[Cite as *Mollett v. Lawrence Cty. Bd. of Dev. Disabilities*, 2024-Ohio-1434.]

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

PAUL B. MOLLETT, Plaintiff-Appellant, v. LAWRENCE COUNTY BOARD OF DEVELOPMENTAL DISABILITIES, Defendant-Appellee.	: : : : : : : : : : :	Case No. 22CA6 DECISION AND JUDGMENT ENTRY **RELEASED: 04/08/2024**

APPEARANCES:

Marc D. Mezibov and Brian J. Butler, Mezibov Butler, Cincinnati, Ohio, for appellant.

Bradley E. Bennett and Lindsay A. Roberts, Brickler & Eckler, Columbus, Ohio, for appellee.

Wilkin, J.

{¶1} Appellant, Paul B. Mollett ("Mollett"), is appealing a Lawrence County Court of Common Pleas judgment entry that dismissed his complaint for breach of contract, and granted appellee, Lawrence County Board of Developmental Disabilities' ("Board") counterclaim for breach of contract.

{¶2} Mollett filed a complaint alleging that his employer, the Board, breached his employment contract by failing to pay him his accrued but unused sick leave credit after he retired. The Board answered denying that it breached Mollett's employment contract. The Board also filed a counterclaim alleging that Mollett breached his implied duty of good faith and loyalty to the Board pursuant to his employment contract. The trial court dismissed Mollett's complaint and

granted the Board's counterclaim. Both holdings independently supported that the Board had no obligation to pay Mollett his accrued but unused sick leave credit.

{¶3} Mollett asserts two assignments of error on appeal: (1) the trial court erred in finding that the Board's failure to pay Mollett the cash value of his accrued but unused sick leave upon retirement did not breach his employment contract, and (2) the trial court erred in finding that Mollett breached his contractual duty of good faith and fiduciary duty to the Board thereby eviscerating any obligation the Board had to pay Mollett for his unused sick leave upon retirement.

{¶4} Having reviewed the parties' arguments, the record, and the applicable law, we sustain Mollett's first assignment of error because the trial court erred in dismissing Mollett's complaint alleging that the Board breached his employment contract by denying his request to recover accrued but unused sick leave upon retirement.

{¶5} We overrule Mollett's second assignment of error alleging that the trial court erred in granting the Board's counterclaim that alleged Mollett breached his employment contract because he acted with dishonesty and disloyalty during his employment. However, because employees are precluded from receiving due compensation only during the period or periods of time that they acted with dishonesty and disloyalty, and the trial court did not address that issue in this case, we remand this matter for the trial court to address that issue.

{¶6} Accordingly, we sustain Mollett's first assignment of error, and overrule his second assignment of error, but remand this matter for proceedings consistent with this decision.

FACTS AND PROCEDURAL BACKGROUND

{¶7} The Board is a public agency that provides services to children and adults who suffer from developmental disabilities and live in Lawrence County, Ohio. The Board employed Mollett in 1983 as a "workshop director" - a position he held for approximately 15 years. He subsequently became the "adult services director" for the Board.

{¶8} In 2007, the Board's superintendent retired, and Board members approached Mollett about applying for the position. Mollett applied and was hired pursuant to a contract, as required by R.C. 5126.0219. Pursuant to back-to-back employment contracts, he was employed by the Board as its superintendent from October 16, 2007 until October 27, 2017.

{¶9} Mollett testified that as the superintendent, he was responsible for handling the daily affairs of the Board. Mollett was a salaried employee who did not clock in and out, but did keep track of the hours that he worked.

{¶10} Mollett claimed that he rarely, if ever, used sick leave because he was "never really sick[,]" and he used vacation leave for medical appointments. He also maintained that he seldom used vacation leave. Mollett testified that accumulating sick leave was important to him for two reasons. The first was to have enough sick leave in case of a catastrophic illness, but if his sick leave was not used, it would result in a payment of his accrued but unused sick leave at

retirement. Mollett testified that if he used sick or vacation leave he would fill out a leave form, which was recorded by his secretary.

{¶11} In 2013, while still employed as superintendent with the Board, Mollett accepted a position as principal for St. Joseph Central Catholic High School in Ironton ("St. Joe's"), pursuant to an employment contract. In taking this position, Mollett had no intention of leaving his employment with the Board. He claimed that his position at St. Joe's was temporary until the individual earmarked for the position completed his certification. Mollett was principal at St. Joe's from 2013 to 2017.

{¶12} Mollett testified that he had informed the Board of his employment at St. Joe's. Doak Russell, Board president at that time, acknowledged that he was aware that Mollett worked at St. Joe's, but added that Mollett did that work "on his own time" and it was his understanding that Mollett was a volunteer. Russell testified that the Board reviewed Mollett's employment annually and his evaluation was "generally" more than satisfactory.

{¶13} Mollett stated that St. Joe's was a three-to-five-minute drive from the Board's offices. School at St. Joe's began at 8:00 a.m. and ended at 2:30 p.m., while Mollett's work hours at the Board began at 8:30 a.m. and ended at 4:30 p.m. Mollett testified that he understood that he would have to work at St. Joe's outside of his normal hours for the Board, except for emergencies. He typically arrived at St. Joe's between 7:00 a.m. and 7:30 a.m. Between 8:15 a.m. and 8:20 a.m. he would leave St. Joe's and go to work at the Board. However, Mollett also testified that he communicated by text and phone calls with

employees at St. Joe's during his work hours at the Board. He also admitted that at times he was at St. Joe's during his work hours for the Board, but maintained that it was "[n]ot frequent."

{¶14} Chris Monte, who was Mollett's assistant principal at St. Joe's, testified that he saw Mollett "at some point every day." He claimed that they often communicated by text "throughout the day." Evidence showed that Mollett and Monte exchanged a multitude of such texts during Mollett's work hours for the Board. Monte testified that there were many tasks that required Mollett as principal to be present physically at St. Joe's, including meetings with teachers, parents, or students; maintenance issues; interviewing teacher and staff positions; and attending mass.

