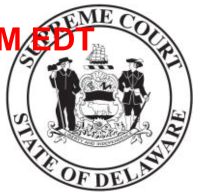
EFiled: Jul 31 2017 02:39PM EDT
Filing ID 60916777
Case Number 166,2017



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S CORRECTED OPENING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Oliver J. Cleary
Oliver J. Cleary (#5830)
Deputy Attorney General
820 N. French St., 6th Floor
Wilmington, DE 19801
(302) 577-8400
Counsel for Appellant
Oliver.Cleary@state.de.us

DATED: July 31, 2017

TABLE OF CONTENTS

TABLE OF CITATIONS iii

PRELIMINARY STATEMENT 1

NATURE OF PROCEEDINGS 3

SUMMARY OF ARGUMENT 5

STATEMENT OF FACTS 6

ARGUMENT 9

I. THE SUPERIOR COURT COMMITTED LEGAL ERROR IN INTERPRETING THE MINIMUM WAGE LAW 9

A. Question Presented 9

B. Scope of Review 9

C. Merits of Argument 10

1. General tenets of statutory construction 10

2. The Minimum Wage Law's provisions 10

3. The Minimum Wage Law prevents employers from diverting any portion of gratuities from Primary Direct Service Employees 12

II. THE MINIMUM WAGE LAW IS A REMEDIAL STATUTE, WHICH MUST BE INTERPRETED BROADLY IN ORDER TO ACHIEVE ITS ENDS 18

A. Question Presented 18

B. Scope of Review 18

C. Merits of Argument 18

1. The Minimum Wage Law is a remedial statute which must be interpreted broadly in order to achieve its ends 18

2. Remedial statutes are designed to enforce restitution to those specifically damaged, not to punish 20

3. Because the Minimum Wage Law is a remedial statute, its exceptions must be construed narrowly 22

III. NEITHER FEDERAL CASE LAW NOR ATTORNEY GENERAL OPINIONS ADDRESSING OLDER VERSIONS OF THE MINIMUM WAGE LAW ARE BINDING ON DELAWARE COURTS INTERPRETING THE CURRENT ITERATION OF THE MINIMUM WAGE LAW 25

A. Question Presented 25

B. Scope of Review 25

C. Merits of Argument 25

IV. THE DDOL IS NOT OBLIGATED TO IMPLEMENT REGULATIONS BEFORE IT CAN ENFORCE THE MINIMUM WAGE LAW. 29

A. Question Presented 29

B. Scope of Review 29

C. Merits of Argument 29

CONCLUSION 31

TABLE OF CITATIONS

913 North Market St. P'ship, L.P. v. Davis,
1998 WL 986007 (Del. 1998)....9

Abdul-Akbar v. Figliola,
1990 WL 197844 (Del. 1990)....9

Am. Fed'n of State v. State Dept. of Health & Social Services,
61 A.23d 620 (Del. Ch. 2012)....26

In re Asbestos Litig.,
673 A.2d 159 (Del. 1996)....9

Callaway v. N.B. Downing Co.,
53 Del. 493 (Del. Super. Ct. 1961)....22

Chase Alexa, LLC v. Kent County Levy Court,
991 A.2d 1148 (Del. 2010)....10

Chhab v. Darden Restaurants, Inc.,
2013 WL 5308004 (S.D.N.Y. Sept. 20, 2013)....26

Cordero v. Gulfstream Dev. Corp.,
56 A.3d 1030 (Del. 2012)....10, 16, 20

Council 81, Am. Fed'n of State, County & Mun. Employees v. State, Dept. of Finance,
288 A.2d 453 (Del. Ch. 1972)....26

Delaney v. Geisha NYC, LLC,
261 F.R.D. 55 (S.D.N.Y. Sept. 22, 2009)....26

Delaware State Univ. v. Delaware State Univ. Chapter of Am. Ass'n of Univ. Professors,
2000 WL 33521111 (Del. Ch. May 16, 2000)....26

Dep't of Labor ex rel. Commons v. Green Giant Co.,
394 A.2d 753 (Del. Super. Ct. 1978)....10

Holland v. Zarif, M.D.,
794 A.2d 1254 (Del. Ch. 2002) 19

Kilgore v. Outback Steakhouse of Fl., Inc.,
160 F.3d 294 (6th Cir. 1998). 27

Montano v. Montrose Rest. Assocs., Inc.,
800 F.3d 186 (5th Cir. 2015) 27

Rays Plumbing & Heating Serv., Inc. v. Stover Homes, L.L.C.,
2011 WL 3329384 (Del. Super. Ct. July 26, 2011).......................................18

