



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

ANDRAS SZANTHO, as the Personal Representative to the
Wrongful Death Estate of BILL FOSTER,

Plaintiff-Respondent,

v.

No. S-1-SC-40809

THI of NEW MEXICO at SUNSET VILLA, LLC d/b/a
SUNSET VILLA CARE CENTER and THI OF NEW MEXICO, LLC.

Defendants-Petitioners.

On Petition for Writ of Certiorari to the New Mexico Court of Appeals
(Ct. App. No. A-1-CA-41036)

PLAINTIFF'S/RESPONDENT'S ANSWER BRIEF

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STANDARD OF REVIEW

This Court applies a de novo standard of review when analyzing a denial of a motion to compel arbitration. *Peavy v. Skilled Healthcare Grp, Inc.*, 2020-NMSC-010, 470 P.3d 218. Additionally, this Court applies a *de novo* standard of review when determining whether the parties have agreed to arbitrate. *Felts v. CLK Mgmt.*, 2011-NMCA-062, 254 P.3d 124.

ARGUMENT

The right to trial by jury is a fundamental right that has been zealously protected for centuries. While parties may voluntarily waive this right through arbitration agreements, “[a]rbitration under the FAA is a matter of consent, not coercion.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). As the Supreme Court of the United States noted in *Waffle House*, “[i]t goes without saying that a contract cannot bind a nonparty.” *Id.* Yet Petitioners seek to do exactly that—to strip Bill Foster of his jury trial rights by way of a contract he never signed or accepted or even knew about, simply by labeling him a “third party beneficiary.” This end-run around the consent requirement would turn *Waffle House* on its head and eviscerate the foundational principle that arbitration must be consensual.

Petitioners’ (“THI’s”) position in this case has been a moving and oft-evolving target. From their position before the district court to their position before the Court of Appeals, to their position in the Petition for Certiorari, and finally to their arguments in the brief before this Court, THI’s arguments have changed with every iteration. To the district court, THI candidly acknowledged that the arbitration agreement THI sought to enforce was signed by **Don Foster**, who was neither a party to the litigation nor an agent or representative of Bill Foster. Nonetheless, THI argued that the district court should bind **Bill Foster’s estate** to the (alleged) contract with Don simply because the document blithely labeled Bill a “third party beneficiary.” THI presented no evidence that Bill Foster agreed to or even had any

knowledge of the agreement between THI and Don. Nor did THI present evidence that Bill Foster sought, accepted, or even was aware of his designation as a “beneficiary” of the agreement.

THI also argued that the issue of whether Bill Foster was bound by an agreement he did not sign and that THI signed with a party unrelated to the litigation should be delegated to an arbitrator under THI’s agreement with Don. Foster responded that the district court had to first determine whether an arbitration agreement even existed at all between the parties to the litigation, namely THI and Bill Foster, and because no such agreement existed, the delegation clause in the alleged contract with Don was irrelevant. Foster further argued that even if he was a third-party beneficiary, as THI claimed, THI could not offensively enforce the obligations of the contract between THI and Don Foster against Bill, who was a stranger to the contract and had not sought to invoke benefits under it. The district court agreed and denied the motion to compel arbitration, finding that “Under New Mexico law, an agreement can be enforced against a third-party beneficiary if the third-party beneficiary accepts the contract after it is made. There is no evidence that Bill Foster accepted the arbitration agreement after it was made.” **[RP 155]** Notably, the burden of establishing a valid and enforceable arbitration agreement is on the proponent of arbitration. *Corum v. Roswell Senior Living, LLC*, 2010-NMCA-

105, ¶3, 248 P.3d 329, 331. THI failed to carry this burden, and the district court correctly denied the motion.

Before the Court of Appeals, THI continued to argue that the issue of “who decides” whether Bill Foster was bound by an arbitration agreement with THI was one of the principal questions in the case and that the district court should have referred this question to an arbitrator under the purported contract between Don and THI. Importantly, however, even the cases THI cited to the Court of Appeals acknowledged that the relevant inquiry was whether the *parties* to the litigation had agreed to delegate issues to an arbitrator, and even THI acknowledged that had not happened here. *See, e.g.* THI COA Brief at 16-17.

Continuing the changing narratives and arguments, THI’s brief to the Court of Appeals raised no issue of FAA preemption and only included one sentence on this issue before the district court. This issue was raised for the first time in THI’s Petition for Writ of Certiorari to this Court, and those arguments were changed again between the Petition and THI’s opening brief here. It is well established, “parties cannot change their arguments on appeal.” *State v. Salazar*, 2006-NMCA-066, ¶ 9, 136 P.3d 1013, 1016. The Court in *Salazar* noted that “many of the issues argued on appeal [were] not the issues that were presented to the trial court,” thus the Court refused to address issues that were not raised below. *Id.* THI’s arguments to this Court suffer

from the same defect and should be swept aside like the unpreserved and ever-evolving arguments the Court of Appeals declined to address in *Salazar*.

