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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

MICHAEL E. SPREADBURY, Plaintiff, v. BITTERROOT PUBLIC LIBRARY, CITY OF HAMILTON, LEE ENTERPRISES, INC., and BOONE KARLBERG P.C., Defendants.	Cause No. CV-11-064-M-DWM DEFENDANT LEE ENTERPRISES, INC.'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON REMAINING COUNTS

COMES NOW Co-Defendant, Lee Enterprises, Inc. ("Lee Enterprises"), through its counsel, Garlington, Lohn & Robinson, PLLP, and hereby respectfully files its Brief in Support of its Motion for Summary Judgment on Remaining Counts.

I. INTRODUCTION

On July 28, 2011, the U.S. Magistrate Judge entered Findings and

Recommendations (Dkt. 75) regarding Lee Enterprises' Federal Rule of Civil Procedure 12(b)(6) motion to dismiss Plaintiff Michael Spreadbury's ("Spreadbury") Amended Complaint (Dkt 1-1) for failure to state a claim upon which relief can be granted. The U.S. Magistrate recommended Lee Enterprises' Motion to Dismiss be granted in part, and denied in all other respects. Specifically, the Court recommended dismissal of Spreadbury's defamation claim with respect to the articles published by Lee Enterprises, dismissal of Spreadbury's claim of defamation per se claim, dismissal of Spreadbury's 42 U.S.C. § 1983 claim, and dismissal of Spreadbury's claim of negligence per se. (Dkt. 75.)

More recently, on August 10, 2011, the U.S. Magistrate granted Spreadbury's request to amend his pleadings with respect to his new claim that Lee Enterprises published false information in an August 9, 2010 article. (Dkt. 85.)

Accordingly, Lee Enterprises provides the following Brief in Support of its Motion for Summary Judgment as to the remaining claims in Spreadbury's Second Amended Complaint.

Lee Enterprises expressly reserves the right to further plead if the Honorable Judge Molloy rejects or otherwise modifies the U.S. Magistrate's Findings and Recommendations (Dkt. 75.)

II. BACKGROUND

Spreadbury's current dispute with the Defendants stems from an altercation

with Ms. Nansu Roddy ("Roddy") at the Bitterroot Public Library ("Library") in May or June 2009, when Roddy refused to submit a letter Spreadbury requested to be placed on the reserve shelf in the Library. *See* Def. Lee Enterprises, Inc.'s State. Undisputed Facts Support Mot. S.J. Remaining Counts ("SUF") ¶¶ 1-3 (Sept. 28, 2011). As a result, Spreadbury had numerous interactions with Library staff and, eventually, was banned from the Library. (SUF ¶ 4.) Subsequently, Spreadbury returned to the Library and was charged with criminal trespass (SUF ¶¶ 5-6.) The *Ravalli Republic*, a newspaper owned by Lee Enterprises, published articles stemming from the criminal trespass charges brought against Spreadbury. (SUF ¶ 7.) The articles were republished by the *Missoulian*, and other newspapers affiliated with Lee Enterprises. (SUF ¶ 8.) However, none of the articles contained personal opinions from the reporters but, instead, were based purely on official Ravalli County Court documents. (SUF ¶ 9.)

Similarly to Spreadbury's ban from the Library, around the same time period, Spreadbury was essentially banned from the offices of the *Ravalli Republic*, after being verbally abusive to *Ravalli Republic* staff. (SUF ¶ 10.)

Meanwhile, the *Ravalli Republic* and the *Missoulian* continued to report on the proceedings in Spreadbury's criminal trespass case. (SUF ¶¶ 11-12.) On September 10, 2009, the *Ravalli Republic* published an article regarding the trespass charges brought against Spreadbury. (SUF ¶ 11.) The article was

published on the *Ravalli Republic*'s website. (SUF ¶¶ 13-14.) Third-party, on-line readers made comments on the article. (SUF ¶¶ 15-16.) However, the *Ravalli Republic* did not encourage, create, or otherwise develop the comments, nor did it alter or otherwise edit the comments. (SUF ¶¶ 17-18.)

While the criminal trespass proceedings continued, Spreadbury was also charged with felony intimidation stemming from an encounter between Spreadbury and Roddy outside the Library. (SUF ¶¶ 19-20.) Roddy sought, and obtained, an Order of Protection against Spreadbury. (SUF ¶ 19.) Like the criminal trespass charges, both the *Ravalli Republic* and the *Missoulian* published articles regarding the felony intimidation charges brought against Spreadbury, but none of these articles contained personal opinions from the reporters. Instead, the articles were based on official Ravalli County Court documents. (SUF ¶¶ 20-21.)

