At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of May 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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ANNE HIGGINS,

Plaintiff,

- against -

Index No. 36321/04

MICHAEL W. CUTLER,

Defendant.

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The following papers numbered 1 to 3 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	2
Reply Affidavits (Affirmations)	3
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Michael Cutler ("Cutler") moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint of plaintiff Anne Higgins ("Higgins" or "plaintiff"). Alternatively, defendant seeks dismissal of the complaint, pursuant to CPLR 3126, for the failure of plaintiff to provide discovery in accordance with a July 25, 2006 court order.

BACKGROUND

On November 5, 2001, at approximately 4:23 p.m., plaintiff and her 10-year old son Andrew were in a vehicle which stopped at a traffic light at or near the intersection of Franklin Avenue and 4th Street in Garden City, New York. Plaintiff operated the vehicle with Andrew in the front passenger seat. At that time and location, plaintiff's vehicle was involved in a collision with Cutler's vehicle. Although plaintiff suffered some physical injury, the infant Andrew lost his life as a result of injuries he sustained in the accident.

Plaintiff commenced the instant lawsuit by filing a summons and complaint on or about November 4, 2004. In her complaint plaintiff alleges that[1] due to defendant's negligence she suffered serious physical injury; and (2) as a result of having been in the zone of danger and witnessing her son's injuries caused by defendant's negligence, she suffered serious psychological injuries and emotional distress. As to her claim for permanent psychological injuries, mental anguish and loss of normal pursuits and pleasures of life, plaintiff alleges, in her verified bill of particulars of January 20, 2006, that she has been unable to drive a motor vehicle since the date of the accident, that she was incapacitated from work for a period of six months, and that she has a diminished capacity to concentrate, to focus on work and to engage in other activities of living. Plaintiff argues that while she is not required to plead or prove a serious injury as defined in Insurance Law § 5102 (d), she nonetheless suffered injury which prevented her from performing substantially all of the

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[1]A separate lawsuit was commenced on behalf of the Estate of the infant Andrew Higgins.

material acts which constitute her usual and customary activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

Plaintiff was deposed on March 9, 2006.

CONTENTIONS

In support of his motion, defendant initially notes that in response to his demand that plaintiff serve medical reports, records and authorizations, plaintiff only served an authorization to obtain plaintiff's emergency room records from Winthrop University Hospital.[2] Referring to plaintiff's deposition, defendant notes that plaintiff testified that: (1) other than an emergency room examination, she has not been treated for an injury or condition resulting from this incident; and (2) she returned to full-time employment approximately one month after the accident, and subsequently took a leave of absence in 2003 or 2004 at half-pay. Plaintiff testified that she requested the month, or two-month, leave because of difficulty focusing follow her son Andrew's death.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system;

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[2]Defendants contend that plaintiff failed to provide authorizations and medical records as directed by a July 25, 2006 order.

or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury or impairment." As the plaintiff does not allege death, dismemberment, significant disfigurement, fracture, loss of a fetus, permanent consequential limitation of use of a body organ, member, function or system or significant limitation of use of a body function or system, the only issue, with respect to Insurance Law 5102 (d), is whether plaintiff sustained a serious injury under the 90/180 category. Based upon plaintiff's deposition testimony, as set forth above, defendant contends that plaintiff cannot establish the "serious injury" threshold of § 5102 (d).

In opposition, plaintiff argues that her claim is based upon the emotional injury she suffered as a result of witnessing her son's fatal injuries while they were both in the same "zone of danger" and that proof of "serious injury," therefore, is not required in order to establish a claim against defendant. Alternatively, plaintiff contends that she did, in fact, suffer "serious injury" as a consequence of the accident.

