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NO: ~~6623-2-I~~

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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JULIE A. JAMES, a single person,

Plaintiff/Respondent,

vs.

ROBERT L. WOODMAN and MARY C. WOODMAN,  
individually and as a marital community,

Defendants/Appellants.

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Appeal from the Superior Court of Washington  
for King County  
Honorable Greg Canova, Judge  
(Cause No. 08-2-36958-7 SEA)

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**BRIEF OF RESPONDENT**

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COURT OF APPEALS  
DIVISION I  
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## I. RESPONDENT'S STATEMENT OF THE NATURE OF THE CASE

The first paragraph of appellants' (the "Woodmans" or "defendants") "Nature of the Case" (Def. Brief, p. 1), asserts as established facts statements from a declaration of the Woodmans' daughter which,

- (a) were not presented to the trial court until after a judgment had been entered;
- (b) were unsupported by any medical professional testimony or evidence; and
- (c) were contradicted on material issues by a videotape of Mr. Woodman attending and playing at a music festival in mid-August 2010, in which he walked on and off the stage unassisted.

The record as a whole contains substantial evidence and findings by the trial court that Mr. Woodman did not appear at trial on August 31, 2010, after being properly served with notice. The trial court did not abuse its discretion by entering a default judgment pursuant to CR 43(f)(3), and denying defendants' motion for post judgment relief.

## II. RESPONDENT'S<sup>1</sup> STATEMENT OF THE ISSUES PRESENTED

Item A of the Woodmans' "Issues Presented" *inter alia* assumes

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<sup>1</sup> In what appear to be typographical errors, the cover page of the Brief of Appellants identifies Julie James (the plaintiff in the Superior Court) as the Appellant, the Woodmans (defendants in the Superior Court) as Respondents and the Reed McClure and Wieck Schwanz firms as attorneys for Appellants. As Julie James sees it, the Woodmans, who lost at trial and are appealing, are the Appellants, she is the Respondent, and Reed McClure represents the Woodmans.

that Mr. Woodman did not attend the trial because of illness and ignores both the lack of any medical evidence supporting that assumption and the trial court's discretion on this matter to resolve disputed issues of fact. Item B of their "Issues Presented" ignores, *inter alia*, the trial court's oral opinion at RP 6-7, which is quoted in part at note 4.

### III. RESPONDENT'S STATEMENT OF THE CASE

Appellants' "Statement of Relevant Facts" cites only to CP 39, a declaration from one of the Woodmans' lawyers. App. Brief, p. 4. That lawyer acknowledges that her "personal knowledge" only comes from her "review of the superior court materials and the audio recording of the August 31, 2010 proceedings." *Id.* That is not "personal knowledge" as that term is used in ER 602. Appellants' "Statement of the Relevant Facts", however, acknowledges the importance that Mr. Woodman's testimony would have had to this case if he had complied with plaintiff's CR 43(f) notice to attend and testify at the trial. His testimony would have been important to liability. His attorneys on appeal claim "Mr. Woodman did not see plaintiff." Def. Brief, p. 4. His attorney at trial, on the other hand, acknowledged that Mr. Woodman had seen Ms. James before hitting her, i.e., "Mr. Woodman did not see Ms. James until it was too late." CP 15 (emphasis added). The truth, including which, if either of those claims was true, could only have been determined by Mr. Woodman's trial

testimony as to whether and when he actually saw plaintiff and was his attention distracted or was he not paying attention. His attorney on appeal also claims that “[t]he vehicle was traveling at low speed.” *Id.* His rate of speed is highly relevant both to liability (his speed compared to the speed limit and visibility) and to damages (the greater the speed at contact, the greater the impact and the greater the likely resulting injury). “Low speed” means different things to different people. Mr. Woodman’s testimony, which plaintiff was entitled to obtain, would have provided important evidence relating to liability and damages.

Mr. Woodman was properly served on July 28, 2010, with a Notice to Attend Trial, which was filed on August 2, 2010. RP 1, CP 152-53. The Clerk’s Papers contain no report, letter, or declaration from any medical professional that Mr. Woodman could not attend the trial. On August 31, the trial court put on the record an earlier conversation with counsel in chambers that “[t]he Defendant has indicated he will not be attending trial in spite of the proper service of the notice.” RP 1 (emphasis added). That same day, Mr. Woodman’s counsel stated in open court that she had “significant concerns over whether he [Mr. Woodman] could or could not attend the trial”, that defendants had obtained nothing on this issue from any medical provider, and that remedies under CR 43 included striking the liability defense as an alternative to default:

I can tell the Court that Mr. Woodman has recently h[ad] a stroke. I – when I say recently, I mean within the last several months. His wife is ill. He is, I – in h[is] mid-eighties. And I do have significant concerns over whether he could or could not attend a trial. He has indicated to me that he cannot attend trial.

I have, however, been unable to obtain anything from any sort of medical provider that would support that idea that he is physically unable to attend trial. And I and my office, and actually Mr. Woodman’s family have all made great efforts to try to obtain something to that effect.<sup>2</sup>

I – there are a number of different remedies under Civil Rule 43. It’s not simply a default judgment. The Court could alternatively strike out the liability defense and have the case proceed to trial on the issue of general damages only. The medical specials have been stipulated already.

RP 3-4 (emphasis added).<sup>3</sup>

Plaintiff moved for a judgment pursuant to CR 43(f)(3). RP 1-2;

CP 161-62. Plaintiff’s counsel at RP 4-5 made:

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<sup>2</sup> The Woodman’s attorney never indicates that she advised either plaintiffs or the court before August 31 of the failure of those efforts and there is no evidence in the record of a motion filed by defendants either pursuant to CR 43(f)(1) or for a continuance pursuant to CR 40. CR 43(f)(1) specifically provides:

For good cause shown in the manner prescribed in rule 26(c), the court may make orders for the protection of the party or managing agent to be examined.

<sup>3</sup> At page 5 of their brief, defendants assert, citing CP 40, 84-85, that “[t]he record is in dispute whether defense counsel had earlier advised plaintiff’s counsel that the Woodmans would not be able to attend trial due to their illness.” Plaintiff’s facts at CP 84-85, are contained in the declaration of Mr. Krinsky, who had personal knowledge since he was a participant in the communications on this subject with defense counsel, and who says there was no prior notice that Mr. Woodman “would not be able to attend trial.” Defendants’ facts are contained in the declaration of Marilee Erickson (CP 39-40), who had no personal knowledge. Plaintiff’s counsel on appeal has reviewed the same materials that Ms. Erickson relied upon and finds no support in the record for her assertion that “counsel for defendants Robert and Mary Woodman had advised plaintiff’s counsel prior to August 31 that they would not be able to attend trial because of illness.” CP 40 (emphasis added).

[A]n offer of proof, if the Court wanted to look at i[t.] Which is the videotape that I made myself of Mr. Woodman approximately two weeks ago accepting an award for his musicianship over the many years and playing his instrument and singing lyrics. And he looked quite fit to me.

So, I don't dispute Counsel at all, but I query whether he could in fact attend.

So, I think an appropriate remedy is to award judgment and strike his pleadings and award a judgment, Your Honor.

THE COURT: Counsel, you indicated back in chambers, I believe, that the date that you recorded Mr. Woodman was the 22<sup>nd</sup> of August?

MR. KRINSKY: That was Saturday, August 21<sup>st</sup> ...

...

MR. KRINSKY: -- recorded at the Vashon Winery on Vashon Island on, I believe it's 154<sup>th</sup> Street Southwest. North of the town of Vashon.

THE COURT: Has Defense Counsel seen the video?

MR. KRINSKY: No, she hasn't. She's welcome to.

THE COURT: All right.

MR. KRINSKY: I did advise her of its existence yesterday when we spoke.

The trial court's oral opinion at RP 6-7 granting plaintiff's motion under CR 43(f)(3) specifically dealt with (a) the prejudice to plaintiff of Mr. Woodman's failure to appear at trial, (b) the lack of any evidence of a medical basis for Mr. Woodman not appearing at court, and (c) the court's

consideration of alternative remedies in connection with granting a default judgment.<sup>4</sup>

The court later entered Findings of Fact and Conclusions of Law (CP 26-27), which were “Approved for Entry” with no objection by defendants’ attorney. CP 27. Finding of Fact 1 states in relevant part, that the “plaintiff presented to the Court a video tape of Mr. Woodman playing his fiddle and singing at a folk festival on Vashon Island on August 21, 2010, which plaintiff argued refuted the defendants claim of Mr. Woodman’s inability to attend deposition or testify at trial.” CP 22. Conclusion of Law 1, stated:

The Court concludes that the defendants failed to appear for trial and were thus unavailable to testify. The Court considered the available remedies for defendants’ failure to testify and concludes that striking the Answer and ordering entry of judgment against the defendants is the appropriate

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<sup>4</sup> Given the fact that the Defense in this case is an absolute denial of liability, the presence of Mr. Woodman is not simply procedural; the presence of Mr. Woodman is rather essential, I would assume, to the Defendant’s case. It’s also rather essential, in fact, to the Plaintiff’s case.

The absence upon proper service of notice compelling his attendance for trial at a minimum, I won’t deal with the issue of his not being available for a deposition, but his having been properly served with a Notice of Appearance at Trial being required and his failing to respond and the Court having no evidence that in fact there is a medical basis for his inability to respond, is going to grant the Defendant’s motion – excuse me, the Plaintiff’s motion under 43(f) Sub 3, is going to grant a default judgment by striking the answer filed in this case.

