IN THE SUPREME COURT OF MISSISSIPPI

NO. 2012-CT-01163-SCT

JOHN DOE o/b/o JANE DOE, A MINOR

v.

RANKIN COUNTY SCHOOL DISTRICT

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	11/16/2011
TRIAL JUDGE:	HON. WILLIAM E. CHAPMAN, III
COURT FROM WHICH APPEALED:	RANKIN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOHN CURTIS HALL, II
ATTORNEYS FOR APPELLEE:	LINDSAY THOMAS DOWDLE JOSEPH LEE ADAMS FRED M HARRELL, JR BENJAMIN LYLE ROBINSON
NATURE OF THE CASE:	CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE
DISPOSITION:	REVERSED AND REMANDED -11/05/2015
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

PIERCE, JUSTICE, FOR THE COURT:

¶1. John Doe initiated this action on behalf of his daughter, Jane Doe (collectively Doe), after she was sexually assaulted on a Rankin County School District (RCSD) school bus, parked on the campus of Richland High School (RHS). After nineteen months of discovery, the circuit court granted RCSD's motion for summary judgment against Doe based on governmental immunity under the Mississippi Tort Claims Act (MTCA). Doe moved for

reconsideration, arguing RCSD had waived immunity through active participation in the litigation. The circuit court denied the motion. The Court of Appeals (COA) reversed the circuit court's ruling. Applying the now-overruled, two-part, public-function test, the COA found that RCSD was entitled to discretionary-function immunity because: (1) RCSD's duty to oversee student conduct and school safety involved an element of choice and/or judgment and (2) RCSD's actions regarding implementation of school-safety measures and student discipline involved social and economic policy considerations. The COA, however, found that RCSD had waived immunity in this instance by actively participating in the litigation process and unreasonably delaying pursuit of its immunity defense for sixteen months. We granted RCSD's request for writ of certiorari.

¶2. Based on this Court's recent decision in ***Brantley v. City of Horn Lake***, 152 So. 3d 1106 (Miss. 2014), which established a new test for determining the application of discretionary-function immunity, we reverse both the COA's and the trial court's decisions and remand this case to the trial court for the parties to present evidence in light of the new standard.

FACTS AND PROCEDURAL HISTORY

¶3. The following facts are undisputed. On May 16, 2008, during the last "block" of Richland High School's academic schedule, Jane Doe and several friends skipped class and met at a nearby McDonald's. While there, Doe met other RHS students for the first time,

including Bart.[1] Bart, Doe, and several classmates returned to RHS prior to the school's scheduled release in order to board their respective school buses. Once back on campus, Bart pushed Doe onto a vacant school bus and forced her to perform oral sex. Doe then left the bus and adjourned to a bathroom until she was able to board her bus to go home. When the new school year began in August, Doe reported this incident for the first time, sharing the information with an RHS teacher. The teacher then alerted others, including the school's principal and Doe's parents. Bart subsequently was expelled and sent to an alternative school.

¶4. On December 7, 2009, Doe (through her father) sued the Rankin County School District, alleging that:

1. RCSD failed to provide adequate security at the high school;

2. RCSD failed to implement reasonable measures for personal security and safety of Doe;

3. RCSD failed to warn Doe of Bart's past sexual misconduct; and

4. RCSD failed to reasonably inspect and secure the premises from the foreseeable harm suffered by Doe.

Throughout the following year and a half, the parties engaged in extensive discovery, with both sides learning important details regarding the assault and Bart's history of criminal and delinquent conduct. Such details involved Bart's activity prior to his transfer to RHS,

[1] Since the alleged perpetrator is a minor, we use the pseudonym Bart in place of his actual name.

including five instances of inappropriate touching of female students, pulling a female student's shirt down, and a 2007 sexual-battery charge involving a twelve-year-old girl. This arrest resulted in a no-contact order and Bart's mandatory transfer to another school.[2]

¶5. In August 2011, RCSD moved for summary judgment, asserting discretionary-function immunity. In Doe's opposition to the summary-judgment motion, Doe argued that RCSD's actions (or failure to act) were ministerial and the RCSD had failed to exercise ordinary care. Reviewing its argument in accord with the two-part, public-function test set forth in ***Mississippi Transportation Commission v. Montgomery***, 80 So. 3d 789 (Miss. 2012), the trial court granted RCSD's motion for summary judgment.

¶6. Doe appealed, raising two issues: (1) whether the trial court erred in granting summary judgment premised on discretionary immunity, and (2) whether the trial court abused its discretion in denying the motion for reconsideration. The COA determined that RCSD was immune from liability under the public-function tests, but RCSD had waived its immunity through active participation in the litigation and its failure to timely raise the defense. The COA reversed the trial court's ruling and remanded the case for further proceedings. On this judgment, RCSD filed its petition for writ of certiorari.

¶7. After granting RCSD's petition for certiorari, this Court asked the parties for supplemental briefing regarding the recent opinion in ***Brantley v. City of Horne Lake***, 152

[2] The assault on the twelve-year-old occurred in her home. Bart was required to transfer to another school to be away from the child, which is why he began to attend RHS.

So. 3d 1106 (Miss. 2014). Because ***Brantley*** greatly changed the manner in which this Court analyzes discretionary-function immunity, the parties were asked to consider how ***Brantley***'s new test directly relates to RCSD's duties, as presented by Doe.

¶8. Having considered the matter, we find RCSD did not waive immunity in this instance. And we find this case must be remanded to the trial court for the parties to present evidence and arguments in light of the new test under ***Brantley***.

STANDARD OF REVIEW

¶9. This Court reviews a trial court's application of the MTCA as well as a trial court's ruling on a motion for summary judgment *de novo*. ***City of Jackson v. Doe***, 68 So. 3d 1285, 1287 (Miss. 2011). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M.R.C.P. 56(c).

DISCUSSION

¶10. As the COA explained, governmental entities generally are afforded immunity from suit under the MTCA. ***Doe***, 2014 WL 5448946, *2 (citing ***Kilhullen v. Kan. City S. Ry.***, 8 So. 3d 168, 174 (Miss. 2009)). But, if a governmental entity or employee commits a tortious act while acting within the scope and course of its or his employment or duties, immunity is waived. ***Id***. (citing Miss. Code Ann. § 11-46-5 (Rev. 2012)). Mississippi Code Section 11-46-9(1) provides a number of exceptions to this waiver, and subpart (d) of this section states

that a governmental entity will be immune from liability for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion is abused[.]" ***Id***. (quoting Section 11-46-9(1)(d)).

¶11. Traditionally, this Court has analyzed the applicability of Section 11-46-9(1)(d) by applying a two-pronged, public-policy function test, which required a determination of "whether the activity in question involved an element of choice or judgment, and if so, . . . whether that choice or judgment involved social, economic, or political-policy considerations." *See* ***Miss. Transp. Comm'n v. Montgomery***, 80 So. 3d 789, 795 (Miss. 2012) (citing ***Jones v. Miss. Dep't of Transp***., 744 So. 2d 256, 260 (Miss. 1999)). ***Brantley***, in furtherance of this Court's decision in ***Little v. Mississippi Department of Transportation***, 129 So. 3d 132, 138 (Miss. 2013), expressly abolished this test, holding that Section 11-46-9(1)(d) applies to governmental functions, rather than acts, and it does not limit immunity to decisions involving policy considerations. ***Brantley***, 152 So. 3d at 1112.

¶12. Under the new test announced in ***Brantley***, our courts must first determine whether the overarching governmental function at issue is discretionary or ministerial. ***Brantley***, 161 So. 3d at 1114. "The Court then must examine any narrower duty associated with the activity at issue to determine whether a statute, regulation, or other binding directive renders that particular duty a ministerial one, notwithstanding that it may have been performed within the scope of a broader discretionary function." ***Id***. at 1115. To defeat a claim of

discretionary-function immunity, a plaintiff must prove that an act done in furtherance of a broad discretionary function "also furthered a more narrow function or duty which is made ministerial by another specific statute, ordinance, or regulation promulgated pursuant to lawful authority." ***Id***.

¶13. Because the Court's rules for determining discretionary-function immunity have changed greatly during the pendency of this litigation, the interest of justice demands this case be remanded for the parties to present evidence and arguments in light of the new test set forth in ***Brantley***.

¶14. To this end, we find that RCSD did not waive its immunity defense. This case necessitated thorough discovery of a sensitive nature, which it took reasonable time to conduct. Unlike ***MS Credit Center v. Horton***, 926 So. 2d 167, 181 (Miss. 2006), which involved waiver of a defendant's right to compel arbitration and did not require discovery for determining so, discovery here is necessary for determining whether RCSD enjoys the right to discretionary-function immunity. The case before us also is distinguishable from ***Estate of Grimes ex rel. Grimes v. Warrington***, 982 So. 2d 365 (Miss. 2008). There, the defendant waited five years before asserting a defense of immunity under the MTCA. ***Id***. at 369. The defendant offered no explanation as to why he did not move the trial court for summary judgment until five years after the plaintiff's filing of the complaint. ***Id***. This Court found that all the protracted litigation that took place during this period of time was unnecessary and an excessive waste of time. ***Id***. We do not find that to be the case here.

¶15. Accordingly, we find that RCSD did not waive its immunity defense and may reassert the defense on remand, and the trial court may consider this defense after reviewing the case under the new test prescribed by ***Brantley***.

CONCLUSION

¶16. We reverse the judgments of the Court of Appeals and the Rankin County Circuit Court and remand the case to the Rankin County Circuit Court for further proceedings consistent with this opinion.

¶17. **REVERSED AND REMANDED.**

WALLER, C.J., CHANDLER AND COLEMAN, JJ., CONCUR. DICKINSON, P.J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED BY RANDOLPH, P.J.; WALLER, C.J., JOINS IN PART. KITCHENS, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY LAMAR AND KING, JJ.

DICKINSON, PRESIDING JUSTICE, CONCURRING IN PART AND IN RESULT:

¶18. I join the majority's decision to remand this case to the trial court to consider discretionary-function immunity in light of ***Brantley***,[3] but I conclude that the Rankin County School District has not waived its immunity argument for a reason different from that articulated by the majority.

¶19. When the District moved for summary judgment based on discretionary-function immunity, the plaintiff argued that immunity did not attach to the District's alleged

[3] ***Brantley v. City of Horn Lake***, 152 So. 3d 1106 (Miss. 2014).

misconduct. After the trial judge granted summary judgment for the District, the plaintiff filed a motion for reconsideration under Mississippi Rule of Civil Procedure 59 and then asserted, for the first time, that the District had waived its immunity.

¶20. Because the plaintiff never asserted waiver before summary judgment was entered, I would find the issue of waiver is procedurally barred. We have recognized that a plaintiff may be procedurally barred from arguing that a defendant waived an affirmative defense:

> This Court has held that "absent extreme and unusual circumstances—an eight-month unjustified delay in the asserting and pursuing a dispositive affirmative defense, coupled with active participation in the litigation process, constitutes waiver as a matter of law." In order to raise such an argument before this Court, however, Anderson and Harris must have first raised this argument in the trial court—which they did not. We will not consider issues raised for the first time on appeal.[4]

¶21. And, though we have not addressed this issue in the Rule 59 context, federal courts have recognized that our rule's federal counterpart does not afford litigants the opportunity to present new arguments.[5] I agree and would hold that the same procedural bar applies with

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[4] ***Anderson v. LaVere***, 136 So. 3d 404, 410 (Miss. 2014) (quoting ***MS Credit Ctr., Inc. v. Horton***, 926 So. 2d 167, 180 (Miss. 2006); citing ***Flagstar Bank, FSB v. Danos***, 46 So. 3d 298, 311 (Miss. 2010)).

[5] *See* ***Westbrook v. Comm'r of Internal Revenue***, 68 F.3d 868, 879 (5th Cir. 1995) (quoting ***CWT Farms, Inc. v. Comm'r of Internal Revenue***, 79 T.C. 1054 (1982) ("A motion for reconsideration is not granted 'to resolve issues which could have been raised during the prior proceedings.'")); ***Grumman Aircraft Eng'g Corp. v. Renegotiation Bd.***, 482 F.2d 710, 721 (D.C. Cir. 1973), *rev'd on other grounds by* ***Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.***, 421 U.S. 168, 95 S. Ct. 1491, 44 L. Ed. 2d 57 (1975) (citing ***Echevarria v. U.S. Steel Corp.***, 392 F.2d 885, 892 (7th Cir. 1968)); ***Rule v. Feuz Constr. Co.***, 103 F. Supp. 499, 502 (D.D.C. 1952) ("Ordinarily Rule 59 motions for either a new trial or a rehearing are not granted by the District Court where they are used by a losing party to request the trial judge to reopen proceedings in order to consider a new defensive theory

respect to our Rule 59.

¶22. Justice Kitchens states that "[a] movant cannot assert that there is an 'intervening change in controlling law' or 'availability of new evidence not previously available' and not simultaneously proclaim a novel argument which had not been made in the trial court previously." I agree. But neither intervening authority, nor new evidence, is at issue in this case. Even Justice Kitchens, himself, argues only that Rule 59 relief was warranted based on "an apparent need to correct a clear error of the law and to prevent a manifest injustice," which possesses no connection to the limited circumstances in which new arguments may be presented. Certainly, a litigant cannot claim manifest injustice based on his own failure to raise an argument.

RANDOLPH, P.J., JOINS THIS OPINION. WALLER, C.J., JOINS THIS OPINION IN PART.

KITCHENS, JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶23. I agree with the majority's reasoning that whether the Rankin County School District was entitled to discretionary-function immunity under the Mississippi Tort Claims Act (MTCA) should be determined by the test this Court articulated in ***Brantley v. City of Horn Lake***, 152 So. 3d 1106 (Miss. 2014), and not by the public-policy function test. However,

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which could have been raised during the original proceedings."); ***Echevarria***, 392 F.2d at 892 ("Defendant, apparently as an afterthought, raised for the first time in its post-trial motions the theory that Iran, the injured boy's brother, was contributorily negligent and that such negligence was imputable to the father. We agree with the trial court that defendant waived any error committed in this respect.").

the Rankin County School District waived the applicability of discretionary-function immunity, regardless of which test is applied, by waiting, without justification, nineteen months before asserting this affirmative defense in its motion for summary judgment. I therefore respectfully concur in part and dissent in part.

¶24. John Doe, acting on behalf of his daughter, Jane Doe, filed a complaint in the Rankin County Circuit Court, naming the Rankin County School District as the defendant. On January 8, 2010, the Rankin County School District filed its answer to John Doe's complaint, raising discretionary-function immunity under the Mississippi Tort Claims Act as its seventh affirmative defense. Subsequently, both parties engaged in discovery, including filing interrogatories and requests for production of documents. Further, the school district filed motions for extensions of time on February 25, 2010, and on June 24, 2010, seeking more time to comply with Doe's discovery requests. On May 19, 2010, the school district executed a subpoena *duces tecum* for Jane Doe's records at the Rankin County Child Advocacy Center. The Rankin County Circuit Court entered an agreed order on September 1, 2010, allowing the release of Bart's youth court records.[6] With the attendance and the participation

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[6] Section 43-21-261 of the Mississippi Code governs disclosure of youth court records and states that:

> [R]ecords involving children shall not be disclosed, other than to necessary staff of the youth court, except pursuant to an order of the youth court specifying the person or persons to whom the records may be disclosed, the extent of the records which may be disclosed and the purpose of the disclosure. Such court orders for disclosure shall be limited to those instances in which the youth court concludes, in its discretion, that disclosure is required for the best

of the school district, John Doe deposed five witnesses. The school district took the depositions of John Doe and Jane Doe. On April 26, 2011, the parties entered into an agreed scheduling order. On August 19, 2011, more than nineteen months after it had filed its answer, the Rankin County School District filed a motion for summary judgment, raising the affirmative defense of discretionary-function immunity under the MTCA. On November 16, 2011, the Rankin County Circuit Court granted summary judgment in favor of the school district on that basis.

¶25. The majority finds, in the absence of citation, that the school district did not waive its discretionary-function immunity defense, because [t]he "case necessitated thorough discovery of a sensitive nature, which it took reasonable time to conduct." Maj. Op. at ¶14. The Mississippi Legislature has determined that governmental entities and their employees are exempt from liability in certain situations outlined in the MTCA. Miss. Code Ann. § 11-46-9 (Rev. 2012). "This exemption, like that of qualified or absolute immunity, is an entitlement not to stand trial rather than a mere defense to liability and, therefore, should be resolved at the earliest possible stage of litigation." ***Mitchell v. City of Greenville***, 846 So. 2d 1028, 1029 (¶8) (Miss. 2003). Section 11-46-9(1)(d) of the Mississippi Code, the discretionary-function exception, provides immunity from claims "[b]ased upon the exercise

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interests of the child, the public safety or the function of the youth court.

Because of this statutory prohibition against revealing the contents of youth court records and because youth court records are at issue in this case, the pseudonym *Bart*, instead of his real name, is appropriate for the alleged perpetrator of Jane Doe's sexual assault.

or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee thereof, whether or not the discretion be abused[.]" Miss. Code Ann. § 11-46-9(1)(d) (Rev. 2012). Our precedent characterizes "MTCA immunity as an affirmative defense." ***Estate of Grimes ex rel. Grimes v. Warrington***, 982 So. 2d 365 (Miss. 2008).

¶26. In ***MS Credit Center, Inc. v. Horton***, 926 So. 2d 167 (Miss. 2006), this Court held that

> A defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver.

Horton, 926 So. 2d at 180. The Court explained in a footnote that "[t]o pursue an affirmative defense or other such rights, a party need only assert it in a pleading, bring it to the court's attention by motion, *and* request a hearing." ***Id.*** at 181 n.9 (emphasis added).

¶27. In ***Grimes***, this Court considered whether the failure of the defendant physician to assert a defense of immunity under the MTCA for five years, during which time the defendant physician actively participated in the litigation process, constituted a waiver under ***Horton. Grimes***, 982 So. 2d at 369. In that case, the plaintiff filed a complaint against the defendant physician on June 4, 2001. ***Id.*** at 370. On June 27, 2001, the defendant timely filed an answer to the plaintiff's complaint in which he asserted tort-claims immunity, but he waited until August 3, 2006, more than five years later, to pursue a motion for summary judgment on the basis of the MTCA. ***Id.*** The defendant actively participated in the litigation

as well: "the case was set and twice reset for trial, experts were designated and deposed on the merits of the negligence claim, and [the defendant] filed a motion *in limine* to exclude part of Grimes's expert's testimony." ***Id.*** This Court held that the defendant had waived Tort Claims Act immunity and reversed and remanded the case for trial on the merits. ***Id.***

¶28. Similarly, in ***Horton***, we held that, by waiting eight months to assert its right to compel arbitration and by participating in the litigation process, a defendant had waived this affirmative defense as a matter of law. ***Horton***, 926 So. 2d at 181. In ***East Mississippi State Hospital v. Adams***, we determined that the defendant had waived its insufficiency-of-process and insufficiency-of-service-of-process defenses "by failing to pursue them until almost two years after they raised them in their answer while actively participating in the litigation." ***E. Miss. State Hosp. v. Adams***, 947 So. 2d 887, 890-91 (Miss. 2007). Finally, in ***Meadows v. Blake***, we found that the defendants had forfeited their ability to succeed on the basis of affirmative defenses when they waited two years to assert their affirmative defenses and participated in discovery. ***Meadows v. Blake***, 36 So. 3d 1225, 1232-33 (Miss. 2010).

¶29. In this case, the Rankin County School District actively participated in discovery, as evidenced by, *inter alia*, its engaging in seven witness depositions, its obtaining and executing a subpoena *duces tecum* for Jane Doe's Rankin County Child Advocacy Center records, its requesting the release of Bart's youth court records, its answering interrogatories, its responding to documents requests, its requesting two extensions to comply with discovery requests, and its entering into an agreed scheduling order. Significantly, nineteen months

elapsed between the point in time when the Rankin County School District asserted discretionary-function immunity as an affirmative defense in its answer and its filing a motion for summary judgment, requesting judgment as a matter of law on the basis of this defense. Thus, the majority errs in determining that the school district did not waive its immunity defense.

¶30. Moreover, the majority errs in determining that the school district's belated motion for summary judgment was justified because "[t]his case necessitated thorough discovery of a sensitive nature." Maj. Op. at ¶14. But the school district, in its answer filed just over one month after the filing of Doe's complaint, pled as an affirmative defenses "all applicable provisions of the Mississippi Tort Claims Act," "all defenses and limitations listed in 11-46-9," and "defenses of discretionary, executive, and/or legislative authority, function, and/or duty." The school district then, nineteen months later and after having participated actively in the litigation, moved for summary judgment, arguing entitlement to discretionary-function immunity pursuant to the Mississippi Tort Claims Act. The nature of an affirmative defense assumes that, even if the plaintiff "proves everything he alleges and asserts, even so, the defendant wins." ***Hertz Commercial Leasing Div. v. Morrison***, 567 So. 2d 832, 835 (Miss. 1990).With that in mind, the majority's attempt to distinguish this case from ***Horton*** and its progeny fails. Whether the school district was entitled to discretionary-function immunity constitutes a question of law which no amount of discovery would have made more apparent.

¶31. Justice Dickinson's concurrence asserts that a plaintiff is barred from asserting the

Horton doctrine for the first time in a Rule 59(e) motion for reconsideration, as Doe did here. This Court reviews a trial court's denial of a Rule 59 motion under an abuse-of-discretion standard. ***Bang v. Pittman***, 749 So. 2d 47, 52 (Miss. 1999), *overruled on other grounds by* ***Cross Creek Productions v. Scafidi***, 911 So. 2d 958 (Miss. 2005).

¶32. Certainly, the better practice would have been for Doe to have advanced his ***Horton*** argument in his response to the school district's motion for summary judgment. But Doe's bad timing does not mean that he was barred from asserting that argument in his Rule 59(e) motion for reconsideration.

¶33. A Rule 59(e) motion is substantially different from a Rule 60(b) motion. ***Bruce v. Bruce***, 587 So. 2d 898, 904 (Miss. 1991) ("[T]he movant under Rule 59 bears a burden considerably lesser than a movant under Rule 60(b). . . . [T]he trial court has considerably broader discretionary authority under Rule 59(e) to grant relief than it does under Rule 60(b)."). Furthermore "[w]hen hearing a motion under Rule 59(e), a trial court proceeds *de novo*, if not *ab initio*." ***Id.*** at 904. Thus, when considering a Rule 59(e) motion, a trial court must give no deference to the facts or pleadings that it previously has considered. *See* ***id.*** This Court's purpose in promulgating Rule 59 is stated thusly: "Recognizing that to err is human, Rule 59(e) provides the trial court the proverbial chance to correct its own error to the end that we may pretermit the occasion for a less than divine appellate reaction." ***Id.*** Further, in ***Bang v. Pittman***, we held that, in order to succeed on a Rule 59 motion, the movant must show: "(i) an intervening change in controlling law, (ii) availability of new

evidence not previously available, or (iii) need to correct a clear error of law or to prevent manifest injustice." ***Bang***, 749 So. 2d at 52; *accord* ***In re R.J.M.B***, 133 So. 3d 335, 339 (Miss. 2013); ***Brooks v. Roberts***, 882 So. 2d 229, 233 (Miss. 2004). A movant cannot assert that there is an "intervening change in controlling law" or "availability of new evidence not previously available" and not simultaneously proclaim a novel argument which had not been made in the trial court previously. *See* ***id.*** Indeed, in order to render a decision consistent with our case law and our stated purpose for the promulgation of Rule 59, we must recognize that, under rare circumstances consistent with ***Bang v. Pittman***, a party may assert new arguments, including the ***Horton*** doctrine, in a Rule 59(e) motion. *See* ***Bang***, 749 So. 2d at 52.

¶34. In this case, there was "an apparent need to correct a clear error of the law and to prevent a manifest injustice." *See* ***id.*** The trial court erroneously granted summary judgment in favor of the school district on the basis of an affirmative defense that it had waived by waiting nineteen months between filing its answer and asserting the defense in a motion for summary judgment. As a matter of law, under ***Horton*** and its progeny, the school district was not entitled to summary judgment. *See* ***Horton***, 926 So. 2d at 173. Thus, the trial court abused its discretion by failing to grant Doe's Rule 59(e) motion, in which Doe rightly asserted that the school district was not entitled to summary judgment on the basis of ***Horton***.

¶35. In sum, I agree with the majority's holding that whether Rankin County School District was entitled to discretionary-function immunity under the Mississippi Tort Claims

Act (MTCA) should be determined by the test this Court articulated in ***Brantley v. City of Horn Lake***, 152 So. 3d 1106 (Miss. 2014), and not by the public-policy function test. However, the Rankin County School District waived the applicability of discretionary-function immunity by waiting nineteen months before asserting this affirmative defense in its motion for summary judgment. I therefore respectfully concur in part and dissent in part.

LAMAR AND KING, JJ., JOIN THIS OPINION.