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IN THE SUPREME COURT OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

JUL 15 2024

JOHN D. HADDEN
CLERK

CHOCTAW NATION OF OKLAHOMA,	
Plaintiff/Appellee,	
v.	**Case No. 122098**
	Appeal from Case No. CJ-23-230
(1) FLINTCO, LLC	
Defendant/Appellant;	**Bryan County, Oklahoma**
(2) WORTH GROUP ARCHITECTS, P.C.;	
(3) SPECIFIED TECHNOLOGIES, INC.;	
(4) ABC ENTITIES I-X; and	
(5) JOHN DOES I-X;	
Defendants.	

APPELLEE CHOCTAW NATION OF OKLAHOMA'S RESPONSE TO BRIEF IN CHIEF

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DATE: July 15, 2024

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INTRODUCTION

The only question raised is whether the Court erred in denying a motion to compel in light of applicable case law, the Oklahoma Uniform Arbitration Act and the Federal Arbitration Act. In filing this appeal, Flintco, LLC (hereinafter referred to as "Flintco") includes in the record as relevant their motion to dismiss. However, in both Flintco's Petition in Error and Brief in Chief, Flintco omits any reference to the Motion to Dismiss, the Choctaw Nation of Oklahoma's (hereinafter referred to as the "Nation") Response thereto, and Flintco's Reply in support of dismissal. The inclusion of these documents in Flintco's record is irrelevant and attempts to bog down the record rather than allowing a concise and succinct appeal record as intended by the rules. *See* S. Ct. R. § 1.28(j).

The trial court correctly held that the arbitration agreement was unenforceable in this case. Contrary to Flintco's assertions on appeal, the trial court did not misinterpret the law, and the Nation appropriately pled that the arbitration was obtained through coercion rather than consent. The Nation puts forth three propositions for upholding the trial court's determinations below: (1) Flintco does not demonstrate that the FAA applies, (2) Flintco's fraud nullifies the agreement to arbitrate, and (3) the arbitration agreement does not contemplate the arbitration of the Nation's lawsuit for fraud.

Finally, S. Ct. R. § 1.11(e)(1) provides, "[i]f the answering party shall contend that such Summary of the Record is incorrect or incomplete, that party's brief shall contain a Summary of the Record correcting any such inaccuracies with citation to the record." Because Flintco's Summary of the Record fails to set forth material parts of the pleadings, proceedings, facts and documents which are necessary to a full understanding of the questions presented for a

decision, in accordance with Rule 1.11(e)(1), the Nation hereby corrects those inaccuracies and provides a complete Summary of the Record, as follows:

CHOCTAW NATION OF OKLAHOMA'S SUMMARY OF THE RECORD ON APPEAL

Appellee Choctaw Nation of Oklahoma (the "Nation") is a federally recognized Indian tribe with its headquarters situated in Durant, Oklahoma. ROA, Doc. 1, Petition, ¶ 1. Appellant Flintco is an Oklahoma limited liability company whom the Nation hired as the construction manager for numerous construction projects for the Nation. *Id.* at ¶¶ 2 & 12. The Nation and Flintco entered into a Construction Management Agreement (the "Contract") in 2005 in which Flintco agreed to perform construction pursuant to the requirements of these projects. *Id.* at ¶¶ 13 & 41. Unfortunately for the Nation, it discovered in November 2022 that the construction projects by Flintco had numerous deficient conditions, including but not limited to fire stops not installed, missing firewalls, missing fire safing and caulking, undersized hot water pipes, and additional fireproofing/life safety issues. *Id.* at ¶¶ 25 & 27. The fire protection, plumbing, and other defects caused the projects by Flintco to be unsafe, hazardous, and to not be compliant as required by the contract and codes. *Id.* at ¶ 31. It is clear from the deficient conditions of the projects and lack of fireproofing that Flintco shirked its obligations under the contract, took shortcuts during construction of the projects, and never intended to fully perform its contractual obligations for these projects.

