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5 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
6 IN AND FOR THE COUNTY OF KING

7 SARA L. LACY in her Personal Capacity and
8 as Personal Representative of the Estate of
9 CECIL D. LACY, JR., deceased,

10 Plaintiff,

11 v.

12 SNOHOMISH COUNTY,

13 Defendant.

NO. 16-2-21526-2 SEA

**PLAINTIFF'S RESPONSE IN
OPPOSITION TO DEFENDANT'S
MOTION TO STAY TRIAL DATE
AND CERTIFY FOR
DISCRETIONARY REVIEW**

14 Plaintiff Sara Lacy, as Personal Representative of the Estate of her deceased husband,
15 Cecil D. Lacy, Jr., responds to Defendant's motion to stay trial date and certify for discretionary
16 review. Ms. Lacy opposes this request.

17 Defendant had the chance and incentive to present its *Beltran v. City of Tacoma* argument
18 at earlier stages in the proceedings—especially before Ms. Lacy and her retained experts and
19 witnesses began rigorously preparing for a quickly-approaching jury trial—and chose not to.
20 Having lost a last-minute summary judgment motion, wherein *Ms. Lacy* alerted this Court to
21 *Beltran*, Defendant now requests that the Court press pause while Defendant throws a Hail Mary.
22 Defendant's tactic serves only to prejudice Ms. Lacy. Were the Parties forced to await a decision
23 in *Beltran* by 2019, memories would further fade, potential witnesses and evidence would become
24 harder to produce, and scarce resources would be further whittled away. Defendant's motion
25 should be denied.

1 I. FACTS

2 Snohomish County Deputy Charles Pendergrass asphyxiated Ms. Lacy’s husband on
3 September 18, 2016.¹ The Snohomish County Multiple Agency Response Team (“SMART”)
4 took five months to complete its investigation of the officer involved in-custody death. Ms. Lacy
5 waited to file suit as soon as possible after the SMART investigation and statutory notice periods
6 were complete, on September 8, 2016.² Less than one month later, on October 4, 2016,
7 Defendant removed this action to federal court, arguing that Ms. Lacy’s “complaint is artfully
8 pleaded to conceal claims for alleged Fourth and Fourteenth Amendments in the form of a claim
9 of ‘Negligent Use of Excessive Force.’”³ Two days later, U.S. District Court Judge Lasnik issued
10 a *sua sponte* order that required Defendant to explain “why this action should not be remanded for
11 lack of federal jurisdiction.”⁴ That same day, Ms. Lacy filed a motion for remand.⁵ On October
12 24, 2016, the Judge Lasnik remanded this case back to this Court for lack of jurisdiction, and
13 awarded Ms. Lacy’s fees and costs.⁶

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17 ¹ See Declaration of Ryan D. Dreveskracht in Support of Plaintiff’s Response in Opposition to Defendant’s Motion
for Summary Judgment (July 9, 2018), Ex. A at 1.

18 ² Complaint (Sept. 8, 2016).

19 ³ Notice of Removal, *Lacy v. Snohomish Cty.*, No. 16-1551 (W.D. Wash., Oct. 4, 2016), Dkt. # 1 at 2. Despite
20 extensive briefing on the issue, Defendant continues to refer to this claim as being “unrecognized under Washington
21 law.” Def. Mot. Stay, at 2. But as Ms. Lacy has explained, this claim is nothing more than “an issue within the
22 general negligence claim,” *Conely v. City of Lakewood*, No. 11-6064, 2012 WL 6148866, at *12 (W.D. Wash. Dec.
23 11, 2012), and is commonplace in police misconduct cases, *see, e.g., Arsenault v. City of Seattle*, No. 11-1200 (W.D.
24 Wash.); *Dedic v. City of Seattle*, No. 12-2-30065-8 SEA (Wash. Super. King Cty. May 1, 2015); *Watness v. City of
Seattle*, No. 17-2-23731-1 SEA (Wash. Super., King Cty. Feb. 27, 2018); *Adult v. Carr*, No. 07-5708 (W.D. Wash.
25 Oct. 9, 2009). Defendant’s statement that “Plaintiff has acknowledged” that “the claim of ‘Negligent Use of
Excessive Force’ is yet to be recognized by any Washington state court” is false. Def. Mot. Stay, at 5. Ms. Lacy has
noted that “Washington State’s appellate courts have not yet had the opportunity to opine on this cause of action,”
which is true. *Lacy*, No. 16-1551, Dkt. # 7 at 6. Lower courts in this state have, however, opined on this issue, and
allowed the claim to proceed. *See, e.g., Dedic*, No. 12-2-30065-8 SEA; *Watness*, No. 17-2-23731-1 SEA.

