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In re Franklin Forum

July 2003

Cohen v. Cowles Media Co., d/b/a Minneapolis Star & Tribune Co.
United States Supreme Court (1991)

During the 1982 Minnesota gubernatorial race, Dan Cohen, an active Republican associated with Wheelock Whitney's Independent-Republican gubernatorial campaign, approached reporters from the *St. Paul Pioneer Press Dispatch (Pioneer Press)* and the *Minneapolis Star & Tribune (Star Tribune)* and offered to provide documents relating to a candidate in the upcoming election. Cohen made clear to the reporters that he would provide the information only if he was given a promise of confidentiality. Reporters from both papers promised to keep Cohen's identity anonymous and Cohen turned over copies of two public court records concerning Marlene Johnson, the Democratic-Farmer-Labor candidate for Lieutenant Governor. The records indicated that Johnson had been charged in 1969 with three counts of unlawful assembly and that she had been convicted in 1970 of petit theft. Both newspapers interviewed Johnson for her explanation. As it turned out, the unlawful assembly charges arose out of Johnson's participation in a protest of an alleged failure to hire minority workers on municipal construction projects, and the charges were eventually dismissed. The petit theft conviction was for leaving a store without paying for $6 worth of sewing materials. The incident apparently occurred at a time during which Johnson was emotionally distraught, and the conviction was later vacated.

The editorial staffs of the two newspapers independently decided to publish Cohen's name as part of their stories. Both papers identified Cohen as the source of the court records, indicated his connection to the Whitney campaign, and included denials by Whitney campaign officials of any role in the matter. The same day the stories appeared, Cohen was fired by his employer.

Cohen sued the newspapers and reporters on a theory of promissory estoppel in Minnesota state court. A divided Minnesota Supreme Court concluded that "in this case enforcement of the promise of confidentiality under a promissory estoppel theory would violate defendants' First Amendment rights." We granted certiorari to consider the First Amendment implications of this case.

The initial question we face is whether a private cause of action for promissory estoppel involves "state action" within the meaning of the Fourteenth Amendment such that the protections of the First Amendment are triggered. The rationale of our decision in *New York Times Co. v. Sullivan* (U.S. Supreme Court 1964) and subsequent cases compels the conclusion that there is state action here. Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment.

However, 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. The press may not with impunity break and enter an office or dwelling to gather news. Neither does the First Amendment relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source. The press, like others interested in publishing, may not publish copyrighted material without obeying the copyright laws. Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.

The Minnesota doctrine of promissory estoppel is a law of general applicability. It does not target or single out the press. Rather, the doctrine is generally applicable to the daily transactions of all the citizens of Minnesota. The First Amendment does not forbid its application to the press.

Cohen is not attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim. Cohen is not seeking damages for injury to his reputation or his state of mind. He sought damages in excess of $50,000 for breach of a promise that caused him to lose his job and lowered his earning capacity. Thus, this is not a case like *Hustler Magazine, Inc. v. Falwell* (U.S. Supreme Court 1988), where we held that the constitutional libel standards apply to a claim alleging that the publication of a parody was a state-law tort of intentional infliction of emotional distress.

The judgment of the Minnesota Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. So ordered.

Food Lion, Inc. v. ABC, Inc.

Franklin Supreme Court (1999)

Two ABC television reporters got jobs at Food Lion supermarkets and secretly videotaped unwholesome food-handling practices. Some of the footage was used in a "PrimeTime Live" broadcast that was sharply critical of Food Lion. The grocery chain sued ABC, Inc., and Lynne Dale and Susan Barnett, the two reporters (collectively, "ABC"). Food Lion focused on how ABC gathered its information through claims for fraud, breach of duty of loyalty, and trespass. We (1) reverse the judgment that ABC committed fraud, (2) affirm the judgment that Dale and Barnett breached their duty of loyalty and committed a trespass, and (3) affirm, on First Amendment grounds, the refusal to allow publication damages.

In early 1992, producers of "PrimeTime Live" received a report alleging that Food Lion stores engaged in unsanitary practices. The producers recognized that these allegations presented the potential for a powerful news story. Reporters Dale and Barnett concluded that they would have a better chance of investigating the allegations as Food Lion employees. They submitted job applications that showed false identities, references and local addresses and that failed to mention their concurrent employment with ABC.

A Food Lion store hired Barnett as a deli clerk and another hired Dale as a meat wrapper trainee. They worked for two weeks. As they went about their tasks, Dale and Barnett used tiny cameras and microphones to secretly record employees treating, wrapping, and labeling meat, cleaning machinery, and discussing the practices of the meat department. The videotape that was broadcast showed employees repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, bleaching rank meat, and applying barbecue sauce to chicken past its expiration date to mask the smell and sell it as fresh in the gourmet food section. The program included statements by former Food Lion employees alleging even more serious mishandling of meat at stores across several states. The truth of the broadcast was not at issue.

