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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

Lee Enterprises, Inc. ("Lee Enterprises" or "Lee"), through its counsel, Garlington, Lohn & Robinson, PLLP, respectfully files its Reply Brief in Support of its Motion for Summary Judgment.

I. INTRODUCTION

As detailed in Lee's Opening Brief, Plaintiff, Michael Spreadbury ("Spreadbury"), is a local public figure who gained notoriety in the Ravalli County community by deliberately and persistently creating or interjecting himself into multiple public controversies for the purpose of affecting the course of public affairs. These public controversies include alleged corruption, illegal conduct, and constitutional violations by the local police, judicial system, city and county governments, state agencies, federal agencies, various public officials, businesses, and individuals.

In his response, Spreadbury does not refute this or raise any genuine issue of fact material to his status as a limited public figure. Instead, he uses his Response Brief and Statement of Disputed Facts to re-argue matters already decided by the Court and matters not relevant to the issue of whether he was a limited public figure. For example, Spreadbury argues Lee's August 9, 2010, publication was malicious (Dkt. 267:5-6). He offers no new facts, and the Court has already determined Lee did not act with malice, as a matter of law. (Dkt. 249.) Spreadbury's reference to Lee's filing of a corrected affidavit (Dkt. 124) is immaterial. Spreadbury's arguments about emotional distress, conspiracy, punitive damages, and liability for on-line reader comments may be disregarded as they have already been decided. (Dkt. 249.)

Spreadbury's redundant discussion of other issues of concern to him, such as his claim that Lee has filed "serial summary judgment [motions]" (Dkt. 267), that a law student was not properly supervised, that Lee had no right to exclude him from its office, the relevance of his record of disability, and so on, do not affect the outcome of this motion. Nor does his allegation that Backus' Affidavit (Dkt. 261-1) makes a false and misleading statement, as that was timely remedied by the filing of an Amended Affidavit, Dkt 261-1. (*See* Dkts. 272, 277.) None of these issues create a genuine issue of material fact on whether Spreadbury was a limited public figure at the time of the August 9, 2010, article, whether Lee breached the applicable standard of care, or whether Lee acted with malice.

II. ARGUMENT

A. Spreadbury Has Not Met His Burden of Demonstrating the Existence of a Genuine Issue of Material Fact About Whether He Was a Limited Public Figure

Lee met its initial burden of showing there is no genuine dispute of fact that Spreadbury was a limited public figure by producing documentary evidence that permits only that conclusion. (*See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). Once Lee did so, the burden shifted to Spreadbury to go beyond the pleadings and identify *specific facts* showing there is a genuine issue of fact for trial. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 324 (1986). Spreadbury cannot meet that burden by relying on allegations, speculation, or conclusory legal

theories. *Anderson*, 477 U.S. at 248. Mere disagreement or bald assertion about the interpretation of a fact does not create a genuine issue of material fact. *In Re Wash. Mut. Overdraft Protection Litig.*, 539 F. Supp. 2d 1136, 1144 (C.D. Cal. 2008).

Spreadbury does not dispute the legal standard: "Limited purpose public figures" have voluntarily injected themselves into a particular public controversy and, thereby, become public figures for that limited range of issues. *Kurth v. Great Falls Trib. Co.*, 246 Mont. 407, 409, 804 P.2d 393, 394 (1991) (*citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). In his Statement of Disputed Facts, Spreadbury did not dispute or deny the authenticity of any of the evidence produced by Lee, showing his local notoriety, public protests, and involvement in public controversies. Spreadbury admits to thrusting himself into controversy (*see* Dkt. 268:¶ 4) and admits to being a public figure (Dkt. 268:¶ 5).

Nor did Spreadbury produce any facts that create a dispute about whether Lee acted with malice. The Court has already determined that if Spreadbury were a limited public figure, Lee is entitled to judgment as a matter of law on the remaining claim of defamation per se, because Lee did not act with malice. (Dkt. 249:9, 11.)

Spreadbury does not dispute the facts. He merely argues these undisputed facts should not be interpreted to find he is a public figure. Thus, the matter is

appropriate for summary judgment.

Spreadbury first cites a concurring opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), for the proposition that he cannot be considered a public figure because he "swears never to have any influence on the finalized public policy and has no ear on any public official more than any other private citizens." (Dkt. 267:4.) In other words, he could only be a public figure if he was actually capable of successfully influencing public affairs. This argument is not supported by the case cited.

The quote from *Curtis* is from Justice Warren's concurring opinion in which he agrees with the results of the majority, but disagrees with the majority's decision to differentiate between "public figures" and "public officials." *See Curtis Publg.*, 388 U.S. at 163-165. The quote cited by Spreadbury was Justice Warren's explanation why he did not agree with the majority's distinction. It does not change the law. Persons who, like Spreadbury, have voluntarily injected themselves into a particular public controversy, are limited public figures. *See Kurth*, 804 P.2d at 394.[1]

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[1] Nevertheless, to the public, Spreadbury proudly claims credit for successfully affecting public affairs. On April 18, 2012, he posted "an open letter to George Corn, former Ravalli County Attorney" in which he refers to his previous writings about Mr. Corn and claims "I played by the rules AND I kicked your ass. . . . The best way we put you in your place was to have 15 Million people in the world wonder who the hell you were. The letter to the first African American US President about YOUR civil rights violations is a hit. They google

Next, Spreadbury cites to *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), for the proposition that he cannot be considered a public figure because the August 9, 2010, article reported on judicial proceedings. (Dkt. 267:4.) This is not the holding of *Firestone*. The Court in *Firestone* rejected the petitioner's argument that all reports from judicial proceedings should be considered matters of public concern. 424 U.S. at 455. Lee is not arguing that Spreadbury was a public figure because he was present at the August 6, 2010, judicial proceedings. As explained in Lee's Opening Brief, Spreadbury was a public figure long before the August 6, 2010, hearing and the August 9, 2010, article. It was his public notoriety that made his appearance at judicial proceedings a matter of public interest, not the other way around. Further, Spreadbury's lawsuits were against public servants and policy makers alleging malfeasance, clearly matters of public concern.

Spreadbury also argues the *New York Times* standard does not apply to reports of court proceedings, citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Again, Spreadbury's interpretation of case law is incorrect. In *Cox Broadcasting*, the Court held the U.S. Constitution prevents states from imposing sanctions for publication of truthful information contained in official court records

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your name, and read this Mr. Corn. . . . I feel a great sense of accomplishment for bringing you to justice for all of your victims. . . . It is amazing what the people can do; like showing a tyrant who they actually are. . . ." Signed, Michael E. Spreadbury. www.nansuroddy.com/

open to public inspection. *Cox Broadcasting*, 420 U.S. at 495. The case does not prohibit application of the limited public figure doctrine when the alleged defamation occurs in a report on judicial proceedings.

Spreadbury's reliance on simply asserting he was a private citizen is insufficient to create a genuine issue of fact. *See Celotex,* 477 U.S. at 323-324. Similarly, Spreadbury's allegations, arguments, and legal conclusions in his Statement of Disputed Facts (Dkt. 268) and Affidavit (Dkt. 267-1) are not, in fact, evidence, and do not create a genuine issue of material fact. *See* Fed. R. Civ. P. 56(c)(1).

Spreadbury has failed to satisfy his burden of establishing any dispute of fact on the issue of whether he was a limited public figure at the time of the August 9, 2010, article. Lee is, therefore, entitled to judgment as a matter of law on defamation per se and the remaining companion claims. Dkt. 249:10.

B. Spreadbury Has Not Met His Burden of Demonstrating the Existence of a Genuine Issue of Material Fact About Whether Lee's Agents Met the Standard of Care for a Professional Journalist

Even if Spreadbury were a private figure, Lee is still entitled to summary judgment because Lee has produced evidence that negates an essential element of his negligence claim, and Spreadbury failed to respond with any evidence showing the existence of a genuine issue of fact. The Court has already determined if Spreadbury were a private figure when the August 9, 2010, article was published, a

negligence standard applies. (Dkt. 249:7-8, 11.) A breach of the applicable standard of care is an essential element of a negligence claim. *See Dubiel v. Mont. Dept. of Transp.*, 2012 MT 35, ¶ 14, 364 Mont. 175, 272 P.3d 66. "It is well established that if a plaintiff fails to offer proof of any one of the elements of a negligence claim, the negligence action fails and summary judgment in favor of the defendant is proper." *Dubiel*, ¶ 12.

