COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

FAR NO. _ _ _ _

APPEALS COURT DOCKET NO. 2019-P-0761

KHRIS HOVAGIMIAN AND DILMA SILVA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

Plaintiffs-Appellants

v.

CONCERT BLUE HILL, LLC D/B/A BLUE HILL COUNTRY CLUB; PETER NANULA; GREGG DEGER; BRYAN ELLIOTT; FRANCISCO VENTURA; AND TOM GIBSON

Defendants-Appellees

On Application for Further Appellate Review of a Judgment of The Massachusetts Appeals Court, No. 2019-P-0761

PLAINTIFFS-APPELLANTS' APPLICATION FOR FURTHER APPELLATE REVIEW

Date: August 4, 2020

Paul Holtzman
BBO# 563184
Janet Steckel Lundberg
BBO # 545623
KROKIDAS & BLUESTEIN LLP
600 Atlantic Avenue, 19th Floor
Boston, MA 02210
(617) 482-7211
pholtzman@kb-law.com
jlundberg@kb-law.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION AND REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass.R.App.Proc. 27.1, Plaintiffs-Appellants Khris Hovagimian and Dilma Silva (and others similarly situated) ("Plaintiffs") request leave to obtain further appellate review of the judgment in Khris Hovagimian & another v. Concert Blue Hill, LLC & others, C.A. No. 1882-CV-00590 (Norfolk Superior) , which was affirmed in a split decision of the Appeals Court (No. 19-P-761) authored by Justices Meade and Desmond ("Decision"), with a dissent by Justice Milkey ("Dissent").[1] Plaintiffs are servers who worked at the Blue Hill Country Club owned by Defendants-Appellees ("Club"), whose compensation was subject to the Tips Act ("Act"), G.L.c.149, §152A. The Club submitted two invoices to its customers for each event containing both a "gratuity" and a "service" charge, the latter of which the Club admits it did not pay to Plaintiffs. As indicated by the Dissent, the Decision approving the Club's actions is squarely contrary to long settled precedent interpreting the Act and its core mandate that "[i]f the employer or other person includes a service charge in the bill, the entirety of that service charge must be remitted to the food and beverage servers who provided the service". DiFiore v. American Airlines, Inc., 454 Mass. 486, 492 (2009). This

[1] The Majority Decision and Dissent are attached hereto in the Addendum ("Add.") at pp. 1 to 16.

outcome is of particular concern because this Court has held that the statutes under which Plaintiffs seek relief embody fundamental public policy protecting wages and the Decision will necessarily impact service workers throughout the Commonwealth.

The Decision's conclusion that a "Service" charge imposed on banquet invoices does not constitute a "Service charge" within the meaning of the Act[2] is error as a matter of law, as confirmed by the Dissent. The Decision holds instead that references in a pre-event contract to different charges never assessed by the Club on an invoice somehow void the explicit statutory language imposing automatic liability for retention of "any fee designated as a service charge, tip, [or] gratuity" on a "bill, invoice or charge" submitted to a patron. G.L.c.149, §152A(a), (d). The Decision further goes wrong by concluding that the Club is entitled to the protections of the statutory safe harbor despite that neither the safe

---

[2] The Act defines a "Service charge" as

> a fee charged by an employer to a patron in lieu of a tip to any wait staff employee, service employee, or service bartender, <u>including any fee designated as a service charge,</u> tip, gratuity, <u>or</u> a fee that a patron or other consumer would reasonably expect to be given to a wait staff employee, service employee, or service bartender in lieu of, or in addition to, a tip."

G.L.c.149, §152A(a) (emphasis added).

harbor language nor the "administrative" or "overhead" charges described in the pre-event contract are referenced anywhere on either of the two invoices submitted to patrons. Add.7. Thus, the Decision improperly turns on the issue of the reasonable belief of the patrons, and the applicability of the safe harbor provision, even though the Club here used per se liability language. Id.

As reflected in the Dissent, further appellate review is justified because the Decision is squarely at odds with the unambiguous statutory language and settled precedent of this Court and the Appeals Court, and eliminates the strict liability imposed by the Act. As the Dissent states, "[t]he language that the club itself chose triggered per se liability under the act, as our cases have long established…." Further, the understanding of patrons is irrelevant "where, as here, the per se liability provisions apply." Add.14,16. As the Appeals Court held in Norrell v. Spring Valley Country Club, Inc., 98 Mass.App.Ct. ___ (2020), the reasonable belief test is relevant only if an employer "calls the charge something else" other than one of the terms defined as a "per se service charge." Norrell, SlipOp.6-7. Accord Bednark v. Catania Hospitality Group, Inc., 78 Mass.App.Ct. 806, rev. denied 459 Mass. 1110 (2011). Thus, as the Dissent states, the Decision is "at odds with the plain language of the act and our case law." Add.10.

Likewise, the Decision's holding that the presence on the invoices of two "per se" charges permits the Club to retain one of the two, and its reliance on

different charge language contained in a pre-event contract, were both impermissible. The explicit language of the Act itself includes no limitation on the number of per se charges required to be paid to servers, and makes no reference whatsoever to pre-event contracts or other documents previewing potential, as opposed to actual, charges that are "imposed." See Cooney v. Compass Group Foodservice, 69 Mass.App.Ct. 632, rev. denied 450 Mass. 1102 (2007), confirming that the Act focuses on "invoiced charges that are named, designated, denominated, labeled, or otherwise called a 'service charge' on the invoice that is submitted." Id. at 637 (emphasis added). See also, Norrell, SlipOp.18. Allowing the Club here such an "end run" around the explicit language of the Act alone justifies review by this Court in order to prevent the undermining of the intent of the Legislature.

