

NO. 09-1045

IN THE  
SUPREME COURT  
OF TEXAS

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UNIFUND CCR PARTNERS, a partnership, as ASSIGNEE OF PALISADES  
COLLECTION LLC

Petitioner,

vs.

STACY D. SMITH

Respondent.

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PETITION FOR REVIEW

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ATTORNEYS FOR PETITIONER,  
UNIFUND CCR PARTNERS

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IDENTITY OF PARTIES & COUNSEL

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## STATEMENT OF THE CASE

***Nature of the case.*** Petitioner, Unifund CCR Partners, a partnership, as Assignee of Palisades Collections LLC (“Unifund” or “Petitioner”), sued the Respondent, Stacy D. Smith (“Smith” or “Respondent”), on an unpaid credit card in order to recover the debt owed. The case arose from a revolving credit agreement between Smith and Citibank (South Dakota). The agreement enabled Smith to purchase items on credit in exchange for a promise to pay back the debt. The principle amount owed was \$8,124.15.

***Proceedings in the trial court.*** The lawsuit was filed in the County Court at Law No. 1, Dallas County, Texas, the Honorable Demetria Benson, Presiding. The lawsuit was filed on March 21, 2007. Despite proper service under Rule 106 on July 23, 2007, Respondent did not answer the lawsuit. Unifund filed two motions for default judgment; the first was on August 27, 2007, and the second on September 28, 2007.<sup>1</sup> In addition to the pleadings and attached written instruments, Unifund provided the trial court with evidence in the form of deemed admissions, documentation of the debt and the assignment, and affidavits. The trial court refused to grant any of the motions, and dismissed the case for want of prosecution on October 4, 2007.

***Proceedings in the court of appeals.*** Unifund appealed the dismissal to the Fifth District Court of Appeals in Dallas. Unifund was the Appellant, and Smith was the Appellee. Smith did not file a brief or otherwise participate. The court did not hear oral arguments. The Panel Opinion was delivered on August 31, 2009. Unifund filed a Motion for Rehearing on September 15, 2009. The motion was denied on October 16, 2009.

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<sup>1</sup>Unifund also filed a trial brief in support of the default judgment. The trial brief is included in the record. (C.R. at 24-41; Supp. C.R. at 10-27).

*The opinion of the panel.* The panel that decided the case was composed of Justice Moseley, Justice FitzGerald, and Justice Lang-Miers. The Court of Appeals rendered its judgment and issued an opinion on August 31, 2009. The panel opinion was not published in the Southwest Journal.

a. Justice Lang-Miers authored the opinion.

The Court of Appeals affirmed the judgment of the trial court. Despite the two motions for default judgment filed, a trial brief, the dismissal for want of prosecution, and the letter from the trial judge, the court held that Petitioner did not preserve error on its second motion for default judgment. The panel opinion stands in direct contradiction with the Dallas Court of Appeals *en banc* decision issued merely six days before the opinion in this case. *Crown Asset Mgmt., L.L.C. v. Loring*, 294 S.W.3d 841, 843 (Tex.App.–Dallas 2009). The panel opinion directly referenced Petitioner’s first motion for default judgment and the letter from the trial judge regarding that motion. Even assuming that Petitioner somehow did not preserve error on the second motion for default judgment, the panel did not discuss how Petitioner failed to preserve error on the first motion.<sup>2</sup> For the reasons stated in the supplemental brief, Petitioner disagrees that parties must go to such lengths to preserve error in a case such as this. Because the panel did not address the merits, it did not reach the issue of whether Petitioner was entitled to a default judgment.

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<sup>2</sup>Absent unusual circumstances not present here, litigants like Petitioner do not normally file multiple motions for default judgments unless the trial court has an “issue” with the first motion. Although not required by the law, certain trial courts have extraordinary requirements for default judgments above and beyond what this Court has said. When compared with the cost of an appeal, it is usually more cost efficient to simply comply with these extraordinary requirements. It has become apparent to Petitioner that, as in this case, sometimes compliance is only a theoretical possibility.

## STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal because the Fifth Court of Appeal's decision conflicts with this Court's decision in *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796 (Tex. 2008). TEX. GOV'T CODE § 22.001(a)(2). The Supreme Court has jurisdiction over this appeal because the Fifth Court of Appeal's decision conflicts with the Fourteenth Court of Appeal's decision in *Rowlands v. Unifund CCR*, 2007 Tex. App. LEXIS 2332 (Tex. App.–Houston[14th Dist.] March 27, 2007, no pet.) (mem. op.). TEX. GOV'T CODE § 22.001(a)(2). The Court of Appeals implicitly held the deemed admissions, which are similar to *Rowlands* and nearly identical to *Weaver*, cannot support a default judgment.

This case conflicts with multiple cases out of this Court and other courts of appeals that discuss what is necessary to obtain a default judgment. *See, e.g., Morgan v. Compugraphic Corp.*, 675 S.W.2d 729 (Tex. 1984); *Sherman Acquisition II LP v. Garcia*, 229 S.W.3d 802 (Tex. App.–Waco, 2007, no pet.).

This case conflicts with *Oliphant Fin., LLC v. Galaviz*, 2009 Tex. App. LEXIS 8208 (Tex. App.–Dallas October 26, 2009, no pet. filed) and *Crown Asset Mgmt., L.L.C. v. Loring*, 294 S.W.3d 841 (Tex. App.–Dallas 2009). *Galaviz* held that the trial court abused its discretion when it failed to render default judgment for the plaintiff and instead dismissed the case for want of prosecution. *Galaviz* involved deemed admissions that were a nearly identical to those submitted in this case. *Compare* APPENDIX “C” & “D.” *Loring* held that a party preserves error regarding a default judgment if the trial court sends a letter stating various perceived deficiencies in the motion.

The Supreme Court has jurisdiction over this appeal because the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected. TEX. GOV'T CODE § 22.001(a)(6). As explained below, the panel held that Unifund is not entitled to



a default judgment despite the fact Unifund filed two motions and went far beyond what is required to obtain a default judgment. If allowed to stand, this case stands ready to alter the steps a party must take to obtain a default judgment. Trial courts will be compelled to create extensive procedures and strict evidentiary requirements for default judgments, and the opinion will effect other uncontested matters by implication. This will lead to massive effort, energy, time, and money that is wasted trying to dispose of uncontested matters. Texas courts are busy enough; there is no need to add to the workload by making uncontested matters more complicated.

Finally, this Court has jurisdiction because it has the inherent authority to regulate the conduct of lower courts throughout Texas. For the reasons stated in this Petition for Review, the trial court replaced the law with its own, unwritten requirements for default judgments. This Court needs to restore the law of default judgments and instruct lower courts that default judgments should not be denied simply because a particular trial court disfavors them. *DART v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 666 (Tex. 2008); *In the Interest of K.M.S.*, 91 S.W.3d 331 (Tex. 2002); *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 386 (Tex. 1989); TEX. CONST. ART. II, § 1.

## ISSUES PRESENTED FOR REVIEW

- Issue 1: Because Pleadings, Evidence, and Deemed Admissions Support the Motions for Default Judgment, the Court of Appeal's Decision will Permanently Alter the Nature of Default Judgment Standards.
- Issue 2: Plaintiff Submitted its First of Two Motions for Default Judgment 35 days after Respondent was served; Upholding a Dismissal for Want of Prosecution under these Circumstances will Drastically Change Texas Law on Diligently Prosecuting Lawsuits.

## STATEMENT OF FACTS

Unifund will reference the facts as stated the panel opinion. The panel correctly states most of the facts, but does not correctly state the issue in this case. Petitioner did not limit the issue for review to its second motion for default judgment. The issue presented was “In the context of a Motion for No-answer Default Judgment on liquidated damages, is a party required to submit evidence of liability beyond the pleadings (and the attached documents) and prove its case as if it had moved for a traditional summary judgment?” *See APPELLANT’S BRIEF*, pg. 1.

