IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-CA-01163-COA

JOHN DOE O/B/O JANE DOE, A MINOR **APPELLANT**

v.

RANKIN COUNTY SCHOOL DISTRICT **APPELLEE**

DATE OF JUDGMENT:	11/16/2011
TRIAL JUDGE:	HON. WILLIAM E. CHAPMAN III
COURT FROM WHICH APPEALED:	RANKIN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	CLARENCE TERRELL GUTHRIE III OMAR LAMONT NELSON
ATTORNEYS FOR APPELLEE:	JOSEPH LEE ADAMS FRED M. HARRELL JR. BENJAMIN LYLE ROBINSON
NATURE OF THE CASE:	CIVIL - TORTS - OTHER THAN PERSONAL INJURY AND PROPERTY DAMAGE
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT GRANTED IN FAVOR OF APPELLEE
DISPOSITION:	REVERSED AND REMANDED - 12/10/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE IRVING, P.J., ISHEE AND FAIR, JJ.

ISHEE, J., FOR THE COURT:

¶1. John Doe, on behalf of Jane Doe,[1] a minor, filed a negligence action in the Rankin County Circuit Court against the Rankin County School District (RCSD) in December 2009. In November 2011, RCSD was granted summary judgment based on governmental immunity under the Mississippi Torts Claims Act (MTCA). John filed a motion for reconsideration of

[1] For purposes of confidentiality, this Court declines to identify minors in child-sexual-abuse cases. In the interest of the child's privacy, we will refer to her throughout this opinion as Jane Doe.

the decision. The motion was denied. John appeals, arguing: (1) the circuit court erred in granting summary judgment in favor of RCSD based on discretionary immunity, because genuine issues of material fact exist; and (2) the circuit court erred in denying John's motion for reconsideration, because RCSD had waived the affirmative defense of immunity and was not entitled to a judgment as a matter of law.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

¶2. On May 16, 2008, Jane, a ninth-grade student at Richland High School (RHS), a school under RCSD's authority, left the school's premises at approximately 1:30 p.m. and visited a nearby McDonald's restaurant. During her visit, Jane met Tyler Trigg, another RHS student, for the first time, and talked with him briefly. After leaving McDonald's, Jane, along with Trigg and three other students, returned to the RHS campus at approximately 3:11 p.m. Upon reaching campus, Trigg forced Jane onto an empty parked school bus and forced her to perform oral sex. Following the assault, Jane went to the restroom until school was dismissed at 3:14 p.m., and then boarded her assigned bus.

¶3. Jane first reported the incident on August 12, 2008, to her teacher, Beth Cook. Cook informed Judy Statham, the school counselor; William Sutton, the RHS principal; and Jane's parents of the incident. Sutton initiated an investigation into the matter. Subsequently, Trigg was transferred to the alternative school on August 15, 2008, and suspended from RHS on August 18, 2008, pending further investigation.

¶4. John, on behalf of Jane, filed a complaint on December 7, 2009, in the circuit court alleging severe and permanent mental and physical pain and suffering, emotional distress, medical expenses, and inconvenience due to the negligence of RCSD. John alleged RCSD,

through its agents and employees acting within their scope of employment, had acted negligently by: (1) failing to provide adequate security at RHS; (2) failing to implement reasonable measures for the personal security and safety of Jane; (3) failing to warn Jane of the harm that she suffered; (4) failing to reasonably inspect and secure the premises from the foreseeable harm suffered by Jane. RCSD answered and alleged various defenses, including immunity under the MTCA.

¶5. Following discovery, RCSD moved for summary judgment arguing that the duty to provide a safe environment for students involves discretionary functions that provide RCSD with immunity under the MTCA. John countered arguing the actions of RCSD were ministerial and that the school failed to exercise ordinary care, thereby precluding it from receiving immunity under the MTCA. The circuit court granted summary judgment in favor of RCSD on November 16, 2011, based on governmental immunity under the MTCA. John responded with a motion for reconsideration arguing RCSD waived immunity by actively litigating the case for approximately eighteen months. John also requested clarification regarding discretionary functions under the MTCA.

¶6. The motion was denied. John now appeals arguing: (1) the circuit court erred by granting summary judgment premised on discretionary immunity; and (2) the circuit court abused its discretion in denying the motion for reconsideration when RCSD waived the affirmative defense of immunity.

STANDARD OF REVIEW

¶7. A grant of a motion for summary judgment is reviewed de novo by this Court. *Kilhullen v. Kan. City S. Ry.*, 8 So. 3d 168, 174 (¶14) (Miss. 2009). In reviewing a grant of

summary judgment, this Court must view the evidence "in the light most favorable to the party against whom the motion has been made." *Id.* Summary judgment is appropriate "if 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).

¶8. "A motion for reconsideration is treated as a motion to amend the judgment pursuant to Rule 59(e) of the Mississippi Rules of Civil Procedure[.]" *Lampkin v. Thrash*, 81 So. 3d 1193, 1199 (¶21) (Miss. Ct. App. 2012). In order "[t]o succeed on a Rule 59(e) 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.'" *Lampkin*, 81 So. 3d at 1199 (¶21) (quoting *Brooks v. Roberts*, 882 So. 2d 229, 233 (¶15) (Miss. 2004)). This Court reviews the "denial of a Rule 59(e) motion under an abuse-of-discretion standard." *Lampkin*, 81 So. 3d at 1199 (¶21).

DISCUSSION

¶9. Under the MTCA, governmental entities are generally afforded immunity from suit. Miss. Code Ann. § 11-46-3 (Rev. 2012). However, generally speaking, if a governmental entity or employee commits a tortious act while acting within the scope and course of its or his employment or duties, then immunity is waived. Miss. Code Ann. § 11-46-5 (Rev. 2012). Nonetheless, Mississippi Code Annotated section 11-46-9(1) (Rev. 2012) provides a number of exceptions to this waiver. Section 11-46-9(1)(d) 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[.]"

¶10. John argues that RCSD's actions were ministerial in nature, and not discretionary. As such, John asserts the applicable section of the MTCA is not section 11-46-9(1)(d), but rather section 11-46-9(1)(b). Section 11-46-9(1)(b) states that a governmental entity is afforded immunity for claims "[a]rising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance[,] or regulation, whether or not the statute, ordinance[,] or regulation be valid[.]" Miss. Code Ann. § 11-46-9(1)(b) (Rev. 2012). However, John argues that RCSD failed to exercise ordinary care and, therefore, immunity should not attach.

¶11. Yet the Mississippi Supreme Court recently overruled the line of cases that condone an interplay between section 11-46-9(1)(b) and section 11-46-9(1)(d). *Miss. Transp. Comm'n v. Montgomery*, 80 So. 3d 789, 797 (¶26) (Miss. 2012). Instead, this Court now follows a well-established two-part test "to determine if 'governmental conduct is discretionary so as to afford the governmental entity immunity.'" *Id.* at 795 (¶20) (quoting *Jones v. Miss. Dep't of Transp.*, 744 So. 2d 256, 260 (¶11) (Miss. 1999)). Accordingly, we must first determine whether the activity in question involved "an element of choice or judgment." *Id.* If so, we must then determine "whether that choice or judgment involved social, economic, or political-policy considerations." *Id.*

¶12. To determine whether or not the actions involved an element of choice or judgment, we must first decide whether RCSD's actions were discretionary or ministerial. *Simpson Cnty. v. McElroy*, 82 So. 3d 621, 625 (¶20) (Miss. Ct. App. 2011) (citing *Knight v. Miss.*

Transp. Comm'n, 10 So. 3d 962, 968 (¶20) (Miss. Ct. App. 2009)). "A duty is discretionary when it is not imposed by law and depends upon the judgment or choice of the government entity or its employee." *Montgomery*, 80 So. 3d at 795 (¶19) (citing *Miss. Dep't of Mental Health v. Hall*, 936 So. 2d 917, 924-25 (¶17) (Miss. 2006)). "A duty is ministerial if it is positively imposed by law and required to be performed at a specific time and place, removing an officer's or entity's choice or judgment." *Id.* (citing *Covington Cnty. Sch. Dist. v. Magee*, 29 So. 3d 1, 5 (¶8) (Miss. 2010)). Generally, when a statute mandates a particular function, then all actions regarding that function are considered binding and are not subject to immunity. *Id.* at 798 (¶31). However, when the Legislature carves out some portion of that function to be discretionary, then immunity is afforded to the discretionary portion. *Id.*

¶13. It is clear that the applicable activity of RCSD – the oversight of student conduct and school safety – has been carved out as a discretionary function. John asserts that Mississippi Code Annotated section 37-9-69 (Rev. 2007) imposes upon schools a ministerial duty to hold students accountable for disorderly conduct. In pertinent part, that section provides that "superintendents, principals[,] and teachers shall hold the pupils to strict account for disorderly conduct at school, on the way to and from school, on the playgrounds, and during recess." Miss. Code Ann. § 37-9-69.

¶14. RHS had clear policies regarding both school safety and student discipline. RHS, operating on a block schedule, was conducting exams the week of the assault. Block scheduling allows students to attend four classes on one day and four different classes the next day, alternating days. Teachers are to take attendance and complete an absentee form if a student is absent from class. During exam week, teachers are not required to take attendance

because parents are allowed to sign students out of school, through the main office, at the completion of the students' exams that day. Students are not allowed to leave school premises without permission.

¶15. At the time she left the school premises, Jane was scheduled to be in her fourth block class with her teacher. Jane had not been signed out by her parents, did not receive permission to leave school property, and had not informed any school authority of her absence. Although her teacher failed to report Jane's absence from class, the evidence reflects that once the assault had been reported, Trigg was transferred to an alternative school and subsequently suspended from RHS following an investigation. RHS nonetheless implemented its specific safety protocols to monitor students.

¶16. While it is true that section 37-9-69 provides a ministerial duty that schools hold students accountable for disorderly conduct at school, it does not dictate how this duty is to be carried out. The Legislature has specifically provided that school discipline be implemented "in the determination of the superintendent or principal[.]" Miss. Code Ann. § 37-9-71 (Rev. 2012). Therefore, RCSD's decisions regarding how best to implement security measures or how to discipline offenders such as Trigg were within its discretion. We find that RCSD's actions involved an element of choice or judgment and meet the first prong of the public-function test.

¶17. Under the second prong of the public-function test, discretionary-function immunity is limited to functions that are policy decisions. *Dancy v. E. Miss. State Hosp.,* 944 So. 2d 10, 16 (¶17) (Miss. 2006) (quoting *Jones v. Miss. Dep't of Transp.*, 744 So. 2d 256, 260 (¶10) (Miss. 1999)). "The purpose of the exception is to prevent judicial second-guessing of

legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.*

¶18. We find that RCSD's actions regarding the implementation of school-safety measures and student discipline involved both social and economic policy. With regard to social policy, RCSD had to consider the best way to implement safety and security on campus while also providing students with freedom in their school environment. In the same light, RCSD had to consider the effects discipline would have on the student body as a whole, as well as the individual student. With regard to economic policy, RCSD had to consider the cost of security in order to implement both an efficient and economical plan. To question either of these tasks would be to second-guess actions within RCSD's discretionary decision-making authority. Therefore, RCSD meets the second prong of the public-function test and is immune under Mississippi Code Annotated section 11-46-9(1)(d).

¶19. Finding that RCSD is immune under Mississippi Code Annotated section 11-46-9(1)(d), we now address whether this immunity was waived. Immunity under the MTCA is an affirmative defense. *Kimball Glassco Residential Ctr. Inc. v. Shanks*, 64 So. 3d 941, 945 (¶12) (Miss. 2011). "[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." *Id.* (quoting *MS Credit Ctr., Inc. v. Horton*, 926 So. 2d 167, 180 (¶44) (Miss. 2006)). "To 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. Once a hearing is requested, any delay by the trial court in holding the hearing would

not constitute a waiver." *Horton*, 926 So. 2d at 181 (n.9) (Miss. 2006).

¶20. On January 8, 2010, RCSD filed its answer to John's complaint raising entitlement to immunity pursuant to the MTCA as its seventh affirmative defense. Subsequently, the parties engaged in sixteen months of discovery, including filing interrogatories and requests for production of documents. RCSD filed a motion for an extension of time on February 25, 2010, and June 24, 2010. An agreed order was entered on September 1, 2010, for the release of Trigg's youth court records. With the participation of RCSD, John scheduled five depositions, including those of Sutton, Cook, and Statham. RCSD scheduled depositions of John and Jane. On April 26, 2011, the parties entered into an agreed scheduling order. Approximately four months later on August 19, 2011, RCSD filed a motion for summary judgment, raising the immunity defense.

¶21. John argues that, regardless of whether RCSD is afforded immunity pursuant to the MTCA, the defense was waived when RCSD actively participated in the litigation process and unreasonable delayed its pursuit of immunity for sixteen months. In support of his argument, John cites to the following supreme court cases: *Meadows v. Blake*, 36 So. 3d 1225 (Miss. 2010); *Estate of Grimes ex rel. Grimes v. Warrington*, 982 So. 2d 365 (Miss. 2008); *E. Miss. State Hosp. v. Adams*, 947 So. 2d 887 (Miss. 2007); *Horton*, 926 So. 2d 167.

¶22. In *Grimes*, the plaintiff filed a wrongful-death complaint against a state-employed doctor who raised MTCA immunity as an affirmative defense in his answer to the complaint. *Grimes*, 982 So. 2d at 366 (¶4). After five years of participation in the litigation process, the doctor was granted summary judgment by the trial court based on MTCA immunity. *Id.* at (¶5). On appeal, the supreme court reversed the trial court's judgment and found that the

doctor had waived the MTCA affirmative defense. *Id.* at 369-70 (¶¶21-28). In regard to the doctor's actions, the supreme court stated that "[a]ll of this was an unnecessary and excessive waste of the time and resources of the parties and the court if [the doctor] had been immune from tort liability since the moment the [c]omplaint was filed." *Id.* at (¶26). The supreme court held that the doctor's "failure actively and specifically to pursue his MTCA affirmative defense while participating in the litigation served as a waiver of the defense." *Id.* at (¶27).

¶23. While *Meadows*, *Adams*, and *Horton* are not cases that deal with immunity pursuant to the MTCA, they are relevant to the issue of waiver. In *Meadows*, the plaintiffs filed a medical-negligence complaint against a hospital and doctor. *Meadows*, 36 So. 3d at 1226 (¶2). The defendants later filed a motion to dismiss for the plaintiffs' failure to comply with the requirements of Mississippi Code Annotated section 11-1-58 (Supp. 2013), which was granted. *Id.* at 1227 (¶4). On appeal, the supreme court reversed the dismissal finding that the defendant's active participation in the litigation process and failure to pursue this defense for two years had waived this defense. *Id.* at 1233 (¶15).

¶24. In *Adams*, the defendants raised the defenses of insufficiency of process and insufficiency of service of process in their answer to the plaintiff's complaint. *Adams*, 947 So. 2d at 889 (¶4). They waited two years, however, before asserting the defense again in their motion to dismiss. *Id.* at (¶5). The trial court denied the motion and found that the actions of the defendants had waived these defenses. *Id.* at (¶6). The supreme court agreed with the trial court on appeal, finding that the defendants' active participation for over two years without actively pursuing the defenses constituted a waiver. *Id*. at 891 (¶11).

¶25. In *Horton*, the defendants asserted their right to compel arbitration in their answer to

the plaintiff's amended complaint, but did not pursue the defense again until eight months later in their motion to compel arbitration. *Horton*, 926 So. 2d at 172 (¶7). The supreme court found that this delay was substantial, and when coupled with their active participation in litigation, constituted a waiver. *Id.* at 180 (¶42).

¶26. RCSD asserts that, due to general allegations pleaded in John's complaint, it could not properly move for summary judgment based on immunity absent the discovery that occurred in this case. We disagree. A review of the record shows that the allegations in John's complaint adequately described the actions that formed the basis of John's claims. Further, all of the evidence necessary to determine whether RCSD was immune from liability was available at the outset of the case. While this Court declines to set a number of days that would constitute unreasonable delay, our supreme court has found "that—absent extreme and unusual circumstances—an eight month unjustified delay in the assertion and pursuit of any affirmative defense or other right which, if timely pursued, could serve to terminate the litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law." *Id.* at 181 (¶45) (footnote omitted).

¶27. For the reasons stated, we find that the circuit court erred in granting summary judgment based on discretionary immunity, because RCSD waived this affirmative defense. Having found RCSD waived immunity pursuant to the MTCA and finding that the circuit court's grant of summary judgment was improper, John's argument regarding the motion for reconsideration is moot. Thus, we reverse the circuit court's judgment and remand this case for further proceedings consistent with this opinion.

¶28. **THE JUDGMENT OF THE RANKIN COUNTY CIRCUIT COURT IS**

REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

LEE, C.J., IRVING, P.J., ROBERTS, FAIR AND JAMES, JJ., CONCUR. BARNES, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION. GRIFFIS, P.J., AND MAXWELL, J., DISSENT WITHOUT SEPARATE WRITTEN OPINION. CARLTON, J., NOT PARTICIPATING.