IN THE COURT OF APPEALS

SECOND APPELLATE DISTRICT OF OHIO

MONTGOMERY COUNTY

CURTIS PIERSON,	:	
Plaintiff-Appellant,	:	CASE NO. CA23498
	:	O P I N I O N
- vs -	:	
JOHN H. RION, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM MONTGOMERY COUNTY COURT OF COMMON PLEAS
Case No. 2008CV07697

Tomb, Roberts & Bucio, LLP, Jeremy M. Tomb, 124 W. Main Street, Troy, Ohio 45373, for plaintiff-appellant

Pyper, Alexander & Nordstrom, LLC, Thomas H. Pyper, Tony M. Alexander, 7601 Paragon Road, Suite 301, Dayton, Ohio 45459, for defendants-appellees

HENDRICKSON, J.

{¶1} Plaintiff-appellant, Curtis Pierson, appeals from a decision of the Montgomery County Court of Common Pleas granting summary judgment to defendants-appellees, John H. Rion and the law firm of Rion, Rion and Rion, L.P.A., Inc., on a complaint for legal malpractice and related claims. For the reasons discussed below, the judgment of the trial court will be affirmed.

{¶2} On April 30, 2007, Pierson was charged with misdemeanor assault following an altercation with his neighbor. He retained the law firm of Rion, Rion and Rion, L.P.A., Inc. (hereinafter, "the Rion Firm") to represent him in the matter. According to Pierson, John H. Rion (hereinafter, "Mr. Rion") orally agreed to personally represent him and to request a jury trial on his behalf. Mr. Rion did not personally appear at trial or request a jury trial on Pierson's behalf, however. Instead, attorney Keri Farley, an associate with the Rion Firm, appeared for Pierson's bench trial in the Vandalia Municipal Court. After finding out that a jury trial had not been not requested, Pierson fired the Rion Firm immediately prior to trial and expressed his dissatisfaction with the situation to the trial court. His request for a continuance to obtain new counsel was denied. Pierson proceeded pro se with the bench trial and was convicted of a lesser charge of disorderly conduct. Pierson's conviction was reversed on appeal, the appellate court finding that he was denied his right to counsel and holding that the trial court abused its discretion in denying him a continuance. Following the remand, the case was dismissed for failure to prosecute.

{¶3} On August 20, 2008, Pierson filed a complaint against Mr. Rion and the Rion Firm asserting claims of legal malpractice, fraud/fraudulent misrepresentation, negligent misrepresentation, and breach of contract. The complaint also sought to hold the Rion Firm liable for Mr. Rion's alleged malpractice on the basis of respondeat superior. The complaint further listed a separate claim for punitive damages.

{¶4} Mr. Rion and the Rion Firm (collectively, "appellees") moved for summary judgment on all of Pierson's claims on January 20, 2009. In a decision rendered on June 2, 2009, the trial court granted appellees' motion. It is from this judgment that Pierson now appeals.

II

Standard of Review

{¶5} An appellate court conducts a de novo review of a trial court's decision granting summary judgment. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. Summary judgment is proper where: (1) there are no genuine issues of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only come to a conclusion adverse to the nonmoving party, construing the evidence most strongly in that party's favor. Civ.R. 56(C). See, also, *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183, 1997-Ohio-221; *Hissong v. Miller*, Montgomery App. No. 2009-CA-37, 2010-Ohio-961, ¶5. The moving party bears the initial burden of informing the court of the basis for the motion and demonstrating the absence of any genuine issues of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. If the moving party meets its burden, the nonmoving party must then present evidence that some issue of material fact remains to be litigated. Id.

{¶6} The record reflects that there are no material facts in dispute in the present matter.[1] The disposition of this appeal thus turns on whether, construing the evidence most strongly in Pierson's favor, reasonable minds can only conclude that appellees are entitled to judgment as a matter of law.

