



Winter 1981

## Torts - Libel - The Defenses of Fair Comment and Qualified Privilege

Paul E. Houston

### Recommended Citation

Paul E. Houston, *Torts - Libel - The Defenses of Fair Comment and Qualified Privilege*, 11 N.M. L. Rev. 243 (1981).

Available at: <https://digitalrepository.unm.edu/nmlr/vol11/iss1/15>

# NOTES

## TORTS

**LIBEL—THE DEFENSES OF FAIR COMMENT AND QUALIFIED PRIVILEGE.** *Mauck, Stastny & Rassam, P.A. v. Bicknell*, 19 N.M. St. B. Bull. 708 (Ct. App. July 31, 1980).

New Mexico defines libel as “making, writing, publishing, selling or circulating without good motives and justifiable ends, any false and malicious statement affecting the reputation, business, or occupation of another, or which exposes another to hatred, contempt, ridicule, degradation or disgrace.”<sup>1</sup> In attempting to define what constitutes “good motives” or “justifiable ends,” the courts of New Mexico have recognized the defenses of truth,<sup>2</sup> absolute privilege,<sup>3</sup> and qualified privilege.<sup>4</sup> In *Mauck, Stastny & Rassam, P.A. v. Bicknell*,<sup>5</sup> the New Mexico Court of Appeals held another defense, that of fair comment, applicable in libel cases. In so doing, the court recognized the generally accepted rule that a qualified privilege exists regarding communications about one who voluntarily places himself in the “public arena,” whether he is a public official, a public figure, or simply someone involved in a matter of public interest.<sup>6</sup> This Note will address the court’s treatment of the defenses of privilege and fair comment, and will suggest an alternative rationale for the court’s finding that the defense of a qualified privilege was unavailable. The Note also will deal with the court’s failure to discuss whether the plaintiffs were public figures.

### THE CASE

On July 11, 1973, Mauck, Stastny, and Rassam, P.A. (MSR), entered into a contract with San Juan County to perform architectural services for an addition to the San Juan County Hospital.<sup>7</sup> A New

---

1. N.M. Stat. Ann. § 30-11-1 (1978).

2. *Eslinger v. Henderson*, 80 N.M. 479, 457 P.2d 998 (1969).

3. *Adams v. Tatsch*, 68 N.M. 446, 362 P.2d 984 (1961); *Stewart v. Ging*, 64 N.M. 270, 327 P.2d 333 (1958).

4. *Ward v. Ares*, 29 N.M. 418, 223 P. 766 (1924).

5. 19 N.M. St. B. Bull. 708 (Ct. App. July 31, 1980).

6. *Id.* at 710.

7. *Id.* at 708.

Mexico statute<sup>8</sup> requires, with certain exceptions not relevant to this case,<sup>9</sup> that all architectural services performed on public works projects be supplied by architects who are residents of New Mexico. Two of the principals in the association, Mauck and Stastny, were architects registered in New Mexico;<sup>10</sup> both, however, resided in Colorado.<sup>11</sup> The third principal of the association, Dr. Rassam, although a New Mexico resident, was a professional engineer, not an architect.<sup>12</sup>

The New Mexico Board of Examiners for Architects held discussions concerning MSR's status in relation to the hospital project and the New Mexico residency requirement.<sup>13</sup> Following these discussions, an article appeared on the front page of the Farmington Daily Times<sup>14</sup> relating the concern of the Architectural Board over MSR's failure to comply with the licensing statute.

Six days after the article appeared, Bruce Bicknell, an architect licensed and residing in New Mexico<sup>15</sup> mailed a letter, the subject of this action, to approximately 230 individuals and businesses.<sup>16</sup> The letter implied that MSR was practicing architecture "without the proper qualifications as prescribed by law for registration,"<sup>17</sup> stating that Mauck, Stastny and Rassam "have not fully demonstrated a capability to perform architectural work."<sup>18</sup> Bicknell went on to state: "[l]aws are designed to protect the public from the pretender and the incompetent."<sup>19</sup> He closed his letter by expressing "hope that the present laws of the state of New Mexico and the architectural community within the State can effectively rally itself against the encroachment of incompetence and untrained, unqualified architecture [*sic*]."<sup>20</sup>

MSR filed suit against Bicknell in February of 1976, seeking damages for defamation by publication of the letter.<sup>21</sup> In his answer,

8. N.M. Stat. Ann. § 61-15-9(A) (Supp. 1979).

9. The exceptions are applicable to works not involving public health or safety and costing less than \$50,000 (in the case of school districts) or less than \$80,000 (in the case of commercial, industrial or semi-public buildings). The contract between MSR and San Juan County was for a project of 6.8 million dollars.

