IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

LINCOLN W. (CHIPS) MOMAN,

Appellant,

Vs.

M. M. CORPORATION, d/b/a THE MEMPHIS FLYER, H. DAVID LYONS, KENNETH NEILL, and GREGG CRAVENS,

Appellees.

Shelby Circuit No. 29502 T.D.
C.A. No. 02A01-9608-CV00182

FROM THE CIRCUIT COURT OF SHELBY COUNTY
THE HONORABLE GEORGE H. BROWN, JR.

Hal Gerber and Lewis R. Polk, III of Memphis
For Appellant

Jerry Mitchell and John H. Dotson of Memphis
For Appellees

VACATED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This is a libel case. Plaintiff, Lincoln W. (Chips) Moman, appeals from the order of the trial court denying his motion to compel discovery and granting the defendants' motion for summary judgment.

Chips Moman is a nationally known producer of phonograph records. In 1985, Richard Hackett, then the mayor of Memphis, and Ron Terry, the president of First Tennessee Bank, approached Moman about moving to Memphis to rejuvenate the music industry in Memphis. Moman moved to Memphis and opened 3 Alarm Studio in an old fire station at Third and Linden in downtown Memphis. Although the precise arrangements are not clear from the record, it is conceded that First Tennessee Bank made a loan in the amount of $720,000.00 to Moman Recording Corporation that was guaranteed by Moman. The proceeds of the loan were used for rehabilitation and remodeling of the old building. The City of Memphis leased the building to Moman, individually, and Moman Recording Corporation, as lessees, for $1.00 per year, with an option to purchase. In addition, Moman did not have to pay tax on the property because of the city's ownership of the property. Although 3 Alarm Studio produced a few successful records, the venture was not profitable, and eventually, Moman had to declare bankruptcy.

The M. M. Corporation publishes *The Memphis Flyer*, a weekly entertainment newspaper. In 1989, the *Flyer* published two articles about Moman's recording studio and record production business. The first article, entitled "Goodbye, Mr. Chips," appeared in the April 6-12, 1989 edition (Volume I, No. 8). A caricature showing Moman waiving "goodbye" as he was leaving Memphis with money stuffed in his pockets was on the front cover of Volume I, No. 8 and was reprinted on page eleven of the same volume with the text of the article. The article was written by H. David Lyons, and the caricature was drawn by Gregg Cravens. The second article was printed in the "Tomorrow's News, Today Rumor Mill" section of the April 27-May 3, 1989 edition (Volume I, No. 11).

On June 2, 1989, Moman filed a complaint against the M. M. Corporation, H. David Lyons, Kenneth Neill, and Gregg Cravens.[1] Contemporary Media, Inc., a subsidiary of M. M. Corporation, was added as a defendant in an amended complaint filed May 11, 1990. Moman first alleges that the caricature

"falsely and maliciously portrays plaintiff in a demeaning and derogatory way." He claims that the caricature "is libelous, false, holds plaintiff in an untrue light, subjects plaintiff to ridicule and contempt, has damaged his good name and reputation among his peers and the citizens of

[1] Kenneth Neill is the publisher of the *Flyer*. On July 20, 1990, Moman took a voluntary nonsuit against Gregg Cravens only. Cravens is not a party to this appeal.

Memphis and has caused him great financial loss, mental pain, and suffering for embarrassment to him and his family." Moman also alleges that the first article contains twenty-three defamatory statements that "are false, portray plaintiff in a false light, were made with malicious intent to humiliate, embarrass and defame plaintiff." Finally, Moman alleges that the second article is also defamatory. On July 14, 1989, the defendants filed an answer that denied the material allegations of the complaint.

During his deposition, Lyons, the author of the first allegedly defamatory article, refused to answer questions concerning the source of anonymous statements in the article. Lyons relied on T.C.A. § 24-1-208(a) (Supp. 1996), which provides that a member of the press is not required to disclose the source of any information procured for publication or broadcast. On March 6, 1996, Moman filed a Motion to Compel Discovery to require Lyons to answer the questions. Moman relied on T.C.A. § 24-1-208(b), which provides that T.C.A. § 24-1-208(a) does not apply with respect to the source of any alleged defamatory statement where a defense is based on the source of the information. The trial judge denied Moman's Motion to Compel Discovery.

