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Recovery of Emotional Distress Damages in AIDS-Phobia Cases: A Suggested Approach for Virginia*

I. Introduction

By characterizing emotional distress as pain and suffering, courts traditionally have allowed recovery of damages for emotional injury resulting directly from a tortiously caused physical injury.¹ However, courts long have struggled with the issue of emotional distress as an independent cause of action.² Most decisions on this issue in the nineteenth and early twentieth centuries denied recovery.³ The rationale behind these decisions often rested

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1. See W PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 55 (5th ed. 1984) (stating well-recognized rule that emotional distress may form substantial part of award for physical injury); *id.* § 54, at 363 (noting that courts award parasitic damages for emotional distress when plaintiff establishes cause of action through proof of physical harm); Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV L. REV 1033, 1048 (1936) (noting familiar rule that courts only award damages for emotional distress that is parasitic to recognized cause of action); William L. Prosser, *Insult and Outrage*, 44 CAL. L. REV 40, 42-43 (1956) [hereinafter Prosser, *Insult and Outrage*] (noting that recognized tort served as "a peg upon which to hang the mental damages"); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV 874, 879-80 (1939) [hereinafter Prosser, *A New Tort*] (same).

2. See KEETON ET AL., *supra* note 1, § 12, at 54-55 (noting reluctance of courts to accept cause of action for intentional infliction of emotional distress); *id.* § 54, at 360 (stating that courts were even more reluctant to recognize cause of action for negligently inflicted emotional distress); Prosser, *A New Tort*, *supra* note 1, at 874 (noting reluctance of courts to accept interest in peace of mind as worthy of legal protection); see also Magruder, *supra* note 1, at 1058 (noting that recovery of emotional distress damages was at intermediate stage of development—between parasitic and independent—and predicting that courts would recognize independent cause of action for emotional distress resulting from defendant's outrageous conduct); Prosser, *A New Tort*, *supra* note 1, at 892 (predicting that courts would treat intentional infliction of extreme emotional distress caused by outrageous conduct as independent tort).

3. See KEETON ET AL., *supra* note 1, § 12, at 56 (noting that early cases denied recovery of emotional distress damages unless plaintiff could bring damages claim under scope of

on the argument that such claims are so difficult to substantiate that to allow recovery for emotional distress as an independent cause of action would encourage fraudulent claims.⁴ Gradually, however, courts in all jurisdictions overcame this fear of fraudulent claims and recognized an independent cause of action for emotional distress when the plaintiff meets certain threshold requirements—for example, outrageous conduct on the part of the defendant or physical manifestations of the emotional distress—that ensure the genuineness of the claim.⁵

In the last several years, several courts have considered whether to grant damages for emotional distress alone in "fear-of-AIDS" or "AIDS-phobia" cases.⁶ In such a case, the plaintiff alleges that the defendant's negligent or intentional act exposed the plaintiff to the Human Immunodeficiency Virus (HIV)—the virus that causes Acquired Immune Deficiency Syndrome (AIDS)—and claims to have suffered emotional distress as a result of that exposure.⁷ AIDS-phobia cases are distinct from AIDS-infection cases. In the latter, the plaintiff actually has contracted AIDS or has tested HIV-

recognized tort).

4. See *Victorian Rys. Comm'rs v Coultas*, 13 App. Cas. 222, 226 (P.C. 1888) (asserting that recognition of independent cause of action for emotional distress would open wide field for imaginary claims); *KEETON ET AL.*, *supra* note 1, § 12, at 56 (noting courts' concern that recognition of cause of action for emotional distress would open wide door to fictitious claims and "litigation in the field of trivialities and mere bad manners"); Prosser, *Insult and Outrage*, *supra* note 1, at 42 (same); Prosser, *A New Tort*, *supra* note 1, at 877 (same); see also Archibald H. Throckmorton, *Damages for Fright*, 34 HARV L. REV 260, 276 (1921) (presenting argument that allowance of damages for nervous shock caused by fright might allow recovery for fraudulent claims, but responding that policy of preventing fraudulent claims should not preclude recovery for genuine claims).

5. See *KEETON ET AL.*, *supra* note 1, § 12, at 60 (noting that courts around 1930 began to recognize cause of action for intentionally inflicted emotional distress that defendant's extreme and outrageous conduct caused); *id.* § 54, at 364 (noting that most courts allow recovery for negligently inflicted emotional distress upon proof of physical injury); Prosser, *Insult and Outrage*, *supra* note 1, at 43 (noting that courts have insisted upon guarantee of genuineness consisting of physical injury or outrageousness of defendant's conduct because emotional distress is easy to feign and difficult to deny); Prosser, *A New Tort*, *supra* note 1, at 878 (stating that court may deny recovery of emotional distress damages absent sufficient assurance of genuineness of claim and noting that outrageousness requirement serves as guarantee of seriousness of emotional distress).

6. See Debbie E. Lanin, Note, *The Fear of Disease as a Compensable Injury: An Analysis of Claims Based on AIDS Phobia*, 67 ST. JOHN'S L. REV 77, 78 (1993) (recognizing AIDS-phobia cases as newest branch of fear-of-disease cases).

7 See *id.* at 90 (describing AIDS-phobia claim).

positive; in the former, by contrast, the plaintiff has tested negative for the virus up to and throughout the trial.⁸

Some courts that have confronted AIDS-phobia cases require the plaintiff to prove actual exposure to the virus to demonstrate the reasonableness of the plaintiff's fear and, thus, the genuineness of the claim.⁹ Other courts have allowed recovery absent a showing of actual exposure.¹⁰ Some courts require the plaintiff to prove that physical injury resulted from the emotional distress.¹¹ Others do not require proof of physical injury.¹²

The Supreme Court of Virginia has yet to address this issue.¹³ This Note argues that the doctrines governing Virginia's independent cause of

8. See Stephanie B. Goldberg, *AIDS Phobia: Reasonable Fears or Unreasonable Lawsuits?*, A.B.A. J., June 1992, at 88, 88 (stating that gravamen of AIDS-phobia suit is alleged exposure to AIDS, regardless of whether plaintiff develops HIV).

9. See *Carroll v Sisters of Saint Francis Health Servs., Inc.*, 868 S.W.2d 585, 594 (Tenn. 1993) (requiring proof of actual exposure to AIDS virus for recovery of damages for negligently inflicted emotional distress); *Johnson v West Va. Univ Hosps., Inc.*, 413 S.E.2d 889, 893 (W Va. 1991) (same).

10. See *Kerins v Hartley*, 21 Cal. Rptr. 2d 621, 632 (Ct. App. 1993) (rejecting actual exposure requirement in AIDS-phobia case), *vacated and transferred for reconsideration*, 868 P.2d 906 (Cal. 1994); *Faya v. Almaraz*, 620 A.2d 327, 336-37 (Md. 1993) (same).

11. See *Faya*, 620 A.2d at 338-39 (requiring that plaintiff show physical injury in order to recover emotional distress damages); *Johnson*, 413 S.E.2d at 892 (same).

12. See *Carroll*, 868 S.W.2d at 593-94 (requiring proof of actual exposure to AIDS in place of physical injury requirement).

13. *But cf.* *Howard v Alexandria Hosp.*, 429 S.E.2d 22, 24-25 (Va. 1993) (allowing plaintiff to recover emotional distress damages for fear of contracting AIDS when emotional distress was pendent to claim of medical malpractice). In *Howard*, during the plaintiff's operation at defendant hospital, the attending medical personnel negligently used unsterilized equipment. *Id.* at 23. The plaintiff underwent a battery of tests, vomited "continuously," and developed vaginal discharge as a side effect of antibiotics that her doctors had prescribed to prevent infection from the use of the unsterilized equipment. *Id.* at 24. The defendant argued to the Supreme Court of Virginia that the plaintiff had attempted to state a cause of action for negligently inflicted emotional distress without alleging physical injury, an omission that would warrant dismissal of the action under Virginia law. *Id.* Disagreeing, the court stated somewhat obliquely that Howard had not alleged negligently inflicted emotional distress as an independent cause of action, but had claimed emotional distress damages pendent to her claim of medical malpractice. *Id.* at 24-25; see also *Ney v. Landmark Educ. Corp.*, No. 92-1979, 1994 WL 30973, at *5 (4th Cir. Feb. 2, 1994) (per curiam) (construing *Howard* as addressing claim of emotional distress arising out of physical injury, not physical injury arising out of emotional distress). *But see* *Tischler v Dimenna*, 609 N.Y.S.2d 1002, 1008 (Sup. Ct. 1994) (citing *Howard* for proposition that some jurisdictions have allowed AIDS-phobia claim without proof of actual exposure).

action for emotional distress offer the appropriate analysis for deciding AIDS-phobia claims.¹⁴ This Note first discusses the development in Virginia of the independent cause of action for the infliction of emotional distress, both intentional and negligent.¹⁵ The most significant hurdle for a plaintiff alleging intentionally inflicted emotional distress is the requirement of outrageous conduct on the part of the defendant.¹⁶ To recover for the negligent infliction of emotional distress, on the other hand, the plaintiff generally must demonstrate a physical injury resulting from that emotional distress, a requirement that seeks to ensure the genuineness of the claim.¹⁷

This Note then discusses significant AIDS-phobia cases from other jurisdictions and the policy reasons underlying those decisions.¹⁸ Because these policies are nearly identical to the policies underlying Virginia's existing emotional distress doctrine, Virginia should rely on its well-developed emotional distress case law to determine whether a plaintiff has stated a cause of action arising from the fear of AIDS.¹⁹ Hence, the Virginia Supreme Court should apply the outrageousness standard to fear-of-AIDS claims alleging the intentional infliction of emotional distress.²⁰ In negligence cases, the court should require plaintiffs to demonstrate either a physical manifestation of emotional distress or actual exposure to the disease-carrying virus.²¹

14. *See infra* notes 315-22 and accompanying text (arguing that Virginia courts should apply established precedent to cause of action for AIDS-phobia).

15. *See infra* notes 22-125 and accompanying text (discussing watershed cases in Virginia concerning recovery of damages for emotional distress as independent cause of action).

16. *See infra* notes 38-64 and accompanying text (discussing requirement of outrageousness to recover damages for intentionally inflicted emotional distress).

17. *See infra* notes 93-125 and accompanying text (discussing requirement of physical injury resulting from defendant's tortious conduct in order to recover damages for negligently inflicted emotional distress).

18. *See infra* notes 141-275 and accompanying text (discussing important AIDS-phobia cases in which plaintiff alleged either intentionally or negligently inflicted emotional distress).

19. *See infra* notes 276-314 and accompanying text (noting that policy arguments in AIDS-phobia cases and in Virginia's emotional distress case law are nearly identical).

20. *See infra* notes 276-89 and accompanying text (arguing that Virginia should apply established test for intentionally inflicted emotional distress to AIDS-phobia claim).

21. *See infra* notes 290-314 and accompanying text (arguing that Virginia should apply established case law of negligently inflicted emotional distress to AIDS-phobia claim). This

II. The Development of an Independent Cause of Action for Emotional Distress in Virginia

A. Intentionally Inflicted Emotional Distress

At common law, a plaintiff generally could not recover damages for emotional distress unless the plaintiff's emotional distress claim was pendent to a claim of physical injury resulting from the defendant's tortious conduct.²² The Supreme Court of Appeals of Virginia did not address the issue of independent recovery for intentionally or willfully inflicted emotional distress until its 1932 decision in *Bowles v. May*.²³ In *Bowles*, the plaintiff, Mae May, claimed damages for the emotional distress that Agee Bowles's threatening remarks and gestures allegedly caused.²⁴ Bowles had learned that Mrs. May and her husband had been spreading rumors about Bowles's illicit relationship with the wife of his business associate, a neighbor of the Mays.²⁵ Bowles went to the May household in

Note's analysis of Virginia law may not extend to cases in which the plaintiff alleges fear of contracting AIDS as a result of extramarital or premarital consensual sexual intercourse. Virginia adheres to the common-law rule that precludes a party who consents to immoral or illegal conduct from recovering damages from other participants for the consequences of that conduct. *Zysk v. Zysk*, 404 S.E.2d 721, 722 (Va. 1990). In *Zysk*, the plaintiff alleged that her former husband had transmitted Herpes Simplex Type 2 to her through consensual sexual intercourse occurring shortly before their marriage. *Id.* at 721. Because the intercourse at issue occurred before the marriage, the Virginia Supreme Court noted that the parties' conduct violated Virginia's fornication statute, VA. CODE ANN. § 18.2-344 (Michie 1988). *Zysk*, 404 S.E.2d at 721-22. As a consensual participant in an illegal act, the plaintiff was precluded from recovering damages in tort arising out of the illegal conduct. *Id.* at 722. The same analysis may apply to an AIDS-phobia claim based on similar facts. This Note, however, takes no position on this issue. *But see Doe v. Roe*, 841 F. Supp. 444, 447 n.8 (D.D.C. 1994) (criticizing *Zysk* on ground that fornication statute is dead letter and noting that *Zysk* essentially immunizes from liability those who intentionally or negligently spread sexually transmitted diseases).

22. *See, e.g., Bruce v. Madden*, 160 S.E.2d 137, 140 (Va. 1968) (allowing recovery for mental anguish resulting directly from tortiously caused physical injury even though plaintiff offered no proof of mental anguish at trial); *Southern Bell Tel. & Tel. Co. v. Clements*, 34 S.E. 951, 952 (Va. 1900) (allowing jury to infer existence of plaintiff's mental anguish from tortiously caused physical injury); *Norfolk & W. Ry. v. Marpole*, 34 S.E. 462, 464 (Va. 1899) (same).

23. 166 S.E. 550 (Va. 1932).

24. *Bowles v. May*, 166 S.E. 550, 552 (Va. 1932).

25. *Id.*

order to confront the plaintiff and her husband about these rumors.²⁶ The plaintiff alleged that Bowles threatened criminal prosecution of the Mays during this confrontation and generally was "threatening, menacing, boisterous and beastly."²⁷ A second similar encounter occurred five days later.²⁸ On the night of the first encounter, Mrs. May, a woman of delicate health, was nervous and unable to sleep; after the second encounter, she suffered a "stroke of paralysis."²⁹ On the basis of this evidence, the jury returned a verdict for the plaintiff.³⁰ The Supreme Court of Appeals of Virginia reversed.³¹

The supreme court first acknowledged that severe fright can result in a "wreck to the nervous system, the consequence of which may be a visible physical injury."³² When this fright results from a willful, wanton, and vindictive wrong, the court held that recovery is available.³³ But, in order to ensure the genuineness of such a claim, the court heightened the burden of proof: to prevail, a plaintiff must prove by clear and convincing evidence that the defendant committed a willful tortious act and that a chain of unbroken causal connection exists between that act and the plaintiff's physical injury.³⁴ The court explained:

This case falls within a class which is not favored. While the possible success of unrighteous or groundless actions should not bar recovery in a meritorious case, nevertheless, because of the fact that fright or mental shock may be so easily

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 557

32. *Id.* at 556.