That appears to the Court to be the most appropriate remedy under the rules. While Counsel for the Defendant is correct, there are other options available, this appears to be the most appropriate, given the nature of the defense and the detriment to Plaintiff by not having the Defendant available for trial and certainly not having had him available for a deposition precludes the use of [de]position testimony in lieu of his appearance here.

RP 6-7 (emphasis added).

remedy in this case. On August 31, 2010 in open court, upon plaintiff's motion, the Court Granted PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' ANSWER AND FOR ENTRY OF JUDGMENT pursuant to CR 43.

CP 25.

Citing only CP 123, a declaration dated November 1, 2010, defendants assert that no copy of the videotape was "ever provided to the defense prior to this appeal." Def. Brief., p. 6.<sup>5</sup> However, defendants' first request for a copy of the video was the afternoon of October 28 even though plaintiff's advised defendants of its existence on August 30 (almost two months earlier) and offered defendants' counsel an opportunity to see it on August 31. RP 4-5. Plaintiff will provide a copy of the videotape to this Court if defendants agree to its provision in their reply.

On October 1, 2010, defendants moved to "Vacate Default Judgment and For Reconsideration And/Or New Trial." CP 28-36. Attached to this motion was a declaration from Elaine Jewett, defendants' daughter (CP 64-66). That declaration stated that at some unspecified time and on one occasion, Ms. Jewett called the office of her father's neurologist, but could not get past the receptionist and left a message. She also states she made one visit to her father's cardiologist, but there "was no one in the office at the time of my visit." There is no indication of

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<sup>5</sup> Defendants later implicitly admit that a copy was provided "after this appeal was filed." *Id.* at p. 21. *See also* letter attached as Appendix 1 to this brief.

when that was or of any follow up. She also refers to a primary care doctor for her father, but in that declaration (more than two months after the CR 43(f) notice was served), she states that “[t]o date, I have been unable to obtain anything from the doctor’s office regarding the state of my father’s health.” CP 65. She never identifies the “doctor’s office” to which she was referring.

She also declared that her father has “three physical therapy appointments a week” and that while her father attended the August festival videotaped by Mr. Krinsky, she “helped [sic] onto and off of the stage.” CP 66. Assuming Ms. Jewett intended to convey that she “helped [her father] onto and off of the stage”, Mr. Krinsky at CP 88 disputed this and declared,

The video disc of the folk music festival shows Mr. Woodman walking to the stage by himself and mounting the stairs to the stage, unassisted by his daughter. This is contrary to her statement in her declaration.

#### IV. ARGUMENT

##### A. Standard of Review.

*Magana v. Hyundai Motor America*, 167 Wn.2d 570, 582-83, 220 P.3d 191 (2009), sets forth the appropriate standard of review for this appeal. *Magana* held that:

We review a trial court’s discovery sanctions for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993)<sup>5</sup>.

“A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion.” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (citing *Fisons*, 122 Wn.2d at 355-56 (emphasis added; footnote omitted)).

While *Magana* dealt specifically with discovery sanctions rather than sanctions for failure to comply with CR 43(f), all parties to this appeal agree that cases interpreting sanctions under CR 37 are useful and defendants (who also cited *Magana*) claim that they are controlling. Plaintiff believes that *Magana* is the closest precedent. *Magana* also holds at 582-83 that:

[S]ince the trial court is in the best position to decide an issue, deference should normally be given to the trial court's decision. *Fisons*, 122 Wn.2d at 339, 858 P.2d 1054. . . . An appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record. See *Ermine v. City of Spokane*, 143 Wn.2d 636, 650, 23 P.3d 492 (2001) (noting that a reasonable difference of opinion does not amount to abuse of discretion).

The biggest difference between plaintiff and defendants view of the standard of review is defendants' argument that:

Significantly, where, as here, the trial court denied a CR 60(b)(5) motion to vacate a void judgment, review is de novo. See *Ahten v. Barnes*, 158 Wn. App. 343, 350, 242 P.3d 35 (2010); *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997). Otherwise, a denial of a motion to vacate a judgment is reviewed for abuse of discretion. *Friebe v. Supancheck*, 98 Wn. App. 260, 266, 992 P.2d 1014 (1999). (Emphasis added.)

Def. Brief, p. 11. Plaintiff disagrees with the first sentence in the above quote, which represents a change in position from defendants' position in the trial court. Defendants admitted in the trial court that "this court must exercise its discretion in deciding whether to vacate a default judgment." CP 31 (emphasis added). The use of discretion by the trial court is inconsistent with *de novo* review on appeal.

