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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 REPLY 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 Reply Brief in Support of Its Motion for Summary Judgment on Remaining Counts.

I. INTRODUCTION

In its Opening Brief, Lee Enterprises argued it was entitled to summary

judgment regarding the allegations concerning the August 9, 2010, article, because it is undisputed the August 9, 2010, article was not false. Dkt. 109. In his response brief, Plaintiff Michael Spreadbury ("Spreadbury") argues there are material issues of fact precluding summary judgment. First, Spreadbury pointed out a discrepancy between the original August 9, 2010, article and the article which is currently on the *Ravalli Republic* website. Lee Enterprises' counsel has subsequently amended his Foundational Affidavit in Support of Motion for Summary Judgment on Remaining Counts, appropriately rectifying the discrepancy. Dkt. 124.

However, even though the original August 9, 2010, article inaccurately states Spreadbury was convicted of "disturbing the peace," when, in fact, at the time the article was written, he had been convicted of criminal trespassing - charges which were subsequently dropped - Lee Enterprises is still entitled to judgment as a matter of law, because Spreadbury has failed to establish Lee Enterprises defamed Spreadbury from the inaccurate information, and the remaining portions of the August 9, 2010, article are true, and, therefore, privileged publications.

Secondly, there are no issues of material fact that the alleged defamatory comments posted on the *Ravalli Republic* website, regarding the September 10, 2009 article, were made by third-party on-line readers, and not the *Ravalli Republic*. As such, Lee Enterprises is immune from liability and entitled to

judgment as a matter of law.

II. ARGUMENT

Although the August 9, 2010, article contains an inaccuracy about Spreadbury's prior criminal conviction, Lee Enterprises is, nevertheless, entitled to summary judgment because Spreadbury has failed to establish the essential elements of his remaining claims against Lee Enterprises.

"[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).

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. (E.D. Cal. 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.

Spreadbury contends there are issues of material fact which preclude

summary judgment. For example, Spreadbury argues there are issues of material fact regarding whether the Hamilton Library owns its property and whether Spreadbury was abusive with Lee Enterprises' staff (Dkt. 115-2, ¶¶ 21-26). However, these arguments are without merit and have nothing to do with Spreadbury's remaining allegations against Lee Enterprises. Like the rest of Spreadbury's claimed issues of fact, which are individually dismantled below, these alleged disputes are not genuine, and are simply assertions, without factual support, insufficient to defeat summary judgment. *See Celotex*, 477 U.S. at 323-324.

1. Count 19: Defamation.

Lee Enterprises is entitled to judgment as a matter of law, because it is undisputed Spreadbury has failed to establish he was defamed by the August 9, 2010, article and the comments on the *Ravalli Republic* website were made by third-party on-line readers.

a. Defamation, as to the August 9, 2010 article.

Montana Code Annotated § 27-1-802 (2011) 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.

Although the August 9, 2010, article inaccurately stated Spreadbury was

previously convicted of "disturbing the peace," when it should have read "criminal trespass," Lee Enterprises is still entitled to summary judgment because it is undisputed Spreadbury has not established the inaccurate information exposed him to "hatred, contempt, ridicule, or obloquy or [caused him] to be shunned or avoided or that" the inaccuracy injured his occupation. Instead, Spreadbury only offers mere assertions, without factual support from the record, which are insufficient to defeat summary judgment. *See Celotex*, 477 U.S. at 323-324.

More specifically, Spreadbury has failed to establish exposure to such damages from the time the article was published and when the *Ravalli Republic* published the correction. Spreadbury asked the *Ravalli Republic* to make the appropriate correction to the August 9, 2010 article. Dkt. 110 at ¶ 33. Accordingly, the *Ravalli Republic* made a correction in an August 24, 2010, article (Dkt. 110 at ¶ 34.). Spreadbury claims the correction is insufficient as it "did not mention, or correct the published error and falsehood stating I was convicted of Disturbing the Peace." Dkt. 115-2 at ¶ 18. However, the correction clearly provides, "An article on the front page of the Aug. 9 edition of the Ravalli Republic incorrectly identified a charge against Hamilton resident Michael Spreadbury. The article should have stated that Spreadbury was appealing a conviction of criminal trespassing, . . ." Dkt. 124-10 at 2. Moreover, the August 9, 2010, article, currently available on-line, accurately depicts that Spreadbury, at the

time of the article, had been convicted of criminal trespass, not disturbing the peace. Dkt. 124-8.

Spreadbury has not alleged, let alone established, he suffered any damages during this time period. Rather, his claims for alleged damages focus on the on-line comments which were made in the September 10, 2009, article and an August 20, 2009, article which reported on the criminal trespass charges. Dkt. 90. Further, the August 9, 2010, article could not have effected Spreadbury's occupation since he had already lost his job and candidacy for mayor of the City of Hamilton. Dkt. 90 at ¶ 74.

