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

MICHAEL E. SPREADBURY,

Plaintiff,

v.

BITTERROOT PUBLIC LIBRARY,
CITY OF HAMILTON, LEE
ENTERPRISES, INC., and BOONE
KARLBERG P.C.,

Defendants.

Cause No. CV-11-064-M-DWM

DEFENDANT LEE ENTERPRISES,
INC.'S BRIEF IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT AGAINST LEE
ENTERPRISES, INC.

COMES NOW Co-Defendant, Lee Enterprises, Inc. ("Lee Enterprises"),
through its counsel, Garlington, Lohn & Robinson, PLLP, and hereby respectfully
files its Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment
Against Lee Enterprises, Inc. (Dkt. 51).

INTRODUCTION

Plaintiff, Michael E. Spreadbury ("Spreadbury"), has moved for partial

summary judgment against Lee Enterprises. However, Spreadbury fails to submit any substantive evidence in support of his motion; failing to set forth a statement of undisputed facts pursuant to Local Rule 56.1, and, instead, contending the alleged admission in the City and Library Defendants' Answer entitles him to relief. Spreadbury's contentions are incorrect. Accordingly, Spreadbury's Motion for Partial Summary Judgment against Lee Enterprises should be denied.

BACKGROUND

Spreadbury's current dispute with the Defendants stems from an altercation with Ms. Nansu Roddy at the Bitterroot Public Library ("Library"), in May or June of 2009, when Ms. Roddy refused to submit a letter Spreadbury requested to be placed on the reserve shelf in the Library. *See* Def. Lee Enterprises' Statement Genuine Issues ("SGI") ¶¶ 1-3 (June 21, 2011). As a result, Spreadbury had numerous interactions with Library Staff, and eventually was banned from the Library. (SGI ¶ 4.) Subsequently, Spreadbury returned to the Library and was charged with criminal trespass (SGI ¶¶ 5-6.) The *Ravalli Republic*, a newspaper owned by Lee Enterprises, published articles stemming from the criminal trespass charges brought against Spreadbury. (SGI ¶ 7.) The articles were republished by the *Missoulian*, a paper owned by Lee Enterprises. (SGI ¶ 8.) However, none of the articles contained personal opinions from the reporters, but, instead, were based purely on official Ravalli County Court documents. (SGI ¶ 9.)

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

The *Ravalli Republic* and the *Missoulian* continued to report on the proceedings in Spreadbury's criminal trespass case. (SGI ¶¶ 11-14.) While the criminal trespass proceedings continued, Spreadbury was also charged with felony intimidation stemming from an encounter between Spreadbury and Ms. Roddy outside the Library. (SGI ¶¶ 15-16.) Ms. Roddy sought and obtained an Order of Protection against Spreadbury. (SGI ¶ 15.) Like the criminal trespass charges, both the *Ravalli Republic* and the *Missoulian* published articles regarding the felony intimidation charges brought against Spreadbury, but none of these articles contained personal opinions from the reports. Instead, the articles were based on official Ravalli County Court documents. (SGI ¶¶ 9, 16-17.)

On February 18, 2010, a jury in the City Court for the City of Hamilton found Spreadbury guilty of criminal trespass. (SGI ¶ 18.) Both the *Ravalli Republic* and the *Missoulian* published articles regarding the conviction. (SGI ¶¶ 19-20.)

Spreadbury appealed the decision, and eventually the City of Hamilton dropped the criminal trespass charges, after the Montana Supreme Court upheld Ms. Roddy's Order of Protection, restraining Spreadbury from entering into the Library for five years. (SGI ¶ 20.) The *Ravalli Republic* and the *Missoulian*

published articles regarding the City dropping the criminal trespass charges against Spreadbury. (SGI ¶ 20.) Spreadbury eventually pled guilty to the felony intimidation charges. (SGI ¶ 21.)

Spreadbury's most recent motion requests partial summary judgment against Lee Enterprises. However, Spreadbury has failed to show an entitlement to judgment as a matter of law.