On appeal, defendants now rely on *Ahten, supra* and *Dobbins, supra*. However, both of those cases involved motions to vacate default judgments for lack of jurisdiction.<sup>6</sup> That is not the situation here because there is no dispute that the trial court had jurisdiction over this matter: the dispute is whether the trial court properly granted a default judgment for violation of CR 43(f)(3).

Adopting defendants' current position, moreover, would be inconsistent with *Magana*, and would render that case largely meaningless. That is because while *Magana* adopts an abuse of discretion standard for review of the trial court's imposition of sanctions, defendants'

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<sup>6</sup> In *Ahten v. Barnes*, 158 Wn. App. 343, 349-50, 242 P.3d 35 (2010), the court held:

"Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void." *In re Marriage of Markowski*, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988). "Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed *de novo*."<sup>4</sup> *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997).

(Footnote omitted.)

position would mean that if a trial court, utilizing its discretion, imposed default as a sanction, the defaulted party could move for relief pursuant to CR 60 and when that relief was denied, appeal that denial on a *de novo* basis. That makes no good sense.<sup>7</sup>

**B. Relationship Between CR 37 And CR 43(f)(3).**

CR 43 is part of the “Trials” portion of the civil rules (CR 38 - 53.4). CR 43(f)(1) provides that “a party” “may be examined at the instance of any adverse party”, while 43(f)(3) provides that if a party refuses to attend and testify at trial, “the complaint, answer, or reply of the party may be stricken and judgment taken against the party ...”

This appeal involves interpreting the language and purpose of CR 43. The Woodmans rely heavily on cases interpreting CR 37, a discovery rather than a trial rule. *See* Def. Brief, pp. 13-15, citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997) and *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002). They argue that “[a]lthough these safeguards have thus far been applied only under CR 57, they should also apply to the striking of an answer and entering judgment against a defendant under CR 43(f)(3).” Def. Brief, p. 15. And they go so far as to argue that “there is no reason why the two rules [CR 37 and 43] should be treated differently

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<sup>7</sup> Plaintiff, on the other hand, agrees with defendants that “[a]n order denying reconsideration is reviewed for abuse of discretion.” Def. Brief, p. 12.

where due process is concerned” and that the “difference between not answering discovery and not appearing at trial” is irrelevant. *Id.* at 14. Defendants’ argument goes too far.

Plaintiff agrees that a default judgment has due process implications and agree that *Burnet* and *Rivers* are relevant to the present appeal. However, there are significant differences between trial and discovery which undermine defendants’ argument that the CR 37 analysis should apply to CR 43 without any modification. For example, the court system has an interest in trials beginning when scheduled that is greater than its interest in discovery taking place at a particular day. That is because trials are often the key point in the judicial decision-making process and also because trials use a disproportionate share of judicial and public resources. This is in contrast to discovery which primarily involves the parties and their attorneys and witnesses with only periodic judicial supervision.

Not showing up at trial is more problematic than not answering an interrogatory or not showing up on a particular day for a deposition for several reasons. First, the discovery period for most cases is a year or more, while most trials are completed in a much more compressed period of one to ten days. Secondly, delays and continuances obtained on the day of trial cause particularly serious costs and inefficiencies for the parties

(getting witnesses available and prepared for a particular trial date only to have the trial moved), the court (setting aside time for a particular trial, only to have the trial moved), the attorneys (getting prepared for a trial, only to have the trial moved), and the public (prospective jurors coming in only to have the trial continued).<sup>8</sup> For that reason, several sections of the court rules involving trial besides CR 43(f) are designed strongly to discourage last-minute delays and trial changes. *See, e.g.*, CR 40(d)(e).<sup>9</sup>

The cases relied upon by defendants recognize these distinctions between discovery and trial. For example, in *Burnet*, 131 Wn.2d at 497-98, the court stated:

One major difference is that although several years had transpired from the initiation of the Burnets' claim until their expert witnesses were named, deposed, and their opinions was clearly identified, a significant amount of time yet remained before trial. That being the case, Sacred Heart could not be said to have been as greatly prejudiced as the non-wrongdoing parties in *Allied* and *Dempere*, who engaged in the sanctionable conduct on the eve of trial.

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<sup>8</sup> As defendants admitted, the trial court had previously granted a trial continuance based on defendants' claimed health problems: "On March 1, 2010, the trial court, upon agreement of the parties, moved the trial date to August 30, 2010, to accommodate Mr. Woodman's health. (CP 100-01)." Def. Brief, p. 5.

<sup>9</sup> CR 40(d), (e) provides in relevant part:

- (d) Trials. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a continuance. The court may in a proper case, and upon terms, reset the same.
- (e) Continuances. A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and address of the witness or witnesses.

... Furthermore, even if the trial court had considered other options before imposing the sanction that it did, we would be forced to conclude that the sanction imposed in this case was too severe in light of the length of time to trial, ...

