IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

CLARA DARLENE HICKMAN,	)	
Plaintiff,	)	**REPORT AND**
	)	**RECOMMENDATION**
v.	)	
	)	Civil Action No.: 1:05cv00049
LABORATORY CORPORATION	)	
OF AMERICA HOLDINGS, INC.,	)	
Defendant.	)	By: PAMELA MEADE SARGENT
	)	United States Magistrate Judge

Clara Darlene Hickman originally brought this suit against the defendant, Laboratory Corporation of America Holdings, Inc., ("LabCorp"), for negligence, intentional and outrageous conduct, breach of warranty, negligent misrepresentation, medical malpractice and punitive damages. Thereafter, by an Order, (Docket Item No. 19), and accompanying Memorandum Opinion, (Docket Item No. 18), entered October 6, 2005, this court dismissed the claims of intentional and outrageous conduct, breach of implied warranty, negligent misrepresentation and medical malpractice. This matter is currently before the court on LabCorp's Motion for Summary Judgment, (Docket Item No. 73) ("the Motion"), which was filed on August 24, 2006. This court has jurisdiction in the case based upon 28 U.S.C. §§ 1332 and 1441. Furthermore, pursuant to 28 U.S.C. § 636(b)(1)(B), the Motion is before the undersigned magistrate judge by referral. The undersigned heard oral argument on the Motion on September 14, 2006. As directed by the order of referral, the undersigned now submits the following report and recommendation.

I. Facts

In October 2001, while engaged in her employment as a hemodialysis technician in Bristol, Tennessee, Hickman was inadvertently stuck with a needle while treating a patient. Hickman expressed concerns about potential exposure to the patient's bodily fluids. Thus, her employer, Dr. Simon Pennings, M.D., ordered an HIV panel for Hickman. Hickman's panel was drawn on July 16, 2002, and sent to LabCorp for analysis. On July 19, 2002, LabCorp reported the results to Abingdon Family Practice, P.C., as positive for HIV. As a result, Hickman was placed under the care of infectious disease specialist, Dr. Gail Stanley, M.D. While under the care of Dr. Stanley, further lab work was conducted to determine Hickman's viral load and to determine future treatment plans. In addition, Hickman sought the care of Dr. William Diebold, M.D., a psychiatrist. Dr. Diebold diagnosed Hickman with generalized anxiety disorder and prescribed medication for the depression and anxiety Hickman developed after receiving the positive test results.

In December 2003, Hickman learned that the patient she was treating at the time she was stuck with the needle had tested negative for HIV. Thereafter, Hickman submitted to further testing for HIV. On December 18, 2003, Quest Diagnostics reported that Hickman had tested completely negative for HIV. Hickman then requested that LabCorp conduct additional HIV tests, which also resulted in negative results on December 20, 2003, and again on February 27, 2004. As a result of the erroneous test results provided by LabCorp on July 19, 2002, Hickman initiated this case, which, after the defendant's Motion to Dismiss and this court's ruling on the motion, is limited to Hickman's claims of negligence and breach of an express

warranty.

Hickman alleges that the positive HIV test result caused numerous physical and emotional problems such as weight loss, hair loss, insomnia, heart palpitations, panic attacks, flushing, shakiness, tremors, lack of focus and lack of concentration. (Deposition of Clara Darlene Hickman, Docket Item No. 74, Exh. 1, ("Hickman Deposition"), at 159-60). Hickman also stated that, due to stress, she began smoking after receiving the positive test results. (Hickman Deposition at 42).

Both Dr. Stanley and Dr. Diebold have been deposed in this case. Dr. Stanley conducted several laboratory tests in order to determine Hickman's viral load and to monitor her situation. However, during this treatment, Dr. Stanley never prescribed Hickman with any medications for HIV. (Deposition of Dr. Gail Stanley, M.D., Docket Item No. 74, Exh. 2, ("Stanley Deposition"), at 39). When asked about Hickman's symptoms, Dr. Stanley explained that "[s]tress causes alopecia," or hair loss, and "emotional stress [and] psychological problems can cause physical ailments." (Stanley Deposition at 109). In addition, Dr. Stanley further opined that "there are many physical manifestations of stress and depression," i.e. ulcers, lack of sleep and hair loss. (Stanley Deposition at 110).

Dr. Diebold explained that a person diagnosed with generalized anxiety disorder, such as Hickman, "generally [feels] nervous or anxious the majority of the time." (Deposition of Dr. William Diebold, M.D., Docket Item No. 74, Exh. 3, ("Diebold Deposition"), at 26). Dr. Diebold explained that Hickman's symptoms of nervousness, fatigue, lack of focus and irritability were all symptoms of anxiety.

