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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2016-000146-001 DT 07/05/2016

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

ELCHE L L C

v.

RONALD L WRIGHT II (001)
FOX RESTAURANT CONCEPTS LLC (001)

BRIAN A PARTRIDGE

RONALD L WRIGHT II
2041 W HIDALGO AVE
PHOENIX AZ 85041
C CHRISTINE BURNS

REMAND DESK-LCA-CCC
SOUTH MOUNTAIN JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2011–075390.

Plaintiff-Appellant ELCHE LLC (Plaintiff) appeals the South Mountain Justice Court's determination that granted Fox Restaurant Concepts LLC's (Fox) motion to reconsider the trial court's grant of a default garnishment which included Mr. Wright's tips as disposable earnings. Plaintiff contends the trial court erred. For the reasons stated below, the Court affirms the trial court's judgment about not including tips as part of a person's wages for garnishment purposes but reverses the trial court's judgment regarding the use of the Arizona minimum wage of $5.05 rather than the adjusted federal minimum wage of $2.13—adjusted for tipped employees—when calculating the employee's exemptions.

I. FACTUAL BACKGROUND.

On November 10, 2011, Plaintiff obtained a judgment against Defendant Ronald L. Wright (Defendant) in the principal amount of $1,515.44 plus attorneys' fees of $310.00 and costs of $211.00 for a total judgment of $2,036.44 with interest at the rate of 4.25%. Plaintiff applied for writs of garnishment beginning on February 28, 2012. Each writ of garnishment instructed the garnishee to do the following:

> Garnishee shall answer within ten (10) days, exclusive of the date of service, according to the instructions served herewith. After you calculate the amount of the garnishment, which is done by completing the Non-Exempt Earnings Statement served herewith, the garnishment-amount [*sic*] must be held and paid over to the judgment creditor, and you must send a copy of the Non-Exempt Earnings Statement to the Creditor with your Answer, but don't send the Non-Exempt Earnings Statement to the Court unless your employee requests a hearing, and then you must file the Non-Exempt Earnings Statement with the Court.[1]

On March 11, 2014, Plaintiff applied for a writ of garnishment. The Writ of Garnishment and Summons filed that day contained the instructions copied above. Fox answered the writ of garnishment and stated it employed Mr. Wright. Mr. Wright did not object to the garnishment and the trial court entered an Order of Continuing Lien directing Fox to withhold and turn over funds until the judgment balance was paid.

Fox complied with the Order of Continuing lien from March 17, 2014, until March 20, 2015, but ceased compliance after March 20, 2015. Fox explained Mr. Wright became a tipped employee on March 20, 2015, and Fox did not count tips as disposable earnings. The garnishee completed multiple earnings statements indicating Mr. Wright's income was exempt, and, because Mr. Wright's monthly income was $435.00 per month and his monthly exemption was $1,080.00, Fox did not withhold any earnings.

On September 29, 2015, the trial court held a hearing where Plaintiff's counsel appeared but Fox failed to appear. The trial court entered a default judgment against Fox.

On October 1, 2015, Fox filed a motion for reconsideration and argued the Consumer Credit Protection Act (CCPA) prohibited it from including tips as part of Mr. Wright's wages for purposes of a garnishment. On November 9, 2015, the trial court held a garnishment hearing and asserted the hearing was scheduled because the trial court granted the motion for reconsideration. Mr. Wright was not present at this hearing. Plaintiff's counsel argued Fox miscalculated Mr. Wright's wages once he became a tipped employee because Fox failed to include an adjustment for the amount of tips and the base minimum wage for a tipped employee was considerably lower than the base minimum wage for a salaried employee. Plaintiff's counsel proffered a worksheet he prepared and argued the garnishee should use the minimum wage for tipped employees under the federal statute rather than the Arizona minimum wage (for hourly employees) which would result in an exemption of $127.80 instead of the $435.00 the garnishee used.[2] After noting Mr. Wright was paid bi-weekly, Plaintiff's counsel argued that the federal minimum wage of $2.13 per hour multiplied by 60 hours (biweekly pay period) yielded $127.80–the figure he proposed for the exemption.[3]

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[1] Writ of Garnishment and Summons, filed on Feb. 28, 2012, at p. 2, ll. 8–15.
[2] Reported Transcript, Nov. 9, 2015, at p. 11, ll. 20–24; p. 12; p. 13, ll. 1–22.
[3] *Id*. at p. 14, p. 15, ll. 1–16.

