Dan Cohen v. Cowles Media Co.

Supreme Court of Minnesota, 1990.

457 N.W.2d 199, reversed, 501 U.S. 663 (1991), opinion on remand, 479 N.W.2d 387 (1992).

■ Simonett, Justice. This case asks whether a newspaper’s breach of its reporter’s promise of anonymity to a news source is legally enforceable. We conclude the promise is not enforceable, neither as a breach of contract claim nor, in this case, under promissory estoppel. We affirm the court of appeals’ dismissal of plaintiff’s claim based on fraudulent misrepresentation, and reverse the court of appeals’ allowance of the breach of contract claim.

Claiming a reporter’s promise to keep his name out of a news story was broken, plaintiff Dan Cohen sued defendants Northwest Publications, Inc., publisher of the St. Paul Pioneer Press Dispatch (Pioneer Press), and Cowles Media Company, publisher of the Minneapolis Star and Tribune (Star Tribune). The trial court ruled that the First Amendment did not bar Cohen’s contract and misrepresentation claims. The jury then found liability on both claims and awarded plaintiff $200,000 compensatory damages jointly and severally against the defendants. In addition, the jury awarded punitive damages of $250,000 against each defendant.

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On October 27, 1982, in the closing days of the state gubernatorial election campaign, Dan Cohen separately approached Lori Sturdevant, the Star Tribune reporter, and Bill Salisbury, the Pioneer Press reporter, and to each stated in so many words:

I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this, and you will also agree that you’re not going to pursue with me a question of who my source is, then I’ll furnish you with the documents.

Sturdevant and Salisbury were experienced reporters covering the gubernatorial election and knew Cohen as an active Republican associated with the Wheelock Whitney campaign. Cohen told Sturdevant that he would also be offering the documents to other news organizations. Neither reporter informed Cohen that their promises of confidentiality were subject to approval or revocation by their editors. Both reporters promised to keep Cohen’s identity anonymous, and both intended to keep that promise. At trial Cohen testified he insisted on anonymity because he feared retaliation from the news media and politicians. Cohen turned over to each reporter copies of two public court records concerning Marlene Johnson, the DFL candidate for lieutenant governor. The first was a record of a 1969 case against Johnson for three counts of unlawful assembly, subsequently dismissed; the second document was a 1970 record of conviction for petit theft, which was vacated about a year later.

Both newspapers, on the same day, then interviewed Marlene Johnson for her explanation and reaction. The Star Tribune also assigned a reporter to find the original court records in the dead-storage vaults. The reporter discovered that Gary Flakne, known to be a Wheelock Whitney supporter, had checked out the records a day earlier; no one, before Flakne, had looked at the records for years. The reporter called Flakne and asked why he had checked out the records. Flakne replied, “I did it for Dan Cohen.” The Star Tribune editors thereafter conferred and decided to publish the story the next day including Dan Cohen’s identity. Acting independently, the Pioneer Press Dispatch editors also decided to break their reporter’s promise and to publish the story with Cohen named as the source.

The decision to identify Cohen in the stories was the subject of vigorous debate within the editorial staffs of the two newspapers. Some staff members argued that the reporter’s promise of confidentiality should be honored at all costs. Some contended that the Johnson incidents were not newsworthy and did not warrant publishing, and, in any case, if the story was published, it would be enough to identify the source as a source close to the Whitney campaign. Other editors argued that not only was the Johnson story newsworthy but so was identification of Cohen as the source; that to attribute the story to a veiled source would be misleading and cast suspicion on others; and that the Johnson story was already spreading throughout the news media community and was discoverable from other sources not bound by confidentiality. Then, too, the Star Tribune had editorially endorsed the Perpich–Johnson ticket; some of its editors feared if the newspaper did not print the Johnson story, other news media would, leaving the Star Tribune vulnerable to a charge it was protecting the ticket it favored. Salisbury and Sturdevant both objected strongly to the editorial decisions to identify Cohen as the source of the court records. Indeed, Sturdevant refused to attach her name to the story.

Promising to keep a news source anonymous is a common, well-established journalistic practice. So is the keeping of those promises. None of the editors or reporters who testified could recall any other instance when a reporter’s promise of confidentiality to a source had been overruled by the editor. Cohen, who had many years’ experience in politics and public relations, said this was the first time in his experience that an editor or a reporter did not honor a promise to a source.

The next day, October 28, 1982, both newspapers published stories about Johnson’s arrests and conviction. Both articles published Cohen’s name, along with denials by the regular Whitney campaign officials of any connection with the published stories. Under the headline, *Marlene Johnson arrests disclosed by Whitney ally*, the Star Tribune also gave Johnson’s explanation of the arrests and identified Cohen as a “political associate of IR gubernatorial candidate Wheelock Whitney” and named the advertising firm where Cohen was employed. The Pioneer Press Dispatch quoted Johnson as saying the release of the information was “a last-minute smear campaign.”