On February 18, 2010, a jury in the City of Hamilton City Court found Spreadbury guilty of criminal trespass. (SUF ¶ 22.) The *Ravalli Republic* published an article regarding the conviction. (SUF ¶ 23.) Spreadbury subsequently appealed the decision. (SUF ¶ 22.)

In May 2010, Spreadbury filed separate lawsuits against Roddy, a Library employee, Angela Wetzsteon, and George Corn, employees for Ravalli County, and Kenneth Bell, employee for the City of Hamilton. (SUF ¶ 24.) The Defendants filed Motions for Summary Judgment and oral argument was heard

regarding each motion on August 6, 2010. (SUF ¶ 25.) The Ravalli District Court also held a pretrial conference regarding Spreadbury's appeal for his conviction of criminal trespass on August 6, 2010. (SUF ¶ 29.)

The Ravalli Republic published an article on August 9, 2010, regarding the hearings of August 6, 2010. (SUF ¶ 30.) The article correctly noted Spreadbury was previously charged and convicted for criminal trespass. (SUF ¶ 30.) On August 17, 2010, the criminal trespass charges were dropped. (SUF ¶ 32.) On August 24, 2010, the *Ravalli Republic* published a correction to the August 9, 2010 article, noting the City had subsequently dropped the charges of criminal trespass against Spreadbury. (SUF ¶ 34.) Spreadbury had requested the change. (SUF ¶ 33.)

It is undisputed that there were no false statements made in the August 9, 2010, *Ravalli Republic* article, and the alleged defamatory comments were made by third party, on-line readers and not the *Ravalli Republic*. Accordingly, Lee Enterprises is entitled to judgment as a matter of law as to all of Spreadbury's remaining counts.

III. ARGUMENT

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law."

Fed. R. Civ. P. 56(c)(2). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986.)

The Court in *Celotex* emphasized that summary judgment is not to be disfavored but, rather, employed as an "integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (citations omitted). Courts must construe Rule 56(c) with regard to the rights of both parties, including persons who oppose claims having no basis in fact. *Celotex*, 477 U.S. at 327. A party's failure to make a sufficient showing on an essential element of a case entitles the moving party to summary judgment as a matter of law. *Celotex*, 477 U.S. at 323.

Not all disputes create a genuine issue of material fact. "A dispute as to a material fact is 'genuine' if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997) (citation omitted), *overruled on other grounds by Ellington v. Dir. of Corrections*, 2009 WL 900168, slip op. (Mar. 31, 2009). Mere assertions or allegations by the opposing party, without factual support from the record, are

insufficient to defeat summary judgment. *Celotex*, 477 U.S. at 323-324. While this Court must view the evidence of record in the light most favorable to the non-moving party, "a mere scintilla of evidence or some metaphysical doubt as to material facts will not suffice to defeat summary judgment." *Scribner v. Worldcom, Inc.*, 249 F.3d 902, 907 (9th Cir. 2001) (citation and internal quotation omitted). Therefore, if there is no genuine dispute over the facts, this Court may enter judgment now.

Once the moving party has met its burden, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

A. Lee Enterprises Is Entitled to Summary Judgment As a Matter of Law.

It is undisputed that there were no false statements made in the August 9, 2010, *Ravalli Republic* article, and the alleged defamatory comments were made by third-party, on-line readers - not the *Ravalli Republic*.

Once it is shown that Lee Enterprises did not defame Spreadbury, his remaining allegations fail as a matter of law. Therefore, this brief will first examine Spreadbury's claim of defamation, as to the alleged false information published in the August 9, 2010, *Ravalli Republic* article and, then, examine Spreadbury's claim of defamation regarding the comments posted on the *Ravalli Republic's* website.

1. Count 19: Defamation.

Lee Enterprises is entitled to judgment as a matter of law, because it is undisputed the September 9, 2010, article did not contain any false information, and the alleged defamatory comments Spreadbury complains of in his Second Amended Complaint were made by third parties.

a. Defamation, as to the alleged false information published in an August 9, 2010 article.

