

1 SECOND JUDICIAL DISTRICT COURT
2 COUNTY OF BERNALILLO
3 STATE OF NEW MEXICO

4 D-202-CV-2016-02775

5 HAILEY ATYANI, et al.,

6 Plaintiffs,

7 vs.

8 DENNIS BONFANTINE, et al.,

9 Defendants.

10 PARTIAL TRANSCRIPT OF PROCEEDINGS

11 On the 29th day of May, 2019, at approximately
12 9:30 a.m., this matter came on for Motions Hearing before
13 the HONORABLE BENJAMIN CHAVEZ, Division XIX, Judge of the
14 Second Judicial District, State of New Mexico.

15 The Plaintiffs, HAILEY ATYANI, et al., appeared in
16 person and by Counsel of Record, YOUTZ & VALDEZ, PC, Shane
17 Youtz, James Montalbano, and Stephanie Welch, 900 Gold
18 Avenue, SW, Albuquerque, NM 87102.

19 The Defendants, DENNIS BONFANTINE, et al., appeared in
20 person and by Counsel of Record, ERIC R. BURRIS, Brownstein,
21 Hyatt, Farber, Schreck, LLP, 201 Third Street, NW, Suite
22 1800, Albuquerque, NM 87102.

23 At which time the following proceedings were had:
24
25

1 May 29, 2019

2 (NOTE: Beginning of requested portion.)

3 * * * * *

4 (NOTE: In open court.)

5 THE COURT: Okay.

6 All right. So, parties, thank you. That's a lot to
7 take in. I think we have all looked very closely at and
8 struggled with the issues of this case. The depositions
9 have been reviewed and considered. The Court has reviewed
10 the motions, responses, replies, and in consideration of
11 arguments made today, and additional information provided,
12 briefing, arguments, precedence, ordinances and other
13 written law. The Court considers the following: Obviously,
14 the Court certified a class of plaintiffs on May 15 of last
15 year, for all servers who worked for DB Kelly, Inc., doing
16 business as Kelly's Brew Pub and Restaurant and -- I'm
17 sorry; yes, and DB Brewery, LLC, from January 1, '13,
18 through August 17 of '16.

19 And, of course, the Court is required to and will
20 apply the standard for summary judgment enunciated in the
21 precedence, including *Romero v. Philip Morris, Inc.*, 2010,
22 and Rule 56, itself. That's the fundamentals. In November
23 of 2012, the ballot initiative increased the minimum wage in
24 the minimum wage ordinance to begin on January 1 of 2013.
25 The ordinances at issue are 13-12-1 through 13-12-6. Those

1 are the primary ordinances at issue. The plaintiffs sue
2 pursuant to their second amended complaint, Counts 1 through
3 5, that were discussed early on in today's arguments.

4 The minimum wage ordinance, as was discussed,
5 parallels our State code and 29 USC 203(m), in the Fair
6 Labor Standards Act, allowing for a reduced minimum wage for
7 tipped employees, which is often referred to as a "tipped
8 minimum wage." And I think that language does cause some
9 confusion in applying the law because of the use of the
10 phrase "minimum wage" in the phrase "tipped minimum wage."

11 There are, however, requirements that must be met for
12 an employer to pay the tipped minimum wage. For an employer
13 to pay this reduced tipped minimum wage, the employer must
14 do several things, including: Number one, inform the
15 employee in advance, in writing, of the payment mode. That
16 is important to the Court's consideration this morning.
17 Inform the employee in advance, in writing, of the payment
18 mode; number two, pay the employee a cash wage equal to or
19 greater than the tipped minimum wage; number three, be able
20 to establish that the tips and wages are equal to or greater
21 than the minimum wage by proof of FICA declaration or by the
22 employer's record of total tips received by the employee.

23 That proof is required, not necessarily dispositive to
24 this discussion, but one of the three requirements. Tip
25 pooling is permitted if certain requirements are met. And,

1 importantly, tip pooling does not allow that the tips be
2 shared with the employer for purposes of personal enrichment
3 or -- or for purposes of providing funds for payment of
4 other nontipped employees. This is prohibited by 13-12-3A.