Left undisturbed, the Decision would have the effect of undoing the Act's fundamental protection for service employees and reversing the seminal decision on the Tips Act, Cooney (and its progeny Bednark and Norrell), where the Appeals Court held:

> the statutory language reflects legislative intent to regard any fee that the invoicing entity chooses to call a "service charge" on an invoice for food or beverage service as being the functional equivalent of a tip or gratuity, thereby subjecting the fee to the statute. "The statute is unambiguous and must be construed as written." It applies to tips, gratuities, and fees that are called "service charges" in aid of a clear purpose: letting employees keep these payments.

69 Mass.App.Ct. at 637-638 (citation omitted). Or, as this Court stated in DiFiore, "the purpose of the revised [Tips] Act is to 'protect[] the wages and tips of certain employees'" and "[t]he Legislature intended to ensure that service employees receive all the proceeds from service charges, and any interpretation of the definition of 'service charge' must reflect that intent." 454 Mass. at 492, 493. See also Meshna v. Scrivanos, 471 Mass. 169, 175 (2015). A more direct statement of an important public policy is difficult to imagine.[3] Yet, the Decision directly contradicts this longstanding precedent, without so much as a single reference to the core "strict liability" holding in Cooney. In contrast, the Dissent directly and properly applies Cooney's strict liability mandate, in compliance with the Legislature's intent, even where "from time to time service employees may reap seemingly unfair benefits from an invoicing entity's honest misstep." Add.15.

A decision which is so evidently inconsistent with longstanding precedent and the explicit language of the statute is appropriate for further appellate review. This is particularly the case where, as here, the statute at issue has been held to embody fundamental public policy protecting wages and the decision will affect

[3] Plaintiffs' Complaint includes claims under both the Tips Act and Wage Act, as the timely payment requirement of the Wage Act is incorporated in Section (e) of the Tips Act and likewise embodies fundamental public policy. Melia v. Zenhire, Inc., 462 Mass. 164, 169 (2012).

service employees statewide. As a result, it is respectfully requested that the instant Application be granted because the Decision below is not only erroneous as a matter of law, but implicates issues identified by the Legislature and this Court as affecting both the public interest and the interests of justice.

STATEMENT OF PRIOR PROCEEDINGS

Plaintiffs brought this action individually and on behalf of other wait staff employees of the Club. Pursuant to G.L.c.149, §152A ("Tips Act") and G.L.c.149, §148 ("Wage Act"), the Complaint sought to recover for the wait staff the proceeds of Service charges which the Club collected from banquet patrons. The Club moved for Judgment on the Pleadings, asserting that Plaintiffs' allegations "fail to state claims for which relief may be granted." Plaintiffs opposed that Motion and filed a Cross Motion for Judgment on the Pleadings based on the statutory language and settled law establishing strict liability for an employer which submits an invoice imposing a "Service" charge and fails to remit the proceeds to the designated employees.

In a Memorandum of Decision and Order dated March 29, 2019, the Superior Court allowed the Club's motion and denied Plaintiffs' motion. Plaintiffs filed a Notice of Appeal on April 23, 2019. The Appeals Court affirmed the judgment below by a vote of 2-1, with Justice Milkey authoring the Dissent. The Decision concludes that the charge labeled "Service" on the Club's two rounds of

invoices was not a "Service charge" required to be distributed to the service employees. Rather, the Decision concludes that "it appears that the nongratuity overhead or administrative charge" referenced in a pre-event contract was simply mistakenly "listed under 'Service' on the final invoice." Add.4. In addition, the Decision applies a patron "reasonable belief" standard and a "safe harbor" analysis (set forth in §§152A(a) and (d)) to a term ("service" charge) that the Tips Act has explicitly designated as triggering "per se" liability for employers. Add.7. Finally, the Decision rejects the settled authority of this Court and the Appeals Court imposing strict liability where an employer retains charges denominated on an invoice as "service charge, tip, [or] gratuity" on the grounds that the Club collected two 10% fees, the "service" charge at issue and "a separate gratuity fee for the employees' benefit," and was therefore not required to remit to its employees the proceeds of the "Service" charge at issue. Add.9.

The Dissent concludes that "the club's liability is plain" based on what "our cases have long established." Add.14. Specifically, that "by embracing strict liability with respect to those charges that facilities themselves choose to label as tips, gratuities, or service charges, the Legislature" adopted "per se liability provisions" which require payment of invoiced charges with those labels to employees regardless of "[w]hether patrons in fact understood that the second ten

percent 'service charge' would be paid to the service staff or instead to the club itself." Add.15-16.

STATEMENT OF FACTS

The undisputed facts are that the Club provides catering and event services and collects "Service" charges and "Gratuities" from patrons – each in the amount of ten percent (10%) of the food and beverage purchased at the event. Specifically, both the Club's preliminary Banquet Event Order Invoice and its final Invoice to patrons after the conclusion of the event (collectively, "Invoices") impose those two charges and no other additional charges.

In advance of banquet events, the Club utilizes an Event Contract and Schedule of Charges which reference, inconsistently, an "administrative" and an "overhead" charge in the amount of ten percent and include language to the effect that these charges do "not represent or constitute any form of gratuity to the wait staff, service employees and service bartenders working on the function." In the section of the contract titled "Taxes, Tips and Additional Charges," there is no mention of an "administrative" or "overhead" charge. Rather, it specifies "Additional Charges" that include "service charges, gratuities."