ARGUMENT

Spreadbury alleges he is entitled to partial summary judgment against Lee Enterprises because Lee Enterprises allegedly published articles regarding Spreadbury's peaceful assembly on public property, which is protected by the First Amendment of the U.S. Constitution, and violated Spreadbury's right to due process by depriving him of the right to enter the *Ravalli Republic* offices. (Dkt. 51:2.) Spreadbury further alleges the publication of these articles damaged him by assisting in depriving his library privileges and interfering in his election. However, Spreadbury has failed to meet his burden for the relief sought. Spreadbury fails to recognize the articles published by Lee Enterprises' newspapers were based on the charges brought against Spreadbury and did not contain any form of opinions. Accordingly, the articles are privileged and Lee Enterprises cannot be liable for Spreadbury's alleged damages. Therefore, Spreadbury is not entitled to summary judgment and his motion should be denied.

I. Spreadbury Is Not Entitled to Judgment As a Matter of Law.

Federal Rule of Civil Procedure 56 governs the standard for awarding summary judgment.

Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (internal quotations omitted).

The moving party bears the burden of showing an absence of material issues of fact and entitlement to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323. Courts must view the evidence in the light most favorable to the non-moving party when ruling on a motion for summary judgment and must deny the motion when there are genuine issues of material fact. *Nolan v. Heald College*, 551 F.3d 1148, 1154 (9th Cir. 2009).

A. Spreadbury's § 1983 Claims Against Lee Enterprises Fail As a Matter of Law.

In his motion for partial summary judgment, Spreadbury states he has alleged constitutional deprivations in color of law in his Complaint, Amended Complaint, and Second Amended Complaint. (Dkt. 52:2.) However, this Court has yet to determine whether or not Spreadbury is able to file a second amended complaint, and Defendants have filed briefs in opposition to Spreadbury's Leave to File a

Second Amended Complaint.¹ Further, Lee Enterprises has yet to answer any of Spreadbury's Complaints; instead, filing a Motion to Dismiss and Brief in Support, since Spreadbury's Amended Complaint fails to state a claim upon which relief can be granted. (Dkt. 7.) In particular, Spreadbury's Amended Complaint fails to allege Lee Enterprises violated any of Spreadbury's constitutional rights, and fails to allege Lee Enterprises acted under color of state law. (Dkt. 7:7-8.)

However, even if his § 1983 claims include Lee Enterprises, Spreadbury is not entitled to summary judgment because it is undisputed Lee Enterprises did not act under the color of state law and/or have an agreement with the government to conspire against Spreadbury.

In order to recover under § 1983 for conduct by the defendant, a plaintiff must show that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. The state-action element in § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful.

[s]tate action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.

Caviness v. Horizon Community Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2009) (internal quotations and citations omitted).

¹ Note: per the Court's Docket Report, Docket No. 21, filed on May 4, 2011, describes the item filed as a "MOTION for Leave to File Second Amended Complaint." However, when looking at Docket No. 21, it is actually entitled "2nd Amended Complaint."

To put it another way, it is undisputed there was no agreement and/or plan between Lee Enterprises and the government. “To prove a conspiracy between private parties and the government under § 1983, an agreement or ‘meeting of the minds’ to violate constitutional rights must be shown.” *See Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983) (citation omitted). Spreadbury’s motion for partial summary judgment does not include any undisputed fact to support his claim. Rather, Spreadbury simply provides conclusory statements in support of his conspiracy theory.

For example, Spreadbury asserts Lee Enterprises conspired with the Hamilton Police Department by banning him from the *Ravalli Republic* offices. (Amend. Compl. ¶¶ 38-39 (Apr. 19, 2011) (Dkt. 1-1); Dkt. 51:3-4). However, Spreadbury offers no support for these allegations, and Lee Enterprises acted within their rights in banning Spreadbury from the premises. The *Ravalli Republic* office is located at 232 Main Street, Hamilton, Montana. Spreadbury is not allowed to enter the premises because he was abusive to *Ravalli Republic* staff. (SGI ¶ 10.) Following the abusive behavior, the *Ravalli Republic* notified Spreadbury, along with the Hamilton Police Department. (SGI ¶ 10.) Contrary to Spreadbury’s assertions, this is not evidence of a conspiracy and/or agreement.

