

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MAGDALENA OCASIO,
Appellant,
vs.
JONATHAN JORDAN WIRSZ,
Respondent.

No. 84089-COA

FILED

OCT 20 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT

BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Magdalena Ocasio appeals from a district court order denying a motion to modify child custody.¹ Eighth Judicial District Court, Family Court Division, Clark County; Soonhee Bailey, Judge.

Ocasio and Jonathan Jordan Wirsz are parents of minor child M.W.² Wirsz was granted primary physical custody of M.W., joint legal custody, and tie breaking decision-making authority in June 2020. In September 2020, Ocasio and Wirsz agreed to an Amended Stipulation and Order (ASAO) that allowed Wirsz and M.W. to relocate to northern Idaho while maintaining the physical and legal custody previously ordered by the district court. Additionally, the ASAO created a parenting time schedule, a three-year litigation moratorium with exceptions for emergencies and material breaches of the ASAO, and a behavior order for Ocasio and Wirsz to follow.

After the ASAO went into effect, Ocasio began to take note of several situations that she believed demonstrated the inappropriateness of Wirsz having primary physical custody and tie breaking decision-making

¹The Honorable Jerome T. Tao, Judge, did not participate in the decision of this matter.

²We recount facts only as necessary for our disposition.

authority. In August 2021, Ocasio filed a motion seeking, among other things, to modify custody. The district court denied the motion in an October 2021 order without conducting an evidentiary hearing. The court did not provide an explanation in its order other than a statement that mirrored the legal requirements of *Rooney*³ and *Ellis*⁴ that Ocasio had failed to make “a prima facie case of a substantial change in circumstance” that affected the welfare of M.W. Ocasio filed a motion for reconsideration, to alter or amend findings, and for attorney fees and costs in November 2021. Wirsz filed an opposition and a countermotion. The district court denied both parties’ motions in an order issued in December 2021.

Ocasio appealed both the October 2021 Order and December 2021 Order. Wirsz filed a motion to dismiss the appeal. The Nevada Supreme Court dismissed the appeal in part.⁵ We now address the remaining issues raised by Ocasio.

*The district court abused its discretion when it did not conduct an evidentiary hearing*⁶

³*Rooney v. Rooney*, 109 Nev. 540, 543, 853 P.2d 123, 125 (1993).

⁴*Ellis v. Carucci*, 123 Nev. 145, 147, 161 P.3d 239, 240 (2007).

⁵*Ocasio v. Wirsz*, Docket No. 84089 (Order Dismissing Appeal in Part and Regarding Motion to Stay Briefing and Impose Sanctions, May 24, 2022).

⁶We note that Ocasio argues that the litigation moratorium was improperly relied upon by the district court when denying her motion to modify custody. A careful review of the district court order reveals that the court relied upon the standards set forth in *Rooney* and *Ellis* when denying her motion and not the moratorium. Therefore, because this issue was not decided by the district court, we need not further address it. See *Douglas Disposal, Inc v. Pelkola*, 123 Nev. 552, 557 n.6, 170 P.3d 508, 512 n.6 (2007) (“The district court did not address this issue. Therefore, we need not reach the issue.”).

Ocasio argues that under this court’s decision in *Myers*⁷ an evidentiary hearing should have been held on her motion to modify custody. Wirsz responds that Ocasio failed to make a prima facie case for modification, which is required under *Myers*, so her motion was properly denied.

We review a district court’s decision to not hold an evidentiary hearing before denying a motion to modify custody for abuse of discretion. See *Bautista v. Picone*, 134 Nev. 334, 338, 419 P.3d 157, 160 (2018). A district court abuses its discretion when its findings of fact are not supported by substantial evidence. *Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980, 984 (2022).

“[A] district court has the discretion to deny a motion to modify custody without holding a hearing unless the moving party demonstrates ‘adequate cause’ for holding a hearing.” *Rooney*, 109 Nev. at 542, 853 P.2d at 124. “Adequate cause” arises when the movant demonstrates a prima facie case for modification. *Id.* at 543, 853 P.2d at 125. When determining whether a movant has made a prima facie case for modification, the district court may generally only consider “the properly alleged facts in the movant’s verified pleadings, affidavits, or declarations” and must accept the movant’s specific allegations as true. *Myers*, 138 Nev., Adv. Op. 51, 513 P.3d at 529-30, 532. Although the district court typically must not consider the nonmovant’s factual allegations or offers of proof, the court “may look to the nonmovant’s evidentiary support when it ‘conclusively establishes’ the falsity of the movant’s allegations.” *Id.* at 530.