(Emphasis added.) Furthermore, the tests applied with respect to violation of discovery orders under CR 37(b), cannot be carried over wholesale to CR 43(f)(3), which does not require violation of a predicate order. *See, e.g., Rivers*, 145 Wn.2d at 686, which requires that the record reflect “the party’s refusal to obey the discovery order.” Since 43(f)(3) is not based on violation of an “order”, that part of the test cannot be literally applied to CR 43(f)(3).<sup>10</sup>

**C. The Trial Court’s Oral Decision Is Part Of The Record And May Be Considered To Interpret Its Findings And Judgment.**

Plaintiff agrees with defendants that the “court’s oral decision may be considered to interpret and explain findings and judgment”. Def. Brief. pp. 17-18 citing *Wallace Real Estate Investment, Inc. v. Groves*, 72 Wn. App. 759, 770, 868 P.2d 149, *aff’d*, 124 Wn.2d 881, 881 P.2d 1010 (1994).<sup>11</sup> The Court’s oral decision at RP 6-7 is important in interpreting

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<sup>10</sup> CR 37(d) also does not require violation of a court order.

<sup>11</sup> In *Blair v. TA-Seattle East No. 176*, 2011 WL 1499901 (Wash), the Supreme Court of Washington acknowledged the potential importance of oral findings and conclusions in the record by remarking on their absence:

Neither of the trial court's orders striking Blair's witnesses contained any findings as to willfulness, prejudice, or consideration of lesser sanctions, nor does the record reflect these factors were considered. For example, there was no

and explaining Finding of Fact 1 (CP 22), Conclusion of Law 1 (CP 25), and its Judgment. For example, the trial court orally found that Mr. Woodman's appearance and testimony was "rather essential, in fact, to the Plaintiff's case." (Emphasis added.) Judge Canova went on to find and conclude that there was no evidence of a medical basis for Mr. Woodman's failing to respond as required and that none of the options under CR 43(f)(3) other than default were appropriate given "the detriment (i.e., prejudice) to plaintiff by not having the defendant available for trial":

The absence upon proper service of notice compelling his attendance for trial at a minimum, I won't deal with the issue of his not being available for a deposition, but his having been properly served with Notice of Appearance at trial being required and his failing to respond and the Court having no evidence that in fact there is a medical basis for his inability to respond, is going to grant the Defendant's motion -- excuse me, the Plaintiff's motion under 43(f) Sub 3, is going to grant a default judgment by striking the answer filed in this case.

That appears to the Court to be the most appropriate remedy under the rules. While Counsel for the Defendant is correct, there are other options available, this appears to be the most appropriate, given the nature of the defense and the detriment to Plaintiff by not having the Defendant available for trial . . . (emphasis added).

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colloquy between the bench and counsel. There was no oral argument before the trial court entered its orders, and the orders themselves contain bare directives. Under Burnet and Mayer, the trial court therefore abused its discretion by imposing the severe sanction of witness exclusion in the August 14 and October 15 orders. (Emphasis added.)

This oral decision is in “the record” and thus meets the requirement of cases such as *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006), that:

[F]or the “most severe” CR 37(b)(2)(C) sanction of dismissal or default, the record must show three things—the trial court’s consideration of a lesser sanction, the willfulness of the violation, and substantial prejudice arising from it. (Emphasis added.)

*Cf. Blair, supra* at n. 11.

Defendants’ argument at pp. 18-19 of their Brief that there was no finding of fact of substantial prejudice to plaintiff is belied by the oral decision quoted above. The same is true of defendants’ argument at page 19 that “nowhere is there any finding of fact or conclusion of law about the nature of the lesser remedies the court considered or why one or more of those remedies would not have sufficed.” The last quoted paragraph of the oral decision deals directly with that topic. Moreover, as discussed, *supra* at pages 2-3, the record in the trial court showed the relevance of Mr. Woodman’s testimony to both liability and damages and thus the prejudice to plaintiff on both topics from Mr. Woodman not attending and testifying. Finally, while defendants claim that there are no findings as to “willful refusal” (*id.*), the oral opinion found that there was “no evidence that in fact there is a medical basis for his inability to testify.” As discussed, *infra* at Section E, that is a basis for a finding of willfulness.

**D. The Court’s Finding that Mr. Woodman “Failed” To Appear And Testify At Trial Complied With CR 43(f)(3).**

CR 43(f)(3) uses the term “refuses to attend and testify”, while the trial court found that Woodman “failed to appear at trial.” Defendants, citing only dictionary definitions, argue that the “failure to do something is not necessarily a refusal to do so,” and, therefore that there was no finding or evidence that Mr. Woodman refused to attend and testify. Brief, p. 18. Defendants are wrong because (a) Washington courts, interpreting both CR §§ 43(f) and 37, use “refuse” and “fail” synonymously and (b) that is what the trial court did in this case.

