Case No. B188413

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

SANTA YNEZ BAND OF MISSION INDIANS,

Plaintiff and Appellant,

vs.

VINCE TORRES, et al.,

Defendants, Respondents, and Cross-Appellant

APPEAL FROM THE SUPERIOR COURT FOR SANTA BARBARA COUNTY,
HON. ZEL CANTER, JUDGE, CASE NO. 1039213.

CROSS-APPELLANT'S OPENING BRIEF

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Vince Torres, Defendant
Respondent and Cross-Appellant

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I. INTRODUCTION

All references herein are to the Clerk's Transcript, designated by the initials CT followed by the page referenced.

Cross-Appellant has filed this independent Appeal seeking affirmative relief. As set out herein after an 8-week court trial, the court entered it's statement of decision which contained its basis for a judgment for monies that were owed Cross-Appellant for work performed in 1999 including materials furnished, rentals, supplies, labor and profit for the period of November and early December 1999. [CT 00617-00619]

That decision also made reference to the monies Cross-Appellant had advanced to the John Wallace and Associates Company as a retainer for and on behalf of Cross-Respondents. [CT 00616-00617] That statement of decision and the judgment based upon it contained inherent and irreconcilable findings and conclusions as hereinafter set out.

Prior to entry of judgment, Cross-Appellant moved the court to correct these inherent discrepancies by a motion for additur or alternatively for a motion for new trial pursuant to section 657 5. & 7. [CT 00622-00650] inadequate damages and error of law. Those motions were denied. [CT 00651]

Cross-Respondents appealed the judgment entered against them herein and Cross-Respondent appealed the denial of its post trial motions independently seeking additional affirmative relief or a remand on that issue to determine by limited new trial on that issue of additional damages or remand with instructions to add the requested damages, with interest, to the judgment herein or as a separate judgment.

II. APPEALABILITY

The denial of Cross-appellant's Motion to correct the statement of decision to resolve the inherent, internal and irreconcilable conflict in that decision and to add damages or alternatively grant Cross-Appellant a limited new trial is an appealable post trial order. In addition, denial of Cross-Appellant's Motion for limited new trial based on the evidence submitted at trial and the ultimate findings of the court regarding the Wallace retainer as set out in the intended decision was also appealable pursuant to sections 473, 632 and 657 of the California Code of Civil Procedure.

III. SUMMARY OF RELEVANT FACTS

Cross-Appellant entered into a series of oral contracts with cross-defendants to do several large projects on Cross-Respondent's tribal lands, including among others, installation of a large street lighting system, a storm drain system and a massive clean-up for the Sanja Cota creekbed and tribal lands, where tons of junk and trash had been illegally dumped for years. This debris included old cars, refrigerators and other appliances, car batteries, oil. [CT 00600-00611], [CT 00612-00614]

This clean-up project was undertaken because the then tribal leadership was concerned about the appearance of the reservation and the upcoming March 2000 statewide election which included Proposition 1A, an initiative to amend the State Constitution to legalize Cross-Respondents existing gambling casino to conform to federal and state law.

Cross-Appellant had a good working relationship with the tribal government from January through October of 1999. [CT 00613-00614] In October 1999 certain tribal

members sought control of the tribal chairmanship and business committee, and began making false claims about the quality of Cross-Appellant's work and implying wrong-doing on the part of the existing tribal government who contracted with Cross-Appellant and also Cross-Appellant.[1] Ultimately that new tribal faction seized control of the tribal government and wrongfully terminated the contracts with Cross-Appellant and then refused to pay him for the work Cross-Appellant had done. [CT 00614-00619]

One of the issues that arose between July1999 and November 1999 was the fact that the tribal reservation boundaries were not accurately known. This resulted in some of the creek clean-up work being done on an area of adjacent property just outside the reservation boundaries. [CT 00612-00619]

During the period from October to December 1999, the old tribal government instructed Cross-Appellant to get a thorough survey of the reservation boundaries because of problems determining the upper reservation limits and because a complaint from the County of Santa Barbara, that the creek clean-up work had extended off the reservation without a County permit. This survey and related work by Wallace & Associates was to be at the tribe's expense and Cross-Appellant retained the firm of John Wallace and Associates to do so, and advanced them the retainer they requested for this additional work, paid over three months time totaling over $131,000 with the bulk of it paid from October to the end of November 1999. [CT 00607, lines 1-18]