33. *Id.*, see *Moore v. Jefferson Hosp., Inc.*, 158 S.E.2d 124, 127 (Va. 1967) (finding that defendant nurse's unwarranted refusal to allow patient or doctor in operating room constituted willful and intentional action sufficient to support patient's cause of action for intentionally inflicted emotional distress); cf. *Ferrell v. Chesapeake & Ohio Ry. Employees Hosp. Ass'n*, 336 F. Supp. 833, 836, 838 (W.D. Va. 1971) (recognizing cause of action for emotional distress that defendant caused through intentional acts directed towards third person closely related to plaintiff, but denying recovery on grounds that plaintiff failed to establish that defendant's conduct was willful, wanton, intentional, or vindictive).

34. *Bowles*, 166 S.E. at 557

feigned without detection, the court should allow no recovery in a doubtful case.³⁵

The court found that Mrs. May did not prove by clear and convincing evidence that Bowles's tirade caused her to suffer mental shock so severe as to cause nervous trauma.³⁶ Because Mrs. May failed to establish a clear causal link between Bowles's actions and Mrs. May's stroke, the court reversed the jury verdict in Mrs. May's favor.³⁷

In 1974, in *Womack v Eldridge*,³⁸ the Supreme Court of Virginia recognized a distinct cause of action for intentionally inflicted emotional distress, one that requires no proof of physical injury³⁹. In *Womack*, Rosalie Eldridge was an investigator for a defense attorney representing Richard Seifert in a child molestation case.⁴⁰ Eldridge posed as a newspaper reporter and told Danny Lee Womack that she wanted his picture for a news story⁴¹. Believing that Eldridge was indeed a reporter, Womack allowed her to take his photograph.⁴² The defense attorney then presented the photograph to children whom Seifert allegedly molested in an attempt to have the children identify Womack as the molester.⁴³ Although the children stated that Womack was not the molester, the Commonwealth's Attorney nonetheless requested that Womack testify in court.⁴⁴ Although the Commonwealth did not bring charges against him, Womack sued Eldridge claiming damages for the emotional distress that her wanton, willful, and malicious conduct caused.⁴⁵ The jury returned a verdict for the

35. *Id.*

36. *Id.*

37. *Id.*

38. 210 S.E.2d 145 (Va. 1974).

39. *Womack v Eldridge*, 210 S.E.2d 145, 148 (Va. 1974); *cf.* *Bowles v May*, 166 S.E. 550, 557 (Va. 1932) (requiring proof of physical injury to recover damages for willfully inflicted emotional distress).

40. *Womack*, 210 S.E.2d at 146.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 147.

plaintiff, but the trial judge set aside the verdict for lack of physical damages or bodily harm.⁴⁶

The supreme court reversed the trial judge and reinstated the jury's verdict.⁴⁷ Relying on section 46 of the *Restatement (Second) of Torts (Restatement)*⁴⁸ and the Supreme Court of Utah's decision in *Samms v. Eccles*,⁴⁹ the court ruled that a plaintiff must prove four elements in order to recover for the intentional infliction of emotional distress when there is no physical injury:⁵⁰ (1) the wrongdoer's conduct was intentional or reckless;⁵¹ (2) the conduct was outrageous or intolerable;⁵² (3) the alleged

46. *Id.* at 146.

47. *Id.* at 149.

48. RESTATEMENT (SECOND) OF TORTS § 46 (1965) [hereinafter RESTATEMENT].

49. 358 P.2d 344 (Utah 1961). In *Samms*, the Supreme Court of Utah considered whether to recognize an independent cause of action for the intentional infliction of emotional distress. *Samms v Eccles*, 358 P.2d 344, 344-47 (Utah 1961). The plaintiff, a married woman, alleged that the defendant persistently annoyed her with proposals that she have sexual relations with him; as a result of his conduct, she claimed to have suffered severe emotional distress. *Id.* at 345. Rejecting the argument that it should disallow such an action because of the possibility of groundless claims, the court, in a three-to-two decision, formulated a test based on *Restatement* § 46. *Id.* at 346-47. The test, which the plaintiff in *Samms* satisfied, allowed recovery for emotional distress absent bodily impact or physical injury when the defendant intentionally acted either with the purpose of inflicting emotional distress or when any reasonable person would have known that such distress would result. *Id.* Additionally, the defendant's actions must have been outrageous and intolerable—that is, offensive to society's generally accepted standards. *Id.* at 347. Two justices dissented on the ground that the plaintiff failed to show that the defendant intended to injure the plaintiff or that he should have known that his conduct would result in the plaintiff's emotional distress. *Id.* (Callister, J., dissenting); see RESTATEMENT, *supra* note 48, § 46 cmt. j (stating requirement, accepted in *Womack*, that emotional distress be severe).

50. *Womack*, 210 S.E.2d at 148.

51. See *Ely v. Whitlock*, 385 S.E.2d 893, 897 (Va. 1989) (holding that plaintiff failed to allege that defendant attorneys intended conduct to inflict emotional distress); *Ruth v Fletcher*, 377 S.E.2d 412, 416 (Va. 1989) (holding that defendant did not intend to cause emotional distress through successful attempt to prove that plaintiff was not father of her child); *Chesapeake & Potomac Tel. Co. v. Dowdy*, 365 S.E.2d 751, 754 (Va. 1988) (finding evidence insufficient to support plaintiff's claim that defendant intentionally inflicted emotional distress); see also *Carstensen v Chrisland Corp.*, 442 S.E.2d 660, 668 (Va. 1994) (denying recovery for intentionally inflicted emotional distress on grounds that defendant's alleged breach of fiduciary duty did not constitute willful, wanton, or vindictive conduct).

52. See *infra* note 55 (listing cases in which outrageousness element was dispositive).

wrongful conduct and emotional distress were connected causally;⁵³ and (4) the distress was severe.⁵⁴ Additionally, the *Womack* court adopted the *Restatement's* requirement that the trial court first determine whether a jury reasonably could find that the defendant's conduct was so extreme and outrageous as to permit recovery.⁵⁵ If reasonable persons could differ on

53. See *Morgan v. Foretich*, 846 F.2d 941, 950 (4th Cir. 1988) (implicitly finding causal connection between defendant's wrongful conduct and plaintiff's emotional distress even though plaintiff was never present when defendant directed outrageous conduct toward daughter); *Haigh v. Matsushita Elec. Corp.*, 676 F Supp. 1332, 1355 (E.D. Va. 1987) (implicitly finding causal connection between defendants' wrongful conduct and plaintiff's emotional distress even though defendants did not direct their outrageous acts towards plaintiff).

54. See *Russo v White*, 400 S.E.2d 160, 163 (Va. 1991) (holding in four-to-three decision that to recover under *Womack* emotional distress must be so severe "that no reasonable person could be expected to endure it") (citing *RESTATEMENT*, *supra* note 48, § 46 cmt. j). The *Russo* majority stated that *Womack* requires the plaintiff to prove each of the test's four elements by clear and convincing evidence. *Id.* at 162. However, the court did not discuss this evidentiary issue because the case was before the court upon the trial court's grant of the defendant's demurrer to the pleadings. *Id.* No subsequent decision has cited *Russo* for the proposition that *Womack* required clear and convincing evidence. See *Beardsley v. Isom*, 828 F Supp. 397, 400 (E.D. Va. 1993) (citing *Russo* only for proposition that defendant's conduct must go beyond all bounds of decency).

55. *Womack*, 210 S.E.2d at 148 (citing *RESTATEMENT*, *supra* note 48, § 46 cmt. h). The court's initial determination of outrageousness in an action for the intentional infliction of emotional distress has been the source of most of the published decisions in this area of Virginia law. See *Paroline v Unsys Corp.*, 879 F.2d 100, 112-13 (4th Cir. 1989) (holding that defendant's alleged sexual harassment of plaintiff did not rise to level of outrageousness required under Virginia law), *vacated in part*, 900 F.2d 27 (4th Cir. 1990); *Gaiters v Lynn*, 831 F.2d 51, 54 (4th Cir. 1987) (concluding that country singer's racially insensitive remarks did not constitute outrageous conduct under Virginia law); *Beardsley*, 828 F Supp. at 400-01 (holding that defendant's acts of gender-based retaliation did not constitute outrageous conduct); *Simmons v Norfolk & W Ry.*, 734 F Supp. 230, 232 (W.D. Va. 1990) (finding that defendant's alleged cursing and screaming at plaintiff at work did not rise to level of outrageous conduct); *Harris v Norfolk & W Ry.*, 720 F Supp. 567, 568 (W.D. Va. 1989) (finding that public announcement of plaintiff's demotion did not constitute outrageous conduct); *Timms v. Rosenblum*, 713 F Supp. 948, 955 (E.D. Va. 1989) (holding that plaintiff failed to show outrageousness of defendant attorneys' alleged malpractice), *aff'd*, 900 F.2d 256 (4th Cir. 1990); *Owens v Ashland Oil, Inc.*, 708 F Supp. 757, 760 (W.D. Va. 1989) (finding that defendant's decision to terminate plaintiff's employment was neither extreme nor outrageous); *Pennsylvania Life Ins. Co. v Bumbrey*, 665 F Supp. 1190, 1204 (E.D. Va. 1987) (holding that insurance company's attempt to enforce releases through litigation did not constitute extreme and outrageous conduct); *Woodring v Board of Grand Trustees of the Benevolent & Protective Order of Elks*, 633 F Supp. 583, 593 (W.D. Va.

that issue, then the trial court must send the case to the jury.⁵⁶ Because reasonable persons could differ as to whether the defendant's conduct in *Womack* was extreme and outrageous, the trial judge properly submitted the case to the jury.⁵⁷ Accordingly, the supreme court reinstated the jury's verdict.⁵⁸

In announcing this new cause of action allowing emotional distress damages absent proof of physical injury, the Utah Supreme Court in *Samms v Eccles*,⁵⁹ upon which the *Womack* court relied, presented policy considerations strikingly similar to those stated in *Bowles*.⁶⁰ The *Samms* court first acknowledged that the fact that "some claims may be spurious should not compel those who administer justice to shut their eyes to serious

1986) (holding that termination of plaintiff's employment was not extreme or outrageous conduct); *Brown v Loudoun Golf & Country Club, Inc.*, 573 F Supp. 399, 405 (E.D. Va. 1983) (holding that alleged racial discrimination did not, as a matter of law, offend generally accepted standards of decency or morality); *Johnson v. McKee Baking Co.*, 398 F Supp. 201, 208 (W.D. Va. 1975) (holding that defendant's visit to plaintiff in hospital did not constitute outrageous and intolerable conduct), *aff'd*, 532 F.2d 750 (4th Cir. 1976). *But see* *Swentek v. USAIR, Inc.*, 830 F.2d 552, 562 (4th Cir. 1987) (overturning district court's ruling that defendant's sexual harassment did not constitute outrageous conduct as matter of Virginia law and remanding for trial); *Foretich v Glamour*, 753 F Supp. 955, 970 (D.D.C. 1990) (finding under Virginia law that magazine's publication of child custody dispute was not outrageous in one respect and presented jury question in another respect); *Welch v. Kennedy Piggly Wiggly Stores, Inc.*, 63 B.R. 888, 895-96 (W.D. Va. 1986) (holding that employer's termination of plaintiff did not constitute outrageous conduct, but that employer's interference with plaintiff's right to unemployment compensation presented jury question as to outrageousness); *Morgan v American Family Life Assurance Co.*, 559 F Supp. 477, 482 (W.D. Va. 1983) (finding that plaintiff's allegations of bad faith in defendant's refusal to pay claim presented jury question as to outrageousness); *Moore v. Allied Chem. Corp.*, 480 F Supp. 364, 369-70 (E.D. Va. 1979) (finding that defendant's failure to warn of effects of Kepone presented question for fact-finder as to outrageousness).

56. *Womack*, 210 S.E.2d at 148 (citing RESTATEMENT, *supra* note 48, § 46 cmt. h); *see Fahringer v Bohne (In re Victor Distrib. Co.)*, 11 B.R. 242, 250 (Bankr. E.D. Va. 1981) (finding that determination of four elements is question of fact). *But see* *Lewis v First Nat'l Bank*, 645 F Supp. 1499, 1506 (W.D. Va. 1986) (finding that plaintiff's proof failed as matter of law to establish any of four elements), *aff'd*, 818 F.2d 861 (4th Cir. 1987).

57. *Womack*, 210 S.E.2d at 148.

58. *Id.* at 149.

59. *Samms v. Eccles*, 358 P.2d 344 (Utah 1961).

60. For further discussion of *Bowles v. May*, 166 S.E. 550 (Va. 1932), *see supra* notes 23-37 and accompanying text.

wrongs and let them go without being brought to account."⁶¹ However, the *Samms* court noted that the *Restatement* test provided a realistic safeguard against false claims.⁶² Similarly, the *Womack* court explained that the *Restatement* test's threshold determination of outrageousness limited frivolous suits and avoided litigation in situations "where only bad manners and mere hurt feelings are involved."⁶³ Thus, although physical injury is no longer necessary to recover damages for intentionally inflicted emotional distress in Virginia, *Womack's* outrageousness standard serves the similar purpose of eliminating fraudulent claims.⁶⁴

Although courts use the outrageousness requirement most frequently to ensure the genuineness of emotional distress claims,⁶⁵ the requirement of severe emotional distress serves the same purpose.⁶⁶ In *Russo v White*,⁶⁷ the plaintiff, Patricia Russo, received hundreds of "hang-up" telephone calls between April 1987 and January 1988.⁶⁸ With the help of the police and the telephone company, Russo learned that the defendant, Burton White, had been making the calls, some of which he made while watching Russo's house.⁶⁹ As a result of these calls, Russo claimed to have

61. *Samms*, 358 P.2d at 347; see *Bowles*, 166 S.E. at 557 (acknowledging that possibility of recovery for false claim should not preclude recovery for valid claim).

62. *Samms*, 358 P.2d at 347; see *Bowles*, 166 S.E. at 557 (establishing test with clear-and-convincing evidence standard to prevent recovery in doubtful case).

63. *Womack*, 210 S.E.2d at 148; see RESTATEMENT, *supra* note 48, § 46 cmt. d (establishing outrageousness standard as hurdle to recovery for "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities").

64. Compare *Bowles*, 166 S.E. at 557 (stating that requirement of clear and convincing proof of physical injury limits fraudulent claims) with *Womack*, 210 S.E.2d at 148 (stating that outrageousness standard will limit frivolous claims).

65. See Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 46 (1982) (asserting that outrageousness requirement of *Restatement* § 46 limits reach of tort of intentional infliction of emotional distress and dominates proof of its elements).

66. See RESTATEMENT, *supra* note 48, § 46 cmt. k (noting that physical injury serves as proof of genuineness of claim and concluding that proof of physical injury is not necessary if plaintiff can show severity of emotional distress).

