Supreme Court, State of Colorado 2 East 14th Ave. Denver CO 80203 Colorado Court of Appeals Opinion by Judge Taubman; Jones and Harris, JJ., concur Case No. 14CA1626 District Court, City and County of Denver, Colorado Judge Shelley I. Gilman, Civil Action No. 13CV30444 Tele Comm Resources LP and Jeffrey Wright, **Petitioners** v. City and County of Denver and City Treasurer, **Respondents**	▲ ▲ COURT USE ONLY
Attorney for Petitioners: Brett R. Lilly, LLC Brett R. Lilly, Esq. P.O. Box 1081 Wheat Ridge, CO 80034 Phone Number: 303-233-0973 E-mail: BrettLilly@comcast.net Atty. Reg. #: 25662	Case Number:
PETITION FOR WRIT OF CERTIORARI	

Comes Now Petitioners, by and through Brett R. Lilly, LLC, and hereby submit this Petition for Writ of Certiorari.

I. CERTIFICATE OF COMPLIANCE

I hereby certify this Petition complies with all the requirements of C.A.R. 32, including all formatting requirements set forth in these rules, and I further certify this Petition complies with C.A.R. 53(b) in that it contains 3,755 words, exclusive of the appendix. I acknowledge that my Petition may be stricken if it fails to comply with any of the requirements of C.A.R. 32.

s/ Brett R. Lilly

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Exhibit A: Opinion of the Colorado Court of Appeals, Case No. 14CA1626.

V. JURISDICTION

This Court has jurisdiction under C.R.S. § 13-4-108 and C.A.R. 49. The Court of Appeals issued its unpublished opinion on October 29, 2015. No petition for rehearing was filed.

VI. STATEMENT OF THE CASE

A. Nature of the Case

The trial court granted summary judgment in favor of the City based solely on deemed admissions for a lack of response to discovery requests. As such, this

case is really a default judgment for over $1.3 million dollars as a discovery sanction because the City and the trial court seized on the opportunity to take an end run around the normal discovery procedure by means of the motion for summary judgment.

While the trial court may have been understandably frustrated with Mr. Mitchell, the trial court moved too far too fast, and in this haste rushed to judgment. This case is about the Defendants' lack of a day in court. This default judgment of over $1.3 million dollars must be reversed and this case remanded.

B. Course of Proceedings and Disposition Below

In the underlying administrative action, the City conducted an administrative hearing at which Defendants were not present or represented. Defendants had requested a continuance which was denied without good cause. The City assessed a $999.00 penalty per day until the alleged violations were remediated. The City sat on its claim for 31 months before commencing a collection action in the trial court for penalties and costs of $1,358,258.82.

The City's Complaint alleges on February 2, 2012, the City assessed penalties of $999.00 per day on properties located at Gaylord and York pursuant to an order for penalties accruing from June 30, 2010. CF, p. 51. The City then waited until January 31, 2013, to file this case. CF, p. 456.

The trial court granted summary judgment in favor of the City based solely on deemed admissions for a lack of response to discovery requests.

The City states it served a set of discovery requests by mail. Defendants' counsel Mr. Mitchell states he did not receive the requests. At no time did the City communicate with Defendants about the pending discovery, by phone, email or any means. Nor did the City move to compel response. Rather, the City sought summary judgment based on the deemed admissions. CF, p. 415-425.

Defendants opposed the City's motion for summary judgment, requested to withdraw the deemed admissions, and requested until July 18 to complete and return all discovery. CF, p. 429-30.

The trial court did not wait until July 18 for Defendants' discovery responses, and entered its Order on July 15, 2014. CF, p. 445. The trial court found the City would be prejudiced if it were denied the effect of the admission, and that discovery would have to be conducted after the initially set discovery deadline, implying the parties had agreed discovery after that date would cause prejudice. Based on the deemed admissions, the trial court granted summary judgment in the amount of $1,358,258.82. CF, p. 445.

The Court of Appeals affirmed.

VII. REASONS FOR GRANTING THE WRIT

Mr. Mitchell's gross neglect is apparent upon a review of the record. The trial court's entry of summary judgment as a result of his failures is a punitive disposition of the litigation and must be reversed. To rule otherwise will result in an arbitrary denial of substantial justice to Defendants.

The trial court erred in finding Defendants had received the discovery request. Even so, it was a simple remedy to allow the time requested to answer the discovery instead of determining the admissions were deemed admitted and therefore the City was entitled to summary judgment. The notion that permitting discovery answers on July 18 for a September 5 trial is too "late" and constitutes prejudice strains credibility.