Fox's counsel argued they merely wanted to do what is legal because they had "no dog in this fight."[4] Counsel argued the employees declared the amount of tips received but Fox did not monitor these declarations.[5] The trial court determined tipped employees make more than the federally mandated $2.13 when the tips are considered and Plaintiff's counsel responded (1) Mr. Wright was making more than minimum wage when considering his tips; and (2) Plaintiff did not believe Mr. Wright was being harmed by adjusting the calculation to account for minimum wage. Fox's counsel added it wanted to be sure to follow the law and the reason for minimum wage of $7.80 was to provide individuals a minimum amount of income.[6] The trial court invited both counsel to address the issue of what constitutes earnings.[7]

Plaintiff's counsel asserted that both Arizona and federal statutes define wages as payment in exchange for services, but in 2001, the Department of Labor said if the money was "actually a gratuity, it doesn't count."[8] The trial court asked counsel to focus on what might have changed since the Department of Labor made its determination and Plaintiff's counsel responded (1) the minimum wage numbers had changed; (2) the number of credit card tips and debit card tips had substantially increased; and (3) more companies were involved with tip pools where tips were shared with non-tipped employees.[9] Fox's counsel disputed this position and argued the Department of Labor had been consistent in holding that gratuities never became part of the funds of the employing entity and therefore could not been considered "wages" as these funds were never included as payment made by the employer.[10] Plaintiff's counsel concluded by arguing it was unfair not to include the tips when calculating the amount of money that would be exempt from garnishment and it was "off-kilter" to allow a person to work for a "wage" that exceeded his hourly position but exempt the employee from any requirement to repay the employee's debts because a percentage of the received money came from gratuities.[11]

The trial court concluded there was a "quirk" in the rules but held that it was for the Legislature to address the problem; the court does not make law; and the trial court would adopt Fox's position.[12] On November 9, 2015, the trial court ordered it lacked the authority to alter the exemption amount—which was based on the federal minimum wage—and denied the Plaintiff's request to order the garnishee to amend its Non-exempt Earnings Statement to base the garnishment on earnings that included the Defendant's tips.

Plaintiff filed a timely appeal. Defendant Ronald L. Wright failed to file a responsive memorandum. Fox also failed to file a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

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[4] *Id*. at p. 17, ll. 16–24.
[5] *Id*. at p. 18, ll. 18–25; p. 19; p. 20, ll. 1–13.
[6] *Id*. at p. 21, ll. 4–12.
[7] *Id*. at p. 28, ll. 1–3.
[8] *Id*. at p. 28, ll. 7–14.
[9] *Id.* at p. 29, ll. 7–24.
[10] *Id*. at p. 30, ll. 24–25; p. 31, ll. 1–19.
[11] *Id*. at p. 32, ll. 11–25.
[12] *Id*. at p. 33, ll. 22–25; p. 34, ll. 1–4.

II. ISSUES:

A. Did The Trial Court Err In Ruling That Gratuities Were Not Included As Part of Wages When Calculating The Amount Available To Be Garnished.

Standard of Review

"The interpretation of a statute is a question of law that we review *de novo.*" *State v. Wilson,* 200 Ariz. 390, 26 P.3d 1161 ¶4 (Ct. App. 2001). Here, Plaintiff requested that this Court determine if the trial court correctly interpreted Arizona's garnishment law to preclude Plaintiff from including Defendant's—Mr. Wright's—tip income as part of his earnings for purposes of calculating the amount to be used when computing the amount of wages subject to garnishment.

