

NO. 66323-2-I

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

20110007 49 000010

JULIE A. JAMES, a single person,
Respondent,

vs.

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

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Greg Canova, Judge

BRIEF OF APPELLANTS

Address:
Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900

REED McCLURE
By Pamela A. Okano WSBA # 7718
Attorneys for Appellants

400- 112th Avenue NE, Suite 340
Bellevue, WA 98004
(425) 454-7437

WIECK SCHWANZ, PLLC
By Coreen Wilson WSBA #30314
Attorneys for Appellants

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I. NATURE OF THE CASE

Defendant Robert Woodman had a stroke. He was so frail that his daughter and her husband rented out their house and moved their motor home onto the Woodmans' property so that they could be nearby to assist. Indeed, Mr. Woodman could not remember his address or telephone number without prompting. Nor could he remember that his wife had been hospitalized with cancer and might not survive.

Nevertheless, plaintiff pedestrian claimed that she was prejudiced by the Woodmans' inability to attend trial and testify, presumably about an auto accident they were involved in five years before. Although plaintiff could never identify precisely why she needed to call Mr. or Mrs. Woodman, the trial court struck their answer and refused to impanel a jury, even though the defense had timely filed a jury demand. The court entered judgment after allowing only the plaintiff to testify as to damages.

II. ASSIGNMENTS OF ERROR¹

Did the trial court err in—

1. Entering judgment (CP 18-20);
2. Striking defendants' answer (RP 6; CP 22, 25);

¹ A copy of the Findings of Fact and Conclusions of Law is set forth in the appendix hereto.

3. Refusing to allow a jury trial, even though the defense had timely filed a jury demand (RP 7);
4. Hearing the testimony of only the plaintiff (RP 7);
5. Denying the defense motion for reconsideration, to vacate, and/or “new” trial (CP 140-41);
6. Entering finding of fact 1 (CP 22);
7. Entering finding of fact 2 (CP 22-23);
8. Entering finding of fact 3 (CP 23);
9. Entering finding of fact 4 (CP 23);
10. Entering finding of fact 5 (CP 23-24);
11. Entering finding of fact 6 (CP 24);
12. Entering finding of fact 7 (CP 24);
13. Entering finding of fact 8 (CP 24);
14. Entering finding of fact 9 (CP 24-25);
15. Entering finding of fact 10 (CP 25);
16. Entering conclusion of law 1 (CP 25);
17. Entering conclusion of law 2 (CP 25-26);
18. Entering conclusion of law 3 (CP 26);
19. Entering conclusion of law 4 (CP 26).

III. ISSUES PRESENTED

A. Has a defendant who does not attend trial because of illness “refused” to attend trial within the meaning of CR 43(f)(3)?

B. Is the judgment entered against the Woodmans pursuant to CR 43(f)(3) void, when—

1. The trial court made no findings that there was a willful or deliberate refusal to attend or that plaintiff was substantially prejudiced by the Woodmans’ inability to attend, and its finding that it considered lesser sanctions does not identify what they were or explain why they would not have sufficed?

2. There was no evidence of a willful or deliberate refusal to attend, that plaintiff was substantially prejudiced by the Woodmans’ inability to attend, or that a lesser sanction would not have sufficed?

C. Is the judgment void as violative of due process?

D. Is the judgment void as violative of the defendants’ constitutional right to a jury trial?

E. Assuming arguendo that CR 55 applies, are the four elements necessary to vacate a default judgment under that rule present?

IV. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

On the evening of November 3, 2005, defendant/appellant Robert Woodman's vehicle hit plaintiff/respondent Julie James who, dressed in black clothing, was crossing the street. The vehicle was traveling at low speed. Mr. Woodman did not see plaintiff. Ed Laughlin, a motorist behind Mr. Woodman, did not see her either. (CP 39)

B. STATEMENT OF PROCEDURE.

In October 2008, shortly before the 3-year limitations period was about to expire, plaintiff filed suit against Mr. Woodman and his wife. (CP 1-6) The Woodmans answered and asserted that plaintiff's injuries were caused by her own negligence. (CP 7-8) The Woodmans also timely filed and served a jury demand and paid the jury fee. (CP 9-10)

In early January 2009, plaintiff attempted to schedule Mr. Woodman's deposition for January 27, 2009.² (CP 98-99; RP 3) His then defense counsel advised plaintiff's attorney that Mr. Woodman would not be able to attend. (RP 3) The deposition was never taken. The record shows no indication that in the 20 months thereafter, plaintiff ever moved to compel Mr. Woodman's deposition.

