

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

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CA 08-02450

PRESENT: SCUDDER, P.J., MARTOCHE, FAHEY, PERADOTTO, AND GREEN, JJ.

JOHN BOLENDER, INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF NICHOLAS BOLENDER, AN
INFANT, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

TOPS MARKETS, LLC, DEFENDANT-APPELLANT.

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR
DEFENDANT-APPELLANT.

LAW OFFICE OF KENNETH P. BERNAS, PLLC, WEST SENECA (KENNETH P. BERNAS
OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered March 4, 2008 in a negligence action. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action, individually and on behalf of his son, seeking damages for injuries sustained by his son when he ingested allegedly tainted ground beef sold by defendant. Contrary to the contention of defendant, Supreme Court properly denied its motion for summary judgment dismissing the complaint. Even assuming, arguendo, that defendant met its initial burden on the motion, we conclude that plaintiff raised a triable issue of fact by submitting evidence establishing that his son suffered from E. coli poisoning as a result of ingesting ground beef sold by defendant (see generally *Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: April 24, 2009

Patricia L. Morgan
Deputy Clerk of the Court