Jeffrey B. Smith
GARLINGTON, LOHN & ROBINSON, PLLP
350 Ryman Street • P. O. Box 7909
Missoula, MT 59807-7909
Telephone (406) 523-2500
Telefax (406) 523-2595
jbsmith@garlington.com
Attorneys for Defendant, Lee Enterprises, Inc.

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 SUPPORT OF MOTION TO DISMISS ALL COUNTS AGAINST LEE ENTERPRISES, INC.

Defendant, Lee Enterprises, Inc. ("Lee Enterprises"), through its counsel, respectfully submits this Brief in Support of its Motion to Dismiss All Counts Against Lee Enterprises contained in Plaintiff's Amended Complaint: Counts 8, 18-21, 23 and 26 (Dkt. 1-1).

I. INTRODUCTION

This matter arises out of Plaintiff, Michael E. Spreadbury's ("Spreadbury") altercations with residents of Ravalli County. As alleged in his Amended Complaint, on or about May/June 2009, Spreadbury requested correspondence be admitted into the public library reserve at the Bitterroot Public Library ("Library"). *See* Amend. Compl. ¶ 31 (Apr. 5, 2011) (Dkt. 1-1). Library staff refused to accept Spreadbury's submission. An altercation ensued which led the Library to revoke Spreadbury's Library privileges and ban him from the premises. *See* Dkt. 1-1 at ¶¶ 32-36. However, Spreadbury did not comply. After again being warned not to return to the Library, Spreadbury was seen trespassing on Library property on or about August 20, 2009. *See* Dkt. 1-1 at ¶ 46. As a result, Spreadbury was charged with criminal trespassing. *Ravalli Republic*,[1] the local newspaper in Hamilton, Montana, published a story based on the charges brought against Spreadbury. *See* Dkt. 1-1 at ¶ 49. The article was posted on *Ravalli Republic*'s website and independent citizens posted comments regarding the article. *See* Dkt. 1-1 at ¶¶ 50-52. During this time, Spreadbury was running for Mayor of Hamilton, Montana. *See* Dkt. 1-1 at ¶ 76.

On or about August 16, 2010, the criminal trespass charges against

---

[1] Ravalli Republic is owned by Defendant Lee Enterprises, Inc.

Spreadbury were dismissed. *See* Dkt. 1-1 at ¶ 66. *Ravalli Republic* published articles stemming from the criminal trespass charges. *See* Dkt. 1-1 at ¶ 68. Spreadbury has subsequently brought multiple suits against parties in Ravalli County which allegedly conspired against him.

The current matter is brought against the Library, City of Hamilton, Lee Enterprises, and the law firm of Boone Karlberg P.C. Regarding Lee Enterprises, Spreadbury alleges: Count 8 - Tortious Interference With a Prospective Economic Advantage; Count 18 - Negligence/Negligence Per Se; Count 19 - Defamation/ Defamation Per Se; Count 20 - Intentional Infliction of Emotional Distress; Count 21 - Negligent Infliction of Emotional Distress; Count 23 - Injunctive Relief; and Count 26 - Punitive Damages. *See* Dkt. 1-1.

II. ARGUMENT

The various allegations and Counts against Lee Enterprises fail to state a claim under Montana law. Accordingly, pursuant to Federal Rule of Civil Procedure 12(b)(6), all allegations and Counts against Lee Enterprises in Spreadbury's Amended Complaint should be dismissed.

A. Spreadbury's Amended Complaint Fails to Set Forth Sufficient Facts Which Would Entitle Him to Relief.

A district court has the authority to dismiss a claim for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Shandell v. Rubin*, 103

F.3d 140 (table), 1996 WL 713471 (9th Cir. 1996). When considering a motion to dismiss, "the Federal Rules do not require courts to credit a complaint's conclusory statements without references to its factual context." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1954 (2009). A complaint should be dismissed for failure to state a claim if the plaintiff cannot prove a set of facts which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

B. While the Court May Take the Factual Allegations of a Plaintiff's Complaint As True for Purposes of a Motion to Dismiss, the Same Presumption Does Not Apply to Spreadbury's Legal Conclusions.

