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6 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

7 **LINDA SEXTON,**

8 Plaintiff-Appellant,

9 v.

**No. 30,876**

10 **RUSSELL THOMPSON,**

11 Defendant-Appellee.

12 **APPEAL FROM THE DISTRICT COURT OF RIO ARRIBA COUNTY**

13 **Sheri A. Raphaelson, District Judge**

14 D. Scott Reidel

15 Kathleen Kentish Lucero

16 Espanola, NM

17 for Appellant

18 Martin Martinez

19 Espanola, NM

20 for Appellee

21 **MEMORANDUM OPINION**

22 **VIGIL, Judge.**

1 Plaintiff appeals an order granting summary judgment in favor of Defendant.  
2 In this Court's second notice of proposed summary disposition, we proposed to affirm.  
3 Plaintiff has filed a memorandum in opposition, which we have duly considered.  
4 Defendant has filed a memorandum in support, which we have not considered, as the  
5 memorandum was untimely and Defendant sought no extension. Because we are not  
6 persuaded by Plaintiff's arguments, we affirm.

7 In this Court's second notice of proposed summary disposition, we proposed  
8 to hold that Plaintiff failed to meet her burden of making "an affirmative showing by  
9 affidavit or other admissible evidence that there is a genuine issue of material fact"  
10 after Defendant made a prima facie showing that summary judgment was warranted.  
11 *See Schwartzman v. Schwartzman Packing Co.*, 99 N.M. 436, 441, 659 P.2d 888, 893  
12 (1983). We pointed out that the evidence Plaintiff relied upon was an unsworn  
13 interview with Randy Cordova, which is not competent evidence to defeat summary  
14 judgment. *See Marquez v. Gomez*, 116 N.M. 626, 631-32, 866 P.2d 354, 359-60 (Ct.  
15 App. 1991) (holding that the district court did not abuse its discretion when it refused  
16 to consider unsworn witness statements submitted in response to a motion for  
17 summary judgment). We also stated that the unsworn interview on which Plaintiff  
18 relied actually supported Defendant's motion in that it clearly stated that there was no  
19 greater damage to the pool caused by the tortious acts alleged in this case. To the  
20 degree that the interview was ambiguous with respect to any greater damage to the

1 deck, we noted that Plaintiff never argued a theory that the second flood damaged the  
2 pool decking even if it caused no greater damage to the pool itself.

3 In response, Plaintiff argues that an affidavit in the record demonstrates that  
4 Cordova's statement was a sworn statement. [MIO 2] We disagree. The affidavit in  
5 the record was "sworn, upon oath" that the transcript of the interview "is a true and  
6 correct copy of the statement I gave." [RP 155] Swearing that a written document  
7 contains an accurate transcription of statements made during an interview is not the  
8 same as swearing that the statements made during the interview are true. Therefore  
9 we affirm based on the district court's expressed concerns about this unsworn  
10 evidence.

11 Furthermore, even if the use of the unsworn interview was proper, we would  
12 nevertheless conclude that it did not demonstrate a question of material fact.  
13 Defendant's motion was accompanied by sworn affidavits clearly expressing that  
14 neither the pool nor the decking suffered any greater damage as a result of the second  
15 flood. [RP 74] Plaintiff's response asserted that "[a]n issue exists as to whether the  
16 flood at issue caused the damages to Plaintiff's swimming pool and deck. Randy  
17 Cordova will testify that the flood damaged Plaintiff's swimming pool and deck." [RP  
18 119] As support for this statement, Plaintiff attached a portion of Cordova's unsworn  
19 interview containing the following exchange:

20 [The preceding page of the interview was not included. The page begins  
21 with:] flood or do you remember?

1 RC: That \_\_\_\_ was there after the first flood, when it first \_\_\_\_ and  
2 that's what Linda was saying to fix.

3 SR: So obviously the effects of \_\_\_\_ was made worse by the second  
4 flood or do know [sic]?

5 RC: No, the \_\_\_\_ and the hairline cracks were pretty much the same.

6 SR: Okay, so the main damage then

7 RC: Would have been to the deck, all parts of the deck, the fence and  
8 as far as elevating the pool now it's gotta be leveled.

