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1       **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

3 Filing Date: June 4, 2008

4 **NO. 27,135**

5 **KIM TALBOTT and BONNIE M. TALBOTT**  
6 **as Personal Representatives of the ESTATE OF**  
7 **DAMON K. TALBOTT, Deceased,**

8           Plaintiffs-Appellees,

9 v.

10 **ROSWELL HOSPITAL CORPORATION**  
11 **d/b/a EASTERN NEW MEXICO MEDICAL**  
12 **CENTER,**

13           Defendant-Appellant.

14 **APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY**  
15 **Jay W. Forbes, District Judge**

16 Sanders, Bruin, Coll & Worley, P.A.  
17 Michael T. Worley  
18 Clay H. Paulos  
19 Ian D. McKelvy  
20 Roswell, NM

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COURT OF APPEALS  
STATE OF NEW MEXICO  
GINA MAESTRAS

FILED

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1 **OPINION**

2 **WECHSLER, Judge.**

3 {1} Defendant Roswell Hospital Corporation (the Hospital) appeals from a jury  
4 verdict in favor of Plaintiffs Kim and Bonnie Talbott. Plaintiffs are co-personal  
5 representatives of the estate of Damon Talbott (Decedent) in a wrongful death action.  
6 After the first jury trial in this case resulted in a verdict for Plaintiffs, this Court  
7 reversed and remanded to the district court for a new trial. *See Talbott v. Roswell*  
8 *Hosp. Corp.*, 2005-NMCA-109, ¶ 43, 138 N.M. 189, 118 P.3d 194. After the second  
9 jury trial, a verdict for Plaintiffs was again entered, and the Hospital was found to be  
10 partially liable for Decedent's wrongful death because it negligently selected the  
11 helicopter air ambulance provider with which it contracted and its negligence resulted  
12 in the helicopter crash that killed Decedent. On appeal, the Hospital contends that the  
13 district court erred in (1) allowing Plaintiffs to try the case on a Restatement (Second)  
14 of Torts § 411 (1965) (Section 411) theory, (2) giving deficient jury instructions, and  
15 (3) denying its motion for a new trial. We conclude that the district court did not err  
16 and affirm.

17 **FACTUAL BACKGROUND**

18 {2} In the summer of 2000, MedFlight Air Ambulance (MedFlight) approached  
19 Medical Air Transport, Inc. (MAT) with a proposal to form a joint business operation

1 that would provide air ambulance services in southeastern New Mexico. Shortly  
2 thereafter, MedFlight and MAT succeeded in agreeing to terms to form the operation.  
3 For the purpose of deciding this case, we refer to the MedFlight/MAT operation as  
4 “the Business” and note that MedFlight withdrew from the operation in May 2001,  
5 leaving MAT to ultimately run the operation on its own.

6 {3} The Business contacted the Hospital in late 2000 and proposed a deal to  
7 establish its base of operations on the Hospital’s helipad. The Business’s proposal  
8 was potentially beneficial to the Hospital because (1) although the Hospital had a  
9 helipad, it did not regularly base a helicopter at its facility to transport patients and  
10 (2) having a helicopter based on its premises would enable the Hospital to provide  
11 enhanced services to its patients, allow the Hospital to provide care to a greater  
12 number of patients, and create additional revenue for the Hospital.

13 {4} Following the Business’s proposal, negotiations with the Hospital began. The  
14 Hospital’s chief executive officer, Ronald Schaffer, gave the Hospital’s chief  
15 operating officer, Brian Bickel, the task of handling the negotiations. During the  
16 course of the negotiations, Bickel contacted the chief executive officer of a hospital  
17 in Arizona, which had used the Business’s air ambulance services, to inquire about  
18 the Business’s track record. Bickel did not make any further specific inquiries into

1 the Business's safety history; rather, he relied on the Business's Federal Aviation  
2 Administration (FAA) and state licensure as sufficient to establish that the Business  
3 was a competent air ambulance operator. Ultimately, the Hospital and the Business  
4 reached an agreement under which the Business was permitted to establish its base  
5 of operations on the Hospital's helipad. The Hospital also agreed to give the  
6 Business the "first call" opportunity to respond to the need to transport patients by  
7 helicopter from the Hospital's helipad. Accordingly, the agreement went into effect  
8 in December 2000.