Plaintiff provides the affirmed report of a psychiatrist, Dr. Allan I. Stempler, dated December 10, 2006. Dr. Stempler conducted an examination of plaintiff on September 6, 2006. Dr. Stempler states, by way of background, that plaintiff was referred to him by her attorney who informed the doctor that plaintiff appeared to him to be depressed and delusional following the accident, and that although he believed it to be necessary for her to

receive psychiatric care, she was resistant to any form of psychiatric intervention. Dr. Stempler reports that plaintiff finally agreed to see him at the insistence of her attorney, rather than because of her desire for help. Subsequent to their initial meeting, and as of the date of his affirmed report, Dr. Stempler had not heard from plaintiff despite having extended the opportunity for her to return.[3]

Dr. Stempler further reports that although plaintiff did not discuss with him the details of the accident, plaintiff did talk about her emotional trauma due to it, stating that emotionally she would never be the same, that she "is just surviving and going to work" and that since the death of her son, "she feels like her life collapsed." Plaintiff stated "I lost my little boy . . . I don't want to talk about it." Dr. Stempler reports that plaintiff indicated that her "life is like cardboard" and that she now avoids trying to do anything, including household chores, and that she just "sits" and does nothing. Plaintiff pointed out that she was driving the car and feels guilty about her son's death.

Dr. Stempler opines that plaintiff presents as "a very anxious and worried woman who is withholding her thoughts and feelings and is aware of that." She shows no outward signs of psychosis, organicity or substance abuse. He further states that: (1) at times she appears to be overwhelmed by what she is thinking, and, in stating that she is avoiding talking about things so as to avoid thinking about what happened, she is indicating that she is constantly thinking about the accident and the loss of her son; (2) she appears depressed, slow-moving

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[3]Plaintiff told Dr. Stempler that she only came to see him "for the case," so that there would be "a doctor's report to help in her lawsuit," and that she is "not interested in help for herself."

yet agitated; (3) she responds to loud noises outside the office in an exaggerated manner suggestive of hypervigilance; and (4) she attempts to use suppression of thoughts and avoidance to cope with her overwhelmingly painful emotions of loss.

Dr. Stempler renders a preliminary diagnosis of:

Axis I: (1) Major Depressive Disorder, Severe with probable psychotic and delusional features;
(2) Postraumatic Stress Disorder
Axis II: No Personality Disorder;
Axis III: No Contributing Medical Condition;
Axis IV: Family Deaths especially that of her son as a major contributing factor;
Axis V: GAF 60 moderate to severe symptoms.

Dr. Stempler states that "[p]rior to the [subject] automobile accident, [plaintiff] was in her usual state of health [and] she had adjusted to the deaths of her mother and husband seven years earlier. . . . Subsequently, she developed a serious depression with reported delusional features from which she has not recovered. The death of [plaintiff's] young son has caused her severe distress. She has not developed appropriate coping mechanisms nor has she learned how to adjust adequately . . . [and] she has resisted any form of help while she continues to feel extremely guilty about her son's death. . . . It seems that she is not the type of person to confide in others, probably feeling a sense of shame . . . [and] she is reticent to seek help. Without appropriate psychiatric help including psychotherapy and medication for depression, it is unlikely that she will improve."

Finally, plaintiff contends that (1) her injury is one that requires no medical proof because the harm done cannot be seriously disputed, and (2) defendant's threshold motion

fails to address plaintiff's zone of danger claim and, therefore, does not establish *prima facie* entitlement to the relief sought.

In reply, defendant assails Dr. Stempler's report as legally insufficient to establish that plaintiff has a valid "serious injury" claim of the 90/180 day category, asserting that Dr. Stempler is not competent to assess plaintiff's medical condition because he did not see her until five years following the accident.

DISCUSSION

The burden on a motion for summary judgment rests initially upon the moving party to come forward with sufficient proof in admissible form to enable a court to determine that it is entitled to judgment as a matter of law. If this burden cannot be met, the court must deny the relief sought (CPLR 3212; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). However, once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also, Zuckerman,* 49 NY2d at 562). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat the motion (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]).