67. 400 S.E.2d 160 (Va. 1991).

68. *Russo v. White*, 400 S.E.2d 160, 161 (Va. 1991) (4-3 decision).

69. *Id.*

suffered severe emotional distress, manifested by nervousness, sleeplessness, "stress and its physical symptoms," and lack of concentration at work.⁷⁰ Russo sued White for intentionally inflicted emotional distress, but the trial court sustained the defendant's demurrer to the pleadings.⁷¹

The Supreme Court of Virginia, holding that Russo failed to allege severe emotional distress sufficient to satisfy the fourth prong of the *Womack* test, affirmed.⁷² The court noted that liability for intentionally inflicted emotional distress arises only when the distress is so severe that "no reasonable person could be expected to endure it."⁷³ The court then held that Russo's alleged nervousness, sleeplessness, stress, and inattention did not rise to that level.⁷⁴ In support of its holding, the court noted that Russo did not claim any objective physical injury, did not seek medical care, and was not confined at home or in a hospital.⁷⁵

The dissent in *Russo*, disagreeing with the majority's conclusion that the plaintiff failed to satisfy *Womack's* requirement of severe emotional distress, stated that no reasonable person could or should be expected to endure the distress that Russo suffered.⁷⁶ Furthermore, the dissent took issue with the majority's observation that Russo alleged no objective physical injury.⁷⁷ In the dissent's view, allegations of physical injury were unnecessary because "physical injury is not an element required to establish the tort of intentional infliction of emotional distress."⁷⁸

Whether or not physical injury is necessary for recovery—and the *Restatement* explicitly states that it is not⁷⁹—*Russo* illustrates that the requirement of severe emotional distress is a significant hurdle for plaintiffs

70. *Id.* at 161-62.

71. *Id.* at 162.

72. *Id.* at 163.

73. *Id.* (citing RESTATEMENT, *supra* note 48, § 46 cmt. j).

74. *Id.*

75. *Id.*

76. *Id.* at 164 (Hassell, J., dissenting).

77. *Id.*

78. *Id.*

79. See RESTATEMENT, *supra* note 48, § 46 cmt. k (noting that *Restatement* test does not require proof of bodily harm to maintain cause of action for intentionally inflicted emotional distress).

to overcome before a jury will hear their emotional distress claims.⁸⁰ This hurdle also prevents fraudulent or spurious claims.⁸¹ Thus, *Womack's* outrageousness and severity requirements ensure the genuineness of intentionally inflicted emotional distress claims, just as the clear-and-convincing evidentiary standard of *Bowles*⁸² had done prior to *Womack*.⁸³

B. Negligently Inflicted Emotional Distress

The first Virginia decision to address the issue of negligently inflicted emotional distress was *Connelly v. Western Union Telegraph Co.*⁸⁴ In *Connelly*, the telegraph company failed to deliver promptly a telegram informing the plaintiff that his father had died.⁸⁵ Because of the company's tardiness, Connelly was absent from his father's funeral.⁸⁶ Connelly filed suit claiming damages for the grief and mental anguish the defendant's negligence caused him, but the trial court granted the defendant's demurrer.⁸⁷

In affirming the demurrer, the Supreme Court of Appeals of Virginia adopted the English rule of negligently inflicted emotional distress:⁸⁸ "[M]ental anguish and suffering resulting from mere negligence, unaccompanied with injuries to the person, cannot be made the basis for an action for

80. See *id.* § 46 cmt. j (stating that trial judge determines "whether on the evidence severe emotional distress can be found" and that jury determines "whether, on the evidence, it has in fact existed").

81. See *id.* § 46 cmt. k (noting that physical injury serves as proof of genuineness of claim and concluding that proof of physical injury is not necessary if plaintiff can show severity of emotional distress).

82. See *Bowles v. May*, 166 S.E. 550, 557 (Va. 1932) (adopting clear-and-convincing standard for emotional distress claims). For further discussion of *Bowles*, see *supra* notes 23-37 and accompanying text.

83. Cf. *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982) (stating that *Womack* requirements serve to discourage spurious claims).

84. 40 S.E. 618 (Va. 1902).

85. *Connelly v. Western Union Tel. Co.*, 40 S.E. 618, 619 (Va. 1902).

86. *Id.*

87. *Id.*

88. *Id.* at 619-20. The *Connelly* court relied specifically upon *Lynch v. Knight*, 11 Eng. Rep. 854 (H.L. 1861), which in turn relied upon *Allsop v. Allsop*, 157 Eng. Rep. 1292 (Ex. 1860). *Connelly*, 40 S.E. at 619-20.

damages.⁸⁹ Because Connelly alleged no physical injury, the court upheld the trial court's dismissal.⁹⁰ In doing so, the court recognized the difficulty that most courts face in determining the scope of the damages in emotional distress cases:

The injuries in such cases are too hard to determine with any reasonable certainty, are more often assumed than real, and the suit too liable to be wholly speculative. If every one was allowed damages for injuries to his feelings caused by some one else, the chief business of mankind might be fighting each other in the courts.⁹¹

Thus, the primary policy considerations behind *Connelly's* physical injury requirement are the prevention of fraudulent claims of emotional distress and the fear of a massive influx of litigation.⁹²

89. *Connelly*, 40 S.E. at 620; see *Soldinger v. United States*, 247 F. Supp. 559, 560 (E.D. Va. 1965) (referring to well-settled rule that no plaintiff may recover for negligently inflicted mental anguish absent contemporaneous physical injury or willful and wanton conduct); *Herman v. Eastern Airlines, Inc.*, 149 F. Supp. 417, 422 (E.D.N.Y. 1957) (finding that Virginia law requires that actual physical injury accompany mental anguish); *Alexander v. Western Union Tel. Co.*, 126 F. 445, 445 (C.C.E.D. Va. 1903) (holding under settled Virginia law that damages for mental anguish alone were not recoverable); *Tyler v. Western Union Tel. Co.*, 54 F. 634, 635 (C.C.W.D. Va. 1893) (finding no departure in Virginia from common-law doctrine that damages for mental suffering were allowed only when resulting from physical injury); *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660, 668 (Va. 1994) (refusing recovery for emotional distress absent accompanying physical harm or wanton and willful conduct); *Awtrey v. Norfolk & W. Ry.*, 93 S.E. 570, 572 (Va. 1917) (allowing no recovery for mental anguish unaccompanied by actionable physical or pecuniary damage); *Chesapeake & O. Ry. v. Tinsley*, 82 S.E. 732, 733 (Va. 1914) (disallowing recovery of damages for mental anguish and suffering from mere negligence unaccompanied by physical injuries).

90. *Connelly*, 40 S.E. at 624.

91. *Id.* at 621 (quoting *Francis v. Western Union Tel. Co.*, 59 N.W. 1078, 1082 (Minn. 1894) (Canty, J., concurring)). The *Connelly* court did acknowledge, however, that a plaintiff may recover for emotional injuries, such as pain and suffering, arising from negligently caused physical injury because "such mental suffering is necessarily a part of the physical injury, and inseparable therefrom." *Id.* at 619 (citing *Norfolk & W. Ry. v. Marpole*, 34 S.E. 462 (Va. 1899)).

92. *Id.* at 621; see *Victorian Rys. Comm'rs v. Coultas*, 13 App. Cas. 222, 226 (P.C. 1888) (noting that physical injury requirement serves to prevent imaginary claims of negligently inflicted emotional distress).

Virginia courts left the *Connelly* rule untouched until the supreme court's 1973 decision in *Hughes v Moore*.⁹³ In that case, Toy Hughes negligently drove his automobile into the front porch of Sue Etta Moore's house.⁹⁴ Although Mrs. Moore suffered no physical injuries during the accident, immediately afterwards she was physically unable to breast-feed her infant and experienced an excessive and irregular menstrual flow.⁹⁵ Mrs. Moore filed suit seeking damages for the emotional distress she suffered from having witnessed the car crash into her home.⁹⁶ The jury awarded her \$12,000.⁹⁷

In affirming the jury award, the Supreme Court of Virginia first looked to its discussion of the recovery of emotional distress damages in *Bowles*.⁹⁸ In dicta, the *Bowles* court had reiterated the *Connelly* rule for recovery of damages for negligently inflicted emotional distress: "[I]t seems settled in Virginia that there can be no recovery for mental anguish and suffering resulting from negligence unaccompanied by contemporaneous physical injuries to the person."⁹⁹ The *Hughes* court adopted this physical injury requirement, but added the requirement that the plaintiff prove by clear and convincing evidence a causal connection between the defendant's negligence, the emotional distress, and the subsequent physical injury.¹⁰⁰ Because Mrs. Moore suffered a physical injury as a result of fright that the defendant's negligence caused and because Hughes did not appeal the jury

93. 197 S.E.2d 214 (Va. 1973).

94. *Hughes v Moore*, 197 S.E.2d 214, 215 (Va. 1973).

95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.* at 216-17 (discussing *Bowles*). For further discussion of *Bowles v May*, 166 S.E. 550 (Va. 1932), see *supra* notes 23-37 and accompanying text.

99. *Bowles*, 166 S.E. at 555.

100. *Hughes*, 197 S.E.2d at 219. The *Hughes* court stated only that it sought to clarify the rule expressed in *Bowles*. *Id.* However, *Bowles* applied the clear-and-convincing evidentiary standard only to claims of intentionally inflicted emotional distress, leaving untouched the *Connelly* court's formulation of the rule for negligently inflicted emotional distress. *See Bowles*, 166 S.E. at 555 (citing *Connelly* court's requirement of physical injury for recovery of negligently inflicted emotional distress); *id.* at 557 (applying clear-and-convincing evidentiary standard to plaintiff's claim of intentionally inflicted emotional distress).

instruction requiring the plaintiff to prove her case by only a preponderance of the evidence, the court upheld the jury verdict in her favor.¹⁰¹

In reaching its conclusion, the *Hughes* court examined prevailing trends in emotional distress law in other American jurisdictions and in England.¹⁰² In response to the defendant's argument that Mrs. Moore could not recover damages for negligently inflicted emotional distress absent proof of some physical impact on her, the court noted that the two leading cases requiring physical impact no longer represented valid law in their respective jurisdictions.¹⁰³ More significantly, the court discarded as outmoded the rationale behind the impact rule.¹⁰⁴ Three policy considerations had supported that rule: (1) the difficulty in proving causation between the emotional distress and the physical injury; (2) the fear of fraudulent or exaggerated claims; and (3) the fear of a "flood of litigation" absent such a rule.¹⁰⁵ The *Hughes* court repudiated each rationale in turn: (1) advances in medical science minimized the difficulty in determining causation; (2) the possibility of fraudulent or exaggerated claims should not prohibit those plaintiffs with legitimate claims from stating a cause of action; and (3) courts should not shirk their duties simply because of an unproven possibility of an increase in litigation.¹⁰⁶

The *Hughes* court stated that the fear of fraudulent or exaggerated claims was no longer a valid reason to require proof of physical impact.¹⁰⁷ Nevertheless, that court established a difficult standard for plaintiffs alleging negligently inflicted emotional distress by demanding proof of physical injury¹⁰⁸—a requirement that *Connelly* recognized as preventing specula-

101. *Hughes*, 197 S.E.2d at 220-21.

102. *Id.* at 217-18.

103. *Id.*, see *Battalla v State*, 176 N.E.2d 729, 730 (N.Y. 1961) (overruling *Mitchell v Rochester Ry.*, 45 N.E. 354 (N.Y. 1896)); *Dulieu v. White & Sons*, 2 K.B. 669, 681 (1901) (abandoning *Victorian Rys. Comm'rs v Coultas*, 13 App. Cas. 222 (P.C. 1888)); see also *Penick v Mirro*, 189 F Supp. 947, 949 (E.D. Va. 1960) (stating that Virginia courts never required proof of physical impact to state cause of action for negligently inflicted emotional distress).

104. *Hughes*, 197 S.E.2d at 218-19.

105. *Id.* at 218.

106. *Id.* at 218-19.

107. *Id.*

108. *Id.* at 219.

tive claims.¹⁰⁹ Similarly, *Hughes's* clear-and-convincing evidentiary standard ensures the genuineness of negligently inflicted emotional distress claims.¹¹⁰

Although many jurisdictions have abandoned the physical injury requirement in actions for negligently inflicted emotional distress,¹¹¹ Virginia still preserves that requirement.¹¹² In *Naccash v Burger*,¹¹³ however, the Supreme Court of Virginia confronted a case in which the plaintiffs alleged no physical injury—and no physical impact—in support of their claim for damages for negligently inflicted emotional distress.¹¹⁴ In

109. *Connelly v Western Union Tel. Co.*, 40 S.E. 618, 621 (Va. 1902).

110. *See Bowles v. May*, 166 S.E. 550, 557 (Va. 1932) (establishing clear-and-convincing evidentiary standard for recovery for intentionally inflicted emotional distress and reasoning that higher standard would prevent recovery in doubtful cases).

111. *See KEETON ET AL.*, *supra* note 1, § 54, at 364-65 (noting that several courts allowed cause of action for negligently inflicted emotional distress absent proof of physical injury); Scott D. Marrs, *Mind over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases*, 28 TORT & INS. L.J. 1, 2 (1992) (listing 14 jurisdictions that have abolished physical injury requirement).

112. *See Ney v Landmark Educ. Corp.*, No. 92-1979, 1994 WL 30973, at *4 (4th Cir. Feb. 2, 1994) (per curiam) (acknowledging that Virginia law expressly requires that physical injury accompany claim of damages for negligently inflicted emotional distress); *Ball v Joy Technologies, Inc.*, 958 F.2d 36, 38 (4th Cir. 1991) (same), *cert. denied*, 112 S. Ct. 876 (1992); *Sypert v. United States*, 559 F. Supp. 546, 548 (D.D.C. 1983) (refusing recovery under Virginia law of negligently inflicted emotional distress because plaintiff suffered no physical injury); *Carstensen v Chrisland Corp.*, 442 S.E.2d 660, 668 (Va. 1994) (refusing recovery for emotional distress because plaintiff failed to allege physical injury); *see also El-Meswari v Washington Gas Light Co.*, 785 F.2d 483, 488-89 (4th Cir. 1986) (refusing to allow cause of action for emotional distress caused by witnessing defendant's negligence toward third party absent proof of some physical injury to plaintiff); *cf. Myseros v Sissler*, 387 S.E.2d 463, 466 (Va. 1990) (finding that *Hughes* decision required clear and convincing evidence of manifestations of physical injury, not manifestations of emotional disturbance). In *Myseros*, the plaintiff claimed to have suffered dizziness, nausea, sleeplessness, difficulty in breathing, chest pain, hypertension, unstable angina, marked ischemia, weight and appetite loss, and problems with the heart muscle, all as an alleged result of a collision between his truck and a drunk driver's car. *Id.* at 465. The court nonetheless denied him recovery for emotional distress on the grounds that those ailments were symptoms of emotional distress, not manifestations of physical injury. *Id.* at 466; *see Ney*, 1994 WL 30973, at *6 (reiterating holding of *Myseros* that symptoms of emotional harm do not satisfy physical injury requirement).