Sheehan v. Oblates of St. Francis de Sales,
15 A.3d 1247 (Del. 2011) 9, 18

State ex rel. Davis v. Woolley,
97 A.2d 239 (Del. 1953) 26

Statutes and Other Authorities

29 U.S.C. §§ 201 *et seq*...26

19 *Del. C.* § 901 ....1, 8

19 *Del. C.* § 902 ....*passim*

19 *Del. C.* § 903(a)..25

19 *Del. C.* § 904 30

19 *Del. C.* § 910(a)..21

19 *Del. C.* § 911 21

19 *Del. C.* § 912 21

82 C.J.S. *Statutes*, § 523 (2017)...19, 22

82 C.J.S. *Statutes*, § 529 (2017)..21

PRELIMINARY STATEMENT

This case presents a simple question that both the Texas Roadhouse Appellees[1] and the Superior Court have made needlessly complex: Can a restaurant circumvent the Minimum Wage Law[2] by designating its hosts as employees included in a "tip pool" accumulated from tips that restaurant customers pay to their server?[3] If it can, then TRMC does not have to pay its hosts the state-mandated minimum wage, but only has to pay them the tip credit percentage of the minimum wage (which can be substantially less than the minimum wage).[4] It also means that TRMC is allowed to foist its obligation on its "primary direct service employees"[5] – the servers.

Under TRMC's and the Superior Court's construction of the Minimum Wage Law, a restaurant could designate employees with only fleeting customer interactions as "direct service employees" eligible for the tip pool and fail to pay them the minimum wage because the "primary direct service employees" will make it up to them out of their tips. The only way the Superior Court could reach this

---

[1] These are Texas Roadhouse Management Corp., Texas Roadhouse Holdings LLC and Texas Roadhouse, Inc. Texas Roadhouse Management Corp. is the entity operating the restaurant; however, this brief refers to them collectively as "TRMC" for ease of reference.

[2] 19 *Del. C.* §§ 901 *et seq.*

[3] 19 *Del. C.* § 902(d)(2).

[4] *Id.* § 902(b).

[5] *Id.* § 902(c)(3).

result is to interpret the Minimum Wage Law narrowly and the tip pool exception broadly. That result is absurd and fails to effect the General Assembly's intent. The Minimum Wage Law is a remedial statute, and as such is to be interpreted broadly to effect its goals; any exceptions are to be interpreted narrowly. The Delaware Department of Labor ("DDOL") respectfully requests this Court to find that the Superior Court committed legal error in interpreting the Minimum Wage Law, and to reverse the Court's decision.

NATURE OF PROCEEDINGS

The DDOL filed the first case against TRMC in Justice of the Peace Court 13 ("J.P. Court")[6] seeking a finding that TRMC had violated the Minimum Wage Law and that it therefore owed money to some of its employees. While the J.P. Court litigation was pending, TRMC filed a complaint in the Superior Court [7] seeking a declaration "that hosts at [TRMC] are direct service employees who may participate in a tip pool and for whom [TRMC] may take a tip credit pursuant to 19 *Del. C.* § 902; that DOL shall take no further administrative or enforcement action against TRMC inconsistent with such declaratory judgment; and for such other relief as the Court may deem just and proper."[8]

The J.P. Court litigation proceeded to trial. That Court issued an order finding that TRMC had violated the Minimum Wage Law by using the tip pool to offset its obligation to pay its hosts the minimum wage, and granted judgment to the DDOL.[9]

TRMC appealed the J.P. Court Order to the Court of Common Pleas,[10] but the parties agreed to stay that proceeding in favor of the complaint proceeding filed in the Superior Court.

[6] Case Number JP13-15-006055.
[7] Appendix Entry A-39.
[8] A-47.
[9] A-48.
[10] Case No. CPU4-16-000661.

The Superior Court entered a scheduling order, pursuant to which both parties briefed cross-motions for summary judgment. The Court heard oral argument on December 6, 2016.[11] On March 30, 2017, the Superior Court granted TRMC's Motion for Summary Judgment and denied the DDOL's Motion for Summary Judgment.[12]

This is the DDOL's Opening Brief on appeal.

[11] A-221.
[12] Exhibits A and B.

SUMMARY OF ARGUMENT

I. The Superior Court erred in finding that Texas Roadhouse can treats hosts as primary direct service employees through the expedient of placing them in the tip pool.

II. The relevant statutory exception to the Minimum Wage Law's requirements should be construed narrowly against the employer to effectuate the remedial purposes of the statute.

III. The Superior Court erred in finding that federal law is antithetical to the DDOL's position and that it supersedes the validity of DDOL's position.