⁴ *Lacy*, No. 2:16-cv-01551-RSL, Dkt. # 6 at 2.

⁵ *Id.*, Dkt. # 7.

⁶ *Id.*, Dkt. ## 9, 13.

1 After reaching an agreement with Defendant regarding vicarious liability, Ms. Lacy
2 amended her complaint on March 9, 2017, dismissing the Snohomish County officers in their
3 personal capacities.⁷ The Court issued an amended case schedule that set trial for April 16, 2018.⁸

4 On May 30, 2017, in light of the U.S. Supreme Court's decision in *Lewis v. Clarke*, 137 S.
5 Ct. 1285, (2017), Ms. Lacy filed a second amended complaint.⁹ The United States then removed
6 the case to federal court.¹⁰ Ms. Lacy filed another motion for remand on August 22, 2017, which
7 was granted on December 13, 2017.¹¹ On January 31, 2018, the Court reset trial in this matter for
8 its current date, October 7, 2018.¹²

9 Defendant did not move for summary judgment until June 22, 2018. Ms. Lacy—not
10 Defendant—notified the Court of the *Beltran* litigation in her opposition, and attached the
11 Washington State Supreme Court's Ruling Granting Review as an appendix.¹³ The Court denied
12 Defendant's motion on July 24, 2018, and Defendant's motion for reconsideration on August 3,
13 2018—with full knowledge of *Beltran* and any implications that it might have on this case.

14 Trial in this matter is set for October 7, 2018—a little over a month away, and more than
15 two years after the tragic death of Ms. Lacy's husband. Because of the back and forth between
16 this Court and the federal system, this litigation has progressed at a glacial pace that, at times for
17 Ms. Lacy, mimicked *Jarndyce v. Jarndyce*.¹⁴ After this excruciating delay, however, Ms. Lacy is
18 finally going to have her long-awaited day in court.

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21 ⁷ First Amended Complaint (Mar. 9, 2017).

⁸ Order Granting Joint Motion to Amend Case Schedule (Mar. 29, 2017).

⁹ Second Amended Complaint (May 30, 2017).

¹⁰ Notice of Removal, *Lacy v. Snohomish Cty.*, No. 2:17-cv-01207-RSL (W.D. Wash., Aug. 10, 2017) Dkt. # 1.

¹¹ *Id.*, Dkt. # 20.

¹² Order Amending Case Schedule (Jan. 31, 2018).

¹³ Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment (July 9, 2018), Appx. 13

¹⁴ CHARLES DICKENS, *BLEAK HOUSE* (1853).

1 **II. ARGUMENT**

2 **A. DEFENDANT’S REQUEST FOR A STAY OF TRIAL DATE SHOULD BE DENIED.**

3 The judicial power of this State is vested in the courts. CONST., art. IV, § 1. From this
4 grant of power flows certain obligations; among them are that courts must strive to achieve, to the
5 extent possible, prompt resolution of issues and disputes brought before them. *In re Henderson*,
6 149 Wash.2d 695, 705, 72 P.3d 703 (2003) (Chambers, J. dissenting). In other words, courts
7 must decide litigation, not prolong it indefinitely on speculative considerations as to how the law
8 might be clarified in the future. The Civil Rules reflect this canon in that they are to be
9 “construed and administered to secure the just, speedy, and inexpensive determination of every
10 action.” CR 1. A stay of proceedings prior to final judgment would appear to be the antithesis of
11 a “speedy” path to determination.

12 The complete absence of reference to a stay pending interlocutory review in the Civil
13 Rules is noteworthy. The Rules of Appellate Procedure, however, are not as taciturn. Under
14 RAP 7.1, the mere filing of a motion for discretionary review—which Defendant has not even
15 done—has no effect whatsoever on the case schedule. It is only in those rare cases that the
16 appellate court grants discretionary review under RAP 2.3 that the case is automatically stayed.

17 Defendant has provided no authority of assistance to this Court in determining whether, if
18 ever, and under what circumstances a stay is appropriate by reason of a request for interlocutory
19 review.¹⁵ This is likely because parties seeking discretionary review seek emergency stays from
20 the court of appeals, not the court that made the decision at issue. Given the absence of case law
21 on what standard this Court should apply, Ms. Lacy will oppose Defendant’s motion using the
22 standard that the Court of Appeals would apply if it were asked for an emergency stay.

