Case No. **B188413**

Oct 16, 2007

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION SIX

Case No. B188413

SANTA YNEZ BAND OF MISSION INDIANS,

Plaintiff, Appellant and Cross-Respondent,

vs.

VINCE TORRES, et al.,

Defendants, Respondents and Cross-Appellants.

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

COMBINED APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Respondent doesn't much like the notion of tribal sovereign immunity, which he refers to as "an outdated anachronism" and the "so-called sovereign immunity doctrine."[1] Neither, as his brief reveals, does he understand it, which accounts for his argument that this Court treat the doctrine the way he feels about it: a niggling and archaic defense that should be eviscerated or avoided through the device of "waiver," "untimely collateral attack" or "abstention."

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[1] Respondent's Brief, p. 8 (RB). Respondent incorrectly attributes the phrase "outdated anachronism" to the Court's opinion in *Kiowa Tribe v. Manufacturing Technologies, Inc.* (1988) 523 U.S. 751, but the opinion never uses that phrase or describes tribal sovereign immunity as either "outdated" or an "anachronism." At one point *Kiowa* references a dissent by Justice Stevens in another case, *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe* (1991) 498 U.S. 505, in which he opined the doctrine may be "founded upon an anachronistic fiction" and suggested it might not extend to off-reservation commercial activity, though the Court in that opinion allowed the doctrine to bar a cross-complaint against an Indian tribe.

Respondent's arguments, however, find no support in law or reason. The Santa Ynez Tribe, by filing a "proof of claim" in federal bankruptcy court based on its pending state court breach-of-contract suit against respondent, did not waive its immunity to respondent's cross-complaint. Santa Ynez, by filing its contract claim in state court and later "proof of claim" in bankruptcy court, waived its sovereign immunity defense *only* as to the determination of that claim – *i.e.*, whether appellant could collect anything against respondent and, if so, how much – not its immunity to respondent's counterclaim.

This is the lesson of, and the difference between, *White v. Confederated Tribes of the Colville Reservation Tribal Credit*,[2] on the one hand, and on the other, *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*[3] and *United States v. United States Fidelity & Guaranty Co.*[4] The Tribe did not waive its immunity to respondent's *counterclaim*[5] by the mere act of filing a "proof of claim" in bankruptcy court against respondent's attempted discharge of its obligation to the Tribe. Neither does the Bankruptcy Act expressly waive the Tribe's immunity against respondent's cross-complaint. Though federal courts divide on this very question, the better reasoned opinions support

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[2] (9th Cir. 1998) 139 F.3d 1268 (*White*) (holding tribal credit association did not have sovereign immunity in appellee debtor's bankruptcy proceeding because it had made an affirmative act to collect a particular debt when it objected to appellee's reorganization plan).

[3] *Supra*, 498 U.S. 505 (*Potawatomi*).

[4] (1940) 309 U.S. 506 (*U.S. Fidelity & Guaranty Co.*) (holding with *Potawatomi* that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe).

[5] Appellant uses the terms "cross-complaint" and "counterclaim" interchangeably because there is no legal difference between them with respect to tribal sovereign immunity.

appellant. Thus, this Court is free to embrace the better reasoned and more sensibly based public policy opinions and rule that the Tribe, while it waives its immunity insofar as it may have its claim against respondent ultimately denied (which occurred here) retains its immunity as to counterclaims (which did not occur here).

The issue of the Tribe's immunity to respondent's cross-complaint was properly preserved for appeal and is within the Court's jurisdiction. The Court should address it and recognize the immunity defense as abstention is inappropriate.

LEGAL DISCUSSION

I. THE TRIBE DID NOT WAIVE ITS IMMUNITY DEFENSE TO RESPONDENT'S CROSS-COMPLAINT BY SUING HIM IN STATE COURT OR BY FILING A "PROOF OF CLAIM" IN BANKRUPTCY COURT WHEN RESPONDENT SOUGHT TO DISCHARGE THE TRIBE'S STATE COURT CLAIM.

A. Controlling Law Distinguishes Between a Tribe's Waiver of Immunity with Respect to Determination of a Claim it is Prosecuting and the Immunity it Retains Against a Corresponding Counterclaim, the Latter of which Cannot be Implicitly Waived.