{¶15} Also in 2013, Mollett hired Ryan Cornett to be the Board's business manager. Mollett authorized Cornett to operate his business, Rymacore, out of the Board's offices in its annex building.

{¶16} In August 2017, Betty Jones, a Board member at the time, was attending church when it was announced that Mollett would no longer be principal at St. Joe's due to a lawsuit that had been filed against him. Jones informed Board President, Doak Russell, of Mollett's employment at St. Joe's, as well as his termination from that position.

{¶17} Shortly thereafter, the Lawrence County Commissioner's Office called the Board and requested its members attend a meeting with the Lawrence County Auditor regarding Mollett and Cornett. At that meeting, the Auditor's staff showed the Board a document containing transactions between the Board and

Cornett's company, Rymacore. The Auditor's staff informed the Board that Rymacore was owned by Cornett, the Board's business manager, and he operated it out of the Board's annex building. The staff also informed the Board that it was Mollett who hired Cornett and authorized him to run the business out of the annex building.

{¶18} The Auditor's staff also apprised the Board about the lawsuit that was filed against Mollett, which caused him to lose his job at St. Joe's. The complaint included allegations of sexual harassment against Mollett.

{¶19} The Board called a special meeting where it was determined that it would conduct its own investigation of Mollett. Pending results of the investigation, the Board placed Mollett on administrative leave. The Board hired attorney Frank Hickman to investigate the matter. After his investigation, Hickman met with members of the Board and informed them that Mollett was frequently out of the office, was working at St. Joe's during Board work hours, and was often seen at Rymacore during Board work hours. Jones testified that the Board had its attorney notify Mollett that it believed that there was enough information to terminate him for cause.

{¶20} After consulting with his attorney, Mollett decided to retire, believing that it was the Board's intention to fire him. He drafted a document dated October 27, 2017 and sent it to the Board informing them of his immediate retirement. In a document dated November 27, 2017, Mollett requested the Board to pay him his accumulated, but unused sick leave. Jones testified that

the Board denied his request for the payment because "He had already retired. And once you're off active status, the payment isn't there."

{¶21} On December 11, 2018 Mollett filed a complaint seeking a declaration that the Board breached his employment contract. The complaint alleged that under his employment contract the Board was obligated to pay him the amount of accrued but unused sick leave credit that he had accumulated over the years, which he calculated to be $221,151.62.

{¶22} The Board filed an answer and multi-count counterclaim. In its answer, the Board maintained that Mollett never requested a timely payment of accrued but unused sick leave as required by his employment contract, the Board's policy, and Ohio law. The Board also set out numerous affirmative defenses, including that the Board was excused from any performance to pay Mollett unused sick leave due to Mollett breaching his contract.

{¶23} In Count 1 of its counterclaim, the Board alleged Mollett breached his employment contract by violating an implied duty of good faith, fair dealing, full disclosure, and loyalty that he owed to the Board as his employer. The counterclaim asserted that Mollett breached his employment contract "by engaging in numerous bad faith actions and failing to disclose material facts and information to [the Board]." In Count 2, the Board alleged that Mollett intentionally and or negligently misrepresented facts to the Board about Cornett and his company Rymacore, and about his employment with St. Joe's. Finally, in counts 3, 4, and 5, the Board alleged that Mollett converted property, was unjustly enriched by accepting incentive payments for not using sick leave, and was

estopped from taking action against the Board to recover his accrued but unused sick leave.

{¶24} The case was tried before a magistrate on May 10 and 11, 2021. On August 26, 2021, the magistrate issued his decision, which dismissed Mollett's breach of contract claim and declaratory relief against the Board because Mollett did not request payment of his unused sick leave at the time of his retirement as required by his employment contract. The magistrate also granted the Board's counterclaim for breach of contract against Mollett and he further found that the Board's counterclaim for unjust enrichment had merit ordering Mollett to pay the Board $2,550 in incentive payments that he had accepted for not using sick leave. All remaining claims by the Board were dismissed for lack of merit.

{¶25} Mollett filed objections to the magistrate's decision. The Board filed a motion opposing Mollett's objections. After a hearing, subject to minor modifications, the trial court overruled Mollett's objections and held as follows.

{¶26} In analyzing Mollett's breach of contract claim against the Board, the court found his employment contract incorporated the sick leave requirements set forth in any Board policies in effect at the time of his retirement from employment. The court determined that Board policy 5.6.10 required that an "employee must request payment of unused sick leave[.]" The court found that this requirement was consistent with R.C. 124.39(B), which was also incorporated into Mollett's contract. The court found that Mollett was no longer an employee when he requested payment of his unused sick leave in violation of

his contract (i.e., he was retired), which "terminated any obligation by the Board to payout any accrued sick leave benefit." Thus, the court dismissed Mollett's complaint for breach of contract.

{¶27} The court also granted the Board's counterclaim against Mollett for breach of contract. The court found that every employment contract " 'implicitly contains an agreement that the employee will act in good faith and will not act to the detriment of his employer.' " *Roberto v. Brown County Gen. Hosp*., 59 Ohio App.3d 84 (12th Dist.1989)." The court determined that Mollett breached those implied duties by: (1) spending a significant amount of time at St. Joe's during his work hours at the Board, (2) spending a certain amount of work hours in part of the annex office building where Cornett's private business was operating, instead of spending time in his office that was also in the annex, and (3) failing to use sick or vacation leave while attending at least 30 visits to medical providers while accepting incentive payments for not using sick leave. The court found that these were breaches of Mollett's obligation to act with good faith and loyalty that relieved the Board from its obligation to pay him his accrued but unused sick leave.

{¶28} The court then addressed the Board's counterclaim for unjust enrichment. It found that Mollett was unjustly enriched by accepting the 17 quarterly $150 incentive payments for not using sick leave despite attending at least 30 medical appointments without using sick or vacation leave. Therefore, under the equitable doctrine of unjust enrichment, the court ordered that Mollett must return those payments to the Board, which totaled $2,250. The court found

the Board's remaining counterclaims for misrepresentation, conversion of property, and estoppel lacked merit.

{¶29} Thus, the court: (1) dismissed Mollett's breach of contract claim against the Board, (2) granted the Board's counterclaim for breach of contract against Mollett, and (3) dismissed the Board's remaining claims, except for its unjust enrichment claim under which the court ordered Mollett to pay the Board $2,250 for the sick leave incentive payments that Mollett wrongly accepted. It is this judgment that Mollett appeals, asserting two assignments of error.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN FINDING THAT [THE BOARD'S] FAILURE TO PAY MOLLETT THE CASH VALUE OF HIS ACCRUED BUT UNUSED SICK LEAVE UPON RETIREMENT DID NOT BREACH HIS EMPLOYMENT CONTRACT

II. THE TRIAL COURT ERRED IN FINDING THAT MOLLETT BREACHED HIS CONTRACTUAL DUTY OF GOOD FAITH AND FIDUCIARY DUTY TO THE BOARD THEREBY EVISCERATING ANY OBLIGATION THE BOARD HAD TO PAY MOLLETT FOR HIS UNUSED SICK LEAVE UPON RETIREMENT

ASSIGNMENT OF ERROR I

1. Mollett's Arguments

{¶30} Mollett asserts that the Board breached the terms of his employment contract by refusing to pay him his accrued but unused sick leave in the amount of $221,151.62. Mollett argues that his contract had only two conditions precedent that he had to satisfy to be entitled to recover his accrued but unused sick leave, which were (1) having at least 10 years of service, and (2) retiring or separating from service with the Board. Because he satisfied both of

those conditions precedent, he was entitled to recover his accrued but unused sick leave.

{¶31} Mollett argues that the trial court improperly read an additional condition precedent into his contract that required him to request payment of accrued but unused sick leave before (or contemporaneously with) his retirement. Mollett maintains the court reached this conclusion by improperly relying on R.C. 124.39 and Board policy 5.6, et., seq.

{¶32} Mollett admits that R.C. 124.39(B) permits employees of political subdivisions to "elect to cash out unused sick leave 'at the time of retirement[,]' " but claims that this provision does not apply to him. Mollett points out that R.C. 124.39(B) applies to " 'an employee of a political subdivision covered by R.C. 124.38 or 3319.141 of the Revised Code.' " In turn, R.C. 124.38 applies to " 'employees * * * other than superintendents * * * of county boards of developmental disabilities.' " And R.C. 3319.141 applies to persons employed by the Ohio Department of Education ("ODE"). Because Mollett is the superintendent of the Board and he is not an employee of the ODE, he maintains that R.C. 124.39 is not applicable to him and therefore has no impact on the payment of his sick leave credit.

{¶33} Mollett maintains pursuant to his contract that upon retiring with at least 10 years of service, his contract afforded him an unequivocal right to payment of his accrued but unused sick leave. In support of this assertion, Mollett relies on the following emphasized language from his contract: "Upon separation or retirement from employment with the Board, and after 10 years of

service, the Superintendent *will be paid* in accordance with current board policy at the time of separation." (Emphasis added.). He maintains that the language – "in accordance with current board policy" – addresses only the "manner" in which accrued but unused sick leave is paid. Thus, Mollett argues his contract contains no requirement to request payment of his accrued but unused sick leave at the time of retirement before he is entitled to receive it.

{¶34} Mollett also asserts that the trial court improperly determined that even if he had satisfied the conditions precedent to entitlement of his accrued but unused sick leave, the Board would have terminated him. Mollett claims that the court erred in relying on testimony from the Board members to reach that conclusion because such testimony cannot alter contract language.

{¶35} Finally, Mollett claims a "cursory glance at policy no. 5.6.10 shows that it is filled with provisions that directly conflict with Mollett's employment contract and cannot be reasonably harmonized with its terms."

{¶36} Therefore, Mollett maintains that the trial court erred in dismissing his breach of contract claim against the Board for failing to pay him his accrued but unused sick leave credit.

2. The Board's Response

{¶37} The Board maintains that the trial court did *not* "read in" an extra condition precedent to Mollett's employment contract pertaining to the payment of unused sick leave. Rather, Mollett's employment contract incorporated the Board's policy 5.6.10 and R.C. 124.39(B), which created a third condition precedent to the recovery of his accrued but unused sick leave. Specifically, the

Board argues that "Section I of [policy 5.6.10] states " '[t]he employee must request payment of unused sick leave' in order to be entitled to it." The Board further claims "[t]he requirement that an employee must request payment upon retirement, not a retiree, is to comply with R.C. 124.39(B)."

{¶38} In response to Mollett's argument that R.C. 124.39(B) does not apply to him because it does not pertain to superintendents and he is not an employee of the Ohio Department of Education, the Board claims that absent R.C. 124.39(B) affording Mollett payment of his accrued unused sick leave benefits in his contract, "he is entitled under law to nothing." "[T]here is no statutory requirement for a superintendent to receive payment of sick leave upon retirement." The Board maintains that pursuant to its contracting authority under R.C. 5126.0219, it incorporated R.C. 124.39(B) into Mollett's contract for the purpose of affording him the same right to receive payment of accrued but unused sick leave upon retirement that it affords to other employees. Consequently, the Board claims that Mollett was subject to R.C. 124.39(B), which in part states that "an employee * * * may elect, at the time of retirement * * * to be paid in cash * * * the employee's accrued but unused sick leave credit."

{¶39} Finally, the Board addresses Mollett's argument that the "in accordance with board policy" set forth in the contract just refers to "the manner of payment." The Board first argues that Mollett never raised this issue before the magistrate so it is waived on appeal. The Board further maintains that such an interpretation reads the Board's policies out of Mollett's contract and renders the in-accordance-with language "utterly meaningless."

{¶40} Thus, the Board maintains that pursuant to R.C. 124.39(B) and Board policies, including policy 5.6.10, Mollett's contract contained a condition precedent to recovery of his accrued but unused sick leave that required him to request payment of his accrued but unused sick leave *at the time of his retirement*. The Board argues that because Mollett failed to comply with this condition precedent, it relieved the Board of its obligation to pay Mollett his sick leave credit, and was a defense to Mollett's breach of contract claim. Therefore, the Board urges this court to affirm the trial court's judgment dismissing Mollett's breach of contract claim.