Even assuming, *arguendo*, the admissions are deemed admitted, material issues of fact and law preclude the entry of summary judgment. Simply put, Defendants are entitled to litigate the legal and factual issues of this case, and it was error for the trial court to use the neglect of Mr. Mitchell in allegedly failing to respond to discovery as a justification to enter summary judgment.

A. The Court of Appeals erred in requiring an affidavit under Rule 36

The Court of Appeals held Defendants did not overcome the presumption that the requests for admissions were received. Although C.R.C.P. 36(c) does not require the filing of an affidavit to withdraw requests for admissions, the Court of Appeals held that "TCR did not submit any affidavits ... *as required by C.R.C.P. 56(e).*" Slip Op. at 6 (emphasis added). Not only did the Court of Appeals graft an affidavit requirement onto C.R.C.P. 36(c) where none exists, the Court of Appeals then used this non-existent requirement to avoid the issue that Mr. Mitchell's statements as an officer of the court are sufficient to rebut the presumption the letter was mailed. Slip Op. at 6-7. This is an error of law that requires correction by this Court.

The Court of Appeals, like the trial court, imposed a non-existent requirement under Rule 36 to provide an affidavit. And even if the question is one of legal sufficiency for the trial court, not a question of fact, s*ee Kreuger v. Ary*, 205 P.3d 1150, 1154 (Colo. 2009), the trial court made no findings regarding the legal sufficiency of why she did not believe or accept Mr. Mitchell's claim he never received the discovery. Obviously, if she had believed him, the result would have been different. It would seem from the order the trial court did not believe a word Mr. Mitchell said, the trial court presumed he got the discovery and moreover his

responsive pleading was inadequate because he did not submit an affidavit. But there is nothing in the record to support this, and no findings were made by the trial court. The trial court merely states that Mr. Mitchell did "not submit an affidavit or evidence in support of" the position even though no affidavit is required by Rule 36. CF, p. 443.

First, this imposition of a requirement for an affidavit where no such requirement exists under Rule 36 is hyper-technical by the trial court as Mr. Mitchell is an office of the court, and by not accepting his representation she elevated form over substance. Second, assuming *arguendo* an affidavit is required under Rule 56, this just demonstrates the negligence of Mr. Mitchell for failing to provide such an affidavit. Third, the trial court made no findings whether the client actually got discovery or not regardless of whether Mr. Mitchell got the discovery. It is unfair to dismiss case for a client because attorney was not believed by the trial court. The trial court failed to find how the Defendants were aware of the discovery, even after the City filed summary judgment. The trial court merely "rejects this argument". CF, p. 442. But why? No findings are made on the lack of Mr. Mitchell's credibility.

The Court of Appeals failed to consider whether Defendants had actual knowledge of the discovery requests as opposed to whether service is complete on

mailing. Regardless of whether service to Mr. Mitchell was accomplished by mail under the mail box rule, which is disputed, it is not disputed Defendants were unaware of the discovery, and under these circumstances the trial court should have concluded the thirty-five day time period did not begin to run. *Utah Motel Associates v. Denver County Bd. of Commissioners*, 844 P.2d 1290, 1293 (Colo. App. 1992).

B. The trial court abused its discretion when it refused to allow Defendants to withdraw its deemed admissions and to provide responses to the requests

It was an abuse of discretion for the trial court not to allow withdrawal of the deemed admissions where the record raises the issue whether the "admitted" facts are contrary to the actual facts. *See FDIC v. Prusia*, 18 F.3d 63, 641 (8th Cir. 1994). Further, a lenient standard applies in the context of summary judgment. *Kirtley v. Sovereign Life Ins. Co. (In re Durability Inc.)*, 212 F.3d 551, 556 (10th Cir. 2000). Because courts should be particularly responsive to allowing late answers to requests for admission when summary judgment is involved, the trial court abused its discretion in declining to allow the Defendants to withdraw their admissions based on the defenses raised. *Id.*

1. The trial court should have conducted a hearing and Mr. Mitchell's neglect requires remand

If Mr. Mitchell's excusable neglect or gross negligence would require a different result under Rule 60, then there is no reason the same result should not be reached in this appeal regarding deemed admissions resulting in summary judgment. If the trial court had a hearing and determined Mr. Mitchell's neglect was his own and not attributable to the client, this finding would then require service on Defendant personally and, as a result, the service of the requests for admissions on Mr. Mitchell was inadequate.

