IN THE COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

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JEANNE A. SZULIM
CLERK OF COURT

IN THE COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Little Six, Inc., members of its Board of Directors, and the Shakopee Community,	)	
Appellants/Cross Appellees,	)	
v.	)	Ct. App. No. 020-99, 021-99, 022-99
Leonard Prescott and F. William Johnson,	)	
Cross Appellants/Appellees	)	

MEMORANDUM OPINION AND ORDER

This case is before the Court on the cross appeals of each party from the Trial Court's most recent decision in Little Six, Inc. et al v. Prescott and Leonard, No. 048-94 (SMS(D)C Tr. Ct. April 8, 1999). In that decision, the Trial Court concluded that Leonard Prescott and William Johnson were entitled to summary judgment on a number of the claims raised by Little Six, Inc., its Board, and the Community (hereinafter the "Community"). However, on two claims the Trial Court concluded that the parties should proceed to trial. The Community has appealed the Trial Court's decision to the extent it grants summary judgment to Prescott and Johnson on certain counts in the Complaint. Prescott and Johnson have appealed those parts of the decision adverse to them. We affirm the Trial Court's decision in part and reverse in part.

FACTUAL BACKGROUND

The Community representatives originally filed their complaint in October of 1994. Their suit is one for money damages for alleged instances of misconduct by Prescott and Johnson in their former roles as officers of Little Six, Inc. (LSI). During the times in questions, Prescott was both the Chairman of the Community and President of LSI, (later leaving this latter post to become Chairman of the Board of Directors of LSI). Johnson was first employed as LSI's Chief Executive Officer and later succeeded Prescott as LSI's President.

In general, the Community alleges that in their former positions with LSI Prescott and Johnson engaged in a pattern of behavior by which they expended Community monies for improper purposes and without authorization.

During the tenure of Prescott and Johnson, the LSI Board created an Executive Committee and delegated to it certain responsibilities. Both Prescott and Johnson served on the Executive Committee. Many of the allegations brought by the Community against Prescott and Johnson concern the scope and authority of the Executive Committee, the manner in which the Committee exercised its authority, and the representations made to the LSI Board concerning the actions of the Committee.

Other allegations brought by the Community include a claim that Johnson breached his employment contract, and that Prescott misrepresented information in his application for a Community gaming license.

In response to the Community's allegations, Prescott and Johnson filed motions for summary judgement, claiming, among other things, that they possessed various forms of official immunity. The Trial Court granted summary judgment on some of Prescott and Johnson's claims, but denied their claims of immunity. LSI, et al v. Prescott and Johnson, No. 048-94 (SMS(D)C Tr. Ct. April 1, 1996). After allowing an interlocutory appeal on the immunity question, this court reversed the Trial Court and concluded that Prescott and Johnson could raise a defense of qualified immunity. Prescott and Johnson v. LSI, et al, No. 017-97 & No. 018-97 (SMS(D)C Ct. App. April 17, 1998). On remand, the Trial Court concluded that Prescott and Johnson were entitled to qualified immunity

on some counts in the Complaint, that they were entitled to summary judgment on some other counts, and that the parties should proceed to trial on two specific subcounts alleged in the Complaint. LSI, et al v. Prescott and Johnson, No. 048-94 (SMS(D)C Tr. Ct. April 8, 1998).

Since there are eight counts in the complaint, and numerous subcounts, and since the history of this case is complicated, our opinion today will go through each count and explain our disposition and reasoning. In the end, we affirm the District Court in part and reverse in part, with the net result being judgment in favor of Prescott and Johnson.

LEGAL DISCUSSION

Standard of Review

Review of a decision on summary judgment is a matter of law that we review de novo. Welch et al v. SMS(D)C, No. 009-96 (SMS(D)C Ct. App. Oct. 14, 1996). When reviewing a question of summary judgment, we ask if the material facts are undisputed, and if so, whether the moving party is entitled to judgment as a matter of law. Rule 28 SMS(D)C Rules of Civil Procedure; Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Nov. 27, 1995). In determining whether the facts are undisputed, we view the evidence in a light most favorable to the non-moving party. Barrientez v. SMS(D)C, No. 007-88 (SMS(D)C Tr. Ct. Sept. 7, 1990). However, to survive a motion for summary judgment, there must exist in the record enough evidence to raise a genuine issue of material fact – the non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986). The dispute of material fact must be sufficient for a reasonable trier of fact to find for the non-moving party. Id. 475 U.S. at 587.