Twice in the past sixty-some-odd years the U. S. Supreme Court has made clear that a tribe seeking to judicially prosecute a claim against a defendant does *not* waive its immunity to a counterclaim. Most recently, *Potawatomi*[6] considered this issue when a tribe brought suit against the State of Oklahoma to enjoin it from collecting an assessed state tax on the tribe for the sale of cigarettes on its reservation. Oklahoma counterclaimed to enforce the assessment and to enjoin the Potawatomi Tribe from making future sales without collecting and remitting state taxes. The federal district court allowed, against the Tribe's objection, the State's counterclaim respecting future

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[6] *Supra,* 498 U.S. 505.

sales, but the Court of Appeals (10th Circuit) reversed, holding, *inter alia,* that the lower court erred in entertaining Oklahoma's counterclaim because the Tribe enjoys absolute sovereign immunity from suit and had not waived that immunity by filing its action against the state.

The Supreme Court agreed with the Court of Appeals, stating "the Tribe did not waive its sovereign immunity merely by filing an action for injunctive relief." (*Id.* at 510.) In support of its conclusion, the Court cited to and quoted from *United States Fidelity & Guaranty Co.*[7] In that case, a surety bondholder claimed that a federal court had jurisdiction to hear its state-law counterclaim against an Indian Tribe because the Tribe's initial action to enforce the bond constituted a waiver of sovereign immunity. Viewing that waiver contention as "identical" to the one raised in *Potawatomi*, the Court explained:

> We held that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. "Possessing . . . immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits."[8]

Respondent does not cite or discuss *Potowatami* or *United States Fidelity & Guaranty Co.*, perhaps because, as he mistakenly contends, they and "most" other cases cited by appellant in its opening brief "have no application to . . . this case."[9] But that assertion is belied by the very authorities upon which appellant relies, opinions which

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[7] *Supra*, 309 U.S. 506.

[8] *Id.* at 509; citations omitted.

[9] RB 9.

present facts similar to this case and lend themselves admirably to "reasoning by example,"[10] the essence of *stare decisis*. Instead respondent relies mainly upon four cases, none of which, properly read, repel or distinguish the authorities and reasoning advanced by appellant for why it did not waive its tribal immunity to respondent's cross-complaint.

Gardner v. New Jersey[11] and *White*,[12] for example, which respondent contends support his argument that appellant waived its immunity defense by filing a "proof of claim" against him in bankruptcy court, both stand for the more limited proposition that one filing a "proof of claim" in bankruptcy waives any defense he may have with respect to the determination of *that* claim, a point appellant does not contest. Neither *Gardner* nor *White* mention or discuss cross-complaints or counterclaims asserted by the debtor against the creditor, however, which is the gravamen of appellant's grievance. Cases are not authority for propositions neither raised nor discussed; and since immunity as to respondent's counterclaim is the question presented here, *Gardner* and *White* are of no help to him.[13]

Respondent's confusion over when and how tribal immunity can be waived is shown by his misguided assertion that appellant's "filing of a creditor's claim in respondent's bankruptcy action is *conduct* evidencing a waiver of the immunity

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[10] Edward H. Levi, *AN INTRODUCTION TO LEGAL REASONING* 5 (1949).

[11] (1947) 329 U.S. 565.

[12] *Supra*, 139 F.3d at 1271.

[13] In the Appellant's Opening Brief (AOB) additional reasons are given for why *White* is not persuasive on the issue of whether a tribe waives its immunity to a debtor's counterclaims by filing a "proof of claim" in bankruptcy. See AOB 22-26.

otherwise enjoyed by an Indian tribe."[14] To be sure, under California law "waiver must be either express, based on the words of the waiving party, or *implied*, based on conduct indicating an intent to relinquish the right; "[15] but it is indisputable that "waivers of tribal sovereign immunity *may not be implied.*"[16] The conduct of filing a pleading in court cannot, then, contrary to what respondent argues, be considered a waiver of tribal immunity because it would be waiver by implication, and not express as the law requires. *Potowatami* and *U.S. Fidelity & Guaranty Co.* demonstrate that the mere filing of a "proof of claim" in bankruptcy by a tribe does not suffice to "waive" its immunity to a counterclaim. "Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation;"[17] and there is a strong presumption against waiver of tribal sovereign immunity.[18]

When, as here, appellant Tribe asserts its sovereign immunity continuously – from the inception of respondent's assertion of his cross-complaint in state court against the tribe,[19] to transfer of the case to bankruptcy court[20] and then back again

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[14] RB 15; emphasis original.

[15] *Waller v. Truck Ins. Exch.* (1995) 11 Cal.4th 1, 31.

[16] *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58 (explaining that a waiver of immunity "must be unequivocally expressed")(emphasis added).

[17] *Potawatomi, supra,* 498 U.S. at 509 (1991).

[18] *Pan Am. Co. v. Sycuan Band of Mission Indians* (9th Cir.1989) 884 F.2d 416, 419.