III

1. As Pierson points out, appellees assumed the truth of the factual allegations in Pierson's complaint in their February 17, 2009 reply memorandum filed in support of their motion for summary judgment. In the body of the memorandum, appellees denoted that "[f]or summary judgment purposes[,] one may assume that there was some understanding by Pierson that a jury trial on his behalf would be demanded." This statement was accompanied by a footnote providing the following: "Plaintiff appears either unwilling or incapable of understanding that *Defendants' Motion assumes (for summary judgment purposes only) the accuracy of Plaintiff's factual assertions*, but then proceeds to demonstrate how under applicable law he cannot prevail anyway. Such an approach is a mere corollary to Rule 56's admonition that the evidence must be viewed in a way most favorable to the party resisting summary judgment." (Emphasis added.)

{¶7} Pierson raises two assignments of error for our consideration:

{¶8} Assignment of Error No. 1:

{¶9} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT GRANTED APPELLEES' MOTION FOR SUMMARY JUDGMENT SINCE THE DECISION IS CONTRARY TO LAW."

{¶10} Assignment of Error No. 2:

{¶11} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ALL CLAIMS IN FAVOR OF THE LAW FIRM WHERE THE CLAIMS WERE NOT PROPERLY BEFORE THE COURT AND THE LAW FIRM COMPLETELY FAILED TO PRESENT EVIDENCE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT."

{¶12} Due to the fact that both assignments of error relate to the trial court's decision to grant summary judgment in favor of appellees, we shall address them together.

A. Fraud, Negligent Misrepresentation, and Breach of Contract

{¶13} As a preliminary matter, we find no error in the trial court's determination that a number of Pierson's claims warranted dismissal because they were subsumed within his legal malpractice claim. This court has previously cited with approval the case of *Muir v. Hadler Real Estate Mgmt. Co.* (1982), 4 Ohio App.3d 89, a Tenth District Court of Appeals decision addressing the practice of asserting duplicative causes of action in cases based on legal malpractice:

{¶14} "An action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice * * *, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages. * * * Malpractice by any other name still constitutes malpractice. As stated in *Richardson v. Doe* (1964), 176 Ohio St. 370, malpractice consists of 'the

professional misconduct of members of the medical profession and attorneys.' Such professional misconduct may consist either of negligence or of breach of the contract of employment. It makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice." Id. at 89-90. (Citations partially omitted.) See, also, *Gullatte v. Rion* (2000), 145 Ohio App.3d 620, 626.In spite of the foregoing, this court suggested that a separate claim for fraud may lie where the alleged fraudulent conduct on the part of the attorney is distinct from the conduct underlying the legal malpractice claim. Id. In the case at bar, the entirety of Pierson's complaint was premised upon two alleged omissions on the part of Mr. Rion. One was Mr. Rion's failure to request a jury trial on Pierson's behalf, and the other was Mr. Rion's failure to personally appear at trial to represent Pierson. These two omissions formed the basis of, and were integral to, Pierson's legal malpractice claim. See id. Pierson's claims for fraud, breach of contract, and negligent misrepresentation were not founded upon allegations or conduct distinct from those supporting his legal malpractice claim. See id. Rather, they merely advanced duplicative claims concerning the same alleged omissions by Mr. Rion. Accordingly, the trial court properly dismissed these claims on the basis that they were subsumed within Pierson's legal malpractice claim.

B. Legal Malpractice

{¶16} Pierson argues that Mr. Rion breached his professional duty to Pierson by failing to request a jury trial on Pierson's behalf and by failing to provide adequate representation. Pierson further urges that this breach was the proximate cause of damages sustained by him in connection with the assault matter.

{¶17} In representing a client, an attorney has a duty to "exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, and to be ordinarily and reasonably diligent, careful, and prudent[.]"

