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NO. 66323-2-I

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

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**JULIE A. JAMES, a single person,**

**Respondent,**

**vs.**

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

**Appellants.**

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**APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Greg Canova, Judge**

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**REPLY BRIEF OF APPELLANTS**

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## I. ARGUMENT<sup>1</sup>

### A. COURTS HAVE NO DISCRETION IF THE JUDGMENT IS VOID.

Plaintiff does not and cannot dispute that judgments in violation of due process are void. *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 102, 708 P.2d 1220 (1985). Although plaintiff claims that review in this case is for an abuse of discretion, she totally ignores *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323, 877 P.2d 724 (1994), in which this court ruled that “a court has a **nondiscretionary duty** to vacate a void judgment” (emphasis added). If the duty is nondiscretionary, then review cannot be for abuse of discretion.

Plaintiff’s attempt to distinguish cases in which the judgment was void for lack of jurisdiction must fail. A judgment is void not only when the court lacks jurisdiction but also when the trial court “lacks the inherent power to enter the order involved.” *Mueller v. Miller*, 82 Wn. App. 236, 251, 917 P.2d 604 (1996) (quoting *State v. Petersen*, 16 Wn. App. 77, 79, 553 P.2d 1110 (1976)). A trial court has no authority to enter a default judgment that violates due process. *See Rosander v.*

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<sup>1</sup> Plaintiff complains about the typographical error on the original cover page to the Brief of Appellants that misidentified the parties. The cover page was corrected, and a copy of the corrected cover page was sent to plaintiff, within a week after the brief was filed, as shown by the letter from Cathi Key to this court dated May 10, 2011. Consequently, the purpose of footnote 1 in the Brief of Respondent is not clear.

*Nightrunners Transport, Ltd.*, 147 Wn. App. 392, 399, 196 P.3d 711 (2008).

*Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009), does not apply since in that case, the judgment did not violate due process and thus was not void. Since a void judgment *must* be vacated, review is *de novo* if the judgment is void. As will be discussed, the judgment here—which was effectively a default judgment—is void.

Even if the standard of review were an abuse of discretion, the trial court here abused its discretion. The Washington Supreme Court has explained the abuse of discretion standard as follows:

The reviewing court will find an abuse of discretion “when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); *Michielli*, 132 Wn.2d at 240. A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

*State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). As will be discussed, the trial court here applied the wrong legal standard, based its decision on “facts” unsupported by the record, and thus abused its discretion.

**B. THE JUDGMENT IS VOID FOR VIOLATING DUE PROCESS.**

Plaintiff does not seriously dispute that entering what is essentially a default judgment under CR 43(f)(3) has due process implications. Indeed, she concedes that *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 41 P.3d 1175 (2002), and *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997), are relevant to this matter. Those cases set forth the due process safeguards that a trial court must employ when entering default judgment as a sanction. Specifically—

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*, 145 Wn.2d at 686; *see also Burnet*, 131 Wn.2d at 494.

Nonetheless, plaintiff claims that because *Rivers* and *Burnet* involved violations of discovery orders, rather than a refusal to attend trial in response to a CR 43 notice, some “modification” must be made. (Brief of Respondent 12) What “modification” plaintiff is proposing is not entirely clear.

What is clear is that plaintiff is arguing that some due process violations are not worthy of the *Rivers/Burnet* safeguards. Plaintiff has

cited no authority that there are “second class” due process violations that warrant lessening these *safeguards* to prevent such violations. The flaw in plaintiff’s argument is that even if there were second class due process violations, that would not justify lessening the *safeguards*. Rather, any such distinction would merely justify lessening the *sanctions*—exactly what should have been done here, assuming *arguendo* that there was even a refusal to attend trial within the meaning of CR 43(f).

In fact, although plaintiff relies on *Burnet*, 131 Wn.2d at 497-98, to support her claim that the difference between discovery and trial warrants lessening the *safeguards* for a due process violation involving CR 43, *Burnet* involved whether the severity of the *sanctions* imposed by the trial court was an abuse of discretion. Thus, by focusing on the nature of the sanctions rather than on the quality of the safeguards, *Burnet* supports the Woodmans’ position, not plaintiff’s.

In any event, even if there were “second class” due process violations, the violation here is a first class one. Where, as here, the trial court elects to enter default judgment as a sanction in a non-CR 55 situation<sup>2</sup>, it does not matter whether it was a sanction under CR 43 or under CR 37. The result—a judgment against a defendant who was not

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<sup>2</sup> Plaintiff agrees that CR 55 does not apply in this case. (Brief of Respondent 27)

permitted to defend against it—is the same. If the judgment violates due process, it matters not whether the sanction was imposed for a discovery violation or for not attending trial.

As will be discussed *infra*, whether the standard of review is *de novo* or an abuse of discretion, the trial court applied the wrong legal standard by failing to apply *Rivers* and *Burnet*. The trial court also made its ruling relying on “facts” unsupported by the record. Consequently, the trial court’s ruling was based on untenable grounds or for untenable reasons—an abuse of its discretion. *Rohrich*, 149 Wn.2d at 654. In so doing, it not only deprived the Woodmans of due process, but also of their constitutional right to a jury trial. WASH. CONST. art. I, § 21.

**1. The Trial Court’s Finding and Conclusion Do Not Support a Default Judgment Compliant with Due Process.**

It is axiomatic that the trial court’s findings and conclusions must support its judgment.<sup>3</sup> But in this case, they do not.

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<sup>3</sup> Plaintiff claims that the Woodmans never objected to the findings of fact or conclusions of law but fails to cite any legal authority that such objections were required. CR 52(b) provides that whether the findings are supported by the evidence may be raised whether or not the party raising the issue has objected to the findings. *See also* RAP 2.5(a)(2). Exceptions need not be taken to conclusions of law that do not follow from findings of fact. *Vansant v. Hartman*, 88 Wash. 636, 641, 153 P. 1062 (1915), *reh’g denied*, 91 Wash. 690 (1916). *See generally Yakima Cty. v. Evans*, 135 Wn. App. 212, 222-23, 143 P.3d 891 (2006) (party may challenge findings and conclusions on appeal for the first time).

By its terms, CR 43(f)(3) requires a “refusal” to attend. To satisfy due process, the trial court must find a “willful” refusal to attend that “substantially prejudiced” the opposing party and that the trial court considered whether lesser sanctions would have sufficed. *Rivers*, 145 Wn.2d at 686.

The trial court entered one finding, Finding of Fact 1, and one conclusion, Conclusion of Law 1, about the Woodmans’ failure to attend trial. (CP 22, 25) Neither the finding nor the conclusion says anything about a “refusal” to attend, that any “refusal” was “willful”, that plaintiff was “substantially prejudiced”, or that the trial court considered lesser sanctions to determine whether they would have sufficed. The judgment is void and must be vacated *in the absence of any one of these*.

**a. There Is No Finding of a “Refusal” To Attend Trial Nor Could There Be.**

CR 43(f)(3) explicitly requires that a party served with a notice to attend trial “refuse” to attend trial. The trial court, in Finding of Fact 1 and Conclusion of Law 1, found that Mr. Woodman had “failed” to attend trial. Plaintiff claims that this is a distinction without a difference.

Where, as here, the rule at issue does not define “refuse”, the Washington Supreme Court has given it its ordinary meaning: “to show or express a *positive unwillingness* to do or comply with (as something

asked, demanded, expected . . .’.” *Department of Licensing v. Lax*, 125 Wn.2d 818, 822, 888 P.2d 1190 (1995) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1910 (1986)). Accordingly, the court has ruled that one who cannot attend trial due to illness does not “refuse” to do so as required by CR 43(f). *Gillett v. Lydon*, 40 Wn.2d 915, 918, 246 P.2d 1104 (1952).

Nevertheless, plaintiff argues that *Campbell v. A.H. Robins Co.*, 32 Wn. App. 98, 645 P.2d 1138, *rev. denied*, 97 Wn.2d 1037 (1982), and *Rivers*, 145 Wn.2d 674, both used “fail” as a synonym for “refuse.” Neither case, however, involved the issue of whether “refuse” is the same as “fail.”

At most, the two cases confirm why the Washington Supreme Court has pointedly observed, “All statements made by this court are not intended to be incorporated into jury instructions.” *Vangemert v. McCalmon*, 68 Wn.2d 618, 627, 414 P.2d 617 (1966); *accord Swope v. Sundgren*, 73 Wn.2d 747, 750, 440 P.2d 494 (1968). Thus, this court has recently explained that “[t]he fact that a proposed jury instruction includes language used by a court in the course of an opinion does not necessarily make it a proper jury instruction.” *Anfinson v. FedEx Ground Package*

*System, Inc.*, 159 Wn. App. 35, 45, 244 P.3d 32 (2010). In short, language in court opinions is often not precise.<sup>4</sup>

The trial court found and concluded that defendants had “failed” to appear for trial. (CP 22, 25) But CR 43(f) requires more than that: it expressly requires a *refusal* to attend. Thus, by their terms, Finding of Fact 1 and Conclusion of Law 1 were insufficient to support the entry of the default judgment against defendants Woodman. Even if due process were not a consideration, the trial court’s failing to find a “refusal” to attend, as required by CR 43(f)(3) would mandate reversal and remand for a jury trial. *See Gillett*, 40 Wn.2d at 918.

Plaintiff claims that there could be no due process violation even if there had been a “refusal” to attend as required by CR 43(f)(3). (Brief of Respondent 21-22) Without any citation to any authority whatsoever, and contrary to her admission that *Rivers* and *Burnet* are relevant here, she claims that so long as the trial court complied with the strict letter of CR 43(f)(3), due process was satisfied.

But Washington courts have held that compliance with the strict letter of CR 37(b)(2) is insufficient to support dismissal of an action or the

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<sup>4</sup> Since the language of *written* court opinions is not sufficiently precise, neither is a trial court’s *oral* recounting of what occurred in chambers. (Brief of Respondent 18)

entry of default judgment unless due process requirements are also satisfied. *Rivers*, 145 Wn.2d at 686-87; *Burnet*, 131 Wn.2d at 494. Plaintiff has failed to make a convincing case why entry of default judgment under CR 43(f)(3) should be any different.

Due process requires that there be a finding of *willful* refusal to attend. Not only did the trial court not find a “refusal”, it also did not find a “willful” refusal.

Faced with a finding that does not support the entry of default judgment, plaintiff claims that this court may look to the trial court’s oral ruling. But here, the trial judge’s oral remarks were internally inconsistent. Although the court noted that there was “no evidence that in fact there is a medical basis for his inability” to attend (RP 6), the trial court also said (RP 5-6):

Well, at this point *I’m going to accept the representations of both Counsel as officers of the Court . . .* 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.

(Emphasis added.) These oral remarks by the trial court do not support plaintiff’s contention that what the trial court really meant to say in its finding of fact was that defendants willfully “refused” to appear. *Cf. Mairs v. Department of Licensing*, 70 Wn. App. 541, 545, 854 P.2d 665

(1993) (oral decision inconsistent with written findings and conclusions cannot be used to impeach them). Consequently, the trial court’s oral decision is of no help to plaintiff.

In any event, even had the trial court entered a finding and conclusion that defendants had willfully “refused” to appear, such a finding and conclusion would not have been supported by substantial evidence.<sup>5</sup>

The testimony of Mr. Woodman’s daughter was undisputed that—

- Mr. Woodman had a stroke,
- is easily confused,
- has a memory so poor that he cannot remember his own address or telephone number without frequent reminders and persists in believing that his wife is in the hospital for ulcers, not for the cancer and obstructed bowel that she in fact has;

- Mr. Woodman’s daughter and her husband have had to move their motor home onto the elder Woodmans’ property to be able to assist them. (CP 64-65)

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<sup>5</sup> The Woodmans had no opportunity to present opposing evidence at the time plaintiff made her CR 43(f)(3) motion because the motion was made in open court on the first day of trial with no prior notice. In any event, the trial court may reopen a case in a postjudgment motion to hear additional evidence not presented at the first hearing so that it may consider all relevant evidence. *State v. Scott*, 20 Wn. App. 382, 580 P.2d 1099 (1978), *aff’d*, 92 Wn.2d 209, 595 P.2d 549 (1979).

It does not take a medical professional to determine that Mr. Woodman gets easily confused, has a poor memory, and is so frail that he needs his adult daughter's assistance on a daily basis.