10. 19 N.M. St. B. Bull. at 708.

11. Transcript of Proceedings, vol. 1, at 1, Mauck, Stastny & Rassam, P.A. v. Bicknell, 19 N.M. St. B. Bull. 708 (Ct. App. July 31, 1980).

12. *Id.*

13. 19 N.M. St. B. Bull. at 708.

14. *Id.*

15. Transcript, vol. 1, at 23.

16. *Id.* at 188.

17. *Id.* at 6.

18. *Id.*

19. *Id.*

20. *Id.* at 9.

21. *Id.* at 1-3.

Bicknell denied the allegations of the complaint.<sup>22</sup> On April 7, 1978, Bicknell filed a motion to amend his answer to the complaint,<sup>23</sup> seeking to add the affirmative defenses of truth, privilege, and fair comment.<sup>24</sup> The trial court allowed the defense of truth to be added but, without comment or justification, excluded the defenses of privilege and fair comment.<sup>25</sup> The trial court, sitting without a jury, awarded each plaintiff \$37,500 in actual damages<sup>26</sup> and an equal amount in punitive damages.<sup>27</sup> These awards made the total judgment \$75,000 for each individual plaintiff.<sup>28</sup>

On Bicknell's appeal, the New Mexico Court of Appeals found that the defense of privilege was not applicable under the facts.<sup>29</sup> The defense of fair comment, however, was found to apply.<sup>30</sup> The court of appeals held that "the trial court's actions in failing to allow the defendant to amend his answer to add the affirmative defense of fair comment was . . . an abuse of discretion."<sup>31</sup>

#### RATIONALE

Because the trial court had not given any justification for excluding the defenses of privilege and fair comment,<sup>32</sup> the appeals court was forced to assume "that the trial court felt that [these] affirmative defenses were not applicable to the facts herein."<sup>33</sup>

##### A. *Privilege.*

The defense of privilege may be asserted as either an absolute privilege or a qualified privilege.<sup>34</sup> Bicknell, in his motion to amend his answer, did not specify which type of privilege he wished to claim. The court of appeals, however, correctly assumed that Bicknell was

---

22. *Id.* at 18-25. Bicknell also counter-claimed for damages, alleging slander and non-performance of a contract between MSR and himself.

23. *Id.* at 75-80.

24. *Id.* at 77.

25. *Id.* at 129.

26. *Id.* at 188.

27. *Id.* at 189.

28. *Id.* at 190.

29. 19 N.M. St. B. Bull. at 709.

30. *Id.* at 710.

31. *Id.* at 711. The court of appeals found that by not allowing the fair comment defense to be amended to his answer, Bicknell was denied the right to present a full and effective defense.

32. *Id.* at 708-709.

33. *Id.* at 709.

34. See *Neece v. Kantu*, 84 N.M. 700, 507 P.2d 447 (Ct. App. 1973); W. Prosser, *Handbook of The Law of Torts* § § 114-115 (4th ed. 1971) (hereinafter cited as Prosser).

pleading the defense of a qualified privilege rather than an absolute privilege.<sup>35</sup>

In *Neece v. Kantu*,<sup>36</sup> the New Mexico Supreme Court defined absolute privilege:

An absolute or unqualified privilege means absolute immunity from liability for defamation. It "has been confined to very few situations where there is an obvious policy in favor of permitting complete freedom of expression, without any inquiry as to the defendant's motives." It is generally limited to judicial proceedings, legislative proceedings, executive communications, consent of the plaintiff, husband and wife, and political broadcasts.

