Supreme Court No. 99367-0
Court of Appeals No. 80055-8-I
Island County Superior Court Case No. 18-2-06549-31

SUPREME COURT OF WASHINGTON

**DIANE PERILLO and TED PERILLO,
Trustees of the Diane Perillo Living Trust,
dated September 28, 2011,**

Respondents/Plaintiffs,

v.

**ISLAND COUNTY, a political
subdivision of the State of
Washington,**

Petitioner/Defendant,

and

**VIEW SUN INVESTMENTS, LLC,
a limited liability company,**

Defendant.

RESPONDENT'S ANSWER TO AMENDED PETITION FOR REVIEW OF ISLAND COUNTY

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I. IDENTITY OF RESPONDENTS

The respondents are DIANE PERILLO and TED PERILLO, Trustees of the Diane Perillo Living Trust, dated September 28, 2011 ("the Perillos"), being plaintiffs before the trial court and petitioners before the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals issued its published decision on November 30, 2020, *Perillo v. Island County,* --- P.3d ---, 2020 WL 7021689 (2020), reversing the trial court and remanding the matter for trial. *See* Petition for Review "Appendix A."

III. ISSUES PRESENTED FOR REVIEW

1. Should the Supreme Court review this case when any issue of public interest which it may present is contingent upon issues of fact not yet decided by the trial court?

2. Should the Supreme Court review this case when a conflict it may present with other cases in judging "culpable neglect" and a "duty to investigate" is contingent upon issues of fact not yet decided by the trial court?

IV. STATEMENT OF THE CASE

On February 24, 2017, Ted and Diane Perillo purchased a home located at 505 Michelle Drive, Camano Island, Island County, Washington 98282 ("the property"). CP 130. While preparing to move into the residence, the Perillos were informed by neighbors and others familiar with the area that the house had a history of criminal activity, drug use, and drug manufacturing. *Id.* The Perillos had their real estate agent, Jennifer Maher, issue a public records request to Island County to learn more about this history. *Id.* 130, 174. The documents the Perillos received in response to this request included a case detail from Island County Public Health which outlined a history of complaints of meth manufacturing on the property, and email correspondence from Island County Public Health expressing the urgency of the matter. *See generally id.* at 182–189. In one such email dated March 26, 2015, Andrea Krohn, an environmental health specialist for the county, stated that the property was "not a safe place." *Id.* at 185. Also, the president of the property homeowner's association, Austin Bougie, had contacted Island County Public Health from November 2014 through summer 2015 to complain about drug activity on the property, but was advised by the Island County Sheriff's Office to report to Island County Public Health. In turn, Island

County Public Health advised him to report to the Island County Sheriff's Office. *See id.* at 192, 82–85.

Multiple other neighbors, as well as contractors working on the property, had also reported drug activity and signs of drug manufacturing on the property to the Island County Sheriff's Office since 2014. *See id.* at 59–60, 69–80, 87–100, 127–128. On October 13, 2014, Cassandra Bjorn complained to the Island County Sheriff's Office that the property was a "drug house" and "saturated with meth." CP 75–80. On April 25, 2015, Dave Hyatt reported to Island County Public Health that meth was being cooked on the property. *See* CP 59–60. On April 22 and 24, 2015, another neighbor, Jewel Enger, reported a strong chemical smell coming from the property and difficulty breathing to the Island County Sheriff's Office, along with her belief that meth was being made there. CP 128, 87–91. Law enforcement advised Ms. Enger of information that would be necessary for a search warrant, but suggested she talk to Island County Public Health about a nuisance violation. *Id.* at 89. Ms. Enger did report this to Island County Public Health as well, but she received no response on either report. *Id.* at 69–60, 127–128. In October 2015, a contractor hired to clean the property, Nat Haskell, reported to Ms. Krohn that he saw evidence of illegal drug manufacturing on the property, and also felt ill after being on-site. *Id.* at 59–60, 93–96. There was physical evidence of illegal drug use

and manufacturing upon the property, including needles, gas cans, propane tanks, antifreeze tanks, and many short lengths of hoses. *See* CP 93–100. Mr. Haskell asked "if there is some way to test the environment for contamination (interior or exterior) or not." *Id.* at 96. Ms. Krohn said Island County Public Health did not have any records of manufacturing of drugs on the property, and referred him to the anonymous meth hotline. *See generally id.* On October 21, 2015, another contractor contacted the Island County Sheriff's Office to report the presence of similar drug-related items and asked what would be done about it. *See* CP 98–100.

