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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 **CITY DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

On behalf of Defendants Bitterroot Public Library, Dr. Robert Brophy, Trista Smith, Nansu Roddy, City of Hamilton, Jerry Steele, Steve Snavely, Steven

Bruner-Murphy, Ryan Oster, Kenneth S. Bell and Jennifer B. Lint (collectively, "City Defendants"), this responds to Plaintiff Michael E. Spreadbury's ("Spreadbury") motion for partial summary judgment. Spreadbury submits no evidence to the Court in support of his motion, let alone the required Statement of Undisputed Facts. *See* L.R. 56.1. Instead, Spreadbury claims he is entitled to judgment as a matter of law based on certain of the City Defendants' admissions in answer to his Amended Complaint. Spreadbury is wrong. His motion should be denied.

BACKGROUND

In May or June 2009, Spreadbury met with Senior Librarian Nansu Roddy at the Bitterroot Public Library (the "library"). (City Defendants' Statement of Genuine Issues ("SGI") 1.) Spreadbury requested that a hand-written letter written by another person alleging local government corruption be placed on the reserve shelf of the library. (SGI 2.) Ms. Roddy, on behalf of the library, refused. (SGI 3.) After multiple interactions with library staff, Spreadbury was banned from the library. (SGI 4.)

Despite the ban, witnesses reported to local law enforcement that Spreadbury returned to the library property, and he was subsequently charged with criminal trespass. (SGI 5.) On February 18, 2010, based on proof beyond a

reasonable doubt, a jury in the City Court for the City of Hamilton found Spreadbury guilty of criminal trespass. (SGI 6.) Spreadbury appealed the conviction.

While the criminal trespass charge was pending, Spreadbury approached Ms. Roddy outside the library, and, as a result of that encounter, Ms. Roddy sought and obtained an Order of Protection against him. (SGI 7.) Spreadbury repeatedly attempted to modify, re-litigate or otherwise collaterally attack the Order of Protection. (SGI 8.) All attempts were denied, including a Petition for Rehearing where the Montana Supreme Court warned Spreadbury that further legal filings against Ms. Roddy "may be sanctioned by the imposition of costs, attorney's fees and/or other monetary or non-monetary penalties under M.R.App.P. 19(5)." (SGI 9.)

Based on Spreadbury's encounter with Ms. Roddy, Spreadbury was charged with felony intimidation. (SGI 10.) He pleaded no contest to the felony intimidation charge and was sentenced on October 20, 2010. (SGI 11.) Following his plea, the charge for misdemeanor criminal trespass, which Spreadbury had appealed, was voluntarily dismissed. (SGI 12.) Spreadbury has appealed the felony conviction and the sentence has been stayed pending the appeal. (SGI 13.)

Spreadbury filed the instant action against the City Defendants, Boone Karlberg, P.C., and Lee Enterprises, Inc. He has asserted 25 causes of action. Spreadbury's motion for partial summary judgment concerns 17 of these. Specifically, he moves for judgment as a matter of law on "count #1,2,3,5,6,7,9,10,11,12,13,14,17,20,21,25,26 of 2nd Amended Complaint. . . ." (Spreadbury's Brief, p. 6.) The manner in which Spreadbury has listed claims in his complaint is confusing and duplicative.[1] As understood by the City Defendants, Spreadbury seeks partial summary judgment on the following causes of action:

1. Section 1983 – First, Fifth, and Fourteenth Amendment Violation(s)
2. Negligence
3. Negligent Misrepresentation
4. Abuse of Process
5. Defamation/Defamation Per Se
6. Infliction of Emotional Distress (NIED and IIED)
7. Injunctive Relief
8. Punitive Damages

[1]As titled by Spreadbury, the causes of action at issue in his motion are: Negligence–Brophy/public library–Count 1; Abuse of Process/Brophy–public library–Count 2; Procedural Due Process/14th Amendment–Brophy/public library–Count 3; Misrepresentation–Brophy–public library–Count 5; 1st Amendment–Roddy/public library–Count 6; Malicious Prosecution–Public Library, City of Hamilton–Count 7; "Policy or Custom" Policymaker Bell, 1st, 14th Amendments–Count 9; Policy of Custom-Amendment 5, 14–City of Hamilton–Oster–Count 10; Negligence–City of Hamilton/Bell–Count 11; Negligence, City of Hamilton/Snavely–Count 12; Negligence, City of Hamilton–Murphy–Count 13; Freedom to Speak/1st Amendment, Abuse of Power/14th Amendment–HPD Det. Murphy–Count 14; Defamation/Defamation per se– City of Hamilton–Count 17; Intentional Infliction of Emotional Distress (IIED)–Defendants–Count 20; Negligent Infliction of Emotional Distress (NIED) Defendants–Count 21; Injunctive Relief–City of Hamilton–Count 25; Punitive Damages–Defendants–Count 26.