On the qualified immunity questions, however, our inquiry is slightly different. Our review is governed by our earlier decision in this case, in which we concluded:

> [a]n official performing a discretionary function within the scope of their duty will be shielded from liability for civil damages as long as their conduct does not violate a clearly established right of which a reasonable official would have

> known. See Harlow, 457 U.S. at 818. In other words, an official is entitled to qualified immunity only if in light of pre-existing law, the unlawfulness of his conduct would be apparent to a reasonable official. Anderson v. Creighton, 483 U.S. 635, 640 (1987)....
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> The first task ... in this inquiry is to determine if the law was clearly established at the time the official acted. If it was not, the official could not be reasonably expected to anticipate subsequent legal developments and could not either actually or constructively "know" that his actions were illegal. Harlow, 457 U.S. at 818-19. In such a case, summary judgment for the official would be appropriate.
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> If, on the other hand, the Community law is clearly established, a reasonably competent official is presumed to know the law governing his conduct, and the [court] should then determine if material facts are undisputed. Summary judgment should be entered for the official only if there are no disputed material facts, and those facts show the official did not violate any established right as a matter of law.

Prescott and Johnson v. LSI, No. 017-97 & 018-97 (SMS(D)C Ct. App. April 17, 1998) at 13-14.

Prescott and Johnson's Scope of Duty

As an initial matter, the Community claims on appeal that the Trial Court erred in its qualified immunity analysis by not considering whether the alleged actions of Prescott and Johnson fell within the discretionary scope of their duties. We agree with the Community that in order to raise a defense of qualified immunity an official must have been acting within the scope of his or her duties as an officer of the Community. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The Community's argument on this point, however, sweeps too broadly.

The Community maintains that if Prescott and Johnson cannot prove that the alleged actions were within the scope of their authorized duties, they are not entitled to a defense of qualified immunity. Plaintiff's Brief to the Appellate Court at 5. Under this reasoning, only officials who can prove that their actions were authorized by law, or who

could essentially prove their "innocence" before trial, would be entitled to qualified immunity. Qualified immunity, however, is designed to protect more than only those who can prove they are blameless – it protects officials whose actions, although mistaken, were reasonable. Hunter v. Bryant, 502 U.S. 224, 227 (1991) (officials who conclude reasonably, but mistakenly, that probable cause existed can raise qualified immunity defense); Malley v. Briggs, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."); United States v. Yakima Tribal Court, 806 F.2d 853, 859-60 (9th Cir. 1986) (mistake of fact or law not outside of scope of official's duty; only matters unrelated to job are outside scope).

For the purposes of qualified immunity analysis, the scope of duty inquiry should simply allow the Court to determine if an official's alleged actions were a part of his or her official job. See, e.g., Yakima Tribal Court, 806 F.2d at 859-60.[1] This inquiry should not extend to the merits of lawsuit, as the Community urges us to do here. Therefore, for the purposes of qualified immunity analysis, to determine if an official's action was within the scope of his or her duty, we will ask whether there is a reasonable connection between the alleged act and the type of duties that the official is normally responsible for. If there is a reasonable connection, we will proceed with the next step of the immunity analysis.