3. Law

a. Standard of Review

{¶41} The parties dispute the standard of review we should apply in this matter. Therefore, we will first determine the proper standard of review applicable herein.

{¶42} Mollett maintains that he does not challenge the trial court's factual findings. Rather, he claims that his assignments of error raise issues that pertain to the interpretation of his employment contract and interpretation of Ohio law regarding his "duties of good faith and fair dealing." He claims that both are "purely legal issues" requiring a de novo standard of review on appeal.

{¶43} In contrast, the Board maintains "Mollett is challenging the trial court's decision to adopt the magistrate's decision, which is reviewed for an abuse of discretion. *Langmore v. Danci*, 2020-Ohio-3704, 155 Ohio App.3d 1014 (10th Dist.)." The Board claims that Mollett filed objections to the magistrate's

decision on issues that he now raises on appeal. The Board cites two breach-of-contract cases that were tried before a magistrate and the resulting trial court judgment adopting the magistrate's decision was appealed and the reviewing courts applied an abuse of discretion standard of review. *See Yashphalt Seal Coating, LLC v. Giura*, 7th Dist. Mahoning No. 18 MA 0107, 2019-Ohio-4231 and *Haman Ents., Inc. v. Sharper Impressions Painting Co.*, 2015-Ohio-4967, 50 N.E.3d 924, ¶ 18 (10th Dist.).

{¶44} It is true that "[a]n appellate court generally reviews the trial court's decision to adopt, reject, or modify the magistrate's decision for an abuse of discretion." *Danci* at ¶ 20, citing *Altercare of Canal Winchester Post-Acute Rehab. Ctr., Inc. v. Turner*, 10th Dist. No. 18AP-466, 2019-Ohio-1011, ¶ 15; *Whitesed v. Huddleston*, 2021-Ohio-2400, 175 N.E.3d 930, ¶ 27 (4th Dist.). However, as *Danci* elaborated, the standard of review of a trial court's judgment adopting a magistrate's decision " 'varies with the nature of the issues that [are] * * * raised on appeal by assignment of error' (Internal citations omitted.)[.]" *Id*., quoting *Fraley v. Ohio Dept. of Rehab. & Corr.*, 2019-Ohio-2804, 139 N.E.3d 1264, ¶ 9 (10th Dist.).

{¶45} Mollett's first assignment of error asserts that the trial court erred in finding that the Board's failure to pay him the cash value of his accrued but unused sick leave upon retirement was not a breach of his employment contract. However, determining whether the Board breached Mollett's contract is not dependent upon facts. Rather, it is dependent on determining whether Mollett's contract contained a condition precedent that required him to request his accrued

but unused sick leave credit at the time of his retirement, which involves interpreting the contract.

{¶46} "Contract interpretation is a matter of law, and questions of law are subject to de novo review on appeal." *St. Marys v. Auglaize Cty. Bd. of Commrs.,* 115 Ohio St. 3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶ 38, citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm,* 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995); *Zimmerview Dairy Farms, LLC v. Protege Energy III LLC*, 4th Dist. Washington No. 21CA1, 2022-Ohio-1282, ¶ 22. Under a de novo review, we afford no deference to the trial court's decision. *McNichols v. Gouge Quality Roofing, LLC.*, 2022-Ohio-3294, 195 N.E.3d 1119, ¶ 25 (4th Dist.).

{¶47} It is unclear why the courts in *Giura* and *Haman* applied an abuse of discretion standard of review solely on the basis that the case was initially decided by a magistrate without any consideration of the legal issue on appeal. " 'The magistrate is a subordinate officer of the trial court, not an independent officer performing a separate function.' " *Yazdani-Isfehani v. Yazdani-Isfehani*, 4th Dist. Athens No. 11CA1, 2012-Ohio-1031, ¶ 8, quoting *Jones v. Smith,* 187 Ohio App.3d 145, 931 N.E.2d 592, 2010-Ohio-131, ¶ 9 (4th Dist.). Therefore, "[i]n ruling on objections [to a magistrate's decision], the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law." *Redmond v. Wade*, 4th Dist. Lawrence No. 16CA16, 2017-Ohio-2877, ¶ 22, quoting Civ.R. 53(D)(4)(d). After the trial court resolves any objections to the magistrate's decision, "[t]he trial court, "separate and apart from the magistrate's

decision," must enter its own judgment containing a clear pronouncement of the trial court's judgment and a statement of the relief granted by the court." *Jackson v. Jackson*, 4th Dist. Washington No. 13CA40, 2014-Ohio-5853, ¶ 11, citing *Flagstar Bank, FSB v. Moore,* 8th Dist. Cuyahoga No. 91145, 2008-Ohio-6163, ¶ 8. And it is the trial court's judgment that is subject to appeal, not the magistrate's decision. Therefore, *Giura* and *Haman* do not persuade us that an abuse of discretion standard of review is appropriate herein merely because Mollett's case was first addressed by a magistrate.

{¶48} As explained in *Danci*, the standard of review of a trial court's judgment adopting a magistrate's decision " 'varies with the nature of the issues that [are] * * * raised on appeal by assignment of error[.]' " Resolving whether the trial court erred in dismissing Mollett's breach of contract claim against the Board is dependent upon interpreting Mollett's contract, which we review de novo.

b. Contract Law

{¶49} Mollett claims that the trial court erred in dismissing his breach of contract claim against the Board because the trial court improperly interpreted his contract to contain a condition precedent that required him to request payment of the sick leave credit before (or contemporaneously with) his retirement. "A cause of action for breach of contract requires the claimant to establish the existence of a contract, the failure without legal excuse of the other party to perform when performance is due, and damages or loss resulting from the breach." *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St. 3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶

41, citing *Natl. City Bank of Cleveland v. Erskine & Sons*, 158 Ohio St. 450, 110 N.E.2d 598, paragraph one of the syllabus (1953).

