STATE OF MICHIGAN

COURT OF APPEALS

JONATHAN ROOKS, BRADLEY GRUIZINGA, PARKLAND REALTY, INC., and PARKLAND INVESTMENTS, INC.,	UNPUBLISHED April 3, 2014
Plaintiffs-Appellees,	
v	No. 306034 Ottawa Circuit Court
JOSEPH KRZEWSKI,	LC No. 10-001787-CZ
Defendant-Appellant.	

Before: FITZGERALD, P.J., and MARKEY and BECKERING, JJ.

PER CURIAM.

Following a bench trial, the trial court found that defendant, Joseph Krzewski, portrayed the two individual plaintiffs, Jonathan Rooks and Bradley Gruizinga, in a false light. The trial court ordered defendant to remove the false statements about Rooks and Gruizinga from the Internet and enjoined him from republishing any of the false statements. Defendant appeals as of right. We affirm in part, reverse in part, and remand for the issuance of a new injunction.

I. SUMMARY OF THE FACTS

In April 2010, plaintiffs sued defendant for defamation, corporate defamation, false light invasion of privacy, and tortious interference with a business relationship or expectancy. All claims, except the request for injunctive relief on the claims of corporate defamation by Parkland Realty and false light invasion of privacy by Rooks and Gruizinga, were dismissed by summary disposition in favor of defendant or by settlement before trial. Following trial, the trial court dismissed Parkland Realty's claim for corporate defamation. Plaintiffs have not filed a cross-appeal. Thus, the only issues before this Court concern the trial court's findings and holdings in favor of Rooks and Gruizinga on their claim for false light invasion of privacy.

A. ROOKS AND DEFENDANT

Rooks is a real estate developer and investor. He is the owner of the corporate plaintiffs, Parkland Realty, Inc., and Parkland Investments, Inc. Rooks was involved in the development of the Shoreline Inn, a 140-room hotel, in Muskegon; Ellenwood Landing, a 187-unit dockominium and 45-unit condominium project, in White Cloud; and Boardwalk, a 240-unit condominium

project in Grand Rapids. At the time of trial, he was in the process of developing Highpoint Flats, a condominium project, in Muskegon.

Through one of his corporate entities, Rooks purchased an old school building on Broadway Street in Grand Rapids. He then sold the building to Union Square Condominiums, LLC (Union Square), an entity owned by Gruizinga, which developed the building into approximately 180 condominium units. Gruizinga contracted with Parkland Realty to market the units.

At the time of trial, defendant was 30 years old and lived with his parents, James and Patricia Krzewski. He previously owned a condominium unit in the Landmark Lofts in Grand Rapids. He has never owned, leased, or occupied a condominium unit in the Union Square building.

Rooks first encountered defendant in 2006 or 2007 at a home show, where defendant was selling hot tubs. Rooks thought defendant had a "good sales personality," and invited him to apply for a sales position with Parkland Realty. Defendant had two interviews. However, after Rooks did some "background checking," he hired someone other than defendant. Rooks and defendant had another encounter when defendant was selling his Landmark Lofts condominium unit. During the Parade of Homes, defendant placed a sign on the street indicating that his unit was "Best of Parade." Rooks called defendant. According to Rooks, the purpose of the telephone call was to let defendant know that, because his condominium unit was not in the Parade of Homes, he could get into trouble with the Home Builders' Association. Rooks got defendant's voicemail, and the voicemail message asked the caller why he or she would want to buy a condominium unit at Boardwalk, which has high dues and is a block from the Grand River, when one could live directly on the river. Rooks asked defendant to call him, and defendant did. Rooks told defendant that it did not make sense to promote his condominium unit by badmouthing other condominium developments. According to defendant, Rooks threatened to sue him for his unlawful participation in the Parade of Homes.

B. THE RIPOFF REPORT AND OTHER INTERNET POSTINGS

Although defendant never owned or lived in a Union Square condominium unit, he posted messages on the Union Square Forums, an Internet website for discussion of Union Square. His user name was "BestofParade." On April 29, 2008, defendant inquired on the Union Square Forums whether it was true that an owner of a condominium unit had been injured due to faulty construction. On June 29, 2008, defendant answered his own inquiry and stated that it was not a rumor, explaining that "[f]ormer resident Matt Stanley #324 was injured pretty bad." On November 10, 2008, defendant sent Allen Derusha, the administrator of the Union Square Forums, a message, asking Derusha why his posts were being deleted and promising his best "to post warnings about U2 [Union Square] on Craigslist.com."

On January 3, 2009, "Terryb" from Grand Rapids posted a report about Rooks and his corporate entities on ripoffreport.com (the ripoff report). The ripoff report read, in pertinent part:

> Beware of Jon Rooks, his development companies, and his main partner in development, Brad Gruizinga. These people mislead buyers, provide extremely

shoddy and low quality workmanship, cut every possible corner, lie when they are confronted, and then absolve themselves of any ownership of problems after the sale, leaving their customers with unfinished condos and bad quality work. Here are just a few actual situations that purchasers of Jon Rooks' condos have experienced:

1. Low quality construction work with little soundproofing. Many owners of Parkland condo developments experience major problems with sound transmission between condos and with hallways and common areas. No insulation was used in walls, leaving just a few layers of drywall between units. Hearing your neighbors talk or smelling the food they are cooking are common experiences. Sales literature spoke of "excellent" soundproofing. However, when confronted with this, residents are told to get sound tests, at the cost of several thousand dollars, before they will lift a finger to help out. Even then, residents are strung along until they simply give up trying to get anything fixed.

2. When you close on your condo, you are given a "punch list" of construction items that need to be corrected. You see, Rooks and his company pressured many people to close on their condos before they were completely finished. The problem is that once the closing documents are signed, Parkland and Jon Rooks are completely absolved of any further legal responsibility for the construction. People that closed on their condos years ago still have not had their punch lists completed. Jon Rooks and his partner Brad Gruizinga won't lift a finger to get things done. Some examples of ongoing problems are soundproofing (previously mentioned), peeling paint, poor drywall workmanship, plaster that was very badly repaired, leaking windows, incorrectly completed flooring, construction plans that were not correctly followed, etc.

3. Jon Rooks and his company advertising [sic] one of his developments as "luxury condos." Owners were promised exercise facilities and two laundry rooms. However, after moving in, Rooks' company purchased used exercise equipment that broke down less than a year later. Owners were then stuck with the bill of thousands of dollars to replace the equipment. Owners were also promised to [sic] laundry rooms, but Rooks decided that only one was necessary, with only two washers and dryers for 180 condos. After construction was completed, owners were told that it would cost tens of thousands of dollars to add additional laundry facilities.

4. Jon Rooks and Brad Gruizinga have the condo association documents written so that they maintain control over the condo association even when 95% or more of the condos have been sold. They appoint their pals to run the association board and do not allow owners to take control. They ensure that their buddies get the lucrative management and maintenance contracts, to the detriment of owners. They do not utilize the condo association to the best interest of owners, only to the interest of Rooks and his pals.

5. In one instance, the owners of a condo building were told by Parkland and Rooks that they were "testing" the look of cell phone towers on top of the building. After residents complained, they were told that they were being taken down. However, only weeks later, half a dozen cell phone towers were put up, only feet from people's bedroom windows. Residents were lied to and ignored when their concerns were brought up.

6. Jon Rooks and Brad Gruizinga make every effort to get residents to give up when they have problems with their condos. They both say that the other person is responsible and then conveniently forget to return calls. Residents have been screamed at, sworn at, and treated with extreme levels of cruelty and obnoxiousness by Jon Rooks and Brad Gruizinga. They work very hard to obstruct efforts of residents to get responses to problems. Most residents just give up and many have decided to move on or move out.

7. Jon Rooks is a pathological liar. You can't believe anything he says. Promises are made and they [sic] reneged. Rooks and his companies have a history of this behavior. They were even sued and lost over a broken promise several years ago. Whenever confronted with information about his broken promises, he claims that they were "misunderstandings." Jon Rooks should be treated at all times as though he is lying and working against your best interest. You should treat everything he says with extreme skepticism. He lies on a continual basis. Essentially, if his mouth is moving, he is probably lying.

8. If you go to Jon Rooks or Brad Gruizinga with any problems, you are treated as if you in fact are the one that has done something wrong. If you complain about construction quality or broken promises, Rooks and Gruizinga will treat you as though they have done everything they possibly could and that it's outside of their realm of abilities to help you out. They will do nothing to help or fix things. Don't believe them. They are lying and just unwilling to help because it would cost them a few extra dollars. There is no corner they wouldn't cut to save themselves money.

In summation, Jon Rooks, Brad Gruizinga, and all the Parkland companies should be avoided. They screwed so many people over in Grand Rapids (both buyers and contractors) that they had to move on to Muskegon for their next project – Highpoint Flats. Watch out. Rooks and his companies used all the lowest bidders and lowest quality contractors in Grand Rapids. They apparently drove several contractors out of business, leaving owners with no one to turn to with construction problems. The contractors that worked with Rooks in Grand Rapids will not do business with him again.

Rooks has the nickname of "Jon Crooks" in Grand Rapids, amongst those who have done business with him. Essentially, it comes down to this: Jon Rooks screws people over for a living.

Defendant acknowledged that he is a registered user of ripoffreport.com. His user name is "Upsetcustomer." Defendant denied that he was "Terryb" or that he prepared any portion of the ripoff report. According to defendant, he made no efforts to contact "Terryb" or to learn the identity of "Terryb."

Defendant posted three comments to the ripoff report. In the first comment, titled "JON 'CROOKS' ROOKS," defendant wrote, "I would suggest contacting the BBB of Western Michigan and file a complaint. This man associates himself with a lot of snakes . . . ." In the second complaint, defendant wrote that, although he had never purchased a condominium unit from Rooks, he had been threatened with a lawsuit by Rooks after voicing his concern about high maintenance fees at Boardwalk. He, therefore, understood why "Terry B." decided to conceal his identity. The third comment, which defendant wrote under the user name "paybacksabitch," was titled, "WARNING!!! WATCH OUT FOR BINDING ARBITRATION CLAUSE IN PARKLAND REALTY PURCHASE AGREEMENT AND/OR CONTRACT." Defendant posted some questions and answers regarding binding mandatory arbitration and a page from "Parkland Realty's purchase agreement" that included a provision on dispute resolution. Defendant testified that he received the purchase agreement through a Freedom of Information Act (FOIA) request he sent to the Bureau of Commercial Services after reading of a complaint on the Internet.

On October 23, 2009, defendant made a posting titled "Highpoint Condos, Boardwalk Condos & Union Square Condos (Downtown Grand Rapids)" on craigslist.com. The posting was a copy of the ripoff report, absent the comments. Defendant testified that his postings on craigslist.com were flagged for removal and subsequently removed. He always replaced the removed posting.

On December 28, 2009, defendant made a posting titled "Union Square Condo & Boardwalk Condo DOWNTOWN (Downtown Grand Rapids)" to craigslist.com. The posting was a copy of the October 2009 craiglist.com posting. Defendant also attached three documents to the posting. First, defendant attached a criminal record report that showed Rooks had been charged with operating while intoxicated in 1996. Second, defendant attached a report from the Better Business Bureau (BBB) that gave Union Square Condominiums an "F" rating. Third, he attached a notice of a lawsuit by Pioneer Construction, Inc. (Pioneer) against Union Square.

