

NURSING SERVICE  
HOUSEKEEPING  
AIDE SERVICE



**RNs • LPNs • Nurses Aides • HHA, PCA  
Nursing Service • Housekeeping • Aide Service**

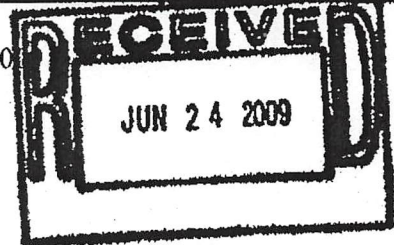
**HARRY'S  
HOME  
CARE**

Tel: 718-739-0045 • Fax: 718-739-0102

88-25 163rd Street, Jamaica, NY 11432

E-mail: hnrinc@erols.com

June 24, 2009



Honorable Judge Marilyn D. Go  
United States District Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, NY 11201

Dear Judge Go:

Re: Claudia Gayle, Individual on behalf of all others v. Harry's Nurses Registry, Inc and Harry Dorvilier  
07 CV 04672 (CPS) (MDG) - ECF ACTION

This is in reference to CV-07-4672 (CPS) (MDG), a judgment which I believe to have been unjustly made against this Agency. Harry's Nurses Registry, Inc. is a Corporation organized under the Laws of New York State and has its principal place of business in Queens, New York. Harry's Nurses Registry is a licensed Home Health Agency under Article 36 of the Public Health Law, providing employment to some 200 RN's and LPN's. These Nurses are contracted on a fee for service basis and are engaged in a bonafide professional capacity, however they should be exempt from the Fair Labor Standards Act, (FLSA), concerning overtime payments to them since they provide this service in and around the home. Additionally, all of the points the Honorable Judge Sifton used to make his determination in this case are erroneous and quite untrue. The Nurses were paid an agreed upon sum for each Home Visit. There seems to be enough evidence supporting my understanding as to the interpretation of what the FLSA states for Nurses to be exempt.

Moreover, it seems to me that Judge Sifton, United States District Judge, misinterpreted the (FLSA) requirement and has granted overtime wages, and liquidation damages, Worker's Compensation, prejudgment interest, a permanent injunction, costs this decision. I am presently in contact with two Attorneys who are awaiting the final judgment against me in order to appeal Judge Sifton's ruling. We are prepared to go the High Court to have this decision reversed.

We have enclosed the following documents to substantiate our case:

Exhibit A: Case – Fazekas v. Cleveland Clinic Foundation Health Care Ventures, Inc.  
C.A.6 (Ohio) 2000, 204 F.3d 673

Exhibit B: Article #30a – FLSA – Law Library

Exhibit C: Long Island Care at Home, Ltd. v. Coke

We beseech you to intervene in this matter and have this case dismissed.

Sincerely,

Harry Dorvilier  
Executive Officer



In the Supreme Court of the United States

No. 04-1315

LONG ISLAND CARE AT HOME, LTD., ET AL.,  
PETITIONERS

v.

EVELYN COKE

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

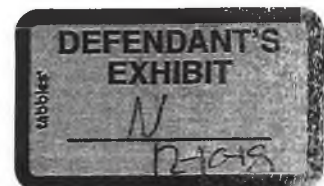
This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires covered employers to pay a minimum wage and, for work hours that exceed 40 hours in a work week, one and one-half times an employee's regular rate of pay. Fair Labor Standards Amendments of 1974 (1974 Amendments), Pub. L. No. 93-259, 88 Stat. 55, generally extend those requirements to "domestic service" employees, but specifically exempt such employees providing "companionship services" to the elderly or infirm. That exemption applies to:

any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to

(1)



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

CLAUDIA GAYLE, Individually and on  
behalf of all others similarly  
situated,

ORDER

Plaintiffs,

07-CV-4672 (CPS) (MDG)

- against -

HARRY'S NURSES REGISTRY, INC. and  
HARRY DORVILIER,

Defendants.

-----X

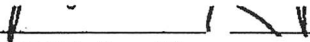
GO, United States Magistrate Judge:

Defendant Harry Dorvilier hand delivered to my chambers a letter with exhibits on June 24, 2009 (to be docketed herewith) and came to my chambers again on July 6, 2009. The defendants Harry Dorvilier and Harry's Nurses Registry, Inc. are still represented by counsel and should communicate with the Court only through counsel. No further direct communications with the Court by Mr. Dorvilier will be accepted and all submissions to the Court must be served on the other party.