Spreadbury also asserts Lee Enterprises conspired to interfere in his election and assisted in depriving his library privileges. (Dkt. 51:3.) However, like his

other claims, Spreadbury offers no proof to establish his contentions.

Similarly, Spreadbury's claim that Lee Enterprises conspired against him by publishing various newspaper articles is made without any supporting evidence. First, as noted above, Lee Enterprises has yet to answer Spreadbury's Amended Complaint, and denies Spreadbury's contention that Lee Enterprises published articles in the manner described by Spreadbury. As described in greater detail herein, articles published by Lee Enterprises were based on official Ravalli County Court documents. They did not contain opinions and, accordingly, are privileged. Spreadbury essentially claims Lee Enterprises' act of publishing articles about Spreadbury's charge of criminal trespass and subsequent conviction amount to a conspiracy against him because the trespass charges were later dropped by the City, and Lee Enterprises should have known "peaceful assembly" on public property is a protected property right. (Dkt. 51.) However, Spreadbury's description of the charges brought against him is inaccurate. He offers no evidence of a conspiracy or otherwise agreement to conspire against him, and he offers no evidence to show the articles published by Lee Enterprises' newspapers were false or otherwise not privileged.

Spreadbury has offered no evidence that there was an agreement to conspire against him, and Lee Enterprises affirmatively provides there was no such conspiracy and/or agreement. (Foundational Aff. Jeffrey B. Smith ("Aff. Smith"),

Ex. A: Aff. Stacey Mueller ¶ 7 (June 20, 2011) (“Aff. Mueller”).) Accordingly, even if Spreadbury’s § 1983 claim is properly plead against Lee Enterprises, it fails as a matter of law and his motion for partial summary judgment should be denied.

1. Spreadbury Has Not Established an Underlying Constitutional Violation for His § 1983 Claim.

Even assuming Spreadbury has sufficiently plead his § 1983 claim against Lee Enterprises, and that Lee Enterprises acted under color of state law, Spreadbury’s § 1983 claim still fails since he has not established an underlying violation of his Constitutional rights. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005).

Spreadbury alleges his First Amendment rights were violated for being prosecuted for trespassing on public property, and alleges his due process rights under the Fifth and Fourteenth Amendments were violated for not being allowed to enter the *Ravalli Republic* offices.

a. First Amendment

Contrary to Spreadbury’s contentions, all speech is not protected at the Library simply because it is a public library. The First Amendment protects freedom of speech. *See* U. S. Const. amend. I “That said, [e]ven protected speech is not equally permissible in all places and at all times.” *Snyder v. Phelps*, ___ U.S. ___, 131 S. Ct. 1207, 1218 (2011) (internal quotation and citation omitted). “. . . [T]he First Amendment does not guarantee the right to

communicate one's views . . . in any manner that may be desired." *Hoye v. City of Oakland*, 642 F. Supp. 2d 1029, 1044 (N.D. Cal. 2009) (internal quotation and citation omitted). As articulated by the Third Circuit:

It is clear to us that a public library, albeit the quintessential locus for the exercise of the right to receive information and ideas, is sufficiently dissimilar to a public park, sidewalk or street that it cannot reasonably be deemed to constitute a traditional public forum. Obviously, a library patron cannot be permitted to engage in most traditional First Amendment activities in the library, such as giving speeches or engaging in any other conduct that would disrupt the quiet and peaceful library environment.

Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1256 (3rd Cir. 1992). Accordingly, libraries are considered limited public forums, and "[a]s such, the Library is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum." *Neinast v. Bd. of Trustees of Columbus Metro. Lib.*, 346 F.3d 585, 591 (6th Cir. 2003) (internal quotation and citation omitted).