² Whether the deposition was actually noted pursuant to CR 30(b) was disputed. (CP 110-11; RP 3)

At some point, possibly before the requested deposition in January 2009, Mr. Woodman suffered a stroke and his wife was diagnosed with cancer. (RP 3, CP 64) 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)

The Woodmans' original trial counsel withdrew and their current trial counsel appeared on July 14, 2010, less than two months before trial. (CP 208-09)

On August 2, 2010, plaintiff sent notices to attend trial to both Mr. and Mrs. Woodman. (CP 11-14) Both parties submitted proposed jury instructions, trial briefs, and motions in limine in preparation for the upcoming trial. (CP 15-17, 163-99) Despite engaging in settlement negotiations up to the day of trial, the parties could not reach agreement. (CP 85)

Consequently, on August 31, 2010, the matter was called for trial. The 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 illnesses. (CP 40, 84-85)

Regardless, plaintiff's attorney arrived on the first day of trial with a written CR 43(f) motion to strike defendants' answer and enter judgment, on the ground that defendants had refused to attend trial. (CP

161-62) Plaintiff's attorney asked for a default judgment. (RP 2) He also said that he had recently videotaped Mr. Woodman accepting an award for his musicianship and playing a musical instrument and singing. (CP 22; RP 4) The videotape does not appear to have been filed with the trial court. Nor was a copy ever provided to the defense prior to this appeal, despite a request for it. (CP 123)

Defense counsel (who had been involved in the case for only approximately a month and a half due to the withdrawal of previous counsel) told the trial court that Mr. Woodman had had a stroke in the last several months and his wife was ill. She advised that Mr. Woodman was in his mid-80's, that she had "significant concerns" whether he could or could not attend trial, and that he had indicated to her that he could not attend trial. (RP 3) She also explained that both her office and the Woodman family had been trying to contact Mr. Woodman's medical providers to obtain documentation of his inability to attend trial. (RP 3-4)

After hearing from both attorneys, the trial court orally granted plaintiff's motion, struck defendants' answer, and granted a default judgment. Instead of conducting a jury trial, it permitted only plaintiff to testify to the court about damages. (RP 5-7, 8-23)

The trial court then decided that plaintiff had incurred damages totaling \$130,692. (RP 27-31) Subsequently, however, the trial court

recognized that pursuant to *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001), *Matsyuk v. State Farm Fire & Casualty Co.*, 155 Wn. App. 324, 229 P.3d 893 (Div. I), *rev. granted*, 170 Wn.2d 1008 (2010), and *Weismann v. Safeco Insurance Co.*, 157 Wn. App. 168, 236 P.3d 240 (Div. II), *rev. granted*, 170 Wn.2d 1010 (2010), defendants were entitled to a \$10,000 offset for payments previously made by their insurance carrier. (CP 18, 200-07)

Findings of Fact and Conclusions of Law and Judgment for \$121,178.50 were entered. (CP 18-27) The judgment reflected the \$130,692 in total damages found by the trial court and the \$10,000 offset plus statutory attorney fees and costs. (CP 18)

The Woodmans moved to vacate; to reconsider the decision to strike their answer and enter default judgment; and for a “new” trial on liability and damages. (CP 28-38) Among other things, they submitted the declaration of the Woodmans’ daughter, Elaine Jewett. (CP 64-66)

Ms. Jewett testified that her father, Mr. Woodman, had suffered a stroke several months ago and that his wife, Mrs. Woodman, had cancer. She explained that neither of her parents could drive, and that she and her husband had had to rent out their own home and move their motor home to her parents’ property to be able to assist them. (CP 64)

Ms. Jewett also testified that her father was frail, had memory problems, was easily confused, and required assistance with daily living.

(CP 65) She gave the following examples (CP 65):

He thinks that she [Mrs. Woodman] is in the hospital for ulcers. She is actually in the hospital with cancer and an obstructed bowel and may not survive. I have tried to explain this to him, but he forgets and becomes confused.

I have to re-teach my father his address and phone number, as well as other information he doesn't use all the time. If I do not regularly remind him of his address and phone number, he cannot recall them.

As to the August 2010 festival her father had attended to play his fiddle, she said that he had initially intended not to go even though the event was being held in his honor. She testified that she had talked him into it and drove him both ways. She said he was able to play, but not like he had before and that although they stayed only a short time, her father was completely exhausted by the event. (CP 66)

She also said her father took several naps a day and became more confused in stressful situations, such that she believed that "[t]he stress of traveling to Seattle [from Vashon Island] and sitting in court would have a significant physical affect [sic] on him." (CP 66)

Ms. Jewett also explained that she had tried to contact her father's physicians to get a letter about his inability to attend trial. She advised that she had called his neurologist but was not allowed to speak directly

with him and left a message that was never returned. She advised that she went to the office of her father's cardiologist, but no one was there. She further testified that just before trial, her father had been transitioning from his former primary care physician to a new physician, who at that point was unfamiliar with Mr. Woodman's care. (CP 64-65)

The trial court denied the Woodmans' motion. (CP 140-41) This appeal followed. (CP 142-48) Plaintiff has not cross-appealed the \$10,000 offset.

V. SUMMARY OF ARGUMENT

Under CR 43(f)(3), if a defendant refuses to attend and testify at trial after a notice to attend has been served upon him or her pursuant to CR 30(b)(1), the trial court may strike that defendant's answer and enter judgment against him or her. It is true that a notice to attend trial was served on defendants, Mr. and Mrs. Woodman. It is also true that neither attended or testified at trial. But that does not mean that their answer could be stricken or judgment could be entered against them.

First, even if the Woodmans "refused" to attend as required by CR 43(f)(3), entering what is essentially a default judgment against a defendant under CR 43(f)(3) has due process implications. *Mitchell v. Watson*, 58 Wn.2d 206, 213, 361 P.2d 744 (1961). Therefore, dismissal cannot occur unless the trial court makes findings, supported by

substantial evidence, that the party's refusal to attend was willful, that the opposing party suffered substantial prejudice as a result, and that lesser sanctions were considered but were deemed inappropriate. *See Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002); *see also Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009). Unless these requirements are met, the judgment is void for want of due process. *Mitchell*, 58 Wn.2d at 213; *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985).