**SO ORDERED.**

Dated: Brooklyn, New York  
July 7, 2009

s/Hon. Marilyn D. Go

  
MARILYN D. GO  
United States Magistrate Judge

cc: Harry Dorvilier  
Harry's Home Care  
88-25 163rd Street  
Jamaica, NY 11432

**FAZEKAS v. CLEVELAND CLINIC FOUND. HEALTH CARE** 673  
Cite as 204 F.3d 673 (6th Cir. 2000)

from whom the defendants in this case solicited bribes were not wealthy men. It was virtually certain that each of them would have to go into debt to raise the bribe money. With respect to the five young men who borrowed the bribe money from First Metropolitan (at annual percentage interest rates exceeding 30%), moreover, it is clear that defendant Toarmina or one of the co-conspirators who did the soliciting on his behalf had actual knowledge of the source of the funds. The sixth young man, Derick Feathers, found First Metropolitan's interest rate too high, so he borrowed the money on his credit cards. There was uncontradicted testimony from the member of the conspiracy who solicited the bribe from Feathers that the conspirator knew this was where the money was coming from: "Mr. Feathers advised that he did not have the money. He advised that he could get some cash advances on his credit cards, which he did."

[31] It is true that the borrowing of the money from interstate lenders could not have been expected to "interfere" with interstate commerce. We are satisfied, however, that the effect on commerce need not be adverse; even a beneficial effect can satisfy the statute. See *Mattson*, 671 F.2d 1024. In exercising its constitutional power to regulate commerce among the several states, Congress often prohibits conduct that would have a stimulative effect on commerce as opposed to a depressive effect. And the Hobbs Act applies whenever extortion "in any way or degree affects commerce..." (Emphasis supplied.)

The judgment of acquittal is REVERSED, and the case is REMANDED for the entry of judgment in accordance with the jury's verdict.

Marcia FAZEKAS; Carole Leland; Carol Pernell; Susan Shelko; Rebecca Winfield, Plaintiffs-Appellants,

v.

THE CLEVELAND CLINIC FOUNDATION HEALTH CARE VENTURES, INC., Defendant-Appellee.

No. 99-3059.

United States Court of Appeals,  
Sixth Circuit.

Argued: Dec. 15, 1999

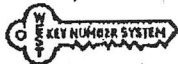
Decided and Filed: Feb. 25, 2000

Home care nurses brought suit against former employer seeking overtime compensation under Fair Labor Standards Act (FLSA). The United States District Court for the Northern District of Ohio, Patricia A. Gaughan, J., 29 F.Supp.2d 839, entered summary judgment for employer. Nurses appealed. The Court of Appeals, Daughtrey, Circuit Judge, held that nurses, who were paid agreed-upon sum for each home care visit regardless of time spent on each visit, were employed on fee basis and engaged in bona fide professional capacity, so as to be exempt from FLSA overtime requirements.

Affirmed.

**1. Labor Relations §1206**

Home care nurses were employed on fee basis and engaged in bona fide professional capacity, so as to be exempt from Fair Labor Standards Act (FLSA) overtime requirements, where nurses were paid agreed-upon sum for each home care visit regardless of time spent on each visit, written opinion letter from acting administrator of Department of Labor's Wage and Hour Division indicated that per-visit pay plan would qualify as compensation on a fee basis, nurses' undisputed deposition testimony demonstrated uniqueness of each home health care visit they made, and



**EXHIBIT (A)**

LICENSE NO 9245L001

State of New York  
Department of Health  
Office of Health Systems Management

EFFECTIVE DATE 11/27/95

HOME CARE SERVICE AGENCY

LICENSE

HARRY'S NURSES REGISTRY, INC.  
88-25 163RD STREET  
JAMAICA, NY 11432  
QUEENS COUNTY

OPERATOR  
PROPRIETARY CORPORATION  
HARRY'S NURSES REGISTRY, INC.  
88-25 163RD STREET  
JAMAICA, NY 11432

HAS BEEN GRANTED THIS LICENSE TO OPERATE PURSUANT TO ARTICLE 36  
OF THE PUBLIC HEALTH LAW FOR THE HEALTH SERVICES SPECIFIED:

COUNTY(S) SERVED

NASSAU  
BRONX  
KINGS  
NEW YORK  
QUEENS  
RICHMOND

SERVICE

NURSING  
HOME HEALTH AIDE  
PERSONAL CARE  
HOUSEKEEPER

*[Signature]*  
AREA ADMINISTRATOR

*Barbara A. Debnor, MD*  
COMMISSIONER

ORIGINAL

UNITED STATES DISTRICT COURT OF NEW YORK  
EASTERN DISTRICT OF NEW YORK

-----X  
CLAUDIA GAYLE, Individually, On Behalf of  
All Other Similarly Situated and as Class Representative

Index No 07 CV 4672 (CPS)

Plaintiffs,

**NOTICE  
OF MOTION**

-against-

HARRY NURSES REGISTRY, INC., and  
HARRY DORVILIER a/k/a HARRY DORVILIEN

Defendants.

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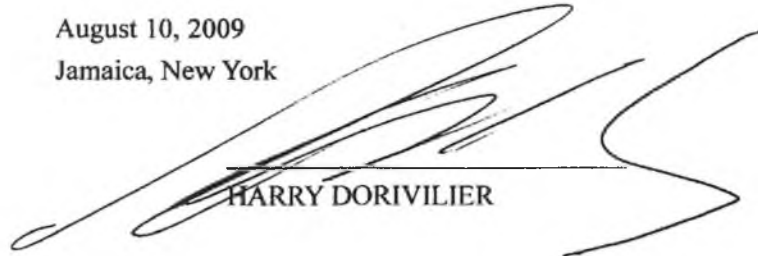
**PLEASE TAKE NOTICE**, that upon the annexed Affidavit of HARRY DORVILIER dated August 10, 2009 and exhibits annexed thereto, and upon the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Justice Charles p. Sifton, United State District Judge, in Room 6A S of the United States District Courthouse, located at 225 Cadman Plaza East, Brooklyn, New York on the 9<sup>th</sup> day of September, 2009 at 9:30 a.m., or as soon thereafter as defendant can be heard, for an Order pursuant to Rule 60(b) of the Federal Rules, to renew and/or reargue the court's prior decision denying defendant's motion, dismissing the plaintiff's complaint to pursuant to Rule 56 of the Federal Rules of the Civil Procedure, granting the plaintiff's cross-motion for summary judgment and class certification, and granting such other and further relief as this Court may deem just and proper.

RECEIVED  
AUG 18 2009  
PRO SE OFFICE

Handwritten notes and signature: "10/19/09" and a circled "S".

**PLEASE TAKE FURTHER NOTICE**, that answering papers, if any, are required to be served upon the undersigned at least seven (7) prior to the return date of this motion.


Dated: August 10, 2009  
Jamaica, New York



HARRY DORVILIER

HARRY DORVILIER  
Defendant Pro Se  
88-25 163<sup>rd</sup> Street  
Jamaica, New York 11432  
(718) 739-0045

To:  
  
LEVY, DAVID & MAHER, LLP  
29 Broadway, 9<sup>th</sup> Floor  
New York, New York 10006



ROBERT SCHIRTZER  
Notary Public, State of New York  
No. 02SC6057715  
Qualified in Queens County /  
Commission Expires April 23, 20

ORIGINAL

UNITED STATES DISTRICT COURT OF NEW YORK  
EASTERN DISTRICT OF NEW YORK

-----  
CLAUDIA GAYLE, Individually, On Behalf of  
All Other Similarly Situated and as Class Representative

X  
07 CV 4672 (CPS)

Plaintiffs,

AFFIDAVIT IN  
SUPPORT

-against-

HARRY NURSES REGISTRY, INC., and  
HARRY DORVILIER a/k/a HARRY DORVILIEN

Defendants.

RECEIVED  
AUG 18 2009  
PRO SE OFFICE

*Handwritten:* 8/19/09 (9)

-----  
1. That I am HARRY DORVILIER, the defendant in this action, and as such,  
am fully familiar with the circumstances surrounding the matter.