Since it is undisputed the information published in the August 9, 2010, article was not false, Lee Enterprises is entitled to judgment as a matter of law. Spreadbury claims an August 9, 2010, article published in the *Ravalli Republic* contained false information, defaming Spreadbury. However, a review of the August 9, 2010 article, and the proceedings it summarizes, shows the article did not contain false information.

Traditionally, the term "libel" refers to defamatory statements made in writing. *Restatement (Second) of Torts* § 568 (WL current through Apr. 2011). Montana Code Annotated § 27-1-802 (2009) (emphasis added) defines libel:

> Libel is a false and *unprivileged* publication by writing, printing, picture, effigy, or other fixed representation that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a tendency to injure a person in the person's occupation.

However, certain communications are privileged. Section 27-1-804(4), "makes a fair and true report without malice of a judicial proceeding a privileged

publication." *Cox v. Lee Enters., Inc.*, 222 Mont. 527, 529, 723 P.2d 238, 239-240 (1986). In *Cox*, the Montana Supreme Court held pursuant to § 27-1-804(4):

> [A] qualified privilege is available as a defense for a newspaper publisher in a defamation case when the alleged defamation consists of facts taken from preliminary judicial pleadings which have been filed in court but which have not been judicially acted upon.

Cox, 723 P.2d at 240. The Court noted the definitions of "judicial proceedings" include:

> Any proceeding wherein judicial action is invoked and taken; [a]ny proceeding to obtain such remedy as the law allows; [a]ny step taken in a court of justice in the prosecution or defense of an action.

Cox , 723 P.2d at 240 (citation and internal quotation omitted). The Court also noted a modern trend of jurisdictions applying a qualified privilege to reports of judicial pleadings which have not yet been the subject of judicial action.

> Certainly, the administration of justice is of utmost importance to the citizenry. While we are aware that pleadings are one-sided and may contain, by design, highly defamatory statements, we believe the information found in such pleadings is of sufficient value as to warrant the encouragement of its publication.

Cox, 723 P.2d at 240 (quoting *Newell v. Field Enters., Inc.*, 415 N.E.2d 434, 444 (Ill. App. 1980) (internal quotations omitted).

Spreadbury's Second Amended Complaint alleges an August 9, 2010, article published by the *Ravalli Republic* contains false information about Spreadbury's ". . . criminal behavior, prior lawsuits filed, and comments made by Plaintiff in oral arguments before Judge Larson, in the 21st Judicial district court." (SUF ¶ 41.)

However, a review of the transcripts from the August 6, 2010, hearings, which the August 9, 2010, article summarizes, clearly shows the article does not contain false information. As such, it is a privileged publication pursuant to § 27-1-804(4), and Lee Enterprises is entitled to judgment as a matter of law.

First, with regards to the claim that the August 9, 2010, article contains false information about Spreadbury's "criminal behavior," the article correctly notes that Spreadbury was earlier found guilty of criminal trespass in an incident at the Library, and that on Friday, August 6, 2010, the Ravalli District Court had a pretrial hearing on an appeal by Spreadbury regarding the criminal trespassing conviction. (SUF ¶¶ 22, 29-30.) Spreadbury apparently believes the August 9, 2010, article contained false information about his "criminal behavior" because the criminal trespass charges were subsequently dropped on August 17, 2010. (SUF ¶ 32.) However, this does not change the truth of the August 9, 2010, article. After the charges were dropped, Spreadbury asked the *Ravalli Republic* to make the appropriate correction to the August 9, 2010 article. (SUF ¶ 33.) Accordingly, the *Ravalli Republic* made a correction in an August 24, 2010 article, noting the charges of criminal trespass had been subsequently dropped. (SUF ¶ 34.) Contrary to Spreadbury's allegations in his Second Amended Complaint, the August 9, 2010, article does not contain false information concerning his "criminal behavior."

Secondly, as it pertains to Spreadbury's allegations that the August 9, 2010, article contained false information regarding prior lawsuits filed by Spreadbury, the article simply summarizes arguments made by the City and County attorneys in cases brought by Spreadbury. (SUF ¶¶ 24-31.) The article's information concerning Spreadbury's prior law suits is true. As the transcripts from the August 6, 2011 hearings show, counsel for Defendant Bell, an employee of the City of Hamilton, argued for summary judgment pertaining to an Amended Complaint filed by Spreadbury in May 2010. (SUF ¶¶ 24-25.) On the same day, attorneys for Wetzsteon and Corn, employees for Ravalli County, argued for summary judgment pertaining to an Amended Complaint filed by Spreadbury in May 2010. (SUF ¶¶ 24-25.) Similarly, attorneys for Roddy, a Library employee, also argued for summary judgment stemming from an Amended Complaint filed by Spreadbury in May 2010. (SUF ¶ 24-25.)