In this case, the Trial Court concluded Prescott and Johnson were entitled to qualified immunity on most of the first five counts in the Community's Complaint. A review of these counts shows that all the actions the Community alleges were illegal were actions taken by Prescott and Johnson in their capacity as LSI officers. Decisions about expenditures, compensation for employees, the release of information to the public, and

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[1] For example, in Yakima Tribal Court, 806 F.2d at 859-60 the Ninth Circuit states:

> If an employee of the United States acts completely outside his governmental authority, he has no immunity. An obvious example would be if a dispute occurs pertaining to the sale of an employee's personal house, his government employment provides him with no shield to liability. But that is different from the situation where an employee acting as a government agent, commits an act that is arguably a mistake of fact or law.... A simple mistake of fact or law does not necessarily mean that an officer of the government has exceeded the scope of his authority....
>
> Scope of authority turns on whether the government official was empowered to do what he did; i.e., whether, even if he acted erroneously, it was within the scope of his delegated power.

various dealings with the Business Committee and the Gaming Commission, are all actions that arguably fall within the scope of the positions held by Prescott and Johnson. This is particularly true in light of the disagreement among the parties as to the authority invested in the Executive Committee by Board Resolution No. 2-19-92-003. Although the Trial Court may have erred in not addressing this point, we conclude that the relevant counts of the Complaint only allege actions within the scope of Prescott and Johnson's positions, and that judicial economy counsels against a remand on this issue.

Count I

Count I alleges that in their former positions with LSI, Prescott and Johnson breached their fiduciary duty to the Community imposed by § 36 of the Corporation Ordinance. The Community alleges Prescott and Johnson breached this duty in 15 different ways. For the sake of clarity, the Trial Court treated each of these 15 factual allegations as subcounts A thorough O. The Trial Court had earlier granted Prescott and Johnson summary judgment on subcounts H and N, and the Community has not challenged those rulings in this appeal.

Subcounts A-F, I-L

In the decision presently on appeal, the Trial Court granted Prescott and Johnson summary judgment on qualified immunity grounds on subcounts A-F and I-L.[2] These subcounts deal with the creation and operation of the Executive Committee, and actions Prescott and Johnson took on behalf of LSI as officers and Executive Committee members. These actions allegedly involved the improper hiring and compensation of employees, the improper approval of various expenditures, and the improper public disclosure of certain financial information.

The Trial Court concluded that nothing in the Community's Constitution, the 1991 Corporation Ordinance, the LSI Articles, the IGRA, the Community's Gaming

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(Citations and quotations omitted).

[2] Disposition of subcount G will be addressed by our treatment of Count VIII below.

Ordinance, or the Community's Code of Ethics clearly prevented the creation or operation of the Executive Committee by Prescott and Johnson in the manner alleged. Under our earlier opinion, the Trial Court concluded that since the law was not clearly established at the time Prescott and Johnson acted, they were entitled to summary judgment on the grounds of qualified immunity. See Prescott and Johnson v. LSI et al, No. 017-97 & 018-97 (SMS(D)C Ct. App. April 17, 1998) at 13-14.

On appeal, the Community argues the Trial Court erred because it improperly framed its qualified immunity inquiry. Instead of asking if the law was clear regarding the creation and operation of the Executive Committee, the Community contends that the Trial Court should have asked if Prescott and Johnson clearly breached their fiduciary duty to the Community. We disagree.

Under the Community's approach, all a plaintiff would need to do to defeat a claim of qualified immunity is to allege that the defendant violated a generalized legal right, such as a breach of fiduciary duty under § 36 of the Corporation Ordinance. As the United States Supreme Court has recognized, an evaluation of a qualified immunity defense can depend a great deal on the level of generality at which the relevant legal rule is identified. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

> For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right... But if the test of "clearly established law" were applied at this level of generality ... [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.... Such an approach, in sum, would destroy the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.... It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

Anderson, 483 U.S. at 639-640. In other words, it is not enough for the Community to allege after the fact that the actions of Prescott and Johnson constitute a breach of their fiduciary duty. Instead, the question is whether the law at the time Prescott and Johnson undertook the specific alleged actions was clear enough so that a reasonable officer would have understood those actions to constitute a breach of fiduciary duty. In analyzing whether Prescott and Johnson are entitled to qualified immunity, the Trial Court properly framed the question as whether Community law clearly prohibited the specific actions Prescott and Johnson took in creating and maintaining the Executive Committee in the manner alleged.[3]