There were several comments to the December 2009 posting. One comment read:

> Wow, I heard about former Union Square owner Matt Stanley who fell, and injured himself badly, because of Parkland Properties['] construction negligence. I heard he was awarded some form of settlement from Parkland's insurance provider. On another note, Parkland Properties is being sued by the main contractor Pioneer Construction, over non payment [sic]. I found this web site about the developer. It rates local real estate agents – http://www.realestateratingz.com/ShowRatings.jsp?tid=1573[.]

This comment was posted anonymously. Defendant denied that he wrote it.

Defendant testified that he obtained the record of Rooks's 1996 arrest from the state of Michigan through ICHAT. He obtained the BBB report from the Internet. Defendant denied any involvement in the complaint that led to the "F" rating. Defendant acknowledged that he has filed two complaints with the BBB. One of the complaints, made in the spring of 2010, involved Union Square and signs displayed on the building. Defendant thought the signs, which indicated that the condominium units were tax free, were misleading because, although an owner of a unit did not have to pay property taxes, the owner still had to pay income taxes. The outcome was that the complaint was viewable on the BBB website. Defendant also made a complaint to the Grand Rapids Association of Realtors (GRAR) about the signs. The GRAR dismissed the complaint.

On January 27, 2010, defendant made a posting titled "!UPDATES! Boardwalk Condo – Union Square Condo LAWSUITS & TESTIMONIALS (Downtown Grand Rapids)" on craiglist.com. The posting was a copy of the December 2009 craigslist.com posting; it contained the comments and the three attachments. In addition, defendant added three paragraphs to the beginning of the posting, which read:

> Lawsuit filed against Brad Veneklase[1] of Parkland Realty in Grand Rapids[,] Michigan[,] seeking damages in excess of $6million [sic] for such things as tortious interference, conversion, and unjust enrichment.
> http://www.scribd.com/doc/25021714/Bradley-Veneklase-Lawsuit
>
> Lawsuit filed against Parkland Properties owner Jonathan Rooks. Court ruled in favor of Plaintiff, and determined Mr. Rooks failed to honor obligations of contract. http://www.michbar.org/opinions/appeals/2003/081903/20001.pdf
>
> See copy of NEW pending lawsuit filed against Parkland Properties Union Square Condo Project on bottom of this posting! It is alleged Mr. Rooks owes Pioneer Construction for work performed, and is refusing to pay. Pioneer has placed liens on several units.

Defendant testified that he was not responsible for the information posted on scribd.com. Defendant, by himself, found the michbar.org link.[2]

---

[1] Veneklase was a salesman for Parkland Realty.

[2] The link is to this Court's opinion in *Hauler v Parkland Dev of West Michigan, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2003 (Docket No. 240753). Gregory Hauler testified that he had purchased a condominium unit and a boat slip in Ellenwood Landing. His purchase agreement included an option to exchange the boat slip for a slip that was to be built in the next phase of development. According to Hauler, he exercised the option, but his request for the slip exchange was not honored by Parkland Development or Rooks. He and his wife sued. They prevailed, and Parkland Development satisfied the judgment against it.

On April 12, 2010, defendant made a posting titled "WATCH OUT Boardwalk Condo – Union Square Condo LAWSUITS & TESTIMONIALS (Downtown Grand Rapids)" on craigslist.com. The posting was a copy of the January 2010 craigslist.com posting. Defendant also added a paragraph to the beginning of the post, which read:

> UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
> Notice of Noncompliance to Parkland Realty and Union Square Development, Inc.
> http://www.scribd.com/doc/29797533/Jon-Rooks-Bradley-Veneklase-NONCOMPLIANCE-LEAD-PAINT -DISCLOSURE-VIOLATIONS[.]

The email address "jokeisstillonyou@gmail.com" is one that defendant has used. On April 23, 2010, using this email address, which had the name "Jonathan Rooks" connected to it, defendant sent an email to ten persons involved in real estate in West Michigan. The email read:

> For those of you interesting [sic] in knowing more about our friends at Parkland Properties, I would highly suggest reviewing these documents.
>
> More to come!

Attached to the email was a letter from the Environmental Protection Agency to Veneklase about a notice of noncompliance issued to Parkland Realty and Union Square Development.

Defendant admitted that he made three comments about Rooks on realestateratingz.com. First, he made a June 15, 2010 comment that stated, "Jon Rooks is the same developer of Ellenwood Landing on White Lake that had a negative effect on the most critical fishery [sic] habitat at the mouth of the White River." Defendant testified that he knew "a little" about fishing and that, in his opinion, any development in a "natural habitat, would not be good for it." Defendant could not recall whether he had ever been on the White River. Second, defendant made the May 21, 2010 comment. The comment contained a provision from the purchase agreement for a Union Square condominium unit that concerned the possible existence of lead paint in the building. Third, defendant made the April 20, 2010 comment, which read:

> The guy has all the knowledge to screw you over, to cover his behind and to make himself look good in the community. Watch out for his purchase agreement, it contains a binding arbitration clause, meaning if you have problems with your purchase, you give up your rights to sue, and waive your right to a trial by judge or jury. His purchase agreement forces you to go in front of [an] arbitrator, which keeps the dispute off public record, saves him money and risk of bad press. Basically, it hides customers [sic] complaints! [F]urthermore, as in any binding arbitration case, your [sic] less likely to get your problem fixed, because their [sic] is no judge or jury involved. Do yourself a favor, google "binding arbitration clause[.]" Any company who has that in their purchase agreement, [sic] can get away with murder, and there is no public record of it to warn other potential purchasers! I'd stay away from Highpoint Flats, Shoreline Inn and Rafferty's Dockside Restaurant all in Downtown Muskegon.

Defendant testified that he warned people to stay away from Highpoint Flats, Shoreline Inn, and Rafferty's Dockside Restaurant because he did not like Rooks.

C. THE ACCURACY OF THE STATEMENTS IN THE INTERNET POSTINGS

Gruizinga testified that he contracted with Pioneer to be the general contractor of the Union Square condominium units. The contract was for more than $22 million. Gruizinga chose Pioneer as the general contractor because Pioneer had previously done "historical remodels" and had a large employment force. When Pioneer began work on the condominium units, there were reservations for 60 to 70 percent of the units. After a purchaser, who had made a reservation, picked out a specific unit and agreed to a purchase price, a purchase agreement was signed. In the purchase agreement, the purchaser agreed to purchase a unit, which was in an unfinished state, from Union Square. Pursuant to its contract with Union Square, Pioneer would construct the improvements to the unit that were listed in the purchase agreement. However, if the purchaser wanted any upgrades to the unit, the purchaser entered into a separate contract with Pioneer for them. At the closing of the unit sale, Pioneer provided a limited warranty to the purchaser. Also, at the closing, the purchaser and representatives from Union Square and Pioneer signed a "punch list." The punch list contained construction items that Pioneer still needed to perform or correct in the unit.

Union Square was the fastest selling condominium project in Michigan. The first closing was in July 2006. According to Gruizinga, problems with Pioneer arose as soon as owners moved into the condominium units. One of the biggest problems was that Pioneer failed to complete punch lists within 30 days, as had been promised. Another big problem was that the windows in the penthouse units leaked. Attempts were made to fix the windows, but then the window subcontractor quit. Gruizinga demanded that Pioneer fix the windows, but Pioneer refused. Gruizinga initiated arbitration against Pioneer. At the same time, he was involved in a lawsuit that had been initiated by Pioneer because he owed $500,000 to Pioneer. A settlement was reached in 2010. The majority of the settlement money went to the condominium association to fix problems in the units. Money was used to replace the windows in the penthouse units, and money was still being used to fix individual items on punch lists.

The trial court heard testimony from six people who bought a Union Square condominium unit: Jeff Steinport, Justin Ruehs, Todd Duncan, Kristin Bell, Mark Therrien, and Tandy Champion.

Steinport testified that he moved into his condominium unit in October 2006; he was the first person to occupy a unit on the fourth floor. The rest of the floor remained under construction. Every morning after he moved into his unit, Steinport heard construction noises and, although that was expected, Steinport believed that he would eventually stop hearing noises from outside his unit. But, that never happened. His bedroom abuts the hallway, and he can hear people in the hallway. He hears the elevator whenever it stops on the fourth floor. He occasionally hears his neighbors. According to Steinport, he contacted Rooks and Gruizinga about the soundproofing problems. They responded that it was not their problem and that he needed to contact Pioneer. There was then a lot of finger pointing between Rooks and Gruizinga and Pioneer. Steinport kept pushing Rooks and Gruizinga and, according to him, Gruizinga told him that if he did not like it, he should initiate arbitration. Steinport testified that he cut a hole in

his bedroom wall because the sound was so bad and discovered that there were only two layers of drywall, and not the multiple layers of drywall and studs that were supposed to have been there. Pioneer blew some insulation into Steinport's walls but, according to Steinport, this was only after he filed a complaint with the city of Grand Rapids and after the city inspector found six violations of the building code in his unit.

Steinport also testified that his windows leak. He notified Gruizinga and Pioneer of the leaking windows, but the windows have never been fixed. In addition, Steinport testified that the ceiling in his unit is peeling. When he complained of the problem, Rooks and Gruizinga and Pioneer pointed fingers at each other. Eventually, Pioneer sent painters to scrape the ceiling. But, according to Steinport, they did not do a very good job and the ceiling continues to peel.

Ruehs testified that he moved into his condominium unit in December 2006. According to Ruehs, he had requested and paid for changes to the floor plan, including the addition of a linen closet. However, the unit was not built in accordance with the plans. The linen closet was supposed to have been two feet deep but, as built, it was barely one foot deep.

Like Steinport, Ruehs testified that his unit has soundproofing problems. The problems are worst in his master bedroom. Above the bedroom is the "former auditorium," which had a "hollow stage," and Ruehs can hear everything that happens up there. He can also hear music and people talking in the neighboring condominium unit. Also, the main elevator is next to his bedroom, and Ruehs can hear "every call" for the elevator. According to Ruehs, the common wall was "redrywalled" because it was discovered that drywall was never put in the wall. Ruehs does not believe the additional drywall has provided any relief. Ruehs has experienced other problems too. There is moisture staining near a bedroom window and the living room window. Paint is peeling from the walls and ceilings in his bathrooms and great room.

Duncan testified that he moved into his condominium unit in January 2007. The first night in his unit was "disheartening." He "didn't sleep a wink" because he heard loud noises until 2:00 or 3:00 a.m. The next morning, Duncan called Rooks, who asked for permission to go into the unit. Duncan gave permission, and he soon received a telephone call from Rooks. Rooks apologized to Duncan; he said that the soundproofing was not acceptable and that it would be remedied. According to Duncan, nothing has been done to improve the soundproofing. Sounds that he can hear from the unit above him include the television, furniture being moved, and silverware being dropped. In July 2008, Duncan received an email from Rooks, in which Rooks asked him to get his own sound testing done. Rooks made the request because the architect said that all sound requirements were met for Duncan's unit. Duncan looked at prices for sound testing, and learned that it was very expensive.

Bell testified that she and her husband and their three children moved into their condominium unit in January 2007. Sometime thereafter, four cellular telephone towers were installed on an elevator shaft. The closest tower was 12 feet from the bedroom where her three children slept. Bell immediately expressed concerns to Rooks and Gruizinga, who replied that, because they owned the space, they had the right to install the towers. They promised to send her a report from Alltel. Alltel sent Bell the report, but the report, which used very scientific language, meant nothing to her. Bell continued to share her concerns, but Rooks and Gruizinga always referred her to the report. Bell believed that they did not care about her safety concerns.

