

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILBERT ROY HOLMES,
Appellant,
vs.
CAPUCINE YOLANDA HOLMES,
Respondent.

No. 78885-COA

FILED

JUN 19 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Wilbert Roy Holmes appeals from a district court order dismissing a complaint in a tort action. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

In the proceedings below, Wilbert filed suit against respondent Capucine Holmes, Wilbert's ex-wife, alleging intentional infliction of emotional distress (IIED) based on his allegation that Capucine engaged in an extramarital affair while married to Wilbert. The district court granted Capucine's motion to dismiss pursuant to NRCP 12(b)(5), concluding that Wilbert failed to state a claim upon which relief can be granted, and 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); see also *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). 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 complainant. *Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. This court will affirm the decision to dismiss a complaint under NRCP

12(b)(5) when the complaint's factual allegations do not entitle a plaintiff to relief under the claims asserted. *Id.*

On appeal, Wilbert sets forth alleged facts relating to Capucine's testimony in Wilbert's unrelated criminal matter and alleges conduct relating to Capucine's work history, none of which were included in the complaint below. Wilbert contends that the district court failed to consider or admit these facts and based on these facts, his complaint for IIED should be heard. However, the district court dismissed Wilbert's complaint pursuant to NRCP 12(b)(5) on the basis that the allegations in his complaint, if true, do not state a claim upon which relief can be granted. Because Wilbert has failed to provide any cogent argument addressing the grounds relied on by the district court, he has waived any such arguments. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider claims that are not cogently argued).

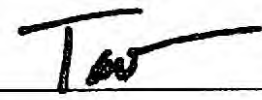
Regardless, we note that in his complaint, Wilbert claims injuries based on the alleged extramarital affair and his subsequent divorce from Capucine as a result. Although titled as a claim for IIED, the allegations assert a civil tort claim based on alleged adultery. *See Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 809, 312 P.3d 491, 498-99 (2013) (explaining that this court analyzes "a claim according to its substance, rather than its label"). And civil tort claims based on adultery have been specifically abolished in Nevada. *See* NRS 41.380 (abolishing "[a]ll civil causes of action for . . . alienation of affections, and criminal conversation"); *see also Doe v. Doe*, 747 A.2d 617, 622-23 (2000) (explaining

that criminal conversation historically provided a cause of action against a third-party, and not a wife, not because the wife was deemed a non-tortfeasor, but because historically a married woman could not sue or be sued; therefore, the same public policy considerations that led to the abolition of criminal conversation are applicable to tort claims based on adultery against a spouse). Thus, based on our review of the record, we agree that, even taking Wilbert's allegations as true, his complaint fails to state a claim upon which relief can be granted. *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

¹Insofar as Wilbert raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Kerry Louise Earley, District Judge
Wilbert Roy Holmes
Heaton Fontano, Ltd.
Eighth District Court Clerk