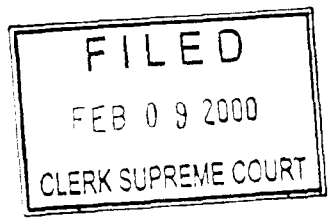
IN THE COURT OF APPEALS OF IOWA

No. 1999-445 (9-702) / 98-1585
Filed February 9, 2000



DALE ROHER and SHARON ROHER,
Plaintiffs-Appellants,

vs.

VETERANS MEMORIAL HOSPITAL and CITY OF WAUKON, IOWA,
Defendants-Appellees.

Appeal from the Iowa District Court for Allamakee County, Joseph C. Keefe, Judge.

The plaintiffs appeal a district court ruling granting the defendants' second motion for summary judgment on plaintiffs' action for damages sustained resulting from a fall. Plaintiffs contend the district court erred in: (1) ruling that the defendants had the right to assert the defense of immunity under Iowa Code chapter 670 despite the fact the time for filing notice of such defenses had expired; and (2) ruling that defendant Hospital was a municipality for purposes of governmental immunity.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Kevin E. Schoeberl of Story, Schoeberl & Kowalke Law Firm, Cresco, for appellants.

David L. Hammer and Angela C. Simon of Hammer, Simon & Jensen, Dubuque, for appellees.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

MILLER, J.

Plaintiffs Dale and Sharon Roher appeal the decision of the district court which granted defendants' motion for summary judgment. We affirm in part, reverse in part, and remand.

I. Factual and Procedural Background

On February 15, 1996, Dale Roher and his wife, Sharon, filed a petition at law alleging negligence by the Veterans Memorial Hospital (hereinafter "Hospital") and its owner, the City of Waukon (hereinafter "City"), resulting in injuries to Dale. Further, Sharon alleged a loss of consortium against the defendants because of her husband's injuries. The facts alleged in the petition state on February 16, 1994, Dale Roher was delivering Pepsi products to the Hospital. As he was moving cartons of cola down a ramp in a sub-basement of the Hospital, he slipped and fell on a vinyl mat covered with water and snow. Because of the fall Roher suffered injuries to his left shoulder and back. The petition alleged negligence by the Hospital and City for not replacing the worn out mat and prayed for compensatory and punitive damages. On May 7, 1996, the Hospital and City filed an answer denying all material allegations of the petition and asserting the affirmative defense of comparative fault. On June 5, 1998, the defendants filed a motion to Bar Expert Testimony and for Summary Judgment, along with a Statement of Undisputed Facts. The defendants premised the motion for summary judgment on the fact that because the Rohers had not identified any expert to testify as to proximate causation, the claim must fail as a matter of law.

Four days later, on June 9, 1998, the defendants filed a Second Motion for Summary Judgment. In it they asserted municipal immunity pursuant to chapter

670 of the Code of Iowa. The district court granted this second motion for summary judgment. The Rohers appeal.

II. Scope and Standard of Review

Our review of a district court's grant or denial of summary judgment is for correction of errors at law. Iowa R. App. P. 4; *LeMars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 306 (Iowa 1998). Summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c); *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 544 (Iowa 1995). In determining whether a genuine issue of material fact exists, we consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Iowa R. Civ. P. 237(c). To decide if the moving party has met this burden, we review the record in the light most favorable to the nonmoving party. *C-Thru Container*, 533 N.W.2d at 544.

III. Merits

Chapter 670 of the Code of Iowa limits those situations in which one may sue a governing body or municipality for torts committed by it or its officers and employees. *See Baker v. City of Ottumwa*, 560 N.W.2d 578, 582 (Iowa 1997) (holding that Chapter 670 of the Code of Iowa subjects every city to liability for the torts of its officers and employees unless such torts fall within exemptions listed in section 670.4). The Rohers argue that Chapter 670 does not apply for two reasons. First, they argue the Hospital is not a municipality as defined by the Code, and second, none of the exemptions listed in section 670.4 apply under the facts of this case.

The district court found that the Hospital and City were exempted from liability by sections 670.4(3), 670.4(6), and 670.4(8). The facts as they relate to this motion for summary judgment based upon municipal immunity are undisputed, and therefore we must determine if the moving party was entitled to a judgment as a matter of law. We take each exemption in turn.

A. Discretionary Function Exemption

1. The Law

In relevant part, section 670.4(3) of the Code of Iowa exempts municipalities from tort liability for:

> any claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality, whether or not the discretion is abused.

Iowa Code § 670.4(3) (1997). Under this provision, a municipality is not liable for claims arising from an officer or employee's failure to exercise or perform a discretionary function. *Keystone Elec. Mfg., Co. v. City of Des Moines*, 586 N.W.2d 340, 346 (Iowa 1998). Conversely, a municipality is not immune from liability for acts or omissions made at the operational level. *Id.*

To determine whether a decision challenged under chapter 670 was discretionary, the Iowa Supreme Court adopted the planning-operational dichotomy set forth in *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953). *See Hansen v. City of Audubon*, 378 N.W.2d 903, 906 (Iowa 1985); *Butler v. State*, 336 N.W.2d 416, 419 (Iowa 1983).

Under analogous section 669.14(1)[1], the supreme court explained the planning/operational distinction as follows:

[1]Exceptions to the State's liablity under the Iowa Tort Claims Act.

> The planning level is generally characterized as the policy making stage and is said to encompass decisions "that involve the formulation of policy, that call for a weighing of competing interests, that require an assessment of the practicability or feasibility (including the consideration of budgetary constraints) of a proposed course of action, or that entail an evaluation of how the public interests will best be served." Thus the initial decision to undertake a project falls within the immunity of the planning stage.
>
> The implementation of decisions made at the planning level is operational; decisions made at the operational level are not covered by the discretionary function exception. For example, in the area of highway construction and repair "[o]nce the decision [has been] made to construct [or repair] a . . . freeway . . . , the State [is] obligated to use due care to make certain that the freeway [meets] the standard of reasonable safety for the traveling public."
>
> The distinction between the two levels is best illustrated in terms of judicial review. Policy decisions, such as when and where to construct a freeway, involve the weighing of the merits of social, political and economic factors traditionally held to be within the purview of the legislature. Judicial review of such decisions would be an apparent violation of the separation of powers principle. Decisions made at the operational level, however, do not involve the same overriding policy determinations and can readily be reviewed under judicially manageable tort standards of due care and reasonableness.

Butler, 336 N.W.2d at 419-20 (holding that State's decision not to update an installed guardrail was made at the operational, rather than the planning level, and thus did not fall within the discretionary function exception) (citations omitted).[2]

The Iowa Supreme Court has also stated, "'the planning level is generally the policy-making stage and decisions made at that level involve the formulation of policy' for which the government entity will be immune from liability." *Keystone*, 586 N.W.2d at 347 (quoting *Nordbrock v. State*, 395 N.W.2d 872, 873 (Iowa 1986)). Thus, a decision involving a discretionary function generally involves the evaluation

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[2]At the time *Butler* was decided, Iowa Code chapter 669 was codified at Iowa Code chapter 25A. Chapter 25A was transferred to Iowa Code chapter 669 by the Code Editor for the 1993 Code. *Keystone Elec. Mfg., Co. v. City of Des Moines*, 586 N.W.2d 340, 347 n.4 (Iowa 1998).

of broad policy factors. *Id.* "Such an evaluation would include a consideration of the financial, political, economic, and social effects of a given plan or policy." *Id.*

"On the other hand, actions at the operational level *implement the decisions that were made at the planning level.*" *Nordbrock*, 395 N.W.2d at 873-74 (emphasis added). Thus, the rule is that "[i]n order for the [governmental entity] to be immunized from liability, the choice must represent a policy judgment of superior authority that a particular task be done in accordance with the prescribed policy." *Hawkeye Bank v. State*, 515 N.W.2d 348, 351 (Iowa 1994) (holding the State is not immune from liability under discretionary function exception in suit for negligence in supervising child on playground at state operated school).

Further, the Iowa Supreme Court cited with approval 57 Am.Jur.2d Municipal, County, School & State Tort Liability § 121, at 133-34 (1988), which commented on the planning/operational distinction as follows:

> The planning level is generally characterized as the policy-making stage, encompassing decisions that involve the formulation of policy, a weighing of competing interests, the assessment of the practicability or feasibility (including budgetary constraints) of a proposed course of action, or decisions that entail an evaluation of how public interests will best be served. The test involves a delineation between actual high-level policy-making decisions or basic policy determinations made at the planning rather than at the operational level by one who, faced with alternative approaches, weighed the competing policy considerations and made a conscious choice. *Operational acts*, for which there is no immunity, consist of conduct which merely puts into effect a *predetermined plan, or acts which concern routine, everyday matters, not requiring evaluation of broad policy factors.*

Keystone, 586 N.W.2d at 348 (quoting 57 Am.Jur.2d *Municipal, County, School & State Tort Liability* § 121, at 133-34 (1988)) (emphasis in original).

Operational level decisions generally mean those that involve routine, everyday matters, not requiring evaluation of broad policy factors. *See Keystone*, 586 N.W.2d at 348 (citation omitted).

Discretionary acts, in contrast, "do not include carrying out previously established plans or policies." 57 Am.Jur.2d *Municipal, County, School & State Tort Liability* § 121, at 134.

> Performance of a discretionary function requires an exercise in judgment and choice as to what is proper and just under the circumstances. It involves the exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed, or establishing plans, specifications, and schedules where there is room for policy judgment and decision . . . If a public employee is required to decide and act without fixed or readily ascertainable standards, that act is a discretionary function. At the point where discretion is exhausted, duty arises, and further acts or functions may be considered ministerial.

Id. § 119, at 131-32.

These principles suggest that the primary factor in determining whether a particular activity qualifies as a discretionary function is whether the decision to act involves the evaluation of broad policy factors. *See Keystone*, 586 N.W.2d at 348. If so, the decision is more likely to be characterized as a discretionary function. *Id.*

2. Application of the Law to the Facts of This Case

The defendant claimed immunity under the "discretionary function" exemption of section 670.4(3) and the district court ruled that exemption applied. We disagree. We conclude that the Hospital's failure to replace the vinyl mat was an operational decision, and not a discretionary function. While "'[e]very act involves discretion,'" *Sullivan v. Wickwire*, 476 N.W.2d 69, 71 (Iowa 1991) (quoting *Stanley v. State*, 197 N.W.2d 599, 603 (Iowa 1972)), there were no "broad policy factors" to be weighed when making this decision. To put it in the words of the *Butler* Court, once the decision was made to place a vinyl mat in the sub-basement of the Hospital, the City and Hospital were obligated to use due care to make certain that the vinyl mat

met the standard of reasonable safety for the public and business invitees. *Cf. Butler v. State*, 336 N.W.2d 416, 419-20 (Iowa 1983).

Any decision by the Hospital and City concerning the vinyl mat did not weigh "the merits of social, political and economic factors traditionally held to be within the purview of [a legislative body]." *Butler v. State*, 336 N.W.2d 416, 419 (Iowa 1983). Rather, this was a routine, everyday matter. *See Keystone*, 586 N.W.2d at 348. The issue is whether the City and Hospital exercised due care, which can "readily be reviewed under judicially manageable tort standards of due care and reasonableness." *Butler*, 336 N.W.2d at 420. Thus, judicial review will not violate the principle of separation of powers.

Therefore, we conclude the district court erred as a matter of law in holding the Hospital and City were exempted from potential tort liability by section 670.4(3) of the Code of Iowa

B. Latent Defect Exemption

Section 670.4(6) exempts municipalities from tort liability for any claim "caused by a municipality's failure to discover a latent defect in the course of an inspection." We agree with the Rohers that this exemption does not apply under the undisputed facts in this case.

The legislature did not define the terms used in section 670.4(6) of the Code and our appellate courts have yet to pass on its scope and meaning. Therefore, we refer to the rules of statutory interpretation to determine the appropriate meaning. *State v. Sailer*, 587 N.W.2d 756, 759 (Iowa 1998). Our goal in interpreting a statute is to give effect to the intent of the legislature. *Lockhart v. Cedar Rapids Community Sch. Dist.*, 577 N.W.2d 845, 847 (Iowa 1998). That intent is shown by the words

used in the statute. *Id.* The rules of statutory interpretation can be summarized as follows:

> Absent legislative definition or a particular and appropriate meaning in law, we give words their plain and ordinary meaning. We also consider the context in which the words are used. We apply rules of statutory construction only when the terms of a statute are ambiguous. A statute is ambiguous if reasonable persons could disagree as to its meaning. Ambiguity may arise in two ways: (1) from the meaning of particular words; or (2) from the general scope and meaning of a statute when all its provisions are examined.

Sailer, 587 N.W.2d at 759-60 (internal citations omitted). We believe, looking at the wording of the subsection, there is no ambiguity in its terms, and neither party claims there is. Therefore, we will give the words their plain and ordinary meaning.

First, we do not believe that a worn mat, covered by water and snow at the time of the fall, was a latent defect as defined by Iowa law. A latent defect is "[a] hidden or concealed defect. One which could not be discovered by reasonable and customary observation or inspection; one not apparent on face of goods, product . . . ." Black's Law Dictionary 883 (6th ed. 1990). *See Estate of Vazquez v. Hapner*, 564 N.W.2d 426, 430 (Iowa 1997) (citing Black's Law Dictionary 794 (5th ed. 1979)). Any worn or wet condition of the mat could have been discovered by reasonable and custody observation or inspection and was therefore not a "latent defect."

Second, and perhaps more importantly, section 670.4(6) requires that the municipality must fail to discover a latent defect *in the course of an inspection*. See Iowa Code § 670.4(6) (1997). The record before the district court on summary judgment does not show as undisputed fact that the mat or the surrounding area was inspected. Without such an inspection, the section 670.4(6) exemption is not applicable. The district court erred as a matter of law in holding the Hospital and

City were exempted from potential tort liability by section 670.4(6) of the Code of Iowa.

C. Exemption for Failure to Upgrade, Improve or Alter

1. The Law

In relevant part, section 670.4(8) exempts municipalities from tort liability for any claim "for failure to upgrade, improve, or alter any aspect of an existing public improvement or other public facility to new, changed, or altered design standards." Iowa Code § 670.4(8) (1997).

In *Hansen v. Audubon*, 378 N.W.2d 903 (Iowa 1985), our supreme court explained that the purpose of this exemption[3] is "to alleviate municipal responsibility for design or specification defects, as judged by present state of the art standards, when the original designs or specifications were proper at the time the public facility was constructed." *Hansen*, 378 N.W.2d at 906.

The supreme court further defined the parameters of this exemption in *Hansen*. In that case, the plaintiff sued the defendant City of Audubon when the city's sewer lines backed up, causing a backflow into the plaintiff's basement. *Hansen*, 378 N.W.2d at 904. The plaintiff claimed this was due to the city's failure to maintain or repair its sanitary sewer system after it became aware of the problem. *Id.* The supreme court held that the terms

> "upgrade, improve, or alter . . . to new, changed, or altered design standard" . . . indicates a change in design or different design. However, . . . , we still recognize tort actions against a municipality for its failure to repair and maintain its sanitary sewer system. "Repair" or "maintain," as opposed to "upgrade," denotes a restoration to former design standards to enable the existing facility to operate adequately.

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[3]At the time *Hansen* was decided, this exemption was codified at section 613A.4(8) of the 1985 Code of Iowa.

Id. at 906-907. Because the plaintiff in *Hansen* based her claim of negligence on a failure to repair, maintain, or operate, rather than a failure to upgrade, improve, or alter the existing sewage system, the city was not exempt from liability under section 613A.4(8) (now section 670.4(8)). *Id.* at 907.

2. Application of the Law to the Facts of This Case

The defendants attempt to differentiate the holding in *Hansen* because in that case, the defect had been known for several years. *See Hansen*, 378 N.W.2d at 904. In contrast, the danger may have been unknown in this case. That factual difference is not of consequence. Rather, we must focus on whether the plaintiffs' claim is that the Hospital and City failed to upgrade, improve, or alter an existing public facility to new, changed, or altered design standards, or instead is a claim that it failed to repair and maintain existing facilities. *Hansen*, 378 N.W.2d at 906.

The plaintiffs' petition at law specifically states that their negligence claim is based on the Hospital and City's failure "to replace or repair the worn out vinyl mat located at the bottom of the ramp at the sub-basement of Veterans Memorial Hospital." The defendants do not show, nor can we find, any place where the plaintiffs base their claim on a failure to upgrade, improve, or alter the design of the sub-basement or the vinyl mat located therein to new, changed, or altered design standards. Therefore, the district court erred as a matter of law in holding the Hospital and City were exempted from potential tort liability by section 670.4(8) of the Code.

D. Punitive Damages

In their petition the plaintiffs sought punitive damages as well as compensatory damages. In a statement of "undisputed facts" submitted in support of their motion for summary judgment, the defendants asserted that as

municipalities they are immune from liability for punitive damages pursuant to section 670.4(5) of the Code of Iowa. Because it granted both defendants complete summary judgment on the basis of the exemptions set forth in sections 670.4(3), (6) and (8) of the Code of Iowa, the district court implicitly found as uncontested fact that the defendants are both municipalities. The plaintiffs assert that the Hospital is not a municipality subject to chapter 670.

In their petition the plaintiffs allege, and in their answer the defendants admit, that defendant Hospital is "duly organized under the laws of the state of Iowa," and that defendant City is an Iowa municipal corporation which "owns Veterans Memorial Hospital." In affirming the trial court's grant of summary judgment to a county hospital, the Iowa Supreme Court held that a hospital owned by a county is a "municipality" for purposes of the immunity provisions of chapter 670. *See Kulish v. Ellsworth*, 566 N.W.2d 885, 891 (Iowa 1997). Noticeably, the pleadings and undisputed facts in *Kulish* established only that the Howard County Hospital was owned by Howard County. They did not establish that the hospital in that case was itself organized under the laws of the state of Iowa, as is alleged and admitted in this case, or that the Howard County Hospital was itself a legal entity. *See Kulish*, 566 N.W.2d at 891. However, the pleadings and undisputed facts in *Kulish* did establish that another defendant in that case, Howard County Hospital Ambulance Services, was a "legal entity." The Iowa Supreme Court stated that the same analysis which resulted in immunity for the hospital also resulted in immunity for that ambulance service. *Kulish*, 566 N..W.2d at 891 n. 4.

It is undisputed that the defendant City of Waukon is a "municipality." We conclude that Veterans Memorial Hospital is also a "municipality." In so concluding

we rely not only on the Iowa Supreme Court's analysis in *Kulish* concerning the county hospital, but also its statement that the same analysis regarding immunity applied to a "legal entity" owned by the hospital, Howard County Hospital Ambulance Services.

Because both defendants are municipalities, they are immune from any claim for punitive damages. Iowa Code § 670.4(5). In granting both defendants complete summary judgment, the district court necessarily granted summary judgment on the punitive damage claims. We conclude the grant of summary judgment on the punitive damage claims was correct and should be affirmed.

IV. Timeliness of "Immunity Defense"

Because we have concluded the defendants are municipalities and thus immune from any claim for punitive damages, we must address one other issue. The plaintiffs assert the district court erred in allowing the defendants to assert the "affirmative defense" of immunity under chapter 670. They complain that the "late filing of the notice of governmental immunities under chapter 670" put them at a disadvantage. Later in the same division of their argument they assert they needed additional time to conduct discovery as to the scope of any insurance policy covering defendants.

These assertions leave somewhat unclear what error the plaintiffs claim the trial court to have committed. However, from the parties' discussions of the scope of review and the authorities they cite concerning the scope of review, we believe we can deduce what error they assert. The plaintiffs and defendants both state our scope of review is for abuse of discretion. For that proposition both cite *State v. Webb*, 309 N.W.2d 404, 413 (Iowa 1981) and *Moser v. Thorp Sales Corp.*, 312

N.W.2d 881 (Iowa 1981). Both cases deal in relevant part with the trial court's administration of discovery rules. The latter case in relevant part deals specifically with a party's claim that he had not been given enough time to gather and submit affidavits in resistance to a motion for summary judgment. *Moser*, 312 N.W.2d at 890-91. From the nature of the issues in the two cited cases, taken together with the plaintiffs' assertion that they needed additional time to conduct discovery concerning insurance coverage, we understand the plaintiffs' claim to be that the court abused its discretion in not allowing additional time for discovery in order to resist defendants' second motion for summary judgment. For the reasons which follow, we find this claim of error to be without merit.

The plaintiffs assert the time for any amendments to pleadings had passed when the defendants asserted governmental immunity. This assertion is clearly refuted by the record. An August 2, 1997 Civil Trial Setting Conference Memorandum had scheduled trial for October 1, 1997 and ordered pleadings closed by August 15, 1997. However, a later Civil Trial Setting Conference Memorandum of September 26, 1997 rescheduled trial for August 5, 1998 and ordered pleadings closed by July 1, 1998. The defendants' second motion for summary judgment was served June 8, 1998, more than three weeks before the deadline for any amendments to pleadings.

Implicit in the plaintiffs' claim or error and resulting prejudice is a claim that they did not know and could not know that the defendants were or would be asserting that they were municipalities (and thus entitled to those immunity provisions of section 670.4 of the Code which might be applicable). However, as noted at III-D above, the pleadings, including the allegations of the plaintiffs' own

petition, established that the defendants were municipalities.

The plaintiffs claim they were prejudiced because they needed additional time to conduct discovery before the second motion for summary judgment was heard. Implicit in this claim is a claim that they sought but were denied such additional time for discovery. The facts do not support this claim. The defendants' first motion for summary judgment was served June 4, 1998 and a June 8, 1998 order set it for June 29, 1998 hearing. The defendants' second motion for summary judgment was served June 8, 1998. The plaintiffs did not seek additional time until June 26, 1998 when they filed a "Resistance" in which they requested additional time because of the illness of counsel. Neither motion for summary judgment was heard June 29, 1998. Rather, both were heard July 20, 1998, six full weeks after the second motion for summary judgment was served, three weeks after the first motion for summary judgment was scheduled to be heard, and three and one-half weeks after the plaintiffs' request for additional time. Further, nothing in the trial court's ruling on the motions for summary judgment, and nothing else in the record, indicates that the plaintiffs sought further additional time beyond July 20, 1998. Under these facts, we conclude the district court did not abuse its discretion by not ordering additional time beyond July 20, 1998.

Although we have addressed the merits of this claim of error, we also find the plaintiffs' claim should be resolved against them on error preservation grounds. For two reasons we conclude the plaintiffs have failed to preserve the claimed error. First, although they now complain of a lack of additional time to do *discovery* in order to oppose the second motion for summary judgment, their request in the district court is most reasonably seen as only seeking additional time to present a

brief. They stated that because of an illness of counsel they needed additional time to "prepare the appropriate brief to support the Plaintiff's [sic] Resistance," and prayed that the court "allow Plaintiffs' counsel additional time to provide a brief in support of said resistance . . . ." We will not address an argument which the district court did not have an opportunity to consider. *Vincent v. Four M Paper Corp.*, 589 N.W.2d 55, 64 (Iowa 1999); *see also In re Marriage of Gulsvig*, 498 N.W.2d 725, 727 n. 1 (Iowa 1993).

Second, and more importantly, the record on appeal discloses no ruling by the trial court on the plaintiffs' request for additional time. Issues must ordinarily be presented to and passed upon by the trial court before they can be raised and adjudicated on appeal. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). When a trial court fails to rule on an issue properly raised, the party raising the issue must seek a ruling from the trial court in order to preserve the issue for appeal. *Id.* Not only does the record disclose no ruling on the plaintiffs' request for additional time, it also discloses no motion or request for a ruling, at or after the July 20, 1998 hearing.

V. *Disposition*

We affirm that part of the district court's ruling which grants the defendants summary judgment on the plaintiffs' punitive damage claims. We reverse the remainder of the district court's summary judgment ruling. We remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.