2. I submit this Affidavit in support of defendants' motion to renew and/or  
reargue the court's prior decision denying defendant's motion, dismissing the  
plaintiff's complaint to pursuant to Rule 56 of the Federal Rules of the Civil  
Procedure, granting the plaintiff's cross-motion for summary judgment and class  
certification, (See Court Order attached hereto as Exhibit "A")

3. This action was commenced by the plaintiff under the Fair Labor Standards  
Act, 29 U.S.C. 201 ("FLSA") and the New York State Minimum Wage Act, New York  
Labor Law 190 to recover alleged overtime pay due to plaintiff and those similarly  
situated in her class.

4. This action was commenced by the filing of a Summons and Complaint



with the Clerk's Office of the United States District Court, Eastern District of New York on or about November 7, 2007. (See Summons and Complaint attached hereto as Exhibit "B")

5. Defendants filed its Answer on or about January 22, 2008. (See Answer attached hereto as Exhibit "C")

6. On or about July 8, 2008, defendants made its motion seeking an Order for summary judgment (See Motion, Affidavits and Memorandum of Law attached hereto as Exhibit "D")

7. On or about August 13, 2008, plaintiff made a cross-motion seeking an Order granting partial summary judgment and to authorize notice pursuant to 29 U.S.C 216(b). (See Plaintiff's motion, Affidavits and Memorandum of Law attached hereto as Exhibit "E")

8. On or about August 13, 2008, plaintiff filed its Affidavit of Opposition to defendants' motion as well. (See Plaintiff's Affidavit in Opposition and Memorandum in Opposition attached hereto as Exhibit "F")

9. On or about November 21, 2008, defendants filed its Reply papers in support of Defendants motion and in opposition to plaintiff's cross-motion. (See Defendants Reply papers attached hereto as Exhibit "G")

10. On or about November 26, 2008, plaintiff filed her Reply papers in support

of plaintiff's cross-motion. (See Plaintiff's Reply papers attached hereto as Exhibit "H")

11. On March 9, 2009, Honorable Justice Sifton handed down the decision of the aforementioned captioned case, ruling against the defendant motion seeking an Order granting Summary Judgment and in favor of the Plaintiff cross-motion seeking an Order granting summary judgment. (See Exhibit "A") The defendants are now seeking an Order to renew and/or reargue the court's decision.

12. This respectable court decision had indicated that defendant has violated the FLSA and that the plaintiff is entitled to overtime pay for their work.

13. Federal Rules 60. Relief from a Judgment or Order- provides in pertinent part:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); or

(6) any other reason that justifies relief.

14. It is well settled that a motion to **reargue** may not advance new facts, issues

or arguments not previously presented to the court. Rule 3(j) is not meant to serve as a chance for the losing party on a motion to try out an omitted argument, or to re-state its position. The rule serves only to allow a party to bring to the court's attention the "matters or controlling decision" which the court overlooked in ruling on the motion.

15. This court respectfully failed to properly apply New York State Public Health Law §3602, instead of applying Article 28 of the aforementioned law when determining whether the plaintiff and other similarly situated were employees of the defendant.

16. New York State Public Health Law § 3602 provides in pertinent part that:

**As used in this article, the following words and phrases shall have the following meanings unless the context otherwise requires:**

**1. "Home care services" means one or more of the following services provided to persons at home: (a) those services provided by a home care services agency; (b) home health aide services; (c) personal care services; (d) homemaker services; (e) housekeeper or chore services.**

**2. "Home care services agency" means an organization primarily engaged in arranging and/or providing directly or through contract arrangement one or more of the following: Nursing services, home health aide services, and other therapeutic and related services which may include, but shall not be limited to, physical, speech and occupational therapy, nutritional services, medical social services, personal care services, homemaker services,**

and housekeeper or chore services, which may be of a preventive, therapeutic, rehabilitative, health guidance, and/or supportive nature to persons at home.

3. "Certified home health agency" means a home care services agency which possesses a valid certificate of approval issued pursuant to the provisions of this article, or a residential health care facility or hospital possessing a valid operating certificate issued under article twenty-eight of this chapter which is authorized under section thirty-six hundred ten of this article to provide a long term home health care program. Such an agency, facility, or hospital must be qualified to participate as a home health agency under the provisions of titles XVIII and XIX of the federal Social Security Act and shall provide, directly or through contract arrangement, a minimum of the following services which are of a preventive, therapeutic, rehabilitative, health guidance and/or supportive nature to persons at home: nursing services; home health aide services; medical supplies, equipment and appliances suitable for use in the home; and at least one additional service which may include, but not limited to, the provisions of physical therapy, occupational therapy, speech pathology, nutritional services and medical social services.

