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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

Article IV, Section 2(B)(2)(e) of the Ohio Constitution gives this Court jurisdiction to review cases involving “public or great general interest.” This is one of those cases.

Every year in Ohio there are thousands of adversary proceedings between employees seeking unemployment compensation and their employers. These cases all begin administratively, where a paper record is created by the Director of the Ohio Department of Jobs and Family Services (the “Director”). If the Director’s decision is contested by either side, the Unemployment Compensation Review Commission (“Commission”) then conducts an evidentiary hearing, frequently by telephone. The losing party is then entitled to limited judicial review.

The employee has the burden to prove his or her entitlement to unemployment compensation benefits. *Irvine v. State, Unemployment Comp. Bd. of Rev.*, 19 Ohio St.3d 15, 17, 482 N.E.2d 587 (1985). Payment of unemployment compensation is not allowed if the employee “has been discharged for just cause in connection with the individual’s work[.]” R.C. 4141.29(D)(2)(a). This Court has held that “just cause” means that “which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.” *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Serv.*, 73 Ohio St.3d 694, 697, 653 N.E.2d 1207 (1995), quoting *Irvine*, 19 Ohio St.3d at 17.

Just cause is predicated upon employee fault. *Tzangas*, 73 Ohio St. 3d at 698. Where an employee displays an unreasonable disregard for his or her employer’s best interests, the discharge is regarded to be with “just cause.” *Tzangas, supra* at paragraph two of the syllabus. This Court has explained this principle as follows:

When an employee is at fault, he [or she] is no longer the victim of fortune's whims, but is instead directly responsible for his [or her] own predicament. Fault on the employee's part separates him [or her] from the [Unemployment Compensation] Act's intent and the Act's protection. Thus, fault is essential to the unique chemistry of a just cause termination.

Id. at 697-698.

“[T]he question of fault cannot be rigidly defined, but, rather, can only be evaluated upon consideration of the particular facts of each case. If an employer has been reasonable in finding fault on behalf of an employee, then the employer may terminate the employee with just cause. Fault on behalf of the employee remains an essential component of a just cause termination.” *Id.*

The Commission's function is to make factual findings and determine the credibility of witnesses. *Irvine*, 19 Ohio St. 3d at 18. If the record contains evidence supporting the Commission's findings, a court may not substitute its own findings of fact. *Id.* However, if the decision was unlawful, unreasonable or against the manifest weight of the evidence, it may be reversed. *Tzangas*, at syllabus.¹

In the case at bar, the employer, a hospital in Canton, discharged its employee (Appellant, Laura Scali) – who was an administrative employee in its dental clinic – based solely upon uncorroborated, unverified, and unjustified complaints made by patients or potential dental patients about her interactions with them.

¹. There is “no distinction between the scope of review of common pleas and appellate courts regarding ‘just cause’ determinations under the unemployment compensation law.” *Durgan v. Ohio Bur. of Emp. Servs.*, 110 Ohio App.3d 545, 551, 674 N.E.2d 1208 (1996), citing *Tzangas* at 696-697. Thus, an appellate court is “required to focus on the decision of the [Commission] rather than that of the common pleas court, in unemployment compensation cases.” *Ro-Mai Industries, Inc. v. Weinberg*, 176 Ohio App.3d 151, 2008-Ohio-301, 891 N.E.2d 348, at ¶ 7.

The employee explained and thoroughly rebutted each of the patients complaints when she was made aware of them. (One of the complaints she knew nothing about and could even recall the complainant.).

Instead of verifying and validating any of the complaints, the employer simply assumed them to be true and utterly ignored the employee's calm and rational explanation of what actually happened, not to mention her emphatic denials that she had ever been rude, disrespectful, or uncaring to any of the employer's patients.

At the evidentiary hearing conducted by the Commission, the employer relied exclusively upon the testimony of the employee's supervisor, who merely described what the patients had allegedly said or complained about. The employer adduced no other evidence to demonstrate that any of these complaints had validity or that they had been investigated and found meritorious. Scali testified about each of the complaints and clearly rebutted any suggestion that she was at fault in any way.

