

No. 49273-3-II

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

BOSS CONSTRUCTION, INC.,

Respondent

v.

HAWK'S SUPERIOR ROCK, INC.,

Appellant

BRIEF OF RESPONDENT

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INTRODUCTION

Hawk's Superior Rock fails to satisfy the two primary elements of a CR 60-claim, first failing to set forth a prima facie defense. Hawk's provided Boss Construction a price sheet for the project at issue, stating that its material met WSDOT specifications. But Hawk's material failed WSDOT testing repeatedly, so was rejected repeatedly. There is no evidence of a passing test result.

Hawk's claim that WSDOT agreed to allow Boss to use Hawk's out-of-spec material is woefully incomplete. Subsequent correspondence shows that Hawk's never met WSDOT's reduced standards. Again, Hawk's material failed test after test.

As to the second primary CR 60 element, Hawk's asserts that its failure to appear and respond was excusable neglect, but acknowledges that counsel simply forgot to notify the court and counsel of his address change. Hawk's excuse it that this matter had gone dormant before counsel moved offices. That is false – counsel admits that he moved offices “shortly” after filing Hawk's Answer. Failing to have in place any office procedures to monitor pending cases is not excusable neglect.

The trial court was well within its broad discretion in declining to set aside the default. This Court should affirm.

RESTATEMENT OF THE CASE

A. Hawk's Superior Rock was unable to provide material meeting WSDOT specifications for Boss Construction's culvert-construction project.

Plaintiff/Respondent Boss Construction, Inc. is a construction company that was awarded a public construction contract with Washington State Department of Transportation ("WSDOT") to replace a culvert with an 87-foot-long bridge in Pacific County, Washington. CP 20.¹ As part of its contract with WSDOT, Boss was required to obtain a commitment for sufficient rock and gravel (gravel borrow, CSBC and Quarry Spalls) to complete the job. CP 20, 76. Defendant/Appellant Hawk's Superior Rock, Inc. offered to sell Boss the material, providing a price sheet for the project stating: "All Rock Meets DOT and Corp. of Engineer Specifications for Hardness &

¹ Hawk's Superior Rock begins its Statement of the Case by asserting that the procedural facts" are based on the pleadings before the trial court on Hawk's motion to vacate, while the facts establishing its defense are "based upon the record on reconsideration," apparently in addition to facts presented on the motion to vacate summary judgment. BA 3. As addressed below, the trial court's discretion in this area includes the discretion to decline to consider issues raised for the first time on reconsideration. *Infra*, Argument § A.

Wear.” CP 20, 84.² “The Project was highly dependent on a supply of rock and gravel meeting WSDOT requirements.” CP 20.

Hawk’s failed to perform almost immediately. CP 20. Hawk’s acknowledges that WSDOT testing showed that its gravel borrow “was considered a little out” on a “sieve analysis.” BA 4. It claims, however, that WSDOT agreed to let Boss use Hawk’s gravel borrow with a minor price reduction and that Hawk’s agreed to the price reduction. *Id.* Without saying any more, Hawk’s concludes, “Yet Boss Construction chose not to use the gravel borrow or the *approved* quarry spalls, which Hawk’s Superior left in a stockpile for a year.” *Id.* (emphasis added).

Hawk’s omits a great deal, most notably that Hawk’s was never able to provide product meeting WSDOT’s modified specifications and that communications subsequent to the one Hawk’s relies on establish that WSDOT had no passing tests for any material from Hawk’s pit. CP 81-82, 86-87. On November 12, 2010, Hawk’s gravel borrow failed WSDOT’s test. CP 86. Two previous tests for that material also failed. *Id.*

² The price sheet was inadvertently omitted from the declaration of Chris Hart, Boss’s Vice President. CP 19-23. Per the trial court’s request, Boss attached it to Hart’s declaration in response to Hawk’s Motion for Reconsideration. CP 79, 81, 83-84.