(a) *Campbell v. A.H. Robins Co., Inc.*, 32 Wn. App. 98, 64 P.2d 1138 (1982) is a leading Washington case interpreting CR 43(f). In *Campbell*, this Court used “fail” as a synonym for “refuses” under CR 43(f), holding:

The rule authorizes the court in its discretion to levy sanctions against the employer, Robins, if its managing agents fail to appear. CR 43(f)(3).

(Emphasis added.) Similarly, in *Rivers v. Washington State Conference of Mason Contractors*, the Supreme Court uses “failure” and “refusal” interchangeably in the context of CR 37(b)(2), which uses the term “fails”.

*Compare*, 145 Wn.2d at 686:

When a trial court imposes dismissal or default in a proceeding as a sanction for violation of a discovery order,

it must be apparent from the record that (1) the party's refusal to obey the discovery order was willful or deliberate . . .

*With Id.* at 700:

We remand to the trial court for a new determination whether the complaint should be dismissed, with specific findings on the record (1) whether Petitioner's failure to obey discovery orders and case event schedule deadlines was willful or deliberate . . . (Emphasis added.)

*See also Burnet, supra* at 494, interpreting CR 37(b)(2), which uses the phrase “a party fails to obey an order” by requiring that it must be “apparent from the record” whether “it found that the disobedient party’s refusal to obey a discovery order was willful or deliberate.” In all of these cases, the courts used “fail” and “refuse” interchangeably.

(b) The trial court recounted an in-chambers conversation with counsel that “[t]he Defendant has indicated he will not be attending trial in spite of the proper service of the notice.” RP 1. Moreover, there was no evidence or argument that Mr. Woodman’s absence was a result of either “mistake or negligence.” The trial court also found that there was a “video tape of Mr. Woodman playing his fiddle and singing at a folk festival on Vashon Island on August 21, 2010” (CP 23), and found that there was “no evidence that in fact there is a medical basis for his [Mr. Woodman’s] inability to respond” (RP 6-7). Given that evidence, the trial court’s conclusion that Mr. Woodman “failed to appear for trial” was a conclusion

that he refused to appear under CR 43(f)(3), just as this Court used “fail to appear” in *Campbell*, when discussing CR 43(f)(3), and as the Supreme Court used “failure” and “refusal” interchangeably in *Rivers* and *Burnet*.

**E. The Trial Court’s Finding That There Was No Evidence Of A Medical Basis For Mr. Woodman’s Nonappearance At Trial Was A Finding That His Nonappearance Was “Without Reasonable Excuse” And Thus “Willful”.**

This Court has repeatedly held that, under CR 37 the “violation of a court order without reasonable excuse will be deemed willful”. *Allied Financial Services, Inc. v. Mangum*, 72 Wn. App. 164, 168, 864 P.2d 1 (1994), citing *Lampard v. Roth*, 38 Wn. App. 198, 202, 684 P.2d 1353 (1984) and *Anderson v. Mohundro*, 24 Wn. App. 569, 574, 604 P.2d 181 (1979). The Supreme Court agreed with this proposition in *Magana*, 167 Wn.2d at 583:

... A party must answer or object to an interrogatory or a request for production. If the party does not, it must seek a protective order under CR 26(c). CR 37(d). The party cannot simply ignore or fail to respond to the request. “[A]n evasive or misleading answer is to be treated as a failure to answer.” CR 37(d). Hyundai never sought a protective order under CR 26(c) but ignored or evaded Magaña's discovery requests, ...

....  
“A party's disregard of a court order without reasonable excuse or justification is deemed willful.” *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wash.2d 674, 686-87, 41 P.3d 1175 (2002) (citing *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wn. App. 125, 130, 896 P.2d 66 (1995)).

Particularly given defendants' position that Washington courts' interpretation of CR 37 should be persuasive regarding the interpretation of CR 43, an at least similar analysis should apply to the failure or refusal to comply with a CR 43(f) notice "without reasonable excuse." Defendants provided no reasonable excuse on August 31, 2010, as reflected in the Report of Proceedings, including, the trial court's ruling set forth at RP 6-7. Moreover, defendants chose not to request relief under 43(f)(1) such as an order permitting Mr. Woodman to testify by telephone or videotape. Defendants' failure to do so is relevant in the CR 43(f) context. In *Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 923, 15 P.3d 188 (2000), involving CR 43(f), this Court held that:

Skyreach points to nothing in the record indicating that it asked the court to allow Weaver to testify by telephone or videotape in order to reduce the alleged burden of his attendance at trial.

Finally, the court was well within its discretion in rejecting defendants' efforts in their motion to vacate to provide such a reasonable excuse. That is both because the Jewett declaration was disputed as discussed above and because defendants provided no medical evidence even as late as October 1, 2010.