9 {5} On October 19, 2001, Decedent, who was a police officer employed by the  
10 New Mexico State Police, was participating in a training program offered by the  
11 Business to train local law enforcement officers regarding how to establish a landing  
12 zone and direct a helicopter to land at accident scenes and other remote locations. At  
13 the end of the training session, Decedent and two other law enforcement officers  
14 boarded the helicopter owned by the Business and piloted by Shawn Kling, an  
15 employee of the Business, for an orientation flight. The helicopter crashed during the  
16 flight, killing Decedent. As we stated in our first appellate opinion concerning this  
17 case, "there were two possible direct causes of the accident: (1) overly aggressive  
18 maneuvering of the helicopter or (2) failure of the hydraulic system." *Talbott*, 2005-

1 NMCA-109, ¶ 4. Regardless, neither party contests in this appeal the conclusion that  
2 Kling’s negligence directly caused both the crash and Decedent’s death.

3 **PROCEDURAL BACKGROUND**

4 {6} After the helicopter crash, Plaintiffs filed suit in district court. In their second  
5 amended complaint, Plaintiffs included a claim, invoking Section 411, that the  
6 Hospital was negligent because it “failed to exercise reasonable care to employ a  
7 competent and careful contractor” to provide air ambulance services and “failed to  
8 properly investigate or inquire about the fitness of” the Business as an air ambulance  
9 operator. The case proceeded to trial on Plaintiffs’ Section 411 theory, and the jury  
10 returned a verdict for Plaintiffs. The Hospital appealed, and this Court reversed.  
11 *Talbott*, 2005-NMCA-109, ¶ 1.

12 {7} On its first appeal to this Court, the Hospital did not question the viability of  
13 Section 411 as a basis for recovery; rather, it challenged the application of Section  
14 411 to the specific circumstances of the case. *Talbott*, 2005-NMCA-109, ¶ 7. In  
15 doing so, the Hospital argued that Section 411 did not apply because the evidence  
16 presented at trial did not support the district court’s directed verdict concluding that  
17 an employer-independent contractor relationship with the Business existed. *Talbott*,  
18 2005-NMCA-109, ¶ 8. We concluded that the district court erred in directing a

1 verdict regarding that issue because the evidence presented at trial “was capable of  
2 supporting conflicting inferences on the existence of a contractual relationship”;  
3 therefore, “[t]he district court should have permitted the jury to resolve [the] issue.”  
4 *Id.* ¶ 22. Accordingly, the case was reversed and remanded for a new trial. *Id.* ¶ 43.

5 {8} At the second trial, the existence of a contractual relationship between the  
6 Hospital and the Business was framed for the jury’s determination. Once again, the  
7 jury returned a verdict for Plaintiffs based on the Hospital’s liability pursuant to  
8 Section 411. The Hospital now appeals a second time.

9 **RESTATEMENT (SECOND) OF TORTS SECTION 411**

10 {9} In this appeal, the Hospital contends that because New Mexico has not  
11 expressly adopted Section 411, the district court erred in allowing Plaintiffs to try the  
12 case on such a theory. Specifically, the Hospital argues that Plaintiffs should not  
13 have been permitted to proceed on their Section 411 claim because New Mexico law  
14 does not require an employer to exercise reasonable care in selecting and retaining  
15 an independent contractor to conduct potentially dangerous activities. We apply a de  
16 novo review to this question of law. *See Chavez v. Desert Eagle Distrib. Co. of N.M.*,  
17 2007-NMCA-018, ¶ 7, 141 N.M. 116, 151 P.3d 77, *cert. denied*, 2007-NMCERT-  
18 001, 141 N.M. 164, 152 P.3d 151.