Boss and WSDOT “put their heads together” and came up with a method to create “Special Gravel Borrow,” agreeing to a price reduction. *Id.* On November 30, 2010, another sample was taken at Hawk’s pit as “Special Gravel Borrow.” *Id.* The sample did not pass, and the stockpile was rejected. *Id.*

On December 2, 2010, another sample was taken and tested as “Special Gravel Borrow.” CP 86-87. That sample also failed, and the stockpile was again rejected. CP 87. In short, “even with the specification changes, the material [did] not meet the modified specifications.” *Id.*

On December 7, 2010, WSDOT received an email indicating that Hawk’s wanted to use its CSBC pile, claiming that it would meet WSDOT’s Special Gravel Borrow specifications. *Id.* WSDOT sampled and tested Hawk’s CSBC pile, but it also failed. *Id.* WSDOT rejected that pile as well. *Id.*

WSDOT and Boss later discussed another option, creating a new material called “Temporary Special Gravel Borrow,” that could be used on the temporary detour during the construction project. *Id.* This was the only material Hawk’s could provide that met WSDOT specifications. CP 21. Boss used and paid for the “Temporary Special Gravel Borrow.” *Id.*

When Hawk's suggests that it was able to provide suitable material that Boss refused to use, it ignores the repeat failed test results, relying instead on a December 2, 2010 email from WSDOT, stating that Hawk's material was out of spec., but that Boss and WSDOT had agreed to use the material with a price reduction. BA 4; CP 78. When WSDOT wrote that email, it did not yet have the test results – from tests taken just days before and the very same day – showing that Hawk's material did not meet WSDOT's modified specifications. CP 86-87. And after that email, another of Hawk's piles failed to meet WSDOT's specifications. CP 87. As of December 13, 2010 – 11 days after the email Hawk's relies on – WSDOT did “not have a passing test for any material from Hawks [sic] pit.” CP 86

Also inaccurate is Hawk's assertion that its quarry spalls were “approved.” BA 4. WSDOT unequivocally stated that as of December 13, 2010, it did not have any passing test “for any material from Hawks [sic] pit.” CP 86. Although WSDOT stated that it was “checking into the status of the Quarry Spall test,” there is no other mention of a Quarry Spall test in the record. *Id.* Thus, Hawk's has not established that its quarry spalls were “approved.” BA 4.

B. The trial court entered summary judgment for Boss when Hawk's failed to appear and respond, subsequently denying Hawk's motion to set aside the default.

In August 2014, Boss filed suit to recover damages resulting from the cost to secure alternate product and ensuing delays. CP 3-5. Boss moved for summary judgment in February 2016, and Hawk's failed to appear and respond. CP 11-18, 23-28. The trial court granted Boss' motion, entering a default judgment. CP 23-28.

Hawk's learned about the default judgment six weeks later, and filed a CR 60(b)(1) motion about 10 days later. BA 6-7. Counsel argued that he had never received Boss' summary judgment motion, so had no notice or opportunity to respond. CP 35.

Hawk's claims that in "the 16 months that had passed since Hawk's Superior filed its answer, its counsel, . . . moved his law practice to another office in the same building . . ." BA 5. But counsel acknowledged that he moved offices "[s]hortly" after filing Hawk's answer. CP 35.

Although counsel changed his address with the WSBA and applied for a mail forwarding with the post office, he did not notify the court or counsel of his address change. CP 35; RP 2-3. He acknowledged that the notice of hearing for the motion for summary

judgment contained a CR 5 certification that it was mailed to his former address. CP 35.

As discussed in more detail below, Hawk's did not assert excusable neglect, but principally argued irregularity, also falling back on mistake and inadvertence. CP 30, 37-38; RP 3-4. Counsel argued that this matter "just wasn't on [his] mind," as it had been "dormant" for some time, during which he had stepped away from his practice due to illness.³ RP 3-5. When asked whether anyone had been tending to his pending cases during his illness, Counsel gave no answer other than that he had no pending matters other than this one. RP 4-5.

