

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X Docket No. : 12-4764-CV

CLAUDIA GAYLE, individually and on behalf of all others similarly situated and as Class Representative, Aline Antenor, Anne C. DePasquale, Annabel Llewellyn-Henry, Eva Myers-Granger, Lindon Morrison, Natalie Rodriguez, Jacqueline Ward, Dupont Bayas, Carol P. Clunie, Ramdeo Chankar Singh, Christaline Pierre, Lemonia Smith, Barbara Tull, Henrick Ledain, Merika Paris, Edith Mukardi, Martha Ogun Jance, Merlyn Patterson, Alexander Gumbs, Serojnie, Bhog, Genevieve Barbot, Carole Moore, Raquel Francis, Marie Michelle Gervil, Nadette Miller, Paulette Miller, Bendy Pierre-Joseph, Rose-Marie Zephirin, Sulaiman Ali-El, Debbie Ann Bromfield, Rebecca Pile, Maria Garcia Shands, Angela Collins, Brenda Lewis, Soucianne Querette, Sussan Ajiboye, Jane Burke Hylton, Willie Evans, Pauline Gray, Eviarna Toussaint, Geraldine Joazard, Niseekah Y. Evans, Getty Rocourt, Catherine Modeste, Marguerite L. Bhola, Yolanda Robinson, Karlifa Small, Joan-Ann R. Johnson, Lena Thompson, Mary A. Davis, Nathalie Francois, Anthony Headlam, David Edward Levy, Maud Samedi, Bernice Sankar, Marlene Hyman, Lucille Hamilton, and Patricia Robinson,

Plaintiffs-Appellees,

-against-

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

Defendants-Appellants.

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PRELIMINARY STATEMENT

Defendant-Appellant HARRY DORVILIEN ("Dorvilien") and his corporation, Defendant-Appellant HARRY'S NURSES REGISTRY, INC. ("Harry's") (collectively, "Defendants" or "Appellants") appeal from :

(1) that part of the interlocutory Decision-Order dated March 9, 2009 of the Honorable District Court Judge Charles P. Sifton (R

648-677)¹, for the United States District Court for the Eastern District of New York which denied Appellants' motion for summary judgment and which granted Plaintiff CLAUDIA GAYLE's ("Plaintiff Gayle") motion for partial summary judgment on the issue of liability;

(2) each and every part of the interlocutory Decision-Order of the Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York dated December 23, 2010 (R 900-911) which denied Appellants' motion for reconsideration of Judge Sifton's prior interlocutory Decision-Order dated March 9, 2009 (R 648-677) and which granted summary judgment on damages to Plaintiff Gayle, awarding her unpaid wages and liquidated damages totaling \$14,780;

(3) that part of the interlocutory Decision-Order of the Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York dated March 1, 2012 (R 1111-1127) which granted partial summary judgment on the issue of liability to the class action Plaintiffs other than Plaintiff Gayle ("class action Plaintiffs");

(4) that part of the final Decision-Order of the Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York dated September 14, 2012 (R 1163-1173) which granted

¹
"R" references are to the corresponding pages in the Appendix Record on Appeal.

summary judgment on damages to the class action Plaintiffs awarding them unpaid wages and liquidated damages totaling collectively \$619,071.76 in damages; and

(5) that part of the post-Judgment Decision-Order dated September 27, 2013 (R 1452-1459) and Amended Judgment of the Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York dated October 16, 2013 (R 1468-1469) which awarded additional damages of \$126,464 to specified Plaintiffs; \$127,754.17 in additional attorney fees to Plaintiffs' attorneys and additional costs in the amount of \$2,460.29;

(6) His Honor's computation and application of the appropriate Statute of Limitations; and

such other further relief as to this Honorable Court shall be deemed just, proper and equitable.

QUESTIONS PRESENTED

1. Did Hon. Charles P. Sifton err when he denied Appellants' motion for summary judgment and granted Plaintiff-Appellee Gayle's motion for partial summary judgment on the issue of liability?

1. Answer - Yes.

2. Did Hon. Nicholas G. Garaufis err when he denied Appellants' motion for reconsideration of Judge Sifton's prior interlocutory Decision-Order and granted summary judgment on damages to Plaintiff-Appellee Gayle, awarding her \$14,780 in unpaid wages and liquidated damages?

2. Answer - Yes.

3. Did Hon. Nicholas G. Garaufis err when he granted partial summary judgment on the issue of liability to the class action Plaintiffs?

3. Answer - Yes.

4. Did Hon. Nicholas G. Garaufis err when he granted summary judgment on damages to the class action Plaintiffs-Appellees awarding them collectively \$619,071.76 in unpaid wages and liquidated damages in His Honor's Order dated September 14, 2012?

4. Answer - Yes.

5. Did Hon. Nicholas G. Garaufis err when he awarded additional damages in the Amended Judgment, as follows : (a) additional damages of \$126,464 to specified Plaintiffs; (b) \$127,754.17 in additional attorney fees to Plaintiffs' attorneys and (c) additional costs in the amount of \$2,460.29;

5. Answer - Yes.

6. Did Hon. Nicholas G. Garaufis err in His Honor's computation and application of the appropriate Statute of Limitations. ?

6. Answer - Yes.

7. Should the Second Circuit Court of Appeals exercise its inherent power and reverse the District Court Decision-Orders appealed from herein?

7. Answer - Yes.

STATEMENT OF FACTS

Plaintiff-Appellee Gayle served her Complaint (R 60-68) on or about November 1, 2007 and filed it on or about November 7, 2007, alleging violations of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq*, as amended, along with violations of New York Minimum Wage Act, New York Workers Compensation Law, and New York Labor Law.

Appellants filed their Answer and Affirmative Defenses on or about January 22, 2008 (R 546-552) asserting that Plaintiff Gayle's Complaint fails to state a claim against Appellants upon which relief can be granted, either for herself or on behalf of similarly situated Plaintiffs; that Plaintiff Gayle was properly paid and classified as an independent contractor; that the case may not be maintained as a class action because Plaintiff Gayle is not similarly situated or an otherwise adequate representative for the persons for whom she purports to represent; that Plaintiff's claims are barred by the applicable statute of limitations; that plaintiff's claims are barred by laches, estoppel and waiver; that Appellants have at all times acted in good faith and had reasonable grounds for believing that its pay practices complied with all applicable law, including but not limited to the FLSA; that Appellant Dorvilien has never employed or jointly employed any of the Plaintiffs; and that Plaintiffs are not entitled to unpaid overtime wages damages nor liquidated damages.

On January 29, 2008, an initial conference in this case was held before Honorable Magistrate Judge Kiyo Matsumoto, whereby the Court directed, pursuant to the parties' stipulation dated January 31, 2008 (R 69-70), that discovery proceed solely as to the threshold issue of whether or not Plaintiff-Appellee Gayle, alone, had been properly classified as an independent contractor during the eight-months she appeared on Appellants' Registry (hereinafter referred to as the "threshold issue").

On May 15, 2008, at a status conference with Magistrate Matsumoto, Appellants informed the Court that they intended to make a motion for summary judgment as to the threshold issue. Plaintiff-Appellee Gayle informed the Court through counsel that she intended to move for class certification and to authorize notice to similarly situated persons of the collective action, should the Court grant the application approving class action status.

Plaintiff-Appellee Gayle, a Licensed Practical Nurse ("LPN") alleged in her Complaint that, throughout her eight months of utilizing Harry's Registry, Appellants mis-classified her as an independent contractor, failed and refused to pay her premium pay for hours worked in excess of 40 hours per work week within the meaning of the FLSA and the New York Labor Law. Defendants-Appellants asserted that, because Plaintiff-Appellee Gayle fails to satisfy the FLSA and the New York Labor Law definitions of "employee", summary judgment should be granted and her claims

should be dismissed in their entirety.

Harry's Nurses is a domestic corporation, incorporated on February 27, 1991, with its corporate headquarters located at 88 - 25 163rd Street, Jamaica New York 11432 (See Defendants' Statement of Material Facts Not in Dispute Pursuant to Local Rule 56.1 (R 105-120) at R 105, ¶ 1). The President and Chief Executive Officer of Harry's Nurses is Harry Dorvilien (R 106, ¶ 4). Harry's Nurses is engaged in the business of referring temporary healthcare personnel, including Registered Nurses ("RN's") and LPN's to individual patients in their private residences in and around the New York City area (R 105, ¶ 2).

To serve these patients, Harry's Nurses maintains a referral list registry of independent contractor RN's and LPN's (R 106, ¶ 3). At any given time Harry's Nurses may have as many as 500 RN's and LPN's on its list (R 106, ¶ 5).

Before Harry's Nurses places a particular RN or LPN on its list, the RN or LPN must sit for an interview, complete an application, consent to a background check, provide documentation that the RN or LPN is covered by his or her own liability insurance, show a valid RN or LPN license, read Harry's Nurses' orientation information, and complete a test (R 106, ¶ 6). The test measures the RN's or LPN's basic nursing knowledge so as to assist Harry's Nurses in determining which prospective placements would be a good fit for each particular RN or LPN (R 106, ¶ 7).

Harry's Nurses' orientation package (R 521-532) is a purely informational distribution which covers the New York State Department of Health Rules and Regulations, including various commonly known procedures such as, universal precautions for infection control, OSHA standards, advanced directives, emergency or disaster planning, treating a patient with Alzheimer's Disease, the various stages of dying, and New York State's laws regarding proxy decision making power, hepatitis/HIV information, and confidentiality (R 106, ¶ 8).

As placement opportunities become available, Harry's Nurses generates a pool of RN's or LPN's from the entire referral list, whose qualifications, as determined in the aforesaid process, fit the needs of a particular patient requiring residential nursing care(R 106-107, ¶ 9).

The Nursing Supervisor, a full time employee of Harry's Nurses, phones the RN or LPN from this pool to inform them of the particular placement opportunity, including the hours, the number of days, and the rate of pay for that particular placement (R 107, ¶ 10). The specific details of the home care are determined by the patient's needs and conditioned upon the instructions of the patient's treating physician and the preferences of the patient or the patient's family.

