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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DEPARTMENT OF LABOR, Defendant Below-Appellant, v. TEXAS ROADHOUSE MANAGEMENT CORP., TEXAS ROADHOUSE HOLDINGS LLC and TEXAS ROADHOUSE, INC., Plaintiffs Below-Appellees.	)	No. 166, 2017 APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N15C-08-215-CLS

APPELLANT'S REPLY BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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I. TEXAS ROADHOUSE WAS NOT LAWFULLY ENTITLED TO TAKE A TIP CREDIT

A. The Appellee Is Not Authorized to Take a Tip Credit

The Answering Brief of the Appellee underscores the main issue plaguing this litigation, which is a conflation of the difference between "direct service employees" under 19 *Del. C.* § 902(d)(2) and "primary direct service employees" under 19 *Del. C.* § 902(c)(3).

A review of the statutory provisions shows that a "primary direct service employee" is considered to be the recipient of the gratuity under 19 *Del. C.* § 902(c)(3) – and that they are also the employee "who in a given situation performs the main direct service for a customer." 19 *Del. C.* § 902(c)(2) defines "gratuities" as "monetary contributions received directly or indirectly by an employee from a guest, patron or customer for services rendered." It does not include funds received from an employer through a tip pool, for the simple reason that the employer is not intended to access or control funds in the tip pool – nor are those funds the employer's to allocate.

19 *Del. C.* § 902(b) defines the types of employees who may be paid less than the minimum wage of $8.25 per hour.[1] It restricts this to "employees engaged in occupations in which gratuities customarily constitute part of the remuneration."

[1] The minimum wage is found at 19 *Del. C.* § 902(a)(2).

If an employer may arbitrarily commit any category of employee to the narrow exception of 19 *Del. C.* § 902(b) by including them in a tip pool and naming them a category of employee who "customarily" receives such gratuities, then 19 *Del. C.* § 902(c)(2) and 19 *Del. C.* § 902(c)(3) are dead letter. When a customer enters a restaurant, 19 *Del. C.* § 902(c)(3) indicates that if they leave one tip it is intended to be for the employee who performed "the main direct service"- typically a server or bartender, as the case may be. If the customer left individual tips for each employee who helped them with discrete portions of their dining experience- for example, handing money to the host as they were seated, or handing money to the food expediter as food was delivered- those employees would be "primary direct service employees" with respect to such gratuities, since the gratuities were directly provided to them for their services.

Nothing in the Stipulation of Facts addresses such situations, because even TRMC tacitly concedes that the norm is for a customer to leave one gratuity. Under 19 *Del. C.* § 902(c)(3), that gratuity's intended recipient would be the server, not the assortment of other employees who may assist the server in providing a satisfactory dining experience to the customer. Even the Superior Court decision conceded this, noting, "[T]he hosts may not be the primary direct service employee who receives the gratuity from the customer."[2] The Superior Court thus conceded the DDOL was

[2] Appellant Opening Brief, Exhibit A, p. 26.

correct in the central issue regarding the gratuity statute, while ruling in favor of TRMC because of the legality of the tip pool.

B. Tip Pooling Does Not Permit Texas Roadhouse to Take Tip Credits

The tip pool issue is a red herring. The Department of Labor does not dispute that an employer can obligate employees to pool tips under 19 *Del. C.* § 902(d)(2) so that a primary direct service employee pays a portion of the gratuities they receive to those who assisted them in earning the tips. The DDOL does not dispute that direct service employees such as hosts may be included within the tip pool. What the DDOL does dispute is that the employer can derive financial benefit from this arrangement by offsetting its minimum wage requirement against all tip pool participants. There is no statutory authority for that contention and 19 *Del. C.* § 902(d)(2) itself appears to forbid this practice when it says, "The employer shall not, under any circumstances, receive any portion of the gratuities received by the employees." TRMC would ask the Court to hold that an offset of its minimum wage obligation is not "receiv[ing] any portion of the gratuities." The DDOL views this as an abuse of the tip pool statute and as contrary to the goal of the tip pool itself, which is to benefit the workers- not force primary direct service employees to shoulder the statutory burden of the employer.

C. Hosts Are Not Primary Direct Service Employees

TRMC conflates providing direct service to a customer in one situation with being the primary direct service employee for the overall dining experience. A host will indeed provide "direct, personal service" to a customer during a number of situations described in the Stipulation of Facts. That does not equate to the host being the "primary direct service employee" within the meaning of 19 *Del. C.* § 902(c)(3), which would be required for TRMC to deduct a tip credit from the host's minimum wage. The host does not perform "the main direct service for a customer" within the overall context of their visit to TRMC. The Stipulation of Facts makes this clear:

> After guests are seated, a server is primarily responsible for taking food and drink orders; entering those orders into the restaurant's computer system; delivering food and drink orders to the table; following up on additional guest requests (refills of beverages, dessert orders, etc.); removing tableware as guests finish their meals (commonly known as "prebussing"); and collecting payment at the table.[3]

TRMC cannot plausibly deny that this constitutes the bulk of the dining experience. Even in the shortest of dining experiences, a customer will spend far more time seated at the table than they will spend being escorted to the table. The money is left for the primary employee the customer encounters- the server. Nothing

[3] A-18, ¶12.

in the TRMC Answering Brief provides any basis to assume that when a customer leaves a gratuity behind for the server they intend for it to be directed to the host, busser, dishwasher, or anyone other than the recipient of the gratuity- the server.

TRMC argues at length that its employees are subject to 19 *Del. C.* § 902(b) because it has placed them in the tip pool and subjected tip pool employees to 19 *Del. C.* § 902(b). This is an unacceptable argument because it imposes no limits upon which employees may be included in a tip pool (and thereby subjected to a tip credit) beyond what an employer would choose to impose upon it. The "slippery slope" conceded by the Superior Court is a reality. Should the Superior Court decision stand, then an employer could place dishwashers and line cooks in the tip pool; then, six months later, when the DDOL became aware of this practice, the employer could claim that these were employees for whom gratuities "customarily constitute part of the remuneration." The position adopted by Superior Court and TRMC imposes no limit on this. Every employee in the restaurant could conceivably be eligible for an employer's tip credit. So long as a server did not fall below the hourly minimum wage under 19 *Del. C.* § 902, their gratuity could be devoted to paying the minimum wage obligations of the entire restaurant. Such an outcome is inimical to the purpose of the Minmum Wage Law ("MWL") and the language of the statute, which tightly defines the narrow exceptions which TRMC construes so broadly.

The DDOL is cognizant of the fact that all TRMC employees receive the statutory minimum wage. That misses the point that neither TRMC nor any other Delaware employer should be permitted to divert funds from primary direct service employees in its tip pool (servers and possibly bartenders) to pay its statutory minimum wage obligations. If a bartender at another employer's restaurant with a similar tip pooling scheme earned $20 an hour in tips, should that bartender be obligated to lose over $11.00 an hour of their money because the employer included them in a front-of-the-house tip pool with hosts who do not even seat people at the bar? Principles of equity dictate against such an outcome as much as principles of statutory construction; but such a scenario would be legal under the Superior Court's Opinion in this matter.

D. Attorney General Opinions and Federal Case Law

TRMC's Answering Brief refers to an Attorney General Opinion from 1972 as an "authoritative statement" on the issue of tip-pooling.[4] This characterization is misplaced. An opinion of the Attorney General "is advisory and not binding on those to whom it is given."[5] The Court reads them as it reads "other authorities."[6] Neither the Court nor the DDOL are bound by a forty-five-year-old Attorney

[4] Docket Index ("D.I.") 21, pg 22, ¶ 2.
[5] *Sullivan v. Local Union 1726 of AFSCME, AFL-CIO*, 464 A.2d 899, 901 fn. 3 (Del. 1983).
[6] *State ex rel Davis v. Wooley*, 9 Terry 34, 44 (Del. 1953).

General Opinion. Indeed, since the underlying Justice of the Peace Court action was filed by the Office of the Attorney General, not even the Delaware Department of Justice views this Opinion as binding on the issue at hand. The Court could just as easily disregard the Opinion and extend tip pool protections to bussers as well as hosts as lend it persuasive credence.

TRMC also relies upon federal case law to support its position. As the DDOL has already argued at length, federal case law has no relevance to the issue at hand. The Fair Labor Standards Act ("FLSA")[7] is a very different statute from the Minimum Wage Law, and the President and United States Congress may have very different enforcement goals than the General Assembly and the Delaware Governor. One of the errors the DDOL has already noted in the Superior Court's decision is that it lends more weight to federal cases and guidance from the United States Department of Labor than it does to the interpretation of the Delaware Department of Labor.[8] None of this jurisprudence or guidance addresses the Delaware statute, which addresses unique concerns of Delawareans receiving a minimum rate of pay enacted into Delaware law by officials who have yet to be replaced by candidates vowing its repeal. The popular will of the Delaware public is a different phenomenon from the popular will of the general American public. TRMC and the

[7] 29 U.S.C. §§ 201 *et seq*.
[8] D.I. 20, pp. 25-26.

Superior Court err by conflating them. If Delaware's General Assembly intended to shackle the enforcement mechanisms and protections of its minimum wage law to the capricious interpretations of the Obama Administration or the Trump Administration (as TRMC suggests by repeated reliance upon federal case law to determine the interpretation of a state statute), then the statute would indicate this.

Because TRMC is only permitted to deduct a "tip credit" from the primary direct service employee, and because the only primary direct service employees at issue in this litigation are the servers, the MWL makes clear that TRMC cannot deduct a tip credit from the hosts by including them in the tip pool.

II. NO PRINCIPLE OF STATUTORY CONSTRUCTION WOULD PERMIT TEXAS ROADHOUSE TO ARBITRARILY ASSUME THE RIGHT TO APPLY A TIP CREDIT TO NON-TIPPED EMPLOYEES

TRMC casts a number of aspersions on the DDOL for enforcing a law to protect Delaware workers. TRMC cannot obscure the fact that it derives unlawful financial benefit from its employees by diverting gratuities from servers to offset its minimum wage obligations to hosts.

A statute establishing minimum wage law is remedial by its nature. The Superior Court made this determination in *Rays Plumbing & Heating Service, Inc. v. Stover Homes, L.L.C.*:

> In *Callaway [v. N.B. Downing Co.]*, the question presented was whether the state's minimum wage law provides an implied private right of action for employees against employers who paid them less than the minimum wage. As with the polygraph statute, the minimum wage law did not expressly address civil actions. It simply made it illegal to pay less than the minimum wage and set criminal penalties for violations.
>
> Yet, the court was persuaded by the reasoning of sister-state high courts that had decided that **similar minimum wage statutes had a dual purpose of punishing offenders and assuring employees of a minimum wage**. It further determined that **the statute's remedial purpose** creates what is effectively a right to a minimum wage.[9]

[9] *Rays Plumbing & Heating Service, Inc. v. Stover Homes, L.L.C.*, 2011 WL 3329384 at *3 (Del. Super. July 26, 2011) (internal citations omitted). Despite a diligent search, counsel for the Appellant is unable to locate a Supreme Court case addressing this precise legal issue.

This references and interprets another case which TRMC contends is inapplicable to the determination at issue, *Callaway v. N.B. Downing Co*.[10] That case examined prevailing wage laws (a subset of minimum wage laws) and found,

> [I]t is generally recognized that [minimum wage] laws are enacted to serve a dual purpose, i. e., to assure the employee that the required minimum wage will be paid, and to penalize the employer who fails to pay such wage… The statute, it will be seen, has a twofold purpose. One is to secure to the individual workman a minimum living wage, fixed by law, and the other is to penalize the employer who fails to pay the wage.[11]

So minimum wage laws are remedial statutes. And under Delaware precedent, remedial statutes are liberally construed to effectuate their purpose.[12]

TRMC states that the Superior Court found the statute unambiguous in its favor.[13] That is not accurate. The Superior Court Opinion does not clarify this issue well. That Opinion first holds the statutory language unambiguous in that the statute does not indicate the customer "determines the tip standard under Section 902."[14] The Superior Court evidently found it irrelevant to whom the customer intended for the tip to be directed, despite the clear language to that effect contained within 19 *Del. C.* § 902(c)(3). The Superior Court's Opinion also misconstrued 19 *Del. C.* §

[10] 53 Del. 493 (Del. Super. 1961).
[11] *Id*. at 498.
[12] *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256 (Del. 2011).
[13] D.I. 24 at 33-34.
[14] Exhibit A at p. 10.

902(c)(3) by using it to blur the definition between "primary direct service employees" and "direct service employees."[15] The Superior Court then asked the DDOL to issue regulations to clarify definition that are "hazy."[16] To the extent ambiguity existed in the statute, the Superior Court Opinion created it.

An example of why the DDOL's interpretation is correct is contained in 19 *Del. C.* § 902(c)(4), which addresses mandatory service charges. The General Assembly was able to draft a statute that divided the value of a gratuity between a primary direct service employee and an employer when it chose to do so. There is no ambiguity in the statutory provisions at issue. The gratuities are the property of the servers, not an optional account for TRMC to access for payment of its minimum wage obligations.

[15] *Id*. at p. 25.
[16] *Id*. at p. 27.

III. THE SUPERIOR COURT ERRED BY APPLYING NON-ANALOGOUS CASE LAW AND NON-ANALOGOUS SITUATIONS TO THE ISSUE AT HAND

This issue has already been discussed at length *supra*. It is error for a Delaware Superior Court to accord greater deference on an issue of interpreting Delaware law to federal authorities than to state authorities. While "Delaware courts do not accord agency interpretations of the statutes which they administer so-called *Chevron* deference," administrative "conclusions of law are reviewed on a *de novo* basis, but with a deferential bent, which recognizes the expertise of the [agency] in adjudicating disputes in [that] field...."[17]

In this case, the agency enforcing the MWL has made a determination that the statute applies to employers using tip pools to derive tip credits against employees other than primary direct service employees. The issue was presented to the Delaware Department of Justice, which reviewed this interpretation and filed a claim in Justice of the Peace Court in accordance with the requirements of 19 *Del. C.* § 903 and 29 *Del. C.* § 2504(3). The interpretations of a Delaware statute applied by agencies tasked with enforcing that statute deserve greater deference than that accorded to Sixth Circuit FLSA case law or a U.S. Department of Labor handbook interpreting federal law.

[17] *Camtech Sch. of Nursing and Technological Sciences v. Delaware Bd. of Nursing*, 2014 WL 604980 at *6 (Del.Super. Jan. 31, 2014) (internal citations omitted).

IV. THE SUPERIOR COURT DECISION ERRED BY DEMANDING THAT THE DDOL PROMULGATE REGULATIONS TO ENFORCE THE TIP POOL PORTIONS OF THE MINIMUM WAGE LAW

The Appellant is confused by the Appellee's position with respect to this issue. The Superior Court's Opinion speaks for itself. The Superior Court said: "If the definitions [in the Minimum Wage Law] are hazy, it is the [DDOL's] responsibility to provide regulations that define which employees are included in the tip pool. The Court's function is to interpret the law, not promulgate."[18] The Superior Court directed the DDOL to promulgate regulations to define which employees are included in the tip pool before the DDOL's position could be enforceable. Leaving aside the interesting separation of powers issues that allowing an agency to overturn a Superior Court decision by promulgating regulations would create (which may arise from the expansive authority of 19 *Del. C.* § 904 itself), this is an untenable position in which to place an agency. The agency seeks to enforce a statute. The statutory language is broadly remedial but there is a narrowly-drawn exception to it. The DDOL is expected to anticipate that someday a Superior Court judge will decide to take the narrow exception to the Minimum Wage Law for primary direct service employees and expand it to encompass any category of employees an employer may choose to allocate to direct contact with employees.

[18] *Id*.

The DDOL is then expected to believe that such a Superior Court judge would not invalidate such regulations, as well.

CONCLUSION

For the foregoing reasons, the DDOL respectfully requests that the Court reverse the Decision of the Superior Court in the above-referenced matter.

RESPECTFULLY SUBMITTED,

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