IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JAMES C. DELEON GUERRERO, et al.,
Plaintiffs-Appellees,

v.

COMMONWEALTH DEPARTMENT OF PUBLIC SAFETY,
Defendant-Appellant.

SUPREME COURT NO. 2012-SCC-0030-CIV
SUPERIOR COURT NO. 09-0186

OPINION

Cite as: 2013 MP 17

Decided December 19, 2013

Robert T. Torres, Saipan, MP, for Plaintiffs-Appellees James C. Deleon Guerrero, et al.
Ghassan Harb, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Defendant-Appellant Commonwealth of the Northern Mariana Islands

BEFORE: JOHN A. MANGLONA, Associate Justice; JOSEPH N. CAMACHO, Justice Pro Tem; HERB D. SOLL, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Defendant-Appellant Department of Public Safety ("DPS") engaged in hiring practices it now concedes were wrong. A DPS officer, Plaintiff-Appellee James C. Deleon Guerrero ("Deleon Guerrero") challenged these hiring practices, and, after years of litigation, the Superior Court ruled in his favor. It also awarded Deleon Guerrero attorney fees under the private-attorney-general exception to the American Rule (which normally requires each party to pay their own attorney fees). DPS appealed, claiming the Superior Court erroneously awarded attorney fees for two reasons: the decision (1) allegedly relied on a misunderstanding of fact; and (2) wrongly rested on the private-attorney-general exception, which has not been adopted in the Commonwealth. In response, Deleon Guerrero cross-appealed, arguing the Superior Court awarded attorney fees on not only the private-attorney-general exception, but also the bad-faith exception, which has been adopted in the Commonwealth. We adopt the private-attorney-general exception, AFFIRM the Superior Court's application of that exception to this case, and, consequently, do not reach either the alleged misunderstanding of fact (because its relevance goes to the bad-faith exception) or the alleged alternative reliance on the bad-faith exception.

I. Factual and Procedural Background

¶ 2 The underlying dispute started when DPS promoted Officer Alfred Celes ("Celes") from Police Officer II to the highest grade of Sergeant, a promotion that permitted Officer Celes to bypass Police Officer III and several in-grade steps within the rank of Sergeant. Deleon Guerrero objected, filing an informal grievance with DPS claiming Officer Celes lacked the necessary experience for the promotion and concomitant pay raise. When DPS did not respond to the grievance, or Deleon Guerrero's subsequent formal grievance, Deleon Guerrero turned to the Civil Service Commission. The Civil Service Commission, however, could not reach a quorum and therefore could not consider the grievance.

¶ 3 Having exhausted his administrative remedies, Deleon Guerrero filed a complaint with the Superior Court. Both parties eventually filed motions for summary judgment, which the court granted in part and denied in part. The summary judgment order found DPS had unlawfully promoted Officer Celes, but that the issue was moot because DPS had subsequently demoted him. This order also declined to award attorney fees via the private-attorney-general exception to the American Rule.

¶ 4 Despite concluding the claim against Officer Celes' promotion was moot, litigation continued because Deleon Guerrero alleged DPS continued to engage in unfair promotion-and-selection practices. This included promoting Sergeant Eloy K. Fitial ("Fitial"), an officer in Tinian, from Sergeant to Captain, which the Superior Court subsequently found improper.

¶ 5 Based on these improper promotions, the Superior Court ultimately awarded Deleon Guerrero attorney fees. As a basis for the award, the Superior Court adopted the private-attorney-general exception,[1] which permits a court to order the losing party to pay the attorney fees of a private citizen who wins a lawsuit if, among other things, private enforcement was necessary, the lawsuit vindicated an important public interest, and the benefit extended to a large number of people.

¶ 6 In response, DPS filed a motion to reconsider. In that motion, as in this appeal, DPS argued the Superior Court based its decision on a factual error: Officer Fitial did not serve in the rank of Captain at the time of the Court's final order and, therefore, the court erred by adopting the private-attorney-general exception.

¶ 7 Following the Superior Court's denial of that motion, DPS timely appealed.

II. Jurisdiction

¶ 8 The Supreme Court has appellate jurisdiction over final judgments and orders of the Superior Court of the Commonwealth. 1 CMC § 3102(a).