The article further provides that in his Complaints against the City and County, Spreadbury claimed earlier prosecutions against him were made on improper grounds and with intentional malice. (SUF ¶¶ 30-31.) Again, this is true. (SUF ¶ 25.)

Finally, a review of the transcripts from the August 6, 2010, hearings shows that the August 9, 2010, article does not contain false information regarding comments made by Spreadbury. With regard to Spreadbury's claim against the

County, the article provides Spreadbury argued "Prosecutorial immunity did not cover the county attorney in this case . . . , because of the nature of the office's actions." (SUF ¶ 30.) A review of the transcripts shows this is, in fact, what Spreadbury argued. (SUF ¶¶ 25-27.) The article continues quoting Spreadbury as saying, "I'm not sure how George Corn is entitled to any immunity whatsoever." (SUF ¶ 30.) Although a review of the transcript shows Spreadbury actually said, "*I don't see* how George Corn is entitled to any immunity whatsoever," this is not evidence of the article being false. (SUF ¶ 26-27 (emphasis added).)

The article further provides Spreadbury argued immunity was not appropriate because his trial against him was argued by an unsupervised law student. (SUF ¶ 30.) The article is accurately summarizing what was said during the hearing. (SUF ¶ 27.)

The August 9, 2010, article then summarizes the arguments made during the hearing for the City's motion for summary judgment. (SUF ¶ 30.) The article correctly notes Spreadbury argued Bell had no authority to try a prior case against him. (SUF ¶¶ 28, 30.) Further, the hearing's transcript correctly notes Spreadbury said, ". . . he's lost in space . . . , and [I]t would be another year of fun," as stated in the August 9, 2010, article. (SUF ¶¶ 28, 30.) Similarly, page five of the hearing's transcript shows Spreadbury said the City's actions were "outrageous." (SUF ¶¶ 28, 30.)

Clearly, the August 9, 2010, article correctly noted the comments made by Spreadbury during the August 6, 2010 hearings, and it did not contain false information as alleged in Spreadbury's Second Amended Complaint.

Therefore, like the other articles Spreadbury claims were defamatory, the August 9, 2010, article alleged in Spreadbury's Second Amended Complaint to be defamatory is a privileged publication pursuant to § 27-1-804(4), since it was a fair and true report of a judicial proceeding. Accordingly, Lee Enterprises is entitled to judgment as a matter of law.

b. Defamation, as to the comments published by Lee Enterprises.

Similarly, Lee Enterprises is entitled to judgment as a matter of law concerning the comments to the September 10, 2009 article, since it is undisputed the comments were made by third party, on-line readers, and not the *Ravalli Republic*.

"Section 230 of the CDA [Communications Decency Act] immunizes providers of interactive computer services against liability arising from content created by third parties." *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008). Specifically, § 230(c) provides: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c).

"The CDA is intended to facilitate the use and development of the Internet by providing certain services an immunity from civil liability arising from content provided by others." *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009) (citation omitted). "Absent § 230, a person who published or distributed speech over the Internet could be held liable for defamation even if he or she was not the author of the defamatory text, and, indeed, at least with regard to publishers, even if unaware of the statement." *Batzel v. Smith*, 333 F.3d 1018, 1026-1027 (9th Cir. 2003) (citation omitted).

Lee Enterprises should be considered an "interactive computer service" as to the claims that Lee Enterprises published defamatory comments about Spreadbury on the *Ravalli Republic* website. "Recognizing that the Internet provided a valuable and increasingly utilized source of information for citizens, Congress carved out a sphere of immunity from state lawsuits for providers of interactive computer services to preserve the vibrant and competitive free market of ideas on the Internet." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (citations and internal quotations omitted); 47 U.S.C. § 230(b)(2) (WL current through July 2011). "Through this provision, Congress granted most internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

> The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. § 230(f)(2).

