

FILED
SUPREME COURT
STATE OF WASHINGTON
8/8/2019 10:21 AM
BY SUSAN L. CARLSON
CLERK

NO. 97201-0

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

(COA No. 77694-1-1)

JEOUNG LEE and SHERRI MCFARLAND, on their own and on behalf
of all persons similarly situated,

Respondents,

v.

EVERGREEN HOSPITAL MEDICAL CENTER a/k/a KING COUNTY
PUBLIC HOSPITAL DISTRICT #2,

Petitioner.

**REPLY IN SUPPORT OF NOTICE OF WITHDRAWAL OF
REPRESENTATION OF INDIVIDUAL PLAINTIFF JEOUNG LEE**

David E. Breskin, WSBA #10607
Cynthia J. Heidelberg, #44121
BRESKIN JOHNSON & TOWNSEND, PLLC
1000 Second Avenue, Suite 3670
Seattle, WA 98104
Telephone (206) 652-8660

Counsel for Respondents

I. RESPONSE

Defendant/Petitioner Evergreen Hospital Medical Center (“Evergreen”) objects to Class Counsel, David Breskin and Cindy Heidelberg of Breskin Johnson & Townsend (“BJT”), withdrawing as attorneys for Plaintiff Jeoung Lee on her *individual claim*. BJT is *not withdrawing* as counsel for the Class and is *not* withdrawing as the attorneys for Plaintiff Sherri McFarland, who is the other class representative, on her individual claim. Whether or not Ms. Lee will remain as a class representative is not before this Court and would be decided by the trial court after Evergreen’s Petition is denied.

Evergreen’s objection rests on misstatements of fact and law and should be overruled. First, contrary to Evergreen’s assertion, BJT was *never appointed* by the trial court as Ms. Lee’s *personal* counsel on her *individual claim*. She hired BJT on her missed break claim. BJT was later certified by the trial court as adequate to represent the Class. Therefore, Rule 71(b) - which requires court approval of withdrawal of a “court appointed attorney” - has no applicability here whatsoever.

Second, Evergreen conflates Ms. Lee’s individual break claim and the Class claim, and in doing so, argues incorrectly that BJT’s withdrawal as Ms. Lee’s personal attorneys on her individual claim will affect the

Class claim. BJT's withdrawal as counsel for Ms. Lee *does not* affect BJT's ability to adequately represent the Class on the Class claim.

Ms. Lee has an *individual claim* in this lawsuit, not a Class claim. She is a class representative on the Class claim under CR 23 because her individual claim is *typical* of the class. *See*, Order Granting Class Certification, CP 250. It is only with regard to Ms. Lee's individual claim that BJT is withdrawing from representation. The trial court found BJT adequate to represent the Class on the Class claim. CP 251. This remains unaffected by BJT's withdrawal as Ms. Lee's personal attorneys on her individual claim. Further, BJT continues to represent Plaintiff McFarland, the other Class representative in the case.

Third, Evergreen has not asserted let alone shown any prejudice from BJT's withdrawal as attorneys for Ms. Lee on her individual claim. Instead, it admits that BJT's withdrawal as Ms. Lee's attorneys on her individual claim has no bearing on the proceedings before this Court, and admits that any effect that BJT's withdrawal has on the class certification order can be addressed with the trial court on remand. Objection at 5.

BJT should be permitted to withdraw as Ms. Lee's attorneys on her individual claim in this action.

II. FACTS

In November 2016, Ms. Lee, a former Evergreen RN, filed this

action. On March 8, 2017, the trial court certified the Class claim in her Amended Complaint. The Class claim alleged that Evergreen violated state law by not providing Registered Nurses in its Emergency Department with the required 10 minute rest break every 4 hours of work and the required 30 minute meal break by the fifth hour of work. *See*, Order Granting Motion to Cert., CP 250.

The court certified the Class claim on behalf of all Evergreen RNs who worked in Evergreen's ED over the Class period through August 29, 2016. *Id.* The court found Ms. Lee an adequate Class representative and BJT adequate Class counsel. Order at 3, CP 251.

On August 15, 2017, the trial court granted Lee's motion to amend to add Sherri McFarland, a current Evergreen RN, as an additional plaintiff and class representative, and to extend the class period from August 29, 2016 to December 31, 2016. CP 431.

On September 1, Evergreen moved to compel arbitration. On November 3, 2017 the trial court denied the motion, finding that Evergreen's motion was factually and legally baseless. It also found Evergreen waived any right it may have had to compel arbitration by actively litigating for over a year in the state court and passing up prior opportunities to seek to compel arbitration in a timely manner. VRP 25-26. On February 11, 2019, the Court of Appeals (Division I) affirmed the

trial court's order. *Lee v. Evergreen Hosp. Med. Ctr.*, 7 Wn. App. 2d 566, 569 (2019). It then denied Evergreen's motion for reconsideration.

On May 13, 2019, Evergreen petitioned this Court for review of the Court of Appeals decision.

