

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

MILLARD GUTTER CO. V. NATIONWIDE INS.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

MILLARD GUTTER COMPANY, A CORPORATION DOING BUSINESS AS MILLARD ROOFING AND
GUTTER, APPELLANT,

V.

NATIONWIDE INSURANCE, ALSO KNOWN AS OR DOING BUSINESS AS NATIONWIDE PROPERTY AND
CASUALTY INSURANCE COMPANY, APPELLEE.

Filed October 20, 2026. No. A-25-559.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge.
Reversed and remanded for further proceedings.

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellant.

Matthew D. Hammes and Cade C. Fries, of Locher, Pavelka, Dostal, Braddy & Hammes,
L.L.C., for appellee.

RIEDMANN, Chief Judge, and PIRTLE and PICCOLO, Judges.

PIRTLE, Judge.

INTRODUCTION

In connection with a 2013 storm, Millard Gutter Company (Millard Gutter) alleged that it had acquired assignments of rights from various policyholders of Nationwide Insurance (Nationwide). Millard Gutter then filed suit against Nationwide in its own name, as an assignee, seeking to recover damages for breach of the insurance contracts. The district court for Douglas County granted Nationwide's motion for summary judgment and denied Millard Gutter's motion to alter or amend. Based on the reasons that follow, we reverse the district court's order granting summary judgment in favor of Nationwide and remand for further proceedings.

BACKGROUND

Millard Gutter is a roofing contractor based in Omaha, Nebraska. Nationwide is an insurance company, which does business in Nebraska and elsewhere. Millard Gutter filed a lawsuit against Nationwide alleging that Nationwide had issued policies of homeowner insurance to 11 third-party policyholders. Millard Gutter claimed that it was hired by the third-party policyholders via assignments to repair their property following a storm. Millard Gutter alleged that Nationwide was in breach of its insurance policies issued to each policyholder by not paying Millard Gutter the amount it claimed was due for the repairs to the policyholders' property.

In its answer, Nationwide denied that it had issued an insurance policy to any of the 11 policyholders. After discovery was closed, Nationwide moved for summary judgment on July 16, 2024, on the grounds that it had not issued a single policy of homeowner's insurance to a policyholder identified in Millard Gutter's amended complaint, and therefore Nationwide could not be found to be in breach of a contract because Millard Gutter had failed to produce the actual, or even a copy of any insurance policy issued by Nationwide to any one of the 11 policyholders.

At a hearing on the motion, Nationwide offered and the court received into evidence, Millard Gutter's amended complaint, Nationwide's answer, and copies of authorizations to proceed from each alleged policyholder. The authorizations to proceed varied in that some listed Nationwide as their insurer with their alleged policy and claim numbers, while others failed to include any policy or claim numbers, and some referenced that a separate insurance agency, such as "Allied" or "My Insurance," was their insurer. Nationwide also offered a copy of an order and judgment, along with some related filings, from *Millard Gutter v. State Farm Fire and Casualty Company*, No. CI23-4897. Millard Gutter objected, and was given leave to respond to the exhibit. The court subsequently overruled Millard Gutter's objection, disregarding hearsay within the exhibit.

Millard Gutter offered into evidence an affidavit of its counsel and asked for leave to submit an affidavit of James Eggers out of time due to the absence of the signature page, which the court allowed. The affidavit of Eggers is not in the record before us. Millard Gutter did not offer into evidence any insurance policies between Nationwide and the 11 property owners at issue.

The district court granted Nationwide's motion for summary judgment and dismissed all claims brought by Millard Gutter. The court found that Nationwide met its initial burden by denying in its answer that it issued the insurance policies that were the subject of Millard Gutter's breach of contract claim. It stated that Nationwide issuing the insurance policies was an "essential element" of Millard Gutter's claim. It noted that Millard Gutter attempted to create a genuine issue of material fact by providing attachments to Eggers' affidavit showing that Nationwide personnel adjusted the claims at issue and checks from "Nationwide" were issued on these claims. The court found this was not enough evidence for a finder of fact to determine that Nationwide issued insurance policies, and Millard Gutter failed to offer the insurance contracts at issue into evidence. Based on Nationwide's denial that it issued the policies at issue, the court concluded Millard Gutter did not create a genuine issue of material fact.

Millard Gutter filed a motion to alter or amend the district court's order granting summary judgment to Nationwide. Millard Gutter argued that Nationwide did not meet its burden because it failed to offer any competent evidence in support of its motion for summary judgment; it offered

no evidence that the insureds were not insured by Nationwide and the district court relied only on the denial in Nationwide's answer. It asserted the district court applied the wrong standard and should have recognized that there was a material issue of fact, which should have served to preclude summary judgment. Millard Gutter also argued that it had sued two distinct entities, "Nationwide Insurance" and "Nationwide Property and Casualty Insurance Company" and that summary judgment should have applied only to the latter.

