IN THE COURT OF APPEALS OF IOWA

No. 6-092 / 05-1051
Filed October 11, 2006

V.W. ENTERPRISES, INC., BRYAN WHIPP, and LORI VEACH,
Plaintiffs-Appellants,

ROBERT PHILLIPS and TERRY PHILLIPS,
Intervenors-Plaintiffs,

vs.

CITY OF CLARINDA, an Iowa Municipal Corporation, FRANK SNYDER, US BANK, N.A., As receiver, and SCOTT TRACY, Husband and Wife, Jointly and Severally,
Defendants-Appellees.

Appeal from the Iowa District Court for Page County, Charles L. Smith, and Jeffrey L. Larson, Judges.

V.W. Enterprises, Inc., Brian Whipp, and Lori Veach appeal from the district court's grant of the City of Clarinda's first and second motions for summary judgment and the grant of U.S. Bank's motion for summary judgment. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Theodore F. Sporer of Sporer & Ilic, P.C., Des Moines, for appellant.

Robert Phillips, Maryville, Missouri, pro se.

Kristopher K. Madsen and Robert M. Livingston of Stuart, Tinley, Peters, Thorn, Hughes, Faust & Madsen, Council Bluffs, for appellees City of Clarinda and Frank Snyder.

Randy V. Hefner and Mathew J. Hemphill, Adel, for appellee U.S. Bank, N.A.

Heard by Vaitheswaran, P.J, Eisenhauer, J. and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

BROWN, S.J.

We filed an opinion in this case on June 14, 2006. U.S. Bank filed a petition for rehearing which we granted. Our June 14, 2006 unpublished opinion has been withdrawn. The issues raised in the rehearing petition are our grant of relief to the intervener plaintiffs, Robert Phillips and Terry Phillips, and a request that we determine whether V.W. Enterprises may pursue its claims against U.S. Bank individually as well as its claims against the bank as receiver. We have now considered the arguments of the parties submitted in support of and in opposition to the issues presented in the petition for rehearing.

The district court granted the first and second summary judgment motions of the defendant, City of Clarinda, and U.S. Bank's motion to dismiss as well as its summary judgment motion. The plaintiff property owners appeal those rulings. We affirm in part, reverse in part, and remand.

I. *Background Facts & Proceedings*.

Bryan Whipp and Lori Veach are co-owners of V.W. Enterprises, Inc.[1] V.W. Enterprises owned a building located at 119 East Main Street in Clarinda, Iowa. Whipp and Veach operated a Breadeaux Pizza restaurant at this location. Scott and Robin Tracy owned the adjoining building located at 117 East Main Street, and it shared a common wall with the V.W. Enterprises' property. The Tracys purchased the building from Robert and Terri Phillips, the intervener plaintiffs. The Phillips hold a second mortgage on the building payable by the Tracys. The Tracys had abandoned this property by January 2003.

[1] Unless otherwise indicated, we will refer to Whip, Veatch, and V.W. Enterprises collectively as V.W. Enterprises.

In mid-January, Whipp and Veach noticed that water was entering their business via the common wall shared with 117 East Main Street. On January 21, 2003, U.S. Bank filed an action to foreclose its mortgage on 117 East Main Street, and an employee of U.S. Bank was appointed receiver of 117 East Main Street.[2] In the order appointing receiver, the court found that 117 East Main Street was abandoned, was in danger of being destroyed as a result of abandonment, and the receivership was established to protect the real estate.

In mid-February of 2003, Whipp contacted the city manager of Clarinda, Gray Walter, and complained about the abandoned building, informing Walter that water was coming into his building and told Walter that the smell was having harmful effects on his business. On March 4, 2003, Whipp again told Walter about the deteriorating conditions of 117 East Main Street and its harmful effects on his building. At this point, V.W. Enterprises' building was infused with a permanent moldy smell. Around March 12, 2003, Whipp contacted the city attorney for Clarinda and informed him about the condition of the building and requested that something be done. Again, on April 2, 2003, Whipp contacted Walter and at the end of April, Whipp complained to the mayor, Frank Snyder. Whipp and Walter inspected 117 East Main and found that the floors were bowed and water was seeping out of the front door of the building. The basement had standing water and a strong moldy smell permeated the building. Walter and Whipp heard the sound of running water and saw that water was leaking through

[2] All parties have treated U.S. Bank as the receiver, not its employee, and we will consider U.S. Bank as the receiver in this opinion.

a cracked regulator on the water line. The water had not been shut off to the building.