[19] C.T. I:35, 38-42; 72:6-8.

[20] C.T. II:303.

to state court[21] – it cannot be credibly contended that the Tribe implicitly waived its immunity to that claim. Indeed, the record is uncontradicted that appellant expressly and rhythmically asserted its immunity to respondent's cross-complaint at every stage of the proceedings, never implicitly waiving it.

B. Congress Did Not Expressly Abrogate Tribal Sovereign Immunity in Sections 101 and 106 of the Bankruptcy Act.

Respondent's two remaining authorities for his contention that appellant has no immunity to his cross-complaint are *Hoffman v. Connecticut Dept. of Income Maintenance*[22] and *Krystal Energy.*[23] Both deal with the scope of abrogation for creditors' immunity to counterclaims in bankruptcy proceedings. *Hoffman*, however, concerns the immunity of *states*, not *tribes*; and was, as appellant previously pointed out, one of the reasons Congress amended §§ 101 and 106 of the Bankruptcy Act to make clear that creditor *states* filing "proofs of claim" did not have immunity as to counterclaims.[24] While frequent reference to the previous immunity of states and the federal government is made in the legislative history of §§ 101 and 106 explaining the phrase "governmental unit" and making clear that it applies to the "United States . . . [and] a State," "Indian tribes" are nowhere mentioned. Congress knows well enough how to abrogate the immunity of tribes when it wishes to do so[25]; that it did not

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[21] C.T. I:240.

[22] (1989) 492 U.S. 96.

[23] *Krystal Energy Co. v. Navajo Nation* (9th Cir.2004) 357 F.3d 1055.

[24] AOB 18-20.

[25] When statutes have defined a "governmental unit" or "governmental entity," Indian tribes have often not been included in the definitions. See, e.g., 7 U.S.C. § 1997(a) (2000) (continued...)

expressly mention tribes in §§ 101 and 106 or in the legislative history accompanying those sections is a strong indication that it did not intend to abrogate a tribe's immunity from counterclaims. "[I]t is inferred from *legislative silence* that Congress did not intend to abrogate such immunities."[26]

That Congress has sound historical and constitutional reasons for treating states differently from Indian tribes in bankruptcy proceedings when it comes to waiving their respective immunities as to cross-complaints is underscored by *Cental Virginia Community College v. Katz*.[27] That opinion informs us that States, in contrast to tribes, were participants in the Constitutional Convention and approved adoption of the Bankruptcy Clause, a provision which "reflects the States' acquiescence in a grant of congressional power to subordinate to the pressing goal of harmonizing bankruptcy law sovereign immunity defenses that might have been asserted in bankruptcy proceedings."[28] Tribes, however, "were not at the Constitutional Convention,"[29] and therefore not part of the bargain to waive their immunity from counterclaims in bankruptcy proceedings. Any abrogation of tribal immunity by Congress, then, should be express and specific; general or ambiguous phrases that might arguably abrogate tribal immunity should, if the federal government's fiduciary obligation to

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[25](...continued)
(providing a definition for the term "governmental entity" that does not include Indian tribes). But see 28 U.S.C. § 3701 (2000) (providing a definition for the term "governmental entity" that includes Indian tribes).

[26] *Wyatt v. Cole* (1992) 504 U.S. 158, 164 (emphasis added).

[27] (2006) 546 U.S. 356.

[28] *Id.* at 362.

[29] *Kiowa Tribe v. Manufacturing Technologies, Inc., supra*, 523 U.S. at 755-56.

protect tribal sovereignty means anything, be rejected.

That leaves respondent with his last remaining authority, *Krystal Energy*,[30] an opinion he believes controlling without bothering to answer any of appellant's reasons as to why it is not. Let us again (briefly) count the ways.

- *Krystal Energy* did not cite or discuss *U.S. Fidelity & Guaranty Co.* and, while it did cite *Potawatomi* for a general and uncontestable proposition, it failed to discuss either opinion's holding that a tribe asserting a claim does not waive its immunity against a corresponding counterclaim. No case can stand as authority for arguments it did not consider[31] and, since these arguments are central to appellant's position, *Krystal Energy* cannot be considered to refute them.

- *Krystal Energy* neither mentions nor discusses the "trust relationship" between Congress and tribes, and the obligation that imposes on courts to protect tribes from assaults on their sovereignty, especially attacks on tribal immunity.