4. "Home health aide services" means simple health care tasks, personal hygiene services, housekeeping tasks essential to the patient's health and other related supportive services. Such services shall be prescribed by a physician in accordance with a plan of treatment for the patient and shall be under the

supervision of a registered professional nurse from a certified home health agency or, when appropriate, from a provider of a long term home health care program and of the appropriate professional therapist from such agency or provider when the aide carries out simple procedures as an extension of physical, speech or occupational therapy. Such services may also be prescribed or ordered by a nurse practitioner to the extent authorized by law and consistent with the written practice agreement pursuant to subdivision three of section six thousand nine hundred two of the education law and not prohibited by federal law or regulation.

5. "Personal care services" means services to assist with personal hygiene, dressing, feeding and household tasks essential to the patient's health. Such services shall be prescribed by a physician in accordance with a plan of home care supervised by a registered professional nurse. Such services may also be prescribed or ordered by a nurse practitioner to the extent authorized by law and consistent with the written practice agreement pursuant to subdivision three of section six thousand nine hundred two of the education law and not prohibited by federal law or regulations.

6. "Homemaker services" means assistance and instruction in managing and maintaining a household, dressing, feeding, and incidental household tasks for persons at home because of illness, incapacity, or the absence of a caretaker relative. Such services shall be provided by persons who meet the standards established by the department of social services.

7. "Housekeeper services" or "chore services" means the provision

of light work or household tasks which do not require the services of a trained homemaker. Such services may be provided for persons at home because of illness, incapacity, or the absence of a caretaker relative by persons who meet the standards established by the department of social services.

8. "Long term home health care program" means a coordinated plan of care and services provided at home to invalid, infirm, or disabled persons who are medically eligible for placement in a hospital or residential health care facility for an extended period of time if such program were unavailable.

a. Such program shall be provided in the person's home or in the home of a responsible relative or other responsible adult.

b. Such program shall be provided in adult care facilities, other than shelters for adults, certified pursuant to section four hundred sixty-b of the social services law, provided that the person meets the admission and continued stay criteria for such facility. Services provided by the program shall not duplicate or replace those which the facility is required by law or regulation to provide.

c. Approved long term home health care program providers may include, as part of their long term home health care program, upon approval by the commissioner, a discrete AIDS home care program as defined in this section.

11. "Government funds" means funds provided under the provisions of title eleven of article five of the social services law.

12. "Construction" means the addition or deletion of services offered; a change in the agency's geographic service area; the

erection, building, or substantial acquisition or alteration of a physical structure or equipment; or a substantial change in the method of providing services.

13. "Licensed home care services agency" means a home care services agency, issued a license pursuant to section three thousand six hundred five of this chapter.

15. [Expires March 31, 2011] "Limited home care services agency" means a certified operator of an adult home or an enriched housing program which directly provides: personal care services authorized and provided in accordance with rules and regulations of the department of social services; and the administration of medications and application of sterile dressings by a registered nurse, provided, however, that the services provided by such agency are not services that must be provided to residents of such facilities pursuant to article seven of the social services law and rules and regulations of the department of social services. Such operator may provide these services only to residents of the adult home or enriched housing program governed by the terms of such limited license.

17. In this matter, 30a of the New York State Department of Labor made the distinction between Article 28 and 36 institutions. The *Superior Care* case should only be applicable on Art. 28 institutions, while Harry's Nurses Registry, operating under Art. 3, should not be treated alike. The correct case for Art. 36 institutions should be *Fazekas*, which stated that home care nurses were employed on fee basis and engaged in bona fide professional capacity were exempted from the FLSA overtime requirements, where nurses were paid agreed-upon sum for each

home care visits regardless of time spend on each visit, written opinion letter of Department of Labor's Wage and Hour Division indicated that per-visit pay plan would qualify as compensation on a fee basis, nurses' undisputed deposition testimony demonstrated uniqueness of each home health care visit they made, and their duties required advance knowledge and discretion. (*Fazekas v Cleveland Clinic Found. Health Care* 204 F.3d 673 (6<sup>th</sup> Cir. 2000))

18. In the *Superior Care* case, the agency was not operating on Art. 36 but instead is a placement agency that place nurses in hospitals and nursing homes (institutions governed Art. 28). Nurses who worked at hospital through nursing referral agencies, signed in through multiple referral agencies, did not preclude nurses from recovering overtime compensation from hospital, her joint employer under FLSA. Nurses reported all of hours she worked on agency sign-in sheets, hospital collected these sheets and cross-referenced them on daily basis, hospital employees encouraged nurse to work additional shifts, and at least one hospital employee noticed that sometimes agency nurses worked for more than one agency. (*Barfield v New York City Health and Hospital Corp.*, S.D.N.Y. 2006, 432 F.Supp.2d 390)

19 HNR, who place nurses in patient's homes, was exempted from federal overtime. New York State Department of Labor conducted an audit and certified that LPNs are considered domestic service employees under FLSA (when employed in or about private households) and are therefore exempt from Fed. O.T. regs under 13(b)(21). According to the case of *Long Island Care at Home v Coke*, it was held that the DOL Regulation was valid and the companionship exemption includes those "companion worker employed by the agency ... other than the family or household using their services". 29 C.F.R. s.552.109(a) The LPNs, who are placed in patients' homes but not employed by the patients, fall into such category and shall be exempted from federal overtime requirements as well. See again the New York State Legislation



s.8637/A.11711 which again stated that agencies under Art. 36 of the Public Health Law are exempted from federal overtime requirement.

21. It is clear, that based upon the prior testimony of the plaintiff that she is a home health care aide under Article 36 of the New York State Public Health Law.

22. Moreover, Claudia Gayle and all other similarly situated as a class were employed on fee basis and engaged in bona fide professional capacity, so as to be exempt from Fair Labor Standards Act (FLSA) overtime requirements, where nurses were paid agreed-upon sum for each home care visit regardless of time spend on each visit, written opinion letter from acting administrator of Department of Labor's Wage and Hour Division indicated that per-visit pay plan would qualify as compensation on a fee basis. Plaintiff's undisputed deposition testimony demonstrated uniqueness of each home health care visit they made, and their duties required advanced knowledge and discretion. As such these nurses (See Plaintiff's testimony attached hereto as Exhibit I')

23. The plaintiff and all other Registered Nurses formally employed by HNR, Inc. performed home care visits for patients in New York City and Naussau Metropolitan area from 1994 to the present time. There visit generally involve treating patients for diagnosed medical condition, designing health care protocols for individual patient educating the patients and their families regarding participation in ongoing treatment. The plaintiff and others also supervised home health care visits made by licensed practical nurses and kept administrative records for all visits to patients under their care.

24. The plaintiffs' individual employment relationships with HNR Inc. were defined by signed employment agreements. As set forth in each standard agreement, the scheduling of a registered nurse's home health care visits was governed by

different doctors' order according to their medical condition. The orders may require the nurses to make certain number of visits, each with varying hours. For example, a "25/15 Plan" requires each nurse to make at least 25 visits to patients and be on call at least 15 hours per week. Their schedule base upon their availability per week, however, the number of visits may vary. A visit may be 24, 16, 8 or 4 hours per visit base on the doctors' order.

25. Patients beginning a course of home health care treatments would be screened initially by a HNR, Inc. supervisor who is Mrs. Cherriline Williams-West, a good friend of the plaintiff, who would then assign each patient to one of the registered nurses performing home visits. Each nurse would then be responsible for developing an initial treatment plan for his or her new patient and scheduling all necessary home visits in accordance with that care plan. HNR, Inc. provided guidelines for the patients' home visit schedules, but the nurses themselves devised each patient's individual treatment plan and were responsible for subsequent revisions in treatment protocols.

26. The nurses were compensated on a "per-visit" basis. Pursuant to an attachment to the employment agreement, the nurses could receive up to \$250, \$300, \$400, or even \$500 based upon doctors' order prescribing the duration of the visits. The agreements were modified from time to time, so that eventually the nurses also received \$70 for each visit involving home supervision, initial assessment of a new patient. These payments included compensation for all attendant transportation and administrative duties connected with the actual visits themselves.