Whipp requested the water be shut off to the building in the first days of May of 2003. On May 15, 2003, the city health officer, Dr. Keuhn, was made aware of the conditions of the building. In a letter he drafted to the City, he requested immediate action be taken to minimize health risks. On May 19, 2003, the water was shut off to 117 East Main Street.

On May 21, 2003, U.S. Bank filed an application for discharge of the receiver. In the application, the receiver indicated that an estimate for repairing the roof had been obtained and U.S. Bank was unwilling to expend the funds to fix the roof because that would result in a loss to U.S. Bank. Therefore U.S. Bank requested it be discharged as receiver. On July 14, 2003, the court granted U.S. Bank's application for discharge and required the City of Clarinda to propose a replacement receiver.

On August 1, 2003, the City began cleaning out the building by tearing out carpet and rotten interior fixtures. In early November, Veach became sick with bi-lateral pneumonia allegedly as a result of her exposure to the mold. Whipp and Veach officially closed Breadeaux Pizza on November 13, 2003.

On August 4, 2003, V.W. Enterprises filed a petition against the City of Clarinda, U.S. Bank, and the Tracys alleging negligence, nuisance, dangerous premises, trespass, and inverse condemnation of their property at 119 East Main Street. U.S. Bank filed a motion to dismiss arguing that the petition incorrectly alleged negligence against the receiver in its individual capacity. The motion to

dismiss, resisted by V.W. Enterprises, was granted. V.W. Enterprises filed an amended petition asserting claims against U.S. Bank in its receivership capacity.

The City filed a motion for summary judgment claiming immunity under Iowa Code section 670.4(10) (2003). V.W. Enterprises resisted the motion and filed a motion for leave to amend the petition adding intentional interference with business and violations of 42 U.S.C. § 1983. The motion to amend also added the City's mayor, Frank Snyder, as a party to the case. The court granted V.W. Enterprises' motion for leave to amend. The court then granted the City's motion for summary judgment finding that the City was immune respecting the claims in its original petition under Iowa Code section 670.4(10) of the Municipal Tort Claims Act. V.W. Enterprises moved to amend and enlarge the findings of fact and conclusions of law, which was denied.

U.S. Bank filed a motion for summary judgment. The court granted U.S. Bank's motion for summary judgment on the grounds that U.S. Bank was no longer the receiver for 117 East Main Street and had not foreclosed on or taken title to 117 East Main Street.

A second motion for summary judgment was filed by the City and the mayor, Frank Snyder. In this motion, the mayor moved for summary judgment on all claims against him, and the City moved for summary judgment on the claims against it in the amended petition. Prior to the court's ruling on this motion, V.W. Enterprises filed a third amended petition adding claims of mandamus and waste against the mayor and the City. Each of the amended petitions realleged all prior claims.

The district court then granted the motion to amend and applied the City's second motion for summary judgment to the new claims of mandamus and waste. The district court barred V.W. Enterprises' claims against the City and the mayor under the theory of res judicata. The court further found again that section 670.4(10) barred the claims against the City and the mayor. The court also dismissed V.W. Enterprises' constitutional claim under 42 U.S.C. § 1983.

V.W. Enterprises now appeals the court's ruling on the City's and the mayor's first and second motions for summary judgment and U.S. Bank's motion for summary judgment, as well as the ruling dismissing U.S. Bank in its individual capacity. V.W. Enterprises argues the following on appeal:

> I. The district court erred in granting the city's first motion for summary judgment on the basis of supervision and control of the water supply and actual malice of city officers.
> II. The district court erred in granting U.S. Bank's motion for summary judgment on the basis of its receivership and the bank's motion to dismiss.
> III. The district court erred in granting the city's second motion for summary judgment by applying the motion to plaintiffs' new pleadings and on the basis of res judicata and 42 U.S.C. section 1983.

