

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

1052

CA 11-00394

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND GREEN, JJ.

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MICHAEL METZGIER, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

ABE A. MILLER, DEFENDANT-APPELLANT.

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BRINDISI, MURAD, BRINDISI, PEARLMAN, JULIAN & PERTZ, LLP, UTICA  
(ANTHONY J. BRINDISI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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Appeal from an order of the Supreme Court, Herkimer County  
(Michael E. Daley, J.), entered June 29, 2010 in a personal injury  
action. The order denied the motion of defendant for summary  
judgment.

It is hereby ORDERED that the order so appealed from is  
unanimously reversed on the law without costs, defendant's motion is  
granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for  
injuries he allegedly sustained while operating an all-terrain vehicle  
(ATV) on defendant's property when he struck a single strand of barbed  
wire fencing that defendant had strung between two trees on the  
property. At the time of the accident, plaintiff and his cousin were  
operating ATVs on defendant's property without the knowledge or  
permission of defendant. We conclude that Supreme Court erred in  
denying defendant's motion for summary judgment dismissing the  
complaint. Defendant met his initial burden on the motion by  
establishing that he was entitled to the benefit of the recreational  
use statute, i.e., General Obligations Law § 9-103, inasmuch as he was  
the owner of the property where plaintiff was operating an ATV (see §  
9-103 [1] [a]; *Albright v Metz*, 88 NY2d 656, 662; *Bragg v Genesee  
County Agric. Socy.*, 84 NY2d 544, 551-552; see generally *Zuckerman v  
City of New York*, 49 NY2d 557, 562). In opposition to defendant's  
motion, plaintiff failed to come forward with evidence in admissible  
form establishing that defendant's conduct in constructing the barbed  
wire fencing constituted a "willful or malicious failure to guard, or  
to warn against, a dangerous condition" such that the statute would  
not limit defendant's liability (§ 9-103 [2] [a]; see *Farnham v  
Kittinger*, 83 NY2d 520, 528-529; *Hinchliffe v Orange & Rockland Utils.  
Co.*, 216 AD2d 528, 529, *lv denied* 87 NY2d 801; *Wilkins v State of New  
York*, 165 AD2d 514, 518).

Entered: September 30, 2011

Patricia L. Morgan  
Clerk of the Court