The definition of "interactive computer service" includes a wide range of cyberspace services. *Carafano*, 339 F.3d at 1123 (". . . reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service' . . . "); *see e.g. Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 n. 7, (Cal. App. 2 Dist. 2002) (on-line auction website is an "interactive computer service"); *Schneider v. Amazon.com, Inc.*, 108 Wash. App. 454, 460-461 (Wash. App. Div. 1 2001) (on-line bookstore Amazon.com is an "interactive computer service."); *see also Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 984 (10th Cir. 2000) (parties conceded that AOL was an interactive computer service when it published an on-line stock quotation services); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328-329 (4th Cir. 1997) (AOL assumed to be interactive computer service when it operated bulletin board service for subscribers).

"The prototypical service qualifying for this statutory immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posed by others." *F.T.C.*, 570 F.3d at 1195 (citation

omitted). In fact, Congress enacted the CDA in response to *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 *5 (N.Y. Sup. Ct. May 24, 1995) (unpublished), *superseded by statute by Zeran*, which held a provider of an online message board could be liable for defamatory statements posted by third parties. *See Fair Hous. Council*, 521 F.3d at 1163 (en banc).

In *Collins v. Purdue University*, 703 F. Supp. 2d 862 (N.D. Ind. 2010), the U.S. District Court was recently faced with the question of whether a newspaper that publishes articles on-line is liable for subsequent comments made about the articles by third parties. On January 13, 2007, Timothy J. Collins ("Collins"), a Purdue University student, reported being assaulted on the Purdue campus. On January 16, 2007, three days after Collins' alleged assault, another Purdue University student, Wade Steffey ("Steffey"), was reported missing. A search ensued, ending in Steffey's body being found in a utility closet on campus. Police questioned Collins regarding Steffey's death and later charged Collins with numerous criminal charges based on the results of a polygraph test. The School's newspaper ran an article regarding the charges brought against Collins. The article was later published on the newspaper's website, which allowed readers to post comments about the article. Numerous comments were made resulting in hostile treatment of Collins. *Collins*, 703 F. Supp. 2d at 867-869. Collins brought suit, alleging the University defamed him by publishing the comments made on the

website. The Court dismissed these claims; finding the newspaper's website was an interactive computer service as defined under the CDA and immune from liability.

Similarly, in *Nemet Chevrolet* ("Nemet"), the Fourth Circuit determined Consumeraffairs.com was immune from liability under the CDA. Nemet brought suit against Consumeraffairs.com, alleging defamation and tortious interference with business expectancy, for publishing posts made by third parties regarding Nemet's car business. However, the district court's order dismissing Nemet's complaint was upheld by the Fourth Circuit because the comments were made by third parties, and Consumeraffairs.com, an interactive computer service, did not develop or create the comments.

Likewise, in *Johnson v. Arden*, 614 F.3d 785 (8th Cir. 2010), the Eighth Circuit upheld the dismissal of Plaintiffs' complaint of defamation against InMotion Hosting Inc., an internet service provider pursuant to the CDA. *Johnson*, 614 F.3d at 792. The Johnsons owned and operated an exotic cat breeding business known as the Cozy Kitten Cattery. A third party allegedly made defamatory comments about the Johnsons' business on the interactive website www.ComplaintsBoard.com. The Johnsons filed suit against numerous parties, including InMotion Hosting, Inc., the internet service provider who hosted the www.ComplaintsBoard.com website. *Johnson*, 614 F.3d at 789. The district court

entered an order dismissing the claims against InMotion with prejudice, because the CDA barred Johnsons' claims against InMotion. The Eighth Circuit upheld the dismissal since it was undisputed that InMotion did not originate the material that the Johnsons deemed damaging. *Johnson*, 614 F.3d at 791.

Most recently, in *Miles v. Raycom Media, Inc.*, 2010 WL 3419438 at *3, slip op. (S.D. Miss. Aug. 26, 2010), the U.S. District Court dismissed Miles' claim of defamation against her former employer, because the employer was immune from liability under the CDA. While working as a news anchor for Raycom Media, Inc., Miles was arrested in a drug raid at a home she was visiting. As a result of the arrest, Miles was terminated from her employment. The television station ran a story on-line regarding the arrest and allowed third parties to make comments. Miles brought suit, alleging among other things, that Raycom defamed her by allowing third parties to make false comments about her on the website. *Miles*, 2010 WL 3419438 at *1. However, the court dismissed Miles' claim pursuant to the CDA since it was undisputed third parties made the comments, not Raycom. *Miles*, 2010 WL 3419438 at *3.