Despite THI's continued attempts to reframe the issues in the case after each loss and to recraft the Court of Appeals' decision as something novel and at odds with existing New Mexico law, the Court of Appeals decision is, in fact, a proper statement of the relevant law governing arbitration as well as third-party beneficiaries. While there are admittedly few if any decisions analyzing the interplay between motions to compel arbitration and third-party beneficiaries, the law surrounding these topics individually is well established and was followed by the Court of Appeals in rendering its decision in this case.

First, a threshold question that must be determined by the district court when confronted with a motion to compel arbitration is whether **the parties to the litigation** entered into an arbitration agreement. This issue of "formation" must be decided by the courts and cannot be delegated to the arbitrator. The parties in this case are THI and the Estate of Bill Foster. Accordingly, the district court and the Court of Appeals properly considered whether an arbitration agreement existed between THI and Bill Foster ("Father"). Both courts correctly concluded that there was not.

THI spends much of its Brief focusing on an alleged contract between Bill Foster's son Don ("Son") and THI. THI misstates the facts in suggesting that

“Plaintiff did not contest that (1) a valid contract was formed between the Facility and Son and (2) Father was the intended third-party beneficiary of that contract.” The opposite is true. Plaintiff has steadfastly contested the existence of a contract between THI and Son as well as Father’s status as a third-party beneficiary throughout these proceedings. *See, e.g.* [RP 123] “No agreement was created between the Facility and Mr. Bill Foster *or the Facility and Mr. Don Foster...*” (emphasis added); COA Answer Brief at 18-20 (“Even if there were a valid agreement to arbitrate between Don Foster and the Facility...”); [RP 126] (“While Plaintiff does not concede that Bill Foster qualifies as a third party beneficiary. . .”) COA Answer Brief at pp.18-20 (containing an entire subpoint arguing that Father is not a third-party beneficiary). The Court of Appeals expressly recognized that Foster contested any agreement with Son, stating, “We note that Plaintiff disputes whether an agreement was formed with Son. We do not delve into this dispute because the outcome does not impact our resolution of the issues presented on appeal.” COA Op. ¶18 n. 2.

While Foster disputes the existence or validity of any alleged contract between Son and THI, Foster agrees with the Court of Appeals that any such contract is legally irrelevant because Son is not a party to this proceeding. Accordingly, the Court of Appeals properly held that the threshold issue to be decided was whether an agreement to arbitrate existed between Father and THI. Because it did not, THI’s

arguments regarding the delegation clause are inapt and nothing more than an attempt to “put the cart before the horse” by suggesting that a court should enforce a delegation clause before determining whether the agreement containing the delegation clause is between the parties to the litigation.

Second, while Foster has maintained throughout this litigation that Father cannot be considered a third-party beneficiary of any alleged agreement between THI and Son (even if such agreement did exist), that issue, too, is irrelevant because a contract cannot be offensively enforced against a non-signatory to the contract unless the non-signatory third party has sought benefits under the contract. As the Court of Appeals noted, the majority of jurisdictions that have considered this issue have agreed.

On this point, too, THI egregiously mischaracterizes the history of this litigation and the Court of Appeals’ holding in its attempts to reframe the debate to one more favorable for itself. The Court of Appeals’ holding was not specific to arbitration agreements. Rather, the Court of Appeals held that “Defendants have not established that New Mexico law permits a contract to be offensively enforced against a third-party beneficiary under the circumstances here.” The plain language of the Court’s opinion was neutral and applied to all contracts. THI, however, infers a malignant intent against arbitration agreements by arguing that the phrase “under the circumstances here” nefariously singles out arbitration agreements rather than

represent a general— and correct— statement of basic contract law. A fair reading of the Court’s opinion makes clear that the “circumstances here” that the Court was addressing were circumstances where the alleged third-party beneficiary has not brought suit to obtain benefits under the contract or assumed the obligations of the contract. Indeed, the Court of Appeals expressly recognized that an arbitration agreement *could* be enforced against a third party if the third party brings suit under the contract. But the Court of Appeals agreed with the district court that “Nevertheless, those facts are not present here.” COA Op. ¶37.

The Court of Appeals’ ruling correctly applied existing New Mexico law on contracts and third-party beneficiaries, and the opinion does not single out arbitration contracts for unfair treatment in violation of the FAA. The Court’s opinion should be affirmed.