Further, Spreadbury could not have been defamed by the inaccuracy in the August 9, 2010, article, because "disturbing the peace" is a lesser offense than what Spreadbury had actually been convicted of at the time of the article. Montana Code Annotated § 45-6-203 (2011) provides: "[a] person convicted of the offense of criminal trespass to property shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both." In contrast, the punishment for a person convicted of the offense of disturbing the peace, or disorderly conduct, generally shall not exceed $100 or be imprisoned in the county jail for a term not to exceed 10 days, or both. *See* Mont. Code Annotated § 45-8-101 (2011). Stating Spreadbury had been convicted of a lesser offense could not have exposed him to such damages, as required in a defamation claim.

It should also be noted that, although the August 9, 2010, article mistakenly states Spreadbury was convicted of disturbing the peace, later in the article it correctly states, "Spreadbury was found guilty this winter of *criminal trespass* in an incident at the Bitterroot Public Library." Dkt. 123, Ex. K, page 2(emphasis added). The article subsequently provides, while summarizing arguments made by Spreadbury, "[t]he entire case, he said, was without merit since it ought to be impossible to charge someone for *trespassing* in a public space. What if Bell wanted to prosecute Spreadbury for *trespassing* while in court, Spreadbury asked." Dkt. 124-11 at 2 (emphasis added). Clearly, the August 9, 2010, article could not have exposed Spreadbury to the requisite damages for his defamation claim when the article itself provides Spreadbury was previously convicted of criminal trespassing.

Lee Enterprises is also entitled to summary judgment as a matter of law since Spreadbury has failed to establish Lee Enterprises acted with malice in publishing the August 9, 2010 article, as Spreadbury was a limited public figure who voluntarily injected himself into his own public controversy. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Kurth v. Great Falls Trib. Co.*, 246 Mont. 407, 409-410, 804 P.2d 393, 394-395 (1991).

Finally, the remaining portions of the August 9, 2010, article are privileged communications. 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).

Spreadbury claims the August 9, 2010, article is false concerning the amount of money Spreadbury was suing for, arguing it incorrectly describes " . . . spralling [sic] $3.6 million cases . . . " Dkt. 115-2 at ¶ 12. However, Spreadbury takes the August 9, 2010, report out of context. The report referenced the amount of money Spreadbury was seeking in numerous cases filed against the county's civic and municipals officials. Dkt. 124-11. This was true, as Spreadbury had recently filed a suit in Federal Court seeking $3.6 million against such defendants. *See* Ex. A: Compl. & Demand Jury Tr., *Spreadbury v. Hoffman* (U.S.D.C., Dist. of Mont., Missoula Div. May 11, 2010). Although the August 9, 2010, article may have inaccurately inferred Spreadbury was seeking $3.6 million in the state court actions, it is still true that Spreadbury was concurrently seeking $3.6 million.

Similarly, Spreadbury claims "[t]he August 9, 2010 article falsely indicated that Hamilton City Attorney Bell's actions of November 20, 2009 acting within a civil courtroom were '. . . the normal scopes of duties . . .' of a city prosecutor although a crime of Official Misconduct in Montana . . . ." Dkt. 115-2 at ¶ 13. Again, Spreadbury takes the August 9, 2010, article out of context. A simple reading of the article shows it was summarizing the argument of Bell's attorney. The August 9, 2010, article provided the City's attorney said, "Bell's actions fell

within the normal scope of duties of a city attorney." Dkt. 124-11 at 2. A review of the transcript clearly shows this is what Bell's attorney argued and, therefore, the August 9, 2010, article was not false.

Similarly, Spreadbury's argument that the August 9, 2010, article incorrectly indicates Spreadbury said Mr. Fullbright supervised Law Student Angela Wetzsteon, is without merit. The transcript from the proceedings indicates Spreadbury said, "If he [Mr. Corn] was sitting at his desk right over here and Angela Wetzsteon was downstairs in the Justice Courts, outside of the speedy trial time period, eight months into a trial, I don't see how George Corn is entitled to any immunity whatsoever." Dkt. 124-4 at 7:7-11. Later, Spreadbury argued Ms. Wetzsteon was not getting clinical instruction because Mr. Corn was outside of the courtroom. "It's clinical instruction. You're not getting clinical instruction when you're standing there alone. You're not being watched." Dkt. 124-4 at 10:21-23. The August 9, 2010, article summarized Spreadbury's arguments - that he disagreed with the way in which Wetzsteon was supervised, or the lack thereof.

Accordingly, Lee Enterprises is entitled to judgment as a matter of law concerning Spreadbury's claims of defamation from the August 9, 2010, article. Spreadbury has failed to establish how any inaccuracy in the August 9, 2010, article exposed him to the requisite damages, and/or that Lee Enterprises had the requisite intent in mistakenly publishing the inaccuracy, as Spreadbury was a

limited public figure who voluntarily injected himself into his own public controversy. Furthermore, the remaining information reported in the August 9, 2010, article is true, based on a judicial proceeding and, therefore, privileged.

b. Defamation, as to the comments posted on the *Ravalli Republic*'s Website.

