EFiled: Jul 27 2017 08:55AM EDT
Filing ID 60903888
Case Number 166,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLEES' CORRECTED ANSWERING BRIEF

SAUL EWING LLP

/s/*Elizabeth S. Fenton*
Elizabeth S. Fenton (#5563)
1201 N. Market St., Suite 2300
P.O. Box 1266
Wilmington, Delaware 19899-1266
(302) 421-6800 Phone
(302) 421-6813 Facsimile

Attorneys for Appellees Texas Roadhouse Management Corp., Texas Roadhouse Holdings LLC, and Texas Roadhouse, Inc.

Dated: July 27, 2017

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

This is a matter of first impression in Delaware courts -- whether restaurant hosts who engage in direct customer service may be part of a tip pool, and whether an employer may take a "tip credit" toward its minimum wage obligation with respect to those hosts.

On August 27, 2015, Plaintiffs Texas Roadhouse Management Corp., Texas Roadhouse Holdings, LLC, and Texas Roadhouse, Inc. (collectively, "Texas Roadhouse") filed an action in Superior Court against the Delaware Department of Labor ("DDOL") seeking declaratory judgment that Texas Roadhouse restaurant hosts are "direct service employees" within the meaning of 19 *Del. C.* § 902(d)(2) who may participate in a tip pool; and for whom Texas Roadhouse may take a tip credit toward the minimum wage obligation pursuant to 19 *Del. C.* § 902(b). (A-39[1]). The parties stipulated to the relevant facts, and presented the issues for decision on cross motions for summary judgment. (A-71, A-97). By order of March 30, 2017, the Superior Court (the Honorable Calvin L. Scott, Jr.) granted Texas Roadhouse's summary judgment motion and denied DDOL's summary judgment motion. (DDOL Br., Ex. A[2]). DDOL then appealed to this Court.

[1] "A-28" refers to page A-28 of DDOL's "Corrected Appendix" filed July 17, 2017.

[2] "DDOL Br." refers to DDOL's "Corrected Opening Brief" filed July 17, 2017.

By way of additional background, DDOL had originally filed an action on June 3, 2015, in the Justice of the Peace Court (the "JP Court Action") against Texas Roadhouse, Inc.[3] seeking to recover alleged unpaid wages on behalf of hosts who were paid $4.00 per hour and received the remainder of the minimum wage by way of tips from a tip pool. (A-12). On February 16, 2016, the JP Court found in favor of DDOL. (A-48). Texas Roadhouse timely appealed that ruling to the Court of Common Pleas. (A-60, No. CPU4-16-000661). The parties subsequently agreed to stay that action in favor of this declaratory judgment action. (No. CPU4-16-000661, Order of 4/28/2016).

[3] The JP Court Action also named two Texas Roadhouse executives as defendants, but they were subsequently dismissed without prejudice. (A-15).

SUMMARY OF ARGUMENT

I. **Denied**. The Superior Court correctly found, based on stipulated facts, that Texas Roadhouse hosts are (1) direct service employees and (2) employees engaged in an occupation in which they customarily and regularly receive gratuities. Thus, hosts were properly included in a tip pool and Texas Roadhouse could lawfully take a tip credit for gratuities received by hosts through the tip pool. The Superior Court did not err in rejecting DDOL's "slippery slope" argument that employers could artificially create tip-credit-eligibility by arbitrarily assigning employees to a tip pool. (*See* DDOL Summary of Argument I; Argument I[4]).

II**.** **Denied**. The Superior Court's method of statutory interpretation was proper. The Minimum Wage Law is enforceable by civil penalty. Thus, the Minimum Wage Law is a penal statute and, as such, is to be strictly construed. Although the Superior Court did not apply a strict construction form of analysis, the Superior Court reached the correct result because the plain language of the Minimum Wage Law permitted Texas Roadhouse to take the tip credit for the hosts at issue here. (*See* DDOL Summary of Argument II; Argument II).

III. **Denied**. The Superior Court did not err in reviewing analogous federal law and State Attorney General opinions on tip credit and tip pooling in its

[4] The "Question Presented" in sections I and II of DDOL's brief do not appear to correspond to the Summary of Argument and Argument for those two sections.

analysis of the Minimum Wage Law. (*See* DDOL Summary of Argument III; Argument III).

IV. **Denied**. The Superior Court did not hold that DDOL is required to apply the Minimum Wage Law exclusively through promulgation of regulations. Regardless, the Superior Court appropriately found, based on the stipulated facts, that the plain language of the Minimum Wage Law permitted Texas Roadhouse to take the tip credit for the hosts at issue here. (*See* DDOL Summary of Argument IV; Argument IV).

STATEMENT OF FACTS

I. Stipulated Facts

In the Superior Court, the parties stipulated to the following facts (A-101 to A-104):

1. Texas Roadhouse employs individuals in various "front of house" positions, including bartenders, servers, server assistants, and hosts. Texas Roadhouse also employs individuals in various "back of house" positions, including cooks, expediters ("expo"), and dish machine operators.

2. 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.

3. Along the way to the table, the host inquires as to whether the guests are visiting for the first time or are 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.

4. On the way to the table, the host leads guests past a display case, pointing out featured cuts of steak.

5. Also on the way to the table, the host picks up a basket of fresh-baked bread and butter, and serves the bread and butter to the guests as they are being seated at their table.

6. The host provides menus to guests.

7. Depending on guest preference and availability of the assigned server, the host may also take and deliver drink orders and otherwise address any guest requests.

8. 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.

9. Server assistants help the servers with delivering food and drink orders; refilling drinks; prebussing tableware; completing the bussing of tables after guests leave the table; and preparing the table for the next guests.

10. As hosts are walking through the dining area, they routinely assist with refilling of beverages and bread, and prebussing tableware.