1 {10} Typically, the employer of an independent contractor is not liable for physical  
2 harm caused to a third person by a negligent act or omission of the independent  
3 contractor. *Valdez v. Yates Petroleum Corp.*, 2007-NMCA-038, ¶ 17, 141 N.M. 381,  
4 155 P.3d 786, *cert. denied*, 2007-NMCERT-006, 142 N.M. 16, 162 P.3d 171.

5 However, Section 411 provides an exception to that general rule as follows:

6 An employer is subject to liability for physical harm to third persons  
7 caused by his failure to exercise reasonable care to employ a competent  
8 and careful contractor

9 (a) to do work which will involve a risk of physical harm  
10 unless it is skillfully and carefully done, or

11 (b) to perform any duty which the employer owes to third  
12 persons.

13 Restatement, *supra*, § 411, at 376. Section 411 defines a “competent and careful  
14 contractor” as one “who possesses the knowledge, skill, experience, and available  
15 equipment which a reasonable man would realize that a contractor must have in order  
16 to do the work which he is employed to do without creating unreasonable risk of  
17 injury to others” and one “who also possesses the personal characteristics which are  
18 equally necessary.” *Id.* § 411 cmt. a, at 377.

19 {11} A number of jurisdictions across the country have expressly adopted Section  
20 411 as a valid cause of action. *See, e.g., W. Stock Ctr., Inc. v. Sevit, Inc.*, 578 P.2d

1 1045, 1048-49 (Colo. 1978) (en banc); *McDonnell v. Music Stand, Inc.*, 886 P.2d 895,  
2 900 (Kan. Ct. App. 1994); *Dexter v. Town of Norway*, 1998 ME 195, ¶ 10, 715 A.2d  
3 169, 172; *Lee v. Pulitzer Publ'g Co.*, 81 S.W.3d 625, 634-35 (Mo. Ct. App. 2002);  
4 *Puckrein v. ATI Transp., Inc.*, 897 A.2d 1034, 1041-42 (N.J. 2006); *Sipple v. Starr*,  
5 520 S.E.2d 884, 890-91 (W. Va. 1999). Recently, in *Dye v. WMC, Inc.*, 172 P.3d 49,  
6 51 (Kan. Ct. App. 2007), the Kansas Court of Appeals considered a Section 411 claim  
7 in a case that was factually similar to this case. In *Dye*, the co-personal  
8 representatives of a man killed in an air ambulance crash brought a claim, based on  
9 Section 411, against a medical center for negligently hiring the air ambulance  
10 contractor that was involved in the crash. *Id.* at 51, 55. Although *Dye* was presented  
11 to the Kansas Court of Appeals in a different procedural posture from this case, the  
12 *Dye* court noted, similar to the district court's conclusion in this case, that if the  
13 decedent was not an employee of either the medical center or the contractor, it would  
14 be possible for him "to recover as [a] third person[] under Restatement § 411." *Id.*  
15 at 57.

16 {12} Although New Mexico is not among the jurisdictions that have expressly  
17 adopted Section 411, several New Mexico cases have discussed it in passing. *Valdez*,  
18 2007-NMCA-038, ¶ 19. Those cases did not present the opportunity for the

1 reviewing court to expressly adopt it. *See, e.g., id.* (assuming, without deciding, that  
2 “Section 411 is viable substantive law”); *Talbott*, 2005-NMCA-109, ¶ 7 (noting that  
3 because it was not attacked, it was improper for this Court to reach a decision  
4 regarding the viability of the Section 411 claim); *Gabaldon v. Erisa Mortgage Co.*,  
5 1997-NMCA-120, ¶¶ 42-43, 124 N.M. 296, 949 P.2d 1193 (discussing Section 411  
6 but deciding the case on other grounds), *rev’d in part on other grounds*, 1999-  
7 NMSC-039, ¶ 39, 128 N.M. 84, 990 P.2d 197. However, this case squarely presents  
8 us with the issue of whether a plaintiff is permitted to bring a claim for another’s  
9 negligent selection of an independent contractor. We answer in the affirmative and  
10 take this opportunity to expressly adopt Section 411 as part of New Mexico’s tort  
11 law.

