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NEBRASKA SUPREME COURT
COURT OF APPEALS

IN THE NEBRASKA COURT OF APPEALS

Case No. A-25-559

MILLARD GUTTER COMPANY,

Appellant,

v.

NATIONWIDE INSURANCE a/ka/a or d/b/a Nationwide Property and Casualty Insurance Company,

Appellee.

BRIEF OF APPELLANT MILLARD GUTTER COMPANY

APPEAL FROM THE DOUGLAS COUNTY DISTRICT COURT

The Honorable Dwayne Dougherty
Case No. CI 18-3028

Prepared and Submitted by:

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STATEMENT OF THE BASIS FOR JURISDICTION:

On April 9, 2018, Appellant Millard Gutter filed a Complaint against Nationwide Insurance a/k/a or d/b/a Nationwide Property and Casualty Company. (T1-T7). Nationwide Insurance was served on October 18, 2018 by personal service of summons and Complaint. (T12). On November 17, 2018, Nationwide Insurance filed a Motion to Dismiss, Motion to Make More Definite and Certain, and/or Motion to Bifurcate and Stay Discovery. (T13-20). Appellant thereafter filed an Amended Complaint on February 28, 2019. (T35-43).

A Motion for Summary Judgment was filed under the name Nationwide Property and Casualty Insurance Company on July 16, 2024. (T62-64). The Court granted "Defendant's" Motion for Summary Judgment via Order dated March 4, 2025. (T75-78). Within ten days of the Order, Appellant filed a Motion to Alter or Amend on April 3, 2025. (T80-83). On June 23, 2025, the Court entered an Order denying the Motion to Alter or Amend. (T87—90). On June 24, 2025, the Court entered an Order Nunc Pro Tunc on Plaintiff's Motion to Alter of Amend. (T91-94). Appellant thereafter filed a Notice of Appeal, Praecipe for Transcript and Praecipe for Bill of Exceptions within thirty days thereafter and paid the requisite docket fee. This Court has jurisdiction over this matter because it is an appeal from a "final order" by virtue of the District Court's final disposition of the Appellant's Motion to Alter or Amend. *See* Neb. Rev. Stat. §25-1902.

STATEMENT OF THE CASE

Appellant filed suit seeking payment of insurance proceeds for repairs that has been assigned to Appellant in consideration for Appellant's services and supplies rendered to insureds.

THE NATURE OF THE CASE:

This case is predicated upon a claim that additional payments were owed on claims that had been assigned to the Appellant.

THE ISSUES ACTUALLY TRIED IN THE COURT BELOW:

The District Court entered an Order concluding that "Defendant", who filed a Motion for Summary Judgment, Nationwide Property and Casualty Insurance Company, did not issue the subject policies and dismissed Appellant's Amended Complaint.

HOW THE ISSUES WERE DECIDED

The District Court sustained the Motion for Summary Judgment and thereafter denied Appellant's Motion to Alter or Amend.

SCOPE OF REVIEW

Appellant believes that this Court should analyze the District Court's order de novo. Appellant submits that the issues which serve as the basis for this appeal all constitute matters of law which this Court should review de novo. The Nebraska Supreme Court has recognized that as to questions of law, an appellate court decides independently of the decision made by the court below. *See, e.g., Melanie M. v. Winterer*, 290 Neb. 764, 769, 862 N.W.2d 76, 82 (2015).

ASSIGNMENTS OF ERROR:

I. THE DISTRICT COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT AS THE MOVANT FAILED TO ESTABLISH ANY UNDISPUTED FACTS THROUGH COMPETENT EVIDENCE.

II. THE DISTRICT COURT ERRED IN INTERPETNG THE MOTON FOR SUMMARY JUDGMENT AS BEING BROUGHT BY NATIONWIDE INSURANCE AND DISMISSING ANY

CLAIMS AGAINST THAT ENTITY EVEN THOUGH IT WAS NOT IDENTIFIED AS THE MOVANT.

III. THE DISTRICT COURT ERRED IN FAILING TO SUSTAIN APPELLANT'S MOTION TO ALTER OR AMEND.

PROPOSITIONS OF LAW

1. In the summary judgment context, a non-moving party has no responsibility to prove anything affirmatively. Rather, the burden rests upon the moving party to establish a prima facie case. *Roubideaux v. Davenport*, 247 Neb. 746, 751 (1995).

