



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Plaintiff-Respondent,

vs.

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.

BRIEF IN CHIEF OF DEFENDANTS-PETITIONERS

ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

The body of this Brief in Chief exceeds the 35-page limitation set forth in Rule 12-318 (F)(2) NMRA but complies with the limitations of Rule 12-318(F)(3). The body of this Brief in Chief uses a proportionally spaced typeface (14-point Times New Roman) and the body of the Brief contains 8,877 words, which is less than the 11,000 word maximum permitted by Rule 12-318(F)(3). The Brief was prepared using Microsoft Word for Microsoft 365 MSO (Version 2503) and the word count was obtained using that program.

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SUMMARY OF PROCEEDINGS

A. Introduction

Congress enacted the Federal Arbitration Act (“FAA”), 9 U.S.C. §§1-16, which “reflect[s] both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract. In line with these principles, courts must place arbitration agreements on an equal footing with other contracts.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted; cleaned up). The FAA has been interpreted innumerable times by the United States Supreme Court, which repeatedly has rejected attempts to limit its application. In yet another attempt to avoid the FAA’s mandate and decisional law, the Court of Appeals’ (“COA”) Opinion in this case violates the FAA’s equal-footing principle and therefore is preempted. In addition, the COA Opinion fundamentally misapplies—and upends—New Mexico’s jurisprudence governing the third-party beneficiary doctrine. Neither result can stand.

B. Nature of the Case

In this case, Bill Foster (“Father”) was a resident of a skilled nursing facility, Petitioner THI of New Mexico at Sunset Villa, LLC (“Facility”).¹ To obtain care and treatment for Father, his son (“Son”) signed the contract admitting Father to the

¹ Both Petitioners (the Facility and its sole member) moved to compel arbitration. This Brief refers only to the Facility for ease of reference.

Facility (“Admission Contract”). The Admission Contract included an integrated Arbitration Agreement. 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. As a result, the FAA and New Mexico law dictated that any dispute about the Arbitration Agreement’s enforceability against Father be referred to the arbitrator under the Agreement’s clear and unmistakable delegation provisions. Yet, the district court disregarded the delegation provisions and denied the Facility’s motion to compel arbitration, incorrectly holding that the Facility was required to show that the Arbitration Agreement is enforceable before attempting to enforce it. And—even though Father accepted and received medical treatment and services from the Facility as provided in the Admission Contract—the court declined to find that Father, in fact, accepted the Arbitration Agreement (that is an integral part of the Admission Contract).

The COA affirmed but took a different path. *First*, to bypass the Arbitration Agreement’s delegation provisions, the COA announced a new rule—applicable only to arbitration—which requires that before a signatory to a contract containing an arbitration provision may compel a third-party beneficiary of the contract to arbitrate, the court must determine whether a *separate* agreement to arbitrate exists between the *signatory and beneficiary*. Applying this arbitration-specific rule, the COA effectively rendered the third-party beneficiary doctrine superfluous by

holding that regardless of whether a contract was formed between Son and the Facility with Father as its intended third-party beneficiary, and notwithstanding the Arbitration Agreement's delegation clauses, the trial court had the power to decide whether a separate arbitration contract was formed between the Facility and *Father*.

Second, after wrongly depriving the arbitrator of the authority to determine whether the Arbitration Agreement was enforceable against Father under a third-party beneficiary theory, the COA held that New Mexico law does not allow an arbitration clause to be enforced against a third-party beneficiary unless the beneficiary seeks to enforce the underlying contract.

C. Course of the Proceedings

Plaintiff, in his capacity as the personal representative of Father's wrongful death estate, filed a Complaint for negligence, violations of the Unfair Practices Act, and punitive damages. [RP 3-4, 7-31.] In response, the Facility moved to compel arbitration [RP 38-106]. The district court denied the Motion to Compel Arbitration and the Facility timely appealed. [RP 155-56, 159-62].

D. Summary of the Relevant Facts

1. Plaintiff's Lawsuit

Father was a resident of the Facility on three separate occasions between October 17, 2018 and November 14, 2020. [RP 38-9.] Each time Father was admitted, one of his children executed an identical Admission Contract [RP 45-62]

and Arbitration Agreement **[RP 63-89]** to obtain care and treatment for Father at the Facility. On June 15, 2022, Plaintiff filed this lawsuit based on allegedly deficient care that Father received during his third residency period. **[RP 7, ¶ 3.]**

2. The Arbitration Motion

a. The Arbitration Agreement

The Arbitration Agreement was a condition of Father’s three admissions to the Facility. **[RP 65, 74, 83, 102.]** Son executed both the Admission Contract and Arbitration Agreement for Father’s third residency on the same date. **[RP 62, 88.]** The Arbitration Agreement explicitly incorporates the Admission Contract and specifies that the Arbitration Agreement “should be read together with the Admission [Contract].” **[RP 84.]** Likewise, the Admission Contract incorporates the “other Admissions materials,” including the Arbitration Agreement, and expressly makes those documents part of the Admission Contract. **[RP 62.]**

The Arbitration Agreement states that the Agreement itself and any arbitration proceeding “will be subject to and governed by the [FAA].” **[RP 86.]** The Arbitration Agreement also contains two delegation clauses which clearly and unmistakably give exclusive authority to the arbitrator, rather than the court, to decide arbitrability issues. The Arbitration Agreement’s first delegation provision reads: “To the fullest extent permitted by law, any disagreements regarding the

applicability, enforceability or interpretation of this Agreement will be decided by the arbitrator and not by a judge or jury.” **[RP 86.]**

The second delegation provision is set forth in JAMS’ arbitration rules which the Arbitration Agreement incorporates by stating that the “arbitration will follow the rules and procedures of the Judicial Arbitration and Mediation Service (‘JAMS’).” JAMS Rule 11(b) provides: “Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.” **[RP 86, 95.]**