12 {13} In reaching our conclusion, we note that our adoption of Section 411 does not  
13 represent any substantial departure from our tort jurisprudence. Apart from going as  
14 far as assuming, without deciding, that a Section 411 claim is viable, *Valdez*, 2007-  
15 NMCA-038, ¶ 19, we have traditionally “been very willing to adopt the view of the  
16 Restatement of Torts to assist our development of new tort areas.” *Schmitz v.*  
17 *Smentowski*, 109 N.M. 386, 396, 785 P.2d 726, 736 (1990). Furthermore, as  
18 Plaintiffs’ answer brief indicates, on at least one occasion, this Court has affirmed the

1 validity of a claim based on the negligent selection of an independent contractor,  
2 thereby implicitly endorsing the policy on which Section 411 is based. *See Eckhardt*  
3 *v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, ¶¶ 41-44, 124 N.M. 549,  
4 953 P.2d 722 (affirming a judgment where the plaintiff claimed that a hospital  
5 negligently selected a contract therapist without referencing Section 411).  
6 Accordingly, our adoption of Section 411 comports with both the national trend in  
7 tort jurisprudence as well as the natural progression of our own tort jurisprudence.

8 {14} Finally, as a result of our adoption of Section 411, we must address the  
9 Hospital's argument that because the Business was licensed and certified by the FAA,  
10 the Hospital should have been allowed to presume that the Business was  
11 appropriately competent to provide air ambulance services. The plain language of  
12 Section 411 indicates that the amount of care that must be exercised in selecting an  
13 independent contractor varies depending on the dangerousness of the work to be  
14 performed. Restatement, *supra*, § 411 cmt. c, at 379. Specifically,

15 if the work is such as will be highly dangerous unless properly done and  
16 is of a sort which requires peculiar competence and skill for its  
17 successful accomplishment, one who employs a contractor to do such  
18 work may well be required to go to considerable pains to investigate the  
19 reputation of the contractor and, if the work is peculiarly dangerous  
20 unless carefully done, to go further and ascertain the contractor's actual  
21 competence.

1 *Id.* Thus, we do not interpret Section 411 to necessarily allow for an employer to  
2 avoid liability by blindly relying on an independent contractor's licensure to establish  
3 its competence. On the contrary, the question regarding the lengths to which the  
4 Hospital was required to go to investigate the Business's reputation, based on the skill  
5 required to provide air ambulance services and the dangerousness of such work, was  
6 a factual one that was correctly left to the jury's discretion. *See Spencer v. Health*  
7 *Force, Inc.*, 2005-NMSC-002, ¶ 22, 137 N.M. 64, 107 P.3d 504.

#### 8 **APPLICABILITY OF SECTION 411**

9 {15} Because we decide that it was permissible for Plaintiffs to bring a claim for the  
10 Hospital's negligent selection of the Business pursuant to Section 411, our focus  
11 shifts to the Hospital's arguments regarding whether Plaintiffs were entitled to a jury  
12 verdict on their Section 411 claim. We consider each of the Hospital's arguments in  
13 turn.

14 {16} First, the Hospital argues that the district court erred in implicitly concluding  
15 that Decedent was a foreseeable plaintiff. The crux of the Hospital's argument is that  
16 because Decedent was not a foreseeable plaintiff, the Hospital did not owe him a  
17 duty. *See Chavez*, 2007-NMCA-018, ¶ 9 (explaining that foreseeability is an  
18 important component in determining whether one owes a duty to another). Whether

1 a particular defendant owed a particular plaintiff a duty is a matter of law that we  
2 review de novo, *see Calkins v. Cox Estates*, 110 N.M. 59, 62, 792 P.2d 36, 39 (1990),  
3 and if a plaintiff is able to show that the course of events was what one might have  
4 “objectively and reasonably expect[ed] to occur,” we will conclude that the plaintiff  
5 was foreseeable. *Chavez*, 2007-NMCA-018, ¶ 17 (internal quotation marks and  
6 citation omitted).

