

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

1017

CA 13-00389

PRESENT: SMITH, J.P., SCONIERS, VALENTINO, AND WHALEN, JJ.

ANTHONY P. FANTI AND DEBORAH FANTI,
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

RYAN L. MCLAREN AND STACY MCLAREN,
DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 23, 2012. The order, insofar as appealed from, 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 permanent loss of use 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 commenced by plaintiffs to recover damages for injuries allegedly sustained by Anthony P. Fanti (plaintiff) in an automobile accident, defendants appeal from an order denying their motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). We conclude that Supreme Court properly denied the motion with respect to the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury. "It is well settled that the aggravation of an asymptomatic condition can constitute a serious injury" (*Verkey v Hebard*, 99 AD3d 1205, 1206). Here, defendants' own submissions, including plaintiff's deposition testimony, raise triable issues of fact whether, under those three categories, "the accident aggravated and exacerbated plaintiff's pre-existing, asymptomatic degenerative disease in his [lumbosacral] spine" (*Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1543; see *Hint v Vaughn*, 100 AD3d 1519, 1520). Finally, plaintiffs have abandoned the permanent loss of use category of serious injury alleged in their bill of particulars (see *Austin*, 90

AD3d at 1543; *see also Yoonessi v Givens*, 39 AD3d 1164, 1165), and we therefore modify the order accordingly.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court