II. *Standard of Review*.

We review a district court's ruling on a motion for summary judgment for correction of errors of law. *Financial Mktg. Servs., Inc. v. Hawkeye Bank & Trust,* 588 N.W.2d 450, 455 (Iowa 1999). Summary judgment will be upheld when the moving party shows there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. *See* Iowa R. Civ. P. 1.981(3). In reviewing a motion for summary judgment, we consider the evidence in a light most favorable to the party opposing the motion. *Crippen v. City of Cedar*

Rapids, 618 N.W.2d 562, 565 (Iowa 2000). The court must consider every legitimate inference that can be reasonably deduced from the record in favor of the resisting party. *Phillips v. Covenant Clinic,* 625 N.W.2d 714, 718 (Iowa 2001). An inference is legitimate if it is "'rational, reasonable, and otherwise permissible under the governing substantive law.'" *Id.* (quoting *Butler v. Hoover Nature Trail, Inc.,* 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)). On the other hand, an inference is not legitimate if it is based upon speculation or conjecture. *Id*. If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. *Id.* A factual issue is "material" only if "'the dispute is over facts that might affect the outcome of the suit.'" *Id.* at 717 (quoting *Fouts ex rel. Jensen v. Mason,* 592 N.W.2d 33, 35 (Iowa 1999) (citation omitted)).

Rulings on motions to dismiss are reviewed for legal error. *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 442 (Iowa 2002).

III. *City's First Motion for Summary Judgment*.

In the City's first motion for summary judgment, it argued that it is immune from liability under Iowa Code section 670.4(10) of the Iowa Municipal Tort Claims Act. The district court agreed. On appeal, V.W. Enterprises argues that the City had sufficient supervision and control of the cause of the damage to obligate it to turn off the water to 117 East Main Street and the City had a duty to inspect 117 East Main Street under the city ordinances on nuisance.

Under section 670.2, "every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary

function." However, liability imposed under section 670.2 does not apply to the following:

> Any claim based upon an act or omission of an officer or employee of the municipality, whether by issuance of permit, inspection, investigation, or otherwise, and whether the statute, ordinance, or regulation is valid, if the damage was caused by a third party, event, or property not under the supervision or control of the municipality, unless the act or omission of the officer or employee constitutes actual malice or a criminal offense.

Iowa Code § 670.4(10). In this context, "supervision" has been defined as "oversee[ing] with the powers of direction and decision the implementation of one's own or another's intentions," and "control" as "to exercise restraining or directing influence over" or "have power over." *Hameed v. Brown*, 530 N.W.2d 703, 707 (Iowa 1995). Whether immunity exists is "a question of law appropriate for determination by the trial court." *Madden v. City of Eldridge*, 661 N.W.2d 134, 140 (Iowa 2003) (citing *Messerschmidt v. City of Sioux City*, 654 N.W.2d 879, 884 (Iowa 2002)).

> Under this statute, liability may attach *if the third party caused damage* (1) while the municipality was overseeing the third party's conduct with the power to direct and decide the implementation of the third party's intentions, or (2) while the municipality was exercising restraining influence over the third party.

Id. at 141 (emphasis added).

V.W. Enterprises argues that the City had supervision and control over the water supply and the water supply caused this damage. Because of this control of the water supply, it claims, the City should have shut the water off to 117 East Main Street.

The applicable city ordinances state that the City is responsible for the maintenance of the water supply and the meter. Here, the parties agree the

water leaked into the building as a result of a cracked regulator, which is located on the property owner's side of the meter. The ordinances indicate, and the parties do not argue otherwise, that the City is not responsible for the water once it is past the meter.

Although the parties frame the issues somewhat differently, we believe the essential controversy here is one of causation. To be entitled to immunity under section 670.4(10), the damage must have been "caused by a third party." Causation is not otherwise defined in section 670.4(10). We believe for tort liability purposes causation in the statute means proximate cause. That is, was the conduct of the party "a substantial factor in producing [the] damage" and would the damage "not have happened except for the conduct." I Iowa Civ. Jury Instructions 700.3 (1996). Of course, there may be more than one proximate cause of the damage in a particular case. *Id.* 700.4 (2000). The issue of proximate cause is rarely subject to summary judgment. Iowa R. App. P. 6.14(6)(*j*); *Knapp v. Simmons*, 345 N.W.2d 118, 121-24 (Iowa 1984).

