IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARYL E. GHOLSON,
Appellant,
vs.
HAMPTON COURT APARTMENTS,
Respondent.

No. 75389-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Daryl E. Gholson appeals from a district court order dismissing a negligence action. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Gholson sued Las Vegas Metropolitan Police Department[1] and respondent Hampton Court Apartments, alleging intentional infliction of emotional distress, negligence, due process and equal protection violations, and loss of consortium. Hampton filed a motion to dismiss for failure to state a claim, arguing that Gholson had failed to allege extreme or outrageous behavior to support the claim for intentional infliction of

[1]LVMPD was not served and did not make an appearance in the district court. As such, it never became a party to the case, and thus, it is not a proper party to this appeal. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (explaining that a person who is not served with process and does not make an appearance in the district court is not a party to that action). We therefore direct the clerk of the court to amend the caption of this case to conform to the caption on this order.

18-904678

emotional distress, that the negligence and due process and equal protection claims cannot stand against a private entity, and that Gholson cannot seek loss of consortium because he was not married to the woman he claimed left him. The district court agreed and dismissed Gholson's claims. This appeal followed.

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complaint. *Id.* Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. All legal conclusions are reviewed de novo. *Id.*

On appeal, Gholson argues that he set forth sufficient facts to sustain his claims against Hampton at the early pleading stage. *See W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) (stating that a complaint must "set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought"). With respect to Gholson's claim of due process and equal protection violations, we agree with the district court that it cannot stand against Hampton, as Hampton is not a state actor. *See Georgia v. McCollum*, 505 U.S. 42, 50-51 (1992). We also determine that Gholson cannot bring a loss of consortium claim as there was no alleged injury to his significant other from which to recognize

his separate claim for loss of companionship. *See Bennett v. Topping*, 102 Nev. 151, 153, 717 P.2d 44, 45 (1986) (discussing the right to recover for a separate injury done to the claimant by loss of companionship following injury to the claimant's companion). As such, we affirm the dismissal of these claims against Hampton.

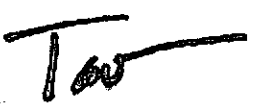
But accepting all alleged facts in Gholson's complaint as true, we determine that Gholson did adequately plead claims for negligence and intentional infliction of emotional distress. *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. While Gholson referenced several constitutional amendments in this claim, he also set forth an allegation that Hampton had a duty to not enter his apartment without notice and to not use pepper spray against him. In pointing to these facts in his negligence claim, he alleged sufficient facts to present the elements of negligence when viewed in the light most favorable to Gholson. *See W. States Constr.*, 108 Nev. at 936, 840 P.2d at 1223 ("A complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief . . . ."); *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (noting that upon review of a motion to dismiss for failure to state a claim, the court "must construe the pleadings liberally" and "draw every fair inference in favor of the non-moving party").

As for the intentional infliction of emotional distress claim, we conclude that the alleged harms, including being pepper-sprayed, could be considered extreme or outrageous, and Gholson therefore set forth the necessary elements of a claim for intentional infliction of emotional distress. *See Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24, 26 (1998)

(stating that an intentional infliction of emotional distress requires a showing that defendant's conduct was "utterly intolerable in a civilized community"). Thus, we reverse and remand to the district court these two claims for proceedings consistent with this order.

It is so ORDERED.[2]

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Joseph Hardy, Jr., District Judge
Daryl E. Sayles, a/k/a Daryl E. Gholson
Muehlbauer Law Office, Ltd.
Eighth District Court Clerk

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[2]Ordinarily we would direct respondents to file a responsive brief prior to providing relief, *see* NRAP 46A(c), but in light of the clear errors in the challenged order, further briefing would not change our resolution of this matter, and we therefore conclude further briefing is not necessary.

In light of our resolution of this matter, we further determine Gholson's request for submission filed September 7, 2018, to be moot.