At the heart of this lawsuit is a construction project for the Nation which was a multilevel hotel in Durant, Oklahoma (the "Project"). ROA, Doc. 5, Plaintiff's Response and Objection to Defendant's Motion to Compel Arbitration and Brief in Support, p. 1. The defects complained of are not minor deviations from a contract. This case is about more than that. This case is about Flintco's promise to properly install safety features on a multilevel structure, a

hotel, which routinely has high occupancy. But Flintco never intended to keep that promise to properly install the necessary safety features. Instead, Flintco intentionally left these safety features incomplete a systemic level to the point that intent to deceive is obvious. These defects were hidden behind layers of sheet rock so that they would not be uncovered unless one of two things occurred: (1) remodeling, or (2) a fire started in one of the rooms. Luckily, the former occurred. Had the latter occurred, the devastation would have been unimaginable. These safety features help prevent the spread of fire from one room to another and also allow collapse of the structure to occur in a compartmentalized manner rather than *in toto*. In other words, a firewall, for instance, is a fire-resistant structure which restricts the spread of fire and extends continuously from the foundation to or through the roof with sufficient structural stability under fire conditions to allow the collapse of the existing construction on either side of the wall to occur without allowing the collapse of the wall. It creates smaller buildings inside of the larger obvious building. Without said features, catastrophe can happen at any time.

Because Flintco defrauded the Nation by concealing the deficient fireproofing and other life safety issues (*i.e.*, fire stops and fire walls not properly installed or completed, missing fire safing and caulking, and use of undersized hot water pipes) with the Property's construction by burying them within the Property's walls, the Nation was unable to discover these issues until it actually penetrated the walls while making renovations to the Property. *Id.* at p. 1-2. If the Nation had not done so, the only other way Flintco's concealed deficiencies would have been discovered was if a catastrophic event, such as a fire, occurred that could have resulted in mass casualties. *Id.* at p. 2. Further, Flintco actively and fraudulently concealed the deficient conditions by purposefully failing to report the same to the Nation despite legal and contractual duties to do so. ROA, Doc. 1, Petition, ¶ 38.

The arbitration clause at issue must not inure to the benefit of Flintco as it obtained the Nation's consent through fraud by withholding Flintco's intent to never fully perform its contractual obligations and by concealing and failing to report the shortcuts taken during construction of the projects that resulted in severe fire and life safety hazards. Moreover, the arbitration clause did not include any reference to Flintco's extracontractual conduct, such as fraud and deceit. The Nation sees two major issues with Flintco's attempt to compel arbitration: (1) Flintco did not obtain the Nation's consent through freely but through fraud, and (2) the arbitration agreement in no way contemplates fraud and deceit.

STANDARD OF REVIEW ON APPEAL

"The Federal Arbitration Act, which was enacted in 1925, makes arbitration agreements as enforceable as other contracts, but not more so." *Bilbrey v. Cingular Wireless, L.L.C.*, 2007 OK 54, ¶ 15, 164 P.3d 131, 135 (*citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404–405, n. 12–13, 87 S.Ct. 1801, 18 L.Ed.2d 1270, (1967)). "A court asked to compel arbitration of a dispute must first determine whether the parties agreed to arbitrate **that dispute**." *Johnson v. Convalescent Ctr. of Grady Cty., LLC*, 2014 OK 102, ¶ 6 (emphasis added). "The existence of an arbitration agreement is governed by principles of state law." *Id.*

> **Consent to arbitrate is an essential component of an enforceable arbitration agreement**. To assure that the parties have consented to arbitration, the courts will decide whether there is a valid enforceable arbitration agreement, **whether the parties are bound by it** and whether the parties agreed to submit **a particular dispute** to arbitration.

Id. (emphasis added). "The question of whether parties have an agreement to submit a dispute to arbitration is a question of law to be decided applying state contract law." *B.A.P., L.L.P. v. Pearman*, 2011 OK CIV APP 30, ¶ 7.

"Under the proceedings governing applications to compel arbitration, the existence of an agreement to arbitrate is a question of law..." and "are reviewed *de novo*." *Sutton v. David Stanley Chevrolet, Inc.*, 2020 OK 87, ¶ 8, as corrected (Oct. 21, 2020) (citations omitted).

In applying the *de novo* standard of review, courts have accepted that plaintiffs may challenge the enforceability of an arbitration agreement in court. *Id.* (citations omitted). And, Oklahoma courts follow the State's Uniform Arbitration Act, 12 O.S. § 1851 *et seq.*, in determining "how proceedings on an application to compel arbitration shall be conducted so long as the Act does not frustrate the purposes underlying the [Federal Arbitration Act]." *Id.* (citations omitted).