I. Whether an arbitration agreement existed between the parties to the litigation is a matter of contract formation which cannot be delegated to an arbitrator. (Question 1)

The issue of whether the parties to litigation have agreed to arbitrate their disputes presents an issue of contract formation that must be heard by the courts and cannot be delegated to the arbitrator. The Supreme Court of the United States has held repeatedly that formation issues in an arbitration agreement must be reviewed by the courts in order to “satisfy itself that such agreement exists” and determine “whether the [arbitration] clause was agreed to.” *Granite Rock Co.*, 561 U.S. 287,

297 (2010). It is imperative that courts determine whether an arbitration agreement is valid and has been agreed to because “**arbitrators derive their authority to respond to disputes only because the parties have agreed** in advance to submit such grievances to arbitration.” *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 648-49 (1986) (emphasis added).

Contrary to THI’s arguments, the presence of a delegation clause does not change or abrogate the court’s duty to determine the question of whether there is an arbitration agreement that binds the parties in the first place. If the answer to that question is “No,” the arbitrator has no authority, and the delegation clause is irrelevant, because no contract to delegate—much less arbitrate—exists. While parties can delegate **some** threshold issues to an arbitrator, “the threshold issue of whether the delegation clause is even applicable to a certain party must be decided by the Court.” *Soto v. Am. Honda Motor Co.*, 946 F.Supp.2d 949, 954 (N.D. Cal. 2012). This is because “where a nonsignatory is involved in a motion to compel arbitration under a contract, there is a question as to the very **existence of an agreement involving the nonsignatory.**” *RUAG Ammotec GmbH v. Archon Firearms, Inc.*, 538 P.3d 428, 433 (Nev. 2023)(emphasis added).

Within its inquiry into contract formation or existence, the court may consider whether arbitration can be compelled by a non-signatory or third-party beneficiary. *See e.g. Noble Cap. Grp. V. US Cap. Partners, Inc.*, Case No. 20-50721, 2021 WL

3477481, at *2 (5th Cir. Aug. 6, 2021) (considering whether non-signatory can compel arbitration within the question of whether an agreement to arbitrate was formed); *Microchip Tech. Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1356 (Fed. Cir. 2004); *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 629 (Tx. 2018). THI's arguments on this point are misguided. THI loses site of the fact that the relevant initial inquiry for the court is whether the parties to the litigation agreed to form a contract at all. THI ignores the need for this threshold finding and instead focuses on whether an agreement containing a third-party beneficiary can be enforced.

THI has the wrong emphasis, because, as argued further herein, the mere existence of a third-party beneficiary listed in a piece of paper does not necessarily transform that piece of paper into a contract. Nor does it necessarily subject the listed third-party beneficiary to the obligations detailed in that piece of paper, even if the paper does happen to meet the requirements to be a contract. Accordingly, whether there is an agreement to benefit a third-party beneficiary does not and cannot end the inquiry. Similarly, because the critical question is whether the parties to the agreement have agreed to arbitrate their claims, the existence of an agreement between one of the parties and a separate entity is irrelevant unless that agreement can fairly be imputed to the other parties to the litigation.

Where, such as here, the party seeking to avoid arbitration is a non-signatory to the agreement, it is critical that a court make determinations regarding the formation and existence of an agreement between the non-signatory and the party seeking to compel arbitration before delegating any threshold issues to an arbitrator. *C.f. Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 209 (2d Cir. 2005). In *Contec*, the Second Circuit determined that a non-signatory to an arbitration agreement could force a signatory to arbitrate issues of arbitrability pursuant to a delegation clause contained within the arbitration agreement, but only because the party seeking to avoid arbitration had signed the arbitration agreement and agreed to the delegation. The Second Circuit distinguished its case from that in *Microchip*, where the party seeking to avoid arbitration had not signed the arbitration agreement or agreed to the delegation of threshold issues. The Second Circuit noted that a party's signature is "an important indicator of [the party's] expectation and intent when binding itself to the [] Agreement." *Contec Corp.* 398 F.3d at 211; *see also Apollo Computer v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (allowing non-signatory to compel signatory to arbitrate issues of arbitrability based on signatory's agreement to be bound to delegation clause).