IV. The DDOL is not obligated to implement regulations before it can enforce the Minimum Wage Law.

STATEMENT OF FACTS

The factual issues in this case were largely resolved through stipulation as follows.[13]

Texas Roadhouse, Inc., through its subsidiary TRMC, owns and operates casual dining restaurants, including a restaurant in Middletown, Delaware (the "Middletown Restaurant"). TRMC employs individuals in various "front of house" positions, including bartenders, servers, server assistants, and hosts. It also employs individuals in various "back of house" positions, including cooks, expediters ("expo"), and dish machine operators.

A. The Hosts' Work Duties

Hosts are typically the first point of contact for guests entering the restaurant. A host greets each guest and, if there is a wait, takes the guest's name and provides an estimate of the wait time. When a table is available, a host leads guests to their table.

On the way to the table, the host inquires whether the guests are first-time or returning guests. The host welcomes returning guests, and for first-time guests shares the "Texas Roadhouse Story," which includes a brief overview of the company and a description of popular menu items. The host leads guests past a

---

[13] The stipulated facts have been identical throughout every stage of this litigation. They are included at A-16 through A-19.

display case, pointing out featured cuts of steak. Additionally, the host picks up a basket of bread and butter, which he or she places on the table as the guests are being seated. The host provides menus to guests. Finally, depending on guest preference and the assigned server's availability, the host may take and deliver drink orders and address other guest requests.

As hosts walk through the dining area, they assist with refilling beverages and bread and pre-bussing tableware. They may also run food to tables if needed.

After guests are seated, a server assumes the primary responsibility for taking food and drink orders; entering those orders into the restaurant's computer system; delivering food and drink orders; following up on additional guest requests (beverage refills, dessert orders, etc.); removing tableware as guests finish their meals ("pre-bussing"); and collecting payment at the table.

B. How TRMC Compensated Its Hosts

TRMC guests are free to determine whether to leave a tip and, if so, the amount of the tip.

From December 17, 2014 through February 24, 2015, the Delaware minimum wage was $7.75 per hour. During this same period, TRMC paid its hosts $4.00 per hour less than the state-mandated minimum wage. The hosts also received tips from

a tip[14] pool created by contributions from servers. During this time, the hosts customarily and regularly received more than $30 per month in tips from the tip pool – because, as a result of TRMC's designation of hosts for tip pool participation, TRMC's servers assumed responsibility for paying at least part of the minimum wage due to the hosts.

C. Alleged Damages

From December 17, 2014 through February 24, 2015, the Middletown Restaurant employed three individuals as hosts. During that time, these employees collectively worked 356.38 hours. The parties agree that if additional wages are due, the total amount is $1,336.43.[15]

[14] For purposes of this brief, the terms "tip" and "tips" have the same meaning as "gratuities" as defined in 19 *Del. C.* §§ 901(5) and 902.
[15] 356.38 hours times $3.75 per hour.

ARGUMENT

I. THE SUPERIOR COURT COMMITTED LEGAL ERROR IN INTERPRETING THE MINIMUM WAGE LAW

A. Question Presented

Did the Superior Court commit legal error in interpreting the Minimum Wage Law as a penal statute and construing it narrowly?[16]

B. Scope of Review

Appeals from grants of summary judgment are reviewed *de novo,*[17] applying the same standards. This Court will determine whether the party for whom judgment was granted demonstrated both the absence of a material issue of fact and entitlement to judgment as a matter of law, and will resolve any doubt concerning the existence of a factual dispute in favor of the non-movant.[18] Where no factual dispute exists, the Court will determine whether the decision below was correct as a matter of law.[19] The Superior Court's interpretation of a statute is a question of law, which the Supreme Court reviews *de novo*.[20]

---

[16] A-221.

[17] *In re Asbestos Litig.*, 673 A.2d 159, 161 (Del. 1996) (internal citations omitted).

[18] *913 North Market St. P'ship, L.P. v. Davis*, 1998 WL 986007 at *2 (Del. 1998) (internal citations omitted).

[19] *Abdul-Akbar v. Figliola*, 1990 WL 197844 at *1 (Del. 1990) (internal citations omitted).

[20] *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1256 (Del. 2011).

C. Merits of Argument

1. General tenets of statutory construction.

In interpreting statutes, this Court "ascertain[s] and give[s] effect to the intent of the legislature."[21] Statutes should be construed to produce a harmonious whole if reasonably possible.[22] In determining the meaning and effect to be given to a legislative enactment, it will be presumed that the legislature intended its statute to be effective and operative and the Court will seek means to effectuate the purpose.[23] Finally, it is well-recognized that the creation of a new duty or obligation carries with it by implication a corresponding remedy.[24] When construing a statute, the Court must "give effect to the whole statute, and leave no part superfluous."[25] Finally, the Court will avoid interpretations that produce an absurd result.[26]

2. The Minimum Wage Law's provisions

This appeal involves the interpretation of Sections 902(a)-(d) of the Minimum Wage Law.[27] They provide as follows:

---

[21] *Cordero v. Gulfstream Dev. Corp.*, 56 A.3d 1030, 1035-36 (Del. 2012) (internal citations omitted).
[22] *Dep't of Labor ex rel. Commons v. Green Giant Co.*, 394 A.2d 753, 757 (Del. Super. Ct. 1978) (*citing Hamilton v. Trivits*, 340 A.2d 178 (Del. Super. Ct. 1975)).
[23] *Green Giant Co.*, 394 A.2d 753, 757 (Del. Super. Ct. 1978) (citations omitted).
[24] *Id.* (citations omitted).
[25] *Cordero*, 56 A.3d at 1036 (internal citations omitted).
[26] *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1152 (Del. 2010).
[27] 19 *Del. C.* §§ 902(a)-(d).

(a) Except as may otherwise be provided under this chapter, every employer shall pay to every employee in any occupation wages of a rate:

(1) Not less than $7.75 per hour effective June 1, 2014; and

(2) Not less than $8.25 per hour effective June 1, 2015.

(b) Gratuities received by employees engaged in occupations in which gratuities customarily constitute part of the remuneration may be considered wages for purposes of this chapter in an amount equal to the tip credit percentage, as set by the federal government as of June 15, 2006, of the minimum rate as set forth in subsection (a) of this section. In no event shall the minimum rate, under this subsection, be less than $2.23 per hour.

(c) (2) “Gratuities” means monetary contributions received directly or indirectly by an employee from a guest, patron or customer for services rendered where the customer is entirely free to determine whether to make any payment at all and, if so, the amount.

(c) (3) A “primary direct service employee” is one who in a given situation performs the main direct service for a customer and is to be considered the recipient of the gratuity.

(d) (1) Any gratuity received by an employee, indicated on any receipt as a gratuity, or deposited in or about a place of business for direct services by an employee is the sole property of the primary direct service employee and may not be taken or retained by the employer except as required by state or federal law.

(d) (2)Employees may establish a system for the sharing or pooling of gratuities among direct service employees, provided that the employer shall not in any fashion require or coerce employees to agree upon such a system. Where

> more than 1 direct service employee provides personal service to the same customer from whom gratuities are received, the employer may require that such employees establish a tip pooling or sharing system not to exceed 15% of the primary direct service employee's gratuities. The employer shall not, under any circumstances, receive any portion of the gratuities received by the employees.
>
> (d) (3) The [DDOL] may require the employer to pay restitution if the employer diverts any gratuities in the amount of the gratuities diverted. …

3. The Minimum Wage Law prevents employers from diverting any portion of gratuities from Primary Direct Service Employees.

Section 902(d)(1) of the Minimum Wage Law provides that "[a]ny gratuity received by an employee, indicated on any receipt as a gratuity, or deposited in or about a place of business for direct services rendered by an employee *is the sole property of the primary direct service employee and may not be taken or retained by the employer* except as required by state or federal law."[28] The last sentence of Section 902(d)(2) provides that "[t]he employer shall not, under any circumstances, receive any portion of the gratuities received by the employees."[29] Section 902(c)(3) defines a "primary direct service employee" as "one *who in a given situation* performs the main direct service for a customer and is to be considered the recipient of the gratuity."[30] And a gratuity is defined as "monetary contributions received

[28] *Id.* § 902(d)(1).
[29] *Id.* § 902(d)(2).
[30] *Id.* § 902(c)(3) (emphasis added).

directly or indirectly by an employee from a guest, patron or customer for services rendered where the customer is entirely free to determine to make any payment at all and, if so, how much."[31]

The General Assembly's use of the words "in a given situation" in the definition of "primary direct service employee" indicate that whether a particular position is a "primary direct service employee" is a fact-based inquiry. As the J.P. Court correctly found:

- TRMC presented no evidence that customers would consider hosts/hostesses employees that would receive tips on a regular and customary basis;
- TRMC presented no evidence that the Delaware Code would include the host/hostess position as a *primary* direct service employee and be included in a tip pool; and
- TRMC produced no evidence as to whether the host is the primary service provider category in the customer's viewpoint.

As to the latter point, the J.P. Court opined that "it would be important to the consumer to know how many people receive a portion of their income from the tip given rather than the employee's income being completely derived from the employer."[32]

TRMC produced no evidence that hosts and hostesses are "primary direct service employees" within the meaning of 19 *Del. C.* § 902(c)(3). Hosts and

[31] *Id.* § 902(c)(2).
[32] A-49.

hostesses work in the front of the restaurant and have some interaction with patrons, but that provides no basis for considering them the recipients of the gratuities, which are typically provided at the end of the meal to the server. TRMC produced no evidence that hosts and hostesses receive gratuities directly or indirectly from customers at any stage in the process of going to a Texas Roadhouse restaurant and eating a meal there. Indeed, there is no more basis to assume that customers assign part of their tips to the person who seats them than there is to assume that customers assign part of their tips to the chef who prepares their meal.

The Superior Court concluded that the parties' stipulation that TRMC's hosts "customarily and regularly"[33] received tips took care of the issue of whether hosts provide direct service to customers.[34] But this is circular reasoning. Under the Superior Court's interpretation, TRMC's hosts constituted positions that "customarily and regularly" received tips because *TRMC* designated them as employees that "customarily and regularly" received tips. The Superior Court undertook no analysis of the sort that the J.P Court conducted.

The Superior Court next concluded that:

> the statute does not indicate that the customer determines the tip standard under Section 902. In fact, the statute is unambiguous on this matter. All that is required under 19 *Del. C.* § 902(b) for an employer to apply a tip credit to the employee's hourly rate, and consequently pay the

[33] Exhibit A, p. 10.
[34] *Id.*

> employee less than a minimum wage of $7.75 per hour, is that the individual is "engaged in an occupation in which workers customarily and regularly receive more than $30 per month in tips or gratuities."[35]

Under this flawed interpretation, any employer could require its servers to pay hosts from the tip pool, which would thereby "prove" that they are a category of employee who "customarily and regularly" receive tips within the meaning of 19 *Del. C.* § 902(c)(1). Taken to its logical extreme, it could permit an employer to require direct service employees to include the entire restaurant staff in the tip pool-including bouncers, dishwashers, and managers - and then prohibit any finding of a violation of the statute by simply asserting that these categories of employees "customarily and regularly" receive tips because the employer decided so. The Superior Court's interpretation twists narrowly-crafted statutory exceptions that permit employers to pay less than the minimum wage to servers and establishes when a tip pool may be required into an obligation that those servers use the gratuities they receive (and which comprise a substantial part of their wages) to pay the minimum wage requirements for the entire business. This interpretation produces the absurd result that a remedial statute designed to ensure that employers pay their workers an adequate wage puts the responsibility for paying that adequate

[35] *Id.*

wage on other employees.[36] It eliminates both rights and remedies from a remedial statute.

The Superior Court acknowledged that the customer's perception of which employee receives the gratuity is "relevant as to the identity of the 'primary direct service employee,'"[37] but dismissed this concern because "one does not need to be considered a primary direct service employee to be included in a tip pool."[38] This misses the point. The main issue in this case is whether the Minimum Wage Law allows TRMC to pay its hosts less than minimum wage by diverting gratuities the primary direct service employees receive. The DDOL does not dispute that TRMC can establish a tip pool; it disputes whether that tip pool can inure to the financial benefit of TRMC. Under the Superior Court's interpretation, that tip pool inures to TRMC's benefit because it offsets TRMC's responsibility to pay its hosts the minimum wage.

The Superior Court committed legal error. In enacting the Minimum Wage Law, the General Assembly clearly intended to ensure that employees receive at least the statutory minimum per-hour wage. Employers cannot divert gratuities that its servers receive to a tip pool to offset its own obligations to other employees under

---

[36] *Cordero*, 56 A.3d at 1036 (internal citations omitted): the Court "read[s] statutes by giving [their] language its reasonable and suitable meaning while avoiding patent absurdity."

[37] Exhibit A, p. 10.

[38] Exhibit A, p. 11.

the Minimum Wage Law, and the law does not permit TRMC to force its servers to subsidize its wage obligations to hosts. The Superior Court decision is wrong.

II. THE MINIMUM WAGE LAW IS A REMEDIAL STATUTE, WHICH MUST BE INTERPRETED BROADLY IN ORDER TO ACHIEVE ITS ENDS

A. Question Presented

Did the Superior Court err by holding that the Minimum Wage Law Permits an employer to determine to which of its employees it can pay less than the minimum wage by including them in a tip pool from which the pay differential is drawn?[39]

B. Scope of Review

The Scope of Review is outlined in Section I.B. above.

C. Merits of Argument

1. The Minimum Wage Law is a remedial statute, which must be interpreted broadly in order to achieve its ends.

The Minimum Wage Law is a remedial statute.[40] Under Delaware law, remedial statutes are construed liberally to effect their purpose.[41] The Minimum Wage Law must therefore be interpreted broadly to accomplish its objective of ensuring that employees are properly paid for the hours they work.[42]

---

[39] Exhibit A, pp. 20-23.

[40] *Rays Plumbing & Heating Service, Inc. v. Stover Homes, L.L.C.*, 2011 WL 3329384 at *3 (Del. Super. Ct. July 26, 2011) (*citing Heller v. Dover Warehouse Market, Inc.*, 515 A.2d 178 (Del. Super. Ct. 1986)).

[41] *Sheehan*, 15 A.3d at 1256.

[42] *Holland v. Zarif, M.D.*, 794 A.2d 1254, 1268 (Del. Ch. 2002) (*citing Stop & Shop Cos. v. Gonzales*, 619 A.2d 896, 898 (Del. 1993): "[W]hen a statute may be deemed remedial legislation, the court is required to accord it a broad construction to accommodate the legislative will."). *Holland* addressed a similar statute that the

The Minimum Wage Law contains only two exceptions to the prohibition on employers retaining any portion of gratuities intended for its employees. Section 902(b) allows an employer to consider at least $2.23 of an employee's tips as wages for purposes of the law in certain circumstances.[43] Section 902(d)(2) provides that "[w]here more than 1 direct service employee provides personal service to the same customer from whom gratuities are received, the employer may require that such employees establish a tip pooling or sharing system not to exceed 15% of the primary direct service employee's gratuities."[44] Those exceptions are to be construed narrowly because they are exceptions to a remedial statute.[45]

The Superior Court ignored the Minimum Wage Law's remedial nature. The Superior Court declared "from the plain reading of the statute the employer would… be able to take a tip credit"[46] despite the absence of any statutory indication that an employer could derive financial benefit from requiring a server to provide a portion of gratuities to supporting staff. The Superior Court conflated this statutory provision permitting an employer to obligate a server to share gratuities with support staff (Section 902(d)(2)) with the separate statutory provision that permits an

---

DDPL also implements and enforces – the Wage Payment and Collection Act, 19 *Del. C.* §§1101 *et seq.*

[43] 19 *Del. C.* § 902(b).

[44] *Id.* §902(d)(2).

[45] 82 C.J.S. *Statutes*, § 523 (2017).

[46] Exhibit A, p. 23.

employer to deduct gratuities from its obligation to pay the minimum wage to primary direct service employees (section 902(b)), and created a hybrid exception in which an employer can deduct gratuities from its obligation to pay the minimum wage to non-primary direct service employees.[47] Not only is there no statutory authority for this construct, but it produces a patently absurd result in which a remedial statute benefitting all employees is used to treat servers as surrogate employers at the true employer's discretion.[48]

The Superior Court committed legal error. Its decision should be reversed.

2. Remedial statutes are designed to enforce restitution to those specifically damaged, not to punish.

It is hornbook law that remedial statutes are designed to enforce restitution to those specifically damaged by the statute's violation, and this is so even if the statute also provides for penalties:

> The distinction between a remedial and penal statute lies in the fact that the latter is designed solely to punish, while the former is designed simply to enforce restitution to those specifically damaged. Thus, a test in determining whether a statute is penal is whether the penalty is imposed for the punishment of a wrong to the public, making the statute penal, or for the redress of an injury or loss suffered by the individual, making the statute remedial. Courts will refer to the legislative findings and declaration of purpose

[47] Exhibit A, p. 21.

[48] *Cf. Cordero*, 56 A.3d at 1036 (internal citations omitted): the Court "read[s] statutes by giving [their] language its reasonable and suitable meaning while avoiding patent absurdity."

> of a statute when considering whether it is penal or remedial and look to whether the legislature indicated either expressly or impliedly a preference for one label or the other.
>
> Some courts, in considering whether a statute is penal or remedial, focus on the severity of the penalty itself, and therefore, statutes and regulations imposing forfeitures or providing for sanctions disproportionate to the alleged violations or to the damage done may be found to be penal. The same conclusion may be reached where the extent of liability imposed is not measured or limited by the act or omission.[49]

Even a cursory review of the Minimum Wage Law demonstrates that it is primarily remedial, not penal. Section 902(d)(3) specifically provides that "[t]he Department may require the employer to pay restitution if the employer diverts any gratuities of its employees in the amount of the gratuities diverted."[50] This is a remedy. 19 *Del. C.* § 911 creates a private right of action for aggrieved employees – again, a remedy. Finally, 19 *Del. C.* § 912 provides that any existing standards that are less favorable to employees than those in the Minimum Wage Law are "specifically superseded" by the Minimum Wage Law – a benefit to employees.

Although the Minimum Wage Law provides for $1,000 to $5,000 civil penalties in the event of violations,[51] that does not offset its primarily remedial nature. In a case involving the prevailing wage law (which at the time carried

---

[49] 82 C.J.S. *Statutes* § 529 (2017) (internal citations omitted).
[50] 19 *Del. C.* §902(d)(3).
[51] *Id.* § 910(a).

criminal sanctions such as imprisonment and fines), the Superior Court held that the law was primarily remedial notwithstanding those criminal penalties:

> Though our minimum wage law carries penal sanctions, I feel the General Assembly intended the law to benefit an employee to the extent that he may maintain a cause of action for the difference between the minimum wages required and the lesser actual wage paid. Any different interpretation would present the anomalous situation of the General Assembly establishing a right without a corresponding remedy, for the penal provisions of the law can not be said to provide an injured employee with sufficient redress.[52]

The Minimum Wage Law is remedial, and the Superior Court erred in failing to construe it broadly to achieve the goal of obtaining full compensation for employees. Its decision should be reversed.

3. Because the Minimum Wage Law is a remedial statute, its <u>exceptions must be construed narrowly.</u>

Because the Minimum Wage Law is a remedial statute, any exceptions to it must be interpreted narrowly.[53] The Superior Court erred because it did not construe the Section 902(d)(2) exception for tip pooling narrowly. Instead, it found that 19 *Del. C.* § 902(d)(2) allows TRMC to require primary direct service employees to participate in a tip pool from which it derives financial benefit - an offset from its

---

[52] *Callaway v. N.B. Downing Co.*, 53 Del. 493, 498 (Del. Super. Ct. 1961).

[53] 82 C.J.S. *Statutes*, § 523 (2017) ("Exceptions to or exclusions or exemptions in remedial legislation, however, must be narrowly construed.") (internal citations omitted).

requirement to pay its hosts the full state-mandated minimum wage. This is contrary to the last sentence of 19 *Del. C*. § 902(d)(2): "The employer shall not, under any circumstances, receive any portion of the gratuities received by the employees."[54]

The clear intent of 19 *Del. C*. § 902(d)(2) is that an employer can require servers to share their gratuities with supporting "front of the house" staff. That does not mean that the employer can derive a financial benefit from this sharing. Here, however, TRMC is effectively diverting a portion of those gratuities: because its primary direct service employees are required to contribute to a tip pool in which hosts participate and TRMC pays every employee in the tip pool less than the minimum wage out of its own coffers, TRMC has foisted its responsibility to pay its hosts the full state-mandated minimum wage onto its servers. That is a violation of 19 *Del. C*. § 902(d)(3). Nothing in the statute permits TRMC to divert a portion of these funds to comply with the Minimum Wage Law, but that is the effect of the Superior Court's interpretation.

Section 902(d)(2)'s narrow exception is not designed to reduce the payroll costs of hosts for employers. The customary American practice of tipping wait staff does not extend to hosts. There is no statutory authority for the proposition that a tip pool may be used to benefit the employer in such a manner. In the absence of such statutory authority, the Court should not permit TRMC to circumvent its

---

[54] 19 *Del. C.* § 902(d)(2).

obligations to pay its hosts the minimum wage by foisting that responsibility onto its servers.

III. NEITHER FEDERAL CASE LAW NOR ATTORNEY GENERAL OPINIONS ADDRESSING OLDER VERSIONS OF THE MINIMUM WAGE LAW ARE BINDING ON DELAWARE COURTS INTERPRETING THE CURRENT ITERATION OF THE MINIMUM WAGE LAW

A. Question Presented

Did the Superior Court Err by Offering Greater Deference to Federal Guidance and Attorney General Opinions Addressing Obsolete Versions of the Minimum Wage Law Than to the DDOL?[55]

B. Scope of Review

The Scope of Review is outlined in Section I.B. above.

C. Merits of Argument

The Superior Court relied on federal case law, the federal Department of Labor's Wage and Hour Division Opinion Letters and Handbook, and old Delaware Attorney General Opinions interpreting a former version of the Minimum Wage Law to reach its determination that hosts are entitled to participate in the TRMC tip pool.[56]

The General Assembly has assigned the responsibility for administering and enforcing the Minimum Wage Law to the DDOL.[57] It has not assigned that

[55] Exhibit A pp. 13-17, 19-20.
[56] Exhibit A, pp. 13-17; pp.19-20.
[57] 19 *Del. C.* § 903(a).

responsibility to the federal Department of Labor,[58] nor has it assigned that responsibility to the Attorney General's office.[59] Notwithstanding that federal law may be considered as guidance, "… neither Delaware courts nor the [agency] should blindly follow federal precedent without first examining whether the [federal] practice in question would in fact promote the goals" of the Delaware statute.[60]

If the Court considers federal precedent, what precedent should it consider? The Fair Labor Standards Act[61] "permits the pooling of tips so long as the tip pool includes only 'employees who customarily and regularly receive tips.'"[62] If the tip pool includes employees who do not customarily and regularly receive tips, the employer must pay them the full minimum wage.[63] Federal courts have held that determining whether an employee is one who "customarily and regularly receives"

---

[58] The Chancery Court has held that Delaware courts will turn to federal case law for guidance in construing similar state statutory provisions. *Am. Fed'n of State v. State Dept. of Health & Social Services*, 61 A.3d 620, 628 (Del. Ch. 2012).