The Federal Arbitration Act (the "FAA") provides that arbitration shall be compelled unless "such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4." 9 U.S.C.A. § 2. The Oklahoma Uniform Arbitration Act ("OUAA") provides:

> An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable **except upon a ground that exists at law or in equity for the revocation of a contract.**

12 O.S. § 1857 (A) (emphasis added). Because the Nation has successfully challenged the enforceability of the arbitration agreement "**upon [] ground[s] that exists at law or in equity for the revocation of a contract**," the Trial Court correctly concluded that arbitration is not required, and the lawsuit may proceed. *Sutton*, 2020 OK 87, ¶ 8.

PROPOSITIONS, ARGUMENTS AND AUTHORITIES

I. PROPOSITION 1: FLINTCO DOES NOT PROVE THAT THE FAA APPLIES.

Flintco makes bold assertions without any support. For instance, Flintco claims that the FAA applies but failed to place the agreement it relied on into the record for the lower Court's

consideration. In *S. Oklahoma Health Care Corp. v. JHBR-Jones-Hester-Bates-Riek, Inc.*, 1995 OK CIV APP 94, ¶ 18, 900 P.2d 1017, 1021, the Court found that the party moving to compel arbitration, JHBR, "demonstrated that, in entering its contract with Hospital, it was anticipated that there would be 'substantial interstate commerce.'" Moreover, while construction contracts ***may*** involve commerce, it is not automatic. There has been no showing by Flintco that the conclusory assertions are supported by facts.

In *JHBR*, the party pursuing arbitration also provided "considerable evidence that non-Oklahoma subcontractors worked on the project." *JHBR*, 1995 OK CIV APP 94, ¶ 19. Flintco provided no evidence that it had subcontractors from outside of Oklahoma. What does exist here is that there were systemic and intentional failures to complete the fire safety measures during the construction. It is clear from Flintco's conduct that they never intended to fulfill these contractual requirements. Flintco has also failed to show that the definition of commerce under 9 U.S.C.A. § 1 has been met. The construction agreement, which is not a part of the record, has not been analyzed as it was in *JHBR*. And Flintco has not proven that workers from other state have worked on the Projects. Basing their arguments on conclusory assertions alone is insufficient. What the record reflects is that the Nation filed suit because Flintco made promises it never intended to keep in order to obtain the Nation's agreement to the contract, including the arbitration agreement.

But most importantly, the FAA does not apply because the Nation showed that this suit was one for fraud, including fraud in the inducement:

II. PROPOSITION 2: FLINTCO OBTAINED THE NATION'S CONSENT THROUGH FRAUD AND DECEIT, WHICH RENDERS THE DISPUTE RESOLUTION CLAUSE UNENFORCEABLE.

"In *State ex rel. Southwestern Bell Telephone Co. v. Brown*, 519 P.2d 491 (Okl.1974), as the Court of Appeals noted, Oklahoma follows the view that fraud can be predicated upon a promise to do a thing in the future when the intent of the promisor is otherwise." *Citation Co. Realtors, Inc. v. Lyon*, 1980 OK 68, ¶ 8, 610 P.2d 788, 790. "There is a wide distinction between the nonperformance of a promise and a promise made mala fide, only the latter being actionable fraud." *Id.* Moreover, "[u]nder Oklahoma law, rules of construction and interpretation are available if an ambiguity is present, but where no ambiguity exists in the language used, the intent must be determined from the words used, **unless there is fraud**, accident, or pure absurdity." *Lindhorst v. Wright*, 1980 OK CIV APP 42, ¶ 8, 616 P.2d 450, 453 (*citing Humphreys v. Amerada Hess Corp.*, 487 F.2d 800, 802 (10th Cir.1973); *Van Zant v. State Ins. Fund*, 203 Okla. 421, 223 P.2d 111, 113; 15 O.S. §§ 152-156) (emphasis added). This case is one for fraud. The basis of fraud is that Flintco made promises they never intended to keep and did not keep. ROA, Doc. 1, Petition, ¶¶ 42 ("Defendants had no intention of performing up to the standards required by the Project."), and 43-53. Now, they attempt to benefit from those promises made mala fide and force the Nation to arbitrate its claims rather than enjoy its right to a jury trial.

The Nation concedes there is a presumption in favor of arbitration, but **consent** to arbitration is required:

> "[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute." *Granite Rock*, 561 U.S. at 297, 130 S.Ct. 2847. The Supreme Court has recognized a presumption in favor of arbitrability, *see id.* at 300–01, 130 S.Ct. 2847, which requires courts to rule a dispute arbitrable "where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and ... the presumption is not rebutted," *id.* at 301, 130 S.Ct. 2847. But the presumption is not a license to override the parties' expressed intent. We must not

> undermine "the first principle that underscores all [the Supreme Court's] arbitration decisions: Arbitration is strictly *1220 a matter of consent." *Id.* at 299, 130 S.Ct. 2847 (internal quotation marks omitted).