Tips As Includable Under Garnishment

Title III of the Consumer Credit Protection Action, (CCPA) 15 U.S. C. § 1672 defines earnings as:

> The term "earnings" means compensation paid or payable for personal services whether denominated as wages, salary commission, bonus or otherwise, and includes periodic payments pursuant to a pension or retirement program.
>
> The terms "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.
>
> The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

15 U.S.C. § 1672. The definition does not include tips. One of the purposes for the CCPA was to restrict the amount of money available for garnishment and maximize the protection available to the debtor. Arizona adheres to this purpose. A.R.S. §33–1131 states:

> **A.** For the purposes of this section, "disposable earnings" means that remaining portion of a debtor's wages, salary or compensation for his personal services, including bonuses and commissions, or otherwise, and includes payments pursuant to a pension or retirement program or deferred compensation plan, after deducting from such earnings those amounts required by law to be withheld.
>
> **B.** Except as provided in subsection C, the maximum part of the disposable earnings of a debtor for any workweek which is subject to process may not exceed twenty-five per cent of disposable earnings for that week or the amount by which disposable earnings for that week exceed thirty times the minimum hourly wage prescribed by federal law in effect at the time the earnings are payable, whichever is less.
>
> **C.** The exemptions provided in subsection B do not apply in the case of any order for the support of any person. In such case, one-half of the disposable earnings of a debtor for any pay period is exempt from process.

> **D.** The exemptions provided in this section do not apply in the case of any order of any court of bankruptcy under chapter XIII of the federal bankruptcy act or any debt due for any state or federal tax.

Ariz. Rev. Stat. Ann. § 33-1131. As with federal law, Arizona's statutes omit tips from the definition of disposable earnings available for purposes of a garnishment. Indeed, Arizona's definitions of "disposable earnings" and its exemptions were modelled after the CCPA. *Frazer, Ryan, Goldberg, Keyt & Lawless v. Smith*, 184 Ariz. 181, 185, 907 P.2d 1384, 1388 (Ct. App. 1995). Neither statute specifically includes or excludes tips from the statutory definitions of earnings or disposable earnings.

While Arizona has not directly ruled on the distinction between tipped and non-tipped employees for purposes of garnishment, courts of several of our sister states have done so although the decisions are not unified.[13] The Court of Appeals of Maryland considered the distinction between tipped and non-tipped employees and held:

> The argument made by Shanks, that, for purposes of the garnishment, Dolle's salary and tips must be aggregated, is susceptible to positing either that Kibby's was under some obligation actually to take possession of the tips and hold them in order to satisfy the garnishment or that Kibby's was responsible for paying over to the judgment creditor money that was never in its possession. That suggestion seemed to concern the District Court. Clearly, that is not the case. **A garnishee is under no obligation to collect anything from the judgment debtor, or anyone else, in order to satisfy a garnishment; nor is it responsible for turning over any funds or property of the judgment debtor that it does not have in its possession.** It must report and, subject to allowable exemptions, withhold only property in, or coming into, its possession during the period covered by the writ.

Shanks v. Lowe, 364 Md. 538, 543-44, 774 A.2d 411, 414 (2001) (emphasis added). The Maryland court ruled the issue was one of statutory construction and stated:

> As noted, § 15-601(c) defines "wages" as "all monetary remuneration paid to any employee for his employment." Is this limited, as Dolle insists, to remuneration paid to an employee *by that employee's employer,* or does it include *any* remuneration paid to the employee for the employment, which, in Shanks's view, would include tips paid by the restaurant patrons? **On its face, the statute does not say, one way or the other, and thus we must attempt to ascertain the legislative intent.** There being no relevant legislative history with respect to § 15-601(c) that we could find to guide us, we shall look at analogous statutes dealing with the treatment of tips, from which a clear and consistent pattern emerges.