Lastly, the Arbitration Agreement explicitly identifies Father as the intended third-party beneficiary of the Agreement: “When this [Arbitration] Agreement says that [Son] signs in his individual capacity, this means that, in addition to entering the Agreement on behalf of [Father], [Son], himself, also enters the agreement with [the Facility]. [Son] does so because *he wishes to obtain care and services for [Father]* who is a *third-party beneficiary* of the agreement between the Facility and [Son]. [The Facility’s] agreement to admit [Father], like this Agreement to use [the Dispute Resolution Program], therefore, *personally benefits [Son] as well as [Father]*.” **[RP 87 (emphasis added; cleaned up).]**

b. Motion to Compel Arbitration in the District Court

In the district court, the Facility filed a Motion to Compel Arbitration based on Father's status as a third-party beneficiary of the Arbitration Agreement. [RP 38-44.] In opposition, Plaintiff argued that: (1) Son lacked agency authority to form a contract on Father's behalf [RP 124-25]; (2) third-party beneficiaries can enforce contracts against signatories, but the inverse is not permitted [RP 125-27]; (3) the delegation clauses in the Arbitration Agreement are not clear and unmistakable [RP 127-30]; and (4) the Arbitration Agreement violated a federal regulation [RP 130-31]. In its reply, the Facility pointed out that it never argued that Son was Father's agent [RP 136-37]; listed New Mexico Supreme Court cases in which contracts were enforced *against* third-party beneficiaries [RP 138-39]; established that under New Mexico law, the delegation provisions are clear and unmistakable and therefore must be enforced [RP 140-43]; and, demonstrated that the federal regulation cited by Plaintiff did not bar the Arbitration Agreement [RP 143-45].

c. The District Court's Order

The district court denied the Motion to Compel Arbitration. *First*, ignoring the Arbitration Agreement's delegation provisions, the district court ruled that Defendants have the "burden to show that an arbitration agreement is enforceable before any part of the agreement can be enforced." [RP 155, ¶ 1.] *Second*, the district court stated 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.” [RP 155, ¶ 2.] The court concluded, however, that there was no evidence that Father ever accepted the Arbitration Agreement. [RP 155 ¶ 2.] In so finding, the district court disregarded that during each of his three admissions to the Facility (including the third residency period at issue here), Father obtained the benefits of the Admission Contract, of which the Arbitration Agreement is a part, and thus assented to the Arbitration Agreement.

d. The Court of Appeals’ Decision

The COA affirmed the district court’s denial of the Facility’s Motion to Compel Arbitration. (Ct. of Appeals Op. A-1-CA-41036 (“COA Op.”), ¶ 4.) In doing so, the COA decided two issues that are pertinent to this appeal.

First, the COA recognized that absent a specific challenge to an unmistakably clear delegation clause, a court’s authority is limited to deciding whether an arbitration contract was “formed” whereas all other issues of contract “enforcement” must go to the arbitrator. (COA Op. ¶¶ 13-16.) Under generally-applicable New Mexico third-party beneficiary law, the only “formation” questions are whether the contracting parties entered into a valid agreement “intended to benefit the third party.” *Fleet Mortg. Corp. v. Schuster*, 1991-NMSC-046, ¶ 4, 112 N.M. 48, 811 P.2d 81. Because the Arbitration Agreement between the Facility and Son was

validly formed² and identified Father as the third-party beneficiary [RP 87], there was no contract formation issue that a court could decide in light of the Agreement's delegation provisions. [RP 86.]

To overcome this obstacle and defeat the Arbitration Agreement's delegation provisions, the COA adopted a new contract-formation requirement applicable *only* to arbitral agreements: a signatory to a contract containing an arbitration clause may compel a third-party beneficiary to arbitrate only if a *separate* agreement to arbitrate exists between *the signatory and beneficiary*. (COA Op. ¶¶ 19, 21.) On that basis, the COA ruled that, notwithstanding the Arbitration Agreement's delegation clauses, “whether Father, a non-signatory to the [A]greement, can be said to have agreed to arbitrate is a formation question the court must resolve before it may order arbitration.” (COA Op. ¶ 20.)

Second, as a matter of “first impression,” the COA adopted another new contract rule: “the third-party beneficiary doctrine does not permit a signatory to enforce a contract against a non-signatory third-party beneficiary where the third-party beneficiary has not otherwise sought to enforce the contract.” (COA Op. ¶ 4.) Noting that under New Mexico law a third-party beneficiary must accept a contract

² The COA Op. ¶ 18 n.2 says that Plaintiff disputes that a contract was formed between Son and the Facility. However, this argument was not raised to the district court. And before the COA, Plaintiff contended only that the Arbitration Agreement was ambiguous, not that it was never formed. (COA Resp. at 15.)

to be bound by it (COA Op. ¶ 26), the COA apparently believed that a beneficiary assents to arbitration *only* when the beneficiary sues to enforce a contract containing an arbitration agreement. The COA thus prohibited offensive use of the third-party beneficiary doctrine “under the circumstances here” (COA Op. ¶ 29) because Plaintiff did not seek to enforce the Admission Contract or Arbitration Agreement that Son entered into with the Facility for Father’s benefit. (COA Op. ¶ 36.) Importantly, this issue was not argued or briefed by the parties or decided by the district court.

As explained below, the COA’s rulings do not comport with the FAA, New Mexico law, or United States Supreme Court precedents. The COA Opinion therefore must be reversed in full.

E. Questions Accepted for Review

Question #1: *Did the COA err in finding that the issue of whether an intended third-party beneficiary can be bound by an arbitration agreement is a matter of contract formation?* Yes. Whether a third-party beneficiary is bound by an arbitration clause contained in a valid contract is an issue of contract enforcement, not contract formation, which must be decided by the arbitrator where, as here, the contract contains a clear and unmistakable delegation provision.

Question #2: Did the COA err in holding, as a matter of “first impression,” that New Mexico law does not permit a signatory to enforce a contract against a third-party beneficiary where the third-party beneficiary is not seeking to enforce the contract? Yes. Like all other types of contracts, arbitration agreements are enforceable under New Mexico law both by and against third-party beneficiaries, even where, as here, the third-party beneficiary does not sue in contract.

Question #3: Did the COA’s holdings violate FAA § 2’s equal treatment principle? Yes. In several respects, the COA Opinion targets arbitration agreements for disfavor by treating them differently from other types of contracts. The COA Opinion therefore is preempted by Section 2 of the FAA.

Question #4: Did the COA err in deciding the appeal on an issue that was not raised or briefed in the district court or on appeal? Yes. Whether a third-party beneficiary can be compelled to arbitrate only when the beneficiary sues to enforce a contract containing an arbitration clause was neither argued nor briefed by the parties below nor decided by the district court. Because none of the exceptions to the preservation rule in 12-321 NMRA applies to this case, the COA erred in deciding this issue.

D. Standard of Review

Whether the parties have agreed to arbitrate is a question of law to which a *de novo* standard of review applies. *See Sanchez v. United Debt Counselors, LLC*, 2024-NMSC-026, ¶ 16, 562 P.3d 564 (citation omitted).