The Court of Appeals held that "nothing in the record indicates that the City was aware of any reasons Mitchell had for not responding to the requests for admissions. In any event, because Mitchell was the attorney of record for TCR, the City was required to communicate with him and service upon him was proper." Slip Op. at 8-9, n.1. Initially, this is contradicted by the Court's statement that the "City apparently believed it was futile to confer with TCR based on TCR's past record of unresponsiveness." Slip Op. at 10. The City knew Mr. Mitchell had acknowledged personal difficulties and had requested repeated extensions of time.

Mr. Mitchell did not act below the standard of care if he did not actually receive the discovery. But if the trial court finding that he got the discovery is accepted, then it was below the standard of care to not respond, and for all practical

purposes the trial court found Mr. Mitchell negligent. The line between mere negligence and gross negligence is not exactly clear. Perhaps this is an opportunity for this Court to clarify that line, but where ever it is, when the totality of Mr. Mitchell's conduct is added up it crosses the line into gross negligence. In fact, most every step Mr. Mitchell took was below the standard of care: he filed no rule 26 disclosures nor response to discovery requests. In his untimely response to the motion for summary judgment, he failed to argue that if Defendants were not allowed to withdraw the admissions, summary judgment should still be denied. CF, p. 445 n. 5. This is all the more reason for the trial court to conduct a hearing, to allow the trial court to impress upon Mr. Mitchell that he must give complete and meaningful answers to the discovery in good faith or suffer the consequences.

The trial court should have conducted a hearing and there were many less drastic options available. The trial court could have allowed the extension and if no genuine or good faith responses to the discovery were filed, then it could evaluate and award sanctions. If the responses were adequate, then the trial court could evaluate what remedies the City may be entitled to for any late disclosures, for example, a continuance of the trial date if necessary. But the trial court went too far too fast and essentially entered a default judgment for over $1.3 million dollars for a violation of discovery deadline. The trial court overreacted by not

conducting a hearing to make sure the sanctions fit the error and punished the correct party, the attorney, not the client.

The trial court should have ascertained in a hearing that Defendants never received the discovery and allowed Defendants an opportunity to respond. On this basis, the trial court's declining to allow the deemed admissions to be withdrawn was an abuse of discretion. *Zika v. Eckel*, 150 Colo. 302, 372 P.2d 165 (1962); *Temple v. Miller*, 488 P.2d 252, 254 (Colo. App. 1971).

2. Mr. Mitchell's neglect cannot be used for unfair tactical advantage

There is no refutation of Mr. Mitchell's neglect as attorney for the Defendants resulting in the trial court's entry of summary judgment for the failure to respond to the discovery. In fact, the City relies on Mr. Mitchell's failures precisely to support its position, noting even when Mr. Mitchell was granted an extension of time to file his untimely response to the Motion for Summary Judgment, he still made no attempt to respond to discovery, nor to make any C.R.C.P. 26 disclosures. The end result is the conduct of Mr. Mitchell has been used by the Court of Appeals, the trial court, and the City to penalize Defendants with a default judgment of over $1.3 million dollars.

The reason the discovery should have been served electronically is that the City used the postal mail as a tactical advantage to take advantage of Mr. Mitchell's "past record of unresponsiveness." Slip Op. at 10. Likewise, the City and the trial court ignored the required procedure to conduct hearings on discovery matters to take advantage of the same. When all other pleadings were by E-Service, it raises the question whether the City sent discovery by postal mail to gain an unfair tactical advantage, especially when the discovery triggers a default judgment for over $1.3 million dollars. *Cf. Perez v. Miami-Dade County*, 297 F.3d 1255, 1268 (11th Cir. 2002). E-Service would be a permanent, verifiable, and objective record.

The trial court found that the discovery was received because the trial court used the mail box rule to "*presume*" receipt. CF, p. 443 (emphasis added). This presumption is important, especially given the lack of findings to support it and the lack of opportunity granted to rebut it by the imposition of the non-existent requirement for an affidavit under Rule 36. Because the trial court failed to conduct a hearing, there was no opportunity to observe credibility and provide an opportunity to rebut the presumption made by the trial court. And most importantly, there are no findings on credibility and there are no findings to support the trial court presumption of receipt. While one can perhaps understand

the trial court's frustration with Mr. Mitchell, this is no excuse to punish the client by failing to hold a hearing and ascertain whether the client ever received the discovery or not. It is perplexing that there was no E Service, yet this was not addressed by the trial court and is simply dismissed by the Court of Appeals.