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.

Dunn v. Hyra, 676 F. Supp. 2d 1172, 1192 (W.D. Wash. 2009) (internal quotations and citations omitted).

Spreadbury has not shown he was engaged in constitutionally protected

conduct. Although Spreadbury claims he was prosecuted for “peaceful assembly” on public property, the fact is that he was charged with criminal trespass due to harassing Library staff and overall disrupting the Library after being told to not return. However, even if his activity is considered protected, he has failed to establish the criminal trespass charges and Lee Enterprises’ act of publishing the subsequent articles was motivated by a desire to interfere with his First Amendment right, and not by any permissible reason. *See Dunn*, 676 F. Supp. 2d at 1992.

b. Fifth and Fourteenth Amendments

Similarly, Spreadbury has failed to establish an underlying constitutional violation of his due process rights under the Fifth and/or Fourteenth Amendments.

First, Spreadbury’s claim involving the Fifth Amendment fails because the Fifth Amendment only applies to the federal government, not state actors. *N Group LLC v. Hawai’i County Liquor Commn.*, 681 F. Supp. 2d 1209, 1228 (D. Haw. 2009); *Lee v. City of L.A.*, 250 F.3d 668, 687 (9th Cir. 2001).

Even though the Fourteenth Amendment applies to state actors, Spreadbury has failed to establish a due process violation with regard to Lee Enterprises’ actions. The Due Process Clause of the Fourteenth Amendment protects individuals against governmental deprivations of life, liberty, and property without due process of law. *See U.S. Const. amend. XIV.*

Spreadbury claims his due process rights were violated for not being allowed into the *Ravalli Republic* offices. However, the *Ravalli Republic*, as a private business, has the right to ban Spreadbury from their offices. “In their private affairs, in the conduct of their private businesses, it is clear that the people themselves have the liberty to select their own associates and the person with whom they will do business, unimpaired by the Fourteenth Amendment.” *Browder v. Gayle*, 142 F. Supp. 707, 715 (M.D. Ala. 1956). Spreadbury was banned from the *Ravalli Republic* after being verbally abusive to staff. (SGI ¶ 10.) The *Ravalli Republic* was within their rights of banning Spreadbury from their private offices, and Spreadbury’s due process claim fails as a matter of law. Moreover, any harm or injury to reputation does not result in deprivation of a liberty or property. *Paul v. Davis*, 424 U.S. 693, 711-712 (1976). Therefore, any claimed violation of due process due to the published articles also fails as a matter of law.

Accordingly, even assuming Spreadbury has properly set forth his § 1983 claims to include Lee Enterprises, and has shown Lee Enterprises acted under color of state law, his motion should still be denied since he has failed to establish an underlying constitutional violation.

B. Lee Enterprises Did Not Interfere With Spreadbury’s Prospective Economic Advantage.

Count 8 of Spreadbury’s Amended Complaint alleges Lee Enterprises intentionally interfered with Spreadbury’s prospective business advantage.

However, Spreadbury's brief in support of his motion does not even mention this claim. Nevertheless, even if it had, Spreadbury's claim fails as a matter of law.

To establish a case of intentional interference with prospective business advantage, a plaintiff must show acts which: (1) were intentional and willful; (2) were calculated to cause damage to the plaintiff's business; (3) were done with unlawful purpose of causing damages or loss, without right or justifiable cause on the part of the actor; and (4) resulted in actual damages or loss.

Sebena v. Am. Automobile Assn., 280 Mont. 305, 309, 930 P.2d 51, 53 (1996). In a cause of action for intentional interference with prospective economic advantage “. . . the focus of the legal inquiry is on the intentional acts of the ‘malicious interloper’ in disrupting a business relationship.” *Maloney v. Home & Inv. Ctr., Inc.*, 2000 MT 34, ¶ 42, 298 Mont. 213, 994 P.2d 1124 (citation omitted).

