

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

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CA 11-02477

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, SCONIERS, AND MARTOCHE, JJ.

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PETER MALAMAS AND JODIE MALAMAS,  
PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

TOYS "R" US-DELAWARE, INC.,  
DEFENDANT-APPELLANT.

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CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF  
COUNSEL), FOR DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (THERESA E. QUINN OF COUNSEL),  
FOR PLAINTIFFS-RESPONDENTS.

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Appeal from an order of the Supreme Court, Niagara County  
(Catherine R. Nugent Panepinto, J.), entered November 1, 2011 in a  
personal injury 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 with costs.

Memorandum: Plaintiffs commenced this action seeking damages for  
injuries allegedly sustained by Peter Malamas (plaintiff) when he was  
struck in the back of the head by a box containing a swing set at  
defendant's store. We conclude that Supreme Court properly denied  
defendant's motion for summary judgment dismissing the complaint. "It  
is well established . . . that [a] moving party must affirmatively  
[demonstrate] the merits of its cause of action or defense and does  
not meet its burden by noting gaps in its opponent's proof" (*Atkins v  
United Ref. Holdings, Inc.*, 71 AD3d 1459, 1459-1460 [internal  
quotation marks omitted]; see *DiBartolomeo v St. Peter's Hosp. of the  
City of Albany*, 73 AD3d 1326, 1327). We conclude that "[d]efendant  
failed to meet its initial burden of establishing as a matter of law  
that . . . its alleged negligence was not a proximate cause of  
plaintiff's injuries" (*Atkins*, 71 AD3d at 1460; see *Kanney v  
Goodyear Tire & Rubber Co.*, 245 AD2d 1034, 1036). Inasmuch as  
defendant failed to meet its initial burden on the motion, the burden  
never shifted to plaintiffs to raise a triable issue of fact (see  
*generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Entered: April 20, 2012

Frances E. Cafarell  
Clerk of the Court