Because THI seeks to enforce an arbitration agreement against a nonsignatory, the Federal Circuit appellate decision in *Microchip* presents the proper analysis of the issue and illustrates how the question of applicability of an arbitration agreement

to a party is, at its core, a question of formation or existence that must be determined by a court and not an arbitrator. Microchip, a successor party to a patent licensing agreement, sought declaratory relief against Phillips on the issue of their coverage under the licensing agreement that Phillips signed with Microchip's predecessor company. *Microchip*, 367 F.3d at 1352-53. Phillips counterclaimed, arguing that Microchip never became a party to the licensing agreement, and moved to compel the issue to arbitration, citing an arbitration provision in the agreement. *Id.* The Court found that since Microchip, as the successor party, "did not itself sign the... agreement on which [Phillips's] claim to arbitration depends", then it was for the district court to "determine whether Microchip was a successor party to the 1983 agreement **before** any issue may be referred to arbitration under the agreement." *Id.* at 1358 (emphasis added).

Here, as in *Microchip*, the central question is whether there is an arbitration agreement that binds the parties to the litigation or not, and Bill Foster—the party challenging arbitration—did not sign the arbitration agreement that THI seeks to enforce. This case is not simply a matter of two signatory parties contracting to arbitrate, or even a case where a nonsignatory seeks to bind a signatory to their own agreement such as *Contec Corp.* In this case, Foster did not sign the Arbitration Agreement, and it was conceded by both parties that the signor of the agreement had no actual or apparent authority to sign the Agreement on Foster's behalf. **[RP 137]**.

Accordingly, because Foster did not agree to arbitration at all, much less delegation of any threshold issues, the question of whether Foster is bound by the agreement must be answered by the court.

THI also argues that Foster should be forced into arbitration because of the arbitration agreement's incorporation of the Federal Arbitration Act and Judicial Arbitration and Mediation Service rules. However, courts are clear that the incorporation of these rules and statutes does not bypass judicial authority. The *Jody James Farms* court explained that “an arbitration agreement’s mere incorporation of the American Arbitration Association rules does not show clear intent to arbitrate arbitrability.” *Id.* Even when the party resisting arbitration is a signatory to an agreement, questions related to the existence of an arbitration agreement with a non-signatory are for the court, not the arbitrator. *Jody James Farms*, 547 S.W.3d at 629.

The District Court of New Mexico has also emphasized that the FAA “was not enacted to force parties to arbitrate in the absence of agreement...the existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked.” *THI of N.M. at Vida Encantada, LLC v. Lovato*, 848 F. Supp. 2d 1309, 1322-23 (D.N.M. 2012) (quoting *Avedon Eng'g, Inc. v. Seatex*, 126 F.3d 1279, 1286 (10th Cir. 1997); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (“[T]he FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties”). The Supreme Court of Nevada took

a similar position in stating that “even the most sweeping delegation cannot send the contract-formation issue to the arbitrator, because, until the court rules that a contract exists, there is simply no agreement to arbitrate.” *RUAG v. Ammotec GmbH*, 538 P.3d at 434.

Against this legal backdrop, it is easy to see why the New Mexico Court of Appeals disregarded the decision in *Casa Arena Blanca LLC v. Rainwater*, wherein the Tenth Circuit held that the district court should have delegated to an arbitrator whether the purported third party beneficiary was bound by an arbitration agreement she did not sign. *Casa Arena Blanca LLC v. Rainwater*, No. 21-2037, 2022 WL 839800 (10th Cir. March 22, 2022) (unpublished).

The New Mexico Court of Appeals correctly found that the *Rainwater* decision was inconsistent with New Mexico state law, stating “In every arbitration case, the first question a court must answer is whether **the parties to the litigation** agreed to arbitrate.” COA Op. at ¶18 (emphasis in original). Because the *Rainwater* decision improperly delegated this central question to an arbitrator, the Court of Appeals correctly declined to follow its rationale.

Furthermore, the *Rainwater* decision is decidedly out of step with other appellate decisions from around the country. *See, e.g. Sherer v. Green Tree Servicing LLC*, 548 F.3d 379, 382 (5th Cir. 2008) (issues surrounding who is bound by an arbitration agreement are issues of contract formation that must be resolved by the

court and cannot be delegated to an arbitrator); *O'Shaughnessy v. Young Living Essential Oils, L.C.*, 810 Fed. Appx. 308, 314 (5th Cir. 2020) (“Given our determination, however, that there is no valid agreement to arbitrate between the parties, we do not reach the secondary issue of the scope of the arbitration agreement and the effect of the delegation clause on the analysis of that issue”); *Druco Rests., Inc. v. Steak N Shake Enters.*, 765 F.3d 776, 784-85 (7th Cir. 2014) (declining to find the existence of a valid agreement to arbitrate where the agreement failed to satisfy fundamental requirements under contract law, such as incompleteness and ambiguity in the terms); *Walker v. Collyer*, 9 N.E.3d 854, 860 (Mass. App. 2014) (delegation clause did not clearly and unmistakably show that the parties to this dispute, rather than the parties to the agreement, agreed to delegate arbitrability questions); *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 599 (1st Cir. 1996) (“certainly a party who did not sign the agreement did not consider who should decide arbitrability”). The district court and Court of Appeals properly held that the question of whether Foster was bound by the arbitration agreement was a question of formation that should be decided by the court.

II. The Court of Appeals correctly held that a signatory to an agreement cannot offensively enforce that agreement on a third-party beneficiary who did not sign the agreement and is not seeking benefits under it. (Question 2)

The Court of Appeals correctly held that, absent special circumstances, a signatory to an agreement cannot offensively enforce that agreement against a non-signatory simply because the third party is designated as a beneficiary of the contract. The view that “the third-party beneficiary doctrine enables a non-contracting party to enforce a contract against a contracting party – not the other way around” is sound and has been adopted by jurisdictions around the country. *Mendez v. Hampton Ct. Nursing Ctr., LLC*, 203 So.3d 146, 149 (Fla. 2016); *see also Central Trust Bank v. Graves*, 495 S.W.3d 797, 803 (Mo. Ct. App. 2016); *Thompson v. Pruitt Corp.*, 784 S.E.2d 679, 687 (S.C. Ct. App. 2016) (“a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.”); *Atlanta Concorde Fire Soccer Ass’n Inc. v. Graham*, 843 S.E.2d 889 (Ga. Ct. App. 2020) (explaining that third-party beneficiaries are strictly permitted to enforce the particular covenants of the contract made for **his or her** benefit, and all non-relevant covenants as between the contract parties are unenforceable by the beneficiary); *MTA, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 114 So. 3d 27, 31 (Ala. 2012).

Courts around the country have applied the third-party beneficiary logic to cases similar to this one and held that the third-party beneficiary cannot be compelled to arbitrate. In *Mendez v. Hampton Ct. Nursing Ctr., LLC*, a nursing home facility attempted to compel Mendez to arbitrate after he sued for negligence. *Mendez*, 203 So.3d at 147. Mendez was admitted to the facility in an incapacitated state and did not sign the arbitration agreement included in his admission agreement. *Id.* Mendez's son signed the agreement; however, he did not have actual or apparent legal authority to do so. *Id.* The Supreme Court of Florida held that Mendez was not bound to arbitration as a third-party beneficiary because Mendez never actually assented to the agreement, and the third-party beneficiary doctrine could not be used to bind a non-signatory to terms to which he had not assented. *Id.* at 151.

Similarly, in *Miller v. Life Care Ctrs. Of Am., Inc.*, the Supreme Court of Wyoming held that a resident of a nursing home facility could not be bound to an arbitration agreement because the resident was incompetent when she was admitted and did not sign the agreement containing the arbitration provision. *Miller v. Life Care Ctrs. Of Am., Inc.*, 478 P.3d 164, 174. (Wyo. 2020). Although the resident's son signed the arbitration agreement on her behalf, the court reasoned that the resident could not have personally held out her son to execute the agreement for her as an agent. *Id.*

The appellate courts of South Carolina and Mississippi also held that a resident cannot be compelled to arbitrate when the resident did not sign the arbitration agreement and the resident's family members, who signed on the residents' behalf, did not have actual or apparent authority to do so. In *Hattiesburg Health & Rehab Ctr., LLC v. Brown*, the Supreme Court of Mississippi held that a resident is not bound to an arbitration agreement as a third-party beneficiary because the resident's family had no actual or apparent authority to act on behalf of the resident. *Hattiesburg Health & Rehab Ctr., LLC v. Brown*, 176 So. 3d 17 (Miss. 2015). In *Thompson v. Pruitt Corp.*, the South Carolina appellate court held that an agent who had the authority to handle finances or make healthcare decisions did not have the actual or apparent authority to execute an arbitration agreement on the principal's behalf in a nursing home case. *Thompson v. Pruitt Corp.*, 784 S.E.2d 679, 686 (S.C. Ct. App. 2016). Because the agent, the resident's relative, did not have actual or apparent authority to execute the resident agreement with the nursing home facility, the resident could not be considered a third-party beneficiary to compel arbitration. *Id.* at 687.