(Diebold Deposition at 34). Furthermore, Dr. Diebold attributed some of Hickman's remaining symptoms, such as insomnia, to her depression. (Diebold Deposition at 44-47).

II. Analysis

The standard of review for a motion for summary judgment is well-settled. A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). *See Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In considering a motion for summary judgment, the court must view the facts, and the reasonable inferences to be drawn from those facts, in the light most favorable to the party opposing the motion. *See Anderson*, 477 U.S. at 255; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986); *Nguyen v. CNA Corp.*, 44 F.3d 234, 237 (4th Cir. 1995); *Miltier v. Beorn*, 896 F.2d 848, 852 (4th Cir. 1990); *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985); *Cole v. Cole*, 633 F.2d 1083, 1090 n. 7 (4th Cir. 1980). The plaintiff is entitled to have the credibility of all her evidence presumed. *See Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990). The party seeking summary judgment has the initial burden to show absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*,

477 U.S. 317, 325 (1986). The opposing party must demonstrate that a triable issue of fact exists; she may not rest upon mere allegations or denials. *Anderson*, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. *Anderson*, 477 U.S. at 248.

When this court's jurisdiction is based upon diversity, the court must apply the substantive law of the forum state, including the forum state's choice of law rules. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *See also Ferens v. John Deere Co.*, 494 U.S. 516, 519, 531 (1990); *Merlo v. United Way of Am.*, 43 F.3d 96, 102 (4th Cir. 1994); *Nguyen*, 44 F.3d at 237. This court sits in the Commonwealth of Virginia, and Virginia is a traditional *lex loci* choice of law state, meaning the substantive law of the place of the wrong governs the proceedings. Here, Hickman alleges that the sample for her HIV test was drawn in Virginia and that the results of the test were reported to her in Virginia. Therefore, any injury that Hickman suffered necessarily occurred in Virginia. Thus, Virginia's substantive law will apply because Virginia was the place of the wrong. *See Frye v. Commonwealth*, 345 S.E.2d 267, 272 (Va. 1986).

A. Negligence

Hickman alleges that LabCorp was negligent in the care, handling and testing of her blood sample, and in the reporting of the results of the HIV test. Specifically, Hickman claims that LabCorp had a duty to exercise ordinary care in the care, handling and testing of her blood sample. In addition, Hickman argues that LabCorp had a duty to exercise ordinary care in reporting the results of the blood tests. Hickman contends that LabCorp breached these duties and was, therefore, negligent

in its actions by erroneously reporting that Hickman's blood sample had tested positive for HIV. Furthermore, Hickman asserts that LabCorp knew or should have known that its erroneous reporting would cause "extreme fright, shock and emotional disturbance and resulting physical injury and illness." (Motion for Judgment, Docket Item No. 10, at 4). Hickman alleges that, as a result of LabCorp's mistake, she

> suffered great pain of body and mind, severe shock, fright, mental anguish and emotional disturbance and resulting physical injury and illness, loss of capacity for the enjoyment of life and inconvenience, has incurred[,] and will incur in the future[,] doctor, hospital and related expenses, loss of earnings and loss of ability to earn money.

(Motion for Judgment at 4-5).

In LabCorp's Memorandum In Support Of Its Motion For Summary Judgment, (Docket Item No. 74), LabCorp argues that Virginia law requires a showing of physical harm to support a claim of negligence. LabCorp contends that Hickman has failed to produce evidence that creates a question of fact as to whether she suffered a compensable injury under Virginia law. In essence, LabCorp argues that Hickman's alleged injuries amount to no more than typical symptoms of an emotional disturbance. *See Myseros v. Sissler*, 387 S.E.2d 463 (Va. 1990). Conversely, in her response to LabCorp's Motion for Summary Judgment, Hickman argues that *Hughes v. Moore*, 197 S.E.2d 214 (Va. 1973), is controlling and permits recovery for emotional damages in a negligence action, even without physical injury or impact, provided that a clear and unbroken chain of causation is shown between the negligent act, the emotional disturbance and the physical injury.