Neither an "administrative" nor an "overhead" charge is referenced on the Club's Invoices, nor is any such charge ever assessed to a patron. Instead, as the Dissent notes,

> the banquet event order invoice provided seeming clarity as to exactly what the patron was committing to pay. This document made no mention whatsoever of the "overhead charge" referenced in the original event contract. Instead, it referenced a single category of supplemental charges labeled as "Service Charges & Gratuities." Under that heading, the document treated service charges and gratuities together as one charge, in an amount that equaled twenty percent of the items on which it was based. Thus, weeks before the events occurred, patrons committed by contract to pay twenty percent in supplemental charges that the club itself denominated as "Service Charges & Gratuities."
>
> Like the banquet event order invoice, the final bill also classified the extra twenty percent levied as "gratuity" and "service" charges, again without the "overhead charge" referenced at the beginning of the process ever being mentioned. This time, the formatting of the charges was slightly different. Instead of one category of "Service Charges & Gratuities" set at twenty percent, there were separate line items for "gratuity" and "service" charges, each listed as ten percent.

Add.13-14. As to the "Service" and "Gratuity" charges assessed on the Invoices, the Club acknowledges that it has failed to distribute the full proceeds of those charges to the wait staff. In fact, the Club has a policy and practice of retaining the full amount of the ten percent (10%) Service charge.

POINTS AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1. Whether the Tips Act permits the application of a patrons' "reasonable belief" standard so as to allow an employer to retain a charge it labeled on invoices as a "per se service charge" which results in "per se liability" under the "strict liability" Tips Act if not distributed to employees.

2. Whether the Tips Act permits application of the "safe harbor" clause (G.L.c.149, §152A(d)) so as to allow an employer to retain a service charge where the only charges imposed on an invoice are "per se service charges."

3. Whether, where an employer lists two charges that constitute "per se service charges" payable to employees under the Tips Act, the employer may lawfully retain one of those charges.

4. Whether applying a patrons' "reasonable belief" standard to a "per se service charge" violates the Tips Act by impermissibly requiring an individualized determination rather than fulfilling the Legislature's "uncomplicated approach" of imposing automatic liability when "per se" language is used on invoices.

5. Whether the Tips Act permits consideration of a document other than an "invoice, bill or charge" (G.L.c.149, §152A(d)) to determine whether invoiced charges must be distributed to employees where invoices contain only "per se service charge" language and make no reference to non-gratuity charges referenced in pre-event documents.

REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

I. The Decision Erroneously Relies on a "Reasonable Belief" Standard Barred by the Act's Strict Liability Language and Settled Authority.

The Decision rests on a fundamental misreading of the Act's definition of "Service charge" and applies a test grounded in "reasonable belief" that is wholly

inapplicable to the charge at issue. Under the Act's definition, the Club's charge labeled "Service" is one of three labels establishing a "per se service charge" which results in "per se liability" if not distributed to the service employees. Norrell, Slip.Op.7,19. This crucial distinction was confirmed by this Court in DiFiore, holding that the following jury instructions "were a correct statement of Massachusetts law."

> Under the [Act], a service charge is a fee charged to a patron in lieu of or in addition to a tip and includes any fee designated as a service charge, tip, gratuity as well as fees . . . charged that a patron or other consumer would reasonably expect to be given to a service employee in lieu of or in addition to a tip. . . .
>
> [T]he [plaintiff service employees] can recover against [the defendant] under the [Act] by proving either that the [applicable] fee was designated by [the defendant] as a service charge, tip, or gratuity, or that patrons or other consumers would reasonably expect that the [applicable] fee was a tip being collected on behalf of the [service employees] . . . .

454 Mass. at 489, n.7, 497 (emphasis added).

Here it is undisputed that the only charges imposed on an invoice fell into the first category of "per se service charges." Nowhere on the Invoices was there any mention of (or reference to) the "nongratuity" terms "administrative" or "overhead" charges from the pre-event contract. Yet, the Decision finds that the Club was entitled as a matter of law to retain the proceeds of the "Service" charge that was imposed on the Invoice. The Decision reaches this erroneous result by inexplicably applying to a charge labeled "Service" the test for the second category

– i.e. what a patron's reasonable expectation would be regarding the disposition of a fee that is designated as something other than one of the terms constituting a "per se service charge." See e.g. Add.7-8 ("a patron who had read and signed the contract could not reasonably believe the fee [on the invoice] was meant to be a gratuity").

As the Dissent notes, "[t]he language that the club itself chose triggered per se liability." Add.14. The Decision's fundamental misreading of the statute is highlighted in Bednark, noting the statute's distinction between two categories of "service charges" to which employees are entitled:

> The definition includes two ways in which an employer-imposed fee to patrons may constitute a service charge that must be remitted to protected employees. First, "any fee designated as a service charge, tip, [or] gratuity" -- regardless of the employer's, employee's, or patron's intent or expectation -- is automatically rendered a "service charge" under the current Tips Act. G.L. c.149, §152A(a) . . . . Second, "a fee that a patron or other consumer would reasonably expect to be given to a wait staff employee, service employee, or service bartender in lieu of, or in addition to, a tip" also constitutes a "service charge."

