Tort Law Update

WSAMA Spring 2026
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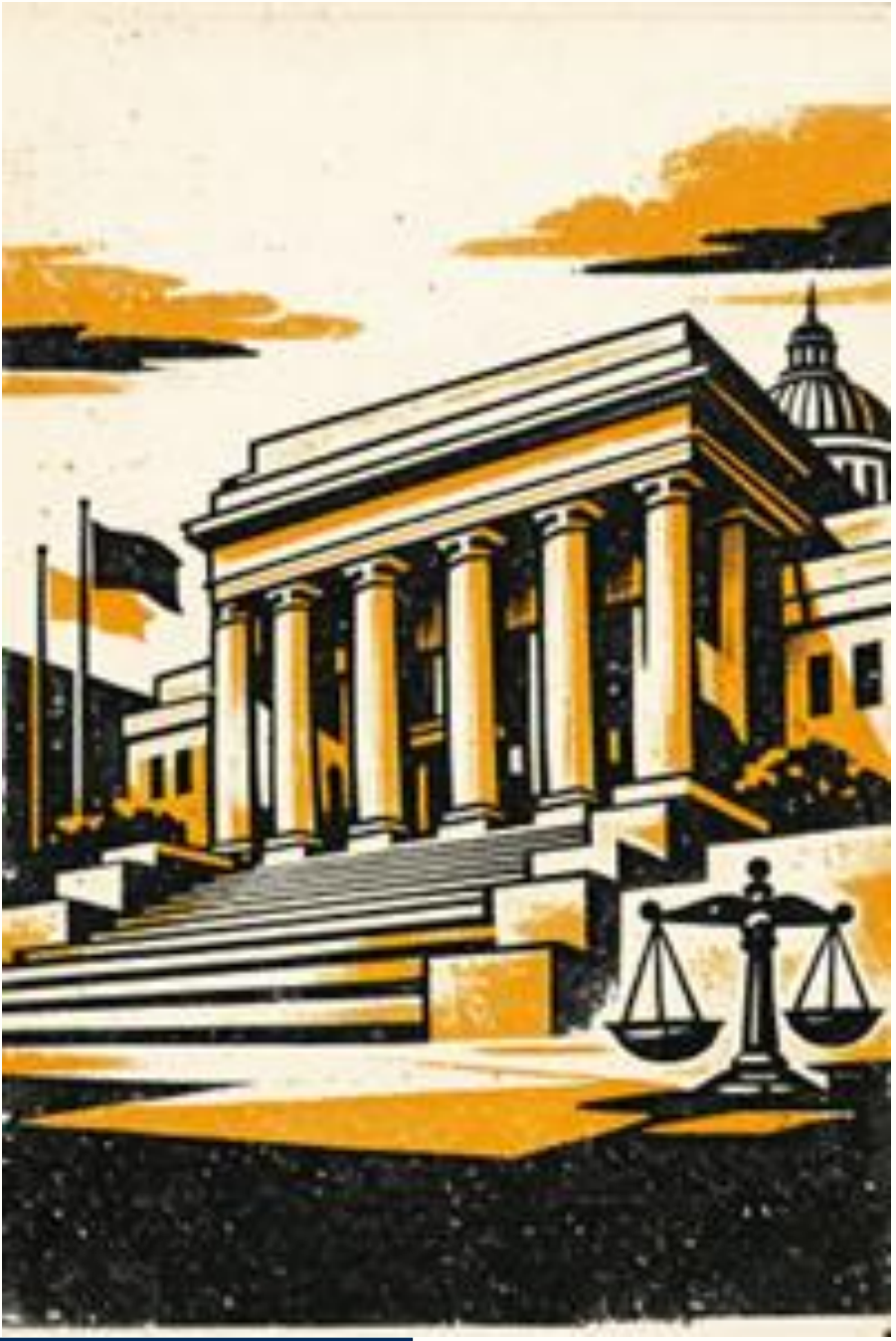

Agenda

- United States Supreme Court
- Washington Supreme Court
- Washington Court of Appeals
- Cases to Watch

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United States Supreme Court

The *Heck* Bar

Heck v. Humphrey (1994)

- Plaintiff barred from suing under §1983 to challenge validity of conviction
- Essential element: past conviction or sentence set aside (appeal, habeas, expungement, etc.)
- Only applies to actions for damages

Olivier v. City of Brandon, 607 U.S. ____ (03/20/2026)