Under Virginia law, in order to prove a prima facie case of negligence, one

must demonstrate the existence of a "legal duty on the part of the defendant, [a] breach of that duty, and a showing that such breach was the proximate cause of injury, resulting in damage to the plaintiff." *Blue Ridge Serv. Corp. of Va. v. Saxon Shoes, Inc.*, 624 S.E.2d 55, 62 (Va. 2006) (citing *Trimyer v. Norfolk Tallow Co.*, 66 S.E.2d 441, 443 (Va. 1951)). Here, Hickman has alleged that LabCorp had a duty to properly handle and test the blood sample, as well as to accurately report the HIV test results. Hickman further alleges that, by not accurately reporting the test results, LabCorp breached this duty. LabCorp has not challenged these assertions at this stage. Instead, LabCorp argues that Virginia law does not allow Hickman to recover for the physical manifestations of an emotional injury in a claim for negligence.

As stated above, Hickman alleges that the inaccurate reporting of the HIV test resulted in severe emotional distress, which caused her physical injury and illness. In her deposition, Hickman testified that, as a result of the positive HIV test, she feared death; she began smoking due to stress; she suffered from insomnia; she gained weight; she lost hair; she suffered heart palpitations, shakiness, flushing and tremors; she suffered panic attacks; she lost the ability to focus and concentrate; and she was prescribed medication to treat her stress and anxiety.

In the well-known case of *Hughes v. Moore*, the Supreme Court of Virginia acknowledged the unsettled rule of law as to whether recovery for emotional damages should be afforded to individuals who are not physically impacted or injured by the negligent acts of others. *See* 197 S.E.2d 214. At the time of the *Hughes* ruling, various courts throughout the nation had adopted competing viewpoints regarding whether a physical injury was required in a negligence claim where emotional distress

or disturbance was the alleged damage. In *Hughes*, the Court took the opportunity to clarify its stance and explained that Virginia

> adhere[s] to the view that where conduct is merely negligent, not willful, wanton, or vindictive, and physical impact is lacking, there can be no recovery for emotional disturbance alone. We hold, however, that where the claim is for emotional disturbance *and* physical injury resulting therefrom, there may be recovery for negligent conduct, notwithstanding the lack of physical impact, provided the injured party properly pleads and proves by clear and convincing evidence that his physical injury was the natural result of fright or shock proximately caused by the defendant's negligence. In other words, there may be recovery in such a case if, but only if, there is shown a clear and unbroken chain of causal connection between the negligent act, the emotional disturbance, and the physical injury.

197 S.E.2d at 219 (emphasis in original). Thus, based upon a strict reading of this language, it seems clear that the Supreme Court of Virginia intended to permit recovery for emotional damages when a resulting physical injury developed from an "unbroken chain" of events that arose from the negligent act.

The *Hughes* decision, however, is not the Virginia Supreme Court's most recent pronouncement on this issue. In *Myseros*, the Supreme Court of Virginia addressed the question of whether a plaintiff's emotional damages were compensable under the previous rule established in *Hughes. See* 387 S.E.2d at 464. The *Myseros* case involved an incident where the plaintiff's vehicle was struck, and as a result of the collision, the plaintiff brought his vehicle to a complete stop in the traffic lane in which he had been traveling. *See* 387 S.E.2d at 464. The plaintiff inspected the damage to his vehicle and attempted to slow the traffic around him. *See Myseros*, 239 Va. at 10, 387 S.E.2d at 464. As he inspected the vehicle, a car came dangerously

close to striking him and forced him into the median to avoid being struck. *See Myseros*, 387 S.E.2d at 464. The plaintiff again attempted to return to his vehicle, but on two more occasions he was forced to run into the median to avoid being struck. *See Myseros*, 387 S.E.2d at 464. The plaintiff was not physically injured as a result of these events. *See Myseros*, 387 S.E.2d at 465.

When the plaintiff reported to work the next week, however, he felt "scared" and was "nervous, sweaty, [and] dizzy." *Myseros*, 387 S.E.2d at 465. As a result of these feelings, the plaintiff sought psychiatric care. The plaintiff offered expert testimony from two psychiatrists who opined that the plaintiff had suffered post-traumatic stress disorder, which had evolved into "a generalized anxiety disorder with some depressive features" and a "phobic reaction." *Myseros*, 387 S.E.2d at 465. One of the psychiatrists also stated that the condition was aggravated by the fact that the plaintiff's vehicle had been struck by an intoxicated driver. *See Myseros*, 387 S.E.2d at 465. Furthermore, one of the psychiatrists noted that the plaintiff's disorder was accompanied by "sweating, dizziness, nausea, difficulty in sleeping and breathing, constriction of the coronary vessels, two episodes of chest pain, hypertension, unstable angina, an electrocardiogram showing marked ischemia, loss of appetite and weight, change in heart function, and problems with the heart muscle." *Myseros*, 387 S.E.2d at 465.