Marbury v. Schaengold, Montgomery App. No. 21120, 2006-Ohio-1814, ¶5, quoting *Palmer v. Westmeyer* (1988), 48 Ohio App.3d 296, 298. In order to establish a claim for legal malpractice, a complainant must show that: (1) the attorney owed him a duty or obligation, (2) there was a breach of that duty or obligation and the attorney failed to conform to the standard required by law, and (3) there was a causal connection between the offensive conduct and the resulting damage or loss. *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, syllabus.

{¶18} We shall first address Pierson's argument that Mr. Rion's failure to personally represent him before the Vandalia Municipal Court constituted legal malpractice. As stated, the first prong of the legal malpractice test requires us to consider whether Mr. Rion owed Pierson an affirmative duty or obligation to *personally* represent him. *Vahila* at syllabus. We answer this question in the negative.

{¶19} Pierson and the Rion Firm executed a written contract for the provision of legal services in the assault case. A signed copy of the agreement was incorporated into the record. The contract denoted that "the attorneys of Rion, Rion & Rion, L.P.A., Inc., will represent Curtis Pierson in connection with the matter(s) of assault in the Vandalia court(s)" for a flat fee of $2,000. In executing the contract, Pierson and the Rion Firm entered into an attorney-client relationship which gave rise to appellees' *general* duty to "exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, and to be ordinarily and reasonably diligent, careful, and prudent[.]" *Marbury*, 2006-Ohio-1814 at ¶5.

{¶20} Despite the existence of this general duty, nowhere in the express terms of the contract did the parties stipulate that Mr. Rion was obligated to personally appear in court to represent Pierson. In fact, the clear and unambiguous terms of the contract spoke to the contrary. It is well settled that the intent of the parties is presumed to lie

within the language used in the contract. *Saunders v. Mortensen*, 101 Ohio St.3d 86, 2004-Ohio-24, ¶9. The contract in the case at bar explicitly stated that Pierson "authorize[d] *any* of the attorneys employed by Rion, Rion & Rion, L.P.A., Inc., to represent [him]" in the assault case. (Emphasis added.) We must attribute the plain and ordinary meaning to the language employed by this clear and unambiguous contract provision and refrain from revising the contract. *Shifrin v. Forest City Ent., Inc.*, 64 Ohio St.3d 635, 638, 1992-Ohio-28. Hence, in accordance with the plain and ordinary meaning of the words in the above-quoted provision, Pierson assented to representation by any of the attorneys working for the Rion Firm.

{¶21} A party to a contract is presumed to have read and understood the agreement. *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257, ¶10. Furthermore, "a signatory is bound by a contract that he or she willingly signed." Id. Pierson does not claim that he was prevented from reading the contract or that he did not understand the terms before signing it. Pierson also does not attempt to refute the fact that he willingly affixed his signature to the contract. In addition, the trial court properly refused to entertain any evidence of contradictory oral negotiations on the basis that such evidence was excluded by the parol evidence rule. *Ed Schory & Sons, Inc. v. Soc. Natnl. Bank*, 75 Ohio St.3d 433, 440, 1996-Ohio-194 (stating, "[t]he parol evidence rule is a rule of substantive law that prohibits a party who has entered into a written contract from contradicting the terms of the contract with evidence of alleged or actual agreements. * * * [T]he parol evidence rule will not be overcome by merely alleging that a statement or agreement made prior to an unambiguous written contract is different from that which is contained in the contract").

{¶22} We conclude that Pierson presented no viable evidence to refute the finding that Mr. Rion did not assume a duty to personally represent him in the assault

matter.

{¶23} Next, we address Pierson's argument that Mr. Rion's failure to request a jury trial on Pierson's behalf constituted legal malpractice. Once again, the first prong of the legal malpractice test requires us to consider whether Mr. Rion or the Rion Firm owed Pierson a duty or had an obligation to request a jury trial. *Vahila*, 1997-Ohio-259 at syllabus. Taking into account the particular facts and circumstances of this case, we must answer this inquiry in the negative.