The trial court here did not find that any refusal to attend trial was willful or that plaintiff suffered substantial prejudice as a result. Although it stated that it had considered lesser sanctions, it did not identify what they were or why they were not appropriate, either orally or in writing. Moreover, even if the trial court had entered the required findings, there was no substantial evidence to support them. Consequently, the trial court deprived defendants of their constitutional right to a jury trial.

In any event, by its very terms, CR 43(f)(3) requires that the party "refuse[]" to attend. Parties like Mr. and Mrs. Woodman, who are ill and cannot attend, do not "refuse" to attend. *Gillett v. Lydon*, 40 Wn.2d 915, 918, 246 P.2d 1104 (1952).

Finally, even if the Woodmans were required to show the elements necessary to vacate a default judgment under CR 55, which they should not be required to do, those elements are each present here.

VI. ARGUMENT

A. THE STANDARD OF REVIEW.

This is an appeal from findings of fact, conclusions of law, and an order denying reconsideration, a motion to vacate, and “new” trial. 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).

If substantial evidence does not support a finding of fact, that finding cannot stand. See *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 157, 776 P.2d 676 (1989). A mere scintilla of evidence is insufficient. *Williams v. Fixdahl*, 6 Wn. App. 24, 26, 491 P.2d 1309 (1971). To be substantial, the evidence must be of “a kind and quantity that will persuade an unprejudiced thinking mind of the existence of the fact to which the evidence is directed.” *Id.* The findings of fact must support the conclusions of law. *Wallace v. Kuehner*, 111 Wn. App. 809,

815, 46 P.3d 823 (2002). Conclusions of law are reviewed *de novo*. *Miles v. Miles*, 128 Wn. App. 64, 70, 114 P.3d 671 (2005).

An order denying reconsideration is reviewed for abuse of discretion. *Brinnon Group v. Jefferson County*, 159 Wn. App. 446, 485, 245 P.3d 789 (2011). An abuse of discretion occurs if the trial court's decision "was based on untenable grounds or made for untenable reasons, or was based upon a mistake of law." *State v. Berry*, 129 Wn. App. 59, 68, 117 P.3d 1162 (2005), *rev. denied*, 158 Wn.2d 1006 (2006).

Under Washington law, judgment can be entered under CR 43(f)(3) only if certain requirements have been met. As will be discussed, the trial court did not enter findings reflecting that such requirements were met and even if it had, substantial evidence does not support them. Furthermore, the findings the trial court did make do not support its conclusions, and the conclusions do not support the judgment.

B. THE JUDGMENT IS VOID FOR WANT OF DUE PROCESS.

CR 43(f)(3) provides:

If a party . . . refuses to attend and testify before the officer designated to take his deposition or at the trial after notice served as prescribed in rule 30(b)(1), the . . . answer . . . of the party may be stricken and judgment taken against the party

Although the Woodmans were unable to attend trial because of their ill health, the trial court struck their answer and entered judgment

against them. As will be discussed, that judgment is void and must be vacated pursuant to CR 60(b)(5).

1. Any Judgment Entered under CR 43(f)(3) Must Comply with Due Process.

A judgment entered against a defendant under CR 43(f)(3) has due process implications. *Mitchell v. Watson*, 58 Wn.2d 206, 361 P.2d 744 (1961), is illustrative. There the defendant refused to answer certain interrogatories, even after the court ordered him to do so. The trial court struck the defendant's answer and entered a default judgment against him.

The Washington Supreme Court reversed and remanded for reinstatement of the defendant's answer, vacation of the default judgment, and for trial. In so holding, the court explained:

[A] defendant, who is refused a trial, may be deprived of a constitutional right to a hearing. . . .

. . . .

“[T]here are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. . . .”

58 Wn.2d at 213, 216.

It is true that *Mitchell* was dealing with Rule 37(b)(2)(iii), now

known as CR 37(b)(2)(C)³, which deals with sanctions for violation of discovery orders. But that rule is quite similar to CR 43(f)(3). In fact, the *Mitchell* court recognized that because of the existence of CR 43(f)(3)'s predecessor, Rule 37 did not create new law. CR 43(f)(3)'s predecessor is practically identical to the current CR 43(f)(3). 58 Wn.2d at 211.

Indeed, there is no reason why the two rules should be treated differently where due process is concerned. Both rules allow the trial court to strike a defendant's answer and enter judgment against him for the failure (CR 37(b)(2)(C)) or refusal (CR 43(f)(3)) to do something. Whether that "something" is answering discovery or appearing at trial to testify is irrelevant, particularly where, as here, the trial court did not permit the defense to put on its case, let alone have a jury trial as the defense had requested.

Because striking a defendant's answer and entering judgment against him without permitting him to put on his case raises due process

³ CR 37(b)(2)(C) provides:

If a party . . . fails to obey an order to provide or permit discovery . . . or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others, the following:

. . .