27. The "25/15 Plan" was apparently designed to approximate a 40-hour work week. Nevertheless, the plaintiffs contended that they regularly made more than 25 total visits per week and generally documented between 50-90 hours per week of work done in conjunction with these visits. Regardless of whether the plaintiffs

worked more than 40 hours during any one week, they still received the standard per-visit fee for each home visit as proscribed by Article 36 of the Public Health Law.

28 HNR, Inc. is operated under Article 36 of the Public Health law and is fully exempt from Federal overtime requirements. The regulations require the Registered Nurse to comply as set forth in each standard agreement of scheduling of the Registered Nurse of the Home visit who is governed by the 25/15 plan. (See Home Care Service Agency License attached hereto as "J")

29. Labor Department regulations construing and enforcing the Act outline several requirements for employment purported to be "professional" in nature:

**"The term *employee employed in a bona fide ... professional capacity* shall mean any employee:**

**a. Compensated on a salary or fee basis at a rate of not less than \$455 per week ..... exclusive of board, lodging, or other facilities; and**

**b. Whose primary duty is the performance of work:**

**i. Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; ... ..**

**(29 C.F.R. 541.300)**

30. Such arrangements are characterized by the payment of an agreed sum for a single job regardless of the time required for its completion. These payments in a sense resemble piecework payments with the important distinction that generally speaking a fee payment is made for the kind of job which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again. (29 C.F.R. § 541.313(b))

31. In this case, the plaintiffs were paid an agreed-upon sum for each visit regardless of the time spent on each visit. It is our position that no employee will perform what is essentially a single repetitive task over and over. Each patient's needs and situation is different, and would be individually assessed and treated by the

employee as the employee deems necessary during each visit. The employees must use independent, professional and largely unsupervised judgment on a case-by-case basis.

32. The plaintiff's focus attention on the observation in the internal memorandum that the Department of Labor regulations' use of singers, artists, and illustrators as examples of professionals compensated on a fee basis suggests "that the character or nature of the job itself must be unique, and not simply that the performance of the job vary from day to day." The memorandum recognizes that the use of the examples in 29 C.F.R. § 541.313(d) was most likely intended to illustrate how the adequacy of a fee payment must be determined-by calculating whether each fee payment is at a rate which would, in the aggregate, amount to at least \$455 per week-and that the regulations do not indicate that only professions with some relation to artistic endeavors may be compensated on a fee basis so as to qualify for the exemption.

33. The plaintiff's attorney Mr. Jonathan A. Bernstein called the New York State Department of Labor to conduct an investigation on federal overtime for nurses. After the investigation, they concluded that the registered nurses were exempted from federal overtime under professional exemption under Miscellaneous Wage Order. (See Exhibit "J") Licensed Practical Nurses were considered to be domestic service employees under the FLSA, that is, when employees in or about private households are exempt from overtime regulation under 13(b)(21). (See Exhibit "K")

**Ground 2 – Brock v Superior Care 840 F.2d 1054 is not applicable**

34. Judge Sifton relied on the case of Superior Care in page 11 and other pages of his judgment to rule the case in favor of the plaintiff. However, we submit that the *Superior* case should not be applicable to home care nurses. The case is only applicable on hospitals and nursing homes operating under Art.28 of the Public Health

Law of the New York State Department of Health. The agency in the *Superior* case will place the nurses on those hospitals, nursing homes, diagnostic and treatment centers, facilities operating under Article 28. They have more than 40 patients per unit to care for. As compared to home care agency under Art. 36 (HNR), who only have one patient to care for and have to be governed by the “25/15 Plan”, these 2 types of agencies must be distinguished from each other.

35. Firstly, in the *Superior Care* case, , the New York State Department of Labor did an audit and find the Defendants were violating the FLSA because the nurses were placed in hospitals and nursing homes which were institutions operating under Art. 28.

### **Ground 3 - Method of payment to Home Care Nurses**

36. It is submitted that the method of payment to the plaintiff, home care Registered Nurses (RNs) was on fee-basis, instead of hourly rate. They were paid an agreed-upon sum for each home care visit. Attached please find record establishing a visit for the defendant. This document clearly shows that defendant is paid on a per visit basis.(Exhibit “L”)

37. In the judgment, page 7 1<sup>st</sup> paragraph and page 19 1<sup>st</sup> paragraph have incorrectly stated the payment method. It is therefore submitted that the decision was made on wrong factual basis.