As evident by the facts in *Myseros*, the plaintiff suffered from several emotional and physical difficulties. Nonetheless, the Supreme Court of Virginia stated "[w]hat *Hughes v. Moore* requires, however, and what this case lacks, is clear and convincing evidence of 'symptoms' or 'manifestations' of *physical injury*, not merely of an

underlying emotional disturbance." *Myseros*, 387 S.E.2d at 466 (emphasis in original). Thus, the Court held that the plaintiff had simply proven "'typical symptoms of an emotional disturbance,' for which there can be no recovery under *Hughes v. Moore* in the absence of resulting physical injury." *Myseros*, 387 S.E.2d at 466.

Although the Supreme Court of Virginia saw a distinction between the injuries suffered in *Hughes* and those suffered in *Myseros*, this court can see no such distinction. In *Hughes*, the plaintiff claimed that she became nervous after the incident, could not sleep and had pains in her chest and arms. *See* 197 S.E.2d at 215. Thereafter, plaintiff was unable to breast feed her 3-month old baby because she stopped lactating, and her menstrual period started. *See Hughes*, 197 S.E.2d at 215. The plaintiff was diagnosed with an "anxiety reaction, with phobia and hysteria." *Hughes*, 197 S.E.2d at 216. The plaintiff's treating psychiatrist testified that she was experiencing physical pain in her body from the emotional disturbance. *See Hughes*, 197 S.E.2d at 216.

Based on the similarity of the symptoms in the two cases, this court cannot understand the Supreme Court of Virginia's ruling that the plaintiff in *Hughes* provided "clear and convincing evidence of 'symptoms' or 'manifestations' of *physical injury*," but that the plaintiff in *Myseros* had proven only "typical symptoms of an emotional disturbance" not rising to the level of a physical injury.

In comparing the facts of *Myseros* to the case at hand, it is clear that each plaintiff suffered from similar difficulties. Just as in *Myseros*, Hickman has endured

significant symptoms and manifestations that resulted from an underlying emotional disturbance. Hickman's doctor explained to her that the palpitations were "part of the anxiety" and that "the stress and anxiety would cause . . . physical problems." (Hickman Deposition at 160, 172). Dr. Stanley further opined that the alopecia, or hair loss, could be directly linked to stress. Dr. Stanley stated that "[s]tress causes alopecia. And it doesn't matter what the stress is coming from." (Stanley Deposition at 109). Dr. Stanley also commented that stress can lead to physical ailments and that there are "many physical manifestations of stress and depression." (Stanley Deposition at 110). Furthermore, Dr. Diebold diagnosed Hickman with generalized anxiety disorder and a form of depression. (Diebold Deposition at 26). He stated that Hickman's symptoms were physical symptoms or manifestations caused by anxiety and depression. (Diebold Deposition at 34, 44-48). Therefore, based upon the depositions of Hickman's own doctors, it is obvious that her difficulties and physical problems were the result of an underlying emotional disturbance, i.e., receiving a false-positive HIV test result.

This court recognizes that, if its analysis were isolated to the application of the rule set out in *Hughes*, then Hickman would seemingly have met her burden and established a compensable physical injury. Nevertheless, this court cannot ignore the rule of law and analysis set out in the Supreme Court of Virginia's more recent holding in *Myseros*. Being faced with two competing precedents which, in this court's view, cannot be reconciled, it would appear that the court should look to the Supreme Court of Virginia's more recent pronouncement and application of the rule to guide its decision in this case. Based upon the Supreme Court of Virginia's opinion in *Myseros*, Hickman's injuries must be viewed as symptoms or manifestations of an

underlying emotional disturbance, and, thus, are not sufficient to establish a compensable physical injury under Virginia law. Hickman's own doctors provided testimony through their sworn depositions explaining that Hickman's physical and emotional injuries were the result of stress, depression and anxiety. Therefore, since Hickman has provided no proof that she suffered from a physical injury, as opposed to physical symptoms or manifestations of an underlying emotional disturbance, her negligence claim must fail as a matter of law. Accordingly, I will recommend that the defendant's motion for summary judgment be granted as to the negligence claim.

B. Breach of Warranty

Hickman also contends that LabCorp breached an express warranty because it held itself out as an expert in the field of laboratory analysis; because it warranted that its services would be performed in a professional manner; and because it warranted that its reporting would be accurate and true. Hickman asserts that this alleged breach of contract caused her to suffer

> great pain of body and mind, severe shock, fright, mental anguish and emotional disturbance and resulting physical injury and illness, loss of capacity for the enjoyment of life and inconvenience, has incurred[,] and will incur in the future[,] doctor, hospital and related expenses, loss of earnings and loss of ability to earn money.