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24 ¹⁵ Defendant’s citation to *King v. Olympic Pipeline Co.* is inapposite, as it applies only during “the pendency of a
parallel criminal proceeding.” 104 Wash. App. 338, 352, 16 P.3d 45 (2000) (quotation omitted).

1 **1. Discretionary Review Is Very Rarely Granted.**

2 The appellate courts of Washington do not favor interlocutory review. *Right-Price*
3 *Creation, LLC v. Connells Prairie Community Council*, 105 Wn. App. 813, 21 P.3d 1157 (2001).
4 This is particularly true with regard to orders denying a motion for summary judgment. Denial of
5 a motion for summary judgment is generally not an appealable order, and discretionary review of
6 such orders is only granted in extraordinary circumstances. *DGHI Enterprises v. Pacific Cities,*
7 *Inc.*, 137 Wn.2d 933, 977 P.2d 1231 (1999); *see also Caulfield v. Kitsap Cty.*, 308 Wn.App. 242,
8 249 (2001) (“Denial of a motion for summary judgment is generally not an appealable order, RAP
9 2.2(a), and discretionary review of such orders is not ordinarily granted.”).

10 Further, with the Washington State Supreme Court having granted direct review in
11 *Beltran*, what incentive does Division One of the Court of Appeals have to grant review and
12 consider the same legal issue at the same time? It defies logic for this Court to certify and for
13 Division One to grant review.

14 **2. Defendant Does Not Satisfy Any Test For Discretionary Review.**

15 As it *currently* stands: (1) a plaintiff may plead both negligence and intentional tortious
16 conduct in the same case, and allege that both negligent and intentional conduct caused the same
17 damage; and (2) the “public duty” doctrine applies only to those “mandated duties” imposed by a
18 statute, ordinance, or regulation and not to duties imposed by common law. CR 8(e)(2); *Munich*
19 *v. Skagit Emergency Comm’n Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012). The trial court in
20 *Beltran* concluded that a police officer’s common law duty to refrain from the unreasonable use
21 of deadly force was precluded by the public duty doctrine. This holding was contrary to the
22 above well-established principles, and the Washington Supreme Court correctly granted direct
23 review. Notably, *Beltran* is the only case to so hold. *Cf. Dedic*, No. 12-2-30065-8 SEA; *Watness*,

1 No. 17-2-23731-1 SEA. In other words, this Court need not wait for a “break in the legal fog”—
2 because it does not exist.¹⁶ The law in this area is crystal clear and the only order reflecting
3 otherwise was immediately accepted for direct review by the Supreme Court. At least one court
4 has already denied a defendant’s motions to stay trial dates based on *Beltran. Davis v. King Cty.*,
5 No. 18-2-00321-1 KNT (Wash. Super. King Cty. July 26, 2018). This court should do the same.

6 Defendant will likely seek discretionary review under RAP 2.3(b)(1) or (2). Under either
7 rule, Defendant must demonstrate that the Superior Court either committed obvious error (b)(1) or
8 probable error (b)(2). Of course, the Court would not have ruled as it did if it believed that it was
9 committing obvious error or probable error. Since the rulings in this case, Defendant has cited no
10 controlling, contrary law that should cause this Court to reconsider its position. To qualify under
11 (b)(1), plaintiff must demonstrate that a reversal of this Court’s order would “render further
12 proceedings useless.” In this case, a reversal of the issue that Defendant seeks to reverse—“the
13 viability of a claim for ‘Negligent Use of Excessive Force’ based on intentional conduct, and the
14 effect of the public duty doctrine as the applicable focusing tool for defining the legal duty”¹⁷—
15 would still necessitate a trial because the Court denied summary judgment on other claims, such
16 as battery and false imprisonment. To qualify under (b)(2), plaintiff must demonstrate that the
17 Court’s error substantially alters the *status quo* or substantially limits its freedom to act. The
18 effect of the Court’s order was merely to preserve all issues, characterized by as questions of fact
19 for the jury, as questions of fact for the jury. Because discretionary review is not warranted, a
20 stay is not warranted.

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¹⁶ Def. Mot. Stay, at 6.

24 ¹⁷ Def. Mot. Stay, at 6.