The Commission found that because complaints had been made (their validity was not determined), the employer was somehow justified in discharging Scali. The Court of Appeals held that since there was "some evidence" of alleged employee fault based upon the complaints, it could not reverse the decision. See, *Scali v. CSA HS UHHS Canton, Inc.*, Stark App. No. 2011-CA-00165, 2011-Ohio-577, 1012 WL 474200 at ¶ 15

The time has come for this Court to address whether, and on what basis, the Commission and reviewing courts can rely upon the rankest hearsay in making a determination of "fault" necessary for denying a claim for unemployment compensation. The decision in this case shows how incredibly unfair it is for the Commission to rely upon uncorroborated hearsay, particularly

where it is competently rebutted, to conclude that good cause existed for a termination.

More and more cases of this type are being decided upon hearsay evidence. While hearsay evidence may be admissible, it is fundamentally unfair to a claimant such as Scali to be denied benefits she desperately needs and is entitled to based solely on uncorroborated hearsay, particularly where she otherwise demonstrated the lack of fault. There is a compelling need for clear judicial guidance as to when Commission and/or reviewing courts may rely upon such hearsay especially where, as here, hearsay is the *only* evidence offered by the employer and where the employee thoroughly rebuts that evidence.

We submit that in such instances, a decision in favor of the employer, without more, is unreasonable, unlawful, and against the manifest weight of the evidence.

Accordingly, Laura Scali respectfully requests that this Court take this case in to address this very important evidentiary issue which recurs with alarming frequency.

STATEMENT OF THE CASE AND FACTS

Scali filed an application of unemployment compensation benefits on December 16, 2009, following her termination by Appellee, CSA HS UHHS Canton, Inc. ("Mercy"). Scali was an office services assistant that Mercy's Dental Clinic, where she worked for more than a year.

Scali and Mercy each submitted information to the Director. The Director "disallowed" her claim on the basis that Mercy had discharged her because she was "not able to perform required work." Scali appealed to the Director on January 12, 2010. The Director affirmed his decision on February 11, 2010. Scali's timely appeal was transferred to the Commission for a full evidentiary hearing. That hearing was held on July 15, 2010 by telephone. Neither the employer nor Scali were represented by counsel; however, the employer was "represented" by

someone from its human resources department.

On August 4, 2010 the Commission's hearing officer officer determined that Scali had been discharge for just cause in connection with work because complaints had been made about her as being rude and intemperate with several patients.

Scali timely requested review by the full Commission. The Commission disallowed this request. Scali timely appealed to the Court of Common Pleas of Stark County, Ohio on September 28, 2010. After full briefing by the parties, the Trial Court affirmed the Commission's Decision. Scali timely appealed to the Court of Appeals for the Fifth Appellate District, Stark County, Ohio. On February 13, 2012 the Court affirmed.

Mercy's only witness was Scali's supervisor, who had never witnessed Scali engaging in any inappropriate or rude behavior with any of the clinic's patients. Mercy's witness testified that Scali had "front office duties" including answering phones, scheduling patients and any other "front office" duties as necessary. These duties included filing, faxing, taking payments from patients, and direct conversations with patients as needed.

Mercy's witness testified that Scali was discharged because of "patient complaints" related to her "nature toward patients." She indicated that Scali was alleged to have been "very rude" to a patient on August 19, 2009 but conceded that Scali had denied this. She mentioned receiving a complaint letter (which is part of the record) from someone named Wise but did not investigate it or comment about it. She also noted that a third patient had indicated in a letter (which is part fo the record) that Scali had "brushed off" the patient and had not given the patient the "time that he wanted." Mercy's witness concluded that Scali "wasn't compassionate and understanding and, uh, not at all helpful."

Before Scali had any opportunity to explain her side of the story, the hearing officer commented that “seems kind of bizarre” that Scali had performed her job without difficulty for many months and then all of a sudden something [changed].” The hearing officer’s first question to Scali assumed the truth of the complaints: “[W]hy were you getting all these customer complaints?” Scali testified that she spoke with “a lot of people every day” and that given the economic circumstances at the time the phone at the dental clinic just “rang off the hook.” She said she “tried to be as kind and compassionate and considerate [of the dental clinic’s patients] as possible” and stated unequivocally that she had not been “argumentative with patients.”

