

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

**BERNARD J. ZIMMERER, as Trustee of
BERNARD J. ZIMMERER LIVING
TRUST, and SHAMROCK POTATOES, a
Nebraska partnership,**
Plaintiffs,

vs.

INTERSTATE STRUCTURES, INC.,
Defendant.

reentitled

**CURT B. ZIMMERER and JOHN C.
ZIMMERER, as Co-Trustees of BERNARD
J. ZIMMERER ADMINISTRATIVE
TRUST, and SHAMROCK POTATOES, a
Nebraska partnership,**
Plaintiffs,

vs.

INTERSTATE STRUCTURES, INC.,
Defendant.

Case No. CI00-128

**ORDER ON MOTION TO
STRIKE AND/OR MOTION TO
STRIKE AND MAKE MORE
DEFINITE AND CERTAIN**

DATE OF HEARING: October 1, 2001.
DATE OF RENDITION: December 24, 2001.
DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).
TYPE OF HEARING: Telephonic conference.
APPEARANCES: See journal entry filed October 1, 2001.
SUBJECT OF ORDER: Defendant's motion to strike and/or motion to strike and make more definite and certain filed September 17, 2001.
PROCEEDINGS: See journal entry filed October 1, 2001.
MEMORANDUM:

1. Because of the importance of this decision to the course of this case and an unusually busy trial calendar this fall, the court has not rendered decision as promptly on this motion as it normally would and apologizes to the parties and counsel for any inconvenience resulting therefrom. The parties have provided comprehensive written briefs regarding their respective arguments, and these well-written materials deserved a comprehensive and thorough examination by the court. Having now had the opportunity to fully study the matter, the decision follows.

2. It is certainly possible for an action to state separate causes of action between the same parties, some arising in contract and others in tort. The Nebraska Supreme Court has enunciated the test to determine whether an action is based on a contract or a tort, which requires this court to examine and construe the petition's essential and factual allegations by which the plaintiff requests relief. *Cimino v. Firstier Bank, N.A.*, 247 Neb. 797, 530 N.W.2d 606 (1995). This court considers those essential and factual allegations rather than the legal terminology utilized in the petition or the form of the pleading. *Id.* This test requires the court to consider the facts which constitute the cause of action. *Id.*

3. If the petition contains a cause of action for breach of contract, additional averments appropriate to a cause of action for a wrong will not change the action from contract to tort, and if there is doubt as to the character of the action, it will be resolved in favor of an action in contract. *Id.* In such an instance, the statements appropriate to an action in tort will be considered surplusage. *Id.*

4. The cases cited by the plaintiffs do not address the distinction, perhaps because the difference was not raised in those causes. Nonetheless, the Supreme Court appears to have consistently followed the standards articulated above where the issue has been presented.

5. All of the allegations of the alternative third cause of action in the plaintiffs' third amended petition regarding specifications of negligence clearly arise from contractual duties under the express contract alleged in the first cause of action. This court agrees with the defendant that this case sounds in contract and not in tort, and that the negligence allegations of the third cause of action should be considered surplusage.

6. Because this issue has been previously raised in this case and there is no reasonable possibility that an amendment will change the nature of the negligence allegations, the court does not need to grant the plaintiffs further leave to amend.

7. Paragraphs 17 through 22, inclusive, should be ordered stricken out therefrom, and the defendant's motion to strike as to the third cause of action sustained.

8. The court need not consider the defendant's alternative motion to strike and make more definite and certain regarding the third cause of action, which is thereby rendered moot.

9. The defendant also included a motion to strike and to make more definite and certain addressing the plaintiffs' first, second, and fourth causes of action. The court determines that all of the matters raised therein lack merit, in light of the context of the allegations of the third amended petition and the surrounding language to that specifically attacked in the motion.

10. Paragraphs 1 through 6 require no further discussion. Paragraph 7 of the motion should be overruled in light of the specific allegations of paragraph 9 of the third amended petition and its subparagraphs.

ORDER: IT IS THEREFORE ORDERED that:

1. The defendant's motion to strike the third cause of action of the plaintiffs' third amended petition as surplusage is granted, and paragraphs 17 through 22, inclusive, of the third amended petition are ordered stricken out therefrom.

2. Leave to further amend with regard thereto is denied.

3. The defendant's alternative motion to make more definite and certain as to the third cause of action of the plaintiffs' third amended petition, including the six paragraphs of specification thereof, is moot.

4. The defendant's motion to strike and to make more definite and certain as to the first, second, and fourth causes of action of the plaintiffs' third amended petition is denied as to all seven paragraphs thereof.

5. The defendant shall have 10 days from the date of entry of this order to demur or 20 days to answer as to the first, second, and fourth causes of action, or upon failing to do so, shall be deemed to have elected to have its most recently filed answer, less any allegations previously ordered stricken out therefrom, stand as the operative answer to the first, second, and fourth causes of action of the plaintiffs' third amended petition.

Signed in chambers at **Ainsworth**, Nebraska, on **December 24, 2001**;
DEEMED ENTERED upon file stamp date by court clerk.

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- Note the decision on the trial docket as: [date of filing] **Signed “Order on Motion to Strike and/or Motion to Strike and Make More Definite and Certain” entered.**
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge