IN THE DISTRICT COURT OF BRYAN COUNTY
STATE OF OKLAHOMA

CHOCTAW NATION OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: CJ-2023-230
	)	
(1) FLINTCO, LLC;	)	
(2) WORTH GROUP ARCHITECTS, P.C.;	)	
(3) SPECIFIED TECHNOLOGIES, INC.;	)	
(4) ABC CORPORATIONS I-V; and,	)	
(5) JOHN DOES I-V		

PLAINTIFF'S RESPONSE TO DEFENDANT FLINTCO'S MOTION TO DISMISS

COMES NOW the Plaintiff, Choctaw Nation of Oklahoma, ("the Nation"), and responds to the Motion to Dismiss (the "Motion") filed by Defendant Flintco, LLC ("Flintco") and states as follows:

INTRODUCTION

The Nation learned after November 2022 that Flintco was actively involved in defrauding the Nation by concealing the fact that it and others had not installed complete fire stops, firewalls, fire safing, fire caulking, and used undersized hot water pipes while performing construction at a multilevel hotel owned by the Nation in Durant (the "Property"). In making renovations to the Property in 2022, the Nation discovered that fire stops and fire walls were never properly installed or completed, creating serious safety hazards. Fire stops, fire tape, and fire walls prevent a fire from spreading from room to room or between floors of a multilevel structure. In sum, Flintco profited from charging the Nation for these safety features, while knowing it would be impossible to discover these materials were omitted from the properly until either the Nation discovered them by accident when penetrating the walls for other purposes—which occurred here—or a devastating travesty claimed many lives.

Now, Flintco has filed the Motion which states that even though these allegations are made, Flintco should be able to receive the benefit of the "economic loss rule," the statue of limitations, and the statue of repose. Flintco further alleges the Nation failed to plead fraud with particularity.

In analyzing the Motion, it is important to keep in mind that Oklahoma is a notice pleading state and the Nation is making these claims with regard to life saving features on property within the Nation's control. The Nation is not seeking to hold Flintco responsible for failing to complete a business feature of the Property's bars or miscalculating square footage of a gaming floor, but a feature that protects its patrons, tribal members, employees, and the community. The potential for catastrophic loss of life Flintco has made possible by not completing its duties and by concealing the incomplete features are unjust and unlawful: They concealed and deceived the Nation, putting people in Bryant County at risk.

As outlined below, Flintco is subject to the jurisdiction of this Court, this action is not barred, and the Nation must be allowed to amend, as justice requires, if the Court is inclined toward dismissal.

ARGUMENTS AND AUTHORITIES

I. STANDARD OF REVIEW

Oklahoma's pleading standard is not as stringent as the defense would have this Court believe, as Oklahoma is a "notice pleading state." Under the notice pleading standard, a petition must only give fair notice of the plaintiff's claim and the grounds upon which it rests." *Gens v. Casady School*, 2008 OK 5, ¶ 9, 177 P.3d 565. A plaintiff is not required to identify a specific theory of recovery nor to set out the correct remedy or relief to which he (or she) may be entitled. *Great Plains* at ¶ 3 (Opala, J., concurring), 1096. Furthermore, when reviewing a motion to dismiss the plaintiff's petition, "the court **must take as true all the challenged pleading's allegations together with all reasonable inferences which may be drawn from them**." *Hayes v. Eateries,*

Inc., 1995 OK 108, ¶ 2, 905 P.2d 778, 780 (emphasis added); *see also Great Plains Federal Savings and Loan Assn v. Dabney*, 1993 OK 4, 846 P.2d 1088; *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7, 176 P.3d 1204, 1208. "A pleading must not be dismissed for failure to state a legally cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove no set of facts which would entitle him to relief." *Frazier v. Bryan Memorial Hospital Authority*, 1989 OK 73, ¶ 13 (emphasis in original). Inversely stated, "[a] petition can generally be dismissed only for lack of any cognizable legal theory to support the claim or for insufficient facts under a cognizable legal theory." *Darrow v. Integris Health, Inc.*, 2008 OK 1, ¶ 7. "Motions to dismiss are generally disfavored unless there are no facts consistent with the allegations under any cognizable legal theory." *Cole v. Bank of Am., N.A.*, 2022 OK 96, ¶ 10 (citation omitted). "When evaluating a motion to dismiss, the court examines only the controlling law, not the facts. Thus, the court must take as true all of the challenged pleading's allegations together with all reasonable inferences that can be drawn from them." *Wilson v. State ex rel. State Election Bd.*, 2012 OK 2, ¶ 4 (citations omitted). Taking all allegations in the Petition as true, it is clear that Defendant Flintco's Motion to dismiss must be denied.