"As a threshold matter in an automobile accident personal injury case, the plaintiff is required to plead and prove that he or she sustained a 'serious injury'" as defined in the

No-Fault Law (see Insurance Law §§ 5102[d]; 5104; *Licari v Elliott*, 57 NY2d 230 [1982]). "Further, it is for the court to determine, in the first instance, whether the plaintiff has sustained a serious injury because '[t]he result of requiring a jury trial where the injury is clearly a minor one would perpetuate a system of unnecessary litigation'" (*Zecca v Riccardelli,* 293 AD2d 31, 33 [2002], quoting *Licari*, 57 NY2d at 237). In this light, the physical injuries sustained by plaintiff in this accident would not qualify as "serious" within the meaning of Insurance Law § 5102(d). However, "a causally-related emotional injury, alone or in combination with a physical injury, can constitute a serious injury" under the Insurance Law, (*Taranto v McCaffrey*. ___ AD3d ___, 2007 WL 128956 [2nd Dept. 2007], citing *Bissonette v Compo*, 307 AD2d 673, 674 [2003] and *Brandt-Miller v McArdle*, 21 AD3d 1153, 1153 [2005]), sufficient to maintain a cause of action for non-economic loss. "[S]uch injury — as well as being 'serious and verifiable' . . . — must also be established by objective medical evidence . . . and causally related to the motor vehicle accident" (*Bissonette v Compo*, 307 AD2d at 674, citing *Bovsun v Sanperi*, 61 NY2d 219, 231-232 [1984]).

In this case, although defendant does not offer medical evidence demonstrating that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d), in relying on plaintiff's own deposition testimony, defendant presents sufficient proof to shift the burden to plaintiff to raise a triable issue of fact (*see Zecca,* 293 AD2d at 31; *Bissonette v Compo*, 307 AD2d at 674).

However, plaintiff's action for damages due to emotional distress is predicated on two distinct claims: (1) "serious injury" under Insurance Law § 5102 (d), and (2) emotional injuries as a result of being within the "zone of danger" and observing the fatal injury to her son. Plaintiff has raised issues of fact as to both.

SERIOUS INJURY

"In order to prove 'serious injury' under the 90-out-of-180-day rule, plaintiff must prove that she was 'curtailed from performing [her] usual activities to a great extent rather than some slight curtailment" (*Gaddy v Eyler,* 79 NY2d 955 [1992], quoting *Licari*, 57 NY2d at 236). While plaintiff's testimony that she returned to work approximately one month after the accident is inconsistent with the allegation in the bill of particulars that she was "incapacitated from work for a period of six months," plaintiff's testimony, buttressed by Dr. Stempler's affirmation concerning her condition, and that she has been unable to own or drive a car since the accident, raise a material issue of fact as to this claim (*see Sellitto,* 268 AD2d at 755-756 [plaintiff's affidavit that although she continued to drive from her home to her job in another county, she experienced anxiety attacks while driving, supported by psychologist, to raise question of fact]; *see also, Connors v Center City, Inc.*, 291 AD2d 476, 477 [2002]; compare, *Taranto v McCaffrey*, ___ AD3d ___, 2007 WL 1289562 [pre-existing psychological condition, other life stressors and two years since diagnosis of claimed impairment]).

Defendant's reliance on *Bisonette v Compo* (307 AD2d 673 674 [2003]), is misplaced. In *Bisonette,* plaintiff commenced a negligence action to recover damages for injuries allegedly sustained by her daughter and son when the vehicle in which they were riding struck a tree. With respect to defendant's motion to dismiss the complaint of the daughter, defendant relied upon her medical records, which reported only minor physical injuries, as well as the mother's deposition testimony, unsupported by a report of a psychiatrist or psychologist, stating that her daughter became quieter and was not as outgoing as she had been prior to the accident. In affirming an order granting summary judgment to the defendants, the court noted that the daughter's medical records "contain no examination, diagnosis or treatment of any emotional or psychological condition, and plaintiff does not allege that any medical expert has identified such an injury or causally linked it to the accident" (*id.* at 674). By contrast, in this case, Dr. Stempler's affirmed report supports plaintiff's assertions of permanent changes in her functioning following the accident, including difficulty in focusing and avoidance (*see Cushing v Seemann,* 247 AD2d 891 [1998]), opines the existence of a causal connection between the accident and plaintiff's psychiatric injuries, and, in explaining how plaintiff's own emotional deterioration has impeded her ability to obtain the necessary treatment, accounts for the absence of medical records. Accordingly, plaintiff raises an issue of fact in this regard.