11. Hosts are also called upon to run food to tables as needed to assist servers.

12. As used herein, the terms "tip" and "tips" are intended to have the same meaning as "gratuities" as used in 19 *Del. C.* §§ 901(5) and 902.

13. For at least the period of time from December 17, 2014 through February 24, 2015, hosts were paid $4.00 per hour, and also received tips from a tip pool created by contributions or "tip outs" from servers.

14. For at least the period of time from December 17, 2014 through February 24, 2015, hosts were engaged in occupations in which they customarily and regularly received more than $30 per month in tips from the tip pool.

15. Servers did not contribute to the tip pool an amount in excess of 15% of the tips they received from guests.

16. Texas Roadhouse guests are free to determine whether to make any tip payment at all and, if so, the amount of any tip.

17. Neither Texas Roadhouse nor its managers took, received or retained any portion of the tips received by employees.

18. The wage paid to hosts by Texas Roadhouse, when combined with tips hosts received from the tip pool, at all times equaled or exceeded the state minimum wage of $7.75 per hour.

II. Additional Uncontroverted Facts

Texas Roadhouse also submitted the following additional facts in support of the summary judgment motion (A-104 to A-107), which DDOL did not controvert for purposes of summary judgment (A-129):

19. Texas Roadhouse Holdings LLC is a Kentucky limited liability company registered to do business in the state of Delaware. Texas Roadhouse Management Corp. is a Delaware corporation with its principal place of business in Kentucky. Texas Roadhouse, Inc. is a Delaware corporation with its principal place of business in Kentucky, and is the corporate parent of Texas Roadhouse Holdings LLC and Texas Roadhouse Management Corp.

20. Texas Roadhouse Holdings LLC and Texas Roadhouse Management Corp., pursuant to certain operating agreements, own and operate casual dining restaurants, including restaurants in Middletown, Bear, and Camden, Delaware.

21. The Delaware Department of Labor ("DDOL") is an agency of the State of Delaware. Among other powers, DDOL is authorized to administer and enforce the provisions of the Delaware Minimum Wage Law through investigation of alleged violations and collection of unpaid minimum wages.

22. On or about March 12, 2015, a DDOL labor law enforcement officer sent a letter to the Texas Roadhouse restaurant in Middletown, Delaware,

contending that Texas Roadhouse had improperly treated hosts and bus persons as tipped employees.

23. On or about March 27, 2015, a DDOL labor law enforcement officer sent a letter to the Texas Roadhouse restaurant in Bear, Delaware, alleging that the restaurant failed to pay full minimum wage to an employee who worked as a host or bus person.

24. On or about April 15, 2015, a DDOL labor law enforcement officer sent a letter to the Texas Roadhouse restaurant in Camden, Delaware, alleging that the restaurant failed to pay full minimum wage to an employee who worked as a host.

25. On or about June 3, 2015, DDOL initiated an action in the Justice of the Peace Court in Newcastle County, Case No. JP13-15-006055 (the "JP Court Action"), seeking to recover wages allegedly owed to three individuals employed as hosts at the Middletown restaurant, alleging, in principal part, that "'hosts' at the Texas Roadhouse in Middletown, Delaware were being paid at a rate of $4.00 per hour and were being included in a tip pool, although they are not direct service employees. Per the Wage Payment and Collection Act, these employees should have been compensated at a rate of $7.75."

26. On February 16, 2016, Justice of the Peace Kathy Gravell issued an order finding in favor of the DDOL in the JP Court Action.

27. Texas Roadhouse timely appealed the ruling in the JP Court Action to the Court of Common Pleas, but that appeal has been stayed, upon joint motion of the parties, in favor of this declaratory judgment action.

28. The DDOL, due to its role in administering and enforcing the Minimum Wage Law, has an interest in contesting Texas Roadhouse's claim.

29. The parties' interests are real and adverse.

ARGUMENT

I. Texas Roadhouse Lawfully Took the Tip Credit for Hosts, Who Are Direct Service Employees and Are Engaged in an Occupation in Which They Customarily and Regularly Receive Gratuities.

A. Question Presented

Whether the Superior Court erred when it found, based on stipulated facts, that Texas Roadhouse hosts are (1) "direct service employees" who are properly included in a tip pool, and (2) employees engaged in an occupation in which they customarily and regularly receive gratuities, for whom Texas Roadhouse may take a tip credit. (*Preserved in the Superior Court as the issues to be determined on Texas Roadhouse's summary judgment motion, A-97 to A-121*).

B. Scope of Review

An order granting summary judgment is reviewed de novo, applying the same standards as applied by the Superior Court. *In re Asbestos Litigation*, 673 A.2d 159, 161 (Del. 1996). A court may grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to summary judgment as a matter of law." Super. Ct. R. 56(c).

C. Merits of Argument

The only issue before the Superior Court was whether, pursuant to the Delaware Minimum Wage Law, Texas Roadhouse lawfully included hosts in a tip pool and lawfully took the tip credit for gratuities received by the hosts through the tip pool. In the sections below, Texas Roadhouse summarizes the applicable

provisions of the Minimum Wage Law, and then demonstrates that Texas Roadhouse lawfully paid its hosts pursuant to those provisions.

1. The Statutory Framework For Tip ***Credit*** and Tip ***Pooling***

Delaware employers are generally required to pay employees a specified minimum hourly wage, which, during the time period at issue in the JP Court Action (prior to June 1, 2015), was $7.75 per hour. 19 *Del. C.* § 902(a). However, this general requirement is subject to additional provisions of the Minimum Wage Law regarding tip ***credit*** and tip ***pooling***.

