

*The Honorable Karen Donohue  
Noted for consideration September 5, 2018  
Without Oral Argument*

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
KING COUNTY

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

Plaintiff,

v.

SNOHOMISH COUNTY, a political  
subdivision of the State of Washington,

Defendants.

Case No. 16-2-21526-2 SEA

DEFENDANT'S REPLY ON MOTION TO  
STAY TRIAL DATE AND CERTIFY  
ISSUES FOR DISCRETIONARY  
REVIEW.

**I. REPLY**

Plaintiff ignores all but one of the factors this Court should weigh in deciding whether to grant a stay, stating only that she is ready for trial. Defendant is also ready for trial in its current bench trial posture. However, given the fortuitous opportunity for review of the issues in this case, which Plaintiff concedes have not been addressed by any appellate court in Washington, judicial economy and the interests of justice favor delaying the trial date for a few months to avoid the very real possibility of two lengthy and expensive trials. Defendant thus asks this Court to stay the trial date and certify the issues of law addressed below for review under RAP 2.3(b)(4).

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## II. FACTS RELEVANT TO THIS MOTION

Defendant moved to dismiss Plaintiff’s claim for “Negligent Use of Excessive Force” as unrecognized and improperly pled because it relied on intentional conduct. Defendant also moved to dismiss the negligence claims because a long history of tort law has refused to impose a duty of reasonable care on law enforcement officers. The parties also significantly disagree about the meaning and impact of this Court’s letter decision on Defendant’s Motion for Summary Judgment. The legal issues about which the parties disagree are the same issues currently on review before the Washington State Supreme Court in *Beltran-Serrano et al. v. City of Tacoma*, No. 95062-8.<sup>1</sup>

## III. ARGUMENT

### A. This Court should stay the trial date to avoid the cost and delay attendant with two trials.

Both judicial economy and the interests of justice support staying the trial date in this matter pending the Supreme Court’s decision in *Beltran-Serrano*, as well as any appellate review of this matter. This Court has ample discretion to grant such a stay, contrary to Plaintiff’s suggestion. (*Compare* Plaintiff’s Response at 4, with *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000), citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (1936))<sup>2</sup>. The factors courts weigh in determining whether a stay is appropriate are 1)

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<sup>1</sup> Plaintiff suggests Defendant should have brought *Beltran-Serrano* to the Court’s attention sooner (Plaintiff’s Response at 3), Defendant brought its summary judgment motion based on the current status of the law. *Beltran-Serrano*’s potential to change the law was not germane, until the controlling legal issue became apparent in argument and the Court’s decision. Plaintiff ignores that Defendant raised *Beltran-Serrano* as soon as the controlling issue of law was squarely before this Court.

<sup>2</sup> Plaintiff’s contention that this Court’s authority to grant a stay is limited to cases involving parallel civil and criminal proceedings is meritless. (Plaintiff’s Response at 4) *King* recognizes this Court’s broad discretion to grant stays and trial courts have entered stays such as the one requested here “to preserve the posture of the case” while an appeal proceeds. *See, e.g., Serv. Employees Int’l Union Local 925 v. Univ. of Washington*, No. 76630-9-I, 2018 WL 3828798, at \*9 (Wash. Ct. App. June 11, 2018). Indeed, Plaintiff’s acknowledgement that other parties have sought stays based

1 the interests of the plaintiffs in proceeding expeditiously with litigation, 2) the potential prejudice  
2 to plaintiffs of a delay; 3) the burden which any particular aspect to the proceedings may impose  
3 on the defendants; and 4) the convenience of the court in management of its cases and the efficient  
4 use of juridical resources. *King, 104 Wn. App.* at 353. “[T]he balancing must be conducted on a  
5 case by case basis, in light of the particular circumstances and competing interests involved in a  
6 case.” *Id.*

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8 This Court should stay the trial date so that the Court and parties do not expend substantial  
9 resources “flying blind” in the absence of any controlling authority on the issue of whether law  
10 enforcement officers can be liable for negligently using excessive force. In the case’s current  
11 posture, there is a very substantial risk of multiple trials, with justice achieved only after a lengthy  
12 trial, followed by a lengthy direct appeal, followed by another lengthy trial where the trier of fact  
13 is properly informed on any remaining viable claims as elucidated by the Supreme Court in  
14 *Beltran-Serrano*. Far from being based on “speculative considerations as to how the law might be  
15 clarified” (Plaintiff’s Response at 4), a stay would take advantage of the fact that the same issues  
16 in this case are already on review before the Supreme Court.