- Street preacher arrested for violating ordinance requiring "protests" or "demonstrations" to occur within confined area.
- Pleads no contest, fined $304, one year probation & 10 days jail suspended
- Sues under § 1983 to obtain injunctive relief prohibiting future enforcement

Photo: brandonamphitheater.com

Olivier v. City of Brandon, 607 U.S. ____ (03/20/2026)

rights and an injunction preventing city officials from enforcing the ordinance in the future.[1] In other words, the relief requested is only prospective; Olivier seeks neither the reversal of, nor compensation for, his prior conviction. And Olivier has since made clear that he has no interest in using a favorable judgment in this suit to later get his record expunged or avoid his conviction's collateral effects. See Tr. of Oral Arg. 7. The suit is just meant to ensure that

never in custody for his conviction, so never had a chance to challenge it in federal habeas proceedings.[2]

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[1] Originally, Olivier also sought damages for the City's prior enforcement of the ordinance against him. But he abandoned that request as the suit progressed, leaving only the above-described pleas for declaratory and injunctive relief.

[2] The premise of Olivier's second argument is, of course, that he had not been in custody following his conviction. That premise appears to be wrong. Under his sentence, Olivier served a year of probation—indeed, was still serving that time when he filed this suit. And a person on probation is generally "'in custody' for purposes of federal habeas corpus." *Minnesota* v. *Murphy*, 465 U. S. 420, 430 (1984); see *Jones* v. *Cunningham*, 371 U. S. 236, 241–243 (1963). For whatever reason, though, the City failed to raise that objection below, and both lower courts accepted that Olivier was not put in custody for his conviction. See 2022 WL

Olivier v. City of Brandon, 607 U.S. ____ (03/20/2026)

The same is true of Olivier's suit. Olivier is not challenging the "validity of [his] conviction or sentence," for the purpose either of securing (or speeding) release or of obtaining monetary damages. *Nance* v. *Ward*, 597 U. S. 159, 167–168 (2022). Instead, Olivier is seeking (in *Wooley*'s words) "wholly prospective" relief—"only to be free from prosecutions for future violations" of the city ordinance. 430 U. S., at 711. And that request, as *Balisok* and *Dotson* recognized, falls outside habeas's core—and likewise outside *Heck*'s concerns. See 520 U. S., at 648; 544 U. S., at 82. Olivier's suit does not, as habeas suits do, "collateral[ly] attack" the old conviction. *Heck*, 512 U. S., at 485. It thus cannot give rise, as *Heck* feared, to "parallel litigation" respecting his prior conduct. *Id.*, at 484. Nor does it risk "conflicting" judgments over how that conduct was prosecuted or

Washington Supreme Court

Anderson v. Grant County, 585 P.3d 87 (Wash. 2026)

- "Jailers owe special common law duty of care." *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628 (2010)

- *Gregoire*: no assumption of risk defense for in-custody suicide

  - *KEY POINT*: Madsen's *Gregoire* concurrence preserved contributory fault, joined by dissent (**actual majority**)

Anderson v. Grant County, 585 P.3d 87 (Wash. 2026)

- ***RCW 4.24.420***: felony & "a proximate cause"
- ***RCW 5.40.060***: intoxication & >50% at fault
- Decedent ingested smuggled heroin in jail, overdosed & died
- Jail: history of smuggling
- Lower courts: under *Gregoire*, "special relationship" prevented County from asserting felony bar & intoxication defenses

Anderson v. Grant County, 585 P.3d 87 (Wash. 2026)

The courts' common law authority is exercised alongside our legislature's plenary power to legislate. We must decide whether, given the jailers' common law duty, the county jail may raise two statutory defenses created in the 1986 tort reform act: felony defense and intoxication defense. RCW 4.24.420; RCW 5.40.060. LAWS OF 1986, ch. 305. We conclude that it may. Accordingly, we reverse the Court of Appeals and remand back to that court for further proceedings consistent with this opinion.

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Anderson v. Grant County, 585 P.3d 87 (Wash. 2026)

In 1986, the legislature enacted the tort reform act, which aimed to "create a

the availability and affordability of quality governmental services, comprehensive reform is necessary."). As a matter of policy, the legislature intended these defenses to apply whenever any defendant, including counties, faces tort liability. For us to say that these defenses do not apply in the context of jail and prison overdoses would override the clear language of the statutes and require us to replace the legislature's policy determination with our own.