Dodson Int'l Parts, Inc. v. Williams Int'l Co. LLC, 12 F.4th 1212, 1219–20 (10th Cir. 2021). Moreover, "[w]hen deciding whether the parties consented to arbitrate a certain matter, we 'generally ... apply ordinary state-law principles that govern the formation of contracts.' *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)." *Id.* And, "**[a]bsent fraud**, illegality or overreaching in the procurement of written contract, parties rights are fixed by the contract." *Singer v. Singer*, 1981 OK CIV APP 43, 634 P.2d 766, 772 (emphasis added).

This Court has clearly stated:

> The courts will enforce arbitration agreements according to the terms of the parties' contract, as **"[a]rbitration is a matter of consent, not coercion**." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). To assure that the parties have consented to arbitration, the courts will decide whether there is a valid enforceable arbitration agreement, whether the parties are bound by the arbitration agreement, and whether the parties agreed to submit a particular dispute to arbitration. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). The courts will not require a party to submit a controversy to arbitration where it has not been so agreed. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 591, 154 L.Ed.2d 491 (2002).

Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc., 2007 OK 12, ¶ 22, 160 P.3d 936, 944–45 (emphasis added). And this favors public policy and the Constitutional right to a jury trial which must be protected from coercion: "Where the Constitution provides that the right of trial by jury shall be inviolate, legislation must be both construed strictly and observed vigilantly in favor of the right. This right cannot be abrogated arbitrarily by a court; it can be

surrendered only by **voluntary consent or waiver**." *Seymour v. Swart*, 1985 OK 9, ¶ 5, 695 P.2d 509, 511 (emphasis added). Under Oklahoma law, "apparent consent is not real or free when obtained through: ... [f]raud." 15 O.S. § 53(3). Flintco correctly asserts that "[t]he dispute resolution clause must be interpreted to give effect to the mutual intent of the parties, as it existed at the time of contracting;" but omits that this is true "**so far as the same is ascertainable and lawful**." Brief in Chief, p. 6; *citing* 15 O.S. § 152 (emphasis added). However, "[c]onsent is not mutual unless the parties all agree upon the same thing in the same sense." 15 O.S. § 66. "The intentions and purposes of parties as evidenced by a contract, **in the absence of allegations that fraud**, accident, or mistake entered into its execution, are to be determined from the language of the agreement, the nature of the subject-matter contracted about, and the relation of the parties thereto." *Spring v. Major*, 1927 OK 226, ¶ 6, 126 Okla. 150, 259 P. 125, 126 (*quoting Cherokee Oil & Gas Co. v. Lucky Leaf Oil & Gas Co.*, 116 Okl. 121, 242 P. 214, 45 A. L. R. 698; 6 R. C. L. 836, par. 226). Here, Flintco's deception at the time of contracting cannot be ignored. ROA, Doc. 1, Petition, ¶ 42 ("Defendants had no intention of performing up to the standards required by the Project.").

The Nation's position here is based on Flintco's fraud and deceit in entering into the contract with the Nation, which contained a dispute resolution clause, despite Flintco ***never*** intending to fully perform its obligations pursuant to that contract. ROA, Doc. 1, Petition, ¶ 42. Flintco obtained the Nation's agreement to arbitrate by coercion, not consent. The Nation has alleged that the Defendants entered into agreements to perform construction according to certain requirements and that "Defendants had no intention of performing up to the standards required by the Project." ROA, Doc. 1, Petition, ¶¶ 41-42. The Nation also alleges that "Defendants committed fraud by purposefully and intentionally failing to construct and/or

renovate the Projects in accordance with the design and code requirements of the Projects, as well as the Construction Management Agreement." ROA, Doc. 1, Petition, ¶ 43. And "Defendants took various shortcuts during the construction and/or renovation of the Projects." ROA, Doc. 1, Petition, ¶ 44.

