

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**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 DENYING MOTION FOR SUMMARY JUDGMENT**

**DATE OF HEARING:** June 23, 2003.

**DATE OF RENDITION:** July 23, 2003.

**DATE OF ENTRY:** See court clerk's file-stamp date.

**APPEARANCES:**

For plaintiffs: Robert T. Gruit without plaintiffs.

For defendants: Dan H. Ketcham.

**SUBJECT OF ORDER:** Defendant's motion for summary judgment.

**PROCEEDINGS:** See journal entry rendered following hearing.

**FINDINGS:** The court finds and concludes that:

1. The defendant seeks a summary judgment on the two remaining causes of action. In *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002), the Nebraska Supreme Court restated the familiar principles applicable to motions for summary judgment:

a. Summary judgment is proper 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.

b. In considering a summary judgment motion, the court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence.

c. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.

d. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

e. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.

f. After the moving party makes a prima facie case for summary judgment, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

2. Viewed in the light most favorable to the plaintiffs, a genuine issue exists as to a material fact or facts or as to the ultimate inferences that may be drawn from those facts. This court must not weigh the evidence or consider which party the court considers more likely to prevail at trial. This court must, at this stage, merely determine whether a genuine issue of fact exists, and not how such factual issues should be determined. A mere inference favorable to the nonmoving party is sufficient to defeat a summary judgment motion. As the Supreme Court observed in *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000), the overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to a judgment as a matter of law. That situation applies here. The motion must be denied.

3. Although the inferences may be sufficient to defeat the summary judgment motion, the ruling on a motion for directed verdict at trial might well be different. The

plaintiff asserts that a latent defect prevents application of the accepted work doctrine. While an inference of latency appears in this evidence when viewed most favorably to plaintiffs, this court can easily envision a different situation at trial.

4. The defendant strenuously argues that the evidence fails to establish causation. The Nebraska Supreme Court has stated that determination of causation is ordinarily a question for the trier of fact. *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998). On summary judgment, the issue is not whether this court finds the evidence on causation highly favorable to the defendant. The evident strengths of the defendant's evidence cannot be weighed by this court. Rather, this court merely observes that some evidence or inferences exist to the contrary. That alone defeats summary judgment on the issue.

5. The deadline for filing of pretrial motions has expired and the only pretrial motion filed by either party has been disposed by this order. The matter should be set for final pretrial conference.

**ORDER:** IT IS THEREFORE ORDERED that:

1. The defendant's motion for summary judgment is denied.

2. The final pretrial conference is rescheduled for **Monday, September 15, 2003**, at **1:35 p.m.**, or as soon thereafter as the same may be heard. The pretrial conference will be held in the District Judge's chambers, Holt County Courthouse, O'Neill, Nebraska. All other provisions of the prior progression order(s) remain fully effective.

3. For the assistance of counsel, the court advises that the scheduling at 1:35 p.m. means that this case is the second case scheduled for pretrial conference on that afternoon and that if the prior case actually proceeds to pretrial on that date the actual pretrial conference time may be considerably later. The court further observes that this scheduling is also subject to continuance because that afternoon is Boyd County priority time on the court's annual published calendar and if matters are actually scheduled for hearing in Butte on that date continuance of this pretrial to an alternate date and time would be required. Counsel would be advised by court staff in advance if such continuance is necessary.

Signed in chambers at **Ainsworth**, Nebraska, on **July 23, 2003**;  
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 Motions"**  
**entered; pretrial conference scheduled for [date and time from order].**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

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**William B. Cassel**  
District Judge