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Defamation Claims Against Experts

by Jeffrey T. Kubes and Margaret Fitzsimmons

Experts are often hired to evaluate a construction professional's work. When an expert critiques a professional's work, the expert's opinion plays a substantial role in shaping and evaluating the professional's competence. When an expert's opinion about a professional's work is negative, the professional's reputation may be diminished, or he or she may be exposed to litigation. When this occurs, the professional may sue the expert for defamation. Whether or not this claim is successful often turns on whether the expert may successfully assert the defense of qualified privilege.



This article discusses defamation claims against experts, the qualified privilege defense, and potential exceptions to the privilege.

Construction Experts and Defamation

Construction experts are an integral part of the professional construction world, as well as the legal system. Both construction professionals and lawyers rely on the opinions of experts to maintain quality control and to determine if a professional has exercised adequate care and expertise. A construction expert has a specialized interest and knowledge in a subject. Experts include traditional experts, such as engineers and architects, as well as skilled witnesses, such as contractors. Expert witnesses' opinions and testimony are often a central and controversial component in determining the competency of another professional's work. An expert's determination can have a lasting effect on a construction professional's career.

In some instances, a construction professional may sue the expert for making defamatory and/or disparaging comments about the quality of his or her work. This could include, among other things, critiques of architectural drawings, engineering plans, or the discovery of mistakes made while rehabilitating an older building.

In order to prove defamation, the professional must demonstrate that the expert issued a false statement about their work, which caused that professional to suffer harm. *Vickers v. Abbot Laboratories*, 308 Ill. App. 3d 393 400 (1999). Defamation is not an economic tort. In the classic sense, it is something that exposes the professional to "hatred, contempt, or ridicule." *Parmiter v. Coupland*, 151 Eng. Rep. 340, 342 (1840). The professional must show that the expert made a false statement about him, that there was an unprivileged publication to a third party with fault by the expert, and that the publication damaged the professional. *Id.*

Privileged Communications

Most defamation cases against experts fail, however, because the expert's opinion is considered qualified privilege. If a communication is privileged, there can be no action for defamation. *Kuwick v. Starmark Star Marketing and Administration Inc.*, 156 Ill.2d 16, 24 (1993). A privileged communication would be otherwise actionable for defamation except for the specific circumstances in which the communication was made. A qualified privilege immunizes an expert from suit only when the privilege is properly exercised in the performance of a legal or moral duty. *Id.* The purpose of qualified privilege is to facilitate the free flow of information so that correct information may ultimately be attained. *Vickers*, 308 Ill. App. 3d at 401. Whether this privilege exists is always a question of law. *Kuwick*, 156 Ill.2d at 27. Privilege was designed especially for the protection and encouragement of disinterested lay witnesses. *McGregor v. Rutberg*, 478 F.3d 790 (2007). However, this protection has been extended time and time again to protect the interests of experts. 31 Wake Forest L. Rev. 497 (1996). In defamation cases, the expert has the burden of establishing the privilege. *Kuwick*, 156 Ill.2d at 27.

The Restatement (Second) of Torts definition of qualified privilege has been adopted by numerous jurisdictions. *See Jones v. Central Peninsula General Hospital*, 779 P.2d 783 (Alaska 1989); *Hirsch v. Cooper*, 153 Ariz. 454, 737 P.2d 1092 (1986); *Navorro-Monzo v. Hughes*, 297 Ark. 444, 763 S.W.2d 635 (1989); *Battista v. Chrysler Corp.*, 454 A.2d 286 (Del.1982); *Nodar v. Galbreath*, 462 So.2d 803 (Fla.1984); *Arnold v. Diet Center, Inc.*, 746 P.2d 1040 (Idaho, 1987); *Kuwick v. Starmark Star Marketing and Administration Inc.*, 156 Ill.2d 16, 619 N.E.2d 126 (1993); *Onat v. Penobscot Bay Medical Center*, 574 A.2d 872 (Me.1990); *Mareck v. Johns Hopkins University*, 60 Md.App. 217, 482 A.2d 17 (1984); *Bratt v. International Business Machines Corp.*, 392 Mass. 508, 467 N.E.2d 126 (1984); *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987); *Erickson v. Marsh & McLennan Co.*, 117 N.J. 539, 569 A.2d 793 (1990); *Hitter v. Bellevue School District No. 66* Wash.App. 391, 832 P.2d 130 (1992); *Zinda v. Louisiana Pacific Corp.*, 149 Wis.2d 913, 440 N.W.2d 548 (1989); *Williams v. Blount*, 741 P.2d 595 (Wyo. 1987).