78 Mass.App.Ct. at 814 (emphasis added). Accord Norell, SlipOp.7.

In sum, long settled law confirms that "reasonable belief" is legally irrelevant in regard to the three "per se liability" charges. In fact, Cooney holds that when an employer imposes a "Service" charge, the proceeds must go to the employees even where patrons are explicitly told it is not a gratuity. 69 Mass.App.Ct. at 634. Nevertheless, the Decision turns on what it calls "haphazard

labeling" of a charge listed simply as "Service," and whether a patron might "reasonably believe the fee was meant to be a gratuity" based on language in a pre-event contract referencing two charges with different labels. Add.7,8,9. If, as in Cooney, an explicit statement that an invoiced "Service" charge is not a gratuity could not relieve an employer of its statutory payment obligation, it is evident that the use here of terms for non-gratuity charges which appear nowhere on the Invoices cannot have that effect.

II. Safe Harbor Provision Is Inapplicable Where a Per Se Charge is Assessed.

Disregarding the explicit language of the Act, the Decision holds that language about different charges in the pre-event contract "was sufficient to afford [the Club] the protections of the Tips Act's safe harbor" regarding the "Service" charge at issue. Add.9. That provision permits employers to collect and retain a "house" or "administrative" fee imposed on an invoice if it includes a "designation or written description" informing patrons "that the fee does not represent a tip or service charge." G.L.c.149, §152A(d). Here, however, it is undisputed that the Club's Invoices contain no reference to either a "house" or "administrative" fee. In addition, the statute specifically provides that such a "house or administrative fee" is one imposed "in addition to, or instead of a service charge or tip." Id. There is no such qualifying charge on the Club's Invoices. Instead, the only

relevant charges listed are "Gratuity" and "Service." Thus, the "Service" charge simply cannot be a fee "in addition to or instead of a service charge."

The Decision's reliance on the Safe Harbor provision is also flawed because that provision has no relevance to invoices bearing one of the "per se service charges." As with consideration of patrons' intentions, the Act does not permit the use of a Safe Harbor designation to convert a charge labeled with one of the "per se service charge" designations into a fee that "does not represent a tip or service charge." But that is precisely the erroneous premise of the Decision.

III. Number of Per Se Charges Assessed Does Not Relieve an Employer of Its Tips Act Obligations.

The settled precedent discussed above is unaffected by the fact that the Club elected to impose two distinct charges totaling 20%, each of which was a "per se service charge." In short, the statute contains no limitation on the number of charges that trigger employers' obligation to convey proceeds to the wait staff. Nor would any such limitation make sense as the statute's very purpose is to ensure that those workers receive the proceeds of any charge so labeled. Thus, the Club's decision to assess two such charges does not constitute a basis to distinguish the dispositive holdings in Cooney, Bednark and Norrell.

The Decision's ruling that an employer is required to remit the proceeds of only one "per se" charge per invoice, means that every employer in the

Commonwealth could simply divide its 20% Gratuity, Tip or Service Charge into two 10% charges -- e.g. a 10% Gratuity and a 10% Tip -- and retain one or the other. However, the Act defines each of the three terms -- "service charge, tip, gratuity" – identically as a "per se" charge, the proceeds of which an employer is prohibited from retaining.

The Decision's holding that only one "per se" charge per invoice must be paid to the service workers invites employers to evade the fundamental purpose of the Tips Act with this simple artifice. In sum, the Decision reads into the Act an impermissible, non-existent limitation on the number of qualifying "per se" charges. There is simply no such exemption from the strict liability imposed by the Act.

IV. The Decision Improperly Requires an Individualized Determination Regarding the "Reasonable Belief" of Patrons Regarding Every Service Charge.

Cooney held that the Legislature chose an "uncomplicated approach of imposing liability whenever the invoicing entity, for whatever reason, chooses to call a fee a 'service charge' and then keeps the proceeds."

> The Legislature no doubt could have written the statute in the way that Northeastern would prefer, putting the burden on service employees to prove in each instance that a particular "service charge" was in fact intended by the "employer or other person" as a tip or gratuity. Doing so would surely have accorded greater protection to the innocent "employer or other person" and would have made recovery under the statute more onerous a task. But the Legislature did not strike the balance that way . . . .

69 Mass.App.Ct. at 639, 638.

The Decision's focus on the "reasonable belief" of patrons eviscerates this "uncomplicated" strict liability framework. It is replaced with surmises about what charges "appear" to be included under charges bearing wholly different designations and whether "haphazard labeling," that the Decision concedes "can be seen as inviting the type of confusion the Tips Act was designed to avoid," should be corrected by the courts. Add.7. As the Dissent notes, "[i]n light of the clarity of the act's per se liability provisions, I fail to see any justification for rescuing the club from its own errors." Add.15. Moreover, the Decision will require an examination in each case of the understanding of patrons regarding a particular charge – even where the employer has assessed a charge denominated with one of the three "per se" labels. By designating those fees as ones that are "automatically rendered a 'service charge'" (Bednark, at 814), the Legislature specifically foreclosed such case by case inquiry about how a patron would interpret them.

V. Because the Act's Strict Liability is Triggered by the Designation of Charges on an Invoice, the Decision's Reliance on the Event Contract is Erroneous as a Matter of Law.

The Decision also runs contrary to the explicit language of the Act which regulates the disposition of charges imposed on an "invoice, bill or charge," and not potential future charges referenced solely in a pre-event contract. Section

152A(d) of the Act requires that employees receive the "total proceeds" if "an employer or person submits a bill, invoice or charge to a patron or other person that imposes a service charge or tip." Unlike contracts which are ordinarily negotiated documents, an invoice is the only document that is "submitted" to a patron, and is certainly the only document submitted after the cost of the event has been tallied. Critically, no charges can be "imposed" until after the event because they are calculated as a percentage of purchases made.

