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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 BOONE KARLBERG P.C.'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Michael E. Spreadbury ("Spreadbury") has moved for summary judgment on his "1983, negligence, defamation, IIED, [and] NIED" claims against

Defendant Boone Karlberg, P.C. ("Boone Karlberg"). (Spreadbury's Brief, p. 4.) Spreadbury submits no evidence in support of his motion, however, let alone the required Statement of Undisputed Facts. *See* L.R. 56.1. Instead, Spreadbury claims the admissions in the City and Library Defendants' Answer entitle him to judgment as a matter of law. Spreadbury is wrong. His motion should be denied.

BACKGROUND

In 2009, Spreadbury met with Senior Librarian Nansu Roddy at the Bitterroot Public Library. (Defendant Boone Karlberg's Statement of Genuine Issues ("SGI") 1.) Spreadbury requested 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, Spreadbury returned to the library, and was subsequently charged with criminal trespass. (SGI 5.) On February 18, 2010, a jury in the City Court for the City of Hamilton found Spreadbury guilty of the charge. (SGI 6.) Spreadbury appealed.

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's claims against Boone Karlberg arise from civil litigation in the Montana state court system in which Boone Karlberg represented parties adverse to Spreadbury:

1. *Roddy v. Spreadbury*, DV-10-93 (Protective Order Action): Bitterroot Public Library Senior Librarian Nansu Roddy was granted an order of protection against Spreadbury on November 20, 2009, following a hearing before Hamilton City Judge Reardon. On appeal to the District Court, Judge Larson affirmed the order of protection on

May 20, 2010, based upon a review of the record. Boone Karlberg represented Ms. Roddy in DV-10-93 and during Spreadbury's appeal to the Montana Supreme Court in Appellate Cause No. DA 11-0017. (SGI 14.)

2. *Spreadbury v. Roddy*, DV-10-224 (Emotional Distress Case - Roddy): Spreadbury sued Nansu Roddy for infliction of emotion distress. Summary judgement was entered in favor of Ms. Roddy on October 5, 2010, and Notice of Entry of Judgment was filed and served on November 1, 2010. The time for appeal expired on or about December 3, 2010. Spreadbury did not appeal. Boone Karlberg represented Ms. Roddy in DV-10-224. (SGI 15.)

3. *Spreadbury v. Bell*, DV-10-223 (Emotional Distress Case - Bell): Spreadbury sued Hamilton City Attorney Ken Bell for infliction of emotional distress. Summary dismissal was granted in favor of City Attorney Bell on September 22, 2010, and judgement was entered on September 22, 2010. The dismissal was affirmed on appeal on April 5, 2011, in Appellate Cause No. DA-10-442. Spreadbury's petition for rehearing under Rule 20 is pending. Boone Karlberg represented City Attorney Bell in DV-10-223 and presently represents City Attorney Bell in Appellate Cause No. DA-10-442. (SGI 16.)

It is Boone Karlberg's representation of City Attorney Ken Bell and Senior Librarian Nansu Roddy in matters 1-3 above that forms the basis of Spreadbury's allegations against Boone Karlberg. With his latest motion, Spreadbury requests summary judgment against Boone Karlberg for "1983, negligence, defamation, IIED, [and] NIED." (Spreadbury's Brief, p. 4.) However, Spreadbury has failed to sustain his burden under Fed. R. Civ. P. 56.

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). 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), Spreadbury misstates the admissions in the City and Library Defendants' Answer, and those admissions do not establish liability. To the contrary, they demonstrate Spreadbury's claims are without merit.

ANALYSIS

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

A. Spreadbury's Section 1983 Claim Against Boone Karlberg Fails As a Matter of Law.

Spreadbury's civil rights claim against Boone Karlberg is murky, at best. Spreadbury's brief focuses on an alleged violation of his right to peaceful assembly. Specifically, he claims he was wrongfully prosecuted for criminal trespass as a result of exercising this constitutional right. However, it is undisputed Boone Karlberg did not prosecute Spreadbury for trespass, and did not remove him from the library grounds. (SGI 17.) Boone Karlberg had no involvement in those events. (SGI 17.) Rather, it has subsequently represented parties in litigation

arising from those events. (SGI 17) Spreadbury's civil rights claim against Boone Karlberg should be dismissed.

1. Boone Karlberg Did Not Act Under Color of State Law.

A plaintiff may not sue a lawyer in private practice for violations of civil rights because private practice attorneys are not state actors. *Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir.2003) (holding plaintiff could not sue opposing counsel under section 1983 "because he is a lawyer in private practice who was not acting under color of state law" and "plaintiff's conclusory allegations that the lawyer was conspiring with state officers to deprive him of due process are insufficient."); *Briley v. State of Cal.*, 564 F.2d 849, 855 (9th Cir. 1977) ("We have repeatedly held that a privately-retained attorney does not act under color of state law for purposes of actions brought under the Civil Rights Act."); *Miranda v. Clark County, Nevada*, 319 F.3d 465 (9th Cir.2003) (even if employed by government agency, if attorney is engaged in traditional lawyer role, lawyer is not state actor for § 1983 purposes); *Dallas v. Holmes*, 137 F. Appx. 746, 752 (6th Cir. 2005) (allegations against opposing counsel are "frivolous" in light of "well-settled" principle that a lawyer representing a client is not state action); *Stone v. Baum*, 409 F. Supp. 2d 1164, 1176 (D. Ariz. 2005) ("Plaintiffs may not sue a lawyer in private practice for

violations of their civil rights because private practice attorneys are not state actors."); *Polk County v. Dodson*, 454 U.S. 312, 319 n. 9, 325 (1981) (noting that a private attorney performing a lawyer's traditional function cannot be considered to act under color of state law).

The rule relating to private attorneys, like Boone Karlberg, is consistent with the general rule that private parties are not acting under color of state law. *See, e.g., Price v. Hawaii,* 939 F.2d 702, 707-08 (9th Cir.1991). The U.S. Constitution protects individual rights only from government action, not from private action. *Single Moms, Inc. v. Montana Power Company,* 331 F.3d 743, 746-47 (9th Cir.2003). Thus, a § 1983 plaintiff must show that a defendant's actions are fairly attributable to the government, which generally involves significant state involvement in the action in question. *Franklin v. Fox*, 312 F.3d 423, 444-45 (9th Cir.2002).

The Ninth Circuit recognizes four different tests to identify state action: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003). Here, Spreadbury alleges Boone Karlberg is a state actor under the first two tests – *i.e.*, the "Public Function [and] Joint Action tests." (Spreadbury's Brief, p. 3.)

"Under the public function test, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they

become agencies or instrumentalities of the State and subject to its constitutional limitations." *Lee v. Katz,* 276 F.3d 550, 554–55 (9th Cir. 2002) (internal quotation marks omitted). The public function test is satisfied only on a showing that the function at issue is "both traditionally and exclusively governmental." *Id.* at 555. The "function" which forms the basis of Spreadbury's claims against Boone Karlberg, however, is the representation of the private law firm's clients in various civil lawsuits. That is not a traditional or exclusive governmental function.

Under the joint action test, "courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002). The test focuses on whether the state has "so far insinuated itself into a position of interdependence with [the private actor] that it must be recognized as a joint participant in the challenged activity." *Gorenc v. Salt River Project Agric. Improvement & Power Dist.,* 869 F.2d 503, 507 (9th Cir.1989). A plaintiff may demonstrate joint action by proving the existence of a conspiracy or by showing that the private party was "a willful participant in joint action with the State or its agents." *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989) (quotations omitted).