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

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

Although in his Amended Complaint Spreadbury alleges Lee Enterprises and the rest of the Defendants “committed intentional and willful acts calculated to cause damage to Spreadbury's reputation, and prospective economic advantage,” he fails to provide any support for this claim. (Dkt. 1-1 at ¶ 124.) The only factual allegations against Lee Enterprises are that newspapers it owns published news articles reporting the charges and allegations brought against Spreadbury in a court

of law. There are no factual allegations regarding Spreadbury's economic relationship or prospective relationship which were allegedly disrupted by Lee Enterprises' alleged conduct. There are no allegations Lee Enterprises took any action without right or justification. Rather, Spreadbury's claim is mere speculation and, as such, his claim for intentional interference with prospective business advantage fails as a matter of law and his motion for summary judgment should be dismissed.

C. Lee Enterprises Was Not Negligent and/or Negligent Per Se.

Spreadbury's claim of negligence and/or negligence against Lee Enterprises fails as a matter of law.

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

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

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

generally not susceptible to summary judgment.” *Fisher v. Swift Transp. Co.*, 2008 MT 105, ¶ 12, 342 Mont. 335, 181 P.3d 601.

Similarly, in order to establish negligence per se, plaintiff must prove that:

(1) defendant violated the particular statute; (2) the statute was enacted to protect a specific class of persons; (3) the plaintiff is a member of that class; (4) the plaintiff’s injury is of the sort the statute was enacted to prevent; and (5) the statute was intended to regulate members of defendant’s class.

Prindel v. Ravalli County, 2006 MT 62, ¶ 27, 331 Mont. 338, 133 P.3d 165.

Spreadbury’s Amended Complaint and Motion for Partial Summary

Judgment do not establish Lee Enterprises owed him a duty. The law is clear, “[a]bsent a duty, breach of duty cannot be established and a negligence action cannot be maintained.” *Sikorski*, ¶ 13. Since Spreadbury has not set forth a duty that Lee Enterprises allegedly owed to him, his claim of negligence fails and his motion for partial summary judgment should be dismissed. Even assuming Lee Enterprises owed a duty to Spreadbury, summary judgment is not appropriate since Spreadbury has failed to establish that Lee Enterprises breached its duty and, consequently, caused damages.

Similarly, Spreadbury’s claim of negligence per se fails as a matter of law because Spreadbury has not established Lee Enterprises violated a particular statute. *See Prindel*, ¶ 27.

Since Spreadbury fails to establish Lee Enterprises owed him a duty and/or

that Lee Enterprises violated a particular statute, his claim of negligence and negligence per se fail as a matter of law, and his motion for partial summary judgment should be denied.

D. Spreadbury's Defamation and Defamation Per Se Allegations Fail As a Matter of Law.

Spreadbury is not entitled to summary judgment because the articles published by the *Ravalli Republic* were privileged. Spreadbury claims he is entitled to partial summary judgment against Lee Enterprises due to the published articles stemming from the charges of criminal trespass brought against him.

(Dkt. 51:5.) Essentially Spreadbury believes he was defamed by Lee Enterprises publishing articles about the criminal trespass charges because they were subsequently dropped by the City. However, Spreadbury fails to recognize the articles were true, simply reporting that criminal trespass charges were brought against Spreadbury and that he later was convicted of those charges. The fact the charges were later dropped does not change the facts which were published.

Spreadbury fails to show these publications were not true and how they defamed him. Moreover, Spreadbury fails to recognize these articles were privileged.

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

Libel is a false and *unprivileged* publication by writing, printing,

picture, effigy, or other fixed representation that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a tendency to injure a person in the person's occupation.

However, certain communications are privileged. Montana Code Annotated § 27-1-804 (2009) establishes what types of publications are privileged.