The allegations and Counts against Lee Enterprises in Spreadbury's Amended Complaint should not be taken as true for purposes of this motion because they are simply legal conclusions with no factual basis.

Generally, in deciding a motion to dismiss, "[t]he Court must accept all allegations of material fact as true, . . . , and construe the pleading in the light most favorable to the nonmoving party." *Knievel v. ESPN, Inc.*, 223 F. Supp. 2d 1173, 1177 (D. Mont. 2002). However, the same standard is not applicable to legal conclusions. "While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Iqbal*, 129 S. Ct. at 1940. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949.

As articulated by the U.S. Supreme Court:

> To survive a motion to dismiss, a complaint must contain sufficient *factual* matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads *factual* content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Iqbal, 129 S. Ct. at 1949 (internal citations and quotations omitted, emphasis added).

In *Iqbal*, the U.S. Supreme Court held the complaint failed to state a claim for purposeful and unlawful discrimination. *Iqbal*, 129 S. Ct. at 1954. Crucial to this determination was the Court's finding that numerous allegations in the complaint were not entitled to an assumption of truth, because they were not supported by proper factual allegations. *Iqbal*, 129 S. Ct. at 1951. For example:

> Respondent pleads that petitioners knew of, condoned, and willfully and maliciously agreed to subject [him] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.
>
> * * *
>
> [and] Ashcroft was the principal architect of this invidious policy, and that Mueller was instrumental in adopting and executing it.

Iqbal, 129 S. Ct. at 1951 (internal quotations citations omitted). The Court determined these allegations were merely conclusory and not entitled to be

assumed true, because they "amount to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim." *Iqbal*, 129 S. Ct. at 1951 (internal quotation and citation omitted).

Similarly, in the present case, Spreadbury's allegations against Lee Enterprises simply amount to legal conclusions unsupported by factual allegations. *See Iqbal*, 129 S. Ct. at 1950.

Count 8 - Tortious Interference With a Prospective Economic Advantage; Count 18 - Negligence/Negligence Per Se; Count 19 - Defamation/Defamation Per Se; Count 20 - Intentional Infliction of Emotional Distress; Count 21 - Negligent Infliction of Emotional Distress; Count 23 - Injunctive Relief; and Count 26 - Punitive Damages, are all simply legal conclusions with no factual support.

Like in *Iqbal*, these allegations amount to nothing more than a recitation of the elements for each Count. As such, they should not be assumed true and, in the absence of plausible factual allegations, should be dismissed.

C. Even If Spreadbury's Factual Allegations Are Taken As True, His Amended Complaint Fails to State a Claim Against Lee Enterprises Upon Which Relief Can Be Granted.

As articulated above, the allegations and Counts in Spreadbury's Amended Complaint should not be taken as truth because they are merely legal conclusions. However, even if taken as truth, the allegations and Counts against Lee Enterprises in Spreadbury's Amended Complaint should still be dismissed for failing to state a

claim upon which relief can be granted.

1. 42 U.S.C. § 1983

First, although not specifically plead as a Count against Lee Enterprises, Spreadbury alleges the Defendants conspired to deprive him of his Constitutional Rights under 42 U.S.C. § 1983. *See* Dkt. 1-1 at ¶¶ 25-29. While it is unclear which Defendants allegedly violated Spreadbury's constitutional rights, Lee Enterprises cannot be included in this allegation since no Counts in Spreadbury's Amended Complaint allege Lee Enterprises violated any of Spreadbury's constitutional rights.

Further, Spreadbury's Amended Complaint fails to allege Lee Enterprises acted under the color of state law.

> 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). To put it another way,

Spreadbury fails to show Lee Enterprises had any sort of an agreement and/or plan with 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).