There seems to be no question that the water was leaking into the building from a broken regulator inside the building. Neither the City nor its mayor has any ownership interest in the privately-owned 117 East Main Street building or any control over the building. There is no viable fact issue as to whether the regulator was under the supervision and control of the City; it was not. However, V.W. Enterprises argues the cause of the damage was the continual supply of water to the building. We think there is a genuine issue of material fact as to whether the continued supply of water was a substantial factor in producing the damage. Accepting that a genuine issue of material fact exists as to the cause of

damages, it is premature to apply immunity under Iowa Code section 670.4(10), because immunity applies only if the damage was caused by a third party, event or property not under the supervision and control of the municipality.[3] The trial court erred in assuming the cause of the damages was the leak inside the building. V.W. Enterprises adequately preserved this issue by raising it again in a motion pursuant to Iowa Rule of Civil Procedure 1.904(2), which was summarily denied.

As a collateral issue, V.W. Enterprises maintains that the City failed to exercise its non-discretionary duty to inspect the premises, which would have led it to abate it as a nuisance. The district court impliedly conceded the City had such a duty, but nevertheless found the immunity in section 670.4(10) applicable.

The ordinance regarding the inspection and control of nuisances provides the City may serve on the owners of a building a complaint after the public officer has noticed or been notified of a nuisance and inspected the nuisance. Following that, a hearing will be scheduled to resolve the controversy. Our review of the ordinance leaves considerable doubt a duty to inspect was created.

In support of this claimed duty to inspect, V.W. Enterprises argues inspection is an operational, not a discretionary, function of the City, thus the City is not immune under Iowa Code section 670.4(3). The immunity granted by section 670.4(3) was not raised as a defense in this case. We do not believe this attempt to create a duty based on an immunity provision not relevant to the issues in this case can succeed.

[3] Applicable city ordinances show that the City has supervision and control of the water supply up to the point of the meter.

Even accepting a duty to inspect was created as the district court implicitly found, we find it premature to apply immunity under Iowa Code section 670.4(10) because a genuine issue of fact still exists as to the cause of the damage. Despite V.W. Enteprises' argument, the right to inspect, or even the duty to inspect, does not place the escaping water in 117 East Main Street under the City's supervision and control. Therefore if section 670.4(10) comes into play by a determination that the damage was caused by a third party, event, or property not under the supervision and control of the City, it applies to this claim as well. *See Madden*, 661 N.W.2d at 141 ("In other words, Madden alleges the city is liable for its acts or omission in its inspection of the building. This is precisely the type of claim that is meant to come within the protective ambit of Iowa Code section 670.4(10).").

Iowa Code section 670.4(10) provides for an exception to immunity if the failure to inspect constitutes actual malice or a criminal offense. V.W. Enterprises claims that the district court erred in applying section 670.4(10) immunity to V.W. Enterprises' claims because a genuine issue of material fact exists as to whether the mayor acted with actual malice in failing to order the inspection of 117 East Main Street. V.W. Enterprises supports its claim by contending that the mayor's failure to inspect enabled Rick Alley, a former member of the City's economic development committee, to attempt to take over the Breadeaux Pizza franchise in Clarinda. We have previously stated that because the cause of the damage has not been ascertained, it is premature to consider immunity under Iowa Code section 670.4(10). Accordingly, we find it is

also premature to address V.W. Enterprises' argument that the exception to immunity applies and therefore we decline to do so.

IV. City's second motion for summary judgment.

A. Tort claims.

The City filed a second motion for summary judgment directed to V.W. Enterprises' amended and substituted petition. The City argued that the amended and substituted petition is barred by res judicata because it re-alleges claims that the court summarily dismissed in its ruling on the City's first motion for summary judgment. The City further argues that V.W. Enterprises' claim of tortious interference with business is barred by the municipal tort immunity of Iowa Code section 670.4(10) and that the claim of a violation of 42 U.S.C. § 1983 fails as a matter of law.

For the same reasons we have stated in reversing the trial court's grant of the City's original motion for summary judgment, we also reverse its grant of the City's second motion for summary judgment except as to the U.S.C. § 1983 claim.

