

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

**589**

**CA 15-01712**

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

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CHESTER W. PASTUSZYNSKI, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

LISA F. LOFASO AND CINTAS CORPORATION,  
DEFENDANTS-APPELLANTS.

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BARCLAY DAMON LLP, BUFFALO (HEDWIG M. AULETTA OF COUNSEL), FOR  
DEFENDANTS-APPELLANTS.

BROWN CHIARI LLP, LANCASTER (BRADLEY D. MARBLE OF COUNSEL), FOR  
PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered July 9, 2015. The order denied the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: In this action to recover damages for injuries arising from an automobile accident, defendants appeal from an order denying their motion for summary judgment dismissing the complaint. The complaint, as amplified by the bill of particulars, sought recovery under three categories of serious injury, i.e., the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories (see Insurance Law § 5102 [d]). We agree with defendants that Supreme Court erred in denying the motion with respect to the 90/180-day category, and we therefore modify the order accordingly.

We conclude with respect to the permanent consequential limitation of use and significant limitation of use categories that, although defendants met their initial burden, plaintiff raised triable issues of fact with respect to those two categories. Plaintiff submitted, inter alia, affirmations from both his treating physician and a neurological expert that provided "objective proof of spasm in his [lumbar] spine . . . and proof showing quantitative restrictions in the range of motion in his . . . lumbar spine" (*Siemucha v Garrison*, 111 AD3d 1398, 1399). In addition, plaintiff raised an

issue of fact whether there was a gap in his treatment by submitting the affirmation of his treating physician stating that the physician continuously treated plaintiff from the date of the accident until the present date.

With respect to the 90/180-day category, however, defendants met their initial burden by submitting excerpts of plaintiff's deposition testimony in which plaintiff admitted that he did not miss any full days of work after the accident. "In response, plaintiff failed to raise an issue of fact whether he was unable to perform substantially all of the material acts that constituted his usual and customary daily activities" (*Robinson v Polasky*, 32 AD3d 1215, 1216; see *Parkhill v Cleary*, 305 AD2d 1088, 1089-1090).

Entered: June 10, 2016

Frances E. Cafarell  
Clerk of the Court