II. THE NATION APPROPRIATELY PLED ITS CLAIMS AGAINST FLINTCO.

Taking the Petition as a whole, as required under Oklahoma law, it is clear the Nation met the Oklahoma pleading standard. *See Wilson*, 2012 OK 2, ¶ 4; *Carignano v. Box*, 1924 OK 161, 97 Okla. 184, 223 P. 673, 675; *see also McFarland v. Atkins*, 1979 OK 3, ¶ 1, ("To answer that question, we must consider as true all of the allegations of the amended petition as a whole, and not merely the three isolated paragraphs quoted in the majority opinion.") (Williams, J., concurring in part, dissenting in part). The Petition alleges that Flintco's management obligations (see ¶¶ 13-17 of the Petition) were not met (see ¶¶ 25- 37) and that such failures were fraudulently concealed

from the Nation (see ¶38). Moreover, because of its failures, the Nation has suffered both financial loss to its general funds and lives were put at risk. (see ¶ 39).

Fraud "exists where there is some 'false suggestion or suppression of the truth'—some false representation—by which one 'can get advantage over another,', made with the intention that it be acted upon." *Estrada v. Kriz*, 2015 OK CIV APP 19, ¶ 15 (citing *Croslin v. Enerlex, Inc.*, 2013 OK 34, ¶ 11)*compare with* Petition at ¶¶ 35-38. Further, "[i]f on account of peculiar circumstances there is a positive duty on the part of one of the parties to a contract to speak, and he remains silent to his benefit and to the detriment of the other party, the failure to speak constitutes fraud." *Silk v. Phillips Petroleum Co.*, 1988 OK 93, ¶ 33, (citing *Hubbard v. Bryson, Okl.*, 474 P.2d 407, 410 (1970))*compare with* Petition at ¶¶ 35-38. The Nation has clearly and sufficiently alleged that Flintco suppressed the truth by hiding needed and crucial information from the Nation. *See* Petition at ¶¶ 35-38. Moreover, constructive fraud "'does not necessarily involve any moral guilt, intent to deceive, or actual dishonesty of purpose'—requires a misrepresentation (although the misrepresentation may consist of remaining silent when one has the duty to speak) that 'gains an advantage for the actor by misleading another to his prejudice.'" *Estrada*, 2015 OK CIV APP 19, ¶ 15 (citation omitted). Oklahoma law allows a claim for constructive fraud to arise out of *any duty* owed by the defendant to the plaintiff. Constructive fraud is (1) any breach of duty which, without actual fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; or (2) any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud. 15 O.S. § 59. The Petition sufficiently alleges that Flintco, throughout the entirety of the Project, failed to speak and notify the Nation that there were not properly installed firewalls and other life safety elements in the Property.

Oklahoma courts have held that "allegations of fraud must be stated with sufficient particularity to enable the opposing party to prepare his/her responsive pleadings and defenses." *Estrada*, 2015 OK CIV APP 19, ¶ 12. But, while "Section 2009(B) 'requires specification of the time, place and content of an alleged false representation, [it does] not [require] the circumstances or evidence from which fraudulent intent could be inferred." *Estrada v. Kriz*, 2015 OK CIV APP 19, ¶ 12, 345 P.3d 403, 407 (quoting *Gianfillippo v. Northland Cas. Co.*, 1993 OK 125, ¶ 11, 861 P.2d 308 (citation omitted)). The "time, place and content" of this suit as provided in the Petition is that Flintco and others, the architect and subcontractor responsible for the installation of fire suppression measures, during the construction of the Projects beginning May 5, 2005 (Pet. at ¶ 13) did not ensure firewalls and life safety related measures were installed (Pet. at ¶ 28) and did not construct the Projects in accordance with the codes and construction agreement (Pet. at ¶¶ 29-30). Flintco's specific duties are outlined in the Petition. See Petition at ¶¶ 14-18 (Including, but not limited to the duties to "review of design," "construction coordination and scheduling, and direction of all construction activities," "monitor compliance by the separate contractors with their contractual safety requirements and report deficiencies," "be responsible... for complying with any Federal, State and municipal laws, codes, and regulations applicable to the performance of the work," "[m]aintain a competent full-time supervisory staff at the job for coordination and direction of the work of the separate contractors," and "take the action necessary to correct any defective work"). Each one of these duties were alleged to be breached by Flintco's failure to install the requisite safety features at the Nation's multistory Property.