On the facts in *Mauck*, absolute privilege could not be granted to the defendant because the communications were not made in one of "the very few situations" to which the privilege applies. If a defense of privilege is applicable in this case, it must be that of a qualified privilege.

A qualified privilege arises where "the interest which the defendant is seeking to vindicate is regarded as having an intermediate degree of importance, so that the immunity conferred is not absolute, but is conditioned upon publication in a reasonable manner and for a proper purpose."<sup>37</sup> In *Mahona-Jojanto, Inc., N.S.L. v. Bank of New Mexico*,<sup>38</sup> the court defined an occasion giving rise to the qualified privilege as "one consisting of a good-faith publication in the discharge of a public or private duty when the same is legally or morally motivated."<sup>39</sup>

As stated in *Mahona*<sup>40</sup> and recognized by the court of appeals in *Mauck*,<sup>41</sup> the defense of qualified privilege can succeed only if the party claiming it can show that the allegedly libelous statements were made in good faith. "Good faith" is an intangible and abstract qual-

35. 19 N.M. St. B. Bull. at 710.

36. 84 N.M. 700, 705, 507 P.2d 447, 452 (Ct. App. 1973) (citations omitted).

37. Prosser, *supra* note 34, at 785-86. Prosser acknowledges the difficulty of applying such a statement to individual cases and suggests, at 786, that:

[P]erhaps no better formula can be offered than that of Baron Parke, that the publication is privileged when it is "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned." *Toogood v. Spyring*, 1 C.M. & R. 181, 149 Eng. Rep. 1044 (1834).

38. 79 N.M. 293, 442 P.2d 783 (1968).

39. *Id.* at 295-96, 442 P.2d at 785-86. Although the existence of a qualified privilege depends upon the facts of the particular case, the court in *Stewart v. Ging*, 64 N.M. 270, 274, 327 P.2d 333, 336 (1958) held that "[t]he question whether an occasion gives rise to a qualified privilege is one for the court as an issue of law."

40. 79 N.M. at 295-96, 442 P.2d at 785-86.

41. 19 N.M. St. B. Bull. at 709.

ity with no technical meaning or statutory definition. The California Court of Appeals has said that the phrase "good faith" was "ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation."<sup>42</sup>

Although Bicknell testified that his actions were motivated by ethical considerations,<sup>43</sup> the trial court, in its Findings of Fact, specifically found that the letter in question was "calculated to and did in fact hold plaintiffs in public ridicule, hatred and contempt,"<sup>44</sup> and was "published in willful disregard of the rights of the plaintiffs."<sup>45</sup> The court of appeals refused to reverse the Findings of Facts of the trial court, apparently on the ground that there was sufficient evidence to find the absence of good faith.<sup>46</sup> Because a qualified privilege cannot exist without good faith, the court held that Bicknell could not assert a defense based on such a privilege.<sup>47</sup>

Although the court in *Mauck* reaches the proper result on this issue, under a different and perhaps better-reasoned analysis, the court could have found that a privilege did exist but could not be asserted as a defense because of Bicknell's abuse of that privilege. In *Franklin v. Blank*,<sup>48</sup> the court of appeals said that the defense of absolute privilege applied to quasi-judicial proceedings involving peer review of alleged professional misconduct. *Franklin* involved an action taken by an osteopath against a medical doctor based on the doctor's publication of an allegedly defamatory letter reporting alleged incidents of incompetence and unethical and illegal activities by the coroner. The letter was sent to the New Mexico Osteopathic Medical Association, the Albuquerque-Bernalillo County Medical Association and the Albuquerque Hospital Council.<sup>49</sup> Using *Franklin* as prece-

---

42. *Efron v. Kalmanovitz*, 249 Cal. App. 2d 187, —, 57 Cal. Rptr. 248, 251 (1967).

43. Transcript, vol. 4, at 924. Bicknell testified:

There was a great many things in that article that concerned me. Here was a clear illustration of controversy on one hand, the State Attorney General's Office making its statement, the Board Examiner's for Architects making its statements, and then on the other side, the other point of view. I saw that controversy and felt ethically committed to identify with the Attorney General's comments and with those of the Board of Examiners.