The trial court denied Hawk's motion to vacate, holding that counsel's failure to file and serve a notice of address change did not satisfy CR 60(b)(1). CP 62; RP 7. Hawk's moved for reconsideration, raising excusable neglect for the first time. CP 67-68. Hawk's also raised for the first time that WSDOT "had specifically approved 'the material [Hawk's provided] with a minor 3% price reduction.'" BA 7; CP 65-69. As addressed above, however, Hawk's was unable to provide material meeting these modified requirements. CP 86-87.

³ Again, counsel acknowledges that his address changed "shortly" after he filed Hawk's Answer. CP 35.

The trial court asked Boss to respond to Hawk's assertions that it had demonstrated a meritorious defense. CP 79. Boss provided the above-discussed WSDOT correspondence establishing that Hawk's had never provided material meeting WSDOT specifications, other than the Temporary Special Gravel Borrow Boss used and paid for. CP 21, 86-87. The trial court then denied Hawk's motion for reconsideration. CP 92. Hawk's appealed.

ARGUMENT

A. Standard of review.

A party moving to vacate under CR 60(b)(1) must establish: "that (1) there is substantial evidence supporting a prima facie defense, (2) the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect, (3) the defendant acted with due diligence after notice of the default judgment, and (4) the plaintiff will not suffer a substantial hardship if the default judgment is vacated." *Ha v. Signal Elec., Inc.*, 182 Wn. App. 436, 448-49, 332 P.3d 991 (2014) (citing *Little v. King*, 160 Wn.2d 696, 703-04, 161 P.3d 345 (2007)); *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). Factors (1) and (2) are primary, and factors (3) and (4) are secondary. *White*, 73 Wn.2d at 352; *Ha*, 182 Wn. App. at 449.

This test is not mechanical. **Ha**, 182 Wn. App. at 449. The primary factors, “coupled with the secondary factors’ [sic] vary in dispositive significance as the circumstances of the particular case dictate.” **White**, 73 Wn.2d at 352. If the moving party demonstrates “a strong or virtually conclusive defense,” then the reasons for the default become less important, “provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful.” 73 Wn.2d at 352. But if the moving party can demonstrate only a prima facie defense warranting a trial on the merits, then the reasons for his failure to timely appear and respond “will be scrutinized with greater care, as will the seasonability of his application and the element of potential hardship on the opposing party.” *Id.* at 352-53.

This Court reviews a trial court’s ruling on a motion to vacate a default judgment for abuse of discretion:

[A] motion to vacate or set aside a default judgment, which is grounded upon RCW 4.32.240, is, in the first instance, addressed to the sound judicial discretion of the trial court, and that this court, sitting in appellate review, will not disturb the trial court’s disposition of the motion unless it be made to plainly appear that sound discretion has been abused.

Id. at 352; **Ha**, 182 Wn. App. at 449. This Court will reverse only if it “plainly appears that the trial court abused its discretion.” **Estate of**

Stevens, 94 Wn. App. 20, 29, 971 P.2d 58 (1999). The trial court abuses its discretion when it is exercised based on untenable grounds or for untenable reasons. **Stevens**, 94 Wn. App. at 29. “[T]he discretionary judgment of a trial court of whether to vacate [an order] is a decision upon which reasonable minds can sometimes differ.’ . . . Thus, if the decision ‘is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld.’” 94 Wn. App. at 29 (quoting **Lindgren v. Lindgren**, 58 Wn. App. 588, 595, 794 P.2d 526 (1990)).

“[T]he trial court’s discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse.” **River House Dev., Inc. v. Integrus Architecture, PS**, 167 Wn. App. 221, 231, 272 P.3d 289 (2012) (citing **Rosenfeld v. U.S. Dep’t of Justice**, 57 F.3d 803, 811 (9th Cir. 1995)). The standard of review on appeal is also “less favorable” when an issue is raised for the first time on reconsideration. **River House**, 167 Wn. App. at 231.