2. In the absence of a prima facie showing by the movant that she is entitled to summary judgment, the opposing party is not required to reveal evidence which she expects to produce at trial to prove the allegations contained in her petition. *Roubideaux v. Davenport*, 247 Neb. 746, 751 (1995).

3. One must make more than a conclusion assertion that a plaintiff has no evidence to prove its case. Clark v. Scheels All Sports, Inc., 314 Neb. 49 (2023)

STATEMENT OF FACTS:

Millard Gutter agreed to perform services for insured homeowners in consideration for assignments of claim. (Ex. 1, offered and received at Vol. 1 of the Bill of Exceptions at page 2, lines 5-10). Nationwide is an insurance company doing business in Omaha, Douglas County, Nebraska, and elsewhere. (Ex. 1, paragraph 2). Nationwide operates under various names and/or does business through names or affiliates including Nationwide Property and Casualty Insurance Company, but generally markets itself to insured homeowners as Nationwide. (Ex. 1, paragraph 2).

Millard Roofing is the assignee of eleven insured property owners, who assigned their right to any proceeds under policies of insurance issued by Nationwide to Millard Roofing. (Ex. 1, paragraphs 3-4). The insureds who made assignment, included:

a. Beverly Ayala for her property at 2929 S. 137th Street in Omaha, Nebraska 68144 for an incident occurring on April 9, 2013, resulting in damages to her roof, windows, gutters and siding as a result of a hail and wind storm, for which she assigned her claim on April 11, 2013 in consideration for Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.
b. Dennis Cihacek for his property at 15460 Western Avenue in Omaha, Nebraska 68154 for an incident occurring on April 9, 2013, resulting in damages to his roof, windows, gutters, doors and siding as a result of a hail and wind storm, for which he assigned his claim on May 6, 2013 in consideration for Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.
c. Robert and Deborah Evans for their property at 1408 Webster Street in Fort Calhoun, Nebraska 68023 for an incident occurring on or about June 3, 2014, resulting in damages to their roof, windows, gutters, doors, paint and siding as a result of a hail and wind storm, for which they assigned their claim on June 10, 2014 in consideration for Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.
d. Joshua and Kasi Haberman for their property at 2005 South 141st Circle in Omaha, Nebraska 68154 for an incident occurring on April 9, 2013, resulting in damages to their roof, windows, gutters and siding as a result of a hail and wind storm, for which they assigned their claim on April 29, 2013 in consideration for Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.
e. Jeremy Knuth for his property at 7802 South 169th Street in Omaha, Nebraska 68136 for an incident occurring on April 9, 2013, resulting in damages to his roof, windows, gutters and siding as a result of a hail and wind storm, for which he assigned his claim on April 11, 2013 in consideration for

Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.

f. Steve Kramer for his property at 16535 Willow Street in Omaha, Nebraska 68136 for an incident occurring on April 9, 2013, resulting in damages to his roof, windows, gutters and siding as a result of a hail and wind storm, for which he assigned his claim on September 5, 2013 in consideration for Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.
g. Todd Moss for his property at 7102 S. 176th Street in Omaha, Nebraska 68136 for an incident occurring on April 9, 2013, resulting in damages to his roof, windows, gutters and siding as a result of a hail and wind storm, for which he assigned his claim on October 10, 2013 in consideration for Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.
h. John and Susan Niggemeyer for their property at 12066 Patrick Avenue in Omaha, Nebraska 68164 for an incident occurring on April 9, 2013, resulting in damages to their roof, windows, gutters and siding as a result of a hail and wind storm, for which they assigned their claim on October 15, 2013 in consideration for Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.
i. Brenda and Mark Stursma for their property at 13829 Arbor Street in Omaha, Nebraska 68144 for an incident occurring on April 9, 2013, resulting in damages to their roof, windows, gutters and siding as a result of a hail and wind storm, for which they assigned their claim on May 20, 2013 in consideration for Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.
j. Justin Veik for his property at 4311 S. 198th Avenue in Omaha, Nebraska 68135 for an incident occurring on June 13, 2014, resulting in damages to his roof, windows, gutters and siding as a result of a hail and wind storm, for which he assigned his claim on July 3, 2014 in consideration for Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.
k. Sharp Image for its property at 1944 Pleasant Valley in Blair, Nebraska 68008 for an incident occurring on October 7, 2014,

> resulting in damages to its roof, windows, gutters, doors, garage doors, paint and siding as a result of a hail and wind storm, for which it assigned its claim on October 22, 2014, in consideration for Plaintiff agreeing to perform necessary repair work, which was accomplished by the Plaintiff thereafter.

