

[Cite as *Elliott v. Brown*, 2010-Ohio-5749.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MIAMI COUNTY**

AMANDA ELLIOTT, et al.	:	
	:	Appellate Case No. 10-CA-19
Plaintiff-Appellants	:	
	:	Trial Court Case No. 10-CV-320
v.	:	
	:	
APRIL BROWN	:	(Civil Appeal from
	:	Common Pleas Court)
Defendant-Appellee	:	
	:	
	:	

## OPINION

Rendered on the 24<sup>th</sup> day of November, 2010.

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FAIN, J.

{¶ 1} Plaintiff-appellant Amanda Elliott appeals from a judgment of the Miami County Court of Common Pleas rendered in favor of defendant-appellee April Brown upon the pleadings, pursuant to Civ.R. 12(C). Elliott's suit depends upon allegations that Brown committed perjury in a prior legal action regarding custody of Elliott's

minor child. Elliott also bases her action upon the claim that following the award of temporary custody of the child to Brown, Brown failed to permit Elliott to visit the child. Elliott contends that the trial court erred by failing to consider her allegation that Brown's conduct in denying visitation constituted an actionable claim.

{¶ 2} We conclude that the trial court did not err in rendering judgment on the pleadings. The alleged perjury cannot be used to maintain a subsequent action. Although Elliott also alleged in her complaint that Brown did not permit her to see her daughter after Brown was awarded custody, there is no allegation in the complaint that Brown had a duty to permit Elliott to see her daughter, or that Brown's refusal to allow Elliott to see her daughter was otherwise wrongful, much less that this conduct was sufficiently outrageous to constitute the intentional infliction of emotional distress. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} Elliott brought this action against Brown, alleging intentional infliction of emotional distress, loss of filial consortium and loss of parental consortium, all arising from Brown's alleged conduct in a prior juvenile court custody proceeding. According to Elliott's complaint, Brown "acquired temporary custody of" Elliott's minor child, M.B., from the Miami County Juvenile Court. The complaint alleged that an affidavit filed by Brown in the Juvenile Court action was perjurious. Elliott further alleged that, following the award of temporary custody, Brown "refused to allow [Elliott] to see [M.B.]." These alleged acts are the sole basis for the claims for loss of consortium and intentional infliction of emotional distress.

{¶ 4} Brown moved for judgment upon the pleadings, pursuant to Civ.R.

12(C). The trial court granted the motion and rendered judgment in Brown's favor, citing *Morrow v. Reminger & Reminger Co. L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, for the proposition that perjury committed in a legal action cannot support a subsequent civil cause of action. The trial court further noted that "any inconsistencies in the facts presented by the parties have been previously litigated and resolved by the Juvenile Court. Therefore, res judicata applies to prevent the parties from re-litigating their versions of the truth here, in a subsequent case."

{¶ 5} From the judgment rendered against her, Elliott appeals.

## II

{¶ 6} Elliott's sole assignment of error states as follows:

{¶ 7} "THE TRIAL COURT ERRED WHEN IT GRANTED THE DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS HOLDING THAT PERJURY COULD NOT SUPPORT PLAINTIFF'S CLAIMS - PLAINTIFF ALLEGED BOTH PERJURY AND CONDUCT AS A BASIS FOR HER CLAIMS. THUS, PLAINTIFF SHOULD BE ALLOWED TO FURTHER LITIGATE HER CLAIMS."

{¶ 8} Elliott contends that the trial court erred in granting Brown's motion for judgment on the pleadings. She argues that Brown's conduct, not just the claimed perjurious affidavit, creates a cognizable cause of action. Thus, she argues that the trial court erred by rendering judgment against her based solely upon the legal principle that perjury does not constitute a cause of action upon which relief can be granted.

{¶ 9} "When a motion for judgment on the pleadings is made, the

non-moving party is entitled to have all material allegations in the pleadings, with all reasonable inferences to be drawn therefrom, construed in the non-moving party's favor as true." *Dearth v. Stanley*, Montgomery App. No. 22180, 2008-Ohio-487, ¶ 15. A motion for judgment on the pleadings presents only questions of law. *Compton v. 7-Up Bottling Co./Brooks Beverage Mgt.* (1997), 119 Ohio App.3d 490, 492. The determination of a motion for judgment on the pleadings is restricted solely to the allegations in the pleadings and any writings attached to the complaint. *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 165. Dismissal is appropriate under Civ. R. 12(C) when, after construing all material allegations in the complaint, along with all reasonable inferences drawn therefrom in favor of the nonmoving party, the court finds that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570. Because a trial court's decision to grant or deny a motion for judgment on the pleadings involves solely a question of law, it is reviewed on a de novo basis. *Citicasters Co. v. Bricker & Eckler, L.L.P.*, 149 Ohio App.3d 705, 2002-Ohio-5814, ¶ 5.