Therefore, even if his factual allegations are taken as truth, the claim against Lee Enterprises alleging a violation of Spreadbury's constitutional rights under 42 U.S.C. § 1983 should be dismissed since his Amended Complaint fails to state a claim upon which relief can be granted.

2. Count 8 - Intentional Interference With Prospective Business Advantage

Spreadbury's Amended Complaint does not provide sufficient information to raise the issue of intentional interference with prospective business advantage.

> 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 on 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.

> 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).

In *Hughes v. Lynch*, 2007 MT 177, 338 Mont. 214, 164 P.3d 913, the Montana Supreme Court determined Hughes failed to establish a tortious interference claim because, among other reasons, Hughes' allegations that Lynch's actions were done with the unlawful purpose of causing damages were supported by nothing but speculation.

Like in *Hughes*, Count Eight of Spreadbury's Amended Complaint, is not supported by anything but speculation. The Tort of Intentional Interference with Prospective Business Advantage protects a plaintiff in an economic relationship with another or a legitimate prospect of such a relationship from a third party's conduct intended to disrupt the relationship. *See Maloney*, ¶ 42. Although 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 the factual allegations to support this claim. *See* 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 disrupted by Lee Enterprises' alleged conduct. There are no allegations Lee Enterprises took any action without right or justification. Rather, Count 8 is mere speculation, and, like in *Hughes*, Spreadbury's Amended Complaint provides insufficient information to establish a cause of action for intentional interference with prospective business advantage. As such, Count 8 should be dismissed.

3. Count 18 - Negligence/Negligence Per Se

Spreadbury's Amended Complaint does not support a case for negligence or negligence per se.

"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.

Similarly, there are certain elements which must be met in order to find a defendant negligent per se.

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, 331 Mont. 338, 133 P.3d 165.

Count 18 of Spreadbury's Amended Complaint alleges Lee Enterprises was negligent and/or negligent per se. However, Spreadbury does not set forth any factual allegations regarding a duty Lee Enterprises owed to him. 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's claim of negligence against Lee Enterprises is not supported by the proper factual allegations, it should be dismissed.

Similarly, Spreadbury's Amended Complaint fails to state a claim upon which relief can be granted for his claim that Lee Enterprises was negligent per se. As noted above, to establish negligence per se, Spreadbury must first prove Lee Enterprises violated a particular statute. *See Prindel*, ¶ 27. However, Spreadbury does not cite to a statute which Lee Enterprises allegedly violated. Therefore,

Spreadbury's claim of negligence per se against Lee Enterprises should be dismissed.

Since Spreadbury's Amended Complaint fails to set forth a claim of negligence, and/or negligence per se, upon which relief can be granted, Count 18 should be dismissed.

4. Count 19 - Defamation/Defamation Per Se

Spreadbury's Amended Complaint does not provide sufficient information to support a case for defamation or defamation per se against Lee Enterprises.

Traditionally, the term "libel" refers to defamatory statements made in writing. *Restatement (Second) of Torts* § 568 (1979). 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.

Spreadbury's claims of defamation and defamation per se against Lee Enterprises, contained in Count 19 of his Amended Complaint, should be dismissed because Lee Enterprises' publications regarding Spreadbury were privileged, as they were based on facts taken from judicial pleadings. In *Cox v. Lee Enterprises*, the Montana Supreme Court held pursuant to Montana Code Annotated § 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 v. Lee Enters., Inc., 222 Mont. 527, 530, 723 P.2d 238, 240 (1986).