5 The plaintiffs claim that an unlawful tip pool existed
6 because of -- the pool of money was, number one, not
7 properly accounted for; and, number two, partially taken by
8 the employer. The defendants argue that the Court should
9 not interpret the minimum wage ordinance without the
10 additional City rules for implementation of -- and
11 enforcement.

12 And so the defendants cite, for this proposition, to
13 what is a US tax court decision that this Court concludes is
14 not instructive in the instant matter. The Court does
15 reject this argument and will interpret the minimum wage
16 ordinance. The defendants also argue that the employees
17 ultimately received the minimum wage when the tipped minimum
18 wage is aggregated with the tips received at the end of the
19 pay period, and that, therefore, the plaintiffs may not
20 bring a civil action under the minimum wage ordinance,
21 citing to *Marlow v. New Food Guy, Inc.*, a Tenth Circuit case
22 from 2017.

23 Now, in *Marlow*, a catering company -- not a
24 restaurant, but a catering company -- paid its employee well
25 above the minimum wage and did not share any of the tips

1 with the employee, though there were tips. The Court
2 concludes, having reviewed everything, that *Marlow* is not
3 analogous to the instant case, in respect to the defendants'
4 arguments, because in *Marlow*, the employer did not -- did
5 not take the tip credit and did not pay the reduced tipped
6 minimum wage. That's an important distinction for the
7 Court's consideration and, therefore, the employer did not
8 invoke the obligations of the tip credit provision
9 requirements that are in the federal -- federal law.

10 Importantly, *Marlow* also stands for the proposition
11 that once the employer opts to use the tip credit provision,
12 then if there are not enough tips to get to minimum wage,
13 the employer must make up the difference; and, number two,
14 if there are excess tips, the excess goes to the employees
15 and not the employer. That would be consistent with the
16 minimum wage ordinance, which expressly prohibits
17 tip-sharing with employers.

18 Now, the depositions do not establish whether the
19 employees always got to minimum wage after opting for --
20 after the employer opted for the tip credit provision. The
21 depositions also, especially, do not establish whether the
22 employer was unlawfully sharing in the employees' tips after
23 opting for the tip credit provision. If either of these
24 still disputed material facts is true, then the plaintiffs
25 received less than the wage to which they were entitled,

1 giving the plaintiff a legitimate claim pursuant to
2 13-12-5B.

3 Therefore, the Court will deny the defendants' motion
4 for summary judgment regarding the plaintiffs' claims under
5 the minimum wage ordinance. There are disputed material
6 facts as to whether the defendants unlawfully instituted a
7 tip pool and, because of that, the Court will deny the
8 plaintiffs' motion for summary judgment regarding the
9 lawfulness of the tip pool per the minimum wage ordinance.

10 However, the plaintiffs have established some facts.
11 They have established as fact that the employer opted for
12 the tipped minimum wage tip credit provision. Everybody
13 accepts that. Number two, also by evidence and argument,
14 the case -- I'm sorry. The defendants did not inform the
15 employees in advance, in writing, of the tipped minimum wage
16 mode of payment. Also, with the \$3 per hour, the employees
17 were arguably -- and this is considered, but not
18 dispositive -- arguably not paid the tipped minimum wage at
19 all.

20 That aside, however, facts established are that the
21 tip credit provision was invoked; that the defendants did
22 not inform the employees in advance, in writing, of the
23 tipped minimum wage mode of payment; and, number three, the
24 defendants did not and cannot establish by FICA or records
25 of total tips -- total tips, including cash tips, that the

1 employees received equal to or greater than the minimum wage
2 or that they kept an accurate accounting of that
3 information.

4 The plaintiffs' evidence regarding these issues is
5 sufficient to establish them as facts. The defendants'
6 arguments in opposition do not sufficiently rebut, do not
7 provide reasonable inferences to rebut, and, in fact, in
8 these three areas, do not really give rise to the -- to the
9 level of supposition or even conjecture. They are, very
10 simply, insufficient.

11 The defendants did not inform the servers in advance,
12 in writing, of their tip -- that their tips would be
13 credited as part of their wages pursuant to the evidence and
14 all reasonable inferences benefiting the opponent to that
15 aspect of this discussion. The Court will, therefore, grant
16 summary judgment in favor of the plaintiffs as to whether
17 the defendants violated the minimum wage ordinance. This
18 is, in fact, dispositive of liability under the minimum wage
19 ordinance. Notice is a prerequisite -- notice is a
20 prerequisite to an employer availing itself of the tip
21 credit. Without notice, the employer is not entitled to pay
22 the tipped minimum wage as a matter of law, and so the Court
23 does grant summary judgment in that respect.