ARGUMENT

I. THE COA OPINION IS PREEMPTED BY FAA § 2 (Question 3)

A. The FAA Applies to this Case

First and foremost, the COA Opinion must be reversed because it blatantly violates FAA § 2’s equal treatment rule and therefore is preempted by federal law. For its part, the COA Opinion fails to mention or recognize that the FAA applies here. But there is no question that the FAA governs the Arbitration Agreement, and Plaintiff never has argued otherwise. [RP 38 (Facility filed its Motion to Compel Arbitration “pursuant to the [FAA], 9 U.S.C. §§ 1-16”); 86 (“our Agreement ... will be subject to and governed by the [FAA];” 91-92 (demonstrating compliance with the FAA’s interstate-commerce requirement).] *See Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 29, 304 P.3d 409 (“we conclude that the FAA applies to the arbitration agreement Plaintiff signed as a mandatory condition of nursing home admission”). The FAA therefore applies to this case.

B. FAA § 2 Preemption Principles

Under FAA § 2, an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any contract*.” 9 U.S.C. § 2 (emphasis added). Thus, only “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravention of § 2.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Strausberg*, 2013-NMSC-032, ¶ 31 (same).

FAA § 2 preempts state laws that target arbitration for disfavor or “derive their meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. at 339. This means that the enforceability of an arbitration agreement cannot, as a matter of federal law, be subject to rules that differ in any respect from the rules governing the enforceability of non-arbitral contracts. More specifically, any rule that subjects an arbitration agreement to different standards than those applicable to non-arbitral agreements is preempted. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995). In short, under FAA § 2, a court may void an arbitration agreement if—and only if—the party opposing arbitration can point to a generally applicable principle of contract law under which the agreement can be revoked. *See generally Sanchez*, 2024-NMSC-026, ¶ 9; *see also Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001) (“[A] state law that invalidates

arbitration agreements is not preempted by the FAA only if the law is ‘generally applicable,’ or applies to ‘any contract.’” (internal citations omitted)). Importantly, FAA § 2’s preemption principles apply to issues of contract formation, not just matters of contract enforcement. *See Kindred Nursing Ctrs. L.P. v. Clark*, 581 U.S. 246, 254-55 (2017).

C. The COA Opinion Violates FAA § 2 Because It Imposes Special Rules that Single Out Arbitration Agreements for Disfavor

The COA Opinion is preempted by FAA § 2 because it imposes special rules on arbitration agreements that are inapplicable to other types of contracts. *First*, in deciding that the third-party beneficiary issue in this case was a matter of contract formation (thus circumventing the Arbitration Agreement’s delegation provisions), the COA adopted and applied a new contract-formation requirement inapplicable to contracts generally. (COA Op. ¶¶ 19, 21.)

Under generally-applicable New Mexico third-party beneficiary law, issues of contract formation are limited to whether the contracting parties entered into a valid agreement “intended to benefit the third party.” *Fleet Mortg.*, 1991-NMSC-046, ¶ 4; *see also Floeck v. United Benefit Life Ins. Co.*, 1948-NMSC-049, ¶¶ 2, 17, 52 N.M. 324, 197 P.2d 897 (enforcing a contract provision against a plaintiff-insurance beneficiary after finding that the insurance contract was formed for the beneficiary’s benefit); *Moruzzi v. Federal Life & Casualty Co.*, 1938-NMSC-002, ¶¶ 45, 42 N.M. 35, 75 P.2d 320 (enforcing a release signed by a deceased spouse

against the spouse's beneficiary because the contract was formed for the beneficiary's benefit). Thus, under New Mexico law, the COA's contract-formation analysis should have been confined to whether the Facility and Son entered into the Arbitration Agreement for the benefit of Father.

But the COA eschewed these generally applicable contract principles. Under the COA's new contract-formation requirement, a signatory to a contract with an arbitration clause can compel a third-party beneficiary of the contract to arbitrate only if a *separate* agreement to arbitrate was formed between *the signatory and beneficiary*. (COA Op. ¶¶ 19, 21.) No such formation requirement exists, however, for non-arbitral contracts under New Mexico third-party beneficiary law. *See Casarotto*, 517 U.S. at 687 (“[c]ourts may not [] invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.” (emphasis in original)). This aspect of the COA Opinion therefore is displaced by FAA § 2.

Second, FAA § 2 preempts the COA's holding that New Mexico's “third-party beneficiary doctrine does not permit a signatory to enforce a contract against a non-signatory third-party beneficiary where the third-party beneficiary has not otherwise sought to enforce the contract.” (COA Op. ¶ 4.) Indeed, this new rule established by the COA Opinion is not a “generally applicable” contract defense that applies to “any” contract under FAA § 2. Rather, on its face, the rule applies only to one type of contract: *third-party beneficiary agreements*. (COA Op. ¶ 4.) The

COA's rule therefore is displaced by the FAA and provides no basis for the COA Opinion. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984) (“the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity ‘for the revocation *any* contract’ but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law” (emphasis in original; quoting FAA § 2)); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998) (concluding that the FAA preempted New Jersey decisional law because it applied “to only one sort of contract provision (forum selection) in only one type of contract (a franchise agreement),” citation omitted); *see also Carter v. SSC Odin Operating Co., LLC*, 927 N.E.2d 1207, 1219 (Ill. 2010) (“State laws that are applicable to arbitration contracts and some other types of contracts, but not all contracts, are not grounds for the revocation of *any* contract” under FAA § 2 (emphasis in original)).

Further, the COA's new rule is preempted by the FAA because it departs from ordinary New Mexico third-party beneficiary law under which a third-party beneficiary of the contract (like Father here) stands in the shoes of the contracting parties and can have no greater rights than the contracting parties themselves. *See Floeck*, 1948-NMSC-049, ¶¶ 17 (“the [third-party] beneficiary stands in the shoes of the insured. Her rights do not rise above what his would have been. . . . She must take the policy as she finds it and abide by its terms.”). By contrast, the COA's new

rule bestows greater rights upon third-party beneficiaries who elect not to sue under the contract than the contracting parties have—to wit, immunity from equities and defenses, including a duty to arbitrate, that the contracting parties could raise against each other. *See Concepcion*, 563 U.S. at 339 (noting that FAA § 2 mandates that arbitration agreements be “enforce[d] according to their terms” and permits arbitral agreements to be invalidated only by “generally applicable” contract defenses).