- *Krystal Energy* does not mention or apply the "canon of sympathetic construction"[32] to sections 101 and 106 of the Bankruptcy Act. "The basic Indian law canons of construction require that . . . statutes . . . be liberally construed in favor of the Indians; and all ambiguities . . . resolved in favor of the Indians."[33]

Despite these reasons why the Court should find that *Krystal Energy* does not control this case, respondent still clings to what he understands is its holding and

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[30] *Supra*, 357 F.3d 1055.

[31] "The opinion of an appellate court is not authority for every statement it contains, but only for those points raised and decided." *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.

[32] William C. Canby, Jr., *AMERICAN INDIAN LAW IN A NUTSHELL* 116 (4th ed. 2004).

[33] *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* § 2.02[1], p. 119 (2005 ed.).

warns the Court not to "substitute its judgment" in place of *Krystal Energy.*[34] But when, as here, clear conflicts exist between federal courts on the key issue – i.e., whether §§ 101 and 106 of the Bankruptcy Act abrogate tribal immunity as to a debtor's cross-complaint against the tribe[35] – this Court is free to interpret the law *de novo* in accordance with the most persuasive opinions and sound public policy.

> Where lower federal court precedents are divided or lacking, state courts must necessarily make an independent determination of federal law. Where the federal circuits are in conflict, the authority of the Ninth Circuit (which decides appeals from the federal courts in California) is entitled to no greater weight than decisions from other circuits. [W]here there is more than one appellate court decision, and such appellate decisions are in conflict the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions.[36]

The best reasoned opinions on the issue lead to the conclusion that appellant Tribe did not waive, nor did Congress in enacting sections 101 and 106 to the Bankruptcy Act, abrogate tribal immunity against cross-complaints by debtors when, as here, a tribe files a "proof of claim."

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[34] RB 19.

[35] Compare *In re National Cattle Congress* (Bankr. N.D. Iowa 2000) 247 B.R. 259 and *In re Mayes* (B.A.P. 10th Cir. 2003) 294 B.R. 145 with *In re Russell* (Bankr. D. Ariz. 2003) 293 B.R. 34, 40 and *In re Vianese* (Bankr. N.D.N.Y. 1995) 195 B.R. 572, 576. "The U.S. Supreme Court has not yet decided whether these sections [101 and 106 of the Bankruptcy Act] abrogate tribal sovereign immunity, and lower courts addressing the issue have reached varying conclusions." Gregory W. Dalton, *A Failure of Expression: How the Provisions of the U.S. Bankruptcy Code Fail to Abrogate Tribal Sovereign Immunity* (2006) 81 *WASH. L. REV.* 645, 646.

[36] *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 879, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456 and other authorities.

II. THE TRIBE'S IMMUNITY DEFENSE TO RESPONDENT'S CROSS-COMPLAINT IS PROPERLY AND TIMELY RAISED AND SHOULD BE DECIDED BY THE COURT.

Respondent urges this Court to avoid the issue of the Tribe's immunity to his cross-complaint and argues that either "abstention"[37] or the Tribe's failure to timely seek writ review or appeal should foreclose consideration of that defense now.[38] This is a bizarre contention given that respondent admits that "tribal sovereign immunity" is "a jurisdictional issue."[39] Both federal and state court opinions make clear that tribal sovereign immunity is, indeed, a jurisdictional issue and, as such, may be raised *at any time* in the proceedings, including for the first time on appeal. "[T]he defense of sovereign immunity from suit presents a jurisdictional question . . ."[40] "[G]overnmental immunity is a jurisdictional bar to a claim for money damages against a public entity. . ."[41] "[G]overnmental tort immunity . . . is a jurisdictional issue that may be raised at any time, even for the first time on appeal."[42]

Since a tribe's immunity defense may be raised at any time in the proceedings, including for the first time on appeal, it is difficult to imagine how the Tribe could have waived its immunity by failing to take an earlier appeal or writ. Indeed, both in

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[37] Appellant explained why abstention is inappropriate in its earlier filed Opposition to Respondent's Motion to Dismiss Appeal or To Abstain From Jurisdiction.

[38] RB 17-19.

[39] *Id.* at 5.

[40] *People v. Superior Court* (1947) 29 Cal.2d 754, 756.

[41] *Gates v. Superior Court* (1995) 32 Cal.App.4th 481, 509.