C. The trial court abused its discretion when it found the City would be prejudiced if Defendants were permitted to withdraw the deemed admissions

The Court of Appeals held that because the City had little information to use at trial it would have been prejudiced by a withdrawal of the deemed admissions three days before the close of discovery and less than two months before trial. Slip Op. at 13. There is no answer or consideration that the discovery deadline could easily have been extended. Then once Defendants responded to the requests for admissions, the City could have scheduled depositions concerning any denials contained in those requests. Inconvenience does not rise to the level of prejudice, and preparing a summary judgment motion by relying on the admissions does not constitute prejudice. *Conlon v. U.S.*, 474 F.3d 616, 623-24 (9th Cir. 2007); *In re Durability Inc.*, 212 F.3d at, 556; *FDIC*, 18 F.3d at 640; *Raiser v. Utah County*, 409 F.3d 1243 (10th Cir. 2005).

The second presumption made by the trial court that is not supported by the record is the presumption of prejudice to the City. It is the City's burden to

establish prejudice, yet the trial court resorted to a presumption of prejudice based on the discovery cutoff date. A presumption of prejudice because of an 11 day delay strains credibility, to say the least. This is why the trial court casts the argument in terms of the 63 day cut off, but it is hard to accept that a mere 11 days constitutes prejudice. The request was to extend the deadline from July 7 to July 18, and there is no findings or explanation why this 11 days is prejudicial given a trial date of September 5. If a court is allowed to presume without any findings that discovery after the discovery cut-off date is prejudicial, this makes it next to impossible to demonstrate a lack of prejudice.

The logic of the Court of Appeals is as circular as that of the trial court. There is a presumption of receipt due to the mail box rule. The mail box rule is just a presumption, but this presumption is then used to build on another presumption of prejudice to City based on the arbitrary use of the discovery cut-off date. The trial court and the Court of Appeals essentially relieved the City of its burden to establish prejudice.

To make this stacking of presumption on top of presumption worse, the trial court offered no opportunity or chance to rebut these presumptions and in particular to show that withdrawal of the admissions in whole or in part would not constitute prejudice. This rush to judgment was exacerbated by the lack of any

findings on credibility, and this error is further compounded by requiring an affidavit under Rule 36 where no such requirement exists.

It was a simple remedy to allow the time requested to answer the discovery. The notion that permitting discovery answers on July 18 for a September 5 trial is too "late" and constitutes prejudice is an abuse of discretion.

D. The Court of Appeals erred in not addressing issues of law and fact precluding summary judgment

Defendants' position the City's actions and ordinance are unconstitutional is alone sufficient to warrant reversal. Moreover, as to the admissions themselves, there is a dispute in the pleadings and the public record regarding the issue of ownership.

The Court of Appeals contends issues not raised in or decided by a trial court will not be addressed for the first time on appeal, citing *Boatright v. Derr*, 919 P.2d 221, 227 (Colo. 1996). Slip Op. at 16.

Though often stated as a broad proposition, such as in *Boatright*, if no specific rule requires a party to raise an issue in the trial court, an appellate court should review it. *Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 549-50 (Colo. 2006). *Roberts* found no specific rule requiring questions of law to be raised and preserved in *summary judgment motions*. *Id.* at 550-51. By contrast,

Boatright was a case that went to *trial*. Given the circumstances surrounding Mr. Mitchell's neglect, this Court should consider what appears to need no preservation: arguments that could have been, but were not, raised in a response to a motion for summary judgment in order to reverse summary judgment on appeal.

Further, this Court has the power to "notice any error appearing of record, whether or not a party preserved its right to raise or discuss the error on appeal." *Id.* at 550. Pursuant to C.A.R. 1(d), the Court should notice the failure to address the constitutional defenses as legal error appearing of record. The errors "appear[] of record", as the constitutional defenses are contained in the pleadings. The record is sufficient to show the error of failing to address the legal defenses when granting summary judgment, and such error can be fixed by reversing the entry of summary judgment and remanding the matter for trial. The existence of disputed issues of law require reversal of the entry of summary judgment. This discretionary review is necessary to prevent manifest injustice and "is especially appropriate in a case involving ... final judgment on substantial constitutional claims." *Mount Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 238 (Colo. 1984). These constitutional issues are legal, subject to de novo review, and the parties have extensively briefed the issues. *Roberts*, 144 P.3d. at 1009.

It was thus error to not address whether the City's actions and ordinances are unconstitutional, and it was error for the Court of Appeals to affirm summary judgment.

Further, the discovery not answered that the trial court relied upon to enter summary judgment dealt solely with the issue of who was the owner of record at a particular, unstated time, not with the merits of the claim.

