

**McCann v Gordon**

2021 NY Slip Op 33459(U)

June 4, 2021

Supreme Court, Oneida County

Docket Number: Index No. EFCA2019-001574

Judge: Scott J. DelConte

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This opinion is uncorrected and not selected for official publication.

At a Special Term of the Supreme Court of the State of New York held in and for the County of Oneida on June 4, 2021.

PRESENT: **HON. SCOTT J. DELCONTE**  
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK  
ONEIDA COUNTY

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**CAITLIN MCCANN,**

Plaintiff,

v.

**DAVID GORDON,**

Defendant.

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**DECISION ON MOTIONS  
IN LIMINE  
(Motions No. 10 and 19).**

Index No. EFCA2019-001574

Plaintiff Caitlin McCann brings this action against *pro se* Defendant David Gordon for defamation, based upon defamatory accusations Gordon made during his 2019 political campaign for Oneida County Executive. By Decision and Order entered February 10, 2021, McCann was awarded summary judgment on liability (NYSCEF Docs. 176-79). An inquest on damages before a jury is set to begin on June 7, 2021, with jury selection to commence June 4, 2021 (NYSCEF Doc. 185). By Notice of Motion dated April 23, 2021 (Motion No. 10), Defendant Gordon moves to preclude the admission of records from The Samaritan Counseling Center on the grounds that those records were not disclosed until March 30, 2021 (NYSCEF Doc. 190). By Notice of Motion dated May 24, 2021 (Motion No. 19), Plaintiff McCann moves to preclude evidence and testimony that is not relevant, and also for judicial notice of the FCC's contour maps and U.S. Census population data (NYSCEF Doc. 256). For the reasons set forth below, Gordon's motion is **DENIED**, and McCann's motion is **GRANTED**, in part.

**I.**

“Generally, an order ruling [on a motion in limine], even when made in advance of trial on motion papers[,] constitutes, at best, an advisory opinion [that] is neither appealable as of right nor by permission” (*Franklin Corp. v Prahler*, 91 AD3d 49 [4th Dept 2011]). As such, and in recognition of the well settled law that a trial judge is “necessarily ... vested with broad discretion to determine the materiality and relevance of proposed evidence” (*Hyde v County of Rensselaer*, 51 NY2d 927, 929 [1980]), this Court issues the following decisions, subject to renewal of the underlying evidentiary issues by the parties during the trial itself.

**II.**

With respect to Gordon’s motion to suppress McCann’s psychological treatment records, Gordon was aware of McCann’s claims of psychological injuries and treatment when he deposed her, and fails to identify any prejudice that he suffered as a result of the disclosure of the related records after the note of issue of was filed (*see e.g. LeMaire v Kuncham*, 102 AD3d 659, 661 [2d Dept 2013] [holding that it would be an abuse of discretion for a trial court to not consider an affidavit from an expert who was not disclosed until after the note of issue was filed where there was “no evidence of prejudice from the plaintiffs’ late disclosure of their expert”]). Since the scheduling order upon which Gordon relies for his motion did not require the production of McCann’s psychological treatment records (NYSCEF Doc. 29), and Gordon never moved to strike the note of issue, this Court has no basis to preclude records from The Samaritan Counseling Center. Gordon’s motion to suppress is, therefore, **DENIED**. Gordon’s remaining arguments – that the records don’t mention his name, that McCann’s issues could have had other causes, and that the treating counselor isn’t a medical doctor – go only to the weight of the evidence, not its admissibility (CPLR 4518[a]).

### III.

With respect to McCann's motion to exclude irrelevant documents and testimony, it is settled law that a trial court must exclude evidence from being presented to a jury that is either irrelevant or whose probative value is outweighed by undue prejudice (*Caster v Increda-Meal, Inc.*, 238 AD2d 917 [4th Dept 1997]; *Passino v DeRosa*, 199 AD2d 1017 [4th Dept 1993]). The following subjects are not relevant to the issues of McCann's damages and, as such, the motion to preclude evidence on these subjects is **GRANTED**, and any testimony, documents or argument of any nature relating to them is hereby precluded and barred at the inquest for damages in this action:

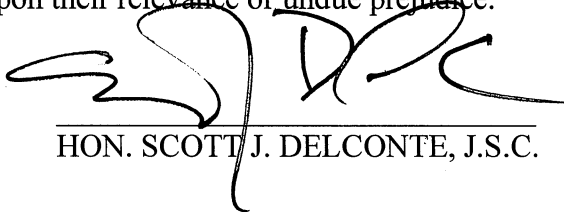
- Prior settlement discussions in this action, or in the related action *Gordon v Picente et al.* under Oneida County Index Number EFCA2019-002270;
- Any damages allegedly sustained by Gordon, including harm to his reputation, legal expenses that he has incurred, or purported violations of his civil rights;
- The character of the attorneys representing parties in this action, or in the related action *Gordon v Picente et al.* under Oneida County Index Number EFCA2019-002270;
- The truthfulness of Anthony Picente's May 15, 2019 public statement; and
- McCann's 2008 pay raise (including any articles relating to it).

The Court cannot, however, conclude as a matter of law that the testimony of Brett Truett, or that articles or other evidence relating to McCann's employment in 2020, are irrelevant or unduly prejudicial. As such, any rulings relating to the admissibility of evidence on those subjects are **RESERVED** until they are proffered at trial.

## IV.

With respect to McCann's motion that this Court take judicial notice of the Federal Communication Commission's licensing and database public inspection files and the United States Census data pursuant to CPLR 4511(b), these are government documents and reports generated in a manner that assures their reliability and, as such, judicial notice is proper (*see e.g. Kingsbrook Jewish Medical Center v Allstate Ins. Co.*, 61 AD3d 13 [2d Dept 2009]). McCann's request that the Court take judicial notice of these document is therefore **GRANTED**, and the documents are admissible at trial, subject to objections based upon their relevance or undue prejudice.

Dated: June 4, 2021



HON. SCOTT J. DELCONTE, J.S.C.

**ENTER.**

**APPEARANCES:**

Brindisi, Murad, Brindisi & Pearlman *by Anthony J. Brindisi, Esq., on behalf of Plaintiff*  
David Gordon, *pro se*

**PAPERS CONSIDERED:**

1. Notice of Motion, dated April 23, 2021 (NYSCEF Doc. 190, Motion No. 10);
2. Affidavit of David Gordon in Support of Motion, sworn to April 23, 2021, with Exhibits A through C, attached (submitted *in camera*, Motion No. 10);
3. Notice of Motion, dated May 24, 2021 (NYSCEF Doc. 256, Motion No. 19);
4. Attorney Affirmation of Anthony Brindisi, Esq., in Support of Plaintiff's Motion in Limine and Request for Judicial Notice, affirmed May 24, 2021, with Exhibits A through T, attached (NYSCEF Docs. 258-278, Motion No. 19); and
5. Attorney Affirmation of Anthony Brindisi, Esq., in Opposition to defendant's Motion in Limine/Motion to Reargue, affirmed May 28, 2021, with Exhibits A and B, attached (NYSCEF Docs. 295-297, Motion No. 10).