COHEN v. COWLES MEDIA (1991)

Since the U.S. Supreme Court decided *New York Times v. Sullivan* in 1964, the courts have recognized that the First Amendment requires plaintiffs to overcome a number of hurdles before their damage claims against the press will be recognized. The *New York Times* case, of course, extended constitutional protection to the press in libel suits brought to public officials. Since then, the Supreme court has extended similar protection in the areas of privacy (*Time, Inc. v. Hill,* 385 (1967)) and intentional infliction of emotional distress (*Hustler Magazine v. Falwell,* 485 U.S. 46 (1988)). And, as recently as 1989, the Court reaffirmed the holding laid down in *Cox Broadcasting v. Cohn,* 420 U.S. 469 (1975) that the press has a protected right to publish truthful information lawfully obtained from government sources. *Florida Star v. B.J.F.,* 491 U.S. 523 (1989).

This bulwark of constitutional protections afforded the press in damage claims, particularly claims arising out of the publication of truthful information, took a direct hit in 1991 when the Supreme Court decided *Cohen v. Cowles Media,* 111 S. Ct. 2513 (1991). In *Cohen,* the Court ruled that the First Amendment does not prevent a news source from recovering damages when a news organization breaks a verbal confidentiality agreement. In so ruling, the Court formally recognized a new basis for damage recovery against the press, and, at the same time, decreed that the press has no First Amendment protection against such claims. The decision has resulted in an array of new lawsuits, a trend which is likely to continue unless the lower courts place some limits on these types of claims.

The *Cohen* case arose when two Minnesota newspapers published reports that a candidate for lieutenant governor had been convicted of shoplifting. Reporters from both newspapers had learned of the conviction from Dan Cohen, a political operative who worked for a competing candidate. Cohen revealed the information to the press on the eve of the election, but only after reporters had promised they would not disclose his identity. Given the timing of the disclosure as well as the obvious political motivation, editors at both newspapers decided that the identity of the source was as newsworthy as the information on the candidate's criminal record. Over the objection of the reporters, the editors chose to disregard the pledges of confidentiality and named Cohen. After the reports were published, Cohen lost his job, sued the newspapers and eventually recovered $200,000 in compensatory damages at a jury trial.

The Minnesota Supreme Court initially set aside the verdict, finding that under Minnesota law there cannot be a contract where the parties do not intend one. The court concluded that sources view a reporter's promise as a moral — rather than a legally binding — commitment. According to the court: "What we have here, it seems to us, is an 'I'll-scratch-your-back-if-you'll-scratch-mine' accommodation." *Cohen v. Cowles Media,* 457 N.W. 2d 199, 203 (Minn. 1990).

Although the Minnesota high court ruled in favor of the press on the breach of contract claims, it left open the possibility that a source might recover based on a promissory estoppel theory. *Id.* At 203-4. Promissory estoppel allows courts to enforce a promise — even though

there is no legally binding contract — in order to avoid injustice. Having outlined promissory estoppel as a possible basis for recovery, the Minnesota Supreme Court went on to rule that Cohen could not recover such a theory because the concept of "avoiding injustice" requires the court to balance the equities which, in the *Cohen* case, included First Amendment considerations. "Of critical significance," said the majority opinion, "is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign." *Id.* At 205.

Cohen petitioned the U.S. Supreme Court for certiorari, arguing that the First Amendment should not preclude his recovery under promissory estoppel. The newspapers countered that the First Amendment protected their decision to name a source. The Supreme Court sided with Cohen, holding that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." 111 S. Ct. At 2518. According to the Court, the First Amendment "does not confer on the press a constitutional right to disregard promises that would otherwise be enforced under state law." 111 S. Ct. At 2519. With that, the Court send the case back to the Minnesota Supreme Court which decided on remand to reinstate the verdict.

Some members of the press predicted that the *Cohen* decision would have little impact on newsroom litigation because instances in which a news organization disregards a pledge of confidentiality — as happened in *Cohen* — are extremely rare. It is true that confidential sources are rarely revealed. In newsroom parlance, breaking a promise of confidentiality is known as "burning a source," and if it were done with any degree of frequency, newspapers would quickly find they had no sources. Most journalists regard such agreements as ethically sacred, and news organizations routinely resist subpoenas which seek confidential information. Indeed, at least five reporters have gone to jail over the last two year rather than comply with judicial orders requiring them to name confidential sources.