Finally, while the COA couched the new rule in language suggesting that it applies to all types of third-party beneficiary agreements (COA Op. ¶ 4), the rule derives its meaning from the fact that an agreement to arbitrate is at issue. *See Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). This is evident from the fact that the COA framed the question as “whether the third-party beneficiary doctrine applies to allow a signatory to enforce an *arbitration agreement* against a non-signatory.” (COA Op. ¶ 27 (emphasis added).) The question itself implies that the third-party beneficiary doctrine’s application to arbitration agreements may be governed by special rules inapplicable to contracts generally. Any such rule would be preempted by the FAA § 2. *See Kindred*, 581 U.S. at 251-52.

Tellingly, the COA’s analysis did not identify any non-arbitral contracts or contract terms that would be adversely affected by the rule, concluding only 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”—an oblique reference to the fact that “here,” the contract term at issue is an arbitration agreement. (COA Op. ¶ 29 (emphasis added).) There should be no question that, as applied, the rule aims to disparately affect arbitration provisions in violation of FAA § 2. *See Concepcion*, 563 U.S. at 342 (noting that the FAA would preempt a judicial rule finding unconscionable or unenforceable as against public policy dispute resolution agreements that fail to provide for judicially-monitored discovery; “[i]n practice, [such a] rule would have a disproportionate impact on arbitration agreements”).

Because the COA Opinion imposes special rules on arbitration agreements that are preempted by the FAA, it must be reversed.

II. THE COA ERRED IN RULING THAT WHETHER A THIRD-PARTY BENEFICIARY IS BOUND BY AN ARBITRATION AGREEMENT IS A MATTER OF CONTRACT FORMATION (Question 1)

Even if the COA Opinion was not preempted by the FAA, the COA still erred in holding that whether a third-party beneficiary is bound by an arbitration clause in a valid agreement is a matter of contract formation (rather than contract enforcement) that a court must decide regardless of whether the agreement contains a delegation clause. (COA Op. ¶ 19.)

A. The Enforceability of an Arbitration Clause Against a Third-Party Beneficiary Is *Not* an Issue of Contract Formation

Where, as here, an arbitration agreement contains a clear and unmistakable delegation provision, a court can decide only whether the agreement was formed; all other gateway issues are matters of contract enforcement that must be arbitrated. *See Granite Rock Co. v. Int’l Broth. of Teamsters*, 561 U.S. 287, 299 (2010). The determination of whether a contract was formed implicates narrow issues: “For a contract to be legally valid and enforceable, it must be factually supported by an offer, an acceptance, consideration, and mutual assent.” *Heye v. Am. Golf Corp., Inc.*, 2003-NMCA-138, ¶ 9, 134 N.M. 558, 80 P.3d 495 (citations omitted); *see also* UJI (Civil) 13-801 NMRA (same). As noted above, in the third-party beneficiary setting, the only formation issues are whether (1) the contracting parties formed a valid contract and (2) “the parties to the contract intended to benefit the third party.” *Fleet Mortg.*, 1991-NMSC-046, ¶ 4; *Callahan v. N.M. Fed. of Teachers-TV*, 2006-NMSC-010, ¶¶ 20-21, 139 N.M. 201, 131 P.3d 51 (same).

Contrary to the COA’s ruling, New Mexico’s third-party beneficiary jurisprudence does *not* require the formation of an independent agreement to which an intended beneficiary itself is a party.³ Indeed, this Court recognized as much in

³ As explained *infra* at 21-23, the COA Opinion cites no New Mexico authority requiring the formation of an independent agreement to arbitrate with a third-party beneficiary before the beneficiary can be compelled to arbitrate. In fact, the only authority cited by the COA for this proposition is *Jody James Farms, JV v. Altman*

a case cited by the COA (COA Op. ¶ 26), namely, *Rankin v. Ridge*, 1948-NMSC-068, ¶ 24, 53 N.M. 33, 201 P.2d 359, which reiterated that a third-party beneficiary agreement can exist even “though [the beneficiary] is not named in the contract or may not have known of it at the time.” The reason that no such formation requirement exists is obvious: if a signatory seeking to compel arbitration against a third-party beneficiary of a contract containing an arbitration clause must prove the existence of a separate agreement to arbitrate between the signatory and beneficiary, the third party—by definition—is not a “third-party beneficiary” at all because s/he is a contracting party in his or her own right. See, e.g., *Motorsport Eng’g, Inc. v. Maserati Spa*, 316 F.3d 26, 29 (1st Cir. 2002) (noting the difference between a third-party beneficiary and a party to the contract; “[a] third-party beneficiary is one who is given rights under a contract to which that person is *not* a party” (emphasis in original)). In effect, the COA Opinion eliminates application of the third-party beneficiary doctrine to arbitration contracts.

The third-party beneficiary formation requirements were met in this case because the Facility and Son executed both the Admission Contract and the integrated Arbitration Agreement, which expressly identifies Father (the “Resident”)

Grp., Inc., 547 S.W.3d 624 (Tex. 2018) (COA Op. ¶ 19), in which the court found that the non-signatory was *not* a third-party beneficiary. Unlike the Arbitration Agreement here, the *Jody James* contract “does not ‘expressly provide[] that certain non-signatories are considered parties’ or otherwise expressly extend the contract’s benefits to third parties.” *Id.* at 633.

as the intended third-party beneficiary of the Agreement. [RP 87.] Thus, the question of whether Father is bound to arbitrate as a third-party beneficiary of the Arbitration Agreement was a matter of contract enforcement (not contract formation) that must be arbitrated pursuant to the Agreement’s delegation provisions.⁴

In *Casa Arena Blanca, LLC v. Rainwater*, No. 21-2037, 2022 WL 839800 (10th Cir. March 22, 2022), the Tenth Circuit Court of Appeals correctly reached this same conclusion in reviewing this same Arbitration Agreement. In its Opinion, the COA repeatedly cited with approval the Tenth Circuit’s prior holding in *Fedor v. United Healthcare, Inc.*, 976 F.3d 1100, 1105 (10th Cir. 2020). (COA Op. ¶¶ 13, 15, 23 n.3.) *Fedor*, which did not involve a third-party beneficiary, ruled that the question of whether an alleged party to a contract ever signed it was an issue of contract formation. Yet, in *Rainwater*, 2022 WL 839800 at *4, the Tenth Circuit distinguished *Fedor*, noting that while *Fedor* involved a formation issue (whether the contract was ever signed), *Rainwater* did not because whether the nursing-home resident in that case was bound by an arbitration clause as a third-party beneficiary