Dale Cox was an attorney practicing in Glendive, Montana. He represented Laura Thomas in a civil suit stemming from an auto accident. The case was settled and, since Thomas was a minor, the settlement proceeds were placed in a legal guardianship, appointed by the Court because Thomas had no living parents. Later, as an adult, Thomas brought suit against Cox for an unnecessary extension of the guardianship. *Cox*, 723 P.2d at 239. The *Billings Gazette* published an

article regarding Thomas' Complaint, simply paraphrasing and quoting Thomas' allegations against Cox. Thomas' case against Cox was eventually dismissed and, subsequently, Cox brought suit against the newspaper in federal court, alleging defamation. The federal court certified the following question to the Montana Supreme Court:

> Under the law of the State of Montana, is the defense of privilege available to 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 239.

The Supreme Court answered in the affirmative. In making this determining, the Court relied on § 27-1-804(4), "which makes a fair and true report without malice of a judicial proceeding a privileged publication." *Cox*, 723 P.2d at 239-240. The Court noted the definitions of "judicial proceedings" included:

> 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 deflamatory 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 (Ill. App. 1980) (internal quotations omitted).

Similarly, in *Lence v. Hagadone Co.*, 258 Mont. 433, 853 P.2d 1230 (1993), *overruled on other grounds by Sacco v. High Country Indep. Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995)), the Montana Supreme Court upheld the district court's entry of summary judgment in favor of the defendants, because the article published was privileged pursuant to § 27-1-804(4).

Attorney John Lence sued the *Daily Inter Lake* newspaper for publishing articles which detailed judicial proceedings which were filed against him. First, in 1998, the newspaper published an article regarding a complaint filed against Lence by a former client to the Commission on Practice. Later, in 1989, the newspaper published two articles surrounding charges brought against Lence for allegedly violating city building codes. The first article published discussed the charges brought against Lence, and the second article published discussed that Lence pleaded innocent to the charges. Lence brought suit, alleging the newspaper defamed him. *Lence*, 853 P.2d at 1232-1234. However, the district court entered summary judgment in favor of the defendants since the newspaper articles were privileged; reporting on facts taken from a judicial proceeding. On Appeal, the

Montana Supreme Court agreed, finding the preliminary Commission on Practice investigation and Lence's alleged violations of Kalispell building codes in city court were part of judicial proceedings and, thus, the published article reporting on the facts from the proceedings were privileged pursuant to § 27-1-804(4). *Lence*, 853 P.2d at 1236-1237.

Spreadbury alleges Lee Enterprises defamed him by reporting on his criminal trespass charges. *See* Dkt. 1-1 at ¶ 182. However, Spreadbury does not provide the Court with any language Lee Enterprises published which allegedly defamed him. Rather, the Amended Complaint simply recites the legal elements of defamation. As detailed in section II. B. of this Brief, Spreadbury's allegations should not be taken as fact since they are merely legal conclusions.

Furthermore, even if taken as fact, Spreadbury fails to state a claim upon which relief can be granted because Lee Enterprises publications were privileged pursuant to § 27-1-804(4). Spreadbury's Amended Complaint shows these articles were based on the judicial proceedings of criminal trespass charges. As such, they are privileged and Lee Enterprises cannot be liable for defamation and/or defamation per se.

Spreadbury claims Lee Enterprises first published an article entitled "Mayoral Candidate charged with Trespass." *See* Dkt. 1-1 at ¶ 49. Later, Spreadbury alleges subsequent articles were published regarding the criminal trespass charges. *See*

Dkt. 1-1 at ¶¶ 64-73. Consequently, even if taken as truth, Spreadbury's Amended Complaint fails to state a claim upon which relief can be granted, because it fails to show how Lee Enterprises' articles were not privileged.

Further, even though charges for criminal trespassing were later dropped, this does not preclude the *Ravalli Republic* or other newspapers from reporting facts from a preliminary proceeding. Nor does it preclude the *Ravalli Republic* from publishing subsequent articles based on judicial proceedings involving Spreadbury. In this regard, Spreadbury alleges Lee Enterprises published stories "pertaining" to the criminal trespass charges after the charges were dropped. *See* Dkt. 1-1 at ¶¶ 68-69. However, even if taken as truth, these allegations are insufficient to show the publications were not privileged.