(C) An order striking out pleadings or parts thereof . . . or rendering a judgment by default against the disobedient party;

. . . .

implications, Washington courts have developed a specific set of safeguards to protect the defendant's constitutional rights. *See Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), *citing Snedigar v. Hodderson*, 53 Wn. App. 476, 487, 768 P.2d 1 (1989), *rev'd in part on other grounds*, 114 Wn.2d 153, 786 P.2d 781 (1990). These safeguards are as follows:

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, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed.

Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002). Although these safeguards have thus far been applied only under CR 37, they should also apply to the striking of an answer and entering judgment against a defendant under CR 43(f)(3).

2. A Judgment Entered in Violation of Due Process Is Void.

"Judgments entered in a proceeding failing to comply with the procedural due process requirements are void." *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985); *see generally State ex rel. Adams v. Superior Court*, 36 Wn.2d 868, 872, 220 P.2d 1081 (1950). "[A] court has a nondiscretionary duty to vacate a void

judgment.” Allstate Insurance Co. v. Khani, 75 Wn. App. 317, 323, 877 P.2d 724 (1994) (emphasis added).

Thus, if the judgment against the Woodmans was procured in a proceeding that failed to comply with procedural due process, this court *must* vacate the judgment. As will be discussed, the proceedings that led to the judgment against the Woodmans violated due process.

3. The Trial Court’s Findings and Conclusions Did Not Comply with Due Process.

a. There Were No Findings or Conclusions Complying with Due Process.

The trial court orally granted plaintiff’s CR 43(f)(3) motion and reduced this ruling to writing in findings of fact and conclusions of law.

Specifically, finding of fact 1 states:

1. This matter came before the Court for trial on August 31, 2010. The plaintiff properly served upon the defendants a Notice to Compel Attendance at Trial in accordance with CR 43. The plaintiff filed proof of service with the Court. *Defense counsel represented that Defendant Robert Woodman was unable to attend trial and testify because of ill health. Defendant’s counsel and defendant’s adult daughter had made best efforts to obtain written evidence regarding Mr. Woodman’s ill health.* Despite their efforts, they had been unable to obtain any written evidence as of August 31, 2010. 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 defendant’s claim of Mr. Woodman’s inability to attend deposition or testify at trial. The

Court finds that the defendants have *failed* to appear and testify at trial and that the Answer of the defendants should be stricken and that judgment should be entered for the plaintiff.

(CP 22) (emphasis added). Conclusion of law 1 states:

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

(CP 25) (emphasis added).

Nowhere is there a finding of willfulness, much less a finding that the defendants *refused* to attend, as required by CR 43(f)(3). This is not surprising because in making its oral ruling, the trial court said (RP 5-6):

Well, at this point I'm going to accept the representations of both Counsel as officers of the Court, certainly on behalf of the Plaintiff as to the representations just most recently made. And secondly, on behalf of the Defendant, the representations made about Mr. Woodman's situation and the efforts made by Counsel and Mr. Woodman's family, apparently, in trying to obtain some medical verification of his inability to attend trial.

See 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) (trial

court's oral decision may be considered to interpret and explain findings and judgment).

Accordingly, rather than find that defendants had *refused* to attend, as required by CR 43(f)(3), the trial court instead explicitly found and concluded that defendants had *failed* to attend. (CP 22) The *failure* to do something is not necessarily a *refusal* to do so.

In fact, the dictionary defines the two terms differently. "Fail" means "to miss success in some effort: become forced to leave incomplete an attempt or enterprise." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 814 (1993). In contrast, "refuse" means "to show or express a positive unwillingness to do or comply with (as something asked, demanded, expected)". *Id.* at 1910. Compare BLACK'S LAW DICTIONARY 673 (9th ed. 2009) ("failure" means "[a]n omission of an expected action, occurrence, or performance") with *id.* at 1394 ("refusal" means "[t]he denial or rejection of something offered or demanded"). *Cf. Harrison Plumbing & Heating Inc. v. New Hampshire Insurance Group.*, 37 Wn. App. 621, 624-25, 681 P.2d 875 (1984) (refusal is an intentional act, whereas failure could be negligent or accidental).

Moreover, the trial court made no finding of fact that plaintiff was substantially prejudiced by the Woodmans not being at trial. An absence of a finding is treated "as though a finding of fact against the party with

the burden of proof was made.” *Xieng v. Peoples National Bank*, 120 Wn.2d 512, 526, 844 P.2d 389 (1993). As the party moving to strike the answer and enter judgment under CR 43(f)(3), plaintiff had the burden of showing substantial prejudice resulting from the willful refusal to attend.

Because there are no findings as to willful refusal or resultant substantial prejudice, this court must deem there to have been no willful refusal or resultant substantial prejudice. 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.

Furthermore, 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. Since one of the major purposes of findings and conclusions is to facilitate meaningful appellate review, the trial court’s failure to do anything more than make the conclusory statement that other remedies would not suffice is wholly inadequate. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 154, 157 P.3d 831 (2007).

In any event, the absence of one or more of the required findings is fatal. *See Blair v. TA-Seattle East No. 176*, 2011 WL 1499902, at *5 (Wash. Apr. 21, 2011) (trial court abused its discretion by imposing nonmonetary sanctions “without considering *and* entering findings under *Burnet*”) (emphasis added); *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn. App. 65, 70, 155 P.3d 978 (2007) (trial court abused its discretion in failing to enter findings about willful violation, resulting substantial prejudice, and that lesser sanction was unavailable); *cf. Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (must be “apparent from the record” that trial court explicitly considered lesser sanctions, whether it found refusal willful, and substantial prejudice); *accord Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006). For this reason alone, the judgment must be reversed and the case remanded for trial.

b. There Was No Substantial Evidence that Would Have Allowed Compliance with Due Process.