III. Standard of Review

¶ 9 While this appeal ostensibly presents three issues, we reach only one:[2] Whether the trial court erred when it awarded Deleon Guerrero attorney fees via the private-attorney-general exception to the American Rule (which ordinarily requires each party to pay for their own litigation costs). We review issues of law de novo. *Commonwealth v. Minto*, 2011 MP 14 ¶ 11; *see also Fleming v. Quigley*, 2003 Guam 4 ¶ 14 (reviewing a trial court's departure from the American Rule de novo).[3]

IV. Discussion

¶ 10 Deleon Guerrero challenged several DPS hiring practices. Following years of litigation, the Superior Court ultimately agreed, declaring the contested hires and promotions unlawful and awarding Deleon Guerrero attorney fees via the private-attorney-general exception to the American Rule.

¶ 11 DPS disputes the appropriateness of the attorney-fees award for three reasons. First, DPS claims the Superior Court erred by relying on the private-attorney-general exception because the Commonwealth

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[1] The private-attorney-general exception is also known as the substantial-benefits exception. *Arnold v. Arizona Dept. of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989).

[2] Because we ultimately adopt the private-attorney-general exception, we need not reach whether the trial court relied on the bad-faith exception as an alternative ground for the attorney fee award. We likewise need not consider if the trial court misunderstood whether Officer Fitial had been formally demoted because, while that fact is relevant to considering the bad-faith exception, it is not for analyzing the private-attorney-general exception.

[3] As part of the attorney-fee question, Deleon Guerrero added an issue during oral argument: Must he wait until the legislature appropriates funds to satisfy the judgment, or may he instead collect the funds directly from DPS? Deleon Guerrero suggests waiting an uncertain time for the legislature to appropriate the money would amount to a pyrrhic victory. We, however, do not reach whether a fee award under the private-attorney-general exception might constitute a sufficient reason to deviate from the general rule because Deleon Guerrero waited until oral argument to raise the argument. *Cf. Bank of Saipan v. Superior Court*, 2002 MP 17 ¶ 20 (noting an appellant is normally limited to arguments raised in his or her opening brief).

legislature has already fashioned a remedy for this situation: The Northern Marianas Civil Service Act of 1978, 1 CMC § 8144(a). The Act provides that any citizen may bring a lawsuit against a government officer to stop them from making payments to a person whose appointment or employment violates the civil service laws and regulations. If successful, that citizen may receive attorney fees approved by a court from the funds recovered during the suit. Second, DPS argues the trial court erred because the exception is not part of either Commonwealth written law or the common law. Third, DPS contends that even though this Court (in contrast to the trial court) has the authority to adopt the exception, we should not. We address each argument in turn.

A. *1 CMC § 8144*

¶ 12 The wrongful-payment statute, 1 CMC § 8144, permits private citizens to halt improper hiring and promotion decisions, and receive attorney fees from the government officer who authorized the improper employment decision. 1 CMC § 8144(a). Attorney fees under the statute, however, are limited to funds recovered as a result of the suit:

> Any citizen may maintain a suit to restrain a disbursing officer from making any payments of any salary or compensation to any person whose appointment or employment has not been made in accordance with this part and the rules and regulations in force thereunder. Any sum paid contrary to the provisions of this part and the rules and regulations established thereunder may be recovered in an action maintained by any citizen from any officer who made, approved, or authorized such payment, or who signed or countersigned a voucher, payroll, check or warrant for such payment, or from the sureties on the official bond of any such officer. The citizen bringing the action shall be entitled to the costs of the suit, including a reasonable attorney's fee, from any money recovered in such action. The balance of any sums recovered shall be paid into the Commonwealth Treasury.

Id.

¶ 13 In light of the statute, DPS' statutory argument is straightforward: 1 CMC § 8144(a) ostensibly governs this situation, so the Superior Court erred by relying on an alternative basis to award attorney fees. We disagree.