However, though pledges of confidentiality are rarely broken, journalists do make a number of other types of representations during the course of routine reporting, and it is these types of promises that are giving rise to the post-*Cohen* broken promise lawsuits. For example, a reporter may tell an individual interviewed on television that he or she will not be identifiable, or a news organization may promise embargo information until a certain time. These promises are rarely, if ever, put in writing and are usually made in conversations between a reporter and a source to which there are no witnesses. The potential for abuse in lawsuits arising out of such promises should be apparent. At newspapers owned by Gannet alone, there have been nine such lawsuits filed over the last several years.

Since there are seldom any witnesses to reporter-source conversations, and since the Supreme Court has ruled that the First Amendment does not protect news organization from broken promise claims, a source who asserts that a reporter broke a promise now stands an excellent chance of reaching a jury on the question, even if the journalist denies the promise was made.

For example, in *Morgan v. Celender*, 780 F. Supp. 307 (W.D. Pa. 1992), the mother of two children who had allegedly been abused by their father claimed that the newspaper published the names of the children despite an agreement by the reporter not to identify them. The reporter, on the other hand, took the position that the mother had specifically authorized the disclosure of her children's identity and had asked only that her new married name not be published. The complaint sought damages based on fraud, and, after a three day trial in which each side testified about the conversations between the reporter and the source, the judge finally dismissed the case, ruling that plaintiff had failed to establish one of the essential elements of a fraud claim, i.e., a misrepresentation of an existing fact. *Id.* at 311. If the lawsuit had alleged breach of contract or promissory estoppel, however, the theory on which the newspaper successfully relied would not have been available.

Moreover, because the promises journalists make are often vague in nature, sources often have room to claim that a reporter's promise was not carried out. For example, in *Anderson v. Strong Memorial Hospital*, 151 Misc. 2d 353, 573 N.Y.S. 2d 828 (1991), an individual brought suit after a newspaper published a rear angle photograph of him receiving treatment in an AIDS clinic. The individual claimed the newspaper broke a promise that he would not be identifiable and, at trial, produced several friends who testified they were able to recognize him in the photograph. The newspaper acknowledged that its photographer had told plaintiff he would not be identifiable, but claimed the rear angle setup, along with retouching techniques, had successfully obscured plaintiff's identity. The New York court disagreed. Relying on *Cohen*, the court held that where a promise of anonymity is made, the burden of carrying out that promise rests with the news organization. The fact that the newspaper's editors could not identify the plaintiff was not enough, the court said, when the plaintiff was subsequently identifiable to friends. *Id*. at 360, 573 N.Y.S. 2d at 833.

At least one court has recognized the potential for abuse in enforcing vague reporter-source promises. In *Ruziccka v. Conde Nast Publications,* Inc., 794 F. Supp. 303 (D. Minn. 1992), plaintiff, a sexual abuse victim who had been interviewed for a Glamour report on abuse by psychotherapists, claimed that the magazine broke its promise that she would not be identifiable by including in the report a number of details about her personal background that she claimed allowed her friends to identify her. In defense, the magazine argued that by changing the name of the woman, they kept their promise that she would not be identifiable. The court ruled against the plaintiff, holding that the promise was not sufficiently "clear and definite" to be enforceable: "Just what will make a private figure identifiable depends on the information known by that person's friends and acquaintances. A reporter, for the most part, cannot know what information will threaten the anonymity of a source, unless the source specifies that facts should not be published." *Id*. at 308

As these cases demonstrate, the type of claim encouraged by the *Cohen* holding has not been limited to situations where a news organization admittedly made and broke a promise of confidentiality to a source. Instead, the law handed down by the Supreme Court in *Cohen* has been used to support claims: (1) where it is not clear a promise was made; (2) where there are disputes as to the nature of the promise; and (3) where there was a promise that the newspaper argued had been met.

Where the courts will ultimately draw the line in this new class of claims is, as yet, unclear. It is, however, readily apparent that because the *Cohen* decision precludes a judge from dismissing a broken-promise claim on First Amendment grounds, the courts will be relying on the law of contracts and promissory estoppel — or their own state constitutions — in order to settle these disputes. This, in turn, may mean the news organizations will face protracted litigation before the disputes are resolved.

In the meantime, the recent rash of broken-promise claims suggests that reporters, photographers, and editors should take extra care with sources to whom promises are made — or who may later claim they received such promises. (June 1993)