Even if the necessary findings had been made, they would not have been supported by substantial evidence.

The Woodmans’ daughter testified about her mother’s hospitalization for cancer and an obstructed bowel and how she might not survive. She also testified about her father’s ill health and frailty. She

testified that he had memory problems and could not remember his own address and telephone number without frequent reminders. She testified that she and her husband had moved their motor home onto her parents' property so that they could assist both parents, who were in poor health, and that her father had been forbidden to drive, was easily confused, and required assistance with daily living. She explained that she had been unsuccessful in her attempts to contact her father's medical care providers and that his primary care physician was new and unfamiliar with her father's care. (CP 64-66)

Plaintiff's only "evidence" in opposition was a videotape of Mr. Woodman. The record is not clear whether the trial court actually saw the video, but the record is clear that plaintiff did not file the video in the trial court. The record is also clear that plaintiff's counsel did not provide a copy to the undersigned, despite a request to do so, until *after* this appeal was filed. But even had that been done, the Woodmans' daughter testified that they stayed only a short while and that the event was "completely exhausting" for him. (CP 66)

Perhaps even more significantly, there was absolutely *no* evidence that plaintiff was prejudiced by the Woodmans' not attending trial. Plaintiff *never* identified how she expected their testimony would have helped her. The record is silent as to whether plaintiff even sought to

depose Mrs. Woodman. As to Mr. Woodman, given that he, through no fault of his own, cannot recall his own address or phone number without being reminded and forgets that his wife has been hospitalized due to cancer (CP 65), it is doubtful that plaintiff would have been able to elicit any testimony from him about an event that occurred five years earlier.

Indeed, a year and eight months passed between the time when plaintiff initially sought to schedule Mr. Woodman's deposition and trial. Had plaintiff thought that Mr. Woodman's testimony was so valuable, she could have moved to compel the deposition at some point during those 20 months. She elected not to do so.

Thus, *plaintiff was unable to identify even one concrete way in which the Woodmans' absence from trial prejudiced her.* Instead, she claimed merely that she and her expert witnesses had spent the time and expense to prepare to go to trial. (CP 80) But they would have had to engage in such preparations if the Woodmans had been able to appear. In short, the Woodmans' absence from trial did not substantially prejudice plaintiff.

C. THE WOODMANS DID NOT REFUSE TO ATTEND TRIAL AS REQUIRED BY CR 43(f)(3).

In any event, the Woodmans did not refuse to attend trial, as required by CR 43(f)(3). They could not attend trial because of illness.

The Washington Supreme Court has held that the inability to attend trial due to illness is not a “refusal” to attend under CR 43(f)(3). In *Gillett v. Lydon*, 40 Wn.2d 915, 246 P.2d 1104 (1952), the plaintiff failed to appear and testify at trial because of illness. Defendant appealed. The Washington Supreme Court affirmed the judgment against defendant on the ground that the trial court had properly ruled that plaintiff had not refused to attend and testify under a predecessor to CR 43(f)(3).

As discussed *supra*, the Woodmans’ daughter testified that Mrs. Woodman was in the hospital with cancer and an obstructed bowel and might not live, that her father had had a stroke, was easily confused, needed assistance with daily living, could not understand his wife’s dire health situation, could not remember his own address and telephone number without assistance, and was completely exhausted by a short trip to a local festival in his honor. (CP 64-65) Thus, neither Mr. nor Mrs. Woodman could “refuse” to attend trial as required by CR 43(f)(3). Granting plaintiff’s motion to strike and to enter judgment and denying the Woodmans’ motion for reconsideration were thus erroneous.

D. THE WOODMANS WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

Article I, section 21, of the Washington State Constitution provides:

The right of trial by jury shall remain inviolate.

The right to trial by jury is so important that both the United States Supreme Court and this court have agreed that “[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” *Auburn Mechanical, Inc. v. Lydig Construction, Inc.*, 89 Wn. App. 893, 897, 951 P.2d 311 (1998) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501, 79 S. Ct 948, 3 L. Ed. 2d 988 (1959)), *rev. denied*, 136 Wn.2d 1009 (1998).

Here the Woodmans had timely filed a jury demand and paid the jury fee. (CP 9) 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.

E. EVEN IF CR 55 APPLIED, THE JUDGMENT SHOULD BE VACATED UNDER THAT RULE AS WELL.

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. But even if it did, vacation of the judgment against the Woodmans would still be required.

“Default judgments are generally disfavored in Washington based on an overriding policy which prefers that parties resolve disputes on the merits.” *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004). Accordingly, although a trial court’s decision whether to vacate a default judgment is reviewed for an abuse of discretion, an order denying a motion to vacate a default is more readily found to be an abuse of discretion than is an order vacating the default and permitting the matter to proceed to trial. *White v. Holm*, 73 Wn. App. 348, 351-52, 438 P.2d 581 (1968). The primary concern is that the trial court’s decision be just and equitable. *Showalter*, 124 Wn. App. at 510.

