

## Home Health: Court Sees Aides As Agency's Employees, Not Clients' Employees.

The Court of Appeals of Arkansas, in an opinion that has not been designated for publication, ruled a state agency was correct in holding a home health agency liable for unemployment taxes on the wages of home health aides placed in the agency's clients' homes.

That is, the aides were ruled to be employees of the home health agency, not employees of the clients.

The home health agency required its aides to sign an agreement that they were independent contractors, did not withhold income taxes from their wages and did not pay unemployment taxes. The home health agency simply took a \$2 per hour fee for every hour the aides worked in its clients' homes on top of the \$6 to \$10 per hour the aides were paid.

The court found this evidence unpersuasive, and ruled the aides nevertheless were agency employees rather than independent contractors.

### Right of Control

The first test for the existence of an employment relationship is who has the right of control over the worker in carrying out work tasks.

In this case the home health agency accepted and disbursed Medicaid funds and had another firm's nurses evaluate clients clinically, write care plans and supervise the aides in carrying out the care plans. However, the court ruled, the home health agency had ultimate legal responsibility for control over how the work was carried out by the aides.

The aides were not free from control and direction in carrying out the work as true independent contractors would be.

### Usual Course of Employer's Business

The court also pointed out the aides were performing services within the usual course of the business of the home health agency, a legal indication they are employees rather than outside contractors.

### No Independent Trade or Business

Finally, the court noted that the aides were not engaged in an established independent trade, occupation, profession or business, which also tends to prove they are employees rather than independent contractors. Superior Senior Care, Inc. v. Director of Employment Security, 2002 WL 31518302 (Ark. App., November 13, 2002).

## Restraints: Court Throws Out Nurse's Testimony, Had No Specific Expertise In Use Of Restraints.

A patient sued the hospital after she broke her hip. She fell while trying to work her way out of a belt restraint and get out of bed in a state of confusion.

The patient died from unrelated causes before the suit came to trial and the lawsuit was continued by the personal representative of her probate estate on behalf of her family who stood to inherit the assets of her estate.

The Supreme Court of Alabama upheld the trial court's decision to dismiss the case for lack of evidence.

The evidence was lacking because the trial court threw out the testimony of the nursing expert the patient's personal representative's attorneys retained for the case. The court ruled she did not have sufficient qualifications.

***The patient's nursing expert is not qualified to testify in this case.***

***She is on the staff at the university's nursing school, but she has not worked in a hospital for more than twenty years, has not worked anywhere as a nurse in eight years, has never researched or written about restraints and has never used the belt restraint at issue in this case.***

SUPREME COURT OF ALABAMA  
November 27, 2002

### Specific Expertise Was Lacking

To testify as an expert in a health-care negligence case a witness must have expertise in the same professional discipline and experience in the same care setting as the defendant on trial. Nurses are generally recognized as expert witnesses when nursing negligence is the issue.

However, in this case the specific question was whether the patient was properly restrained. The court wanted an expert with specific knowledge as well as specific experience in the use of restraints with geriatric acute-care hospital patients. The plaintiff's witness had no such knowledge or experience and was ruled ineligible to testify as an expert. Tuck v. Healthcare Authority of the City of Huntsville, \_\_ So. 2d \_\_, 2002 WL 31663594 (Ala., November 27, 2002).