[59] This Court has held that Attorney General Opinions are "simply legal opinions." *State ex rel. Davis v. Woolley*, 97 A.2d 239, 244 (Del. 1953); *see also Council 81, Am. Fed'n of State, County & Mun. Employees v. State, Dept. of Finance*, 288 A.2d 453, 455 (Del. Ch. 1972).

[60] *Delaware State Univ. v. Delaware State Univ. Chapter of Am. Ass'n of Univ. Professors*, 2000 WL 33521111 at *12 (Del. Ch. May 16, 2000).

[61] 29 U.S.C. §§ 201 *et seq*.

[62] *Chhab v. Darden Restaurants, Inc.*, 2013 WL 5308004 at *5 (S.D.N.Y. Sept. 20, 2013).

[63] *Delaney v. Geisha NYC, LLC*, 261 F.R.D. 55, 58 (S.D.N.Y. Sept. 22, 2009).

tips is a fact-intensive inquiry that requires a case-by-case analysis of the employee's duties and activities.[64]

The Superior Court relied upon a Sixth Circuit case, *Kilgore v. Outback Steakhouse of Fl., Inc.*,[65] to support its position. The *Kilgore* Court determined that restaurant hosts and hostesses were engaged in an occupation in which they customarily and regularly received tips because they had "more than a *de minimis* interaction with customers" in an industry in which "undesignated tips are common."[66] If the Delaware Minimum Wage Law were controlled by the Sixth Circuit, that would settle the issue. But the General Assembly has crafted a Minimum Wage Law that provides more robust protections- and a higher rate of pay- than the FLSA provides.

TRMC has diverted tips to hosts and hostesses by placing them in a tip pool, but has not established that they would be employees that "customarily and regularly receive tips" if TRMC had *not* placed them in the tip pool. If the Minimum Wage Law permits TRMC to determine which categories of employees customarily and regularly receive tips, then it could include every employee category in the restaurant within its tip pool and thereby justify the payment of all employees from the pool.

---

[64] *Montano v. Montrose Rest. Assocs., Inc.*, 800 F.3d 186, 188 (5th Cir. 2015).
[65] *Kilgore v. Outback Steakhouse of Fl., Inc.*, 160 F.3d 294 (6th Cir. 1998).
[66] *Id*. at 301.

Nothing in Delaware or federal law permits TRMC to engage in this behavior. The Superior Court's decision is wrong.

IV. THE DDOL IS NOT OBLIGATED TO IMPLEMENT REGULATIONS BEFORE IT CAN ENFORCE THE MINIMUM WAGE LAW

A. Question Presented

Did the Superior Court err by holding that the DDOL cannot apply the correct interpretation of the Minimum Wage Law without implementing regulations?[67]

B. Scope of Review

The Scope of Review is outlined in Section I.B. above.

C. Merits of Argument

The Superior Court raised an issue at oral argument that neither party had briefed or addressed – whether the DDOL should promulgate regulations to address tip pooling[68] - and concluded that the DDOL could not enforce the Minimum Wage Law unless it promulgated regulations:[69] "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."[70] This assertion is unsupported by any authority and is flatly wrong.

---

[67] Exhibit A, p. 27.
[68] A-221-230.
[69] Exhibit A, p. 27.
[70] *Id.*

First, although 19 *Del. C.* § 904 allows the DDOL to promulgate regulations, it does not *require* the DDOL to do so- especially in the context of existing statutory language.

Second, the Minimum Wage Law defines "gratuities" and it defines "primary direct service employees." The meaning of both was clear until TRMC and the Superior Court misconstrued them.

Finally, whether the DDOL can promulgate definitions that define the employees to be included in the tip pool is not the question here. The question is whether TRMC can abdicate its responsibility for paying its hosts the minimum wage to its servers. That answer can only be no.

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,

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ *Oliver J. Cleary*
Oliver J. Cleary (5830)
Deputy Attorney General
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8400
Oliver.Cleary@state.de.us
Counsel for Appellant

July 31, 2017