¶ 14 The argument fails because the existence of a statute addressing a situation does not automatically render it the exclusive means to approach that situation. For example, in *Sierra Club v. Dept. of Transp.*, the Hawaii Supreme Court confronted an issue nearly identical to this case: a fee award granted to a private party against a government agency under the private-attorney-general exception despite a relevant fee-shifting statute. 202 P.3d 1226, 1239-40 (Haw. 2009). Because of that statute, the losing party in *Sierra Club*, as here, claimed the private-attorney-general exception did not apply. *Id.* at 1267. The Hawaii Supreme Court rejected that reasoning, concluding the statute did not "provide the exclusive means for awarding attorney's fees and costs" because the statute did not expressly exclude other bases for awarding attorney fees. *Id.* at 1268. Likewise, in *Montanans for Responsible Use of School Trust v.*

State Bd. of Land Comm'rs, the Montana Supreme Court considered a case in which a trial court denied a private plaintiff attorney fees requested under the private-attorney-general exception because the conduct fell outside an attorney-fee provision in a relevant statute. 989 P.2d 800, 810-11 (Mont. 1999). The Montana Supreme Court reversed, holding the trial court abused its discretion by denying attorney fees because while the statute might not apply, the private-attorney-general exception independently permitted an award of attorney fees. *Id.* at 812.

¶ 15 As the Hawaii and Montana cases demonstrate, the existence of an attorney fee provision in a statute, absent more specific guidance, does not necessarily preclude courts from granting attorney fees on an alternative basis. That is significant because 1 CMC § 8144(a) says nothing about being the *exclusive* source of attorney fees. Instead, it merely notes a "citizen bringing [an] action shall be entitled to the costs of the suit, including a reasonable attorney's fee, from any money recovered in such action." *Id.* Because the statue does not declare itself the exclusive means for awarding attorney fees, we hold it is not the exclusive means for awarding attorney fees in cases involving improper government employment practices.

B. *Authority*

¶ 16 We must next address whether we have authority to adopt the private-attorney-general exception. As a general matter, judicial power flows from three sources: the Commonwealth Constitution, statutes, and our inherent authority. The Constitution is not implicated here; thus, we may only adopt the private-attorney-general exception if permitted by either statute or our inherent authority.

¶ 17 Starting with statutory law, 7 CMC § 3401 provides that "in the absence of written law or local customary law . . . contrary [to the common law];" Commonwealth courts must apply "the rules of the common law, as expressed in the restatements of the law . . . and, to the extent not so expressed[,] as generally understood and applied in the United States."

¶ 18 Here, no written or customary law expressly adopts or rejects the private-attorney-general exception. The same is true of the Restatements. We, therefore, must survey the exception's use in other jurisdictions. That survey indicates at least sixteen jurisdictions have taken firm positions on the exception: seven for and nine against.[4] Because each position shares similar support, we must look

[4] For: *Fuhs v. Gilbertson*, 186 P.3d 551, 557 (Alaska 2008) (permitting the exception for constitutional claims only); *Arnold v. Arizona Dept. of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989); *In re Head*, 721 P.2d 65, 67 (Cal. 1986); *Sierra Club v. Dept. of Transp.*, 202 P.3d 1226, 1263 (Haw. 2009); *Hellar v. Cenarrusa*, 682 P.2d 524, 531 (Idaho 1984); *Montanans for Responsible Use of School Trust v. State Bd. of Land Comm'rs*, 989 P.2d 800, 812 (Mont. 1999); *Stewart v. Utah Public Serv. Comm'n*, 885 P.2d 759, 783 (Utah 1994).

Against: *Doe v. Heintz*, 526 A.2d 1318, 1323 (Conn. 1987); *Hamer v. Kirk*, 356 N.E.2d 524, 528 (Ill. 1976); *State Bd. of Tax Comm'rs v. Tom of St. John*, 751 N.E.2d 657, 664 (Ind. 2001); *Pearson v. Bd. of Health of Chicopee*, 525 N.E.2d 400, 403 (Mass. 1988); *Nemeth v. Abonmarche Dev., Inc.*, 576 N.W.2d 641, 651-53 (Mich. 1988); *New Mexico Right to Choose/NARAL v. Johnson*, 986 P.2d 450, 453-54 (N.M. 1999); *Jones v. Muir*, 515 A.2d 855, 862 (Pa. 1986); *Providence Journal Co. v. Mason*, 359 A.2d 682, 688 (R.I. 1976); *Van Emmerik v.*

beyond acceptance rates to determine which rule is applicable. In so doing, when two commonly held positions enjoy similar minority support, we, like other jurisdictions, will apply the sounder rule. Thus, if we conclude that adoption of the private-attorney-general exception is the sounder rule, we may adopt it.