Millard Roofing forwarded a copy of an assignment of rights under the policies, including the right to proceeds, executed by each of the insureds to Nationwide. (Ex. 1, paragraph 5). Nationwide was obligated to pay for loss to the insureds' property resulting from any peril not otherwise excluded within the policies. (Ex. 1, paragraph 7).

The insureds sustained loss due to storms, which included damage arising from wind, hail and/or rain. (Ex. 1, paragraph 8). The damages suffered by the insureds are covered under the policies issued by Nationwide. (Ex. 1, paragraph 8). The policies were in full force and effect at the time of the losses. (Ex. 1, paragraph 9). The insureds and/or Millard Roofing, as assignee, promptly and properly made claims to Nationwide for insurance benefits under the policies and fulfilled all of their post loss duties required of the insured under the policies, except any obligations which may have been prevented or waived by Nationwide. (Ex. 1, paragraph 10). As assignee, Millard Roofing has satisfied all of those matters and things properly required of it under the policies, including substantial compliance with all conditions precedent or, alternatively, performance of all obligations that have not been excused by virtue of the acts, representations or conduct of Nationwide. (Ex. 1, paragraph 11).

Millard Roofing has made demand upon Nationwide to advise it of any further information or documentation that it needs to process the claims of the insured and Nationwide has failed to identify any information, documents or other matters which it needs to process the claims. (Ex. 1, paragraph 12). Notwithstanding the fact that Millard Roofing obtained valid assignments of rights under the policies issued by Nationwide, Nationwide has failed to pay Millard Roofing amounts due under the policies, despite notice of the assignment of the claims to Millard Roofing. (Ex. 1, paragraph 13). Nationwide has a contractual obligation to pay the full amount of the losses, including the cost to repair, restore or replace the damages, less the applicable deductible.

(Ex. 1, paragraph 14). Nationwide has breached the policies by failing to pay to Millard Roofing all benefits due and owing under the policies. (Ex. 1, paragraph 15).

Although Millard Gutter sued and served complaint upon Nationwide Insurance (T1-7, T12, and T35-43), the Movant that filed a Motion for Summary Judgment was styled as only Nationwide Property and Casualty Insurance Company. (T62-63).

At hearing on the motion for summary judgment, the Movant did not offer any affidavits, depositions, stipulations, or discovery responses. In support of its motion, the Movant offered a copy of the Amended Complaint, Answer to Amended Complaint, and authorization documents signed by each of the insured property owners referenced in the Amended Complaint. (*See* Bill of Exceptions at page 2, line 3 through page 3, lines 14).

ARGUMENT:

I. THE DISTRICT COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT.

SUMMARY OF ARGUMENT: There was a disputed issue of fact as to whether Nationwide adjusted the subject losses and paid the claims in full.

Among other matters ignored by the Court is the fact that the Court ignored the fact the claims at issue were alleged in the Amended Complaint to be adjusted by "Nationwide Insurance" which also marketed itself under the name "Nationwide". (Ex. 1). Plaintiff-Appellant Millard Gutter alleged that Nationwide adjusted and paid some of the damages on the claims which were subject to the lawsuit. (Ex. 1). On the other hand, there is no averment or exhibit from any authorized representative of Nationwide attesting to the fact that the insureds at issue were not insured by a company known and doing business as Nationwide.