Spreadbury has failed to sustain his burden under Fed. R. Civ. P. 56. His motion has no merit and should be denied.

SUMMARY JUDGMENT STANDARD

Spreadbury has called his motion a motion for partial summary judgment. While it may have been more accurately described as a motion for judgment on the pleadings, the standard is essentially the same where the only evidence presented is the pleadings themselves. Under Rule 12(c), a court must accept as true all material allegations in the non-moving party's pleadings and must construe those allegations in the light most favorable to the non-moving party. *Pillsbury, Madison & Sutro v. Lerner,* 31 F.3d 924, 928 (9th Cir.1994); *Fajardo v. County of Los Angeles,* 179 F.3d 698, 699 (9th Cir.1999). Similarly, under Rule 56, Summary judgment may be granted only when, drawing all inferences and resolving all doubts in favor of the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–55 (1986). The moving party bears the burden of identifying those portions of the pleadings, discovery and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Any inferences sought from the evidence must be reasonable. *Conley v. R.V. Reynolds*

Tobacco Co., 286 F.Supp.2d 1097, 1103-04 (N.D. Cal. 2002). They cannot be based on speculation, imagination, suspicion, conjecture or guesswork. *Id*. Only after the moving party meets its initial burden must the non-moving party go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. Fed R. Civ. P. 56(c); *see Anderson,* 477 U.S. at 250.

Here, Spreadbury has not met his initial burden. His own conclusory allegations are not evidence. Although admissions in an opposing party's pleadings may serve as a basis for summary judgment, *see Lockwood v. Wolf Corp.*, 629 F.2d 603, 611 (9th Cir. 1980), the City Defendants' admissions do not establish liability here. To the contrary, they demonstrate the specious nature of Spreadbury's claims. None of the admissions cited by Spreadbury entitle him to judgment as a matter of law. Indeed, the City Defendants did not admit much of the matter which Spreadbury says was admitted.

ANALYSIS

I. SPREADBURY HAS NOT SUSTAINED HIS BURDEN UNDER RULE 56.

A. Spreadbury Mischaracterizes the Evidence.

Because the only evidence Spreadbury presents are the City Defendants' responses in their Answers, it is important to set forth exactly what those responses

say. This is particularly important because Spreadbury's characterization of the responses is wildly inaccurate.[2]

1. Responses Regarding the Prosecution of Spreadbury.

According to Spreadbury, the City has admitted "to prosecuting Spreadbury for peaceful assembly on public property. . . ." (Spreadbury's Brief, p. 3.) Not true. The responses cited by Spreadbury merely state that (1) Spreadbury was prosecuted for misdemeanor criminal trespass and (2) the charge was voluntarily dismissed after Spreadbury's no contest plea to the crime of felony intimidation. (SGI 14.)

2. Responses Regarding Spreadbury's Library Submission Request.

Spreadbury asserts that "Bitterroot Public Library admits to refusing a submission request by Spreadbury which deprives fundamental right of free speech found in Amendment 1 US Constitution. . . ." (Plaintiff's Brief. p. 3.) The "admission" upon which Spreadbury's statement is based, however, reads as follows:

> 19. Answering the allegations in paragraphs 31-37, 40, 41 and 57 of the Amended Complaint, admit Plaintiff attempted to persuade

[2] Spreadbury bases his motion upon 11 specific responses: Answer of Defendants Bitterroot Public Library and City of Hamilton, ¶¶ 21, 26, 30, 32, 34, 37, 43, 45, 51, 57; Answer of Individual City Defendants, ¶ 19.

> Nansu Roddy and other Library staff to include a letter written by another Bitterroot Valley resident, other than Plaintiff, to President Obama in the Library's collection. Admit the request was refused. Admit Plaintiff was eventually banned from the Library. Admit Plaintiff sent one or more letters regarding the Library's actions.

(SGI 15.)

3. Responses Regarding Library Privileges.

Spreadbury claims the City Defendants have admitted tortious and unconstitutional conduct in revoking his library privileges. However, in the specific responses cited by Spreadbury, the City only admitted that "Plaintiff's library privileges were revoked," and denied all remaining allegations.