Food Lion's suit focused not on the broadcast, as a defamation suit would have, but on the methods ABC used. The chain sought millions in compensatory damages. Food Lion sought to recover (1) administrative costs and wages paid in connection with the employment of Dale and Barnett, and (2) publication damages for matters such as loss of goodwill, lost sales and profits, and diminished stock value. They also requested punitive damages for fraud.

The jury found all of the ABC defendants liable for fraud and Dale and Barnett additionally liable for breach of the duty of loyalty and trespass. The trial court ruled that damages allegedly incurred as a result of ABC's broadcast—"lost profits, lost sales, diminished stock value or anything of that nature"—could

not be recovered because these damages were not proximately caused by the acts of ABC. Operating within this constraint, the jury awarded Food Lion $1,400 in compensatory damages on its fraud claim, and $1 against each individual defendant on its duty of loyalty and trespass claims. The jury awarded $315,000 in punitive damages on the fraud claim.

We first consider whether ABC can be held liable for fraud. To prove fraud, the plaintiff must establish that the defendant (1) made a false representation of material fact, (2) knew it was false (or made it with reckless disregard of its truth or falsity), and (3) intended that the plaintiff rely upon it. In addition, (4) the plaintiff must be injured by reasonably relying on the false representation. It is undisputed that Dale and Barnett knowingly made misrepresentations with the aim that Food Lion rely on them. Only the fourth element, injurious reliance, is at issue. Food Lion claimed two categories of injury resulting from the lies on the job applications: the costs associated with hiring and training new employees (administrative costs) and the wages it paid. Food Lion did not show that the costs were caused by reasonable reliance on the misrepresentations.

Food Lion also argued that it was fraudulently induced to pay wages to Dale and Barnett because of the misrepresentations and sought to recover the full amount ($487.73) of the wages. The last element of fraud is again the only one at issue. Dale and Barnett were paid because they showed up for work and performed their assigned tasks. Their performance was at a level suitable to their status as new employees. Food Lion did not prove injury caused by reasonable reliance on the misrepresentations made by Dale and Barnett on their job applications. Because Food Lion was awarded punitive damages only on its fraud claim, the judgment awarding punitive damages cannot stand.

Second, ABC argues that Dale and Barnett cannot be held liable for a breach of duty of loyalty to Food Lion. Both reporters wore hidden cameras. An employee owes a duty of loyalty to her employer. It is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment. Employees are disloyal when their acts are inconsistent with promoting the best interest of their employer at a time when they were on its payroll and when they deliberately acquired an interest adverse to their employer.

The interests of ABC, to whom Dale and Barnett gave complete loyalty, were adverse to the interests of Food Lion, to whom they were unfaithful. ABC's interest was to expose Food Lion to the public. Dale and Barnett served ABC's interest, at the expense of Food Lion's, by engaging in the taping for ABC. Because Dale and Barnett had the requisite intent to act against the interests of Food Lion, they were liable for their disloyalty. The trial court did not err in refusing to set aside the jury's verdict.

Third, ABC argues that it was error to allow the jury to hold Dale and Barnett liable for trespass. It is a trespass to enter upon another's

land without consent. Accordingly, consent is a defense. Even consent gained by misrepresentation may be sufficient. The consent is canceled out, however, if a wrongful act is done in excess of and in abuse of authorized entry.

We turn first to whether the consent Dale and Barnett had was void because of the resume misrepresentations. Consent to an entry is often given legal effect even if obtained by misrepresentation or concealed intentions. Otherwise a restaurant critic could not conceal his or her identity when ordering a meal, a browser could not pretend to be interested in merchandise that he or she could not afford to buy, or a consumer, in an effort to bargain down an automobile dealer, could not falsely claim to be able to buy the same car elsewhere at a lower price.

Authorities in this country are not of one mind concerning when consent to enter based on misrepresentation may be given effect. Compare Restatement (Second) of Torts § 892B(2) (1965) ("if the person consenting to the conduct of another . . . is induced [to consent] by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm") with *Desnick v. Sterling Broadcasting Company* (7th Cir. 1995)(SBC agents with concealed cameras who obtained consent to enter a clinic by pretending to be patients were not trespassers because they entered offices open to anyone).