113. 290 S.E.2d 825 (Va. 1982).

114. *Naccash v Burger*, 290 S.E.2d 825, 830 (Va. 1982).

that case, Edmund Naccash, a physician, negligently failed to discover that the Burgers' unborn child had Tay-Sachs disease.¹¹⁵ The parents sued Naccash for damages for the emotional distress that they suffered as a result of witnessing the child's deteriorating condition.¹¹⁶ The jury returned a verdict for the plaintiffs in excess of \$180,000.¹¹⁷

Although the plaintiffs claimed no physical injury as a result of their emotional distress, the *Naccash* court allowed recovery for this negligently inflicted distress.¹¹⁸ Stating that "the circumstances of this case justify another exception" to the traditional rule requiring physical injury, the court explained that its previous decisions imposed restrictions on recovery in order to discourage spurious or fraudulent claims.¹¹⁹ Because of the special circumstances in *Naccash*—negligence in prenatal care—the court reasoned that no doubt could exist that the plaintiffs' emotional distress was genuine.¹²⁰ Therefore, the court affirmed the jury's verdict for the plaintiffs.¹²¹

Naccash represents a significant departure from established Virginia case law. In no previous case had the Virginia court allowed recovery for negligently inflicted emotional distress absent some physical injury manifesting that distress.¹²² In the twelve years since *Naccash*, cases that have relied upon that decision in allowing emotional distress damages without proof of physical injury have all arisen in the context of negligence in prenatal care or in childbirth.¹²³ In 1990, the Supreme Court of

115. *Id.* at 827

116. *Id.* at 826-27

117. *Id.* at 827

118. *Id.* at 831.

119. *Id.*

120. *Id.*, see Marrs, *supra* note 111, at 1 (noting that many jurisdictions that adhere to physical injury requirement create exception when circumstances of claim guarantee genuineness).

121. *Naccash*, 290 S.E.2d at 833.

122. See *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va. 1973) (requiring physical injury causally connected to defendant's negligence in order for plaintiff to recover).

123. See *Boyd v. Bulala*, 877 F.2d 1191, 1198 (4th Cir. 1989) (allowing father of child born with birth defects to recover for emotional distress under exception created in *Naccash*); *McIntyre v. Schuck*, 795 F. Supp. 777, 782 (E.D. Va. 1992) (same).

Virginia explicitly confined the holding of *Naccash* to its particular facts.¹²⁴ Despite this limitation, the reasoning behind the decision—the belief that the plaintiffs' claims were indisputably genuine—is important in considering the policies behind Virginia law concerning the recovery of damages for emotional distress and the application of those policies to AIDS-phobia cases.¹²⁵

*C. Proof of Genuineness: The Common Thread in
Virginia's Emotional Distress Case Law*

Virginia's emotional distress jurisprudence has changed significantly in the last twenty-five years. In the area of intentionally inflicted emotional distress, *Womack*¹²⁶ introduced the possibility that a plaintiff could recover emotional distress damages absent proof of any physical injury resulting from or accompanying the emotional distress.¹²⁷ Although *Russo*¹²⁸ subsequently suggested that a physical injury requirement might still exist,¹²⁹ the *Womack* test's requirements of outrageousness and severe emotional distress fulfill the same purpose as did the physical injury requirement—ensuring the genuineness of emotional distress claims.¹³⁰

The Virginia Supreme Court's development of a cause of action for negligently inflicted emotional distress also illustrated the court's desire to

124. *Myseros v Sissler*, 387 S.E.2d 463, 464 n.2 (Va. 1990); see *Ney v Landmark Educ. Corp.*, No. 92-1979, 1994 WL 30973, at *4 (4th Cir. Feb. 2, 1994) (per curiam) (rejecting plaintiff's attempt to apply *Naccash* holding to facts of her case because Virginia Supreme Court explicitly had confined *Naccash* to its facts); *Timms v Rosenblum*, 713 F Supp. 948, 955 (E.D. Va. 1989) (finding *Naccash* to be *sui generis*), *aff'd*, 900 F.2d 256 (4th Cir. 1990). *But see McIntyre*, 795 F Supp. at 782 & n.10 (ignoring limitation placed on *Naccash* and finding that facts before court fit into *Naccash* exception).

125. See *infra* notes 276-314 and accompanying text (discussing policy reasons behind AIDS-phobia decisions).

126. For further discussion of *Womack v Eldridge*, 210 S.E.2d 145 (Va. 1974), see *supra* notes 38-64 and accompanying text.

127. *Womack*, 210 S.E.2d at 148.

128. For further discussion of *Russo v. White*, 400 S.E.2d 160 (Va. 1991), see *supra* notes 67-83 and accompanying text.

129. *Russo*, 400 S.E.2d at 163.

130. See *Naccash v Burger*, 290 S.E.2d 825, 831 (Va. 1982) (stating that *Womack* requirements serve to discourage spurious claims).

prevent fraudulent or spurious claims.¹³¹ *Hughes*¹³² erected two hurdles to recovery—physical injury and clear and convincing proof of a causal connection—both of which ensure that spurious claims of emotional distress will not reach the jury.¹³³ However, *Naccash*¹³⁴ allowed recovery for negligently inflicted emotional distress despite the plaintiffs' inability to allege physical injury.¹³⁵ The *Naccash* court reasoned that the physical injury requirement was unnecessary in that case, because the court found the Burgers' claim to be indisputably genuine.¹³⁶ Once the court had found some guarantee of genuineness, it asserted that denying recovery solely because the plaintiffs had not shown some physical injury "would constitute a perversion of fundamental principles of justice."¹³⁷

The need to ensure the genuineness of emotional distress claims consistently drives Virginia's emotional distress case law. Similarly, the fear of fraudulent or spurious claims plays a significant role in AIDS-phobia cases.¹³⁸ Most jurisdictions that have addressed the AIDS-phobia issue have erected hurdles to ensure the genuineness of such claims, often drawing those standards from well-established emotional distress case law.¹³⁹ By

131. See *Connelly v. Western Union Tel. Co.*, 40 S.E. 618, 621 (Va. 1902) (stating that requirement of physical injury discourages speculative claims of negligently inflicted emotional distress).

132. For further discussion of *Hughes v. Moore*, 197 S.E.2d 214 (Va. 1973), see *supra* notes 93-110 and accompanying text.

133. *Hughes*, 197 S.E.2d at 219; see *Naccash*, 290 S.E.2d at 831 (stating that *Hughes* requirements serve to discourage spurious claims).

134. For further discussion of *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982), see *supra* notes 113-25 and accompanying text.

135. *Naccash*, 290 S.E.2d at 831.

136. *Id.*

137. *Id.* (quoting *Berman v. Allan*, 404 A.2d 8, 15 (N.J. 1979)).

138. See *infra* notes 141-275 and accompanying text (discussing policy underlying illustrative AIDS-phobia decisions).

139. See, e.g., *Faya v. Almaraz*, 620 A.2d 327, 337-39 (Md. 1993) (applying Maryland's physical injury requirement to AIDS-phobia claim); *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014, 1016-17 (Sup. Ct. 1992) (applying New York's requirement of guarantee of genuineness of emotional distress to AIDS-phobia claim); *Johnson v. West Va. Univ. Hosps., Inc.*, 413 S.E.2d 889, 892 (W. Va. 1991) (applying West Virginia's physical injury requirement to AIDS-phobia claim); see also *Lanin*, *supra* note 6, at 81-87 (analyzing trends in law of intentional and negligent infliction of emotional distress as background for discussion of AIDS-phobia cases); Harry H. Lipsig, *AIDS Phobia and*

adhering to the policy behind its own emotional distress jurisprudence, Virginia also will ensure the validity of any AIDS-phobia claims that may arise.¹⁴⁰

III. AIDS-Phobia Cases in Other Jurisdictions

A. Intentionally Inflicted Emotional Distress

Several jurisdictions that have adopted the *Restatement* section 46 test have applied that test in AIDS-phobia cases in which plaintiffs sought damages for intentionally inflicted emotional distress.¹⁴¹ For example, in *J.B. v. Bohonovsky*,¹⁴² the United States District Court for the District of New Jersey considered whether a plaintiff could recover damages under New Jersey law for the fear of contracting AIDS.¹⁴³ The plaintiff in *Bohonovsky* began having sexual relations with the defendant in January 1986.¹⁴⁴ By the summer of that year, the defendant had tested positive for HIV, which developed into AIDS by the winter of 1987-88.¹⁴⁵ The relationship between the plaintiff and the defendant continued until July 1990, but the

Negligent Infliction of Emotional Distress, N.Y. L.J., Mar. 26, 1992, at 3, 3-4 (discussing New York law of negligently inflicted emotional distress as background for discussion of New York AIDS-phobia cases); Harris J. Zakarin, Comment, *Scared to Death: A Cause of Action for AIDS Phobia*, 10 *TOURO L. REV.* 263, 267-75 (1993) (same).

140. See *infra* notes 276-314 and accompanying text (arguing that Virginia should apply *Womack* test to AIDS-phobia plaintiff's claim of intentionally inflicted emotional distress and should require proof of physical injury or actual exposure to AIDS for AIDS-phobia plaintiff's claim of negligently inflicted emotional distress); see also James C. Maroulis, Note, *Can HIV-Negative Plaintiffs Recover Emotional Distress Damages for Their Fear of AIDS?*, 62 *FORDHAM L. REV.* 225, 250-51 (1993) (asserting that policy arguments behind limitation of recovery of emotional distress damages apply equally to AIDS-phobia cases).

141. See *Baranowski v. Torre*, No. CV90-0236178, 1991 WL 240460, at *2 (Conn. Super. Ct. Nov. 7, 1991) (applying *Restatement* test to claim of intentionally inflicted emotional distress in which plaintiff asserted that defendant—his former homosexual partner—concealed AIDS-related cause of death of defendant's previous partner); *Whelan v. Whelan*, 588 A.2d 251, 252 (Conn. Super. Ct. 1991) (applying *Restatement* test to wife's claim of intentionally inflicted emotional distress arising from husband's false statement that he had tested positive for AIDS).

142. 835 F. Supp. 796 (D.N.J. 1993).

143. *J.B. v. Bohonovsky*, 835 F. Supp. 796, 797 (D.N.J. 1993).

144. *Id.* at 798.

145. *Id.*

plaintiff did not discover that his partner had AIDS until September of that year, one month before his partner's death.¹⁴⁶ Despite having tested negative for HIV five times between 1988 and 1992, the plaintiff sued the defendant's estate seeking damages for intentionally inflicted emotional distress.¹⁴⁷

In granting the estate's motion for summary judgment, the district court quoted the necessary elements for stating a claim of intentionally inflicted emotional distress in New Jersey: "[T]he plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe."¹⁴⁸ The court found that the plaintiff failed to satisfy this test, based on section 46 of the *Restatement*,¹⁴⁹ because the plaintiff did not prove that he had suffered severe emotional distress.¹⁵⁰ The court stated that the evidence that the plaintiff offered was insufficient as a matter of law to support a finding that the plaintiff's emotional distress was so severe that no reasonable man could be expected to endure it.¹⁵¹ The requirement that the plaintiff's emotional distress be severe ensured the genuineness of the claim—a policy consideration that applies not only in AIDS-phobia cases, but also to any claim of intentionally inflicted emotional distress.¹⁵²

146. *Id.*

147. *Id.* at 798-99; *cf.* *Hosford v. Estate of Campbell*, 708 F. Supp. 7, 8-9 (D.D.C. 1989) (dismissing, under District of Columbia's Dead Man Statute, AIDS-phobia plaintiff's claim of intentional infliction of emotional distress asserted against estate of former homosexual partner).

148. *Bohonovsky*, 835 F. Supp. at 800 (quoting *Buckley v. Trenton Sav. Fund Soc'y*, 544 A.2d 857, 863 (N.J. 1988)); *see* *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974) (allowing recovery for intentionally inflicted emotional distress if defendant's conduct was intentional or reckless, conduct was outrageous and intolerable, causal connection existed between conduct and distress, and emotional distress was severe).

149. *See* *Buckley v. Trenton Sav. Fund Soc'y*, 544 A.2d 857, 863 (N.J. 1988) (basing cause of action for intentionally inflicted emotional distress on *Restatement* § 46).

150. *Bohonovsky*, 835 F. Supp. at 802.

151. *Id.*, *see* *RESTATEMENT*, *supra* note 48, § 46 cmt. j (requiring that emotional distress be so severe that no reasonable man could be expected to endure it).

152. *See* *Russo v. White*, 400 S.E.2d 160, 163 (Va. 1991) (affirming dismissal of claim of intentionally inflicted emotional distress on grounds that plaintiff failed to allege sufficiently severe emotional distress).

In *K.A.C. v. Benson*,¹⁵³ the Court of Appeals of Minnesota also addressed a claim for intentionally inflicted emotional distress arising from the fear of contracting AIDS.¹⁵⁴ The plaintiffs were former patients of an AIDS-infected physician, Philip Benson, who allegedly exposed the plaintiffs to the AIDS virus by performing "invasive gynecological procedures" while he suffered from "weeping exudative sores."¹⁵⁵ The plaintiffs alleged that the defendant conducted these procedures despite instructions from the Minnesota Board of Medical Examiners (Board) that he cease such procedures once he developed oozing sores.¹⁵⁶ Benson responded to this allegation by stating that the Board had instructed him not to perform "invasive surgical procedures."¹⁵⁷ Although the plaintiffs had tested negative for HIV, each sought damages for intentionally and negligently inflicted emotional distress.¹⁵⁸ The trial court granted the defendant's motion for summary judgment on the claim of intentionally inflicted emotional distress.¹⁵⁹

In an unpublished decision reversing the trial court, the court of appeals first noted that Minnesota courts recognize a cause of action for intentionally inflicted emotional distress: "[A] plaintiff must show that (1) the conduct was extreme and outrageous; (2) the conduct was intentional or reckless; (3) the conduct caused emotional distress; and (4) the distress was severe."¹⁶⁰ Citing the discrepancy between the litigants' versions of the Board's instructions to Benson, the court held that a genuine issue of

153. Nos. C6-93-1203, C5-93-1306, C4-93-1328, 1993 WL 515825 (Minn. Ct. App. Dec. 14, 1993).

154. *K.A.C. v. Benson*, Nos. C6-93-1203, C5-93-1306, C4-93-1328, 1993 WL 515825, at *1 (Minn. Ct. App. Dec. 14, 1993), *review granted*, (Minn. Feb. 24, 1994).

155. *Id.* at *1-2.

156. *Id.* at *2.

157. *Id.*

158. *Id.* at *1.