On February 28, 1996, the defendants filed a Motion for Summary Judgment claiming that there were no genuine issues of material fact and that they were entitled to judgment as a matter of law. On May 31, 1996, the trial court entered an order granting the defendants' motion.

Moman has perfected this appeal and presents two issues for our review: 1) Whether the trial court erred in denying his Motion to Compel Discovery, and 2) Whether the trial court erred in granting summary judgment to the defendants. In the first issue, Moman argues that the trial court should have applied the statutory exception to the "Shield Statute." Lyons refused to answer questions during his deposition because he did not want to disclose the identity of his sources. He based his refusal on T.C.A. § 24-1-208(a) (Supp. 1996), which provides:

> A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.

However, Moman relies on the exception in the statute, T.C.A. § 24-1-208(b), which provides

that "Subsection (a) shall not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information."

The procedure to be followed when source information is refused is set out in T.C.A. § 24-1-208 (c) (Supp. 1996) which, as pertinent, provides:

> (c)(1) any person seeking information or the source thereof protected under this section may apply for an order divesting such protection. Such application shall be made to the judge of the court having jurisdiction over the hearing, action or other proceeding in which the information sought is pending.
>
> (2) The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that:
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> (A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;
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> (B) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and
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> (C) The person has demonstrated a compelling and overriding public interest of the people of the state of Tennessee in the information.

The record does not contain a transcript or statement of the evidence of the hearing provided for in T.C.A. § 24-1-208 (c). In the absence of a record of the hearing, we must presume that the evidence supports the ruling of the trial court. ***Scarbrough v. Scarbrough***, 752 S.W.2d 94 (Tenn. 1988); ***David v. Metropolitan Gov't of Nashville and Davidson County***, 696 S.W.2d 8 (Tenn. App. 1985).

As to the second issue, Moman claims that the statements in the articles were lies that were published with malice or reckless disregard for their truth or falsity. While the defendants admit that the tone of the article was unflattering and negative toward Moman, they claim that the statements were either not defamatory as a matter of law, protected opinion, or substantially true.

A trial court should grant a motion for summary judgment only if the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.03; ***Byrd v. Hall***, 847 S.W.2d 208,

210 (Tenn. 1993); ***Dunn v. Hackett***, 833 S.W.2d 78, 80 (Tenn. App. 1992). The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***Byrd***, 847 S.W.2d at 210. On a motion for summary judgment, the court must consider the motion in the same manner as a motion for directed verdict made at the close of the plaintiff's proof; that is, "the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Id***. at 210-11.

For a communication to be libelous, it must constitute a serious threat to the plaintiff's reputation. A libel does not occur simply because the subject of a publication finds the publication annoying, offensive, or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt, or ridicule. They must carry with them an element "of disgrace." ***Stones River Motors, Inc. v. Mid-South Publ'g Co.***, 651 S.W.2d 713, 719 (Tenn. App. 1983) (quoting W. Prosser, Law of Torts, § 111, at 739 (4th Ed. 1971)). In determining whether the published words are reasonably capable of such a meaning, the courts must look to the words themselves and are not bound by the plaintiff's interpretation of them. If the words are not reasonably capable of the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation. ***Id.***

The damaging words must be factually false. If they are true, or essentially true, they are not actionable, even though the published statement contains other inaccuracies that are not damaging. Thus, the defense of truth applies so long as the "sting" (or injurious part) of the statement is true. ***Id.*** The proper question is whether the *meaning* reasonably conveyed by the published words is defamatory, that is, "whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." ***Memphis Publ'g Co. v. Nichols***, 569 S.W.2d 412, 420 (Tenn. 1978) (quoting ***Fleckenstein v. Friedman***, 193 N.E. 537, 538 (N.Y. 1937)). Truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true. ***Id***.