Scali then addressed each of the three complaints. The first one, on August 29, 2009, was made by a man who called the dental clinic seeking free dental care for his wife. Scali explained to him that the dental clinic always charged a fee but that the fee would depend on his financial circumstances. Scali told him he had to complete some paperwork and offered to send to him. However, the man did not want “paperwork” and insisted on knowing what the fee would be. Scali patiently explained that the clinic had three fee levels and told him the lowest fee he would be charged. When she told him that he had to complete some paperwork to qualify for that fee, he yelled and swore at her, and then hung up. This was not the first time that a patient or potential patient had engaged in similar conduct.

The second complaint was in a letter from a named W. W reported that “the gal” was “rude and not at all professional” when, several weeks before it was written, W had called the dental clinic and was informed she could not “schedule . . . treatment until [the patient] talked to a dentist to set up a treatment plan, met with the financial counselor, and had another exam that W would have to pay the bill of \$37.00.” W felt the “the gal” was “condescending about W’s

intelligence because “the gal” didn’t understand my resistance to having the exam.” W acknowledged that “the had set up an appointment for her to be interviewed by a dentist and the financial counselor without cost. W said that “the gal doing your scheduling” can relate to a family living on \$13,503.00 per year.

Scali testified that she had “racked her brain” over W’s letter, since she did not recall any interactions with her. (Scali even asked her supervisor to see if the hospital may have recorded this call so she could review the tape.) Scali was certain that she had *never* belittled a patient about being unable to pay a fee and indicated that she had been in that situation herself when her husband had been out of work: “I totally understand how that feels.” Scali asked her supervisor if it was possible that the patient had spoken with someone else at the dental clinic as she was “really surprised” by the claims in her letter.

The last complaint was made by a patient who came into the dental clinic on Decmeber 4, 2009. Scali explained that the man, J, arrived at about 8:30 a.m. (not at noon as Mercy’s witness claimed). Scali was in an office-wide staff meeting and had left it to turn on the phones for the dental clinic. As she did so she noticed J standing at the window. J explained he had been a patient the clinic, that he was in pain, and wanted to be seen by a particular dentist, who happened to be the co-director of the clinic. Scali explained that this dentist was no longer seeing patients on a regular basis and that, instead, patients were to be seen by dental residents. This is precisely what she had been directed to tell patients.

J became “upset” by this information. Scali sat down so he would “look down on me” to tried to make Jacoby “feel a little more at ease.” She explained that he would need to schedule a “problem focus” exam, which was “like an emergency exam because he was having pain.” Scali

made an appointment for him to see a dental resident, told him that the resident was “very nice” and would make him “feel comfortable” and that patients liked her (the resident). Scali also told J she would put a note on the chart that he wanted the co-director of the clinic in the room during the examination.

Scali’s focus was to get J an “appointment as soon as possible.” J asked Scali to tell him how much of the clinic’s fees would be paid for by his insurance. While Scali had an “idea” what J’s insurance might cover, she was not sure and did not want to give him the wrong information. She suggested to J that he call his insurer or wait until the woman who handled such matters at the clinic was available (she was in the same staff meeting). Scali gave J the telephone number to his insurance company as well. J thereafter wrote a letter indicating he was “very disappointed” by the treatment he received from Scali when “making a dental appointment.” J said he felt “brushed off” when “asking several questions important to him” and was allegedly made to “feel stupid by [Scali’s] response and questions.”

Scali testified she had not brushed J off in the slightest. To the contrary, she gave him all of the time he needed and provided him with proper service.

The hearing officer found Scali had been discharged for “unsatisfactory performance” after receiving several formal warnings for poor performance and customer service. The hearing officer also found the man described above had sent a letter “stating that the claimant was rude and would not help him.” The evidence showed no such thing. Rather, the man merely said he felt “brushed off” by Scali and would have “appreciated a little compassion to ease my fears.”

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: A decision denying unemployment compensation benefits resting solely upon uncorroborated hearsay is unreasonable, unlawful, and against the manifest weight of the evidence where the hearsay was refuted by to competent, credible evidence

R.C. 4141.281(C)(2) provides, in relevant part, that

[i]n conducting hearings, all hearing officers shall control the conduct of the hearing, exclude irrelevant or cumulative evidence, and give weight to the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of serious affairs. Hearing officers have an affirmative duty to question parties and witnesses in order to ascertain the relevant facts and to fully and fairly develop the record. Hearing officers are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure.