Flintco obtained the Nation's consent to the contract by promising to fulfill safety measures when Flintco never intended to do so. This is clear by the systemic and intentional conduct of cutting corners and not completing lifesaving measures. ROA, Doc. 1, Petition, ¶ 45. The Nation would never have agreed to the contract had it known Flintco's true intent. Flintco withheld that it had no intention of fully performing because it knew that the Nation would never enter into the contract had the Nation known this to be true. When arbitration agreements are entered into under circumstances of fraud, the defrauded party cannot be compelled to arbitration. *Sutton*, 2020 OK 87, ¶ 6. The Nation filed this lawsuit for fraud. Therefore, there is no consent to arbitrate as the Defendants procured the Nation's consent through means of fraud. The Nation would not have consented to arbitration, or to the contract at all, except for the representations by Flintco. *See* 15 O.S. § 54 ("Consent is deemed to have been obtained through one of the causes mentioned in the last section, only when it would not have been given had such cause not existed."). The arbitration clause contained in the contract can no longer be binding on the Nation because there was no meeting of the minds between the Nation and Flintco. Flintco receiving the benefit of an arbitration clause in a contract procured through fraud and deceit would lead to an unjust result that is unsupported by Oklahoma law.

Because Flintco obtained the Nation's consent by fraud and deceit, the arbitration clause at issue must be rendered unenforceable against the Nation.

III. *PROPOSITION III: THE ARBITRATION CLAUSE IS TOO NARROW IN SCOPE TO COMPEL ARBITRATION OF A SUIT FOR FRAUD.*

In determining the scope of an arbitration agreement, courts will usually "classify the particular clause as either broad or narrow." *Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc.*, 567 F.3d 1191, 1196 (10th Cir. 2009). Broad arbitration clauses "purport to refer all disputes arising out of a contract to arbitration," while "narrow arbitration clauses "limit arbitration to specific types of disputes." *McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988). "In determining whether a particular dispute falls within the scope of a narrow and specific arbitration clause, '[t]he tone of the clause as a whole must be considered.'" *McDonnell Douglas Fin. Corp.*, 858 F.3d at 832 (quoting *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 64 (2d Cir. 1983)).

In *McKinzie v. American General Financial Services, Inc.*, 2012 OK CIV APP 37, 276 P.3d 1082, the court held that the agreement between the plaintiff and defendant required arbitration. *Id.* at ¶, 1087. There, the language of the agreement specifically stated that it required arbitration of:

> All claims and disputes arising out of, in connection with, or relating to: My loan from Lender today; ... the validity and enforceability of this Arbitration Agreement and the Agreement, my understanding of them, or any defenses as to the validity and enforceability of the Agreement and this Arbitration Agreement; any claim or dispute based on any alleged tort (wrong), including Intentional torts; and any claim for injunctive, declaratory, or equitable relief. The Arbitration Agreement also applies even if my loan has been cancelled, changed, modified, or refinanced.

Id. at ¶, 1087 (emphasis added). The court reasoned that the plaintiffs had agreed to the binding arbitration of any issue arising out of or related to the Loan Agreement and ordered arbitration. *Id.* at ¶, 1087. Here, unlike the agreement in *McKinzie*, the Agreement between the Nation and Flintco does not include such specific language. The Agreement states, in pertinent part: "Any

Claim arising under this Agreement that cannot be resolved between the Project Officer and the Project Manager for Flintco shall be submitted . . . to binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association." ROA, Doc. 4, Flintco's Motion to Compel Arbitration, p. 2 (the agreement was not actually attached for the lower court's review). The Agreement does not "clearly and plainly" require that the parties arbitrate in the instance of fraud.

Moreover, the term "Claim" is not defined and clearly not meant to include "any and all disputes," which could have been easily provided in the arbitration clause, as it was in *McKinzie*. See Flintco's Brief in Chief at p. 3, fn 2. The arbitration clause in the contract "is not the sort of broad clause in which parties agree 'to submit to arbitration disputes 'of any nature or character,' or simply 'any and all disputes.'"" *McDonnell Douglas Fin. Corp.*, 858 F.2d 825, 832 (2d Cir. 1988). If the Defendants intended the Nation to arbitrate claims of fraud or other extracontractual conduct by the Defendants, the Agreement would have plainly stated so. Moreover, for the Nation to consent to arbitrate acts of fraud and other extracontractual conduct by Flintco, the Nation would have to have been aware of that at the time of contracting. By their very nature, fraud and deceit are not detectible like other occurrences.