B. Hawk’s fails to show substantial evidence supporting a prima facie defense. (BA 21-24).

After a party obtains a default judgment, this Court “presumed that he or she has substantial evidence to support his or her claim.”

Pfaff v. State Farm, 103 Wn. App. 829, 834, 14 P.3d 837 (2000), *rev. denied*, 143 Wn.2d 1021 (2001). That presumption is the basis of the first primary CR 60(b)(1) factor – whether the defendant has put forth substantial evidence supporting “at least” a prima facie defense. **White**, 73 Wn.2d at 352; **Pfaff**, 103 Wn. App. at 834. If the party seeking to set aside a default “cannot produce substantial evidence with which to oppose the claim, there is no point to setting aside the judgment and conducting further proceedings.” **Pfaff**, 103 Wn. App. at 834.

Hawk’s has not established a prima facie defense. Hawk’s first claims that it “never made any guarantees on products.” BA 22. That is false. Hawk’s price quote for this specific construction project at issue says right on it: “All Rock Meets DOT and Corp. of Engineer Specifications for Hardness & Wear.” CP 83-84. On its face, that is a guarantee that Hawk’s products met WSDOT specifications for this particular project. *Id.*

Hawk’s next argues that WSDOT confirmed that it could “allow Boss Construction, Inc. to use the material with a minor 3% price reduction.” BA 23. Where this defense was asserted for the first time on reconsideration, this Court applies a “less favorable” standard of review. **River House**, 167 Wn. App. at 231.

As addressed above, Hawk's claim is technically accurate but woefully incomplete. *Supra*, Restatement of the Case § A. While WSDOT and Boss were willing to work with Hawk's and modify the specifications for the gravel borrow, Hawks was never able to provide material that met even the modified specifications. CP 86-87.

Hawk's argues that Boss "did not address the other four types of rock, and the correspondence it submitted stated that that [sic] WSDOT had not rejected the quarry spall material." BA 23. Again, this is inaccurate. Hawk's reference to "the other four types of rock" is misleading, where Boss bid on three types of rock, total: gravel borrow, CSBC and quarry spall. CP 76. As discussed above, Hawk's gravel borrow and CSBC failed WSDOT testing and were rejected. CP 86-87; *Supra*, Restatement of the Case § A.

As to the quarry spall, WSDOT unequivocally stated that it had no passing tests for any of Hawk's material, though it was "checking into the status of the Quarry Spall test." CP 86. WSDOT did not, as Hawk's claims, state that it "had not rejected the quarry spall material." *Compare* BA 23 *with* CP 86-87. In any event, Hawk's has the burden to make out – "at least" – a prima facie case. **White**, 73 Wn.2d at 352; **Ha**, 182 Wn. App. at 448. Hawk's fails to provide *any* passing test result, including for quarry spall.

Hawk's concludes that a reasonable jury could find that the material Hawk's "selected and furnished" was "suitable for the Project and would satisfy all WSDOT specifications." BA 23. There is not even a scintilla of evidence that Hawk's could provide any suitable material other than the "Temporary Special Gravel Borrow" Boss purchased. CP 21. "Even viewed in the light most favorable to the parties moving to set aside the default judgment, mere speculation is not substantial evidence of a defense." *Little*, 160 Wn.2d at 705 (citing *White*, 73 Wn.2d at 352).

In sum, Hawk's has failed to establish that it was able to provide any material meeting WSDOT requirements, and there is considerable evidence that Hawk's could not do so. Thus, Hawk's has failed to set forth a prima facie defense, much less a strong or nearly conclusive defense.

C. Hawk's fails to demonstrate that its failure to appear and answer was due to excusable neglect, the only CR 60(b)(1) ground asserted on appeal. (BA 13-18).

Hawk's principle argument on appeal is that failing to file a notice of address change was excusable, where counsel "forgot" to do so while this matter had grown dormant. BA 13-18. Counsel acknowledges, however, that he moved offices just shortly after filing Hawk's Answer. The matter was not dormant, and counsel's failure

to file the required notice was due to a lack of internal office procedures. This Court should affirm.