{¶50} "Where, however, the formation of a contract is dependent upon a condition precedent, such condition must be performed before the agreement becomes effective." *Campbell v. George J. Igel & Co.*, 2013-Ohio-3584, 3 N.E.3d 219, ¶ 13 (4th Dist.). "The nonoccurrence of a condition precedent 'excuses performance under the contract and is a defense to a breach-of-contract claim.' " *Eagle Realty Invs., Inc. v. Dumon*, 2022-Ohio-4106, 201 N.E.3d 963 (1st. Dist.), ¶ 11, quoting *Gilman v. Physna, LLC*, 1st Dist. Hamilton No. C-200457, 2021-Ohio-3575, ¶ 19, citing *Transtar Elec., Inc. v. A.E.M. Elec. Servs. Corp.*, 140 Ohio St.3d 193, 2014-Ohio-3095, 16 N.E.3d 645, ¶ 22.

{¶51} " 'The determination of whether a contractual provision "is a condition precedent or merely a promise to perform is a question of the parties' intent." Intent is best determined "by considering the language of a particular provision, the language of an entire agreement, or the subject matter of an agreement." ' " *Campbell* at ¶ 13, quoting *Adkins v. Bratcher,* 4th Dist. No. 07CA55, 2009-Ohio-42, 2009 WL 44822, ¶ 32*,* quoting *Hiatt v. Giles,* 2d Dist. Darke No. 1662, 2005-Ohio-6536, ¶ 23. However, "[c]onditions precedent are not favored by the law, and whenever possible courts will avoid construing provisions to be such unless the intent of the agreement is plainly to the contrary." *Adkins* at ¶ 32, quoting *Hiatt* at ¶ 23. *See also Eagle Realty Invs., Inc. v. Dumon*, 2022-Ohio-4106, 201 N.E.3d 963, ¶ 12 (1st Dist.); *City of Westlake v. VWS, Inc.,* 8th Dist. Cuyahoga No. 100180, 2014-Ohio-1833, ¶ 24; *Evans,*

Mechwart, Hambleton & Tilton, Inc. v. Triad Architects, Ltd., 196 Ohio App. 3d 784, 965 N.E.2d 1007, ¶ 15 (10th Dist.). The need to plainly show that contract language creates "a condition precedent, rather than as a promise or covenant" is particularly important if interpreting the language as a condition precedent "would work a forfeiture." *Dover v. Morales*, 9th Dist. Summit No. 15817, 1993 WL 120366, *7 (Apr. 21, 1993); *See also Franklin Consultants, Inc. v. Osborne*, 11th Dist. Lake No. 7-050, 1979 WL 208177, *2 (Oct. 1, 1979).

4. Analysis

{¶52} Because determining whether a contract term is a condition precedent or merely a promise to perform is based on intent, and courts determine intent by examining contract language, we begin our analysis by examining Mollett's contract. In undertaking this review, we must recall that "[c]onditions precedent are *not favored* by the law, and *whenever possible courts will avoid construing provisions to be such unless* the *intent of the agreement is plainly to the contrary*." (Emphasis added.) *Adkins* at ¶ 32.

{¶53} Part V. of Mollett's contract addresses his compensation. Section A. of Part V. sets out Mollett's salary. Section B. of Part V. is titled "OTHER COMPENSATION" and states in part:

> 1. Sick Leave: The Superintendent shall earn sick leave at the rate of 4.312 hours per 75 hours of service as defined in O.R.C. 124.38. There shall be no limit on the accumulation of sick leave. Upon separation or retirement from employment with the Board, and after 10 years of service, the Superintendent will be paid for accrued, but unused sick leave in accordance with current board policy at the time of separation.

In effect at the time of Mollett's retirement was Board Policy 5.6.10 titled "SICK LEAVE CONVERSION AT THE TIME OF RETIREMENT." It states:

> Conditions exist at the time of retirement that differs from the regular process of separation. These conditions are:
>
> A. Sick Leave: Upon retiring from active state or county services after ten or more years with the state or any of its political subdivisions, an employee may elect to be paid in cash for one-four [sic.] (1/4) of the accrued but unused sick leave credit. The maximum accrual is thirty (30) days. Conversion of sick leave on retirement exhausts the employee's entire sick leave balance. Sick leave conversion does not apply to any termination or separation other than retirement. O.R.C. Section 124.39 (B).
> B. Such payment may be made more than once to any employee. That is, an employee who returns to state or county service after retiring may accrue and use sick leave as before, but may only convert any portion of unused sick leave at the time of a second retirement, that does not exceed for all payments, the value of thirty (30) days of accrued but unused sick leave.
> C. If at least one-half (1/2) of their total public service time has been with the Lawrence County Board of DD, Board employees may elect, at the time of retirement or resignation from active public service, and with ten (10), but less than fifteen (15) years of service with the state, any political subdivision of [sic.] any combination thereof, to be paid in cash for forty (40%) of the value of their accrued but unused sick leave credit.
> D. If at least one-half (1/2) of their total public service time has been with the Lawrence County Board of DD, Board employees may elect, at the time of retirement or resignation from active public service, and with fifteen (15), but less than twenty (20) years of service with the state, any political subdivision or any combination thereof, to be paid in cash for sixty (60%) of the value of their accrued but unused sick leave.
> E. If at least one-half (1/2) of their total public service time has been with the Lawrence County Board of DD, Board employees may elect, at the time of retirement or resignation from active public service, and with twenty (20), but less than twenty-five (25) years of service with the state, any political subdivision or any combination thereof, to be paid in cash for

> eighty (80%) of the value of their accrued but unused sick leave credit.
> F. If at least one-half (1/2) of their total service time has been with the Lawrence County Board of DD, Board employees may elect, at the time of retirement or resignation from active public service, and with twenty-five (25) years of service with the state, any political subdivision or any combination thereof, to be paid in cash one hundred percent (100%) of the value of their accrued but unused sick leave credit.
> G. Sick leave shall be based on the employee's rate of pay at the time of retirement or resignation of [sic.] eliminates all sick leave credit accrued but unused by the employee at the time payment is made.
> H. If an employee of the Board dies while in active pay status, all accrued sick leave due his or her credit shall be paid to the estate of the deceased.
> I. The employee must remain separated from the Board for a minimum of sixty (60) days before payment can be made under the provisions of sections above. The employee must request payment of unused sick leave

{¶54} The language in Part V. Section B.1. of Mollett's contract unambiguously creates two conditions precedent that must be satisfied for Mollett to be entitled to payment of his sick leave. Specifically, it states: "[1] *Upon* separation or *retirement* from employment with the Board, *and* [2] after *10 years of service*, the Superintendent *will be paid* for accrued, but unused sick leave in accordance with current board policy at the time of separation." (Emphasis added.) In other words, once Mollett retired with at least "10 years of service[,]" the contract provided that Mollett "will be paid" his accrued but unused sick leave credit, and the Board would be obligated to pay it.