Within the week following the 25th of November 1999, Cross-Respondent's new tribal government effectively took over control of the tribal government and not only

[1] Cross-Defendants engaged in a pattern of conduct set out more particularly in other cases that this court decided and in which this court upheld the determination of the Superior Court in Appeals in Case B-171830 (*Torres v. Littlejohn et.al.*) and B-173553 (*Torres v. Armenta*) that they lacked jurisdiction to hear either of those cases on the merits because of the common law defense of Indian tribal immunity.

refused to pay for the work Cross-Appellant had completed, but refused ultimately to reimburse Cross-Appellant for the retainer he had advanced to Wallace and Associates on the tribe's behalf. By the end of December 1999 Cross-Respondent's new tribal chairman had ordered Cross-Appellant off of the reservation.

Cross-Respondents continued the work in progress in November and December 1999 and all the survey and other work undertaken by John Wallace & Associates continued. The Wallace Company continued to bill for their work against the retainer Cross-Appellant had paid them, charging that retainer for work up to and including work done in February 2000. They did make a partial refund of Cross-Appellant's retainer to him in the amount of $23,519.57 on 25 January 2000. [CT 00616]

In March and April 2000, Cross-Respondents then passed a tribal ordinance banning Cross-Appellant from the tribal lands, even though he still had equipment and materials on that land and he had no notice of the matter and was never allowed to appear before the tribal council or business committee. When Cross-Respondents sought to enforce that tribal ordinance by suing Cross-Appellant in federal court in Los Angeles, that lawsuit was ultimately thrown out of court on summary judgment.[2]

At no time did Cross-Respondents ever repay the approximately $108,000 balance of the retainer Cross-Appellant had advanced from his own money to John Wallace & Associates during the period from October 1999 through November 1999 for survey and other work done on Cross-Respondents lands and which was done at the instance and request of Cross-Respondents tribal government and to be done at their expense. [CT 00618, lines 1-13]

[2] See Santa Ynez Band of Mission Indians v. Torres [2002 U.S.D.C. Ca.] 262 F.Supp.2d 1038].

IV. SUMMARY OF PRIOR PROCEEDINGS

Cross-Respondents first sued Cross-Appellant in State court. The proceedings in that case are set out in the concurrent and pending Appeal of Cross-Respondents in this case and will not be repeated here. At the conclusion of the 8-week court trial of that state court action in April 2005, a statement of decision was rendered. That decision was intended to resolve all issues in the pending state court complaint and Cross-Appellant's cross-complaint therein as well as the validity of a $3,000,000 claim Cross-Respondents had filed against Cross-Appellant in the pending Bankruptcy case in December 2002, as well as Cross-Appellant's counter-claims against Cross-Respondent as a creditor claimant arising under bankruptcy law pursuant to an order of the Bankruptcy Court entered on 21 October 2004. That statement of decision was filed on 27 April 2005. In that statement of decision, the trial court found that Cross-Respondent had no legal basis to have terminated Cross-Appellant from the projects he was working on in 1999 and that Cross-Respondents were required to pay him the money due for unpaid work between October 31, 1999 and December 31, 1999, in the amount of $309,950. The court also ordered Cross-Respondents to pay interest on that sum at the legal rate since December 1999 when it was due and payable to Cross-Appellant.

Once the trial court entered its statement of decision Cross-Appellant noted that the court had made an inherently inconsistent and erroneous ruling on the retainer money paid to John Wallace & Associates. As set out herein, Cross-Appellant had advanced a retainer from his own funds to John Wallace & Associates for work to be done at the request of, and for the benefit of Cross-Respondent. Cross-Appellant then made a motion

for additur and to correct the Statement of Decision or in the alternative for a limited new trial on that issue. Those post trial motions were denied and this cross-appeal followed.

