IN THE COURT OF APPEALS OF IOWA

No. 7-403 / 06-1156
Filed October 24, 2007

MARK DAVENPORT,
Plaintiff-Appellant,

vs.

CITY OF CORNING, MARVIN STEFFEN, and LARRY DREW,
Defendants-Appellees.

Appeal from the Iowa District Court for Adams County, David L. Christensen, Judge.

Plaintiff appeals from the district court summary judgment rulings dismissing his claims for conspiracy, defamation, harassment, and invasion of privacy. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

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

Hugh J. Cain of Hopkins & Huebner, P.C., Des Moines, for appellees City of Corning and Marvin Steffen.

Joseph P. McLaughlin and Mark Wiedenfeld of Wiedenfeld & McLaughlin, L.L.P., Des Moines, for appellee Larry Drew.

Heard by Zimmer, P.J., Eisenhauer, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ZIMMER, P.J.

Mark Davenport appeals from the district court rulings that granted summary judgment in favor of the City of Corning; its former mayor, Marvin Steffen; and its chief of police, Larry Drew; and dismissed his claims for conspiracy, defamation, harassment, and invasion of privacy. We affirm the judgment of the district court in part, reverse in part, and remand for further proceedings.

I. Background Facts and Proceedings.

Davenport's public battle with the City of Corning (City), its former mayor, and the chief of police began in 1999 when Davenport's employment as a police officer was terminated after several local women alleged Davenport harassed them. Davenport sued the City, Steffen, and Drew for wrongful termination. He filed a separate lawsuit against the women who accused him of harassment. The parties in both cases reached a settlement in January 2000, and the lawsuits were dismissed.

Shortly after the January 2000 settlement, Drew purportedly received information that Davenport abused his wife from a person who asked to remain anonymous. Drew stated he investigated the incident, but he did not file any charges against Davenport. Davenport denies the allegations and believes the informant is fictitious. Kelly Calvert, a former police officer in Corning, stated he overheard Drew "talking to someone on the phone about Mark" one day at the police department. Calvert said Drew "did nothing but bash Mark." He also "remember[ed] about the time that Mark's lawsuit over his job was coming to a head, Larry Drew was making several comments to others and on more than one

occasion around the Police Department about Mark abusing his wife." Calvert stated Drew told him "if I continued to be friends with Mark, my job would be on the line." Calvert "left the Corning Police Department and area" in September 2000.

In 2001 Davenport ran against Steffen in the City's mayoral election. He lost the election to Steffen. During the campaign, Greg Passley, a resident new to Corning, wrote a letter to the editor of the local paper criticizing the police department and Steffen, concluding, "We think its STEFFENATLEY time for a change!!" Suspecting the author of the letter was actually Davenport, Steffen asked Drew to find out "who [Passley] was." Drew ran a background check on Passley; talked to the mother of Passley's girlfriend, Marilyn Steele; and submitted a written report to the city council concerning the results of his inquiry.

Davenport complained about Drew's actions in investigating Passley to the city council. At the request of the council, Davenport prepared a written report detailing Drew's alleged unlawful activities. The city council voted not to investigate Davenport's complaints. Davenport then provided a copy of his report to the council to the county attorney. The county attorney convened a grand jury, which returned a two-count indictment against Drew on March 11, 2002, for nonfelonious conduct in office. Drew was acquitted of the charges in a jury trial.

In February 2002 Vic Gray was stopped by Drew for a seatbelt violation as Gray was leaving "Davenport's place of business." During the traffic stop, Drew asked Gray if he was acquainted with Davenport. Drew told him Davenport was "no friend of mine," and he asked Gray if he could get any "dirt" on Davenport.

Soon thereafter, Gray reported the incident to Davenport, who was bothered because he noticed "every time [he] looked out [his] front door" Drew was driving by in his unmarked police car "glaring at [his] store." Davenport submitted multiple affidavits from other Corning residents stating they too noticed Drew frequently driving by Davenport's home and business.

Davenport became concerned about Drew's "drive-bys," which he alleges continued until "at least August 2004," and hired two private investigators. They both contacted Drew and recorded their telephone conversations with him. The first investigator, Nicole Adams, spoke to Drew on February 14, 2002. She implied she had worked with Davenport in Des Moines and said she was contacted by Gray for information about Davenport. Adams asked Drew why he wanted information about Davenport. Drew made his dislike of Davenport clear and said he wanted "to get his ass out of here." He told her he heard Davenport "beats on" his wife. Adams informed Drew her "boyfriend" knew more about Davenport and would contact him. The second investigator, Scott Gratias, contacted Drew on February 15, 2002, pretending to be the boyfriend. Drew told Gratias he was "looking for something to jab [Davenport] with . . . something formal." Drew said he thought Davenport "was doing some domestic crap . . . I think mentally, not so much physical."

On November 16, 2002, Davenport filed suit in federal court against the City, Steffen, and Drew under 42 U.S.C. § 1983, alleging his First Amendment right to free speech was violated by Drew's retaliatory conduct against him for criticizing public officials. He also alleged a state law defamation claim against Drew. The federal court granted Steffen's unresisted motion for summary

judgment and dismissed the claims against him. The City and Drew also filed motions for summary judgment, which the court granted on April 9, 2004. The court dismissed the § 1983 claim and declined to exercise supplemental jurisdiction over the state law defamation claim.

Davenport then filed a petition in state court on August 11, 2004, alleging claims for conspiracy, defamation, harassment, and invasion of privacy. The City, Steffen, and Drew filed motions for summary judgment in September 2004. On December 3, 2004, the district court entered a ruling granting Steffen's motion for summary judgment in its entirety. The court also granted summary judgment in favor of Drew and the City on the harassment claim and the "allegedly defamatory statements made by Larry Drew to the two private investigators," but denied their motions for summary judgment as to the "statements Larry Drew allegedly made in the presence of Kelly Calvert and other Corning residents and as to Mr. Davenport's claim of invasion of privacy." The court also "decline[d] to discuss" Davenport's "allegation of conspiracy." The City and Drew filed a joint motion to reconsider pursuant to Iowa Rule of Civil Procedure 1.904(2). The district court granted their motion as to the "allegedly defamatory statements made in the presence of Kelly Calvert and other Corning residents," finding such statements were barred by the statute of limitations.

In October 2005 the City and Drew filed a second motion for summary judgment. The district court entered a ruling on March 1, 2006, granting summary judgment in their favor as to the "invasion-of-privacy claim relating to plaintiff's business," but denying the motion as to the "invasion-of-privacy claim relating to plaintiff's home." The City and Drew again filed a joint motion to

reconsider. Davenport also filed a motion to reconsider, arguing the court incorrectly dismissed his claim for harassment. The court entered summary judgment in favor of the City and Drew on the remaining invasion-of-privacy claim and denied Davenport's motion to reconsider as untimely.

Davenport appeals. He claims the district court erred in "rejecting the effect of defendant's conspiracy on other substantive claims" and in finding harassment is not a civil cause of action. He further claims the court erred in granting summary judgment on his claims for defamation and invasion of privacy. The City, Steffen, and Drew argue Davenport's claims are barred by the doctrine of claim preclusion.

II. Scope and Standards of Review.

We review the district court's summary judgment rulings for the correction of errors at law. Iowa R. App. P. 6.4; *Faeth v. State Farm Mut. Auto. Ins. Co.*, 707 N.W.2d 328, 331 (Iowa 2005). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002).

III. Merits.

A. Claim Preclusion.

"The general rule of claim preclusion provides a valid and final judgment on a claim precludes a second action on that claim or any part of it." *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002). Claim preclusion is based on the principle that a party may not split or try his claim

piecemeal, but must put in issue and try his entire claim in the case on trial. *B & B Asphalt Co., Inc. v. T.S. McShane Co., Inc.*, 242 N.W.2d 279, 286 (Iowa 1976). "It is necessary to determine whether plaintiff's first and second actions were the same claim or cause of action within the meaning of this principle." *Id*. In assessing whether a party is forwarding the same or a distinct cause of action, "we examine (1) the protected right, (2) the alleged wrong, and (3) the relevant evidence." *Iowa Coal Min. Co., Inc. v. Monroe County*, 555 N.W.2d 418, 441 (Iowa 1996). If the same facts or evidence would sustain both actions, the two actions are considered the same. *Id.*

The defendants initially contend the doctrine of claim preclusion applies to bar Davenport's state court claims because he alleged the same facts and evidence to sustain his federal action. In the federal action, Davenport claimed the defendants retaliated against him for exercising his First Amendment right to criticize public officials in violation of § 1983. In support of this claim, Davenport alleged,

> Drew while in uniform and/or on duty has engaged in behavior meant to harass, annoy or cause alarm to the Plaintiff such as while in his patrol car stopping motorists seen leaving the plaintiff's place of business, making threats to the Plaintiff, making slanderous statements to third parties such as the Plaintiff abuses his wife and/or attempting to gather information that he may use to force the Plaintiff to move from the area.

In granting summary judgment in favor of the City and Drew, the federal court reviewed evidence regarding "the Passley investigation," the domestic abuse allegations Drew related to the private investigators, "Drew's frequent drive-bys of Davenport's home and place of business," and Drew's claimed harassment of Calvert.

Davenport advanced the same facts and evidence to support his claims of conspiracy, defamation, harassment, and invasion of privacy in state court. "A plaintiff is not entitled to a second day in court by alleging a new ground of recovery for the same wrong." *Arnevik*, 642 N.W.2d at 319. However, Davenport contends the doctrine of claim preclusion should not apply because the defendants' conduct "continued without pause" since the dismissal of the federal action. He claims Drew continued to frequently drive by his home and workplace until "at least August 2004" and even as late as 2005, specifically alleging Drew drove by his home seven times within an hour on July 4, 2005. He also alleges he received death threats through the mail and a "grave memorial wreath" at his business after filing his state court action in August 2004.[1]

Preclusion is inappropriate as to matters that could not have been advanced in the first action. *See Whalen v. Connelly*, 621 N.W.2d 681, 685 (Iowa 2000). *But see Spiker v. Spiker*, 708 N.W.2d 347, 357 (Iowa 2006) (recognizing ordinary claim preclusion rules are strained by continuing conduct). We therefore conclude the doctrine of claim preclusion does not bar Davenport's claims to the extent they are based on the defendants' alleged continuing conduct following the dismissal of the federal action.

The defendants also argue the doctrine of claim preclusion applies to bar Davenport's claims because "he is not entitled in state court to bring claims he neglected to bring in federal court." Claim preclusion applies not only to matters actually determined in an earlier action but to all relevant matters that could have

[1] We note Davenport did not present any evidence in the summary judgment proceedings indicating the source of the death threats and "grave memorial wreath."

been determined. *Shumaker v. Iowa Dep't of Transp.*, 541 N.W.2d 850, 852 (Iowa 1995). The Restatement explains:

> When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground.

Restatement (Second) of Judgments § 25 cmt. e (1982). This rule does not apply where a court with jurisdiction in the first action "'would clearly have declined to exercise it as a matter of discretion.'" *Shumaker*, 541 N.W.2d at 854 (quoting Restatement (Second) of Judgments § 25 cmt. e).

In the preceding federal action, the court declined to exercise supplemental jurisdiction over Davenport's state law defamation claim against Drew, finding "state courts are a much better forum in which to judge the conduct of local police officers under state law." Thus, we believe it is clear the federal court would have declined to exercise jurisdiction over the additional tort claims Davenport advanced in this action. We therefore conclude the district court was correct in finding the doctrine of claim preclusion did not apply to bar Davenport's claims.

B. Conspiracy.

The district court "decline[d] to discuss" Davenport's theory that the City and Steffen were liable based on their "ratification, approval and/or acquiescence in Drew's tortious acts," because the petition did "not include an allegation of conspiracy," Davenport did not "lay out the law for conspiracy, and he has not attempted to apply any law regarding conspiracy to the facts of this case." The

court accordingly dismissed Davenport's claims against Steffen because he did not allege any facts establishing Steffen himself harassed, defamed, or invaded Davenport's privacy.[2] Davenport did not file a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) requesting the court to rule on his theory that the City and Steffen were vicariously liable for Drew's wrongful conduct because the parties acted in concert with one another.

It is well-settled such a motion "is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication." *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984). We therefore conclude error was not preserved on the issue of whether the City and Steffen are liable for Drew's alleged tortious acts due to a conspiracy between the parties. We further conclude the district court correctly dismissed the claims against Steffen because Davenport did not allege any other theory of liability pursuant to which Steffen would be liable for the conduct of Drew.

C. Defamation.

Defamation is the invasion of another person's interest in his or her reputation or good name. *Taggart v. Drake Univ.*, 549 N.W.2d 796, 802 (Iowa 1996). It is composed of the twin torts of libel and slander: Libel involves a written publication of defamatory matter while slander involves an oral publication of such matter. *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 768 (Iowa

[2] In the first summary judgment ruling, the district court determined a genuine issue of material fact existed as to whether the City was liable for Drew's conduct pursuant to Iowa Code section 670.2 (2003), which provides "every municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment."

2006). The tort alleged in this case is slander based on Drew's statements to the private investigators, Calvert, and "other Corning residents" regarding Davenport's supposed abuse of his wife.

To establish a prima facie case of slander, the plaintiff must show the defendant published a statement that was defamatory and concerned the plaintiff. *Taggart*, 549 N.W.2d at 802; *see also Kiesau v. Bantz*, 686 N.W.2d 164, 175 (Iowa 2004) (noting an attack on a person's integrity or moral character is defamatory per se and falsity, malice, and injury are presumed). "Publication is an essential element of defamation and simply means a communication of statements to one or more third persons." *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 221 (Iowa 1996). A defamatory statement is not published unless it is heard and understood by a third person to be defamatory. *Id.* "In determining what the third person understands, the defamatory statement must be viewed in the context of the surrounding circumstances and within the entire communication." *Id.* Communication of the defamatory statements only to the one defamed does not constitute publication. *Belcher v. Little*, 315 N.W.2d 734, 738 (Iowa 1982). Thus, if the communication of the defamatory statement is in answer to a request from an agent of the one defamed, the publication may not be actionable. Restatement (Second) Torts § 577 cmt. e (1977).

The district court determined Drew's statements to the private investigators were not published because they "were hired by Mr. Davenport and they contacted Larry Drew pursuant to Mr. Davenport's request." The court reasoned "the surrounding circumstances and the context of the entire communication do not lead a reasonable person to believe that either

investigator understood Larry Drew's statement that Mr. Davenport abuses his wife to be defamatory." We agree.

Drew's statements to the investigators were in response to "artful questions from the investigators designed to" induce Drew to say something defamatory about Davenport. The first investigator told Drew she thought Davenport was a "pig" who she had problems with. She stated "there were several women who didn't want to work with him." Towards the end of the conversation, she asked Drew if other women "were having problems with him down there or not." In response, Drew told her about the harassment allegations that led to Davenport's termination and stated he heard Davenport "beats on" his wife. The second investigator, like the first, led Drew to believe he had information about Davenport acting in an inappropriate manner. In response, Drew stated he thought Davenport "is doing some domestic crap . . . I think mentally not so much physical but I don't know." Given the context of the statements and the circumstances in which they were made, we believe the district court was correct in concluding the statements to the investigators were not published. *See Huegerich*, 547 N.W.2d at 221.

The district court also dismissed Davenport's defamation claim based on the statements Drew allegedly made to former Corning police officer Kelly Calvert as barred by the statute of limitations. The parties agree the two-year statute of limitations period under Iowa Code section 614.1(2) applies to defamation claims. *See Clark v. Figge*, 181 N.W.2d 211, 215 (Iowa 1970). Davenport does not dispute that Drew's statements to Calvert were made outside of the applicable limitations period. Instead, he argues the discovery rule, which

tolls the statute of limitations until the plaintiff "discovers the injury or by the exercise of reasonable diligence should have discovered it," should apply to the tort of defamation. *Nixon v. State*, 704 N.W.2d 643, 646 (Iowa 2005) (citations omitted). We disagree.

In *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 13 (Iowa 1990), our supreme court stated the two-year statute of limitations for slander claims begins to run "on the date of publication." Thus, the *Kiner* court found in order for a plaintiff's "slander action to be timely under section 614.1(2), it must be based" on a "publication within the two-year time period." *Id.* at 14; *see also Jean v. Hennessy*, 69 Iowa 373, 375-76, 28 N.W. 645, 647 (1886) (finding an action for libel filed May 30, 1885, would be barred if the libelous letter was written "at any time previous to May 30, 1883"). We accordingly conclude the district court was correct in finding the statute of limitations begins to run on the date of publication, not on the date the plaintiff discovers or reasonably should have discovered the slanderous statement.

Finally, Davenport appears to argue there were defamatory statements made to "other Corning residents" that were within the two-year statute of limitations. However, he did not submit any evidence as to the content, dates, or to whom such statements were made. *See Huegerich*, 547 N.W.2d at 221 (finding the evidence was insufficient to establish publication where no evidence was introduced as to "how, when and from whom" the individuals heard the defamatory statements). We therefore conclude the district court was correct in dismissing Davenport's defamation claims as to statements Drew supposedly made to "other Corning residents."

D. Harassment.

Davenport claims the district court erred in finding that harassment is not a civil cause of action. He asserts our criminal statute on harassment, Iowa Code section 708.7, gives rise to a civil cause of action for harassment by virtue of section 611.21, which provides: "The right of civil remedy is not merged in a public offense and is not restricted for other violation of law, but may in all cases be enforced independently of and in addition to the punishment of the former."

In *Hall v. Montgomery Ward & Co.*, 252 N.W.2d 421, 423 (Iowa 1977), our supreme court held section 611.21 provides a "civil right for violation of a criminal statute." The court in *Hall* explained the statute "appears to have been enacted to abolish the ancient common-law rule that civil wrongs are merged in felonies." *Hall*, 252 N.W.2d at 423. Thus, while section 611.21 prevents merger of a civil remedy in a public offense and therefore avoids preclusion of a civil cause of action for a public offense, it does not *create* a civil cause of action for violation of a criminal statute. In *Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 38 (Iowa 1982), our supreme court clarified that

> the *Hall* holding was based upon legislative intent to create a civil tort action, and is therefore in accord with the general rule that violation of a criminal statute gives rise to a civil cause of action only if such an action appears, by express terms or clear implication, to have been intended by the legislature.

Davenport has not submitted any authority to support his contention the legislature intended a violation of section 708.7 to give rise to a civil cause of action for harassment. Nor does it appear "by express terms or clear implication" that "such an action" was intended by the legislature. *Id.* We therefore conclude

the district court correctly dismissed Davenport's claim for harassment against Drew and the City.

E. Invasion of Privacy.

Our supreme court first recognized the right of privacy and an action based on it in *Bremmer v. Journal-Tribune Publishing Co.*, 247 Iowa 817, 821-22, 76 N.W.2d 762, 764-65 (1956). The court in *Bremmer* defined the right to privacy as "the right of an individual to be let alone, to live a life of seclusion, to be free from unwarranted publicity." *Bremmer*, 247 Iowa at 821, 76 N.W.2d at 764. Since *Bremmer*, our supreme court has "adopted and applied the principles of the privacy invasion tort set out in the Restatement (Second) of Torts (1977)," which provides that the right of privacy may be invaded by "'unreasonable intrusion upon the seclusion of another.'" *Stessman v. American Black Hawk Broad. Co.*, 416 N.W.2d 685, 686 (Iowa 1987) (quoting Restatement (Second) of Torts § 652A(2)(a)).

Davenport alleges Drew intruded upon his seclusion by continuously driving by his home and business. To recover under an intrusion upon seclusion theory, a plaintiff must show the "defendant intentionally intruded upon the seclusion that the plaintiff 'has thrown about [his or her] person or affairs.'" *Id.* at 687 (quoting Restatement (Second) of Torts § 652B cmt. c). The plaintiff must also show the intrusion "is one that would be highly offensive to a reasonable person." *Id.* (internal quotation omitted). "The defendant is not liable, however, if the plaintiff is already in public view." *Id.*; Restatement (Second) of Torts § 652B cmt. c.

The district court determined Drew's invasion of privacy claim relating to Davenport's place of business should be dismissed because "the undisputed facts . . . reveal that Chief Drew observed Davenport in a business that not only was open to the public, but also invited the public inside." We agree. The comments to the Restatement explain "the defendant is subject to liability . . . only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." Restatement (Second) of Torts § 652B cmt. c. Thus, there is no liability for observation of a person "while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye." *Id.*

Davenport's business was located on a public highway and was visible to people passing by through a large plate glass window located at the front of the store. His desk was situated in the front of the store looking out onto the highway. Based on these undisputed facts, we conclude the district court was correct in finding Drew did not intrude upon Davenport's seclusion in driving by his public place of business. *See, e.g.*, *Stessman*, 416 N.W.2d at 687 (noting the plaintiff might not be able to recover under an intrusion upon seclusion theory if she was in a public dining area when she was filmed without her permission).

Davenport argues even if he was not in seclusion at his business when the drive-bys occurred, the defendants are liable for intrusion upon seclusion because of the persistent and harassing nature of Drew's conduct. We do not agree. According to comments to the Restatement, the "persistence and frequency" of the complained conduct goes to the issue of whether the

"interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man." Restatement (Second) Torts § 652B cmt. d. Thus, in order for persistent and harassing conduct to be actionable as an invasion of privacy claim, the plaintiff must still show he was in a private place when the conduct occurred. *See Stessman*, 416 N.W.2d at 687 (stating that to recover under an intrusion upon seclusion theory, the plaintiff must first establish the defendant invaded the seclusion plaintiff has thrown about his person or affairs and then show the intrusion is such that it would be highly offensive to a reasonable person).

However, we do agree with Davenport that the district court erred in finding he "did not have a reasonable expectation of privacy in those portions of his home that were clearly visible by a passing police officer" based on "Fourth Amendment jurisprudence." Davenport asserted a state law invasion of privacy claim. The fact that the alleged violator of his right to privacy is a police officer does not necessitate a Fourth Amendment privacy analysis. *See, e.g.*, *Hill v. McKinley*, 311 F.3d 899, 905-06 (8th Cir. 2002) (applying state law invasion of privacy principles to a prison inmate's claim that prison guards violated her right to privacy by restraining her while she was naked). Therefore, Davenport's invasion of privacy claim relating to Drew's conduct in driving by his house should be analyzed under the invasion of privacy principles as previously set forth.

The comments to the Restatement state a person's seclusion can be intruded upon "by use of the defendant's senses, with or without mechanical aids, to oversee . . . the plaintiff's private affairs, as by looking into his upstairs

windows with binoculars." Restatement (Second) of Torts § 652B cmt. b; *see also* W. Keeton, *Prosser & Keeton on Torts* § 117, at 854-55 (5th ed. 1984) (stating an example of actionable intrusion upon seclusion includes peering into the windows of a private home). On one occasion, Davenport alleged Drew "went by my house no less than five times in five or six minutes, back and forth and staring up my driveway each time he was doing it." Davenport's neighbor, Stanley Core, submitted an affidavit stating, "I have seen Larry Drew . . . drive by my house many, many times . . . I can usually see him looking at Mark's house and garage because he drives by so slow most of the time."

Upon viewing the record in the light most favorable to Davenport and affording him every legitimate inference the record will bear, *Eggiman v. Self-Insured Servs. Co.*, 718 N.W.2d 754, 758 (Iowa 2006), we conclude there are questions of material fact as to whether Drew unreasonably intruded upon Davenport's seclusion in driving by and looking at him in his house. We therefore find the district court erred in granting summary judgment to the City and Drew on Davenport's invasion of privacy claim relating to Drew's alleged surveillance of Davenport's home.

IV. Conclusion.

In summary, we conclude the district court was correct in finding the doctrine of claim preclusion did not bar Davenport's claims in state court following the dismissal of his federal action. Davenport failed to preserve error on his theory that the City and Steffen were liable for Drew's alleged tortious conduct based on a conspiracy between the defendants. Therefore, the district court correctly dismissed all of Davenport's claims against Steffen. The district

court was also correct in finding that Davenport's defamation claims should be dismissed because the statements to the private investigators were not published, and the statements to Calvert are barred by the statute of limitations. We conclude the district court did not err in finding harassment is not a civil cause of action. Nor did the district court err in granting summary judgment on Davenport's claim that Drew violated his privacy by patrolling his public place of business. However, we find the district court did err in granting summary judgment in favor of the City and Drew on Davenport's invasion of privacy claim relating to his home. We therefore affirm the judgment of the district court in part, reverse in part, and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.