Flintco also argues that as a matter of law the Nation's fraud claims fail because there is a contractual relationship between the Nation and Flintco. Motion at 3. None of the three cases cited by Flintco support this bold assertion. In fact, *Kissee*, one case cited by Flintco, relies on *Rodgers*, another case cited by Flintco, to say:

> However, what guarantor fails to recognize is that in *Rogers v. Tecumseh Bank*, this Court held that without "gross recklessness or wanton negligence on behalf of a party" to a commercial contract, a breach of the implied covenant of good faith and fair dealing merely results in a breach of contract.

First Nat. Bank & Tr. Co. of Vinita v. Kissee, 1993 OK 96, ¶ 24, 859 P.2d 502, 509 (citing *Rodgers v. Tecumseh Bank*, 1988 OK 36, ¶ 16, 756 P.2d 1223, 1227). Moreover, "under the common law each contract carries an implicit and mutual covenant to act towards each other in good faith." *Rodgers*, 1988 OK 36, ¶ 17. And, "[w]ithout an independent basis to support a tortious wrongdoing, there is nothing more than an alleged breach of that contract." *Id.* at ¶ 18. Here, the independent basis is that Flintco had duties to speak (Pet. at ¶ 16 ("report deficiencies")) and instead concealed the fact that their failure to comply with their contractual duties caused massive safety hazards, including that the firewalls and fire stops were not installed, fire caulk was not used where needed, and hot water pipes were undersized. Petition at ¶¶ 27, 38. To not install these life saving features and others in a multilevel structure, then to not report those deficiencies and correct them, but instead represent that the construction is complete is fraud—actual and constructive.

Moreover, several cases have held that torts can exist even where a contractual relationship does. In *Specialty Beverages, L.L.C. v. Pabst Brewing Co.*, the Tenth Circuit held that under Oklahoma law the plaintiff "was free to pursue both fraud and breach-of-contract claims." 537 F.3d 1165, 1180 (10th Cir. 2008). The rule is that "where 'the facts alleged in [a plaintiff's] tort claim are precisely the same as those alleged in [his] contract claim,' a separate tort claim will not be allowed." *McGregor v. Nat'l Steak Processors, Inc.*, 11-CV-0570-CVE-TLW, 2012 WL 314059, at *3 (N.D. Okla. Feb. 1, 2012) (quoting *Isler v. Tex. Oil & Gas Corp.*, 749 F.2d 22, 24 (10th Cir.1984)). Obviously, the Nation can pursue a fraud claim where a contract existed. Here, the act of concealing and withholding information on the lack of safety features from the Nation is the fraud.

Finally, the "economic loss rule" simply does not apply. Citing *Waggoner*, Flinteo attempts to mislead this Court into applying a rule which does not apply here. Waggoner specifically states "[w]e adopt this reasoning and hold that in Oklahoma no action lies in manufacturers' products liability for injury only to the product itself resulting in purely economic loss." *Waggoner v. Town & Country Mobile Homes, Inc.*, 1990 OK 139, ¶ 22, 808 P.2d 649, 653. Importantly, this is not a product liability case.

In the event the Court finds Defendant Flinteo's arguments persuasive, the Nation requests the leave to amend, as required by justice:

> Even if the allegations in [the] petition were not sufficient to withstand a motion to dismiss, the trial court still erred in dismissing the case without providing [plaintiff] with an opportunity to amend .... Title 12, Section 2012(G) provides: '[o]n granting a motion to dismiss a claim for relief, the court shall grant leave to amend if the defect can be remedied and shall specify the time within which an amended pleading shall be filed.' This Court has interpreted the statute as a mandatory duty placed on trial courts, as long as the defect can be remedied. *See Kelly v. Abbott*, 1989 OK 124, ¶ 6, 781 P.2d 1188, 1190.") (cleaned up).

FourPoint Energy, LLC v. BCE-Mach II, LLC, 2021 OK CIV APP 46, ¶ 18.

III. THE STATUTE OF LIMITATIONS/REPOSE HAS NOT RUN.

A. The Statute of Limitations/Repose does not apply to the Nation.

Under Oklahoma common law, the doctrine of *nullum tempus occurrit regi* ("time does not run against the king") prohibits a statute of limitations defense would not apply to the Choctaw Nation acting in its sovereign capacity. "As of June 29, 2022, the U.S. Supreme Court has recognized the following reservations within the external boundaries of Oklahoma: Creek, Cherokee, Choctaw, Chickasaw and Seminole reservations." *Matter of S.J.W.*, 2023 OK 49, 535 P.3d 1235, 1241, reh'g denied in part (Sept. 18, 2023). As a federally recognized tribe, the Nation exercises sovereign authority over its Reservation, including Bryan County, "because 'Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and

their territory." *Id.* ¶ 11[1]. The Oklahoma Supreme Court recognized in 2012, "prior decisions of [t]he Court have declined to impose a time limit on claims of a 'government entity seeking in its sovereign capacity to vindicate public rights.'" *Bell-Levine v. State ex rel. Okla. Tax Comm'n*, 2012 OK 112, ¶ 10 n.6 (quoting *Okla. City Imp. Auth. v. HTB, Inc.*, 1988 OK 149, ¶ 5).

> Since 1913, this court has followed the general rule that statutes of limitation do not apply to a government entity seeking in its sovereign capacity to vindicate public rights, and "that the maxium, 'nullum tempus occurrit regi,' ***is not restricted in its application to sovereign states or governments, but that its application extends to and includes public rights of all kinds***, and that it applies to municipal corporations as trustees of the rights of the public ..." *Foot et al. v. Town of Watonga*, 37 Okl. 43, 130 P. 597, 598 (1913).

Oklahoma City Mun. Imp. Auth. v. HTB, Inc., 1988 OK 149, ¶ 5, 769 P.2d 131, 133 (emphasis added). The Court has long recognized that "public policy requires that every reasonable presumption favor government immunity from such limitation." *HTB*, 1988 OK 149, at ¶ 13. It reasoned that "the public's rights should not be prejudiced because a public official does not or cannot timely bring an action on behalf of the public." *Ladd v. State ex rel. Okla. Tax Comm'n*, 1984 OK 60, ¶ 9 (State ex rel. *Cartwright v. Tidmore*, 1983 OK 116, ¶ 9). Thus, the rule depends on the governmental entity acting in its sovereign capacity "to vindicate public rights," which comes down to "whether the right is such as to effect the public generally or merely affects a class of individuals." *State ex rel. Okla. DOT v. Bd. of County*, 2007 OK CIV APP 126, ¶ 8 (*citing HTB*, 1988 OK 149, at ¶¶ 10-12). Here, the Nation is seeking to recover tribal dollars, i.e., public funds. The Nation and its members are generally impacted by conduct such as Defendant Flintco's. *See*

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[1] "Indian tribes retain 'attributes of sovereignty over both their members and their territory,' *United States v. Mazurie*, 419 U.S. 544, 557, 42 L.Ed.2d 706, 95 S.Ct. 710 [717] (1975), and 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States,' *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154, 65 L.Ed.2d 10, 100 S.Ct. 2069 [2081] (1980)." *State ex rel. Oklahoma Tax Comm'n v. Bruner*, 1991 OK 77, ¶ 11.

e.g., *State ex rel. Schones v. Town of Canute*, 1993 OK 90, ¶ 13, 858 P.2d 436, 439–40 ("The action clearly is one to vindicate public rights in insuring that public funds are properly spent.") (overturned by statute on other grounds). Moreover, Therefore, the statute of limitations does not operate against the Nation.