Accordingly, courts have held that hearsay is a permissible form of evidence at such hearings. *Bulatko v. Ohio Dept. of Job & Fam. Servs.*, Mahoning App. No. 07MA124, 2008-Ohio-1061, 2008 WL 650776, ¶ 11. However, courts have also held that a hearing officer may not credit hearsay evidence over the testimony of a live witness. See, e.g., *Cunningham v. Jerry Spears Co.*, 119 Ohio App. 169, 197 N.E.2d 810 (1963); *Taylor v. Board of Review*, 20 Ohio App.2d 297, 253 N.E.2d 804 (1984). As the Court of Appeals for Hamilton County presciently observed,

To give credibility to the written statements of a person not subject to cross-examination because he did not appear at the hearing and to deny credibility to the claimant testifying in person makes a mockery of any concept of a fair hearing. (Emphasis supplied.)

Shirley v. Admr. OBES, (Oct. 11, 1978), Hamilton App. No. C77431, 1978 WL 216523 at * 2, unreported; Accord: *Isaac v. O.B.E.S.*, (March 21, 1985), Cuyahoga App. No. 48850, 1985 WL 9788, unreported.

In *Williamson v. Complete Healthcare for Women, Inc.*, Licking App No. 10CA 0044,

2010-Ohio-3693, 2010 WL 3103672 the court observed that “general thread that runs through these cases is that when hearsay is presented *that appears not to be reliable, credible or corroborated by other evidence, it should be rejected in determining ‘just cause.’*” (Emphasis supplied.) *Id.* at ¶ 22

Despite the “general thread” regarding reliance upon hearsay testimony which may “run through the cases,” in the case at bar the Commission relied only upon uncorroborated hearsay and entirely disregarded Scali’s evidence that she had never been disrespectful or rude to any of her employer’s dental patients. The Commission essentially held that since complaints had been made, no matter whether they had any validity or substance, the employer had “just cause” to discharge her. The Court of Appeals affirmed, holding there was “some evidence” to support the Commission’s decision. *Scali v. CSA HS UHHS Canton, Inc.*, Stark App. No. 2011-CA-00165, 2011-Ohio-577, 1012 WL 474200 at ¶ 15. This conclusion not only makes a “mockery of any concept of a fair hearing,” *Shirley, supra*, it also makes a mockery of the just cause standard.

Surely this cannot and should not be the law. Accordingly, Appellant respectfully requests review by this Court.

Respectfully submitted,



BRENT L. ENGLISH
LAW OFFICES OF BRENT L. ENGLISH
M.K. Ferguson Plaza, Suite 470
1500 West Third Street
Cleveland, Ohio 44113-1422
(216) 781-9917
(216) 781-8113 (Fax)
Sup. Ct. Reg. No. 0022678
benglish@englishlaw.com
Attorney for Appellant, Laura Scali

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of Laura A. Scali's Memorandum in Support of Jurisdiction was served by first class U.S. Mail, postage prepaid, upon the following by first class U.S. Mail, postage prepaid on this 29 day of March 2012:

Susan M. Sheffield, Esq.
20 West Federal Street, 3rd Floor
Youngstown, Ohio 44503

*Attorney for Director, Ohio Department of
Jobs and Family Services*

David L. Dingwell, Esq.
Amanda M. Paar, Esq.
Tzangas, Plakas, Marinos & Raies, Ltd.
220 Market Avenue South
Eighth Floor
Canton, Ohio 44702-2180
Fax No. (330) 455-2108

*Attorneys for Appellee, CSA HS UHHS
Canton, Inc.*

U.C. Express
Hallmark Marketing Corporation
P.O. box 182366
Columbus, Ohio 43218-2366

Hallmark Marketing Corporation
P.O. Box 182366
Columbus, Ohio 43218-2366

Unemployment Compensation Review
Commission
P.O. Box 18229
Columbus, Ohio 43218-2299



BRENT L. ENGLISH
LAW OFFICES OF BRENT L. ENGLISH

Attorney for Appellant, Laura A. Scali

APPENDIX

NANCY S. REINEOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT FEB 13 PM 2:45

LAURA SCALI

Plaintiff-Appellant

-vs-

CSA HS UHHS CANTON, INC., ET
AL

Defendant-Appellee

JUDGES:

Hon. Patricia Delaney, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 2011-CA-00165

OPINION

CHARACTER OF PROCEEDING:

