

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

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CA 12-01707

PRESENT: SCUDDER, P.J., FAHEY, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

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WALTER P. MALESA, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

KRISTI M. BURG, WHEELS LT., TAKEDA  
AMERICA HOLDINGS, INC., ALSO KNOWN AS  
TAKEDA AMERICA, INC., AND TAKEDA  
PHARMACEUTICALS AMERICA, INC., ALSO KNOWN  
AS TAKEDA PHARMACEUTICALS AMERICA  
SALES CO., DEFENDANTS-APPELLANTS.

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LAW OFFICES OF LAURIE G. OGDEN, BUFFALO (PAMELA S. SCHALLER OF  
COUNSEL), FOR DEFENDANTS-APPELLANTS.

MICHAEL G. COOPER, HAMBURG, FOR PLAINTIFF-RESPONDENT.

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Appeal from an order of the Supreme Court, Erie County (Michael L. D'Amico, A.J.), entered January 5, 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 consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this personal injury action seeking damages for injuries that he sustained as a result of an automobile accident. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), and Supreme Court denied their motion. In our view, defendants established their entitlement to summary judgment dismissing the complaint, as amplified by the bill of particulars, with respect to two of the three categories of serious injury allegedly sustained by plaintiff. We therefore modify the order accordingly. We conclude that defendants established that plaintiff did not sustain a permanent consequential limitation of use, and plaintiff failed to raise an issue of fact whether the injury was both permanent and consequential, i.e., important or significant (*see Kordana v Pomellito*, 121 AD2d 783, 784, *appeal dismissed* 68 NY2d 848). We further conclude that defendants

established as a matter of law that plaintiff did not sustain a significant limitation of use and that plaintiff failed to raise an issue of fact with respect thereto (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, the evidence submitted by plaintiff in opposition to the motion does not provide " 'either a quantitative or qualitative assessment to differentiate serious injuries from mild or moderate ones' " (*Secore v Allen*, 27 AD3d 825, 827; see *Scott v Aponte*, 49 AD3d 1131, 1134). Even assuming, arguendo, that the injuries sustained by plaintiff were caused by the accident, we conclude that plaintiff's proof "fell short of demonstrating that [the injuries] constituted a significant limitation" (*Scott*, 49 AD3d at 1134). We agree with the court, however, that there is an issue of fact whether plaintiff sustained a serious injury within the meaning of the 90/180-day category (see *Rienzo v La Greco*, 11 AD3d 1038; *DiNunzio v County of Suffolk*, 256 AD2d 498, 498, lv denied 93 NY2d 812).

Entered: April 26, 2013

Frances E. Cafarell  
Clerk of the Court