38. As the RNs are paid per visits to the homes of patients, it would be impossible to monitor the workings hours of them. Thus the overtime rates shall not be applicable in the present situation.

### **Ground 4 - Home Care Nurses should be exempted from FLSA overtime requirements**

39. It is submitted that even the home care nurses are classified as an employee, they should be exempted from FLSA overtime requirements as they are

employed in a bona fide professional capacity. (FLSA section 13(a)(1))

40. According to the Labor Department Regulation, “employee employed in a bona fide professional capacity” shall mean any employee:

- (1) Compensated on a salary or fee basis at a rate of not less than \$455 per week ..... exclusive of board, lodging, or other facilities; and
- (2) Whose primary duty is the performance of work:
  - (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; ... ..

(29 C.F.R. 541.300)

41. The primary duty test is elaborated to include 3 elements:

- (1) The employee must perform work requiring advanced knowledge;
- (2) The advanced knowledge must be in a field of science or learning; and
- (3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(29 C.F.R. 541.301)

42. It is our position that home care nurses satisfy these 3 requirements.

Home care visits require an expertise in the field of medicine and nursing. The nurses are required to possess advanced nursing knowledge and have to take care of the various needs of patients. They need to draft up nursing plans for patients and ensure that the doctors’ orders are followed. Moreover, according to 29 C.F.R. 541.301 (e)(2), Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. The plaintiff, as a RN holding valid license, should qualify for the exemption.

43. Furthermore, it was stated in the regulation 29 C.F.R. 541.304 (a)(1) that “employee employed in a bona fide professional capacity” in section 13(a)(1) of the

Act also shall mean: any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof .....

44. Registered home care nurses holding valid license who practice in the home care industry should be considered as a branch of the practice of medicine. They should therefore be exempted as engaging in professional capacity.

**Ground 5 – Relationship between Cherriline Williams and the Plaintiff together with her attorney.**

45. The supervisor who has set forth in each standard agreement of the scheduling of Registered Nurses of the home visits were governed by the 25/15 plan have similar license as the plaintiff. In an organization nurses as different role, but in reality the training to receive the license from the State of New York is the same.

46. It doesn't matter what she observes and assesses the nursing skills, including watching and also checking the books of doctors' orders relating to the patients to ensure the medications and dosage are up to date. That is her job descriptions. Nursing supervisor is responsible for reviewing, assessing and service for the nurse and the field. It's the task for the agency.

47. She was hiring her friend, Miss Claudia Gayle, the plaintiff with

- i. no proof of residency
- ii. no proof of proper identification
- iii. no proof of social security
- iv. they both came from the same town in Jamaica

(See Exhibit 'M')

Please note that plaintiff's name does not match her social security number under the Homeland Security Act.

48. On April 1 2008, after the lawsuit was in place, the office was

burglarized, and the perpetrator got into the window to the office. They stole 2 computers. One have got the information for the patients' names, addresses, care plans etc. Another computer has got names of the employees, social security, date of birth, addresses and all other information that plaintiff's attorney was looking for. The police never replied to the defendant about the theft, and never looked into whether it was related to the plaintiff and the supervisor. Please be advised that the New York City Police Department 103<sup>rd</sup> precinct is still investigating this matter at this time.

49. Please be advised that on March 16, 2009, I went to visit my attorney's office to provide home with the necessary documentation to appeal or renew the prior court's decision. Ms. Deborah Harry went to attorney's office with me. (See Deborah Harry supporting affidavit attached hereto as Exhibit "N")

**Conclusion**

50. Base on the above grounds, we request the allegations of plaintiff and all the others should be dismissed.


Dated: August 14, 2009  
Jamaica, New York



HARRY DORVILIER

HARRY DORVILIER  
Defendant Pro Se  
88-25 163<sup>rd</sup> Street  
Jamaica, New York 11432  
(718) 739-0045

To:  
  
LEVY, DAVID & MAHER, LLP  
29 Broadway, 9<sup>th</sup> Floor  
New York, New York 10006



ROBERT SCHIRTZER  
Notary Public, State of New York  
No. 02SC6057715  
Qualified in Queens County  
Commission Expires April 23, 20

Sworn to Me on  
8/17/09