4. Responses Regarding Access to Ravalli Republic.

Spreadbury states "Defendant City of Hamilton admits to asking Spreadbury not to enter 232 W. Main St. Hamilton MT the business of Defendant Lee Enterprises, Inc. . . ." (Spreadbury's Brief, p. 3.) Although Spreadbury appears to cite the wrong response (¶19) in support, this much is true:

> 20. Answering the allegations in paragraphs 38 and 39 of the Amended Complaint, admit a representative of the *Ravalli Republic* called the Ravalli County Dispatch concerning Plaintiff's conduct at the offices of the *Ravalli Republic*. Admit representatives of the Hamilton Police Department responded to the *Ravalli Republic*. Admit one or more representatives of the Hamilton Police Department have told Plaintiff that the *Ravalli Republic* did not want Plaintiff to enter their business offices because of his conduct.

(SGI 17.)

5. Responses Regarding Investigating Spreadbury and Writing Public Police Reports.

Spreadbury argues it is established he was defamed and his civil rights were violated because "Defendant City of Hamilton further admits HPD Detective Murphy investigated, published, and sent reports to Hamilton City Attorney Bell for prosecution. . . ." (Spreadbury's Brief, p. 4.) The admission Spreadbury cites actually reads as follows:

> 51. Answering the allegations in paragraphs 151-155 of the Amended Complaint, admit Plaintiff was investigated. Deny the balance of the allegations in these paragraphs.

(SGI 18.)

6. Responses Regarding Policymakers.

Plaintiff suggests the City has admitted City Attorney Kenneth S. Bell and Hamilton Police Chief Ryan Oster were policymakers for all purposes. (Spreadbury's Brief, p. 4.) The City's responses read as follows:

> 43. Answering the allegations in paragraphs 128-131 of the Amended Complaint, admit Kenneth S. Bell is an official policymaker in some respects. Deny the balance of the allegations in the paragraphs.
> ...
> 45. Answering the allegations in paragraphs 133-135 of the Amended Complaint, admit Police Chief Oster is an official policymaker in some respects. Deny the balance of the allegations in the paragraphs.

(SGI 19)

B. Spreadbury Has Not Proven a Federal Civil Rights Claim.

1. Spreadbury Has Not Shown an Underlying Violation.

In order to prevail against any Defendant under 42 U.S.C. § 1983, Spreadbury must first establish a violation of his federal constitutional rights. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005). In his complaint, he asserts violations of the First, Fifth, and Fourteenth Amendments.

a. First Amendment

Spreadbury contends his First Amendment rights were violated by the library's refusal to place certain materials into its collection, and also by being prosecuted for "peaceful assembly on public property." However, the City Defendants' Answers do not establish a First Amendment violation.

First, an individual has no constitutional right to require inclusion of materials of his/her choosing in a municipal library collection. *See U.S. v. American Library Assoc., Inc.*, 539 U.S. 194, 210, n. 4 (2003) ("[A] public library does not have an obligation to add materials to its collection simply because the material is constitutionally protected.") In other words, a library's refusal to accept certain materials does not, as Spreadbury contends, establish a per se violation of the First Amendment.

Next, the evidence does not support Spreadbury's argument that he was prosecuted for a "peaceful assembly" on public property. Rather, Defendants' Answer demonstrates Spreadbury was prosecuted for trespass because he continued to come to the library to harass library staff and disrupt operations, even after being banned from the library grounds. (SGI 5.) Moreover, even assuming Spreadbury was engaged in constitutionally-protected conduct, it is well settled that the First Amendment's right to assembly does not mean that everyone with opinions to express may assemble and speak at any public place and at any time. *E.g., Cox v. State of Louisiana*, 379 U.S. 536 (1965). This is particularly true in the case of a library – a limited public forum – whose "very purpose is to aid in the acquisition of knowledge through reading, writing and quiet contemplation." *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1261-62 (3d Cir. 1992); *see also Armstrong v. Dist. of Columbia Pub. Lib.*, 154 F. Supp. 2d 67, 75 (D.D.C. 2001).

"In order to demonstrate a First Amendment violation, a plaintiff must provide evidence showing that 'by his actions [the defendant] deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendant's] conduct.' " *See Mendocino Envtl. Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir.1999) (quoting *Sloman v. Tadlock*, 21 F.3d

1462, 1469 (9th Cir.1994)). In other words, Spreadbury must demonstrate that, by prosecuting him for criminal trespass, the City was motivated by a desire to interfere with his First Amendment rights, and not by some permissible reason. *See id.*; *see also Brown v. Louisiana,* 383 U.S. 131, 142 (1966) ("A library is a place dedicated to quiet, to knowledge, and to beauty.")