¶ 19 Reinforcing that conclusion is our inherent authority, NMI Const. art. IV, § 2 (recognizing the court's inherent powers); which includes "those powers necessary in the pursuit of a just result." *In re San Nicolas*, 2013 MP 8 ¶ 15. Relying on this inherent equitable authority, several other states have adopted the private-attorney-general exception. *Arnold v. Arizona Dept. of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989); *Serrano v. Priest*, 560 P.2d 1303, 1306, 1314 (Cal. 1977); *Stewart v. Utah Public Serv. Comm'n*, 885 P.2d 759, 783 (Utah 1994). In support, these cases note the private-attorney-general exception is an equitable rule and, therefore, within the bounds of the court's equitable authority. *See Arnold*, 775 P.2d at 537. As a result, "in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity." *Stewart v. Utah Public Serv. Comm'n*, 885 P.2d 759, 783 (Utah 1994). We concur and, consequently, hold we also have the inherent equitable authority to adopt the private-attorney-general exception.

C. *Private-Attorney-General Exception*

¶ 20 Because we have the authority to adopt the private-attorney-general exception, we turn to the main issue, whether to do so.

¶ 21 Before deciding that, however, we must address a threshold matter: DPS suggests *stare decisis* prevents us from adopting the private-attorney-general exception because the American Rule has long been recognized in the Commonwealth and this Court's case law has not formally adopted the exception. We find no merit to this claim because our case law has not rejected the possibility of exceptions. To the contrary, in our two cases addressing exceptions to the American Rule, we adopted one exception (the bad-faith exception) and alluded to the availability of further exceptions, including the private-attorney-general exception. *Reyes*, 2004 MP 1 ¶¶ 79, 82; *Ishimatsu*, 2010 MP 8 ¶ 71. In both instances, this Court held the judiciary can award attorney fees; listed the common exceptions, which included the private-attorney-general exception; and then applied a separate exception, the bad-faith exception. *Reyes*, 2004 MP 1 ¶¶ 79 n.16, 82; *Ishimatsu*, 2010 MP 8 ¶ 71. Neither of these cases implicated the private-attorney-general exception directly; thus, those decisions had no cause to either adopt or reject the exception. As such, these cases' silence cannot be read as preventing this Court from doing so now.

1. *Adoption of the Private-Attorney-General Exception*

Montana Dakota Utils. Co., 332 N.W.2d 279, 284 (S.D. 1983); *Blue Sky Advocates v. State*, 727 P.2d 644, 649 (Wash. 1986).

¶ 22 In deciding whether to expand on *Reyes* and *Ishimatsu*, some background is useful. In early English courts of equity, courts had the authority to award attorney fees to the prevailing party. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U.L. REV. 1567, 1570 (1993) (citing Statutes of Gloucester, 1278, 6 Edw. 1, ch. 1 (Eng.) (awarding plaintiff costs for certain actions of land)). They seldom did so, however, "unless the losing party acted in an abusive manner." *Id.* Over time, the practice morphed into what has become known as the English Rule, in which the losing party pays the prevailing party's attorney fees. *Id.* at 1571.

¶ 23 America has long rejected the English Rule, preferring each party pay his or her own costs. Underpinning this approach, known as the American Rule, is a desire to encourage "liberal access to courts for righting wrongs." Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1863 (1998).

¶ 24 The American Rule, according to its adherents, has three main benefits. First, because litigation is risky, people should not be penalized for bringing a legitimate claim. *See Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967) (explaining American court's continued reliance on the American Rule), *superseded by statute*, Lanham Act, P.L. 93-600, 88 Stat. 1955 (1975) (codified as amended at 15 U.S.C. § 1117(a)). Second, the American Rule protects the lower and middle class, many of whom would choose not to bring a meritorious claim under the British Rule, because of the chance they might lose and have to pay both their own and their opponent's attorney fees, an expense that could prove financially ruinous. *Id.* Third, the American Rule conserves judicial resources by eliminating the need for courts to review winning parties' attorney-fees calculations. *Id.*

¶ 25 Despite these benefits, exceptions to the American Rule abound. The Commonwealth Constitution, for example, provides that in a taxpayer lawsuit "against the government or one of its instrumentalities," courts may "award costs and attorney fees to any person who prevails in [a taxpayer suit] in a reasonable amount relative to the public benefit of the suit." NMI CONST. art. X, § 9.