24 Now, because the employers are liable under the
25 minimum wage ordinance, itself, the Court does not get to

1 the plaintiffs' claims for conversion or unjust enrichment.
2 The Court also does not need to decide the defendants'
3 request for summary judgment on plaintiffs' claims for
4 conversion and unjust enrichment. I very simply do not get
5 to those questions because of the prior conclusion regarding
6 the minimum wage ordinance, itself.

7 Now, regarding the defendants' motions for summary
8 judgment as to the issue of who is an employer, the minimum
9 wage ordinance reads, as was discussed at length and -- that
10 an employer is "Any person, partnership, association,
11 corporation, business trust, legal representative, or any
12 other entity, or group of persons or entities, including
13 corporate officers or executives, who is required to have a
14 business license or business registration from the City of
15 Albuquerque," and then it goes on to describe more. And
16 this is in the definition section, 13-12-2, of the
17 ordinance, itself.

18 Kelly's Brew Pub was or is -- was owned by DB Brewery,
19 LLC, the sole member of which was DB Kelly, Inc., the sole
20 owner of which was Dennis Bonfantine. Now, the defendants
21 cite to 30-12-2 and 30-1-1, also, arguing rigorously that
22 there are no employees in Mr. and Mrs. Bonfantine because of
23 that definition. The plaintiff asserts that as the sole
24 owner, Mr. Bonfantine is described as -- or is necessarily
25 an officer or an executive, also arguing that by her

1 actions, Mrs. Bonfantine becomes an employer.

2 The -- as regards whether -- whether Mr. Bonfantine is
3 an officer or an executive, this is manifestly true. Also,
4 Mr. Bonfantine undisputedly employed the servers, exercised
5 control over their wages, hours and working conditions;
6 therefore, the Court will deny the defendants' motion for
7 summary judgment regarding whether Dennis Bonfantine is an
8 employer.

9 Regarding Janice Bonfantine, she is not an owner,
10 executive or officer. She is arguably a managing-type
11 employer who exercised some control. But given the standard
12 of proof required at this stage of the proceedings, the
13 Court -- let me restate that. I apologize. Janice
14 Bonfantine is not an owner, executive or officer, and the
15 Court will grant the Defendant Janice Bonfantine's motion
16 for summary judgment regarding violations of the minimum
17 wage ordinance.

18 And so that is the ruling of the Court, which I think
19 captures the totality of the arguments today. I would ask
20 that the plaintiffs put together a proposed order for the
21 Court's signature. And this one's a little more lengthy.
22 I'm not sure that it necessarily needs to be too lengthy,
23 but how much time would you prefer, Mr. Youtz?

24 MR. YOUTZ: Your Honor, I would hate, in a
25 proposed order, to mischaracterize what you very

1 thoughtfully said here today in your order. What I would
2 propose is either I wait for the transcript and reproduce
3 your statements in the order, or I just have a simple order
4 stating, "As indicated by the Court in its comments on its
5 decision and order, the summary judgment" -- "the
6 disposition of the summary judgments."

7 THE COURT: Okay.

8 MR. YOUTZ: Obviously, waiting for the transcript
9 would take longer, but if I did the very simple form of
10 motion that said, "For the reasons identified by the Judge
11 in his comments and order, the summary judgments are
12 disposed of as follows." And so I guess I'd defer to you.
13 I'm happy to wait for the transcript and put it on there. I
14 just don't want to paraphrase your words.

15 THE COURT: I understand.

16 MR. YOUTZ: That's always a problem between
17 parties.

18 THE COURT: Okay.

19 Mr. Burris, do you have a preference there?

20 MR. BURRIS: I don't have any -- I mean, I don't
21 know that there is anything pressing that requires us to get
22 this order entered right away, and I would honestly prefer
23 that we get the transcript --

24 THE COURT: Okay.

25 MR. BURRIS: -- so that we can include your

1 statements in full, so that we can deal with that.

