IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

JAN WATERS, BC-00248	) C/A NO. 03A01-9808-
	)
Claimant-Appellant,	) TENNESSEE CLAIMS COMMISSION) EASTERN DIVISION
v.	) HON. THOMAS G. STOVALL,) ADMINISTRATIVE JUDGE
STATE OF TENNESSEE,	)
	) AFFIRMED AND
Defendant-Appellee.	) REMANDED

ROGER E. JENNE and MICHAEL E. JENNE, Cleveland, for Claimant-Appellant.

JOHN KNOX WALKUP, Attorney General and Reporter, and
GEORGE COFFIN, JR., and LAURA T. KIDWELL, Assistant Attorneys General,
Nashville, for Defendant-Appellee.

O P I N I O N

Franks, J.

In this action, the Claims Commission denied and dismissed claimant's claim. Claimant has appealed.

Claimant is the surviving spouse of Joshua Scott Waters who died as the result of an accident occurring on January 19, 1991, in Polk County, Tennessee, while Waters was traveling east on Highway 64. He lost control of his vehicle and his truck left the roadway and plunged into the Ocoee River, where Waters died.

At the accident site, Highway 64 is bounded by a mountain on one side and the Ocoee River on the other. On the river side, there is a steep slope down to the water, and at the time of the accident, there were no guardrails along that portion of the highway.

Claimant is seeking to recover damages for Waters' death under T.C.A. §§ 9-8-307(a)(1)(I) and (J). Claimant contends that the State negligently failed to install a guardrail at the situs of the accident.

In dismissing the action, the Claims Commission held that the decision whether or not to install guardrails was discretionary and the State was therefore immune from suit. The Commission also held that claimant failed to establish any negligence by the State in its design or maintenance of the highway or that its actions were the proximate cause of the accident.

T.C.A. § 9-8-307 provides the Commission has exclusive jurisdiction to decide certain monetary claims against the State. In this case, the Claimant brought claims under T.C.A. §9-8-307(a)(1)(I) and T.C.A. §9-8-307(a)(1)(J). Under T.C.A. §9-8-307(d), the State "may assert any and all defenses, including common law defenses, which would have been available to the officer or employee in an action against such an individual based upon the same occurrence." Additionally, T.C.A. §9-8-307(g) provides "[n]o language contained in this chapter is intended to be construed to abridge the common law immunities of state officials and employees." Thus, under T.C.A. §9-8-307(d), "the State may assert the common law immunity which has developed in this State with regard to discretionary actions of State employees." *Cox v. State*, 844 S.W.2d 173, 176 (Tenn. App. 1992).

The issue thus becomes whether the challenged conduct was a "planning" decision and therefore immune from suit, or whether it was merely an "operational" act to which no immunity attaches. *See Bowers v. City of Chattanooga*, 826 S.W.2d 427 (Tenn. 1992). Neither category is capable of precise definition. Rather, the most appropriate analysis is one that considers "(1) the decision-making process and (2) the propriety of judicial review of the resulting decision." *Id.* at 431. Although *Bowers* addresses discretionary function immunity under the Tennessee

Governmental Tort Liability Act, we have applied this approach in our analysis of common law immunity as well. *See Youngblood v. Clepper*, 856 S.W.2d 405 (Tenn.App. 1993).

"If a particular course of conduct is determined after consideration or debate by an individual or group charged with the formulation of plans or policies, it strongly suggests the result is a planning decision." *Bowers*, 826 S.W.2d at 430. Such decisions "often result from assessing priorities; allocating resources; developing policies; or establishing plans, specifications, or schedules." *Id.* Additionally, it must be taken into consideration whether the decision is the type properly reviewable by a court. "The discretionary function exception 'recognizes that courts are ill-equipped to investigate and balance the numerous factors that go into an executive or legislative decision' and therefore allows the government to operate without undue interference from the courts. *Id.*

Other cases considering this issue include *Helton v. Knox County*, 922 S.W.2d 877 (Tenn. 1996), where the Supreme Court determined that the county's decision not to install standard guardrails on a bridge was discretionary. The Court noted that the decision-making process included "the weighing of economic factors," including cost-benefit analysis. *Id.* at 887. Similarly, in *Kirby v. Macon County*, 892 S.W.2d 403 (Tenn. 1994), the Supreme Court held that the defendant's decision to forego installation of guardrails was discretionary. The court noted that the decision was made by officials whose duty included formulating such plans and was "consistent with the financial restraints under which the county operated." *Id.* at 408.[1]

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[1] *Helton* and *Kirby* dealt with claims against counties and thus did not involve T.C.A. §§ 9-8-307(a)(1)(I) and (J). The opinions addressed T.C.A. §§ 29-20-203 and 29-20-205. These sections are similar to T.C.A. §§ 9-8-307(a)(1)(I) and (J). T.C.A. §§ 29-20-203 and 29-20-205, however, state that governmental immunity is removed if the decision is operational or if the governmental entity had notice of the dangerous condition. T.C.A. §§ 9-8-307(a)(1)(I) and (J) do not contain this express waiver, although the effect is the same under T.C.A. §§ 9-8-307(a)(1)(I) if the decision is operational in nature.

In this case, the Claims Commission based its decision on several factors. U.S. Highway 64 was constructed sometime before the 1930's. The Tennessee Department of Transportation ("TDOT") considered building a new road and determined that it was economically impossible. TDOT subsequently conducted studies to identify alternative ways to improve Highway 64. TDOT identified seven of the most accident-prone locations on the road and sought to improve them. Because of economic limitations, TDOT could not improve all seven locations at once, and worked on the top three areas first.

Additionally, the Commission noted that the State faced other difficulties since "the location of the highway and the jurisdiction of various federal agencies further complicated any attempt to make significant alterations to the road." Since Highway 64 runs through the Cherokee National Forest, TDOT "was prevented from cutting into the mountain for the purpose of widening the road." Also, "as the Ocoee River is controlled by TVA, significant . . . impediments existed to expanding the bank into the river for the purpose of widening the highway shoulder to install adequate guardrails and/or lessen the degree of the slope as it headed into the water." These findings are supported by the evidence.

Claimant argues the decision at issue was "operational" in nature, relying on *Watts v. Robertson County*, 849 S.W.2d 798 (Tenn. 1992), to support her contention. In *Watts*, however, the defendant county had adopted a private act that set forth its duties for maintaining the road. In *Kirby*, the Tennessee Supreme Court distinguished *Watts*:

> The [*Watts*] court interpreted the private act to **require** the county to make **all** changes to their "roads, highways and bridges" as were recommended upon inspection. Thus, the court reasoned that the private act became the "preexisting law[], regulation[], polic[y] or standard[]." In the instant case, however, there was no similar formal act imposing a specific duty on Macon County to make **all** changes recommended upon inspection. Macon County simply had a general duty to

> reasonably and adequately maintain its roads, highways and bridges. Within this general duty there is room for the decision-making body to "assess[] priorities; allocat[e] resources; develop[] policies; or establish[] plans, specifications, or schedules . . ." Therefore, to the extent that the private acts in *Watts* imposed a specific duty on the county to make all changes recommended upon inspection, *Watts* is inapposite.

892 S.W.2d at 408 n.5 (citations omitted).

Accordingly, *Watts* is distinguishable from the instant case, and we hold that the Claims Commission properly determined that the State is immune from suit on this evidence under T.C.A. §§9-8-307(a)(1)(I) and (J). Although the Commission also based its decision on other grounds, it is unnecessary to discuss issues further.

The judgment of the Commission is affirmed, with the cost of the appeal assessed to appellant.

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Herschel P. Franks, J.

CONCUR:

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Houston M. Goddard, P.J.

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Don T. McMurray, J.