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KING COUNTY
SUPERIOR COURT CLERK

The Honorable Karen Donohue
Without Oral Argument

Noted for Consideration September 5, 2018

E-FILED
CASE NUMBER: 16-2-21526-2 SEA

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;

Defendant.

Case No. 16-2-21526-2 SEA

MOTION TO STAY TRIAL DATE AND
CERTIFY FOR DISCRETIONARY
REVIEW

I. INTRODUCTION & RELIEF REQUESTED

Snohomish County respectfully requests this Court grant the County’s motion to stay the trial date in this matter pending the decision of the Washington State Supreme Court in *Beltran-Serrano, et. al. v. City of Tacoma*, Supreme Court Cause no. 95062-8. The County also respectfully requests this Court certify for Discretionary Review under RAP 2.3(b)(4) the following issues of law:

- (1) whether a law enforcement officer may be liable for the “Negligent Use of Excessive Force;”
- (2) whether law enforcement officers owes a general duty of reasonable care to each person

1 encountered in the scope of their duties, and (3) whether the scope of any such general duty extends
2 to actions that are unique to the law enforcement setting and that may not be undertaken by other
3 members of the public.

4 Because *Beltran-Serrano*, currently pending before the Supreme Court, will likely be
5 dispositive on the validity and scope of Plaintiff's Negligent Use of Excessive Force claim, a stay
6 is necessary both in the interests of justice and judicial economy.

8 **II. STATEMENT OF RELEVANT FACTS**

9 Plaintiff filed this lawsuit in September 2016, including claims for negligence, battery,
10 false imprisonment, outrage, negligent training and supervision, and a separate claim for
11 "Negligent Use of Excessive Force." Dkt. #1. This last claim being unrecognized under
12 Washington law, Snohomish County removed this matter to federal court on the belief that Plaintiff
13 intended to raise a Fourth Amendment excessive force claim. Dkt. #9. Plaintiff disclaimed any
14 cause of action under the U.S. Constitution, explaining that she intended to proceed only under
15 Washington law, while conceding the claim was novel. Accordingly, this case was remanded back
16 to King County Superior Court in December 2016. Dkt. #12.

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18 Plaintiff filed two subsequent amended complaints, including the operative complaint, in
19 May 2017. Dkts. ## 14, 28. In August 2017, the United States appeared on behalf of the then-
20 named Tulalip Tribal Police Officers and again removed the case to federal court. Dkt. # 41.
21 Plaintiff subsequently dismissed the Tribal Police defendants, leaving only Snohomish County,
22 and the case was again remanded to King County Superior Court in January 2018. Dkt. # 43. A
23 trial date of October 8, 2018 was set. Dkt. #51.
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1 On June 22, 2018 the County moved for summary judgment on all claims in this matter.
2 Dkt. # 67. With particular relevance to this pleading, the County moved to dismiss the “Negligent
3 Use of Excessive Force” claim as it is not recognized in Washington, and sought dismissal of the
4 remaining negligence claims as the County owed no specific duty to the Plaintiff. Plaintiff
5 withdrew her negligent training and supervision claim against the County, and relies solely on the
6 theory of respondeat superior. Dkt. # 72. This Court subsequently dismissed the outrage claim,
7 and issued a letter opinion which appeared to deny the remainder of the County’s motion. Dkt.
8 #78. The County, uncertain as to the case’s posture particularly with regard to the “Negligent Use
9 of Excessive Force” claim, and the duties underlying the general negligence claim, moved for
10 clarification and reconsideration of the letter decision. Dkt. # 84. The Court denied the Motion
11 for Reconsideration and Clarification without comment. Dkt. #96.
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14 In *Beltran-Serrano, et. al. v. City of Tacoma*, currently before the Washington State
15 Supreme Court, the City of Tacoma moved for partial summary judgment to dismiss negligent
16 training, negligent supervision and negligent use of excessive force claims brought by the plaintiff.
17 The trial court granted the City of Tacoma’s motion to dismiss on all three claims, leaving
18 Plaintiff’s battery claim for trial, and later certified for review, the dismissal of plaintiff’s negligent
19 use of force claim. Exhibits B, C and D to Casey Decl. The Supreme Court granted direct
20 discretionary review, summarizing the issue on review as:
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22 Whether a municipality acting through its law enforcement officers owes members
23 of the public a common law duty of care when deploying potentially deadly force
24 against an individual member of the public, and if so, whether the public duty
25 doctrine bars an action for breach of that duty, or an exception to the doctrine
26 applies.
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1 Supreme Court Issues Statement, No. 95062-8, *Beltran-Serrano, et al. v. City of Tacoma*.
2 (https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/ most recently updated August
3 15, 2018). The Court has scheduled oral argument for November 15, 2018. Exhibit A to Casey
4 Decl.