On July 30, 2019, BJT filed a notice of withdrawal as attorneys for Plaintiff Lee on her individual claim, to be effective August 9, 2019.

On August 5, 2019, Evergreen filed its objection.

III. LEGAL ARGUMENT

A. BJT's Withdrawal Has No Effect on This Appeal

Evergreen concedes that BJT's withdrawal as attorneys for Ms. Lee on her individual claim in this action has absolutely no bearing on the issue before this Court on its Petition for Review. Accordingly, there is no basis for its objection and this Court should overrule the objection and permit withdrawal.

B. Evergreen's Objection is Unfounded

Evergreen confuses Ms. Lee's *individual claim* for missed rest and meal breaks and the Class claim. BJT is withdrawing as Ms. Lee's personal attorneys on her individual claim. BJT is not withdrawing as Class counsel or as the personal attorneys for the other Plaintiff and Class representative Sherri McFarland.

Ms. Lee's individual *legal* claim is not the same *legal* claim as the

certified Class. Rather, because her individual claim is *typical* of the Class claim and *similar* to the Class claim, she is permitted to represent the Class on the Class claim.

Indeed, the current Class claim extends to December 31, 2016, because Ms. McFarland's employment with Evergreen extended to December 31, 2016, and she was added as a Class representative. Because the trial court found Ms. McFarland to be an adequate representative of that Class, withdrawal of BJT as the personal attorneys for Ms. Lee on her individual claim could not have any effect on the Class claim.¹

C. BJT Was Not Appointed Ms. Lee's Attorney

To manufacture a basis for objecting to BJT's withdrawal, Evergreen argues that BJT was appointed Ms. Lee's attorney and under Rule 71, appointed attorneys may not withdraw absent court order. But Evergreen is wrong. BJT was never appointed Ms. Lee's personal attorney on her individual claim, and the term "court appointed attorney" in CR 71 refers to attorneys appointed, usually in criminal proceedings, to represent clients, not to Class Counsel in a certified class action. *See*

¹ To illustrate the point, for example, the Class claim is for hundreds of thousands to millions of dollars in unpaid rest and meal breaks over the Class period, whereas Ms. Lee's individual break claim is for thousands of dollars.

State v. Perez-Morales, No. 32782-5-III, 2015 Wash. App. LEXIS 2744 (Ct. App. Nov. 10, 2015).

D. There is No Prejudice from BJT's Withdrawal

Normally, the touchstone for an objection to an attorney of record withdrawing is prejudice to the party objecting. When a defendant objects it is usually because withdrawal would cause an unwarranted or unexpected delay in resolving the case through summary judgment or trial. But here, Evergreen does not assert any prejudice from BJT's withdrawal and BJT's withdrawal does not affect resolution of the case. Indeed, the delay in resolving the case has been created solely by Evergreen's appeal of its unsuccessful motion to compel arbitration.

E. The Trial Court Will Decide Any Class Certification Issues

BJT will remain counsel for the Class and for named Plaintiff and class representative McFarland. As Evergreen concedes, any issues relating to class certification can be addressed by the trial court on remand.

IV. CONCLUSION

For the foregoing reasons, withdrawal should be granted.

DATED: August 8, 2019

BRESKIN JOHNSON & TOWNSEND, PLLC

By: *s/ Cynthia J. Heidelberg*
David E. Breskin, WSBA #10607

Cynthia J. Heidelberg, #44121
1000 Second Avenue, Suite 3670
Seattle, WA 98104 Tel: (206) 652-8660

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on this date I filed the foregoing document via the Washington State Appellate Courts' Portal which will serve the same on all parties of record.

DATED this 8th day of August, 2019, at Seattle, Washington.

s/Nerissa Tigner
Nerissa Tigner, Paralegal

BRESKIN JOHNSON TOWNSEND PLLC

August 08, 2019 - 10:21 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97201-0
Appellate Court Case Title: Jeoung Lee v. Evergreen Hospital Medical Center

The following documents have been uploaded:

- 972010_Answer_Reply_20190808101928SC751435_0485.pdf
This File Contains:
Answer/Reply - Reply to Answer to Motion
The Original File Name was Reply iso Notice of Withdrawal re Plaintiff Lee 2019 08 08.pdf

A copy of the uploaded files will be sent to:

- admin@bjtlegal.com
- dbreskin@bjtlegal.com
- hansen@livengoodlaw.com
- j20highnoon@hotmail.com
- penn@livengoodlaw.com
- white@livengoodlaw.com

Comments:

Sender Name: Nerissa Tigner - Email: ntigner@bjtlegal.com

Filing on Behalf of: Cynthia J Heidelberg - Email: cheidelberg@bjtlegal.com (Alternate Email:)

Address:
1000 Second Avenue
Suite 3670
Seattle, WA, 98104
Phone: (206) 652-8660

Note: The Filing Id is 20190808101928SC751435