We adopt the analysis of *Desnick.* Sterling sent persons posing as patients to the plaintiffs' eye clinics, and the test patients secretly recorded their examinations. Some of the recordings were used in a news story that alleged intentional misdiagnosis and unnecessary cataract surgery. *Desnick* held that, although the test patients misrepresented their purpose, their consent to enter was still valid because they did not invade any of the specific interests relating to peaceable possession of land that the tort of trespass seeks to protect. The test patients entered offices open to anyone expressing a desire for ophthalmic services and videotaped doctors engaged in professional discussions with strangers, the testers. "Testers" posing as prospective homebuyers to gather evidence of housing discrimination are not trespassers. Consent based on a resume misrepresentation does not turn a successful job applicant into a trespasser as this approach would not protect the interest underlying the tort of trespass. The jury's first trespass verdict cannot be sustained.

The jury also found that the reporters committed trespass by what they did after they entered Food Lion's property by breaching their duty of loyalty. We affirm the finding of trespass on this ground because the breach of duty of loyalty, triggered by the filming in non-public areas, was a wrongful act in excess of Dale and Barnett's authority to enter Food Lion's premises as employees. Although Food Lion consented to the reporters' entries, the reporters exceeded that consent when they breached their implie promises to serve Food Lion faithfully. The jury's second trespass verdict should be sustained.

Fourth, ABC raises an important constitutional question of whether to subject Food Lion's claims to any heightened level of First Amendment scrutiny based on Dale and Barnett's engagement in newsgathering. ABC argues that the court must apply this heightened level of scrutiny. Although there are First Amendment interests in newsgathering, the Supreme Court held in *Cohen v. Cowles Media Co.* (U.S. Supreme Court 1991) 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." *Cowles,* however, is not applicable automatically to every generally applicable law. The Court has held that "the enforcement of [such a] law may or may not be subject to heightened scrutiny under the First Amendment." *Turner Broadcasting System v. FCC* (U.S. Supreme Court 1994). In *Barnes v. Glen Theatre* (U.S. Supreme Court 1991), nude dancing establishments and their dancers challenged a generally applicable law prohibiting public nudity. Because the general ban covered nude dancing, which was expressive conduct, the Supreme Court applied heightened scrutiny.

The torts Dale and Barnett committed fit into the *Cowles* framework. Neither tort targets nor singles out the press. Each applies to the daily transactions of citizens. If an employee of a competing grocery chain hired on with Food Lion and videotaped damaging information in Food Lion's non-public areas for later disclosure to the public, these tort laws would apply with the same force as they do against Dale and Barnett. Also, when applying these laws against the media will have no more than an "incidental effect" on news- gathering and the media can do its important job effectively without resort to the commission of run-of-the-mill torts, no heightened First Amendment scrutiny is appropriate.

In its cross-appeal, Food Lion argues that the trial court erred in refusing to allow it to use its non-reputational tort claims (breach of duty of loyalty, trespass) to recover publication damages for items relating to its reputation, such as loss of goodwill and lost sales. The trial court determined that it was the food-handling practices themselves, not the method by which they were recorded or published, that caused the loss of consumer confidence and, therefore, that the publication damages were not proximately caused by the non-reputational torts. We do not reach the matter of proximate cause because an overriding First Amendment principle precludes the award of publication damages. Food Lion attempted to avoid the First Amendment limitations on defamation claims by seeking publication damages under non-reputational tort claims.

Food Lion did not sue for defamation because it would have had to prove that the broadcast contained a false statement of fact made with actual malice, that is, with knowledge that it was false or with reckless disregard as to whether it was true or false. *See New York Times Co. v. Sullivan* (U.S. Supreme Court 1964). Since Food Lion was not prepared to offer proof meeting the *New York Times* standard, it sought to recover defamation-type damages under non-reputational tort claims

without satisfying the stricter First Amendment standards of a defamation claim. Such an end-run around First Amendment strictures is foreclosed by *Hustler Magazine, Inc. v. Falwell* (U.S. Supreme Court 1988), which confirms that when a public figure uses a law to seek damages resulting from speech covered by the First Amendment, the plaintiff must satisfy the proof standard of *New York Times*. Food Lion argues that because ABC obtained the videotapes through unlawful acts, it is entitled to publication damages without meeting the *New York Times* standard. In *Hustler,* the magazine's conduct would have been sufficient to constitute an unlawful act, the intentional infliction of emotional distress, if state law standards of proof had applied. Notwithstanding the nature of the underlying act, satisfying *New York Times* was a prerequisite to the recovery of publication damages. That result was "necessary," in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Id.* The trial court was correct when it disallowed publication damages, although we affirm on First Amendment grounds.

Affirmed in part and reversed in part.