We agree with the Trial Court that the law governing the conduct of Prescott, Johnson, and other Executive Committee members was far from clear during the time periods covered by this suit. Section 21.0 of the 1991 Corporation Ordinance provided that "the business and affairs of that corporation shall be managed by a board of directors...." But Section 4.017 permits the Board to "establish committees of the board of directors, elect or appoint persons to the committees, and define their duties and fix their compensation..." and Section 21.1 authorizes the Board to "establish committees having the authority of the board in the management of the business of the corporation only to the extent provided in the resolution." The Executive Committee was originally established by Board Resolution 10-23-91-28 and its authority increased by Board Resolution 2-19-92-003. Resolution 2-19-92-003 reads in pertinent part that the Executive Committee has "the authority to manage the business and affairs of the Corporation subject to the authority of the full Board of Directors . . . [and] the Executive Committee shall have the authority to make decisions up to $250,000."

This legal framework indicates that at the time Prescott and Johnson acted, the Board had apparently delegated substantial operational authority to the Executive Committee. However, the meaning of the phrases "subject to the authority of the board"

[3] In evaluating the qualified immunity defenses of Prescott and Johnson, the question confronting us today is limited to whether the Community law was sufficiently clear at the time the actions of Prescott and Johnson were alleged to have occurred. Most of the actions alleged in this case took place in the early 1990s. The Court notes that since that time, Community law, federal regulation of tribal gaming, and standards within the gaming industry have all evolved significantly. Nothing in this opinion should be construed to reflect an opinion as to the clarity of Community law at the present time. While we express no opinion on the matter, it is conceivable that the same actions alleged in this case would defeat a claim of qualified immunity if evaluated under the Community law as it stands today.

and "shall have the authority to make decisions up to $250,000" are far from clear. In addition, in this litigation the Community has taken the position that Resolution 2-19-92-003 cannot grant the authority it purports to convey because it conflicts with Section 8.6 of the Corporation Ordinance which provides that "officer [of the corporation] shall receive such salary or compensation as may be fixed by the Board of Directors."[4]

Given the uncertain status and legal authority of the Executive Council, we cannot say that the law governing the actions of Prescott and Johnson was clear when they acted. A reasonable officer in their position could have thought they had the authority to take the actions they did. We conclude that the Trial Court's decision granting summary judgment to Prescott and Johnson on the grounds of qualified immunity for Count I, subcounts A-F and I-L is not in error and is affirmed.

Subcount M

On subcount M, the Trial Court concluded that Prescott was not entitled to qualified immunity and the matter should proceed to trial. Subcount M involves an allegation that Prescott breached his fiduciary duty to the Community by misrepresenting information in his application for a gaming license with the Community. The Trial Court reasoned that a reasonable official would have understood that making a misrepresentation to a Community regulatory board was a violation of his fiduciary duty to the Community, and that Prescott, therefore, should not be entitled to qualified immunity. The Trial Court then cited deposition testimony in the record as evidence of a factual dispute that warranted a trial on this subcount.

The parties seem to agree on the following facts. Prescott concedes that on his gaming license applications for the years 1991, 1992, and 1994 he stated that he had never had a felony conviction. Brief of Appellant Leonard Prescott at 2. He was, however, convicted of a felony in the State of Minnesota in 1971. Id. He completed his probation in 1972, and the charge was then reduced to a misdemeanor by operation of

[4] After oral argument in this case, counsel for the Community advanced a complicated theory that the copy of Board Resolution 2-19-92-003 that Community itself had submitted to the trial court was in fact not authentic. Among the numerous problems with this argument is that the Community failed to raise it in the Trial Court below, and the argument will not be considered here.

Minnesota state law. Id.; see Minn. Stat. §609.13, subd. 1(2). This conviction was later completely expunged in 1992. Id. We do not understand the Community to contest any of these above facts. Prescott also claims in his brief to have sought legal advice in determining how to answer the felony question on his 1994 application.

Even assuming, without deciding, that the Trial Court was correct that Prescott was not entitled to a defense of qualified immunity on this count, we nonetheless conclude summary judgment should be granted in his favor. There do not appear to be any disputed facts in the record on this subcount. Both sides agree that Prescott answered "no" to the question about previous felonies on his application. Given the facts, the question is whether his behavior violated § 36 of the Corporation Ordinance.