**F. Defendants' Other Arguments Provide No Basis For Reversal.**

**1. Defendants' Due Process Argument Is Simply Another Way Of Arguing That The Trial Court Did Not Follow CR 43(f)(3).**

Defendants' argument that "B. THE JUDGMENT IS VOID FOR WANT OF DUE PROCESS" (Def. Brief, pp. 12-21) boils down to the following three propositions:

a. The proposition at page 13 that "1. Any Judgment Entered under CR 43(f)(3) Must Comply with Due Process."

b. The proposition at page 15 that "2. A Judgment Entered in Violation of Due Process Is Void;" and

c. The proposition at page 16 that "3. The Trial Court's Findings and Conclusions Did Not Comply with Due Process."

Plaintiff does not dispute Proposition Nos. 1 and 2 in general, although as discussed above, there are differences in both the language and purposes of CR 37 and 43 which make it inappropriate simply to import without change the rule 37 case law into rule 43. However, those propositions do not apply under the facts of this case.

Plaintiff strongly disagrees with the third proposition including the sentence at page 20, just above the third proposition, stating "[a]s will be discussed, the proceedings that led to the judgment against the Woodmans violated due process." That is because defendants do not challenge CR

43(f)(3) as violating due process. Thus, if the trial court correctly complied with the provisions of CR 43(f)(3), there can be no violation of due process. In essence, therefore, defendants' "due process" argument is really a CR 43(f)(3) argument using due process language because it sounds more impressive. As discussed above, the trial court did not violate CR 43(f)(3). Consequently, it did not violate due process.

**2. Substantial Evidence Supported The Trial Court's Findings.**

At pages 20-22, defendants argue that there was "no substantial evidence that would have allowed compliance with due process." As discussed above, that is simply a dramatic way of arguing that there was not substantial evidence permitting the sanction adopted by the trial court pursuant to CR 43(f)(3).

Defendants' discussion is unpersuasive for several reasons. First, it focuses largely on Ms. Jewett's October 1<sup>st</sup> declaration, which did not exist at the time of the trial court's August 31<sup>st</sup> oral decision or its September 21, 2010 Findings of Fact, Conclusions of Law, and Judgment. CP 18-19, 21-26. Secondly, the trial court was not obliged to accept Ms. Jewett's declaration. She has no medical training and thus would not be in a position to opine as to her father's competence, the nature of his medical conditions, or whether from a medical stand point he could have attended

trial. Furthermore, she stated that he routinely attends physical therapy sessions, and attended at least one music performance where he played. That demonstrates his ability to travel, comprehend and interact.

The trial court also could reasonably have wondered (as does plaintiff's counsel), why there was no evidence from a medical professional provided in the more than a month between serving the CR 43(f) notice and trial, and why none was provided even after the oral decision and the judgment. Ms. Jewett apparently only went or attempted to communicate once with each of the doctors she claimed were her father's medical providers, including a neurologist, a cardiologist, and a general practitioner. If she had done that in August, it makes no sense that she did not try again after the default. Yet, she apparently did not do so.

Finally, the trial court had in front of it evidence directly contradicting Ms. Jewett's declaration from Mr. Krinsky who videotaped the music folk festival attended by Mr. Woodman in mid-March, 2010. Mr. Krinsky declares at CP 88 that the video disk "shows Mr. Woodman walking to the stage by himself and mounting the stairs to the stage, unassisted by his daughter." As Mr. Krinsky states in his declaration, that was directly contrary to Ms. Jewett's declaration. *Id.*<sup>12</sup>

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<sup>12</sup> Defendants now argue that "the record is not clear whether the trial court actually saw the video," filmed by Mr. Krinsky. Def. Brief, p. 21. That is contrary to what they stated to the trial court in their October 1, 2010 motion:

As mentioned above, if the defendants agree in their reply brief, plaintiff will supply the videotape to this Court so everyone can see it. Even if defendants do not consent, the existing record includes Mr. Krinsky's offer of proof, defendants acknowledgment quoted above, and Mr. Krinsky's declaration. The trial court had the discretion not to credit Ms. Jewett's contested statement of fact and had discretion to conclude that the inconsistency of her declaration with the videotape impacted other portions of her declaration.

Defendants also argue that "there was absolutely *no* evidence that plaintiff was prejudiced by the Woodmans' not attending trial." Def. Brief, p. 21 (emphasis in original). Contrary to defendants' position, the record is clear that Mr. Woodman and plaintiff were the two direct witnesses to the accident, plaintiff specifically wanted Mr. Woodman (who, according to his attorneys, either did not see Ms. James or did not see her until it was too late), to testify at trial. His testimony as to his rate of speed at the time of collision would also have been relevant to damages and its absence prejudiced plaintiff. Plaintiff did what was legally necessary to compel Mr. Woodman to appear and testify at trial. The trial

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On August 31, 2010, plaintiff moved under CR 43(f) to strike the defendants' answer. Plaintiff played a video to the court which showed Mr. Woodman playing at a musical festival. The implication was that if Mr. Woodman was able to attend the festival, Mr. Woodman would be able to attend trial.