Administrative appeal from the Stark
County Court of Common Pleas, Case
No. 2010CV03609

JUDGMENT:

Affirmed

Heath

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For - Appellee - CSA HS UHHS Canton

For - Appellant Laura Scali

TZANGAS, PLAKAS, MANNOS & RAIES
DAVID DINGWELL
AMANDA M. PAAR CONROY
220 Market Avenue South, 8th Fl.
Canton, OH 44702

BRENT ENGLISH
M.K. Ferguson Plaza
Ste 470
1500 West Third Street
Cleveland, OH 44113-1422

For - Director - ODJ&FS

SUSAN SHEFFIELD
Assistant Attorney General
20 West Federal Street, 3rd Floor
Youngstown, OH 44503

A TRUE COPY TESTE:
NANCY S. REINEOLD, CLERK
Deputy
2-13-12

Gwin, P.J.

{1} Appellant Laura A. Scali appeals a judgment of the Court of Common Pleas of Stark County, Ohio, which affirmed the decision of the Ohio Unemployment Compensation Review Commission's denying her unemployment compensation benefits. Appellees are CSA HS UHHS Canton, Inc. (hereinafter "Mercy"), and the Director of the Ohio Department of Job and Family Services. Appellant assigns a single error:

{2} "THE REVIEW COMMISSION'S DECISION THAT SCALI WAS DISCHARGED FOR JUST CAUSE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS UNREASONABLE."

{3} The hearing officer who reviewed appellant's claim found she had been employed by Mercy from October 20, 2008 until she was discharged on December 11, 2009. She was employed as a dental care assistant. The hearing officer found Mercy discharged appellant for unsatisfactory performance after she received several formal warnings for her performance in customer service. The hearing officer found appellant contended that the patients who complained were just difficult and she was following office policy. The hearing officer found appellant was hired to provide customer service and after receiving warnings and offers of training, she continued to receive complaints from customers. The hearing officer found based upon the evidence, appellant was discharged for just cause in connection for her work.

{4} The Unemployment Compensation Review Commission confirmed the hearing officer's findings, finding it had reviewed the entire record and concluded appellant's claim for unemployment compensation should be disallowed.

{5} Appellant appealed the matter to the Court of Common Pleas pursuant to R.C. 4141.282. The trial court recited the factual background, adding more detail than the hearing officer had included, and affirmed the administrative decision. From that judgment, this appeal ensues.

{6} Our standard of review in unemployment compensation cases is limited. An appellate court may reverse a board's decision only if the decision is unlawful, unreasonable, or against the manifest weight of the evidence. See, *Tzangas, Plakas & Mannos v. Administrator, Ohio Bureau of Employment Services*, 73 Ohio St.3d 694, 696, 1995-Ohio-206, 653 N.E.2d 1207, citing *Irvine v. Unemployment Compensation Board of Review*, 19 Ohio St.3d 15, 17-18, 482 N.E.2d 587 (1985). An appellate court may not make factual findings or determine the credibility of the witnesses, but rather, is required to make a determination as to whether the board's decision is supported by evidence on the record. *Id.* The hearing officer, as the fact finder, is in the best position to judge the credibility of the witnesses. *Shaffer-Goggin v. Unemployment Compensation Review Commission*, Richland App. No. 03-CA-2, 2003-Ohio-6907, citing *Hall v. American Brake Shoe Co.*, 13 Ohio St.2d 11, 233 N.E.2d 582 (1968); *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511, 76 N.E.2d 79 (1947).

{7} Mercy produced documentation regarding four violations of its disciplinary policy which occurred in less than one year. The first was on June 5, 2009, when Mercy gave appellant a verbal warning for making a personal phone call in a patient area without notifying her department manager.

{8} The second warning indicated two patients had complained about the service they received on the phone with appellant, specifically, that she was rude and

unprofessional and was unable to help them with the information they were trying to get. In response, appellant wrote she was sorry that two patients felt she was unable to help them because she tried to listen to every patient and address their needs. She stated that although she had attempted to help the two patients, she could not give them the outcome they wanted at that particular time, but she would try to be more aware of her reactions.