Based on this record, we cannot say that Prescott violated § 36 of the Corporation Ordinance. Section 36 requires officers to act in the best interest of the Community, to act in good faith, and to act as an ordinarily prudent person would under the circumstances. The facts do not positively reveal that Prescott failed to act in good faith, or as an ordinarily prudent person would have in the circumstances. Prescott may have held an incorrect view of the law or an incorrect view of his responsibility to disclose his earlier criminal problems in Minnesota.[5] But being possibly mistaken is not necessarily the same as failing to act in good faith, or as a reasonably prudent person. We therefore reverse the Trial Court's conclusion on subcount M and grant summary judgment in Prescott's favor on that subcount.[6]

Subcount O

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[5] In its brief the Community notes that the actual application form explains that a failure to answer a question truthfully may subject the applicant to criminal sanctions under 18 U.S.C. § 1001. As we noted in our earlier decision in this case, Prescott and Johhson v. LSI, No. 017-97, 018-97 (SMS(D)C Ct. App. April 17, 1998) at 6-7, this Court does not have criminal jurisdiction over Prescott and Johnson. If the Community believes the actions of Prescott and Johnson warrant criminal proceedings, the appropriate remedy is to seek such sanctions from the federal authorities.

[6] We note, however, that this analysis only pertains to our holding on subcount M of the Community's Complaint alleging that Prescott breached a fiduciary duty he owed to the Community. Nothing in this opinion should be construed as expressing disapproval of any of our conclusions in In re Leonard Prescott Appeal, No. 015-97 (SMS(D)C Ct. App. July 30, 1999). In that case we concluded that the Gaming Commission's decision to revoke Leonard Prescott's gaming license was not in error. That case and this case involve completely different legal standards and different factual records, and nothing in this opinion

On review, we conclude that Prescott and Johnson are entitled to a defense of qualified immunity on subcount O. The Trial Court reasoned that a reasonable officer would know that misrepresenting information to a government body is a violation of his fiduciary duty to the Community, so Prescott and Johnson were not entitled to a defense of qualified immunity. The Trial Court, however, defined the question too broadly. The question for qualified immunity purposes is not whether a reasonable officer would have known that misrepresentation is a breach of fiduciary duty; the question is whether the specific alleged actions of Prescott and Johnson violated their fiduciary duty to the Community.

The Community alleges in its complaint that Prescott and Johnson provided the Executive Committee and Board of Directors with information that was inaccurate, false, misleading, or incomplete. To support this allegation, the Community has submitted a deposition, that of Arlene Ross, one of the plaintiffs in this suit. The Trial Court concluded that there was a dispute of material fact on "two discrete issues" – whether Prescott and Johnson made false statements about their compensation and whether they made false statements about the proceedings to suspend their gaming lisences.

Ms. Ross claims in her deposition that Prescott and Johnson misrepresented the amount of total compensation they were receiving. Ms. Ross testified that in 1993 she asked Johnson, "is it true that they were making – that Bill [Johnson] himself was making $850,000? He said no." Ross Deposition, 11/28/98, Docket 80, Exhibit 18 at 151. Johnson claims he replied "I told her I did not get a salary of $800,000. 'Arlene, you've got to look at the numbers.'" Johnson Deposition, Exhibit 11, at 242. Johnson's salary in 1993 was under $300,000, but he concedes that he had substantial non-salary income for that year. Ms. Ross also stated in her deposition that in 1993 she said to Prescott, "Leonard, the rumor is that you making half a million dollars." Ross Deposition at 151. Prescott told Ross that the rumor was not true. Id. Prescott's salary in 1993 was under $250,000, but he also concedes he had substantial non-salary income for 1993 as well.

Given these facts, we cannot say that a reasonable officer would have understood Prescott and Johnson's responses to constitute a violation of their fiduciary duties. In

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should be interpreted as questioning or undermining this Court's conclusion in In re Leonard Prescott Appeal.

response to informal questions from an individual Board member about "how much they were making" Prescott and Johnson responded with answers based on their salary, without including other compensation received in the form of non-salary benefits. The record reveals that Ms. Ross was well aware of the distinction between salary and total compensation, Ross Deposition at 81, and that as an Executive Committee member and Board member, she presumably had access to the information for which she was asking. Since we cannot say that a reasonable officer would not have understood Prescott and Johnson's statements as a breach of their fiduciary duties, Prescott and Johnson are entitled to immunity on the allegations that they misrepresented information on their salaries.