{¶ 10} Contrary to Elliott's claims, the trial court did not solely decide this case upon a finding that perjury could not be the basis for the claimed causes of action against Brown. The trial court also found that Elliott's claims were barred by the doctrine of res judicata.

{¶ 11} We begin with the claim that the allegedly perjurious affidavit permits maintenance of this action. Elliott contends that the affidavit does not "fit" into the category of "remarks made during the course of and relevant to a judicial proceeding

\*\*\* [and] should be considered a fraud upon the court, rather than mere remarks.”

{¶ 12} As noted by the trial court, perjury in a prior case cannot support a cause of action in a subsequent civil case. “While perjury, subornation of perjury, and conspiracy to commit perjury are punishable under criminal statutes, they may not, for public policy reasons, form the basis of a civil lawsuit. ‘[T]he giving of false testimony in a judicial proceeding \* \* \* does not give rise to a civil action for damages resulting from the giving of the false testimony’ even when it is alleged that the witness knew the testimony to be false. Although a person injured by the criminal act of another may ordinarily obtain civil relief, an exception exists in the ‘very well established rule that no action lies to recover damages caused by perjury, false swearing, subornation of perjury, or an attempt to suborn perjury \* \* \* committed in the course of, or in connection with, a civil action \* \* \*, regardless of whether the perjurer was a party to, or a witness in, the action or proceedings.’ ” *Morrow*, supra at ¶ 16, internal citations omitted.

{¶ 13} Elliott cites no cases, and this court has found no Ohio cases, permitting the imposition of civil liability based upon false statements, testimony made by attorneys, parties, or witnesses in a civil lawsuit. We further find no basis for treating affidavits filed in an action by parties or witnesses differently. Thus, we find that the affidavit, even if perjurious, does not give rise to a subsequent civil action.

{¶ 14} Furthermore, any false statements made in the affidavit used by Brown with regard to the prior custody case could, and should, have been raised in the Juvenile Court proceeding, where the falsity of those statements would have been

relevant to the issue of custody. If it was not raised, Elliott cannot now raise it in a collateral proceeding. If it was raised, then the Juvenile Court either found no merit to the claim of perjury, or found the allegedly perjurious affidavit to have been immaterial to the issue of child custody, and therefore not prejudicial to Elliott. Therefore, the trial court in this action did not err by declining to revisit the issue, and we agree that all claims based upon the allegation of perjury were properly determined not to have legal merit.

{¶ 15} We next address the claim that Brown's conduct in denying visitation following the award of custody to her provides a basis for the claims of loss of consortium and intentional infliction of emotional distress.

{¶ 16} Elliott's complaint alleges that Brown acquired temporary custody of the child "on or about March 9, 2010" "from the Miami County Juvenile Court," and that from and after that date, Brown refused to allow Elliott "to see [the child]." Conspicuously missing from the complaint is any allegation that Brown had a duty to permit Elliott to see the child, or that her refusal to allow Elliott to see the child was otherwise wrongful. Without any allegation along these lines, we cannot find a basis for a claim of intentional infliction of emotional distress, which requires conduct that is so extreme and outrageous as to go beyond all possible bounds of decency. See, *Reid v. Plainsboro Partners, III*, Franklin App. Nos. 09AP-442, 09AP-456, 2010-Ohio-4373, ¶ 61.

{¶ 17} We also find no basis for the claims of loss of consortium. Again, there is no allegation in the complaint that Brown was acting contrary to a valid court order when she failed to permit visitation.

{¶ 18} At the oral argument of this appeal, Elliott argued that Brown's conduct in repeatedly taunting Brown, by telling her that she would never have access to her child again, etc., was conduct, independent of the alleged perjury, constituting a basis for finding the intentional infliction of emotional distress. The problem with this argument is that Elliott did not allege in her complaint any conduct other than the alleged perjury and the refusal to permit visitation with the child. She acknowledged at the oral argument that she did not seek to amend her complaint, and she did not otherwise put before the trial court any allegations of taunting, etc., before the trial court granted the motion for judgment on the pleadings. Therefore, the trial court did not err in failing to consider these matters, which were never alleged, in connection with the motion for judgment on the pleadings.

{¶ 19} Elliott's sole assignment of error is overruled.

### III

{¶ 20} Elliott's sole assignment of error having been overruled, the judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

Copies mailed to:

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