Tele Comm Resource, L.P. obtained the York and Gaylord properties by Public Trustee Deeds dated November 21, 2003, recorded in the Clerk and Recorder's office at Reception Numbers 2003246190 and 2003246189. CF, p. 22, 42. Yet, the owner of record as of the spring of 2013 was Roger McCarville, who obtained the York and Gaylord properties by Individual Grant Deed dated April 15, 2013, recorded in the Clerk and Recorder's office at Reception Number 2013053422.

This is the third presumption made by the trial court with no findings in the record. The trial court presumed that the actual requests for admission were adequate as to the date at issue, but it is not, so again the trial court relieved the City of its obligation to ask precise questions regarding the ownership during the applicable time period, and the trial court simply presumed ownership. It is not the trial court's job or place to fill in the blank for the City. The Court of Appeals

attempts to remedy this error by the trial court by relying other requests for admissions than those relied upon by the trial court. Slip Op. at 2-3. Yet this exceeds the scope of review of a trial court's decision to deny a motion to withdraw or amend a C.R.C.P. 36 admission for abuse of discretion.

A default admission of something factually contradicted by Defendants and the public record cannot stand. Defendants denied ownership in its answer, so the issue of the owners of record at the time of the entry of the judgment remains a disputed material fact precluding summary judgment.

VIII. CONCLUSION

For the reasons stated above, this Court should grant the Petition.

Respectfully submitted this December 9, 2015.

By: *s/ Brett R. Lilly* (Original Signature on File)
Brett R. Lilly, LLC
Brett R. Lilly, #25662

IX. CERTIFICATE OF SERVICE

I hereby certify on December 9, 2015, I served a true and correct copy of the foregoing via ICCES electronic service, and by first class mail postage pre-paid to the following:

Attorney for Respondents:
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s/ Brett R. Lilly

X. C.A.R. 53(a)(6) APPENDIX

A. Exhibit A: Court of Appeals Opinion

14CA1626 Denver v Tele Comm 10-29-2015

COLORADO COURT OF APPEALS

DATE FILED: October 29, 2015
CASE NUMBER: 2014CA1626

Court of Appeals No. 14CA1626
City and County of Denver District Court No. 13CV30444
Honorable Shelley I. Gilman, Judge

City and County of Denver and City Treasurer,

Plaintiff-Appellee,

v.

Tele Comm Resources LP and Jeffrey Wright,

Defendants-Appellants.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE TAUBMAN
J. Jones and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced October 29, 2015

Machol & Johannes, LLC, James A. Kaplan, Denver, Colorado, for Plaintiff-Appellee

Brett R. Lilly, LLC, Brett R. Lilly, Wheat Ridge, Colorado, for Defendants-Appellants

Defendants, Tele Comm Resources LP, and Jeffrey Wright (collectively TCR), appeal the trial court's summary judgment in favor of plaintiffs, the City and County of Denver and the City Treasurer (collectively the City). We affirm.

I. Background

In June 2010, an order from the City authorized penalties of $999 per day per property on seven vacant and derelict TCR properties located in Denver. In February 2012, the City assessed penalties accruing from June 30, 2010 through December 26, 2011, pursuant to an administrative order for penalties for violations of the Denver Revised Municipal Code (DRMC) prohibiting overgrown vegetation, trash, and debris, as well as vacancy and abandonment.

In January 2013, the City filed a complaint against TCR for failure to pay the penalties. The trial was initially scheduled for December 13, 2013. On August 6, 2013, the City submitted interrogatories, requests for admissions, and requests for production of documents to TCR. On August 27, 2013, pursuant to a court order finding that a corporation could not be represented pro se, Shawn Mitchell entered his appearance as attorney for TCR.

Over the course of four months, the City agreed four times to extend the period in which TCR could respond to the discovery requests and eventually filed a motion to compel. At the hearing on the motion to compel, TCR asked to amend its complaint. The court agreed and reset the trial for September 5, 2014. The court set a discovery deadline of July 7, 2014.

On April 4, 2014, the City mailed a second set of interrogatories, requests for admissions, and requests for production of documents to Mitchell. There were twenty-eight requests for admissions on detailed allegations regarding the structure of TCR's business, ownership of the vacant properties, and violations of the DRMC. For example, three of the admissions were:

> 19. Admit that at no time from May 18, 2005 through February 2, 2012 did the Defendants have either the Gaylord Street Property or the York Street Property listed for sale with any Multiple Listing Service (MLS). If this Request for Admission is denied, explain in detail each fact, matter, and basis upon which you base your denial.
>
> 20. Admit that a Notice of Violation dated March 9, 2010, and a letter dated March 9, 2010, with regard to [the] Gaylord Street [property] was mailed to Tele Comm Resource,

> LP at [the listed address], copies of which are attached hereto as Exhibit 11. If this Request for Admission is denied, explain in detail each fact, matter, and basis upon which you base your denial.
>
> 21. Admit that the structures on the Gaylord Street Property were not boarded and secured as of March 9, 2010. If this Request for Admission is denied, explain in detail each fact, matter, and basis upon which you base your denial.