Accordingly, the articles published by *Ravalli Republic* which contained facts of the judicial proceedings do not support Count 19 - Defamation/Defamation Per Se and those claims should be dismissed.

5. Count 20 - Intentional Infliction of Emotional Distress

Spreadbury's Amended Complaint does not support a case for intentional infliction of emotional distress against Lee Enterprises.

Montana law allows intentional infliction of emotional distress to be plead as a separate cause of action. *See Sacco*, 896 P.2d at 427. However, the Plaintiff has the burden of coming forth with material and substantial evidence to support his

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, 138, 805 P.2d 1354, 1365 (1991)). 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 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).

In *Renville v. Frederickson*, 2004 MT 324, 324 Mont. 86, 101 P.3d 773, the Montana Supreme Court upheld the district court's order granting summary judgment in favor of the defendant regarding Renville's claim for emotional distress, since plaintiff failed to show her alleged emotional distress was so severe that no reasonable person would be expected to endure it. In the above-referenced case, Renville's son was killed in an automobile accident. The vehicle was driven by Frederickson. Renville brought suit against Frederickson, seeking damages for emotional distress and loss of consortium. *Renville*, ¶ 2. However, the Court granted summary judgment in favor of Frederickson since Renville's alleged emotional distress did not arise to the level of compensability.

> While we sympathize with Renville for her loss, our review of her testimony does not lead us to conclude that her emotional distress is so severe that it rises to the level of a compensable claim. There was no indication of any physical manifestation of grief; no counseling has been sought or recommended; Renville chose not to

> take anti-depressants; her use of Valium has not dramatically increased; she does not have continuous nights of sleeplessness or days without appetite; and she maintains close relationships with family members and friends.

Renville, ¶ 15.

Count 20 of Spreadbury's Amended Complaint, Intentional Infliction of Emotional Distress, should be dismissed because Spreadbury fails to show he suffered from severe emotional distress. Rather, like Spreadbury's other allegations, he simply recites the elements of a claim for intentional infliction of emotional distress. For example, in paragraph 80 of his Amended Complaint, Spreadbury alleges "[a]s a direct and proximate result of Defendant's acts alleged herein, Spreadbury was caused to incur severe and grievous mental and emotional suffering, fright, anguish, shock, nervousness, and anxiety." Dkt. 1-1 at ¶ 80. However, Spreadbury does not allege any specific facts regarding the alleged emotional distress.

Dismissing Spreadbury's claim of emotional distress is necessary to uphold the purpose of the Montana Supreme Court's strict standard regarding a claim for emotional distress. "[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." *Sacco*, 896 P.2d at 428 (emphasis in original).

Spreadbury has not met his burden of presenting material and substantial evidence to support his claim for emotional distress. *See McConkey*, ¶ 54 (if the evidence presented by plaintiff is insufficient as a matter of law, his claim must fail). Accordingly, Count 20 of Spreadbury's Amended Complaint should be dismissed.

6. Count 21 - Negligent Intentional Infliction of Emotional Distress

Similar to the claim of Intentional Infliction of Emotional Distress, Spreadbury's Amended Complaint fails to state a claim upon which relief can be granted for Negligent Infliction of Emotional Distress.

> 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 in Section II. 3. of this Brief, Spreadbury's Amended Complaint

does not provide sufficient information to establish a case for negligence, since it fails to set forth any factual allegations regarding a duty Lee Enterprises allegedly owed to Spreadbury.