Once informed of the potential placement opportunity, the RN or LPN is under no obligation to accept the potential placement(R

107, ¶ 11); he or she may decline a proposed placement for any reason, or no reason at all, without suffering any consequences concerning to future placement opportunities (R 107, ¶ 12).

The RN's and LPN's are and always have been free to remove their names from the availability list for any reason, at any point in time (R 107, ¶ 13). Harry's Nurses has no predetermined work schedule for RN's and LPN's, nor requirements governing hours that an independent contractor RN or LPN may accept (R 107, ¶ 14). Each individual placement has its own schedule based upon the patient's unique needs (R 107-108, ¶ 15-16).

RN's and LPN's on Harry's Nurses' referral list are not discouraged from holding other jobs, including holding positions with other referral services. At all times, it is expressly understood by everyone involved that any agreement with Harry's Nurses is non-exclusive. The RN or LPN is free to take on additional work from other agencies, so long as that work does not conflict with a placement from Harry's Nurses (R 108, ¶ 17-18).

Harry's Nurses informs the RN's or LPN's that they should not accept a placement unless they can dedicate the time necessary to care for the patient. Harry's Nurses offers a placement to an RN or LPN who is available for the relevant time period to ensure proper care for the patient (R 108, ¶ 19). Harry's Nurses prioritizes patient care; while RN's and LPN's are free to work for other health care providers, they cannot double book their time, which

would create patient care and safety issues (R 108-109, ¶ 20-21).

When patients, doctors, hospitals or family members seek Harry's Nurses home health care referral, Harry's Nurses evaluates each case separately and offers the potential placement to a pool of qualified candidates that, according to the doctor's orders and family's wishes, would best suit the needs of that particular patient (R 109, ¶ 23).

Many RN's or LPN's on Harry's Nurses' referral list choose to wait days, weeks, or even months between placements, before accepting a placement from Harry's Nurses(R 109, ¶ 24). Since most RN's and LPN's require a steady source of income, the RN's or LPN's commonly work at other jobs, including maintaining their names on other lists, during the time between placements (R 109, ¶ 25). Thus, an RN or LPN is under no obligation to accept any placement opportunities from Harry's Nurses when Harry's Nurses calls them offering a potential placement. The choice of whether or not to accept a particular placement is always up to the RN or LPN (R 109, ¶ 26-27). If an RN or LPN does not accept a potential placement offered on a particular day, the RN or LPN is free to work elsewhere, stay at home for the day, or do anything else they choose to do (R 111-112, ¶ 38-39). The RN's or LPN's are not paid for any days spent without accepting placement (R 112, ¶ 40).

Harry's Nurses does not have the power to discharge or terminate an RN or LPN, because the RN or LPN is not an employee of

Harry's Nurses (R 109-110, ¶ 28). If the patient is unhappy for any reason with the RN or LPN who has taken a particular placement, the patient, or patient's family, may contact Harry's Nurses and request that the particular RN or LPN be replaced by an RN or LPN who is more compatible with that placement (R 110, ¶ 29). Replacement, in this context, does not mean termination because the RN or LPN continues to work for Harry's Nurses, it simply means that the concerns of the patient are addressed, and that this particular RN or LPN will not be given future placement opportunities with that patient (R 110, ¶ 30).

Upon accepting a placement, the RN or LPN delivers home care as prescribed by the patient's physician on the dates specified (R 110, ¶ 31). The RN's or LPN's are expected to have the requisite skills to perform nursing tasks based upon their training and education; the RN's or LPN's are not regularly supervised while performing their duties in the placement's home (R 110-111, ¶ 32-34).

Aside from a customary telephone call upon arrival to ensure that the RN or LPN has reported to the patient's home at the specified time, Harry's Nurses does not regularly check up on the RN or LPN, nor does it contact the patient to inquire about the RN's or LPN's treatment of the patient, unless an emergency arises or the placement, or the placement's family, complains (R 111, ¶ 35).

The RN's or LPN's never work at Harry's Nurses' business location, and are never present at Harry's Nurses' offices, aside from submitting bi-weekly progress notes and time sheets and to retrieve paychecks (R 111, ¶ 36). Instead, the RN's or LPN's always report to the placement's private residence (R 111, ¶ 37). The LPN's or RN's progress notes are not reviewed by Harry's Nurses to monitor the performance of the RN or LPN, but rather to document the placement's status in order to ensure that his or her needs are being met, to memorialize that the physician or patient's instructions are being properly administered and to ensure continuity of care between the various RN's or LPN's taking care of placements (R 112, ¶ 42). Further, the RN's or LPN's are required to hand in the biweekly progress notes in order to comply with Medicaid standards (R 112, ¶ 43).

Approximately 95% of Harry's Nurses' placements are Medicaid patients (R 112, ¶ 44). As a result, Harry's Nurses must comply with Medicaid's rules and regulations (R 112, ¶ 44). These Medicaid standards dictate the method by which Harry's Nurses pays the RN or LPN (R 112-113, ¶ 45). The RN's or LPN's turn in their time-sheets and progress notes to Harry's Nurses on a bi-weekly basis. Harry's Nurses then pays the RN or LPN at a set hourly rate for those hours present at a placement (R 113, ¶ 46). Harry's Nurses in turn submits the progress notes and time-sheets to Medicaid on a bi-weekly basis, and Medicaid then ultimately

reimburses Harry's Nurses for the hours worked by RN's or LPN's (R 113, ¶ 47). Harry's Nurses' rate of pay for RN's or LPN's is based upon the Medicaid reimbursement rate ² (R 113, ¶ 48). For example, Medicaid currently reimburses Harry's Nurses at a fixed rate of \$24 per hour ³ for LPN's, so Harry's Nurses pays the LPN \$19 per hour with the remaining \$5 accounting for Harry's Nurses' overhead, expenses and profit (R 113, ¶ 49). Irrespective of the number of hours spent at any given placement during any such period, Medicaid will not pay overtime or a higher rate of pay for licensed practical nurses than the current fixed rate of \$24 per hour (R 113, ¶ 50).

Harry's would be unable to operate if it were required to pay overtime because the unreimbursed overtime rate of to RN's and LPN's would exceed the Medicaid reimbursement. This would collapse Harry's business, and negatively effect approximately 500 independent home care professionals, causing patients to suffer.

All RN's and LPN's on Harry's Nurses' referral list are required to carry their own professional liability insurance and each individual RN or LPN is responsible for maintaining his or her professional license (R 113-114, ¶ 51).

Harry's has no involvement as to the means or manner in which

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The Medicaid reimbursement rate is \$23.69 for a licensed practical nurse and \$27.81 for a registered nurse.

³ Rounded to nearest dollar.

RN's and LPN's obtain their respective licenses, nor offers any opportunity to obtain same through Harry's (R 114, ¶ 52). Similarly, the RN or LPN must furnish and maintain in proper condition their own medical equipment, including a sphygmomanometer (used for reading a patient's blood pressure), stethoscope and any other nursing supplies they choose to use at their placement (R 114, ¶ 53-54). The RN's and LPN's are also responsible for their own uniforms, which consist of nursing scrubs and to pay for the care and upkeep of the uniforms (R 114, ¶ 55). In addition, Harry's Nurses does not pay for or reimburse the RN's or LPN's for travel or commuting expenses (R 114, ¶ 56).

In addition to the RN's and LPN's on the referral list who are independent contractors as per their individual independent contractor agreements, at any given time Harry's Nurses also staffs its office with between seven and ten full-time front office permanent employees holding positions such as, Director of Patient Services, Office Manager, Accountant, Field Nurse Staffer, Homecare Nurse Staffer, Staff Coordinator, Billing/Payroll Clerk, and Nursing Supervisor (R 114-115, ¶ 57). These full-time employees of Harry's Nurses handle all of the day-to-day activities of the business (R 115, ¶ 58) along with Defendant-Appellant Dorvilien.

On February 20, 2007, Plaintiff Gayle interviewed at Harry's Nurses and filled out an application to be placed on Harry's Nurses' active referral list of LPN's (R 115, ¶ 59). Plaintiff

Gayle consented to a background check, provided documentation that she was covered by her own liability insurance, produced a valid LPN license, and completed a basic nursing skills test (R 115, ¶ 60-61). On that same date, Gayle entered into an Independent Contractor Memorandum of Agreement (R 115, ¶ 62, form at R 521-524) with Harry's Nurses whereby she agreed to retain Harry's Nurses services to help provide LPN placement opportunities for her.

After executing this Independent Contractor Memorandum of Agreement and her completion of an LPN exam, Plaintiff-Appellee Gayle was under no obligation to accept a potential placement, and remained free to decline an available placement for any reason, or no reason at all, without suffering any negative ramifications as to future placement opportunities (R 115-116, ¶ 63-64). At the time of the beginning of her association with Harry's Nurses, it was made clear to Plaintiff-Appellee Gayle that the agreement she had with Harry's Nurses was non-exclusive and that she was free to hold other jobs, including holding positions with other referral services (R 116, ¶ 65). At the time, Plaintiff Gayle further agreed that she would be responsible for payment of any income taxes for the work performed and that she would carry her own professional liability insurance (R 116, ¶ 66).

Plaintiff Gayle's contractual relationship with Harry's Nurses extended approximately 9 months from late February, 2007 to

November, 2007(R 117, ¶ 71). During that period, Plaintiff-Appellee Gayle was not compensated for overtime pay because Plaintiff-Appellee Gayle was an independent contractor. As such, Harry's provided her with an IRS 1099 Miscellaneous Income tax form for her to report in the year 2007, and did not deduct any federal or state income taxes on her behalf.

Notwithstanding this agreement and understanding, Plaintiff-Appellee Gayle asserted in her Complaint (R 60-68) that she should have been classified as an "employee" of Harry's Nurse's, and be entitled overtime pay for hours worked in excess of 40 hours per week. Contrary to Plaintiff Gayle's claims, the record in this case clearly establishes that she was properly classified as an independent contractor because :

1- Gayle always performed her LPN work at the patient's home, where she was required to conform to the prescribed method of treatment by the patient's physician or according to the wishes of the patient or the patient's family;

2- Harry's Nurses did not furnish her with any equipment or tools and did not pay any of her business or travel expenses;

3- The structure of the relationship between Harry's Nurses and Gayle was at all times controlled by Plaintiff Gayle; the number of hours spent at placements varied from placement to placement depending on the needs of the individual patient and the desires of Plaintiff Gayle;

4- Plaintiff Gayle could refuse any available placement;

5- Harry's Nurses placed no restriction on Plaintiff Gayle's business opportunities outside of Harry's Nurses, including her right to be listed on other nursing registries with no negative ramifications; and

6- The custom and practice of the industry dictate that the relationship between Plaintiff Gayle and Harry's Nurses was that of an independent contractor relationship; she fully understood and agreed to enter into an independent contractor relationship, whereby Harry's Nurses would treat her as an independent contractor.

Accordingly, when viewing the totality of the circumstances in the case, Gayle was properly treated as an independent contractor.

On May 8, 2008 Plaintiff Claudia Gayle was deposed (R 255-423). She testified as follows :

- that in or about the year 2000, Plaintiff Gayle finished her training at American Medical Career Training Center and received certification as a Certified Nursing Assistant and Patient Care Tech (R 265, line 20 through R 266, line 14);

- that in or about the year 2005, Plaintiff Gayle finished her training at Sullivan County BOCES and received her certificate in Practical Nursing (R 267, lines 3-15);

- that Plaintiff Gayle started with Harry's in February, 2007 (R 272, lines 12-18);

- that Plaintiff Gayle was also working with a different nursing referral service named White Glove since September, 2006 to date (R 272, line 20 through R 273, line 3);

- that Plaintiff Gayle couldn't identify the picture she included in her application to Harry's (R 282, lines 2-18);

- that Plaintiff Gayle, at all times remained on White Glove's ready for assignment list throughout the times she was on Harry's referral list (R 297, lines 12-15);

- that Cherrilyn Williamson, a registered nurse, was director of nursing at Harry's while Plaintiff Gayle was affiliated there, later leaving Harry's to work at Bay Park Nursing Home (R 309, line 6 through R 310, line 11);

- that Plaintiff Gayle utilized Harry's Registry from February

through November, 2007 (R 321, line 24 through R 322, line 4);

- that Plaintiff Gayle came to Harry's because she wanted to "take a break" from working at a nursing facility and "try home care" (R 322, line 24 through R 323, line 7);

- that Plaintiff Gayle's prior work at "skilled nursing facilities" had her sent to nursing homes to take care of approximately 40 residents at once, doing full service nursing throughout her shift, where while affiliated with Harry's, she is responsible for one patient at the individual's home (R 323, line 8 through R 324, line 24);

- that at the time Plaintiff Gayle was also looking for placements directly from Medicaid, bypassing the registries she was utilizing for placements (R 328, line 22 through R 329, line 9);

- that on February 20, 2007, Plaintiff Gayle signed an independent contractor agreement with Harry's, whereby Plaintiff Gayle agreed to use Harry's Registry, among other sources, to receive available placements in private homes (R 337, line 23 through R 339, Line 3) (contract at R 523-524);

- that the contract states : "it is understood that Claudia Gayle is an independent contractor and is responsible for any and all income taxes, health insurance, malpractice insurance, etc. which may be due from the income derived pursuant to this contract" (R 338, lines 11-18);

- that Plaintiff Gayle was never instructed nor informed she could

not seek placements from other sources and, to the contrary, the independent contractor agreement states : "If the employee works for another employer in addition to working for Harry's Nurses Registry, Inc., the employee must arrange his/her schedule to avoid conflict with work assignments" (R 339, lines 16-25);

- that Plaintiff Gayle was paid \$20 per hour for the placements she decided to accept from Harry's Registry(R 341, lines 3-10);

- that pursuant to the Rules and Regulations of the New York State Department of Health, Harry's gets reimbursed by Medicaid for the hours the independent contractor was at a placement and if the resident is required to go to the hospital, at that time the reimbursement ends and the hospital bills Medicaid directly (R 350, line 7 through R 351, line 8) (Rules and Regulations on R 521);

- that Plaintiff Gayle never objected to receiving IRS tax Form 1099 for independent contractors from Harry's (R 352, line 17 through R 353, line 19);

- that Plaintiff Gayle was required to maintain liability insurance when working on placements undertaken by her through Harry's, and she did (R 353, line 20 through R 354, line 23);

- that Plaintiff Gayle chose to remain taking placements from Harry's, agreeing to be paid less money than the other, busier, nursing home referrals because Plaintiff Gayle preferred to work with a single patient at home rather than with 40 patients at a

busy facility (R 363, lines 2-10);

- that Plaintiff Gayle's preference for home care referrals was that it was easier work and at the time she "needed to be off her feet" (R 364, lines 9-11);

- that according to Plaintiff Gayle, there is no difference between an employee and an independent contractor (R 368, lines 13-21);

- that when a placement is available to Plaintiff Gayle, and she decides to accept it, she is given the name of the patient, the address, the diagnosis, the patient's needs, and the hours the patient requires(R 372 line 18 through R 373, line 21);

- that Plaintiff Gayle always maintained the right to refuse an available placement (R 375, lines 2-6);

- when Plaintiff Gayle went to a placement's residence to relieve another nurse, that nurse gave instructions to her as to what was required at the time (R 377, lines 8-21);

- that Plaintiff Gayle was required to complete and submit nurse's progress notes for the time spent at the placement's residence (R 388, line 11 through R 389, line 21);

- the notes and the nurse's time sheets were completed daily and handed in bi-weekly (R 389, line 8 through R 390, line 19);

- that aside from dropping off progress notes and time sheets and picking up paychecks, Plaintiff Gayle had no other occasion to go to the office at Harry's (R 395, line 7 through R 396, line 11);

- that Harry's provided no additional training to Plaintiff Gayle

(R 396, line 23 through R 397, line 15);

- that Plaintiff Gayle was never told she was prohibited from taking referrals from other agencies during the period she took placements from Harry's (R 407, lines 6-14);

- that Plaintiff Gayle was never given a minimum or maximum hour requirement (R 408, line 25 through R 409, line 17); and

- that Harry's provided neither uniforms nor equipment (R 412, line 3 through R 413, line 11).

On May 13, 2008 Defendant-Appellant Harry Dorvilien was deposed (R 123-254). He testified as follows :

- that he is the Chief Operating Officer of Harry's Nurses Registry (R 131, lines 6-10);
- that his duties at Harry's are to oversee that the services provided satisfies the needs of the communities (R 131, lines 11-17);
- that Harry's creates the opportunities for the nurses to provide care in the patients' homes (R 131, lines 18-23);
- that his role is to create opportunities for nurses to provide care for patients in their homes (R 131, line 23 through R 132, line 12);
- that Harry's has been in business since February, 1991 (R 132, line 23 through R 133, line 4);
- that Harry's office staff are regarded as and treated as employees and the nurses are regarded as and treated as independent contractors pursuant to their signed contracts (R 134, line 23 through R 135, line 9);
- that Harry's office staff numbers between seven and ten employees at present (R 135, lines 7-11);
- that the then current nursing supervisor was Deborah Harry and her predecessor was Cherilyn Williams (R 135, lines 15-22);
- that Harry's advertises on radio, the Yellow Pages and in newspapers, as well as taking referrals from hospital social

workers and doctors (R 136, lines 9-15 and R 138, lines 4-13);

- that at times he initiates contact with hospital social workers via telephone (R 138, line 14 through R 139, line 3);
- that at times he initiates contact with referral services with doctors and hospitals (R 139, line 19 through R 140, line 22);
- that Harry's nurses register for what shifts and hours they want and what they will and will not do (R 140 lines 3-8);
- that the rate of compensation of individual registered nurses and licensed practical nurses differs depending on the contracts with the placements (R 141, line 16 through 142, line 5);
- that registered nurses and licensed practical nurses are paid on an hourly rate (R 142, lines 6-12);
- that placements are made available to registered nurses and licensed practical nurses and priority of availability is based on the respective experience (R 142, lines 15-20);
- that Harry's determines the requirements for a placement and the goals to be met, then makes a potential placement available for the Registry nurses to accept or decline as they see fit (R 143, lines 5-18);
- that the care to be given by the registered nurses and licensed practical nurses to the placements are set by the placements' doctor's orders and the doctor's parameters of the care to be given (R 144, lines 5-9);
- that the nursing supervisor speaks with the doctors to ensure the

medications provided in the doctor's orders are in compliance with what is to be given so that the proper dosages confirmed with the doctor before implementation by the nurse (R 144, lines 16-25);

- that the nurses on placements will only communicate with the nursing supervisor if there is a problem with the doctor's order or its implementation or in emergencies (R 145, lines 2-18);
- that Harry's doesn't remove nurses from placements. If the family wants a different nurse, for any reason of their own, Harry's will call another nurse to that placement to accommodate the family's wishes (R 145, line 19 through R 146, line 2);
- that the family of a placement ensures that the nurse is providing care to patients (R 146, line 17 through R 148, line 2);
- that Harry's employs three nursing coordinators who would be available to be contacted by a patient's family if necessary (R 148, lines 3-16);
- that the nurses must complete their patient's progress notes (R 149, lines 2-10, form at R 511);
- that the nursing supervisor reports to the nursing director, a job currently held by Judy Dorvilien (R 150, lines 3-9);
- that nurses' progress notes are turned in bi-weekly for review by the nursing supervisor for compliance with doctor's orders (R 150, line 21 through R 151, line 5);
- that payroll time sheets are also turned in bi-weekly (R 151, lines 6-12);

- that Harry's ensures compliance with New York State policies regarding in-service training and HIV confidentiality (R 152, line 8 through R 154, line 14);
- that the only nurses directly employed by Harry's are the nursing supervisors; the nurses taking available placements are independent contractors (R 155, lines 12-16);
- that the nurses, as independent contractors, care for the placements at their home and only come to the office to drop off bi-weekly paperwork (R 155, lines 17-24);
- that the supervising nurses only go to a placement's home in cases of emergency, such as when a nurse fails to show up (R 155 line 15, through R 156, line 7);
- that Harry's provides in-service training to nurses pursuant to New York State law requiring 12 such hours yearly for each nurse to comply to remain certified (R 154, lines 2-14 and R 156, lines 15-20);
- that the New York State Department of Health audits Harry's personnel records to ensure such compliance (R 158, line 20, through R 159, line 19);
- the in-service requirement can be completed by the nurse at a hospital or a different agency if the nurse so chooses (R 160, line 11, through R 161, line 5);
- that Plaintiff Gayle was a nurse who took placements whose services were made available to her if she chose to accept the

placement in the patient's home (R 162, lines 2-16);

- that if a placement nurse was sick or otherwise unable to care for her placement on a given day, he or she could not have the placements served by an other nurse bypassing Harry's staff (R 162, line 18, through R 163, line 13);

- that Harry's pays none of the nurses' expenses (R 165, lines 7-12);

- that payments made to nurses taking placements differ based on the Medicaid reimbursement (R 172, lines 15-17);

- that for taking placements, registered nurses generally received \$23 per hour, licensed practical nurses, \$20 per hour ⁴ (R 172, lines 19-25);

- that the placement fills out a consent form acknowledging that the family takes responsibility in case of a nurse's non-appearance or other emergency(R 174, lines 2-14);

- that New York State law requires Harry's to maintain the information on the placements' condition generated from a hospital or physician (R 174, line 4, through R 176, line 8);

- that the initial assessment of the patient is done by the hospital or the Visiting Nurse Service of New York, who go into the home of a placement to see that the form is accurately completed and then do a follow-up assessment for the office (R 174, lines 10-21);

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At the time of deposition.

- that Harry's nursing supervisors do the original assessment when a patient is discharged from the hospital pursuant to New York State law (R 178, line 24 through R 179, line 9);
- that the placement's charts are kept in sequential order for review in the case of audit (R 179, line 15 through R 180, line 5);
- that Plaintiff Claudia Gayle was introduced to Harry's by her friend, Cherilyn Williams-West, the nursing supervisor (R 185, lines 6-12);
- that Harry's requires its placements to carry their own malpractice insurance to protect against nursing errors at placements (R 188, lines 14-24);
- that Harry's distributes a list of the rules and regulations of the New York State Department of Health to all placements, to ensure compliance with the Department of Health and with Medicaid (R 189, lines 15-23, form on R 450);
- that, at the beginning of each day, there is a roll call, to ensure that coverage arrived for all the placements that day(R 191, lines 5-13);
- that according to Plaintiff Gayle's time sheets, the time spent at her placements was generally from 8 p.m. to 8 a.m. (R 195, lines 13-21);
- that if a placement is made available that calls for a night shift, it may be freely declined (R 196, lines 2-7);

- that Harry's ensures that the placement is covered for the time needed (R 196, line 8 through R 197, line 12);
- that one dollar per hour is deducted and remitted directly to the New York State Insurance Fund for Workers Compensation and Disability (R 201, lines 4-22);
- that Harry's provides an in-service manual that the nurses must read and understand before they are allowed to take a placement (R 207, lines 2-22, manual at R 464-485);
- that when working for home referrals like at Harry's where you have one patient to care for at a time, it is common practice in the industry to treat home care personnel as independent contractors compared to duty nurse work in a hospital where a nurse may have 40 patients to care for at once (R 210, lines 8-20);
- that reimbursement rate is a set amount of reimbursement set solely by Medicaid (R 211, lines 18-23);
- that due to Medicaid's set reimbursement rate, neither the contracting care providers nor Harry's are able to negotiate their fee because that is governed by the federal government (R 212, lines 3-11);
- that Harry's has doubts about the authenticity of the identification initially provided by Plaintiff Claudia Gayle due to the fact that she cannot produce a federal ID and uses different names and addresses on her driver's license and other records (R 216, lines 8-23);

- that Harry's Nurses Registry Inc. is a member of the Association of the New York State Home Care and the Joint Commission of the Accreditation of Healthcare Organizations (R 229, lines 7-13);
- that Harry's has each placement nurse signed an agreement ensuring that they coordinate the activities with the particular placement through Harry's so as not to disturb the continuation of care given each placement (R 224, lines 7-18, form at R 451); and
- that 95% of Harry's placements are reimbursed to him through Medicaid with the other 5% being reimbursed to him through private health insurance like Aetna (R 241, line 17 through R 242, line 2).

PROCEDURAL HISTORY

On or about July 9, 2008, Defendants made the initial motion for summary judgment (R 71-506) seeking summary judgment dismissal of Plaintiff-Appellee Gayle's complaint.

On or about August 13, 2008, Plaintiff-Appellee Gayle opposed Defendants' motion for summary judgment (R 507-552).

Also on or about August 13, 2008, Plaintiff served a cross-motion seeking partial summary judgment as to liability(R 553-574) and for leave to circulate a notice of class-action pendency similarly situated potential co-Plaintiffs.

THE MARCH 9, 2009 RULING OF HON. CHARLES SIFTON ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF GAYLE'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

On March 9, 2009, the Honorable Judge Charles Sifton denied Defendants' motion for summary judgment and granted Plaintiff Gayle's cross-motion for partial summary judgment on the issue of liability (R 648-677).

In addition, the Court granted Plaintiffs' motion for leave to circulate a notice of pendency of a collective action, directing Defendants to disclose the names, last known addresses, dates of employment, and telephone numbers for all persons employed as field nurses from November 7, 2004, three years prior to Plaintiff-Appellee's filing of her initial complaint.

On or about August 10, 2009, Defendants-Appellants moved pursuant to Federal Rule of Civil Procedure ("FRCP") 60 (R 678-

714) seeking to renew and reargue Honorable Judge Sifton's March 9, 2009 Order.

The Honorable Justice Sifton passed away on November 9, 2009 during the pendency of the within action which was subsequently, administratively transferred to the Honorable Nicholas G. Garaufis D.C.J. as of November 11, 2009.

On or about January 16, 2010, Plaintiffs-Appellees made a letter application to Honorable Magistrate Judge Marilyn Dolan Go seeking to strike Defendants' Answer, and with said Answer stricken, for default judgment to be entered against Defendants (R 715-716).

On or about June 25, 2010, Plaintiffs-Appellees moved for summary judgment (R 791-825).

On August 9, 2010, Honorable Judge Garaufis held oral argument to administratively address Plaintiffs-Appellees' motion for summary judgment. Defendants maintained their intention to move for reconsideration of Judge Sifton's liability findings. Defendants also explained that their opposition to Plaintiffs' summary judgment motion fully covered the arguments that they would make regarding reconsideration.

With the consent of both sides, the Court ruled that Defendants' opposition to Plaintiffs-Appellees' motion be considered as a motion for reconsideration. Plaintiffs-Appellees maintained that their opposition to Defendants' motion for

reconsideration is fully addressed in their reply. His Honor Judge Garaufis allowed Defendants- Appellants until August 20, 2010 to file sur-reply papers addressing Plaintiffs' arguments regarding reconsideration. Said Sur-Reply appears at R 843-889.

On or about August 30, 2010, Plaintiffs-Appellants made a motion to strike Defendants-Appellees' Rule 56.1 Statement and portions of Defendants-Appellees' Sur-Reply (R 890-899).

THE DECEMBER 23, 2010 RULING OF HON. NICHOLAS GARAUFIS ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR RECONSIDERATION OF JUDGE SIFTON'S PRIOR MARCH 9, 2009 ORDER

On December 23, 2010, His Honor Nicholas Garaufis granted summary judgment to Plaintiff Claudia Gayle on the issue of damages, denied summary judgment to all Plaintiffs other than Plaintiff Claudia Gayle and denied Defendants' motion for reconsideration which in effect agrees with the prior March 9, 2009 Order of His Honor Judge Sifton, which had granted partial summary judgment, limited to the issue of liability.

In this December 23, 2010 ruling (R 900-911), His Honor computed Plaintiff Claudia Gayle's damages in the amount of \$7,390 in unpaid overtime and the same amount as liquidated damages pursuant to the Fair Labor Standards Act for a total of \$14,780, and decreed that the individual Defendant and his Defendant corporation shall be jointly and severally liable for these damages.

On or about April 15, 2011, Plaintiffs made a motion for certification of class action and for partial summary judgment as to the collective opt in Plaintiffs-Appellees as to liability (R 913-1040).

THE MARCH 1, 2012 RULING OF HON. NICHOLAS GARAUFIS ON PLAINTIFFS' MOTION FOR CERTIFICATION OF A COLLECTIVE ACTION AND SUMMARY JUDGMENT AS TO LIABILITY AND TO ENFORCE SANCTIONS AND DEFENDANTS' CROSS-MOTION TO STRIKE PLAINTIFFS' MOTION

On March 1, 2012, His Honor Nicholas Garaufis granted Plaintiffs' motion for certification of a collective action, granted partial summary judgment to the collective Plaintiffs on the issue of liability, granted Plaintiffs' motion to enforce the prior sanctions ordered by Her Honor Judge Go and denied Defendants' motion to strike.

On or about March 6, 2012, Plaintiffs-Appellees moved for summary judgment for the collective opt in Plaintiffs-Appellees as to damages (R 1128-1158)⁵.

THE SEPTEMBER 14, 2012 RULING OF HON. NICHOLAS GARAUFIS ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO DAMAGES AND FOR SANCTIONS AND DEFENDANTS' CROSS-MOTION TO STRIKE PLAINTIFFS' MOTION

On March 1, 2012, His Honor Nicholas Garaufis previously granted Plaintiffs' motion for summary judgment as to the collective Plaintiffs, on the issue of liability, denied Plaintiffs' motion for sanctions and denied Defendants' motion to

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Plaintiff's motion contained a DVD which has been duplicated and included in the appellants' submission of the record appendix

strike Plaintiffs' Reply Memorandum of Law.

On September 14, 2012, His Honor granted the collective Plaintiffs' motion for summary judgment as to damages (R 1163-1173), including a finding of willfulness which premised His Honor doubling the amount of damages he awarded for unpaid overtime wage.

His Honor attached an Appendix to His Honor's Order (R 1173) which detailed \$309,535.88 in unpaid overtime to the 36 Plaintiffs that opted in to the collective action and the same amount as liquidated damages pursuant to the Fair Labor Standards Act for a total of \$619,071.76 and decreed that the individual Defendant and his Defendant corporation shall be jointly and severally liable for these damages.

On November 13, 2012, Plaintiffs moved for an amended judgment seeking additional damages, costs and attorney's fees.

THE SEPTEMBER 27, 2013 MEMORANDUM DECISION-ORDER AND OCTOBER 16, 2013 AMENDED JUDGMENT SIGNED BY HON. NICHOLAS GARAUFIS INCREASING DAMAGES AWARDED TO SPECIFIED OPT-IN PLAINTIFFS AND INCLUDING HIS HONOR'S AWARD OF PLAINTIFFS' LEGAL FEES AND COSTS

On August 26, 2013, Honorable Magistrate Judge Marilyn D. Go issued Her Honor's Report and Recommendation and Supplemental Report and Recommendation (R 1439-1441) deciding the post judgment motions (R 1402-1429) before her.

Based upon Her Honor's Report and Recommendation and Supplemental Report and Recommendation, Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York issued His Honor's Memorandum Decision-Order dated

September 27, 2013 (R 1452-1459) adopting Her Honor's recommendations in full.

On October 16, 2013, Honorable Nicholas G. Garaufis, United States District Judge for the Eastern District of New York issued an Amended Judgment (R 1468-1469) reflecting the above decisions which awarded amended calculated damages of \$126,464 to specified Plaintiffs; \$127,754.17 in additional attorney fees to Plaintiffs' attorneys and additional costs in the amount of \$2,460.29.

This appeal ensued.

ARGUMENT

The principles applicable to summary judgment are familiar and well settled. Summary judgment may be granted only when there is no genuine issue of material fact remaining for trial, and the moving party is entitled to judgment as a matter of law F.R.C.P. 56(c); See Anderson v. Liberty Lobby, 477 U.S. 242, 247-8, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); Lee v. ABC Carpet & Home, 186 F.Supp.2d 447 (S.D.N.Y. 2002).

As a general rule, all ambiguities and all inferences drawn from the underlying facts must be resolved in favor of the party contesting the motion, and all uncertainty as to the existence of a genuine issue for trial must be resolved against the moving party LaFond v. General Physics Services Corp., 50 F.3d 165, 171 (2d Cir. 1995). As is often stated, viewing the evidence produced in the light most favorable to the non-movant, if a rational trier of fact could not potentially and objectively find for the non-movant, then there is no genuine issue of material fact and only then is entry of summary judgment appropriate See Binder v. LILCO, 933 F.2d 187 (2d Cir. 1991).

An appellate court reviews the grant or denial of a motion for summary judgment *de novo*, applying the same legal standard as the District Court. Under that standard, summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law See FRCP 56(c).

When applying this standard, the appellate court construes all facts and reasonable inferences in a light most favorable to the nonmoving party. The appellate court must determine whether there is any genuine issue as to any material fact, and, if not, whether the district court correctly applied the law to the facts as construed in the light most favorable to the non-movant for summary judgment.

Summary judgment should be granted, where the evidence is such that it would require a directed verdict for the moving party. The inquiry for summary judgment and a directed verdict are essentially the same : whether the evidence presents a sufficient disagreement that requires submission to a jury, or whether it is so one sided that one party must prevail as a matter of law. The inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at a trial on the merits.

Plaintiff-Appellee Gayle contends that she is an employee under the FLSA and therefore has standing to bring her claims against Defendants-Appellants. Defendants-Appellants argue that Plaintiff and all similarly situated personnel are independent

contractors, not employees, and consequently cannot bring suit for those damages under the FLSA.

A grant of summary judgment is a drastic remedy that is to be used sparingly, especially so in a case, where specific additional considerations must be taken into account. A Court must be highly cautious about a grant of summary judgment to a party because, in addition to the duty to fairly adjudicate a claim within its purview, the Court is acting as a finder of fact, to some extent.

POINT I

SUMMARY JUDGMENT AS TO LIABILITY SHOULD NOT HAVE BEEN GRANTED BECAUSE THE NATURE AND TYPE OF THE WORK ACTUALLY DONE BY THE PLAINTIFFS IN THE PLACEMENTS' HOMES WAS THAT OF COMPANIONSHIP WITHIN THE DEPARTMENT OF LABOR EXEMPTION IN THE FAIR LABOR STANDARDS ACT

It is respectfully submitted that Honorable Judge Sifton erred when he denied Defendants-Appellants' motion for summary judgment and granted partial summary judgment to Plaintiff Gayle because as she freely admits, the work she performed at the placements' homes was similar to that of a home care companion, rather than a nurse. Therefore, she should have been classified as such falling within the home care companionship exemption to the Fair Labor Standards Act.

The FLSA requires employers to pay all covered employees at least time and a half for all hours work in excess of 40 hours See 29 U.S.C. § 207(a)(1). To establish a prima facie case for overtime under the FLSA, a plaintiff must prove four things. First, a plaintiff must show the existence of an employment relationship. The existence of an employer-employee relationship is a prerequisite to an FLSA claim See 29 U.S.C. § 203 (d). In determining employer status, "economic reality" prevails over technical common law concepts of agency Goldberg v. Whitaker, 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961).

Second, a plaintiff must show that she was covered by the FLSA. Third, a plaintiff must establish that the defendants had

knowledge of overtime hours worked without proper compensation for all hours in excess of 40 in one work week See 29 C.F.R. § 785.11. Finally, a plaintiff must demonstrate that she was not properly compensated under the FLSA and must prove the amount of the liability. Plaintiff bears the burden of proof to establish a prima facie case.

The FLSA provides several exceptions to the general requirement that an employee must be paid overtime for all hours worked. Pursuant to 29 U.S.C. § 213(a)(15) of the FLSA, the overtime provisions do not apply to any worker involved in domestic service employment to provide companionship services for individuals who, because of age or infirmity, are unable to care for themselves, as such terms are defined and delimited by the Department of Labor. Congress enacted the companionship services exemption to enable guardians of the elderly and disabled to financially afford to have their wards and relations cared for in their own private homes as opposed to institutionalizing them.

Under New York State law, the Labor Law follows the guidelines of the FLSA, including exempting from the overtime provisions home health care workers. The FLSA provides that the exemptions set forth in § 13 (a)2 and § 13 (a)4 provide that the overtime provisions do not apply if the worker in question is performing companionship services for individuals who because of age or infirmity are unable to care for themselves See 29 U.S.C. § 213

[a][15]. See Ballard v. Community Home Care Referral Service, 264 A.D.2d 747, 695 N.Y.S.2d 130 (2d Dept 1999).

This companionship exemption has been interpreted to include health care aides and similar employees involved in the day-to-day care of aged or infirm individuals and whose work includes in part related domestic services See also Cox v. Acme Health Services, 55 F.3d 1304 (7th Cir 1995); Thomas v. Dosberg, 249 A.D.2d 999, 672 N.Y.S.2d 164 (4th Dept 1998). Other courts have also held that the work of a caregiver falls within a health care companionship exception. See Salyer v. Ohio Bureau of Worker's Compensation, 83 F.3d 784 (6th Cir 1996) (woman who gave medication and helped disabled dress, bathe, ambulate, and clean provided companionship services" under the FLSA); Cox v. Acme Health Services, 55 F.3d 1304 (7th Cir. 1995) (caregiver performing therapy, nursing services, personal care, ambulation, exercise, and medication assistance performed companionship services within the exception. Accordingly, "a provision of the FLSA exempts from the statute's minimum wage and maximum hours rules 'any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves" Herrera v. Council for Human Services Home Care Services Corp., 2008 U.S. Dist LEXIS 67446 (S.D.N.Y. 2008). "A Department of Labor regulation (labeled an "interpretation") states that this statutory exemption includes those "companionship" workers who "are employed

by an employer or agency other than the family or household using their services” 29 C.F.R. 552.109(a).

In 1974, Congress amended the FLSA to include many individuals in the service of the old and infirm in their residences not previously subject to the FLSA’s minimum wage and maximum hour requirements Long Island Care at Home, Ltd. V. Evelyn Coke, 551 U.S. 158, 127 S.Ct. 2339, 168 L. Ed.2d 54 (2007) citing Fair Labor Standards Amendments (“FLSA Amendments”) of 1974. Congress simultaneously created an exception that excluded from FLSA coverage certain subsets of individuals in service at placement’s homes, including companionship workers citing 29 U.S.C. § 213 (a)(15).

The apparent conflict between the language in 29 C.F.R. 552.3 (“domestic services refers to services of a household nature performed by an employee in or about a private home -permanent or temporary - of the person by whom he or she is employed”) and 29 C.F.R. 552.109 (“employees engage in companionship services and who are employed by an employer or agency other than the family or household using their services, are exempt from the FLSA’s requirements”) was resolved by the Supreme Court in the Coke case. The question before the Supreme Court in Coke, was whether ‘in light of the statute’s text and history, and a different (apparently conflicting) regulation, the Department’s regulation is valid and binding’ quoting Coke at 551 U.S.158, 127 S.Ct.

2339,2344, 168 L.Ed. 2d 54 (2007). The Court held the regulation was binding, and properly applied to individuals such as the plaintiff in that action, a domestic worker who provides companionship services to elderly and infirm men and women Id.

Plaintiff Evelyn Coke was employed as a domestic worker who provided home companionship services to elderly and infirm men and women who were otherwise unable to care for themselves. Ms. Coke was paid by Long Island Care at Home, Ltd. ("Long Island Care"), a third party referral agency that facilitated her placement. Ms. Coke sued her former employer, alleging that Long Island Care failed to pay the minimum and overtime wages to which she was entitled to under the Fair Labor Standards Act ("FLSA") as amended by the 1974 "FLSA Amendments".

Coke was employed by a third party and not the individuals receiving services. Coke pointed out the conflict in the two regulations, 29 C.F.R. § 552.3 and § 552.109, and then argued that because she was not working in a private home of her employer (referring to the language in 552.3), the FLSA companionship exception did not apply. The Court rejected that argument and upheld the regulation permitting a third party to pay the care provider. The Court held that the companionship exception to the over-time and minimum-wage provisions of the FLSA applied to the work she performed.

The United States Department of Labor interpreted the

statutory exemption to include workers who are employed by an agency other than the family or household utilizing their services. Unlike the distinction in the within case where Plaintiff Gayle was employed directly by the placements with whom she visited, Ms. Coke's employment was completely controlled by Long Island Care, and the Supreme Court still found her exempt based on the companionship exemption.

The distinction diminishes in light of the quality and quantity of tasks and responsibilities that are attendant to the one on one relationship of a home care giver as compared to the exponentially heightened tasks and responsibilities of a hospital duty nurse helping a staff to handle 40 or more patients at a time.

The Department of Labor defines the statutory term "domestic service employment" as:

services of a household nature performed by an employee in or about a private home... of the person by whom he or she is employed... such as cooks, waiters, butler's, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handyman, gardeners, footmen, grooms and chauffeurs" (codified at 29 CFR § 552.3)

See Long Island Care at 551 U.S. 158, 163 (emphasis added). The determining factor in the statute is a general description of the kind or type of work that must be performed in the placement's home by the worker put under his or her charge.

The case of Threatt v. CRF First Choice, 2006 US Dist LEXIS

50934, 2006 WL 2054372 (N.D. Indiana 2006) is probative. Defendant CRF First Choice provided residential care services to infirm individuals within their homes. The normal work schedule for the staff was to work 12 hours a day for seven straight days a total of 84 hours and then to be off work for seven straight days. The plaintiffs were paid on an hourly basis without overtime.

The care was funded by Indiana's Medicaid program which requires CRF to comply with state regulations. The workers were with the placements all day and night to assist them in all aspects of their daily life including, but not limited to: waking consumers up in the morning; helping them bathe and with other personal hygiene; getting them ready for work if they had a job outside of the home; preparing meals; eating with them; driving them to work or other activities and doctors appointments; participating in educational and recreational activities and exercises with them; taking them for walks and on outings; cleaning up after all meals and activities; assisting with the general cleaning and upkeep of a home; doing laundry; going grocery and clothing shopping; taking them to doctors appointments; doing banking; passing medications; playing games or doing puzzles; watching television; reading books to them; preparing them for bed; waking them during the night to use the restroom; **monitoring the placements and documenting their progress** (emphasis supplied); and even just hanging out Id. Gayle's tasks, from her 8 p.m. to 8 a.m. shifts, were nearly identical.

In light of the testimony, and with an eye on the favorable inferences that must be afforded the non-movant when confronting summary judgment, The Court's finding that Gayle was non-exempt should be reversed. and the case should be remanded so that the factual determination can be made regarding the quality and quantity of the tasks and responsibilities Gayle actually performed.

The Supreme Court's decision in Long Island Care v. Coke settled the third party agency issue by holding that the exemption applied in situations where the work emanated from a third party referral service such as Long Island Care. By her own testimony as detailed above, Plaintiff-Appellee Gayle's tasks undertaken at the placements she selected more closely resembled that of a home care companionship, such as provided by Long Island Care placements by Plaintiff Coke in Coke. As Plaintiff-Appellee Gayle described at deposition, she took the placements from Defendants-Appellants to get off her feet, to try the easier job of caring for a single person rather than 40 patients in a hospital setting and providing service in the home of a placement (R 363-364) rather than a full ward of a busy hospital. Such a 97.5% reduction in task responsibility, in light of the deference afforded the non-movant facing motion for summary judgment, in light of the substance of Plaintiff Gayle's testimony, there are clear questions of fact as to whether Plaintiff Gayle could be properly classified as such a

home care worker under the FLSA.

The proper focus must remain on the amount of time the worker spent doing the type of work. It is a case sensitive inquiry as to how much of the 12 hour night shift was actually spent caring for the placement, and it can be assumed, that the placement was in bed, asleep, for most of this time.

In order to satisfy their burden of proof, plaintiff must establish that they performed uncompensated overtime "work" See Reich v. New York City Transit Authority, 45 F.3d 646, 651 (2d Cir 2005) (employees are entitled to compensation only for "work").

Because Congress did not define the contours of the type of "work" that merited compensation under the FLSA, the scope of the term "work" was initially delineated by the United States Supreme Court. In Tennessee Coal Iron & Railroad v. Muscoda Local Union # 123, 321 U.S. 590, 88 L.Ed. 949, 64 S.Ct. 698 (1944), the Supreme Court looked to the commonly used meaning of "work" and determined that, for FLSA purposes, work is any activity (1) involving physical or mental exertion; (2) controlled or required by the employer; and (3) pursued necessarily and primarily for the benefit of the employer and his business Tennessee Coal Iron at 321 U.S. 590, 598.

The Supreme Court broadened its definition of "work" two years later in Anderson v. Mount Clemens Pottery, 328 U.S. 680, 90 L.Ed. 1515, 66 S.Ct. 1187 (1946), interpreting the FLSA to provide

compensation for such activities as walking from the factory gate to the workbench and changing into work clothes.

The more expansive interpretation of "work" in Anderson, prompted Congress to amend the FLSA, by passing the Portal-to-Portal Act 29 U.S.C. §§ 251-262 (2000) relieving employers from liability from preliminary activity and postliminary activity occurring during a particular workday which is completely unrelated to the principle activity that for which a worker is engaged.

It is respectfully submitted that when a class Plaintiff alleges a 60 hour work-week comprised of five, twelve hour shifts consuming the majority of each night when the placement is asleep, such time should be considered "companionship" within the exemption set forth in Coke.

When a Plaintiff such as Plaintiff-Appellee Gayle testifies that she took placement jobs to afford herself a 97.5% reduction in task responsibility (from 40 patients down to one placement), to get off her feet and to work in a private home, it is hard to categorize much of such time spent as "work", especially in light of the favorable deference that must be afforded Defendants-Appellants facing summary judgment.

POINT II

SUMMARY JUDGMENT AS TO LIABILITY SHOULD NOT HAVE BEEN GRANTED
BECAUSE THE CLASSIFICATION OF THE PLAINTIFFS AS INDEPENDENT
CONTRACTORS SATISFIES THE CONTROL TEST EXEMPTION OF THE FAIR
LABOR STANDARDS ACT

It is respectfully submitted that Honorable Judge Sifton erred when he denied Defendants-Appellants' motion for summary judgment and granted partial summary judgment to Plaintiff Gayle because as the evidence shows her control over her taking of placements establishes her role as that of independent contractor. Therefore, she should have been classified as such, exempting her from being an "employee" covered by the FLSA.

Barfield v. New York City Health & Hospitals Corp., 537 F.3d 132 (2d Cir 2008), a Second Circuit case distinguishable by the fact that the plaintiff Barfield therein was a certified nursing assistant working full time at Bellevue Hospital in New York is informative. In that case, the Court utilized a "functional control" test with the following factors :

1- whether the defendant's premises and equipment were used for plaintiff's work;

2-whether the referral agencies had a business that could or did shift as a unit from one putative employer to another;

3- the extent to which plaintiff's performed a discrete line job that was integral to defendants process of production;

4- whether responsibility under the contract could pass from

one subcontractor to another without material changes;

5- the degree to which defendants or their agents supervised plaintiff's work; and

6- whether plaintiffs worked exclusively or predominantly for the defendants.

To compare the results of the Barfield Court with the case herein, the Court applied these elements as follows:

1- Barfield performed her work on Bellevue's premises using Bellevue's equipment - Plaintiff Gayle performed her work on each of the placements' premises, using her own equipment;

2- In Barfield, the referral agency did not shift its business as a unit from one joint employer to another, but instead each agency assigned the same agency employees to the same hospitals wherever possible. In contrast, Plaintiff-Appellee Gayle worked the placements she chose, and as they became available, with the selection based on her availability and desire for a particular placement;

3- In Barfield, Plaintiff performed work integral to Bellevue's operation; here, Plaintiff Gayle was one of hundreds of LPNs who could serve the needs of the individual placements at their home;

4- Barfield's work responsibilities remained the same regardless of which agency referred her, whereas Plaintiff Gayle's responsibilities were determined by the individual placement's

medical doctors;

5- Barfield's schedule was controlled by Bellevue, where here Plaintiff Gayle had full control over when she made herself available to take a placement; and

6- Barfield worked exclusively for Bellevue, while Plaintiff Gayle did not worked exclusively for any agency nor any placement.

In addition, in Barfield, Bellevue retained the right to terminate her because of its regular evaluation system and ability to terminate her if Bellevue was dissatisfied with the individual's performance. In the case herein, Plaintiff Gayle would only be terminated from a placement by the placement itself; not from the referral agency.

The United States Supreme Court has instructed that the determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in "economic reality rather than technical concepts" Goldberg v. Whitaker House, 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961), determined by reference not to "isolated factors, but rather upon the circumstances of the whole activity" Rutherford Food Corp. V. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed 1772 (1947).

As a result, the Second Circuit has treated employment for FLSA purposes as a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances. In assessing the economic reality of a particular employment

situation, the Court has identified different sets of relevant factors based on the factual challenges posed by particular cases.

The Second Circuit has developed a least two different sets of criteria for determining the economic reality of a relationship. One set of factors, derived from Carter v. Dutchess Community College, 735 F.2d 8 (2d Cir 1984), looks mainly at factors signifying formal control over workers See also Barfield at 537 F.3d 132, 143. The other set of factors, derives from Brock v. Superior Care, 840 F.2d 1054 (2d Cir 1988), considers factors relevant to functional control over workers and is typically more relevant for distinguishing between independent contractors and employees.

The Carter factors evaluate whether the alleged employer (1) had the power to hire and fire the employees, (2) controlled employee work schedules and conditions of employment, (3) determine the rate and method of payment, and (4) maintain employment records.

The Brock factors considered (1) the degree of control exercised by the employer over the workers; (2) the workers' opportunity for profit or loss and their investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

In Barfield, the Court citing the case of Bommett v. California Health & Welfare Agency, 704 F.2d 1465 (9th Cir 1983), set forth four factors that determine the economic reality of an employment relationship specifically whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment, (3) determine the rate and method of payment; and (4) maintain employment records.

In Barfield, the Court citing the case of United States v. Silk, 331 U.S. 704, 67 S.Ct. 1463, 67 S.Ct. (1947) utilized the following five factors in determining that an agency qualified as a nurses employer :

1- the degree of control exercised by the employer over the workers;

2- the workers' opportunity for profit or loss and their investment in the business;

3- the degree of skill and independent initiative required to perform the work;

4- the performance or duration of the working relationship; and

5- the extent to which the work is an integral part of the employer's business.

In Barfield, the Court relying on Rutherford Food, set forth a sixth factor test pertinent to identifying the economic realities

of the employment relationship as whether plaintiffs worked exclusively or predominantly for the employer.

Like the Court in Barfield, the Department of Labor views joint employment as a question to be resolved from the totality of the evidence, the identifying relevant factors include:

- 1- power to control or supervise workers or work performed;
- 2- power, whether alone or jointly, directly or indirectly, to hire, fire or modify employment conditions of an individual;
- 3- permanency and duration of the relationship;
- 4- the level of skill involved;
- 5- whether the worker's activities are an integral part of the overall business operations of the employer;
- 6- where the work is performed and what equipment is used; and
- 7- who performs payroll and similar functions.

Bonnetts v. Arctic Express, 7 F.Supp2d 977 (S.D Ohio 1998)

The plaintiffs in Bonnetts were truck drivers who were independent contractors. The case was brought under the Federal Family and Medical Leave Act, which incorporated by reference the definition of employee found in the FLSA. In denying summary judgment, the court applied the economic realities test looking to determine whether the employee is economically dependent upon the principal or is instead in business for him or herself. According to the Court, the test is a loose formulation leaving the determination of employment status to case-by-case resolution based

upon the totality of the circumstances.

The Court applied the economic realities test as follows :

1- The permanency of the relationship - due to the fact that the employment contract was of indefinite duration and terminable at any time, the Court found that the relationship between the parties was not one of the permanent nature and therefore was indicative of an independent contractor relationship.

2- The degree of skill required for the particular job - since in Bonnetts, the employer exercised significant control over the route selection and other aspects of the trucking job, the Court could not conclude that the Plaintiff used his skills in an independent manner consistent with an independent contractor relationship. However, as here, Plaintiff Gayle performed her duties based upon the instructions of the placements' doctors, with little or no control reserved by Harry's over the specific form of the tasks required by the placement's doctors. Therefore, a finding of independent contractor would be warranted in the case herein.

3- The workers capital investment - the Court held that where the arrangement leaves the worker with the responsibility for the extent of their work and number of hours undertaken, the worker is in business for him or herself. The workers own their own equipment; they pay their own insurance; and they can haul for one business, or any other, at their choosing. It is the total situation, including the risk undertaken, the control exercised,

the opportunity for profit from sound management of the extent of work undertaken, that the Bonnetts Court concluded that the truck drivers were independent contractors.

4- The opportunity for profit or loss - The Court found that since the Plaintiff truck driver could derive and control his profits by minimizing his expenses given the fact that he could not drive over the Federally mandated limits on milage a driver can drive per shift and per week, the sole way he controlled his profit was by limiting his expenses. Conversely, the driver bore the risk of loss should he choose not to accept routes and remain responsible for his overhead.

Here, Plaintiffs-Appellees could control their ability to profit by taking more hours and bore the risk of loss should they choose to take less placements, limiting their ability to pay their living expenses.

5- The employer's right to control - the Court found that there was a genuine issue of material fact as to whether the employer exercised control over the manner in which the driver performed his duties under the contract. If the control issue of the drivers allegations is not proven, then the totality of the circumstances warrant a finding that the driver was an independent contractor.

6- Whether the worker was an integral part of the employer's business - the Court found that the determination of whether the driver was an employee or an independent contractor cannot be made

until the factual issues relating to right to control and degree of skill are resolved.

In Boudreaux v. Bantec, Inc., 366 F.Supp 2d 425 (E.D. Louisiana 2005), the case centered on the FLSA interpretation addressed herein. In Boudreaux, the Plaintiff was a computer repair technician. In denying summary judgment, the Court found the following:

Control - the Court found that the amount of control exerted over the Plaintiff raises a genuine issue of material fact. While the Plaintiff asserted that the Defendant exerted significant control over his daily routine, the Defendant countered the allegation, arguing that the independent contractor agreement specifically stated that the contractor had the freedom to accept or reject assignments and determine the specific manner in which the services are provided. The respective counter allegations set forth material factual issues inappropriate for summary disposition.

Opportunity for profit or loss - the Plaintiff claimed that the Defendant had the bigger opportunity for profit or loss because Defendant was the one who set the charges and fees and the Defendant argued that since the Plaintiff had the opportunity to accept or reject service goals, the Plaintiff, in effect and practice, determine his income. (It must be noted that in this case neither Plaintiff Gayle nor Harry determined the charges and

fees which were set by Medicaid reimbursement schedules).

To collect claimed back overtime wages, a party must be considered an employee under FLSA 29 U.S.C. § 201. Therefore, the employment relationship determination becomes the threshold issue for the parties' competing motions for summary judgment.

The definition for "employee" under the FLSA is a broad one : the term employee means any individual employed by an employer 29 U.S.C. § 203(e)(1). The terms "independent contractor", "employee" and "employer" are not to be construed in their common law senses in this situation. Instead, the relationship must be evaluated by its "economic reality" on a case-by-case basis upon the circumstances of the whole business activity See Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947).

The economic realities test consists of six factors :

- 1- the permanency of the relationship between the parties;
- 2- the degree of skill required for the rendering of the services;
- 3- the worker's investment in equipment or materials for the task;
- 4- the worker's opportunity for profit or loss, depending upon his skill;
- 5- the degree of the alleged employer's right to control the manner in which the work is performed; and
- 6- whether the service rendered is an integral part of the alleged employer's business.

In the present case there are material facts that are

sufficiently disputed by the parties so that granting summary judgment is not appropriate. For example, the facts supporting the permanency of the relationship (whether the party was able to work for other companies), the degree of skill needed (does 96 hours of class time and a limited license give rise to being classified as skilled?), and at what point did the party acquire those skills, and level of control factors exercised (whether the business treated fellow workers the same as independent contractors; and was a 40 hour work week forced), are equally disputed in the record.

Therefore, the Rutherford Court found summary judgment inappropriate on the issue of the employment versus independent contractor relationship.

POINT III

SUMMARY JUDGMENT AS TO LIQUIDATED DAMAGES SHOULD NOT HAVE BEEN GRANTED BECAUSE DEFENDANTS' SYSTEM OF MAKING PLACEMENTS AVAILABLE TO REGISTERED NURSES AND LICENSED PRACTICAL NURSES WAS NOT A KNOWINGLY WILLFUL VIOLATION OF THE FAIR LABOR STANDARDS ACT

The Plaintiffs-Appellees' allegations that the Defendant-Appellant Dorvilien lacked good faith in believing the FLSA to be inapplicable are unsubstantiated and argumentative. The Court in Davis v. Lenox Hill Hospital, 2004 U.S. Dist. LEXIS 17283, 9 Wage & Hour Cas. 2d 1683 (SDNY 2004, Docket : 03 Civ. 3746) held that Defendants actual knowledge and its reasonableness remains genuine issues of material fact inappropriate for summary disposition.

The Davis Court opined :

as an initial matter, whether this action is governed by a two or three years statute of limitations is an issue of fact. Although the statute of limitations for violation of the FLSA is ordinarily two years, is extended to three years for willful violations 29 U.S.C. § 255(a)...

Willfulness cannot be found on the basis of mere negligence or on a completely good faith but incorrect assumption that a pay plan complied with the FLSA in all respects...

Whether the defendants knew or recklessly disregarded the fact that a failure to pay over time violated the FLSA - thereby extending the statute of limitations to three years - is a disputed issue of fact and must be decided by a jury (internal case citations omitted).

Davis at 2004 U.S. Dist. LEXIS 17283, pp. 26-27.

FLSA § 216(b) provides in pertinent part that :

"Any employer who violates the provisions of §206 or §207 of this title shall be liable to the employee or employees affected in the amount of their unpaid wages, or their unpaid overtime compensation, as the case may be, and in addition an equal amount tacked on as 'liquidated damages'."

Under the FLSA, another year is added to the two-year statute of limitations if the claim is one "arising out of a willful violation" 29 U.S.C. §255(a) . To extend the statute of limitations to three years, the employee must prove by a preponderance of the evidence that her employer either knew that its conduct was prohibited by the statute or showed reckless disregard about whether it was." Powell v. Carey International, 483 F.Supp 2d 1168 (S.D. Florida 2007) (summary judgment denied on issue of willfulness due to the fact question requiring evidence of employer's reliance on advice of counsel)

FLSA § 260 provides in pertinent part that :

"In any action... to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages... if the employer shows to the satisfaction of the Court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation... the Court may, in its sound discretion, award no liquidated damages".

In McLaughlin v. Richmond Shoe Co., 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988) the Supreme Court defines willfulness.

In common usage, the word "willful" is considered synonymous with such words as "voluntary", "deliberate" and "intentional". The word "willful" is widely used in the law, and, although it has not by any means been given a perfectly consistent interpretation, it is generally understood to refer to conduct that is not merely negligent. The standard of willfulness - that a Defendant either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute - is surely a fair reading of the plain language of the FLSA. The fact that Congress did not simply extend the limitations period to three years, but instead adopted a two-tiered statute of limitations, makes it obvious that Congress intended to draw a significant distinction between ordinary violations and willful violations.

In Levings v. Mt. Country Foods, Inc., 2012 U.S. Dist. LEXIS 41846 (W.D. Oklahoma 2012), the Court explained that the question of whether an FLSA violation occurred is a fact question for jury resolution, and that the issue of willfulness cannot be determined without trial. If the jury finds a violation of the statute, then it may also determine whether such violation was willful. The court's conclusion was that since these are factual disputes which cannot be resolved on Plaintiff's summary judgment motion, accordingly, Plaintiff's motion for summary judgment must be

denied.

The Portal-to-Portal Act, 29 U.S.C. §216251 et seq, which amended the FLSA, affords a District Court the discretion to deny liquidated damages when the Defendant shows that, despite its failure to pay overtime wages, it acted in the subjective good-faith belief, with objectively reasonable grounds for believing, that its acts or omissions did not violate the FLSA.

Proof that the law is uncertain, ambiguous, or complex may provide reasonable grounds for employers belief that he is in conformity with the FLSA, even though his belief may be erroneous See Bull v. United States, 68 Fed Cl. 212, 2005 U.S. Claims LEXIS 284, 10 Wage & Hour Cas. 2d 1687 (2005).

POINT IV

THE CLASS SHOULD BE DE-CERTIFIED BECAUSE THE SPECIFICS OF EACH CAREGIVER'S TASKS DIFFER ON A CASE-BY-CASE BASIS AND SUCH DIFFERENCES REQUIRE INDIVIDUAL ANALYSIS TO DETERMINE WHETHER THE CAREGIVER WAS WITHIN THE EXEMPTIONS TO FLSA COVERAGE

The case of Threatt v. CRF First Choice, 2006 US Dist LEXIS 50934, 2006 WL 2054372 (ND Indiana 2006), should prove informative as to the types of tasks considered to be within the "companionship" exemption.

De-certification - according to defendants at least five factors contributed to significant differences in the actual duties that any two plaintiffs performed or the actual services they provided. Given the general nature of the caregivers duties, defendants cite five factors which can result in a wide disparity between the types of services that any two plaintiffs provided to placements on a regular basis or even day by day

1- placements have various degrees of mental and physical challenge... the duties and services that any particular plaintiff performed with or for the placements they served very depending upon the degree of mental and physical challenge of the placement. Some placements can be very capable and able to participate in doing most things, while others are not very capable and most things had to be done for them. Some placements were active while other placements were not. Some placements were non-verbal while other placements could barely do anything at all and remained bed

ridden.

2- an individual plaintiff care giver's duties also differed depending on the number of placements he or she was responsible for at a given time. Different homes had different numbers of placements varying from one to two or more, which has a natural impact on the amount of and divisions of duties within the home.

3- different individual caregivers worked on different shifts, some all on day shift, some all on night shift and some worked both shifts at various times. The duties of the individual plaintiff caregivers were different on the day shift and on the night shift. On the night shift, since the placements are typically asleep for much of the time there was more time for cleaning, laundry, documentation, and a simple monitoring of placements with typically much less interaction with the placements than during the day shift. However, the night shift duties vary depending on the sleep habits and desires of the placements on any particular shift, because the placements relay to the care giver when they would go to sleep and when they would stay up and want to do other things, sometimes even staying up all night and limiting the time the individual plaintiff caregiver could spend tending to other duties.

4- it has not been determined whether or not each individual plaintiff caregiver worked alone or with a coworker. The care performed by a particular plaintiff would vary depending upon if they worked with a coworker who would share the duties and how the

coworkers chose to divide them. Different care givers would break up the daily tasks on a daily basis with the person they work with often based upon each other's likes and dislikes, which could result in each of them doing more or less of particular types of duties.

5- the fifth and final factor resulting in differences in the duties between particular plaintiffs is the size of the placements home at which care was provided. Not only do different homes have different numbers of placements, but the homes also differed in physical size. In particular, some homes that significantly larger areas to monitor than others. The relative duties of particular care givers differ depending upon the size of the home primarily resulting in different percentages of time required for monitoring their placements.

All of these factors evidence how fact intensive each individual's case is and underlines the fact that each Plaintiff's case has to be evaluated on a case-by-case basis, ill fitting for class action.

POINT V

THE DECISIONS-ORDERS APPEALED FROM SHOULD BE REVERSED BECAUSE DEFENDANTS-APPELLANTS' BUSINESS IS GOVERNED BY NEW YORK STATE PUBLIC HEALTH LAW ARTICLE 36 WHICH MIRRORS THE HOME COMPANIONSHIP EXEMPTION IN COKE

New York State Public Health Law § 3602 provides in pertinent part, as follows:

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 preventative, 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 28 of this chapter which is authorized under § 3610 of this article to provide a

long-term home health care program. Such an agency, facility, or hospital must be qualified to petition paid 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 preventative, 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 the 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 §6902 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 §6902 of the Education Law and not prohibited by federal law or regulation.

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.

Pursuant to the above, Defendant-Appellant Harry's Nurses Registry, Inc. was duly accredited by the New York State Department of Health, which granted the company a license(R 698) to operate as a home care service agency for the five boroughs and Nassau County as of November 27, 1995.

In accord with the Supreme Court's decision in Coke, the Department of Labor exempts home health care services personnel

from the overtime provisions of the FLSA. Rather than relying on Coke, His Honor Judge Sifton relied on Brock to categorize Defendants-Appellants as employees, despite the sharp differences in task responsibilities and work site. It is respectfully submitted that this was error.

In Brock, the agency therein did not provide home health care services, but placed nurses in hospitals and nursing homes which are governed by New York State Public Health Law Article 28, and whose nurses are not exempt from the FLSA overtime provisions. The distinction between hospital nurses and home health care nurses was addressed by the Supreme Court in the Coke case.

In addition, the level of control of nurses that work in a hospital setting by their employer is far greater than the freedom experienced by an independent contractor nurse working for multiple employers in business for his or herself. Hospital nurses are subject to a more stringent scrutiny, have far greater task responsibility and spend less time off their feet doing companionship services, the subject of the Coke case.

It must be noted that the FLSA exemption for home companionship services has been extended by the Department of Labor, the latest time keeps the exemption in place through January, 2015. As such, the Honorable Court should have followed the Supreme Court's 2007 decision in Coke supported by the Department of Labor's 2015 extension and negated Plaintiffs-

Appellees' claims for unpaid overtime.

It is clear that Defendants-Appellants' license to operate a home health care agency was duly granted under Article 36. Similarly, all Plaintiffs-Appellees obtained their certification through the same Article 36 of the New York State Public Health Law. As set forth more at length above, Plaintiffs-Appellees were required to follow the guidelines of Article 36. As such, and following the parallel example in the Coke case, Plaintiffs-Appellees are properly exempt from any over time claims.

As an example, Plaintiff-Appellee Willie Evans a complaint with the New York State Department of Labor for overtime compensation in 2007, claiming that he had worked more than a 40 hour week for Defendants-Appellants, and as such should have received over time compensation. New York State Department of Labor disagreed (R 723).

Now, the same Plaintiff-Appellee Willie Evans is being allowed a second claim for the same overtime wages he was previously denied. Plaintiff-Appellee Willie Evans second chance at the same relief violates the principles of claim preclusion and *res judicata* and provides a further distinction between the class members and it is respectfully submitted, an additional error enforced improperly by the Honorable Court.

CONCLUSION

The companionship services exception promotes the availability of companionship services. Congress did not intend to place a heavy burden on working adults who are responsible for elderly or infirm relatives and who would be unable to afford home care services if overtime wages, not subject to reimbursement by Medicaid, was a mandate.

Congress was mindful of the special problems of working fathers, mothers and children who need a person to care for an elderly invalid in their home. Congress ultimately determined the exemption was necessary to avoid making domestic companionship services unaffordable to working-class adults, who would then be required to care for their elderly or invalid family members on their own time and thus be unable to maintain employment themselves.

The fear was that FLSA coverage of home care services would force families to resort to the services of a nursing home. While the Department of Labor initially proposed to limit the exception to employers not otherwise covered by the FLSA, both the 1974 proposal and the regulation adopted in 1975 created a class of domestic service employees who were not subject to the FLSA if they were providing home care services.

The economic impact of applying the FLSA to home care services also persuaded the Department of Labor to abandon its 2001 proposal

to deny the companionship exemption to third-party employers altogether. Multiple government agencies such as the Small Business Administration and the Department of Health and Human Services seriously called into question any conclusion that the proposed removal of the exemption would have little economic impact. Such considerations were central to the Department of Labor's conclusions and they must be seriously persuasive to the court system.

To the extent that these concerns apply to families caring for their elderly or infirm, they also necessarily apply to the elderly and infirm themselves. If the elderly or infirm who are likely on fixed or otherwise limited incomes, can obtain home care services by their own means, then this would further reduce the burdens on their families.

For all of the aforesaid reasons it is respectfully submitted that this Honorable Court reverse the Decisions-Orders appealed from and remand the within action back to the District Court for trial.

Respectfully submitted,

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