B. 42 U.S.C. § 1983 claim.

In granting the City's second motion for summary judgment on V.W. Enterprises' 42 U.S.C. § 1983 claim, the district court found that V.W. Enterprises did not allege facts constituting an egregious governmental abuse against their property rights that is shocking to the conscience of the court. 42 U.S.C. § 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of

> Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. . . .

Dickerson v. Mertz, 547 N.W.2d 208, 214 (Iowa 1996). "A plaintiff in a § 1983 action must establish (1) that the defendants deprived the plaintiff of a right secured by the Constitution and laws of the United States, (2) that the defendant acted under color of state law, (3) that the conduct was a proximate cause of the plaintiff's damage, and (4) the amount of damage." *Id*. (citing *Leydens v. City of Des Moines*, 484 N.W.2d 594, 596 (Iowa 1992)).

V.W. Enterprises is claiming a violation of its substantive due process rights when the City failed to take actions to abate the nuisance at 117 East Main Street resulting in a taking of V.W. Enterprises' property without just compensation. "The fourteenth amendment provides that no state shall 'deprive any person of life, liberty, or property, without due process of law . . . .'" *Bailey v. Lancaster*, 470 N.W.2d 351, 361 (Iowa 1991). "Substantive due process protects against abusive government conduct including deliberate or intentional misconduct of an official." *Id.* (citing *Davidson v. Cannon*, 474 U.S. 344, 347-48, 106 S. Ct. 668, 670, 88 L. Ed. 2d 677, 682-83 (1986)). Moreover, "[a]n act becomes willful in law only when it involves some degree of conscious wrong or evil on the part of the actor." *Id*. (citing *State v. Willing*, 129 Iowa 72, 74, 105 N.W. 355, 356 (1905)). A violation of substantive due process is not easy to prove. *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 694 (Iowa 2002).

> [S]ubstantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that "shock the conscience or otherwise offend . . . judicial notions of fairness . . . [and that are] offensive to human dignity." With the exception of certain intrusions on an individual's privacy and bodily integrity, the collective conscience of the United States Supreme Court is not easily shocked.

Id. (quoting *Blumenthal Inv. Trusts v. City of West Des Moines*, 636 N.W.2d 255, 265 (Iowa 2001) (citations omitted)).

The City maintains that V.W. Enterprises cannot show that it was deprived of a right secured by the Constitution and laws of the United States, because it has not produced facts egregious enough to constitute a violation of substantive due process. Here, V.W. Enterprises is alleging the mayor did not take action to inspect or abate the nuisance at 117 East Main Street in an effort to put V.W. Enterprises out of business. We have carefully reviewed the evidence claimed to support the deprivation of substantive due process and we agree with the trial court's determination that the claim fails as a matter of law. We believe the substantive due process claim must be dismissed.

V. *U.S. Bank's Motions to Dismiss and for Summary Judgment*.

1. Motion to dismiss.

As a preliminary matter, in its petition for rehearing, U.S. Bank claims V.W. Enterprises has not appealed the district court's dismissal of U.S Bank in its individual capacity. The notice of appeal specifically refers to the various summary judgment motions, but makes no mention of the ruling on the motion to dismiss. The notice did, however, refer to "each and every other order inhering" in the summary judgment rulings. V.W. Enterprises now contends the ruling on the motion to dismiss inhered in the court's summary judgment ruling. U.S Bank

did not argue its initial position regarding the notice of appeal in its brief, but rather defended the dismissal ruling on its merits.

We conclude V.W. Enterprises has appealed from the ruling on the motion to dismiss. Although the notice of appeal did not specifically refer to the dismissal motion ruling, the summary judgment ruling did refer to it. We conclude the nonappealable dismissal ruling inhered in the summary judgment ruling. We also fail to find any prejudice to U.S. Bank in addressing this issue here. The general rule is that notices of appeal should be construed liberally to effect the laudable purpose of addressing issues on the merits. *Iowa Dep't of Human Servs. ex rel. Greenhaw v. Stewart*, 579 N.W.2d 321, 323-24 (Iowa 1998); *Blink v. McNabb,* 287 N.W.2d 596, 598-99 (Iowa 1980).

We also reject U.S. Bank's contention that V.W. Enterprises abandoned its claim against it individually by filing an amendment to the petition naming U.S Bank as receiver before the court's ruling on the motion to dismiss was rendered. Both parties have continued to discuss this issue throughout their briefs. We do not attribute the serious effect of abandonment to the timing of the amended petition.

The motion to dismiss, although not expressly so stating, was based on the premise that a claim against U.S. Bank in its individual or corporate capacity failed to state a claim upon which any relief could be granted. Iowa R. Civ. P. 1.421(1)(*e*). U.S. Bank alleged that as a matter of law it could not be held individually responsible for any misdeeds connected with the receivership. Both parties cite *Miller v. Everest*, 212 N.W.2d 522, 525-26 (Iowa 1973), in support of their contentions that a receiver may or may not be personally responsible for the

receiver's conduct. *Miller* illustrates that a receiver may incur individual liability for its conduct under certain circumstances, and, in other instances, will only be liable as a receiver. *Miller,* 212 N.W.2d at 525-26. Generally, a receiver is not individually liable for torts against third parties. *Id.* However, if a receiver's conduct involves personal misconduct, individual responsibility may attach. *Id.*

Motions to dismiss for failure to state a claim upon which any relief may be granted should be rarely granted. *Robinson v. State*, 687 N.W.2d 591, 592-93 (Iowa 2004) (stating "vast judicial resources could be saved with the exercise of more professional patience"); *Rieff v. Evans*, 630 N.W.2d 278, 292 (Iowa 2001) (stating only rare cases will not survive a motion to dismiss under notice pleading). Only when a plaintiff's petition "on its face shows no right of recovery under any state of facts," is it proper to grant a motion to dismiss. *Schaffer v. Frank Moyer Constr., Inc.*, 563 N.W.2d 605, 607 (Iowa 1997). We view the petition in the light most favorable to the plaintiff, resolving all doubts and ambiguities in plaintiff's favor. *Below v. Skarr*, 569 N.W.2d 510, 511 (Iowa 1997). We find nothing in V.W. Enterprises' petition which would limit its claims against the receiver to its official capacity. We do not consider this one of the rare cases in which all of V.W. Enterprises' claims against U.S. Bank in its individual or corporate capacity should be disposed of so precipitously and reverse the district court's sustention of U.S. Bank's motion to dismiss. This, of course, is not intended to convey that we have any view as to the ultimate outcome of the receiver's liability, officially, individually, or at all.

2. Motion for summary judgment.

V.W. Enterprises maintains that the district court incorrectly framed the issues. The district court granted the motion finding that U.S. Bank never actually foreclosed the mortgage or took title to 117 East Main Street and therefore, U.S. Bank could not be liable for the damage caused by 117 East Main Street. V.W. Enterprises is claiming that U.S. Bank knowingly and intentionally permitted the property under its possession and control to invade, injure and damage the property of another and that the bank negligently failed to exercise ordinary care in managing the receivership property.

V.W. Enterprises again relies on *Miller v. Everest*, 212 N.W.2d 522 (Iowa 1973). In *Miller*, the receiver of foreclosed property failed to have the ice and snow removed from the parking lot of the property which was shared with an adjacent building. *Miller,* 212 N.W.2d at 523. An action for negligence was brought against the receiver by the estate of a man who fell on the ice and died. *Id*. The supreme court stated that failing to remove the snow may invoke liability on the receiver's part. *Id*. at 526. In reaching this conclusion, the supreme court adopted the principle that as a receiver he was in possession of the property and when his failure to perform a duty injures another he is liable. *Id.* Furthermore, trespass is an actionable invasion of an interest in exclusive possession of land. *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 N.W.2d 435, 437 (1942). An invasion can occur by physical invasion by tangible matter as well as by intangible matter, such as noise and odors. *Id*. There are fact issues to be resolved regarding these claims. The trial court erred in granting U.S. Bank's motion for summary judgment.

We reverse the district court's grant of summary judgment in favor of the City and the mayor, Frank Snyder, except as to the grant of summary judgment on the 42 U.S.C § 1983 claim, which we affirm. We also reverse the district court's grant of U.S. Bank's motion to dismiss and summary judgment in favor of U.S. Bank. We remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED