

**IN THE COURT OF APPEALS OF IOWA**

No. 2-274 / 11-1492  
Filed July 25, 2012

**TARSICIO MACIAS d/b/a  
NUESTRA GENTE, L.L.C.,**  
Plaintiff/Counterclaim Defendant-Appellant,

**vs.**

**ALAN RIVERA,**  
Defendant/Counterclaimant-Appellee.

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Appeal from the Iowa District Court for Scott County, Paul Macek, Judge.

Tarsicio Macias appeals the imposition of sanctions and subsequent damage award following voluntary dismissal of his claims and his default on Alan Rivera's counterclaim. **REVERSED AND REMANDED.**

Jennifer Kincaid and Steven Balk of McGehee, Olson, Pepping & Balk, Ltd., Silvis, Illinois, for appellant.

Craig Levien, Davenport, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

**DANILSON, J.**

Tarsicio Macias, d/b/a Nuestra Gente, L.L.C., brought an action against his former partner, Alan Rivera, alleging libel per se, unfair competition, and trade name dilution. Rivera filed a counterclaim alleging fraudulent misrepresentation, fraudulent nondisclosure, breach of fiduciary duty, and unfair competition. Macias was unrepresented by counsel during approximately nine months of the pretrial proceedings, failed to comply with discovery and court orders directing such compliance, and failed to pay monetary sanctions imposed by the court. After voluntary dismissal of his claims, the district court sanctioned Macias by entering a default judgment on the counterclaim and prohibiting Macias from providing any evidence at the hearing to determine damages. Macias appeals the district court ruling and judgment. We find the trial court abused its discretion by preventing Macias from participating in the damage hearing. We reverse and remand for a new hearing on damages.

**I. Background Facts and Proceedings.**

Tarsicio Macias and Alan Rivera entered an oral partnership agreement to produce and broadcast a Spanish language television show. Macias was the publisher of a Spanish language newspaper, and had connections with advertisers. Rivera had experience producing television programs and acting as the personality on camera. Rivera's wife also had experience producing television programming. While the parties did not execute a written partnership agreement, they agreed that Macias would fund the venture and Rivera would invest time and effort.

The parties collaborated to create a name and logo for the program, “Nuestra Gente.” Rivera’s employer produced the logo for him as a favor, at no cost. Rivera and his wife produced a demonstration video and eight additional programs.

A June 15, 2009 letter from Macias’ then attorney sought to reduce the terms of the partnership agreement to a written instrument and referenced over \$10,000 Macias had contributed to the partnership as of that date. Rivera and his wife refused to sign the agreement.<sup>1</sup> Macias registered a trademark for the show in his name only, without Rivera’s knowledge.

On or about June 15, 2009, Macias told Rivera he should have nothing further to do with Nuestra Gente. For the next two years, Macias aired the programs and used the introductions, “bumps,” and logo for an additional 102 programs. Rivera produced a different Spanish entertainment and news show which was broadcast on the same day and at the same time as Nuestra Gente, but on a different channel.

Nuestra Gente did not earn a profit. Rivera was not compensated for his investment of time, effort, and expertise. The few commercials Macias sold did not cover his financial investment in the show.

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<sup>1</sup> Rivera testified that the original plan was to divide ownership of the project 50% to Rivera and his wife, and 50% to Macias and his brother. Rivera claims after Macias’ brother left the partnership in late 2008 or early 2009, Macias agreed that Rivera and his wife would each retain a 30% share and Macias would have a 40% share of the partnership. However, by early June, Rivera was dissatisfied with Macias’ contribution, and proposed that Macias receive a 25% interest in the partnership. A June 15, 2009 letter from Macias’ attorney proposed that Macias would retain a controlling 50.1% share, leaving 49.9% to Rivera and his wife. Rivera testified that they did not enter a written partnership agreement because he and his wife would not agree to those terms.

On September 28, 2009, Tarsicio Macias, d/b/a Nuestra Gente, L.L.C., filed a petition alleging libel per se, unfair competition, and trade name dilution against Alan Rivera. After unsuccessful attempts at resolution, Rivera filed an answer and counterclaim alleging fraudulent misrepresentation, fraudulent nondisclosure, breach of fiduciary duty, and unfair competition. Rivera served interrogatories and requests for production on Macias.

Macias' original counsel filed a motion to withdraw on May 7, 2010. The motion was granted June 11, 2010. Macias went unrepresented until March 4, 2011. Macias failed to respond to Rivera's discovery requests and failed to attend a settlement conference. On February 10, 2011, Judge Darbyshire ordered Macias to pay \$300 to Rivera's attorney to cover attorney fees for the settlement conference which he failed to attend. The sanction went unpaid.

Macias attended the rescheduled settlement conference, but failed to comply with the local rule by neglecting to file required pre-trial materials.<sup>2</sup> In a March 4, 2011 ruling, Judge McKenrick imposed \$500 in monetary sanctions for Macias' failure to comply with the rule. The court further ordered Macias to comply with outstanding discovery and announced a sanction which would be imposed for failure to comply: "If Plaintiff fails to so deliver his responses, he will (be) prohibited from introducing any evidence to support his claims at trial."

No discovery responses were provided. Three days before trial, Rivera filed a motion to enforce the penalty contemplated for failure to comply with

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<sup>2</sup> Rule 7.1 of the Local Rules for the Seventh Judicial District of Iowa requires production of the following written materials at a settlement conference: a written statement of the contested issues of fact, facts to be proved, specific legal issues, and the theories of recovery for defense on behalf of each party, including a synopsis of the party's position . . . a schedule of exhibits, and a written copy of proposed jury instructions.

Judge McKenrick's March 4, 2011 ruling. Specifically, Rivera sought an order prohibiting Macias from introducing any evidence to support his claims at trial, and a default judgment against Macias on Rivera's counterclaim. Rivera's motion did not seek to prevent Macias from introducing any evidence in the hearing on damages for the counterclaim. A hearing on the motions was set for the morning of the jury trial. Macias was represented by counsel.

Macias had provided no discovery responses of any kind by the morning of trial. Potential jurors had been summoned to the courthouse. At the recommendation of counsel, Macias voluntarily dismissed his claims before the jury was empanelled in order to avoid further sanctions.<sup>3</sup> He expressed a willingness to stipulate to a breach of fiduciary duty and "just have the hearing on damages." Rivera's counsel characterized Macias' actions as follows:

I believe this is a case of the most serious violation a civil litigant could have in front of a court by ignoring two separate district court judge rulings and motions to compel and motions for sanction, and I would request at this point that the court enter an order of default against the plaintiff on all of defendant's liability claims.

Both parties agreed to waive the jury for the damage hearing. However, while Macias' counsel agreed to accept a default judgment, he advocated for his client's right to testify as to what damages should be allowed. Rivera's counsel objected to letting Macias testify in the damage hearing, stating "I don't know what the plaintiff would say on our claim of damages because he never

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<sup>3</sup> Macias contends he voluntarily dismissed his claim in lieu of further sanctions. While dismissal of his claim may have prevented further sanctions under his petition, it did not extinguish the court's authority to impose sanctions against Macias due to his failure to respond to discovery on the counterclaim. See *Miller v. Lauridsen Foods, Inc.*, 525 N.W.2d 417, 420 (Iowa 1994).

responded to discovery, so I—I don't think that it would be fair to allow him to testify.”

Judge Macek granted a default judgment against Macias on Rivera's counterclaim. He outlined Macias' lack of compliance with the rules of civil procedure and court orders, failure to pay the amounts imposed as sanctions, and waste of thirty potential jurors' time as justification for a severe sanction. He acknowledged that an individual should be able to defend himself in respect to a damage claim, but determined the prejudice to Rivera in proceeding without knowledge of Macias' defenses outweighed the imposition on Macias' right to present evidence. Judge Macek interpreted the language in Judge McKenrick's previous order as prohibiting Macias from presenting evidence in support of “his claims” to apply to all claims and assertions, but noted that even if Judge McKenrick did not intend such a broad interpretation, that would still be his ruling. Macias' attorney was only permitted to cross-examine Rivera's witnesses.

The court's ruling awarded Rivera \$30,400 in compensatory damages, \$5000 in punitive damages, and enjoined Macias from using, displaying, broadcasting, or otherwise benefitting from the Nuestra Gente logo and any of the programs, introductions, and bumps created by or produced by Rivera. Macias appeals the district court ruling and judgment.

## **II. Standard of Review.**

“[T]rial courts have inherent power to enforce our discovery rules and have discretion to impose sanctions for a litigant's failure to obey them.” *Keefe v. Bernard*, 774 N.W.2d 663, 669 (Iowa 2009) (quoting *White v. Citizens Nat'l*

*Bank of Boone*, 262 N.W. 2d 812, 816 (Iowa 1978)). We review imposition of discovery sanctions for abuse of discretion. *Kendall/Hunt Pub'g Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988).

### **III. Discussion.**

Macias contends the trial court erred in (1) preventing him from testifying in his own defense as a sanction for failure to comply with a discovery order, (2) prohibiting him from testifying as to the amount of damages, (3) its interpretation of the oral partnership agreement between the parties, and (4) its determination of compensatory and punitive damages awarded to Rivera. We do not address the issues relative to the appropriateness of the damage award, as we conclude the district court abused its discretion in the imposition of the sanction prohibiting Macias from offering proof in mitigation of damages.

#### *A. Default*

Judges have wide discretion in imposing sanctions for failing to comply with procedural rules; however, that discretion narrows when default is imposed. *Rowe*, 424 N.W.2d at 240. Default judgments may only be imposed if refusal to comply with discovery was a result of willfulness, fault, or bad faith. *Id.* This severe sanction is usually imposed only when a party has violated a district court order. *Id.* “The rule reflects the ‘proper balance between the conflicting policies of the need to prevent delays and the sound public policy of deciding cases on their merits.’” *Id.* (quoting *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977)).

After voluntarily dismissing his own claims, Macias stipulated to a breach of fiduciary duty and agreed to accept a default judgment.

The district court found that Macias' actions "were done willfully and in reckless disregard of (Rivera's) rights." Macias' repeated failure to comply with discovery requests and orders of the court commanding such compliance, coupled with the lack of any explanation for his failure, supports a conclusion that Macias acted either willfully, in bad faith, or was seriously at fault for his failings. See *DiGregorio v. First Rediscount Corp.*, 506 F.2d 781, 788 (3rd Cir. 1974). Macias violated multiple district court orders and failed to pay monetary sanctions imposed. Thus, a default judgment against Macias on Rivera's counterclaim was warranted. We affirm the entry of default judgment against Macias on Rivera's counterclaim.

*B. Damage Hearing—general rule.*

Generally, a defaulting party has the right to be heard and participate, cross-examine witnesses, offer proof in mitigation, and challenge causation. *Hallet Constr. Co. v. Iowa State Hwy. Comm'n*, 154 N.W.2d 71, 74 (Iowa 1967).

"It is true, that when a defendant defaults, the plaintiff becomes entitled to certain advantages. But such failure by the defendant does not enlarge his claim nor broaden his rights under the allegations of his petition. His right of recovery and the amount and nature thereof is still limited by those averments. Though a defendant may default, he is still within the pale of the law and is entitled to just treatment."

*Id.* at 73-74 (quoting *Rayburn v. Maher*, 288 N.W.136, 141 (Iowa 1939)). The defaulting party may even defeat the action by proving that no damages resulted.

*Id.* at 74.

We have been unable to find any Iowa case law to support prohibiting the defaulting party from introducing any evidence whatsoever where the damages



sought are unliquidated damages. Further, our review of other jurisdictions has found only one court that has upheld such a severe sanction in cases involving unliquidated damages. See *Davis v. Chatter, Inc.*, 270 S.W.3d 471, 479-80 (Mo. Ct. App. 2008).

In *Davis*, the court found the defaulting party followed a “deliberate and calculated course of obstruction.” *Id.* at 475. The defaulting party failed to appear for depositions and failed to respond adequately to interrogatories and requests for production, thus providing no indication of its defenses. *Id.* at 474. The court blamed the defaulting party for the incomplete record. The court relied on Missouri precedent which supported judicial discretion for imposition of sanctions including denying the right to cross-examine or present witnesses. *Id.* at 476. To avoid prejudice, the court denied the opposing party the right to participate in the damages hearing, but allowed counsel to make a record.

Rejecting the result in *Davis*, *Fisher v. McCarray Crescent City*, 972 A.2d 954, 978-80, 983-84 (Md. Ct. Spec. App. 2009), held that a district court abused its discretion by precluding a defaulting party from participating in a damages hearing:

Default (and) dismissal are the greatest sanctions under Rule 2-433(a). All of the other sanctions—taking facts as established, prohibiting a party from introducing certain evidence, striking out parts of pleadings—are measures that could lead to default or dismissal. The rules do not expressly permit completely precluding a defaulting party from participating in a damages hearing.

*Id.* at 982 (footnote omitted).<sup>4</sup> The court found the discovery abuses willful and egregious, justifying imposition of harsh sanctions on remand; however, it determined that counsel must at least be permitted to participate to preserve a record for appellate review:

It is beyond cavil that the entry of [an order of] default . . . merely establishes the non-defaulting party's right to recover. The general rule, therefore, is that, although the defaulting party may not introduce evidence to defeat his opponents' right to recover at the hearing to establish damages, he is entitled to present evidence in mitigation of damages and cross-examine witnesses.

*Id.* at 983.

*c. Sanctions prohibiting the introduction of evidence.*

The district court's written ruling explains the sanctions imposed on Macias:

On the date set for trial, the plaintiff had not complied in any way with the Court's order to provide responses to outstanding discovery. Because the plaintiff had failed to respond to discovery, he was barred from introducing evidence at the time of the trial. Some of the discovery was intended to obtain information concerning the plaintiff's defenses to the counterclaim. Without the discovery, the defendant was not fairly apprised of the plaintiff's evidence and was thereby prejudiced. Because of this prejudice, the plaintiff was not allowed to adduce any evidence against the defendant. The plaintiff was in default.

Our rules provide that a court may impose just sanctions for failure to obey an order to provide or permit discovery, including "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting such party from introducing designated matters in evidence . . . or

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<sup>4</sup> Maryland's Rule 2-433(a) is the equivalent of Iowa Rule of Civil Procedure 1.517, and the relevant language is virtually identical.

rendering a judgment by default against the disobedient party.” Iowa R. Civ. P. 1.517(2)(b).<sup>5</sup>

In examining the rule, we are guided by the maxim “*expressio unius est exclusio alterius*”—expression of one thing is the exclusion of another. We presume that the intent of the rule drafters is expressed by omission as well as by inclusion, and that the express mention of one thing implies the exclusion of others not mentioned. See *Marcus v. Young*, 538 N.W. 2d 285, 289 (Iowa 1995) (applying this principle to determination of legislative intent in statutory construction). Rule 1.517(2)(b) introduces a non-exhaustive list of sanctions available to the court, with the language “and among others the following.” However, the rule then specifically sets forth five of the most severe sanctions available—including dismissal and entry of default—without mentioning the type of sanction imposed in this case: the exclusion of all evidence.