The responses to the requests for admissions were due on May 9, 2014, thirty-five days after service.

Having received no response, the City filed a motion for summary judgment and affidavits in support of the motion on May 29, 2014. The next day, the City filed a brief in support of the motion and attached its second discovery requests. On June 27, 2014, eight days late, TCR filed a motion for a seven-day extension of time to file a response in opposition to the motion for summary judgment. TCR filed its response on June 30, 2014, which the court accepted. On July 15, 2014, the trial court granted the City's motion for summary judgment, awarding it $1,358,258.82 in damages based on deemed admissions from TCR's lack of response to the second set of requests for admissions.

TCR raises three contentions on appeal: (1) the trial court abused its discretion in deeming the requests for admissions admitted; (2) the trial court abused its discretion when it refused to allow TCR to withdraw the deemed admissions and when it found the City would be prejudiced if TCR were permitted to withdraw the deemed admissions; and (3) the court erred in entering summary judgment. We reject each contention.

II. Admitted Requests for Admissions

TCR contends the trial court abused its discretion in deeming the requests for admissions admitted. It contends it never received the City's April 2014 requests for admissions and argues that service by mail was insufficient because it had no actual knowledge of the discovery requests and, consequently, the thirty-five day period to respond to the discovery requests had not begun to run. TCR also argues the requests for admissions should have been served electronically and the City's motion should be denied because the City did not inquire, move to compel, confer, or communicate with TCR before filing its motion for summary judgment. TCR further contends Mitchell's excusable neglect required service on it personally and, thus, the service of the

requests for admissions on Mitchell was inadequate. We are not persuaded by these arguments.

A. Standard of Review

We review a trial court's decision to deny a motion to withdraw or amend a C.R.C.P. 36 admission for an abuse of discretion. *Grynberg v. Karlin*, 134 P.3d 563, 565 (Colo. App. 2006). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *Id.* at 565-66.

B. Applicable Law

A letter properly mailed is presumed received by its addressee. *Olsen v. Davidson*, 142 Colo. 205, 208, 350 P.2d 338, 340 (1960). When an addressee denies receiving a letter, the binding effect of the presumption ends, and the trier of fact must decide the issue based on the weight of the evidence. *City & Cty. of Denver v. E. Jefferson Cty. Sanitation Dist.*, 771 P.2d 16, 18 (Colo. App. 1988). A mere denial of the letter's receipt does not rebut the presumption. *See Olsen*, 142 Colo. at 208, 350 P.2d at 340; *but see Wiley v. Bank of Fountain Valley*, 632 P.2d 282, 286 (Colo. App. 1981) (holding the plaintiff's testimony under oath at trial that he had not received the letter was sufficient evidence to overcome the presumption).

Whether the evidence meets the burden to overcome the presumption is a question of legal sufficiency for the trial court, not a question of fact. *See Kreuger v. Ary*, 205 P.3d 1150, 1154 (Colo. 2009).

C. Analysis

TCR contends the trial court abused its discretion in deeming the requests for admissions admitted. We disagree.

First, TCR contends it never received the City's second set of requests for admissions. It argues that service by mail was insufficient because it had no actual knowledge of the discovery requests and that the thirty-five day period to respond had not yet begun to run. We conclude TCR did not overcome the presumption that the requests for admissions were received. TCR did not submit any affidavits in support of this proposition as required by C.R.C.P. 56(e). TCR contends Mitchell's statements as an officer of the court are sufficient to rebut the presumption the letter was mailed. However, as the trial court noted, when a motion for summary judgment is supported by affidavit, the party opposing the motion cannot rely on the mere allegations of the party's pleadings, but must, by affidavit or otherwise as provided in C.R.C.P. 56, set forth

specific facts. *See* C.R.C.P. 56(e); *McDaniels v. Laub*, 186 P.3d 86, 87 (Colo. App. 2008). Even though C.R.C.P. 36(c) does not require the filing of an affidavit to withdraw requests for admissions, the circumstances here show that the trial court did not abuse its discretion in declining to do so.