To be liable as co-conspirators, each participant must share the common objective of the conspiracy. *United Steelworkers of America v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th Cir. 1989). A private defendant must share with the public entity the goal of violating a plaintiff's constitutional rights. *Id.; see also Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453-54 (9th Cir. 1995) (holding that public university's acquiescence in private security team's pat-down searches of concert-goers did not establish state action under joint action test, despite shared goal of producing a profitable event). Spreadbury presents no evidence Boone Karlberg conspired to deprive him of his civil rights. Indeed, it is undisputed the subject publications by Boone Karlberg came after Spreadbury was banned from the library and prosecuted for criminal trespass.

In his Amended Complaint, Spreadbury states he "believes, and is prepared to show. . .that Defendants listed, together, individually, and as pairs conspired to deprive the Constitutional rights of Plaintiff." (SGI 18.) Spreadbury further alleges "two or more Defendants...contrive[d], and execute[d] criminal charges...keeping Plaintiff out of office." (SGI 18.) Finally, Spreadbury claims "Defendant Boone Karlberg PC acting in civil conspiracy with client Bell when defaming Spreadbury in published pleadings to courts in State of Montana." (SGI 18.)

Defendants have denied all allegations of conspiracy, and Spreadbury presents no proof, beyond his own conclusory allegations, that Boone Karlberg conspired to deprive Spreadbury of a federal constitutional right. Not only does Spreadbury's claim of conspiracy fail under Rule 56, but as set forth in Boone Karlberg's Motion To Dismiss, incorporated herein by reference, it does not even satisfy the liberal pleading requirements to state a claim under Rule 12(b)(6). Because Spreadbury has failed to prove Boone Karlberg was a state actor under either the public function or joint action tests, his §1983 claim fails as a matter of law.

2. Spreadbury Has Not Established an Underlying Violation of His Constitutional Rights.

Even assuming that Boone Karlberg was acting "under color of state law," Spreadbury must still establish a violation of his federal constitutional rights. *See Menotti v. City of Seattle,* 409 F.3d 1113, 1147 (9th Cir. 2005). In his latest brief, he asserts violations of the First and Fourteenth Amendments.[1]

a. First Amendment

Spreadbury contends his First Amendment rights were violated when he was prosecuted for a "peaceful assembly" on public property. However, the record

[1] In previous filings, Spreadbury alleged a Fifth Amendment violation. However, Fifth Amendment due process only applies to federal actors. *E.g., American Bankers Mortg. v. Federal Home Loan Mortg.,* 75 F.3d 1401, 1406 (9th Cir. 1996).

demonstrates Spreadbury was prosecuted for trespass because he continued to come to the library after being told not to, and continued to harass library staff and disrupt operations. Also, as set forth above, Boone Karlberg did not prosecute Spreadbury for trespass.

Even assuming Spreadbury was engaged in constitutionally-protected conduct, it is well settled that the First Amendment's right to assembly does not mean 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). In other words, Spreadbury must demonstrate his prosecution 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 admissions of the City and Library Defendants merely establish Spreadbury was prosecuted for misdemeanor criminal trespass – a crime of which he was found guilty beyond a reasonable doubt. This does not prove a First Amendment violation.

b. 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.

Setting aside the fact there is no evidence Boone Karlberg exercised state power, 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.

B. Spreadbury's Claims Against Boone Karlberg Fail Because They Are Based Upon Privileged Statements.

Under Montana law, statements made in a judicial proceeding are privileged. *See* 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.") Because Spreadbury's claims against Boone Karlberg are based entirely on statements made in judicial proceedings, they fail as a matter of law.

The Montana Supreme Court has consistently held Section 27-1-804, applicable to parties' pleadings. "It has long been held that statements made in a

judicial proceeding are absolutely immune and a cause of action for defamation cannot be predicated thereon." *Montana Bank of Circle, N.A. v. Ralph Meyers & Son, Inc.*, 769 P.2d 1208, 1213 (Mont. 1989); *see also Hauptman v. Edwards, Inc*., 553 P.2d 975, 979 (Mont. 1976) ("[P]laintiff's publication of a lis pendens was privileged and not subject to a slander of title action.")