44. Transcripts, vol. 1, at 188.

45. *Id.*

46. The court of appeals, however, did not address the sufficiency question directly. The court simply quotes the two findings of the trial court, as noted, and draws its conclusion.

47. 19 N.M. St. B. Bull. at 709.

48. 86 N.M. 585, 525 P.2d 945 (Ct. App. 1974).

49. In his dissent to the majority opinion in *Franklin*, Judge Hendley notes that the evidence in the case established that the peer review proceeding was a round table discussion. No minutes were made. In fact, at least in his view, there were no quasi-judicial attributes of the ad hoc committee formed by the three associations. Judge Hendley goes on to say, how-

dent, the court in *Mauck* could have found that Bicknell's status as a professional architect commenting on and criticizing the architectural practices of MSR gave rise to the defense of a qualified privilege if not that of an absolute privilege.

The existence or availability of the qualified privilege defense does not preclude recovery by the plaintiff, however. In *Mahona-Jojanto*<sup>50</sup> the New Mexico Supreme Court said that the defense of qualified privilege may be lost through abuse, which arises:

out of the publisher's lack of belief, or reasonable grounds for belief, in the truth of the alleged defamation; by the publication of the material for an improper use; by the publication to a person not reasonably necessary for the accomplishment of the purpose; or by publication not reasonably necessary to accomplish the purpose.<sup>51</sup>

Given the facts as presented in *Mauck*, the court could have found Bicknell's publication unreasonable and an abuse of the qualified privilege which protected the communication. Bicknell sent his letter to over two hundred thirty individuals, firms, and public bodies.<sup>52</sup> Many of these recipients had no relationship to architecture or its practice,<sup>53</sup> and would have had no influence in the outcome of the controversy involving MSR. Bicknell probably could have accomplished his stated purpose by sending his letter only to the appropriate Architectural Boards of Examiners, the Office of the Attorney General, and possibly individual architects in San Juan County.

The result under the foregoing analysis is the same as that of the court of appeals in that the defense of qualified privilege is not available to the defendant. The difference between the analysis suggested here and that used by the court is that the qualified privilege should have been acknowledged as existing between a member of a professional organization and its governing body. The subsequent use of the qualified privilege as a defense was properly refused because it was abused, not because it did not exist under the facts of the case.

---

ever, that causing such a form of peer review was not unreasonable. The defendant letter-writer was also a member of the medical community. "As such," says Hendley, "he would be a member who was entitled to a qualified privilege." 86 N.M. at 588, 524 P.2d at 948 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)).

50. 79 N.M. 293, 442 P.2d 783 (1968).

51. *Id.* at 296, 442 P.2d at 786. The court in *Mahona* notes that the determination of a possible abuse is a factual question, unless only one conclusion can be drawn from the evidence. In that case, the question is to be determined as a matter of law. *Id.* at 295, 442 P.2d at 785.

52. Transcript, vol. 1, at 188.

53. *Id.* at 9-10.

### B. Fair Comment.

The court in *Mauck* held that the common law defense of fair comment was available to the defendant and that the refusal to allow the defendant to amend his answer to include that defense was an abuse of discretion requiring a new trial.<sup>54</sup> In so holding, the court noted that the trial court's findings of the defendant's bad faith and ill will toward the plaintiffs did not preclude the "fair comment" defense.<sup>55</sup>

The defense of "fair comment" was developed at common law to protect communications regarding matters of public concern.<sup>56</sup> In 1964 the United States Supreme Court, without eliminating the traditional common law defense, added a second level to the defense of fair comment where the comments are directed at public officials.<sup>57</sup> At this new level the allegedly libelous statement is given first amendment protection. In a subsequent case the Court extended this newly-created level of constitutional protection to libel cases involving public figures.<sup>58</sup> The Court stretched the protection to its farthest limits in 1971 in a case which allowed the constitutional level of protection to apply to allegedly libelous statements involving matters of public interest.<sup>59</sup>

