IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JULIE A. JAMES, Respondent, v. ROBERT L. WOODMAN and MARY C. WOODMAN, individually and as a marital community, Appellants.	)	No. 66323-2-I DIVISION ONE UNPUBLISHED OPINION FILED: May 14, 2012

Schindler, J. — Where a party is properly served with a notice to attend trial but refuses to do so, CR 43(f)(3) gives the trial court the discretion to strike the complaint or answer and enter judgment. The record in this case supports the trial court's determination that the failure of the defendant Robert L. Woodman to appear at trial to testify was willful, but the record does not support the determination that the plaintiff was prejudiced or that the court affirmatively considered lesser sanctions. We remand to the trial court to address on the record whether Woodman's failure to appear at trial substantially prejudiced the plaintiff and to consider the lesser sanctions.

FACTS

At approximately 5:30 p.m. on November 3, 2005, Julie A. James was walking

across an unmarked crosswalk located at the intersection of SW 174th Street and Vashon Highway SW. As Robert Woodman made a left turn in his Ford Windstar minivan from Vashon Highway SW, he struck James. James landed on her left knee and right elbow. James suffered a herniated disc, injury to her clavicle, and soft tissue injuries to her cervical, thoracic, and lumbar spine.

On October 24, 2008, James filed a "Complaint for Personal Injuries" against Robert Woodman and his spouse Mary Woodman. James claimed Robert Woodman's negligence was the proximate cause of the "vehicle-pedestrian collision" and damages. James alleged that Woodman negligently or recklessly failed to stop for a pedestrian in an unmarked crosswalk in violation of RCW 46.61.235. James also alleged Woodman was negligent in failing to yield the right of way, failing to keep a proper lookout, and to exercise caution. Woodman filed an answer denying liability and damages. Woodman alleged that James was negligent.

Trial was originally scheduled for April 19, 2010. James scheduled Woodman's deposition for January 27, 2009. However, because Woodman was unavailable, "the deposition did not go forward." On January 29, Woodman filed a demand for a jury trial.

In February, the parties filed a stipulated motion and order to change the trial date to the "mutually agreeable date of August 30, 2010, to accommodate Defendant's current health conditions." On March 1, the court entered an order changing the trial date from April 19 to August 30, 2010.

Approximately six weeks before trial, a new attorney for Woodman filed a notice

of appearance. On July 28, James served Robert Woodman and Mary Woodman with a notice to compel attendance at trial. On August 9, the parties filed a "Joint Confirmation of Trial Readiness." According to the Joint Confirmation, the parties had met and conferred, were aware of the deadlines and requirements in the pretrial order, and certified that the jury trial scheduled to begin on August 30 would last three to five days. On August 23, Woodman filed motions in limine as well as proposed jury instructions.

At the beginning of the trial, the court states that during a chambers conference with the attorneys, the lawyers informed the court that Woodman "has indicated he will not be attending trial in spite of the proper service of notice."

Woodman's attorney states on the record that Woodman had a stroke "within the last several months" but there was no medical documentation supporting the "idea that he is physically unable to attend trial."

> I can tell the Court that Mr. Woodman has recently had a stroke. I -- when I say recently, I mean within the last several months. His wife is ill. He is . . . in his mid-eighties. And I do have significant concerns over whether he could or could not attend 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.

James's attorney questioned whether Woodman was unable to attend trial. The attorney asked the court to review a videotape taken approximately 10 days earlier. The attorney states that the video shows Woodman attending an event on Vashon Island, and walking unassisted to stage to accept an award and perform.

> I have an offer of proof, if the Court wanted to look at it. 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.

James's attorney asked the court to strike the answer and enter a default judgment under CR 43(f)(3).

In response, Woodman's attorney asked the court to strike "the liability defense" but proceed to trial on damages.

> 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. . . . [S]o that's another alternative as well that I would pose.

The court concluded Woodman's failure to appear at trial was prejudicial to James because "the Defense is 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." Because Woodman was properly served with the notice to compel attendance at trial, and there was "no evidence that in fact there is a medical basis for his inability to respond," the court granted the motion to strike the answer and enter a default judgment.

The written findings of fact state, in pertinent part:

> 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 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.
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> The written conclusions of law state, in pertinent part:
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> 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 DEFENDANTS' ANSWER AND FOR ENTRY OF JUDGMENT pursuant to CR 43.

The parties stipulated to special damages in the amount of $12,950. James testified about the accident and general damages. The trial court entered findings of fact and conclusions of law and judgment against Robert and Mary Woodman in the amount of $121,178.50 on September 21.[1] The findings describe the accident and the serious injuries James suffered, and lost earning potential. The court awarded James $7,742 in loss of income; $25,000 in lost future earnings; and $85,000 in general damages.

On October 1, Woodman filed a "Motion to Vacate Default Judgment and for Reconsideration and/or 'New' Trial." Woodman asserted that entry of the judgment violated due process because the court did not find that his failure to attend trial was willful, that James was prejudiced, and the court did not explicitly considered lesser

[1] The court concluded Woodman was entitled to a $10,000 offset for funds paid to James by his insurance company.

sanctions.

In support of the motion, Woodman filed a declaration from his daughter Elaine Jewett, signed on October 1. In the declaration, Jewett states that Woodman "suffered a stroke several months ago," that her mother has cancer, and that she provides daily care for her parents. Jewett also states that Woodman "is frail, has memory problems, is easily confused, and has been forbidden to drive by his neurologist." Jewett says that Woodman has three physical therapy appointments per week and takes naps throughout the day. But Jewett said that she was unable to obtain documentation from a doctor stating that her father could not attend trial due to illness. Jewett says that she called Woodman's neurologist once and left a message but did not receive a response, and that she visited the office of his cardiologist once but "[t]here was no one in the office at the time of my visit so I was unable to obtain anything in writing from him." Jewett said she did not attempt to get documentation of her father's condition from his primary care physician because Woodman was in the process of transitioning to a new doctor. Jewett acknowledged that Woodman performed at the music festival in August and "[h]e was able to play, but not like he used to."

In opposition, James argued that the record supported the trial court's decision to strike the answer and enter the judgment. James pointed out that Woodman did not request a continuance of the trial date, or seek a perpetuation deposition or protective order, and Woodman did not provide medical documentation to support the claim that he was unable to attend trial. The court denied Woodman's motion to vacate the judgment.

ANALYSIS

On appeal, Woodman contends the record does not support the trial court's decision to strike the answer and enter judgment under CR 43(f)(3). Woodman argues entry of the judgment violated due process because the court did not find Woodman willfully refused to attend trial, that his failure to attend trial was prejudicial, or that the court expressly considered lesser sanctions on the record.

We review the decision to enter judgment as a sanction for abuse of discretion. Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. T.S. v. Boy Scouts of Am., 157 Wn.2d 416, 423, 138 P.3d 1053 (2006); Magaña v. Hyundai Motor Am., 167 Wn.2d 570, 582-83, 220 P.3d 191 (2009).

CR 43(f)(3) gives the court discretion to strike a party's pleadings if that party refuses to attend trial or give testimony. CR 43(f)(3) provides, in pertinent part:

> If a party or a managing agent 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 complaint, answer, or reply of the party may be stricken and judgment taken against the party.

It is well established that when a trial court strikes an answer and enters judgment as a sanction for violation of a discovery order under CR 37, it must be apparent from the record that (1) the party's refusal to obey the 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. The same requirements

obviously also apply to the sanctions imposed under CR 43(f)(3).

Relying primarily on the declaration of his daughter and Gillett v. Lyndon, 40 Wn.2d 915, 246 P.2d 1104 (1952), Woodman claims that the record does not support the trial court's finding that the refusal to attend trial was willful. Woodman argues that the finding that Woodman "failed" to appear at trial despite proper notice does not constitute a finding of willfulness.

In Gillett, a cancer patient sued "a sanipractor and drugless healer" for false promises to cure her cancer. Gillett, 40 Wn.2d at 915-16. The court concluded that because "[i]t was shown that plaintiff was unable to attend because of her illness," the plaintiff did not refuse to attend and testify. Gillett, 40 Wn.2d at 918.

Here, unlike in Gillett, Woodman did not show he was unable to attend because of his illness. Woodman provided no evidence of a medical basis for his inability to attend either at trial or in support of his motion to vacate. Jewett's declaration contains no dates of her attempts to contact Woodman's doctors or the date of her father's stroke. The record shows that Woodman was able to attend and perform at a music festival, and walk to the stage unassisted approximately 10 days before trial. Where the failure to comply with the notice to attend trial is without reasonable excuse, " 'the refusal [i]s willful.' " Rivers, 145 Wn.2d at 693[2] (quoting Anderson v. Mohundro, 24 Wn. App. 569, 574, 604 P.2d 181 (1979)). The trial court's determination that Woodman was absent without reasonable excuse, and therefore refused to attend trial, is supported by the record.

Although the record establishes willfulness, we conclude that as in Rivers, the

[2] (Internal quotation marks and citation omitted.)

record does not show that the trial court considered the question of prejudice and lesser sanctions. Rivers, 145 Wn.2d at 693-96. In Rivers, the court referred to discovery violations and the alleged effect on the defense, but never affirmatively stated on the record why the defendant was substantially prejudiced in its ability to prepare for trial

and did not consider lesser sanctions. Rivers, 145 Wn.2d at 694.

> The trial court on the record did consider lesser sanctions, but only by stating in the order, "The court has considered lesser sanctions of terms and exclusion of testimony, but has determined that dismissal of [Petitioner's] complaint with prejudice is the only appropriate remedy."
> . . . Whether she should be subject to the drastic sanction of dismissal cannot be determined under the limited language used by the trial court in its order of dismissal. Before resorting to the sanction of dismissal, the trial court must clearly indicate on the record that it has considered less harsh sanctions under CR 37. Its failure to do so constitutes an abuse of discretion.

Rivers, 145 Wn.2d at 696.[3]

Likewise here, the trial court did not clearly state on the record the reasons why Woodman's failure to appear and testify was prejudicial, or why the lesser sanction that Woodman proposed to strike the answer denying liability but proceed to a jury trial on damages was not appropriate.[4] See Rivers, 145 Wn.2d at 695 (sanctions should be proportional to the nature of the violation and the surrounding circumstances).

We reverse the trial court's order entering judgment against Woodman under CR 43(f)(3) and remand.[5]

WE CONCUR:

[3] (Brackets in original) (footnote omitted).

[4] Article I, section 21 of the Washington State Constitution states that "[t]he right of trial by jury shall remain inviolate."

[5] We grant Woodman's motion to strike appendix 1 to the brief of respondent.