ISSUES PRESENTED ON CROSS-APPEAL

1. Should the trial court have added the sums of money advanced by Cross-Appellant to Wallace and Company, on behalf of Cross-Respondents and for work they ordered, and which deposit was for work from the end of October 1999 to February 2000. The court's statement of decision, findings of fact and conclusions of law resorted to speculation, that Cross-Appellant must have somehow billed Cross-Respondents for those monies earlier, when that would have been impossible to have done. Moreover there was absolutely no evidence that had occurred. The court's Statement of Decision on that issue is therefore inherently inconsistent with the facts at trial and other findings set out in that same statement of decision.

2. The court resorted to speculation on the issue of the Wallace retainer. A finding of fact in a statement of decision must be based on fact and upon evidence adduced at trial, not speculation and conjecture. If the court was unsure whether monies advanced by Cross-Appellant from October 1999 through November 1999 were for the benefit of Cross-Respondent or the court was unsure as to the amount of money or was unsure when it was paid (or wasn't paid), or when the work was done then the court should have granted Cross-Appellants Motion for a limited new trial on that issue as requested. It is an issue that could have been resolved, if necessary, by summary judgment because the cancelled checks evidencing the amount of payment to the Wallace Company, when it was paid and how and when they billed against that deposit for work for the benefit of Cross-Respondents, was clearly shown on the Wallace invoices.

SUMMARY OF ARGUMENTS ON CROSS-APPEAL

1. After a lengthy 8-week trial the State court concluded that Cross-Appellant was paid no monies by Cross-Respondent for anything or any work done after 1 November 1999 [CT 00618-00619] and as a result, in it's statement of decision and judgment found Cross-Respondents owed Cross-Appellant the sum of $309,950.00 for ***work done and materials furnished by him after 1 November 1999***. The trial court also found that Cross-Appellant was wrongfully fired from the projects on Cross-Respondents lands and for improper reasons. [CT 00612-00614] In addition to recovering the monies that Cross-Appellant was owed for the work done, and materials furnished from the 31st of October 1999 through November 1999 to the end of December 1999, Cross-Appellant should have received and been entitled to recover his own monies that he advanced to John Wallace & Associates for surveying and other services which were entirely for the benefit of Cross-Respondent and were undertaken at Cross-Respondent's instance and by agreement would be at their expense. The Wallace billings in evidence showed invoices billed against that cash retainer for continuing work by them from the end of October 1999 well into February 2000 and well after Cross-Appellant had been terminated. The court's Statement of Decision contains inherent, internal inconsistencies. Before the judgment was entered, Cross-Appellant moved the court to correct that inconsistency and add the Wallace retainer amount to the award made to Cross-Appellants. The court erred and/or abused its discretion in denying Cross-Appellant's motion to correct the intended decision and for the requested additur.

2. If the court were unsure of the amount of money advanced to John Wallace & Associates and paid to them by Cross-Appellant at the request of and for the benefit of

Cross-Respondent tribal government, which was undisputed fact, or if the court was unsure what that money was used for by John Wallace & Associates who billed Cross-Appellant's retainer on deposit for that work, then the trial court should have granted Cross-Appellant's alternative Motion for limited new trial. Similarly it is clear that the court resorted to speculation on the point. Cross-Appellant could not have recovered monies from Cross-Respondents before the end of October for work done after that. It was not possible not only to bill for work not yet done, but also because the retainer deposit that was requested had not even been paid to Wallace until much later and the bulk of the invoices billed against that retainer were all for work done by Wallace between the end of October 1999 and February 2000.

In relation to the total amount of the various projects (over $2,000,000) the amount advanced to Wallace & Associates in October and November 1999 was less than 5% of the total. In addition, Cross-Appellant had a good relationship with the then tribal government and had no reason to believe they would not promptly reimburse him for those monies when Wallace and Associates had completed the work and finished invoicing Cross-Appellant for all of the work done and which had been billed to Cross-Appellant's retainer deposit.