[13] "As a matter of fact most of the jurisdictions of this country already take judicial notice of the laws of its sister states." *Prudential Ins. Co. of Am. v. O'Grady*, 97 Ariz. 9, 12, 396 P.2d 246, 248 (1964). The Arizona Supreme Court continued "We therefore hold that the constitution, statutes and reported court decisions of our sister states are a proper subject for judicial notice." *Prudential Ins. Co. of Am. v. O'Grady*, *id.,* 97 Ariz. at 13-14, 396 P.2d at 249.

Shanks v. Lowe, 364 Md. at 544-45, 774 A.2d at 415. The Maryland court reviewed Maryland's statutory scheme about tips and concluded tips were wages for purposes of unemployment insurance as well as for calculating workers' compensation benefits and within the meaning of "gross income" for state and federal income tax purposes. *Shanks v. Lowe,* 364 Md. at 538, 546, 774 A.at 416. The Maryland court then referenced *United Guar. Residential Ins. Co. v. Dimmick*, 916 P.2d 638, 640 (Colo. App. 1996), as modified on denial of reh'g (Mar. 28, 1996) which allowed tips to be garnished. In *United Guar. Residential Ins. Co.* the Colorado court held:

> For these reasons, we conclude that the 1994 amendment "simply made clear" that the statute always included tips as "earnings" for purposes of calculating the amount subject to garnishment. *See Rickstrew v. People,* 822 P.2d 505, 508 (Colo.1991). Thus, it is necessary to remand the cause for recalculation of the debtor's earnings during the pay periods in question to include the amounts he reported to his employer as having been earned in tips and for entry of an order requiring the garnishee to pay the judgment creditor any garnishable earnings owed by the garnishee to the debtor for those pay periods. *See* § 13–54.5–103(1), C.R.S. (1987 Repl. Vol. 6A).

United Guar. Residential Ins. Co. v. Dimmick, 916 P.2d at 642. Maryland accepted the Colorado interpretation and held:

> We are convinced, however, that tips do constitute "monetary remuneration paid to any employee for his employment," and therefore are part of the employee's "wages" for purposes of § 15-601 of the Commercial Law Article.

Shanks v. Lowe, 364 Md. at 548, 774 A.2d at 417.

Tips As Excludable Under Garnishment

Some states exclude tips when calculating the amount to be used for garnishment. The Tennessee Court of Appeals rejected the concept that tips were earnings and held tips should not be included in the calculation of disposable wages for the purposes of garnishment. The Tennessee Court of Appeals relied on the U.S. Department of Labor Field Operations Handbook dated February 9, 2001, and stated:

> The U.S. Department of Labor Field Operations Handbook, dated February 9, 2001, which interprets the Federal Consumer Credit Protection Act, states with regard to tips and garnishment:
>
> (a) Bona fide tips are not subject to the provisions of the CCPA. A garnishment is inherently a procedural device designed to reach and sequester earnings held by the garnishee (usually the employer). Tips paid directly to an employee by a customer are not "earnings" within the meaning of sec 302 of the CCPA, since they do not pass to the employer. This includes gratuities transferred free and clear to an employee at the direction of credit customers who add tips to the bill.
>
> (b) Service charges added to a customer's bill constitute "earnings" within the meaning of sec 302 when passed on to the employee. As such, they are subject to the provisions of the CCPA. The following examples demonstrate the point:

> (1) A restaurant charges a customer 15% of the check, as a service charge, and in turn pays this amount to the server (debtor). Since this is an automatic charge, there is no gratuity by the customer. The compensation passed from the employer (garnishee) to the server.
>
> (2) The employment agreement is such that the customer's tips belong to the employer and must be credited or turned over to the employer.
>
> Additionally, the U.S. Department of Labor Fact Sheet # 30, revised July 2009, states: "Tips are generally not considered earnings for the purposes of the wage garnishment law."