Further, the doctrine of *nullum tempus occurrit regi* has also been held to apply to statutes of repose in Oklahoma: "Accordingly, we grant certiorari and vacate the opinion of the Court of Appeals, holding that neither statutes of limitation nor repose shall bar plaintiffs' actions brought in their sovereign capacity to vindicate *vested* public rights." *Oklahoma City Mun. Imp. Auth. v. HTB, Inc.*, 1988 OK 149, ¶ 29. And other courts agree: "We therefore conclude that the District of Columbia is immune from the running of the statutes of limitations and repose when it brings suit seeking to vindicate public rights and involving the performance of public functions." *D.C. v. Owens-Corning Fiberglas Corp.*, 572 A.2d 394, 406 (D.C. 1989).[2]

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[2] The *Owens-Corning* Court provided a helpful analysis to determine which entities enjoy the doctrine of *nullum tempus*:

> By "sovereign immunity," of course, we refer to the immunity a political community or institution enjoys by right of its political status, and not merely by virtue of the legal function it performs at a given time. While sovereign immunity may be waived by permission or by statute, *Glidden Co. v. Zdanok*, 370 U.S. 530, 563–64, 82 S.Ct. 1459, 1479–80, 8 L.Ed.2d 671 (1962) (immunity from tort liability), it continues to exist as a privilege the sovereign may reclaim. *Maricopa County v. Valley National Bank*, 318 U.S. 357, 362, 63 S.Ct. 587, 589, 87 L.Ed. 834 (1943) (immunity from liability to suit); *Pass v. McGrath*, 89 U.S.App.D.C. 371, 372, 192 F.2d 415, 416 (1951) (immunity from liability to suit). By contrast, the derivative immunity a municipality enjoys inheres in it only when it performs a sovereign function, such as the vindication of a public right, and then only with reference to the function performed. We do not reach the issue of sovereignty here; we merely hold that in its municipal capacity, the District enjoys a common-law immunity under the doctrine of *nullum tempus*.

Id. at 404.

Here, the Nation is suing to vindicate a public right. For example, the property mentioned in ¶¶ 25-31 are on tribal land used for "gaming activities on Indian lands as a means of generating tribal governmental revenue...." 25 U.S.C.A. § 2701(1). Congress has declared that gaming under the Indian Gaming Regulatory Act ("IGRA") serves "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments...." 25 U.S.C.A. § 2702(1). Moreover, as provided in the Petition, this suit is about vindicating code violations for the purposes of safety and life saving precautions. The incomplete manner in which Flintco and others worked together to cut corners puts lives at risk in the event of a fire. This is not a case about a business feature of the property, but lifesaving, safety features required by building codes.

However, in the alternative:

B. Flintco misapplies the Statute of Repose

First, Flintco argues that the Projects were substantially completed over ten (10) years ago. The Nation and Flintco agreed that the period of performance for the Projects in the contract would not end until May 5, 2015:

SECTION C

PERIOD OF PERFORMANCE

F-1 Period of Performance. This contract is from the date of award (or Notice to proceed) for a period of 10 years. A two year renewal may be exercised at the option of the Choctaw Nation.

This would place the ten (10) years' time for repose to run in 2025. Thus, Flintco cannot rely on a conclusory statement that the Projects were substantially completed more than ten (10) years ago and the statute of repose has not run regardless.

Second, Flintco misunderstands the application of a statute of repose in Oklahoma. The statute of repose only requires that the elements of a cause of action exist within the time period provided. *Oklahoma City Mun. Imp. Auth. v. HTB, Inc.*, 1988 OK 149, ¶ 28. Once the cause of action accrues, then it is subject to statute of limitations to bring the action, even if that lawsuit is not brought until after the time limitation in the statute of repose has passed. *Id.*