As addressed above, Hawk's has failed to establish even a prima facie defense, but assuming otherwise for the sake of argument, this Court looks with greater scrutiny at the reasons for default, where Hawk's plainly has not demonstrated a "strong or virtually conclusive defense." *White*, 73 Wn.2d at 352-53. As the trial court correctly ruled, counsel could have prevented the default with the simple step of notifying the court and counsel of his address change. RP 7. Hawk's acknowledges that its counsel simply "forgot" to do so. BA 5 (CP 38, 46; RP 4). Hawk's attempts to explain counsel's forgetfulness, stating that this was counsel's only pending case, as he had reduced his practice due to illness. BA 5, 16-17. The argument seems to be that this matter had gone "dormant" while counsel was sick, so it had slipped his mind. BA 5, 16-17; RP 3-5.

But counsel admitted that he changed his address "shortly" after filing Hawk's Answer. CP 35. Thus, the case was not "dormant" when counsel moved his office, so was not "dormant" when he should have notified the court and counsel of his address change. CP 35; RP 4-5. In short, counsel's own admission belies the

suggestion that he “forgot” about this matter because it had gone dormant before he moved his office. BA 5, 16-17; RP 3-5.

Our courts have long held that failing to respond due to a breakdown in internal office procedure is not excusable. ***Puget Sound Med. Supply v. Dep’t of Soc. & Health Servs.***, 156 Wn. App. 364, 374-75, 234 P.3d 246 (2010) (collecting cases and citing ***TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.***, 140 Wn. App. 191, 212, 165 P.3d 1271 (2007)). In ***Prest v. American Bankers Life***, for example, this Court held that neglect was inexcusable where the insurer failed to answer the complaint because it “mislaidd” the copy of the legal process sent by the insurance commissioner. 79 Wn. App. 93, 100, 900 P.2d 595 (1995). Defendant attempted to excuse its neglect by arguing that its counsel of record with the Washington Insurance Commission had been reassigned and was out of the office frequently during the time they received service. ***Prest***, 79 Wn. App. at 100. This Court reversed the trial court’s order vacating the default, holding that the failure to designate a new recipient and notify the insurance commissioner of the change, or to arrange for someone else to assume the prior recipient’s duties, was inexcusable. 79 Wn. App. at 100.

In ***Beckman v. DSHS***, neglect was inexcusable where an employee in the Attorney General's office failed to timely route documents to the proper attorney. 102 Wn. App. 687, 695, 11 P.3d 313 (2000). Lacking office procedures to calendar due dates is not excusable neglect. ***Beckman***, 102 Wn. App. at 695. Similarly, in ***TMT Bear Creek***, neglect was inexcusable where the legal assistant in charge of calendaring deadlines did not calendar defendant's response before leaving on an extended vacation, and defendant had no procedures in place to ensure that anyone else could operate the calendaring system or that the attorney in charge was aware of the deadline. 140 Wn. App. at 213. This "breakdown in internal office management and procedure" was inexcusable. *Id.*

Finally, in ***Puget Sound Medical Supply v. Dep't of Soc. & Health Servs.***, defendants attempted to excuse their neglect by claiming that staff was out for the holidays and the lead attorney had left the firm. 156 Wn. App. 364, 375, 234 P.3d 246 (2010). This Court held that these shortcomings in "organizational procedures" did not constitute excusable neglect. 156 Wn. App. at 375.

The trial court is clearly correct that default could have been prevented by the simple step of filing a change of address with the court and counsel. RP 7. Forgetting to do so is not excusable neglect,

but a failure to have in place any office procedures for tracking pending matters.

Hawk's relies principally on the Fifth Circuit case ***Blois v. Friday***, in which the court held that it was excusable that counsel simply forgot to file a notice of address change. 612 F.2d 938, 939-40 (5th Cir. 1980). ***Blois*** is at odds with the controlling precedent discussed above.