This conclusion is confirmed by Cooney which held that the statute focuses on "invoiced charges that are named, designated, denominated, labeled, or otherwise called a 'service charge' on the invoice that is submitted." 69 Mass.App.Ct. at 637 (emphasis added). As the Dissent notes, it is only "following the event" that "patrons were billed for" the charges at issue because no tally of final charges to be "assessed" was possible until that stage. Add.14. See also Norrell, SlipOp.18, where the Court drew the critical distinction between Cooney where "the facility owner expressly had billed patrons for a 'service charge'" and the scenario where "any actual invoices were for what was labeled a 'house charge'…without the term ['service charge'] otherwise appearing in any invoices." It is undisputed that here the Club "expressly had billed patrons for a 'service charge'" and the "actual invoices" included only charges labeled "Gratuity" and "Service."

The Decision improperly skirts the dispositive significance of the label on the invoiced charge by concluding, concerning the first invoice submitted to patrons, that "[t]he ten percent administrative charge is not labeled specifically as such, but appears to be included within the 'Service Charges & Gratuities' section." Likewise, the Decision concludes that "it appears that the nongratuity overhead or administrative charge is listed under 'Service' on the final invoice." Add.4. This remarkable result is reached in the face of the uncontested fact that the Invoices include not a single reference, cross-reference or allusion to either an overhead or an administrative charge. Thus, the Decision erroneously interprets a charge defined as automatically constituting a service charge to mean the very opposite. As the Dissent notes, the Decision's "close enough" approach is "starkly at odds with the act and our cases interpreting it." Add.14.

CONCLUSION

Further appellate review should be granted.

Dated: August 4, 2020

/s/ Paul Holtzman

Paul Holtzman
BBO # 563184
Janet Steckel Lundberg BBO # 545623
Krokidas & Bluestein, LLP
600 Atlantic Ave., 19th Floor
Boston, MA 02210
(617) 482-7211
Pholtzman@kb-law.com
Jlundberg@kb-law.com

3487\0001\633600.v4

CERTIFICATE OF COMPLIANCE WITH MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I, Janet Steckel Lundberg, hereby certify that this Plaintiffs-Appellants' Application for Further Appellate Review complies with the rules of this Court that apply to the filing of appellate briefs, including, but not limited to Mass.R.App.P. 16(a) and 20, as applicable, and 27.1 and Supreme Judicial Court Rule 1:21. The application was written using proportional 14 point, Times New Roman font in Word 2016, and the statement of the reasons why further appellate review is appropriate contains 1993 non-excluded words.

/s/ Janet Steckel Lundberg

_____

Janet Steckel Lundberg

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

FAR NO. _ _ _ _

APPEALS COURT DOCKET NO. 2019-P-0761

KHRIS HOVAGIMIAN AND DILMA SILVA, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED

Plaintiffs-Appellants

v.

CONCERT BLUE HILL, LLC D/B/A BLUE HILL COUNTRY CLUB; PETER NANULA; GREGG DEGER; BRYAN ELLIOTT; FRANCISCO VENTURA; AND TOM GIBSON

Defendants-Appellees

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I, Janet Steckel Lundberg, hereby certify, under the penalties of perjury, that on August 4, 2020, I caused a true and accurate copy of the foregoing to be filed via electronic filing and served copies upon the following counsel by electronic filing, first class mail, postage prepaid, and via email to:

Geoffrey P. Wermuth, Esq.
Paul G. King, Esq.
Murphy Hesse Toomey & Lehane LLP
300 Crown Colony Drive, Suite 410
Quincy, MA 02169

gwermuth@mhtl.com
pking@mhtl.com

/s/ Janet Steckel Lundberg

Paul Holtzman
BBO # 563184
Janet Steckel Lundberg
BBO # 545623
Krokidas & Bluestein, LLP
600 Atlantic Ave., 19th Floor
Boston, MA 02210
(617) 482-7211
Pholtzman@kb-law.com
Jlundberg@kb-law.com

ADDENDUM

KHRIS HOVAGIMIAN & another[1] vs. CONCERT BLUE HILL, LLC,[2] & others.[3]

No. 19-P-761.

Norfolk. February 4, 2020. - July 16, 2020.

Present: Meade, Milkey, & Desmond, JJ.

Tips. Labor, Wages. Statute, Construction. Practice, Civil, Judgment on the pleadings. Words, "Service charge."

Civil action commenced in the Superior Court Department on May 7, 2018.

The case was heard by Elaine M. Buckley, J., on motions for judgment on the pleadings.

Paul Holtzman (Janet Steckel Lundberg also present) for the plaintiffs.

Paul G. King (Geoffrey P. Wermuth also present) for the defendants.

[1] Dilma Silva. Both plaintiffs bring the action individually and on behalf of all other persons similarly situated.

[2] Doing business as Blue Hill Country Club.

[3] Peter Nanula, Gregg Deger, Bryan Elliott, Francisco Ventura, and Tom Gibson.

DESMOND, J. This case arises out of a dispute between defendant Blue Hill Country Club (club) and its restaurant servers over the application of the safe harbor provision of G. L. c. 149, § 152A (Tips Act or act). See G. L. c. 149, § 152A (d), second par. The plaintiffs, two of the club's servers, contend that because the club collected a fee that was described as a nongratuity "administrative" or "overhead charge" in the club's event contract but later grouped as a "service charge" on two club invoices, they are owed the fee pursuant to the Tips Act, and that the safe harbor provision of the act is inapplicable. The defendants, on the other hand, argue that the use of the term "service charge" on the invoices was simply poor labeling. They assert that the clear and repeated definitions of the terms, which are contained in the event contract, control, and thus the safe harbor provision applies. We conclude that on these facts the language in the event contract indeed controls, and that the challenged charge was not a "service charge" under the meaning of the act.

Background. The facts are undisputed. Defendant Blue Hill Country Club does business hosting banquets and other events requiring food and beverage service. To that end, the club employs dozens of nonmanagerial wait staff employees, including the plaintiffs, who are paid on an hourly basis. When patrons

wish to use the club's facilities, they must first execute a nine-page "Blue Hill Country Club Event Contract" (contract). The contract goes into great detail delineating, inter alia, deposit and payment schedules, event hours, menu selections and pricing, and club liability. In two separate places within the contract, the club states that patrons will be charged both a ten percent gratuity on all food and beverages and a separate ten percent administrative or overhead charge on all food and beverages. The contract states in clear, plain language that the administrative or overhead charge is not a gratuity.[4]

---

[4] Under the heading "Menu Selections & Pricing," the contract provides:

> "All food and beverage is subject to ten percent (10%) gratuity which is distributed one hundred percent (100%) to the wait staff employees, service employees and service bartenders working on the function and an overhead charge of an additional ten percent (10%) administrative charge is also added on all food and beverage purchases which is held by the house to be used for administration and other overhead costs and does not represent or constitute any form of gratuity to the wait staff, service employees and service bartenders working on the function."

Additionally, on a page titled "Schedule of Charges and Fees," the contract states:

> "A 10% gratuity and a 10% overhead charge are applied to all food and beverage charges together with the 7% Massachusetts Meals and Sales Tax. The 10% gratuity is distributed 100% to the wait staff employees, service employees and service bartenders serving the function. The overhead charge is retained by [the club] for administrative and overhead costs only. The 10% overhead charge does not represent a gratuity or tip to wait and service staff."

Once the contract is signed, patrons receive and sign an "Event Order Invoice" that notifies the club of the number of expected guests and the amount of food requested for the event.[5] On the invoice, the estimated costs are broken down and divided into three categories: "Charges," "Taxes," and "Service Charges & Gratuities." The ten percent administrative charge is not labeled specifically as such, but appears to be included within the "Service Charges & Gratuities" section. Additionally, patrons also receive a final "Invoice" after the event is held. On that bill, under the heading "Service & Tax Charges," there are three line items for "Tax," "Gratuity," and "Service." The "Gratuity" line item charge and the separate "Service" line item charge are the same amount: ten percent of the food and beverage charges. As a result, it appears that the nongratuity overhead or administrative charge is listed under "Service" on the final invoice.

The plaintiffs, in their Superior Court complaint, asserted that the club violated the Tips Act by failing to remit those charges labeled as "service" to the wait staff. See Bednark v. Catania Hospitality Group, Inc., 78 Mass. App. Ct. 806, 814

[5] We contest the dissent's assertion that the subsequent "Event Order Invoice" served as an addendum to the event contract "in both form and function," post at , as the invoice did not amend or modify any of the contract terms.

(2011), quoting Cooney v. Compass Group Foodservice, 69 Mass. App. Ct. 632, 637 (2007) (any fee identified as "service charge" is "automatically rendered a 'service charge' under . . . G. L. c. 149, § 152A [a]"). The defendants filed a motion for judgment on the pleadings, and the plaintiffs countered with their own cross motion for judgment on the pleadings. After a hearing, the judge allowed the defendants' motion, reasoning that the plaintiffs' argument was "correct as far as it goes," but that the end result would contravene the Legislature's intent with regard to the Tips Act. The judge concluded that the most reasonable interpretation of the Tips Act's safe harbor provision would be to consider the "gratuity" charge as the service charge, and the additional "service" charge to be the "house or administrative fee in addition to . . . [the gratuity] charge." The plaintiffs timely appeal.

Discussion. The plaintiffs argue that because the statutory language defines "[s]ervice charge" as, inter alia, "any fee designated as a service charge, tip, [or] gratuity," G. L. c. 149, § 152A (a), the invoices provided by the club automatically make the fees in question a service charge under the act. We disagree. When reviewing a ruling on a motion for judgment on the pleadings, we do so under de novo review. Ridgeley Mgt. Corp. v. Planning Bd. of Gosnold, 82 Mass. App. Ct. 793, 797 (2012). "A fundamental tenet of statutory

interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Sullivan v. Brookline, 435 Mass. 353, 360 (2001). "A court may not add words to a statute that the Legislature did not put there." Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Court Dep't, 439 Mass. 352, 355 (2003).

As summarized in Norrell v. Spring Valley Country Club, Inc., 97 Mass. App. Ct. , (2020), the 2004 amendment to the Tips Act states that any service charge or tip must be remitted to the staff or service employees.[6] However, in order to preserve the right of employers to impose a supplemental charge without running afoul of the act, a "safe harbor provision" was also included, stating:

> "Nothing in this section shall prohibit an employer from imposing on a patron any house or administrative fee in addition to or instead of a service charge or tip, if the employer provides a designation or written description of that house or administrative fee, which informs the patron that the fee does not represent a tip or service charge for wait staff employees, service employees, or service bartenders."

