

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**ELDON D. ADAIR, and BERNADETT
DUARTE-ADAIR, husband and wife,**)
)
)
 Plaintiffs,)
 vs.)
)
 WILLIAM RADOBENKO, et ux, et al.)
)
 Defendants.)

Case No. **CV 2002 3988**

**MEMORANDUM DECISION AND
ORDER ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT IN CV
2002 2952**

**ACI, an Idaho Corporation, and WILLIAM
RADOBENKO**)
)
)
 Plaintiffs,)
 vs.)
)
 **ELDON ADAIR and JANE DOE ADAIR,
husband and wife.**)
)
 Defendants.)

Case No. **CV 2002 2952**

I. PROCEDURAL BACKGROUND.

These two cases have been consolidated for trial. The cases involve a dispute over business dealings between these parties. In Kootenai County Case No. CV 2002 2952, defendants Adair filed a motion for summary judgment.

On May 2, 2002, plaintiffs ACI, Inc. and William Radobenko (Radobenko), in Case No. CV 2002 2952 (collectively referred to as ACI) sued Eldon (Ed) and Jane Doe (Bernadette) (Duarte-)Adair (collectively referred to as Adair). In that complaint ACI alleged several causes of action. On February 11, 2004 defendants Adair moved for summary judgment on all causes of action. ACI withdraws their claims of fraud, intentional interference with a business relationship, intentional interference with a contractual relationship, unjust enrichment, equitable estoppel and breach of contract. ACI's Memorandum in Opposition to Motion for Summary Judgment, p 15. Oral argument was heard August 31, 2004, and ACI's counsel confirmed the withdrawal of those claims. Only ACI's breach of fiduciary duty remain.

Plaintiffs ACI and Radobenko allege Adairs (specifically Eldon "Ed" Adair), while an employee of ACI and while a director of Adairco, breached a fiduciary duty owed to Adairco by "forming a new corporation known as Adair & Sons and engaging in acts in direct competition with Adairco." Complaint, ¶ 3.2 and ¶4.2. ACI's Memorandum in Opposition to Motion for Summary Judgment, p. 11. ACI and Radobenko allege: "These acts include, but are not limited to, bidding works of improvement in competition with Adairco, as well as causing Adairco to lose its bonding capability." *Id.* ACI alleges Adair breached his fiduciary duty owed to ACI as a director by self dealing in Adair's own private business interests at the same time he was director of ACI.

II. FACTUAL BACKGROUND.

Radobenko and Adair were owners of Adairco. Adairs' Motion for Summary Judgment and Memorandum (Adairs' Memorandum), p. 2, Facts, ¶¶ 4 – 7; Adair Affidavit ¶¶ 3 – 6. Due to undisclosed difficulties between the parties, they could not remain in business together. Adairs' Memorandum, p. 3, ¶ 8; Adair Affidavit, ¶ 7. On February 17, 1998, Adair, using the

name Adair Golf, Inc., solicited a quote from Western Utilities Supply. Exhibit E, Magnuson Affidavit in Opposition to Motion for Summary Judgment. Adairco had previously purchased from Western Utilities Supply. Adair Deposition. p. 37, Exhibit D, Magnuson Affidavit in Opposition to Partial Motion for Summary Judgment; ACI's Memorandum in Opposition to Motion for Summary Judgment, p. 6. On February 19, 1998, Adair, this time using the name Adair & Sons Construction, Inc., solicited a bid from Spokane Culvert for a project called "Cambridge Knoll First Addition". Exhibit E, Magnuson Affidavit in Opposition to Partial Motion for Summary Judgment; ACI's Memorandum in Opposition to Motion for Summary Judgment, p. 7. On February 20, 1998 Adair, again using the name Adair & Sons Construction, Inc., solicited a bid from Western Concrete Products for Cambridge Knoll. Exhibit E, Magnuson Affidavit in Opposition to Partial Motion for Summary Judgment; ACI's Memo in Opposition to Motion for Summary Judgment, p. 6.