Because the statement must be factually false in order to be actionable, comments upon or characterizations of published facts are not in themselves actionable. If the published facts being commented upon are true and nondefamatory, the writer's comments upon them are not

actionable, even though they are stated in strong or abusive terms. This principle has been given constitutional protection under the First Amendment by the United States Supreme Court. ***Greenbelt Coop. Publ'g Ass'n. v. Bresler***, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970); ***Old Dominion Branch No. 496 v. Austin***, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974).

In ***Stones River Motors***, this Court discussed the United States Supreme Court's rulings in ***Greenbelt***, ***Old Dominion Branch***, and ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974):

> The holdings in ***Greenbelt***, ***Old Dominion*** and ***Gertz*** together are regarded by the ALI as having the effect of holding that the First Amendment will not permit recovery in defamation for a statement which is the mere expression of an opinion and which does not assert by implication the existence of underlying false, defamatory facts. Restatement (Second) of Torts § 566 comment c (1977). In other words, it is now a matter of constitutional law, that statements of opinion or characterizations based upon disclosed nondefamatory facts are not defamatory even though they are stated in strong or abusive terms. . . . The thrust of these authorities is that an opinion is not actionable as libel unless it implies the existence of unstated defamatory facts. As long as the true facts on which the opinion is based are published, the opinion itself is not actionable.

Stones River Motors, 651 S.W.2d at 721-22.

In ***Milkovich v. Lorain Journal Co.***, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), the United States Supreme Court analyzed the constitutional protection afforded to an opinion. The Court first said that there was not "a wholesale defamation exception for anything that might be labeled 'opinion.'" ***Id.*** at 18, 110 S. Ct. at 2705. The Court then discussed the controlling case law[2]:

> Foremost, we think ***Hepps*** stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in cases like the present where a media defendant is involved. . . . ***Hepps*** ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional

[2] ***Philadelphia Newspapers, Inc. v. Hepps***, 475 U.S. 766, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986); ***Greenbelt Coop. Publ'g Ass'n. v. Bresler***, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970); ***Old Dominion Branch No. 496 v. Austin***, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974); ***Hustler Magazine v. Falwell***, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988); ***New York Times Co. v. Sullivan***, 376 U.S. 254, 84 S. Ct. 710 (1964); ***Curtis Publ'g Co. v. Butts***, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967); ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974).

> protection.
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> Next, the ***Bresler-Letter Carriers-Falwell*** line of cases provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. This provides assurance that public debate will not suffer for lack of "imaginative expression" or the "rhetorical hyperbole" which has traditionally added much to the discourse of our Nation.
>
> The ***New York Times-Butts-Gertz*** culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open." Thus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard for the truth.

Milkovich, 497 U.S. at 19-20, 110 S. Ct. at 2706-07 (citations omitted). The Court then concluded: "We are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." ***Id***. at 20, 110 S. Ct. at 2707.

Moman first alleges that the caricature appearing both on the cover and within the first article is defamatory and portrays him in a "demeaning and derogatory way." The caricature is a picture of Moman waving "goodbye" as he is crossing a bridge that leads from Memphis to Nashville. He has records under one arm and money stuffed in two of his pockets. Finally, it appears as if the bridge is burning behind him as he leaves Memphis. The title of the article is "Goodbye, Mr. Chips," with an accompanying sub-title of "The City Fathers brought him back to save Memphis music. But will Chips Moman just take the money and run?"

In ***Hustler Magazine v. Falwell***, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988), the United States Supreme Court discussed caricatures and political cartoons:

> The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events--an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or even-handed, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:
>
> "The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters." Long, The Political Cartoon: Journalism's Strongest Weapon, The Quill 56, 57 (Nov. 1962).

Id. at 54, 108 S. Ct. at 881. The Court accepted the lower court's findings that the cartoon was "not reasonably believable." ***Id.*** at 57, 108 S. Ct. at 882-83. The Court felt speech, including

cartoons, should be protected when that speech "could not reasonably have been interpreted as stating actual facts about the public figure involved." ***Id***. at 50, 108 S. Ct. at 879.