For example, in *Oklahoma City Municipal Authority v. HTB, Inc.*, the same statute of repose raised by Flintco was at issue. *Id.* ¶ 1, n. 2 (citing 12 O.S. § 109). There, the "defendants completed work" on "May 24, 1974." *Id.* ¶ 2. The Court noted "the earliest acceptance date mentioned falls precisely ten years *before* plaintiffs filed suit . . . ." *Id.* (emphasis added). The Oklahoma Supreme Court went on to note that Oklahoma City's cause of action for broken piping related to the construction accrued in 1980, even though it did not file suit until 1984. *Id.* ¶¶ 2, 28. The Court found if the cause of action accrued within the time period of the statute of repose, then the lawsuit would only be subject to any applicable statute of limitation:

> Consequently, since plaintiffs' initial right of action accrued and vested within the prescribed time period, the statute governs in this case not the substantive issue of the existence of a right, but the procedural aspect of the availability of a remedy. Once a cause of action arises, applicable statutes of limitation begin to operate placing a limit on the plaintiff's availability of remedy. Since plaintiffs initial cause of action arose and vested during the ten year period prescribed by law, public policy compels us to adhere to the general rule that public rights should not be prejudiced by the tardiness of officials to whom those rights are entrusted. *State ex rel. Cartwright v. Tidmore*, 674 P.2d 14, 16 (Okl.1983).

Id. ¶ 28.

Here, the Nation has pled that the fraud claim would have accrued during the period of construction, but due to the misconduct of Flintco, it was not discovered until years later. However, that would render any applicable statute of limitations subject to the discovery rule:

> We begin with the accrual date: "Civil actions can only be commenced ... after the cause of action shall have accrued...." 12 O.S.2011, § 92. . . . Generally, the statute of limitations begins to

> run from the accrual date. Id. **However, the discovery rule may delay the start of the statute of limitations**. Digital Design Grp., Inc. v. Info. Builders, Inc., 2001 OK 21, ¶ 17, 24 P.3d 834, 839 (holding that the discovery rule delays the running of the statute of limitations "until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury").

Horton v. Hamilton, 2015 OK 6, ¶ 9 (emphasis added); *see also infra* at 14. Because the cause of action would have accrued during the period provided in the statute of repose, the Nation's claim is governed by the discovery rule to toll the applicable statute of limitations and this action should proceed.

C. The Statute of Repose does not apply.

The Oklahoma Constitution provides:

> Laws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted.

Okla. Const. art. V, § 59. The statute of repose relied on by Flintco provides that:

> No action in tort to recover damages
>
> (i) for any ***deficiency*** in the design, planning, supervision or observation of ***construction or construction of an improvement to real property***,
> (ii) for injury to property, real or personal, arising out of ***any such deficiency***, or
> (iii) for injury to the person or for wrongful death arising out of ***any such deficiency***,
>
> shall ***be brought against any person*** owning, leasing, or in possession of such an improvement or performing or ***furnishing the design, planning, supervision or observation of construction or construction of such an improvement more than ten (10) years after substantial completion of such an improvement.***

12 O.S. § 109. Here, the statute of repose violates the "uniform operation" of law by carving out an exception for construction professionals. "It is not within the power of the Legislature to cut off an existing or vested remedy entirely." *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 1977 OK 70, ¶ 10.

"We have said that a statute is a general law if it relates to persons or things as a class rather than relating to particular persons or things, and a statute is a special law where a part of the entire class of similarly affected persons is separated for different treatment." *Strickland v. Stephens Prod. Co.*, 2018 OK 6, ¶ 10 (*citing Goodyear Tire*, 2000 OK 41, ¶ 5; *Reynolds*, 1988 OK 88, ¶ 14). The generally applicable law in Oklahoma is: "Generally a cause of action accrues at the moment the party owning it has a legal right to sue." *Cavaness*, 1977 OK 70, ¶ 9. Here, because the issues were concealed behind walls, the Nation would never know either until a fire or renovations. In conducting renovations, the Nation found the incomplete safety measures in November of 2022. Thus, the cause of action is subject to the discovery rule that would toll the time period in which the Nation must bring its cause of action. *Horton v. Hamilton*, 2015 OK 6, ¶ 9. Thus, if the law were applied generally, there would be no bar to this cause of action solely because it involves construction.