Spreadbury, citing Mont. Code Ann. § 27-1-804(4), argues that court pleadings made with malice are not privileged. (Spreadbury's Brief, p. 4.) However, the subsection Spreadbury relies upon has no application to pleadings, or to any publications made as part of a judicial proceeding. Rather, subsection (4) applies to a "fair and true report without malice <u>of</u> a judicial, legislative, or other public official proceeding." Mont. Code Ann. § 27-1-804(4) (emphasis added). In other words, this subsection would apply to a report on a judicial proceeding – such as a newspaper article about an ongoing trial, for instance – as long as the publication was "fair," "true," and made "without malice." *See id*.

Here, Boone Karlberg's statements were made as part of the judicial proceedings themselves and fall under subsection (2) of the statute. This subsection applies to any publication made "in any legislative or judicial proceeding. . . ." Mont. Code Ann. § 27-1-804(2). Montana law is clear that this is an <u>absolute</u> privilege. *E.g., Montana Bank of Circle, N.A. v. Ralph Meyers & Son,*

Inc., 769 P.2d 1208, 1213 (Mont. 1989) ("It has long been held that statements made in a judicial proceeding are absolutely immune and a cause of action for defamation cannot be predicated thereon."); *Bollinger v. Jarrett*, 406 P.2d 834 (Mont. 1965) ("[T]here is no libel because any publication made in a judicial proceeding is privileged").

Spreadbury's specific allegations against Boone Karlberg refer exclusively to publications made in judicial proceedings. Those statements are privileged under Montana law. Consequently, even if every fact alleged by Spreadbury were true, there is no possibility of recovery against Boone Karlberg.

C. Spreadbury's Negligence Claim Against Boone Karlberg Fails as a Matter of Law.

To prove 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 Boone Karlberg establishes or suggests the breach of a legal duty to Spreadbury.

The limited question of whether a legal duty exists at all, however, is a question of law. *Stratemeyer v. Lincoln County*, 915 P.2d 175, 182 (Mont. 1996).

Spreadbury fails to identify evidence suggesting Boone Karlberg owed him an actionable duty in tort. Boone Karlberg did not have a professional relationship with Spreadbury and did not communicate information to Spreadbury for the purpose of guiding him. *See, e.g., Durbin v. Ross*, 916 P.2d 758, 763-64 (Mont. 1996). Thus, absent a legal duty, any negligence-based claim against Boone Karlberg should be dismissed.

D. Spreadbury's Infliction of Emotional Distress Claims Fail As a Matter of Law.

Spreadbury alleges Defendants conspired to charge him with a crime and defamed him, thereby causing emotional distress. However, as set forth above, Boone Karlberg's statements in pleadings are privileged and cannot form the basis of either a negligent or intentional infliction of emotional distress claim. In addition, there is no factual support for a conspiracy claim against Boone Karlberg.

Moreover, Spreadbury has not "introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress", *Sacco v. High Country Independent Press, Inc.*, 896 P.2d 411, 427 (Mont. 1995), nor has Spreadbury alleged emotional distress of actionable severity. *Renville v. Fredrickson*, 101 P.3d 773, ¶ 15 (Mont. 2004). 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*, 896 P.2d at 425. 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*, ¶¶ 14-16. The admissions of the City and Library Defendants do not establish negligent or wrongful conduct, let alone the requisite degree of emotional injury, for Spreadbury to prevail.

CONCLUSION

For the reasons stated, Spreadbury's Motion for Partial Summary Judgment Against Defendant Boone Karlberg, P.C. should be denied.

DATED this 9th day of June, 2011.

/s/Thomas J. Leonard
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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 3,673 words, excluding the parts of the brief exempted by L.R. 7(d)(2)(E).

DATED this 9th day of June, 2011.

/s/ Thomas J. Leonard
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CERTIFICATE OF SERVICE

I hereby certify that, on the 9th day of June, 2011, a copy of the foregoing document was served on the following persons by the following means:

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