"Deliberate Intention" Exception to IIA Immunity

- Title 51 RCW: exclusive remedy for injured workers (jurisdiction abolished)
- RCW 51.24.020: "deliberate intention … to produce such injury"
- *Walston v. Boeing Co.* (2014): knowledge of "substantial risk" that latent disease would materialize insufficient

not immune from lawsuits if an "injury results to a worker from the deliberate

Alcoa had actual knowledge an injury was certain to occur. Under this court's prior decision in *Walston v. Boeing Co.*, 181 Wn.2d 391, 334 P.3d 519 (2014), no employee could sue for a latent disease like mesothelioma because they could never satisfy the level of certainty required there; Howmet would prevail and latent diseases like cancer would not be injuries any employee could sue for, regardless of their employer's intent. This court does not lightly set aside precedent, but justice requires us to admit our mistakes when we make them and to overrule precedent that is demonstrably incorrect and harmful. For the reasons explained below, we now recognize *Walston* to be such a decision and must be overruled.

behind the IIA. The holding in *Walston* is also harmful because it denies relief to employees who happen to be injured in the form of disease that may take years to

Cockrum v. C.H. Murphy/Clark-Ullman, Inc.
No. 102881-4

manifest rather than immediate and visible injuries. Therefore, *Walston* must be overruled.

Washington precedent, there is room for liability where injury in the form of disease results from the deliberate intention of the employer. RCW 51.24.020.

We hold that a plaintiff can satisfy the deliberate injury exception under RCW 51.24.020 and *Birklid* if they demonstrate the employer had actual knowledge that latent diseases are virtually certain to occur and willfully disregard such knowledge. *Birklid* is a two-pronged test: a plaintiff must demonstrate both that the employer had the requisite knowledge of the certainty of injury *and* that the employer willfully disregarded that knowledge. *Id.* at 865. Thus, even if a plaintiff

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to injure exception. To reach this result, the majority takes the extraordinary step of overruling *Walston*—which no party asked us to do—and adopts a test this court already rejected in *Birklid*.

1. Deliberate Intent Exception

The IIA is the "grand compromise" between the interests of employers and workers injured on the job. *Birklid*, 127 Wn.2d at 859. The Act "was designed to be a comprehensive and exclusive compensation system." 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 12:6, at 572 (5th ed 2020). While the statute was intended to be liberally construed in favor of coverage, *Dep't of Lab. & Indus. v. Lyons Enters., Inc.*, 185 Wn.2d 721, 734, 374 P.3d 1097 (2016), we interpret exceptions narrowly. *See Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 27, 109 P.3d 805 (2005). The legislature did not grant immunity to employers who injured employees intentionally. An employee may sue an employer in

Additional WSC Cases of Note…

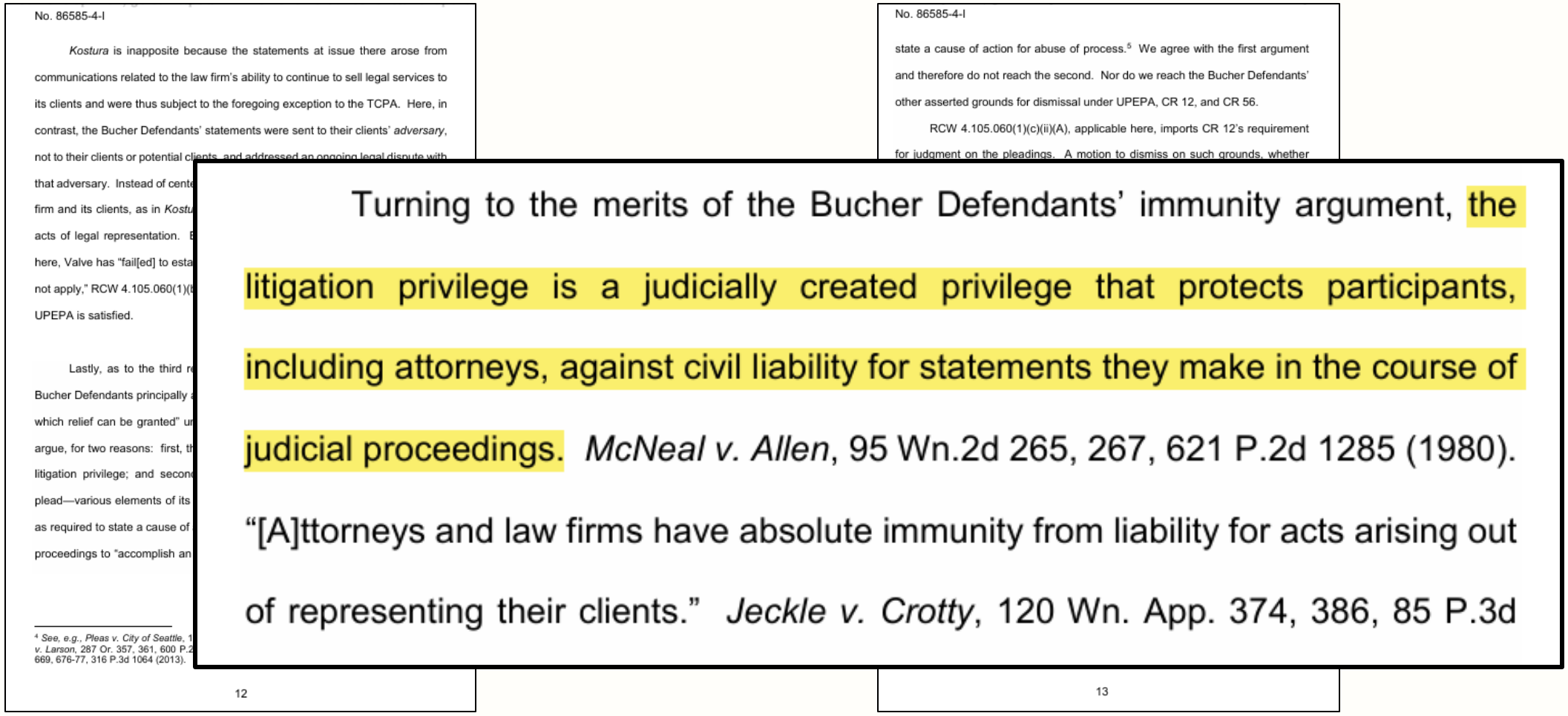
- *Branson v. Washington Fine Wine & Spirits, LLC*, 5 Wn.3d 289 (2025) (plaintiff claiming to be "job applicant" under Washington Equal Pay & Opportunities Act (EPOA) must apply to job posting but need not prove they are a "bona fide" or "good faith" applicant)
- *Bearden v. City of Ocean Shores*, 5 Wn.3d 1 (2025) (Washington's paid military leave statute (RCW 38.40.060) entitles employee to 21 days paid military leave even if not scheduled to work during period in which employee reports for military duty)

Washington Court of Appeals

Valve Corp. v. Bucher Law PLLC, 34 Wn. App. 2d 727 (2025)

- ***LITIGATION PRIVILEGE***: lawyers have absolute immunity from civil liability for communications having "some relation to" judicial proceedings
- Law firm sent thousands of demand letters on behalf of clients to video game developer proposing settlement terms, filed arbitration claims
- Developer sued for abuse of process & tortious interference
- Law firm asserted UPEPA / litigation privilege
- Trial court denied motion to dismiss

Valve Corp. v. Bucher Law PLLC, 34 Wn. App. 2d 727 (2025)



No. 86585-4-I

Kostura is inapposite because the statements at issue there arose from communications related to the law firm's ability to continue to sell legal services to its clients and were thus subject to the foregoing exception to the TCPA. Here, in contrast, the Bucher Defendants' statements were sent to their clients' *adversary*, not to their clients or potential clients, and addressed an ongoing legal dispute with that adversary. Instead of cente
firm and its clients, as in *Kostu*
acts of legal representation.
here, Valve has "fail[ed] to esta
not apply," RCW 4.105.060(1)(
UPEPA is satisfied.

Lastly, as to the third r
Bucher Defendants principally
which relief can be granted" u
argue, for two reasons: first, t
litigation privilege; and secon
plead—various elements of its
as required to state a cause of
proceedings to "accomplish an

[4] *See, e.g., Pleas v. City of Seattle*, 1
v. Larson, 287 Or. 357, 361, 600 P.2
669, 676-77, 316 P.3d 1064 (2013).

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state a cause of action for abuse of process.[5] We agree with the first argument and therefore do not reach the second. Nor do we reach the Bucher Defendants' other asserted grounds for dismissal under UPEPA, CR 12, and CR 56.