As recognized above, "a statute is a special law where a part of the entire class of similarly affected persons is separated for different treatment." *Strickland*, 2018 OK 6, ¶ 10. In *Strickland*, the Oklahoma Supreme Court found that 85A O.S. § 5(A):

> operates uniformly on all employees and employers, but for the last sentence. The last sentence of § 5(A) carves out a special subclass of employers, specifically oil and gas employers, who are automatically deemed principal employers and given immunity in the district court regardless of whether the employer would be considered a principal employer under the facts of the case.

Strickland, 2018 OK 6, ¶ 10. Here, 12 O.S. § 109 provides immunity only for the construction professionals. While no other profession enjoys the ability for claims to expire, general contractors such as Flintco do. And, § 109 is not a permissible special law as the effects actual promote harm such as the case here.

While no other profession can benefit from concealing its conduct for a period of time, general contractors are able to conceal misconduct beneath layers of sheetrock and receive a "get

out of jail free" card once they reach the ten (10) year mark from substantial completion. The disparate treatment under § 109 actually promotes misconduct, such as here. Thus, the differential treatment under § 109 is without warrant. While no other professions receive this protection, § 109 is unconstitutional as it provides a carve out protection for construction professions only.

In *Strickland*, the Court determined that § 5(A) was a prohibited special law:

> SPC argues that oil and gas production involves complex processes including exploration, drilling, and production, and that such processes are routinely performed by different specialists subcontracted by the owner of the well, making the oil and gas industry unique. However, many other industries also engage in complex processes and utilize subcontractors for specialized work. Thus, without more, we cannot conclude that the use of complex processes or the use of subcontractors to perform certain specialized work is distinct to the oil and gas industry so as to warrant differential treatment.
>
> SPC also argues that oil and gas well owners and operators need "certainty" regarding their exposure to civil liability. But employers in other industries would, in all likelihood, also prefer to have certainty regarding their exposure to liability. Thus, certainty regarding immunity from liability is not a distinctive characteristic of the oil and gas industry that warrants special treatment. SPC has not presented any evidence specific to the oil and gas industry that would warrant differential treatment or furnish a practical and reasonable basis for discrimination. The last sentence of § 5(A) is an unconstitutional special law under Art. 5, § 59 of the Oklahoma Constitution.

Strickland, 2018 OK 6, ¶¶ 12-13, 411 P.3d 369, 375–76. Without any justification, there can be no argument for special treatment under the law. Thus, § 109 is unconstitutional and does not apply.

D. Flintco's conduct tolled the statute of limitations.

Oklahoma law has established that:

> Fraudulent concealment constitutes an implied exception to the statute of limitations, and **a party who wrongfully conceals material facts, and thereby prevents a discovery of his wrong, and the fact that a cause of action has accrued against him, is not allowed to take advantage of his own wrong by pleading the statute**, the purpose of which is to prevent wrong and fraud.

Loyal Protective Ins. Co. v. Shoemaker, 1936 OK 491, ¶4 (emphasis added). The Oklahoma Supreme Court has explained that the fraudulent concealment doctrine applies when the defendant commits "some affirmative act of concealment or some misrepresentation to exclude suspicion and prevent inquiry." *Kansas City Life Ins. Co. v. Nipper*, 1935 OK 1127, ¶32 (quoting *Waugh v. Guthrie Gas, Light, Fuel & Improvement Co.*, 1913 OK 42, ¶16). While the statute of limitations is not tolled where circumstances would "put a man of ordinary prudence on inquiry" or where the party's own negligence caused the failure to discover the cause of action, that is not the case here. *Id.* at ¶35. Here, because the fraud by Flinteo and others was covered by sheet rock and walls in the hotel rooms, hallways, etc., the ordinary and prudent person would never be able to know of the deceit until demolition. The Nation would be forced to tear down walls to inspect the fire walls and had no need to do so because it trusted the representations of Flinteo.

For example, the statute of limitations in this suit does not run until the Nation learned of the suable conduct. In *Smith v. Johnston*, the Court found that:

> The discovery was happenstance and came through the need of additional lights that caused another electrician to suggest additional inspection by the city. That inspection resulted in the discovery of the harm caused by the hazardous condition. Owner was not neglectful of his rights and did not fail to use reasonable and proper diligence after the discovery.