Mere status as a third-party beneficiary, alone, is not sufficient to support binding an unwilling non-signatory to an arbitration agreement. *Central Trust Bank v. Graves*, 495 S.W.3d at 803. "Even if a party is a third-party beneficiary of an agreement containing an arbitration provision, the third-party must still manifest

some agreement to arbitrate or otherwise be bound ... before a signatory may bind the third-party beneficiary.” *Id.* Binding a third-party beneficiary to contractual provisions to which they have not manifested any intent to the contract “is to allow contracting parties to alter the rights of a third party, based on whatever consideration the contracting parties intended to provide to the third party, and without regard for whether the third party deems that consideration to be an adequate exchange for the contractual obligations.” *Drury v. Assisted Living Concepts, Inc.*, 262 P.3d 1162, 1166 (Or. App. 2011). In other words, what THI suggests here is that THI should be entitled to unilaterally determine what consideration Foster receives in exchange for his relinquishment of his constitutional right to a jury trial, without consideration to whether Foster himself would believe the exchange was fair. New Mexico does not allow a party to force another party to give up substantial rights where the other party has not in some way acquiesced to the exchange.

For its assignment of error, THI argues that the Court of Appeals failed to recognize that this Court “has applied the [third-party beneficiary] doctrine to permit signatories to enforce contract terms against beneficiaries.” Pet. Brief at 25. But the Court of Appeals’ opinion **did** acknowledge that signatories have been allowed to enforce contract terms against non-signatories in certain limited circumstances. COA Op. ¶ 27. Specifically, citing the decision in *Damon v. StrucSure Home Warranty, LLC*, 2014-NMCA-116, 338 P.3d 123, the Court identified that “non-

signatories may be bound by an arbitration agreement under principles of contract, agency, or equity.” COA Op. ¶ 27.

The decision in *Damon* supports the Court of Appeals’ decision in this case. In *Damon*, the Court of Appeals examined under what circumstances a non-signatory can be bound to an arbitration agreement and acknowledged “five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel. *Damon v. StrucSure Home Warranty, LLC*, 2014-NMCA-116, 338 P.3d 123. In *Damon*, a homeowner sued a home warranty company for structural defects in the home pursuant to a home warranty that the company issued to the builder and original purchaser of the home. The home warranty company sought to compel arbitration pursuant to an arbitration agreement contained within the contract. Admittedly, the current homeowners were not parties to the original warranty agreement. Nonetheless, the New Mexico Court of Appeals held that the signatory home warranty company could enforce the arbitration provision against the nonsignatory home-owner under the theory of equitable estoppel. Specifically, the Court held that the homeowners “voluntarily seek to directly benefit from the warranty by enforcing some of its terms while simultaneously attempting to avoid one of its perceived burdens.” *Id.* at ¶ 13. The Court held that because the homeowners had chosen to seek a benefit under the agreement, they were subject to the arbitration provision

contained within the agreement. Importantly, the Court noted that if the homeowners had **not** sought such a benefit, they would not have been subjected to the arbitration provision stating, “If Plaintiffs wished to exempt themselves from the arbitration clause, they could have chosen not to claim and enforce any of the rights under the warranty. However, once Plaintiffs voluntarily sought to embrace and invoke the benefits created by the warranty, they could not avoid the arbitration provision in the warranty.” *Id.* at ¶16. The importance of the *Damon* decision is that, contrary to THI’s position, nonsignatories are not always subject to arbitration merely because the contract claims to confer a benefit upon them. Arbitration can only be offensively compelled against nonsignatories when they actively and voluntarily seek out benefits under the agreement.

THI argues that two New Mexico cases support its argument that Foster should be bound by the arbitration agreement. THI cites *Floeck v. United Benefit Life Ins. Co.* as supporting its contention that third party beneficiaries should be bound by the terms of the contract under which they are seeking benefits. *Floeck v. United Benefit Life Ins. Co.*, 1948-NMSC-049, 197 P.2d 897. This case is distinguishable from *Floeck* in two significant ways. First, the *Floeck* decision originates from an insurance contract, a vastly different contract than a nursing home residency contract. *Id.* Secondly, this case is actually in line with the decision made by the Court of Appeals. In *Floeck*, a third-party beneficiary was sued to obtain

benefits of a contracted insurance policy from her husband's insurance company. *Id.* at 325. Because Floeck was suing to obtain benefits from the agreement with the insurance company, Floeck was also ordered to abide by the agreement's arbitration provision. *Id.* at 331.

THI's second case is the decision in *Moruzzi v. Federal Life & Casualty Co.* case. *Moruzzi v. Federal Life & Casualty Co.*, 1938-NMSC-002, 75 P.2d 320. This, too, is an insurance case where an insurance beneficiary was suing under the contract to receive benefits. *Id.* at 321. Because the widow was seeking contracted benefits from a life insurance policy on her deceased husband, the widow was held to other contracted provisions, such as a release. *Id.* at 332. Both *Moruzzi* and *Floeck* support the Court of Appeals' decision in this case, acknowledging that where a nonsignatory takes independent steps to seek benefits under the contract, the nonsignatory is also bound by the obligations of the contract.