159. *Id.* The trial court also granted Dr. Benson's motion for summary judgment on the plaintiffs' claims of negligently inflicted emotional distress. *Id.* The court of appeals, reversing, held that proof of actual exposure to the virus was unnecessary for recovery and that a genuine issue of material fact existed as to whether Dr. Benson had placed his patients in the "zone of danger" of contracting HIV. *Id.* at *4.

160. *Id.* at *2 (citing *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983)); *see Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974) (requiring same elements as *Hubbard*).

material fact existed as to whether the defendant's conduct was extreme and outrageous.¹⁶¹ The court therefore remanded the issue for trial.¹⁶²

The importance of *Benson* and *Bohonovsky*¹⁶³ lies in the readiness with which both courts applied the *Restatement* test for a claim of intentionally inflicted emotional distress.¹⁶⁴ Although neither *Benson* nor *Bohonovsky* cites section 46, the Minnesota and New Jersey courts previously had adopted the *Restatement* test for claims of intentionally inflicted emotional distress.¹⁶⁵ Because the Supreme Court of Virginia adopted the same test in *Womack v Eldridge*,¹⁶⁶ Virginia courts should agree with the *Benson* and *Bohonovsky* courts that a claim for intentionally inflicted emotional distress in an AIDS-phobia case is in substance no different from any other cause of action for intentionally inflicted emotional distress. The *Womack* test would ensure the genuineness of AIDS-phobia claims just as it discourages spurious claims of other forms of emotional distress.¹⁶⁷

161. *Benson*, 1993 WL 515825, at *2; see *Aetna Casualty & Sur. Co. v Sheft*, 989 F.2d 1105, 1106 (9th Cir. 1993) (describing proceedings in California state trial court in which former homosexual partner of Rock Hudson recovered \$14.5 million for fear of having contracted AIDS; jury found Hudson's conduct outrageous enough to support claim for intentional infliction of emotional distress); *Baranowski v Torre*, No. CV90-0236178, 1991 WL 240460, at *2 (Conn. Super. Ct. Nov. 7, 1991) (holding that defendant's concealment of AIDS-related death of former homosexual partner constituted outrageous conduct sufficient to support claim for intentional infliction of emotional distress); *Whelan v Whelan*, 588 A.2d 251, 253 (Conn. Super. Ct. 1991) (holding that husband's false statement that he had tested positive for AIDS constituted outrageous conduct sufficient to support claim for intentional infliction of emotional distress).

162. *Benson*, 1993 WL 515825, at *2.

163. For further discussion of *J.B. v Bohonovsky*, 835 F Supp. 796 (D.N.J. 1993), see *supra* notes 142-52 and accompanying text.

164. See *Bohonovsky*, 835 F Supp. at 800 (applying test nearly identical to that of *Restatement* § 46); *Benson*, 1993 WL 515825, at *2 (same).

165. See *Hubbard v United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983) (adopting test explicitly based on *Restatement* § 46); *Buckley v. Trenton Sav Fund Soc'y*, 544 A.2d 857, 863 (N.J. 1988) (same); *Womack v Eldridge*, 210 S.E.2d 145, 148 (Va. 1974) (same).

166. 210 S.E.2d 145 (Va. 1974). For further discussion of *Womack v Eldridge*, 210 S.E.2d 145 (Va. 1974), see *supra* notes 38-64 and accompanying text.

167. See *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982) (stating that *Womack* requirements serve to discourage spurious claims).

B. Negligently Inflicted Emotional Distress

In evaluating AIDS-phobia claims seeking damages for negligently inflicted emotional distress, many courts have based their decisions on well-developed common-law principles of negligently inflicted emotional distress applicable to their jurisdictions.¹⁶⁸ In *Ordway v. County of Suffolk*,¹⁶⁹ Craig Bradford Ordway, a surgeon, sued the County of Suffolk for what the New York Supreme Court hearing the case characterized as the negligent infliction of emotional distress.¹⁷⁰ On November 28, 1989, Ordway performed surgery on the wrist of a patient whom the Suffolk County Police had arrested on charges of burglary.¹⁷¹ One week later, Ordway per-

168. See *Burk v Sage Prods., Inc.*, 747 F Supp. 285, 286-87 (E.D. Pa. 1990) (noting that Pennsylvania courts require proof of physical injury to recover for negligently inflicted emotional distress and proof of actual exposure to disease-causing agent; finding that AIDS-phobia plaintiff's loss of sexual function satisfied physical injury requirement, but that plaintiff failed to show exposure); *Poole v Alpha Therapeutic Corp.*, 698 F Supp. 1367, 1371 (N.D. Ill. 1988) (noting that Illinois courts refuse recovery for emotional distress absent physical injury or illness and finding that AIDS-phobia plaintiff alleged no injury); *Transamerica Ins. Co. v. Doe*, 840 P.2d 288, 292 (Ariz. Ct. App. 1992) (noting that Arizona case law requires bodily injury as prerequisite for recovery for emotional distress and finding that AIDS-phobia plaintiffs failed to establish physical harm), *review denied*, (Ariz. Dec. 1, 1992); *McQuaig v. McLaughlin*, 440 S.E.2d 499, 503 (Ga. Ct. App. 1994) (noting that Georgia case law requires physical injury as prerequisite for recovery for negligently inflicted emotional distress and finding that plaintiffs alleged no cognizable injury); *Vallery v Southern Baptist Hosp.*, 630 So. 2d 861, 866-67 (La. Ct. App. 1993) (stating that recovery for claims of emotional distress unaccompanied by physical injury is well established in Louisiana case law, but requiring plaintiff to prove channel of infection to recover in AIDS-phobia case), *writ denied*, 634 So. 2d 860 (La. 1994); *K.A.C. v. Benson*, Nos. C6-93-1203, C5-93-1306, C4-93-1328, 1993 WL 515825, at *4 (Minn. Ct. App. Dec. 14, 1993) (noting that Minnesota had abandoned impact rule in cases of negligently inflicted emotional distress and that plaintiffs could recover upon proof that defendant's negligence placed them in zone of danger of contracting HIV), *review granted*, (Minn. Feb. 24, 1994); *Tischler v. Dimenna*, 609 N.Y.S.2d 1002, 1003-04, 1009 (Sup. Ct. 1994) (noting that New York courts recognize claims of emotional distress without physical injury and holding that plaintiff stated AIDS-phobia claim despite failing to allege physical injury); *cf. Doe v Doe*, 519 N.Y.S.2d 595, 598 (Sup. Ct. 1987) (noting reluctance of New York courts to grant emotional distress damages in absence of contemporaneous physical injury and refusing to grant such damages to AIDS-phobia plaintiff who failed to allege physical injury or actual exposure to virus).

169. 583 N.Y.S.2d 1014 (Sup. Ct. 1992).

170. *Ordway v. County of Suffolk*, 583 N.Y.S.2d 1014, 1015 (Sup. Ct. 1992).

171. *Id.*

formed another operation on the patient.¹⁷² Three days after the second surgery, Ordway learned that the patient had tested positive for HIV for the preceding four years.¹⁷³ Alleging that he would have protected himself further had he known of the patient's condition, Ordway sought damages for the severe emotional distress caused by his fear of having contracted AIDS even though he had tested HIV-negative.¹⁷⁴

The Supreme Court of Suffolk County granted the county's motion for summary judgment.¹⁷⁵ In doing so, the court briefly traced the evolution in New York of the recoverability of damages for negligently inflicted emotional distress.¹⁷⁶ Recognizing that New York courts at one time required "attendant physical injuries" in order to ensure the genuineness of claims for psychic injury,¹⁷⁷ the court noted that plaintiffs in such cases now have the burden of demonstrating some guarantee of genuineness insuring the legitimacy of the claim.¹⁷⁸ Such a showing often includes some form of physical trauma, but any evidence establishing the validity of the claim will suffice.¹⁷⁹

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1018.

176. *Id.* at 1016; *see* Lipsig, *supra* note 139, at 3-4 (tracing history of New York law of negligently inflicted emotional distress); Zakarin, *supra* note 139, at 267-75 (same).

177. *Ordway*, 583 N.Y.S.2d at 1016 (citing *Mitchell v Rochester Ry.*, 45 N.E. 354 (N.Y. 1896)).

178. *Id.* (citing *Battalla v State*, 176 N.E.2d 729 (N.Y. 1961)); *see* *Neal v Neal*, 873 P.2d 871, 876 (Idaho 1994) (requiring proof of reasonableness of fear of contracting AIDS and genuineness of mental injury, but not addressing genuineness issue on ground that plaintiff failed to demonstrate reasonableness); *cf.* *Marriott v Sedco Forex Int'l Resources, Ltd.*, 827 F Supp. 59, 75-76 (D. Mass. 1993) (allowing recovery for emotional distress in AIDS-phobia case under Jones Act because it was beyond doubt that plaintiff suffered genuine emotional distress); *Castro v New York Life Ins. Co.*, 588 N.Y.S.2d 695, 697-98 (Sup. Ct. 1991) (holding that guarantee of genuineness exists if AIDS-phobia plaintiff can tie claim of emotional distress to distinct event and finding that proof of needle-stick suffices to guarantee genuineness). *But see* *Vallery v Southern Baptist Hosp.*, 630 So. 2d 861, 867 (La. Ct. App. 1993) (noting that plaintiff's fear of contracting AIDS may be genuine, but refusing recovery of emotional distress damages absent proof of channel of exposure), *writ denied*, 634 So. 2d 860 (La. 1994).

179. *Ordway*, 583 N.Y.S.2d at 1016 (citing *Lancellotti v. Howard*, 547 N.Y.S.2d 654, 655 (App. Div. 1989)).

In applying this common-law standard to the facts in *Ordway*, the court concluded that the plaintiff's claim for emotional damages was insufficient as a matter of law.¹⁸⁰ The court found no unusual occurrence during the operations that would guarantee the genuineness of Ordway's claim.¹⁸¹ Because Ordway did not allege any physical manifestations of his emotional distress, the court could find no "physical trauma" sufficient to support his claim.¹⁸² Therefore, the court ruled that Ordway's claim failed to clear the hurdle of genuineness,¹⁸³ which the New York courts had developed in order to prevent a plethora of vexatious, frivolous lawsuits.¹⁸⁴

The Supreme Court of Appeals of West Virginia also relied on its common law of negligently inflicted emotional distress in deciding an AIDS-phobia case, *Johnson v. West Virginia University Hospitals, Inc.*¹⁸⁵ The plaintiff, Lofton Johnson, was a police officer for the West Virginia University Security Police.¹⁸⁶ On June 2, 1988, an unruly AIDS-infected patient entered the university hospital.¹⁸⁷ The patient disclosed his condition to doctors and nurses, but when Johnson arrived thirty minutes after the patient made that disclosure, no one informed the officer that the patient had AIDS.¹⁸⁸ During a struggle, the patient bit himself on the arm, drawing his own blood into his mouth.¹⁸⁹ Moments later, the patient bit Johnson on the arm as Johnson attempted to subdue him.¹⁹⁰ After Johnson

180. *Id.* at 1017. *But see* Louise H. Feffer, *AIDSphobia, A New Entity*, N.Y. St. B.J., Feb. 1993, at 14, 15 (arguing that New York courts should treat AIDS-phobia claims differently from other emotional distress claims because of fatality of disease).

181. *Ordway*, 583 N.Y.S.2d at 1016-17; *see Zakarin, supra* note 139, at 284-85 (interpreting *Ordway* to require actual exposure to AIDS to guarantee genuineness of AIDS-phobia claim despite *Ordway* court's failure to discuss exposure issue).

182. *Ordway*, 583 N.Y.S.2d at 1017

183. *Id.*

184. *Id.* at 1016.

185. 413 S.E.2d 889 (W. Va. 1991).

186. *Johnson v. West Va. Univ. Hosps., Inc.*, 413 S.E.2d 889, 891 (W. Va. 1991).

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

and others succeeded in restraining the patient, hospital personnel informed Johnson that the patient had AIDS.¹⁹¹

After this discovery, Johnson allegedly began to suffer from severe emotional distress, which caused sleeplessness, loss of appetite, and other physical ailments.¹⁹² His distress intensified after his wife's refusal to have sexual relations with him and their eventual divorce.¹⁹³ Johnson tested negative for AIDS.¹⁹⁴ He then sued the hospital for damages for his emotional distress, and the jury awarded him \$1.9 million.¹⁹⁵

In affirming the trial court's refusal to set aside the verdict, the West Virginia Supreme Court of Appeals noted first that a plaintiff under West Virginia law could not recover damages for negligently inflicted emotional distress absent physical injury.¹⁹⁶ The court held that Johnson offered sufficient evidence of physical injury—the bite that precipitated the lawsuit and the physical manifestations of his emotional anguish (including sleeplessness and loss of appetite).¹⁹⁷ Thus, the plaintiff met the physical injury requirement.¹⁹⁸ The court added another hurdle, however, by

191. *Id.*

192. *Id.* at 891-92.

193. *Id.* at 891 & n.2.

194. *Id.* at 891.

195. *Id.* at 891-92. The jury returned a verdict of \$2 million in Johnson's favor, but reduced that amount to \$1.9 million because of Johnson's 5% contributory negligence. *Id.* at 892.

196. *Id.* at 892 (citing *Monteleone v. Co-Operative Transit Co.*, 36 S.E.2d 475 (W Va. 1945)). *But see* Susan J. Zook, Case Note, 43 WASH. U. J. URB. & CONTEMP L. 481, 490 (1993) (criticizing *Johnson* for adhering to outdated physical injury requirement). In 1992, the West Virginia Supreme Court held that a plaintiff may recover for negligently inflicted emotional distress without demonstrating physical injury if that plaintiff can show that his claim for emotional distress damages is not spurious. *Ricottilli v. Summersville Memorial Hosp.*, 425 S.E.2d 629, 635 (W Va. 1992). The court recently ruled that fear-of-AIDS claims are inherently genuine—not spurious—given the fact that AIDS is an invariably fatal disease; therefore, the physical injury requirement no longer applies to AIDS-phobia claims in West Virginia. *Bramer v. Dotson*, 437 S.E.2d 773, 774-75 (W Va. 1993).

197. *Johnson*, 413 S.E.2d at 892.

198. *Id.*, *see* *Marchica v. Long Island R.R.*, 810 F Supp. 445, 449 (E.D.N.Y. 1993) (holding that AIDS-phobia plaintiff in FELA action for emotional distress satisfied physical injury requirement by proving that hypodermic needle punctured skin of hand); *Burk v. Sage Prods., Inc.*, 747 F Supp. 285, 287 (E.D. Pa. 1990) (finding that AIDS-phobia plaintiff sufficiently alleged physical injury by claiming loss of sexual function). *But see* *Lubowitz*

requiring the plaintiff to prove that his fear of contracting AIDS was reasonable.¹⁹⁹

In discussing the reasonableness issue, the *Johnson* court became the first state supreme court to address what has become the most contested issue in AIDS-phobia cases: whether actual exposure to the virus is necessary for the plaintiff to recover emotional distress damages.²⁰⁰ After reviewing three AIDS-phobia cases denying recovery because the alleged emotional distress was too speculative,²⁰¹ the court looked to two fear-of-cancer

v. Albert Einstein Medical Ctr., 623 A.2d 3, 4-5 (Pa. Super. Ct. 1993) (finding that AIDS-phobia plaintiff failed to allege legally cognizable injury although plaintiff alleged nausea, vomiting, and diarrhea as result of emotional distress).