¶ 26 Similarly, statutory exceptions to the American Rule are widespread. At the federal level, the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1994); the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1998); and the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1994); allow fee shifting. Locally, 1 CMC § 8144(a) permits fee shifting from a citizen to a government officer who made payments to a person whose appointment or employment violates civil service laws and regulations.

¶ 27 Judicial exceptions are likewise common. Some of the more commonly recognized include: common fund, *Sprague v. Ticonic National Bank*, 307 U.S. 161, 165-67 (1939); private attorney general, *Serrano v. Priest*, 569 P.2d 1303, 1314 (Cal. 1977); third-party tort, *Kremers-Urban Co. v. Am. Employers Ins. Co.*, 351 N.W.2d 156, 168 (Wis. 1984); and bad faith, *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962).

¶ 28 Despite the ubiquity of exceptions to the American Rule as a general matter, jurisdictions differ as to their adoption of specific exceptions. For example, as noted above, jurisdictions have more-or-less split on the private-attorney-general exception. Of those jurisdictions that have considered the private-attorney-general exception, those rejecting it have done so primarily for two reasons: lack of authority and inconsistent enforcement.[5] Regarding the first reason, authority, courts opposed to the rule view the creation of exceptions to the American Rule as the province of the legislature. The United States Supreme Court, for instance, wrote that it was the prerogative of Congress, not the judiciary, to establish exceptions to the American Rule. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269 (1976). *E.g.*, *Hamer v. Kirk*, 356 N.E.2d 524, 528 (Ill. 1976) (quoting *Alyeska*, 421 U.S. at 247); *Blue Sky Advocates v. State*, 727 P.2d 644, 649 (Wash. 1986) (adopting *Alyeska*'s reasoning). As for the second reason, inconsistent enforcement, some courts object to the open-ended discretion it gives judges, and the inconsistent decisions that discretion would foster. *See, e.g.*, *Alyeska*, 421 U.S. at 269 (1976) ("[C]ourts are not free . . . to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases."). This view disapproves of the doctrine's requirement that "the Court . . . look beyond the proceedings before it to determine which rights are of more societal importance than others, which classes of litigants have protected such rights, and which classes of people have benefitted from such protection," especially in the absence of sufficient guidelines for making these determinations. *New Mexico Right to Choose v. Johnson*, 986 P.2d 450, 458 (N.M. 1999).

¶ 29 In contrast, jurisdictions adopting the doctrine have found the authority and inconsistent-enforcement arguments overstated for two reasons. First, these courts highlight the widespread recognition of numerous exceptions to the American Rule, which has left the rule significantly eroded since its inception. *See, e.g.*, *Arnold v. Arizona Dept. of Health Servs.*, 775 P.2d 521, 537 (1989). Given that erosion, to suddenly decide the legislature now needs to vouch for further inroads is akin to closing the stable door after the horse has galloped away. Second, the exception only applies to special circumstances. Because those circumstances seldom arise, and the doctrine's three-prong test further confines the exception's use, the risk of judges abusing their discretion is small. *See, e.g.*, *Stewart v. Utah*

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[5] To a lesser extent (and less persuasively), some courts have also retreated to *stare decisis* and judicial economy. *E.g. New Mexico Right to Choose v. Johnson*, 986 P.2d 450, 453-54 (N.M. 1999). These two arguments, however, seem added more for volume than substance. *Stare decisis*, for instance, did not stop New Mexico from adopting several other exceptions to the American Rule. *Id.* at 455-57 (acknowledging New Mexico has adopted several exceptions including common fund, bad faith, and dissolution of a wrongful injunction). Likewise, claiming courts would suffer under the weight of drawn-out fee claims because of the exception exaggerates both the difficulty of resolving attorney-fee awards and the frequency under which plaintiffs would pursue and win private-attorney-general claims.

