

LD5783661

SENATE BILL NO. 613

Offered January 11, 1995

Prefiled December 8, 1994

A BILL for the relief of Theodore Yawornicky and Gertrude Yawornicky.

Patrons—Gartlan; Delegate: Keating

Referred to the Committee on Finance

Whereas, Theodore Yawornicky and Gertrude Yawornicky purchased a newly constructed home at 7109 Layton Drive in the Springfield area of Fairfax County in February 1960; and Whereas, Theodore Yawornicky and Gertrude Yawornicky have resided in this home continuously since its construction, and did not witness any damage to the foundation of the residence from its construction until February 1990; and

Whereas, in February 1990, the residence sustained severe damage, including the cracking and collapse of the foundation slab, as the direct and proximate result of severe vibrations and concussions caused by the use of heavy compaction equipment, and by the use of excavation equipment in a manner that caused dewatering of soil beneath the residence, in connection with the installation of storm pipe less than 100 feet behind the residence; and

Whereas, the heavy compaction equipment and excavation equipment were operated by Landcraft Construction Company, which contracted with The Driggs Corporation to perform certain excavation activities pursuant to a contract between the Virginia Department of Transportation and The Driggs Corporation for alterations to the Springfield Bypass; and

Whereas, Theodore Yawornicky and Gertrude Yawornicky brought an action against Landcraft Construction Company and The Driggs Corporation in Fairfax County Circuit Court, alleging that the defendants negligently engaged in the excavation activities; and

Whereas, in *V. N. Green & Co. v. Thomas*, 205 Va. 903 (1965), the Supreme Court held that a highway contractor is entitled to share in the sovereign immunity of the Commonwealth from liability for consequential damages necessarily involved in the performance of the contract, unless the contractor is guilty of negligence; and

Whereas, Landcraft Construction Company, as subcontractor, and The Driggs Corporation, as prime contractor, in their performance of the contract to provide excavation services for the Commonwealth, enjoyed the sovereign immunity of the Commonwealth; and

Whereas, the court declined to allow the plaintiffs to invoke the doctrine of *res ipsa loquitur*, which would have allowed the jury to infer that the damage to the plaintiffs' residence was due to the negligence of the defendants, despite evidence that (i) the instrumentality causing the injury was within the exclusive possession and control of Landcraft Construction Company, (ii) such defendant had exclusive knowledge of the way the instrumentality was used, and (iii) the injury would not ordinarily have occurred if such defendant had exercised proper care; and

Whereas, the court instructed the jury in the case that the plaintiffs had the burden of proving by a preponderance of the evidence that the defendants, in installing the storm pipe behind the plaintiffs' residence, acted negligently in the performance of its the contract with the Commonwealth; and

Whereas, the jury returned a verdict in favor of both defendants, without special questions that would have provided the reasons for the jury's verdict; and

Whereas, the General Assembly, in its enactment of § 8.01-224, has specifically provided that the defense of governmental immunity is not available to any person in any cause of action for property damages proximately or directly resulting from blasting in the performance of work on behalf of a governmental agency; and

Whereas, if the severe vibrations and concussions which damaged the residence had resulted from the use of blasting by explosives rather than by the use of heavy compacting equipment, the defendants would have been held liable for damages sustained by the residence under the theory of strict liability, and the plaintiffs would not have had to meet the difficult burdens of establishing that the defendants acted negligently and outside of the contract with the Commonwealth; and

Whereas, but for the defense of sovereign immunity provided to Landcraft Construction Company and The Driggs Corporation, Theodore Yawornicky and Gertrude Yawornicky would have been able to recover from the defendants for the damage sustained; and

Whereas, the claim of Theodore Yawornicky and Gertrude Yawornicky was not of a type for

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which the Virginia Torts Claim Act would have provided relief because § 8.01-195.3 limits its applicability to claims on account of damage caused by the negligent or wrongful act or omission of a contractor acting within the scope of his employment, and had the plaintiffs been able to prove negligence on the part of the contractors the plaintiffs would have obtained recovery for the damage to their residence; and

Whereas, Theodore Yawornicky and Gertrude Yawornicky have been denied coverage under their homeowners policy on grounds that the policy did not cover damage from settlement of the foundation of the insured residence; and

Whereas, because of the cracking and collapse of the foundation to their residence caused by the compaction and excavation activities of Landcraft Consecution Company and The Driggs Corporation, Theodore Yawornicky and Gertrude Yawornicky must expend \$42,000 to repair the foundation of their residence; and

Whereas, Theodore and Gertrude Yawornicky have no other means to obtain relief except by the action this body; now, therefore,

Be it enacted by the General Assembly of Virginia:

1. § 1. *That there is hereby allocated from the amount appropriated to the Transportation Trust Fund of the Department of Transportation the sum of \$42,000 for the relief of Theodore Yawornicky and Gertrude Yawornicky to be paid by check issued by the State Treasurer on warrant of the Comptroller to Theodore Yawornicky and Gertrude Yawornicky upon a release by them of all claims against the Commonwealth and its political subdivisions, agencies, instrumentalities, officers, or employees in connection with, or arising out of, the aforesaid occurrence.*