7 {17} In this case, the Business was allowed to use the Hospital’s helipad as its base  
8 of operations for its air ambulance enterprise. Under Section 411, the potential harm  
9 that the Hospital was required to consider before partnering with the Business was an  
10 accident, presumably a helicopter crash, that might be caused by the incompetence  
11 or carelessness of the Business. Nevertheless, the Hospital partnered with the  
12 allegedly incompetent and careless Business, and Decedent died in a helicopter crash  
13 as a result of the Business’s negligence while participating in a law enforcement  
14 training exercise that sought to teach officers how to assist in facilitating the  
15 transportation of injured patients to medical facilities, such as the Hospital’s property.  
16 *See Talbott*, 2005-NMCA-109, ¶ 4. We conclude that the helicopter crash that killed  
17 Decedent was precisely what could have objectively and reasonably been expected  
18 to occur as a result of partnering with a careless or incompetent air ambulance service

1 provider. *See Pittard v. Four Seasons Motor Inn, Inc.*, 101 N.M. 723, 730-31, 688  
2 P.2d 333, 340-41 (Ct. App. 1984) (“Foreseeability does not require that the particular  
3 consequence should have been anticipated, but rather that some general harm or  
4 consequence be foreseeable.”).

5 {18} Second, with respect to another issue framed as a duty question, the Hospital  
6 asserts that the district court erred, as a matter of law, in allowing the jury to decide  
7 the question of whether the Hospital made the proper inquiries into the capability of  
8 the Business to provide careful and competent air ambulance services. As noted  
9 above, however, it is the jury’s province to determine the extent of the background  
10 investigation required in a case based on Section 411. The jury was instructed  
11 pursuant to Section 411 and accordingly resolved the factual disputes regarding the  
12 Hospital’s investigation of the Business’s competence in Plaintiffs’ favor. We will  
13 not disturb that decision on appeal. *See Gonzales v. Gen. Motors Corp.*, 89 N.M.  
14 474, 477, 553 P.2d 1281, 1284 (Ct. App. 1976) (“[W]here the evidence is inconsistent  
15 or contradictory, it is the function of the jury to resolve the conflict and not the  
16 function of this Court to resolve the conflict as a matter of law.”).

17 {19} As a corollary to its second argument, the Hospital contends that any duty that  
18 could possibly exist in this case is preempted by federal law. In support of its

1 position, the Hospital references three federal statutory provisions and one part of the  
2 Code of Federal Regulations regarding the minimum safety regulations promulgated  
3 by the FAA, *see* 49 U.S.C. §§ 41101, 44701, 44703, 44705 (2000); 14 C.F.R. §§  
4 135.1 to .507 (2007), and relies primarily on *Abdullah v. American Airlines, Inc.*, 181  
5 F.3d 363, 364-65 (3d Cir. 1999), which concluded that the Federal Aviation Act  
6 impliedly preempts “the entire field of aviation safety.” In *Abdullah*, several  
7 plaintiffs sued an airline company, alleging that the pilot and flight crew on a  
8 commercial flight did not adequately warn them in time to prevent injuries that  
9 resulted from expected turbulence. *Abdullah*, 181 F.3d at 365. That case turned on  
10 whether either the territorial common law of the Virgin Islands or federal regulations  
11 were applicable in determining the appropriate standards of care for the pilot and  
12 flight crew. *Id.* at 366. In this case, however, the acts or omissions of Kling with  
13 respect to safety standards set forth in federal statutory and regulatory law are not in  
14 dispute; rather, the issue revolves around whether the Hospital made reasonable  
15 inquiries into the competence and carefulness of the Business as an air ambulance  
16 service provider pursuant to Section 411. Against the backdrop of our “strong  
17 presumption against preemption,” *Montoya v. Mentor Corp.*, 1996-NMCA-067, ¶ 7,  
18 122 N.M. 2, 919 P.2d 410, the Hospital’s reliance on *Abdullah* is misplaced under the

1 facts of this case.

2 {20} Third, the Hospital contends that the district court erred in denying its motion  
3 for judgment as a matter of law because Plaintiffs failed to introduce evidence that  
4 adequately supported proximate cause. In the first appeal in this case, we clearly  
5 stated that if the jury took a “broad view” of the evidence presented in the first trial,  
6 it “could have found that the qualities of [the Business] that the Hospital negligently  
7 failed to discover, disregard for pilot qualifications and safety, [proximately] caused  
8 the crash.” *Talbott*, 2005-NMCA-109, ¶ 39. In this appeal, it is uncontested that  
9 Plaintiffs offered similar evidence at the second jury trial. Because it is the jury’s  
10 province to weigh conflicting evidence regarding proximate cause, *id.* ¶ 40, we see  
11 no reason to disturb the district court’s denial of the Hospital’s motion. *See id.* ¶ 33  
12 (“When reviewing the denial of a directed verdict, we must view the evidence in the  
13 light most favorable to the prevailing party.”).

14 {21} Fourth, the Hospital contends that the district court erred when it failed to  
15 determine, as a matter of law, that the Hospital did not enter into a contract to employ  
16 the Business. We have expressly stated that when “the existence of a contract is at  
17 issue and the evidence is conflicting or permits more than one inference, it is for the  
18 finder of fact to determine whether the contract did in fact exist.” *Eckhardt*, 1998-

1 NMCA-017, ¶ 39 (internal quotation marks and citation omitted). Again, in the first  
2 appeal in this case, we plainly concluded that at the first trial, “the evidence was  
3 capable of supporting conflicting inferences on the existence of a contractual  
4 relationship between [the Business] and the Hospital.” *Talbott*, 2005-NMCA-109,  
5 ¶ 22. In this appeal, the Hospital argues that the testimony of three of its witnesses  
6 regarding the Hospital’s relationship with the Business, apparently not offered at the  
7 first trial, was sufficient to prove that there was, in fact, no contractual relationship  
8 that could sustain a Section 411 claim. That new testimony included (1) the opinion  
9 of the Hospital’s chief resource officer that the Hospital’s relationship with the  
10 Business did not “help the Hospital’s profitability”; (2) the statements of the  
11 Hospital’s ex-director of marketing that the Hospital did not actively advertise its  
12 newly available air ambulance service; and (3) the opinion of the Hospital’s expert  
13 witness that the Hospital’s patients, not the Hospital itself, benefitted from the  
14 Business’s presence. Plaintiffs, on the other hand, offered evidence at the second trial  
15 regarding the active negotiations between the Hospital and the Business and the  
16 ultimate deal that allowed the Business to establish its base of operations on the  
17 Hospital’s helipad in exchange for the right to “first call” if a patient needed air  
18 ambulance services. Accordingly, at the second trial, similar to the first trial, there

1 was conflicting evidence regarding whether a contract existed, and the district court  
2 judge appropriately deferred to the jury to resolve the issue. *See Eckhardt*, 1998-  
3 NMCA-017, ¶ 39.

4 {22} Fifth, the Hospital argues that the district court should have granted its motion  
5 for judgment as a matter of law because Plaintiffs failed to introduce evidence that  
6 an appropriate background check would have revealed the Business's incompetence.  
7 However, the Hospital expressly concedes that Plaintiffs presented evidence that the  
8 Business "had internal problems and leadership issues" shortly before the crash that  
9 took Decedent's life occurred. Additionally, Plaintiffs' expert testified at trial that  
10 it would have been very easy for the Hospital to uncover all of the problems that the  
11 Business had experienced if it had consulted with someone with aviation expertise  
12 prior to making a deal with the Business. Therefore, the district court properly denied  
13 the Hospital's motion for judgment as a matter of law on this issue and allowed the  
14 jury to decide whether to lend credence to the Hospital's argument. *See Weidler v.*  
15 *Big J Enters., Inc.*, 1998-NMCA-021, ¶ 30, 124 N.M. 591, 953 P.2d 1089 (stating that  
16 it is the jury's responsibility to resolve conflicts in the evidence and to ultimately  
17 determine where the truth rests).