The Perillos hired Bio Clean, Inc., to test the property for meth contamination. *See id.* at 130. Tests in April 2017 and February 2018 confirmed that the house contained meth residue in excess of acceptable levels in Washington State. *See id.* at 130–131, 135–152, 198, 224–233. Consequently, the house could not be occupied and needed to be thoroughly decontaminated, at an expected cost of nearly $110,000.00. *See id.* at 131, 197, 235–236. The Perillos sought a second opinion from another contractor, Puget Sound Abatement, who told them that such decontamination likely would not suffice, and that the property should be demolished instead. *See id.* at 131, 168–170. The Perillos thus had Sawtooth Trucking and Excavating demolish their house, which cost $85,609.95. *See id.* at 131, 172.

On July 26, 2018, the Perillos filed suit against Island County for damages associated with the cleaning and loss of their real and personal property because of this undisclosed contamination. CP 312. They raised a cause of action for negligence for Island County's failure to report and post warning of this contamination pursuant to RCW 64.44.020 and WAC 246-205-520, and failure to act on the decontamination standards established by RCW 64.44.070. Their claim was based on the above evidence that the Island County Sheriff's Office and Island County Public Health were both aware of a history of drug activity at the property for several years prior to when the Perillos purchased it.

On April 8, 2019, Island County filed a motion for summary judgment, claiming that it was exempt from liability because the public duty doctrine protected it from tort liability. On May 17, 2019, the Honorable Judge Eric Z. Lucas of the Snohomish County Superior Court entered an Order granting Island County's motion. CP 4–5. The Perillos filed their Motion for Discretionary Review with the superior court and the Court of Appeals on June 14, 2019. On October 22, 2019, the Court of Appeals granted the Perillos' motion, and reviewed the matter upon oral argument. On November 30, 2020, the Court of Appeals reversed and remanded the case to trial, finding that Chapter 64.44 RCW evinces a clear legislative intent to protect potential future purchasers and occupiers of

property, and that there is sufficient evidence of a legal duty which precludes summary judgment. On December 29, 2020, Island County petitioned this court for review of the decision of the Court of Appeals. This responsive brief follows.

V. ARGUMENT

A. Any Issue Of Public Interest Which Island County's Statutory Duties May Present Should Be Decided By The Trial Court.

Invoking RAP 13.4(b)(4), Island County claims it is an "issue of substantial public interest" for this Court to determine whether reports of drug activity can trigger a duty of law enforcement to tell local health officials that a property is contaminated. However, this summation compresses a crucial distinction: it is not whether such "reports" themselves trigger a duty, but rather whether *awareness* of drug activity, "noxious smells," et cetera, trigger such a duty.

Island County's argument is, essentially, that a property must be inspected before it can be posted as "contaminated," and yet—incongruously—that "[l]aw enforcement may 'become aware' of contamination" by "serving warrants, effecting arrests, or investigating criminal activity." Petition for Review at 15. "Awareness," then, is clearly dependent on context. "Awareness" would not necessarily come from just any "report," but whether it did in this case—considering the nature of the

reports, as established above—is for the trier of fact to decide. This is indeed a case of first impression for RCW 64.44.020, but the choice that statute presents for law enforcement is not as "impossible" as Island County worries. For lack of an explicit threshold of "becom[ing] aware," it would be perfectly reasonable for a trial court to find the eyewitness statements and physical evidence brought to Island County's attention regarding the property constituted "aware[ness] that [it] has been contaminated by hazardous chemicals" under RCW 64.44.020.

This reading does not conflict with constitutional protections of the home. This is not a criminal matter such as *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593, 599 (1994), or *United States v. Romero-Bustamente*, 337 F.3d 1104, 1107 (9th Cir. 2003), where the constitutional rights of a private citizen facing prosecution are paramount, but a civil case concerning the duties of a public entity under a civil statute. Moreover, RCW 64.44.020 *et seq.* establish a myriad of standards and procedures before a person's home can be deemed unfit for habitation, surely with such protections in mind; confirming the reported presence of contamination is just one initial element. Law enforcement could become "aware" that a property is contaminated without even setting foot on it or otherwise intruding upon a homeowner's privacy. In this case, that is arguably exactly what happened.

As for the role of local health officials after such awareness, Island County is mistaken in claiming this cannot be reconciled with the "reasonable grounds" standard to enter and inspect a potentially contaminated property. This responsibility is cumulative, not contradictory; a law enforcement agency must report contamination of which it becomes aware to local health officials, but those local health officials have a *separate*, independent option to cut to the chase and inspect a property when they have reasonable grounds to do so. Likewise, the warrant and pre-inspection posting requirements acknowledged by Island County are a responsibility separate and independent from the role of law enforcement under RCW 64.44.020.

Island County is simply wrong when it says that law enforcement has only a "permissive . . . obligation" to report property contamination of which they become aware. RCW 64.44.020 clearly states that a "law enforcement agency . . . *shall* report the contamination to the local health officer" (emphasis added).The Perillos are well aware of the importance of interpreting a statute in context, this being the cornerstone of their argument for a legislative intent exception to the public duty doctrine with which the Court of Appeals agreed. If the standards for health officials under RCW 64.44.020 are higher than those for law enforcement, then, it is likely because the legislature determined such a potentially unilateral

decision should not be taken lightly—and that Fourth Amendment considerations are indeed crucial. After all, it is health officials who will conduct any inspection and, if need be, condemnation of a property; all law enforcement has to do is say something when they see something. Island County failed in both of these interrelated obligations, and the consequences for that inaction should remain remanded to the trial court for judgment.

B. WHETHER THE COURT OF APPEALS' DECISION CONFLICTS WITH OTHERS APPLYING THE LEGISLATIVE INTENT EXCEPTION DEPENDS ON FACTS WHICH MUST BE TRIED.

Additionally, the Court of Appeals' decision does not merit review under RAP 13.4(b)(1) or (2), as Island County suggests, for purportedly conflicting with its other decisions or those of this Court. Generally, and curiously, this is the first time Island County has raised "culpable neglect" or "indifference" to a duty breached as necessary criteria for the legislative intent exception. In neither its response to the Perillos' Motion for Discretionary Review nor its response to the Perillos' appellate brief did Island County ever before mention this supposed omission. Therefore, they are asking the Supreme Court to consider the facts of this case in an unprecedented context, and to make de novo determinations upon the evidence. Respectfully, it is not this Court's place to do so.

1. The Trial Court Should Make Any Necessary Decisions Concerning "Culpable Neglect."

Even should the Court consider this additional element, and deem it necessary before applying the legislative intent exception to the public duty doctrine, there are issues of fact as to whether Island County committed culpable neglect or demonstrated indifference relative to a duty under RCW 64.44.020. It is for the trier of fact to decide whether evidence sufficient to find that neglect exists. The Court of Appeals indeed did not "[find] 'culpable neglect'," Petition for Review at 12; what it did find are facts indicating that, considered in the light most favorable to the nonmoving party (the Perillos), Island County could be liable. The Court of Appeals has not created a new duty for law enforcement, as Island County fears; it simply determined the facts of this matter may indicate Island County had sufficient "awareness" under RCW 64.44.020. The threshold for entry of summary judgment is high; for a decision whether to overturn such an order, this ambiguity is sufficient.

Cases cited by Island County which supposedly conflict with the instant decision in fact only further illustrate that the trial court should address any dispute over "culpable neglect." In *Washburn v. City of Federal Way*, petitioner sought review of a Court of Appeals decision concerning the verdict after a jury trial—by which time issues of

negligence would have already been determined. *See* 178 Wn.2d 732, 738, 310 P.3d 1275, 1279 (2013). By contrast, the Perillos' appeal was interlocutory, stemming from a summary judgment motion by a single party out of many. Meanwhile, in *Halvorson v. Dahl*, the Court found mere "allegations" of "long-term knowledge of, and inadequate response to" statutory violations could constitute "culpable neglect," and remanded the matter to trial "without consider[ing] whether falling short of actual and long-standing knowledge of noncompliance would support a claim for relief." 89 Wn.2d 673, 678, 574 P.2d 1190, 1193 (1978); *see Taylor v. Stevens County*, 111 Wn.2d 159, 165–66, 759 P.2d 447, 451 (1988) (confirming that "[t]he requirement was met . . . with allegations" of "actual and long-standing knowledge of noncompliance."). If need be, then, the Perillos would ask for the opportunity for such consideration.

Should the Court decide to consider this element, however, the facts on record amply indicate culpable negligence on the part of Island County. Years of documented reports to—and amongst—the Island County Sheriff's Office and Island County Public Health demonstrate "long-term knowledge of, and [an] inadequate response to" the Property's contamination under RCW 64.44.020. *See Halvorson*, 89 Wn.2d at 678, 574 P.2d at 1193; *Taylor*, 111 Wn.2d at 165–66, 759 P.2d at 451. Hence,

acts potentially constituting culpable neglect need only be generally alleged by the Perillos.

The facts of the case and the particulars of any negligence simply have not been tried, and indeed, the Court of Appeals generally determined that the trial court erred in foreclosing this possibility. To now prevent the trial court from being able to consider such questions of negligence would only compound that error. Still, should it wish to determine the matter of culpable neglect itself, the evidence before this Court is sufficient to support the factor's existence.

2. The Trial Court Should Make Any Necessary Decisions Concerning A "Duty To Investigate."

With all of this in mind, questions as to any "duty to investigate" on the part of the Island County Sheriff's Office are beside the point. This appeal is not concerned with an "open-ended duty" of the kind which Island County cautions in citing *Donaldson v. City of Seattle*, 65 Wn. App. 661, 671–72, 831 P.2d 1098, 1104 (1992). The question is not whether there was more the Island County Sheriff's Office hypothetically should have learned or done but—having learned what the evidence shows they *did*—whether an explicit statutory duty was triggered. Even acknowledging that law enforcement is generally afforded unique protection from claims of negligence, the plain language of RCW

64.44.020 is undeniable—only the tipping point for its application is at issue.

To the extent that RCW 64.44.020 does not explicitly establish a threshold for "aware[ness]," it also does not establish the point at which disregard of such awareness would become "culpable negligence," either by law enforcement not reporting a property to the local health officer as "contaminated" or by not further investigating reports of drug activity. Island County cites nothing for its supposition that it would not be negligent for their Sheriff's Office to "fail[] to pass along reports of drug activity or . . . contamination received . . . to local health officials." Petition for Review at 15. This indicates their own perceived threshold of "awareness" is no less speculative than that of which they accuse the Perillos. However, the trial court can determine the appropriate threshold based on the objective facts in evidence. That is a prerogative which this Court should let the trial court exercise.

VI. CONCLUSION

On the whole, both of the grounds for review under RAP 13.4 proffered in this case are fundamentally—and fatally—premature for Island County's petition for review. Whether or not Island County's statutory duties under RCW 64.44.020 implicate a public interest is contingent upon the factual matter of whether it collectively had "awareness" sufficient to trigger those duties. Similarly, it would be inappropriate for this Court to judge a potential conflict with its past decisions or those of the Court of Appeals when "culpable neglect" as an alleged element of the Perillos' claim was never raised by Island County until now, and when a finding thereof requires further findings of fact. Likewise, questions of a "duty to investigate" on the part of the Island County Sheriff's Office are secondary to a factual finding of whether they were "aware" that the Property was contaminated regardless. All of these determinations are within the sole purview of the trial court, and Island County's petition should be denied accordingly, together with such other and further relief as this Court deems just and proper.

Respectfully submitted this 28th day of January, 2021.

Presented By:
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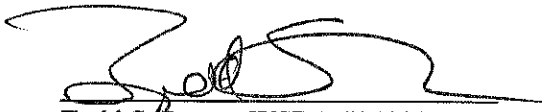

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on January 28, 2021, I served this document upon the below parties via email, pursuant to an e-service stipulation:

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