* at 140.

113. *Id.* at 138–140.

due to the significant number of landowners arguing the Slough was not within the realm of the 310 Law, and the fact that neither the BCD nor FWP were directly responsible for the years of litigation, the Court determined the second factor was met.¹¹⁴ Further supporting that conclusion, the Court found that *but for* BRPA's challenge to the initial BCD determination that the 310 Law did not apply to the Slough, the BCD's decision "may very well still stand."¹¹⁵

Addressing the third factor, the Court considered the number of people standing to benefit from the litigation.¹¹⁶ The landowners argued the holding from *BRPA II* only applied to one body of water, did not revise the SAL or 310 Law, any potential benefit was merely speculative, and the "precedential value [was] minimal."¹¹⁷ In response, BRPA argued that the public benefited directly, as it can now recreate on the Mitchell, the stream is protected from unregulated alteration, and the "precedential effect is substantial for purposes of protecting other Montana waterways."¹¹⁸ The Court agreed with BRPA, and held that the case was of statewide importance, clarified the status of other public waters, and recognized that recent efforts to enact a constitutional initiative to remove bodies of water like the Mitchell from the 310 Law demonstrated the importance of the case.¹¹⁹

Finally, the Court concluded an award would not be unjust under the circumstances.¹²⁰ The landowners argued that equitable considerations weighed against an award for multiple reasons, including their defense of their own property rights, a reliance on previous interpretations of the SAL and 310 Law, and "that an award of private attorney general fees against private parties is unfair."¹²¹ But the Court again disagreed, reasoning that prior to the litigation, BCD had issued numerous permits under the 310 Law to conduct work on the Mitchell, and that there was longstanding recreational use which the landowners' actions threatened to eliminate.¹²² The Court thus affirmed the district court's award in its entirety.¹²³

114. *Id.*

115. *Id.* at 140.

116. *Bitterroot River Protective Assn.*, 251 P.3d at 140.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Bitterroot River Protective Assn.*, 251 P.3d at 140.

123. *Id.* at 143. The Court also addressed and affirmed the district court's calculations of the amount, which the landowners had also contested.

II. *WESTERN TRADITION PARTNERSHIP II* GOT IT WRONG AND
THREATENS THE VALIDITY OF THE PRIVATE ATTORNEY GENERAL
DOCTRINE IN ANY CONTEXT

As Part I demonstrates, the bar for a successful award of attorney fees under the private attorney general doctrine is high. Each and every time the Montana Supreme Court considered the doctrine—from *Bean Lake II* in 1989 to *BRPA III* in 2011—the Court recognized why the doctrine existed: to compensate a private party when it is forced to vindicate constitutional issues of societal importance. None of the decisions preceding *WTP II* had ever considered bad faith a factor in the determination of whether an award was justified under the private attorney general doctrine. Instead, in each decision, the Court analyzed the three *Serrano* factors and then, sometimes, considered the overall equities of an award. Further, the *Montrust* Court recognized that it was precisely the State’s duty to defend statutes that created “the necessity of private enforcement” of constitutional interests.¹²⁴

But in *WTP II*, the Court veered widely off the established course, and made a series of analytical mistakes that—if followed—will render the private attorney general doctrine meaningless. Before addressing *WTP II*’s treatment of the doctrine, a brief review of the background facts and circumstances of that case is necessary.

A. *A brief review of Western Tradition Partnership I*

In *WTP I*, Western Tradition Partnership and a number of other business interests sued the Attorney General and the Commissioner of Political Practices, alleging that § 13–35–227(1)—which prohibited corporate political expenditures on behalf of political candidates for in-state offices—infringed on their fundamental First Amendment rights, and therefore could not survive the United States Supreme Court’s holding in *Citizens United*. The district court agreed, and granted summary judgment in favor of the plaintiffs but did not award fees.¹²⁵

The Montana Supreme Court reversed, and attempted to distinguish the case from *Citizens United* on three grounds. First, the Court said that the plaintiffs had generally failed to “demonstrate any material way in which Montana law hindered or censored their political activity or speech.”¹²⁶ Second, the Court concluded that, unlike the complex federal laws struck down in *Citizens United*, the Montana rules were simple, and therefore there was a “material factual distinction” between the laws at issue in the

124. *Montrust*, 989 P.2d at 812.