That the video tape—of which appellant's counsel had sole custody but elected not to put into the trial court record<sup>6</sup>—may have showed Mr. Woodman playing his fiddle and singing for a short time at a local festival means nothing. There is a big difference between playing the fiddle and singing for a few minutes in one's hometown—presumably something that Mr. Woodman had been doing for years—versus having to get on a ferry from Vashon to Seattle and back to come into court to testify about an accident that occurred 5 years before.

That Mr. Woodman also attends physical therapy sessions is also of little consequence. Physical therapy can be performed on the comatose. While the Woodmans are of course not suggesting that Mr. Woodman is comatose, they are pointing out that physical therapy does not mean that the patient is capable, either physically or mentally, of the rigors of traveling to Seattle and back and testifying.

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<sup>6</sup> The Woodmans do not agree at this late date that the video should be made part of the record. Furthermore, they have moved to strike Appendix 1, regarding the video, to the Brief of Respondent and all reference to or argument based thereon because the documents contained therein are not in the record on appeal. This court's commissioner has passed the motion to the panel by ruling dated July 5, 2011.

Plaintiff argues that it is speculation that Mr. Woodman's ability to give any testimony helpful to plaintiff was doubtful. If so, it is just as speculative to assume that he would have been able to give testimony helpful to plaintiff. *Indeed, had plaintiff really thought that Mr. Woodman's testimony was crucial to her case, she would have moved to compel his deposition months before. She did not.*

Furthermore, despite plaintiff's claim that medical testimony is needed, she herself relies on her attorney's observation that Mr. Woodman looked "quite fit to me" at the festival. (RP 4) Counsel did not say how long he observed Mr. Woodman or whether he heard him talk. Counsel's lay opinion based on what could only have been a few minutes of observation is immaterial, particularly compared to the testimony of Mr. Woodman's daughter, who sees her father on a daily basis.

Plaintiff's reliance on *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009) is misplaced. In *Magana*, the appellate courts found that the trial court did not abuse its discretion in finding willful failure<sup>7</sup> to comply with the discovery rules after the party against whom sanctions were sought had *falsely* answered discovery at a

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<sup>7</sup> Unlike CR 43(f)(3), CR 37(b)(2) requires a "failure" rather than a "refusal" to act.

time when it knew the answers were not true.<sup>8</sup> 167 Wn.2d at 584-85; *see also Magana v. Hyundai Motor America*, 141 Wn. App. 495, 511, 515, 170 P.3d 1165 (2007). Here, the trial court did not find willfulness.

*Esparza v. Skyreach Equipment, Inc.*, 103 Wn. App. 916, 15 P.3d 188 (2000), *rev. denied*, 144 Wn.2d 1004 (2001), and its discussion of CR 43(f) are also inapposite. In that case, the witness was not ill, attended trial, and no sanctions were imposed. *Esparza* has nothing to do with whether a refusal to attend trial was willful.

**b. There Is No Finding of Substantial Prejudice Nor Could There Be.**

Plaintiff claims that at best, the evidence was disputed whether Mr. Woodman was physically or mentally able to attend trial and testify. Even if this were so, the fact remains that the trial court failed to comply with due process. Specifically, even if the trial court had made a finding as to willful refusal to attend trial, and even if there were substantial evidence to support such a finding, the trial court *did not make any finding* that such refusal substantially prejudiced plaintiff.

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<sup>8</sup> Oddly enough, although the trial court here did not issue an order requiring the Woodmans to attend trial, plaintiff claims at page 19 of her brief that a violation of a court order without reasonable excuse is deemed willful. But on page 14 of her brief, she does an about-face and argues that the due process standards applied to violation of discovery orders under CR 37(b) do not apply to CR 43(f)(3) since the latter does not require a court order. (Brief of Respondent 14)

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); *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2006), *rev. denied*, 161 Wn.2d 1005 (2007). In this case, the party with the burden of showing substantial prejudice was plaintiff. Because there was no finding, that alone requires reversal.

Again, plaintiff attempts to use the trial court’s oral remarks in lieu of the absence of a finding. But the only thing that the trial court said was:

[Mr. Woodman’s presence is] also rather essential, in fact, to the Plaintiff’s case. . . .

. . . .

. . . 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 . . . .

(RP 6) But these were merely conclusory remarks by the trial court. The trial court *never* identified what the detriment to plaintiff was. Findings and conclusions should be sufficient to suggest their factual basis. *See In re Marriage of Monaghan*, 78 Wn. App. 918, 925, 899 P.2d 841 (1995).