199. *Johnson*, 413 S.E.2d at 893.

200. *See Burk*, 747 F. Supp. at 287-88 (requiring proof of actual exposure to AIDS virus to recover emotional distress damages and finding that plaintiff failed to satisfy requirement); *Lopez v Leal*, 29 Cal. Rptr. 2d 832, 839 (Ct. App. 1994) (requiring proof of actual exposure to AIDS virus in absence of proof of physical injury and finding that plaintiff failed to establish exposure); *Neal v. Neal*, 873 P.2d 871, 876 (Idaho 1994) (requiring proof of actual exposure to AIDS virus to recover emotional distress damages and finding that plaintiff failed to allege exposure); *Vallery v Southern Baptist Hosp.*, 630 So. 2d 861, 867 (La. Ct. App. 1993) (requiring AIDS-phobia plaintiff to prove channel of infection to recover emotional distress damages and remanding to trial court for determination of issue), *writ denied*, 632 So. 2d 860 (La. 1994); *Lann*, *supra* note 6, at 99 (concluding that courts should require AIDS-phobia plaintiffs to demonstrate actual exposure); *Maroulis*, *supra* note 140, at 261 (same); *see also Marriott v. Sedco Forex Int'l Resources, Ltd.*, 827 F. Supp. 59, 74-76 (D. Mass. 1993) (allowing recovery under Jones Act for emotional distress resulting from fear of AIDS because plaintiff alleged direct exposure to HIV, but not explicitly requiring proof of exposure for recovery); *Barrett v Danbury Hosp.*, No. 31 00 46, 1994 WL 76394, at *13 (Conn. Super. Ct. Mar. 3, 1994) (refusing recovery for emotional distress resulting from fear of AIDS because plaintiff's failure to prove exposure to disease-causing agent demonstrated unreasonableness of fear, but not explicitly requiring proof of exposure for recovery); *Tischler v Dimenna*, 609 N.Y.S.2d 1002, 1009 (Sup. Ct. 1994) (allowing recovery for emotional distress resulting from fear of AIDS because plaintiff proved probable exposure to disease, but not explicitly requiring proof of exposure for recovery).

201. *See Burk*, 747 F. Supp. at 288 (refusing recovery of emotional distress damages for fear of contracting AIDS because plaintiff failed to prove actual exposure to virus); *Hare v State*, 570 N.Y.S.2d 125, 127 (App. Div.) (affirming lower court's denial of damages for emotional distress in AIDS-phobia case on ground that distress was speculative), *appeal denied*, 580 N.E.2d 1058 (N.Y. 1991); *Doe v Doe*, 519 N.Y.S.2d 595, 599 (Sup. Ct. 1987) (refusing recovery of emotional distress damages in AIDS-phobia case on ground that causal connection was highly attenuated); *see also Doe v. State*, 588 N.Y.S.2d 698, 705-06 (Ct. Cl. 1992) (refusing recovery of emotional distress damages in AIDS-phobia case because defendant's negligence did not proximately cause plaintiff's emotional injury), *modified*, 595

decisions.²⁰² Based on these precedents, the court held that before the plaintiff may recover emotional distress damages for fear of contracting a disease such as AIDS, the plaintiff first must prove exposure to the disease.²⁰³ Proof of exposure serves to establish the reasonableness of the plaintiff's fear.²⁰⁴ Because the hospital conceded that the unruly patient's bite exposed Johnson to the AIDS virus and because Johnson proved a sufficient physical injury, the court upheld the jury verdict in the plaintiff's favor.²⁰⁵

In addition to the traditional physical injury requirement, the *Johnson* court required proof of the reasonableness of the plaintiff's fear, which the plaintiff could demonstrate through proof of actual exposure to the AIDS virus.²⁰⁶ However, that court did not discuss the policy considerations behind this added element. The Supreme Court of Tennessee reached a similar conclusion after discussing the issue of actual exposure in *Carroll v Sisters of Saint Francis Health Services, Inc.*²⁰⁷ In that case,

N.Y.S.2d 592 (App. Div. 1993); *Petri v. Bank of N.Y. Co.*, 582 N.Y.S.2d 608, 613-14 (Sup. Ct. 1992) (refusing emotional distress damages for fear of contracting AIDS on ground that plaintiff's claim was too speculative).

202. *Johnson*, 413 S.E.2d at 893; see *In re Moorenovich*, 634 F. Supp. 634, 637 (D. Me. 1986) (holding that plaintiff may recover damages for fear of cancer if fear is reasonable); *Rittenhouse v. St. Regis Hotel Joint Venture*, 565 N.Y.S.2d 365, 367 (Sup. Ct. 1990) (denying damages for fear of cancer absent physical indication of disease), *rev'd*, 579 N.Y.S.2d 100 (App. Div. 1992). *But see Lann*, *supra* note 6, at 94-95 (noting that fear-of-AIDS plaintiff can undergo reliable tests to determine likelihood of having contracted AIDS, whereas fear-of-cancer plaintiff cannot; criticizing *Johnson* court's failure to consider this distinction).

203. *Johnson*, 413 S.E.2d at 893.

204. *Id.*, see *Neal v. Neal*, 873 P.2d 871, 876 (Idaho 1994) (holding that AIDS-phobia plaintiff's fear is unreasonable as matter of law if plaintiff fails to present evidence establishing actual exposure); *Funeral Servs. by Gregory, Inc. v. Bluefield Community Hosp.*, 413 S.E.2d 79, 84 (W. Va. 1991) (same).

205. *Johnson*, 413 S.E.2d at 894. *But see Goldberg*, *supra* note 8, at 88 (criticizing *Johnson* by noting that virtually every medical authority agrees that biting is not means of spreading AIDS).

206. *Johnson*, 413 S.E.2d at 894. *But see Zook*, *supra* note 196, at 491-92 (criticizing *Johnson* court's adoption of reasonableness standard and arguing that courts should base recovery in AIDS-phobia suits on evidence of actual exposure and statistical likelihood of contracting AIDS).

207. 868 S.W.2d 585 (Tenn. 1993).

Bessie Carroll visited her sister at St. Joseph Hospital in Memphis on June 21, 1988.²⁰⁸ After washing her hands, Carroll reached up to what she believed to be a paper towel dispenser.²⁰⁹ Unable to extract a towel from the bottom of the container, the plaintiff lifted the lid from the top, placed her hand down inside the container, and immediately felt sharp pricks in three of her fingers.²¹⁰ She later discovered that she had pricked her fingers on contaminated needles.²¹¹ Carroll immediately became fearful of having contracted AIDS.²¹² A subsequent HIV test was negative, as were five other HIV tests over a three-year period following the accident.²¹³ Carroll, nevertheless, filed suit against the hospital, seeking damages for negligently inflicted emotional distress.²¹⁴

The trial court granted the hospital's motion for summary judgment, but the court of appeals reversed.²¹⁵ The hospital argued on its appeal to the supreme court that Tennessee case law in fear-of-disease cases mandated that the plaintiff demonstrate actual exposure to the disease-causing agent.²¹⁶ Carroll interpreted the same case law to require only that the plaintiff show "sufficient indicia of genuineness and reasonableness" to support her fear of the disease.²¹⁷ Carroll also argued that a requirement of actual exposure would prejudice plaintiffs in AIDS-phobia cases such as hers, in which the defendant had disposed of the only evidence capable of proving exposure.²¹⁸

208. *Carroll v. Sisters of Saint Francis Health Servs., Inc.*, 868 S.W.2d 585, 586 (Tenn. 1993).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 586-87

214. *Id.* at 587; *cf. Cotita v. Pharma-Plast, U.S.A., Inc.*, 974 F.2d 598, 599 (5th Cir. 1992) (affirming jury verdict for plaintiff for emotional distress from fear of contracting AIDS under facts similar to *Carroll*, but discussing only procedural issues).

215. *Carroll*, 868 S.W.2d at 587.

216. *Id.* at 589-90.

217. *Id.* at 590.

218. *Id.*

The supreme court found weaknesses in both parties' arguments.²¹⁹ The hospital's argument relied on decisions in fear-of-cancer cases that the court found "somewhat unsatisfying" because of the unique deadliness of AIDS and the potentially long latency of HIV.²²⁰ The supreme court then noted that courts that had adopted Carroll's argument often justified their decisions on the gradual liberalization of the law of negligently inflicted emotional distress, particularly the relaxation of the traditional physical injury requirement.²²¹ The *Carroll* court disagreed with this approach for two reasons.²²² First, the plaintiff's argument treated the issue of reasonableness in emotional distress cases in the same manner as in other areas of negligence law, a treatment that the court viewed as problematic due to the traditional reluctance of courts to allow juries to award damages based solely upon subjective claims of emotional distress.²²³

The court's primary reason for rejecting the plaintiff's argument was that her proposed reasonableness standard would remove the "objective component" that Tennessee courts had deemed necessary to state a cause of action for negligently inflicted emotional distress.²²⁴ That objective component often consisted of a demonstrable physical injury.²²⁵ However, the court noted that in fear-of-disease cases under Tennessee law, courts tended to allow such a cause of action upon a minimal showing of physical injury.²²⁶ This weakening of the physical injury requirement did not, however, signal the abandonment of the necessary objective component.²²⁷ Because an objective component was still necessary to recover for negligently inflicted emotional distress, the court held that actual exposure to HIV was a prerequisite for recovery of emotional distress damages in fear-of-AIDS cases.²²⁸ Because Carroll could not prove actual exposure to the

219. *Id.* at 592-93.

220. *Id.*

221. *Id.* at 593.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* (citing *Laxton v Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982)).

227. *Id.*

228. *Id.* at 594.

virus, the supreme court reinstated the trial court's entry of summary judgment for the hospital.²²⁹

At least one court has relied on the decision of the Tennessee Court of Appeals in *Carroll*, which the Tennessee Supreme Court later reversed.²³⁰ The Court of Appeals of Maryland in *Faya v Almaraz*²³¹ adopted the reasonableness test for AIDS-phobia cases and explicitly rejected the requirement of actual exposure to the virus.²³² In *Faya*, the defendant, Rudolph Almaraz, discovered that he was HIV-positive in 1986.²³³ On October 7, 1988, Almaraz, a physician, performed a partial mastectomy on one plaintiff, Sonja Faya, without first disclosing his infected status.²³⁴ On October 27, 1988, Almaraz developed an eye infection that is symptomatic of AIDS.²³⁵ Eighteen days later, he surgically removed a benign lump from the breast of the other plaintiff, Perry Mahoney Rossi, again without disclosing his condition.²³⁶ After Almaraz's death in late 1990, both plaintiffs learned that Almaraz had operated on them while he was HIV-positive.²³⁷ Both took AIDS tests, which were negative.²³⁸

Faya and Rossi filed separate complaints against Almaraz's estate seeking damages for emotional distress that the doctor's negligence caused.²³⁹ The trial court, granting the estate's motion to dismiss both complaints, held that the plaintiffs failed to state a legally compensable injury and failed to allege actual exposure to the disease-causing agent.²⁴⁰

229. *Id.*

230. *See Carroll v. Sisters of Saint Francis Health Servs., Inc.*, No. 02A01-9110-CV-00232, 1992 WL 276717, at *4 (Tenn. Ct. App. Oct. 12, 1992) (allowing recovery of emotional distress damages in AIDS-phobia case without proof of actual exposure to virus), *rev'd*, 868 S.W.2d 585 (Tenn. 1993).

231. 620 A.2d 327 (Md. 1993).

232. *Faya v Almaraz*, 620 A.2d 327, 336-37 (Md. 1993).

233. *Id.* at 329.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 330.

240. *Id.*

The court of appeals granted certiorari before the intermediate appellate court heard the plaintiffs' appeal.²⁴¹

In reversing the trial judge's dismissal, the court of appeals first found that the plaintiffs had stated a cause of action in negligence against Almaraz for his failure to disclose his infected condition.²⁴² Next, the court considered whether allegations of actual exposure to the virus were necessary for the plaintiffs to state a cause of action for fear of contracting AIDS.²⁴³ Relying primarily on the Tennessee Court of Appeals' decision in *Carroll*, the *Faya* court adopted the test requiring an AIDS-phobia plaintiff to demonstrate the reasonableness of a claim.²⁴⁴ In rejecting the actual exposure requirement, the court reasoned that requiring plaintiffs to prove actual exposure would unfairly punish them for lacking the requisite information to do so.²⁴⁵

In discussing the damages issue, the *Faya* court examined the common law in Maryland concerning the recovery of damages for emotional distress.²⁴⁶ The original rule in Maryland required a showing of physical impact or injury in order to recover emotional distress damages.²⁴⁷ However, Maryland courts, like the courts in many jurisdictions, had softened that rule so that a plaintiff could recover upon a showing of objectively measurable injuries, a standard that allowed recovery despite no medical diagnosis of any physical ailments.²⁴⁸ In *Faya*, both plaintiffs alleged headaches, sleeplessness, and the "physical and financial sting of blood tests for the AIDS virus."²⁴⁹ The court found these injuries to be sufficient to allow recovery of damages for emotional distress,²⁵⁰ but

241. *Id.* at 331.

242. *Id.* at 334; *cf.* *Diaz Reyes v. United States*, 770 F. Supp. 58, 62-63 (D.P.R. 1991) (holding that plaintiff failed to allege facts sufficient to establish hospital's negligent failure to inform plaintiff's husband that he had AIDS), *aff'd*, 971 F.2d 744 (1st Cir.), *cert. denied*, 112 S. Ct. 2306 (1992).

243. *Faya*, 620 A.2d at 335-36.

244. *Id.* at 336.

245. *Id.* at 336-37.

246. *Id.* at 337-38.

247. *Id.* at 337 (citing *Pennsylvania, B. & W. R.R. v. Mitchell*, 69 A. 422 (Md. 1908)).

248. *Id.* at 338 (citing *Vance v. Vance*, 408 A.2d 728 (Md. 1979)).

249. *Id.*

250. *Id.* at 338-39.

limited the recovery to the time period between the plaintiffs' discovery of Almaraz's illness and their receipt of HIV-negative test results.²⁵¹ This limitation allowed recovery only for fear and emotional distress during the period constituting their "reasonable window of anxiety"²⁵²

The Second District of the California Court of Appeal adopted the reasoning and result of the *Faya* decision in *Kerins v Hartley*.²⁵³ On November 5, 1986, James Gordon, a surgeon, removed a uterine tumor from plaintiff Jean Kerins.²⁵⁴ Prior to that surgery, Kerins alleged that she specifically asked Gordon whether he was in good health.²⁵⁵ Kerins alleged that Gordon's positive response to her question was deceitful in light of the fact that Gordon was in a high-risk group for infection, had been suffering from AIDS symptoms, and had recently undergone testing to determine whether he was HIV-positive.²⁵⁶ Five days after Kerins's surgery, Gordon received the results from his AIDS test, which indicated that he was indeed HIV-positive.²⁵⁷ In April 1988, Kerins learned from a televised press conference that Gordon had contracted AIDS.²⁵⁸ Kerins took an AIDS test, which was negative.²⁵⁹ Kerins sued Gordon, who died in July 1990, for negligently inflicted emotional distress.²⁶⁰

The trial court granted the defendant's motion for summary judgment on the ground that Kerins's fear of AIDS was unreasonable as a matter of law.²⁶¹ The appellate court reversed.²⁶² Gordon's estate argued to the appellate court that regardless of the genuineness of Kerins's distress, the tort system should not bear the burden of purely speculative

251. *Id.* at 337

252. *Id.*

253. 21 Cal. Rptr. 2d 621 (Ct. App. 1993).

254. *Kerins v Hartley*, 21 Cal. Rptr. 2d 621, 623 (Ct. App. 1993), *vacated and transferred for reconsideration*, 868 P.2d 906 (Cal. 1994).

255. *Id.* at 624.

256. *Id.*

257. *Id.* at 623.

258. *Id.*

259. *Id.*

260. *Id.* at 622.

261. *Id.* at 625.

262. *Id.* at 632-33.

lawsuits and should not award compensation absent a reliable indicator that the distress is reasonable.²⁶³ The estate noted that a lesser standard would place an unbearable strain on the overburdened judicial system by allowing frivolous lawsuits in this context.²⁶⁴ The court, rejecting the estate's argument, reasoned that a rule permitting recovery of emotional distress damages in AIDS-phobia cases for the limited period of reasonable mental anguish would protect the judicial system.²⁶⁵ The *Kerins* court then adopted the "window of anxiety" standard that the Maryland court developed in *Faya*.²⁶⁶ Thus, the *Kerins* court concluded that the fear of AIDS becomes unreasonable as a matter of law only after the plaintiff has had sufficient opportunity to determine with reasonable medical certainty that there has been no actual exposure to or infection with the AIDS virus.²⁶⁷ Gordon's estate appealed to the Supreme Court of California, which granted review.²⁶⁸

On February 24, 1994, the supreme court transferred review to the court of appeal with directions to reconsider the case in light of *Potter v*

263. *Id.* at 631.

264. *Id.* at 631-32.

265. *Id.* at 632.

266. *Id.*

267. *Id.*, see *Marchica v. Long Island R.R.*, 810 F. Supp. 445, 452 (E.D.N.Y. 1993) (leaving to trier of fact issue of whether AIDS-phobia plaintiff's emotional distress was reasonable, but deeming fear unreasonable after plaintiff received last negative AIDS test result); *K.A.C. v Benson*, Nos. C6-93-1203, C5-93-1306, C4-93-1328, 1993 WL 515825, at *5-6 (Minn. Ct. App. Dec. 14, 1993) (following *Kerins* and *Faya* by limiting recovery of emotional distress damages to period between discovery of possible exposure and return of HIV-negative test results), *review granted*, (Minn. Feb. 24, 1994); *Kaehne v Schmidt*, No. 90-1108, 1991 WL 121030, at *1 (Wis. Ct. App. May 15, 1991) (approving jury instruction allowing jury to determine emotional distress damages for period between awareness of risk of contracting AIDS and receipt of negative test results), *review denied*, 474 N.W.2d 107 (Wis. 1991); *Maroulis*, *supra* note 140, at 262-63 (arguing in favor of cutting off liability after plaintiff receives negative test results); see also *Tischler v Dimenna*, 609 N.Y.S.2d 1002, 1009 (Sup. Ct. 1994) (narrowing window of anxiety to period between exposure and first reliable AIDS test); *Lanin*, *supra* note 6, at 99-101 (arguing in favor of limiting AIDS-phobia plaintiff's recovery to emotional distress suffered during six-month period after exposure while HIV tests are inconclusive).

268. *Kerins v. Hartley*, 860 P.2d 1182, 1182 (Cal. 1993), *transferred for reconsideration*, 868 P.2d 906 (Cal. 1994).

Firestone Tire & Rubber Co.,²⁶⁹ the supreme court's recent fear-of-cancer decision.²⁷⁰ California's eventual position on the issue of actual exposure undoubtedly will have an important effect on AIDS-phobia cases throughout the country. If California requires proof of actual exposure to the AIDS virus, the view favoring that requirement, propounded in *Johnson*²⁷¹ and

269. 863 P.2d 795 (Cal. 1993). In *Potter*, the Supreme Court of California considered the issue of whether a plaintiff could recover emotional distress damages for his fear of developing cancer in the absence of physical injury or illness. *Potter v Firestone Tire & Rubber Co.*, 863 P.2d 795, 800 (Cal. 1993). The plaintiffs were landowners who lived adjacent to a landfill into which the Firestone Tire & Rubber Co. dumped its waste. *Id.* at 801. Contrary to its agreement with the operators of the landfill, Firestone dumped liquid waste into the landfill, including known and suspected human carcinogens, which eventually contaminated the plaintiffs' water supply. *Id.* at 801-02. The plaintiffs filed suit against Firestone, claiming damages for negligently inflicted emotional distress resulting from their fear of developing cancer. *Id.* at 802. In addressing the issue of whether the plaintiffs could recover emotional distress damages for fear-of-cancer absent proof of physical injury or illness, the *Potter* court first noted that physical injury is not a prerequisite in California for recovering damages for serious emotional distress if some guarantee of the genuineness of the claim exists. *Id.* at 808 (citing *Burgess v Superior Court*, 831 P.2d 1197 (Cal. 1992)). To establish this guarantee of genuineness, the court held that the plaintiff in a fear-of-cancer case who cannot prove physical injury or illness must prove (1) that as a result of the defendant's negligence, the plaintiff was exposed to a toxic substance that threatens cancer, and (2) that his fear results from knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop cancer in the future due to the toxic exposure. *Id.* at 816. The *Potter* court also created an exception to the more-likely-than-not requirement. *Id.* at 817. If the plaintiff in a fear-of-cancer case can prove neither that he suffered a physical injury nor that it is more likely than not that he will develop cancer, the plaintiff may still recover if he proves (1) that as a result of the defendant's negligence, the plaintiff was exposed to a toxic substance that threatens cancer, (2) that the defendant acted with oppression, fraud, or malice, and (3) that the plaintiff's fear of cancer results from knowledge, corroborated by reliable medical or scientific opinion, that the toxic exposure has significantly increased the plaintiff's risk of cancer. *Id.* at 818. The *Potter* court found that Firestone's actions fell under the exception for oppression, fraud, or malice. *Id.* Therefore, the court remanded the issue to the lower courts. *Id.* at 827.

270. *Kerins v Hartley*, 868 P.2d 906, 906 (Cal. 1994); see *Lopez v Leal*, 29 Cal. Rptr. 2d 832, 839 (Ct. App. 1994) (holding that AIDS-phobia plaintiff who suffered no physical injury failed to satisfy *Potter* test by failing to establish actual exposure to virus). But see *Carroll v Sisters of Saint Francis Health Servs., Inc.*, 868 S.W.2d 585, 592-93 (Tenn. 1993) (questioning applicability of fear-of-cancer decisions to AIDS-phobia claims because of unique deadliness of AIDS and potentially long latency period of HIV).

271. For further discussion of *Johnson v West Va. Univ Hosps., Inc.*, 413 S.E.2d 889 (W Va. 1991), see *supra* notes 185-206 and accompanying text.

Carroll,²⁷² likely will become the consensus.²⁷³ If, however, California rules that no proof of exposure is necessary, the tide eventually may shift in favor of the view expressed in *Faya*.²⁷⁴ Given the development of Virginia's common law of negligently inflicted emotional distress, however, reflection upon that common law, rather than adherence to an emerging majority trend, should serve as a guide in resolving whether actual exposure or physical injury or both are prerequisites for recovery of emotional distress damages in AIDS-phobia cases in Virginia.²⁷⁵

IV A Suggested Approach for Virginia Courts in Deciding AIDS-Phobia Cases

A. Intentionally Inflicted Emotional Distress

The Supreme Court of Virginia in *Womack* adopted the test for intentionally inflicted emotional distress that appears in *Restatement* section 46.²⁷⁶ The courts of New Jersey and Minnesota have done the same.²⁷⁷

272. For further discussion of *Carroll v Sisters of Saint Francis Health Servs., Inc.*, 868 S.W.2d 585 (Tenn. 1993), see *supra* note 207-29 and accompanying text.

273. See *Kerins v Hartley*, 21 Cal. Rptr. 2d 621, 629 (Ct. App. 1993) (noting majority trend requires proof of actual exposure to virus to recover in AIDS-phobia case), *vacated and transferred for reconsideration*, 868 P.2d 906 (Cal. 1994); *Carroll*, 868 S.W.2d at 590 (noting that slight majority of jurisdictions favor actual exposure requirement); Brian R. Garves, *In Fear-of-AIDS Cases, Proof Is Key Element*, NAT'L L.J., Apr. 26, 1993, at 27, 32 (noting overwhelming view that fear of contracting AIDS must be reasonable and that reasonableness requires proof of actual exposure); Maroulis, *supra* note 140, at 239 (stating that most courts have denied recovery in AIDS-phobia cases in which plaintiff was unable to prove actual exposure).

274. For further discussion of *Faya v. Almaraz*, 620 A.2d 327 (Md. 1993), see *supra* notes 231-52 and accompanying text.

275. See Maroulis, *supra* note 140, at 260-61 (arguing that AIDS-phobia plaintiff must satisfy common-law rule applicable in particular jurisdiction by demonstrating either physical injury or impact); see also *id.* at 250-51 (stating that arguments for limitations on recovery of emotional distress damages apply equally to AIDS-phobia claims).

276. *Womack v Eldridge*, 210 S.E.2d 145, 148 (Va. 1974); see RESTATEMENT, *supra* note 48, § 46 (allowing recovery for intentionally inflicted emotional distress absent physical injury). For further discussion of *Womack*, see *supra* notes 38-64 and accompanying text.

277 See *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 438-39 (Minn. 1983) (adopting *Restatement* test for recovery for intentionally inflicted emotional distress); *Buckley v Trenton Sav. Fund Soc'y*, 544 A.2d 857, 863 (N.J. 1988) (same).

*Bohonovsky*²⁷⁸ and *Benson*²⁷⁹ illustrate that a court easily can apply that test to AIDS-phobia suits in which the plaintiff seeks damages for intentionally inflicted emotional distress.²⁸⁰ The *Restatement* standard guarantees the genuineness of claims that pass all of its hurdles.²⁸¹ The most significant of those hurdles are the requirements that the defendant's conduct be outrageous²⁸² and that the plaintiff's emotional distress be severe.²⁸³ The former was at issue in *Benson*,²⁸⁴ whereas failure to demonstrate the latter led to dismissal of the claim in *Bohonovsky*.²⁸⁵

In a cause of action alleging intentionally inflicted emotional distress in the AIDS-phobia context, a Virginia court should apply the *Womack* test to the facts before it. Because AIDS is an invariably fatal disease,²⁸⁶ an

278. For further discussion of *J.B. v. Bohonovsky*, 835 F. Supp. 796 (D.N.J. 1993), see *supra* notes 142-52 and accompanying text.

279. For further discussion of *K.A.C. v. Benson*, Nos. C6-93-1203, C5-93-1306, C4-93-1328, 1993 WL 515825 (Minn. Ct. App. Dec. 14, 1993), *review granted*, (Minn. Feb. 24, 1994), see *supra* notes 153-62 and accompanying text.

280. See *Bohonovsky*, 835 F. Supp. at 800-02 (applying *Restatement* test and holding that plaintiff failed to allege sufficient severity of emotional distress); *Benson*, 1993 WL 515825, at *2 (applying *Restatement* test and holding that genuine issue of material fact existed as to whether defendant's conduct was extreme and outrageous); see also *Baranowski v. Torre*, No. CV90-0236178, 1991 WL 240460, at *2 (Conn. Super. Ct. Nov. 7, 1991) (applying *Restatement* test to AIDS-phobia plaintiff's claim of intentionally inflicted emotional distress); *Whelan v. Whelan*, 588 A.2d 251, 252-53 (Conn. Super. Ct. 1991) (same). For further discussion of *Bohonovsky* and *Benson*, see *supra* notes 142-62 and accompanying text.

281. See *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974) (noting that outrageousness requirement serves to limit frivolous suits).

282. See *RESTATEMENT*, *supra* note 48, § 46 cmt. d (stating that defendant's conduct must be atrocious, utterly intolerable in civilized community, and so extreme and outrageous as to exceed all possible bounds of decency).

283. See *id.* § 46 cmt. j (requiring that emotional distress be so severe that no reasonable man could be expected to endure it).

284. *K.A.C. v. Benson*, Nos. C6-93-1205, C5-93-1306, C4-93-1328, 1993 WL 515825, at *2 (Minn. Ct. App. Dec. 14, 1993), *review granted*, (Minn. Feb. 24, 1994).

285. *J.B. v. Bohonovsky*, 835 F. Supp. 796, 802 (D.N.J. 1993).

286. See, e.g., *Kerins v. Hartley*, 21 Cal. Rptr. 2d 621, 624 (Ct. App. 1993) (noting that AIDS is fatal in 100% of known cases), *vacated and transferred for reconsideration*, 868 P.2d 906 (Cal. 1994); *Faya v. Almaraz*, 620 A.2d 327, 329 (Md. 1993) (noting that AIDS is invariably fatal); *Bramer v. Dotson*, 437 S.E.2d 773, 774-75 (W. Va. 1993) (noting that diagnosis of AIDS is tantamount to death sentence).

AIDS-phobia defendant will have great difficulty in convincing the court that the intentional or reckless conduct that proximately caused the plaintiff's fear of AIDS was not outrageous as a matter of law.²⁸⁷ However, the requirement that the plaintiff prove the severity of the claimed emotional distress will give the court an objective standard with which to evaluate the genuineness of the plaintiff's claim and will help to ensure that spurious claims will not reach the jury.²⁸⁸ The concern with fraudulent claims of intentionally inflicted emotional distress in the AIDS-phobia context is no different from the concern in any cause of action alleging intentionally inflicted emotional distress.²⁸⁹ Therefore, Virginia courts should use the *Womack* test in the AIDS-phobia context as well.