In the case before us, we believe that the caricature, in conjunction with the title and the article itself, could be interpreted as stating actual facts about Moman. The article clearly implies that Moman took public money and left town. The caricature is not a parody of Moman. We believe that it is capable of a defamatory meaning and can reasonably be understood to imply that Moman took money from the public in Memphis and moved to Nashville.

In their briefs and at oral argument, the parties discussed each alleged defamatory statement in the article separately. Therefore, we will also examine each statement in order. However, we will consider each statement in context with its paragraph and the entire article. Moman alleges that the first *Flyer* article contains twenty-three defamatory statements.

> 1. "So why did we spend our money on Chips Moman? And what did we get for it? The answer, some say, is 'not much.'"

Moman claims that the whole premise that it was public money, "our money," is false, and he argues that the representation that the public did not get much for its money demonstrates an obvious contested issue of fact. Moman claims that all of the money involved was either his own money or money he borrowed from First Tennessee Bank. Lyons claims that "our money" refers to the lost revenue to the city because of the tax freeze and the $1 per year rent. Moman in turn argues that the "tax freeze" was in place before he moved into the building because the city owns the property and that the $1 per year rent was in consideration for refurbishing the building.

A "tax break" is a fairly common practice used by local governments to attract industry to the local community. For example, the article refers to tax breaks for International Paper and Sharp Manufacturing. We believe that it is undisputed that Moman received some incentive from the local government (and, therefore, the public) to move to Memphis. It is also undisputed that 3 Alarm Studio was not a financial success and that Moman declared bankruptcy.

However, the article is somewhat misleading. It implies that Moman received public funds, namely $720,000.00, to fund his project, while, in truth, he borrowed that amount from First Tennessee Bank. In context of the entire article, coupled with the sub-title "But will Chips Moman just take the money and run?" and the caricature showing him leaving Memphis for

Nashville with money in his pockets, this statement is capable of a defamatory meaning because it implies that Moman took public money and gave Memphis nothing in return.

> 2. "And the trademark chart-toppers were getting farther and farther apart. The Memphis heyday was long past."

Moman claims that the nature of the music industry has changed since his time in Memphis during the 1960s. At that time, records were all singles, but currently, records are released as albums that contain ten or more singles. Moman claims that the statement is false because an album may only contain a few hit songs, and therefore, it is harder to release as many chart-toppers. He argues that one hit album is equivalent to five gold singles, and that since one can only cut about four albums per year, the equivalent in today's industry is about twenty hit singles per year. He asserts that his career has not changed and that it has not gone down hill.

We believe that this statement, even in context with the entire article, is not capable of a defamatory meaning because it does not hold Moman "up to public hatred, contempt or ridicule." ***Stones River Motors***, 651 S.W.2d at 719.

> 3. "But maybe the rumors floating down I-40 from Nashville were true--that Chips had shortchanged one musician too many and was tired of doing business on a cash-and-carry basis."

Moman denied that he had shortchanged any musicians and stated that he had never heard any rumors about his financial dealings with musicians. Lyons refused to disclose the source of the rumors. Moman argues that a material issue exists regarding whether or not there were any rumors. We agree. We believe that this statement is capable of a defamatory meaning because it implies that Moman cheated musicians and ran a quick and dirty operation. The defendants claim that the statement is clearly not a statement of fact and that it is not asserted to be true. However, it implies the existence of underlying defamatory facts and, therefore, is capable of a defamatory meaning.

> 4. "He wanted to come to Memphis, but they had to sell him on the idea? Some observers have suggested that Chips simply wanted to be *begged* and that the 'interview' was just a plant to get things rolling."

Moman claims that this is a false statement and a blatant lie. The defendants claim that the first part of the statement is a question and, therefore, cannot be a false statement of fact and that the second part of the statement is the author's opinion and is not capable of being proved true or false. Moman argues that a quotation from some unknown, unnamed observer, based

upon false facts, does not qualify as a non-defamatory opinion.

We do not decide if the statement is an opinion or a statement of fact because we do not believe that it is capable of a defamatory meaning. Nothing about this statement holds Moman up to public ridicule or public hatred.

Statements 5, 6, and 7 will be considered together.