CP 29 (emphasis added).

court had that evidence, and was well within its discretion, based on that evidence, in finding “detriment to plaintiff by not having the defendant available for trial.” RP 6-7. Defendants speculate that “it is doubtful that plaintiff would have been able to elicit any testimony from him about an event that occurred five years earlier” (Def. Brief, p. 22). That speculation was not accepted by the trial court, and should not be accepted by this Court.

**3. There Was, At Most, Disputed Evidence As To Whether Mr. Woodman Was Too Sick To Attend The Trial And Testify.**

Defendants argue, citing *Gillett v. Lydon*, 40 Wn.2d 915, 246 P.2d 1104 (1952), that the Woodmans “could not attend trial because of illness.” Def. Brief, p. 22.<sup>13</sup> However, that argument is dependent on this Court accepting everything that Ms. Jewett said, even though she has no medical training and an obvious interest in the matter. Their argument also depends on ignoring the fact that at the time of trial, there was no evidence, medical or otherwise, that Mr. Woodman was too ill to attend trial, and there was evidence that, less than two weeks before trial, he was able to attend, walk up on stage unassisted, and play at a music festival. The trial court was entitled from all the evidence to come to the

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<sup>13</sup> In *Gillett*, 40 Wn.2d at 918, “[i]t was shown that plaintiff was unable to attend because of her illness.” There was no such showing in this case by competent and undisputed evidence.

conclusion it made, and there is no good basis for claiming that the trial court abused its discretion in doing so.

**4. The Woodmans Were Not Deprived Of Their Constitutional Right By Jury.**

Defendants' argument relating to jury trial is only correct if this Court concludes that the trial court violated CR 43(f)(3) and due process. Defendants argue that:

By striking their answer and entering judgment against them even though the requirements of due process and CR 43(f)(3) had not been met, the trial court impermissibly deprived them of their right to a jury trial.

Def. Brief, p. 24. However, as discussed above, the trial court met both the requirements of CR 43(f)(3) and due process. As such, the jury trial argument adds nothing. In this regard, it is relevant to point out that defendants do not claim that a properly defaulted defendant has a right to a jury trial. Nor would such a claim be credible. *Johanson v. United Lines*, 62 Wn.2d 437, 383 P.2d 512 (1963).

**5. Defendants' Multiple Assignments Of Error Boil Down To The Claims Discussed In This Brief.**

Defendants assign error to every single finding of fact and conclusion of law. Def. Brief, p. 2. However, defendants' brief later explains that the error it is asserting is predicated on its claims that the elements of CR 43(f)(3) were not met, *i.e.*, defendants argue:

Thus, finding of fact 1 and conclusion of law 1 do not support striking the answer and entering judgment against defendants pursuant to CR 43(f)(3). Since the remaining findings and conclusions – which all deal with the accident and plaintiff’s damages – would have never been entered but for finding of fact 1 and conclusion of law 1, they too are erroneous.

Def. Brief, p. 19. Again, this is simply another way of saying that the case should be reversed because the elements of CR 43(f)(3) have not been met. That argument is wrong for the reasons discussed above.

**6. Since CR 55 Does Not Apply, There Is No Reason To Go Through The Elements Of That Section.**

There is a lot in defendants’ brief that plaintiff does not agree with.

However, plaintiff agrees with defendants’ point that:

The default judgment entered against the Woodmans was entered pursuant to CR 43(f)(3), not under CR 55. By its terms, CR 55 applies only when a party against whom affirmative relief is sought fails to appear, plead, or otherwise defend. CR 55(a). Here, the Woodmans appeared through counsel, filed an answer, and otherwise defended against the suit. Thus, CR 55 does not apply.

Def. Brief, pp. 24-25. Since all parties agree that CR 55 does not apply, there is no point in going through the elements of CR 55.

**V. CONCLUSION**

For the foregoing reasons, the trial court's judgment should be affirmed.

DATED this 6<sup>th</sup> day of June, 2011.

Respectfully submitted,

SCHROETER, GOLDMARK & BENDER



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# APPENDIX 1

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Sandra E. Widlan

Dear Ms. Okano:

Attached please find a copy of the Folk Festival video from August 21, 2010 on DVD.  
Should you have any problems viewing the DVD, please contact me.

Very truly yours,



RHONDA MORETZ  
Paralegal

Of Counsel  
Croil Anderson  
Mark A. Burke  
William Rutzick

Enclosure

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/rlm

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