She eventually hired a lawyer. After the lawyer wrote a letter, the cellular telephone towers were removed. However, the electrical framework remained, and Bell had no confidence that the towers would not be reinstalled. The Bell family moved out of their unit in October 2007. Sometime later, six cellular telephone towers were placed on the roof of the building.

According to Bell, when she and her husband expressed interest in purchasing a Union Square condominium unit, they were assured that extra measures were taken to make the units soundproof. However, their unit had soundproofing problems. Although the Bell family was one of the first occupants of the penthouse units and they had no neighbors on the sixth floor, the lower level of their unit shared a wall with an occupied unit. They could hear "almost everything" through the wall. They heard all sorts of "human activities." Bell complained, and she was tossed between Rooks and Pioneer. Rooks would say that it was Pioneer's problem, and Pioneer would say that it was Rooks's problem. Pioneer eventually came to the unit, but said that its only responsibility was to put caulk on the bottom of the drywall, which it did. However, there was no improvement to the sound problems. Bell also testified that windows in the unit leaked when her family moved into it. Despite multiple remedies tried by Pioneer and the window company, the windows continued to leak. In addition, there were problems with the stain on the unit's lower level. It "peel[ed] up." Although a "flooring guy" came to fix it two times, it still was not very good.

Therrien testified that he moved into his condominium unit in May 2007. According to Therrien, the unit is poorly soundproofed. He can hear people conversing in the hallway. In addition, he can hear people urinating and defecating in the unit above his. He also hears "impact sounds," such as chairs moving. Therrien brought the soundproofing problems to someone's attention. He could not recall to whom he addressed his concerns, but he knew that he "copied" Rooks and Gruizinga. Pioneer attempted to address the situation. During the first year that Therrien lived in his unit, Pioneer insulated his ceiling, and the insulation muffles the sounds a bit. Also, during the first year in his unit, Therrien discovered that water leaked in his large sliding glass doors. He copied "everyone" about his concerns. The doors and some flashing were replaced and that "apparently" solved the problem. He also had problems with plaster peeling, but that had been corrected. Other problems, such as leaks in his garage and warped windows, have not been addressed. In addition, there is poor drywall workmanship in his unit. "[I]t wasn't properly filled and sanded before it was painted."

Champion testified that she closed on her condominium unit in April 2007. At the time of the closing, there was a substantial amount of water damage around the skylights. Champion was told that the damage would be repaired. And, when she moved into the unit the next month, the damage had been repaired. However, over the next several months, the skylights began to leak again. Champion contacted Gruizinga, who either forwarded her correspondence to Pioneer or contacted Pioneer for her. She was told that the skylights would be addressed, but more than 2-1/2 years passed before the skylights were replaced. In addition, Champion testified that she had upgraded her floors to "a stained concrete." However, the finish did not take to the floors, causing "a mottled surface." Further, Champion testified that her unit has soundproofing problems. After moving into the unit, she immediately noticed that she was able to hear conversations in the neighboring unit. She contacted Gruizinga, who contacted Pioneer, and Pioneer blew insulation into her walls. However, Champion continues to hear noise through her attic.

Champion testified that the installation of the cellular telephone towers concerned her. She shared her concerns with Rooks or Gruizinga, and a meeting was set up to discuss the towers. Before the meeting, Champion reviewed the documents that she received when she signed her purchase agreement. She saw no evidence that an easement for the towers had been reserved. She later found a copy of the master deed in her "closing documents," which were dated three months before she signed her purchase agreement. When she asked Rooks and Gruizinga why she had not been given the master deed when she signed her purchase agreement, they did not have an answer. She eventually told them that they had deceived her and that she no longer felt that she could communicate her concerns to them. Eventually, in August or September 2007, the towers were removed from the elevator shaft and placed on the roof of the building. The towers were taken off the roof in the summer of 2010.

Steinport testified that a group of 30 unit owners met regularly to discuss their problems. Bell and Champion were part of this group. The purpose of the group was to identify owners' common concerns and to have a loud voice about them. According to Steinport, the association bylaws "were written in a way that they [the developers] would retain control for the full five years, or whatever it is in the state law, rather than when 90 percent of them are sold." The group also gathered signatures to force an association meeting. They wanted to expand the number of seats on the association board so that owners could take control of the board. The group was concerned about Rooks and Gruizinga having control. A meeting was called; however, according to Steinport, "they basically refused to give up control of the board, which was, you know, within their right to do under the state law."

The Union Square building contained an exercise facility. There was new and used exercise equipment. According to Ruehs, when he moved into his condominium unit, auction tags were still on the used equipment. The Union Square building also contained a community laundry room. Initially, the laundry room contained only two washers and two dryers. Now, according to Ruehs, there are three washers and four dryers. However, the number of washers and dryers did not concern Ruehs because he has a washer and dryer in his unit. But, according to Bell, it was hard to have a washer and dryer in a condominium unit because the dryer could not be vented.

Gruizinga testified regarding each of the six unit owners who testified. Regarding Duncan's unit, Gruizinga testified that work was scheduled to be performed by a "siding contractor" in a couple months. He was unsure if the planned work would resolve all of Duncan's soundproofing issues because Duncan was "so sensitive to sound" and has "a very low tolerance for just about anything." Gruizinga had presented Duncan with another product as an alternative to the fixes that would be made by the siding contractor. But, apparently Duncan had decided not to go with the alternative product because he never got back to Gruizinga.

Gruizinga testified that Pioneer insulated the demising walls in Steinport's unit. Yet, Steinport continued to complain. Gruizinga then had insulation pumped into the hollow floor and insulated some duct work and wrapped it in rubber.

Gruizinga acknowledged that Bell brought her concerns about the cellular telephone towers to him. He explained to her that he had the right to install the towers, and he forwarded Alltel's report to her, which detailed compliance with the "FCC Rules." He testified that the

towers were subsequently removed and placed on the roof of the building. At the present time, however, there were no towers on the building. Gruizinga testified that Bell also complained about soundproofing. He explained that it was discovered that the owner of the adjacent unit, without permission from the association board, had removed drywall and installed a Murphy bed. Gruizinga also explained that, using money from the settlement with Pioneer, the windows in the Bell unit had been replaced and that new carpet would soon be installed.

Gruizinga testified that Champion, who was friends with Bell, complained about the cellular telephone towers, even though the transmissions did not come anywhere close to her unit. According to Gruizinga, the skylights leaked in Champion's unit because the subcontractor, which was the same subcontractor that had installed the windows in the penthouse units, had not used tempered glass. Pioneer replaced the skylights and, at its expense, Union Square fixed the water damage that Pioneer had refused to repair. Regarding soundproofing, it was discovered that a subcontractor had not properly constructed a wall, and Pioneer went in and insulated the demising walls in Champion's unit. Gruizinga admitted that Champion has an outstanding complaint about sound coming through her attic. The problem has him perplexed, but he is still looking for a remedy.

Gruizinga testified that Pioneer performed a "great amount" of work on Ruehs's condominium unit. In November 2007, Ruehs complained about noise from above his unit. Gruizinga informed him that Pioneer had failed to put drywall on the elevator shaft, but that Union Square would install drywall in the shaft and in his master bedroom. Ruehs accepted the offer, and the drywall was installed. According to Gruizinga, the new drywall remedied the problem, although he admitted that the problem was not solved to Ruehs's liking. A subcontractor has been hired to make the remaining repairs to Ruehs's unit.

Gruizinga testified that, after Pioneer completed the items on Therrien's punch list, Therrien started to complain. He made a limited warranty claim for cracked tile and some sound and heating problems. Those issues were addressed by Pioneer. Therrien had recently complained that one of his windows leaked. Gruizinga hired a subcontractor to caulk the windows. Since the windows were caulked, Gruizinga has not heard from Therrien.

At trial, Rooks and Gruizinga were asked about the statements in the ripoff report. According to Rooks and Gruizinga, the statement that the condominium units were built with low quality construction and little soundproofing was false. Soundproofing was incorporated into the building design and construction contract. The building code requires a specific soundproof rating. Rooks believed that the requirement was "45," but Gruizinga testified the requirement was "50." According to Gruizinga, the construction contract required a "65" rating, which was the rating specified by the architect. Rooks acknowledged that not every unit owner was pleased with the soundproofing. However, he and Gruizinga agreed the statement that many owners experienced soundproofing problems was false. According to Rooks, only about five to ten unit owners experienced any problems. According to Gruizinga, about 20 unit owners made a complaint about soundproofing, and only five to seven of the complaints remain unresolved. Rooks further testified that the statement that no insulation was used in the walls was false, explaining that "double stud wall[s] with resilient channel and four layers of drywall" were used. Rooks and Gruizinga denied that unit owners routinely heard their neighbors talk or smelled their food. Gruizinga testified that he had not told any unit owner to get a sound test, while Rooks

testified that he recommended a sound test to one unit owner. He only wanted a determination whether the soundproofing met the standard specified by the architect.

Rooks testified that the brochure for the Union Square condominium units showed an exercise room, which was to be shared with a clubhouse and a laundry room, adjacent to the swimming pool. However, after consulting with an "advisory committee," an "old workshop" in the basement was turned into an exercise facility. Because of this change, the size of the exercise area went from a couple hundred square feet to a couple thousand square feet. Slightly-used exercise equipment was bought from Miedema Auctioneering to fill the exercise room. There was also some new exercise equipment. In addition, "twice as many laundry machines" were placed in the room adjacent to the new exercise facility. According to Rooks, all the promised amenities, plus more, were installed, and a lot more money than anticipated was spent on the amenities. Gruizinga testified that "three times" as much money as was planned was spent on exercise equipment. Rooks testified that unit owners requested an increase in washers and dryers in the laundry room from two each to four. He was surprised by this request because each unit came with a washer and dryer hookup. However, Rooks knew that Gruizinga installed additional washers and dryers. According to Gruizinga, two washers and three dryers were initially installed, and a third washer and a fourth dryer were recently added to the laundry room.

According to Rooks and Gruizinga, the statement that they had the association documents written so that they would maintain control over the association board even when 95 percent of the units have been sold was false. Rooks testified that in each condominium association that he has helped develop, including Boardwalk and Union Square, he has been elected to the association board after the transitional date. Similarly, Gruizinga testified that, after "the transitional control date when nondevelopers" get to elect the board members, he was elected to the association board. In fact, he received the highest number of votes. According to Gruizinga, the association bylaws incorporated the requirement from the Michigan Condominium Act that control of the association board transfer from developers to nondevelopers within a certain number of years after the deed is recorded. It was also false that Rooks and Gruizinga ensure that their buddies get the lucrative management and maintenance contracts. Rooks testified that these contracts are not lucrative and that he has no prior friendship or relationship with the people who manage the association. Gruizinga has sent out requests for proposals in connection to management contracts.

Rooks testified that the statements in the ripoff report about the cellular telephone towers were false. He testified that, pursuant to an easement preserved in the condominium documents, a cellular telephone tower was installed on the elevator shaft. After Bell expressed concern, they showed her documentation that emissions from the tower were not dangerous to her or her children. But, because of complaints, they took down the cellular telephone tower and then they worked with the architect and the cellular telephone company to determine a way to attractively place a series of smaller towers along the side of the building. Although those towers were installed, they have since been taken down. Rooks believed the smaller towers were removed because of complaints. Currently, there are no cellular telephone towers on the Union Square building.