Public Serv. Comm'n, 885 P.2d 759, 783 n.19 (Utah 1994) (noting the exception only applies in exceptional circumstances).

¶ 30 Pro-exception jurisdictions also highlight both the utility of public-interest litigation, and the slim likelihood individuals will bring public-interest cases in the absence of the exception:

> The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.

In re Head, 721 P.2d 65, 67 (Cal. 1986) (internal citation omitted). Put differently, litigation is expensive. Without a mechanism for recouping those costs, most people will choose not to bring a lawsuit because the personal costs substantially outweigh the personal benefits (even if the benefits to the public are substantial).

¶ 31 We find the proponent's view of the exception more persuasive and, therefore, adopt it. We do so for three reasons. First, as noted above, the authority issue is inapplicable here. Second, as will be addressed in further detail below, the concern over inconsistent enforcement is overblown. And, third, the exception (if kept narrow) is good public policy. As recent events have demonstrated, and this case underscores, when a small group of civil servants violate the trust placed in them, and internal mechanisms fail to parry the violations, the people of the Commonwealth need an independent means to oppose the violations. *See Claremont School Dist. v. Governor*, 761 A.2d 389, 394 (N.H. 1999) (noting that only private citizens can be expected to "guard the guardians") (internal quotation omitted).

2. *Test for Applying Private-Attorney-General Exception*

¶ 32 Having adopted the private-attorney-general exception, we must determine what test to apply. DPS proffers the Alaska test, which allows attorney fees "if (1) the case was designed to effectuate strong public policies; (2) numerous people would benefit if the litigant succeeded; (3) only a private party could be expected to bring the suit; and (4) the litigant lacked sufficient economic incentive to bring suit." *See Halloran v. State Div. of Elections*, 115 P.3d 547, 554 n.29 (Alaska 2005) (stating the standard for a public-interest litigant, which appears to be analogous to a private attorney general), *abrogated in part by* ALASKA STAT.§ 09.60.010(b)-(c) (limiting the exception to constitutional causes of action), *upheld by State v. Native Vill. of Nunapitchuk*, 156 P.3d 389 (Alaska 2007) (rejecting a facial constitutional challenge to § 09.60.010). We reject this test as improper for the Commonwealth because Alaska's exception has not been adopted elsewhere and applies only to constitutional causes of action. Taken together, those factors translate into a sparse body of cases addressing only a subset of cases applicable in the Commonwealth. Those limitations minimize its utility here.

¶ 33 Meanwhile, Deleon Guerrero, and the trial court, urge us to adopt the Washington test,[6] which permits attorney fees if "the successful litigant (1) incurs considerable economic expense, (2) to effectuate an important legislative policy, (3) which benefits a large class of people." *Miotke v. Spokane*, 678 P.2d 803, 821 (Wash. 1984) (plurality), *overruled by Blue Sky Advocates v. State*, 727 P.2d 644, 649 (Wash. 1986). We decline to adopt this test because it never enjoyed more than plurality support within the Washington State Supreme Court and was ultimately rejected in *Blue Sky Advocates v. State*, 727 P.2d 644, 649 (Wash. 1986).

¶ 34 Instead, we adopt California's formulation, which was announced in the seminal *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977). The *Serrano* formulation synthesized previous standards into three core factors before affirming an attorney-fees award to a public-interest group that successfully challenged a public school financing system as unconstitutional. *Id.* at 1314-15. California has since codified the exception in Section 1021.5 of the California Code of Civil Procedure.

¶ 35 We adopt the California test for three reasons. First, the California test is the oldest and, consequently, has the most case law to draw from for guidance. Second, all but two states that have adopted the exception have chosen the California test, which suggests the test's utility. That near-uniform adoption also expands the number of cases available for review. And, third, the California test strikes the right policy balance between public benefit and private interest. That balance limits attorney fee awards to cases generating a significant public benefit that would not typically occur absent the exception. In light of the public benefit, and the uneven economic burden borne by the litigant, it is only fair that the public share in both the benefits *and* the costs.