The Restatement (Second) of Torts requires a court to look to the occasion of the communication and determine as a matter of law and general policy if the occasion recognized a duty or interest that would make the communication privileged. *See Restatement (Second) of Torts* ' 593 through 599 (1977). This method has the courts "deal with the law of general averages based on human experience and . . . shape a general policy to deal with a general problem." S. Harper, F. James & O. Gray, *The Law of Torts* ' 5.25 at 214. Conditionally privileged information falls into three categories: "(1) situations in which some interest of the person who publishes the defamatory matter is involved; (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved; [and] (3) situations in which a recognized interest of the public is concerned." *Id.* If an expert's opinion falls under one of the three definitions of qualified privilege, then the communication cannot be construed as defamatory.

The first category, "situations in which some interest of the person who publishes the defamatory matter is involved," often arises in a construction context. If the expert was hired to render his opinion on another construction professional's prior work, then the expert would have an interest in publishing the results to his client and answering any questions the client may have. For example, if an owner of a building hired an architect as an expert to inspect the premises to determine if there were any construction issues that needed attention, the architect would have an interest in his published findings in order to fulfill his obligation to his client.

The second category, "situations in which some interest of the person to whom the matter is published or of some other third person is involved," also occurs in the construction context. The employer of the construction expert has an interest in receiving the communication from the expert. The communication may directly relate to problems on the project that the expert testified about or potential liability on the part of the professional who the expert rendered an opinion about. For example, an owner of an apartment building would have an interest in an expert engineer's published material that determined that the foundation for an apartment complex was unsound.

The third category, "situations in which a recognized interest of the public is concerned," is an integral part of a construction expert's publication of findings. Architecture, engineering, and all forms of construction affect the public health, safety, and welfare. The proper exercise of these professional fields will safeguard the health and safety of the public. For example, an expert architect publishing results of an investigation into defects in the design of the premises of a condominium would serve to protect the safety of not only the individual condominium owners, but the safety, health, and welfare of any individual on the condominium premises.

In many instances, an expert's opinion will fall under all three types of qualified privilege. However, even if the construction expert's published opinion only fulfills one category, he or she will have qualified privilege.

Exception to Qualified Privilege: Abuse

If an expert demonstrates that he or she has qualified privilege, then in order for a professional to continue with the defamation action, abuse of privilege must be demonstrated. This may consist of demonstrating that the expert engaged in a reckless act which shows a disregard for the defamed

party's rights or a failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties. *Kuwick*, 156 Ill.2d at 30. For example, if an expert makes a determination about a professional's competence, but fails to inquire about the proper standards, then the published opinion may constitute a breach of qualified privilege. If a professional cannot demonstrate that an expert with qualified privilege abused his or her immunity, then the expert cannot be liable for defamation.

Conclusion

Defamation actions against construction professionals require a burden shifting analysis. If an expert can prove that he or she has qualified immunity, then the professional must demonstrate that the expert abused that privilege. Construction professionals considering rendering expert opinions or evaluations should be wary of the potential of a defamation action and be thorough when developing opinions. In addition, professionals contemplating filing a defamation action should be aware of potential dismissal if the expert's published opinion fulfills the criteria of qualified immunity.

Jeffrey T. Kubes is a founding partner of Crisham & Kubes, Ltd. in Chicago, practicing in the areas of construction law and commercial litigation in a wide variety of disputes and claims. He can be reached at jkubes@crishamlaw.com

Margaret Fitzsimmons recently completed her third year of law school at Loyola University of Chicago where she served as a senior editor of the *Annals of Health Law*. Ms. Fitzsimmons has accepted a position as an associate at Crisham & Kubes, Ltd.

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