[42] *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1795.

state court and the brief instance this case was before the bankruptcy court, appellant persistently raised its immunity defense to the cross-complaint. The Tribe did not, contrary to what the trial court stated, at any time "waive" its sovereign immunity.[43]

This is not to deny that appellant might have taken a writ when tentative, ambiguous decisions about appellant's immunity defense to the cross-complaint were indicated; but appellant's choice to wait until the conclusion of the case in the hope that the state court would ultimately rule in its favor, cannot in law or fairness be deemed to preclude appellant from raising the defense in this appeal. When the lower court declined to quash service on the summons for respondent's cross-complaint, for example, the Tribe may have sought discretionary writ relief; but its decision to instead await a final judgment does not foreclose raising the issue on appeal.[44]

Neither did the bankruptcy court, by referring this case to state court for "complete resolution," preclude that court from considering the defense. In fact, when appellant moved the bankruptcy court to clarify its order of relief from stay with respect to the immunity defense against respondent's cross-complaint, the court stated:

> [T]he determination of waiver of sovereign immunity by the [Tribe] pursuant to 11 U.S.C. § 106 is not a matter of exclusive Bankruptcy Court jurisdiction, and may be determined by the state court to whom the claim . . . was sent for complete resolution . . ..[45]

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[43] C.T. II:555, 11-18.

[44] An order denying appellant's motion to quash is not appealable until the final judgment. Code of Civ. Proc. § 418.10 (c).

[45] Order Denying Motion for Clarification of Prior Order Lifting Stay, U.S. (continued...)

Now it may be that the trial court misread or misunderstood the bankruptcy court's order lifting the "stay" and referring the case to it for resolution of all claims as somehow deciding the issue against the Tribe. But to allow judicial "buck-passing" or confusion between the bankruptcy court and state court on the propriety of the Tribe's immunity to deprive appellant of the opportunity to have this Court review the viability of that defense, flies in the face of well-settled authority. Waiver of tribal sovereignty, if it is to be attributed to the Tribe, must be knowing and voluntary, not achieved through slight-of-hand or ambiguous rulings.

CONCLUSION

For all these reasons, and others advanced in the Tribe's opening brief, the judgment against Santa Ynez in favor of Torres's cross-complaint should be reversed because the Tribe has not waived its immunity and the Bankruptcy Act does not abrogate it.

Dated: October 16, 2007

Respectfully submitted,

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[45](...continued)
Bankruptcy Court, Central Dist., N. Div., Case No. ND 02-12791 RR, filed March 23, 2005, p. 1-2. See Appellant's Request of this Court to Take Judicial Notice of this Order. 28 U.S.C. § 1334(c) recognizes the permissive and mandatory abstention doctrines which provide that the district court has non-exclusive jurisdiction (i.e., concurrent jurisdiction) over all civil proceedings arising under title 11 or arising in or related to cases under title 11. The effect of the abstention doctrine under § 1334(c) allows the district court (usually the bankruptcy court) to defer to state courts certain proceedings arising under the Code or arising in or related to cases under the Code (i.e., lawsuits that involve strictly state law and state law issues).

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CROSS-RESPONDENT'S BRIEF

INTRODUCTION

Vince Torres claims he is entitled to more money than the court awarded him on his cross-complaint against the Santa Ynez Band of Mission Indians.[46] Specifically, though the trial court awarded Torres $309,950 on top of the $2 million he had been paid for clean-up and construction work he did pursuant to oral contracts with the Tribe, it disallowed "approximately $108,000"[47] he claimed to have "advanced" to a sub-contractor, John Wallace & Associates, from retainers he was paid by the Tribe.

The trial court denied these additional damages because, after hearing Torres's

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[46] Appellant and cross-respondent, also referred to herein as "Tribe" or "Santa Ynez."

[47] Cross-Appellant's Opening Brief, p. 4. (XAOB).

testimony and other evidence on this point, it concluded that Torres did "not carry his burden of proof on this item."[48]

Torres contends in his cross-appeal that the trial court erred in basing it's denial of these damages on "conjecture" and "speculation," and that it erred by not granting his motion for a limited new trial on his entitlement to these additional damages.

STATEMENT OF FACTS

In January 1999 the Santa Ynez Band of Mission Indians, a federally recognized Indian tribe, and Vince Torres entered into an oral contract for Torres to design and install a residential street-light system on the Tribe's reservation. Later amendments to that contract, or additional oral contracts between the parties, authorized Torres to undertake more work, including clean-up of a creek bed, installation of a storm-drain system on a reservation road, construction of a bus parking lot and grading of an area within the northern portion of the Tribe's reservation.[49] During the course of 1999, the Tribe paid Torres close to $1,900,000 for this work.[50]

By 2000 the Tribe became dissatisfied with what it felt was the poor quality of Torres's work and filed suit against him in the Superior Court seeking damages for breach of contract, negligent performance of the contract and fraud.[51] Torres

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[48] Statement of Decision, April 27, 2005, p. 13:5-6; C.T. III 617.

[49] C.T. I: 121-122.