RCW 4.105.060(1)(c)(ii)(A), applicable here, imports CR 12's requirement for judgment on the pleadings. A motion to dismiss on such grounds, whether

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Turning to the merits of the Bucher Defendants' immunity argument, the litigation privilege is a judicially created privilege that protects participants, including attorneys, against civil liability for statements they make in the course of judicial proceedings. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980). "[A]ttorneys and law firms have absolute immunity from liability for acts arising out of representing their clients." *Jeckle v. Crotty*, 120 Wn. App. 374, 386, 85 P.3d

Valve Corp. v. Bucher Law PLLC, 34 Wn. App. 2d 727 (2025)

Here, the Bucher Defendants' conduct was both "pertinent" and "material" to the relief they sought for their clients, and thus insulated from suit by the litigation privilege. The Bucher Defendants agreed to represent clients individually in arbitration pursuant to Valve's SSA and contacted Valve in accordance with its prescribed dispute resolution process. When Valve indicated it required individualized notices for each customer complaint, the Bucher Defendants complied. The conduct Valve complains of—the filing of thousands of individual arbitration requests—is a direct result of its own agreement barring class actions and prohibiting collective or representative arbitration.[6] Such conduct is part of a legal practice and is directly related to representing clients, which is precisely the kind of conduct the litigation privilege is designed to protect.

Valve Corp. v. Bucher Law PLLC, 34 Wn. App. 2d 727 (2025)

While stated broadly, the litigation privilege is "limited to situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct." *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 476, 564 P.2d 1131 (1977). In this way, the "potential harms

Defendants' clients are asserted individually, *as its own SSA requires*, no single arbitrator is "well situated" to remedy the alleged harm caused by the Bucher Defendants' actions. Contrary to Valve's contention, "some power to discipline" impermissible conduct is "available" through the individual arbitrations it demanded, which is sufficient to show the "availab[ility]" of "some" power to discipline, even though it is not the remedy Valve prefers. *Deatherage*, 134 Wn. 2d at 136.

Takeaways

- Litigation privilege: broad
- "Some power to discipline"
- Ultimate end related to legal relief sought

Allen v. Phish, 35 Wn. App. 2d 301 (2025)

- Concert @ Gorge Amphitheatre
- Evidence:
  - Loyal fan base would follow from venue to venue, selling nitrous oxide
  - Three examples of nitrous oxide leading to violence at concerts
- Plaintiffs injured by thrown rocks
- Issue: scope of landowner's duty under Restatement § 344

Allen v. Phish, 35 Wn. App. 2d 301 (2025)

- Restatement (Second) of Torts § 344: business owners owe duty to invitees to protect from foreseeable criminal acts
- Duty: 3rd party harmful conduct must be "imminent" or "reasonably foreseeable"
- Plaintiff's experts: nitrous oxide increases the risk of crime

Allen v. Phish, 35 Wn. App. 2d 301 (2025)

EXISTENCE OF DUTY

- Considers whether landowner owes duty in the first instance
- Landowner's "duty to protect business invitees from third party criminal conduct" arises only "when such conduct is foreseeable based on past experience of prior similar acts."
- ***QUESTION OF LAW***

SCOPE OF DUTY

- Once duty exists, foreseeability becomes a factual determination as to "whether the kind of harm which actually occurred should have been foreseen as the kind of harm from which defendant had a duty to protect plaintiff"
- ***QUESTION OF FACT***

Allen v. Phish, 35 Wn. App. 2d 301 (2025)

Generalized violence can manifest in many ways. It is not the business owner's duty to anticipate every possible scenario. Even if the Defendants tolerated the sale and use of nitrous oxide in the camping area, the Plaintiffs fail to show that this activity was inherently dangerous or increased the chance of random attacks inside the venue. There may be other reasons to believe that patrons will throw objects during a concert, but that evidence was not presented here.

Additional COA Cases of Note…

- *Stephens v. Town of Steilacoom*, 35 Wn. App. 2d 619 (2025) (subsequent purchaser doctrine bars inverse condemnation claim and subsumed tort claims for trespass & nuisance)

Cases to Watch

What's Coming at Supreme Court

- ***Lang v. Platinum Nine Holdings, LLC*** **(unpublished) (ambulance company's immunity under RCW 18.71.210 for nonemergency transport) (arg. 02/24/2026)**
- ***Earl v. City of Tacoma*****, 34 Wn. App. 632 (2025) (negligent retention claim unavailable when defendant stipulates to course & scope of employment) (arg. 06/11/2026)**
- ***Brant v. Shaw*****, 35 Wn. App. 2d 660 (2025) (defendant bears burden to prove "unforeseen medical emergency" caused car accident; evidence in record gave rise to competing inference whether stroke caused collision) (arg. 06/16/2026)**
- ***Anderson v. Snohomish County*** **(prosecutorial immunity – judicial qualification notices/affidavit of prejudice) (certified from WD Wash, not scheduled yet)**

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