Indeed, even plaintiff could not come up with any detriment in the trial court, which was hardly surprising since she failed to move to compel Mr. Woodman’s deposition. Below all she claimed was that she and her expert witnesses had spent the time and expense to prepare for trial. (CP

80) But she would have incurred the same expense (or even more) had Mr. Woodman appeared at trial.

On appeal, plaintiff—through her new appellate attorney—abandons this “prejudice” argument. Instead, she claims, for the first time, that she needed Mr. Woodman to testify that he did not see her either at all or until it was too late and that he was going at a slow speed. (Brief of Respondent 24)

Even assuming that plaintiff could show that Mr. Woodman would so testify, she was not prejudiced because he was not at trial to so testify. Plaintiff herself testified she was walking on a sidewalk and when she got to the corner, she looked both directions and did not see any cars. (RP 8) She testified she did not see any cars coming along the street she intended to cross and that although there was traffic going parallel to the direction she was going, no one seemed to be turning. She said she then got more than halfway across the street when she was hit. (RP 8-9)

From this testimony, along with evidence that the driver was Mr. Woodman—a fact that no one disputed (CP 15), a trier of fact could—without more—find that Mr. Woodman had been negligent. *See* RCW 46.61.235(1). Mr. Woodman’s absence simply meant that the *defense* could not rebut plaintiff’s testimony with Mr. Woodman’s testimony.

Mr. Woodman would, of course, have had no evidence useful to plaintiff as to her damages. Evidence that he may have been going at a slow speed would have been favorable to the defense, not to plaintiff.

Therefore, Mr. Woodman's absence did not substantially prejudice her.

**c. There Is No Finding that Alternative Sanctions Were Insufficient Nor Could There Be.**

Even if there had been findings as to willful refusal to attend resulting in substantial prejudice to plaintiff and even if such findings had been supported by substantial evidence, the result would still have to be the same because there was no finding, let alone substantial evidence, that alternative sanctions were insufficient.

As with the substantial prejudice requirement, the trial court made no finding as to whether it had considered alternative sanctions and whether they were sufficient. Since plaintiff, as the moving party, bore the burden of proof as to this due process of requirement, the absence of any finding on it requires reversal. *Xieng*, 120 Wn.2d at 526; *Burns*, 135 Wn. App. at 300.

Again, plaintiff falls back on the trial court's oral remarks. The trial court simply made the conclusory statement that although there were 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.” (RP 6)

First, as discussed *supra*, the nature of the Woodmans’ defense has absolutely *nothing* to do with whether *plaintiff* was substantially prejudiced. Because Mr. Woodman could not be there to testify that plaintiff’s dark clothing prevented him from seeing her until it was too late, if at all, plaintiff *benefited* by his inability to attend. Thus, entering default judgment against the Woodmans could not be the “most appropriate” sanction.

Second, as discussed *supra*, there was no detriment to plaintiff. The trial court never identified any specific detriment and neither has plaintiff. For that reason as well, entering default judgment against the Woodmans could not be the “most appropriate” sanction.

In any event, Mr. Woodman’s inability to attend hurt only the defense. In lieu of striking the Woodmans’ entire answer, the trial court could have, for example, stricken their affirmative defense of comparative fault. The trial court never explained nor could it have explained why striking affirmative defenses would not have been adequate. There was no compliance with the Woodmans’ due process rights for this reason as well.

## II. CONCLUSION

The default judgment against the Woodmans is void because it did not comply with due process. It did not comply with due process because there was no finding, let alone substantial evidence to support a finding, of a willful refusal to attend, substantial resulting prejudice to the plaintiff, or that an alternative lesser sanction would have been appropriate. Although in this case, none of these required elements were present, reversal and a jury trial would be necessary even if *only one* were not present.

Hence, the judgment must be vacated. Even if the judgment is not void, CR 43(f)(3) did not apply because there was no “refusal” to attend as required by that rule.

By misapplying CR 43(f)(3) and depriving the Woodmans of their due process rights, the trial court also improperly deprived them of their constitutional right to a jury trial.

The judgment in favor of plaintiff should be reversed and a jury trial ordered.

DATED this 2<sup>nd</sup> day of July, 2011.

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