(Motion for Judgment at 5).

In LabCorp's Memorandum In Support Of Its Motion For Summary Judgment, LabCorp argues that Virginia law also prohibits recovery on breach of warranty claims for purely emotional distress. Hickman does not respond to, or address, this

issue in her response to LabCorp's Motion for Summary Judgment.

As previously mentioned, when a federal court is exercising diversity jurisdiction, it must apply the law of the state in which it sits. *See Erie R.R. Co.*, 304 U.S. 64. Furthermore, when a federal court is to apply the substantive law of a particular state, and that state's highest court has not addressed the issue presented, the federal court must anticipate how the state's highest court would rule. *See Bailey Farms, Inc. v. NOR-AM Chem. Co.*, 27 F.3d 188, 191 (6th Cir. 1994); *see also Weaver v.Caldwell Tanks, Inc.*, 2006 U.S. App. LEXIS 16339 (6th Cir. 2006); *Moorehead v. State Farm Fire & Cas. Co.*, 123 F. Supp. 2d 1004, 1006 (W.D. Va. 2000).

The Supreme Court of Virginia has not specifically addressed whether or not emotional damages are permitted in breach of warranty cases. Thus, it is the duty of this court to determine how the Supreme Court of Virginia would rule on this issue. This court was faced with a similar task in *Moorehead*, where the court acknowledged the Supreme Court of Virginia's reluctance to allow damages for emotional harm in contract actions. *See* 123 F. Supp. 2d at 1006 (discussing *Sea-Land Serv., Inc. v. O'Neal*, 297 S.E.2d 647, 653 (1982)). In *Moorehead*, Judge Jones, of this court, cited Judge Williams's analysis in *Wise v. Gen. Motors Corp.*, 588 F. Supp. 1207 (W.D. Va. 1984), where, after a discussion of *Sea-Land Serv., Inc.*, Judge Williams concluded that, in a breach of warranty action, Virginia would follow the rule of law set forth in the Restatement of Contracts. *See* 123 F. Supp. 2d at 1006. "The restatement approach holds that '[d]amages for emotional disturbance are not ordinarily allowed' in contracts actions, subject to two exceptions." *Moorehead*, 123 F. Supp. 2d at 1006 (citing RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981)). The Restatement

allows recovery for emotional damages where (1) the claim involves bodily injury; or (2) where the contract or breach is of such a kind that serious emotional disturbance is a particularly likely result. *See Moorehead*, 123 F. Supp. 2d at 1006-07 (citing RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981)).

Here, as mentioned in the discussion of the negligence claim, Hickman claims damages for physical symptoms or manifestations from an underlying emotional disturbance, and not a physical injury. Thus, Hickman's claim does not satisfy the first exception set out above, as no bodily injury is involved. Furthermore, in this case, no party has produced evidence to the court that a contract exists between LabCorp and Hickman. At the hearing on the defendant's motion for summary judgment, defendant's counsel would not concede to the fact that a contract exists between the two parties. In addition, Hickman has provided no proof or information that tends to establish a contractual relationship between the two parties. Thus, the evidence before the court does not present evidence of a contractual relationship or of any specific express warranty made to Hickman by LabCorp. Therefore, the second exception may not be applied because without any proof or evidence of any type of a contractual agreement, there can be no determination of whether this is the type of contract the breach of which would particularly likely result in a serious emotional disturbance.

Accordingly, I will recommend that the defendant's motion for summary judgment be granted as to the breach of an express warranty claim.

PROPOSED FINDINGS OF FACT

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. There is no genuine issue of material fact regarding Hickman's injuries;
2. As a matter of law, Hickman's injuries amount to physical symptoms or manifestations of an emotional injury and not separate physical injuries;
3. As such, Hickman's injuries are not compensable based on either a negligence or an express warranty claim; and
4. Hickman has produced no evidence of a contract with LabCorp, the breach of which would particularly likely result in a serious emotional disturbance.

RECOMMENDED DISPOSITION

Based on the above-stated reasons, I recommend that the court grant the defendant's motion for summary judgment as to the negligence and breach of an express warranty claims.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(c)(West 1993 & Supp. 2006):

> Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge shall

> make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence to recommit the matter to the magistrate judge with instructions.

Failure to file written objection to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen M. Williams, Senior United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to counsel of record.

DATED: October 6, 2006.

/s/ *Pamela Meade Sargent*

UNITED STATES MAGISTRATE JUDGE