Rooks denied that he was a pathological liar and that nothing he says can be believed. Rooks admitted that he and Robert Gezon had a dispute over the nature of their business

relationship, but he believed that his understanding of their relationship was consistent with every document that was signed. Gezon's belief that he had lied was incorrect.[3] Gruizinga testified it was blatantly false that nothing Rooks said could be believed and that, if Rooks's lips were moving, Rooks was lying.

According to Rooks and Gruizinga, the statement that there was no corner that they would not cut to make money was false. Rooks testified that they spent way more money than they should have. There was no provision in the purchase agreements for them to hire an interior designer, to purchase a brand new $4,000 shuffleboard table, to install a pool as large as the one that they bought or a 20-person hot tub, to illuminate the pool equipment with more lights than was necessary, or to buy high-end light fixtures for the common areas. Gruizinga testified that they spent $70,000 to $80,000 to make the courtyards beautiful.

Rooks testified it was false that his companies used the lowest bidders and lowest quality contractors. He explained that Pioneer, which had also done work at the Boardwalk, was one of the five most expensive contractors in Grand Rapids. Gruizinga agreed that Pioneer was not the cheapest contractor. It was also false that contractors who had worked with Rooks in Grand Rapids will no longer do business with him and that he drove several contractors out of business. Rooks explained that he has a long list of contractors who continue to do business with him. He was not aware of a single contractor that has gone out of business because of him. Almost every contractor with whom he has worked remains in business. Similarly, Gruizinga testified that he has "all kinds of contractors" that he could call and get to a job site. Plus, Pioneer remains in business. In addition, it was false that Rooks moved to Muskegon for his next project because he screwed over so many people in Grand Rapids. Rooks testified that he has always done projects in West Michigan and that the Muskegon economic developer lured him to develop Highpoint Flats.

Gruizinga was asked about the comment regarding Matt Stanley. He testified that no one by that name owned a Union Square condominium unit. Unit 324 was owned by Andrea Russell. Gruizinga admitted that a construction worker by the name of Matthew Eddington was injured in unit 228 and that Eddington sued multiple defendants, including him and "Parkland." Parkland was dismissed on summary disposition, and Gruizinga, at the corresponding trial, was absolved of liability. Eddington was found 70 percent responsible for his injuries and Pioneer was found 30 percent responsible.

D. DEFENDANT'S COMPUTERS

During pretrial proceedings, the trial court ordered that plaintiffs' expert, Brandon Fannon, was allowed to inspect defendant's computers. After defendant delivered his laptop

[3] Gezon, an environmental dredging contractor, testified at trial that he worked on several waterfront development projects with Rooks from 1987 to 1995. When the two men parted in 1995, the parting was contentious, and litigation ensued. Gezon believed that Rooks tried to cheat him because of the way Rooks attempted to divide their assets. In addition, Gezon believed that, in the litigation, there were things about which Rooks lied.

computer to Fannon, plaintiffs moved for an order to show cause and for sanctions. The trial court held a hearing on the motion.

At the hearing, Fannon testified that he was hired by plaintiffs to examine four computers: (1) a desktop computer from defendant's place of employment; (2) a desktop computer that belonged to defendant's parents; (3) a laptop computer that belonged to defendant; and (4) a desktop computer that belonged to defendant. Fannon was concerned that data had been deleted from defendant's parents' desktop computer and from defendant's laptop computer. He explained that defendant's parents' desktop computer had been delivered to him on November 24, 2010, and earlier that morning, disk cleanup and disk defragmentation had been run on the computer. In addition, three files in a folder titled "AOL Saved PFC," which is a container file for email, had been accessed at 9:12 a.m., but the three files were no longer on the computer. Fannon believed that it was highly unlikely that the steps taken on the desktop computer were for a purpose other than to cause data loss. In addition, Fannon testified that similar steps had been taken to defendant's laptop computer before it was delivered to him. He explained that the Firefox browser was uninstalled and that disk cleanup and disk defragmentation were run. However, Fannon was not prepared to say that information on defendant's laptop computer was completely destroyed or was unavailable. Information could be recovered from the volume shadow copy, and he had not done any analysis of the volume shadow copy. Windows XP, the operating system on defendant's parent's desktop computer, however, does not automatically generate a volume shadow copy.

Defendant admitted that he had run disk defragmentation and disk cleanup on his laptop computer shortly before he delivered it to Fannon. He explained that he had private images on the computer, which were irrelevant to the case, and that he did not want Fannon to see them. In addition, defendant acknowledged that he had deleted the Firefox browser from his laptop computer. He did not want Fannon to see the websites he had visited. Defendant denied that he performed disk cleanup and disk defragmentation on his parents' desktop computer. He presumed his mother ran the disk cleanup and disk defragmentation. His mother has said that she runs these programs all the time. However, defendant had told his mother that Fannon was an expert in computers and that, if there were any images or emails on the computer that she did not want Fannon to see, she should get rid of them.

At the conclusion of the hearing, the trial court stated that, because personal information is stored on a computer, what defendant did was "somewhat understandable." However, it also stated that "from the truth-seeking perspective, it's simply not allowed." The trial court held that defendant was required to pay for Fannon's additional efforts to obtain and review information on defendant's laptop computer and defendant's parents' desktop computer. However, the trial court was not prepared to say that evidence had been lost because Fannon and defendant's expert agreed that the deleted data could probably be recovered from the volume shadow copy.

At trial, Fannon testified that, since the hearing, he had not done anything to further analyze defendant's parents' desktop computer. The operating system on the computer did not create volume shadow copy and, therefore, the data that was "overwritten" was no longer accessible or recoverable. Fannon recalled that on November 24, 2010, the day he was supposed to analyze the parents' desktop computer, the computer was delivered to his office at 12:30 p.m. He discovered that at 9:12 a.m., the AOL address book was accessed, but the address book was

no longer on the computer. In addition, after the AOL address book was accessed, the recycle bin was emptied and disk cleanup and disk defragmentation were run on the computer. The disk defragmentation was manually executed. Fannon believed this was a "sophisticated, yet unsophisticated" attempt to permanently delete data. According to Fannon, the same steps were taken to defendant's laptop computer before it was delivered to his office on January 4, 2011. The computer was delivered at 1:34 p.m., and disk cleanup had been run at 12:04 p.m. Fannon looked at the volume shadow copy created by the computer's operating system. Fannon agreed that anything defendant posted to the Internet in 2009 was not done using the laptop computer. Fannon testified that he found nothing on defendant's desktop computer to indicate that any data had been deleted from that computer.

Patricia testified that she knows how to defragment her computer. The button for disk defragmentation is on the computer screen, and she just clicks the button. Patricia clicks the button about once a week. She does it whenever the computer begins to run really slowly because she thinks there might be a virus on the computer. Patricia also runs the anti-virus program and does a disk cleanup.

E. THE TRIAL COURT'S OPINION

The trial court found, based on "circumstantial evidence," that defendant was "Terryb," the author of the ripoff report. It explained:

> Terryb has not been formally identified. As such, one can conclude that this is a false name. Defendant has a history of using false names on his internet posts. It appears that the earliest Terryb post was in October, 2009. This was about one year after Defendant first began posting negative comments on various forums and wrote, "I will do my best to post warnings about U2 on Craigslist.com."

The trial court, noting that defendant asserted truth as a defense, stated that the primary dispute concerned whether the information in the Internet postings was unreasonable and highly objectionable and placed Rooks and Gruizinga in a false light.[4] The trial court provided the following list of "factual inaccuracies," most from the ripoff report, that placed Rooks and Gruizinga in a false light:

- Jon Rooks is a pathological liar, and similar statements.
- They are lying and will cut corners to save money.
- Rooks and his companies used all the lowest bidders and lowest quality contractors in Grand Rapids.

[4] The trial court stated that it was "not seriously in dispute" that defendant broadcast the alleged false statements to the general public or to a large number of people. It stated, "While the posting or placing of various complaints solely on the Union Square forum may not satisfy this element, Defendant's subsequent publication or broadcast on a variety of internet cites [sic] satisfies this element."

- They apparently drove several contractors out of business, leaving owners with no one to turn to with construction problems.
- The contractors that worked with Rooks in Grand Rapids will not do business with him again.
- Rooks and Gruizinga screwed so many people over in Grand Rapids (both buyers and contractors) that they had to move onto Muskegon for their next project. (Inferring that Plaintiffs were "run out of town" and unable to do business in Grand Rapids due to misconduct.)
- That Plaintiffs will maintain control over the condominium association board even when 95% of the units are sold and award management contracts to cronies to the detriment of owners.
- Plaintiffs are liars and will cut corners to save money.
- Used exercise equipment and inadequate laundry facilities were installed.
- Plaintiffs will do nothing to help or fix things. (Given the context, this statement is not simply rhetorical hyperbole.)
- They are lying and are just unwilling to help because it would cost them a few extra dollars.
- An owner at Union Square was injured due to construction negligence.
- A Rooks development had a negative effect on a critical fishing habitat located on the White River.

Omitted from this list were three other statements that the trial court discussed and found to be false: (1) there was low quality construction work with little soundproofing; (2) residents are told to get sound tests, at the cost of several thousand dollars, before Rooks and Gruizinga will lift a finger; and (3) residents were lied to and ignored when they raised their concerns about the cellular telephone towers.[5]

The trial court found that defendant, as "Terryb," knew or acted in reckless disregard of the falsity of the statements. It stated that the information contained in the ripoff report was detailed and required research and that, although it was evident that defendant had spent "considerable time and effort 'digging up dirt'" on Rooks and Gruizinga, many of the facts were "half-truths or complete fabrications," which were similar to defendant's unilateral declarations that Rooks damaged a fishery and that Stanley was injured. According to the trial court, defendant published any negative information about Rooks or Gruizinga that he could find without regard to the accuracy of it. Defendant did so, stated the trial court, because he had an "irrational ax to grind" with plaintiffs because Rooks did not hire him and because Rooks confronted him about his improper claim that his condominium unit was "Best of Parade." The trial court further found that, even if defendant was not "Terryb," defendant's reckless disregard of the falsity of the statements was exemplified by the following: (1) defendant used a variety of

[5] The trial court did not find that all statements in the ripoff report were false. It concluded that the statements that punch lists were not completed and that the legal obligations of Rooks and Gruizinga ended when closing documents were signed were true. It also concluded that some of the statements, including that residents were "strung along" and mistreated, were opinion.

disguised names to post material on the Internet, making it look as if there were a variety of posters; (2) defendant sent an email to Rooks's business competitors; (3) defendant published that Stanley, a nonexistent condominium unit owner, was injured due to construction negligence; (4) defendant wrote that one of Rooks's developments had a negative effect on a critical fish habitat in the White River, despite having never been to the area; (5) defendant admitted in a pretrial proceeding that he attempted to erase or hide evidence on his computers; and (6) defendant lied and declared his former condominium unit "Best of Parade" to lure potential purchasers to it.

The trial court granted injunctive relief to plaintiffs. It ordered that defendant must:

> 1. Remove the listed aforementioned factual inaccuracies from any host, site, posting, or place on which Defendant placed that material and has the ability to remove those items.
>
> 2. Contact any host, site, posting or place for which Defendant currently knows that the offending material is placed and request removal of the factual inaccuracies.
>
> 3. For those hosts, sites, postings or places for which the owner or webmaster will not permit removal of the factual inaccuracies but will allow an addendum or modification of postings, then Defendant shall prepare and submit to those places an addendum which reads:
>
> "After trial in July, 2011 in Ottawa County MI Circuit Court, Case No. 2010-001787-CZ it was found that the factual allegations alleged on [date] by [person submitting] were false and inappropriately placed Jon Rooks and Brad Gruizinga in a false light. The Court ordered the offending party to remove those factual inaccuracies."
>
> 4. Defendant shall inform Plaintiffs, or their counsel, of the host, site, posting or place contacted and the efforts Defendant made to remove the offending material.