B. Negligently Inflicted Emotional Distress

After *Hughes*,²⁹⁰ a plaintiff alleging negligently inflicted emotional distress in Virginia must demonstrate physical manifestations of that emotional distress and must prove by clear and convincing evidence that the defendant's negligence proximately caused the emotional distress, which in turn caused the physical injury.²⁹¹ In an effort to avoid fraudulent or

287. See *Baranowski v Torre*, No. CV90-0236178, 1991 WL 240460, at *2 (Conn. Super. Ct. Nov. 7, 1991) (asserting that prevalence and consequences of AIDS are so widely recognized that intentional exposure of another to AIDS clearly falls within conduct proscribed by *Restatement* § 46); see also *Benson*, 1993 WL 515825, at *2 (holding that genuine issue of material fact existed as to whether defendant's conduct was extreme and outrageous); Robert B. Gainor, Note, *To Have and to Hold: The Tort Liability for the Interspousal Transmission of AIDS*, 23 NEW ENG. L. REV. 887, 900 (1988-89) (asserting that intentionally or recklessly exposing one's spouse to AIDS constitutes outrageous conduct and warrants recovery of emotional distress damages even if exposed spouse does not contract AIDS).

288. See *Russo v White*, 400 S.E.2d 160, 163 (Va. 1991) (denying recovery in case of intentionally inflicted emotional distress on ground that plaintiff failed to allege emotional distress severe enough to support cause of action); see also *Naccash v Burger*, 290 S.E.2d 825, 831 (Va. 1982) (noting that *Womack* requirements serve to discourage spurious claims). *But cf.* Gainor, *supra* note 287, at 900 (asserting that proof of sexual intercourse with AIDS-infected spouse constitutes evidence of plaintiff's having suffered severe emotional distress).

289. See *Bohonovsky*, 835 F. Supp. at 800-02 (applying *Restatement* test to AIDS-phobia claim without discussion of applicability); *Benson*, 1993 WL 515825, at *2 (same).

290. For further discussion of *Hughes v Moore*, 197 S.E.2d 214 (Va. 1973), see *supra* notes 93-110 and accompanying text.

291. *Hughes*, 197 S.E.2d at 219.

trivial claims, the Virginia Supreme Court has erected two significant barriers to recovery of damages for negligently inflicted emotional distress. The plaintiff must prove physical injury and must also present clear and convincing evidence of an unbroken causal connection between the alleged act and the physical injury.²⁹² In applying this standard to AIDS-phobia cases, Virginia courts should require proof by the plaintiff of either physical injury resulting from the emotional distress or actual exposure to the AIDS virus.²⁹³

The courts in *Faya*²⁹⁴ and *Johnson*²⁹⁵ looked to the common law of their jurisdictions to require proof of a demonstrable physical injury before allowing the plaintiff to recover emotional distress damages.²⁹⁶ Similarly, Virginia courts should look to Virginia precedent and apply *Hughes*'s clear-and-convincing evidentiary standard in AIDS-phobia cases

292. *Id.*, see *Ney v. Landmark Educ. Corp.*, No. 92-1979, 1994 WL 30973, at *3 (4th Cir. Feb. 2, 1994) (per curiam) (reiterating Virginia's requirement of proof that physical injury accompany negligently inflicted emotional distress); *Naccash*, 290 S.E.2d at 831 (noting that *Hughes* requirements serve to discourage spurious claims).

293. See *infra* notes 316-22 and accompanying text (arguing that Virginia courts should require AIDS-phobia plaintiff claiming negligently inflicted emotional distress to prove either physical injury or actual exposure to virus). The Virginia Supreme Court has allowed recovery of emotional distress damages for fear of contracting AIDS when the emotional distress is pendent to a claim of medical malpractice. *Howard v. Alexandria Hosp.*, 429 S.E.2d 22, 24-25 (Va. 1993). In such cases, proof of exposure to the virus is irrelevant. See *Stemhagen v. United States*, 768 F. Supp. 200, 208 (E.D. Mich.) (allowing plaintiff to recover emotional distress damages for fear of contracting AIDS without proof of actual exposure because emotional distress claim was pendent to claim of medical malpractice), *vacated per stipulation*, 778 F. Supp. 353 (E.D. Mich. 1991); *Kaehne v. Schmidt*, No. 90-1108, 1991 WL 121030, at *1 (Wis. Ct. App. May 15, 1991) (allowing plaintiff to recover emotional distress damages for fear of contracting AIDS without proof of actual exposure because emotional distress claim was pendent to negligence claim), *review denied*, 474 N.W.2d 107 (Wis. 1991). But see *McQuig v. McLaughlin*, 440 S.E.2d 499, 503 (Ga. Ct. App. 1994) (rejecting plaintiffs' contention that fear of contracting AIDS constitutes element of pain and suffering pendent to medical malpractice claim on ground that plaintiffs alleged no physical injury). For further discussion of *Howard*, see *supra* note 13.

294. For further discussion of *Faya v. Almaraz*, 620 A.2d 327 (Md. 1993), see *supra* notes 231-52 and accompanying text.

295. For further discussion of *Johnson v. West Va. Univ. Hosps., Inc.*, 413 S.E.2d 889 (W. Va. 1991), see *supra* notes 185-206 and accompanying text.

296. *Faya*, 620 A.2d at 337-39; *Johnson*, 413 S.E.2d at 892.

concerning claims of negligently inflicted emotional distress.²⁹⁷ This heightened standard will help prevent fraudulent or spurious claims and avoid a flood of litigation.²⁹⁸

Virginia case law has established that a plaintiff cannot recover for negligently inflicted emotional distress absent a showing of some physical injury.²⁹⁹ No reason exists for Virginia courts to abandon this rule in AIDS-phobia cases.³⁰⁰ In fact, the purpose of this requirement—demonstration that the claim is genuine³⁰¹—may be more important in the AIDS context than outside of it.³⁰² As AIDS becomes more widespread, incidental contact with people and objects carrying the disease will occur more frequently.³⁰³ The physical injury requirement helps to ensure that such incidental, harmless contact does not become the subject of endless

297. See *Hughes v Moore*, 197 S.E.2d 214, 219 (Va. 1973) (requiring clear and convincing evidence of causal connection between defendant's negligence, plaintiff's emotional distress, and resultant physical injury).

298. Compare *Naccash v Burger*, 290 S.E.2d 825, 831 (Va. 1982) (stating that *Hughes* requirements serve to discourage spurious claims) with *Neal v Neal*, 873 P.2d 881, 889 (Idaho Ct. App. 1993) (stating concern that allowing AIDS-phobia plaintiff's claim would invite speculative claims and would allow recovery without proof that disease-causing agent was present), *aff'd*, 873 P.2d 871 (Idaho 1994).

299. See *Hughes*, 197 S.E.2d at 219 (requiring physical injury for recovery for negligently inflicted emotional distress); see also *Ney v Landmark Educ. Corp.*, No. 92-1979, 1994 WL 30973, at *3 (4th Cir. Feb. 2, 1994) (per curiam) (reiterating Virginia's requirement that plaintiff prove physical injury to recover for negligently inflicted emotional distress).

300. See *Maroulis*, *supra* note 140, at 260-61 (arguing that courts should require AIDS-phobia plaintiffs to show either physical injury or physical impact depending upon which common-law rule applies in that jurisdiction). But see *Marrs*, *supra* note 111, at 39 (asserting that courts are shifting focus away from physical injury as assurance of genuineness and towards evaluation of totality of evidence to determine genuineness, seriousness, and reasonableness of alleged emotional distress).

301. See *Naccash*, 290 S.E.2d at 831 (noting that *Hughes* requirements serve to discourage spurious claims).

302. But see *Zook*, *supra* note 196, at 492 (asserting that application of physical injury requirement in attempt to discourage fraudulent or frivolous AIDS-phobia claims prevents recovery for genuine claims).

303. See *Lanin*, *supra* note 6, at 89 n.95 (tracing increased incidence of AIDS since 1981); *Maroulis*, *supra* note 140, at 226 (noting that AIDS has reached nearly epidemic proportions); *Zakarin*, *supra* note 139, at 265 (noting 100-fold increase in AIDS since its discovery in 1981).

litigation in which the key issue is the highly speculative fear of a plaintiff who may be ignorant of the infinitesimal risk of contracting the disease through such contact.³⁰⁴

In *Naccash*,³⁰⁵ however, the Supreme Court of Virginia fashioned an exception to the physical injury rule.³⁰⁶ In *Naccash*, the plaintiffs, despite alleging no physical injuries of their own, recovered damages for emotional distress that the defendant's negligent prenatal care of their unborn child caused.³⁰⁷ Although the court subsequently limited the *Naccash* holding to its facts,³⁰⁸ the rationale behind the decision fits easily into the context of AIDS-phobia cases. In *Naccash*, the court stated:

The restrictions upon recovery imposed by the provisos in *Hughes* were designed to discourage spurious claims asserted by chance witnesses to physical torts involving others. The considerations prompting imposition of the limitations do not exist here; no one suggests that the Burgers' emotional distress was feigned or that their claim was fraudulent. Indeed, to apply the restrictions here "would constitute a perversion of fundamental principles of justice."³⁰⁹

In other words, the facts giving rise to the cause of action left no doubt in the court's collective mind that the claim was genuine.³¹⁰

In an AIDS-phobia case in which the plaintiff is able to prove actual exposure to the virus, the same analysis applies. Given the deadliness of AIDS, a plaintiff actually exposed to the virus undoubtedly will suffer great emotional distress because of the increased possibility of a premature death.

304. See Goldberg, *supra* note 8, at 88 (noting efforts of AIDS activists to spread message that AIDS is not easily transmitted); Lanin, *supra* note 6, at 99 (arguing in favor of requirement of actual exposure in AIDS-phobia cases in order to prevent idle claims based on irrational fears); Maroulis, *supra* note 140, at 226-27, 251 (noting widespread public ignorance and misunderstanding concerning transmittal of AIDS).

305. For further discussion of *Naccash v. Burger*, 290 S.E.2d 825 (Va. 1982), see *supra* notes 113-25 and accompanying text.

306. *Naccash*, 290 S.E.2d at 831.

307. *Id.*

308. *Myseros v. Sissler*, 387 S.E.2d 463, 464 n.2 (Va. 1990).

309. *Naccash*, 290 S.E.2d at 831 (quoting *Berman v. Allan*, 404 A.2d 8, 15 (N.J. 1979)).

310. *Id.*

Therefore, the genuineness of that plaintiff's claim for emotional distress damages in such a context would be beyond dispute.³¹¹ Thus, Virginia courts should allow an AIDS-phobia plaintiff who fails to allege physical injury to recover emotional distress damages upon proof of actual exposure to the virus.³¹² Virginia courts also should allow such a plaintiff to recover without proof of actual exposure provided that the plaintiff proves that some physical injury resulted from the emotional distress.³¹³ In both situations, the plaintiff must prove by clear and convincing evidence that the defendant's negligence caused the emotional distress.³¹⁴

V Conclusion

In AIDS-phobia cases in which the plaintiff claims damages for intentionally inflicted emotional distress, Virginia courts should apply the four-pronged test for recovery originally set forth in *Restatement* section 46 and adopted by Virginia in *Womack*.³¹⁵ This test furthers the public policy of allowing only valid claims of emotional distress to reach the jury

The same policy should govern actions seeking damages for negligently inflicted emotional distress. Courts in Maryland and West Virginia have followed those states' established common law by requiring that an AIDS-phobia plaintiff prove physical injury in order to recover for

311. See *Bramer v Dotson*, 437 S.E.2d 773, 774-75 (W Va. 1993) (allowing AIDS-phobia claim for emotional distress damages despite plaintiff's failure to allege physical injury). The *Bramer* court echoed the reasoning in *Naccash* by stating that, given the unique deadliness of AIDS, conventional wisdom mandates that fear of AIDS triggers genuine—not spurious—claims of emotional distress. *Id.*

312. See *Naccash v. Burger*, 290 S.E.2d 825, 831 (Va. 1982) (allowing recovery for negligently inflicted emotional distress despite lack of proof of physical injury); see also *Lopez v Leal*, 29 Cal. Rptr. 2d 832, 839 (Ct. App. 1994) (requiring proof of actual exposure to virus when AIDS-phobia plaintiff is unable to prove physical injury); *Bramer*, 437 S.E.2d at 774-75 (allowing recovery of emotional distress damages in AIDS-phobia case without proof of physical injury).

313. See *Hughes v Moore*, 197 S.E.2d 214, 219 (Va. 1973) (requiring proof of physical injury for recovery for negligently inflicted emotional distress).

314. See *id.* (requiring clear and convincing proof of causal connection between defendant's negligence, plaintiff's emotional distress, and resultant physical injury).

315. *Womack v Eldridge*, 210 S.E.2d 145, 148 (Va. 1974). For further discussion of *Womack*, see *supra* notes 38-64 and accompanying text.

negligently inflicted emotional distress.³¹⁶ Tennessee and West Virginia have required proof of actual exposure to the virus to assure the court that the claim is reasonable,³¹⁷ whereas Maryland and one California court have expressly disavowed that requirement.³¹⁸ Virginia's common law of negligently inflicted emotional distress requires proof of physical injury and clear and convincing evidence of the causal connection between the defendant's negligence and the plaintiff's emotional distress and consequent physical injury.³¹⁹

An AIDS-phobia plaintiff in Virginia should be able to recover damages for negligently inflicted emotional distress upon proof of physical injury. However, based on the rationale behind *Naccash*,³²⁰ a plaintiff able to prove actual exposure to the virus should recover damages despite having suffered no physical ailments. Therefore, subject to clear and convincing proof of a causal connection, the plaintiff in an AIDS-phobia case in Virginia should recover damages upon proof of *either* a physical injury resulting from the negligently inflicted emotional distress *or* actual exposure to the virus that causes AIDS.³²¹ Each of these requirements satisfies the public policy that demands a threshold guaranteeing the genuineness of emotional distress claims.³²²

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316. *Faya v Almaraz*, 620 A.2d 327, 337-39 (Md. 1993); *Johnson v West Va. Univ. Hosps., Inc.*, 413 S.E.2d 889, 892 (W Va. 1991).

317. *Carroll v Sisters of Saint Francis Health Servs., Inc.*, 868 S.W.2d 585, 594 (Tenn. 1993); *Johnson*, 413 S.E.2d at 893.

318. *Kerms v Hartley*, 21 Cal. Rptr. 2d 621, 632 (Ct. App. 1993), *vacated and transferred for reconsideration*, 868 P.2d 906 (Cal. 1994); *Faya*, 620 A.2d at 336-37.

319. *Hughes v Moore*, 197 S.E.2d 214, 219 (Va. 1973).

320. For further discussion of *Naccash v Burger*, 290 S.E.2d 825 (Va. 1982), see *supra* notes 113-25 and accompanying text.

321. *But see Maroulis, supra* note 140, at 261 (arguing that courts should require AIDS-phobia plaintiffs to prove both physical injury and actual exposure in order to recover emotional distress damages).

322. See *Naccash*, 290 S.E.2d at 831 (stating that *Hughes* and *Womack* requirements serve to discourage spurious claims).