{9} The next warning indicated Mercy had received a letter from a current patient regarding the way she alleged appellant spoke to her and treated her over the phone. Specifically, the patient said she was rude and not at all professional. Mercy attached the letter itself from the patient to the warning. The letter recites that writer had called the dental clinic and was told she could not schedule treatment until she set up a treatment plan, met with a financial counselor, and had dental x-rays, for which she would be billed. The writer felt appellant was condescending about the writer's intelligence. The letter writer expressed the opinion the person who scheduled appointments should not make decisions about any need for updated treatment plans or a patient's ability to pay.

{10} The writer of the letter also complained appellant told her the cost was only \$37.00, which she felt was disrespectful and insensitive to the patient's financial situation. The writer said although most of the conversation was professional, appellant became sarcastic at one point. Appellant responded she did not remember having the conversation and she would be surprised if she actually said those things. She asserted she tried to be very respectful and mindful of the patient's needs and feelings.

{11} The final complaint which triggered the termination of appellant's employment was on December 11, 2009, wherein the supervisor had received a complaint call, followed up by a written complaint from a patient, wherein he indicated he was very disappointed by the treatment he had received from appellant when making a dental appointment. He felt "brushed off" when he asked several questions that were important to him, and was made to feel stupid by the employee's responses to his questions. Appellant responded that she did not brush off the patient but attended to all of his inquires except those involving insurance. Everyone else was in a staff meeting and appellant was unable to answer insurance questions, so she advised him to contact his insurance company directly.

{12} Appellant argues the decision was against the manifest weight of the evidence and was unreasonable. She asserts the evidence presented to the hearing officer was hearsay, which, while permissible in an administrative hearing, should not carry the same weight as testimony of live witnesses.

{13} The Director of the Ohio Department of Job and Family Services argues, among other things, that appellant had failed to object to the introduction of hearsay evidence, and has thus waived the issue. We do not agree. There is a distinction to be drawn between an objection to the admission of evidence and an assertion the evidence is insufficient to support the decision. In her brief appellant does not argue hearsay should not be admitted in an administrative hearing, but argues there was no corroborating evidence, and thus, the evidence was not sufficient to support the hearing officer's decision.

{14} Appellant also argues the record does not show Mercy adhered to its written policy of progressive discipline, and the record does not show Mercy investigated the complaints before taking disciplinary action against her. Appellant argues the record shows Mercy simply accepted the patients' complaints as true in spite of appellant's explanation and denials.

{15} This court must affirm the trial court's decision if we find it is supported by some evidence in the record, and we find the record does contain sufficient, competent and credible evidence from which the trial court could affirm the administrative decision. This court is not permitted to substitute its judgment for that of the finder of fact even if our judgment in the matter would have been different.

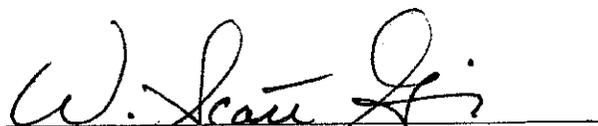
{16} The assignment of error is overruled.

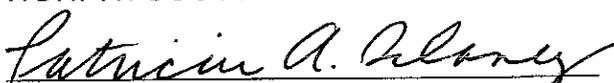
{17} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

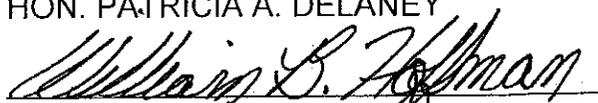
By Gwin, J.,

Delaney, P.J., and

Hoffman, J., concur


HON. W. SCOTT GWIN


HON. PATRICIA A. DELANEY


HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LAURA SCALI

Plaintiff-Appellant

-vs-

CSA HS UHHS CANTON, INC., ET AL

Defendant-Appellee

JUDGMENT ENTRY

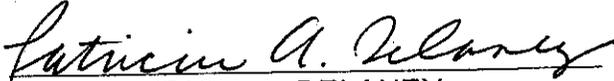
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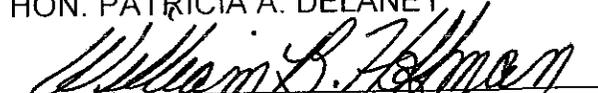
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NANCY S. RENBOLD
CLERK OF COURT OF APPEALS
STARK COUNTY, OHIO

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed. Costs to appellant.


HON. W. SCOTT GWIN


HON. PATRICIA A. DELANEY


HON. WILLIAM B. HOFFMAN