Besides bare conclusory allegations, Spreadbury offers nothing to suggest – much less demonstrate as a matter of law – that this was the case. *See Barney v. City of Eugene,* 20 Fed. Appx. 683, 685 (9th Cir. 2001) (dismissing protestor's claim for violation of right to assemble because she presented no evidence that "deterrence or chilling of First Amendment activity was a substantial and motivating factor for the defendants' conduct.") The City's admissions merely establish Spreadbury was prosecuted for misdemeanor criminal trespass, and the charge was voluntarily dismissed after Spreadbury's no contest plea to the crime of felony intimidation. (SGI 12.) This is insufficient to prove a First Amendment violation.

b. Fifth Amendment

Fifth Amendment due process applies to federal actors or entities. *See, e.g.*, *Public Utilities Commission of District of Columbia v. Pollak*, 343 U.S. 451, 461 (1952); *American Bankers Mortg. v. Federal Home Loan Mortg.*, 75 F.3d 1401,

1406 (9th Cir. 1996). Here, Spreadbury's own allegations prove the City Defendants were acting on behalf of the City of Hamilton, not the federal government. As such, the Court should grant summary judgment to the City Defendants on Spreadbury's Fifth Amendment claim.

c. Fourteenth Amendment

The due process clause of the Fourteenth Amendment protects individuals against governmental deprivations of life, liberty, and property without due process of law. The Amendment affords substantive due process protection against the illegitimate exercise of state power, and a procedural due process guarantee of fundamental fairness. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Here, Spreadbury has failed to establish an invasion of either of these protected interests.

Spreadbury's Fourteenth Amendment claim appears to be based on three events: (1) prosecution for criminal trespass (Spreadbury's Brief, p. 5); (2) revocation of library privileges (Spreadbury's Brief, p. 4); and (3) requests not to enter the offices of the Ravalli Republic (Spreadbury's Brief, pp. 3, 5).

With respect to the prosecution of Spreadbury, Section 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144, n. 3

(1979). In this regard, it is well settled that there is no there is no substantive due process right to be free from prosecution without probable cause. *See Albright v. Oliver*, 510 U.S. 266, 271 (1994). Also, as set forth above, Spreadbury has not established the violation of any other constitutional right in connection with his prosecution. *See Mendocino,* 192 F.3d at 1300.

With respect to the revocation of library privileges, Spreadbury alleges a procedural due process violation. (Spreadbury's Brief, p. 4.) A threshold requirement to a procedural due process claim is the plaintiff must show a liberty or property interest protected by the Constitution. *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994). Spreadbury argues he has a "liberty interest" in access to the library, but cites no support for his claim. Protectable liberty interests arise from the Due Process Clause itself, or from state laws or regulations deemed to have created a liberty interest cognizable as a civil right. *Meachum v. Fano,* 427 U.S. 215, 224-27 (1976); *Smith v. Sumner,* 994 F.2d 1401, 1405-06 (9th Cir.1993). No such right is at issue here. *See Paul v. Davis*, 424 U.S. 693, 701 (1976) (finding one must prove "some more tangible interest such as employment" to invoke the procedural protection of the Due Process Clause.) Spreadbury's library privileges are exactly what he says they are – "privileges," not rights secured by the U.S. Constitution.

Moreover, even if Spreadbury's inability to access the library could be characterized as a deprivation of a liberty interest, he fails to explain, let alone offer evidence, to show he was not afforded the requisite amount of process. For example, he does not show how conducting a hearing or other process would reduce the risk of an erroneous decision under the circumstances presented, nor does he discuss the library's interest in maintaining order and providing a safe environment for staff and patrons. *See Matthews v. Eldridge*, 424 U.S. 319, 332 (1976).

Finally, no constitutional right was invaded when Hamilton police asked Spreadbury not to enter the offices of the Ravalli Republic. (Spreadbury's Brief, pp. 3, 5.) Needless to say, Spreadbury has no constitutional right to access another's private place of business. Moreover, both Spreadbury's brief and the City Defendants' Answer confirm his liberty was not restrained in any way. Rather, after a representative of the *Ravalli Republic* called police about Spreadbury's behavior, members of the Hamilton Police Department "told Plaintiff that the *Ravalli Republic* did not want Plaintiff to enter their business offices because of his conduct." (SGI 17.) How this could conceivably constitute a violation of the U.S. Constitution is unclear.