Nationwide Insurance was served with Summons and Complaint. (T12; *see also* Ex. 19 offered and received at page 50, lines 1-17 of Vol. 1 of the Bill of Exceptions). Nationwide Insurance filed a Motion to Dismiss, Motion to Make More Definite and/or Motion to Stay and thereby entered an appearance in the case. (T13-20; see also Ex. 21, offered and received at page 50, lines 1-17) Nationwide Insurance never thereafter filed an Answer. Nationwide Property and Casualty Insurance Company filed an Answer and Motion for Summary Judgment alleging that it did not issue the policies. (T44-56 and T62-65). No reference is made to Nationwide Insurance or "Nationwide" as a Movant within the Motion for Summary Judgment filed by Nationwide Property and Casualty Insurance Company. (T62-65)

Irrespective of any company whose name appears on the policy, the evidence before this Court is that Nationwide adjusted the losses and made payments on the claims; that alone is sufficient to expose Nationwide to a claim for its failure to properly adjust and make payment of the claims. (Ex. 1) It is recognized under the law that a party that undertakes to make payment and adjustment of a loss, even acting in the capacity of an agent, still bears potential liability for the negligent performance of a duty. Nebraska law recognizes that a party acting as an agent may have liability in tort for damages suffered by a third party. *See Dieter v. Hand*, 214 Neb. 257, 333 N.W.2d 772, 774 (Neb. 1983) . Similarly, the Restatement (Third) of Agency section 7.01 (2006) provides, in relevant part that "an actor remains subject to liability although the actor acts as an agent or an employee". In addition, negligent performance of a contract or other obligation is recognized as exposing a party to liability under the law and the Court's Order ignores that fact.

Millard Gutter's position is that there was no evidence to carry any summary judgment burden offered on behalf of any defendant, whether labeled as "Nationwide Insurance", "Nationwide" or "Nationwide Property and Casualty Insurance Company".

The burden was upon the Appellee to affirmatively prove that it was entitled to judgment as a matter of law. *See, e.g.,* Melick v. Schmidt, 151 Neb. 372, 378, 557 N.W.2d 645 (1997). Matters are proven by the introduction of admissible evidence. The Appellant is entitled to all reasonable inferences deducible from the evidence. Id. In addition, to the extent Appellee fails to rebut an allegation made by the Appellant, the Court must assume the same true. If there are any disputed issues of material fact, then summary judgment is not appropriate. New Tek Mfg. v. Beehner, 270 Neb. 264, 702 N.W.2d 336 (2005). In reviewing a summary judgment, this Court views the evidence in the light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. Johnson v. Anderson, 278 Neb. 500, 501 (2009).

Most importantly, it must also be noted that in the summary judgment context, a non-moving party has no responsibility to prove anything affirmatively. Rather, the burden rests upon the moving party to establish a prima facie case. As the Nebraska Supreme Court observed in Roubideaux v. Davenport, 247 Neb. 746, 751 (1995):

> "In the absence of a prima facie showing by the movant that she is entitled to summary judgment, the opposing party is not required to reveal evidence which she expects to produce at trial to prove the allegations contained in her petition."

Nothing in the *Clark v. Scheels All Sports, Inc.*, 314 Neb. 49, 70-71, 989 N.W.2d 39, 54 (2023) decision altered or reversed these prior case law standards.

To the contrary, even after the *Clark v. Scheels All Sports, Inc* decision, the Nebraska Court of Appeals has observed:

> "The statutory procedure governing summary judgment motions is set out in § 25-1332. Section 25-1332 identifies the type of evidence that may be received on a motion for summary judgment and the legal standard to be applied when deciding such motions. Regarding the former, the statute provides, "The evidence that may be received on a motion for summary judgment includes depositions, answers to interrogatories, admissions, stipulations, and affidavits." Regarding the latter, the statute provides that summary

> judgment "shall be rendered forthwith if the pleadings and the evidence admitted at the hearing show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law."
> Consistent with these statutory provisions, our cases have long held that summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Likewise, **our cases have long held that the party moving for summary judgment must make a prima facie case by producing enough evidence to show the movant would be entitled to judgment if the evidence were uncontroverted at trial**."

Eakes, Inc. v. City of Grand Island, No. A-24-671, 2025 Neb. App. LEXIS 382, at *16-17 (Ct. App. July 8, 2025)(emphasis supplied)

There were no "depositions, admissions, stipulations, and affidavits" offered by Nationwide (or whomever was the moving party). All that the Movant offered as "evidence" in support of its contention was the Amended Complaint and the Answer to Amended Complaint filed on behalf of Nationwide Property and Casualty Insurance Company, as well as copies of various authorizations signed by Millard Gutter's Customers that primarily cite "Nationwide" as their insurer. (Ex. 1-13).

The "Answer" to the Amended Complaint is not competent "evidence" to establish any fact as a matter of law. Rather, the Answer is a mere pleading and simply a contravention of some of the allegations made by Millard Gutter in its Amended Complaint – which is thus reflective of disputed facts.

Logically, a denial in an Answer is insufficient to establish an undisputed fact for the purposes of moving for summary judgment. When a defendant files an "answer" they are responding to the allegations by either admitting or denying those allegations. However, a denial in an "Answer" does not eliminate a factual dispute, rather it confirms the existence of a factual dispute. Thereafter, to seek summary judgment one moves beyond the pleadings and utilizes "evidence" such as deposition testimony, discovery responses or affidavits to establish the absence of a factual dispute. Significantly, a denial contained in an Answer is not an admission against interest, which might be used as affirmative proof. For example, the Answer admits Paragraph 1 of the Amended Complaint. That item is not in factual dispute. However, merely denying other paragraphs does not mean that such denial establishes an undisputed fact.

As previously noted by the Nebraska Court of Appeals:

> "Our cases have long held that summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Likewise, our cases have long held that the party moving for summary judgment must make a prima facie case by producing enough evidence to show the movant would be entitled to judgment if the evidence were uncontroverted at trial.
>
> *Eakes, Inc. v. City of Grand Island*, No. A-24-671, 2025 Neb. App. LEXIS 382, at *17 (Ct. App. July 8, 2025)

No prima facie case was made through the introduction of any evidence by Nationwide Property and Casualty Insurance Company and certainly nothing was offered by Nationwide Insurance. Indeed, asserting that Nationwide Property and Casualty Insurance Company did not issue a policy (even if the Answer were accepted), that is not the same as stating or arguing that Nationwide Insurance or a company known as "Nationwide" did not provide a policy.

As also noted by the Court of Appeals: "in the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial."

Eakes, Inc. v. City of Grand Island, No. A-24-671, 2025 Neb. App. LEXIS 382, at *18 (Ct. App. July 8, 2025)

No burden ever shifted to Millard Gutter as no competent evidence was ever offered by or on behalf of Nationwide Insurance, or anyone else. Certainly, at a minimum, however, nothing was offered on behalf of Nationwide Insurance to prove anything by it.

Courts which have looked at the issue have noted generally that [f]actual allegations in unverified pleadings are not "evidence" to be considered in a factual inquiry. *See In re Grand Jury Subpoena*, 419 F.3d 329, 336 (5th Cir. 2005); *Jupiter v. Ashcroft*, 396 F.3d 487, 491 (1st Cir. 2005); *Medina v. Pacheco*, 161 F.3d 18 (Table), 1998 WL 647784, at *3 n.5 (10th Cir. 1998); and *United States v. Aguirre*, 245 F. App'x 801, 802-03 (10th Cir. 2007). A summary judgment procedure involves a factual inquiry. To meet its burden and shift any burden to Millard Gutter, the Movant was required to submit some evidence and not merely rely upon its denials and affirmative defenses in its Answer to the Amended Complaint. (Ex. 2).

Another way to view this situation is to utilize language frequently relied upon by Ohio courts in the context of summary judgments where it has been observed: "The moving party cannot discharge that burden through conclusory allegations that its opponent cannot prove its case…" See, e.g., *Est. of Reardon v. Ohiohealth Corp.,* No. 20CV-004043, 2023 Ohio Misc. LEXIS 2279, at *20 (Ct. Com. Pl. Feb. 14, 2023)

Other jurisdictions take a similar view. For example, in Texas it is recognized that:

> The longstanding rule is that allegations in pleadings are not competent summary judgment evidence, even if sworn or verified. *See Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer,* 904 S.W.2d 656, 660 (Tex. 1995); *Americana Motel, Inc. v. Johnson,* 610 S.W.2d 143, 143 (Tex. 1980); *Clear Creek Basin Auth.,* 589 S.W.2d at 678; *Hidalgo v. Surety Sav. & Loan Ass'n.,* 462 S.W.2d 540, 545 (Tex. 1971). "Pleadings outline the issues, but they are not evidence." *Shawell v. Pend Oreille Oil &*

> *Gas Co.,* 823 S.W.2d 336, 338 (Tex. App.--Texarkana 1991, writ denied). Therefore, **any averments contained in pleadings are not proper summary judgment evidence and will not sustain the trial court's summary judgment** in favor of Whitehead. *Cedyco Corp. v. Whitehead*, 253 S.W.3d 877, 880 (Tex. App. 2008)(emphasis supplied)

In short, the District Court applied the wrong standard in its analysis. The Defendant is obligated to offer proof beyond denial in an Answer, to prove entitlement to summary judgment, and the Court is obligated to view the evidence in the light most favorable to the non-moving party. The District Court's Order departs from this standard and results in an Order which is making a factual determination based upon a mere pleading, rather than upon evidence.

Plaintiff further notes that the District Court's Order is defective and applies the wrong standard, in part, because the Court has recited that "Nationwide carrie[d] its intial burden by citing to Defendant's Answer"; however, pleadings are not evidence, *Nama v. Shada*, 150 Neb. 362, 34 N.W.2d 650 (1948), and Nationwide offered no competent evidence in support of its Motion for Summary Judgment that established some matter beyond factual dispute. As a consequence, there remain issues of fact which should serve to preclude summary judgment and the decision of the District Court should be reversed.

II. THE DISTRICT COURT ERRED IN SUSTAINING THE MOTION FOR SUMMARY JUDGMENT AS TO NATIONWIDE INSURANCE.

Summary of Argument: MILLARD GUTTER CAME FORWARD WITH EVIDNECE THAT THE CLAIMS WERE ADJUSTED AND PAID BY NATIONWIDE INSURANCE AND IT FAILED TO MAKE PAYMENT IN FULL OF THE CLAIMS. THIS WAS SUFFICIENT TO OVERCOME THE MOTION FOR SUMMARY JUDGMENT AS TO THAT ENTITY.

Nationwide Insurance was sued. (T1). Nationwide Insurance was served. (T12). Nationwide Insurance filed a Motion to Make More Definite. (T13, T18).

The Motion for Summary Judgment was predicated upon the argument and claim that "Nationwide Property and Casualty Insurance Company has not issued a policy" to the insureds that assigned their claims which served as the basis for Millard Gutter's lawsuit. (18:4-7); *see also* T62 reflecting the Movant as Nationwide Property and Casualty Insurance Company.

At the hearing on the motion for summary judgment, no mention was made by Defendant's counsel as to Nationwide Insurance or the fact that it had appeared and responded to the Complaint. No one from Nationwide Insurance came forth to contest any of the allegations of the Complaint or Amended Complaint. Nor was any evidence offered from anyone from Nationwide Insurance disputing the claims made by Millard Gutter Company.

The evidence relied upon by the Defendant moving for summary judgment was limited to the Amended Complaint, the Answer, and copies of authorizations signed by 11 insureds. (E1-13; 2:3-21 and 3:5-12).

Several of the Exhibits authored by the Defendant reflected that the insureds had identified their insurer as Nationwide. (E4, E5, E7, E8, E9, E10, and E13).

No one came forward with any affidavit or evidence indicating that Nationwide or Nationwide Insurance did not provide policies to the insureds. No one came forward with any affidavit or evidence indicating that Nationwide or Nationwide Insurance had made payment in full of the insured homeowner's claims. No one came forward with any evidence controverting the allegations of Plaintiff's Amended Complaint and asserted that payment had been made in full of each of the homeowners' claims.

The District Court interpreted *Clark v. Scheels* as apparently allowing it to rely upon a pleading denial. That is not what *Clark* stated. To the contrary, *Clark* reiterated that there must be competent evidence. The fact that there must be competent evidence offered to carry the initial burden is proven by the following passage:

> **In support of summary judgment, Scheels offered discovery materials** showing that Clark either did not know or could not recall what caused her fall. Scheels argues that this fact alone showed that Clark could not recover at trial, but we disagree. Even a plaintiff who cannot recall the fall may be able to produce sufficient direct or circumstantial evidence from another source to show the fall was caused by one of the dangerous conditions alleged in the complaint. But here, **the discovery materials Scheels offered in support of summary judgment demonstrated** more than just Clark's lack of memory regarding her fall; the materials also demonstrated a lack of evidence supporting Clark's allegations that either the foot grate or a wind tunnel effect in the foyer created an unreasonable risk of harm. Absent direct or circumstantial evidence showing that one of the alleged conditions on Scheels' premises presented a uniquely or unacceptably high risk of harm beyond the ordinary risks encountered by lawful entrants on the premises, Clark could not prevail at trial on her premises liability claim.
>
> As such, **Scheels did more than make a "conclusory assertion that the plaintiff has no evidence to prove [her] case," and instead, it cited to discovery materials in the record** which, if uncontroverted, showed that Clark had no competent evidence to support one of the essential elements of her premises liability claim—an unreasonably dangerous condition in the foyer