IV. DISCUSSION

A. **THE TRIAL COURT RESORTED TO SPECULATION AND CONJECTURE TO FIND, WITHOUT ANY EVIDENCE, THAT CROSS-APPELLANT MUST HAVE INCLUDED IN EARLIER BILLINGS PRIOR TO OCTOBER 1999, MONEY HE HAD NOT YET PAID OUT TO WALLACE & ASSOCIATES AS A RETAINER AND MONEY FOR WORK NOT YET DONE BY WALLACE & ASSOCIATES OR BILLED TO CROSS-APPELLANT OR CHARGED TO ANY RETAINER DEPOSIT BY THE WALLACE COMPANY.**

After a lengthy trial the trial court, the honorable Zel Canter presiding, found that none of the allegations in Cross-Respondent's state court complaint were valid and that there was no basis for their $3,000,000 claim in bankruptcy or for that matter any claim in any amount. In addition the court found that Cross-Respondents still owed Cross-Appellant $309,950 for work done and materials furnished between the end of October 1999 and December 1999. The court then proposed entering judgment on Cross-Appellant's cross-complaint (and related counterclaims arising in bankruptcy) in that amount plus interest at the legal rate from December 1999 when it should have been paid and to accrue until the judgment was paid pursuant to section 632 C.C.P.

In that Statement of Decision the court made certain specific findings with regard to the money Cross-Appellant had advanced to John Wallace & Associates at the Cross-Respondents request and for their benefit.

The testimony at trial was that at all times Cross-Appellant would do the work requested by Cross-Respondents, and incur costs for labor and materials, and then after completion submit his bills to the tribal Chairman and Business committee and when

approved, these bills or invoices would then be paid. This was the established pattern and course of dealings testified to at trial and which was undisputed.

There was no evidence adduced at trial by anyone, that the money advanced by Cross-Appellant to the Wallace Company from October through November 1999 was ever billed or invoiced to the tribe or was ever paid by the tribe at any time.

This Cross-Appeal is taken as an independent Cross-Appeal seeking affirmative relief in the form of an additur of additional damages or in the alternative for a limited new trial on the sole issue of the John Wallace & Associates retainer and Cross-Appellant's right to recover those monies advanced by him at the request of and for the benefit of Cross-Respondents.

See Life v. County of Los Angeles [App.2d Dist. 1990] 218 Cal.App.3d 1287, 1298, 267 Cal.Rptr. 557.

This appeal involves the right of Cross-Appellant to additional affirmative relief which could not be raised in his Respondent's Brief. See also California State Employees Assoc. v. State Personnel Board [App. 2d Dist. 1986] 178 Cal.App.3d 372, 382, 223 Cal.Rptr. 826.

As set out infra in the alternative to a simple additur to the existing judgment, Cross-Appellant is entitled to a new trial on the issue of the John Wallace & Associates retainer he paid out of his own money because the court erred in using conjecture and speculation in stating:

> "...However, that reasoning rings true. **It would seem** that defendant included all of his outlays for labor, materials, trucking fees, etc. in his requests for payment as the projects went along. It taxes credulity to **suppose an outlay of this magnitude would have been overlooked or delayed in processing.**"

The uncontradicted testimony at trial and EXHIBITS submitted by Cross-Appellant[3] established that the bulk of the $131,230 total retainer he paid in advance to the Wallace Company was paid between the end of October and the end of November. The cancelled and cashed checks were in evidence along with the actual Wallace invoices from October 1999 through February 2000 showing the work that was done for and on behalf of Cross-Respondents, on their land and by the Wallace Company and demonstrating that work Wallace & Associates did was done between the end of October and February 2000, and was then billed against and deducted from Cross-Appellant's retainer on deposit with the Wallace Company.

The uncontradicted pattern established by the evidence at trial, that is that Cross-Appellant always did the project and work requested, then when completed submitted a bill or invoice to the tribe for payment. Given those established facts he did not and would not have billed Cross-Respondent tribe unless and until Wallace & Associates had billed him, which they did not do until charging his retainer in November 1999 through February 2000. No invoice or billing for the Wallace Company work was ever submitted for payment to the tribe. First of all because the bulk of the retainer monies were only paid to the Wallace Company between October 1999 and November 1999. The only bill submitted and paid by the tribe during that period of time was for the casino parking lots and other clean-up work completed well before the end of October 1999 and paid for in early November.