{¶24} A criminal defendant's right to a jury trial is guaranteed in the Sixth and Fourteenth Amendments to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution. *State v. Burnside*, Montgomery App. No. 23504, 2010-Ohio-1235, ¶45. Regarding serious offenses, an accused may not be deprived of this right unless it is knowingly, intelligently, and voluntarily waived. See *Duncan v. Louisiana* (1968), 391 U.S. 145, 154, 88 S.Ct. 1444. See, also, R.C. 2945.05; Crim.R. 23(A). However, in misdemeanor cases, a criminal defendant does not have an absolute right to a jury trial. *City of Mentor v. Giordano* (1967), 9 Ohio St.2d 140, paragraph one of the syllabus; S*tate v. Short*, Darke App. No.06-CA-1679, 2006-Ohio-6611, ¶13. Rather, a defendant charged with a misdemeanor waives the right to a jury trial unless he makes a timely written demand in accordance with Crim.R. 23(A). *Short* at ¶13-14.

{¶25} The record indicates that, in the underlying matter, Pierson was charged with first-degree misdemeanor assault in violation of R.C. 2903.13. This offense carries a maximum penalty of six months in jail, making it a petty offense. Crim.R. 2(C) and (D); *State v. Raby*, Greene App. No. 2004-CA-88, 2005-Ohio-3741, ¶6. See, also, *Blanton v. North Las Vegas* (1989), 489 U.S. 538, 541, 109 S.Ct. 1289. As a result, Pierson's right to a jury trial was waived unless properly demanded. *Short* at ¶13-14.

{¶26} It is undisputed that neither Mr. Rion nor any other attorney employed by the Rion Firm filed a written jury demand on Pierson's behalf. Therefore, Pierson's right to a jury trial in his assault case was waived. The trial court found that the decision to waive a jury trial was a strategic choice within the province of Mr. Rion's legal expertise. The court noted that Mr. Rion was not required to obey each of Pierson's commands, including the demand for a jury trial, in view of Mr. Rion's professional judgment that a bench trial offered a greater likelihood of a favorable outcome. On appeal, Pierson strongly objects to the trial court's rationale in upholding Mr. Rion's decision to forego a jury trial, a decision that was in direct conflict with Pierson's express wishes.

{¶27} As indicated at the outset of our analysis, there are no material facts in dispute in the present matter. Thus, construing the facts in Pierson's favor, we may presume that Pierson timely informed appellees that he wished them to file a jury trial demand on his behalf and that appellees chose to disregard this directive as a matter of trial strategy.

{¶28} Numerous Ohio courts have scrutinized whether an attorney's failure to demand a jury trial on his client's behalf constitutes deficient performance for purposes of an ineffective assistance of counsel claim. These courts have repeatedly declined to endorse such an argument, finding that trial counsel's failure to demand a jury trial is a strategic decision which does not serve as evidence of deficient performance. See, e.g., *Beavercreek v. LeValley*, Greene App. No. 06-CA-51, 2007-Ohio-2105, ¶19; *State v. Kerr*, Wood App. No. WD-08-008, 2009-Ohio-1470, ¶41; *Cleveland v. Townsend*, Cuyahoga App. No. 87006, 2006-Ohio-6265, ¶15; *State v. Toney*, Wayne App. No. 04CA0013, 2004-Ohio-4877, ¶11; *State v. Patrick*, Trumbull App. Nos. 2003-T-0166, 2003-T-0167, 2004-Ohio-6688, ¶33; and *State v. Hanks* (Oct. 31, 2000), Franklin App. No. 99AP-1289, 2000 WL 1617755 at *4.

{¶29} We realize that "an action to vacate a criminal judgment based on ineffective assistance of counsel is not the same as a cause of action for legal malpractice" and that "[t]he proof of either of these two causes of action does not necessarily establish the other." *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 107. Nonetheless, this court has recognized that "[t]he showings required for ineffectiveness and malpractice are similar[.]" *Marbury*, 2006-Ohio-1814 at ¶10. Both examine whether an attorney's conduct fell below the accepted standard. Accordingly, we find the determination that trial counsel's failure to demand a jury trial amounts to legitimate strategy for purposes of an ineffective assistance claim reasonably extends to a legal malpractice claim. We conclude that the trial court properly determined that Mr. Rion's decision to forego a jury trial in Pierson's misdemeanor assault case was a strategic decision within the province of the attorney's legal expertise.