G. L. c. 149, § 152A (d), second par.

[6] "If an employer or person submits a bill, invoice or charge to a patron or other person that imposes a service charge or tip, the total proceeds of that service charge or tip shall be remitted only to the wait staff employees, service employees, or service bartenders in proportion to the service provided by those employees." G. L. c. 149, § 152A (d), first par.

In Bednark, we clarified that the safe harbor provision "requires an employer to do something more than simply label a fee as 'house' or 'administrative,' in order to dispel the possibility that a patron would reasonably believe that the fee is a gratuity." Bednark, 78 Mass. App. Ct. at 815.

Here, we acknowledge that the club's invoices can be seen as inviting the type of confusion the Tips Act was designed to avoid. Nonetheless, the club took adequate steps to invoke the safeguards of the safe harbor provision. Looking to the agreement between the club and its patrons, the club's contract twice states that it will assess a ten percent gratuity fee on food and beverage charges that goes entirely to the staff or servers, and an additional ten percent administrative or overhead charge that the club retains. In both clauses, the administrative charge was stated to not represent a gratuity for the wait and service staff. By its plain meaning, we can quickly conclude that the contract's language more than sufficed to "inform[] the patron that the fee does not represent a tip or service charge for wait staff employees, service employees, or service bartenders." G. L. c. 149, § 152A (d), second par.

That the club mislabeled the administrative fee on the subsequent invoices is not enough to remove the safe harbor's protections given that a patron who had read and signed the contract could not reasonably believe the fee was meant to be a

gratuity. This is most apparent by studying the final invoice, which listed the fee at issue -- labeled "service" -- immediately beneath a different fee labeled "gratuity."[7] The existence of two separate charges alone supports the conclusion that the "service" charge was something other than a gratuity.[8]

Our reading is consistent with the statutory language of the Tips Act and the legislative intent behind it. General Laws c. 149, § 152A (d), first par., states that the service staff is owed the total proceeds of a service charge or tip "[i]f an employer or person submits a bill, invoice or charge to a patron or other person that imposes a service charge or tip" (emphasis added). Here, the invoices do not impose new fees -- they are derivatives and summaries of the same transaction governed by the event contract. Likewise, "[t]he Legislature's intent in enacting the act can be plainly discerned from its language and history -- to ensure that service employees receive the tips, gratuities, and service charges that customers intend them to

[7] Here, crucially, the club charged and collected a separate gratuity fee for the club's waitstaff and employees, which the defendants in Bednark, Cooney, and DiFiore v. American Airlines, Inc., 454 Mass. 486 (2009), did not do. See DiFiore, supra at 488; Bednark, 78 Mass. App. Ct. at 808 n.9; Cooney, 69 Mass. App. Ct. at 635-636.

[8] This is true regardless of the synonymy between "service charge" and "gratuity," as found in Cooney. See Cooney, 69 Mass. App. Ct. at 637.

receive." Bednark, 78 Mass. App. Ct. at 809, quoting DiFiore v. American Airlines, Inc., 454 Mass. 486, 491 (2009). Notably, the plaintiffs did not allege that any patrons had been confused as to the assessed charges or had complained of any ambiguity in the documents. The Tips Act is intended to protect servers and waitstaff from being taken advantage of by their employer, and here the club collected a separate gratuity fee for the employees' benefit. Notwithstanding the club's haphazard labeling on invoices, the club's clear and painstaking language in the event contract was sufficient to afford it the protections of the Tips Act's safe harbor.[9]

Judgment affirmed.

[9] Even if the provisions in the event contract were not sufficient to entitle the club to a judgment on the pleadings, the contract language certainly would have been sufficient to raise a jury question.

MILKEY, J. (dissenting). My disagreement with the majority, while outcome determinative, is narrow. In drafting its initial contract with its patrons, defendant Blue Hill Country Club (club) sought to chart a course under which it would be able to reach the safe harbor offered by the Tips Act (act). See G. L. c. 149, § 152A (d), second par. Had the club stayed on that course, it would have been entitled to retain the second ten percent supplemental fee that it charged. However, for whatever reason, the club abruptly changed tack and, as a result, veered away from its intended destination. As a result, weeks before the events occurred, the club began to characterize the fees at issue in a manner that unequivocally triggered per se liability under the act. Because the majority opinion is at odds with the plain language of the act and our case law, I respectfully dissent.

Background. 1. The three-step contracting process. The uncontested, representative documents in the record reveal that the club's contractual relationship with its patrons went through a three-step process. After summarizing that process, I will lay out how the supplemental charges the club levied were addressed at each stage.

In step one, the patron reserved the facility space, paid a deposit, and signed what was denominated an "Event Contract." In that contract, the club agreed to host the event, and the

patron agreed to pay both a flat room charge and a minimum amount for food and drink. The parties also agreed to abide by various terms, including an attached schedule of fees.

In step two of the process, which occurred two weeks before the scheduled event, the patron provided the club with a final head count, based upon which the club would order the food and beverages. As part of this step, the patron was presented with, and asked to sign, a "Banquet Event Order Invoice," which itemized the specific charges that the patron was committing to pay. Despite its being called an "Invoice," this key pre-event document executed by both parties served as an addendum to the event contract in both form and function.

After the event had concluded and the club thereby had supplied the services to which the parties agreed, a third document was generated. This final document (labeled simply "Invoice") was not signed by either party. It functioned simply as the final bill, that is, the club's demand that the patron pay the amount previously agreed upon.