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[3] Cross-Appellant submitted copies of his cancelled checks to Wallace & Associates from October 1999 through November 1999 as well as the detailed invoices from the Wallace Company from October 1999 through February 2000 showing the work done for the tribe and deducting for it from Cross-Appellant's deposit.

In addition it would not make any sense for Cross-Appellant to have billed Cross-Respondent tribe for work not yet done by Wallace & Associates or invoiced to him by the Wallace Company and for which he had not yet even given them the full retainer they had requested because he did not know how much they wanted until they understood what work the Cross-Respondent tribe wanted done. That did not occur until the month of October 1999 and authorized at the meeting of the Business Committee on November 2, 1999, [CT 00606-00607] and [CT 00613, lines 12-16]. As set out above Wallace & Associates did not even know how much of a retainer they needed because the extent of work the tribe wanted was as yet unknown until late October 1999 and not yet authorized until 2 November 1999. It was not until Cross-Appellant and the old tribal government explained to the Wallace Company what needed to be done and it was authorized that the Wallace Company then requested a much larger retainer[4] that they later billed against from late October 1999 to February 2000 for work they had done during that period.

Therefore, based on the court's own findings as set out in the Statement of Decision, the court should have added to Cross-Appellant's judgment the amounts of money he advanced from his own funds to the Wallace Company between October 1999 and November 1999, and which the Wallace Company then billed against for work done by them for the tribe between October 1999 and February 2000.

This court should remand this matter back to the trial court with instructions to add that amount to Cross-Appellant's judgment with legal interest from December 1999 when he should have been reimbursed for the retainer over and above the $23,519.57 that he was reimbursed on 25 January 2005. [CT 00616]

[4] The retainer paid to Wallace & Associates via several checks between October and the end of November 1999 exceeded $100,000.

B. **THE TRIAL COURT SHOULD HAVE GRANTED CROSS-APPELLANT'S MOTION FOR LIMITED NEW TRIAL SOLELY ON THE ISSUE OF THE JOHN WALLACE AND ASSOCIATES RETAINER MONIES PAID TO WALLACE & ASSOCIATES BY CROSS-APPELLANT AT THE REQUEST OF AND FOR THE BENEFIT OF THE CROSS-RESPONDENTS.**

Unquestionably the trial court was losing patience with the parties and counsel at the end of an 8-week trial that had been estimated at 1 to 2 weeks. Thankfully the trial court did not consider declaring a mistrial because of that gross underestimate. [CT 00605]

However, in rendering its statement of decision the court should not have relied upon speculation and conjecture with respect to the retainer Cross-Appellant advanced to the Wallace Company in October and November at the request of the tribe to do surveying and various other work for the benefit of the tribe, including additional road and intersection design and drainage assessment and grading. It was the old tribal government that agreed to go forward with these additional projects on 2 November 1999 [CT 00613 lines 12-16] and upon which the Wallace Company based their request for the more substantial retainer, almost all of which was paid to them by Cross-Appellant from his own funds between October and the end of November when he gave them checks totaling over $100,000 [CT 00616].

In the court's words set out supra:

> "***It would seem*** that Defendant included all his outlays for labor, materials, trucking, fees, etc. in his request for payment as the projects went along. It taxes credulity ***to suppose an outlay of this magnitude would have been overlooked or delayed in processing***." [CT 00616 line 26 to 00617 line 1]

The evidence at trial however established that since the various projects were commenced in January 1999 the practice and custom was that the tribe would suggest, contract for, and order the work from Cross-Appellant. Cross-Appellant would then do the work and submit invoices for all the work and all items involved, i.e., labor, materials, equipment, etc. Payment would then be authorized by the business committee and then Cross-Appellant would be paid. ***There was no evidence ever produced that Cross-Appellant was ever paid for work in advance*** or that he would bill the tribe in advance. Also Cross-Respondents never produced any evidence, not a single invoice or anything indicating Cross-Appellant had ever billed or invoiced Cross-Defendants for any of the retainer monies he had paid to the Wallace Company. This evidence was uncontradicted.