> 5. "Be that as it may, it didn't take a *lot* of begging, just a little. What it *did* take was a lot of money--$720,000 to be exact--in the form of a Center City Commission revenue bond issue which was bought by First Tennessee Bank."
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> 6. "In addition to the $720,000 tax-free mortgage loan rumored at 4 percent ('Who?' asked the voice when we phoned First Tennessee's bond department. 'Chips Moman? How do you spell that? Is that here in Memphis?') . . . ."
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> 7. "Even with the current tax assessment fiasco, it was a helluva deal."

Moman claims that the article implies that he took the money and ran with it. Moman argues that these are factual statements that would lead any reasonable reader to believe that he had taken advantage of the Center City Commission and not only had failed to use the money as intended, but was leaving town with it. He claims that the statements are factually incorrect because the money was a loan from First Tennessee Bank at 10.5% interest, not 4%. Finally, he claims that this was the worst deal of his life.

We believe, that even with the minor factual inaccuracies, these statements are not capable of a defamatory meaning. None of these statements implies that he used the money in any improper way or that he left town with it.

> 8. "Pretty heady company for a guy with an answering service who produces just three or four albums a year."

Moman claims that this statement is a lie because he did not have just an answering service. The defendants argue that the first part of the statement is protected opinion when viewed in context with the preceding paragraph that talked about tax incentives for Sharp Manufacturing and International Paper.

We believe that "pretty heady company" is protected opinion based on the disclosed non-defamatory facts that Sharp Manufacturing and International Paper also received tax breaks.

In addition, Moman argues that the statement shows a lack of understanding of the recording industry because four albums a year is a lot of work and that he did produce more than

four albums per year in Memphis. However, we do not believe that this statement is capable of a defamatory meaning, especially in context with the preceding paragraph.

> 9. "Their first album, *Class of '55*, recorded in 1986, was so bad that *USA Today* ranked it as one of 5 worst albums of the year. And things got worse from there."

Moman did not even argue about this statement in his brief or at oral argument. It is uncontroverted that *USA Today* ranked Moman's album as one of the "5 worst" of the year. That statement is true, and therefore, is not actionable. We believe that the remaining portion of the statement is the author's opinion about Moman's America Records venture. The opinion that "things got worse" is based on disclosed non-defamatory facts concerning the investors in America Records.

> 10. "Still, Moman allowed himself to be portrayed as a savior. He never stood up and said he *couldn't* be one. Nor did anyone else. And that--along with the accompanying financial dealings with the city--still causes hackles to rise in the local music industry when the words 'Moman' and 'money' are used in the same breath."

Once again, Moman argues that the whole theme of the article is that he took public money and ran and that this statement is part of that theme. The defendants argue that the thrust of these statements amounts to rhetorical hyperbole or to opinion based on disclosed non-defamatory facts in the article concerning the city's financial arrangements with Moman. We agree that these statements, standing alone, do not amount to defamation. However, taken in context of the entire article, the meaning reasonably conveyed by the published words could be defamatory because the words imply public distrust of Moman because he took public money.

> 11. "'This industry--the music industry--is money, power, and politics. And Chips has all three. He has those national connections. He can hurt people. Everybody's real nervous about saying anything because Chips is so vindictive. He gets pissed off real easy.'"

Although Moman admitted that there were often heated arguments in the recording industry, he denied the characterizations of these statments. In his deposition, Moman admitted that he doesn't "turn the other cheek" and that after an altercation the other person "knows it has occurred," but he claimed to be a "laid back" person. The defendants claim that these statements are true or are opinion based on disclosed facts.

These statements are a quote from a "local promoter who, typically, asks not to be named." In his deposition, Lyons refused to disclose the name of the promoter. We believe that these statements are merely the opinion of the unnamed promoter, and they do not imply the existence of undisclosed false and defamatory facts. In addition, the statements appear to be substantially true.

> 12. "As if that weren't bad enough, Moman recorded the ill-fated *Class of '55* album using musicians and technical people largely recruited from Nashville, in effect stuffing Memphis money into the pockets of out-of-town musicians."