2. How the club characterized its supplemental charges. As the majority accurately notes, one paragraph in the original event contract, captioned "Menu Selections & Pricing," identified two specific charges for which patrons would be responsible: a ten percent "gratuity" charge and a ten percent "overhead charge" (with the gratuity charge going to service

employees and the overhead charge going to the club). Similar language was also included in the schedule of charges and fees appended to the event contract.

Because of this just-referenced language, the majority maintains that the event contract is crystalline in laying out the nature of the two supplemental charges that patrons were committing to pay. That is not entirely accurate, because whatever clarity that language provided was at least somewhat muddied by language appearing in a different paragraph of the contract. That paragraph was captioned "Taxes, Tips and Additional Charges," a title that suggested that it was the obvious place in the form contract where a patron would learn what additional charges he or she might end up bearing. This paragraph stated that the food and drink minimums that the patron agreed to pay did not include various enumerated additional charges. Nowhere in that lengthy list was the "overhead charge" referenced under "Menu Selections & Pricing." Rather, the list included, among others, charges denominated as "service charges" or "gratuities," as well as "charges for services and items not included in the contracted minimum charges and other additional charges applicable to the Event." In this manner, the "Taxes, Tips and Additional Charges" language served to inform patrons that they were potentially responsible for paying various "service charges" on top of the

food and drink minimums that were the principal focus of the event contract. When the two relevant paragraphs of the initial event contract are taken together, they create at least some confusion over what kinds of charges the patron ultimately will bear.

In any event, in contrast to the ungainly structure of the event contract, the banquet event order invoice provided seeming clarity as to exactly what the patron was committing to pay. This document made no mention whatsoever of the "overhead charge" referenced in the original event contract. Instead, it referenced a single category of supplemental charges labeled as "Service Charges & Gratuities." Under that heading, the document treated service charges and gratuities together as one charge, in an amount that equaled twenty percent of the items on which it was based. Thus, weeks before the events occurred, patrons committed by contract to pay twenty percent in supplemental charges that the club itself denominated as "Service Charges & Gratuities."

Like the banquet event order invoice, the final bill also classified the extra twenty percent levied as "gratuity" and "service" charges, again without the "overhead charge" referenced at the beginning of the process ever being mentioned. This time, the formatting of the charges was slightly different. Instead of one category of "Service Charges & Gratuities" set at

twenty percent, there were separate line items for "gratuity" and "service" charges, each listed as ten percent.

Discussion. Under these undisputed facts, the club's liability is plain. Before each event was held, the club extracted from its patrons a promise to pay twenty percent in charges that the club itself expressly denominated as "Service Charges & Gratuities," and then following the event, patrons were billed for and paid such charges. The language that the club itself chose triggered per se liability under the act, as our cases have long established and as we reaffirm this very day. See Norrell v. Spring Valley Country Club, Inc., 97 Mass. App. Ct. , (2020).

To be sure, the club initially took steps to seek protection under the act's safe harbor provision. However, the club veered off course, and even the majority acknowledges that the club's subsequent communications with its patrons were "haphazard" and "can be seen as inviting the type of confusion the Tips Act was designed to avoid," ante at . Nevertheless, the majority holds that the club was entitled to judgment in its favor on the pleadings, in effect concluding that -- as a matter of law -- the club's efforts were "close enough." See ante at . This is starkly at odds with the act and our cases interpreting it.

Regardless of whether the club's failure to stay on course was inadvertent, the club has only itself to blame for falling asleep at the tiller. In light of the clarity of the act's per se liability provisions, I fail to discern any justification for rescuing the club from its own errors. Indeed, we have previously held that the possibility that service employees might receive a windfall does not invalidate the protections that the act offers. Cooney v. Compass Group Foodservice, 69 Mass. App. Ct. 632, 639 (2007). As we explained in Cooney, we must presume that by embracing strict liability with respect to those charges that facilities themselves choose to label as tips, gratuities, or service charges, the Legislature was aware that "from time to time service employees may reap seemingly unfair benefits from an invoicing entity's honest misstep." Id. (rejecting facility owner's argument that evidence showed that charge it labeled as "service charge" in fact was never intended as tip or gratuity for service staff).[1] Whether patrons in fact understood that the second ten percent "service charge" would be paid to service staff or instead to the club itself similarly is

[1] I recognize that Cooney rested principally on a version of the act that has been amended. However, the amendments retained the provisions imposing per se liability as to those particular charges that the facility itself chooses to label as tips, gratuities, or service charges. See Norrell, 97 Mass. App. Ct. at .

beside the point where, as here, the per se liability provisions apply. Thus, the plaintiffs hardly can be faulted for failing to "allege that any patrons had been confused as to the assessed charges or had complained of any ambiguity in the documents." Ante at .[2]

In sum, under the undisputed facts, the club's liability under the per se provisions of the act is clear as a matter of law. Accordingly, judgment on the pleadings should have entered for the plaintiffs, not the club. I therefore dissent.

[2] Even if this case were not viewed as one of per se liability, allowing the club's motion for judgment on the pleadings still would have been error. The club would be entitled to a ruling in its favor as a matter of law only if we confidently could say that any reasonable patron could not have believed that the twenty percent in "Service Charges & Gratuities" that patrons committed to pay would go to service employees. At the very least, the conflicting documents that the club itself drafted were sufficient to raise a jury question on that point. See Norrell, 97 Mass. App. Ct. at .

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 19-P-761

KHRIS HOVAGIMIAN & another

vs.

CONCERT BLUE HILL, LLC, & others.

Pending in the Superior Court for the County of Norfolk

Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date July 16, 2020.