We believe inclusion of the word “designated” expresses the intent to permit sanctions including refusing to allow the disobedient party to support or oppose certain specified claims or defenses, and prohibiting the disobedient party from introducing certain specified matters into evidence. However, use of the word “designated” instead of the words “all” or “any” implies the court should specify or particularize the evidence to be excluded in preference to a sanction

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<sup>5</sup> A court may also sanction a party for failure to appear at a pretrial conference or for appearing substantially unprepared to participate in the conference. See Iowa R. Civ. P. 1.602(5): (“*Sanctions*. If a party or party’s attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party’s attorney is substantially unprepared to participate in the conference, or if a party or party’s attorney fails to participate in good faith, the court, upon motion or the court’s own initiative, may make such orders with regard thereto as are just.”).

excluding all or any evidence. Furthermore, rule 1.517(1)(a) mandates that “[a]ny order granting (a motion to compel discovery) shall include a statement that a failure to comply with the order may result in the imposition of sanctions.” This rule ensures that parties have some notice that non-compliance with the rules will have consequences. While the language of the rule does not require such notice to be specific as to which sanctions may be imposed, the ruling entered by Judge McKenrick specifically announced that if Macias failed to comply with the March 4, 2011 order, he would be “prohibited from introducing any evidence to support *his claims* at trial.” (Emphasis added.)

Upon entry of that ruling, Macias had notice he would not be permitted to enter evidence in support of his petition if he failed to meet the discovery deadline. However, with knowledge that dismissal of his petition was virtually unavoidable given his repeated discovery abuses, he had no reason to believe that non-compliance posed any additional risk of sanction. The language in the March 4, 2011 ruling gave insufficient notice to Macias that his failure to comply with the motion to compel would result in a prohibition against presenting all evidence, including evidence in mitigation of damages on Rivera’s counterclaim.

However, a court has inherent power to impose sanctions on a litigant. The Iowa Supreme Court recently described the power of district courts to regulate cases and impose sanctions for discovery abuses:

The district court has inherent power . . . to maintain and regulate cases proceeding to final disposition within its jurisdiction . . . . We recently reaffirmed that trial courts have this inherent power. This power includes the authority to exclude evidence for failure to supplement discovery. Noncompliance with discovery requirements is often not tolerated. We will not reverse the

imposition of a sanction unless there has been an abuse of discretion. An abuse of discretion consists of a ruling which rests upon clearly untenable or unreasonable grounds.

*Lawson v. Kurtzhals*, 792 N.W.2d 251, 258 (Iowa 2010) (citations omitted).

To determine whether an abuse of discretion occurred, we must determine whether the district court properly considered the available options. *Lawson*, 792 N.W. 2d at 259. The trial court should consider the following factors to assess appropriateness of possible sanctions: (1) the party's reason for not providing the evidence during discovery; (2) importance of the evidence; (3) time needed for the opposition to prepare to respond to the evidence; and (4) propriety of granting a continuance. *Id.*

Macias offered no reason for his failure to comply with discovery requests, though he was not represented by counsel for approximately nine months. The importance of the ability to offer evidence in mitigation of damages cannot be disputed. It is also undisputed that Rivera would not have had an opportunity to prepare to defend against any evidence Macias would have proffered at trial, but this would be true for any defaulting party. We also do not disregard or overlook Rivera's concern that Macias may have attempted to introduce evidence that Rivera sought in discovery which was not previously disclosed. However, any violations of the prohibition could have been resolved by counsel's objections. Instead, the court imposed a blanket prohibition preventing the introduction of any evidence by Macias.

Certainly, a disobedient party may be prohibited from introducing *designated* matters into evidence. Iowa R. Civ. P. 1.517(2)(b)(2); *Shinrone v.*

*Tasco Inc.*, 283 N.W.2d 280, 283 (Iowa 1979). In *Lawson*, the court found it was not an abuse of discretion to prevent a sanctioned party from presenting evidence not previously disclosed. However, the disobedient party had already disclosed some evidence of damages which was allowed to be introduced. The sanction merely operated to deny the right to introduce additional evidence disclosed in a supplementation of discovery responses which was offered five days prior to trial. *Id.* at 254.

Unlike the sanctioned party in *Lawson*, Macias was not permitted to offer any evidence whatsoever in mitigation of the damages alleged in the counterclaim. This sanction was imposed after Macias voluntarily agreed to dismissal of his petition, in anticipation of a sanction of dismissal, and the district court had already imposed the drastic sanction of entry of default judgment on Rivera's counterclaim. Macias was also sanctioned by the assessment of attorney fees. Moreover, though Macias' counsel agreed to proceed with a damages hearing only, he requested that Macias be allowed to testify in the damages hearing.

We can certainly imagine circumstances where a party may be precluded from fully participating in a damage hearing by the court's inherent authority, such as where the party's conduct in court is so disruptive that the right to participate is lost, or the party engages in other egregious conduct not existing under the facts of this case, for example intentionally destroying evidence.

However, we conclude that even after the imposition of sanctions including a default judgment, the rule espoused in *Hallet* should ordinarily apply,

and the defaulting party should be given the opportunity to participate in the damage hearing if the damages sought are unliquidated damages. If the non-defaulting party contends that it would be unduly prejudiced by the defaulting party's failure to disclose evidence, the district court, after giving due consideration to the arguments of both parties, shall first consider a less drastic sanction or remedy than the exclusion of all evidence of the defaulting party. Similar to failure to comply with the rule for designation of experts,<sup>6</sup> the court should consider other sanctions "such as a continuation of the trial or limitation of evidence" before imposing the severe sanction of prohibiting all of the defaulting party's testimony, or as here, barring the presentation of *any* evidence. See *Lambert v. Sisters of Mercy Health Corp.*, 369 N.W.2d 417, 421 (Iowa 1985) (finding exclusion of an expert's testimony justified only when prejudice would result).

Our supreme court recently reaffirmed its holding in *Lawson* that noncompliance with discovery is not tolerated. *Whitley v. C.R. Pharmacy Service Inc.*, \_\_\_ N.W.2d \_\_\_, 2012 WL 2479588, at \* 8 (Iowa 2012). In *Whitley*, the court again recited the *Lawson* factors the court should consider in imposing sanctions and stated:

Thus, in considering sanctions, a continuance can be used as a tool to minimize or eliminate prejudice that can be visited on a party when discovery is withheld. A continuance can give the complaining party an opportunity to overcome the surprise and prepare an effective response to the new evidence. Generally, a continuance is considered to be the "traditionally appropriate remedy" for a claim of surprise at trial.

*Id.*

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<sup>6</sup> Iowa R. of Civ. P. 1.508.

Here, the court could have ordered a continuance conditioned upon Macias completing Rivera's interrogatories or subjecting himself to a deposition to minimize or eliminate Rivera's surprise or prejudice. If Macias' attorney was unable to gain his client's cooperation under such circumstances, the sanction barring all of Macias' evidence would have been just. Furthermore, we note that Rivera's attorney offered the court another alternative: receiving the evidence subject to Rivera's objection.

Here, the hearing became a one-sided proceeding not significantly different than an ex-parte proceeding.<sup>7</sup> Under the facts of this case, we conclude the district court abused its discretion in barring Macias from presenting any evidence at the damage hearing without first using another remedy such as a continuance or making a record why no other remedy was adequate to avoid prejudice, where the damages sought are unliquidated damages. The need to use or consider other remedies before depriving a litigant of the right to be heard, the right to vocally express themselves in the proceedings, can be no greater where, as here, the damages sought included punitive damages. Because we reverse and remand for a new damage hearing, we need not resolve the issues raised with respect to the propriety of the damage award.

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<sup>7</sup> Moreover, although the district court cited the need for full disclosure and potential unfairness to Rivera in general terms, the district court did not allude to any support in the record other than a general reference that the discovery "was intended to obtain information concerning the plaintiff's defenses to the counterclaim" that we may rely upon to find prejudice. *Bonds v. District of Columbia*, 93 F.3d 801, 804 (C.A.D.C. 1996) (finding the record lacked support for a finding that a sanction prohibiting testimony at trial was necessary to prevent prejudice).



**IV. Conclusion.**

We find the trial court abused its discretion by prohibiting Macias from introducing any evidence in the damages hearing. We reverse and remand for a new hearing on damages, and to allow Macias to participate as provided in *Hallet*, subject to the use of any appropriate remedy, as may be necessary to prevent prejudice to Rivera.

**REVERSED AND REMANDED.**