However, the trial court denied plaintiffs' request that defendant be enjoined from making any future offending statements about them. The trial court reasoned that such an injunction would amount to a prior restraint in violation of the First Amendment. Nonetheless, it agreed with dicta from this Court that, if there has been a judicial finding that prior statements were defamatory, a court should be able to enjoin a defendant from publishing those statements in the future.[6] Consequently, it ordered that defendant was prohibited from publishing or

[6] The trial court was referring to *Dupuis v Kemp*, unpublished opinion per curiam of the Court of Appeals, issued February 21, 2006 (Docket No. 263880), slip op 4, where the Court stated:

> While a court might not have the authority to issue an injunction regarding future statements before the substantive merit concerning whether prior statements were

republishing the false statements. The trial court explained that allowing defendant to republish the false statements would "make[] a mockery of the entire judicial process," especially when defendant "has demonstrated a continuing pattern over a significant length of time of manufacturing facts using a variety of pseudonyms."

In granting injunctive relief to plaintiffs, the trial court rejected defendant's argument that the Communications Decency Act (CDA), 47 USC 230, shielded him from liability. The trial court explained that, because it determined defendant created or developed all the material that placed Rooks and Gruizinga in a false light, he was the originator of the material and, therefore, was afforded no protection under the CDA. In addition, it explained that defendant, even if he was not "Terryb," had no protection under the CDA because defendant was not a "passive forum that allowed content to be published or displayed" on the Internet. Rather, defendant developed and augmented the information in the ripoff report and actively sought out new forums where the false statements could be displayed.

II. FACTUAL FINDINGS

On appeal, defendant argues that the trial court clearly erred in finding that he was "Terryb," the author of the ripoff report. According to defendant, the fact that he had a history of using false names on the Internet does not suggest that he was "Terryb," especially when it is common for persons using the Internet not to use their real names. Following a bench trial, we review a trial court's factual findings for clear error and its conclusions of law de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

The elements of a claim for false light invasion of privacy were stated in *Duran v Detroit News, Inc*, 200 Mich App 622, 631-632; 504 NW2d 715 (1993):

> In order to maintain an action for false-light invasion of privacy, a plaintiff must show that the defendant broadcast to the public in general, or to a large number of people, information that was unreasonable and highly objectionable by attributing to the plaintiff characteristics, conduct, or beliefs that were false and placed the plaintiff in a false position.

In addition, the defendant "must have had knowledge or acted in reckless disregard to the falsity of the publicized matter and the false light in which [the plaintiff] would be placed." *Early Detection Ctr, PC v New York Life Ins Co*, 157 Mich App 618, 630; 403 NW2d 830 (1986).

> indeed defamatory is ruled upon, once the trier of fact determines that certain statements were defamatory, a court should be able to enjoin a defendant from publishing those same defamatory statements in the future.

Unpublished opinions from this Court are not binding under the rule of stare decisis. MCR 7.215(C)(1).

The trial court found, based on "circumstantial evidence" that defendant was "Terryb." The circumstantial evidence cited by the trial court was that "Terryb" was a "false name" and that defendant used "false names" on the Internet.[7] It is common practice for people to make Internet posts under user names that do not reveal their identity. See *SPX Corp v Doe*, 253 F Supp 2d 974, 976 (ND Ohio, 2003) ("As is common in sending messages over the Internet, the Defendant did not use his real name."). Accordingly, if the only evidence that supported the trial court's finding that defendant was "Terryb" was the fact that defendant used "false names" on the Internet, we would be left with a definite and firm conviction that the trial court erred in finding that defendant was "Terryb." *In re Bennett Estate*, 255 Mich App at 549. However, defendant's use of "false names" is not the only evidence that supports the trial court's finding.

First, the trial court, by finding that defendant was "Terryb," did not believe defendant's testimony that he was not "Terryb" or that he did not prepare any portion of the ripoff report. We are required to give due regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

Second, "where a party deliberately destroys evidence, or fails to produce it, courts presume that the evidence would operate against the party who destroyed it or failed to produce it." *Hamann v Ridge Tool Co*, 213 Mich App 252, 255; 539 NW2d 753 (1995). Fannon testified that "sophisticated, yet unsophisticated" attempts to permanently remove data from defendant's laptop computer and his parents' desktop computer were done only hours before the computers were delivered to his office. The attempt to delete data from defendant's laptop computer does not lead to any presumption against defendant. Fannon testified that he analyzed the volume shadow copy on the computer, and a booklet of what he found was presented at trial. There was no testimony that the attempt to delete data from the computer resulted in the actual loss of any data. However, Fannon testified that the data that was overwritten when disk cleanup and disk defragmentation were run on defendant's parents' desktop computer was no longer accessible or recoverable because volume shadow copy was not used by the computer's operating system. Although defendant's mother testified that, whenever she thought there might be a virus on the desktop computer, she ran disk cleanup and disk defragmentation on the computer, because the disk cleanup and disk defragmentation were run only hours before the desktop computer was delivered to Fannon, the evidence supports a finding that defendant, who lived with his parents, ran the cleanup and defragmentation in an attempt to destroy data. Accordingly, the evidence presented at trial allowed a presumption that the data deleted from defendant's parents' desktop computer would have operated against defendant. *Id.*

Third, in its opinion, the trial court stated that defendant had "an irrational ax to grind" with Rooks and Gruizinga. Defendant took numerous actions to grind his ax. He posted on the Union Square Forums that he would do his best to post warnings about Union Square on craigslist.com. He posted three comments to the ripoff report, and in those comments he said, in

[7] "False names" that defendant used on the Internet, in addition to those already mentioned, included "Jokersoaker1," "Jokersoaker2," "Jokersoaker3," Jokersoaker 69," "FerrariFreek599," "FerrariFreekGT," "AntiDutchCRC," and "Nodevriescondos."

part, that Rooks, also known as "Crooks," associated with "snakes," and had threatened to sue him. Defendant repeatedly posted the ripoff report on craigslist.com. To postings, he attached a criminal record report, which he obtained from ICHAT, that showed Rooks had been charged with operating while intoxicated; a BBB report, which he obtained from the Internet, giving Union Square an "F" rating; and a page from a purchase agreement for a Union Square condominium unit, which he had obtained through a FOIA request. He also provided links to an opinion from this Court in which it had ruled against Rooks and to a noncompliance letter from the Environmental Protection Agency. Defendant submitted a complaint to the BBB and the GRAR regarding signs on the Union Square building. He submitted uncomplimentary reviews of Rooks on realestateratingz.com. In addition, defendant sent an email, which appeared to be from Rooks, to persons involved in real estate in West Michigan.[8]

The evidence supporting the trial court's finding that defendant was "Terryb" cannot be classified as overwhelming or significant. Nonetheless, the evidence showed that defendant actively pursued grinding his ax with Rooks and Gruizinga, often doing so while using "false names" on the Internet, and that defendant was aware of and used ripoffreport.com. This evidence, when combined with the regard that we must give to the trial court's determination that defendant's testimony that he was not "Terryb" was not credible and the presumption that data from defendant's parents' desktop computer would have operated against defendant, does not leave us with a definite and firm conviction that the trial court made a mistake when it found that defendant was "Terryb." *In re Bennett Estate*, 255 Mich App at 549. Accordingly, we affirm the trial court's factual finding that defendant was the author of the ripoff report.[9]

In addition, defendant argues that the trial court erred in finding that he authored the anonymous comment, attached to the December 2009 posting of the ripoff report on craigslist.com, about Stanley, a former owner of a Union Square condominium unit, being injured due to construction negligence. We disagree. First, by finding that defendant authored the comment, the trial court did not believe defendant's testimony that he was not the comment's author. Due regard must be given to the trial court's special opportunity to judge the credibility of witnesses. MCR 2.613(C). Second, defendant had previously made a post on the Union Square Forums that Stanley had been injured due to faulty construction. Third, as previously explained, defendant took numerous actions to grind his ax with Rooks and Gruizinga by making

[8] Although the trial court did not address defendant's chosen usernames when posting negative comments about Rooks, some of the usernames such as "paybacksabitch" and "jokeisstillonyou," could be considered evidence of his revengeful attitude toward Rooks, increasingly the likelihood that he was "Terryb."

[9] Defendant argues that the trial court erred in concluding that he was not entitled to immunity under the CDA. According to defendant, because he only republished the ripoff report on craigslist.com, he is entitled to immunity. Defendant's argument is premised on his claim that the trial court clearly erred in finding that he was "Terryb." Because the trial court did not clearly err in finding that defendant was "Terryb," we do not address defendant's argument regarding the CDA. Defendant makes no argument that he is entitled to immunity under the CDA if the trial court did not clearly err in finding that he was "Terryb."

uncomplimentary postings and comments about them on the Internet. Under these circumstances, we are not left with a definite and firm conviction that the trial court made a mistake in finding that defendant authored the anonymous comment about Stanley. *In re Bennett Estate*, 255 Mich App at 549.

III. FIRST AMENDMENT PROTECTION

Defendant asserts that statements found by the trial court to have portrayed Rooks and Gruizinga in a false light were not actionable. According to defendant, the statements were protected under the First Amendment because the statements were substantially true or because the statement constituted subjective opinion or rhetorical hyperbole.[10] Following a bench trial, we review a trial court's factual findings for clear error and its conclusions of law de novo. *Ligon*, 276 Mich App at 124. However, First Amendment limitations on defamation claims are applicable to claims for false light invasion of privacy. *Ireland v Edwards*, 230 Mich App 607, 624; 584 NW2d 632 (1998). When addressing claims that implicate First Amendment freedoms, "appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection." *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 322; 539 NW2d 774 (1995).

A. SUBJECTIVE OPINION AND RHETORICAL HYPERBOLE

The United States Supreme Court has rejected the proposition that all statements labeled an "opinion" are protected speech under the First Amendment. *Milkovich v Lorain Journal Co*, 497 US 1, 18; 110 S Ct 2695; 111 L Ed 2d 1 (1990). It explained that such a proposition ignores the fact that statements of "opinion" often imply an assertion of objective fact. *Id.* The United States Supreme Court "has directed that a statement must be 'provable as false' to be actionable." *Ireland*, 230 Mich App at 616. This Court explained:

> By way of example, the [United States Supreme] Court [in *Milkovich*] suggested that the statement "In my opinion Mayor Jones is a liar" would be potentially actionable, while the statement "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" would not be actionable. The Court apparently intended these examples to illustrate the difference between an objectively verifiable event, such as lying, and a subjective

[10] Defendant also argues that, regardless whether the statements that portrayed Rooks and Gruizinga in a false light were actionable, plaintiffs failed to show that he acted with malice, i.e., that he knew or acted in reckless disregard as to the falsity of the statements. However, defendant's argument is premised on his claim that the trial court clearly erred in finding that he was "Terryb." Because the trial court did not clearly err in finding that defendant was "Terryb," we do not address defendant's argument. Defendant makes no claim that, if the trial court's finding that he was "Terryb" was not clearly erroneous, the trial court still erred in finding that he acted with malice in writing the ripoff report.

> assertion like "shows his abysmal ignorance . . . ." [*Id.* (internal citations omitted).]

In addition, a statement is protected where the statement, when viewed in context, cannot reasonably be interpreted as stating actual facts about the plaintiff. *Id.* at 614, 618. Thus, statements that amount to "rhetorical hyperbole" are not actionable. *Id.* at 617-618.

In *Ireland*, the plaintiff brought defamation claims against the attorney who represented her daughter's father in a custody dispute. Several of the attorney's statements concerned the plaintiff's fitness as a mother. The attorney stated that the plaintiff was "not a fit mother," that the custody dispute was "about a woman who is not fit to raise her child," that the plaintiff "has never been a mother," and that the plaintiff was "an unfit mother." The Court held that these statements were not actionable because they were not provable as false. *Id.* at 617. It explained that "[t]he question whether someone is a 'fit mother,' like the question whether someone is abysmally ignorant, is necessarily subjective." *Id.* In addition, the attorney made several statements concerning the plaintiff being abusive and violent, including the statement that the child "suffered a fractured arm because of [the plaintiff's] neglect." The Court held that the question whether the child's broken arm was the result of the plaintiff's neglect was "like the question whether someone is a fit mother, or whether someone is abysmally ignorant, [and] can only be answered subjectively." *Id.* at 620. Thus, it concluded that the statement was a protected opinion because it was not provable as false. *Id.* The Court stated, "As the [United States] Supreme Court has observed, "however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 620-621 (quotation marks and alternation omitted). Also, several of the attorney's statements concerned the amount of time that the plaintiff spent with her daughter. In part, the attorney stated that the plaintiff "never spent a moment" with her daughter, was "never home" with the child, and the plaintiff "abdicated all responsibility for the care and raising" of her daughter. This Court found that these statements amounted to rhetorical hyperbole. *Id.* at 618-619. It explained that these statements "were obviously expressions of disapproval regarding the amount of time [the] plaintiff spent with her child, and, taken literally, they are patently false. However, any reasonable person hearing these remarks in context would have clearly understood what was intended." *Id.* at 619.

Defendant asserts that several of the statements found by the trial court to have portrayed Rooks and Gruizinga in a false light were not actionable because they were subjective assertions not provable as false. First, defendant claims that the statement in the ripoff report that "Rooks and his companies used all the lowest bidders and lowest quality contractors in Grand Rapids" is subjective opinion. The first part of the statement, i.e., that Rooks and his companies used all the lowest bidders, is not a subjective opinion. Whether all the lowest bidders were used is an objectively verifiable event. See *id.* at 616. It is provable as false. However, the second part of the statement, i.e., that Rooks and his companies used the lowest quality contractors is not an objectively verifiable event. Whether the contractors used by Rooks and his companies were the lowest quality ones, like the question whether someone is a fit parent, is necessarily subjective. *Id.* at 617. Accordingly, the statement that Rooks and his companies used the lowest quality contractors is not actionable. *Id.*

Second, defendant claims that the statements in the ripoff report that Rooks and Gruizinga "will do nothing to help or fix things," that "[t]hey are lying and just unwilling to help because it would cost them a few extra dollars," and that there "is no corner they wouldn't cut to save themselves money" are subjective opinion. We agree, considering the context in which the statements were made. The ripoff report stated that if a person complained to Rooks or Gruizinga about construction quality or broken promises, the person would be told by Rooks and Gruizinga that it was outside of their realm of abilities to help the person. The person was then warned that Rooks and Gruizinga were lying and would not do anything to help because they wanted to save money. The statements were subjective opinion regarding the response of Rooks and Gruizinga and the cause of that response. Accordingly, the three statements are not actionable. *Id.*

Third, defendant claims that the statement in the ripoff report that inadequate laundry facilities were installed is subjective opinion. However, the statement in the ripoff report was not that inadequate laundry facilities were installed. The actual statement in the ripoff report was that "[o]wners were also promised to [sic] laundry rooms, but Rooks decided that only one was necessary, with only two washers and dryers for 180 condos. After construction was completed, owners were told that it would cost tens of thousands of dollars to add additional laundry facilities." This statement was not subjective opinion. Whether the owners of condominium units were promised two laundry rooms, whether Rooks decided that only one laundry room with two washers and dryers was necessary, and whether owners were told that it would cost thousands of dollars to add more laundry facilities are events that can be objectively verified. *Id.* at 616. These events are provable as false. Accordingly, the statement in the ripoff report about the laundry facilities is not protected under the First Amendment as subjective opinion.

Fourth, defendant claims that the statement on realestateratingz.com that Rooks was "the same developer of Ellenwood Landing on White Lake that had a negative effect on the most critical fishery [sic] habitat at the mouth of the White River" is subjective opinion. We agree. A description of the effect of a development on a habitat as "negative" is similar to a description of a mother as unfit. See *id.* at 617. Both are necessarily subjective. Accordingly, the statement is protected by the First Amendment as subjective opinion. *Id.*

Fifth, defendant claims that the statements in the ripoff report that refer to Rooks and Gruizinga as liars are subjective opinion. These statements are that "Rooks is a pathological liar" and that "[r]esidents were lied to and ignored when their concerns [about the cellular telephone towers] were brought up."[11]

In *Ireland*, one of the statements not yet mentioned for which the plaintiff sued the attorney was the attorney's statement that the plaintiff "was a pathological liar." The Court, without any explanation, did not include this statement in the list of statements that it concluded

[11] Defendant also includes the statement that Rooks and Gruizinga "are lying and just unwilling to help because it would cost them a few extra dollars" in his argument. However, because we have already concluded that the statement is subjective opinion, we will not engage in any further analysis of the statement.

were subjective opinions. See *id.* at 617. Thus, based on *Ireland*, as well as the United States Supreme Court decision in *Milkovich*, a statement that someone is a liar or has lied can be an objectively verifiable event. Nonetheless, the statement that "Rooks is a pathological liar" is protected by the First Amendment, not because it is a subjective opinion, but because it is rhetorical hyperbole. No reasonable person could read the paragraph in which the statement was made in the ripoff report and conclude that the statement that Rooks was a pathological liar stated an actual fact about Rooks. *Id.* at 618. Any reasonable person would conclude that the phrase "pathological liar," when used alongside the phrases that "[y]ou can't believe anything he says" and "if his mouth is moving, he is probably lying," both of which cannot possibly be true, was no more than "rhetorical hyperbole, a vigorous epithet" used by someone who had no respect for Rooks and his business practices. *Id.* The statement is protected by the First Amendment.

The statement that "[r]esidents were lied to and ignored when their concerns [about the cellular telephone towers] were brought up" is not subjective opinion. Whether residents were lied to and ignored by Rooks was an objectively verifiable event. *Id.* at 616. The events recited in the ripoff report that provided the basis for the statement, i.e., that Rooks told the residents, after they complained about the cellular telephone towers, that the towers were being taken down, but then installed more than six towers on the Union Square building, are provable as false. Accordingly, the statement is not protected by the First Amendment as subjective opinion.

Defendant asserts that three of the statements found by the trial court to have portrayed Rooks and Gruizinga in a false light are not actionable because they amounted to rhetorical hyperbole. The three statements are the following: (1) Rooks and Gruizinga "apparently drove several contractors out of business, leaving owners with no one to turn to with construction problems"; (2) "[t]he contractors that worked with Rooks in Grand Rapids will not do business with him again"; and (3) Rooks and Gruizinga "screwed so many people over in Grand Rapids (both buyers and contractors) that they had to move on to Muskegon for their next project."

The three statements must be viewed in context to determine whether they can reasonably be understood as stating actual facts about Rooks and Gruizinga. *Id.* at 618. The statements were made in the "summation" paragraph of the ripoff report, which began, "In summation, Jon Rooks, Brad Gruizinga, and all the Parkland companies should be avoided." The three statements followed, along with the statement that Rooks used all the lowest bidders and lowest quality contractors, and provided support for the statement that Rooks and Gruizinga should be avoided. Although the ripoff report clearly showed that "Terryb" was displeased and unhappy with the business practices of Rooks and Gruizinga, nothing in the ripoff report indicates that "Terryb" meant something other than the literal facts of the three statements, i.e., that Rooks and Gruizinga were forced to move to Muskegon for their next project, that they drove several contractors out of business, and that contractors who worked with Rooks will no longer do business with him. Accordingly, the three statements are not protected by the First Amendment as rhetorical hyperbole.

B. SUBSTANTIAL TRUTH

A claim for false light invasion of privacy cannot succeed if the contested statements are true. *Porter v Royal Oak*, 214 Mich App 478, 487; 542 NW2d 905 (1995). In *Rouch v Enquirer*

& News of Battle Creek (After Remand), 440 Mich 238, 258-259; 487 NW2d 205 (1992), our Supreme Court explained the "substantial truth" doctrine:

> The common law has never required defendants to prove that a publication is literally and absolutely accurate in every minute detail. For example, the Restatement of Torts provides that "slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." Michigan courts have traditionally followed this approach. At early common law, Michigan courts predicated a claim for libel on the question whether the article was substantially true. In *McAllister v Detroit Free Press Co*, 85 Mich 453, 460-461; 48 NW 612 (1891), this Court explained that liability could not be imposed for a slight inaccuracy:
>
> > It is sufficient for the defendant to justify so much of the defamatory matter as constitutes the sting of the charge, and it is unnecessary to repeat and justify every word of the alleged defamatory matter, so long as the substance of the libelous charge be justified. . . . A slight inaccuracy in one of its details will not prevent the defendant's succeeding, providing the inaccuracy in no way alters the complexion of the affair, and would have no different effect on the reader than that which the literal truth would produce . . . .
>
> Thus, the test looked to the sting of the article to determine its effect on the reader; if the literal truth produced the same effect, minor differences were deemed immaterial. [Alterations omitted.]

In *Rouch*, the plaintiff was arrested without a warrant as a suspect in the rape of his former wife's babysitter. He was booked on a charge of first-degree criminal sexual conduct, as authorized by the prosecutor, and released on a personal recognizance bond. It was undisputed that the plaintiff was never formally arraigned on a warrant and that the police eventually pursued another suspect. The plaintiff sued the defendant newspaper for libel based on three errors in an article about his arrest: (1) the article asserted that he had been "charged" with sexual assault; (2) the article stated that he was identified by his children, when he had actually been identified by his ex-wife's children; and (3) the article asserted that the "charge" was authorized by the prosecutor's office. The Supreme Court held that these three "minor differences" did not change the "gist or sting" of the newspaper article. *Id.* at 262, 271. It stated, "The sting of the article was that the plaintiff had been identified by persons to whom he was well known and was charged with CSC I. That is true. The question whether a formal warrant had been issued or an arraignment held, like the question whether it was his children or former stepchildren who identified him, did not affect the article's substantial truth." *Id.* at 271.