“To demonstrate a prima facie case, a movant must show that ‘(1) the facts alleged in the affidavits are relevant to the [relief requested];

⁷*Myers v. Haskins*, 138 Nev., Adv. Op. 51, 513 P.3d 527 (Ct. App. 2022).

and (2) the evidence is not merely cumulative or impeaching.” *Arcella v. Arcella*, 133 Nev. 868, 871, 407 P.3d 341, 345 (2017) (quoting *Rooney*, 109 Nev. at 543, 853 P.2d at 125). Additionally, to modify physical custody the movant must show that “(1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child’s best interest is served by the modification.” *Romano*, 138 Nev., Adv. Op. 1, 501 P.3d at 983 (quoting *Ellis*, 123 Nev. at 150, 161 P.3d at 242).

Ocasio has raised two distinct claims for a modification of child custody. First, Ocasio alleges that the ASAO was based on fraud. She supports this allegation by observing that Wirsz never took the job that was the basis for his and M.W.’s relocation to Idaho. Wirsz responds that no fraud occurred because there were numerous reasons supporting his request to relocate to Idaho.

Ocasio provides no authority to support her argument that her discovery of alleged fraud constitutes a substantial change of circumstances affecting the welfare of the child. This court does not need to consider arguments that are non-cogent or lack the support of relevant authority. See *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant’s argument that is not cogently argued or lacks the support of relevant authority). We also note that Ocasio did not file a motion under NRCP 60(b)(3) (authorizing a court to set aside an order based upon fraud).

Second, Ocasio alleges that Wirsz limited her parenting time and alienated her from M.W. These allegations include: that Wirsz has disrupted Skype calls, which prevents her from maintaining her relationship with M.W. due to the physical distance between Ocasio and her child; that Wirsz has blocked Ocasio from receiving medical information about M.W.; that Wirsz has limited the information Ocasio can receive about M.W.’s

education; that Wirsz has refused to investigate potential medical issues affecting M.W.; and that Wirsz scheduled flights to interfere with Ocasio's parenting time.

These allegations have not been raised before and are not cumulative or impeaching. *See Arcella*, 133 Nev. at 871, 407 P.3d at 345. Additionally, these allegations could show that there has been a substantial change of circumstances affecting the welfare of M.W. and that the child's best interests could be served by modification. *See Romano*, 138 Nev., Adv. Op. 1, 501 P.3d at 983. We recognize that Wirsz's challenges to the allegations may eventually be proven correct or found more credible, but at this stage of the proceedings, he has not conclusively refuted Ocasio's claims, especially as to the joint legal custody issue. Thus, we conclude that the district court abused its discretion in refusing to hold an evidentiary hearing based upon Ocasio's motion to modify custody and her sworn allegations.⁸

Ocasio did not raise a new claim for attorney fees in her November 2021 motion

Pursuant to the Nevada Supreme Court order, Ocasio may only appeal any denial of new claims for attorney fees that were denied in the district court's December 2021 order.

On appeal, Ocasio argues that the district court erred in denying her request for relief under NRCP 52 for findings relative to the disparity of income and attorney fees award denial. Wirsz argues that Ocasio failed to raise any new claims for attorney fees in the motions filed between the October 2021 order and the December 2021 order. Ocasio did not reply to this argument.

⁸We note, however, that the district court did not have the benefit of the *Myers* opinion when it rendered its decision.

We typically consider an appellant's failure to challenge an argument as a concession that respondent's argument is correct. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious); *Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) (concluding that when respondents' argument was not addressed in appellants' opening brief, and appellants declined to address the argument in a reply brief, "such lack of challenge . . . constitutes a clear concession by appellants that there is merit in respondents' position"). We conclude that Ocasio's failure to reply to Wirsz's argument is a concession of its merit. We also note that a careful review of the record does not appear to reveal a new claim for attorney fees.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.⁹


_____, C.J.
Gibbons


_____, J.
Bulla

⁹Insofar as the parties have raised any other 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. Soonhee Bailey, District Judge, Family Court Division
Jones & LoBello
The Jimmerson Law Firm, P.C
Eighth District Court Clerk