1978 OK 142, ¶¶ 14-15. The Court went on to "hold the limitation period of two years did not begin to run until learning of or, in the exercise of reasonable care and diligence, should have learned of the harm through discovery of the hazardous condition caused by the hidden defect." *Id.* Thus, the statute of limitation would not begin to run until the Nation discovered the conduct.

The Court similarly held in "The 'discovery rule allows limitations in tort cases to be tolled until the injured party knows or, in the exercise of reasonable diligence, should have known of the injury'" in *McVay v. Rollings Const., Inc.* 1991 OK 102, n.1. In *McVay.*, Ms. McVay entered into a contract with Rollings Construction to replace part of their sewer line. *Id.* at 1331. More than

two years later, McVay began having sewer problems. *Id.* at 1332. It was not until a plumber excavated their property that the Ms. McVay learned that "the sewer line from the McVay house was not connected to the main line." *Id.* at 1332. Rollings Construction argued that the statute of limitation ran from the end of the construction contract in December 1985. *Id.* The Court, however, determined that the limitation began to run when the McVays excavated their property to uncover the concealed injury to the sewer line:

> McVay's failure to discover the injury was not a result of her negligence. **The cause of the injury was hidden and, without excavation, could not have been known to McVay.** McVay discovered that her sewer line had not been reconnected only after having problems with her plumbing. **Rollings' acts in covering pipes and connections concealed the injury from McVay.** McVay was not neglectful of her rights and did not fail to use reasonable and proper diligence after the discovery. The two-year statute of limitations did not begin to run against McVay until she learned of the harm on July 19, 1987.

Id. at 1333 (emphasis added). Of note, is that the *McVay* court clearly infers that while plaintiff experienced plumbing issues prior to the excavation of the sewer line, it was not until she uncovered the detached sewer line that the injury was revealed, and the statute started running. *Id.* Because 12 O.S. § 95 is *not* a statute of repose, the issue must be known before the statute of limitation begins to run. *Id.* n.13 ("A statute of limitations extinguishes the remedy after a substantive right has vested. [A] statute of repose bars a cause of action before it arises." (brackets in original) (internal quotations omitted)).

Additionally, while in the context of a suit to exempt a debt from discharge in a bankruptcy proceeding, 12 O.S. § 95 (A)(3) was interpreted in *In re Ward.* 589 B.R. 424 (Bankr. W.D. Okla. 2018). There, Ward argued that the fraud two-year statute of limitations barred the Bank's claim against him for losses the bank incurred, *Id.* at 428-429, due to "questionable loan practices" of Ward during his tenure as the Bank's president, *Id.* at 426. The court stated that "[a] motion to dismiss raising a statute of limitations bar should not be granted unless 'the dates given in the

complaint make clear that the right sued upon has been extinguished.'" *Id.* at 429. (citing *Radloff-Francis v. Wyoming Med. Ctr., Inc.*, 524 F. App'x 411, 413 (10th Cir. 2013) (unpublished) (quoting *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041 n. 4 (10th Cir. 1980))). The court then held that the Bank's action was not barred because the Bank alleged in its January 2016 complaint that Ward **concealed his harmful activities** from the bank, making the bank unable to discover Ward's conduct until 2015, when Ward no longer worked there. *Id.* at 428-29.

Here, Defendants took affirmative acts of concealment by covering the lack of safety features and not disclosing the lack of safety and misrepresenting that the work was complete, the Nation's cause of action did not accrue until discovery. For example, Flintco, with others, made representations to the Nation that the work was completed and met the safety requirements. Petition ¶¶ 44-51. The Nation relied upon these representations and the truth of this matter was concealed behind the walls.

The Nation's claims are not time-barred, and accordingly Defendant's motion to dismiss should be denied.

CONCLUSION

WHEREFORE, and in consideration of the foregoing, the Nation prays this Court deny Defendant Flintco's Motion to Dismiss and to grant the Nation such further relief as deemed appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December 2023, a true and correct copy of the above and foregoing pleading was sent to the following counsel of record via regular U.S. Mail:

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