The City's second interrogatories, requests for admissions, and requests for production of documents included a valid certificate of service by mail. The City also submitted a sworn affidavit in which the City's paralegal asserted the document was mailed as set forth in the certificate of service. Also, Mitchell did not assert that the second set of discovery requests was mailed to an incorrect address. Additionally, the trial court noted that TCR did not indicate in its opposition to the summary judgment motion that it would have denied any of the requests. Therefore, TCR did not overcome the presumption that it received the City's second set of discovery requests, and the City supported the presumption that TCR received the requests for admissions.

Second, TCR contends the requests for admissions should have been served electronically, but there is no such requirement. The requests for admissions were not required to be served

electronically. Pursuant to C.R.C.P. 5(b)(2), service under C.R.C.P. 5(a) is made by "(B) Mailing a copy to the last known address of the person served. Service is complete on mailing; . . . or (D) Delivering a copy by any other means, including E-Service."

Therefore, E-Service is optional. *See also* C.R.C.P. 121, § 1-26 (electronic filing and service system). TCR contends service should have been made upon TCR, instead of its attorney, Mitchell, pursuant to C.R.C.P. 5(b)(2)(B) ("mailing a copy to . . . the person . . ."). However, Rule 5(b) has been interpreted to provide that if a party is represented by an attorney, and notice of this representation has been given to the opposing party and the court, all notices required to be given in relation to the matters in controversy must be given to and served on the attorney of record. *In re Marriage of Cooper*, 113 P.3d 1263, 1264 (Colo. App. 2005); *see also* Colo. RPC 4.2. Therefore, the City was required to communicate with Mitchell, as long as he was the attorney of record for TCR, and service by mail on him was proper.[1]

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[1] TCR also contends Mitchell's excusable neglect and gross negligence required service on it personally and, as a result, the service of the requests for admissions on Mitchell was inadequate.

Third, TCR maintains that the City's motion should have been denied because the City did not inquire, move to compel, confer, or communicate with it before filing its motion for summary judgment. We conclude the City should have conferred with TCR before filing a motion for summary judgment or explained in its motion why it did not do so.

> Unless a statute or rule governing the motion provides that it may be filed without notice, moving counsel *shall confer* with opposing counsel before filing a motion. The motion shall, at the beginning, contain a certification that the movant in good faith has conferred with opposing counsel about the motion. If the relief sought by the motion has been agreed to by the parties or will not be opposed, the court shall be so advised in the motion. If no conference has occurred, the reason why shall be stated.

C.R.C.P. 121, § 1-15(8); *cf.* D.C. Colo. L. Civ. R. 7.1(a), (b)(3); *Ballard v. Tritos, Inc.*, No. 10-CV-02757-PAB-KMT, 2010 WL 5559544, at *1 (D. Colo. Dec. 30, 2010) (finding no duty to confer on summary judgment motions in *federal court*).

However, nothing in the record indicates that the City was aware of any reasons Mitchell had for not responding to the requests for admissions. In any event, because Mitchell was the attorney of record for TCR, the City was required to communicate with him and service upon him was proper.

However, we conclude the failure to confer was harmless. *See* C.R.C.P. 61 ("[N]o error or defect in any ruling or order . . . is ground for . . . disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."). During the first round of discovery, the City agreed to extend the deadline for the discovery requests four times and, as a last resort, filed a motion to compel. TCR never responded to the first round of discovery requests nor did it file any of its required disclosures. The City apparently believed it was futile to confer with TCR based on TCR's past record of unresponsiveness. In light of these circumstances, the City's failure to confer with TCR was harmless, and the trial court did not abuse its discretion in not requiring the City to confer or explain why it did not confer.

Therefore, we conclude the trial court did not abuse its discretion in deeming the requests for admissions admitted.

III. Withdrawal of Admissions

TCR contends the trial court abused its discretion when it refused to allow TCR to withdraw its deemed admissions and to provide responses to the requests. TCR further contends the trial court abused its discretion when it found the City would be

prejudiced if TCR were permitted to withdraw the deemed admissions. We disagree.

A. Standard of Review

We review a trial court's decision to deny a motion to withdraw or amend a C.R.C.P. 36 admission for an abuse of discretion. *Grynberg*, 134 P.3d at 565. As noted, a court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *Id.* at 565-66.