⁴ See *New Mexico Highlands Univ. v. Makawa Builders LLC*, No. A-1-CA-35125, ¶ 11, 2018 WL 897889 (N.M. Ct. App. Jan. 29, 2018) (nonprecedential) (once the district court decided that the plaintiff’s agent had authority to enter into a contract with an arbitration provision, the court “divested itself of any further power to address any of the issues of law or fact presented by the case” (citing *K.L. House Const. Co. v. City of Albuquerque*, 1978-NMSC-0025, ¶ 7, 91 N.M. 492, 576 P.2d 752 and *Lyman v. Kern*, 2000-NMCA-013, ¶ 9, 128 N.M. 582, 995 P.2d 504)).

was an issue of contract enforcement. On that basis, *Rainwater* held that because an agreement was formed between the Facility and the resident’s daughter, which contained “an enforceable delegation clause, [the district court] should have sent the case to arbitration. The district court erred in going on to decide whether there was a *second agreement* to arbitrate formed between the Facility and [resident] and then proceeding to address the third-party beneficiary issue.” *Id.* at *5 (emphasis added).

The COA mistakenly declined to follow *Rainwater* for two reasons. (COA Op. ¶ 19.) *First*, the COA criticized *Rainwater*’s characterization of an arbitration contract between the nursing home and the third-party beneficiary resident as a “secondary agreement.” (*Id.*) But that is precisely what the COA Opinion requires by holding that the Facility must prove not only the formation of an Arbitration Agreement between the Facility and Son for the Father’s benefit, but also a separate “agreement to arbitrate between [the Facility] and Father.”⁵ (COA Op. ¶ 19.) As noted above, however, New Mexico’s third-party beneficiary doctrine does *not* require the formation of an independent arbitration agreement to which an intended third-party beneficiary itself is a party.

⁵ The COA confirmed this point in a recent decision applying its Opinion below: “Defendants contend that Plaintiff does not dispute that Daughter and the Defendants formed a contract [containing an arbitration agreement]. Even so, the question before the district court was whether *Mother* [*i.e.*, the third-party beneficiary of the arbitration agreement] and Defendants formed an agreement to arbitrate.” *Szantho v. Casa Maria of N.M., LLC*, __-NMCA-__, ¶ 7, __ P.3d __ (A-1-CA-41167, June 5, 2025) (emphasis in original).

Second, the COA believed that New Mexico jurisprudence requires that “[i]n every arbitration case, the first question a court must answer is whether *the parties to the litigation* agreed to arbitrate.” (COA Op. ¶ 19 (emphasis in original).) But this uncontroversial principle does not mean that whether a third-party beneficiary is bound to an arbitration provision in a valid contract is a question of contract formation, rather than contract enforcement. To the contrary, the COA itself specifically cited *Arthur Andersen LLP v. Carlisle* (COA Op. ¶ 20), which identified “‘traditional principles’ of state law that allow a contract to be *enforced* against nonparties to the contract,” including “third party beneficiary theories” at issue in this case. 556 U.S. 624, 631 (2009) (emphasis added).

B. The COA’s Other Cited Authorities Are Unavailing

While contending that *Rainwater* misapplied New Mexico law, the COA cited four New Mexico cases in support of its holding that whether an arbitration agreement can be enforced against a non-signatory is an issue of contract formation. (COA Op. ¶ 20.) However, none of the COA’s cited cases supports its holding. If anything, the cases run in exactly the opposite direction.

For example, *Damon v. StrucSure Home Warranty, LLC*, 2014-NMCA-116, 338 P.3d 123, tacitly found that enforcement of a contract against a non-signatory did *not* implicate contract formation. There, the plaintiffs contended that “they never signed the arbitration agreement and . . . did not know [their warranty] included the

arbitration agreement.” 2014-NMCA-116, ¶ 13. *Damon* nonetheless deemed the contract enforceable: “Plaintiffs contend that StrucSure did not prove in the district court that it had a valid arbitration agreement with the original owners and, therefore, Plaintiffs cannot be bound by a contract to arbitrate. Plaintiffs’ argument is without merit. StrucSure attached the signed home enrollment application and the arbitration provision to its motion to compel arbitration, and Plaintiffs never contested their validity.” *Id.* ¶ 17. Thus, because the contract was uncontestably formed, the rest of the inquiry related to its *enforcement* by or against the non-signatory plaintiffs.

Likewise, the COA miscited *Rodriguez v. Forrester*, A-1-CA-36223, 2019 WL 645161 (N.M. Ct. App. Jan. 7, 2019) (nonprecedential), which also recognizes that whether an arbitration clause is enforceable against a non-signatory is an issue of contract *enforcement*:

*[E]ven a party who is not a signatory to an arbitration agreement may, in certain circumstances, enforce an agreement to arbitrate or be compelled to arbitrate Thus, when a district court is presented with a motion to compel arbitration and must determine whether an arbitration agreement is **enforceable** between the parties, **the question of enforceability** cannot be answered simply by comparing the case’s caption to the agreement’s signature lines to confirm identity of the parties. Rather, the district court must determine whether the agreement may be **enforced** by the party seeking to compel arbitration against the party resisting arbitration *despite the fact that one party—either the party seeking to compel or the party seeking to avoid arbitration—is not a signatory to the agreement.**

Id. ¶ 16 (emphasis added, citations omitted) (COA Op. ¶ 20).⁶

Moreover, the other two cases cited by the COA, *Monette v. Tinsley*, 1999-NMCA-040, ¶¶ 9-12, 126 N.M. 748, 975 P.2d 361, and *Murken v. Suncor Energy, Inc.*, 2005-NMCA-102, ¶ 5, 138 N.M. 179, 117 P.3d 985, are inapposite because they did not even address the non-signatory formation/enforcement issue. (COA Op. ¶ 20.)

Finally, the COA Opinion includes a footnote citing numerous other cases for the general principle that contract formation issues must be resolved by the court even where the agreement contains a delegation clause. (COA Op. ¶ 19 n.3.) No one disputes that contract formation issues must be decided by the court. But the narrow issue here is whether a third-party beneficiary's challenge to an arbitration clause contained in a validly formed contract is, *in fact*, a question of contract formation. As explained above, under New Mexico law, the answer is, "no."