[50] C.T. II: 558.

[51] C.T. I: 119.

answered and filed a cross-complaint against the Tribe for equitable recoupment and breach of contract.

After more than a month-long trial, the court found against the Tribe on its claims and in favor of Torres, and on Torres's cross-complaint found the Tribe liable to him for $309,950.[52] In its 15-page Statement of Decision, the court refused, however, to award respondent the $107,710.43 he claimed due him by the Tribe because he "advanced" that amount to a subcontractor for services performed. The court simply did not believe Torres on this item of alleged damage. "Mr. Torres's own testimony of his . . . billing practices with the Tribe supports a conclusion that [he] would have included these amounts as part of his 'periodic claims for payment' from the Tribe."[53] The court further found that "[i]t taxes credulity to suppose an outlay of this magnitude would have been overlooked or delayed in processing [by Mr. Torres]. . . Defendant does not carry his burden of proof on this item."[54]

STATEMENT OF THE CASE

In a twice amended complaint, the Tribe charged Torres with breaching and negligently performing the contract it had with him for construction and clean-up work on its reservation and for fraud.[55]

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[52] C.T. III: 605.

[53] *Id.* at 616.

[54] *Id.* at 617.

[55] C.T. I: 119.

Torres answered with a general denial and cross-complained against the Tribe for breach of contract and equitable recoupment, as well as common counts.[56] The Tribe answered the cross-complaint[57] by asserting the defense of sovereign immunity and moved to quash service of process on the cross-complaint on that same ground.[58] The Court declined to quash the summons, but indicated during oral argument that it was inclined to agree that sovereign immunity was a viable defense to Torres's cross-complaint.[59]

Torres then filed for bankruptcy, which automatically stayed all creditor actions including the Tribe's state court lawsuit against him.[60] The Tribe responded by filing a "proof of claim" for $3 million with the bankruptcy court, which (unless the "creditor" is immune) subjects the creditor to the jurisdiction of the bankruptcy court for the determination of any counterclaim.[61] Thereafter, the Tribe asked the bankruptcy court to lift the stay and permit it to determine its claims against Torres in state court, which the court granted, stating that the "debtor may pursue any cross-

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[56] *Id.* at I: 28, 206.

[57] *Id.* at I: 70, 72:6-8.

[58] C.T. I:35, 38-42.

[59] R.T. 33:2-6.

[60] C.T. I: 216-218; 11 U.S.C. § 362.

[61] *In re PNP Holdings Corp.* (9th Cir. BAP 1995) 184 BR 805, 807.

complaint arising our of the State Court action . . .."[62]

Torres next moved in Superior Court for an order clarifying his right to affirmative relief based on his cross-complaint and notwithstanding the Tribe's sovereign immunity,[63] which the Tribe opposed. At the hearing on this motion, the court stated: "[W]e are going to hear the Torres claim as if there has been a waiver of sovereign immunity and the Bankruptcy Court has allowed the claim to be litigated in State Court."[64] In making this ruling, the court invited the Tribe, if it didn't agree, to "hop down to Bankruptcy Court and get a stay order . . . or clarify the bankruptcy order."[65]

Santa Ynez then moved the Bankruptcy Court to clarify its order for relief from stay with respect to its sovereign immunity as to Torres's cross-complaint; and on March 23, 2005 the court ruled on that motion, stating: "The determination of waiver of sovereign immunity by the [Tribe] . . . is not a matter of exclusive Bankruptcy Court jurisdiction, and may be determined by the state court to whom the claim for the [Tribe] and the cross-complaint of debtor Torres was sent for complete resolution . . .."[66]

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[62] C.T. II: 303.

[63] C.T. I: 239-240.

[64] R.T. 40:7-17.

[65] *Id.*

[66] Order, *ante*, fn. 45.

After trial, the Tribe objected to the proposed Statement of Decision on the ground that "it did not address the legal authority for the court's . . . abrogati[on of] the Tribe's sovereign immunity;"[67] and Torres moved for a limited new trial or an amendment or modification of the decision to allow him more than $107,000 in additional damages.[68]

The court denied both parties' motions, stating, with respect to the Tribe's sovereign immunity defense, that the court did "address it" when it "denied the [Tribe's] motion to quash the subpoenas on the grounds that the tribe was immune;"[69]and, as to Torres's motion, "that it just stretches credulity to think that these things weren't billed properly."[70]

Notice of entry of judgment was filed on November 16, 2005. Notice of appeal was filed on January 9, 2006;[71] and notice of the cross-appeal filed on February 1, 2006.[72]

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[67] C.T. III: 621.