125. *WTP I*, 271 P.3d at 1, 3.

126. *Id.* at 6.

two cases.¹²⁷ Third, the Court decided that the Montana law at issue “cannot be understood outside the context of the time and place it was enacted,” and because the law was the result of actual and infamous corruption on a local, state, and national level, it was somehow different than the laws struck down in *Citizens United*.¹²⁸ The Court therefore reversed the district court, and concluded that “applying the principles enunciated in *Citizens United*, it is clear that Montana has a compelling interest to impose the challenged rationally-tailored statutory restrictions.”¹²⁹

Justice Nelson dissented, and began with the soon-to-be-proved-correct statement that the “Supreme Court could not have been more clear in *Citizens United*” that there is “virtually no conceivable basis for muzzling or otherwise restricting corporate political speech in the form of independent expenditures.”¹³⁰ Indeed, Justice Nelson even predicted that when WTP appealed to the Supreme Court, “a summary reversal on the merits would not surprise me in the least.”¹³¹

Justice Nelson, of course, proved correct. Less than six months after *WTP I*, the United States Supreme Court granted certiorari and, in a one-paragraph, per curiam opinion, summarily reversed the Montana Supreme Court.¹³² The majority concluded “Montana’s arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.”¹³³

B. Why WTP II was wrongly decided

On remand, WTP moved for an award of attorney fees under the private attorney general doctrine, or alternatively, under the Uniform Declaratory Judgments Act (“UDJA”).¹³⁴ To begin, the Court stated that under certain circumstances, the UDJA provides an “equitable” basis for attorney fee

127. *Id.* at 7–8.

128. *Id.* at 8–10. This publication has devoted substantial space to many exhaustively-researched and comprehensive treatments of the corruption that gave rise to the laws at issue in *WTP I*. See e.g. William P. Marshall, *The Constitutionality of Campaign Finance Regulation: Should Differences in a State’s Political History and Culture Matter?*, 74 Mont. L. Rev. 79 (2013); Larry Howell, *Once Upon a Time in the West: Citizens United, Caperton, and the War of the Copper Kings*, 73 Mont. L. Rev. 25–26 (2012); Jeff Wiltse, *The Origins of Montana’s Corrupt Practices Act: A More Complete History*, 73 Mont. L. Rev. 299 (2012). See also Anthony Johnstone, *Foreword: The State of the Republican Form of Government in Montana*, 74 Mont. L. Rev. 5, 19–20 (2013).

129. *WTP I*, 271 P.3d at 13.

130. *Id.* at 16–17 (Nelson, J., dissenting) (citing *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)).

131. *WTP I*, 271 P.3d at 36 (citation omitted).

132. *Am. Tradition Partn., Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (June 25, 2012).

133. *Id.*

134. *WTP II*, 291 P.3d at 547–548. Interestingly, WTP requested the Court consider the issue on briefing submitted during *WTP I*, which the Court had never addressed because it had been mooted based on the holding in that case.

awards, and because the private attorney general doctrine is also based on equitable considerations, the Court would “consider these arguments together.”¹³⁵ Unfortunately, this conflation laid the foundation that created an unsound analytical framework for the rest of the decision.