In sum, whether Father is bound by the Arbitration Agreement as a third-party beneficiary of the Agreement is an issue of contract enforcement that the Agreement's delegation clauses assigned to the arbitrator. The COA erred in

⁶ Because *Rodriguez* did not involve a delegation provision, the court could decide if the arbitration clause applied to the dispute. But where, as here, a delegation provision exists, the "applicability [of the arbitration agreement] to the dispute" at issue is "commit[ed]...to an arbitrator." *Granite Rock*, 561 U.S. at 299.

concluding otherwise. Thus, the remainder of the COA’s Opinion exceeded its authority and must be vacated.

III. THE COA ERRED IN HOLDING THAT NEW MEXICO LAW DOES NOT PERMIT A CONTRACT TO BE ENFORCED AGAINST A THIRD-PARTY BENEFICIARY UNLESS THE BENEFICIARY SEEKS TO ENFORCE THE CONTRACT (Question 2)

A. The COA Wrongly Ruled that New Mexico Law Does Not Permit a Contract to Be Enforced Against a Third-Party Beneficiary

Even if the COA could decide the question of whether the third-party beneficiary doctrine can be used to enforce a contract against a third-party beneficiary, the COA got it wrong. (COA Op. ¶¶ 26-37.) The COA began its analysis by concluding that while an intended third-party beneficiary may enforce a contract against a signatory, “[w]e find no support for the assertion that the third-party beneficiary doctrine works ‘the other way around’ to enable a contracting party to enforce a contract against a non-signatory.” (COA Op. ¶ 36.)

To the contrary, this Court *has* recognized that the third-party beneficiary doctrine “works the other way around.” To be sure, the Court has applied the doctrine to permit signatories to enforce contract terms *against* beneficiaries.

For example, in *Floeck*, 1948-NMSC-049, ¶ 17, an insurer sought to invoke a policy limitation on the payout of a policy to a beneficiary who was not a party to the insurance contract. The Court determined that the third-party beneficiary (a non-signatory) was bound to the policy terms agreed to by the contracting parties. The

Court explained: “[The non-signatory plaintiff] seeks the benefit of this policy by a recovery of its full amount *by avoiding [a] provision of the policy*. . . . In this respect, the beneficiary stands in the shoes of the insured. Her rights do not rise above what his would have been. . . . *She must take the policy as she finds it and abide by its terms.*” *Id.* (emphasis added); *see also Moruzzi*, 1938-NMSC-002, ¶ 45 (enforcing a release signed by a deceased spouse *against* the spouse’s beneficiary: “We now come to the proposition of whether the release, though binding on [the signatory] as conceded by appellee, is also binding on appellee as the beneficiary named in the policy. Appellee fails to give effect to the plain provisions of the contract of insurance. She concedes that [the signatory], if, after executing the release, he had still been alive . . . could not have recovered additional compensation. We can see no difference under the terms of the insurance contract when the suit is brought by the beneficiary.”).

Because this Court has ruled that non-arbitration contracts may be enforced against third-party beneficiaries, FAA § 2 requires that arbitration agreements be treated the same way. *See Strausberg*, 2013-NMSC-032, ¶ 55; *THI of N.M. at Hobbs Ctr., LLC v. Patton*, 851 F. Supp. 2d 1281, 1291 (D.N.M. 2011) (“State contract law will [] generally apply so long as the state law does not construe an arbitration agreement in a manner different from any other contract; in such a case, the state law will be preempted by the FAA,” citation omitted).

Even though *Floeck* and *Moruzzi* plainly demonstrate that this Court has applied the third-party beneficiary doctrine against non-signatory third parties, the COA incorrectly (and inexplicably) stated: “This is not the case.” (COA Op. ¶ 35.)

The COA also criticized the Facility for citing only two additional cases from New Mexico federal district courts (both of which, in turn, cited a third)⁷ that enforced nursing-home arbitration agreements against third-party beneficiaries under New Mexico law. (COA Op. ¶ 30.) Ignoring these and other New Mexico precedents applying contract terms against third-party beneficiaries, the COA chose to follow the contrary holdings of three out-of-state courts, all of which turned on each state’s own law. (COA Op. ¶¶ 31-34 (discussing *Mendez v. Hampton Court Nursing Ctr., LLC*, 203 So. 3d 146, 149 (Fla. 2016); *Hattiesburg Health & Rehab Ctr., LLC v. Brown*, 176 So. 3d 17, 21 (Miss. 2015); and *Thompson v. Pruitt Corp.*, 784 S.E.2d 679, 687 (S.C. Ct. App. 2016)).) These cases are inapposite and unhelpful to this Court’s analysis because none of them discussed whether the third-

⁷ *Pinnacle Health Facilities XXXIII, LP v. Crecca*, No. CV 15-cv-01062 RB/LAM, 2016 WL 9818326, at *11 (D.N.M. Nov. 7, 2016); *THI of New Mexico at Hobbs Ctr., LLC v. Spradlin*, 893 F. Supp. 2d 1172, 1189 (D.N.M. 2012), *aff’d*, 532 F. App’x 813 (10th Cir. 2013); and *THI of N.M. at Hobbs Ctr., LLC v. Patton*, No. 11-357 LH/CG, 2012 WL 112216, at *7-8 (D.N.M. Jan. 3, 2012) (COA Op. ¶ 30.)

party beneficiary doctrine was permissibly applied (as it has been in New Mexico) to non-arbitral contracts.⁸

Moreover, in addition to the three New Mexico federal decisions referenced in the COA Opinion (*supra* n.7 COA Op. ¶ 30), other federal courts likewise have ordered estate representatives, like Plaintiff, to arbitrate claims because, under New Mexico law, their decedents were third-party beneficiaries of nursing home contracts with arbitration clauses. *See Life Care Centers of Am., Inc. v. Est. of Deal*, No. 18-CV-187-MV, 2019 WL 1283006, at *6 (D.N.M. Mar. 20, 2019) (“[T]he undisputed facts establish that [the resident] was a third-party beneficiary of the Resident Admission Agreement, of which the Arbitration Agreement was a part. She was the named resident to be admitted to the facility. . . . [The resident] obtained the benefits of residency and care at the [facility] for eight months. . . . Accordingly, [the resident] was a third-party beneficiary of the Arbitration Agreement and, as such, was bound by its terms. Defendants, as personal representatives of [the resident’s] estate, are equally bound by the Arbitration Agreement”); *THI of N.M. at Vida Encantada, LLC v. Lovato*, 848 F. Supp. 2d 1309, 1326–27 (D.N.M. 2012) (same); *Evangelical Lutheran Good Samaritan Soc’y v. Moreno*, 277 F. Supp. 3d 1191, 1232-34 (D.N.M. 2017) (recognizing that a third-party beneficiary was bound by

⁸ Importantly, *Mendez*, *Hattiesburg*, and *Thompson* did not consider whether their rulings—*i.e.*, a third-party beneficiary cannot be made to arbitrate a claim unless the beneficiary sues to enforce the underlying contract—were preempted by FAA § 2.

nursing home admission contract and arbitration agreement; surveying New Mexico state and federal decisions on the topic); *see generally Gibson v. Wal-Mart Stores, Inc.*, 181 F.3d 1163, 1170, n.3 (10th Cir. 1999) (“The fact that Brooks did not individually sign the Agreement does not preclude enforcement of the Agreement with respect to Gibson’s claims against her because it is clear that Brooks was [] a third party beneficiary of the Agreement”). Indeed, the COA failed to mention the plethora of New Mexico cases on-point demonstrating that contracts—including arbitration agreements—are enforceable against third-party beneficiaries. The COA thus erred in concluding otherwise.

B. Because Third-Party Beneficiaries Can Enforce Contracts Against Signatories, the Inverse Is Also Permissible

The COA’s ruling that the third-party beneficiary doctrine does not allow enforcement of contracts against beneficiaries also belies fundamental principles on which the doctrine rests. Contrary to the COA’s determination, the third-party beneficiary doctrine is not one-sided; it imposes *mutual* obligations on the promisor and beneficiary. “[T]he foundation of an intended [third-party] beneficiary’s rights lies in the contract between the promisor and the promisee. Accordingly, it has been said that a third-party [] beneficiary in a suit against the promisor is subject to the same equities and defenses which would be available to the promisor if a suit were brought against him by the promisee.” 13 Williston on Contracts § 37:57 (4th ed.). Hence, “[w]here there is a contract, the right of a beneficiary is subject to any

limitations imposed by the terms of the contract.” Restatement (Second) of Contracts § 309, cmt. b (1981).

As a result, “[t]he general rule, supported by the cases and adopted by [the] Restatement Second, is that the promisor can raise against a recognized beneficiary any defense the promisor would have had against the promisee under the contract. This rule is consistent with the third-party-beneficiary principle, because under that principle the third-party beneficiary should have no greater rights under the contract than the parties themselves.” Melvin A. Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358, 1413 (1992) (footnote omitted); *see also, e.g., BAI Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 697 (2d Cir. 1993) (“[It is] contrary to justice or good sense to hold that a [third-party beneficiary] should acquire a better right against a promisor than the promisee himself had,” citation omitted); *Chiriboga v. Int’l. Bank for Reconstruction & Dev.*, 616 F. Supp. 963, 967 n.3 (D.D.C. 1985) (“[A]s a matter of general law a third-party beneficiary stands in the shoes of the promisee and is subject to all defenses that might have been asserted against the promise,” citation omitted); *Camelot Excavating Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 301 N.W.2d 275, 281-82 (Mich. 1981), *overruled on other grounds, Rory v. Continental Ins. Co.*, 703 N.W.2d 23 (Mich 2005) (same); *Hansen v. Proctor*, 74 N.W.2d 281, 284 (Minn. 1955) (same).

This is the law in New Mexico as well. *See Mertens v. Coffman*, 1983-NMCA-062, ¶ 16, 99 N.M. 750, 663 P.2d 1207 (recognizing that “any defense arising in connection with the formation of the contract. . .is available to the promisor against the beneficiary.” (citation omitted)). Because an arbitration agreement may be treated no differently than any other type of contract, a third-party beneficiary must be bound by an arbitration clause in the underlying contract—just as the beneficiary is bound by all of the contract’s other terms. *See Arthur Andersen*, 556 U.S. at 631 (recognizing that under traditional state-law principles, arbitration agreements are enforceable against third-party beneficiaries); 21 Williston on Contracts § 57:19 (4th ed.) (same). To conclude otherwise would defy the basic precept that a beneficiary “must accept a contract’s burdens along with its benefits.” *Lee v. Grandcor Med. Sys., Inc.*, 702 F. Supp. 252, 255 (D. Colo. 1988); *see also Floeck*, 1948-NMSC-049, ¶ 17 (“the beneficiary stands in the shoes of the insured. Her rights do not rise above what his would have been. . . . She must take the policy as she finds it and abide by its terms”). For these reasons, too, the COA Opinion was wrongly decided.

C. The COA Incorrectly Concluded that a Contract’s Arbitration Provision Cannot Be Enforced Against a Third-Party Beneficiary Who Is Not Suing to Enforce the Contract

As explained above, the COA further erred by announcing a new contract rule: “the third-party beneficiary doctrine does not permit a signatory to enforce a contract

against a non-signatory third-party beneficiary where the third-party beneficiary has not otherwise sought to enforce the contract.” (COA Op. ¶ 4.) Although the COA did not fully explain its rationale for this rule (COA Op. ¶ 37), it presumably rests on the COA’s belief that a beneficiary assents to arbitration only by suing to enforce a contract containing an arbitration provision. This is incorrect.

It is well settled that a beneficiary need not sue under a contract to manifest assent. Long ago, this Court ruled that a contract “between two or more parties, for the benefit of a third may be enforced by such third party if he *accepts it* after it is made. . . .” *Johnson v. Armstrong & Armstrong*, 1937-NMSC-014, ¶ 17, 41 N.M. 206, 66 P.2d 992 (emphasis added, citations omitted). Although *Johnson* recognized that suing under a contract is “sufficient acceptance,” *id.* ¶ 18, the Court did not say that that is the *only* way to manifest acceptance—and for good reason. A beneficiary’s reliance upon or enjoyment of a contract’s benefits by itself demonstrates assent. *See, e.g.*, Restatement (Second) of Contracts § 311(3) (1981) (noting that a beneficiary’s rights arise, thus precluding discharge or modification of the contract, when he “materially changes his position in justifiable reliance on the promise *or* brings suit on it *or* manifests assent to it at the request of the promisor or promisee” (emphasis added)); *Spiegel v. Martinez*, 27 So. 3d 889, 892 (La. Ct. App. 2009) (noting a third-party beneficiary allegedly “availed herself of the benefit of the contract by accepting [legal] representation by plaintiff”); *Fortune v. Unum Life*

Ins. Co. of Am., 360 S.W.3d 390, 399 (Tenn. Ct. App. 2010) (“[T]he plaintiff ha[d] already accepted payments of benefits as a third party beneficiary of the [insurance] policy” for two years, requiring him to also accept the contract’s obligations, citation omitted); *cf. International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000) (“A nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a ‘direct benefit’ from a contract containing an arbitration clause” (cleaned up, citations omitted)); *Drury v. Assisted Living Concepts, Inc.*, 262 P.3d 1162, 1166 (Or. Ct. App. 2011) (but for the fact that the decedent had dementia, “we might conclude that a beneficiary who accepts services and an apartment—as decedent did—has claimed the benefits of the agreement and thus manifested her assent.”).