1 **3. The Timing Of A Stay Is Prejudicial To Ms. Lacy.**

2 Ms. Lacy, her family, counsel, and witnesses are ready to start trial. Experts are retained.
3 Schedules have been altered. Travel arrangements have been made. Emotionally, everyone is
4 ready to go. To delay the start of trial at this late date would cause undue prejudice, both
5 financially and emotionally, to Ms. Lacy and her proffered witnesses. This is particularly true
6 when the stay is purportedly for a motion for discretionary review that is extremely unlikely to be
7 granted.

8 **B. THE COURT SHOULD DENY DEFENDANT’S REQUEST FOR CERTIFICATION.**

9 RAP 2.3(b)(4) authorizes the Court to certify an Order for discretionary review if: (1)
10 there is a controlling question of law as to which there is substantial ground for a difference of
11 opinion; and (2) immediate review of the order may materially advance the ultimate termination
12 of the litigation.

13 Here, Defendant’s only argument is that “‘Negligent Use of Excessive Force’ is a novel
14 claim, to date not recognized in Washington.”¹⁸ And as described above, this assertion is false.¹⁹
15 Defendant’s complaints about a purported “legal fog” are misplaced.

16 As to the second requirement, trial is set for a little over a month away. Thus, long before
17 the appeal might be accepted, this case will have been tried on the merits. In other words, there is
18 no way that certifying this matter for discretionary review will materially advance the ultimate
19 termination of the litigation. To hold otherwise would endorse in the precise type of “[p]iecemeal
20 appeals” that the Supreme Court has long held “must be avoided in the interests of speedy and
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22 ¹⁸ *Id.* at 8.

23 ¹⁹ *Supra*, n.3. While it is true that “[g]enerally, claims for negligent investigation against state agencies do not exist
24 under Washington common law because of the potential chilling effect such claims would have on investigations,”
Ms. Lacy is not asserting a claim for “negligent investigation.” *Sound Support Inc. v. State, Dep’t of Soc. & Health
Servs.*, 178 Wash. App. 1002 (2013) (citing *Janaszak v. State*, 173 Wash. App. 703, 725, 297 P.3d 723 (2013)).

1 economical disposition of judicial business.” *Maybury v. City of Seattle*, 53 Wash. 2d 716, 721,
2 336 P.2d 878 (1959).

3 **III. CONCLUSION**

4 Defendant has requested that Ms. Lacy and her children wait until at least mid-2019 for
5 closure in this case because Washington law *might* change. This is not a sufficient reason to
6 cause the prolonged suffering experienced by Ms. Lacy and her family. Plaintiff respectfully
7 requests that this Court deny Defendant’s motion and proceed with the October 8, 2018 trial date.

8 Dated this 31st day of August 2018.

9 GALANDA BROADMAN, PLLC.

10 *s/ Ryan Dreveskracht*

11 Ryan Dreveskracht, WSBA No. 42593

12 Gabriel S. Galanda, WSBA No. 30331

13 Bree R. Black Horse, WSBA No. 47803

14 Attorneys for Plaintiff

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20 *I certify that this memorandum contains 2,348*
21 *words, in compliance with the Local Civil Rules.*

1 **CERTIFICATE OF SERVICE**

2 I, Wendy Foster, declare as follows:

3 I am now and at all times herein mentioned a legal and permanent resident of the United
4 States and the State of Washington, over the age of eighteen years, not a party to the above-
5 entitled action, and competent to testify as a witness.

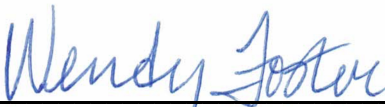
6 I am employed with the law firm of Galanda Broadman PLLC, 8606 35th Ave. NE, Suite
7 L1, Seattle, WA 98115.

8 On August 31, 2018, I emailed the foregoing documents to the following:

9
10 Bridget E Casey
11 Mikolaj T. Tempski
12 SNOHOMISH COUNTY PROSECUTING ATTORNEY
13 3000 ROCKEFELLER AVE M/S 504
14 EVERETT, WA 98201-4046
15 425-388-6330
16 Email: bcasey@snoco.org
17 Email: MTempski@snoco.org

18 The foregoing statement is made under penalty of perjury and under the laws of the State
19 of Washington and is true and correct.

20 Signed at Seattle, Washington, this 31st day of August, 2018.

21
22 
23 _____
24 Wendy Foster