Furthermore, as detailed in Section II. 5., Spreadbury fails to allege facts showing he suffered emotional distress. In *May*, the Court granted summary judgment in favor of ERA regarding Mays' negligent intentional infliction of emotional distress claims, since the Mays failed to show they suffered emotional distress. The Mays entered into an agreement with ERA to sell their gas station in Bozeman, Montana. ERA found a buyer and sold the property. However, the terms of the agreement established the Mays were still responsible for the toxic liability and the gas tank removal. The Mays brought suit alleging various claims against ERA based on the allegation that ERA told the Mays they would not be responsible for the toxic liability and the gas tank removal. *May*, ¶¶ 5-16. With regard to their claim for emotional distress, the Mays alleged they suffered emotional distress from the extra work and added stress as a result of the toxic liability and the gas tank removal. However, they admitted it was not stressful enough to seek medical treatment. As a result, the Court granted summary judgment in favor of ERA, and the Montana Supreme Court affirmed. *May*, ¶ 57.

Like in *May*, Spreadbury fails to support his claim of emotional distress. Paragraph 80 of Spreadbury's Amended Complaint alleges "[a]s a direct and

proximate result of Defendant's acts alleged herein, Spreadbury was caused to incur severe and grievous mental and emotional suffering, fright, anguish, shock, nervousness, and anxiety." Dkt. 1-1 at ¶ 80. Spreadbury does not allege any specific facts supporting the alleged emotional distress. Instead, like his other claims, Spreadbury's Amended Complaint simply recites the legal elements of a claim of emotional distress without any factual support.

Accordingly, Count 21 of Spreadbury's Amended Complaint should be dismissed.

7. Count 23 - Injunctive Relief

Spreadbury's Amended Complaint does not provide sufficient information to support his claim for Injunctive Relief as requested in Count 23.

"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, 289 Mont. 278, 961 P.2d 109.

Spreadbury's Amended Complaint essentially requests the Court order Lee Enterprises stop publishing news articles about Spreadbury. *See* Dkt. 1-1 at ¶ 214. However, Spreadbury has not stated factual allegations sufficient to entitle him relief against Lee Enterprises. 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 (internal citation omitted). "Injunction is not an appropriate remedy to procure relief for past injuries, it is to afford preventive relief only." *Mustang*, ¶ 15.

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 Montana Code Annotated § 27-16-102(2) gives Spreadbury no authority to civilly arrest anyone.

8. Count 26 - Punitive Damages

Spreadbury's Amended Complaint does not provide sufficient information to support his claim for Punitive Damages as requested in Count 26.

"[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 quotations and citations 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. Spreadbury alleges Lee Enterprises acted with actual malice. However, like the rest of his Amended Complaint, Spreadbury fails to allege specific allegations to support his claim. Count 26 of Spreadbury's Amended Complaint fails to provide any evidence, let alone clear and convincing evidence, to support

his claim for punitive damages.

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 to state a claim upon which relief can be granted, it follows that Spreadbury's requested relief of punitive damages should be dismissed as well.

III. CONCLUSION

The various Counts against Lee Enterprises contained in Spreadbury's Amended Complaint (Counts 8, 18-21, 23 and 26) should be dismissed pursuant to Rule 12(b)(6). First, the allegations in Spreadbury's Amended Complaint should not be taken as truth for purposes of this motion, since the allegations are simply legal conclusions with no factual basis. However, even if taken as truth, Spreadbury's Amended Complaint should be dismissed with regard to the Counts alleged against Lee Enterprises because they fail to state a claim upon which relief can be granted.

DATED this 28th day of April, 2011.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that *Defendant, Lee Enterprises, Inc.'s Brief In Support of Motion to Dismiss All Counts 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 5710 words long, excluding Caption, Certificate of Service, and Certificate of Compliance.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2011, a copy of the foregoing document was served on the following persons by the following means:

1, 3	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
Pro Se Plaintiff

3. William L. Crowley
Natasha Prinzing Jones
Thomas J. Leonard
bcrowley@boonekarlberg.com
npjones@boonekarlberg.com
tleonard@boonekarlberg.com
Attorneys for Defendants Bitterroot Public Library, City of Hamilton, and Boone Karlberg P.C.

/s/ Jeffrey B. Smith
Attorneys for Defendant, Lee Enterprises, Inc.