[Cite as *State ex rel. Deem v. Pomeroy*, 2018-Ohio-5375.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE EX REL. DAVID L. DEEM, ET AL.,	:	Case No. 18CA16
Plaintiffs-Appellees,	:	
v.	:	DECISION AND JUDGMENT ENTRY
VILLAGE OF POMEROY, ET AL.,	:	
Defendants-Appellants.	:	RELEASED 12/21/2018

APPEARANCES:

Lawrence E. Barbiere and Katherine L. Barbiere, Schroeder, Maundrell, Barbiere & Powers, Mason, Ohio, for appellants.

Michael M. Hollingsworth, Amesville, Ohio, for appellees.

Hoover, P.J.

{¶1} Defendant-Appellant, Shannon Spaun, appeals from a judgment of the Meigs County Court of Common Pleas denying his motion for summary judgment on the claims asserted by plaintiffs-appellees, David and Jamie Deem, by determining that he was not entitled to immunity in his individual capacity under R.C. 2744.03(A)(6). The trial court concluded that Spaun was not immune because his failure to act to fix a water-line leak, which precipitated landslides that severely damaged the Deems' home, was done in bad faith or in a wanton or reckless manner.

{¶2} Spaun asserts that the trial court erred in denying his motion for summary judgment because it improperly relied on two affidavits of the Deems' experts and ignored his uncontroverted deposition testimony that he never found a leaking water line when he responded

to a complaint by neighbors concerning the lack of water pressure in their home before the first landslide. We reject his assertion for several reasons. First, the experts did not submit affidavits; their testimony was presented as depositions. Second, Spaun forfeited his claim that one of the expert's summary-judgment evidence was improper because he did not raise this objection in response to the Deems' memorandum in opposition to his motion for summary judgment. Third, the experts' conclusions did not constitute inadmissible legal conclusions. Fourth, the record does not include the deposition he cites on appeal, and even if it did, the Deems presented evidence that raises a reasonable inference of his knowledge of a leaking water line. Based on our de novo review of the summary judgment evidence, we agree that at a minimum, after construing the evidence most strongly in favor of the Deems, a genuine issue of material fact exists whether Spaun acted recklessly so as to bar immunity in his individual capacity from the Deems' claims. We overrule Spaun's assignment of error and affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY[1]

{¶3} In 1994, the Deems moved into a 100–year–old home in Pomeroy, Ohio. The home has three bedrooms and one and one-half baths. There is a covered deck in the backyard, which the Deems later converted into additional living space. Next to the Deems' home is the Meigs County Historical Society & Museum. It consists of two buildings, the newer of which is commonly referred to as "the museum annex." The Deems' home and the historical society sit at the foot of a steep wooded hill.

{¶4} Between October 24, 2011 and November 23, 2011, the hill behind the Deems' home slid twice, causing severe damage to their property. The Deems claim that the slides were caused by a leaking water pipe that the village negligently failed to repair. In October 2013, the

[1] Many of these facts are taken from our prior decision in an earlier appeal.

Deems filed a complaint against the Village of Pomeroy and certain employees, Hylant Administrative Services, LLC, The Ohio Plan, Inc., and Laurie O'Malley, individually and as an employee of Hylant Administrative Services, LLC, and The Ohio Plan, Inc.[2] alleging (1) negligence against the village and its employees; (2) spoliation; (3) bad faith denial of their insurance claim; (4) intentional infliction of emotional distress; (5) conspiracy; and (6) deprivation of constitutional rights under 42 U.S.C. § 1983. They also petitioned for a writ of mandamus directing the village to commence appropriation proceedings to address the taking of their property.[3]

{¶5} In their complaint, the Deems alleged that the water department's employees negligently failed to discover and fix a leaking water pipe at the top of the hill behind the museum annex between October 20, 2011 and October 24, 2011, despite the fact that their employees had information that would place an ordinary water department worker on notice that there was a leak. Specifically, they alleged that the employees negligently failed to find and repair a broken valve on the water pipe leading up the hill prior to the first hill slide.

{¶6} The Deems further alleged that when the employees were trying to locate and fix the water leak, they negligently broke the water pipe with a backhoe. The broken water line allegedly caused large amounts of water and mud to flow toward their home, eventually causing damaging mudslides.