In *Koniak v Heritage Newspapers, Inc (On Remand)*, 198 Mich App 577; 499 NW2d 346 (1993), the plaintiff sued the defendant newspaper after it printed an article that stated the plaintiff had sexually assaulted his stepdaughter between 30 and 50 times. However, at the plaintiff's preliminary examination, the stepdaughter testified that the plaintiff only assaulted her eight times. The Court held that the defendant newspaper was not liable for the inaccurate

statement. *Id.* at 581. It stated that, despite the "minor differences," the gist or sting of the article was substantially accurate because "whether plaintiff assaulted his stepdaughter once, eight times, or thirty times would have little effect on the reader." *Id.*[12]

First, defendant asserts that the substantial truth doctrine applies to the statement in the ripoff report that "Rooks and Gruizinga have the condo association documents written so that they maintain control over the condo association even when 95% or more of the condos have been sold." According to defendant, the statement is substantially true because there was testimony that owners of condominium units formed an owners group based on their concern that Rooks and Gruizinga still had control of the association board. As explained, the substantial truth doctrine applies when a statement is false because of a "slight inaccuracy" or "minor differences" in the statement's details, but the inaccuracy or the differences do not change the "sting" of the article. See *Rouch*, 440 Mich at 258-259; see also *Koniak*, 198 Mich App at 580 ("Under the test, minor differences are immaterial if the literal truth produces the same effect."). Here, there was no allegation by plaintiffs that the statement was false based only on a "slight inaccuracy." In fact, when the record is considered, the statement is not substantially true. The association bylaws were not admitted into evidence. The only testimony concerning the specifics of the "transitional control date," i.e., when the association board members were elected by nondevelopers, came from Gruizinga. Gruizinga testified that the transitional control date was based on the passage of a certain number of years after the master deed was recorded. The record does not indicate whether 95 percent of the Union Square condominiums units had been sold at the time of the transitional control date. Because the statement was not substantially true, defendant cannot rely on the substantial truth doctrine to argue that the statement was not actionable.

Defendant also claims that the ensuing statement in the ripoff report that Rooks and Gruizinga "ensure that their buddies get the lucrative management and maintenance contracts, to the detriment of owners" is protected by the substantial truth doctrine. Rooks and Gruizinga denied that they awarded management or maintenance contracts to their friends, and defendant presented no testimony regarding any management contracts. Thus, there was no evidence at trial to support that this statement was true. Defendant appears to recognize this fact. He asserts that because the "gist" of the statement is that Rooks and Gruizinga maintained control of the association board and thus, whether they used their control to award contracts did not alter the overall truth of the statement. We disagree. The statement suggests only one meaning, that Rooks and Gruizinga use their control of the association board for their interests and do not act in the best interests of the condominium owners. Accordingly, the substantial truth doctrine does not apply to the statement because there was no evidence that the statement was true.

[12] *Rouch* and *Koniak* were libel cases; they did not involve a claim for false light invasion of privacy. However, because a claim for libel requires a false statement, *Tomkiewicz v Detroit News, Inc*, 246 Mich App 662, 666; 635 NW2d 36 (2001), as does a claim for false light invasion of privacy, *Duran*, 200 Mich App at 631-632, we are unaware of any reason why the substantial truth doctrine should not apply to claims for false light invasion of privacy.

Second, defendant claims that, based on the testimony of Ruehs and Bell, the statement in the ripoff report about the laundry and exercise facilities was substantially true. Regarding this statement, trial court in its opinion stated:

> New exercise equipment was provided. It was only to provide more equipment and machines than was originally planned that some equipment was purchased at an auction. In fact, more money was spent on exercise equipment than originally intended. No evidence was introduced that the equipment was defective or came into disrepair. The half truth that used exercise equipment was purchased is misleading. The inference that inadequate exercise equipment was provided is false.
>
> Every unit had a washer and dryer hook-up. In spite of this, additional communal washers and dryers were provided at the request of the residents. There is no truth to the inference that there are only two washers and dryers for the entire facility.

Accordingly, the trial court found that the statement in the ripoff report about the exercise and laundry facilities was false, not because it contained a "slight inaccuracy" that failed to provide the "literal truth," *Rouch*, 440 Mich at 259; *Koniak*, 198 Mich App at 580, but because it failed to reflect the events that actually happened. Those events, stated the trial court, included (1) that new and used exercise equipment was purchased and that used equipment was bought only after Rooks and Gruizinga decided to provide more equipment than had been initially planned and (2) because each condominium unit had hookups for a washer and dryer and because Rooks and Gruizinga provided additional community washers and dryers when requested, there were more than two washers and dryers for the entire Union Square building. Because a "slight inaccuracy" was not what rendered the statement about the laundry and exercise facilities false, defendant's reliance on the substantial truth doctrine to argue that the trial court erred in finding the statement false is misplaced.

Third, defendant claims that, based on the testimony of Champion and Bell regarding the cellular telephone towers, the statement in the ripoff report that "[r]esidents were lied to and ignored when their concerns [about the towers] were brought up" was substantially true. Regarding this statement, the trial court wrote:

> It is true that cell phone towers were at one time placed on the building. However, there is no truth to the allegation that residents were "lied to and ignored when their concerns were brought up." Rather, the evidence established that Plaintiffs were honest and responsive to the residents when concerns were raised. Parenthetically, the cell towers are no longer on the building.

Accordingly, the trial court found that the statement in the ripoff report about the response of Rooks and Gruizinga to the concerns about the cellular telephone towers was false because it failed to reflect the actual response by Rooks and Gruizinga. It was not false because it contained a "slight inaccuracy" that failed to provide the "literal truth." *Rouch*, 440 Mich at 259; *Koniak*, 198 Mich App at 580. Again, because a "slight inaccuracy" was not what rendered the statement about the response of Rooks and Gruizinga to the concerns about the cellular telephone

towers false, defendant's reliance on the substantial truth doctrine to argue that the trial court erred in finding the statement false is misplaced.

Fourth, defendant claims that, based on the testimony of the six owners of condominium unit, the statements that unit owners experienced "[l]ow quality construction with little soundproofing" and that "residents are told to get sound tests, at the cost of several thousand dollars, before [Rooks and Gruizinga] will lift a finger to help out" are substantially true. Admittedly, the testimony of the six owners supports the truthfulness of these statements. Each of the owners testified that they experienced soundproofing problems, and Duncan testified that, after the architect said that his unit passed the soundproofing standards, Rooks asked him to get his own soundproofing tests done. In addition, each of the six owners testified about construction problems they experienced. The problems included windows and doors that leaked, paint and plaster that peeled, noncompliance with floor plans, and issues with floor finishes. Despite there being evidence to support that the truth of these statements, defendant's reliance on the substantial truth doctrine in arguing that the trial court found the statements false is misplaced.[13] Rooks and Gruizinga did not claim, and the trial court did not find, that the statements were false because of a "slight inaccuracy" or "minor differences" that caused the

[13] The trial court did not disbelieve the testimony of the condominium owners regarding construction quality, soundproofing, and sound tests, but nonetheless found that the testimony did not make the statements true. It held as follows:

> The Court recognizes that comments such as "low quality construction" or "little soundproofing" alone are more indicative of one's opinion than a misstatement of fact. On the whole, the comment about low quality construction with little soundproofing is inaccurate. It was undisputed that the project was built using appropriate specifications. Testimony established the lengths to which sound issues were initially addressed. However, it is true that problems arose with the soundproofing and other issues. It was established at trial that Pioneer failed to perform all of the work as specified. For example, some soundproofing was omitted. About ten complaints were made for sound issues. Thus, there is some truth in Defendant's published statements that there was "low quality" construction with little soundproofing. However, that situation primarily arose due to the contractor's failure--not Rook's or Gruizinga's.
>
> There is no truth to Defendant's allegation that "residents are told to get sound tests, at the cost of several thousand dollars, before they (Rooks and Gruizinga) will lift a finger." One resident was advised that he could obtain his own independent sound testing in order to ascertain if specifications were met.

statements not to reflect the "literal truth." [14] *Rouch*, 440 Mich at 259; *Koniak*, 198 Mich App at 580.

In conclusion, the trial court erred in finding that the following statements portrayed Rooks and Gruizinga in a false light: (1) Rooks and his companies used the "lowest quality contractors in Grand Rapids"; (2) Rooks and Gruizinga "will do nothing to help or fix things"; (3) Rooks and Gruizinga "are lying and just unwilling to help because it would cost them a few extra dollars"; (4) there "is no corner they wouldn't cut to save themselves money"; (5) Rooks was "the same developer of Ellenwood Landing on White Lake that had a negative effect on the most critical fishery [sic] habitat at the mouth of the White River"; and (6) "Rooks is a pathological liar." These six statements are protected by the First Amendment as subjective opinion or rhetorical hyperbole.

IV. INJUNCTIVE RELIEF

Defendant argues that the trial court erred when it enjoined him from republishing the factually inaccurate statements that placed Rooks and Gruizinga in a false light. We review a trial court's grant of injunctive relief for an abuse of discretion. *Michigan AFSCME Council 25 v Woodhaven-Brownstone Sch Dist*, 293 Mich App 143, 146; 809 NW2d 444 (2011). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* We review constitutional issues de novo. *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008).

"Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." *Kernen v Homestead Dev Co*, 232 Mich App 503, 509; 591 NW2d 369 (1998) (quotation omitted). Defendant's argument regarding the trial court's injunction does not concern the three requirements that must be met before a court may issue an injunction. Rather, defendant makes a constitutional argument; he argues that the injunction is an invalid prior restraint under the First Amendment.[15]

A fundamental principal regarding the First Amendment is that governmental units may not impose a prior restraint on speech. *Nebraska Press Ass'n v Stuart*, 427 US 539, 559; 96 S Ct

[14] Defendant also claims that the statements in the ripoff report that Rooks and Gruizinga "will do nothing to help or fix things" and that Rooks and Gruizinga "are lying and just unwilling to help because it would cost them a few extra dollars" are substantially true. However, because we have already concluded that the two statements are subjective opinion, we need not address whether the statements are protected by the substantial truth doctrine.

[15] Most of the case law that will be discussed in analyzing this issue involves defamatory statements. We see no reason, and the parties have provided none, why an injunction prohibiting the republication of speech found to be false in a claim for false light invasion of privacy should be treated any differently than an injunction prohibiting the republication of speech found to be false in a defamation claim.

2791; 49 L Ed 2d 683 (1976) ("The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."). "The term 'prior restraint' is used to describe an administrative or judicial order that forbids certain communications in advance of the time that the communications are to occur." *Van Buren Charter Twp v Garter Belt, Inc*, 258 Mich App 594, 622-623; 673 NW2d 111 (2003). An injunction that forbids speech activities is a classic example of a prior restraint. *Id.* at 623. "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Org for a Better Austin v Keefe*, 402 US 415, 419; 91 S Ct 1575; 29 L Ed 2d 1 (1971). The party requesting the prior restraint carries a heavy burden of showing justification for the imposition of the restraint. *Id.*

This Court has previously addressed whether a court may grant a plaintiff injunctive relief to prohibit the publication of false statements. In *McFadden v Detroit Bar Ass'n*, 4 Mich App 554; 145 NW2d 285 (1966), the plaintiff, a candidate for judicial office, claimed that the defendant defamed him by implication when it published a report that only listed 56 of the 81 candidates for the judicial office that he sought. The plaintiff was not one of the 56 listed candidates. The Court held that it did not need to address the merits of the plaintiff's defamation claim because the relief that the plaintiff sought—an injunction prohibiting further distribution of the report—was not available to him. *Id.* at 557-558. The Court stated:

> [I]t is a familiar and well-settled rule of American jurisprudence that equity will not enjoin a defamation, absent a showing of an independent economic injury—which does not appear in the instant case. The primary reason is an abhorrence of previous restraints on freedom of speech. (See *Near* v. *Minnesota* [1930], 283 US 697 [51 S Ct 625, 75 L ed 1357].) Additional reasons for the denial of injunctive relief are that there is an adequate remedy at law, *i.e.*, an action for damages, and that the defendant in a defamation action has the right to a jury trial which would be precluded by granting of an injunction.
>
> Thus it is neither necessary nor proper for this Court to determine whether the appellant was libeled as he alleged. An injunction would not lie. [*Id.* at 558.]

However, because *McFadden* was decided before November 1, 1990, it is not binding on the Court. MCR 7.215(J)(1); *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012). Since *McFadden*, neither this Court nor our Supreme Court has addressed the issue whether a party may be enjoined from making statements that have been determined by a fact-finder to be false. Courts from other jurisdictions have addressed the issue. Although not binding on the Court, case law from other jurisdictions may be considered persuasive. *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007).

In *Hill v Petrotech Resources Corp*, 325 SW3d 302 (Ky, 2010), after the respondents sued Hill for defamation, they filed a motion for a temporary injunction prohibiting Hill from making further defamatory statements about them. The trial court enjoined Hill from contacting any of the respondents' customers for the purpose of defaming the respondents and from publishing or making any defamatory public comments about the respondents' business practices. The injunction was to remain in effect throughout the trial court proceedings or until further ordered by the trial court. In determining whether the temporary injunction violated

Hill's First Amendment rights, the Kentucky Supreme Court stated that, because the injunction prohibited Hill from making future statements about the respondents, the injunction was a prior restraint and, therefore, it presumed that the injunction was invalid. *Id.* at 306. It then noted, citing *Nebraska Press Ass'n*, 427 US 539, and several federal circuit cases, the general rule that equity will not enjoin a libel. *Id.* It also noted that, despite an emerging trend toward permitting injunctions upon an adjudication that the alleged defamatory speech was false, there "remain staunch advocates of the traditional rule that a prior restraint on speech is unacceptable under any circumstances. This position, along with supporting authorities, is defended by prominent constitutional law professor Erwin Chemerinsky in his law review article, *Injunctions in Defamation Cases,* 57 Syracuse L.Rev. 157 (2007)." *Id.* The Kentucky Supreme Court explained the position of Professor Chemerinsky:

> Defenders of the traditional rule argue that we should not disturb the maxim that equity will not enjoin defamation, and that injunctions should never be allowed as a remedy in defamation cases. Professor Chemerinsky argues that even after a judicial determination that the speech at issue is false, "[t]he injunction means that a person can only speak by going before the judge and getting permission. That is the very essence of a prior restraint." [Chemerinsky, 57 Syracuse L Rev] at 163. He advocates that "[i]f history matters in interpreting the First Amendment, it could not be clearer: injunctions were not allowed as a remedy in defamation actions." *Id.* at 168. In his view, it is always the case that "damages, not injunctions, are the appropriate remedy in a defamation action," *id.* at 169, "even in the case of the "judgment proof defendant [.]" *Id.* at 170. Under the traditional rule, it is of no concern that the defendant may not be able to pay the damage award because "[c]ourts . . . do not find that damages remedies are inadequate simply because the plaintiff cannot afford to pay them." *Id.* [*Id.* at 306-307.]

However, according to the Kentucky Supreme Court, the traditional view is flawed because its rationale "is severely undercut by the countervailing view that defamatory speech is unguarded by the Constitution." *Id.* at 307. It explained:

> Application of the rules relating to unprotected speech would compel the conclusion that the First Amendment is not even implicated in the case of false, defamatory speech, and therefore the Constitution poses no bar to any injunction restraining such speech.
>
> "From 1791 to the present," the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations." *R.A.V. v. St. Paul*, 505 U.S. 377, 382–383, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). These "historic and traditional categories long familiar to the bar," *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (Kennedy, J., concurring in judgment), include obscenity, *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); defamation, *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952); fraud, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer*

> *Council, Inc.*, 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); incitement, *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam); and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949). These are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *U.S. v. Stevens*, ___ U.S. ___, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010).
>
> Defamation's place on the list of unprotected speech is secure. As straightforwardly stated in *Beauharnais* almost sixty years ago, "[l]ibelous utterances [are not] within the area of constitutionally protected speech." *Beauharnais*, 343 U.S. at 267, 72 S.Ct. 725. [*Id.*]

Nonetheless, the Kentucky Supreme Court agreed, "What is or is not defamatory expression cannot often be summarily ascertained. A rush to enjoin distasteful, annoying, unpopular, or even damaging speech would often result in the suppression of truthful, legitimate discourse." *Id.* Thus, the Kentucky Supreme Court found "it appropriate to consider a more modern and moderate analysis that recognizes the need to minimize the damage of unprotected, defamatory speech in a way that preserves the important constitutional values of free speech and due process." *Id*.

The Kentucky Supreme Court stated the recognition that defamatory speech is not protected by the First Amendment has led to the development of "a modern, superseding rule" that, once a trial court or a jury has made a final determination that speech is defamatory, the speech determined to be false may be enjoined. *Id.* at 308. It noted that the rule has been stated in 42 Am Jur 2d, Injunctions, § 97, as the following:

> [T]he prohibition [against enjoining defamation] is not absolute, as there are exceptional cases in which a prior restraint is acceptable. For instance, an injunction would issue to prohibit a defendant from reiterating statements which had been found in current and prior proceedings to be false and libelous to prevent future injury to the libel plaintiff's personal reputation and business relations. An injunction restraining the publication of matter defaming a plaintiff personally [is] proper where there [is] no adequate remedy at law because of the recurrent nature of the defendant's invasions of the plaintiffs [sic] rights, the need for a multiplicity of actions to assert the plaintiffs [sic] rights, the imminent threat of continued emotional and physical trauma, and the difficulty of evaluating the injuries in monetary terms. [*Id.*]

The Kentucky Supreme Court adopted the modern rule, holding that defamatory speech may be enjoined only after a final determination that the speech at issue was false and, upon the condition, that the injunction be narrowly tailored to limit the prohibited speech to that which has been determined to be false. *Id.* It set aside the injunction that the trial court had granted the respondents because there had not yet been an adjudication that the alleged defamatory statements were, in fact, false. *Id.*

Numerous other courts, both federal and state, have held that a trial court may enjoin a defendant from making defamatory statements after there has been a determination that the speech was, in fact, false. See *Lothschuetz v Carpenter*, 898 F2d 1200, 1208-1209 (CA 6, 1990) (Wellford, J., concurring and dissenting; Hull, J., concurring and dissenting); *Wagner Equip Co v Wood*, 893 F Supp 2d 1157, 1161-1162 (D NM, 2012); *Balboa Island Village Inn, Inc v Lemen*, 40 Cal 4th 1141, 1155-1156; 156 P3d 339 (2007); *Retail Credit Co v Russell*, 234 Ga 765, 777-779; 218 SE2d 54 (1975); *Advanced Training Sys, Inc v Caswell Equip Co, Inc*, 352 NW2d 1, 11 (Minn, 1984); *St James Healthcare v Cole*, 341 Mont 368, 377-378, 380-381; 178 P3d 696 (2008); *Sid Dillon Chevrolet-Oldsmobile-Pontiac, Inc v Sullivan*, 251 Neb 722, 732; 559 NW2d 740 (1997); *Chambers v Scutieri*, unpublished opinion per curiam of the Superior Court of New Jersey, Appellate Division, issued April 4, 2013 (Docket No. L-0089-08); *O'Brien v Univ Community Tenants Union, Inc*, 42 Ohio St 2d 242, 244-246; 327 NE2d 753 (1975). See also *Kramer v Thompson*, 947 F2d 666, 676-677 (CA 3, 1991) (stating that "[b]ecause libelous speech is not [constitutionally] protected . . . it follows that, once a jury has determined that a certain statement is libelous, it is not a prior restraint for the court to enjoin the defendant from repeating that statement," but reversing the injunction after finding that the Pennsylvania Supreme Court, under Pennsylvania law, would not uphold the injunction). Several of these cases relied on the United States Supreme Court decision in *Pittsburgh Press Co v Pittsburgh Comm on Human Relations*, 413 US 376, 390; 93 S Ct 2553; 37 L Ed 2d 669 (1973), where the Supreme Court, after noting that it has never held that all injunctions on expression are impermissible, stated, "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."

In arguing that the trial court's injunction was an invalid prior restraint, defendant relies on Professor Chemerinsky's article in the Syracuse Law Review. In the article, Professor Chemerinsky discussed problems associated with an injunction limited to statements that have been determined to be false:

> An injunction that is limited to preventing repetition of the specific statements already found to be defamatory is useless because a defendant can avoid its restrictions by making the same point using different words without violating the court's order.
>
> Moreover, even if the injunction is limited to particular statements already found false, defamatory, and uttered with the requisite mental state, a prospective prohibition on the same statements cannot guarantee satisfaction of the elements of defamation at every point in the future. A statement that was once false may become true later in time. Likewise, even if a defendant in a defamation action once acted with the requisite degree of culpability, he or she may have a different mental state later. Defamatory statements about public figures are outside the scope of the First Amendment only when the plaintiff can "prove both that the statement was false and that the statement was made with the requisite level of culpability." Permitting permanent injunctive relief in a defamation case absolves the defamation plaintiff of his or her burden to demonstrate falsity and culpability each time a purportedly defamatory statement is made. Thus, unlike injunctions on particular obscene motion pictures, enjoining defamatory speech will

> inherently reach too far and be overbroad because "[i]t is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." [Chemerinsky, *Injunctions in Defamation Cases*, 57 Syracuse L Rev at 171-172.]

Despite these concerns, we adopt the "modern rule" and hold that defamatory speech may be enjoined after a determination that the speech was, in fact, false. We are persuaded by the argument that, because defamatory speech is not protected by the First Amendment, such an injunction does not violate the amendment's guarantee of free speech. Accordingly, the trial court did not err when it issued an injunction that prohibited defendant from republishing the statements that it had determined were false. However, because some of the statements that the trial court found were false and portrayed Rooks and Gruizinga in a false light were protected by the First Amendment as subjective opinion or rhetorical hyperbole, we remand to the trial court for the issuance of a new injunction that is limited to those statements found false by the trial court and not protected by the First Amendment.[16]

Affirmed in part, reversed in part, and remanded for the issuance of a new injunction. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Jane M. Beckering

[16] For the trial court's convenience in crafting a new injunction, we clarify that the following statements that it found to have placed Rooks and Gruizinga in a false light are not protected by the First Amendment: (1) "Rooks and his companies used all the lowest bidders"; (2) "[t]hey apparently drove several contractors out of business, leaving owners with no one to turn to with construction problems"; (3) "[t]he contractors that worked with Rooks in Grand Rapids will not do business with him again"; (4) Rooks and Gruizinga "screwed so many people over in Grand Rapids (both buyers and contractors) that they had to move on to Muskegon for their next project"; (5) Rooks and Gruizinga "have the condo association documents written so that they maintain control over the condo association even when 95% or more of the condos have been sold" and they "ensure that their buddies get the lucrative management and maintenance contracts, to the detriment of owners"; (6) the statements about laundry and exercise facilities; (7) the units had "[l]ow quality construction with little soundproofing" and "residents are told to get sound tests, at the cost of several thousand dollars, before they will lift a finger to help out"; (8) and "[r]esidents were lied to and ignored when their concerns were brought up." We note that defendant, while discussing the substantial truth doctrine in his brief on appeal, made no argument that the statement concerning Matt Stanley, a former condominium unit owner, being injured because of construction negligence was substantially true.