

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ERIC AND TRACY EHMANN,

Plaintiffs,

v.

ORDER

19-cv-586-wmc

NICHOLAS AND TRISH METROPOLUS,  
d/b/a Home of The Hodag Wear, d/b/a  
Metro Screenprinting and Embroidery,

Defendants.

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With the trial in this case set for trial Monday, March 15, 2021, and the final pretrial conference (“FPTC”) to take place tomorrow, March 5, at 10:00 a.m. via Zoom, the court issues the following preliminary rulings with respect to their respective motions *in limine*.

BACKGROUND

*Pro se* plaintiffs Eric and Tracy Ehmann are proceeding on claims that defendants Nicholas and Trish Metropolis infringed a copyright under 17 U.S.C. §§ 501-505. Plaintiffs allege that in 2006, Tracy Ehmann created a number of original artistic designs of the mascot for the City of Rhinelander, known as the “Hodag,” then registered a copyright in those Hodag logos, which consist of graphics and lettering (the “Hodag logos” or “logos”), before later transferring all of her ownership and copyright interests in the logos to her husband, Eric Ehmann. Plaintiffs do not allege in their complaint when this transfer occurred, but they were married in 2008 and sold merchandise with the Hodag logos from 2009 to 2011. However, plaintiffs do represent in their objections to defendants’ proposed jury instructions that the transfer occurred by October 9, 2009.

Plaintiffs further allege that they discovered in 2019 that defendants were using the copyrighted Hodag logos owned by Eric Ehmann to print and sell merchandise online, as well as in defendants' store, all without Mr. Ehmann's license or permission to do so.

Through their counsel, defendants both dispute Eric Ehmann's ownership interest in any of the logos. They also allege that in or around 2007, Tracy Ehmann verbally granted them permission to use her logos in return for the satisfaction of an unpaid debt with their store. In contrast, while plaintiffs admit that Tracy Ehmann had an outstanding bill with defendants, they deny granting defendants permission to use her logos to satisfy her debt. Rather, plaintiffs allege that in the summer of 2009, Tracy presented defendants with a non-exclusive licensing agreement, which Eric Ehmann drafted, to use a different copyrighted design for a 20-foot sculpture of Rhinelander mascot ("The Hodag sculpture") for a period of two years, as satisfaction for her debt. Defendants deny ever receiving or entering into this licensing agreement.

Still, there appears to be no signed copy of any purported licensing agreement, nor of any the alleged copyright transfer agreement between Tracy and Eric Ehmann. Plaintiffs allege that these agreements and all other documents relating to plaintiffs' sales of the Hodag merchandise were lost in a flood in 2010. However, plaintiffs will seek to introduce a computerized copy of the licensing agreement they allegedly drafted in 2009, along with expert testimony from Data Narro that the metadata for the document shows it was last modified on July 23, 2009.

Plaintiffs filed an early motion for summary judgment, which the court denied because there are genuine issues of material fact as to the ownership of the logos (Dkt.

#56). Defendants never filed a motion for summary judgment.

### ISSUES FOR TRIAL

Based on the parties' past submissions in this case, which were limited, the issues for the jury to decide at trial would appear to be: (1) whether Tracy Ehmann authorized defendants to use the Hodag logos in 2007, and if so, for how long; and (2) whether Eric Ehmann is the current owner of the copyright via the alleged transfer in October 2009. However, defendants now seem to dispute the validity of the copyright itself. Specifically, in their proposed jury instruction no. 12.2.1, defendants propose to include language that the copyright interest in the Hodag logos "may have been waived/forfeited by publication without proper statutory copyright notice," and "there was a failure to publish the work in accordance with the copyright statutes." Defendants' proposed jury instructions also suggest that, at some point, Tracy may have abandoned her copyright.

Unclear is whether defendants' claims of authorized use and abandonment are based on the same set of facts as the grant of permission. Legally, these two affirmative defenses are very different, since authorized use suggests merely a nonexclusive, oral license to use the copyrighted work in a particular manner, while abandonment is a relinquishment of the copyright altogether. *See Muhammad-Ali v. Final Call, Inc.*, 832 F.3d 755, 760-62 (7th Cir. 2016); *Shanlian Quan v. Ty, Inc.*, 2019 WL 1281975, at \*8 (N.D. Ill. Mar. 20, 2019).

Defendants have filed no related motion *in limine*, cited no authority for their assertion, nor proposed additional jury instructions on the validity issue. Moreover, the Seventh Circuit has not decided if the issue of validity should be determined by the bench

or jury. 7th Cir. Instr. 12.3.1, cmt. 1 (citing *Gaiman v. McFarlane*, 360 F. 3d 644, 648 (7th Cir. 2004), and *Pub'ns Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir. 1996)).

Accordingly, before the court in advance of trial, is how and in what order to address the two principal questions noted above regarding copying and Eric's standing in the case, as well as potentially, the validity of the copyright. Although Eric Ehmann's alleged current ownership of the copyright affects his standing and entitlement to damages, there appears no dispute that Tracy Ehmann was the owner of any enforceable copyright in 2007, when she allegedly abandoned her copyright and/or granted defendants permission to use the logos.

## OPINION

### A. Plaintiffs' Motions for Leave "to File Papers" (Dkt. ##110, 112)

Plaintiffs mistakenly read their deadline for filing their pretrial disclosures and documents to be February 19, rather than February 5, and accordingly filed their disclosures 3-4 days late (on February 8 and 9). Defendants oppose the motions on the ground that plaintiffs did not provide a good excuse for the late filings and ask that: (1) plaintiffs' statement about their expert witness's qualifications and experience (Dkt. #113) not be accepted; and (2) plaintiffs not be allowed to call any witnesses not identified in their initial disclosures.

Although defendants argue that it is unfair that plaintiff effectively had a few extra days to prepare their Rule 26(a)(3) disclosures, plaintiffs are proceeding *pro se*, and defendants do not seem to have suffered any real prejudice as a result of the very short delay. Although defendants state that they did not know about some of the witnesses

listed in plaintiffs' final disclosures, they do not develop this argument or identify any reason that plaintiffs should have named these witnesses sooner, whether under Fed. R. Civ. P. 26 or other discovery obligations. Finally, it looks like plaintiffs' initial expert witness report did not include Erik Thompson's qualifications, but defendants never challenged the report on that ground before their own expert response deadline and have not raised the issue in a motion of their own since.

If needed, the court can address any remaining failure to disclose issues regarding plaintiffs after hearing from the parties at the FPTC. Accordingly, the court will RESERVE ruling definitively on these motions until then.

#### **B. Plaintiffs' Motion to Exclude Character Evidence (Dkt. #93)**

Plaintiffs seek to exclude evidence about Eric Ehmann's 20-year-old criminal convictions and history of filing civil lawsuits, and Tracy Ehmann's alleged substance abuse. They do not provide any details about any of these things, arguing generally that such evidence is irrelevant and unduly prejudicial under Fed. Rs. Evid. 403, 608(b), and 609.

Defendants respond that they should be allowed to introduce evidence of the following to show plaintiffs' tendency to be untruthful:

- o **Eric Ehmann's convictions** in 1999 for uttering counterfeit obligations or securities under 18 U.S.C. § 472, and 2002 conviction for bank fraud and misuse of social security numbers under 18 U.S.C. § 1344.

Although Eric Ehmann's criminal convictions are old, they appear to relate to fraudulent claims and documents. Given that this case turns at least in part on documents

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