{¶30} Even if we were to find that Mr. Rion breached a duty towards Pierson in failing to personally appear or in failing to request a jury trial on Pierson's behalf, we would still find that Pierson neglected to demonstrate a causal connection between these alleged omissions and any resulting damage or loss. *Vahila*, 1997-Ohio-259 at syllabus. Originally charged with assault, Pierson was convicted of the lesser charge of disorderly conduct. Pierson's conviction was reversed on appeal. On remand, the charges were ultimately dismissed after the state failed to prosecute within the requisite time period.

{¶31} Pierson argues that the legal fees he incurred in hiring appellate counsel for the appeal and trial counsel for the remand resulted in compensable damages, and that those damages foreseeably arose out of Mr. Rion's alleged omissions. Pierson cites the Twelfth District Court of Appeals case of *Rafferty v. Scurry* (1997), 117 Ohio App.3d 240, for the proposition that hiring an attorney to defend in a matter underlying a

legal malpractice claim comprises foreseeable damages for purposes of the malpractice claim. See id. at 246-47. However, Pierson invites us to apply far too broad a construction to the *Rafferty* case, which is factually distinguishable from the case at bar.

{¶32} In *Rafferty*, the trial court granted summary judgment in favor of a client who sued his attorney for legal malpractice. The court awarded the client damages which inlcluded over $6,000 in attorney fees incurred by the client in prosecuting the matter underlying the malpractice claim. The attorney challenged the award on appeal. In upholding the trial court's decision, the Twelfth Appellate District pointed to certain admissions entered into the record by virtue of the attorney's failure to respond to the client's request for admissions in the malpractice action. One of these admissions held that the client would have received a more favorable judgment in the matter underlying the malpractice action had the attorney filed an answer in that matter. In accordance with this admission, the appellate court reasoned that the client would not have had to hire new counsel to file for relief from default judgment in the underlying matter had the attorney filed an answer. The appellate court therefore determined that the record contained competent, credible evidence in support of the award of attorney fees.

{¶33} The case at bar involves no such admissions on the part of Mr. Rion or the Rion Firm. Neither Mr. Rion nor the Rion Firm conceded that Pierson would have received a more favorable judgment in the underlying assault matter had Mr. Rion personally represented Pierson or had Mr. Rion requested a jury trial on Pierson's behalf. This distinction is sufficient to render the rationale employed by the *Rafferty* court inapplicable to the case at bar.

{¶34} In countering Pierson's proximate cause argument, appellees cite the Ohio Supreme Court case of *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833. Relying upon this case, appellees posit that

Pierson was tasked with demonstrating he would have fared better had the assault matter been tried to a jury rather than the bench in order to establish the causation element of his legal malpractice claim.

{¶35} In *Environmental Network*, former clients filed a legal malpractice action against their attorney. The clients maintained that their attorney forced them to settle a matter, and that they would have received a larger monetary payout had the case been tried to its conclusion. The jury returned a verdict in favor of the clients, finding that the attorney had committed malpractice in handling the underlying matter. Because this verdict was not challenged on appeal, the Ohio Supreme Court presumed that the attorney had engaged in malpractice and focused solely on causation and damages. The high court framed its inquiry thusly:

{¶36} "We are asked to determine the quantum of evidence that a plaintiff must produce in order to establish causation in a legal-malpractice case in which the sole theory advanced is that the plaintiff would have received a better outcome if the underlying case had been tried to its conclusion rather than settled." Id. at ¶1.