At the March 3, 1998 board meeting of Adairco, severance pay was ordered for Adair through March 16, 1998. Adairco claims that Adair resigned orally at the meeting. Adairs' Memorandum, p. 3, ¶ 9; Adair Affidavit ¶ 8. There is evidence that shows Adair did not resign at the March 3, 1998, meeting. Minutes of Directors Meeting, Exhibit B, Affidavit of Radobenko re: Motion for Summary Judgment.

Adair and Radobenko and their wives were personal guarantors for Adairco. Adairs' Memorandum, p. 3, ¶ 10; Adair Affidavit ¶ 9. On March 8, 1998, Adair advised the Adairco bonding company that he no longer wished to be liable for the debts of Adairco. Adairs' Memorandum, p. 3, ¶ 11; Adair Affidavit ¶ and Exhibit A. However, the letter is dated March 9, 1998. Exhibit D, Affidavit of Radobenko re: Motion for Summary Judgment.

On March 9, 1998, Adair solicited a bid from O'Leary-Mathis Sweeping for the Cambridge Knoll project. Exhibit E, Magnuson Affidavit in Opposition to Motion for Partial

Summary Judgment. On March 18, 1998, Adair on behalf of Adair & Sons submitted a bid on the Cambridge Knoll project. Adairs' Memorandum, p. 3, ¶ 12; Adair Affidavit ¶ 11. Adairco claims they believed that the bid for Cambridge Knoll was submitted on behalf of Adairco. Adairs' Memorandum, p. 3, ¶ 13; Radobenko Depo., p. 6, Ll. 6 – 19, Exhibit J to Affidavit of Magnuson in Opposition to Motion for Summary Judgment. Ben Simpson, developer of Cambridge Knoll, was aware that the bid was for Adair & Sons. Adairs' Memorandum, p. 3, ¶ 14; Simpson Affidavit ¶¶, 3, 5, & 6. Adair & Sons was formed March 23, 1998. Adairs' Memorandum, p. 4, ¶ 15; Adair Affidavit ¶ 12. The March 26, 1998 Financial Statement of Adair & Sons listed Cambridge Knoll as work in progress. Magnuson Affidavit in Opposition to Motion for Summary Judgment, Exhibit F. On March 27, 1998, Adair & Sons applied for a Contractors License Bond for Adair & Sons. Magnuson Affidavit in Opposition to Motion for Summary Judgment, Exhibit F. Adair & Sons was awarded the Cambridge Knoll project. Adairs' Memorandum, p. 4, ¶ 16; Adair Affidavit ¶ 14.

Adair submitted his resignation to Adairco April 16, 1998. Adairs' Memorandum, p. 4, ¶ 17; Adair Affidavit ¶ 15 and Exhibit B. Adair sold his Adairco stock July 13, 1998. Adairs' Memorandum, p. 4, ¶ 18; Adair Affidavit ¶ 16. The evidence shows any breaches took place before the April 16, 1998, resignation of Adair.

III. ANALYSIS ON MOTION FOR SUMMARY JUDGMENT.

Adairs' first claim on summary judgment is that the statute of limitations, Idaho Code § 5-224 (since there is no specific statute of limitation for breach of fiduciary duty, I.C. § 5-224 controls), requires actions “must be commenced within four (4) years after the cause of action shall have accrued.” Adairs' Memorandum, p. 6. Idaho Code § 5-224 is the appropriate statute of limitation for a breach of fiduciary claim. *Jones v. Kootenai County Title Insurance*

Company, 125 Idaho 607, 614, 873 P.2d 861, 868 (1994). Adairs claim the alleged breaches of fiduciary duty occurred during the period of December (1997) through March of 1998 when Adair was allegedly receiving payment from Adairco and when Adair submitted a bid for the Cambridge Knoll project for Adairs' own benefit. Adairs' Memorandum, p.6. Since the Complaint was not filed until May 2, 2002, Adairs claim it was filed more than four years after the alleged breaches. *Id.*

Adairs' second claim is that damages and the amount of damages must be proven to reasonable certainty, citing *Powell v. Sellers*, 130 Idaho 122, 127, 937 P.2d 434, 439 (Ct. App. 1997), and ACI has failed in that regard. If the Adairs' Motion for Summary Judgment is decided on the statute of limitation issue, the issue of damages becomes moot.