Clark v. Scheels All Sports, Inc., 314 Neb. 49, 70-71, 989 N.W.2d 39, 54 (2023)

This Court can see that the Court in *Clark*, which is relied upon by the District Court did rely upon evidence in the form of actual discovery responses. In this case, no such discovery responses were provided.

In summary, no competent evidence was offered even within the changes to summary judgment procedures brought about by the *Clark v Scheels All Sports* case.

In other words, although summary judgment was improper in totality for any movant, at a minimum, as it relates to Nationwide Insurance – which was clearly named and served with suit, there is absolutely no evidence upon which that entity may obtain a dismissal. Indeed, that entity did not even technically make a motion for summary judgment. Accordingly, it was clear error to treat any claim against Nationwide Insurance as having been dismissed.

III. THE DISTRICT COURT ERRED IN FAILING TO SUSTAIN THE MOTION TO ALTER OR AMEND.

Summary of Argument:

The District Court's analysis in response to the Motion to Alter or Amend was basically to assert that the Court viewed the matter as having only one Defendant sued. Even if that was the case, the entity served was Nationwide Insurance. No evidence was offered by Nationwide Insurance disputing it insured the homeowners. In contrast, most of the homeowners specifically identified Nationwide as their insurer who issued the policy of insurance to them. Accordingly, if anything interpreting the "evidence" (Ex. 3-13) in the light most favorable to Plaintiff (non-movant), the conclusion should have been that there remained a disputed issue of fact.

As reflected within the Motion to Alter or Amend and at the oral argument hearing upon the Motion, the District Court was alerted to the fact that its ruling was in error and it had misapplied the *Clark* decision.

The *Clark* decision did not stand for the proposition that one could move for summary judgment simply arguing that "**plaintiff has no evidence to prove [her] case".** To the contrary, *Clark* went out of its way to indicate it was relying upon evidence in the form of discovery responses. *Clark v. Scheels All Sports, Inc.*, 314 Neb. 49, 70-71, 989 N.W.2d 39, 54 (2023) That was non-existence in this case. The District Court should have recognized that fact and granted the Motion to Alter or Amend.

The District Court should have revisited its analysis. At best, it might conclude that there is no claim against Nationwide Property and Casualty Insurance Company, but certainly, that is not the same as concluding that there is no claim stated against Nationwide Insurance. Nationwide Insurance never disputed that it issued the policies and did not even move for summary judgment on its behalf. It was error not to correct this oversight reiterated and explained via the Motion to Alter or Amend.

CONCLUSION: No competent evidence was ever offered to prove any undisputed fact establishing that any entity sued did not provide insurance of adjust the claims of the insureds who made assignment of their claims to Millard Gutter. Because no competent evidence was ever offered to establish such facts, Millard Gutter had no burden to do anything. At the bare minimum, a claim still existed against Nationwide Insurance as such entity was sued and served, but never even moved for summary judgment. Accordingly, the Order granting summary judgment should be vacated and reversed and this matter remanded for further proceedings.

MILLARD GUTTER COMPANY,
Appellant,

By: */s/ Theodore R. Boecker, Jr.*
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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served via electronic filing

*/s/ Theodore R. Boecker, Jr.*_______

Certificate of Compliance

This document complies was prepared using Microsoft Word 2016. The Brief complies with the typeface requirements of Rule Section 2-103 and the limitation on words, because it contains 5565 words.

/s/ *Theodore R. Boecker, Jr.*
____

Certificate of Service

I hereby certify that on Monday, December 15, 2025 I provided a true and correct copy of this *Brief of Appellant Millard Gutter Co* to the following:

Nationwide Insurance represented by Maggie Ellesse Frei (27507) service method: Electronic Service to **maggiefrei@unomaha.edu**
Nationwide Insurance represented by Matthew D Hammes (21484) service method: Electronic Service to **mhammes@lpdbhlaw.com**

Signature: /s/ Theodore Boecker (20346)