2. Spreadbury Has Not Established a *Monell* Claim.

The U.S. Supreme Court has "consistently refused to hold municipalities liable under a theory of *respondeat superior*." *Bd. of County Comm'rs of Bryan County, Ok. v. Brown*, 520 U.S. 397, 403 (1997). A municipality is not liable under § 1983 simply because it employs a tortfeasor. *See also Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 689 (1979). Rather, "liability may attach to a municipality only where the municipality *itself* causes the constitutional violation through execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005) (emphasis added).

Spreadbury uses the terms "policy" and "custom" in his brief, but the evidence refutes any claim for *Monell* liability. The existence of a municipal policy or custom may be proven in one of three ways: (1) by showing a longstanding practice or custom which amounts to the standard operating procedure of the City; (2) by showing a decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision; or (3) by showing the official

with the final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate. *See Menotti*, 409 F.3d at 1147.

Spreadbury's primary contention in this regard is that by "[r]estricting Spreadbury's access to the Ravalli Republic July 9, 2009," the City implemented a "new policy" that gives rise to municipal liability. (Spreadbury's Brief, p. 5.) However, there is no evidence the police officers who told Spreadbury he was not wanted at the Ravalli Republic were final policymakers, or that policymaking authority had been delegated to them. *See Trevino v. Gates*, 99 F.3d 911, 921 (9th Cir. 1996). Also, regardless of what happened on the day in question, there is no evidence of "a longstanding practice or custom." *See Menotti*, 409 F.3d at 1147. "A plaintiff cannot demonstrate the existence of a municipal policy or custom based solely on a single occurrence of unconstitutional action by a non-policymaking employee." *McDade v. West*, 223 F.3d. 1135, 1141 (9th Cir. 2000). "Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of *sufficient duration, frequency and consistency* that the conduct has become a traditional method of carrying out policy." *Trevino*, 99 F.3d at 918 (emphasis added). No such evidence exists here.

3. Spreadbury Has Not Refuted Qualified Immunity.

As to the individual City Defendants, government officials performing discretionary functions are generally shielded from liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The test for qualified immunity is: (1) identification of the specific right being violated; (2) determination of whether the right was so clearly established as to alert a reasonable officer to its constitutional parameters; and (3) a determination whether a reasonable officer would have believed that the policy or decision in question was lawful. *McDade*, 223 F.3d at 1142. Thus, even if Spreadbury could establish, on the basis of the City Defendants' admissions alone, the violation of a constitutional right, he still falls far short of disproving the reasonableness of the City Defendants' conduct under the circumstances. *See, e.*g. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (if a right is violated, the Court must then determine whether the officer's actions were nonetheless reasonable).

C. Spreadbury Has Not Proven a State Law Claim.

1. Negligence-Based Claims.

Regarding negligence, Spreadbury must establish duty, breach, causation and damages. *Detert v. Lake County* 674 P.2d 1097, 1100 (Mont. 1984). Because issues of negligence ordinarily involve questions of fact, they are generally not susceptible to summary judgment. *Schmidt v. Washington Contractors Group, Inc.*, 964 P.2d 34, 37 (Mont. 1998). That is certainly true here, where no admission by the City Defendants establishes or suggests the breach of a legal duty to Spreadbury.

The limited question of whether a legal duty exists, however, is a question of law. *Stratemeyer v. Lincoln County*, 915 P.2d 175, 182 (Mont. 1996). Spreadbury fails to identify evidence suggesting the City Defendants owed him an actionable duty in tort. To the contrary, his own allegations demonstrate he was allegedly wronged by those performing public functions. Under the public duty doctrine, a government employee or unit performing duties for the public owes no duty of protection to any particular individual. *E.g., Phillips v. City of Billings* 758 P.2d 772, 775 (Mont. 1998); *Prosser v. Kennedy Enterprises, Inc.*,179 P.3d 1178, ¶ 18 (Mont. 2008). Here, the parties' pleadings establish the City Defendants' actions

were public functions. As such, they did not give rise to an actionable duty owed to Spreadbury.

2. Abuse of Process

To prevail on abuse of process, Spreadbury must prove "an ulterior purpose" and "a willful act in the use of the process not proper in the regular conduct of the proceeding." *Seltzer v. Morton*, 154 P.3d 561, ¶ 57 (Mont. 2007). Spreadbury must prove an attempt to use process to coerce him to do some collateral thing which he could not be legally and regularly compelled to do." *Brault v. Smith*, 679 P.2d 236, 240 (Mont. 1984). As set forth above, the pleadings establish the City Defendants appropriately used process to deter and punish criminal conduct.