A privileged publication is one made:

- (1) in the proper discharge of an official duty;
- (2) in any legislative or judicial proceeding or in any other official proceeding authorized by law;
- (3) in a communication without malice to a person interested therein by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent or who is requested by the person interested to give the information;
- (4) by a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

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, 530, 723 P.2d 238, 239-240 (1986). In *Cox*, the Montana Supreme Court held pursuant to § 27-1-804(4):

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

Cox, 723 P.2d at 240.

The Court noted the definitions of "judicial proceedings" include:

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

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

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

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

In accordance with § 27-1-804(4), and the above-cited case law, Spreadbury is not entitled to summary judgment because the articles published by the *Ravalli Republic* were privileged.

Stacey Mueller is the publisher of the *Missoulian*, a newspaper owned by Lee Enterprises. (Aff. Mueller ¶ 1.) As part of her employment, she currently oversees both the *Missoulian* newspaper and the *Ravalli Republic* newspaper. (Aff. Mueller ¶ 2.) Ms. Mueller has personally reviewed the articles published by the *Ravalli Republic* which are the subject of Spreadbury's Amended Complaint. These articles do not contain opinions from the reporters. Instead, the articles are based purely on the charges brought against Spreadbury, reporting facts according to

official Ravalli County documents. (Aff. Mueller ¶ 3.) Pursuant to § 27-1-804(4), these articles are privileged and Spreadbury's allegations against Lee Enterprises fail as a matter of law.

E. Spreadbury's Claim of IIED and NIED Fail As a Matter of Law.

Spreadbury is not entitled to summary judgment regarding his intentional infliction of emotional distress ("IIED") claim because he has failed to establish he suffered from severe emotional distress.

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

As articulated by the Montana Supreme Court in *Sacco*,

[A]n independent cause of action for intentional infliction of emotional distress will arise under circumstances where serious or

severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's intentional act or omission.

Sacco, 896 P.2d at 428.

However, “[i]t is only where it is extreme that the liability [for emotional distress] arises.” *May v. ERA Landmark Real Est. of Bozeman*, 2000 MT 299, ¶ 54, 302 Mont. 326, 15 P.3d 1179. “Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people.” *Maloney*, ¶ 63.

“Emotional distress is serious or severe only if the distress inflicted is so severe that no reasonable [person] could be expected to endure it.” *Ray v. Wash. Natl. Ins. Co.*, 190 F.R.D. 658, 663 (D. Mont. 1999) (citing *Sacco*, 896 P.2d at 426) (quotations omitted)).

[T]he requirement that the emotional distress suffered be *serious* or *severe*, as we have already defined those terms, alleviates any concern over a floodgate of claims, particularly fraudulent claims. Also, the requirement that a claim of intentional infliction of emotional distress will arise only under circumstances where plaintiff's serious or severe emotional distress was the reasonably foreseeable consequence of the defendant's intentional act or omission alleviates the concern that defendants will be exposed to unlimited liability.

Sacco, 896 P.2d at 428 (emphasis in original).

Spreadbury's claim for IIED fails as a matter of law, because he has not established he suffered from severe emotional distress. His Amended Complaint

and motion for partial summary judgment simply contain conclusory statements with no support.

Likewise, Spreadbury's claim for negligent infliction of emotional distress ("NIED") fails as a matter of law.

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

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

As noted above, Spreadbury has not established a case for negligence, since he fails to show Lee Enterprises owed him a legal duty and, even if he had, there would be material issues of fact regarding whether Lee Enterprises breached its duty. Regardless, Spreadbury fails to establish he suffered emotional distress to support his claim.

Accordingly, Spreadbury's claim for both IIED and NIED fail as a matter of law and his motion for partial summary judgment should be dismissed.

F. Spreadbury Is Not Entitled to Injunctive Relief.

Spreadbury's claim for injunctive relief is without merit. "A ruling on a motion for preliminary injunction is subject to the discretion of the district court." *Am. Music Co. v. Higbee*, 1998 MT 150, ¶ 11, 289 Mont. 278, 961 P.2d 109.