Even if the Court finds the arbitration clause is broad in scope, the Nation has not agreed to submit claims of fraud to arbitration. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Cummings v. FedEx Ground Package Sys., Inc.*, 404 F.3d 1258, 1262 (10th Cir. 2005). "Although the [Federal Arbitration Act] favors arbitration when it is the parties' contractual choice of a remedial forum . . . the courts will not impose arbitration upon parties where they have not agreed to do so." *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007

OK 12, ¶ 22, 160 P.3d 936, 944. The courts will enforce arbitration agreements according to the terms of the parties' contract, as "[a]rbitration is a matter of consent, not coercion." *Id.* (*quoting Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). "To assure that the parties have consented to arbitration, the courts will decide whether . . . the parties agreed to submit a particular dispute to arbitration." *Id.* "The courts will not require a party to submit a controversy to arbitration where it has not been so agreed." *Id.*

Oklahoma law supports this as consent is a prerequisite to a binding contract: "It is essential to the existence of a contract that there should be: 1. Parties capable of contracting[;] 2. Their consent[;] 3. A lawful object; and, 4. Sufficient cause or consideration." 15 O.S. § 2. "Consent is not mutual unless the parties all agree upon the same thing in the same sense." 15 O.S. § 66. And Oklahoma law provides that fraud is unlawful:

> Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true[;] 2. The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true[;] 3. The suppression of that which is true, by one having knowledge or belief of the fact[;] 4. A promise made without any intention of performing it; or, 5. Any other act fitted to deceive.

15 O.S. § 58. And:

> Constructive fraud consists: 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

15 O.S. § 59. And fraud, which does not have a singular definition, is a deceitful practice which is not subject to detection and foreseeability by its very nature:

> 'Fraud' is a generic term, which embraces all the multifarious means which human ingenuity can devise, and are resorted to by one individual to get an advantage over another by false suggestions or by the suppression of the truth. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.

Operators Royalty & Producing Co. v. Greene, 1935 OK 769, ¶ 21, 173 Okla. 388, 49 P.2d 499, 502 (citation omitted). "The gist of a fraudulent 'misrepresentation' is the producing of a false impression upon the mind of the other party, and, if this result is actually accomplished, the means of accomplishing it are immaterial." *Id.* (citation omitted). Fraud has recently been characterized by this Court as:

> a generic term, which embraces all the multifarious means which human ingenuity can devise, and are resorted to by one individual to get an advantage over another by false suggestions or by the suppression of the truth. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. The only boundaries defining it are those which limit human knavery.

Sutton, 2020 OK 87, ¶ 13. As a party can only contract for a lawful purpose, then there can be no agreement to arbitrate fraud, especially given that fraud and deceit are not considered in the arbitration clause.

Thus, there is no indication anywhere in the contract or record below that provides the Nation will agree to arbitrate Flintco's intentional misconduct and intentional acts to defraud the Nation and place lives at risk. Therefore, the Nation must not be compelled by Flintco's coercion and deceit, to arbitrate.

CONCLUSION

This lawsuit is not about Flintco's failure to complete the terms of a contract. Instead, this lawsuit focuses on the fact that Flintco made promises to the Nation without any intent to uphold those promises. It is the Nation's belief and understanding that the Nation was misled, and that deception began before the contract was signed and continued through construction and into occupancy.

The danger of allowing a party like Flintco to take advantage of an arbitration clause when it was entered into through deception will allow other parties to reserve contractual benefits while making promises without any intent to keep them. The law does not support any reprieve from another's day in court and the right to a jury trial on such a basis.

The Nation respectfully requests that this Court uphold the trial court's findings and order and allow this case to proceed in the District Court of Bryan County.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 15th day of July 2024 by depositing it in the U.S. Mail, postage prepaid to:

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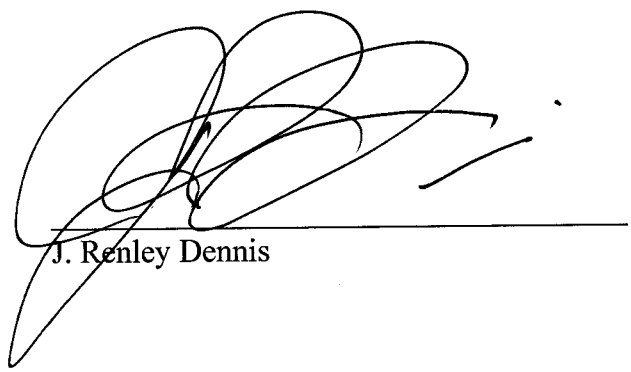

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