¶ 36 Under the California test, before a court may award a party attorney fees under the private-attorney-general exception, the court must consider three factors:

> (1) the strength of the societal importance of the public policy vindicated by the litigation;
> (2) the necessity for private enforcement and the magnitude of the resultant burden; and
> (3) the number of people standing to benefit from the decision.

Serrano, 569 P.2d at 1314.

¶ 37 In applying the rule, under the first societal-importance prong, only instances of governmental malfeasance qualify as a possible "public policy" that may be vindicated. Meanwhile, under the necessity-and-resultant-burden prong, two requirements must be met. First, the government's behavior must force the plaintiff to file a lawsuit. *See Rivera v. Guerrero*, 4 NMI 79, 84 n. 37 (1993) (requiring a party to

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[6] The trial court's adoption of the private-attorney-general exception exclusively relied on *Public Util. Dist. 1 v. Kottsick*, 545 P.2d 1 (Wash. 1976). That case, however, merely discussed the exception before explicitly declining to decide whether to adopt it. *Id.* at 4 ("We express no opinion on the adoption of [the private-attorney-general] exception . . . ."). A decade later the Washington Supreme Court went a step further and explicitly rejected the private-attorney-general exception as an inherent equitable exception to the American Rule. *Blue Sky Advocates v. State*, 727 P.2d 644, 649 (Wash. 1986) ("We reject the private attorney general doctrine.").

exhaust his administrative remedies before filing a court action).This can be satisfied through inaction (as here) or improper action (such as an inadequate investigation of allegations or efforts to "game" the system). And, second, the exception only applies to cases where the cost of litigation is out of proportion to the potential benefit the plaintiff would personally gain from a favorable result. *Woodland Hills Residents Ass'n v. City Counsel of Los Angele*s, 593 P.2d 200, 213 (Cal. 1979). Finally, under the benefit-to-a-group prong, the benefit "need not represent a tangible asset or a concrete gain." *Id.* at 212 (internal quotation omitted). It can also include intangible benefits such as the elimination of unlawful public conduct. *See id.* ("[T]he public always has a significant interest in seeing that legal strictures are properly enforced and thus, in a real sense, the public always derives a 'benefit' when illegal private or public conduct is rectified.")

3. *Application of Private-Attorney-General Exception*

¶ 38 Deleon Guerrero satisfies this high standard. First, the suit had societal importance. It both promoted meritocratic hiring practices and challenged government malfeasance, both things of significant social value. *See* NMI CONST. art. XX, § 1 ("Appointment and promotion within the civil service shall be based on merit and fitness demonstrated by examination or by other evidence of competence."); *In re Joey San Nicolas*, 2013 MP 8 ¶ 13 (writing that Article III, § 12 of the NMI Constitution set up "the OPA to serve as a sentinel against governmental malfeasance").

¶ 39 Second, the suit required private enforcement, which imposed a burden out of proportion with Deleon Guerrero's personal stake in the litigation. Deleon Guerrero filed an informal complaint. Had DPS addressed the complaint and rescinded the improper hires, Deleon Guerrero would not have needed to litigate. Instead, DPS's silence drew Deleon Guerrero's claim out for years, raising the cost. That cost outweighed the benefits to Deleon Guerrero, who had, at best, an uncertain chance of receiving a promotion if his suit was successful.

¶ 40 Third, the suit benefitted a large number of people. The suit benefited government employees because non-meritocratic hiring practices hurt morale; harm employees wrongly passed over for promotion; and increase the workload of employees who have to compensate for deficiencies in their under-qualified peers. The suit also benefits the community because non-meritocratic hiring leads to less-qualified staff and reduced incentives to do good work in pursuit of advancement, each of which contributes to a less effective police force.

¶ 41 Because Deleon Guerrero satisfies the three criteria, we hold the trial court did not err by awarding Deleon Guerrero attorney fees.

V. Conclusion

¶ 42 For the foregoing reasons, we AFFIRM the trial court's award of attorney fees.

SO ORDERED this 19th day of December, 2013.

/S/
JOHN A. MANGLONA
Associate Justice

/s/
JOSEPH N. CAMACHO
Justice Pro Tem

/s/
HERB D. SOLL
Justice Pro Tem