Ravalli Republic's website is an interactive computer service as defined by the CDA. The *Ravalli Republic* published articles on its website and allowed third parties to make comments. (SUF ¶ 14.) It is undisputed that the alleged defamatory comments to the September 10, 2009, article were made by third

parties. (SUF ¶¶ 14-16.) Accordingly, Lee Enterprises cannot be liable for publishing the comments made by third parties and they are entitled to judgment as a matter of law.

Arguably, the *Ravalli Republic* could also be considered an information content provider because it publishes articles on its website. Nevertheless, the *Ravalli Republic* would still be immune from liability regarding the comments because they were made by third parties, and the *Ravalli Republic* did not create or develop the comments.

"Under the statutory scheme, an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' *for the portion of the statement or publication at issue*." *Carafano*, 339 F.3d at 1123 (emphasis added).

> Critically, however, § 230 limits immunity to information provided by another information content provider. An information content provider is defined by the statute to mean any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service. The reference to *another* information content provider . . . distinguishes the circumstance in which the interactive computer service itself meets the definition of information content provider with respect to the information in question.

Batzel, 333 F.3d at 1031 (internal quotations and citations omitted) (emphasis in original).

To clarify,

> A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is "responsible, in whole or in part" for creating or developing, the website is also a content provider.

Fair Hous. Council, 521 F.3d at 1162.

Even though the newspaper provided the September 10, 2009, article which sparked the allegedly defamatory comments, the *Ravalli Republic* is still immune from liability because it did not create or develop the posted comments, nor did it encourage the readers to comment on the articles in a defamatory manner. *Collins*, 703 F. Supp. 2d at 878-879. *See Carafano*, 339 F.3d 1119 (even if a party is considered an information content provider, § 230(c) precludes treatment of a publisher if the information was provided by another information content provider).

"[A] service provider is "responsible" for the development of offensive content only if it in some way specifically encourages development of what is offensive about the content." *F.T.C.*, 570 F.3d at 1199; *see also Carafano*, 339 F.3d at 1124 ("Under § 230(c), therefore, so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.").

The development of information means substantially more than making edits

and selecting material for publication. *See Batzel*, 333 F.3d at 1031 (the mere selection and minor alterations to an email did not make party the content provider of email for purposes of § 230). Even if an information content provider edits comments made by a third party, they are not liable for the comments. *See Batzel*, 333 F.3d at 1031 (making minor alterations to an email did not make party the content provider for purposes of § 230).

Nor can Lee Enterprises be liable for comments made by third parties, even after being put on notice of the comments. *See Murawski v. Pataki*, 514 F. Supp. 2d 577, 591 (S.D. N.Y. 2007) (citation omitted) ("Deciding whether or not to remove content or deciding when to remove content falls squarely within Ask.com's exercise of a publisher's traditional role and is therefore subject to the CDA's broad immunity."); *see also Zeran*, 129 F.3d at 330 (CDA immunized AOL from liability for failing to remove a defamatory posting from an online bulletin board); *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2002) (service provider not negligent for failing to police comments); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929 (D. Ariz. 2008) (even after service provider is put on notice of allegedly defamatory comments, they are still immune from liability under CDA).

Lee Enterprises is immune from liability regarding the allegedly defamatory comments because it is undisputed they were made by third parties. (SUF ¶¶ 14-

16.) A review of the comments clearly shows they were made by third parties and Spreadbury admits they were made by third party, on-line readers, and not the *Ravalli Republic*. (SUF ¶¶ 14-16.) Further, Lee Enterprises did not encourage, create, or otherwise develop the comments made by third parties. (SUF ¶ 17.) Moreover, the *Ravalli Republic* has not altered or otherwise edited the comments made by third parties on the *Ravalli Republic* website. (SUF ¶ 18.) Accordingly, Lee Enterprises is immune from liability under the CDA and entitled to judgment as a matter of law.

2. Count 8: Tortious Interference With Prospective Economic Advantage.

Since Lee Enterprises cannot be liable for comments made by third parties on the *Ravalli Republic* website and for the August 9, 2010 article, they have committed no wrongful acts. Therefore, Lee Enterprises is entitled to summary judgment for Spreadbury's claim of tortious interference with prospective economic advance.

To establish a case of intentional interference with prospective business advantage, a plaintiff must show acts which: (1) were intentional and willful; (2) were calculated to cause damage to the plaintiff's business; (3) were done with unlawful purpose of causing damages or loss, without right or justifiable cause on the part of the actor; and (4) resulted in actual damages or loss. *Sebena v. Am. Automobile Assn.*, 280 Mont. 305, 309, 930 P.2d 51, 53 (1996). In a

cause of action for intentional interference with prospective economic advantage ". . . the focus on the legal inquiry is on the intentional acts of the malicious interloper in disrupting a business relationship." *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 42, 298 Mont. 213, 994 P.2d 1124.