9 SR: So Linda before this second flooding, Linda Sexton was getting  
10 estimates. You don't have any idea what those estimates were to  
11 repair the pool? Did Linda ever tell you?

12 RC: She did tell me but I'm not good at numbers, so I don't remember.

13 SR: Do you have any idea what the estimates are now after the second  
14 flooding?

15 RC: After the second flood she also told me but I

16 SR: Do you know whether Chris or any other tenant has ever wanted  
17 to use the swimming pool?

18 RC: Yes, Chris rented the house with the understanding that Linda was  
19 going to get the swimming pool and that's what we were trying  
20 to do right when it flooded again.

21 [RP 128 (The blanks in the statement are apparently portions of the tape that were  
22 inaudible.)] This statement clearly does not support Plaintiff's assertion that Cordova  
23 would testify that the second flood damaged Plaintiff's swimming pool and deck. As

1 the district court noted in its order, the only question specifically asked about further  
2 damage to the pool and decking caused by the second flood was: “So obviously the  
3 effects of \_\_\_\_\_ was made worse by the second flood or do know [sic]?” and  
4 Cordova’s answer was, “ No, the \_\_\_\_\_ and the hairline cracks were pretty much the  
5 same.” This statement did not support Plaintiff’s claim that both the pool and the deck  
6 were in a worse condition after the second flood than they were before.

7 To the degree that any statement in Plaintiff’s memorandum in opposition could  
8 be read to assert a theory on appeal that even if the pool was not damaged by the  
9 second flood, there is a material question of fact as to whether the decking was  
10 damaged, this Court will not consider a theory on appeal that was not presented to the  
11 district court. *See Spectron Dev. Lab. v. Am. Hollow Boring Co.*, 123 N.M. 170, 178,  
12 936 P.2d 852, 860 (Ct. App. 1997) (declining to consider the plaintiff’s theories of  
13 products liability on appeal that were not presented to district court in response to a  
14 defense motion for summary judgment). There is nothing in Plaintiff’s response or  
15 in her motion to reconsider that would indicate that she intended to put forth this  
16 theory, since she simply asserted that Cordova could testify that both the swimming  
17 pool and deck were more damaged after the second flood. [RP 119, 165-66] As we  
18 have explained, she did not have evidence to support her claim that Cordova would  
19 testify that the pool was in a worse condition due to the second flood, and she did not

1 alert the district court to any theory that even if there was no evidence of increased  
2 damage to the pool, her claim could go forward for the damage to the decking.

1 Furthermore, we do not believe that the evidence on this issue was so  
2 unambiguous that the district court should have been alerted to it on its own or as part  
3 of its consideration of the motion as a whole. Although the quoted sections of  
4 Cordova's interview include information about the damage to the deck, it is not clear  
5 that his statements are intended to express that the damage to the deck was worse after  
6 the flood than it was before, since the questions asked by the interviewer alternate  
7 between questions about the damage prior to and after the second flood. If Plaintiff  
8 had wished to make clear that Cordova did in fact believe that the damage to the deck,  
9 but not the pool, was worse after the flood alleged in the complaint, she could have  
10 done so by providing an affidavit to this effect to the district court.

11 It was Plaintiff's burden to provide admissible evidence demonstrating an issue  
12 of material fact to defeat summary judgment, and she failed to meet this burden.  
13 Therefore, for the reasons stated in this opinion and in our second notice of proposed  
14 summary disposition, we affirm.

15 **IT IS SO ORDERED.**

16 \_\_\_\_\_  
17 **MICHAEL E. VIGIL, Judge**

1 **WE CONCUR:**

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3 \_\_\_\_\_  
3 **CELIA FOY CASTILLO, Chief Judge**

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5 \_\_\_\_\_  
5 **LINDA M. VANZI, Judge**