Pursuant to CR 55(c), a default judgment entered under CR 55 may be vacated if the party against whom such judgment has been entered shows:

“(1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party’s failure to timely appear in the action, and answer the opponent’s claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.”

Pfaff v. State Farm Mutual Automobile Insurance Co., 103 Wn. App. 829, 832, 14 P.3d 837 (2000), *rev. denied*, 143 Wn.2d 1021 (2001).

1. The Woodmans Had a Defense.

The Woodmans had substantial evidence to support at least a prima facie defense to plaintiff's claim. Had the Woodmans been allowed to put on their liability case, they would have presented evidence that plaintiff was wearing dark clothes in the evening and that not only did Mr. Woodman not see her, neither did the driver of the following vehicle.

That plaintiff was not easily visible was pertinent to whether the Woodmans were liable. Specifically, plaintiff's visibility would have been relevant to whether a reasonable person in Mr. Woodman's position would have seen her.⁴ If a jury had found that a reasonable person would not have seen her, the Woodmans would not be held liable.

Furthermore, the Woodmans had pled comparative fault as an affirmative defense. (CP 8) Plaintiff's visibility would have also been relevant to whether a reasonable person in plaintiff's position should have been more vigilant, given the clothing she had chosen to wear.⁵ If a jury

⁴ See *Thomas v. Mueller*, 251 Minn. 470, 88 N.W.2d 842 (1958); *DiFederico v. Reed*, 21 Ohio App. 2d 137, 255 N.E.2d 869 (1969).

⁵ See *Drobish v. Petronzi*, 142 Conn. 385, 388, 114 A.2d 685 (1955); *Kukuchka v. Ziemet*, 219 Mont. 155, 158, 710 P.2d 1361 (1985); *Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710 (2000); *Wong v. Terminal Cars, Inc.*, 201 Va. 564, 111 S.E.2d 799 (1960); *Quigley v. Sikora*, 269 A.D.2d 812, 704 N.Y.S.2d 413 (2000).

had found that such a reasonable person would have been more vigilant, plaintiff could have been found comparatively negligent.

2. The Woodmans Timely Appeared in the Suit and Their Failure To Appear at Trial Was Due to Illness.

The next requirement to vacate a default judgment under CR 55(c) is to show that the defaulting party's failure to timely appear in the suit, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise, or excusable neglect. *Pfaff*, 103 Wn. App. at 831-32. Applying this requirement literally to a motion to vacate a judgment entered under CR 43(f)(3) makes no sense because the judgment was not the result of any failure to appear in the suit or file an answer.⁶

Even if this second requirement were revised to apply to the failure to attend trial, the Woodmans were unable to attend trial due to their illnesses. Although there are apparently no reported Washington decisions on whether illness constitutes "excusable neglect", illness has been recognized as "excusable neglect" in other jurisdictions. *See, e.g., Bluffs of Wildwood Homeowners' Association, Inc. v. Dinkel*, 96 Ohio App. 3d 278, 281, 644 N.E.2d 1100, *appeal dismissed*, 71 Ohio St. 3d 1421 (1994);

⁶ That this second requirement makes no sense in a CR 43(f)(3) situation is just another reason why the *Pfaff* requirements should not apply in this case.

National Mortgage Co. v. Robert C. Wyatt, Inc., 173 Or. App. 16, 20 P.3d 216, 221, *rev. denied*, 30 P.3d 1183 (2001).

3. The Woodmans Acted with Due Diligence After Default Judgment Was Entered.

The Woodmans had no opportunity to submit a meaningful response to plaintiff's CR 43(f)(3) motion because the trial court granted the motion the same day it was brought. Once the default judgment was entered on September 21, 2010, the Woodmans filed their postjudgment motions within 10 days, on October 1, 2010. (CP 18-19, 28-38)

4. No Substantial Hardship Will Result to Plaintiff.

Finally, plaintiff will not suffer substantial hardship if the default judgment is vacated and the case proceeds to a jury trial. At most, she will have to go to trial. But, as Division II has so aptly explained:

[T]he prospect of trial cannot constitute, without more, "substantial hardship" within the meaning of . . . [the] fourth factor [required to vacate a default judgment under CR 55(c)]. If the law were otherwise, a judgment would never be set aside, for that *always* generates the prospect of trial.

Pfaff, 103 Wn. App. at 836 (emphasis in original). Moreover, the delay occasioned by having to go to trial does not qualify as a "substantial hardship" either. *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099, *rev. denied*, 150 Wn.2d 1020 (2003) ("vacation of a default judgment inequitably obtained cannot be said to substantially prejudice the

nonmoving party merely because the resulting trial delays resolution on the merits”).

VII. CONCLUSION

The Woodmans were deprived of their constitutional rights to due process and trial by jury. The judgment entered against them is void. Thus, the judgment must be vacated and the case remanded for a jury trial.

DATED this 5th day of May, 2011.

REED McCLURE

By 
Pamela A. Okano WSBA #7718
Attorneys for Appellants

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THE HONORABLE GREGORY P. CANOVA
TRIAL DATE: August 31, 2010

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

JULIE A. JAMES, a single person,

Plaintiff,

vs.

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

Defendants.