Tip *Credit*: Under the Minimum Wage Law's "tip credit" provision, an employer may count tips/gratuities received by certain employees toward the minimum wage obligation. In particular, the Minimum Wage Law provides "[g]ratuities received by employees engaged in occupations in which gratuities customarily constitute part of the remuneration may be considered wages for purposes of [the Minimum Wage Law]." 19 *Del. C.* § 902(b). "An employee engaged in an occupation in which gratuities customarily constitute part of the remuneration" is "any worker engaged in an occupation in which workers customarily and regularly receive more than $30 per month in tips or gratuities." 19 *Del. C.* § 902(c)(1).

Employees engaged in occupations in which they customarily and regularly receive gratuities are commonly referred to as "tipped employees." An employer

may pay "tipped employees" a direct wage of as little as $2.23 per hour, as long as tips make up the difference to satisfy the full minimum wage requirement. 19 *Del. C.* § 902(b).

Tip ***Pooling***: The Minimum Wage Law also specifies the circumstances under which an employer may require tipped employees to pool or share the gratuities they receive. The law begins with the premise that a gratuity "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." 19 *Del. C.* § 902(d)(1). 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." 19 *Del. C.* § 902(c)(3).

However, the law also provides an express exception to this general rule, which authorizes employers to ***require*** "primary direct service employees" to share a portion of their gratuities with other employees who assisted in serving the customers: "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." 19 *Del. C.* § 902(d)(2) (emphasis added).

Thus, the questions presented here are (1) whether Texas Roadhouse hosts are "direct service employees" who are eligible to receive gratuities from a tip pool, and (2) whether the hosts are "tipped employees" (i.e., employees engaged in an occupation in which they customarily and regularly receive tips), for whom Texas Roadhouse may take the tip credit.

DDOL concedes that hosts are "direct service employees" who may participate in a tip pool, but DDOL contends it is unlawful for Texas Roadhouse to take a tip credit for gratuities hosts receive from that tip pool. As more fully set forth below, the Superior Court properly analyzed these issues of statutory interpretation, and correctly granted summary judgment in favor of Texas Roadhouse.

2. Hosts Are Tip ***Pool*** Eligible "Direct Service Employees"

As noted above, the Minimum Wage Law provides "[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." 19 *Del. C.* § 902(d)(2) (emphasis added).

The Minimum Wage Law does not define "direct service employee," but defines "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." 19 *Del. C.* § 902(c)(3) (emphasis added).

Thus, these two provisions together establish that a "direct service employee" is simply one who provides direct, personal service to a customer, but need not be the employee primarily responsible for such service. As the Superior Court found, "a host *does not* need to be a primary direct service employee to be included in an employer initiated tip pool under Section 902(d)(2)." (Order at p. 11 (DDOL Br. Ex. A)) (emphasis in original).[5] Rather, "the plain reading of the statute indicates that it is at the employer's discretion to create a tip sharing system when 'more than 1 *direct service employee* provides personal service to the same customer.'" (Order at p. 24 (DDOL Br. Ex. A)) (emphasis in original).

Here, the parties stipulated to the facts conclusively establishing that hosts provide direct, personal service to customers in numerous respects. Hosts lead guests to their tables and, along the way, welcome returning guests and, for new guests, share the "Texas Roadhouse Story," which includes a brief overview of the Company and a description of popular menu items. Also on the way to the table, hosts lead guests past a display case, pointing out featured cuts of steak. Hosts also pick up a basket of fresh-baked bread and butter, and serve the bread and butter to

[5] As the Superior Court noted, Justice of the Peace Gravell's ruling on this point was erroneous. (*See* Order at p. 11 (DDOL Br. Ex. A)).

the guests as they are being seated at their table. Hosts provide menus to guests and, depending on guest preference and availability of the assigned server, may also take and deliver drink orders and otherwise address any guest requests. As hosts are walking through the dining area, they routinely assist with refilling of beverages and bread, and prebussing tableware. Hosts are also called upon to run food to tables as needed to assist servers. (Stipulated Fact Nos. 2-11).[6]

Based on these stipulated facts, the Superior Court concluded "[a]lthough the hosts may not be the primary direct service employee who receives the gratuity from the customer, the hosts' tasks provide personal direct service to the customers. This Court finds that under 19 *Del. C.* § 902 the hosts at the Texas Roadhouse restaurants are direct service employees and were properly included in the mandatory tip pool." (Order at p. 26 (DDOL Br. Ex. A)). For the reasons set forth above, the Superior Court's ruling is clearly supported by the stipulated facts and the law.

Indeed, DDOL does not even challenge this aspect of the Superior Court's ruling. Contrary to positions DDOL took at earlier stages of this litigation, DDOL

[6] The parties also stipulated that servers contributed no more than 15% of their gratuities to the tip pool, and that neither Texas Roadhouse nor its managers received gratuities from the tip pool. (Stipulated Fact Nos. 15, 17).

now agrees Texas Roadhouse hosts may participate in the tip pool.[7] Although DDOL argues that Texas Roadhouse should not be permitted to take the tip ***credit*** for gratuities the hosts receive (an argument addressed below), DDOL has made its position on tip-***pool***-eligibility clear in its opening brief and at oral argument in the Superior Court:

> "The DDOL does not dispute that [Texas Roadhouse] can establish a tip pool; it disputes whether that tip pool can inure to the financial benefit of [Texas Roadhouse]." (DDOL Br. at 16).
>
> "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." (DDOL Br. at 23).
>
> "[T]here's no objection to the servers being required to tip-out hostesses, the objection is Texas Roadhouse taking financial benefit from that." (Oral Argument Transcript at 11:14-17 (A-223)).

For all of these reasons, the Superior Court did not err in holding that Texas Roadhouse hosts are "direct service employees" who may participate in a tip pool.

3. Hosts Are Tip ***Credit*** Eligible Employees Who Customarily and Regularly Receive Gratuities

Although DDOL now agrees that Texas Roadhouse hosts may lawfully receive gratuities from a tip pool, DDOL contends it was unlawful for Texas

[7] In its summary judgment motion, DDOL insisted that "19 *Del. C.* § 902(d)(2) precludes involuntary tip pooling under any circumstances; an employer may not, therefore, force its employees to participate in this tip pool." (A-88). Later, in response to Texas Roadhouse's summary judgment motion, DDOL argued "[w]hile the parties have stipulated to facts demonstrating that hosts interact with customers, this is not sufficient to demonstrate that these employees are 'direct service employees' within the meaning of the statute." (A-133).

Roadhouse to take credit for those gratuities toward its minimum wage obligation. DDOL's position is directly contrary to the plain language of the statute, Attorney General opinions, and analogous federal law. Indeed, DDOL has ***stipulated*** to the facts establishing that hosts fall within the Minimum Wage Law's tip credit provision. For the reasons set forth below, the Superior Court correctly granted summary judgment in favor of Texas Roadhouse.

a. The Statute Allows A Tip Credit for Hosts

As noted above, the Minimum Wage Law's tip credit provision states: "[g]ratuities received by employees engaged in occupations in which gratuities customarily constitute part of the remuneration may be considered wages for purposes of [the Minimum Wage Law]." 19 *Del. C.* § 902(b).

The Law defines "[a]n employee engaged in an occupation in which gratuities customarily constitute part of the remuneration" as "any worker engaged in an occupation in which workers customarily and regularly receive more than $30 per month in tips or gratuities." 19 *Del. C.* § 902(c)(1).

In the Superior Court, the parties stipulated: "[Texas Roadhouse] hosts were engaged in occupations in which they customarily and regularly received more than $30 per month in tips from the tip pool." (Stipulated Fact No. 14). Thus, the parties unequivocally asked the Superior Court to accept as true that hosts fit, word for word, the precise language in the Minimum Wage Law's definition of tip-

credit-eligible employees. Texas Roadhouse respectfully submits that this stipulation should end the inquiry.

Although the Superior Court recognized DDOL's stipulation (Order at p. 10 (DDOL Br. Ex. A)), the Superior Court did not stop there.[8] It proceeded to analyze the statute and its history in depth. (Order at 12-17 (DDOL Br. Ex. A)). For example, the Superior Court noted that, in 1986, the Attorney General opined that the then-applicable version of 19 *Del. C.* § 902(c) was "intended to 'prohibit mandatory tip-sharing.'" (Order at p. 15 (DDOL Br. Ex. A), citing Del. Op. Atty. Gen. 86-1002, 1986 WL 191934). The Superior Court also observed that the General Assembly responded almost immediately by enacting the express tip-pooling provision now found at 19 *Del. C.* § 902(d)(2). (Order at 16 (DDOL Br. Ex. A)).

In addition, the Superior Court found significant that the same 1986 enactment also revised the definition of "gratuities" to clarify that "gratuities" includes those received both directly and ***indirectly***. (Order at 22-23 (DDOL Br. Ex. A)); 19 *Del. C.* § 902(c)(2) ("gratuities" are "monetary contributions received ***directly or indirectly*** by an employee from a guest, patron or customer for services rendered where the customer is free to determine whether to make any payment at

[8] As the Superior Court noted, Justice of the Peace Gravell erroneously ignored the parties' stipulation. (Order at p. 9-10 (DDOL Br. Ex. A)).

all and, if so, the amount.") (emphasis added).[9] The Superior Court concluded from these two simultaneous enactments that the insertion of "indirectly" was a clear reference to gratuities received through the newly-established tip sharing system in Section 902(d)(2). (Order at pp. 22-23 (DDOL Br. Ex. A)).

Despite the parties' stipulation that hosts customarily and regularly receive tips, and despite the clear statutory history, DDOL repeatedly argues that Texas Roadhouse violated the Minimum Wage Law by taking a tip credit for gratuities received by hosts by way of the tip pool. For example, DDOL argues "[e]mployers cannot divert gratuities that its servers receive to a tip pool to offset its own obligations to other employees under the Minimum Wage Law, and the law does not permit [Texas Roadhouse] to force its servers to subsidize its wage obligations to hosts." (DDOL Br. at 16-17).

Thus, DDOL's current position is:

> 1) An employer may require servers to give a portion of their gratuities to hosts;
>
> 2) An employer may take a tip credit for the portion of the gratuities that servers retain after contributing to a tip pool;
>
> 3) But an employer may not take a tip credit for gratuities that hosts receive from a tip pool.

[9] The parties stipulated that Texas Roadhouse guests are free to determine whether to make any tip payment at all and, if so, the amount of any tip. (Stipulated Fact No. 16).

In other words, according to DDOL's argument, taking a minimum wage credit for gratuities received by servers is perfectly permissible, but taking a minimum wage credit for gratuities lawfully received by hosts through a tip pool is an abomination. Throughout all of its protestations about improper subsidizing of minimum wage obligations, DDOL loses sight of the fact that all of the employees are guaranteed to receive at least the full minimum wage. (*See* Stipulated Fact No. 18). Receipt of the required minimum wage is, of course, the primary purpose of the Minimum Wage Law. *See Callaway v. N.B. Downing Co*., 172 A.2d 260, 262 (Del. Super. Ct. 1961) (recognizing that one purpose of Delaware's similar prevailing wage law is to "secure to the individual workman a minimum living wage, fixed by law").

More importantly, DDOL's avowed displeasure with alleged minimum wage subsidies is misdirected. The General Assembly adopted the tip credit, through which it declared that employers may satisfy a portion of their minimum wage obligation by way of gratuities received by employees engaged in occupations in which they customarily and regularly receive gratuities. The statute does not limit the tip credit to employees who receive tips directly (e.g., servers), but instead expressly includes those employees who receive gratuities indirectly through tip pools (e.g., hosts). If DDOL does not like the tip credit, it should direct its

displeasure to the General Assembly, not at employers who are simply paying tipped employees in accordance with the law.

As more fully discussed below, DDOL's arguments are also in direct conflict with an Attorney General opinion, and the well-established body of case law developed under the very similar federal tip credit provision.

b. Delaware AG Opinion Further Supports Texas Roadhouse

Aside from the plain language of the statute, there is only one other authoritative statement within the state of Delaware that touches on the issues in this case. Over 40 years ago, the Delaware Attorney General considered the application of the tip credit provision to "busgirls and busboys." Del. Op. Atty Gen. 72-118, 1972 Del. AG LEXIS 116. At that time, the statute did not expressly state whether tips received indirectly could be "counted" for purposes of the tip credit. The Attorney General noted that "the statute could logically be construed to include payment received indirectly since tip splitting is a well-known practice, and it is not unreasonable to assume it is understood by guests, patrons or customers that while the tip is given to the waiter (waitress) it will be split with the busboys or busgirls." Del. Op. Atty Gen. 72-118, at *1-2.

The Attorney General also cited a federal regulation establishing that, under federal law, "when employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those

given to the busboys are considered tips of the individuals who retain them." Del. Op. Atty Gen. 72-118, at *2 (quoting 29 C.F.R. § 531.54).

The Attorney General then concluded that busboys and busgirls were "tipped employees" -- employees for whom an employer could take the tip credit -- "[s]ince payments by waiters to bushelp are tips, if a busgirl or busboy earns as stated in 19 *Del. C.* § 902(b) [now 19 *Del. C.* § 902(c)(1)], they are tipped employees." Del. Op. Atty Gen. 72-118, at *3.

Thus, the DDOL's assertion that an employer cannot take the tip credit for indirect/shared gratuities was rejected by the Attorney General over 40 years ago (albeit in the context of busboys/busgirls rather than hosts).

Although the Attorney General opinion did not specifically identify the duties performed by "busgirls and busboys," such employees customarily assist servers by cleaning tables, removing dirty dishes, and setting tables.[10] (At Texas Roadhouse, the employees primarily responsible for these duties are called "server assistants," rather than "busgirls and busboys." (See Stipulated Fact No. 9))

DDOL begrudgingly acknowledges the existence of the 1972 Attorney General opinion, but attempts to distinguish it by arguing "there is no more basis to assume that customers assign part of their tips to the person who seats them than

[10]*See* O*Net Online, Summary Report for 35-9011.00 – Dining Room and Cafeteria Attendants. http://www.onetonline.org/link/summary/35-9011.00.

there is to assume that customers assign part of their tips to the chef who prepares their meal." (DDOL Br. at 14).

This argument ignores the stipulated facts that reflect the extensive personal, direct service delivered by Texas Roadhouse's hosts. Indeed, the guest service duties performed by hosts at Texas Roadhouse are far more direct and personal in nature than services performed by typical busboys/busgirls. Hosts assist with prebussing tables similar to busboys/busgirls, but hosts perform many other functions traditionally associated with servers – they describe menu items, serve bread and butter, fulfill drink orders, and run food to tables. Accordingly, the 1972 Attorney General opinion provides further support for the conclusion that Texas Roadhouse may take the tip credit for gratuities received by hosts. (See Order at 13-14 (DDOL Br. Ex. A)).

c. Federal Caselaw Supports Texas Roadhouse

Under the federal Fair Labor Standards Act (FLSA), an employer may take a tip credit for a "tipped employee." 29 U.S.C. § 203(m). The FLSA definition of "tipped employee" is virtually identical to the corresponding provision in Delaware law. *Compare* 29 U.S.C. § 203(t) ("'Tipped employee' means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips."), *with* 19 *Del. C.* § 902(c)(1) ("any worker engaged in

an occupation in which workers customarily and regularly receive more than $30 per month in tips or gratuities.").

Moreover, federal law ties tip-pool-eligibility to essentially the same definition. *See* 29 C.F.R. § 531.54 ("mandatory tip pools . . . can only include those employees who customarily and regularly receive tips").

Thus, federal decisions regarding both tip pool eligibility and tip credit eligibility are equally enlightening with respect to the tip credit inquiry under Delaware law. Under the comparable federal law, courts have repeatedly and consistently held that hosts are "tipped employees."

The seminal case applying the "tipped employee" definition to hosts is *Kilgore v. Outback Steakhouse of Florida, Inc.*, 160 F.3d 294 (6th Cir. 1998). There, the court directly addressed whether restaurant hosts worked in an occupation in which they "customarily and regularly receive tips." The court determined that performance of "important customer service functions" was the linchpin in assessing whether an employee "customarily and regularly" received tips, and also differentiated customer service employees like hosts from non-customer service employees like dishwashers and cooks. *Id.* at 301. The Sixth Circuit's full analysis is informative:

> Hosts at Outback are "engaged in an occupation in which [they] customarily and regularly receive[ ] . . . tips" because they sufficiently interact with customers in an industry (restaurant) where undesignated tips are common. Although the parties dispute exactly how hosts spend their time working at

> Outback, hosts do perform important customer service functions: they greet customers, supply them with menus, seat them at tables, and occasionally "enhance the wait." ***Like bus persons, who are explicitly mentioned in 29 C.F.R. § 531.54 as an example of restaurant employees who may receive tips from tip outs by servers, hosts are not the primary customer contact but they do have more than de minimis interaction with the customers***. One can distinguish hosts from restaurant employees like dishwashers, cooks, or off-hour employees like an overnight janitor who do not directly relate with customers at all.

Id. (emphasis added). Notably, the Sixth Circuit in *Kilgore* and the Delaware Attorney General both looked to the same federal regulation (29 C.F.R. § 531.54) in concluding that hosts and busboys/busgirls (respectively) work in tip-credit-eligible occupations.

Moreover, *Kilgore*'s analysis of hosts has become the standard by which other restaurant occupations are measured. Below is merely a brief sampling of the numerous cases that have embraced and expanded upon the *Kilgore* analysis:

> "[E]mployees who provide ***direct services*** to customers, such as servers, ***hosts***, and busboys, are valid tip pool participants." *Chhab v. Darden Restaurants, Inc.*, 2013 U.S. Dist. LEXIS 135926, at * 18-19 (S.D.N.Y. Sept. 20, 2013) (emphasis added, citing *Kilgore* and 29 C.F.R. § 531.54).

> "It has been construed that, in order to be valid under [29 U.S.C.] Section 203(t), an employee receiving [tips from a tip pool] must be a tipped employee, that is, one that customarily and regularly receives tips – as required by Section 203(m) – and be one engaged in an occupation in which he/she customarily and regularly receives tips. . . . Such would be true of restaurant hosts and bus persons, and even maître d's, in addition to waiters." *Solis v. Lorraine Lago Enterprises, Inc.*, 907 F. Supp. 2d 186, 201-02 (D. P.R. 2011) (emphasis added, and citing *Kilgore* in finding cooks and other kitchen personnel were improperly included in tip pool).

"Many courts suggest that an employee's level of customer interaction is the most significant factor in evaluating whether he qualifies as a 'tipped employee' under the FLSA. . . . [The *Kilgore* court] explained that hosts 'perform important customer service functions: they greet customers, supply them with menus, seat them at tables, and occasionally 'enhance the wait.'' Although the hosts in *Kilgore* were not the 'primary customer contact,' they had 'more than de minimis interaction with customers' sufficient to qualify them for tips." *Rudy v. Consolidated Restaurant Companies, Inc.*, 2010 U.S. Dist. LEXIS 92764, at *8-11 (N.D. Tex. Aug. 18, 2010) (emphasis added, and concluding that maître d's, like hosts, are tipped employees).

"The cases that have considered whether a given occupation falls within the definition of tipped employee have focused on the level of customer interaction involved in that occupation. . . . Customer service positions in which the employee has more than de minimis interaction with customers have been found to be tipped occupations even where the employees are prohibited from accepting tips directly from customers." *Townsend v. BG-Meridian, Inc.*, 2005 U.S. Dist. LEXIS 45200, at *17-18 (W.D. Okla. Nov. 7, 2005) (identifying hosts and maître d's as tipped employees, citing *Kilgore*).

Roussell v. Brinker Int'l, Inc., 2008 U.S. Dist. LEXIS 52568, at *40-41 (S.D. Tex. July 9, 2008) (in evaluating whether "Quality Assurance" employees were tipped employees, observing that "[i]n *Kilgore*, the Sixth Circuit thought it was abundantly clear that Outback hosts had sufficient interaction with the customers and performed important customer service functions, making them tip-credit and tip-pool eligible. . . . The Court agrees with the Sixth Circuit that the level of customer interaction is highly relevant to the question of whether an employee may participate in a valid tip pool.") (emphasis added).

Barrera v. MTC, Inc., 2011 U.S. Dist. LEXIS 83468, at *18 (W.D. Tex. July 29, 2011) (citing *Kilgore*, and analyzing "service bartenders" relative to hosts and bussers, noting that "[a] busboy performs an integral part of customer service without much direct interaction, but he does so in a manner visible to customers.").

Ford v. Lehigh Valley Restaurant Group, Inc., 2015 Pa. Dist. & Cnty Dec. LEXIS 11, at *19-24 (Pa. Com. Pl. Ct., Lackawanna County, Apr. 24, 2015)

> (identifying *Kilgore* as the "first federal appellate reference to the significance of direct customer interaction in determining whether an employee 'customarily and regularly receives tips,'" and compiling list of numerous other federal cases supporting the conclusions that "[t]he only other federal circuits which have considered the proffered relevance of direct customer interaction under [29 U.S.C.] Section 203(m) have agreed with the Sixth Circuit's analysis" and that "[t]he clear majority of federal district courts that have addressed the importance of direct customer interaction in determining whether an employee qualifies as someone 'who customarily and regularly receives tips' similarly deem such customer interaction to be a relevant consideration.").

This sampling of cases confirms that restaurant hosts who greet customers, supply them with menus, and seat them at tables are tip-credit-eligible employees. But the Texas Roadhouse hosts at issue here are even more extensively involved in direct customer service than were the hosts in these other cases. In addition to the greeting and seating responsibilities often performed by restaurant hosts, Texas Roadhouse's hosts perform many functions traditionally associated with servers – they describe menu items, serve bread and butter, fulfill drink orders, and run food to tables.

In light of the stipulated facts, the Superior Court found the federal authority persuasive, and further supportive of the conclusion that Texas Roadhouse's hosts are properly paid as tipped employees under the similar Delaware Minimum Wage Law. (Order at 17-20 (DDOL Br. Ex. A)).

DDOL concedes that "[i]f the Delaware Minimum Wage Law were controlled by the Sixth Circuit [i.e., *Kilgore*], that would settle the issue." (DDOL

Br. at 27). But DDOL argues that *Kilgore* should not settle the issue because the Delaware General Assembly allegedly "crafted a Minimum Wage Law that provides more robust protections- and a higher rate of pay- than the FLSA provides." (DDOL Br. at 27).

Admittedly, the Delaware Minimum Wage Law mandates a higher minimum wage rate.[11] But, as fully explained above, there is nothing "more robust" about the Delaware tip ***credit*** provision. Instead, federal and Delaware law are identical in their definition of the employees for whom an employer may take a tip ***credit***.