Lee provided expert testimony that it did not breach the standard of care applicable to professional journalists. Spreadbury provided no contrary evidence, relying on his own mere denial. Therefore, it is undisputed the *Ravalli Republic* did not breach the industry standard of care in fact-checking the August 9, 2010, article and issuing the August 24, 2010, correction. (Dkt. 261:¶ 51.)

Spreadbury realleges his non-expert opinion that the mere existence of an error in the August 9, 2010, article proves negligence. (Dkt. 267.) He did not dispute that the standard of care for professional journalists is outside the scope of the common experience and knowledge of jurors, and expert testimony is required to establish the standard of care. *See Wilderness Dev., LLC v. Hash*, 606 F. Supp. 2d 1275, 1280 (D. Mont. 2009).

Spreadbury's lay opinion regarding the standard is not admissible. Federal Rule of Civil Procedure 56(c)(1)(4) provides:

> An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

Spreadbury has not established that he is competent to testify on the standard of care for journalists with regard to fact checking.

Lee satisfied its burden of bringing forth evidence negating an essential element of Spreadbury's negligence claim. *Nissan Fire & Marine Ins. Co. Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Spreadbury failed to meet his burden of coming forward with admissible evidence showing a genuine issue of disputed fact. Lee is entitled to judgment as a matter of law, even if the standard is negligence.

C. Spreadbury Failed to Raise Any Issues of Fact Regarding Malice, and Without Malice, His Claim for Tortious Interference Fails as a Matter of Law

The Court has already determined Lee did not act with malice. (*See* Dkt. 249.) In his response, Spreadbury offered no new evidence raising an issue of fact on the question of malice. Lee is, therefore, entitled to summary judgment on Spreadbury's claim of tortious interference because malice is an essential element of that claim, and Spreadbury does not have sufficient evidence of that essential element to ultimately carry his burden at trial. *Nissan*, 210 F.3d at 1102.

As shown in Lee's Opening brief, there is no cause of action for negligent

interference with economic advantages in Montana. To establish a case of tortious 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). Three of the elements require malicious intent. *See Bolz v. Myers*, 200 Mont. 286, 295, 651 P.2d 660, 611 (1982).

When the plaintiff fails to make a showing sufficient to establish the existence of any single element essential to his case, and on which he will bear the burden of proof at trial, summary judgment is the proper remedy. *Celotex*, 477 U.S. at 323. Because there is no evidence of malice as a matter of law, and malice is an essential element of tortious interference, summary judgment for Lee Enterprises on this claim is the proper remedy.

III. CONCLUSION

Lee satisfied its burden of showing there are no disputed issues of fact relevant to whether Spreadbury was a limited public figure at the time the August 9, 2010, article was published. Spreadbury failed to meet his burden of showing the existence of any material fact, responding only with allegations, speculation and conclusory statements. It is, therefore, undisputed that Spreadbury was a

limited public figure. Since Lee did not act with malice in publishing the article, it cannot be found liable for defamation per se and the remaining companion claims. Further, even if Spreadbury were found not to be a public figure, despite his deliberate and persistent efforts to become one, Lee is still entitled to judgment as a matter of law because it is undisputed Lee did not breach the applicable standard of care. Finally, the absence of malice by Lee defeats Spreadbury's claim for tortious interference with prospective business advantage. There are no genuine issues of material fact for a jury to decide. Lee is entitled to judgment as a matter of law on all remaining claims.

DATED this 4th day of May, 2012.

/s/ Jeffrey B. Smith
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IV. 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* 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 2352 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

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V. CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2012, a copy of the foregoing document was served on the following persons by the following means:

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