Once it is determined that the publication is constitutionally protected, the plaintiff in a libel action must prove that the publication was made with "actual malice." The United States Supreme Court, in *New York Times Co. v. Sullivan*, defined actual malice as making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>60</sup> In referring to the term "malice," Dean Prosser wrote that "a much better word would have been 'scienter,' since the state of mind required is obviously the same as in deceit actions for intentional misrepresentation. Where this is proved, there is no doubt that there can still be liability."<sup>61</sup>

Constitutional protection was extended to allegedly libelous statements concerning public figures in *Curtis Publishing Co. v. Butts*,<sup>62</sup> the Court generally defined "public figures" in *Gertz v. Robert Welch, Inc.*,<sup>63</sup> in which the Court said:

For the most part those who attain [public figure] status have assumed roles of especial prominence in the affairs of society. Some

---

54. 19 N.M. St. B. Bull. at 711.

55. *Id.* at 710.

56. Prosser, *supra* note 34, at 792.

57. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

58. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

59. *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).

60. 376 U.S. at 280.

61. Prosser, *supra* note 34, at 821.

62. 388 U.S. 130 (1967).

63. 418 U.S. 323, 345 (1974).

occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Public figure classification has been conferred on a wide variety of individuals with the attendant requisite of pleading and proving actual malice to recover damages. The list of "public figures" includes a basketball player,<sup>64</sup> a singer,<sup>65</sup> a baseball player,<sup>66</sup> a real estate developer,<sup>67</sup> a track coach,<sup>68</sup> a minister,<sup>69</sup> a horse trainer,<sup>70</sup> a basketball coach,<sup>71</sup> and a belly dancer.<sup>72</sup> While not all of the individuals who have been held to be public figures have taken active parts in debates on public issues, they are all persons in whom the public was found to have a continuing interest. In each instance, the individuals had taken affirmative steps to attract public attention or to achieve some degree of public acclaim.

Provided with these guidelines, the court of appeals in *Mauck*, without hesitation or discussion, summarily stated that the plaintiffs are neither public officials nor public figures.<sup>73</sup> Notwithstanding the court's bald statement, there is a valid question as to whether the plaintiffs in this case are public figures.

Prior to the letter at issue here, MSR had voluntarily sought and received a governmental contract in violation of section 65-15-9(A) of the New Mexico statutes.<sup>74</sup> When a controversy arose over the propriety of that contractual arrangement, MSR attempted to influence the resolution of the controversy in their favor and made some use of the media to do so. They invited attention and comment when they disputed the allegations of the Architectural Board and called

---

64. *Time, Inc. v. Johnston*, 448 F.2d 378 (4th Cir. 1971).

65. *Vitale v. National Lampoon, Inc.*, 449 F. Supp. 442 (E.D. Penn. 1978).

66. *Cepeda v. Cowles Magazines and Broadcasting, Inc.*, 392 F.2d 417 (9th Cir.), *cert. denied*, 393 U.S. 840 (1968).

67. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970).

68. *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971).

69. *Hensley v. Life Magazine, Time, Inc.*, 336 F. Supp. 50 (N.D. Cal. 1971).

70. *Lloyds v. United Press Int'l, Inc.*, 63 Misc. 2d 421, 311 N.Y.S.2d 373 (Sup. Ct. 1970).

71. *Grayson v. Curtis Publishing Co.*, 72 Wash. 2d 999, 436 P.2d 756 (1967).

72. *James v. Gannett Co.*, 40 N.Y.2d 415, 353 N.E.2d 834, 386 N.Y.S.2d 871 (1976).

73. 19 N.M. St. B. Bull. at 709.

74. N.M. Stat. Ann. § 65-15-9(A) (Supp. 1979).

for a complete disclosure of the Board's files containing names and addresses of individuals who had contacted the Board to complain about MSR.

Applying the *Gertz* standard to the facts of *Mauck*, the court easily could have concluded that MSR and its principals were indeed public figures involved in the controversy surrounding their employment by San Juan County in violation of statutory law.<sup>75</sup> In sidestepping this very important issue the New Mexico Court of Appeals has left a large gap in the law of libel in New Mexico. The issue of who may be classified as a public figure, or why, remains an open question.