Having acknowledged that under some circumstances a nonsignatory **may** be compelled to arbitrate, the Court of Appeals then set out to discern if the instant case presented any justification for offensive enforcement of the arbitration agreement against Foster. The Court concluded, "Defendants have not established that New Mexico law permits a contract to be offensively enforced against a third-party beneficiary under the circumstances here." COA Op. ¶ 29. This conclusion was correct.

First, the instant case is not one where Foster, the nonsignatory, is suing to receive some benefit under the THI contract. Rather, Foster is suing for negligent care he received at THI's nursing home. Accordingly, the exception established in *Damon* is inapplicable. Additionally, THI failed to establish that Foster availed himself of the benefits of the arbitration agreement so as to manifest assent to it. In its Order, the District Court properly found that there is no evidence that Bill Foster accepted the arbitration agreement after it was made. **[RP 155]** Given that Don lacked any agency or authority to sign the arbitration agreement on behalf of Bill—a point THI readily conceded before the district court— **[Tr. 4]**, THI's attempts to conduct an end run around Bill's wishes is particularly disingenuous. Under New Mexico law, "[r]atification is the adoption or confirmation by a principal of an unauthorized act performed on its behalf by an agent." *See Johnson & Johnson v. Taxation & Revenue Dep't*, 1997-NMCA-030, ¶ 16, 936 P.2d 872. As shown in *Johnson & Johnson*, even where a principal stated that they "probably would approve" an agreement made without their consent, ratification could not be inferred. *Id.* "The burden of showing a ratification is upon the one who asserts it." *See Bronx Sav. Bank v. Conduff*, 1967-NMSC-167, ¶ 6, 430 P.2d 374. Such a showing requires "substantial evidence." *Id.*

To find that a party has assented to a contract, "the trier of fact must be able to determine that the party performing an act was aware of the offer and aware that

his conduct could constitute acceptance.” *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 17, 81 P.3d 573, 579. The decision in *DeArmond* is instructive on this point. In *DeArmond*, an employer sought to bind an employee to an arbitration agreement, arguing that the employee had manifested assent to the agreement by continuing in the employment. The New Mexico Court of Appeals held that where assent is suggested from continuing in a routine activity, a party must demonstrate “conscious assent” which consists of “proof that [the party] actually knew of the offer and was aware that remaining on the job constituted acceptance.” *Id.* at ¶ 18. If the party seeking arbitration cannot show this conscious assent, there has not been a contract. The Court held, “To suggest otherwise, particularly when an employee is waiving a fundamental right to a jury trial through an arbitration agreement, offends a basic notion of fairness.” *Id.*

The principles in *DeArmond* apply with equal strength here. THI argues that Foster should be compelled to arbitrate because he “accepted the benefits” of the arbitration agreement by remaining in the facility. But Foster’s merely remaining in the facility with no proof that Foster was even aware that he had been deemed a third-party beneficiary and in return was being forced to relinquish his rights to a trial by jury does not show conscious assent to the agreement. THI’s suggestion that it can create an end run around its residents’ constitutional rights by naming them as third-party beneficiaries in an arbitration agreement signed by someone without

authority and that the residents thereby “accepted” the agreement merely by remaining in the facility is absurd.

The import of this decision cannot be overstated: If THI’s arguments on this point are adopted, a facility need not concern itself with the actual authority of those signing arbitration agreements on behalf of the residents as long as the agreement contains standardized language that the contract was entered into in the signor’s “individual capacity” and “for the benefit of the resident.” In other words, under THI’s interpretation of the third-party beneficiary doctrine, any unauthorized, random third person off the street could sign an arbitration agreement for the “benefit” of a resident and bind the resident and their estate to its terms without the resident ever having any knowledge of the agreement. This is not the law in New Mexico, and this Court should decline THI’s invitation to make it so.

III. The Court of Appeals’ opinion does not violate the Federal Arbitration Act (Question 3)

As an initial matter, the issue THI has now placed at the front and center of its appeal was not even raised at all before the Court of Appeals and was given only one line of text in their briefing before the district court. *See* Appellants’ Opening Brief and [RP139]. Moreover, THI’s assertion of FAA preemption in its Petition for Certiorari was different than that now advanced in its brief. It is well established, “parties cannot change their arguments on appeal.” *State v. Salazar*, 2006-NMCA-

066, ¶ 9, 136 P.3d 1013, 1016. The Court in Salazar noted that “many of the issues argued on appeal [were] not the issues that were presented to the trial court,” thus the Court refused to address issues that were not raised below. *Id.*