The Community also claims that Prescott and Johnson misled the Board in their attempts to seek indemnification for legal fees in connection with the defense of their gaming license suspensions. Ms. Ross' deposition, however, fails to identify any specific misleading or inaccurate statements by Prescott and Johnson in this regard. See Ross Deposition at 101-114. In addition, the minutes of the meeting at which indemnification originally was approved show that neither Prescott or Johnson took part in the discussion of the indemnification issue, and that the other board members reviewed the factual findings of the Gaming Commission with legal counsel before deciding to indemnify Prescott and Johnson. Affidavit of Leonard Prescott in Support of Summary Judgment, Exhibit 30. Without any specific evidence of misleading or inaccurate statements on the indemnification issue, we cannot conclude that a reasonable official would have known that the actions of Prescott and Johnson breached their fiduciary duties. Prescott and Johnson, therefore, are entitled to qualified immunity on the indemnification issue, and are entitled to qualified immunity on subcount O.

Except for subcount G, which will be addressed by our treatment of Count VIII below, we have now disposed of every subcount in Count I. Prescott and Johnson were earlier granted summary judgment on subcounts G and N. Today, we affirm the Trial Court's decision to grant Prescott and Johnson summary judgment on subcounts A-F, I-M , and O.[7]

[7] The Community notes in its briefs that Count I is a general allegation of breach of fiduciary duty, and that the subcounts specified therein are not an exclusive list of the claims the Community holds against Prescott and Johnson. However, the Community originally filed its Complaint over five years ago, and this case has

Count II

We agree with the Trial Court's disposition of Count II. Count II alleges that Prescott and Johnson violated the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, by engaging in acts that prevented the Community from being the sole operator of gaming enterprises on the Reservation. This Count is premised on the same behaviors complained of in Count I. The Trial Court reasoned that the law under the IGRA was not clearly established such that a reasonable officer would have understood the alleged actions of Prescott and Johnson to violate the law. "The creation and operation of the Executive Committee, the appointment of corporate officers, and the nature of the oversight which the Board gave to LSI's operations were not clearly contrary to Community law, and did not clearly remove control of LSI from the Community." LSI et al v. Prescott and Johnson, No. 048-94 (SMS(D)C Tr. Ct. April 8, 1999) at 16. Upon review, we agree with the Trial Court. Under the same reasoning we used to grant summary judgment to Prescott and Johnson on the subcounts in Count I, we affirm the Trial Court's decision on Count II.

Counts III-V

We also agree with the Trial Court that Counts III through V are subject to a similar analysis. Count III alleges Prescott and Johnson engaged in a conspiracy to obtain Executive Committee approval for their actions. Count IV alleges that Prescott and Johnson converted corporate funds for their own use. Count V alleges Prescott and Johnson unjustly enriched themselves at the expense of the Community. Each Count is premised on the specific factual allegations in the subcounts of Count I and do not add any additional factual allegations.

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gone through two proceedings in the Trial Court, and now two sets of appeals. Counsel for the Community has done a thorough job of presenting the Community's case to date, and we assume that by now the Community would have raised any additional factual claims for breach of fiduciary duty, or for any of the other counts, if it was aware that such claims exist.

In our view, the Trial Court correctly analyzed the immunity question on these counts. We do not doubt that the Community common law prevents Community officials from engaging in conspiracy, conversion, or unjust enrichment. But as the Trial Court noted, the correct question is whether a reasonable official would have understood the specific acts allegedly taken by Prescott and Johnson constituted conspiracy, conversion, and unjust enrichment. Anderson, 483 U.S. at 639-40. Since these counts are premised on the same actions in Count I, we cannot say that Community law at the time clearly prohibited the acts complained of, and we affirm the Trial Court's decision to grant Prescott and Johnson qualified immunity for Counts III, IV, V.