Moman stated that he used many Memphis musicians when he was recording in Memphis, sometimes as many as three to four times the number of Nashville musicians. However, he did use a large number of Nashville musicians to record his albums. He has a band that has been with him for 30 years, and some of the band members live in Nashville. Moman stated that he finished the records using Memphis musicians.

Because he did use a number of out-of-town musicians while in Memphis, we believe that this statement is substantially true. Moman argues that the crux of this statement is the misuse of money. However, because it is substantially true, it is not actionable.

> 13. "Rip-off or not, it certainly didn't help their efforts to find sorely-needed investors, who were made even more than usually gun-shy by the America Records fiasco."

Moman once again claims that the charge of "rip-off" is defamatory coupled with the paragraphs about the misuse of money. The defendants claim it is a combination of rhetorical hyperbole and opinion. We believe that it is a non-actionable characterization of the facts concerning using Nashville musicians on the *Class of '55* album. In ***Stones River Motors***, this Court said, "The comments and characterizations involved here, such as 'pure highway robbery' and 'rip-off,' fit precisely the rationale of ***Greenbelt***, ***Old Dominion*** and § 566 of the *Restatement*. These are clearly characterizations of the facts set forth in the letter, and do not imply the existence of undisclosed defamatory facts." ***Stones River Motors***, 651 S.W.2d at 722.

> 14. "Moman proceeded to sign as many as ten songwriters to contracts, but never used the material they produced. He also signed Reba and The Portables to an exclusive contract and sat on *them*."

> 15. "'All that time and energy Reba and The Portables put into their project--he just flushed it,' another anonymous promoter says."

Moman claims that these statements are false because he could not release the Reba and The Portables album that he produced because someone else claimed an economic interest in that recording. Moman stated that he had an offer from CBS to release the album, but that it did not materialize because of the competing interest. Although the statement may misstate the facts or be false, we do not believe it is actionable as defamation. The words are not reasonably construable as holding Moman up to public hatred, contempt, or ridicule. ***Stones River Motors***, 651 S.W.2d at 719.

> 16. "And there were other problems: Moman's aloofness, his refusal to be associated with or get involved in local projects, his criticism of local organizing efforts--none of which endeared him to the locals."

In his deposition, Moman admitted that he does not go out in public because he does not want to come home every time with a pocketful of tapes of potential artists. However, he stated that he did not refuse to be associated or to get involved with local projects and that the statement was a lie. He claims that a material issue of fact arises because he classifies the statement as a lie. We disagree. We find that the statement, even if untrue, is not capable of a defamatory meaning as a matter of law.

> 17. "First, there's his apparent failure. If the city fathers and First Tennessee Bank hadn't put all of their eggs in one basket and instead had put one-tenth of the money, effort, and publicity into the existing studios . . . ."

Moman argues once again that "the whole thing is about money and Mr. Moman's escape with it," while the defendants argue that this statement is an opinion. We see nothing in this statement that is defamatory about Moman. If anything, it is critical of Memphis and the First Tennessee Bank. In addition, it is true that Moman's venture in Memphis failed.

> 18. "Instead, they say, Moman has created a lot of local disillusionment about public-sector arts investments--and he's made Memphis the laughing stock of Nashville. One Nashville promoter reportedly quipped that 'Nashville ran him out of town and Memphis welcomed him with open arms.' But even more embarrassing was the Ringo Starr fiasco which, it seems in retrospect, was the third and final cock's crow for the erstwhile messiah."

Moman testified that he has never been run out of any towns, but instead had been

welcomed to towns. He also claims that the Ringo Starr episode[3] was not a "fiasco." The defendants claim that "local disillusionment," "laughing stock," "ran him out of town," "fiasco," and "final cock's crow for the erstwhile messiah" are all rhetorical hyperbole. We again find that nothing in these statements gives rise to a claim for defamation. Moman may find some of the language of the article annoying or embarrassing, but that does not state a cause of action for libel or defamation. ***Stones River Motors***, 651 S.W.2d at 719.

> 19. "It came as no surprise, given that Moman gave them the shaft, so to speak, that no one else from the Memphis music scene--outside Chips Moman Productions--joined in his rally on the *CA* lawn."