{¶55} The Board unilaterally drafted this contract specifically for its superintendent. Had it intended the superintendent to be subject to an additional condition precedent requiring him to request that payment *at the time of his retirement*, it should have included that precise language with the other two

conditions precedent and immediately prior to the "will be paid" language in Part V., Section B.1., of Mollett's contract. The absence of such language here supports the conclusion that the Board did not "plainly" intend such a third condition precedent requiring Mollett to request payment of his accrued but unused sick leave "at the time of his retirement." This conclusion is even more compelling considering that interpreting Mollett's contract as containing a third condition precedent would result in Mollett forfeiting his accrued but unused sick leave, which pursuant to his contract was part of his compensation as superintendent. *Dover*, 9th Dist. Summit No. 15817, 1993 WL 120366, *7 (Apr. 21, 1993); *Franklin Consultants,* 11th Dist. Lake No. 7-050, 1979 WL 208177, *2 (Oct. 1, 1979).

{¶56} Nevertheless, the trial court determined that the "in accordance with" language in Part V., Section B.1., of Mollett's contract incorporated Board policy 5.6.10, which contained a third condition precedent requiring Mollett to request payment of his accrued but unused sick leave at the time of his retirement. While we agree that Mollett's contract must be interpreted "in accordance with" existing board policies, we do not find that it sets forth a third condition precedent requiring Mollett to expressly request accrued unused sick leave at the time of his retirement. As we stated above had the Board intended such a condition precedent, it would have placed it in the contract along with the other two conditions precedent, but it did not.

{¶57} Instead, policy 5.6.10 provides factors that define how sick leave is paid out. And we believe one of these factors that distinguishes between the

payout of sick leave, versus accrual of sick leave, is important to this case but was not raised by either party on appeal, or by the trial court, so we do so sua sponte. Mollett's employment contract provides that he "shall earn sick leave at the rate of 4.312 hours per 75 hours of service as defined in O.R.C. 124.38. There shall be no limit on the accumulation of sick leave." This permits Mollett to accumulate a significant amount of sick leave in case of an extended illness.

{¶58} However, *payment* of accrued but unused sick upon retirement is addressed in Board Policy 5.6.10, which is incorporated into Mollett's contract. In part it states:

> Conditions exist at the time of retirement that differs from the regular processes of separation. These conditions are:
>
> A. Sick Leave: Upon retiring from active state or county services after ten or more years with the state or any of its political subdivisions, an employee may elect to be paid in cash for one-four [sic.] (1/4) of the accrued but unused sick leave credit. *The maximum accrual is thirty (30) days*.
> B. Such payment may be made more than once to any employee. That is, an employee who returns to state or county service after retiring may accrue and use sick leave a before, but may only convert any portion of unused sick leave at the time of a second retirement, that does *not exceed for all payments, the value of thirty (30) days of accrued but unused sick leave*.

(Emphasis added.)

{¶59} We find that this language limits Mollett to recover at most 30 days of accrued, but unused sick leave. Therefore, while Mollett had the ability to accumulate an unlimited amount of sick leave to protect him from catastrophic illness, he can only recover a maximum of 30 days of accrued unused sick leave upon retirement.

{¶60} Accordingly, we sustain Mollett's first assignment of error and reverse the trial court's dismissal of his breach of contract claim against the Board based on our determination that his contract did not contain a condition precedent that required him to request payment of accrued but unused sick leave at the time of his retirement.

{¶61} We have also recognized that Mollett's contract provides him the right to recover up to 30 days of accrued, but unused sick leave. However, whether he can actually recover that sick leaves depends on our resolution of Mollett's second assignment of error.

ASSIGNMENT OF ERROR II

1. Mollett's Arguments

{¶62} In his second assignment of error Mollett claims that the trial court erred in finding that he breached his implied duty of good faith and fiduciary duty to the Board thereby eviscerating any obligation the Board had to pay Mollett for his unused sick leave upon retirement. Mollett sets forth three reasons why this court should reverse the trial court's judgment.

{¶63} Mollett first argues that the trial court made no findings that the Board was damaged by Mollett's alleged disloyal acts and/or omissions. Mollett maintains that the Board failed to prove that he breached his duty of good faith, but also failed to prove any damages. Mollett cites the fact that he always received a satisfactory or better evaluation from the Board. He also maintains that to the extent that the Board suffered damage from his acceptance of the quarterly incentive payments that he received for not using sick leave, he has

already been ordered to reimburse the Board pursuant to unjust enrichment. Therefore, such damages do not support the Board's breach of contract claim.

{¶64} Mollett next argues that the trial court never determined whether his bad faith/disloyalty "permeated" his work for the Board. He claims that only if an employee's breach of good faith or disloyalty permeates their employment can their employer deprive them of their compensation under the Faithless Servant Doctrine.

{¶65} Finally, Mollett contends that even if the Faithless Servant Doctrine applies to his actions here, any loss of his accrued but unused sick leave would be limited to the period that he failed to act in good faith and/or was dishonest/ disloyal. He claims that his period is limited to 2013 to 2017. Therefore, he would be able to recover any unused sick leave that he accumulated outside that period of time.

2. The Board's Response

{¶66} In response, the Board maintains that the trial court did not misapply the Faithless Servant Doctrine. The Board argues that the trial court properly determined that Mollett breached his duty of faithfulness to the Board and "rightfully" excused the Board from performing under his contract.

{¶67} The Board claims that there is no requirement to provide evidence of damages under the Faithless Servant Doctrine. The Board asserts that upon proof that an employee acted in bad faith or with disloyalty, the employer may refuse to pay the employee their compensation.

{¶68} The Board further maintains that "Mollett's disgorgement of compensation for being a faithless servant was proper." The Board claims that limiting disgorgement of his sick leave credit from 2013 to 2017 "is seriously flawed on so many levels."

{¶69} First, the Board argues that because it could have fired Mollett resulting in no obligation to pay any sick leave benefits, such a limitation is improper.

{¶70} Second, the Board maintains that even if disgorgement is limited to the period from 2013 to 2017, it would not result in a net change to the amount that Mollett could recover had he not been unfaithful in his employment with the Board. This is because the Board's policy provides that the maximum amount of sick leave that can be paid upon retirement will not exceed 30 days.

{¶71} Finally, the Board claims that an "employee's unfaithfulness" will deprive him of his entire agreed compensation' for the period of faithlessness[,]" quoting *Roberto*, 59 Ohio App.3d 84, 86, 571 N.E.2d 467 (12th Dist. 1989).

3. Law

a. Standard of Review

{¶72} In his second assignment of error, Mollett alleges that the trial court erred in applying the Faithless Servant Doctrine. Specifically, he alleges that the trial court failed to address two elements of the Faithless Servant Doctrine. The first is that the court did not determine whether his bad faith/disloyalty "permeated" his employment. He also maintains that the trial court failed to

determine the period during which his bad faith/disloyalty occurred, which he claims is the only period for which he could be deprived of his sick leave credit.

{¶73} In determining whether a party has a common law duty is a question of law that we review de novo. *See In re Adoption of L.C.H*., 4th Dist. Scioto Nos. 09CA3318, 09CA3319, and 09CA3324, 2010-Ohio-643, ¶ 44, citing *Roll v. Edwards,* Ross App. No. 05CA2833, 2006-Ohio-830, ¶ 18. Therefore, we review whether the trial court properly applied the Faithless Servant Doctrine without affording the trial court's decision any deference. *McNichols*, 2022-Ohio-3294, 195 N.E.3d 1119 at ¶ 25 (4th Dist.).

b. The Faithless Servant Doctrine

{¶74} Since 1945, Ohio courts have recognized that

> [w]hen a contract of employment has been entered into it is an implied condition of such contract, if not otherwise expressed, that the employee is bound to act in good faith and is to exercise reasonable care and diligence in the performance of his duties. Failure to so act in the interest of his employer constitutes a breach of his contract.

Ohio Cas. Ins. Co. v. Capolino, 65 N.E.2d 287, 290 (8th Dist. 1945); *see also Cont'l Secret Serv. Bureau, Inc. v. Vogelsang*, 6th Dist. Lucas No. 82-072, 1982 WL 6478, *3 (June 25, 1982); *Am. Ins. Grp. v. McCowin*, 7 Ohio App. 2d 62, 65, 218 N.E.2d 746 (7th Dist.1966).

Because an employee owes the duty of good faith and loyalty to their employer, the employee "may not acquire an interest adverse to that of his principal and thereby reap a secret profit at his, the principal's expense." *Hey v. Cummer*, 89 Ohio App. 104, 139, 97 N.E.2d 702 (9th Dist.1950). An employer may recover any damages caused by the employee's bad faith/disloyalty. *Id*. 138-140.

{¶75} The "Faithless Servant Doctrine" was first recognized by the Supreme Court of Kansas in 1974 in *Bressman v. Bressman*, 520 P.2d 1210 (Kan. 1974). In part the Court's syllabus stated:

> 3. As a general rule an agent who realizes a secret profit through his dealings on behalf of his principal not only must disgorge the profit but also *forfeits the compensation* he would otherwise have earned.
> 4. Dishonesty and disloyalty on the part of an employee which *permeates* his *service to* his *employer* will deprive him of his entire agreed compensation, because he has failed to give the stipulated consideration for the agreed compensation, and because he cannot be paid for his own wrongdoing.
> 5. A 'faithless servant' will be *denied his compensation only during the period of his faithlessness*. Where the agreed compensation can be apportioned he will not be deprived of that portion of the compensation which is allocable to services which he has performed in an unexceptionable manner.

(Emphasis added.)

{¶76} In 1989 the Twelfth District Court of Appeals reaffirmed that under Ohio common law "[a] contract of employment implicitly contains an agreement that the employee will act in good faith and will not act to the detriment of his employer." *Roberto*, 59 Ohio App.3d 84, 86, 571 N.E.2d 467, citing *American Ins. Group v. McCowin*, 7 Ohio App.2d 62, 65, 218 N.E.2d 746 (7th Dist.1966), 39 Ohio Jurisprudence 3d (1982), Employment Relations, Sections 133 and 134. The Court in *Roberto* continued:

> However, once the employee's condition for payment of services is broken, thereby causing a breach, the employer has absolutely no obligation to uphold its end of the bargain, since consideration on the part of the employee does not exist. Accordingly, the court adopts the "faithless servant doctrine"

> enunciated by the Kansas Supreme Court in *Bessman v. Bessman* (1974), 214 Kan. 510, 520 P.2d 1210.
>
> The "faithless servant doctrine" in *Bessman, supra,* holds that dishonesty and disloyalty on the part of an employee which permeates his service to his employer will deprive him of his *entire agreed compensation,* due to the failure of such an employee to give the stipulated consideration for the agreed compensation. Further, as public policy mandates, an employee cannot be compensated for his own deceit or wrongdoing. However, an employee's compensation will be denied only during his period of faithlessness. 2 Restatement of the Law 2d, Agency (1958), Section 469, states:
>
> An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned."
>
> Clearly, the "faithless servant doctrine" is a recognized rule of law in the state of Ohio which requires a disloyal and deceitful employee to forgo his compensation during such period of "faithlessness." (Emphasis sic.)

Id. at 86.

{¶77} While this Court has never expressly adopted the Faithless Servant Doctrine, other Ohio appellate districts have. *See e.g*. *Kamlani v. A.C. Leadbetter & Sons, Inc.*, 6th Dist. Lucas No. L-05-1277, 2006-Ohio-2116, ¶ 26-27; *Cartwright v. Falls Heating & Cooling, Inc.*, 9th Dist. Summit No. 16079, 1994 WL 286280, at *6 (Ohio Ct. App. June 29, 1994). And although we are not bound by decisions from other Ohio Appellate Districts, "we afford [them] 'due consideration and respect[.]' " *State v. Powers*, 4th Dist. Scioto No. 19CA3968, 2020-Ohio-7042, ¶ 48, citing *Phillips v. Phillips*, 2014-Ohio-5439, 25 N.E.3d 371, ¶ 32 (5th Dist.). We find the decisions in these other Districts persuasive and agree that the Faithless Servant Doctrine applies in determining whether an

employer may withhold an employee's compensation for acting in a dishonest and/or disloyal manner in their employment.

{¶78} An Ohio Federal Southern District Court has commented that the Faithless Servant Doctrine is a "subset of a claim for [Ohio's common law] breach of the duty of loyalty." *Cheryl & Co. v. Krueger*, 536 F. Supp. 3d 182, 212 (S.D. Ohio 2021). Under both the Ohio common law and the Faithless Servant Doctrine, an employee has a duty to act with good faith, honesty, loyalty, etc. in their service to their employer.[1] But the Faithless Servant Doctrine also contains two additional "elements" before it permits an employer to decline to pay an employee their agreed to compensation. They include that the employee's lack of good faith/dishonesty/disloyalty (1) "permeates [his or her] service to [his or her] employer" and (2) "compensation will be denied only during his period of faithlessness." *Roberto*, 59 Ohio App.3d at 86 (12th Dist. 1989), citing *Bessman*, 214 Kan. 510, 520 P.2d 1210 (1974).

3. Analysis

{¶79} In evaluating the Board's counterclaim for breach of contract against Mollett, the trial court's decision stated that the Board "relies on the Faithless Servant Doctrine in establishing its claim[.]" The court then restated the Board's allegations that supported a finding that Mollett acted in bad faith and with disloyalty that included:

> 1) [Mollett] engaging in private employment at St. Joe during Board Time; 2) assisting former business manager Ryan Cornett at his business, Rymacore, during Board hours; 3) using the

[1] While Ohio's common law may refer to an employee's duties of good faith and fair dealings, we find those duties differ little in substance, if at all, from the obligation of honesty and loyalty under the Faithless Servant Doctrine.

> annex building for his own personal storage; 4) expending over $25,000 in Board funds on improvements to the annex building for his own personal storage; 5) authorizing the Board to purchase items directly from Rymacore; 6) failing to properly use his sick leave for sick leave purposes, 7) improperly collecting sick leave incentive payments; 8) failing to disclose a sexual harassment complaint to the Board; 9) failing to obtain the Board's consent/approval of his retirement before retiring.

Over the next several pages, the trial court discussed in greater detail some of Mollett's actions that were representative of his bad faith/disloyalty, such as thousands of texts from Mollett's assistant principal at St. Joe's showing that he and Mollett communicated during Board hours. The decision then concluded that the Board's "Counterclaim for breach of [Mollett's] contractual duty of good faith and fiduciary duty to the Board is WELL-TAKEN. Therefore, the Board is under no obligation to pay the sick leave benefits at issue to [Mollett]."

{¶80} We find that the trial court's conclusion that Mollett acted with pervasive bad faith, breached his fiduciary duty that he owed to the Board as a Faithless Servant is supported by the evidence. However, a finding that an employee is a faithless servant is sufficient to deprive the employee of their compensation, but " '*only during his period of faithlessness*.' " (Emphasis sic.) *Kamlani*, 6th Dist. Lucas No. L-05-1277, 2006-Ohio-2116 at ¶ 27, quoting *Roberto v. Brown Cty. Gen. Hosp.*, 59 Ohio App.3d 84, 87, 571 N.E.2d 467 (12th Dist. 1989). The trial court did not consider the timing/duration of Mollett's dishonest and/or disloyal behavior. That calculation, however, is necessary to determine how much accrued but unused sick leave Mollett can recover, if any.

{¶81} Accordingly, we affirm the trial court's finding that Mollett breached his duty of honesty and loyalty and was a faithless servant to the Board, but remand this matter to the trial court to determine Mollett's period or periods of faithlessness for the purpose of determining whether he can recover his accrued but unused sick leave.

CONCLUSION

{¶82} We sustain Mollett's first assignment of error because the court erred in dismissing his complaint alleging that the Board breached his employment contract, which entitled him to recover accrued but unused sick leave upon retirement. But, if, and how much unused sick leave credit he may recover shall be determined by the trial court as outlined in our disposition of Mollett's second assignment of error.

{¶83} We overrule Mollett's second assignment of error alleging that the trial court erred in granting the Board's counterclaim alleging that Mollett breached his employment contract because he acted with dishonesty and disloyalty during his employment with the Board. And under the Faithless Servant Doctrine, Mollett can only recover unused sick leave credit that accrued during any period or periods that he acted with honesty and loyalty, up to a maximum of 30 days of sick leave credit. Within those guidelines, the court must determine the amount of sick leave credit, if any, that Mollett is due on remand.

{¶84} Therefore, we affirm in part, reverse in part, and remand the matter to the trial court for consideration of these matters consistent with our decision herein.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Abele, J., Dissenting

{¶85} I respectfully dissent. Because I believe the trial court correctly characterized appellant as a faithless servant, the board should be relieved of any obligation to pay the requested benefits.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and the CAUSE IS REMANDED. Appellant and appellee shall split the costs equally.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Common Pleas Court 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.

Smith, P.J.: Concurs in Judgment and Opinion.
Abele, J.: Dissents with Dissenting Opinion.

For the Court,

BY: _____
Kristy S. Wilkin, 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.