The court overruled Millard Gutter's motion to alter or amend. The court noted that Nationwide had denied issuing any of the policies relevant to this matter in its answer, and stated that while it was a preferable practice for Nationwide to submit an affidavit to the effect that it did not issue the relevant insurance policies, the statutory language relating to summary judgment in Neb. Rev. Stat. § 25-1332 (Reissue 2016) expressly allows the court to consider both "the pleadings and the evidence." Therefore, the court found the burden shifted to Millard Gutter, and it failed to produce evidence that Nationwide was a party to the insurance contracts at issue. The court also found that the caption of the matter contained a singular "Defendant" who was, according to the caption, known by two names. The court did not consider Millard Gutter to have sued two distinct defendants such that summary judgment was only brought on behalf of one.

Millard Gutter appeals.

ASSIGNMENTS OF ERROR

Millard Gutter assigns that the district court erred in (1) granting the motion for summary judgment as the movant failed to establish any undisputed facts through competent evidence, (2) interpreting the motion for summary judgment as being brought by Nationwide and dismissing any claims against that entity even though it was not identified as the movant, and (3) failing to grant Millard Gutter's motion to alter or amend.

STANDARD OF REVIEW

An appellate court affirms a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Clark v. Scheels All Sports, Inc.*, 314 Neb. 49, 989 N.W.2d 39 (2023). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

An appellate court reviews the denial of a motion to alter or amend the judgment for an abuse of discretion. *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

ANALYSIS

Summary Judgment.

Millard Gutter assigns that the court erred in granting summary judgment to Nationwide. Millard Gutter argues that Nationwide did not provide any depositions, admissions, stipulations, and/or affidavits to support its position that Nationwide did not have an insurance policy with any of the policyholders. It asserts that Nationwide did not make a prima facie case by simply denying in its answer that it had issued insurance policies to the 11 property owners. We agree.

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. *Clark v. Scheels All Sports, Inc.*, *supra*. 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. *Id.* If the moving party makes a prima facie case, the burden shifts to the nonmovant to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law. *Id.* But 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. *Id.*

The Nebraska Supreme Court has held, consistent with the plain and unambiguous text of § 25-1332(2) and guided by the reasoning of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), that if the burden of proof at trial would be on the nonmoving party, then the party moving for summary judgment may satisfy its prima facie burden either by citing to materials in the record that affirmatively negate an essential element of the nonmoving party's claim or by citing to materials in the record demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Clark v. Scheels All Sports, Inc.*, *supra*.

In this case, Millard Gutter alleged in its amended complaint that Nationwide issued insurance policies to 11 property owners who assigned their rights to any proceeds under the policies to Millard Gutter. In its answer, Nationwide denied that it issued policies to the 11 property owners. Based on the pleadings, there was a genuine issue of material fact as to whether Nationwide had issued policies to the named property owners. However, the pleadings alone are not proof but mere allegations of what the parties expect the evidence to show. See *Wilson v. Wilson*, 238 Neb. 219, 469 N.W.2d 750 (1991). The pleadings frame the issues on a motion for summary judgment. *Ronnfeldt Farms v. Arp*, 317 Neb. 690, 11 N.W.3d 371 (2024).

Nationwide, as the movant for summary judgment, had to make a prima facie case by producing enough evidence to show it would be entitled to judgment if the evidence were uncontroverted at trial. See *Clark v. Scheels All Sports, Inc.*, 314 Neb. 49, 989 N.W.2d 39 (2023). Stated differently, it was Nationwide's burden to produce evidence to prove it did not issue policies to the 11 property owners. The evidence that may be received on a motion for summary judgment includes depositions, answers to interrogatories, admissions, stipulations, and affidavits. § 25-1332. Subsection (2)(a) of § 25-1332 provides: "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . [c]iting to particular parts of materials in the record, including depositions, answers to interrogatories, admissions, stipulations, affidavits, or other materials."

Nationwide failed to produce any *evidence* that it did not issue insurance policies. It therefore failed to make a prima facie showing that it was entitled to summary judgment. Because the burden never shifted to Millard Gutter, it did not have an obligation to produce any evidence. See *Clark v. Scheels All Sports*, *supra* (in absence of prima facie showing by movant that he or she is entitled to summary judgment, opposing party is not required to reveal evidence which he or she expects to produce at trial).

We conclude that the district court erred in granting summary judgment in favor of Nationwide. Accordingly, we reverse and remand the matter for further proceedings.

Motion to Alter or Amend.

Millard Gutter next assigns, as restated, that the district court erred in overruling its motion to alter or amend as its suit had been against more than one company and therefore summary judgment should not have been granted in respect to the other company. Millard Gutter also assigns that the district court should have granted its motion to alter or amend as the district court erred in granting the motion for summary judgment.

Having found that the district court erred in granting summary judgment in favor of Nationwide and, as a result, we must reverse and remand, we need not address Millard Gutter's remaining assignments of error. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

CONCLUSION

Nationwide failed to present evidence that it did not issue a policy of insurance to any of the alleged policy holders; therefore, it failed to make a prima facie case in support of its motion for summary judgment. We therefore reverse the district court's order granting Nationwide's motion for summary judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR
FURTHER PROCEEDINGS.