{¶37} Addressing this issue, the high court held that "when a plaintiff premises a legal-malpractice claim on the theory that he would have received a better outcome if his attorney had tried the underlying matter to conclusion rather than settled it, the plaintiff must establish that he would have prevailed in the underlying matter and that the outcome would have been better than the outcome provided by the settlement." Id. at ¶2.

{¶38} Pierson disclaims the applicability of *Environmental Network* to the case at bar, arguing that it should be limited to cases in which a plaintiff claims he would have fared better had the underlying matter been tried rather than settled. Without a doubt, *Environmental Network* is factually distinguishable from the case at bar on this basis.

However, unlike the factual distinctions between the present matter and the *Rafferty* case, the factual distinctions between the present matter and *Environmental Network* are not fatal. In other words, the factual differences do not render the rationale employed by the *Environmental Network* court inapposite to the case at bar. Rather, due to the similarities between the two cases, we find that the rationale employed by the *Environmental Network* court applies with equal force to the case at bar.

{¶39} As stated, Pierson's causation argument is premised upon the assertion that Mr. Rion's breach of duty proximately caused Pierson to incur damages in the form of costs associated with hiring new attorneys in the assault matter. Pierson insists that the costs incurred in paying for his new attorneys foreseeably arose out of Mr. Rion's failure to request a jury trial and Mr. Rion's failure to personally appear at the assault trial. Put another way, had Mr. Rion fulfilled what Pierson classifies as Mr. Rion's "duties" by performing these acts, Pierson would not have incurred the additional attorney fees which comprise his damages in the malpractice action. Unavoidably linked to this argument is the notion that Pierson would have achieved a more favorable outcome in the assault case and avoided the appeal had Mr. Rion personally appeared or demanded a jury trial on Pierson's behalf.

{¶40} We are mindful of the high court's admonition against requiring *every* plaintiff asserting a legal malpractice claim to prove that he or she would have been successful in the underlying matter in order to recover for malpratice. Id. at ¶15, quoting *Vahila*, 1997-Ohio-259 at 428. We do not intend to impose such a blanket requirement today. In view of the above analysis, however, we find that Pierson's proximate cause argument is inextricably linked to the outcome of his assault case. See *Environmental Network*, 2008-Ohio-3833 at ¶17. Accordingly, we believe that *Environmental Network* is on point.

{¶41} After reviewing the record, we find that Pierson presented no evidence beyond mere speculation that he would have obtained a more favorable outcome had Mr. Rion personally represented him or had a jury trial been requested on his behalf. See id. at ¶2. Pierson thus failed to establish a causal connection between the alleged omissions and any resulting damage or loss. *Vahila* at syllabus.

{¶42} We conclude that the trial court did not err in granting summary judgment in favor of appellees on Pierson's legal malpractice claim because there remained no genuine issues of material fact pertinent to that claim and appellees were entitled to judgment as a matter of law.

C. Respondeat Superior

{¶43} Pierson's complaint asserted claims against the Rion Firm for legal malpractice, fraud, negligent misrepresentation, breach of contract, punitive damages, and respondeat superior. According to Pierson, only the respondeat superior claim was dependent upon the claims against Mr. Rion. The rest of the claims against the Rion Firm, he insists, were separate and distinct from the claims against Mr. Rion. Pierson specifically alleges that the Rion Firm acted negligently by failing to request a jury trial, failing to adequately prepare for trial, failing to consult with Pierson to determine his objectives in the assault matter, and in haphazardly assigning multiple attorneys to the case without any supervision.

{¶44} The Ohio Supreme Court recently declared that a law firm, as an entity rather than a person licensed to practice law, cannot directly commit legal malpractice. *Natl. Union Fire. Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, paragraph one of the syllabus. Accordingly, Pierson's malpractice-related claims asserted directly against the Rion Firm must fail. See id. This leaves Pierson's respondeat superior claim as the only viable claim against the Rion Firm.