The same day as the two newspaper articles were published, Cohen was fired by his employer. The next day, October 29, a columnist for the Star Tribune attacked Cohen and his “sleazy” tactics, with, ironically, no reference to the newspaper’s own ethics in dishonoring its promise. A day later the Star Tribune published a cartoon on its editorial page depicting Dan Cohen with a garbage can labeled “last minute campaign smears.”

Cohen could not sue for defamation because the information disclosed was true. He couched his complaint, therefore, in terms of fraudulent misrepresentation and breach of contract. We now consider whether these two claims apply here.

I.

First of all, we agree with the court of appeals that the trial court erred in not granting defendants’ post-trial motions for judgment notwithstanding the verdict on the misrepresentation claim.

For fraud there must be a misrepresentation of a past or present fact. A representation as to future acts does not support an action for fraud merely because the represented act did not happen, unless the promisor did not intend to perform at the time the promise was made. . . . Cohen admits that the reporters intended to keep their promises, as, indeed, they testified and as their conduct confirmed. Moreover, the record shows that the editors had no intention to reveal Cohen’s identity until later when more information was received and the matter was discussed with other editors. These facts do not support a fraud claim. For this reason and for the other reasons cited by the court of appeals, we affirm the court of appeals’ ruling. Because the punitive damages award hinges on the tort claim of misrepresentation, it, too, must be set aside as the court of appeals ruled.

II.

A contract, it is said, consists of an offer, an acceptance, and consideration. Here, we seemingly have all three, plus a breach. We think, however, the matter is not this simple.

Unquestionably, the promises given in this case were intended by the promisors to be kept. The record is replete with the unanimous testimony of reporters, editors, and journalism experts that protecting a confidential source of a news story is a sacred trust, a matter of “honor,” of “morality,” and required by professional ethics. Only in dire circumstances might a promise of confidentiality possibly be ethically broken, and instances were cited where a reporter has gone to jail rather than reveal a source. The keeping of promises is professionally important for at least two reasons. First, to break a promise of confidentiality which has induced a source to give information is dishonorable. Secondly, if it is known that promises will not be kept, sources may dry up. The media depend on confidential sources for much of their news; significantly, at least up to now, it appears that journalistic ethics have adequately protected confidential sources.

The question before us, however, is not whether keeping a confidential promise is ethically required but whether it is legally enforceable; whether, in other words, the law should superimpose a legal obligation on a moral and ethical obligation. The two obligations are not always coextensive.

The newspapers argue that the reporter’s promise should not be contractually binding because these promises are usually given clandestinely and orally, hence they are often vague, subject to misunderstanding, and a fertile breeding ground for lawsuits. . . . Perhaps so, and this may be a factor to weigh in the balance; but this objection goes only to problems of proof, rather than to the merits of having such a cause of action at all. Moreover, in this case at least, we have a clear-cut promise.

The law, however, does not create a contract where the parties intended none. . . . Nor does the law consider binding every exchange of promises. See, e.g., Minn.Stat. ch. 553 (1988) (abolishing breaches of contract to marry); see also Restatement (Second) of Contracts §§ 189–91 (1981) (promises impairing family relations are unenforceable). We are not persuaded that in the special milieu of media newsgathering a source and a reporter ordinarily believe they are engaged in making a legally binding contract. They are not thinking in terms of offers and acceptances in any commercial or business sense. The parties understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract. See Cruickshank v. Ellis, 178 Minn. 103, 107, 226 N.W. 192, 194 (1929). Indeed, a payment of money which taints the integrity of the newsgathering function, such as money paid a reporter for the publishing of a news story, is forbidden by the ethics of journalism.

What we have here, it seems to us, is an “I'll-scratch-your-back-if-you'll-scratch-mine” accommodation. The source, for whatever reasons, wants certain information published. The reporter can only evaluate the information after receiving it, which is after the promise is given; and the editor can only make a reasonable, informed judgment after the information received is put in the larger context of the news. The durability and duration of the confidence is usually left unsaid, dependent on unfolding developments; and none of the parties can safely predict the consequences of publication. See supra note 4. Each party, we think, assumes the risks of what might happen, protected only by the good faith of the other party.

In other words, contract law seems here an ill fit for a promise of news source confidentiality. To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship. We conclude that a contract cause of action is inappropriate for these particular circumstances.

[The court went on to hold that Cohen might claim promissory estoppel under state law, but that the First Amendment barred such a claim, a decision which the U.S. Supreme Court later overruled.]