[2] The complaint also named Jane Doe, council member, officer or employee, in her official and individual capacities, Janet Doe, council member, officer or employee, in her official and individual capacities, and John Doe, council member, officer or employee, in his official and individual capacities, as defendants.

[3] The case was initially removed to federal court, but the United States District Court for the Southern District of Ohio remanded the case back to the Meigs County Court of Common Pleas in June 2014 after determining that Appellees' § 1983 claims were not ripe for review.

{¶7} Finally, the Deems alleged that despite warnings from engineers and others that the hill must be repaired and stabilized immediately, the Village failed to take any action after the first hill slide which caused the hill to further deteriorate and slide a second time on November 23, 2011. The Deems also alleged that the Village failed to take necessary measures to remedy the hill after the second slide thereby causing additional damage to their property.

{¶8} Between December 2013 and November 2014, the Deems filed two amended complaints, clarifying the nature of some of their claims and adding Ruth Spaun, in her individual capacity, and former Pomeroy Mayor Mary McAngus as defendants. Both defendants moved to dismiss the claims against them, arguing that the statute of limitations had expired. The trial court agreed; and the claims against them were dismissed. Ohio Plan, Inc., Ohio Risk Management, Inc., Hylant Administrative Services, LLC, and O'Malley were also dismissed from the suit after they successfully moved for summary judgment.

{¶9} In August 2016, the Village and its employees moved for summary judgment. As relevant here, they argued that they were immune from the Deems' negligence claims because their claims related to a governmental function, as opposed to a proprietary one. Specifically, they argued that the Deems' allegations related to flood-control measures, as opposed to the establishment, maintenance, and operation of a municipal corporation water supply system. They further argued that even if the Deems' allegations related to the establishment, maintenance, and operation of a municipal corporation water supply system and therefore subjected the village to liability, immunity was restored because the village's handling of the slides involved discretionary decisions under R.C. 2744.03(A)(3) and 2744.03(A)(5). Finally, they argued that village employee Shannon Spaun was immune from individual liability because his acts or omissions were neither manifestly outside the scope of his employment or official

responsibilities nor done with malicious purpose, in bad faith, or in a wanton or reckless manner, as required under R.C. 2744.03(A)(6).

{¶10} In October 2016, the Deems filed a memorandum in opposition to summary judgment, arguing that their claims related to a propriety function, as opposed to a governmental function. Specifically, they argued that their allegations related to the establishment, maintenance, and operation of a municipal corporation water supply system, as opposed to flood control measures. They further argued that the village's immunity was not restored under R.C. 2744.03(A)(3) and 2744.03(A)(5) because the village's handling of the situation did not involve discretionary decisions under R.C. 2744.03(A)(3) and 2744.03(A)(5). Finally, they argued Spaun was liable in his individual capacity because his actions were done in bad faith, or in a wanton or reckless manner, as required under R.C. 2744.03(A)(6).

{¶11} The Deems supported their memorandum in opposition with the verified allegations of their second complaint, affidavits, and depositions. This evidence provided the following. Bill and Rilla Smith live in a separate residence in a home they share with Rilla's son. The home is located at the top of the steep hill overlooking the Deems' house and the museum annex.

{¶12} On Thursday, October 20, 2011, the Smiths and Rilla's son experienced a lack of water pressure in their home, and upon investigation, observed water running out of the ground and coming out of the hillside in the back of their property above the museum annex. The son notified the village's water department about the loss of pressure to the home.

{¶13} The next day, October 21, 2011, when they still did not have water pressure, Bill Smith investigated outside and again found water continuing to run from the ground at the same two locations he had observed the day before. Rilla's son again called the village water

department, and two water department maintenance workers, including Shannon Spaun, responded around 4:30 p.m. that Friday afternoon. Bill Smith tried to get them to investigate the water flowing from the ground and the side of the hill behind their home and above the museum annex; but Spaun told him that a water department employee had told him that the leaking water was the Smiths' responsibility, even though the location of the leak was not on their property. The two workers then went into the Smiths' basement to inspect the water meter. After five to ten minutes, they came out and Spaun told them he cracked the meter, found that there was no pressure on either side of the meter, and claimed that the blockage was somewhere in the house. Spaun and the other village employee did not restore their water pressure or stop the water flowing from two spots in the ground behind their house and above the museum annex and the Deems' home.

{¶14} Over the weekend, the Smiths still had no water pressure and the water flowing out of the ground behind their house and above the museum annex continued flowing, washing dirt and debris down the steep hill. That Sunday, October 23, 2011, the village police chief noticed the large amount of water flowing into the road near the museum annex and told the Smiths they had a water leak; the Smiths informed the police chief that they had already contacted the water department and that it needed to be notified again of the problem.

{¶15} Early on Monday morning, October 24, 2011, the hillside behind the Smiths' house gave way, resulting in a landslide that lasted until the afternoon. Water rushed out of the side of the hill and washed mud and debris down the hill with it. The village sent workers, including Spaun, to find the leaking pipe and install a new one. A second water leak developed on the hill, which washed debris, mud, and water towards the Deems' house. Another landslide damaged the Deems' home and forced them to move out in November 23, 2011. John Musser,

who was the Mayor of the Village of Pomeroy at the time of the landslides, investigated the matter and concluded that Spaun's failure to fix the water leak when he responded to the Smiths' complaints on Friday, October 21, 2011, caused the landslide. Musser's affidavit testimony differed somewhat from the Smiths' affidavits in that he stated that Bill Smith told him that when he met with Spaun on October 21, 2011, Smith took Spaun to the area of one of the water leaks, removed some grass and dirt to show him where the water was flowing out of the ground, and Spaun told him that the leaking pipeline at that location was private and not the village's responsibility. This testimony was also supported by the allegations of the Deems' second amended complaint, which were verified by the Deems and further noted that Spaun, a 20-year water department employee, left for the weekend after performing no test of the water flowing out of the ground behind the Smith's home.

{¶16} Donald Poole, the general manager of a water district for over 30 years, noted in his report that he has addressed many types of water leaks, including those near landslides. Poole concluded, assuming certain facts provided by the Deems' counsel, that: (1) Spaun failed to follow widely accepted practices of Ohio municipal water systems, departments, and water districts when he responded on October 21, 2011, to the reported lack of water pressure at the Smiths' home; (2) when Spaun removed and inspected the Smiths' water meter, he would have found a lack of sufficient water pressure, which would have confirmed that the problem was within the village's water distribution system and was not the Smiths' responsibility; (3) the facts provided to Spaun on October 21, 2011—that the Smith home lost water pressure suddenly and water was flowing from the ground and pooling behind the home in the general vicinity of the village water line—suggested that an underground leak in the village water line was responsible for the lack of water pressure; (4) when Spaun was shown the location behind the Smith home at

which water was flowing out of the ground and pooling, he failed to follow widely accepted practices of Ohio municipal water companies, departments, and water districts and exhibited a lack of ordinary care when he failed to investigate further by testing the water for fluoride or chlorine or digging with a shovel to discover the source of the leak; (5) when Spaun left the Smith home on October 21, 2011, he knew or reasonably should have known that he did so prematurely because he had received sufficient information to strongly suggest there was an underground leak in the village waterline behind the home and on the top of the hill above the museum annex; (6) Meigs County is prone to slips leading to landslides, which emphasizes the importance of reacting promptly to repair or shut off water to a leak, and allowing the leak at that location to run unchecked was unconscionable; and (7) Spaun at the very least should have contacted his immediate supervisor or the village administrator to assess the situation and find the source of the depressurization or shut off the water supply to the leak; allowing the leak in an area prone to slips and earth movements leading to landslides causes the initial earth movement to expand exponentially.

{¶17} In a deposition, the Deems' other expert, Jack Spadaro, an environmental consultant who has analyzed the effects of seeping water on landslides, testified that: (1) he did not believe that rainfall contributed to the landslides that damaged the Deems' property; (2) the only cause of the landslide was water that leaked from the broken pipe at the top of the hill; (3) had the village taken decisive action to stop the water leak behind the Smith residence when they first came out there on October 21, 2011, and a later leak that was caused by the village's attempts to remedy the first leak, the Deem residence would have been protected; (4) that the intervening act between the two landslides was the village's failure to act, i.e., its failure to correct the first landslide and allowing it to grow and become more severe so that it destroyed

the Deems' house—the failure to take remedial measures even though it knew that the landslide had been caused by the water leak; and (5) the cost estimate for remedial construction at the site of the landslides before rebuilding the Deem house is $251,000.

{¶18} Upon cross-examination by Spaun's counsel, Spadaro testified that based on his training, a reasonable definition of willful is a person who knows that a standard of practice is not being followed and allows a hazard to either develop or continue. In their memorandum in opposition to the village's motion for summary judgment, without citing any specific part of Spadaro's deposition, the Deems claimed that he "expressed an opinion that the Village had been negligent and its worker [Spaun] had been negligent and willful." Although the village responded contesting Spadaro's opinion testimony and Musser's affidavit testimony, it agreed that Spadaro had opined that based on his experience, he found the actions of the village and its workers to have been both negligent and willful.

{¶19} On February 16, 2017, the trial court denied the village and its employees' motion for summary judgment, concluding that the village was not immune from the Deems' negligence claims because their allegations concerned the alleged negligent performance of a proprietary function and did not involve the exercise of discretion, as contemplated by R.C. 2744.03(A)(3) and R.C. 2744.03(A)(5). It did not address whether Spaun was entitled to individual immunity under R.C. 2744.03.

{¶20} On appeal, we held that the trial court did not err in determining that the village, its mayor and members of its village council, and Spaun, in his official capacity, were not entitled to immunity under R.C. 2744.02 and 2744.03; but it did err in failing to consider whether Spaun was entitled to individual immunity under R.C. 2744.03. *State ex rel. Deem v. Village of Pomeroy*, 2018-Ohio-1120, 109 N.E.3d 30 (4th Dist.). We remanded the cause to the trial court

to determine whether Spaun was entitled to immunity under R.C. 2744.03(A)(6) on the summary-judgment evidence. *Id.*

{¶21} On remand, the trial court reviewed the previously submitted evidence and arguments and denied Spaun's motion for summary judgment on his claim of immunity from the Deems' claims against him in his individual capacity. The court cited the Deems' evidence, including Poole's conclusion that Spaun's failure to act was "unconscionable" and Spadaro's conclusion that Spaun's failure to act was "willful." The court found that "Spaun, as a long-time village employee, had sufficient experience and knowledge to have determined the cause of the lack of water pressure inside the Smith house and the water flowing outside. He was inside the house 5-10 minutes and only checked the water meter. There is no indication that he investigated the cause of the water flowing outside." Based on this evidence, the court concluded "Spaun's failure to act at the Smith's house on October 21, if proven, was done in bad faith or in a wanton or reckless manner." This appeal ensued.

II. ASSIGNMENT OF ERROR

{¶22} Spaun assigns the following error for our review:

> THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO DEFENDANT-APPELLANT SHANNON SPAUN IN HIS INDIVIDUAL CAPACITY.

III. STANDARD OF REVIEW

{¶23} Appellate review of summary judgment decisions is de novo, governed by the standards of Civ.R. 56. *Vacha v. N. Ridgeville*, 136 Ohio St.3d 199, 2013-Ohio-3020, 992 N.E.2d 1126, ¶ 19. Summary judgment is appropriate if the party moving for summary judgment establishes that (1) there is no genuine issue of material fact, (2) reasonable minds can come to but one conclusion, which is adverse to the party against whom the motion is made, and (3) the

moving party is entitled to judgment as a matter of law. Civ.R. 56; *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 24; *Chase Home Fin., LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶ 26.

{¶24} The moving party has the initial burden of informing the trial court of the basis for the motion by pointing to summary judgment evidence and identifying parts of the record that demonstrate the absence of a genuine issue of material fact on the pertinent claims. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996); *Chase Home Fin.* at ¶ 27. Once the moving party meets this initial burden, the nonmoving party has the reciprocal burden under Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue remaining for trial. *Dresher* at 293.

IV. LAW AND ANALYSIS

A. Tort Liability for Political Subdivision Employees-General Principles

{¶25} "R.C. Chapter 2744 sets out circumstances under which political subdivisions and their employees are liable in tort in connection with governmental and proprietary functions." *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-8374, 75 N.E.3d 161, ¶ 6. R.C. 2744.03(A)(6) provides that an employee is personally immune from liability unless "(a) [t]he employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (b) [t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; [or] (c) [c]ivil liability is expressly imposed upon the employee by a section of the Revised Code." The trial court denied summary judgment to Spaun, a village employee at the time of the claims, in his individual capacity because it concluded that there remains a genuine issue of material fact whether his failure to remedy the water-line leak when he first responded on October 21, 2011, to the Smiths' complaints about low water

pressure at their home and the water leak behind the home was done in bad faith or in a wanton or reckless manner.

{¶26} Although the issue of whether a political subdivision or its employee may invoke statutory immunity under R.C. Chapter 2744 generally presents a question of law, the issue of whether a political subdivision employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner are generally questions of fact. *See, generally, Hoffman v. Gallia Cty. Sheriff's Office*, 2017-Ohio-9192, 103 N.E.3d 1, ¶ 38 (4th Dist.), citing several cases; *see also Argabrite* at ¶ 15 (framing immunity question as whether reasonable minds could conclude that the political subdivision employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner so as to preclude immunity).

B. The Trial Court Did Not Improperly Rely on Evidence submitted by the Deems' Experts

{¶27} Spaun first asserts that the trial court erred in denying his motion for summary judgment based on his claimed entitlement to statutory immunity in his individual capacity because the court improperly "relied on two affidavits submitted by Plaintiffs' experts, Jack Spadaro and Donald Poole." He claims that the court could not have relied on Poole's conclusion that the village and Spaun's failure to remedy the water leak on October 21, 2011, was unconscionable and Spadaro's conclusion that Spaun's actions were willful because they were inadmissible legal conclusions that were unsupported by facts.

{¶28} We reject Spaun's claims for several reasons. First, the Deems did not submit affidavits by these experts. Instead, they submitted depositions of the experts conducted by the village and Spaun's attorneys.

{¶29} Second, Spaun forfeited his claim that Poole's deposition testimony was inadmissible because he failed to object to this testimony in his reply to the Deems' memorandum in opposition to his motion for summary judgment. *See Gardner v. Paxton*, 4th Dist. Washington No. 18CA13, 2018-Ohio-4586, ¶ 19 (failure to raise defect in summary-judgment motion below forfeited error on appeal); *Bennett v. Meshell*, 4th Dist. Meigs No. 07CA2, 2008-Ohio-1287, ¶ 13 (failure to object to summary-judgment evidence below forfeited error on appeal); *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 15, quoting *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), quoting *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus ("It is a well-established rule that ' "an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court" ' ").

{¶30} Third, the trial court did not err in considering the experts' deposition testimony in its summary-judgment determination. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact" Evid.R. 704. Poole and Spadaro did not merely give legal conclusions; they supported those conclusions with facts that were for the most part submitted in other summary-judgment evidence in the case. *Compare Sutherland v. Bertka*, 6th Dist. Lucas No. L-04-1123, 2004-Ohio-5998, ¶ 11 ("expert testimony that sets forth mere legal conclusions without supporting facts is not sufficient to establish a genuine issue of material fact"). For example, most of Poole's testimony was supported by facts presented in the Smiths' affidavits regarding their firsthand knowledge of their interaction with Spaun. Likewise, Spadaro's

testimony relied on the Deems' deposition testimony. Neither Poole nor Spadaro set forth legal conclusions without supporting facts.

{¶31} Therefore, we reject Spaun's claim that the trial court erred in relying on the experts' testimony in its summary-judgment determination.

C. The Trial Court did not Erroneously Disregard Uncontroverted Facts

{¶32} Spaun next contends that the trial court erred in ignoring his uncontroverted deposition testimony that he did not find a leaking water line during his October 21, 2011 visit to the Smith home. However, the record does not include his deposition; and the transcript of the docket and journal entries do not show that it was ever filed. The trial court could not err in ignoring deposition testimony when it was never properly before it.

{¶33} Moreover, Spaun did not cite this part of his deposition testimony in either his motion for summary judgment or his reply to the Deems' memorandum in opposition.

{¶34} Furthermore, the trial court's decision does not rely on Musser's hearsay testimony that Bill Smith told him that he took Spaun to the area of one of the water leaks and showed him where it was flowing out of the ground, i.e., its decision is not inconsistent with Spaun's purported deposition testimony that he did not find a leak during his October 21, 2011 visit. Bill Smith's affidavit evidence raised the reasonable inference that Spaun knew about the water leak even if he did not take the time to investigate and find its exact location. Therefore, we reject Spaun's contention.

D. We Need Not Consider Spaun's New Claims Raised in his Reply Brief

{¶35} In his reply brief, Spaun raised new claims that Spadaro's expert testimony was also objectionable because he created his own definition of willful and that the trial court erred in relying on Musser's affidavit because it constituted hearsay.

{¶36} But because he raised these new claims in his reply brief, we need not consider them. *Natl. Collegiate Student Loan Trust 2005-3 v. Dunlap*, 2018-Ohio-2701, __ N.E.3d __, ¶ 43 (4th Dist.); *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 179, quoting *Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, at ¶ 18 (" 'Appellate courts generally will not consider a new issue presented for the first time in a reply brief' ").

E. De Novo Review

{¶37} In our de novo review of the trial court's summary-judgment decision, we first note that the trial court concluded that based on the summary-judgment evidence, Spaun's failure to act to remedy the leak on October 21, 2011, was done in bad faith or in a wanton or reckless manner. "Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct." *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph four of the syllabus; *Argabrite*, 149 Ohio St.3d 349, 2016-Ohio-8374, 75 N.E3d 161, 8.

{¶38} Bill Smith testified in his affidavit that Spaun, an experienced water department employee, spent five to ten minutes inspecting the water meter to his home, found no water pressure on either side of the meter, failed to investigate the water flowing from the two locations behind their home, and left without either restoring water pressure to the home or stopping the water flowing behind their home. The leaking water eventually damaged the Deems' home and other structures.

{¶39} Poole testified in his deposition that based on these facts, Spaun failed to follow widely accepted practices of Ohio municipal water districts when he responded to the reported lack of water pressure at the Smiths' home, that after removing the water meter and finding no

water pressure, he could confirm that the problem was an underground leak in the village's water line, and that Spaun's inaction in not at least advising his supervisor about the problem, which allowed the leak in an area prone to slips leading to landslides caused by water leakage to grow exponentially, was unconscionable. In so holding, we need not rely on Poole's additional testimony based presumably on Musser's hearsay testimony that Bill Smith told him that he showed Spaun one of the locations of the water leak.

{¶40} Based on this evidence, reasonable minds could conclude that Spaun consciously disregarded or was indifferent to a known or obvious risk of harm (the danger of leaking water near the top of a steep hill in an area prone to movements that could lead to landslides) that is unreasonable to others (the structures at the bottom of the steep hill, including the Deems' residence) under the circumstances (reported lack of pressure at home at top of steep hill and leak from two locations behind from home) and is substantially greater than negligent conduct (unconscionable action of leaving the Smiths' home without rectifying the water-pressure problem, the leak causing it, shutting off the water to stop any leak, or notifying his immediate supervisor about the problem).

{¶41} Therefore, we agree with the trial court's conclusion that there remains a genuine issue of material fact about whether Spaun is entitled to immunity from liability in his individual capacity because the trier of fact could determine that his actions or omissions constituted reckless conduct excepting him from immunity under RC. 2744.03(A)(6)(b). The trial court properly denied Spaun's motion for summary judgment. Based on this holding, we need not further address whether the trial court erred in also determining that reasonable minds could differ on whether Spaun's actions and omissions constituted bad-faith or wanton misconduct. *See* App.R. 12(A)(1)(c). Therefore, we overrule Spaun's assignment of error.

V. Conclusion

{¶42} Having overruled Spaun's assignment of error, we affirm the judgment of the trial court denying his motion for summary judgment regarding his claim of immunity in his individual capacity.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, J.: Dissents.

For the Court

By: _____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.