5 **III. ISSUES**

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7 1. Whether this court should stay the trial in this action until the Washington State
8 Supreme Court decides whether negligence and negligent use of excessive force are valid claims
9 in law enforcement intentional use of force cases, and if it allows the negligence claims to
10 proceed, establishes the elements of the cause of action?

11 2. Whether this court should certify under RAP 2.3(b)(4), the issues of (1) whether the
12 tort of “Negligent Use of Excessive Force” is valid in the State of Washington, (2) whether a law
13 enforcement officer owes a general duty of reasonable care to each person they encounter in the
14 scope of their duties, and (3) what the scope of any such general duty includes.

15 **IV. EVIDENCE RELIED UPON**

16 This motion is based on the declaration of Bridget E. Casey, and the pleadings on file
17 with the court.
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19 **V. AUTHORITY & ARGUMENT**

20 **A. The court should enter a stay of the trial date.**

21 In the interest of judicial economy and the interests of justice, a stay of the trial date in this
22 matter is necessary pending the Supreme Court’s decision in *Beltran-Serrano* as well as any
23 appellate review of this matter.
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1 This Court has discretion to grant a motion to stay proceedings before it. *King v. Olympic*
2 *Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000), *citing*, *Landis v. N. Am. Co.*, 299 U.S.
3 248, 254-55, 57 S.Ct. 163, 81 L.Ed. 153 (1936). Courts have identified certain factors allowing
4 them to weigh competing interests involved, when a party has requested a stay in a civil matter.
5 *King*, 104 Wn. App. at 353. The factors courts weigh are 1) the interests of the plaintiffs in
6 proceeding expeditiously with litigation, 2) the potential of prejudice to plaintiffs of a delay; 3) the
7 burden which any particular aspect to the proceedings may impose on the defendants; and 4) the
8 convenience of the court in management of its cases and the efficient use of juridical resources.
9 *Id.* The *King* court discussed that “the balancing must be conducted on a case by case basis, in
10 light of the particular circumstances and competing interests involved in a case.” *Id.*

11
12 In this case, the Court’s decision on the County’s Motion for Summary Judgment appears
13 to allow Plaintiff’s novel “Negligent Use of Excessive Force” claim to go forward. This claim
14 will currently proceed without any definition of the legal elements, any specific finding regarding
15 the duty purportedly underlying it, or any clarity regarding the type or sufficiency of evidence
16 required to support the currently unrecognized claim. On the issue of negligence, the Court’s
17 decision appears to accept the legal duty alleged by Plaintiff: a generally-applicable “duty to act
18 as a reasonable police officer,” which is also not supported by case law in Washington. Dkt. #28
19 at page 8. These issues place this matter in a procedural posture that would benefit from appellate
20 review and guidance before trial.
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23 1. Justice would benefit from waiting until the Supreme Court has ruled.

24 As Plaintiff has acknowledged, the claim of “Negligent Use of Excessive Force” is yet to
25 be recognized by any Washington state court. With the existence of such a claim in question, the
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1 elements of the claim and legal decision which may be relied upon by the fact-finder also remain
2 undefined. Given this lack of clarity, subsequent appellate litigation in this matter is a virtual
3 certainty, regardless of the result at trial.

4 Yet on the not too distant horizon, just beyond the current trial date, there appears an
5 opportunity for a break in the legal fog. Mere weeks after our scheduled trial date, the Supreme
6 Court is slated to hear arguments and resolve a similarly pleaded claim in *Beltran-Serrano, et. al.*
7 *v. City of Tacoma*. The decision in *Beltran-Serrano* will likely control the central legal issue in
8 this case, potentially striking whole claims, and at minimum clarifying the applicable duty and
9 standards, thereby impacting the legal decisions which may be relied on by the fact-finder, as well
10 as the relevance and admissibility of specific evidence. Proceeding to trial without the guidance
11 the Supreme Court will provide would be a grossly inefficient use of this Court's limited resources
12 and impose unnecessary expense on the parties. Delaying trial until the Supreme Court provides
13 guidance regarding the similarly pleaded claims in *Beltran-Serrano, et. al. v. City of Tacoma*, will
14 also serve the interest of finality of justice, lowering the likelihood of appellate litigation and a
15 second trial.
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18 2. A stay should also issue pending appellate review of this matter.