Because the third-party beneficiary doctrine is a two-way street, acceptance of a contract’s benefits triggers the beneficiary’s right to enforce them against the promisor, and it likewise permits the promisor to enforce the contract’s other terms—including an arbitration provision—*against* the beneficiary. Moreover, a beneficiary need not expressly consent to arbitration under a contract to be bound by it, just as no such requirement applies to any of the contract’s other terms. *See* FAA § 2; *Lee*, 702 F. Supp. at 255 (citing cases).

It is true that many third-party beneficiary cases arise in the context of a suit by the beneficiary for breach of the contract when the promisor refuses or fails to

convey the benefit. In that situation, a beneficiary must sue to enforce her rights, and her “assent to be bound by the contract may be presumed.” *Drury*, 262 P.3d at 1165. But that is not always so. Where, as here, the promisor performs under the contract by conferring the benefit upon the beneficiary (*e.g.*, by admitting a resident to the nursing home), no lawsuit by the beneficiary to enforce the contract is necessary. But by accepting the contract’s benefits, a beneficiary demonstrates assent and thus is bound by the contract’s terms, including an arbitration agreement, no less than a beneficiary who sues a promisor likewise is bound by the contract.

Finally, it cannot be the law that suing to enforce a contract is the only way that a third-party beneficiary may assent to the contract because such a rule would lead to absurd results. Under this rationale, a promisor who breaches the contract by depriving the beneficiary of its benefit, thus provoking beneficiary to sue to enforce it, would be in a *better* position (*i.e.*, able to hold the beneficiary to the contract’s arbitration clause) than a non-breaching promisor (like the Facility in this case) that fulfills its duty to confer contractual benefits upon the third party, but is denied its arbitration rights under the contract. Indeed, under the rule adopted by the COA, the only way a promisor could compel a third-party beneficiary to arbitrate its claims against the promisor would be to breach the contract by withholding the beneficiary’s benefits, thus forcing the beneficiary to sue.

Equally illogical, a beneficiary who must sue to enforce a contract would be subject to its arbitration provision, and thus in a *worse* position than a non-suing beneficiary, who, despite having accepted the benefits of the contract, could elect to repudiate the arbitration clause in a suit by the promisor against the beneficiary. The law does not tolerate such absurdities; neither should this Court. Thus, this reasoning reinforces that acceptance of a contract's benefits, when they are conferred by the promisor, binds a third-party beneficiary to the contract, including an arbitration provision therein.

In sum, the COA erred in holding that, under New Mexico law, the Arbitration Agreement is unenforceable against Father under a third-party beneficiary theory because Father's estate is not suing to enforce the Admission Contract or the Arbitration Agreement. The COA Opinion therefore must be reversed.

IV. THE COA ERRED BY FAILING TO AFFORD THE PARTIES THE OPPORTUNITY TO ADDRESS AN ISSUE OF "FIRST IMPRESSION" THAT NEVER WAS RAISED (Question 4)

Below, Plaintiff contended only that no New Mexico case permitted a contract to be enforced against a third-party beneficiary, which was the relevant issue briefed by the parties. [RP 125-27; 137-39; 173-74.] The COA, however, decided a *different* issue: 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. (COA Op. ¶¶ 4, 29, 34, 37.)

In *New Mexico Dep't of Hum. Servs., Income Support Div. v. Tapia*, 1982-NMSC-033, ¶ 8, 97 N.M. 632, 642 P.2d 1091, this Court re-examined the limited circumstances under which the COA should rule upon issues “reached without the benefit of briefs or arguments on appeal” and “not even raised in the trial court.” In addition, *Tapia* noted that the general rule that “propositions of law not raised in the trial court cannot be considered” on appeal is subject to exceptions, *id.* ¶ 9, which now are codified in Rule 12-321 NMRA:

A. Preserving issues for review. To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked. ...

B. Exceptions.

. . . . (2) This rule does not preclude a party from raising or the appellate court, in its discretion, from considering issues that by case law, statute, or rule may be raised for the first time on appeal. These issues include, but are not limited to, issues involving

- (a) general public interest;
- (b) plain error;
- (c) fundamental error; or
- (d) fundamental rights of a party.

The question of first impression under third-party beneficiary law that the COA decided in this case does not fall under any of these exceptions and therefore should not have been considered. Indeed, this Court has cautioned against courts deciding issues never raised by the parties:

Courts risk overlooking important facts or legal considerations when they take it upon themselves to raise, argue, and decide legal questions overlooked by the lawyers who tailored the case to fit within their legal theories. [G]enerally, the courts will apply those exceptions sparingly and only where there could be no valid reason for the lower court's

action. ... These exceptions should not be used to decide new or difficult questions, especially when the factual basis is murky or incomplete.

Tapia, 1982-NMSC-033, ¶ 11; *Imming v. De La Vega*, 2023-NMCA-062, ¶ 9, 535 P.3d 693 (declining to address an issue that was not included in supplemental briefing requested by the COA).

As explained above, the COA should not have addressed this matter of first impression for the independent reason that the Arbitration Agreement's delegation provisions required that the issue be relegated to the arbitrator. If this Court nonetheless reaches the issue, however, the Court should remand this case to the district court for fulsome briefing, argument, and a ruling on the merits to establish a record on which the topic can be preserved and presented for appellate review.

CONCLUSION

For all the foregoing reasons, this Court should reverse and vacate the COA Opinion and remand this case to the district court to compel arbitration.

Request for Oral Argument

Oral argument would be helpful to this Court's determination of the questions presented in this case which are of significant legal interest and frequently occur especially in lawsuits like this one involving nursing-home arbitration agreements. Petitioners therefore would be pleased to present oral argument if the Court so desires.

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2025 a true and correct copy of the foregoing was served via Odyssey File and Serve on all counsel of record.

/s/ Faith Kalman Reyes