It is undisputed the comments posted on the *Ravalli Republic*'s website were made by third-party, on-line readers. Accordingly, Lee Enterprises is entitled to judgment as a matter of law.

"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). Lee Enterprises' opening brief thoroughly set forth the purpose of the CDA and gave specific case examples in order to show Lee Enterprises should be considered an "interactive computer service," and, therefore, immune from liability as to the claim that Lee Enterprises published defamatory comments about Spreadbury on the *Ravalli Republic* website.

In response, Spreadbury argues "Publishers of newspaper such as Defendant

Lee [Enterprises], are found liable for '. . . publishing or distributing obscene or defamatory material written by others." Dkt. 115-1 at 4 (citing *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003).) However, Spreadbury takes the quote from *Batzel* out of context. In *Batzel*, the Ninth Circuit was explaining the purpose behind Congress' enactment of the CDA. The Court in *Batzel* did not, as implied by Spreadbury, hold newspapers are exempt from the CDA. Rather, the Court was explaining the policy of the CDA and clarifying it applied to cyberspace, and not printed material. *See Batzel*, 333 F.3d at 1026.

Spreadbury also argues Lee Enterprises is not an internet service provider, and accuses Lee Enterprises of misleading the Court in citing to *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003), in support of its claim. Dkt. 115-1 at 4. However, Spreadbury fails to recognize courts have defined "computer service provider" broadly, which was the purpose for citing *Carafano.*

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'").

More specifically, courts have defined newspapers, or similar businesses which publish articles on-line, as interactive computer services as defined under

the CDA. In *Collins v. Purdue University*, 703 F. Supp. 2d 862 (N.D. Ind. 2010), the U.S. District Court dismissed Collins' case, alleging the University defamed him by publishing comments made on the University newspaper website, because the comments were made by third-party, on-line readers and the newspaper was an interactive computer service. In *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009), the Fourth Circuit determined Consumeraffairs.com was immune from liability under the CDA and, in doing so, dismissed Nemet's case against Consumeraffairs.com, alleging defamation and tortious interference with business expectancy, for publishing posts made by third parties regarding Nemet's car business.

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, and could not be liable for comments made by third parties to a story on its website.

Moreover, it is undisputed that the *Ravalli Republic* did not encourage the alleged defamatory comments. Dkt. 110 at 17. "[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. v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009); *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.").

As explained in its opening brief, the *Ravalli Republic* could also be considered an "information content provider" because it published the September 10, 2009, article which sparked the alleged defamatory comments on its website. Nevertheless, Lee Enterprises would still be immune from liability, since the alleged defamatory comments were made by third parties. *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 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.

In summary, Lee Enterprises is immune from liability under the CDA and

entitled to judgment as a matter of law. The *Ravalli Republic's* website is an interactive computer service as defined by the CDA. It is undisputed that the alleged defamatory comments to the September 10, 2009, article were made by third parties and the *Ravalli Republic* did not encourage the alleged defamatory comments. Dkt. 110 at ¶¶ 14-17. 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.

2. Spreadbury's Remaining Counts Fail As A Matter of Law.

Since Lee Enterprises is entitled to summary judgment concerning Spreadbury's claims of defamation for comments made by third parties on *Ravalli Republic*'s website, and for the August 9, 2010, article, Lee Enterprises is entitled to summary judgment on all remaining counts.

Regarding Spreadbury's claims of tortious interference with prospective advantage and negligence, Lee Enterprises has committed no wrongful acts and owed no duty to Spreadbury concerning the comments posted by third parties on the *Ravalli Republic* website, and Spreadbury has failed to establish the August 9, 2010, article exposed him to the requisite damages, and/or that Lee Enterprises had the requisite intent in publishing the article to support Spreadbury's claims. Likewise, Spreadbury's claims of intentional and negligent infliction of emotional distress fail as a matter of law, because he has failed to establish sufficient

evidence for such claims. Finally, Spreadbury's claim for injunctive relief fails since he is not entitled to the relief demanded and, similarly, he is not entitled to punitive damages once the other Counts are dismissed, as a claim for punitive damages cannot stand alone.

III. 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 on-line comments complained of in Spreadbury's Second Amended Complaint were made by third parties, not the *Ravalli Republic*. Further, Spreadbury has failed to present any evidence, let alone establish, that Lee Enterprises' act of misstating Spreadbury's prior criminal conviction in the August 9, 2010, article exposed him to the requisite damages for his defamation claim, and/or that Lee Enterprises had the requisite intent in mistakenly publishing the inaccuracy, as Spreadbury was a limited public figure who voluntarily injected himself into his own public controversy. 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 20th day of October, 2011.

/s/ Jeffrey B. Smith
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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 Reply 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 3247 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

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CERTIFICATE OF SERVICE

I hereby certify that on October 20th, 2011, a copy of the foregoing document was served on the following persons by the following means:

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