Moman claims that giving somebody "the shaft" is certainly defamatory. However, we believe that this is the type of rhetorical hyperbole or vigorous epithet discussed in ***Greenbelt***, 398 U.S. at 14, 90 S. Ct. at 1542. This is merely the author's characterization of Moman's activities in Memphis. The expression deals with Moman's relationship with local musicians, not with any allegations of improper handing of the public's money.

> 20. "Was this just an expensive bait-and-switch?"

Moman argues that "bait-and-switch" is defamatory in the context of taking advantage of the financial arrangements and would lead a reasonable reader to infer wrongdoing. The defendants, on the other hand, claim that it is a rhetorical question. We believe that this is a non-actionable rhetorical question that is not capable of being proved false. The words are not factually false and do not contain a provably false factual connotation.

> 21. "[T]here are indications that the play toy might soon be changing hands, that some of the recording equipment is already being carted back to Nashville, that Moman has been spending more time on his Nashville farm than he has in Memphis. We might not have Chips Moman to kick around anymore."

In these statements, the play toy refers to Moman's 3 Alarm Studio. Moman owns an old U-Haul truck that he uses to haul equipment back and forth between Memphis and Nashville. He claims that the statement is a false representation of the facts because he routinely moves equipment. He claims that in light of the caricature showing him leaving Memphis, this statement is defamatory. However, it is undisputed that Moman sold 95% of the stock in 3

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[3] On March 9, 1987, *The Commercial Appeal* printed an article about Ringo Starr stating, "An aging Beatle is yesterday's news." Many musicians, including Moman, picketed on the lawn of *The Commercial Appeal* in protest of the article.

Alarm Studio and that he currently spends most of his time in Nashville.

Although we believe that the statements are substantially true, we also find that they are not capable of a defamatory meaning because they do not constitute a serious threat to Moman's reputation.

> 22. "But if he is once again pulling up his tent and dowsing his campfire, it fits the hopscotch pattern of Chips Moman Productions over the last 20 years or so. And the lease-purchase option on 3 Alarm Studios comes up in 1990. Timing, as Chips should know, is everything."

Although Moman stated in this deposition that he has lived in Memphis, Nashville, Florida, and Georgia during the last twenty years, he claims that this statement is false because he was not leaving Memphis. However, the statement does not say that he is leaving Memphis, it merely poses that hypothetical. In addition, it is true that the option to purchase the building at Third and Beale was in effect in 1990. We believe that these statements are not defamatory because they do not hold Moman up to public ridicule and because they are substantially true.

> 23. "But the next time the city fathers go looking for a savior, they might check his arms first. If there's a 'BORN TO LOSE' tattoo on one of them, maybe they should take it as a warning."

Moman does have a "Born To Lose" tattoo on his arm, but he had the tattoo imprinted on his arm when he was fourteen years old after he "broke up" with a girl. "Born to Lose" is a Ray Charles song and was Moman's favorite song when he was fourteen. Moman argues that for the defendants to put a different connotation on this tattoo "shows [their] poison and hatred."

This statement was the last sentence of the first article and is the summary of Lyon's opinion of Moman. We believe that these statements are rhetorical hyperbole and do not contain a provably false factual connotation. Therefore, they are protected speech.

Finally, Moman alleges that the second *Flyer* article contains defamatory statements concerning him. He alleges that the following statements are defamatory:

> "On The Road Again: Our April 6 cover story which raised the question of whether of not **Chips Moman** would soon be leaving town (after gathering lots of money and tax credits and doing virtually nothing to help save the music industry here as was planned), wasn't too far off the mark, it seems. Just last week, a large moving truck was seen backed up to the door of Moman's downtown recording studio (the purple fire station on Linden), being loaded up with all sorts of equipment. Could he indeed be heading back up I-40?"

The parties did not mention or argue about this article in their briefs or at oral argument.

However, it is similar to statement #21 above because it references Moman's U-Haul truck and a possible move out of Memphis. Once again we believe that the statement is substantially true and also does not pose a threat to Moman's reputation.

In conclusion, we believe that statements 1, 3, and 10 in the first article are capable of a defamatory meaning because they could be read to imply that Moman mishandled or took public money and left town. In addition, we find that the title and the caricature, in context with the entire article, are also capable of a defamatory meaning.

However, this in not the end of the inquiry. The statements are still not defamatory as a matter of law unless Moman can show that they were printed with the requisite degree of fault. There is no dispute in this case that Moman is a public figure. Therefore, he has a substantial burden to overcome. A public figure must prove that the libelous statements were made with "'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not." ***New York Times Co. v. Sullivan***, 376 U.S. at 279-80, 84 S. Ct. at 726. In ***Trigg v. Lakeway Publishers, Inc.***, 720 S.W.2d 69 (Tenn. App. 1986), this Court discussed the question of "actual malice" in the face of a motion for summary judgment:

> "A public figure cannot resist a newspaper's motion for summary judgment under Rule 56 by arguing that there is an issue for the jury as to malice unless he makes some showing, of the kind contemplated by the Rules, of facts from which malice may be inferred."
>
> Whether there is "actual malice" is a proper question to be decided on a motion for summary judgment.
>
> On motion for summary judgment where plaintiff, as in this case, is a "public figure," it is incumbent upon him to show "actual malice" with "convincing clarity."

Id. at 74 (citations omitted). This Court further explained:

> Plaintiff must show that a "false publication was made with a high degree of awareness of . . . probable falsity . . . . There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. . . . Failure to investigate does not in itself establish bad faith."

Id. at 75 (quoting ***St. Amant v. Thompson***, 390 U.S. 727, 731-33, 88 S. Ct. 1323, 1325-26, 20 L. Ed. 2d 262, 267-68 (1968)). In ***Press, Inc. v. Verran***, 569 S.W.2d 435 (Tenn. 1978), the Supreme Court of Tennessee adopted the standards of the *Restatement (Second) of Torts (1977)* as the law in this state:

> § 580A. *Defamation of Public Official or Public Figure.*
> One who publishes a false and defamatory communication

> concerning a public official or public figure in regard to his conduct, fitness or role in that capacity is subject to liability, if, but only if, he
>
> (a) knows that the statement is false and that it defames the other person, or
>
> (b) acts in reckless disregard of these matters.
>
> * * *
>
> We believe that these standards meet the criteria of our federal and state constitutions and we adopt them as the law of this jurisdiction.

Press, Inc., 569 S.W.2d at 442.

In ***St. Amant***, the United States Supreme Court explained the ***New York Times Co. v. Sullivan*** "reckless disregard" standard:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts show reckless disregard for truth or falsity and demonstrates actual malice.
>
> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous phone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

St. Amant, 390 U.S. at 731-32, 88 S. Ct. at 1325-26, 20 L. Ed. 2d at 267-68.

In his deposition, Lyons answered questions concerning the truth or falsity of the statements in the article:

> Q: Well, how much of it that you published did you receive or did you think was true and how much did you think was not true?
>
> A: I don't try to make a judgment on that.
>
> * * *
>
> Q: Anything in that article that you wrote that you thought when you wrote it was not true?
>
> A: It is not my prerogative to determine what is true and what isn't.
>
> * * *
>
> Q: Would the truth or falsity of the information enter into

whether or not it is newsworthy?

A: If I understand the question correctly, I don't think that the truth or falsity of an item affects its newsworthiness. It would be newsworthy either
way.

Q: Are you saying that an item is newsworthy, in your opinion, in accordance with your definition, if it is false?

A: It would certainly be raised.

* * *

Q: A fact known to you to be false, do you consider that newsworthy?

A: Yes.

It seems obvious that Lyons did not care whether the statements he published were true or false. We believe that this shows reckless disregard of whether the article was true or false.

Because the caricature and statements 1, 3, and 10 of the first article are capable of a defamatory meaning, we hold that genuine issues of material fact exist. The order of the trial court granting summary judgment is vacated, and the case is remanded to the trial court for such other proceedings as necessary. Costs

of appeal are assessed against appellees.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE