

Supreme Court Issues  
Cases Not Yet Set & September Term 2015  
August 13, 2015

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- Statutes—Construction—Counties—Joint Self-Insurance Agreement—Contracts—Insurance—Liability Policy—Duty to Defend.
- Vendor and Purchaser—Title—Title Insurance—Later Discovered Encumbrance—Damages—Diminution in Value—Tender by Insurer—Breach of Contract Action Against Insurer—Jury Finding of No Breach and No Award of Damages.
- Witnesses—Privileges—Attorney-Client Privilege—Scope—School District Client—Former Nonparty Employees.

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## Cases Not Yet Set

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### **\*Agriculture—Farm Labor Contractors—License—Necessity—Agent—Liability for Agent’s Failure to Obtain License—Knowing Use of Unlicensed Contractor—Failure to Verify Whether Contractor Licensed.**

Whether in this class action for violation of the Farm Labor Contractor Act, chapter [19.30 RCW](#), an entity that was paid a fee to manage all aspects of farming an apple orchard, including hiring workers and making all planting and harvesting decisions, was a “farm labor contractor” required to have a license under the act, and if so, whether two companies who contracted with the unlicensed contractor to manage the orchard are jointly and severally liable under [RCW 19.30.200](#) for “knowingly” using an unlicensed contractor’s services when they did not know the contractor was unlicensed but failed to inspect the license or verify whether the contractor was licensed.

No. 91945-3, *Saucedo, et al.* (appellees) v. *John Hancock Life & Health Ins. Co., et al.* (appellants).

Certified from U. S. Court of Appeals, Ninth Circuit.

No. [13-35955](#) (9<sup>th</sup> Cir.).

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### **Counties—Joint Self-Insurance Agreement—Assignments—After Loss—Prohibition.**

Whether a county and its employee were precluded from assigning any claims they might have against a county risk pool self-insurance program (formed under chapters [48.62](#) and [39.34 RCW](#)) and its commercial insurers, where the risk pool’s joint self-insurance liability policy and interlocal agreement contained nonassignment provisions and the commercial insurers issued “following form” policies.

No. 91154-1, *Wash. Counties Risk Pool, et al.* (respondents) v. *Clark County, Wash., et al.* (petitioners). (*See also: Statutes—Construction—Counties—Joint Self-Insurance Agreement—Contracts—Insurance—Liability Policy—Duty to Defend.*)

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**\*Criminal Law—Searches and Seizures—Automobiles—Warrantless Search—Protective Search of Vehicle—Objects in Plain View—Seizure of Firearm.**

Whether in the course of stop in which the occupants of a car were ordered out and handcuffed, a police officer, after conducting a “protective sweep” of the car for any other occupants, lawfully reached into the car without a warrant to seize a gun in preparation for towing the car.

No. 90188-1, *State (respondent) v. Duncan (petitioner)*.

180 Wn. App. 245 (2014). (Published in part).

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**\*Criminal Law—Searches and Seizures—Consent—Entry Into Dwelling—Right to Refuse—Warning—Necessity—Before Entry Made.**

Whether in a criminal prosecution in which the defendant gave consent to police officers to enter his home to seize a computer while the officers were still outside his home, the evidence discovered on the computer should have been suppressed because the officers failed to advise the defendant of his right to deny, revoke, or limit consent as required by *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998), until after the officers entered the home.

No. 91529-6, *State (petitioner) v. Budd (respondent)*.

186 Wn. App. 184 (2015).

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**Insurance—Underinsured Motorist—Underinsured Vehicle—“Arise Out of Use” of Underinsured Motor Vehicle—Drive-By Shooting—Intentional Injury.**

Whether, for purposes of underinsured motorist automobile insurance coverage, an insured pedestrian’s injuries sustained after being shot by an underinsured driver who momentarily stopped or slowly drove by in his vehicle “arise out of” the driver’s use of his vehicle, and if so, whether coverage exists even if the driver intended harm.

No. 91846-5, *Kroeber (appellant) v. GEICO Insurance Co.* (respondent).

Certified Question from U. S. District Court for the Western District of Washington.

C14-726RSL (W.D. Wash.).

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**Mental Health—Involuntary Commitment—Inflicting or Attempting to Inflict Serious Physical Harm—180-Day Commitment Period—Renewal—Statute—Constitutionality.**

Whether [RCW 71.05.320\(3\)\(c\)\(ii\)](#), which provides for a 180-day extension of an involuntary civil commitment of a person incompetent to stand trial for violent offenses if the State presents prima facie evidence that the person continues to suffer from a mental disorder or developmental disability that results in a substantial likelihood of acts similar to the charged criminal behavior, violates the United States or Washington constitutions.

No. 90570-3, *In re Detention of M.W. & W.D.* (respondents); *DSHS* (petitioner).

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**\*Property—Title—Recording of Liens—Negligence—Duties—Scope— Third Parties.**

Whether a title company owes a duty of care to third parties to refrain from negligently recording legal instruments.

No. 91932-1, *Centurion Properties III, LLC, et al.* (appellants) v. *Chicago Title Ins. Co.* (respondent).

Certified from U. S. Court of Appeals, Ninth Circuit.

Nos. [13-35725](#) & [13-35692](#) (9<sup>th</sup> Cir.).

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**Statutes—Construction— Counties—Joint Self-Insurance Agreement—  
Contracts—Insurance—Liability Policy—Duty to Defend.**

Whether a county risk pool created under chapters [48.62](#) and [39.34 RCW](#) had a duty to defend a county and its employee under a joint self-insurance liability policy, and whether the existence of such a duty to defend is properly analyzed under principles of contract law or principles of insurance law where [RCW 48.01.050](#) provides that two or more local governmental entities that join together to jointly self-insure “are not an ‘insurer’ under this code.”

No. 91154-1, *Wash. Counties Risk Pool, et al.* (respondents) v. *Clark County, Wash., et al.* (petitioners). (*See also: Counties—Joint Self-Insurance Agreement Assignments—After Loss—Prohibition*).

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**Witnesses—Privileges—Attorney-Client Privilege—Scope—School District  
Client—Former Nonparty Employees.**

Whether in a personal injury action brought by a former high school football player against a school district, defense counsel’s communications with former district coaches not named as defendants are protected by the attorney-client privilege.

No. 90194-5, *Newman, et al.* (respondents) v. *Highland Sch. Dist. No. 203* (petitioner).

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**Conflict of Laws—Limitation of Actions—Foreign Limitation Period—  
Threshold Inquiry—Conflict in Substantive Law—Necessity.**

Whether in a Washington personal injury suit based on an automobile accident that occurred in Idaho, the Court of Appeals erred in holding that the Idaho statute of limitation applies without first determining whether there is a conflict between Idaho and Washington law on the substantive issue involved in the suit, and if so, whether a conflict exists.

No. 91270-0, *Woodward* (petitioner) v. *Taylor* (respondent). (Oral argument 9/24/2015).

[185 Wn. App. 1 \(2014\)](#).

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**Consumer Protection—Action for Damages—Unfair or Deceptive Conduct—  
Right of Action—Scope—Out of State Plaintiff—Washington Corporate  
Defendant—Out-of-State Corporate Principal of Washington Corporate  
Defendant.**

Whether a plaintiff who is not a Washington resident may sue a Washington corporation under the Washington Consumer Protection Act, [RCW 19.86.010 et seq.](#), for allegedly deceptive acts committed by the corporation as the in-state agent of an out-of-state corporation and, if so, whether the plaintiff may also sue the out-of-state corporation under the Act.

No. 91393-5, *Thornell* (plaintiff) v. *Seattle Serv. Bureau, Inc., et al.* (defendants). (Oral argument 10/20/2015).

Certified Question from U.S. District Court for the Western District of Washington.

2015 WL 1000426 (W.D. Wash. Mar. 6, 2015).

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**Counties—Land Use Controls—Growth Management Act—Local Compliance With Act—Rural Area Development—Water Resources—Protection—Sufficiency—Instream Flow Protection—Permit Exempt Groundwater Withdrawals.**

Whether a Whatcom County ordinance amending the rural element of the county's comprehensive plan and zoning code fails to comply with the Washington Growth Management Act, chapter [36.70A RCW](#), in not adequately taking into account the effect that permit-exempt groundwater withdrawals have on instream flows in the county's rural areas, and if so, whether the entire ordinance is invalid.

No. 91475-3, *Hirst, et al.* (petitioners) v. *W. Wash. Growth Mgmt. Hr'gs Bd.* (respondent). (Oral argument 10/20/2015).

[186 Wn. App. 32 \(2015\)](#).

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**Courts—Jurisdiction—Nonresidents—Foreign Manufacturer—Fair Play and Substantial Justice—Transaction of Business—Product in Stream of Commerce—Connection With Forum State—Sufficiency.**

Whether in an action under the Consumer Protection Act alleging a price-fixing conspiracy in the marketing of cathode ray tubes, defendant nonresident consumer electronics manufacturers had sufficient contacts with Washington to subject them to the personal jurisdiction of Washington courts.

No. 91391-9, *State* (respondent) v. *LG Electronics, et al.* (petitioner). (Oral argument 9/24/2015).

[185 Wn. App. 394 \(2015\)](#).

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**Criminal Law—Former Jeopardy—Alternative Means of Committing Offense—Separate Charges of Alternative Means—Acquittal of One Charge and Deadlock on Other—Effect—Retrial on Deadlocked Charge.**

Whether in a prosecution on two counts of second degree assault based on the same act, one alleging assault by means of use of a deadly weapon and one alleging assault by means of recklessly inflicting substantial bodily harm, the jury's acquittal of the defendant on one of the counts and its deadlock on the other precludes the State from retrying the defendant on the deadlocked count under double jeopardy principles.

No. 91193-2, *State (respondent) v. Fuller (petitioner)*. (Oral argument 10/20/2015).

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**Criminal Law—Former Jeopardy—Judgment—Collateral Estoppel—Prosecution for First Degree Murder While Armed With Firearm—Previous Acquittal on Charge of Unlawful Possession of Firearm—Effect.**

Whether under collateral estoppel principles as embodied in the constitutional guarantee against double jeopardy, the defendant's prosecution for first degree murder while armed with a firearm violated double jeopardy principles when in a previous bench trial the court found the defendant not guilty of unlawful possession of a firearm based on the same incident.

No. 89706-9, *In re Pers. Restraint of Moi, Mathew W. Moi* (petitioner); *State* (respondent). (Oral argument 9/8/2015).

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**Criminal Law—Punishment—Sentence—Credit for Detention—Time Served Before Sentencing—Current Offenses—Existing Detention on Intervening Conviction—Overlapping Credit—Whether Allowed.**

Whether in sentencing a defendant on multiple current offenses where the defendant is already serving a sentence imposed on a later-charged offense, the trial court is required under [RCW 9.94A.505\(6\)](#) to give the defendant full presentence jail credit on the current offenses.

No. 91180-1, [State \(respondent\) v. Lewis \(petitioner\)](#). (Oral argument 9/17/2015).

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**Criminal Law—Punishment—Sentence—Life Imprisonment Without Parole—Persistent Offender Accountability Act—Prior Convictions—Vehicular Manslaughter—California Offense.**

Whether a criminal defendant’s prior California conviction for vehicular manslaughter is a “most serious offense” under Washington’s Persistent Offender Accountability Act.

No. 91297-1, [State \(petitioner\) v. Farnsworth \(respondent\)](#). (Oral argument 10/22/2015). ([see also Criminal Law—Robbery—First Degree Robbery—Against Financial Institution—Threat—Robbery Note—“Put the Money in the Bag”](#)).

[State’s Petition.](#)

[Farnsworth’s cross-petition.](#)

[184 Wn. App. 305 \(2014\).](#)

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**Criminal Law—Retail Theft—Special Circumstances—Possession of Device Designed to Overcome Security Systems—What Constitutes—Scope—Wire Cutters.**

Whether in a prosecution for retail theft with “extenuating circumstances” under former [RCW 9A.56.360\(1\)\(b\)](#) (2006), wire cutters used by the defendant to remove a security device attached to the stolen merchandise constituted “an item, article, implement, or device designed to overcome security systems” within the meaning of the statute.

No. 91457-5, *State (respondent) v. Larson (petitioner)*. (Oral argument 10/22/2015).

[185 Wn. App. 903 \(2015\)](#).

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**Criminal Law—Robbery—First Degree Robbery—Against Financial Institution—Threat—Robbery Note—“Put the Money in the Bag.”**

Whether in a prosecution for first degree robbery of a financial institution, a handwritten note directing a bank teller to put money in a bag without dye packs or tracking devices constituted a threatened use of force, violence, or fear of injury for purposes of the definition of robbery, [RCW 9A.56.190](#).

No. 91297-1, *State (petitioner) v. Farnsworth (respondent)*. (Oral argument 10/22/2015). (*See also* [Criminal Law—Punishment—Sentence—Life Imprisonment Without Parole—Persistent Offender Accountability Act—Prior Convictions—Vehicular Manslaughter—California Offense](#)).

[State’s Petition](#).

[Farnsworth’s cross-petition](#).

[184 Wn. App. 305 \(2014\)](#).

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**Criminal Law—Trial—Joinder or Severance—Codefendant’s Statements—  
Confrontation Clause—Testimonial or Nontestimonial Statement—Effect—  
Harmless Error.**

Whether under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the trial court in a criminal prosecution erred in admitting a codefendant’s out-of-court statements concerning the defendant’s culpability or in not severing the trials, and if so, whether the error was harmless.

No. 91331-5, *State (respondent) v. Wilcoxon (petitioner)*. (Oral argument 9/10/2015).

[185 Wn. App. 534 \(2015\)](#).

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**Criminal Law—Trial—Presence of Defendant—Right to Be Present—Waiver—  
Voluntariness—Determination—Presumption Against Waiver—Application—  
Necessity.**

Whether in a criminal prosecution in which the court proceeded with trial in the defendant’s absence after making a preliminary finding that she had voluntarily waived her right to be present by failing to appear, the court upon the defendant’s appearance was required to expressly consider on the record the defendant’s explanation for her absence in light of the presumption against waiver when making its final ruling on whether the defendant waived her right to be present.

No. 91220-3, *State (respondent) v. Thurlby (petitioner)*. (Oral argument 9/10/2015).

[184 Wn. App. 918 \(2014\)](#).

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## **Industrial Insurance—Eligibility—Commission of Felony—Proof—Burden of Proof—Degree of Proof.**

Whether in a worker's challenge to the denial of industrial insurance benefits on the basis that the worker was injured while committing the felony of driving under the influence of an intoxicant, *see* [RCW 51.32.020](#), the Department of Labor and Industries bears the burden of proving that the felony payment bar applies, and if so, whether the standard of proof is by clear, cogent, and convincing evidence.

No. 91357-9, *Dep't of Labor & Indus.* (petitioner) *v.* *Rowley* (respondent). (Oral argument 10/27/2015).

[185 Wn. App. 154 \(2014\)](#).

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## **Judgment—Foreign Judgment—Full Faith and Credit—Domestic Real Property.**

Whether, in a judicial foreclosure action, a Washington court determining the validity of a deed of trust that encumbers Washington property is constitutionally required to afford full faith and credit to an Idaho court order that authorized execution of the deed of trust by a conservator.

No. 91283-1, *OneWest Bank, FSB* (petitioner) *v.* *Erickson* (respondent). (Oral argument 10/22/2015).

[184 Wash. App. 462 \(2014\)](#).

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## **Limitation of Actions—Consumer Protection—State Enforcement—Parens Patriae Action—Limitation Period—Exemption—Applicability.**

Whether the exemption of the State from any statute of limitations under [RCW 4.16.160](#) applies to an action to enforce the Consumer Protection Act brought by the State as parens patriae pursuant to [RCW 19.86.080\(1\)](#).

No. 91263-7, *State* (respondent) *v.* *LG Electronics, et al.* (petitioner). (Oral argument 9/24/2015).

[185 Wn. App. 123 \(2014\)](#).

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**Medical Treatment—Malpractice—Failure to Diagnose—Failure to Treat—Loss of Chance—Percentage—Expert Testimony—Necessity.**

Whether, to recover damages for lost chance of a better outcome in this professional malpractice lawsuit against a psychiatrist based on harm caused by the psychiatrist's patient, the plaintiff must present expert evidence of the percentage by which the psychiatrist's conduct reduced the likelihood of a better outcome.

No. 91387-1, *Volk, et al.* (respondents/cross petitioners) v. *DeMeerleer, et al.* (petitioners/cross respondents) (Oral Argument 11/17/2015). (*See also:* [Negligence—Duty—Protection of Others—Criminal Acts of Third Persons—Special Relationship—Psychiatry—Patient-Caused Injuries—Duty to Prevent—Scope.](#)).

184 Wn. App. 389 (2014).

[Petition for Review Spokane Psychiatric Clinic.](#)  
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**Mental Health—Involuntary Commitment—Sexually Violent Predators—Petition—Statutory Provisions—Persons Subject to Commitment Petition—Prior Offense—Juvenile Offense—Subsequent Release from Total Confinement.**

Whether [RCW 71.09.030\(1\)](#) authorizes the State to file a petition seeking civil commitment as a sexually violent predator of a person who was adjudicated guilty of committing a sexually violent offense as a juvenile and was subsequently released from total confinement.

No. 91385-4, *In re Det. of Anderson John C. Anderson* (petitioner); *State* (respondent). (Oral argument 9/17/2015). (*See also:* [Mental Health—Involuntary Commitment—Sexually Violent Predators—Recent Overt Act—What Constitutes—Consensual Sexual Relations with Fellow Mental Health Patients](#)).

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**Mental Health—Involuntary Commitment—Sexually Violent Predators—Recent Overt Act—What Constitutes—Consensual Sexual Relations with Fellow Mental Health Patients.**

Whether in this petition to civilly commit a person as a sexually violent predator, the person’s noncriminal consensual sexual relationships with fellow patients at a state mental hospital more than 10 years before the commitment trial were “recent overt acts” for purposes of proving that the person is a sexually violent predator.

No. 91385-4, *In re Det. of Anderson, John C. Anderson* (petitioner); *State* (respondent). (Oral argument 9/17/2015). (*See also: Mental Health—Involuntary Commitment—Sexually Violent Predators—Petition—Statutory Provisions—Persons Subject to Commitment Petition—Prior Offense—Juvenile Offense—Subsequent Release from Total Confinement.*).

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**Negligence—Duty—Protection of Others—Criminal Acts of Third Persons—Special Relationship—Psychiatry—Patient-Caused Injuries—Duty to Prevent—Scope.**

Whether in this action for professional malpractice against a psychiatrist, the psychiatrist owed a duty of care to persons murdered by the psychiatrist’s patient where the patient had expressed homicidal ideas but never specifically expressed intent to harm the victims.

No. 91387-1, *Volk, et al.* (respondents/cross petitioners) *v. DeMeerleer, et al.* (petitioners/cross respondents) (Oral argument 11/17/2015). (*See also: Medical Treatment—Malpractice—Failure to Diagnose—Failure to Treat—Loss of Chance—Percentage—Expert Testimony—Necessity.*).

184 Wn. App. 389 (2014).

[Petition for Review Spokane Psychiatric Clinic.](#)

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**Open Government—Public Disclosure—What Constitutes—Call Log—Text Messages—Personal Cellular Telephone—Device Used for Both Work and Personal Communications—Exemptions—Files Maintained for Employees—Right to Privacy.**

Whether [RCW 4.24.550](#), which governs the type of sex offender records that may be disclosed to the public and the circumstances under which they may be disclosed, is an “other statute” under [RCW 42.56.070\(1\)](#) of the Public Record Act, as a result of which sex offender registration forms are exempt from the broader disclosure requirements of the act.

No. 90413-8, *John Doe A., et al.* (respondents) v. *Wash. State Patrol, et al.* (appellants). (Oral argument 9/17/2015).

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**Personal Restraint—Petition—Timeliness—Statutory Limits—Exceptions—Significant Change in Law—Appellate Decision—Mulholland Case.**

Whether the decision in *In re Personal Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007), holding that sentencing courts may impose concurrent sentences for multiple serious violent felonies as a form of exceptional sentence below the standard range, constitutes a “significant change in the law” exempting a collateral challenge to a criminal judgment from the one-year time limit on collateral relief pursuant to [RCW 10.73.100\(6\)](#).

No. 91065-1, *State* (petitioner) v. *Miller* (respondent). (Oral argument 9/10/2015).

[181 Wn. App. 201 \(2014\)](#).

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**Vendor and Purchaser—Title—Title Insurance—Later Discovered  
Encumbrance—Damages—Diminution in Value—Tender by Insurer—Breach of  
Contract Action Against Insurer—Jury Finding of No Breach and No Award of  
Damages.**

Whether in a breach of contract lawsuit against a title insurance company for diminished value of land due to a previously undiscovered easement, the jury properly found that the insurer did not breach the policy and thus awarded the insured nothing, even though it was undisputed that the insured suffered a covered loss and the insurer had previously tendered payment under the policy.

No. 91301-3, *Millies, et ux. (petitioner) v. LandAmerica Transnation, et al.*  
(respondent). (Oral argument 10/27/2015).

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