Similarly, Petitioner did challenge the trial court’s dismissal for want of prosecution. Petitioner included a section discussing its timely motion for default judgment. *See APPELLANT’S BRIEF*, pg. 10. The section also argued that the case should not have been dismissed case for want of prosecution because the trial court had additional requirements above and beyond what the law states. *See APPELLANT’S BRIEF*, pg. 10.

Because the Dallas court arbitrarily limited the issues, it did not discuss Petitioner’s first motion or the larger issue of the trial court’s failure to grant properly supported default judgments and instead dismissing the case for want of prosecution.

## SUMMARY OF ARGUMENT

It is not everyday that a case involving multiple denials of a default judgment on deemed admissions ends up in this Court. This is because default judgments are some of the simplest procedures under Texas law. They are granted everyday in courts throughout Texas. Texas law says if a defendant fails to answer a lawsuit he admits every allegation in the petition. By and large, Texas judges follow this simple rule with an equally simple common sense approach: if you snooze you lose.

Texas law was not followed in this case, and this appeal followed. Instead of granting a default judgment on deemed admissions, the trial court effectively issued *sua sponte* special exceptions, objections, and took the position of an advocate for the defaulting party. Petitioner filed two motions for default judgment; the first one was filed 35 days after Respondent was served. In response to Petitioner's diligent efforts, the trial court dismissed this case.

This is one of eighteen appeals out of the same trial court, County Court Number One of Dallas County.<sup>3</sup> All but one of these appeals involve a failure to grant a default judgment. A trial court cannot deny a default judgment simply because it does not like them. Default judgments on deemed admissions should not be litigated in appellate courts. *See Sherman Acquisition II LP v. Garcia*, 229 S.W.3d 802 (Tex. App.–Waco, 2007, no pet.) (reversing the trial court after it granted a take nothing judgment on behalf of a defaulting defendant despite deemed admissions).

If left uncorrected, this case will create massive confusion and red tape in courts throughout

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<sup>3</sup>Counsel for Petitioner anticipates filing more Petitions for Review in this Court regarding essentially the same issues. Because of the extraordinary cost, effort and energy expended already, and the relatively low chance of recouping those costs through collection efforts, Counsel for Petitioner expects only a few of these cases to be filed in this Court.

Texas; the wheels of justice will grind to a halt. If default judgments are denied as a matter of course, every unopposed motion will undergo intense scrutiny and parties will waste large amounts of money litigating cases against non-appearing parties. This Court, and other lower courts, have held that nearly identical deemed admissions can support a summary judgment. Even assuming deemed admissions are required in order to support a default judgment on liquidated damages, Unifund provided more than ample evidence to support a default judgment. This Court should grant this Petition, restore Texas Law on default judgments, and render judgment for Unifund.

## ARGUMENT

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If left uncorrected, this case will create massive confusion and red tape in courts throughout Texas; the wheels of justice will grind to a halt. If default judgments are denied as a matter of course, every unopposed motion will undergo intense scrutiny and parties will waste large amounts of money

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**Issue 1: Because Pleadings, Evidence, and Deemed Admissions Support the Motions for Default Judgment, the Court of Appeal's Decision will Permanently Alter the Nature of Default Judgment Standards.**

A default judgment is appropriate where the petition properly states a cause of action, invokes the trial court's jurisdiction, gives fair notice to the defendant, and does not affirmatively invalidate the claim on its face. *Jackson v. Biotectronics, Inc.*, 937 S.W.2d 38, 42 (Tex. App.--Houston [14th Dist.] 1996, no writ). At any time after a defendant is required to answer, the plaintiff may take a default judgment if the defendant has not previously filed an answer, and the citation with the officer's return has been on file with the clerk for ten days. *Aguilar v. Livingston*, 154 S.W.3d 832, 834 (Tex. App.--Houston[14th Dist.] 1996, no writ); *see* TEX. R. CIV. P. 239; *see also* TEX. R. CIV. P. 107.

A defendant who defaults admits all allegations of facts in the plaintiff's petition except unliquidated damages. *Tex. Commerce Bank, N.A. v. New*, 3 S.W.3d 515, 516 (Tex. 1999); *Argyle v. Mech., Inc. v. Unigus Steel, Inc.*, 156 S.W.3d 685, 687 (Tex.App.--Dallas 2005, no pet.); *Jackson* 937 S.W.2d at 41; *Norton v. Martinez*, 935 S.W.2d 898, 901 (Tex.App.--San Antonio 1996, no writ); *Novosad v. Cunningham*, 38 S.W.3d 767, 773 (Tex.App.--Houston[14th Dist.] 2001, no pet.).

These requirements are simple, and Unifund easily met them in this case. Unifund attached

a sworn affidavit and written statement to its original petition. (C.R. at 15-16). The petition alleged a breach of contract cause of action and contained the account number, original creditor, amount owed, name and address of the debtor, and the interest and attorneys fees sought. (C.R. 7-9; 11-14). The petition invokes the jurisdiction of the trial court, provides fair notice, states a cause of action, and does not affirmatively disprove the claim. There is absolutely no basis whatsoever for the trial court's denial of Unifund's two motions for default judgment.

In addition to the petition and evidence attached to it, Unifund submitted documentation evidencing the assignment (C.R. at 45-47), an affidavit regarding the debt (C.R. at 44), attorneys fees affidavits (C.R. at 70-71; Supp. C.R. at 30-31), and deemed admissions (C.R. at 11-13; 27-28; Supp. C.R. at 13-14). These are the same deemed admissions (except for the amounts) this Court held support a summary judgment on behalf of a plaintiff in *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796 (Tex. 2008).<sup>4</sup>

The original petition and documents attached to it are more than sufficient to support a default judgment, and a trial court cannot simply decide to ignore uncontroverted, conclusive evidence because it does not want grant default judgments. Even though this is more than enough to support a default judgment, the trial court had additional, unwritten requirements.

In order to foster good relations with trial courts throughout Texas, and even though it is not required, parties like Unifund routinely submit additional documentation for default judgments because certain trial courts want to see additional documentation. In this case, Petitioner submitted additional documentation, affidavits, and deemed admissions to the trial court. If this evidence was

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<sup>4</sup>The Motion for Summary Judgment containing the deemed admissions in *Weaver* is attached as Appendix "E" to this Petition for Review.



not enough to convince the trial court a default judgment should be granted, then there is no evidence that exists that would have convinced the trial court. The law was replaced with the unwritten requirements of this particular trial court.

There is no distinction between this case and *Oliphant Fin., LLC v. Galaviz*, 2009 Tex. App. LEXIS 8208 (Tex. App.–Dallas October 26, 2009, no pet. filed), where the Dallas Court of Appeals reversed the lower court and rendered default judgment for the plaintiff on a nearly identical deemed admissions. *Compare* APPENDIX “C” & “D.” Both cases involve the same type of evidence and similar pleadings. The disparate results in this case and *Galaviz* will promote great uncertainty in the law.

In this case, the Dallas court stated that Petitioner did not preserve error despite its *en banc* holding in *Crown Asset Mgmt., L.L.C. v. Loring*, 294 S.W.3d 841, 843 (Tex.App.–Dallas 2009) only six days before. A panel opinion must follow an *en banc* opinion. The law should not change over the course of six days. Although Petitioner pointed out this major conflict in its motion for rehearing, the Dallas court overruled the motion without comment.

Parties should be able to rely on the law when they determine whether or not to file a lawsuit. Parties should not feel inhibited from filing a meritorious lawsuit simply because a particular trial court may disfavor certain types of cases or certain procedures. If this case is allowed to stand, trial courts throughout Texas will create additional procedural, evidentiary, and practical requirements for obtaining default judgments. Parties will be denied relief in meritorious cases simply because a trial court disfavors a particular type of case. This Court has repeatedly instructed that lower courts cannot disregard the law. *DART v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 666 (Tex. 2008); *In the Interest of K.M.S.*, 91 S.W.3d 331 (Tex. 2002); *Lofton v. Texas Brine Corp.*, 777 S.W.2d

384, 386 (Tex. 1989). This Court should grant this Petition for Review, instruct the lower courts to adhere to the law of default judgments, and render judgment for Petitioner as requested in the motions for default judgment.

**Issue 2: Plaintiff Submitted its First of Two Motions for Default Judgment 35 days after Respondent was served; Upholding a Dismissal for Want of Prosecution under these Circumstances will Drastically Change Texas Law on Diligently Prosecuting Lawsuits.**

Filing two properly supported motions for default judgment is not a lack of diligence. In this case, the first motion was filed on August 27, 2007; only 35 days after the Respondent was served. (Supp. C.R. at 1; 7-9; 28). It took 35 days to file the return of service, wait until the return of service has been on file for ten days, and prepare and file a motion for default judgment. Under Texas law, this is diligence.

The trial court sent a letter to counsel on September 4, 2007 detailing various alleged issues with the motion for default judgment. (Supp. 2d C.R. at 4-5). Unifund filed a second Motion for Default Judgment with additional documentation on September 28, 2007. (C.R. at 42-73). There was no reason for the trial court to fail to grant one of Petitioner's motions.

If this case does not show diligence, then parties throughout Texas will be subject to a dismissal for want of prosecution on nearly any facts. Any delay in this case resulted from the trial court's failure to grant a properly supported default judgment, not from any perceived lack of diligence.

In this case Unifund filed two separate motions for default judgment; the first was submitted 35 days after the Respondent was served. The trial court sent Unifund a letter detailing various "substantive" issues with the default judgments. (Supp. 2d C.R. at 4-5). These are the nearly identical

to the “substantive” issues the Dallas Court of Appeals rejected in *Oliphant Fin., LLC v. Galaviz*, 2009 Tex. App. LEXIS 8208, \*4, \*15-\*16 (Tex. App.–Dallas October 26, 2009, no pet. filed). The result should be the same in this case.

The trial court took the position of an advocate for the defaulting party. In addition to being incorrect, the various “substantive” issues are effectively special exceptions and objections regarding the purported weight of conclusive evidence. The trial court’s actions in this case put Smith in a better position than she would have been if she filed an answer. The trial court’s actions have caused disruption in the law because, now, the best advice an attorney can give a defendant is “Don’t bother filing an answer; the trial court will take care of this for you.” This is directly contrary to the law, common sense, and fundamental fairness. This Court should restore fundamental fairness in litigation and instruct the lower courts to follow the law.

**PRAYER**

For the reasons stated in this petition, Unifund asks the Supreme Court to accept this case, order briefing on the merits, reverse the judgment of the Court of Appeals, and render judgment for Unifund as requested at the trial court level.

Respectfully submitted,

HULL & ASSOCIATES, P.C.  
Attorneys for Plaintiff

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ATTORNEYS FOR PETITIONER,  
UNIFUND CCR PARTNERS

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been served upon Respondent(s) via:

- \_\_\_\_\_ certified U. S. mail, return receipt requested
- \_\_\_\_\_ hand/messenger delivery
- \_\_\_\_\_ regular first class U. S. mail, postage prepaid
- \_\_\_\_\_ facsimile transmission to \_\_\_\_\_

Said service being made this 15th day of January, 2010 by sending to:

Stacy D. Smith  
\*\*\*\*\*  
\*\*\*\*\*

\_\_\_\_\_  
ANDREW E. LEMANSKI

NO. 09-1045

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Petitioner,

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STACY D. SMITH

Respondent.

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APPENDIX TO THE PETITION FOR REVIEW

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LIST OF DOCUMENTS

- A. The trial court's October 4, 2007 dismissal order and letters to Unifund's counsel
- B. Panel opinion dated August 31, 2009
- C. Deemed Admissions in this Case
- D. Deemed Admissions in *Oliphant Fin., LLC v. Galaviz*, 2009 Tex. App. LEXIS 8208 (Tex. App.—Dallas October 26, 2009)
- E. Motion for Summary Judgment with Deemed Admissions in *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796 (Tex. 2008)
- F. TEX. R. CIV. P. 107
- G. TEX. R. CIV. P. 239