Regardless, the Court of Appeals’ opinion does not run afoul of the FAA because it does not treat arbitration agreements any differently than it treats any other contracts. First, the Court did not impose any requirements for additional contracts between signatories and third-party beneficiaries to support enforcement of the arbitration agreement. THI’s argument on this point seems to be a twisting of the Court of Appeals’ determination that the question of whether the arbitration agreement binds Foster as a nonsignatory is one of formation that the courts should answer or one that should be delegated to an arbitrator. The Court of Appeals reached the entirely unremarkable conclusion that the first question the court must ask is whether the parties to the litigation have entered into an agreement to arbitrate their disputes. This is black-letter law, supported by cases from New Mexico, courts around the country and even the Supreme Court of the United States. As it did in its earlier arguments regarding the substance of this issue, THI conflates the creation and formation of a third-party beneficiary contract with the creation and formation of an arbitration agreement that binds the parties to the litigation. The Court of Appeals opinion reached the correct result on this issue, and that result is supported

by numerous courts across the country. The opinion on this point does not violate the FAA.

THI's second assignment of error on this point is similarly unavailing. THI argues that, in announcing the circumstances under which a signatory to a contract can enforce the terms of the contract against a nonsignatory, the Court of Appeals singled out third-party beneficiary agreements in a way that violates the FAA. Importantly, the FAA does not protect third-party beneficiary contracts, and moreover, the Court of Appeals applied the law neutrally to all cases involving the enforcement of contractual rights against a nonsignatory. Nothing in this holding is specific to arbitration and accordingly this ruling cannot violate the FAA.

THI's next argument is similarly perplexing. Here, THI argues that the Court of Appeals improperly "bestows greater rights upon third-party beneficiaries who elect not to sue under the contract than the contracting parties have." Again, third-party beneficiaries are not protected under the FAA, so even if THI's interpretation were correct, this would not violate the FAA. But, as above, the Court of Appeals opinion is applied neutrally to all cases involving attempts to enforce contractual obligations against a nonsignatory to a contract. It does not single out arbitration agreements for unfavorable treatment or otherwise violate the FAA.

Finally, THI argues that the rule announced by the Court of Appeals is "couched in language suggesting that it applies to all types of third-party beneficiary

agreements” but in fact “derives its meaning from the fact that an agreement to arbitrate is at issue.” As support for this argument, THI points to the fact that the Court of Appeals framed the question in this case as “whether the third-party beneficiary doctrine applies to allow a signatory to enforce an arbitration agreement against a non-signatory.” Pet. Brief at 16. The Court of Appeals framed the issue narrowly, as involving the enforcement of an arbitration agreement against a non-signatory because those are the specific facts of this case. But the holding of the Court of Appeals—that a signatory to a contract cannot enforce contractual obligations against a nonsignatory absent circumstances showing acceptance of the contract or an intent to seek benefits under the contract—is a neutral rule that applies to all contractual disputes and not just arbitration agreements. The Court of Appeals’ opinion complies with the neutrality requirements of the FAA.

IV. The Issue of First Impression Was Adequately Raised and Briefed (Question 4)

Finally, the Court of Appeals did not improperly address an issue of first impression without sufficient briefing or argument. THI argues that the issue of “whether a party to an arbitration agreement can compel arbitration against a third-party beneficiary to the agreement that has not asserted a claim based on that contract” was not raised or briefed by the parties. The issue of first impression recognized by the Court of Appeals was subtly different: whether a signatory to a

contract can enforce contractual obligations against a non-signatory third party? See COA Op. ¶ 27. That question was not decided without the benefit of briefing. In fact, the Court of Appeals noted that this issue of first impression was the focal point of the “bulk” of the Petitioners’ briefing. *See id.* at ¶ 29. The Court of Appeals’ resolution of this issue, that a signatory to a contract cannot enforce contractual obligations against a nonsignatory third party except in limited circumstances, including when the nonsignatory sues under the contract, was well within its jurisdictional powers. This issue was properly raised, briefed, and argued before the district court and the Court of Appeals, and the Court of Appeals correctly decided it.

CONCLUSION

For all the foregoing reasons, the Court should uphold the decisions of district court and Court of Appeals.

REQUEST FOR ORAL ARGUMENT

Respondent joins in Petitioner’s request for oral argument. The issues presented in this case are likely present in many pending and future consumer arbitration cases in the district courts of New Mexico. Further development of the law regarding the offensive use of third-party beneficiary doctrine by a signatory to compel a non-signatory to arbitration is needed.

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2025, a true and accurate copy of the foregoing was filed electronically with the Court's electronic filing system, which caused the following parties or counsel to be served by electronic means:

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