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18 Plaintiff provides no *authority* to support her repeated assertion that Washington law  
19 recognizes a claim for negligent use of excessive force. The trial court decisions cited by Plaintiff,  
20 which she does not provide this Court, cannot and do not bind this Court. *Cf.* GR 14.1 (even  
21 unpublished decisions of the Court of Appeals are not binding authority). No appellate court in  
22 Washington has recognized a claim for negligent use of excessive force, a fact Plaintiff  
23 begrudgingly acknowledges (Plaintiff’s Response at 2 n.3), and the vast body of case law rejecting  
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27 on *Beltran* (Plaintiff’s Response at 6) demonstrates that stays are routinely sought when a dispositive issue of law is  
pending before an appellate court.

1 negligence claims against law enforcement – for fear of hindering law enforcement – strongly  
2 suggests no such claim exists. *Janaszak v. State*, 173 Wn. App. 703, 725, 297 P.3d 723 (2013)  
3 (“Washington common law does not recognize a claim for negligent investigation because of the  
4 potential chilling effect such claims would have on investigations. We have refused to recognize  
5 a cognizable claim for negligent investigation against law enforcement officials”) (listing cases).  
6 Indeed, the elements and test for evaluating the claim are in question in this Court, with this Court  
7 rejecting the “totality of circumstances” test advocated for by Plaintiff. Given this lack of clarity,  
8 an appeal in this matter is a virtual certainty, regardless of the result at trial.  
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10 Plaintiff simply ignores this fact and nowhere addresses the effect multiple trials will have  
11 on her or Defendant. Plaintiff likewise does not address the Court’s interest in efficiently using  
12 judicial resources. The parties’ disagreement about the effect of the Court’s order on Defendant’s  
13 Motion for Summary Judgment underscores that immediate review would provide much needed  
14 clarity on the claims that will be tried.  
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16 The only factor Plaintiff addresses in her response to the Motion to Stay is the potential  
17 prejudice of a delay. But Plaintiff has not set forth any specifics as to how a stay will prejudice  
18 her. The general concerns she cites, *e.g.*, “that memories would further fade” and “scarce  
19 resources would be further whittled away” (Plaintiff’s Response at 1), will be far worse if the  
20 parties are forced to conduct a second trial after having already conducted a trial *and* participated  
21 in an appeal.  
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23 This Court should exercise its discretion to stay the trial date. If the law is as clear as  
24 Plaintiff argues, the motion for discretionary review will be denied and the case will be tried in a  
25 matter of months, not years. A brief stay will allow the appellate court to make that threshold  
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1 determination, ensuring that this Court and the parties do not waste substantial resources and time  
2 conducting a trial on a cause of action that – at the minimum – needs clarification and that – at  
3 the most – does not exist at all.

4 **B. This Court should certify the issues pursuant to RAP 2.3(b)(4).**

5 Plaintiff has not objected to the scope or phrasing of the issues Defendant requests the  
6 Court certify for discretionary review. Defendant respectfully requests the Court certify for  
7 review:  
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9 (1) whether a law enforcement officer may be liable for the “Negligent Use of Excessive  
10 Force,” (2) whether law enforcement officers owe a general duty of reasonable care to each person  
11 encountered in the scope of their duties, and (3) whether the scope of any such general duty extends  
12 to actions that are unique to the law enforcement setting and that may not be undertaken by other  
13 members of the public.  
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15 *Beltran-Serrano* was accepted on a certification order from the trial court under RAP  
16 2.3(b)(4) precisely because there is no authority in Washington supporting this type of negligence  
17 claim. These issues are thus undisputedly controlling issues of law over which there is a  
18 substantial ground for disagreement, contrary to Plaintiff’s assertion that the law is “crystal clear”  
19 (Plaintiff’s Response at 6), an assertion she supports only with non-binding trial court decisions.  
20 And as set forth above, immediate review will advance the ultimate termination of the litigation  
21 by avoiding the expense and delay of two trials.  
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23 The issues on review in *Beltran-Serrano* are the same issues at the heart of this case. This  
24 Court should certify the issues for review pursuant to RAP 2.3(b)(4). Should this Court decline  
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1 to certify the issues, Defendant requests at a minimum that this Court stay the trial date pending  
2 a determination by the appellate court on whether to accept review.

3 **IV. CONCLUSION**

4 This Court should stay the trial date in this matter in the interest of judicial economy and  
5 the interests of justice, and certify the issues of law outlined above for discretionary review.  
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7  
8 DATED this 4th day of September, 2018.

9  
10 MARK K. ROE  
Snohomish County Prosecuting Attorney

11 By s/ Bridget Casey

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18 I certify that this memorandum contains 1573 words, in  
19 compliance with Local Civil Rules

**CERTIFICATE OF SERVICE**

I hereby declare I served a true and correct copy of the foregoing **Defendant's Reply on Motion to Stay Trial Date and Certify for Discretionary Review** upon the person/persons listed by the method(s) indicated:

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*Attorneys for Plaintiff*

- King County ECR E-Service
- Facsimile
- Express Mail
- Email
- U.S. Mail
- Hand Delivery
- Messenger Service

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 4<sup>th</sup> day of September, 2018.

  
Teresa Kranz, Legal Assistant