[68] C.T. III: 631.

[69] R.T. 65:13-15,

[70] *Id.* at 62:14-18.

[71] C.T. III: 675.

[72] *Id.* at 684.

STANDARD OF REVIEW

Torres omitted in his cross-appellant's opening brief any statement respecting the applicable standard of review. Since he seeks reversal of the lower court's refusal to modify its order or grant a new trial so that he can obtain additional damages, this Court must review his new trial motion under the "abuse of discretion" standard;[73] and his claim that the court erred in its damage determination under the "substantial evidence" standard.[74] When, as here, the trial court renders a statement of decision, "any conflict in the evidence or of reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision."[75] (The Tribe's contention that Torres is entitled to nothing from his cross-complaint against it because of its sovereign immunity, a subject addressed in its opening and reply briefs, is, of course, a pure question of law for which *de novo* review applies.[76])

LEGAL DISCUSSION

I. THE TRIAL COURT CORRECTLY REFUSED TO GRANT A NEW TRIAL ON THE ISSUE OF WHETHER CROSS-APPELLANT IS ENTITLED TO ADDITIONAL DAMAGES.

Torres bears a heavy burden in seeking appellate reversal of the trial court's refusal to grant his motion for a new trial on damages. After all, the trier-of-fact

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[73] *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859.

[74] *Marriage of Mix* (1975) 14 Cal.3d 604, 614.

[75] *Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.

[76] *Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1354; *Demontiney v. United States* (9th Cir. 2001) 255 F.3d 801, 805.

weighed the evidence, including Torres's testimony, on this particular aspect of damages and found it not to be credible. "Defendant [Torres] does not carry his burden of proof on this item."[77]

Trial courts have broad discretion in granting or denying a motion for new trial. This is because

> The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict.[78]

Torres claims that he is entitled to a new trial because the "court erred in using conjecture and speculation" in denying him recompense for this item of damages. But the court did not engage in "conjecture and speculation;" to the contrary, it found that the Tribe's explanation "rings true" that Torres's "own testimony of his supposed billing practices . . . supports a conclusion" contrary to what Torres claimed.[79] This weighing of the credibility of a witness is peculiarly within the province of the trier-of-fact, and not to be reversed based on the denial of a motion for new trial unless the cross-appellant can demonstrate that the court abused its discretion.

Under the "abuse of discretion" standard of review, trial court rulings will not be disturbed unless the aggrieved party can demonstrate "a clear case of abuse" and

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[77] Statement of Decision, C.T. III: 617:5-6.

[78] *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 412.

[79] Statement of Decision, C.T. III: 616:23-28.

"a miscarriage of justice."[80] The abuse of discretion standard is not met by merely arguing, as Torres does in his cross-appeal, that a different ruling would have been "better." Discretion is "abused" only when, in its exercise, the trial court "exceed[s] the bounds of reason, all of the circumstances before it being considered."[81] When, as here, "two or more inferences can reasonably be deduced from the facts" – *i.e.*, whether Torres's own testimony about his billing practices with the Tribe support his claim that he advanced over $100,000 to a subcontractor for which he inadvertently failed to bill the Tribe – "the reviewing court has no authority to substitute its decision for that of the trial court."[82] "[T]he showing on appeal is wholly insufficient if it presents a state of facts . . . which . . . merely affords an opportunity for a difference of opinion."[83]

The trial court's decision was a reasonable exercise of its discretion. Torres cannot overcome the "abuse of discretion" standard to warrant reversal of the court's denial of his motion for a new trial.

II. THE COURT'S DECISION TO DENY CROSS-APPELLANT ADDITIONAL DAMAGES IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Torres's cross-appeal makes a number of assertions about what the evidence allegedly shows and fails to show about the approximately $108,000 item of damages he claims but was denied after trial. These assertions range from "the uncontradicted

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[80] *Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.

[81] *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.

[82] *Walker v. Superior Court* (1991) 53 Cal.257, 272.

[83] *Marriage of Varner* (1997) 55 Cal.App.4th 128, 138.

pattern established by the evidence" to "there was no evidence ever produced" and "no evidence that [Torres] ever billed [the Tribe]."[84] The problem with his assertions are that they are just that: assertions without any reference to the record showing support for them. Torres, in other words, fails to overcome the presumption of correctness that attends the court's judgment; and his failure to provide an adequate record on the issue he raises requires that it be resolved against him. "If the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed."[85]

Torres also fails to present argument and legal authority on each point raised. Instead, what his brief contains is nothing more than bare assertions that the judgment, or part of it, is erroneous. He leaves it to this Court to figure out *why* in the context of applicable (but missing) authority; however, it is not this Court's role to construct theories or arguments that undermine the judgment and defeat the presumption of correctness. When, as here, appellant asserts a point but fails to support it with citations to authority, the Court may treat it as waived and pass it without consideration.[86]

The gist of Torres's cross-appeal is that the Court erred by making evidentiary findings based on "speculation" and "conjecture;" in other words, there was no substantial evidence to support the court's Statement of Decision. To satisfy the "substantial evidence" standard, however, Torres must reference evidence to support

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[84] XAOB, pp. 12, 15.