> Under this theory a person who is involved in an economic relationship with another, or who is pursuing reasonable and legitimate prospects of entering such a relationship, is protected from a third person's wrongful conduct which is intended to disrupt the relationship.

Maloney, ¶ 42 (internal quotations and citation omitted).

In *Hughes v. Lynch*, 2007 MT 177, 338 Mont. 214, 164 P.3d 913, the Montana Supreme Court determined Hughes failed to establish a tortious interference claim because, among other reasons, Hughes' allegations that Lynch's actions were done with the unlawful purpose of causing damages were supported by nothing but speculation.

Like in *Hughes*, Spreadbury's claim is not supported by anything but speculation. Spreadbury claims the comments on *Ravalli Republic's* website defamed him. However, as provided above, since these comments were made by third parties, Lee Enterprises cannot be liable. Likewise, the August 9, 2010, article was a privileged publication, as it is a true report based on judicial proceedings. Therefore, as a matter of law, Lee Enterprises did not take any action without right or justification and Lee Enterprises is entitled to judgment as a matter

of law.

3. Count 18: Negligence.

Like Spreadbury's claim of tortious interference with prospective business advantage, his claim for negligence fails since it is undisputed Lee Enterprises did not have a duty regarding publishing comments made by third parties on the *Ravalli Republic* website and the August 9, 2010, article is a privileged publication.

"Negligence is the failure to use the degree of care that an ordinarily prudent person would have used under the same circumstances." *Peterson v. Eichhorn*, 2008 MT 250, ¶ 23, 344 Mont. 540, 189 P.3d 615.

> To maintain an action in negligence, the plaintiff must prove four essential elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached that duty, (3) the breach was the actual and proximate cause of an injury to the plaintiff, and (4) damages resulted.

Peterson, ¶ 23. "The question of whether a duty exists is one of law. Absent a duty, breach of duty cannot be established and a negligence action cannot be maintained." *Sikorski v. Johnson*, 2006 MT 228, ¶ 13, 333 Mont. 434, 143 P.3d 161.

In accordance with § 230 of the CDA, Lee Enterprises cannot be liable for comments made on the *Ravalli Republic* website. Therefore, it cannot be found negligent for these comments as a matter of law. Similarly, Lee Enterprises cannot

be negligent for the August 9, 2010, article since it is a privileged publication pursuant to § 27-1-804(4).

4. Count 20: Intentional Infliction of Emotional Distress.

Likewise, Spreadbury's claims of Intentional and Negligent Infliction of Emotional Distress ("IIED" and "NIED") fail as a matter of law.

Montana law allows IIED to be pled as a separate cause of action. *See Sacco v. High Country Indep. Press, Inc.*, 271 Mont. 209, 235, 896 P.2d 411, 427 (1995). However, the plaintiff has the burden of coming forth with material and substantial evidence to support his/her claim. *See McConkey v. Flathead Elec. Coop.*, 2005 MT 334, ¶ 54, 330 Mont. 48, 125 P.3d 1121. In turn, the trial court must determine "whether a plaintiff has introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress." *Sacco*, 896 P.2d at 427 (citing *Doohan v. Big Fork Sch. Dist. No. 38*, 247 Mont. 125, 142, 805 P.2d 1354, 1365 (1991), *overruled on other grounds by Sacco*). If the evidence presented by the plaintiff is insufficient as a matter of law, his claim must fail. *See McConkey*, ¶ 54.

Lee Enterprises is entitled to judgment as a matter of law with regard to Spreadbury's claim for IIED, because Lee Enterprises cannot be liable for what allegedly caused the emotional distress. As provided above, Lee Enterprises is immune from liability under the CDA because it is undisputed the alleged

defamatory comments on the *Ravalli Republic* were made by third parties – not the *Ravalli Republic*. Lee Enterprises also cannot be liable for the August 9, 2010, article because it is a privileged publication.

Similarly, Lee Enterprises is entitled to judgment as a matter of law regarding Spreadbury's claim of NIED, since Lee Enterprises is immune from Spreadbury's claim of negligence.

> A cause of action for negligent infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's negligent act or omission.

