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## SENATE BILL NO. 1176

Offered January 12, 2011

Prefiled January 12, 2011

*A BILL for the relief of Michele G. Stevener*

Patron—Marsden

Referred to Committee on Finance

Whereas, Michele G. Stevener resides in Fairfax County, Virginia; and

Whereas, Michele Stevener entered Inova Fairfax Hospital for delivery of her fetus on December 25, 1998; and

Whereas, Michele Stevener, as a patient under the Virginia Medical Malpractice Act, is entitled to her own right of action; and

Whereas, when Ms. Stevener's daughter was born, she was severely neurologically injured as a result of injuries received in utero on December 25, 1998; and

Whereas, during her labor and delivery, Ms. Stevener was subjected to a dangerous labor and suffered emotional distress due to concern for her well being and the injury of her fetus. From the period of December 25, 1998, to the present, Ms. Stevener has suffered severe emotional distress due to the preventable injury to her fetus; and

Whereas, but for the breaches of their respective duties by the hospital, physician and nurse, Ms. Stevener's fetus would not have been injured in utero and she would not have suffered severe emotional distress during her labor, delivery and afterwards, as a result of her fetus being permanently injured; and

Whereas, on August 30, 2000, the Virginia Workers' Compensation Commission, in a response to a petition filed by Ms. Stevener and her then-husband, Ricki Vick, on behalf of their daughter, Caroline E. Vick, directed the Virginia Birth-Related Neurological Injury Compensation Fund to pay all amounts and expenses provided by § 38.2-5009 of the Code of Virginia for the benefit of Caroline E. Vick; and

Whereas, § 38.2-5009 of the Code of Virginia does not provide any relief nor benefit to Ms. Stevener; and

Whereas, subsection B of § 38.2-5002 of the Code of Virginia, an exclusive remedy provision of the Act, patterned after a similar provision of the Workers' Compensation Act, does not bar Ms. Stevener's emotional distress claim because the exclusive remedy provision of the Act applies only to the infant's claims and to the claims derivative of the infant's claim; and

Whereas, in *Fairfax Hospital System v. McCarty*, 244 Va. 28, 37, 419 S.E.2d 621, 626-27 (1992), the Court held that a mother who gave birth to an injured child was a patient within the meaning of § 8.01-581.15 of the Code of Virginia, thus she was entitled to the benefit of one statutory cap for her compensatory damages and could recover for emotional distress resulting from the birth of a defective child as part of her individual claim as a patient; and

Whereas, Ms. Stevener's rights as a patient are no different than Ms. McCarty's and is entitled to the benefit of one statutory cap for her compensatory damage; and

Whereas, Ms. Stevener's emotional distress claim is not wholly derivative of her daughter's claim; and

Whereas, Ms. Stevener's emotional distress claim is hers alone to assert independently of any claim of her daughter's; and

Whereas, an infant's mother's medical malpractice claim for emotional distress does not arise from, nor is it related to the infant's medical malpractice claim because the mother's claim can be filed, litigated, tried, won, appealed and eventually paid, even without a medical malpractice claim being instituted by the infant; and

Whereas, the Interim Report of the Joint Subcommittee Study of the Definition of the Compensable Injury and the Funding Mechanism of the Virginia Birth-Related Neurological Injury Compensation Act (House Document No. 63, February 1990) states on page 1: "... in 1987, the General Assembly enacted the Virginia Birth-Related Neurological Injury Compensation Act in response to an apparent malpractice insurance liability crisis. This law effectively removed from the tort system a narrowly defined class of infants with severe birth-related injuries who presented severe and unpredictable risks to malpractice carries"; and

Whereas, on page 2 of the Interim Report, it states: "This legislation was proposed by the Medical Society of Virginia, a professional association of Virginia physicians. This association's intention was to remove infants with catastrophic birth-related injuries from the tort system by placing them in a statutory compensation program in order to increase the availability of medical malpractice insurance";

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59 and

60 Whereas, the Circuit Court of Fairfax County entered an order for summary judgment on February 2,  
61 2002, and on February 19, 2002, entered an order denying Ms. Stevener's Motion to Reconsider filed on  
62 February 14, 2002. On February 22, 2002, the Court entered its final order granting the summary  
63 judgment motions for the defendants. The Notice of Appeal was filed on March 7, 2002. The Virginia  
64 Supreme Court's Order dated July 23, 2002, refused the Petition for Appeal; and

65 Whereas, Michele G. Stevener has no other means to obtain adequate relief except by action of this  
66 body and has suffered unimaginable emotional distress and trauma; now, therefore,

67 **Be it enacted by the General Assembly of Virginia:**

68 *1. § 1. That upon the execution of a release by Michele G. Stevener of all claims she may have against*  
69 *the Commonwealth or any agency, instrumentality, officer, employee, or political subdivision in*  
70 *connection with the aforesaid occurrence, the Birth-Related Neurological Injury Compensation Program*  
71 *is directed to pay, on or before August 1, 2011, Michele G. Stevener one statutory cap for her severe*  
72 *emotional distress and suffering for the period from December 25, 1998, to the present and future.*