[85] *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Gee v. American Realty & Const., Inc.* (2002) 99 Cal.App.4th 1412, 1416.

[86] *People v. Stanley* (1995) 10 Cal.4th 764, 793.

his position that is "reasonable . . . credible, and of solid value . . ."[87] Any reference to such evidence is wholly lacking in cross-appellant's opening brief.

Moreover, a major reason underlying the substantial evidence rule shows the difficulty Torres has in satisfying it here: It is felt appellate courts should defer to the trial judge's or jury's resolution of fact issues because they alone (judge or jury) have had the benefit of observing the demeanor of witnesses and are therefore in a better position than the appellate court to assess credibility.[88] As the trial court found with respect to the item of damages for which Torres claims reversal is warranted, "It taxes credulity to suppose an outlay of this magnitude [$108,000] would have been overlooked or delayed in processing. . . [Torres] does not carry his burden of proof on this item."[89] Cross-appellant is essentially arguing that Torres's testimony and argument should be believed, that he is, contrary to the court's finding, credible on this item of damage; but he must know reversals based on credibility of the evidence are extremely rare.[90]

Finally, though there is a Reporter's Transcript in the record, cross-appellant does not cite it anywhere in his opening brief. Nor did he designate any portion of a Reporter's Transcript in his appeal.[91] Presumably this is because the Reporter's Transcript does not provide Torres any comfort or support for his cross-appeal.

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[87] *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.

[88] *Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243.

[89] Statement of Decision, C.T. III: 616-617.

[90] *Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492.

[91] C.T. III: 695-696.

Appellants who appeal, however, only on the clerk's transcript (which is all cross-appellant cites in his opening brief) cannot challenge the sufficiency of the evidence. In such event, the evidence is conclusively presumed to support the judgment. "To put it another way, it is presumed that the unreported trial testimony would demonstrate the absence of error."[92]

Torres cannot overcome the substantial evidence rule and judicial rulings interpreting and applying it to obtain reversal of court's decision to deny him an item of damages or a new trial on that aspect of his case.

CONCLUSION

The judgment of the court denying cross-appellant's motion for a new trial on the issue of damages and denying his motion to modify the judgment to add damages should be affirmed.

Dated: October 16, 2007

Respectfully submitted,

Fred J. Hiestand
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Santa Ynez Band of Mission Indians

[92] *Estate of Fain* (1999) 75 Cal.App.4th 973, 992.

CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this combined Appellant's Reply Brief and Cross-Respondent's Brief contains, exclusive of the caption, tables, certificate and proof of service, approximately 6,300 words.

Dated: October 16, 2007

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PROOF OF SERVICE

I, **David Cooper**, declare as follows:

I am employed in the County of Sacramento, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by the Law Office of Fred J. Hiestand, and my business address is 1121 L Street, Suite 404, Sacramento, CA 95814. I am readily familiar with the practice of the Law Office of Fred J. Hiestand for collection and processing of correspondence for mailing with the United States Postal Service (USPS). On **October 16, 2007**, I served the foregoing document entitled: **COMBINED APPELLANT'S REPLY BRIEF and CROSS-RESPONDENT'S BRIEF in *Santa Ynez Band of Mission Indians v. Torres, et al.*, B188413** on the parties in this action by placing a true copy thereof in an envelope addressed as follows:

Parties Served:

Counsel	Party(ies) Represented
James E. Marino, Esq. 1026 Camino del Rio Santa Barbara, CA 93110 Tel./Fax: 805-967-5141	Counsel for Defendants and Respondents **Vince Torres, et al.**
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Hon. Zel Canter, Judge Santa Barbara Superior Court Cook Building (North County) 312-C East Cook Street Santa Maria, CA 93456	Trial Court
California Supreme Court 350 McAllister Street San Francisco, CA 94102	Four Copies

and, following ordinary business practices of the Law Office of Fred J. Hiestand by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the USPS at 1121 L Street, Suite 404, Sacramento, California.

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 **October 16, 2007**, at Sacramento, California.

David Cooper