No. 08-2-36958-7 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came before the court for trial on August 31, 2010. The plaintiff, Julie A. James, was represented by attorney Robert M. Krinsky. The defendants, Robert L. Woodman and Mary C. Woodman, husband and wife, were represented by attorney Coreen Wilson. The Court having considered PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S ANSWER AND FOR ENTRY OF JUDGMENT pursuant to CR 43(f)(3) and having determined that granting PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S ANSWER AND FOR ENTRY OF JUDGMENT pursuant to CR43(f)(3) is the appropriate remedy in this case, and the Court having heard the testimony of the plaintiff Julie A. James, in support of the entry of judgment herein, and having heard the arguments of counsel for plaintiff and defendants, and considering all of the

FINDINGS OF FACT & CONCLUSIONS OF LAW - 1

LAW OFFICES OF
Robert M. Krinsky
1546 Market Street
Tacoma, WA 98402
2531 872-3434

APPENDIX A

1 representations of counsel as officers of the court to be true, and having considered the
2 records and files herein, and the Court deeming itself fully advised in the premises, Now
3 Therefore, The Court makes the following Findings of Fact and Conclusions of Law:

4 I. FINDINGS OF FACT

5 1. This matter came before the Court for trial on August 31, 2010. The plaintiff
6 properly served upon the defendants a Notice to Compel Attendance at Trial in
7 accordance with CR 43. The plaintiff filed proof of service with the Court.
8 Defense counsel represented that Defendant Robert Woodman was unable to
9 attend trial and testify because of ill health. Defendant's counsel and
10 defendant's adult daughter had made best efforts to obtain written evidence
11 regarding Mr. Woodman's ill health. Despite their efforts, they had been
12 unable to obtain any written evidence as of August 31, 2010. The plaintiff
13 presented to the Court a video tape of Mr. Woodman playing his fiddle and
14 singing at a folk festival on Vashon Island on August 21, 2010, which plaintiff
15 argued refuted the defendant's claim of Mr. Woodman's inability to attend
16 deposition or testify at trial. The Court finds that the defendants have failed to
17 appear and testify at trial and that the Answer of the defendants should be
18 stricken and that judgment should be entered for the plaintiff.

19 2. The Court finds that on November 3, 2005, at about 5:00 PM, the plaintiff Julie
20 James was crossing SW 174th Street at the intersection of Vashon Highway
21 SW, proceeding southbound, on her way to the post office. She lived within
22 walking distance and had crossed this street many times before. The defendant
23 Robert Woodman was driving his motor vehicle, a mini-van, southbound on
24 the Vashon Highway SW and turned left onto SW 174th Street, whereupon the
25 front of his vehicle struck the plaintiff on her right side. The plaintiff was in
26 the defendants' lane of travel when struck by the front of his vehicle. It was

1 dusk at the time of the accident, the area in which the accident occurred was
2 poorly lit, and the plaintiff was wearing dark clothing.

3 3. The Court finds that Julie A. James was familiar with the, sidewalk, street and
4 intersection that she was going to cross; that she looked both ways before
5 crossing and that she was in the pedestrian right-of-way occupying an
6 unmarked crosswalk when she was struck by the defendants' motor vehicle .
7 The Court finds that the defendant Robert Woodman must have failed to
8 observe her occupying and crossing his lane of travel within the unmarked
9 crosswalk.

10 4. The Court finds that Julie A. James was seriously injured when struck by the
11 defendants' vehicle. She was transported by ambulance to Harborview
12 Medical Center. She was thereafter treated by various health care
13 practitioners, including Karen Bolesky, LMP, Loren Chinn, D.C., James
14 Dowling, L.Ac. and Steven Leifheit, D.O. The parties stipulated that the
15 treatment of Julie A. James was reasonable, necessary and accident related in
16 the amount of \$12, 950.00. The Court finds that Julie James incurred
17 reasonable and necessary accident related medical expenses in the amount of
18 \$12,950.00.

19 5. The Court finds as Julie A. James testified, that she lost four months of work in
20 her self-employment as a SOMA practitioner, Yoga instructor and massage
21 therapist. Her testimony, including the Court's review of Exhibit 14, her
22 Federal Income Tax Returns for the years 2000 through 2007, supports her
23 claim for lost earnings in the amount of \$7,742.00. Averaging her income for
24 five years to derive a monthly average wage is reasonable and supports her
25 wage loss computation as demonstrated in Plaintiff's Trial Memorandum. The
26

1 Court finds that Julie A. James lost \$7,742.00 in income as a proximate result
2 of the accident of November 3, 2005.

3 6. The Court finds as Julie A. James testified, that she sold her home on Vashon
4 Island and thereafter moved to Medford, Oregon, due to her diminished
5 financial condition that was a consequence of this accident. She had decided
6 to take one year off work in order to consider whether her injuries would heal,
7 such that she could return to working, or whether she would have to consider
8 retiring. She was unable to establish a business in Medford, Oregon and
9 subsequently moved back to the Seattle/Tacoma area.

10 7. The Court finds that Julie James, based upon her accident related limitations,
11 determined that she would have to change careers from the arduous physical
12 demands of performing SOMA therapy, Yoga teaching and massage therapy,
13 to a new occupation more compatible with her physical condition. She is
14 enrolled in a program to become an Operating Room Technician and will
15 likely complete the program within one year. The Court finds that Julie A.
16 James' career was altered as a consequence of the November 3, 2005,
17 accident. Her physical injuries have limited and curtailed her ability to pursue
18 her chosen career.

19 8. The Court finds that Julie A. James has suffered physical injuries, including a
20 herniated thoracic disc, an ongoing injury to her right clavicle, and other soft
21 tissue injuries. The residual effects of the injuries cause her to experience pain
22 daily.

23 9. The court finds that in the almost 5 years since the accident, Julie A. James has
24 suffered the loss of a career and has lost earning potential/income
25 opportunity. The evidence supports an award of \$25,000.00 for this element
26 of damages, for her loss of earning potential/income opportunity. The Court

1 finds that this award for loss of future earnings from the date of the accident to
2 the present and through her one year of retraining is reasonable compensation
3 for the plaintiff's loss of earning potential/income opportunity.

4 10. The court finds that the disfigurement of Julie's right clavicle is a visible
5 disfigurement and that the injury to her neck and shoulder causes chronic
6 physical pain that she experiences on a daily basis. The plaintiff testified that
7 her neck and shoulder girdle are painful on a daily basis. The plaintiff has lost
8 the opportunity to perform work that she loved. She has "soldiered on" since
9 the accident toward retraining and adjusting to life after the accident. The
10 evidence would support a general damage award of minimum hourly wage for
11 ten years. However, the court finds that a conservative award of \$25.00 per
12 day for ten years is reasonable and therefore that an award of \$85,000.00 for
13 general damages is a just measure of general damages in this case.

14 The Court having made its Findings of Fact, now enters its

15 II. CONCLUSIONS OF LAW

16 1. The Court concludes that the defendants failed to appear for trial and were thus
17 unavailable to testify. The Court considered the available remedies for
18 defendants' failure to testify and concludes that striking the Answer and
19 ordering entry of judgment against the defendants is the appropriate remedy
20 in this case. On August 31, 2010 in open court, upon plaintiff's motion, the
21 Court Granted PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S ANSWER
22 AND FOR ENTRY OF JUDGMENT pursuant to CR 43.

23 2. The Court concludes that the accident of November 3, 2005 was the fault of
24 Robert L. Woodman, who struck Julie A. James on her right side as she
25 lawfully occupied and crossed SW 174th Street at the intersection of Vashon
26

Highway SW. Robert Woodman was negligent in failing to observe Julie
FINDINGS OF FACT & CONCLUSIONS OF LAW - 5

LAW OFFICES OF
Robert M. Krinsky
1546 Market Street
Tacoma, WA 98402
(253) 572-2424

1 James occupying the unmarked crosswalk, and in failing to yield the right-of-
2 way to the plaintiff, a pedestrian. His negligence was the proximate cause of
3 the injuries and damages suffered by the plaintiff Julie A. James. Julie James
4 was not negligent.

5 3. The testimony of the plaintiff, Julie A. James, in support of an award of the
6 amount of the Judgment to be entered was taken by her counsel and subject to
7 cross-examination by defense counsel, in order for the Court to determine the
8 amount of damages to properly award where the amounts were uncertain, and
9 as expressed in CR 55(b) (2).

10 The Court concludes that the evidence supports entry of Judgment against the
11 defendants Robert L. Woodman and Mary C. Woodman, individually and as a
12 marital community, in the following amounts:

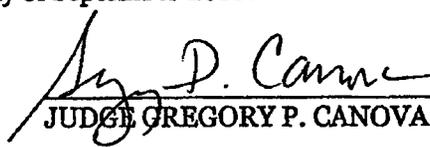
- 13 a. Past medical expenses as stipulated by the parties: \$12,950.00
- 14 b. Loss of Income for four months: \$ 7,742.00
- 15 c. Loss of earning potential: \$25,000.00
- 16 d. General Damages: \$85,000.00

17 Total Principle Judgment Award: ^{al} \$130,692.00

18 4. The Court concludes that the plaintiff is entitled to and therefore shall have
19 Judgment against the defendants in the amount of \$130,692.00 plus statutory
20 costs and attorney fees in accordance with the Cost Bill to be filed by plaintiff

21 herein, *as modified by the Judgment entered regarding this*
22 *date.* *and*

23 Dated this 21st day of September 2010.

24 
25 JUDGE GREGORY P. CANOVA

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Robert M. Krinsky
Robert M. Krinsky, WSBA #6206
Attorney for Plaintiff Julie A. James

Approved for Entry/Copy Received

Coreen Wilson
Coreen Wilson, WSBA # 30314
Attorney for Defendants Woodman

FINDINGS OF FACT & CONCLUSIONS OF LAW - 7

LAW OFFICES OF
Robert M. Krinsky
1546 Market Street
Tacoma, WA 98402

William J. Rutzick
Schroeter Goldmark & Bender
810 Third Avenue, #500
Seattle, WA 98104-1657

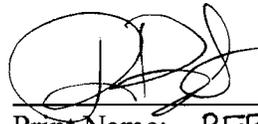
DATED this 6th day of May, 2011.



Cathi Key

SIGNED AND SWORN to (or affirmed) before me on May 6,
2011 by Cathi Key.





Print Name: REBECCA BARRETT
Notary Public Residing at LYNNWOOD, WA.
My appointment expires 4-9-2014