In addition, as set out above, the court found that Cross-Appellant was only paid in November for ***work done by him prior to November 1999*** for the clean-up projects for the tribe and for the casino operations, both done in September and early October 1999. As set out above the bulk of the retainer monies Cross-Appellant advanced to the Wallace Company at their and the tribe's request were paid or deposited with them from the end of October through November. This was a period in which the court found **no current payments** were made to Cross-Appellant, only **past due payments for completed work**.

Given those clear findings there was **NO EVIDENCE** that Cross-Appellant had ever billed the Cross-Defendants for the monies advanced to the Wallace Company or that the Cross-Respondents had ever reimbursed Cross-Appellant for those monies.

The court's remarks, set out above, amount to pure speculation and are contrary not only to the testimony at trial, but also the EXHIBITS introduced at trial.

Those EXHIBITS included the checks written to and cashed by Wallace & Associates in October and November 1999. They included the invoices showing the credits for the retainer balance, the date and type of work done by the Wallace Company for the Cross-Respondents between October 1999 and February 2000 and showing how they billed the retainer on deposit and deducted monies for those services.

There was not an iota of evidence that Cross-Appellant either obtained any money in advance for the Wallace Company work or that he billed for or was reimbursed for those charges against his retainer monies at any time between August 1999 and February 2000 (long after Cross-Appellant had been improperly thrown off the job by the new tribal government).

In light of the undisputed evidence the trial court clearly resorted to conjecture and supposition to surmise that somehow Cross-Appellant must have been reimbursed in advance of paying the requested retainer, and even before the nature and amount of the work was, as yet determined, and in fact he had not even advanced the requested retainer deposit yet, as demonstrated by his cancelled checks. He could not then have received reimbursement for those monies prior to 31 October 1999 as the court speculated. [CT 00616, line 25 to 00617, line 1]

Where a party has objected to an erroneous finding of material fact contained in a Statement of Decision, it was and is an appealable error for the trial court to deny that objection. See Jen-Mar Const. Co. v. Brown [App. 4th Dist. 1967] 247 Cal.App.2d 345, 28 Cal.Rptr. 357, Tucker v. Watkins [App. 1st Dist. 1967] 251 Cal.App.2d 327, 59

Cal.Rptr. 453 and also Bay World Trading Co. Ltd. V. Nebraska Beef, Inc. [App. 1st Dist. 2002].

It has been said even without statutory citation the trial court has inherent authority to correct its own Statement of Decision or judgment. See Ames v. Daley [App. 2d Dist. 2001] 89 Cal.App. 4th 668, 672, 107 Cal.Rptr.2d 515 or upon a motion to reconsider, Jones v. Sieve [App.2d Dist. 1988] 203 Cal.App.3d 359, 249 Cal.Rptr. 821. The standard of review for a motion for new trial is essentially a review de-novo. See Hicks v. Oceanshore Railroad Co. [1941] 18 Cal.2d 773. See also Sierra View Local Health Care Dist. v. Sierra View Medical Plaza Assoc. [App. 5th Dist. 2005] 2005 Cal.App. Lexis 181.

If the court refused to correct its intended decision and judgment with regard to the Wallace retainer monies, the court should not have made a finding based on speculation and conjecture on how the money could have been part of an earlier billing when there was no evidence of that fact and Cross-Respondents produced none in response to Cross-Appellant's Motion for a partial new trial on that issue. Cross-Appellant was therefore entitled to a new trial pursuant to Code of Civil Procedure section 657 subsections 5. and 7.

CONCLUSION

The trial court erred or abused its discretion in not adding to its Statement of Decision and the judgment based thereon the unreimbursed $108,000 paid and advanced by Cross-Appellant at the direction of the Cross-Respondent tribe for work done for them to be at their expense. Cross-Appellant could not have been reimbursed for that retainer deposit because that was not his practice to bill for work in advance, he had not advanced the retainer deposit money until much later. In addition the extent of the work to be done and hence the amount ascertained to be needed by Wallace & Company as a retainer was not known until October and not authorized until 2 November 1999 and lastly the work was only done by them and billed against that retainer deposit from October 1999 to February 2000. This would be inconsistent with the court's finding that the only monies paid to Cross-Appellant after 31 October 1999 were payments made by the tribe and the casino for work done and completed by Cross-Appellant in September and October and could not have included either the advance retainer deposits or could not have included work not yet done by Wallace & Associates until the work was done during the period from October 1999 to February 2000.

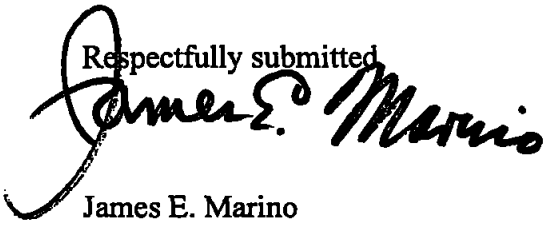
Besides the inherent internal contradiction in the court's Statement of Decision incorporated into the judgment without change the court should have granted Cross-Appellant's alternative Motion for limited new trial on the Wallace retainer issue pursuant to 657 C.C.P. 5. & 7. supra.

Rather than deny Cross-Appellant the $108,000 balance of his monies he had advanced to Wallace Company for the benefit of the tribe and at their instance, with the agreement they would reimburse him. The court's decision was clearly based on

unjustified speculation and conjecture, and the court should have retried that issue. There was NO EVIDENCE either that Cross-Appellant had billed Cross-Respondents for the retainer deposit or that he ever received a reimbursement of any of it other than the refund of $23,230.57 on 25 January 2000. In fact, Wallace & Associates had billed for their work done for these tribal Cross-Respondents by invoicing and deducting the majority of the sums due them between October 1999 and February 2000 when Cross-Appellant had already been improperly fired from the various projects as the trial court found, and the Cross-Respondents had then refused to pay him for the work done by him between the end of October 1999 and the end of December 1999 for the work that was in progress during that time.

A new trial would have conclusively established, probably by summary judgment, that Cross-Appellant had never billed for the retainer advanced and had never been reimbursed for it with the exception of the January 25, 2000 refund from the Wallace Company and was entitled to be repaid his monies advanced as a retainer by agreement with the former tribal government, who were to reimburse Cross-Appellant.

Respectfully submitted,



James E. Marino

CERTIFICATION OF WORD LIMITATION

Case No. Court of Appeals No. **B188413**

I, JAMES E. MARINO, CERTIFY THAT:

Cross-Appellant's Brief (Defendant/Respondent) is 19 pages long and contains 5,133 words.

I declare under Penalty of Perjury the foregoing is true and correct. Executed this 1st day of June, 2007.

James E. Marino
Attorney for Cross-Appellant

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal Rules of Court, Rule 8.208)

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, rule 8.208(d)(3)).

Dated: 1 June 2007

James E. Marino
Counsel for Respondent
Vince Torres

PROOF OF SERVICE

I am, and was at the time of the service hereinafter mentioned, over 18 years of age and not a party to the above-entitled action. My business address is 1026 Camino del Rio, Santa Barbara, California 93110. I am employed in the County of Santa Barbara.

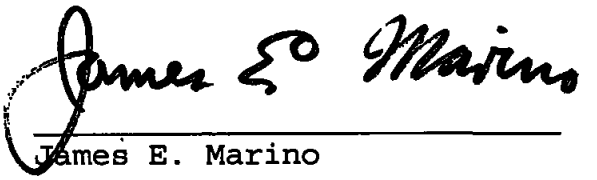
On 1 June 2007, I served the within CROSS-APPELLANT'S OPENING BRIEF and supporting documents, on the following, by placing a true copy in the United States Mail, postage prepaid and addressed as follows:

Fred J. Hiestand Esq.
1121 L Street, Suite 404
Sacramento, CA 95814

The Hon. Zel Canter
Superior Court of Santa Barbara County
Santa Maria - Cook Division
312 E. Cook St.
Santa Maria, CA 93456-5369

California Supreme Court (4 copies)
350 McCallister St.
San Francisco, CA 94102

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on 1 June 2007.



James E. Marino