Erlanger Med. Ctr. v. Strong, 382 S.W.3d 349, 352 (Tenn. Ct. App. 2012). After quoting from *Big M, Inc. v. Texas Roadhouse Holding, LLC,* 415 N.J. Super. 130, 136–37, 1 A.3d 718 (App. Div. 2010), the *Erlanger* court found the New Jersey analysis to be persuasive.[14]

> We find the New Jersey court's analysis of deference to federal administrative agencies to be persuasive. The Handbook makes it clear that tips, subject to certain exceptions which are irrelevant in this appeal, are not earnings for purposes of garnishment as they do not pass to the employer. With its logical and adequately explained reasoning, we afford deference to this U.S. Department of Labor Handbook provision and its implications for this appeal. We hold that tips are not to be included in the calculation of disposable earnings for the purposes of garnishment. We reverse the judgment of the Trial Court.

Erlanger Med. Ctr. v. Strong, 382 S.W.3d at 353. Oklahoma joined the group finding tips—even those paid by credit card directly to the employer—should not be included for garnishment purposes. The Oklahoma Court of Civil Appeals ruled:

> We give the DOL's interpretation deference and find the cases adopting its analysis to be persuasive. We hold that credit card tips paid directly by the employer to an employee at the end of a work shift are insulated from garnishment.

Capital One Bank (USA) N.A. v. Sullivan, 2015 OK CIV APP 25, 347 P.3d 307, ¶ 10 (Ct. App. 2015).

Tips

In order to resolve the problem, this Court must first determine what a tip is and to whom it belongs. As defined by Black's Law Dictionary, a tip is a gratuity for service given. A gratuity is synonymous with "bounty" and is defined as (1) a premium or benefit offered or given to induce someone to take action; or (2) a reward or gift. Merriam Webster defines a tip as (1) giving a gratuity; and (2) a gift or a sum of money tendered for a performed or anticipated service. Merriam Webster defines a gratuity as an amount of money given to a person (such as a waiter or waitress) who has performed a service or something given voluntarily or beyond obligation

[14] We find the New Jersey court's analysis of deference to federal administrative agencies to be persuasive. *Erlanger Med. Ctr. v. Strong*, 382 S.W.3d 349, 353 (Tenn. Ct. App. 2012).

usually for some service. It is not the same as compensation which is defined as payment given for doing a job. Where tipping is customary, tips generally belong to the recipient. *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577, 579 (9th Cir. 2010). Tips differ from compensation because compensation is provided by the employer while tips are generally extraneous payments provided by the customer. In many instances, tips are left on a table and pocketed by the individual. On other occasions, the tips may be included with a credit card payment or pooled. This distinction is important when considering the garnishment process, because the garnishee (employer) is not always the recipient of the money left as a tip.

The Legislature Did Not Include Tips In The Garnishment Process

In a garnishment, the garnishee is required to pay the creditor a percentage of the debtor's non-exempt earnings. Nonexempt earnings means those earnings or portion of earnings which is subject to judicial process—A.R.S. §12–1598(10)—while "earnings" is statutorily defined as "compensation paid or payable for personal services whether these payments are called wages, salary, commission, bonus or otherwise"— A.R.S. §12–1598(4). The statutory definition omits any reference to tips.

Had the Arizona Legislature wished to include tips as part of the definition of earnings, it could have done so. It did not. While this Court may agree with Plaintiff's argument about the unfairness of forgoing a garnishment because the debtor is a tipped as opposed to a non-tipped employee, this is a concern that is more properly addressed by our Legislature. It is not the function of the court to create law or public policy and this Court cannot judicially add a term to legislation that was not included by the Legislature.

> We have said that statements of public policy must be made by the people through the legislature.

Local 266, Int'l Bhd. of Elec. Workers, A. F. of L. v. Salt River Project Agr. Imp. & Power Dist., 78 Ariz. 30, 40-41, 275 P.2d 393, 400 (1954). This Court cannot usurp the powers granted to the Legislature which has the exclusive power to declare what the law shall be. *State v. Rios*, 225 Ariz. 292, 237 P.3d 1052 ¶ 19 (Ct. App. 2010). In discussing the powers of the three branches of government, our Supreme Court held:

> It is very essential that the sharp separation of powers of government be carefully preserved by the courts to the end that one branch of government shall not be permitted to unconstitutionally encroach upon the functions properly belonging to another branch, for only in this manner can we preserve the system of checks and balances which is the genius of our government.

Giss v. Jordan, 82 Ariz. 152, 164, 309 P.2d 779, 787 (1957). A court cannot expand a statute to include matters that are not within the statute's express provisions.

> It is a universal rule that courts will not enlarge, stretch, expand, or extend a statute to matters not falling within its express provisions. We said, Barlow v. Jones, 37 Ariz. 396, 294, P. 1106, that courts cannot read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself. A departure from this rule is to alter the statute and legislate, and not to interpret.

State ex rel. Morrison v. Anway, 87 Ariz. 206, 209, 349 P.2d 774, 776 (1960). Accordingly, this Court cannot expand the language of (1) A.R.S. § 33–1131 re the meaning of disposable earnings beyond the "debtor's wages, salary or compensation for his personal services" referenced in the statute; or (2) A.R.S. § 12–1598 *et seq*. beyond the definitions statutorily provided.

Parallel Statutes

Although our statutory scheme re garnishments omits any discussion of tips as part of earnings, our courts have expanded other definitions of earnings to include tips. When analyzing whether tips should be included as part of wages for purposes of determining a worker's compensation award, our Supreme Court determined tips were to be included. *Senor T's Rest. v. Indus. Comm'n of Arizona*, 131 Ariz. 360, 363, 641 P.2d 848, 851 (1982). Similarly, our Court of Appeals, when analyzing whether tips were included in the definition of "wages" under the Arizona Employment Security Act, held tips were part of wages.[15] *Dearing v. Ariz. Dept. of Economic Security,* 121 Ariz. 203, 204, 589 P.2d 446, 447 (Ct. App. 1978). At first blush, these holdings appear to be inconsistent with the position that tips should not be included as part of wages for garnishment purposes. However, any apparent inconsistency can be resolved when we consider the purposes of the competing statutes. One purpose for the CCPA—the federal law on which the Arizona garnishment proceeding is based—is to limit the amount taken away so that the wage earner is left with at least enough money on which to survive. A related purpose is plain with worker's compensation and employment security—both of which are intended to allow the wage earner to be able to subsist.[16] By minimizing the amount available for garnishment and maximizing the amount the wage earner can obtain from worker's compensation and employment security, both purposes can be achieved and the apparent inconsistency resolved.[17]

Conclusion

This Court finds the holdings of the New Jersey, Texas, and Oklahoma courts to be more persuasive than the decisions made by the courts of Maryland and Colorado. In many instances, the employer never has any control over the tips customers may leave. Plaintiff has not demonstrated Fox has control over the tips or that the tips are ever placed in Fox's coffers. Because the employer cannot control these sums, it seems to be unfair to hold the employer responsible for providing the tip money to the garnishor for the debt of the employee. This

[15] The *Dearing, id*., holding is based on the definition of the term "remuneration" as well as statutory language about payment "from whatever source." *Dearing v. Arizona Dep't of Econ. Sec.,* 121 Ariz. 203, 204, 589 P.2d 446, 447 (Ct. App. 1978). The Court of Appeals continued that the purpose of the statute was to lighten the burden of unemployment and economic insecurity which "is a serious menace to the health, morals and welfare of the people of this state." *Id*., 121 Ariz. 203, 205, 589 P.2d 48.