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20 Whether or not this Court certifies these issues, the County intends to ask the appellate
21 court to review the viability of a claim for "Negligent Use of Excessive Force" based on intentional
22 conduct, and the effect of the public duty doctrine as the applicable focusing tool for defining the
23 legal duty in this case. Regardless whether the Court stays this trial pending a decision in *Beltran-*
24 *Serrano*, the Court should grant a stay pending acceptance or denial of the County's motion for
25 discretionary review by the Court of Appeals.
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1 Staying the case now and allowing the Court of Appeals to consider the motion for
2 discretionary review will further the interests of both parties to avoid expending substantial time
3 and money in preparing for trial, and further judicial economy by obviating the use of this Court's
4 scant resources in making pre-trial rulings that may be unnecessary should review be granted.
5 Should the Court of Appeals deny review, or accept review and affirm this Court, the parties will
6 be in the same position as they are today. If the Court grants review and modifies this Court's
7 decision after trial is underway, the result will be an expensive re-trial. The County believes it
8 would be ill-advised to litigate this case in its current posture only for the appellate courts to
9 possibly conclude that there is no viable tort claim for "Negligent Use of Excessive Force," or that
10 the claim is limited by the public duty doctrine, or to allow it to proceed but hold that the type of
11 evidence required to sustain such a claim is different than what was presented at trial in this case.
12 The parties should not waste resources litigating these claims prior to guidance from higher courts.
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15 Granting a stay furthers the parties' and this Court's interest in achieving expeditious, but
16 final, results through litigation. A brief trial delay causes no prejudice or additional burden on the
17 parties, and, given the confusing state of the law regarding this matter, preserves this Court's
18 limited resources by allowing time for the courts of appeal to provide needed guidance.
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20 **B. The Court should certify the issues pursuant to RAP 2.3(b)(4)**

21 The County requests the court certify pursuant to RAP 2.3(b)(4) the issues raised by the
22 Court's decision to deny the County's Motion for Summary Judgment with regard to Plaintiff's
23 "Negligent Use of Excessive Force" and general negligence claims. The Court's decision
24 "involves a controlling question of law as to which there is a substantial ground for a difference of
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1 opinion and that immediate review of the order may materially advance the ultimate termination
2 of the litigation.” RAP 2.3 (b)(4).

3 RAP 2.3(b)(4) applies with particular force to truly novel claims and other issues of first
4 impression because clarification of the law would either terminate or avoid termination of the
5 litigation if it were decided differently. *See, e.g., Hale v. Wellpinit School Dist. No. 49*, 165
6 Wn.2d 494, 500, 198 P.3d 1021 (2009) (whether an amendment of the Washington Law Against
7 Discrimination avoided the separation of powers doctrine to apply retroactively to revive a
8 claim); *Ensley v. Pitcher*, 152 Wn. App. 891, 897–98, 222 P.3d 79 (2009) (issue of first
9 impression pertaining to res judicata and collateral estoppel); *Dolan v. King County*, 172 Wn.2d
10 299, 310, 258 P.3d 20 (2011) (whether county public defenders had cause of action for PERS
11 contributions).

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14 While the parties have significantly different understandings of the meaning of this court’s
15 decision, they agree that “Negligent Use of Excessive Force” is a novel claim, to date not
16 recognized in Washington. Similarly, Washington appellate courts have previously rejected the
17 notion that law enforcement officers owe a general duty of reasonable care to all whom they
18 encounter. *See, e.g., Janaszak v. State*, 173 Wn. App. 703, 725, 297 P.3d 723 (2013) (“We have
19 refused to recognize a cognizable claim for negligent investigation against law enforcement
20 officials and other investigators.”) Because the courts have found no such general duty, there is
21 no guidance for the specific elements of the claim.

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23 The Court should certify the issues of whether the tort of “Negligent Use of Excessive
24 Force” is valid in the State of Washington, whether a law enforcement officer owes a general duty
25 of reasonable care to each person they encounter in the scope of their duties, and what the scope
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1 of any such general duty includes. Pre-trial answers from the appellate courts regarding any or all
2 of those issues would greatly reduce the likelihood of appeals and re-trial of this matter. This
3 Court should certify the issues in the interest of clarifying and advancing or terminating the
4 litigation pursuant to RAP 2.3(b)(4).

5 **VI. CONCLUSION**

6 The County respectfully requests the Court stay proceedings in this matter pending the
7 Supreme Court's decision in *Beltran-Serrano, et al. v. City of Tacoma*, and stay the proceedings
8 pending the acceptance or denial of the County's Motion for Discretionary Review, as well as
9 certify under RAP 2.3(b)(4), the above-listed issues for review.
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11
12 DATED this 27th day of August, 2018.

13
14 MARK K. ROE
15 Snohomish County Prosecuting Attorney

16 /s/ Bridget Casey
17 BRIDGET CASEY, WSBA No. 30459
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27 I certify that this memorandum contains 2,289 words, in
compliance with Local Civil Rules

CERTIFICATE OF SERVICE

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

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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 27th day of August, 2018.

/s/ Teresa Kranz
Teresa Kranz, Legal Assistant