Going back to the statute of limitations argument, the issue revolves around whether there is a discovery component to a breach of fiduciary claim. As mentioned above, the evidence shows any breaches took place before the April 16, 1998, resignation of Adair. If, as urged by ACI, there **is** a discovery component to the statute of limitations on a breach of fiduciary claim, then the Court would have to deny Adairs' Motion for Summary Judgment on the statute of limitations issue because there is at least a dispute of fact that ACI/Adairco/Radobenko did not know nor should not have known of these alleged breaches of fiduciary duty (self dealing) by Adair until after May 2, 1998, four years before the Complaint was filed. If, as urged by Adairs, there **is not** a discovery component to the statute of limitations on a breach of fiduciary claim, then summary judgment must be granted in favor of Adairs since the breaches all took place before April 16, 1998.

ACI cites *DBSI/TRI V v. Bender*, 130 Idaho 796, 948 P.2d 151 (1997) for the proposition that the case was filed within four years after Radobenko/ACI knew or should have known of Adair's alleged breach. ACI's Memorandum in Opposition to Motion for Summary Judgment,

p. 13. In *DBSI/TRI V*, a case involving breach of fiduciary duty, the Idaho Supreme Court said, “The district court correctly determined that the statute of limitations started to run when *DBSI* knew or should have known of a breach . . .” 130 Idaho at 809, 948 P.2d at 164.

If the reasoning of *DBSI/TRI V* is applied in the present case, the letter to attorney Stephen Fender dated May 12, 1998, may have been the first time that Adairco/ACI/Radobenko knew of a breach. See Exhibit D, Radobenko Affidavit ¶¶ 15 – 17. According to the Radobenko Affidavit, Adairco did not know before May 2, 1998, that a letter had been sent to the bonding agent by Adair. Radobenko Affidavit ¶¶ 15 – 17.

As noted by Adairs, the agency relationship in *DBSI/TRI V* arose out of an **express contract** between the parties. The underlying basis of the claim in *DBSI/TRI V* was contractual. Adairs’ Reply re: Motion for Summary Judgment, p. 2. Similarly, *First Bank & Trust v. Jones*, 111 Idaho 481, 485, 725 P.2d 186, 190 (Ct.App. 1986), involved a breach of a fiduciary duty also based upon a **contract**, an express trust. At oral argument, counsel for ACI/Radobenko argued that *First Bank & Trust* concerned fiduciary duty in the context of a partnership and that the present case is a partnership that morphed into a corporation. The Court understands and appreciates that argument but is not persuaded by that argument. A reading of *First Bank & Trust* shows that when discussing the breach of the express trust (a contract), the statute begins to run from when dilution or damage occurred, and the Idaho Supreme Court held: “There is no justification present in the record for tolling the statutory period.” 111 Idaho at 485. In discussing the winding up of a partnership, which includes a fiduciary duty, the Idaho Supreme Court discussed actions by a beneficiary against a trustee, noting “the rule has long been that the period of limitation begins when the trust is terminated, disavowed or repudiated by the trustee, and such conduct is unequivocally made known to the beneficiary.” 111 Idaho at 483, citing *Harbaugh v. Myron Harbaugh Motor, Inc.*, 100 Idaho 295, 297, 597 P.2d 18, 20

(1979). While there is a discovery exception in an action by a beneficiary against a trust for the winding up of a trust, there is nothing indicating those same duties owed are those owed by a director to a corporation. That aspect of *First Bank & Trust* dealt with partners in a partnership being accountable to each other, which is a duty set forth by specific Idaho statute, I.C. § 53-321(1). That statute is not applicable here. This is a corporation. While it may have started as a partnership, it was at all times pertinent a corporation.