The Washington cases Hawk's relies on are no more compelling. In ***O'Toole v. Phoenix Ins. Co.***, any neglect was excusable where the attorneys had been attempting to reschedule a trial via telegraph, and counsel failed to appear after notice of the new trial date had been sent to a hotel he was no longer staying at. 39 Wash. 688, 690-91, 82 P.2d 175 (1905). In ***Leavitt v. De Young***, any neglect was excusable where lead counsel, who was on vacation, had arranged for another attorney to make any necessary appearances, and the file was mislaid during an office move. 43 Wn.2d 701, 705, 263 P.2d 592 (1953). Finally, in ***Ha***, the failure to appear resulted from a mistake, where the defendant's bankruptcy attorney executed an acceptance of service, but service was made on the bankruptcy financial advisor who forwarded it to the wrong insurance company. 182 Wn. App. at 451.

Finally, Hawk's relies on ***Plouffe v. Rook*** for the proposition that the post office's failure to forward mail is a mistake recognized in the comments to CR 41(b)(1) (dismissal on clerk's motion for want of prosecution). BA 16 (citing 135 Wn. App. 628, 634-35, 147 P.3d 596 (2006)). But the holding in ***Plouffe*** is that reversal is mandatory under CR 41(b)(1) if the intended recipient of the clerk's notice of dismissal did not receive it. 135 Wn. App. at 635. Thus, ***Plouffe*** has no bearing on the trial court's discretion exercised under CR 60.

As to the secondary factors, Boss concedes that Hawk's exercised due diligence and that Boss will not be prejudiced by reversal within the meaning of CR 60(b)(1). Thus, the above factors are dispositive. ***Johnson v. Cash Store***, 116 Wn. App. 833, 842, 68 P.3d 1099 (2003). It bears mentioning that due diligence is not enough – it does not “provide . . . a defense or excuse . . . neglect.” ***Prest***, 79 Wn. App. at 100.

In sum, Hawk's has failed to prove a prima facie defense, much less a strong or nearly conclusive defense. And forgetting to notify the court and counsel of an address change is not excusable neglect, but a breakdown in internal office procedure. This Court should affirm.

D. Hawk's procedural arguments are unavailing. (BA 10-12).

Hawk's claims that reversal is warranted because the trial court failed to consider all CR 60(b)(1) grounds raised, or because it failed to enter adequate findings. BA 10-12. The cases upon which Hawk's relies do not support either argument. This Court should affirm.

Hawk's argues that the trial court committed "legal error" in failing to consider excusable neglect, focusing instead only in Hawk's claim that its failure to appear and respond was inadvertent. BA 12. But counsel failed to raise excusable neglect until his motion for reconsideration, at which point the trial court has discretion to refuse to consider the issue. *River House*, 167 Wn. App. at 231. In his motion and affidavit to set aside the default judgment, counsel argued only that the judgment was obtained by an irregularity, the irregularity being that counsel had no actual notice. CP 37-38. At the May 31 hearing on the motion to set aside the default judgment, counsel again relied on "irregularity," also asserting mistake and inadvertence. (RP 3-4):

THE COURT: CR 60(b) is pretty specific regarding the circumstances under which relief from judgment can be granted; under which of those subsections do you believe your argument falls?

MR. HOLLEY: Well, particularly under mistake or inadvertence, Your Honor.

THE COURT: Under what?

MR. HOLLEY: Under inadvertence or an irregularity.

THE COURT: What was inadvertent about this? You failed to comply with the court rules regarding notifying counsel of the change of address; that wasn't inadvertent.

MR. HOLLEY: Well, it wasn't in a sense, Your Honor

While raising excusable neglect on reconsideration preserved the issue for appellate review, “the trial court’s discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse.” *River House*, 167 Wn. App. at 231. The standard of review on appeal is also “less favorable” when an issue was raised for the first time on reconsideration. 167 Wn. App. at 231. The trial court cannot be faulted for failing to enter findings on an issue belatedly raised, which it had the discretion to refuse to consider.

Nor does *Mosbrucker v. Greenfield Implement, Inc.* support Hawk’s argument that a trial court abuses its discretion if it does not consider each basis raised by the moving party under CR 60(b)(1). BA 10 (citing 54 Wn. App. 647, 653-54, 774 P.2d 1267 (1989)). This misconstrues *Mosbrucker*, where the issue was the

trial court's exclusive focus on excusable neglect, despite the fact that the party seeking to set aside the default judgment had set forth a substantial defense. 54 Wn. App. at 653-54. The point of **Mosbrucker** is that when the moving party demonstrates a strong defense, "scant time will be spent inquiring into the reasons which occasioned entry of the default, provided the moving party is timely with his application and the failure to properly appear in the action in the first instance was not willful." *Id.* (quoting **White**, 73 Wn.2d at 352). Thus, a court undoubtedly errs in failing to consider the moving party's defense, and focusing exclusively on the second primary factor. *Id.*

Hawk's next argues that the trial court abused its discretion in failing to enter written findings on each CR 60(b)(1) factor. BA 11-12 (citing **Norton v. Brown**, 99 Wn. App. 118, 123-24, 992, P.2d 1019, 3 P.3d 207 (1999)). Hawk's incorrectly claims that the appellate court reversed in **Norton** "because the trial court's failure to make findings on [the two secondary CR 60(b)(1)] factors was an abuse of discretion." BA 12. Norton does not stand for the proposition that the failure to enter written findings warrants vacation of a default order. BA 12.

In **Norton**, the trial court found that the party seeking to set aside the default presented a prima facie defense, but did not find that the failure to appear was caused by mistake, inadvertence or excusable neglect. 99 Wn. App. at 124. The court did not make findings on either of the secondary factors. *Id.* But the statement “this was an abuse of discretion,” taken in context, refers not only to the failure to enter findings, but to the trial court’s incorrect decision, reversed on appeal, regarding excusable neglect. *Id.* at 124-26. Indeed, the reversal in **Norton** is based on a long line of cases that a misunderstanding between the insurer and insured regarding who is responsible for handling the case will typically constitute a mistake for purposes of vacating a default judgment. *Id.* In short, the appellate court reversed because the neglect at issue was excusable. *Id.*

But in any event, seven years after **Norton**, our Supreme Court held that the appellate courts will look to the record where findings supporting a default judgment are insufficient. **Little**, 160 Wn.2d 696, 706-08, 161 P.3d 345 (2007). There, the court noted that “CR 55(b)(2) does not define what constitutes adequate findings of fact....” Where the trial court listed the material she considered and entered default for a specified amount of damages, her “implied

findings” were sufficient for appellate review. **Little**, 160 Wn.2d at 706-07. And even then, if the record is insufficient to permit appellate review, the appropriate remedy is to remand for the entry of findings, not to vacate the default judgment.

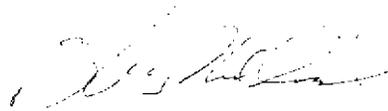
In sum, the record is adequate for review. This Court should affirm.

CONCLUSION

Where Hawk’s fails to establish that it could supply any WSDOT-compliant material, it has failed to set forth sufficient evidence or a prima facie defense, much less a strong or virtually conclusive defense. Thus, this Court looks with greater scrutiny on Hawk’s assertion that counsel’s forgetfulness is excusable neglect. It is not. This Court should affirm.

RESPECTFULLY SUBMITTED this 13th day of March, 2017.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed or caused to be mailed a copy of the foregoing **BRIEF OF RESPONDENT**, via U.S. mail, postage prepaid, and/or via e-mail, on the 13th day of March, 2017, to the following counsel of record at the following addresses:

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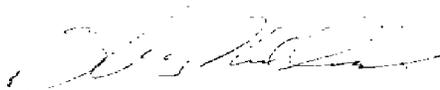
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