



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-16-00132-CV

Michael P. SULLIVAN, et al.  
Appellants

v.

**PORTABLE STORAGE OF MINNESOTA INC., et al.,**  
Appellees

From the County Court at Law No. 10, Bexar County, Texas  
Trial Court No. 2015CV04028  
Honorable Jason Wolff, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice  
Irene Rios, Justice

Delivered and Filed: March 29, 2017

**AFFIRMED**

Appellee Portable Storage of Minnesota, Inc. sued Appellant Michael P. Sullivan on sworn account. On December 18, 2015, the trial court granted Portable Storage's motion for summary judgment based on Sullivan's deemed admissions. On February 11, 2016, the trial court denied Sullivan's motion for new trial; Sullivan appealed. We affirm the trial court's judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

Portable Storage is a Minnesota corporation that buys and sells storage containers. In the usual course of business, Portable Storage sold and delivered goods, wares, merchandise, and

services to Sullivan. The business relationship began in December of 2007 and, following a dispute regarding payment ended in May of 2009. In July 2015, Portable Storage filed suit on a sworn account against Sullivan.

Because the dates of court filings and hearings are vital to our analysis, we set them out in detail below.

- July 7, 2015: Portable Storage filed its original petition, in a suit on sworn account, alleging Sullivan owed Portable Storage \$16,562.02 for goods and services.
- October 26, 2015: Sullivan's trial counsel filed his Original Answer asserting a general denial, verified pleas, affirmative defenses, and special exceptions.
- October 29, 2015: Portable Storage's Request for Admissions was served on Sullivan's trial counsel; Sullivan's responses were due on November 30, 2015.
- November 30, 2015: Sullivan did not timely file responses to Portable Storage's request for admissions. *See* TEX. R. CIV. P. 198.2(a).
- December 8, 2015: Portable Storage filed a motion for summary judgment based on the deemed admissions.
- December 9, 2015: Portable Storage served Sullivan's attorney with notice that the hearing on Portable Storage's motion for summary judgment was set for January 7, 2016, at 9:30 am.
- December 11, 2015: Portable Storage's motion for summary judgment based in part on deemed admissions was served on Sullivan's trial counsel, and Sullivan learned of the deemed admissions.
- December 14, 2015: Order setting Portable Storage's motion for summary judgment for hearing on January 7, 2016, signed by the trial court.  
Sullivan's trial counsel did not file a response to Portable Storage's motion for summary judgment.
- January 7, 2016: Counsel for both parties appeared. The trial court granted Portable Storage's motion for summary judgment and rendered judgment against Sullivan for \$16,562.02 plus interest, attorney's fees, and costs of court.
- January 19, 2016: Sullivan's trial counsel filed a motion for new trial.
- February 11, 2016: Sullivan's motion for new trial was denied by the trial court.

On appeal, Sullivan contends that the trial court abused its discretion in denying his motion for new trial. We disagree.

#### **MOTION FOR NEW TRIAL**

We review a trial court's denial of a motion to withdraw deemed admissions and a motion for new trial for abuse of discretion. *DolgenCorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (motion for new trial); *Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005) (per curiam) (deemed admissions). "A trial court abuses its discretion when it acts without reference to any guiding rules or principles." *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 687 (Tex. 2002) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)).

The Texas Supreme Court addressed a similar fact pattern in *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 797–98 (Tex. 2008) (per curiam). Unifund filed a motion for summary judgment following Weaver's failure to timely serve responses to Unifund's request for admissions. *Id.* at 797 (citing TEX. R. CIV. P. 198.2(c)). Weaver did not file a response to the motion for summary judgment and the trial court granted Unifund's motion. *Id.* The first time Weaver asserted that he complied with Rule 198.2(c) was in his post-judgment Motion for New Trial. *Id.*

Texas Rule of Civil Procedure 166a(c) provides that "[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c); accord *Unifund*, 262 S.W.3d at 797. Relying on Rule 166a(c), the court concluded that Weaver's failure to respond to Unifund's motion for summary judgment acted as a bar to raising the complaint for the first time in a motion for new trial. *Id.* at 797–98 (citing TEX. R. CIV. P. 166a(c)).

The undisputed facts in the present case are indistinguishable. Sullivan was served with a copy of Portable Storage's motion for summary judgment, had notice of the deemed admissions by virtue of the motion for summary judgment, had notice of the hearing, and attended the hearing. Like Weaver in *Unifund*, "[Sullivan] knew of his mistake before judgment and could have responded to [Portable Storage]'s motion, but because he did not, he waived his right to raise the issue thereafter." *Unifund*, 262 S.W.3d at 797 (citing TEX. R. CIV. P. 166a(c)); *see also Johnson v. Lewis*, No. 14-10-00293-CV, 2011 WL 2083965, at \*2-4 (Tex. App.—Houston [14th Dist.] May 19, 2011, no pet.) (mem. op.).

Sullivan also waived his right to challenge the deemed admissions for the first time in his motion for new trial. *See Wheeler*, 157 S.W.3d at 442 ("[E]quitable principles allowing these arguments to be raised in a motion for new trial do not apply if a party realizes its mistake before judgment and has other avenues of relief available."); *see also Unifund*, 262 S.W.3d at 798. Portable Storage's motion for summary judgment placed Sullivan on notice of his failure to comply with discovery Rule 198.2(c) and the resulting deemed admissions. *See* TEX. R. CIV. P. 198.2(c); *Unifund*, 262 S.W.3d at 798. Unlike the pro se litigant in *Wheeler*, 157 S.W.3d at 442, Sullivan knew of his mistake prior to the trial court's judgment and could have responded to the motion for summary judgment. Sullivan's failure to do so resulted in waiver of his right to raise the issue, for the first time, in his motion for new trial. *See Unifund*, 262 S.W.3d at 798 (citing *Wheeler*, 157 S.W.3d at 442).

#### CONCLUSION

Because Sullivan failed to present a written response to Portable Storage's motion for summary judgment or any response to Portable Storage's request for admissions prior to the judgment, he waived any right to raise his issue post-judgment and the trial court did not abuse its

discretion in denying Sullivan's motion for a new trial. Accordingly, we affirm the trial court's judgment.

Patricia O. Alvarez, Justice