Adairs cite *Jones v. Runft, Leroy, Coffin & Matthews, Chtd.*, 125 Idaho 607, 873 P.2d 861 (1994). Adairs' Reply re: Motion for Summary Judgment, pp. 2-3. *Jones* involved the liability of a law firm to a person (a former client of the firm) who loaned money to a current client of the firm. An escrow company distributed funds pursuant to directions given by the client's attorney, but contrary to the directions given by the lender. The lender then sued the law firm, claiming breach of an "assumed duty" and breach of fiduciary duty. The law firm prevailed on summary judgment that the claims must be dismissed due to the applicable statute of limitations. The Idaho Supreme Court first stated that breach of an assumed duty is a negligence action, and, as such, the statute of limitations began to run when the first negligent act occurred, not when it was discovered. The Idaho Supreme Court then addressed the fiduciary duty claim:

Jones's claim for breach of fiduciary duty is not covered by any of the other specific statutes of limitations. Therefore, we apply the four-year statute of limitations contained in I.C. § 5-224. As in the case of the assumed duty claim discussed above, a claim for a breach of fiduciary duty is a negligence action in which the duty to act **is created by the relationship between the parties**. As a negligence action, we must analyze when the first act of negligence occurred. As in the case of the assumed duty claim, the first act of negligence occurred at or before the release of the loan proceeds on September 1, 1983. This is more than four years before Jones sued the law firm.

125 Idaho at 614, 873 P.2d at 868. (emphasis added).

At first glance, *Jones* seems to be inconsistent with *DBSI/TRI V* and *First Bank & Trust*. Being decided in 1994, *Jones* is bookended in time by *First Bank & Trust* decided in 1986 and *DBSI/TRI V* decided in 1997. It is presumed that the Idaho Supreme Court knew what it was doing when it decided *Jones* after *First Bank & Trust*, and *DBSI/TRI V* after *Jones*. The only way to reconcile that perceived inconsistency is to, as Adairs argue, accept that the Idaho Supreme Court did not intend the discovery rule to apply to all breach of fiduciary duty actions, and whether it applies depends on the nature of the underlying claim. If it is based on contract or some other agreement, such as *DBSI/TRI V* and *First Bank & Trust*, there is a discovery rule. If it is based on negligence or other tort such as *Jones*, the discovery exception does not apply. That is the only way this trilogy can be explained.

The facts of the present case are much more similar to *Jones*. ACI/Adairco/Radobenkos' claims of breach of fiduciary duty are not based on contract, but rather are based on violations of Adair's duty as a director of Adairco. As stated in *Jones*, this is "...a duty to act created by the relationship of the parties." This is based in tort, not in contract. The Court has reviewed the cases cited by Adairs and finds them persuasive. *Frank Management, Inc. v. Weber*, 549 N.Y.S.2d 317, 145 Misc.2d 995, 549 N.Y.S.2d 317 (N.Y. 1989) concerned a breach of a management and consulting contract regarding singer Billy Joel. Finding the breach of fiduciary duty is actionable in tort did not preclude an action in contract, the court held the theory with the longest statute of limitation which would keep the claim alive should prevail. 549 N.Y.S.2d at 320. Analyzing it under breach of contract, the statute of limitation began to run from the date of the breach. *Id.* "The argument that defendant is entitled to a discovery accrual is without merit, as no case or statute provides for such accrual as, for example, in cases of actual fraud." *Id.* Also discussing whether a "continuous representation exception" should apply, the court found it did not where the services rendered are discrete and complete. *Id.*, at p. 321. Again, the