{¶45} Under the doctrine of respondeat superior, a principal or employer may generally be held liable for tortious acts committed by its agents or employees if such acts occur within the scope of the employment relationship. *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438, 1994-Ohio-519. A law firm cannot be held vicariously liable for legal malpractice absent a finding of malpractice by individual attorneys who are principals or associates at the firm. *Wuerth* at paragraph two of the syllabus. As indicated above, Pierson failed to establish that Mr. Rion committed malpractice. Consequently, there was no legal malpractice to vicariously attribute to the Rion Firm. The trial court thus did not err in granting summary judgment in favor of appellees on Pierson's respondeat superior claim because there remained no genuine issues of material fact relevant to that claim and appellees were entitled to judgment as a matter of law.

D. Punitive Damages

{¶46} As indicated, Pierson's complaint raised a separate "cause of action" against Mr. Rion and the Rion Firm for punitive damages. Specifically, Pierson asserted that Mr. Rion and the Rion Firm "acted in a willful, malicious, fraudulent, oppressive, or reckless manner with regard to their representation" of him, and that such conducted warranted an award of punitive damages. Although Pierson appealed the entirety of the trial court's decision granting appellees summary judgment, his appellate brief did not revisit the issue of punitive damages.

{¶47} The intent behind punitive damages is to punish the wrongdoer and to deter intolerable conduct. *Calmes v. Goodyear Tire & Rubber Co.* (1991), 61 Ohio St.3d 470, 473. By statute, a complainant in a tort action may not be awarded punitive damages unless (1) the defendant acted with malice or aggravated or egregious fraud, and (2) the trier of fact awards the plaintiff compensatory damages. R.C. 2315.21(C).

See, also, *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, ¶12. The burden of proof rests with the plaintiff to establish his entitlement to punitive damages by clear and convincing evidence. R.C. 2315.21(D)(4). See, also, *Cabe v. Lunich*, 70 Ohio St.3d 598, 601, 1994-Ohio-4.

{¶48} In awarding summary judgment to appellees, the trial court found that Pierson failed to show that Mr. Rion or the Rion Firm acted with actual malice towards him. "Actual malice" in the context of punitive damages has been defined as "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Calmes* at 473, quoting *Preston v. Murty* (1987), 32 Ohio St.3d 334, syllabus. (Emphasis sic.) Even construing the facts in favor of Pierson, we agree that Pierson failed to show that the conduct exhibited by Mr. Rion or the Rion Firm was so egregious as to exhibit hatred, ill will, vengefulness, or a conscious disregard for Pierson's rights or safety. *Preston* at syllabus.

{¶49} The trial court also declined to award punitive damages to Pierson on the basis that Ohio law prohibited Pierson from asserting a separate cause of action for punitive damages. Indeed, it is well settled that a civil cause of action sounding solely in punitive damages cannot be maintained. *Richard v. Hunter* (1949), 151 Ohio St. 185, 189, quoting 15 American Jurisprudence 707, Section 271; *Bishop v. Grdina* (1985), 20 Ohio St.3d 26, 28, superseded by rule on other grounds. Rather, under Ohio law, "a plaintiff must be awarded some measure of compensatory damages to receive punitive damages." *Niskanen*, 2009-Ohio-3626 at ¶12. See, also, R.C. 2315.21(C)(2).

{¶50} As the preceding analysis indicates, we have determined that the trial court did not err in awarding summary judgment to appellees on all of Pierson's claims. Because Pierson was not entitled to compensatory damages on those claims, he was

foreclosed from seeking punitive damages and may not pursue a claim solely for an award of punitive damages as an independent remedy. *Niskanen* at ¶13.

{¶51} We conclude that the trial court did not err in granting summary judgment in favor of Mr. Rion and the Rion Firm on Pierson's punitive damages "claim" because there were no genuine issues of material fact regarding that purported claim and appellees were entitled to judgment as a matter of law.

{¶52} Pierson's first and second assignments of error are overruled.

IV

{¶53} Having overruled both of Pierson's assignments of error, the judgment of the trial court will be affirmed.

POWELL, P.J., and RINGLAND, J., concur.