As also noted above, federal law and Delaware law do differ somewhat in the manner in which they define tip-***pool***-eligibility. But even if the Delaware tip-***pooling*** provision is deemed "more robust" than federal law, that point is of no consequence here because (1) DDOL concedes Texas Roadhouse hosts are eligible to participate in tip pools, and (2) the stipulated facts clearly establish that Texas Roadhouse hosts are "direct service employees" within the meaning of Delaware's tip pooling provision. Accordingly, the Superior Court properly found in favor of Texas Roadhouse.

[11] The federal minimum wage is $7.25. 29 U.S.C. § 206(a).

d. DDOL's "Slippery Slope" Concern is Unfounded

DDOL repeatedly expresses concern that the Superior Court undertook a "flawed interpretation" of a Delaware statutory scheme that is "circular," and argues that the Superior Court's interpretation would permit employers to artificially create tip credit eligibility by arbitrarily assigning employees to a tip pool. (*See, e.g.*, DDOL Br. at 14-15). In *Kilgore*, the plaintiffs raised precisely the same concern as DDOL does here about arbitrary inclusion of employees in tip pools to make them tip-credit-eligible. The *Kilgore* court summarized and resolved the issue as follows:

> Plaintiffs correctly identify some circularity here: whichever employees Outback dictates to allocate the tip pool to could receive the requisite $30 a month in tips. Plaintiffs argue that this definition would allow Outback and other employe[r]s to designate any of its employees as tipped employees, and then use a tip credit against the employer's minimum wage obligations if there are enough tips to go around. ***Plaintiff's argument fails because the circularity is limited by the subsection 203(t) requirement that an employee work "in an occupation in which he customarily and regularly receives . . . tips."***

160 F.3d at 301 (emphasis added).

Similarly here, in response to DDOL's "slippery slope" argument, the Superior Court noted that the Minimum Wage Law "limits tip sharing to *direct service employees who provide personal service* to the same customer as the primary direct service employee." (Order at 24-25 (DDOL Br. Ex. A)) (emphasis in original). Thus, as the Superior Court correctly held, the Minimum Wage Law

already contains the safeguards necessary to prevent unfettered expansion of the scope of tip-credit-eligible employees. There is no basis to disturb the Superior Court's ruling.

II. The Superior Court Did Not Apply an Improper Standard of Statutory Construction, and the Minimum Wage Law Plainly Permitted Texas Roadhouse to Take the Tip Credit for the Hosts at Issue Here Regardless of the Nature of the Statutory Construction.

A. Question Presented

Whether the Superior Court interpreted the Minimum Wage Law as a penal statute and construed it narrowly and, if so, whether such construction was error. (*Preserved in the Superior Court at A-179, and at oral argument, A-226 to A-227*).

B. Scope of Review

An order granting summary judgment is reviewed de novo, applying the same standards as applied by the Superior Court. *In re Asbestos Litigation*, 673 A.2d 159, 161 (Del. 1996).

C. Merits of Argument

DDOL's statutory construction argument begins with a false premise -- DDOL asks "Did the Superior Court commit legal error in interpreting the Minimum Wage Law as a penal statute and construing it narrowly?" (DDOL Br. at 9). Conspicuously absent from DDOL's brief is citation to any page of the Superior Court's Order in which the Superior Court actually adopted such a construction. Rather, DDOL cites only to the summary judgment oral argument, in

which the Court asked DDOL's counsel whether such construction would be appropriate. (DDOL Br. at 9, n. 16).[12]

The reality is that the Superior Court did not interpret the Minimum Wage law narrowly as a penal statute (although it would not have erred in doing so). Instead, the Superior Court noted, in two separate passages, the statutory construction fundamentals that guided its analysis. (*See* Order at 8-9, 20-21 (DDOL Br. Ex. A)). The Superior Court correctly observed that its role was to "attempt to determine and give effect to the General Assembly's intent." (Order at 9 (DDOL Br. Ex. A)). "Where 'the intent is clear from the language of the statute, there is no room for statutory interpretation or construction.' Where a statute is 'ambiguous, we consider the statute as a whole, rather than in parts, and we read each section in light of all others to produce a harmonious whole.'" (Order at 21 (DDOL Br. Ex. A)).

The Superior Court carefully analyzed the Minimum Wage Law, read the various provisions in harmony, and found that it unambiguously permitted

[12] As the Superior Court noted at oral argument, the Attorney General opined in 1986 that the Minimum Wage Law was penal in nature, and thus is subject to narrow construction. (A-221) (referring to Del. Op. Atty. Gen. 86-1002, 1986 WL 191934). But the Superior Court did not adopt that construction anywhere in its Order. Texas Roadhouse submits that the 1986 Attorney General opinion is correct in its assessment that the Minimum Wage Law is penal in nature, but because the Superior Court's analysis clearly was not guided by such a methodology, DDOL's argument is completely misplaced.

employers to create a mandatory tip sharing system like the one adopted by Texas Roadhouse. (Order at 21 (DDOL Br. Ex. A)).

DDOL argues that the Superior Court erred because it should have regarded the Minimum Wage Law as remedial in nature, and thus interpreted it broadly. None of the cases cited by DDOL actually supports this assertion. Indeed, only one of the cases cited by DDOL dealt with wages at all, and that case focused, not on broad or narrow construction, but only on whether courts should recognize an implied civil remedy rooted in the State's prevailing wage statute.[13]

Further, the "remedial" provision cited by DDOL is inapplicable in the circumstances of this case. DDOL notes that it has the power to "require the employer to pay ***restitution*** if the employer ***diverts*** any gratuities of its employees in the amount of the gratuities diverted." (DDOL Br. at 21, quoting 19 *Del. C.* § 902(d)(3) (emphasis added)). As discussed above, however, Texas Roadhouse hosts are proper tip pool participants under section 902(d)(2) (and DDOL concedes as much). As a result, there has been no unlawful diversion of tips, and there is no basis for an order of restitution. DDOL's argument misses this fundamental point.