evidence shows any breaches took place before the April 16, 1998, resignation of Adair. *Babco Industries, Inc. v. New England Merchants National Bank*, 380 N.E.2d 1327, 6 Mass.App.Ct. 929 (Mass.Ct.App. 1978) and *Crosby v. Beam et al.*, 615 N.E.2d 294, 83 OhioApp.3d 501 (Ct.App.Ohio 1992), both show that breach of the duty by controlling parties and majority shareholders to minority shareholders sounded in tort rather than in contract. That being the case, the clear language of *Jones* shows the discovery rule does not apply to the facts of this case. Accordingly, ACI/Radobenko's claim based on breach of fiduciary duty is barred because the alleged breaches took place just over four years before they filed their Complaint in Kootenai County Case No. CV 2002 2952.

The Court has reviewed the recent Idaho Supreme Court case of *Parsons Packing, Inc., v. Massingill*, 04.16 ISCR 661 (July 23, 2004) and finds it inapplicable to the present facts. *Parsons*, like *Jones*, arose out of legal representation. However, *Jones* involved a breach of fiduciary duty claim and *Parsons* is a legal malpractice case. Legal malpractice has its own statute of limitation (I.C. § 5-219), and whether the discovery exception applied to that statute is a different issue. *Parsons* does not concern a breach of fiduciary duty claim. Accordingly, *Parsons* and the cases cited therein are not on point.

Since summary judgment is granted on the basis of the statute of limitations, the Court need not address on summary judgment the issue of the lack of proof of damages sustained under the alleged breach of fiduciary duty.

Finally, ACI argues the Court lacks jurisdiction to entertain Adairs' Summary Judgment Motion. ACI's Memorandum in Opposition to Motion for Summary Judgment, p. 15. ACI argues the parties entered into a stipulation to consolidate the two pending cases, and the stipulation provides for motions for summary judgment, but that ACI and Rabodenko understood any summary judgment motion would be limited to the issue of which agreement governs their

relationship. *Id.* In response to a stipulation of the parties, an order was entered January 14, 2004, that: 1) consolidated cases CV 2002 3988 and CV 2002 2952; 2) ordered “The parties’ respective motions for summary judgment **and** the issue of which ‘Partnership Agreement’ controls their relationship be submitted to this Court”; 3) and “Following the court’s decision on the foregoing **matters**, all remaining issues shall be submitted to binding arbitration.” Order of January 14, 2004, and Stipulation for Order, filed January 7, 2004. (emphasis added). The emphasized portions indicate summary judgment as brought by Adairs is allowed.

ACI/Rabodenko argue the stipulation and order may be ambiguous on the issue, and further argue the ambiguity is removed by correspondence attached to the affidavit of Magnuson, Exhibit A. ACI’s Memorandum in Opposition to Motion for Summary Judgment, pp. 15-16. The Order is **not** ambiguous...it does not limit the parties to just one motion for summary judgment only on the issue of which partnership agreement applies. It is the Order that controls, and the Order was based upon the stipulation. Other correspondence is not relevant. The Court is not persuaded by ACI’s argument that the issue of the statute of limitations for breach of fiduciary duty is not before the Court as a result of the stipulation.

IV. ORDER.

IT IS HEREBY ORDERED defendants Adairs’ Motion for Summary Judgment in CV 2002 2952 on all causes of action is GRANTED (the claim of fiduciary duty for the reasons above, and all other causes of action were withdrawn by plaintiffs). All causes of action by plaintiffs in CV2002 2952 are DISMISSED.

Entered this 8th day of September, 2004.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of September, 2004, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

| <u>Lawyer</u> | <u>Fax #</u> | <u>Lawyer</u> | <u>Fax #</u> |
|--------------------|--------------|------------------|--------------|
| Michael S. Bissell | 509-455-8734 | John F. Magnuson | 667-0500 |

Secretary