After ignoring the defendant's strong case for applying public figure status to the plaintiffs, the court in *Mauck* analyzed the common law defense of fair comment. This privilege is generally acknowledged to apply to all discussions and communications involving matters of public or general interest.<sup>76</sup>

The United States Supreme Court first addressed the question of whether to apply constitutional protection to libelous statements involving matters of public concern in *Rosenbloom v. Metromedia*.<sup>77</sup> Justice Brennan, writing for a plurality of the Court, focused not upon the status of the individual defamed, but rather upon the issue with which the publication was concerned. The Court held that even a private individual could not recover for a defamatory falsehood published in the course of comment upon an event of public or general concern without proving actual malice.

In deciding the subsequent case of *Gertz v. Robert Welch, Inc.*,<sup>78</sup> the Court declined either to follow or to expressly overrule its decision in *Rosenbloom*. The Court held, instead, that where private individuals were defamed the states were to decide individually whether a simple negligence standard or the constitutional standards of actual malice would apply.<sup>79</sup> The majority of states which have had an opportunity to reconsider the law have held that, to establish liability, the lower standard of negligence is to be applied to private individ-

---

75. *Id.*

76. *See, e.g.,* Prosser, *supra* note 34, at 822-23.

77. 403 U.S. 29 (1971).

78. 418 U.S. 323 (1974).

79. The Court in *Gertz* went on to say that there was a legitimate state interest in compensating private individuals for wrongful injury to their reputations. This interest, however, was to extend no farther than compensation for actual injury. "[S]tates may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of falsity of reckless disregard for truth." 418 U.S. at 349. The court in *Mauck* did not address the issue of damages, but it would seem, in light of their finding, that the actual malice standard was not met, and that the punitive damages awarded by the trial court were improper.

uals.<sup>80</sup> Since *Gertz* was decided, however, two states other than New Mexico have extended the *New York Times* standard to cover private individuals involved in matters of public concern.<sup>81</sup>

The New Mexico Court of Appeals in *Mauck* noted that "[t]he common law privilege has been applied to cases where the communication relates to work being paid for out of public funds."<sup>82</sup> The court then indicated its agreement with a Florida Court of Appeals decision<sup>83</sup> and stated that the "common law privilege [of fair comment] is available to one who comments and communicates regarding a matter of public interest where the subject of that commentary has voluntarily sought and acquired a government contract."<sup>84</sup> The *Mauck* court then held that to overcome the qualified privilege of fair comment on a matter of public interest the "actual malice" standard of *New York Times v. Sullivan* must be proved.<sup>85</sup>

Consequently, the New Mexico Court of Appeals in *Mauck* has held that, although the plaintiffs are not public figures, the constitutional standard still may be applied to allegedly libelous statements "where one brings himself into the public arena, regardless of whether he is a public official, a public figure or involved in a matter of public interest."<sup>86</sup> The court then, with an eye to the facts in *Mauck*, states that a matter of public interest is at issue where one voluntarily seeks and acquires a government contract. The *Mauck* court, however, pro-

80. See *Mobile Press Register, Inc. v. Faulkner*, 372 So. 2d 1282 (Ala. 1979); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Foster v. Laredo Newspaper, Inc.*, 541 S.W.2d 809 (Tex. 1976).

81. *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975); *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976). Indeed, Prosser contends that there is no apparent reason why the constitutional standard should not be extended to include all matters of public concern. Prosser, *supra* note 34, at 823.

82. 19 N.M. St. B. Bull. at 709.

83. *Bishop v. Wometco Enterprises, Inc.*, 235 So. 2d 759 (Fla. App. 1970). In *Bishop*, a city tax assessment investigator brought suit against the owner of a local television station for an allegedly libelous editorial. The investigator, Bishop, had testified about his findings before the City Commission. The television editorial which followed was highly critical of Bishop's work and in part false. Nevertheless, the court held:

Whether he was a public official, or a public figure, or involved in a matter of public interest, or whether his appearance and testimony before the City Commission was a matter of public interest, it is clear that the rule in *New York Times Co. v. Sullivan* applies, which requires proof that the alleged libels were published with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Until there is proof of actual malice and unless that proof has the convincing clarity which the constitutional standard demands, it is insufficient.