More importantly, the real problem here is that DDOL advocates a wholesale re-write of the Minimum Wage Law under the guise of "broad

[13] *See Callaway v. N.B. Downing Co*., 172 A.2d 260, 262 (Del. Super. Ct. 1961). None of the other cases cited by DDOL on pages 18-24 of its brief had anything to do with wages.

construction." For example, DDOL focuses on one sentence in Section 902(d)(2): "The employer shall not, under any circumstances, receive any portion of the gratuities received by the employees." (DDOL Br. at 23). This provision is a non-issue -- the parties stipulated that Texas Roadhouse received none of the gratuities. (*See* Stipulated Fact No. 17). Undeterred, DDOL likens an employer's use of the tip credit to an impermissible receipt of gratuities by the employer. (DDOL Br. at 23). But the statutory scheme expressly permits the taking of a tip credit, and thus cannot simultaneously be read to condemn the taking of a tip credit. The construction advocated by DDOL would be an absurd mis-reading of one sentence of section 902(d)(2), which would completely negate the tip credit and tip pooling provisions in other sections of the statute.

Similarly, DDOL would have this Court re-draft the scope of the tip credit provision, section 902(b). Section 902(b) provides that employers may take the tip credit with respect to "gratuities," which section 902(c)(2) defines to include those received both directly and indirectly. Even though DDOL now concedes that Texas Roadhouse hosts lawfully receive gratuities indirectly through a tip pool, DDOL urges this Court, under the guise of "broad statutory interpretation," to redefine the scope of section 902(b)'s tip credit provision to hold that only directly-received gratuities may be counted for purposes of the tip credit. (DDOL Br. at

23). As discussed above, DDOL's position was rejected by the Attorney General over 40 years ago. Moreover, it is contrary to the plain language of the statute.

DDOL's strained interpretation of isolated statutory provisions is inconsistent with the fundamental concept that a statutory scheme must be read in its entirety, and must be construed so as to give effect to ALL of its provisions. *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem. Hosp., Inc.*, 36 A.3d 336, 343 (Del. 2012); *Hirneisin v. Champlain Cable Corp.*, 892 A.2d 1056, 1059 (Del. 2006). One provision of a statute cannot be read in such a way as to render another part of the statute a nullity. *See id*.

In short, there simply is no merit to DDOL's assertion that the Superior Court employed an improper standard of statutory construction. For the reasons described in other sections of this brief, the Superior Court correctly granted summary judgment in favor of Texas Roadhouse.

III. The Superior Court Did Not Err in Reviewing Analogous Federal Law and Attorney General Opinions on Tip Credit and Tip Pooling.

A. Question Presented

Whether the Superior Court erred in reviewing analogous federal law and attorney general opinions on tip credit and tip pooling. (*Preserved in the Superior Court at A-113 to A-121*).

B. Scope of Review

An order granting summary judgment is reviewed de novo, applying the same standards as applied by the Superior Court. *In re Asbestos Litigation*, 673 A.2d 159, 161 (Del. 1996).

C. Merits of Argument

DDOL complains that the Superior Court looked to federal law and Delaware Attorney General opinions in considering the issues at hand. (DDOL Br. at 25-28). Although DDOL recognizes that federal law may be considered as guidance, DDOL notes that federal law should not be blindly followed. (DDOL Br. at 26). Those general observations have in fact been made by Delaware courts, but DDOL does not identify any way in which the Superior Court went astray by referring to federal law or Attorney General opinions in this case.

The Superior Court noted the similarities between the FLSA and Delaware law with respect to tipped employees. (Order at 17-18 (DDOL Br. Ex. A)). As discussed in section I.C.3.c. above, those similarities are striking and simply

cannot be ignored. But the Superior Court did not blindly follow federal law. In fact, when it turned to its analysis of tip-***pool***-eligibility, the Superior Court found that "[t]his State's statute is therefore different than the FLSA which does not distinguish between direct service employees and primary direct service employees, and the primary analysis under FLSA is whether an employee is engaged in an occupation where they customarily and regularly receive tips." (Order at 25 (DDOL Br. Ex. A)).

Similarly with respect to the 1972 Attorney General opinion, the Superior Court made clear that it "only considers this opinion as persuasive authority." (Order at 22-23 (DDOL Br. Ex. A)).

In short, the Superior Court did not err in the manner in which it considered federal law or Attorney General opinions.

IV. The Superior Court Did Not Hold that DDOL is Required to Apply the Minimum Wage Law Exclusively Through Promulgation of Regulations.

A. Question Presented

Whether the Superior Court erred when it commented that DDOL has the authority to promulgate regulations to clarify any allegedly ambiguous definitions in the Minimum Wage Law. (*Preserved in the Superior Court at A-221, A-228*).

B. Scope of Review

An order granting summary judgment is reviewed de novo, applying the same standards as applied by the Superior Court. *In re Asbestos Litigation*, 673 A.2d 159, 161 (Del. 1996).

C. Merits of Argument

DDOL also complains about the Superior Court's concluding comment that "[i]f 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 to promulgate." (DDOL Br. at 29 (quoting Order at 27 (DDOL Br. Ex. A)).

DDOL's argument here is particularly misplaced given that DDOL has conceded that Texas Roadhouse hosts were properly included in the tip pool. (*See* Section I.C.2 above). Regardless, the Superior Court did not, as DDOL claims, conclude that DDOL could not enforce the Minimum Wage Law unless it promulgated regulations. Rather, the Superior Court merely commented that its

role is to interpret the statute as written, and that DDOL had not issued any regulations that might add further guidance in the statutory analysis. There was no error.

CONCLUSION

For all of the reasons set forth above, there was no error, and the Superior Court's Order granting summary judgment in favor of Texas Roadhouse should be affirmed in all respects.