Spreadbury's Amended Complaint essentially requests the Court order Lee Enterprises stop publishing news articles about Spreadbury. (Dkt. 1-1 at ¶ 214.) However, Spreadbury has not stated factual allegations sufficient to entitle him relief against Lee Enterprises and he fails to even mention the injunctive relief in his motion for partial summary judgment. Since it does not appear that the applicant [Spreadbury] is entitled to the relief demanded, an injunction is not proper. *See* Mont. Code Ann. § 27-19-201 (2009).

Furthermore, it appears Spreadbury is requesting the Court restrain Lee Enterprises from publishing something it already published. "An injunction will not issue to restrain an act already committed." *Mustang Holdings, LLC v. Zaveta*, 2006 MT 234, ¶ 15, 333 Mont. 471, 143 P.3d 456 (quotation and internal citation omitted). "Injunction is not an appropriate remedy to procure relief for past injuries, it is to afford preventive relief only." *Mustang*, ¶ 15 (internal quotation and citation omitted).

Within Count 23 of Spreadbury's Amended Complaint is a request for civil arrest of Lee Enterprises' employee and reporter, Perry Backus, per Montana Code

Annotated § 27-16-102(2). This portion of Count 23 specifically should be dismissed because § 27-16-102(2) gives Spreadbury no authority to civilly arrest anyone. Clearly, Spreadbury is not entitled to the injunctive relief requested, and his motion should be denied.

G. Spreadbury Is Not Entitled to Punitive Damages.

Like his claim for injunctive relief, Spreadbury's claim for punitive damages fails as a matter of law. "[N]o plaintiff is ever entitled to exemplary damages as a matter of right, regardless of the situation or the sufficiency of the facts."

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

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

Count 26 - Punitive Damages, of Spreadbury's Amended Complaint, alleges

Lee Enterprises acted with actual malice.

Actual malice exists if a defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and he: 1) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury; or 2) deliberately proceeds to act with indifference to the high probability of injury.

Trifad Ent., ¶ 53.

Spreadbury does not provide any evidence to support his claim for punitive damages in his Amended Complaint nor in his motion for partial summary judgment. Spreadbury alleges Lee Enterprises acted with actual malice, yet fails to provide any evidence, let alone clear and convincing evidence, to support his claim.

Moreover, Spreadbury's claim for punitive damages against Lee Enterprises fails if his other Counts are dismissed. *See Maulding*, 847 P.2d at 298. Spreadbury's claim for punitive damages cannot stand alone. Therefore, since the Counts brought against Lee Enterprises fail as a matter of law, it follows that Spreadbury's requested relief of punitive damages fail as well.

CONCLUSION

Spreadbury is not entitled to summary judgment. Even if he has sufficiently pled his case, Spreadbury has not shown Lee Enterprises acted under color of state law to support his § 1983 claims, nor has he established an underlying violation of

his constitutional rights. He has failed to establish a prospective economic advantage which Lee Enterprises allegedly interfered. He has not established Lee Enterprises owed him a legal duty, nor a statutory duty, for his negligence and negligence per se claims. Nor has he established Lee Enterprises breached its duty, assuming it owed a duty to Spreadbury. His claim for defamation and defamation per se fail as a matter of law because the published articles were privileged; reporting facts based on court documents. His claims for IIED and NIED fail because he has not established he suffered severe emotional distress. Likewise, Spreadbury's claims for injunctive relief and punitive damages fail since he has no authority for the requested injunctive relief, and he has not established any cause of action against Lee Enterprises to support his claim for punitive damages. Clearly, Spreadbury's motion for partial summary judgment should be denied.

DATED this 21st day of June, 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 Brief In Opposition to Plaintiff's Motion For Partial Summary Judgment Against Lee Enterprises, Inc.*, 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 5647 words long, excluding Caption, Certificate of Service and Certificate of Compliance.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2011, a copy of the foregoing document was served on the following persons by the following means:

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