235 So. 2d at 761 (citations omitted).

84. 19 N.M. St. B. Bull. at 710.

85. *Id.*

86. *Id.* at 709-10.

vides no extensive guidance as to what constitutes a matter of public concern sufficient to trigger the actual malice standard. Any definition of "a matter of public interest" is subjective. For many, a matter of public interest may be anything that is deemed "newsworthy."<sup>87</sup> Others might require narrower guidelines.<sup>88</sup> The court says only that a matter of public concern is present where public funds are being spent in conjunction with a government contract.<sup>89</sup> Certainly the court is not limiting matters of public interest or concern so narrowly.

Earlier decisions in New Mexico and elsewhere do provide some guidance. In New Mexico, the courts have addressed matters of public concern and interest in circumstances dealing with health,<sup>90</sup> the dissemination of newsworthy material,<sup>91</sup> and professional qualifications.<sup>92</sup> In Colorado, a news article dealing with the subject of stolen property was deemed to be a matter of public interest,<sup>93</sup> as was an article about the installation of equipment by a non-licensed company in Indiana.<sup>94</sup> Indeed, as Dean Prosser points out, the law has

---

87. *Jenkins v. Dell Publishing Co.*, 251 F.2d 447, 451 (3d Cir. 1958):

For present purposes news need be defined as comprehending no more than relatively current events such as in common experience are likely to be of public interest. In the verbal and graphic publication of news, it is clear that information and entertainment are not mutually exclusive categories. A large part of the matter which appears in newspapers and news magazines today is not published or read for the value or importance of the information it conveys. Some readers are attracted by shocking news. Others are titillated by sex in the news. Still others are entertained by news which has an incongruous or ironic aspect. Much news is in various ways amusing and for that reason of special interest to many people. Few newspapers or news magazines would long survive if they did not publish a substantial amount of news on the basis of entertainment value of one kind or another. This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account. In brief, once the character of an item as news is established, it is neither feasible nor desirable for a court to make a distinction between news for information and news for entertainment in determining the extent to which publication is privileged.

88. In an attempt to achieve some degree of continuity, other jurisdictions have specifically held the determination of what is a matter of public interest or concern sufficient to require the application of constitutional safeguards to allegedly libelous statements concerning those matters a question of law for the court. *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).

89. 19 N.M. St. B. Bull. at 710.

90. *Del Rico Co. v. New Mexican*, 56 N.M. 538, 246 P.2d 206 (1952).

91. *McNutt v. New Mexico State Tribune Co.*, 88 N.M. 162, 538 P.2d 804 (Ct. App. 1975).

92. *Gengler v. Phelps*, 92 N.M. 465, 589 P.2d 1056 (Ct. App. 1979); *Franklin v. Blank*, 86 N.M. 585, 525 P.2d 945 (Ct. App. 1974).

93. *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).

94. *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976).

recognized the privilege of "fair comment upon anything submitted to the public for its approval, as in the case of books, articles, advertisements, radio and television programs, exhibitions of art, music, acting and similar entertainments, or sports, scientific discoveries, or projects appealing for support."<sup>95</sup>

#### CONCLUSION

The New Mexico Court of Appeals has extended the first amendment protection to allegedly libelous communications regarding matters of public concern. The court failed, however, to provide guidelines for applying this standard. Furthermore, the court failed to explain why public figure status was not accorded the plaintiffs in this action. Finally, the court ignored the guidelines set out in earlier New Mexico decisions for determining whether a qualified privilege is available as a defense. The court chose to decide the question by making a cursory examination of the declarant's "good faith" intentions rather than by dealing with the abuse of the privilege that existed. In future cases, the New Mexico courts will be called upon to resolve the questions left unanswered and unaddressed by the New Mexico Court of Appeals in this opinion.

PAUL E. HOUSTON

---

95. Prosser, *supra* note 34, at 828-29.