[16] **"The underlying purpose of the Workmen's Compensation** Act is to compensate an employee for lost earning capacity and **to prevent the injured employee and his dependents from becoming public charges** during the period of disability." *Senor T's Rest. v. Indus. Comm'n of Arizona*, 131 Ariz. 360, 363, 641 P.2d 848, 851 (1982). (Emphasis added).

[17] Although Plaintiff argued that the statutes re wage garnishment were "related" to the same subject matter, the subject is not wages. Instead, there are two independent subjects: garnishment and worker's compensation.

appears to be in line with one of the purposes of the CCPA[18]—to limit the amount of garnishment. As the Court of Appeals of Michigan stated:

> Because this case concerns a statutory provision creating an exemption of wages from garnishment, we construe a rule that affects the exemption in a way that will benefit the debtor.
>
> In garnishment proceedings where an exemption is involved, we will construe rules and statutes to maximize protection of the principal debtor.

Sears, Roebuck & Co. v. A. T. & G. Co., 66 Mich. App. 359, 369, 239 N.W.2d 614, 619 (1976) (citations omitted). The Michigan Court of Appeals continued:

> The intent of the Consumer Act was to make sure that wage earners were able to receive at least 75% of their take home pay in any one pay period so that they would have enough cash to meet basic needs.' [*Sic*].

Sears, Roebuck & Co. v. A. T. & G. Co., 66 Mich. App. at 369, 239 N.W.2d at 619 (citations omitted). The Michigan Court of Appeals concluded that if there is the opportunity to interpret a state court rule in a manner that serves the federal purpose of maximizing the debtor's share of his own earnings, the court should do so. This Court believes that adopting the interpretation of New Jersey, Oklahoma and Texas better serves this purpose.

In addition, this Court finds it is preferable to accord deference to the U.S. Department of Labor and its Field Operations Handbook, which interprets the CCPA, particularly in light of the required deference that must be accorded the interpretation which causes the least amount of money to be garnished. A.R.S. 12–1598(6) establishes this purpose when it defines exempt earnings as:

> "Exempt earnings" means those earnings or that portion of earnings which pursuant to state or **federal law** is **not subject to judicial process** including garnishment.

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[18] a) Disadvantages of garnishment

> The Congress finds:
>
> **(1)** The unrestricted garnishment of compensation due for personal services encourages the making of predatory extensions of credit. Such extensions of credit divert money into excessive credit payments and thereby hinder the production and flow of goods in interstate commerce.
>
> **(2)** The application of garnishment as a creditors' remedy frequently results in loss of employment by the debtor, and the resulting disruption of employment, production, and consumption constitutes a substantial burden on interstate commerce.
>
> **(3)** The great disparities among the laws of the several States relating to garnishment have, in effect, destroyed the uniformity of the bankruptcy laws and frustrated the purposes thereof in many areas of the country.
>
> **(b) Necessity for regulation**
>
> On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of this subchapter are necessary and proper for the purpose of carrying into execution the powers of the Congress to regulate commerce and to establish uniform bankruptcy laws.

15 U.S.C. § 1671.

(Emphasis added.) This Court cannot expand the definition of "tip" to include "compensation" for his personal services. Because (1) the term "tip" is not synonymous with "compensation"; and (2) our Legislature did not include tips as part of compensation for purposes of defining disposable earnings, this Court cannot make the quantum leap Plaintiff requests.

B. Did The Trial Court Err By Utilizing The Arizona Hourly Minimum Wage Instead Of The Federal Hourly Minimum Wage When Calculating The Exemption.

According to the garnishment statutes, the employee is entitled to retain a percentage of his wages. At trial, the parties disagreed about the extent of Mr. Wright's wages. Under Arizona law, an employee is guaranteed a specific minimum wage. However, the amount of the minimum wage differs depending on the person's employment. Effective January 1, 2015, the Arizona minimum wage was $8.05 per hour. Tipped employees in Arizona may be paid $3.00 less per hour than the established minimum wage, leaving the tipped employee's minimum wage at $5.05 per hour provided the employee receives enough in tips to equal—at a minimum—the amount the employee would have earned if he was paid minimum wage. Under federal law, a tipped employee may be paid as little as $2.13 per hour with the caveat that the employee must receive enough in tips to equal federal minimum wage.

Employees are entitled to retain a percentage of their compensation as exemptions from garnishment. The maximum a creditor can garnish is the difference between 25% of the debtor's wages or 60 times the minimum hourly wage[19] (in 2014, that sum equaled $435.00; while in 2015, the sum was $483.00 for the biweekly period) and the amount Mr. Wright was paid. The employer calculated the amount that could be withheld and available for garnishment by using the Arizona minimum wage amount rather than the lesser hourly amount which can be used for tipped employees. By using the state minimum wage amount for calculating exemptions, the trial court determined Mr. Wright was entitled to an exemption of $435.00 per pay period and would not be responsible for further payments on his debt. Plaintiff asserted the $435.00 exemption was incorrect and the employer should have used 60 times the federal minimum wage of $2.13 or $127.80 as the exemption which would have left at least a minimal amount for repayment of the debt. Plaintiff argued it was improper to afford Mr. Wright the best of both worlds—the ability to keep his tips without including them for purposes of the garnishment as well as the benefit of the larger exemption based on the state minimum wage calculation even though the employer was not actually paying the state minimum wage. Because the trial court—and this court—determined Mr. Wright's tip income was not properly includable as part of his "wages," this Court finds it would be inequitable to allow Mr. Wright to be given an exemption based on the full state minimum wage when his tips were not included in calculating the total amount of income attributed to him.

. . . .

. . . .

[19] In 2014, that exempt amount equaled $435 while in 2015, the sum was $483.00 for the biweekly period.

C. Is Plaintiff Entitled To Reasonable Attorneys' Fees.

On appeal, Plaintiff requested reasonable attorneys' fees pursuant to A.R.S. § 12–341.01. Plaintiff did not assert who should be responsible for these fees. This Court finds it would be unfair to order Defendant to pay attorneys' fees as Defendant Ronald L. Wright did not take any adverse position in this garnishment action. While the garnishee, Fox Restaurant Concepts, LLC., (Fox) refused to honor the garnishment, Mr. Wright was not responsible for Fox's position about whether tips should or should not be included. Mr. Wright did not contest Plaintiff's claim and was not responsible for the trial court's decision to not include tips as part of his wages.[20] It would be unfair to shift responsibility for attorneys' fees to Mr. Wright who did nothing to contribute to the dispute and did not appear either at the garnishment hearing or on the appeal.

Fox failed to challenge Plaintiff's appeal. While Fox presented an adversary position at trial, Fox maintained its interest was to comply with the statutory requirements. Plaintiff did not demonstrate it had a right to attorneys' fees. Because neither Mr. Wright nor Fox created the problem, this Court finds, pursuant to Rule 13, SCRAP—Civ., that each party should bear whatever fees and costs the party incurred.

III. CONCLUSION.

Based on the foregoing, this Court concludes the South Mountain Justice Court did not err when it determined tips were not to be included as part of the wages for a tipped employee but did err when it inconsistently allowed an exemption using the higher state minimum wage rather than the adjusted federal minimum wage law that is adjusted for tipped employees..

IT IS THEREFORE ORDERED affirming the judgment of the South Mountain Justice Court about not including tips as part of a person's wages for garnishment purposes but reversing the trial court's judgment regarding the use of the Arizona minimum wage of $5.05 rather than the adjusted federal minimum wage of $2.13 when calculating the employee's exemptions

IT IS FURTHER ORDERED remanding this matter to the South Mountain Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 070520161537

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

[20] The only reference to Mr. Wright's participation in Plaintiff's appellate memorandum was on page 11, where Plaintiff wrote "Wright may argue". . . . Hypothesizing what a party might say is a far cry from having the alleged party actually participate in the proceedings.