

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

AMERICA’S RECOVERY NETWORK, INC.,	:	APPEAL NO. C-070218 TRIAL NO. A-0602060
Plaintiff-Appellee,	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
JOHN K. LIMOLI,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant John K. Limoli represented three defendants—plaintiff-appellee America’s Recovery, HH Gregg Company, and Tom Johnston (“the defendants”)—in a lawsuit filed by Patricia Webster claiming libel and slander. The suit alleged that the defendants had improperly attempted to collect a debt for which she was not liable, and that the defendants had improperly reported this debt to credit reporting agencies. The alleged debt was owed to HH Gregg. America’s Recovery was the collection agency used by HH Gregg to collect delinquent accounts. Tom Johnston was the employee of America’s Recovery who handled the Webster matter.

Limoli filed answers on behalf of the defendants and filed motions for summary judgment that were supported by affidavits. At that point, both Limoli and America’s Recovery believed that the suit was going well and that America’s Recovery had a viable defense to the claim.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

One month after Limoli had filed the motions for summary judgment, Webster sent interrogatories, requests for production of documents, and requests for admissions to Limoli. These filings were based on a document discovered by Webster's counsel indicating that HH Gregg had agreed not to hold Webster liable on the account she had opened on behalf of the apartment complex she represented.

Limoli did not respond. After the response time had lapsed, Webster filed a motion to deem the requests for admissions admitted and a motion for summary judgment based on the admitted facts. Limoli did not respond to either. Two months later, the trial court deemed the requests for admissions admitted and granted summary judgment on the issue of liability in favor of Webster against the defendants.

The trial court scheduled a settlement conference with a magistrate, but Limoli failed to attend. The settlement conference was rescheduled. While Limoli attended that conference, he failed to bring a representative with settlement authority and did not have authority to settle the case on his own. The trial court sanctioned both the defendants and Limoli, stating "[i]n nearly two months from the time of the notice of the second mediation conference to the actual time of the conference, counsel easily could have made the necessary arrangements to have his clients present or represented by other counsel. In counsel's election to do nothing he was acting as an agent for his clients."

At that point, Limoli filed a motion to withdraw as counsel for the defendants. That motion was granted. The defendants obtained new counsel and settled Webster's claim for \$77,000. America's Recovery paid half of that settlement amount and expended \$11,000 in attorney fees after Limoli's withdrawal.

America's Recovery filed suit against Limoli, alleging legal malpractice. The case was tried to the bench. Rather than presenting expert testimony regarding the standard of care, the parties agreed to let the trial court determine the standard. Limoli argued below that he had not breached his duty of care because (1) the court had competing motions for summary judgment, so filing a response to Webster's motion was unnecessary; and (2) the affidavits filed in support of the defendants' motion for summary judgment addressed the issues contained in Webster's requests for admissions, so answering them was unnecessary.

The trial court concluded that Limoli had committed legal malpractice in two instances: (1) the failure to respond to Webster's requests for admissions; and (2) the failure to respond to Webster's motion to deem the requests for admissions admitted and motion for summary judgment. The trial court awarded America's Recovery the amount paid by it toward the Webster settlement, the \$11,000 in attorney fees paid in that case, and \$10,000 in attorney fees for this case. The total award was \$59,500.

Limoli's appeal raises five assignments of error. First, he argues that responding to the motion for summary judgment or the requests for admissions would have required him to violate the Rules of Professional Responsibility. Second, he claims that the damages suffered by America's Recovery were actually the fault of HH Gregg for withholding the document relieving Webster from personal liability on the HH Gregg account. Third, Limoli asserts that America's Recovery failed to mitigate its damages by rejecting Webster's offer to settle the underlying case for \$7500. Fourth, he claims that the trial court failed to recognize that America's Recovery could not have prevailed in the Webster litigation. Finally, he argues that it was not malpractice to represent

multiple clients in the Webster case because he had advised America’s Recovery against it, but his client nonetheless chose to proceed.

Initially, we note that Limoli’s entire argument contains references neither to legal authority nor to the record. Under App.R. 16(A)(7), we could disregard Limoli’s entire brief and affirm the decision below. “To receive consideration on appeal, trial errors must be raised by assignment of error and must be argued and supported by legal authority and citation to the record.”<sup>2</sup>

More problematic, as America’s Recovery notes, none of Limoli’s arguments were raised below. “A party who fails to raise an argument in the court below waives his or her right to raise it here.”<sup>3</sup> Nonetheless, we consider Limoli’s fundamental argument—that the decision of the trial court was against the weight of the evidence.

We conclude that the decision of the trial court was not against the manifest weight of the evidence. The civil manifest-weight-of-the-evidence standard provides that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.<sup>4</sup>

To prove that it was entitled to an award of damages for legal malpractice, America’s Recovery had to show (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach.<sup>5</sup> The existence of the relationship was not in dispute. This left the trial court to determine

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<sup>2</sup> *State v. Perez*, 1st Dist. Nos. C-040363, C-040364, and C-040365, 2005-Ohio-1326, ¶21.

<sup>3</sup> *State ex rel. Zollner v. Industrial Comm. of Ohio*, 66 Ohio St.3d 276, 278, 1993-Ohio-49, 611 N.E.2d 830.

<sup>4</sup> *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶24, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus.

<sup>5</sup> *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 105, 538 N.E.2d 1058.

whether a duty had been breached and whether damages had been proximately caused by that breach.

In this case, the parties stipulated on the record that they were “leaving [the determination of the standard of care] up to the Court to determine \* \* \* based upon [the Court’s] knowledge as an attorney and as a Judge.” Based upon this stipulation, the trial court determined that Limoli had a duty to respond to Webster’s requests for admissions, the motion to deem the requests admitted, and the motion for summary judgment. The trial court rejected Limoli’s argument that the duty did not exist or was satisfied by his previous filing of “competing” motions for summary judgment with supporting affidavits. The trial court then concluded that Limoli’s breach of that duty was the proximate cause of the damages suffered by America’s Recovery.

After a review of the record, we conclude that the decision of the trial court was supported by competent, credible evidence. Limoli admitted at trial that the claim against America’s Recovery was still defensible even after the document surfaced indicating that HH Gregg had agreed not to pursue Webster personally on the debt. The record supports the trial court’s conclusion that it was Limoli’s failure to respond to the requests for admissions and the subsequent motion for summary judgment that effectively destroyed America’s Recovery ability to defend itself in the Webster litigation. Limoli’s five assignments of error are overruled, and the judgment of the trial court is affirmed.

**OHIO FIRST DISTRICT COURT OF APPEALS**

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A certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**SUNDERMANN, P.J., HILDEBRANDT and CUNNINGHAM, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on February 20, 2008  
per order of the Court \_\_\_\_\_.  
Presiding Judge