2 THE COURT: Okay. All right. I'm not sure how
3 long that would normally take.

4 Mr. Youtz, how much time would you like?

5 MR. YOUTZ: Ten days.

6 Could we have the transcript within five days?

7 THE COURT: Okay. And is that --

8 Do you need more time for that?

9 MR. YOUTZ: If you do need -- yeah, there's no
10 reason to rush if you --

11 MR. BURRIS: I agree. There's no reason to rush.

12 THE COURT: Okay. So why don't I -- I'm going to
13 go briefly off the record and confer with court staff. We
14 are off the record.

15 (NOTE: Discussion held off the record.)

16 THE COURT: So I'm going to go back on the
17 record. We've talked a little bit about timing.

18 Mr. Youtz -- let's see, today's Wednesday. That would
19 be about nine days. You know, I'm not sure that there's
20 such a rush. Would you like nine days or a little bit more?

21 MR. BURRIS: Why don't we just say two weeks from
22 now?

23 MR. YOUTZ: Two weeks from today, that's great.

24 THE COURT: Okay. Let's do two weeks.

25 Attorneys, is there anything else that you'd like me to

1 consider at this time?

2 MR. BURRIS: Your Honor, I do believe that the
3 interpretation of the minimum wage ordinance with regard to
4 the definition of an employer is something that might
5 benefit from an interlocutory appeal. I don't know that
6 it's -- I believe it meets the standards for an
7 interlocutory appeal, but with regard to --

8 THE COURT: Okay.

9 MR. BURRIS: -- the possible, you know, different
10 views that we'd have on it -- I am not convinced,
11 necessarily, that we will take it, but I do believe that it
12 will be appropriate to include the ability to pursue an
13 interlocutory appeal in the order, if the Court feels that's
14 appropriate.

15 THE COURT: Okay.

16 Mr. Youtz?

17 MR. YOUTZ: We would, obviously, oppose that. I
18 think one of the main premises for an interlocutory appeal
19 is that the appeal would advance the merits of the case or
20 resolve the merits of the case in toto. This is a sub issue
21 and it would delay the case potentially for two years on an
22 issue which doesn't relate whatsoever to the merits of the
23 case, and I don't think it's appropriate under these
24 circumstances.

25 THE COURT: Oh, okay. You know, initially, that

1 is a persuasive response regarding interloc; however, you
2 know, not having dealt with that in the past maybe seven or
3 ten months, I would want to look very closely at it before
4 making a decision. I think you could make a request by
5 filed motion.

6 MR. BURRIS: Sure.

7 THE COURT: Okay. And then that would give me
8 time to really look at it and see whether it meets the
9 requirements and whether the response is, you know, what it
10 initially appears to be. I'm not sure.

11 MR. BURRIS: Understood. And that --

12 THE COURT: Okay.

13 MR. BURRIS: -- that's entirely proper. We get
14 that.

15 THE COURT: Okay. All right. Well, thank you
16 for that.

17 Attorneys, is there anything else you'd like me to
18 consider at this time?

19 MR. YOUTZ: Not from the plaintiffs, Your Honor.

20 MR. BURRIS: Nothing, Your Honor.

21 THE COURT: Okay. Well, parties, thank you very
22 much. We are, then, in recess and off the record. Have a
23 good morning, everyone. Thank you.

24 MR. YOUTZ: Thank you, Your Honor.

25 (NOTE: Proceedings concluded at 11:53 a.m.)

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STATE OF NEW MEXICO
COUNTY OF BERNALILLO

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SS

I, Shanon R. Myers, Official Court Reporter for the Second Judicial District of the State of New Mexico, hereby certify that I reported, to the best of my ability, the proceedings, D-202-CV-2016-02775; that the pages numbered TR-2 through TR-14, inclusive, are a true and correct transcript of my stenographic notes, and were reduced to typewritten transcript through Computer-Aided Transcription; and that on the date I reported these proceedings, I was a New Mexico Certified Court Reporter.

Dated at Albuquerque, New Mexico, this 3rd day of June, 2019.


SHANON R. MYERS, CCR, RPR, CRR, RMR, CRC
New Mexico CCR No. 275
Expires: December 31, 2019

THE COST NOT NECESSARY FOR NON-APPEALS

The total cost of this transcript is \$.