B. Applicable Law

C.R.C.P. 36(b) "provides a mechanism by which a party may seek to avoid the effect of a deemed admission, and it provides standards by which a court is to evaluate such a request." *Sanchez v. Moosburger*, 187 P.3d 1185, 1187 (Colo. App. 2008). The court may permit a withdrawal of an admission when (1) "'the presentation of the merits of the action will be subserved thereby and [(2)] the party who obtained the admission fails to satisfy the court that withdrawal . . . will prejudice him in maintaining his action or defense on the merits.'" *Id.* at 1187-88 (quoting C.R.C.P. 36(b)). A trial court must be cautious in exercising its discretion to permit withdrawal or amendment of an admission. *Grynberg*, 134

P.3d at 566. "Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated." *Id.* (citation omitted).

C. Analysis

We conclude there was no abuse of discretion. The trial court found the first part of the *Sanchez* test had been met. Allowing TCR to withdraw the deemed admissions would have served the presentation of the merits because it would have provided TCR an opportunity to contest the merits of the City's case at a trial. *Sanchez*, 187 P.3d at 1189.

However, we conclude the trial court did not abuse its discretion in determining that permitting withdrawal of the admissions would prejudice the City. As the trial court detailed in its summary judgment, TCR, at the time of the order, had not answered the requests for admissions. The only action TCR had taken regarding the requests for admissions was to file an untimely response to the motion for summary judgment, in which it requested an extension of time to respond to the requests for

admissions. TCR did not specifically indicate that it would deny any of the information in the requests for admissions. Additionally, the case was in the late stages of litigation, and the trial had been continued once before.

If TCR had only failed to respond to the requests for admissions and had responded to the City's interrogatories and production of documents and made its required disclosures, the City would have had substantial information from TCR to use at trial. However, the City had little information to use at trial and, thus, it would have been prejudiced by a withdrawal of the twenty-eight deemed admissions three days before the close of discovery and less than two months before trial. In contrast, if TCR had timely responded to the requests for admissions, the City could have scheduled depositions concerning any denials contained in those requests.

TCR contends this case should be governed by *Moses v. Moses*, 180 Colo. 397, 505 P.2d 1302 (1973), not *Grynberg*, and as a result, we should not deem the admissions admitted. We disagree. In *Moses*, the respondent filed a motion for summary judgment due to the petitioner's failure to respond to the requests

for admissions, and the petitioner filed her answer to the requests for admissions seven days later. Here, TCR never submitted any responses to the requests for admissions. We conclude this case is more like *Grynberg*. In *Grynberg*, the plaintiff filed a motion for summary judgment due to the defendant's failure to respond to requests for admissions. Like TCR, the defendant filed a response to the motion for summary judgment and did not respond to the requests for admissions. Additionally, the defendant in *Grynberg* was represented throughout the proceedings, while the defendant in *Moses* was unrepresented. TCR, while unrepresented when the first set of discovery requests was served, was represented during all of the requests for extension of time and the entirety of the second set of discovery requests.

Therefore, we conclude the trial court did not abuse its discretion by denying TCR's request to withdraw the admissions.

IV. Summary Judgment

TCR contends the trial court erred in entering summary judgment. TCR argues that even if the requests for admissions are deemed admitted, factual and legal issues remain in dispute, namely the constitutional issues under the Fifth, Eighth, and

Fourteenth Amendments raised in TCR's amended answer. We disagree.

A. Standard of Review

We review a grant of summary judgment de novo. *McDaniels*, 186 P.3d at 87.

B. Applicable Law

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Woodward v. Bd. of Dirs. of Tamarron Ass'n of Condo. Owners, Inc.*, 155 P.3d 621, 623-24 (Colo. App. 2007).

When a motion for summary judgment is submitted and supported by affidavit, the party opposing the motion for summary judgment cannot rely on the mere allegations of that party's pleadings, but must, by affidavit or otherwise as provided in C.R.C.P. 56, set forth specific facts showing a genuine issue of material fact. C.R.C.P. 56(e); *GTM Invs. v. Depot, Inc.*, 694 P.2d 379, 381 (Colo. App. 1984). A motion for summary judgment supported

by an affidavit, to which no counter-affidavit is filed, establishes the absence of an issue of fact, and the court is entitled to accept the affidavit as true. *Witcher v. Canon City*, 716 P.2d 445, 457 (Colo. 1986).

C. Analysis

Issues not raised in or decided by a trial court will not be addressed for the first time on appeal. *Boatright v. Derr*, 919 P.2d 221, 227 (Colo. 1996). TCR did not raise the constitutional issues described above in its response to the motion for summary judgment nor did it make any arguments concerning these issues to the trial court. Therefore, we will not address them for the first time on appeal. In any event, the City had no obligation to respond to or address these constitutional issues when it filed its summary judgment motion.

V. Conclusion

The judgment is affirmed.

JUDGE J. JONES and JUDGE HARRIS concur.