ZONE OF DANGER

"The zone-of-danger rule, which allows one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family . . . is premised on the traditional negligence concept that by unreasonably endangering the plaintiff's physical safety the defendant has breached a duty owed to him or her for which he or she should recover all damages sustained including those occasioned by witnessing the suffering of an immediate family member who is also injured by the defendant's conduct" (*Bosvun v Sanperi,* 61 NY2d 219, 228-229 [1984]). "[Th]erefore . . . where a defendant negligently exposes a plaintiff to an unreasonable risk of bodily injury or death, the plaintiff may recover, as a proper element of his or her damages, damages for injuries suffered in consequence of the observation of the serious injury or death of a member of his or her immediate family — assuming, of course, that it is established that the defendant's conduct was a substantial factor bringing about such injury or death" (*id.* at 230-231). "[N]ot . . . any trifling stress would be sufficient to support recovery of damages under the Zone Of Danger Rule. Rather, the emotional disturbance suffered must be serious and verifiable" (*id.* at 231; *see also, Stamm v PHH Vehicle Management Services, LLC,* 32 AD3d 784, 786 [2006] ["In order to recover for an alleged emotional injury based on the zone of danger theory of liability, a plaintiff must establish that he suffered serious emotional distress that was proximately caused by the observation of a family member's death or serious injury

while in the zone of danger"]).

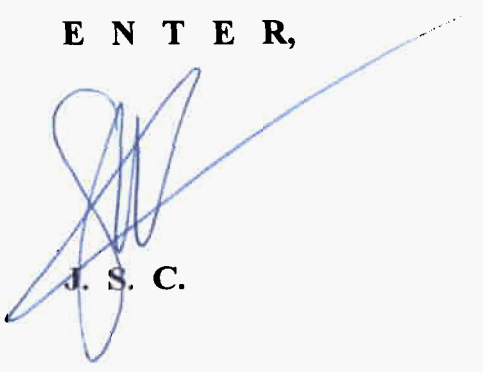
In the instant case, plaintiff has raised an issue of fact regarding her cause of action to recover damages for emotional distress. Both plaintiff and her son were in the same vehicle at the time of impact, and in the same "zone of danger" (*see Bovsun,* 61 NY2d at 228-229; *Shipley ex rel Shipley v Williams,* 14 Misc3d 682 [2006]). Moreover, defendant's argument that plaintiff's cause of action for emotional distress requires proof of an independent serious injury, is without merit (*Cushing,* 247 AD2d at 893; *see also, Graber v Bachman,* 27 AD3d 986 [2006] [while the court dismissed plaintiff's Insurance Law § 5102 cause of action for a failure to offer objective medical evidence, it expressly recognized that plaintiff could recover damages for an emotional distress cause of action even in the absence of a corresponding physical injury]). The "observation" requirement of a "zone of danger" claim for emotional injury is satisfied if the "peril or harm to such [family member] occurs in the plaintiff's presence" and "there is a contemporaneous awareness of injury or death" (*Cushing*, 247 AD2d at 892, citing *Bovsun*, 61 NY2d at 230, 224-225, 233).

Finally, dismissal of the complaint, pursuant to CPLR 3126, is unwarranted as there has been no showing that the failure to provide authorizations and medical records was willful or contumacious (*Wasif v Khan*, 36 AD3d 610 [2007]; *Faulkner v City of New York*, 32 AD3d 452 [2006]). To the contrary, plaintiff concedes that she received no other professional treatment for her condition, and defendant does not contend that plaintiff failed to submit to a medical examination scheduled pursuant to the July 25, 2006 order.

Based upon the foregoing, the defendant's motion is in all respects denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.