3. Defamation/Defamation Per Se

The City Defendants have not admitted any defamatory publication regarding Plaintiff. Moreover, to the extent Plaintiff relies on admitted statements in court proceedings, these are privileged as a matter of law. Mont. Code Ann. § 27-1-804 ("A privileged publication is one made . . . in any legislative or judicial proceeding or in any other official proceeding authorized by law."); *Montana Bank of Circle, N.A. v. Ralph Meyers & Son, Inc.*, 769 P.2d 1208 (Mont. 1989).

4. NIED/IIED

When the Montana Supreme Court recognized the independent tort of infliction of emotional distress, it provided a safeguard to protect against "a floodgate of claims for emotional distress, particularly fraudulent claims." *Sacco v. High Country Independent Press, Inc.*, 896 P.2d 411, 425 (Mont. 1995). Specifically, it determined that only claims for "serious or severe" emotional distress may be maintained. *Id*. Serious or severe emotional distress exists only where the distress is so extreme that no reasonable person could be expected to endure it. *Id.* at 426; *see also McConkey v. Flathead Electric Co-op.,* 125 P.3d 1121, ¶55 (Mont. 2005); *Renville v. Fredrickson,* 101 P.3d 773, ¶¶ 14-16 (Mont. 2004). The City Defendants' admissions do not establish negligent or wrongful conduct, let alone the requisite degree of emotional injury, for Spreadbury to prevail.

5. Injunctive Relief

Montana law provides a party may seek a preliminary injunction to require a person or entity to "refrain" from "a particular act." Mont. Code Ann. § 27-19-101. Although an applicant is not required to prove the ultimate merits of the case, Montana courts have consistently denied applications that fail to establish irreparable harm or otherwise present a prima facie case. *See, e.g., Valley*

Christian School v. Montana High School Assoc., 86 P.3d 554 (Mont. 2004). Spreadbury has made numerous allegations, but has not made a prima facie case on any claim, much less a showing of irreparable harm. *See Bitterrooters for Planning v. Board of Commissioners of Ravalli County*, 189 P.3d 624 (Mont. 2008).

6. Punitive Damages.

There is no independent cause of action for punitive damages. Mont. Code Ann. § 27-1-220. Regardless, the City is immune from a claim of punitive damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981); Mont. Code Ann. § 2-9-105. Under state law, so too are its employees. Mont. Code Ann § 2-9-305.

Further, it has not been shown that any act or omission by a City Defendant was motivated by an evil intent or involved a reckless or callous indifference to Spreadbury's federally protected rights, or amounted to actual malice or actual fraud. *Smith v. Wade*, 461 U.S. 30 (1983); Mont. Code Ann. § 27-1-221.

CONCLUSION

Spreadbury's motion is based on a gross mischaracterization of the City Defendants' answers to his complaint, and a misapplication of law. Because Spreadbury has failed to demonstrate the absence of genuine issues of material fact

and an entitlement to judgment as a matter of law, his motion for partial summary judgment should be denied.

DATED this 16th day of May, 2011.

/s/Thomas J. Leonard
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Attorneys for Defendants Bitterroot Public Library, City of Hamilton and Boone Karlberg P.C.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7(d)(2)(E), Local Rules of the United States District Court, District of Montana, I hereby certify that the textual portion of the foregoing brief uses a proportionally spaced Times New Roman typeface of 14 point; is double spaced; and contains approximately 4,368 words, excluding the parts of the brief exempted by L.R. 7(d)(2)(E).

DATED this 16th day of May, 2011.

/s/ Thomas J. Leonard
Thomas J. Leonard
BOONE KARLBERG P.C.
Attorneys for Defendants Bitterroot Public Library, City of Hamilton and Boone Karlberg P.C.

CERTIFICATE OF SERVICE

I hereby certify that, on the 16th day of May, 2011, a copy of the foregoing document was served on the following persons by the following means:

__1____ CM/ECF

_____ Hand Delivery

__2____ Mail

_____ Overnight Delivery Service

_____ Fax

_____ E-Mail

1. Clerk, U.S. District Court
2. Michael E. Spreadbury
   700 South Fourth Street
   Hamilton, MT 59840

/s/ Thomas J. Leonard
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