Counts VI-VIII

The Trial Court engaged in a different inquiry on Counts VI, VII, and VIII. It granted summary judgment to Prescott and Johnson on these Counts, not on immunity grounds, but on the basis that there were no disputed facts in the record and each was entitled to judgment as a matter of law. This approach was consistent with Prescott and Johnson's earlier motions for summary judgement in the court below, and we will treat these issues as ripe for our consideration on appeal.

Count VI alleges that Prescott and Johnson committed fraud by making misrepresentations in or about June of 1993 to the General Council, through the Business Council, about compensation matters. Count VIII alleges that the same behavior by Prescott and Johnson constitutes negligent misrepresentation. The Trial Court concluded, and we agree, that there is no factual support in the record for these claims – there is simply no evidence that Prescott or Johnson made intentional or negligent misrepresentations to the General Council or Business Council about salaries. On appeal, the Community argues that Prescott and Johnson made misrepresentations by providing the Board of Directors with information about salaries, when what the Board really wanted was information about total compensation. Forgetting for the moment that the Community's Complaint does not allege that misrepresentations were made to the Board, we are not persuaded that this evidence is such that a reasonable jury could find for the Community on these counts. Matsushita Elec. Indus. Co, 475 U.S. at 587 (dispute of

material fact must be sufficient for a reasonable trier of fact to find for the non-moving party.) The decision of the Trial Court, therefore, is affirmed..

Count VIII claims that Johnson breached his written employment contract with the Community. The Trial Court concluded that since extensive discovery had failed to turn up any written employment agreement, and since there was no evidence of such an agreement in the record, the Community had failed to demonstrate there was an issue of material fact warranting a trial.

We begin by noting that we doubt this Court has jurisdiction to review the Trial Court's decision on Count VIII since the Community failed to appeal this part of the Trial Court's decision. The Community's Notice of Appeal individually mentions each count and subcount decided below, but does not mention a desire to appeal the Trial Court's decision on Count VIII. Failure to include an issue in a proper notice of appeal deprives this Court of jurisdiction to consider the claim. Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986) (court of appeals must satisfy itself that it has jurisdiction, even if parties concede jurisdiction); C&S Acquisitions Corp. v. Northwest Airlines, Inc., 153 F.3d 622 (8th Cir. 1998) (when notice of appeal mentions one count, but not another count, court of appeals only has jurisdiction to consider count mentioned).

We note, however, that both relevant parties have briefed this issue and no party has claimed prejudice from the omission of Count VIII from the Community's Notice of Appeal. We will therefore consider the issue as if it had been properly appealed.

We conclude that Johnson is entitled to qualified immunity on Count VIII and subcount G. None of the factual citations in the Community's brief clearly identify the existence of a written contract. Many of the cites are references to the Community's intent to enter into a contract, or the Community's intent to approve a contract, but still there is no contract. Even absent a written contract, the factual citations to the record do not specify the terms of an oral employment agreement nor do they give any indication that Johnson assented to specific terms of an oral contract, including the compensation limitations that are central to the Community's breach claim. Without solid evidence of an employment contract, a claim of breach would be impossible maintain, and without a contract, we cannot conclude that a reasonable official would have understood Johnson's

alleged actions to constitute a breach. To the extent that the Trial Court granted Johnson summary judgment on Count VII and subcount G, we affirm.

CONCLUSION

For the foregoing reasons, the Trial Court's decision in this matter is affirmed in part and reversed in part. The parties to this litigation are to bear their own costs and fees. Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994) (parties normally bear own costs and fees); Legal Services of Northern California v. Arnett, 114 F.3d 135, 141 (9th Cir. 1997) (even where statute provides attorney fees for prevailing party, prevailing defendant only awarded attorney fees if claim is frivolous, unreasonable, or groundless).

ORDER

The matter is remanded to the Trial Court solely for entry of judgment for Prescott and Johnson in accordance with this opinion.

Dated: 1/26/00

Henry M. Buffalo, Jr.
Judge

Robert A. Grey Eagle
Judge