In its analysis, the Court did, at least, recite the three primary *Montrust* factors.¹³⁶ WTP argued it had “vindicated important free speech rights that benefit all Montana citizens and corporations and will result in adding more thoughts and views to the state’s political discourse.”¹³⁷ The State disagreed, and argued there was “substantial overlap” between WTP’s vision of the public interest and its own pecuniary interests.¹³⁸

Yet, at least partially rejecting the State’s argument, the Court noted “[t]he constitutional principles underlying this litigation cannot be doubted.”¹³⁹ Following *Citizens United*, it is the law of the land that “political speech does not lose First Amendment protection simply because its source is a corporation.”¹⁴⁰

The Court then began the private attorney general analysis. First, citing § 2–15–501(1), it recognized that the Attorney General has a general duty to defend a statute, but at the same time, retains discretion whether or not to defend a statute’s constitutionality.¹⁴¹ Addressing this tension, the Court stated that the judicial branch “must use caution in awarding fees against the State in a ‘garden variety’ declaratory judgment action that challenges the constitutionality of a statute that the Attorney General, in the exercise of his executive power, has chosen to defend.”¹⁴² The Court then immediately cited the bad faith statute, noting that the statute “cabined this executive

135. *Id.* at 548–549.

136. *Id.* at 549.

137. *Id.*

138. *Id.* The shadowy “pecuniary interests” underlying WTP’s (now ATP’s) motivations are well outside the scope of this article. Suffice it to say, WTP/ATP and a number of state-level elected officials are currently under investigation and/or facing sanctions due to allegations of illegal campaign coordination. See e.g. Mike Dennison, *Motl: Strip State Rep. of Office or Fine Him*, Helena Independent Record (Jan. 25, 2014). In this article, Dennison notes Commissioner of Political Practices Jonathan Motl found Representative Mike Miller of Helmsville “should be removed from office or fined for accepting illegal campaign help from secretive conservative groups”—namely, WTP/ATP. Further, Motl also recently filed “another round” of complaints, including one alleging Senate Majority Leader Art Wittich “may have illegally coordinated with Western Tradition Partnership and affiliated groups in his 2010 campaign.” *Motl*, Helena Independent Record (Jan. 25, 2014). Notably, Wittich’s law firm represented WTP before the Montana Supreme Court in both *WTP I* and *WTP II*. Complicating the issue even further, Motl represented *amici* siding with the State in *WTP I*. See also *LeFer v. Murry*, CV 13-06-BLG-DWM, 2013 WL 5651415 (D. Mont. Oct. 15, 2013) (outlining factual history of WTP-associated documents that may tend to corroborate illegal campaign coordination between WTP/ATP and a number of Montana candidates and officeholders).

139. *WTP II*, 291 P.3d at 549.

140. *Citizens United v. FEC*, 558 U.S. 310, 342 (2010).

141. *WTP II*, 291 P.3d at 550 (citing *Associated Press v. State of Mont.*, 820 P.2d 421 (1991)).

142. *Id.*

discretion,” and found that the bad faith standard “serves as a guidepost in analyzing a claim for fees under the private attorney general doctrine.”¹⁴³

The only apparent support for that reasoning comes from *Bean Lake II*, where, as *WTP II* noted, the Court had determined that the Department of Fish, Wildlife and Parks had “acted in good faith and in accordance with constitutional and statutory mandates” in defending the public’s recreational use rights.¹⁴⁴ The Court did note, however, that the statute was not necessarily controlling because *Montrust* had established that the private attorney general doctrine is an *equitable* exception to the American Rule.¹⁴⁵

According to the Court, *Montrust* was not a “garden variety” declaratory judgment action because it involved “unique issues” implicating the State’s potential breach of fiduciary duties and constitutional obligations.¹⁴⁶ In contrast, here the Court held that the State “mounted a good faith defense” to WTP’s claims, and it “is difficult to conclude that [the Attorney General’s] arguments were frivolous when five members of this Court were convinced of their merit.”¹⁴⁷

Thus, even though the Court implicitly recognized that WTP had satisfied the first *Serrano* factor after it had undoubtedly “vindicated principles of constitutional magnitude,” because the State’s defense was also “grounded in constitutional principles” and of concern to Montana citizens, the Court determined WTP was not entitled to fees.¹⁴⁸ That is because the “challenge was brought in a time of shifting legal landscapes,” and WTP could not meet its burden to show that the government had failed to properly enforce interests which are significant to its citizens.¹⁴⁹ Of course, this analysis all happened in one paragraph. Instead of continuing on with its analysis, the court stopped here, after it determined the “predicate for an award” had not been established, because apparently the citizens of Montana were unhappy with *Citizens United* and the actions of WTP.¹⁵⁰

But there are at least two distinct problems with the Court’s analysis. First, and most fundamentally, it failed to actually undertake an analysis of the second and third *Serrano* factors.¹⁵¹ Indeed, there is no analysis of those

143. *Id.*

144. *Id.* (citing *Bean Lake II*, 782 P.2d at 900).

145. *Id.*

146. *Id.*

147. *WTP II*, 291 P.3d at 550.

148. *Id.*

149. *Id.*

150. *Id.* (This conclusion can be inferred from the Court’s closing sentence: “The challenge was brought in a time of shifting legal landscapes, the contours of which still have not finally been defined. Under these circumstances, the predicate for an award of fees under the private attorney general doctrine—‘when the government, for some reason, fails to properly enforce interests which are significant to its citizens’—has not been established.”).

151. This issue is covered far more extensively in Justice Nelson’s dissent.

factors whatsoever. In a conjunctive test, if the first part fails, then it is unnecessary to move on to the second and third parts. But here, the Court's own analysis showed WTP *did* meet its burden under the first factor as it had been previously applied, and it appears WTP would have likely met its burden on the other parts of the test. There is little doubt of the necessity for WTP's private enforcement of fundamental First Amendment rights. It is highly unusual for a private plaintiff to be forced to litigate all the way to the U.S. Supreme Court and then have the Court grant certiorari. That alone indicates the sheer magnitude of the plaintiffs' burden. When the Supreme Court reverses summarily, that should be sufficient evidence that the State's argument and the Montana Supreme Court's reasoning were weak, at best. Likewise, whether the Montana Supreme Court or the general public likes it or not, the vindication of what the U.S. Supreme Court has recently recognized as fundamental First Amendment rights will benefit a substantial number of Montana citizens, if not all of us.¹⁵²

The second, and perhaps most legally significant mistake, was the insertion of a bad faith element into the private attorney general doctrine. Contrary to the Court's arguments, *Bean Lake II* does not stand for the proposition that the private attorney general doctrine requires a showing of bad faith. Instead, the *Bean Lake* Court's reference to bad faith was the epitome of dicta, and in any event, was proper for the analysis in that case. That is because there, the Department had a *specific* statutory mandate to litigate water rights issues on behalf of Montana citizens. In contrast, the Attorney General certainly has no statutory mandate to litigate *against* the established First Amendment rights of Montana citizens. Indeed, the very notion is absurd. This issue was also directly addressed in *Montrust*, where the Court recognized that the Attorney General's duty to defend statutes is precisely why the private attorney general doctrine exists—to encourage enforcement of constitutional interests which may trump the very statute the Attorney General is required to defend.¹⁵³

152. See *WTP II*, 291 P.3d at 550 (Nelson, J., dissenting) (“As a matter of federal constitutional law, all Montana citizens—at least, every voter in Montana—benefitted from the . . . decision in favor of ATP under *Citizens United*.”).

153. *Montrust*, 989 P.2d at 812. (“[T]he State argues that it had a duty to defend the statutes in the present case; thus, the State does not dispute the necessity of private enforcement of Montana's Constitution.”). Another potential problem exists with the divided executive power in Montana—what happens if the Governor and the Attorney General disagree on the constitutionality of a statute? The entire WTP situation may have worked out very differently if our present Governor and Attorney General had been in office rather than the last combination, which appeared to generally agree on policy issues. The delegates at the 1972 Constitutional Convention discussed this tension. See Mont. Const. art. VI, § 4; Mont. Code Ann. § 2-15-501 (2011) (setting forth the duties of the Attorney General). See also 1972 Constitutional Convention Transcript at 866-870 (discussing whether the Attorney General should be appointed by the governor or elected by popular vote).

It is also worth noting that, although *Bean Lake II* discussed bad faith, it did not actually apply the private attorney general doctrine—it simply recognized it as a viable theory. In each and every one of the cases where the Court actually addressed the doctrine in any significant manner, it never applied a bad faith analysis. This is consistent with the three-part test itself, because the plain language of the test makes clear that a bad faith analysis is not a part of the inquiry. It is also consistent with the manner in which other courts apply the doctrine.¹⁵⁴ Further, as noted in Justice Nelson’s dissent, in *Montrust*, the *district court specifically rejected the claim for fees due to the absence of bad faith*, yet the Court nevertheless reversed after determining the plaintiffs had established they were entitled to fees.¹⁵⁵ It did so regardless of the district court’s finding that the State had not engaged in any frivolous, extreme, or bad faith conduct.¹⁵⁶

WTP (now ATP) is not a likable organization. In fact, it is likely WTP currently exists in name only. Those associated with it—including the law firm associated with *WTP II*, which includes elected officials—are under scrutiny from the State Commissioner of Political Practices.¹⁵⁷ It may also be that WTP was—on remand after summary reversal—a juridical *persona non grata*, and the Court found it repugnant to award fees to such an unpopular plaintiff who prevailed against what so many saw as a brave decision in *WTP I*. Nevertheless, that is not sufficient grounds to misapply an established judicial doctrine.

CONCLUSION

To be sure, the *WTP II* dissent provides a more thorough analysis of the three-factor test and why WTP clearly satisfied each element of that test. This article does not seek to recreate that dissent. Instead, I hope a brief overview of the important attorney general doctrine cases decided by the Montana Supreme Court vindicates the dissent, which I believe reached the proper conclusion.

Since 1999, the Court has only awarded fees under the doctrine twice, and has remanded a case to the district court for consideration of the doc-

154. See e.g. *Punsly v. Ho*, 129 Cal. Rptr. 2d 89, 97–98 (Cal. 2003) (“Bad faith is not a statutory criteria under [the private attorney general statute].”).

155. *WTP II*, 291 P.3d at 551–552 (Nelson, J. dissenting).

156. *Id.*

157. Charles S. Johnson, *American Tradition Partnership is Back*, Helena Independent Record (April 6, 2014). Here, Johnson notes that Governor Bullock advised the general public that “[a]n organization like [WTP] doesn’t rely on the public trust. They just rely on sheer distortions and shell games.” The article goes on to note that in 2013, Lewis and Clark County district court Judge Sherlock fined ATP over \$260,000 for its attempts to “evade Montana’s campaign and reporting requirements,” but that the State had not yet entered judgment because Bullock and Commissioner Motl are considering whether to “pierce the veil” and seek satisfaction of a judgment from ATP officers individually.

2014

EXPENSIVE FREE SPEECH

295

trine on one other occasion. That fact alone is sufficient to demonstrate that the private attorney general doctrine is not being abused—and also likely illustrates why it has not generated any significant legislative response.

In the two cases where the Court awarded fees, the awards seem legitimate in retrospect. In the cases which were closer but no fees were awarded, perhaps questions remain. One area those questions will likely focus is what—exactly or even inexactly—constitutes a “significant constitutional interest.” But in any case, if the Court wants to walk back its own judicially-created doctrine, it of course may do so. But it should do so openly, acknowledging what it is doing, instead of conflating two entirely separate legal theories and then ignoring the actual requirements of the theory upon which it should decide the case. That is especially true when addressing a case on remand from a summary reversal at the United States Supreme Court affirming “fundamental” First Amendment principles, where the denial of fees could suggest—ironically—bad faith.