Sacco, 896 P.2d at 425. It logically follows that for Spreadbury to have a claim of NIED he must show Lee Enterprises was negligent and the negligence caused the alleged emotional distress. *See Wages v. 1st Natl. Ins. Co. of Am.*, 2003 MT 309, ¶ 23, 318 Mont. 232, 79 P.3d 1095 (noting duty and foreseeability are inextricably linked in a negligent infliction of emotional distress claim); *Sacco*, 896 P.2d at 422-423 (in the absence of foreseeability, there is no duty; in the absence of duty, there is no negligence).

Since Lee Enterprises cannot be found negligent for the comments made by third parties, and the August 9, 2010 article, Lee Enterprises is also entitled to judgment as a matter of law with regards to Spreadbury's claim of NIED.

Accordingly, Lee Enterprises is entitled to judgment as a matter of law concerning Spreadbury's claim for both IIED and NIED.

5. Count 23: Injunctive Relief.

Lee Enterprises is entitled to judgment as a matter of law with regards to Spreadbury's claim for injunctive relief, as to the comments published on the *Ravalli Republic* website and concerning the August 9, 2010 article.

Spreadbury's Second Amended Complaint essentially requests the Court order Lee Enterprises to stop publishing comments and articles about Spreadbury. However, Lee Enterprises is not liable for these comments since they were made by third parties. Further, Lee Enterprises cannot be liable for the August 9, 2010, article because it is a privileged publication. Since it does not appear that Spreadbury is entitled to the relief demanded, an injunction is not proper. *See* Mont. Code Ann. § 27-19-201 (2009).

Further, within Count 23 of Spreadbury's Second Amended Complaint is a request for civil arrest of Lee Enterprises' employee and reporter, Perry Backus, per Montana Code Annotated § 27-16-102(2). Lee Enterprises is entitled to summary judgment regarding this portion of Count 23 because § 27-16-102(2) gives Spreadbury no authority to civilly arrest anyone.

6. Count 26: Punitive Damages.

Lee Enterprise is entitled to judgment as a matter of law regarding Spreadbury's claim for punitive damages.

"[N]o plaintiff is ever entitled to exemplary damages as a matter of right,

regardless of the situation or the sufficiency of the facts." *Maulding v. Hardman*, 257 Mont. 18, 26-27, 847 P.2d 292, 298 (1993) (internal quotations and citations omitted) (finding an award of punitive damages was improper since there was no evidence to support plaintiff's claim). "Section 27-1-221, MCA, governs the award of punitive damages. It provides that reasonable punitive damages may be awarded in a non-contract action when a defendant has been found guilty of actual fraud or actual malice." *Trifad Ent., Inc. v. Anderson*, 2001 MT 227, ¶ 53, 306 Mont. 499, 36 P.3d 363.

"All elements of punitive damages must be supported by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Trifad Ent.*, ¶ 54; Mont. Code Ann. § 27-1-221(5) (2009).

Spreadbury's claim that Lee Enterprises acted with malice fails as a matter of law because Lee Enterprises cannot be liable for the comments posted on the *Ravalli Republic* website, and the August 9, 2010, article is a privileged publication.

Moreover, Spreadbury's claim for punitive damages against Lee Enterprises fails if his other Counts are dismissed. *See Maulding*, 847 P.2d at 298.

Spreadbury's claim for punitive damages cannot stand alone. Therefore,

since Lee Enterprises is entitled to judgment as a matter of law as to Spreadbury's remaining Counts, it follows that Lee Enterprises is entitled to judgment with regards to Spreadbury's requested relief of punitive damages as well.

IV. CONCLUSION

Lee Enterprises is entitled to judgment as a matter of law with respect to the remaining Counts against Lee Enterprises contained in Spreadbury's Second Amended Complaint. It is undisputed the comments complained of in Spreadbury's Second Amended Complaint were made by third parties, not the *Ravalli Republic*. Further, it is undisputed the August 9, 2010, article is a privileged publication as it did not contain false information. Accordingly, Lee Enterprises cannot be liable for Spreadbury's remaining claims and Lee Enterprises is entitled to judgment as a matter of law.

DATED this 28th day of September, 2011.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this DEFENDANT LEE ENTERPRISES, INC.'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON REMAINING COUNTS is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2007, is 6425 words long, excluding Caption, Certificate of Service, and Certificate of Compliance.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2011, a copy of the foregoing document was served on the following persons by the following means:

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