18 {23} We conclude that none of the Hospital's arguments regarding the applicability

1 of Section 411 to this case requires a reversal of the verdict of the second trial jury.

2 We therefore turn to the Hospital's final two arguments raised in this appeal.

3 **JURY INSTRUCTIONS**

4 {24} Having decided that it was permissible for Plaintiffs to bring a Section 411  
5 claim and that the claim was properly left for the jury to decide, we now address the  
6 Hospital's argument challenging various aspects of the jury instructions given at the  
7 second trial. The Hospital contends that the jury instructions concerning the elements  
8 of Plaintiffs' Section 411 claim were confusing and failed to describe all of the  
9 elements necessary to result in a verdict for Plaintiffs. Specifically, the Hospital  
10 argues that the jury should have been instructed that (1) Plaintiffs had the burden of  
11 proving that the Business was acting as the Hospital's independent contractor (i.e.,  
12 within the "scope of work" for the Hospital) at the time of Decedent's death; (2) if  
13 there was no "presumption of competence," Plaintiffs were required to prove that "the  
14 circumstances of this case triggered a greater duty of inquiry before such a duty could  
15 be imposed"; (3) Plaintiffs had the burden of proving a direct causal connection  
16 between the Business's incompetence and the crash that killed Decedent; and (4) one  
17 party could not be the independent contractor of another unless there was "a contract  
18 between them by which the one actually employ[ed] the other."

1 {25} This Court reviews jury instructions de novo in order “to determine whether  
2 they correctly state the law and are supported by the evidence introduced at trial.”  
3 *Benavidez v. City of Gallup*, 2007-NMSC-026, ¶ 19, 141 N.M. 808, 161 P.3d 853  
4 (internal quotation marks and citation omitted). Although “[a] party is entitled to  
5 instructions on all of his or her correct legal theories of the case if there is evidence  
6 in the record to support the theories,” *id.*, jury instructions will be upheld “if, as a  
7 whole, they fairly represent the law applicable to the issue in question.” *Kennedy v.*  
8 *Dexter Consol. Sch.*, 2000-NMSC-025, ¶ 28, 129 N.M. 436, 10 P.3d 115.

9 {26} It appears that the district court chose not to specifically incorporate the  
10 Hospital’s requested instructions regarding (1) whether Decedent was killed “during  
11 the course and scope of” the Business’s employment with the Hospital; (2) Plaintiffs’  
12 burden of proving that the Hospital had actual knowledge of Business’s  
13 incompetence; and (3) Plaintiffs’ burden of proving a “direct causal connection”  
14 between the Business’s “alleged incompetence at the time of ‘hiring’ and the  
15 negligence which, many months later, caused the accident.” We note, however, that  
16 the district court’s instructions regarding Plaintiffs’ Section 411 claim were  
17 specifically patterned after the language in the Restatement and that none of the  
18 essential elements of a Section 411 claim was omitted. As a result, because the jury

1 was presented with a fair representation of the law concerning a Section 411 claim,  
2 which we have expressly adopted in this opinion, the district court did not err in  
3 omitting the instructions that the Hospital requested.

4 {27} Similarly, the Hospital argues that the instructions given to the jury were  
5 misleading regarding the necessary relationship required to prove that the Business  
6 was an independent contractor of the Hospital. However, our review of the record  
7 indicates that each of the elements required to form a contract was included in the  
8 jury instructions along with a definition of the term “independent contractor” and a  
9 brief description of the relationship required to establish that one is the independent  
10 contractor employed by another. Therefore, the jury was adequately instructed on the  
11 independent contractor issue.

#### 12 **MOTION FOR A NEW TRIAL**

13 {28} Finally, the Hospital contends that the district court erred when it denied its  
14 motion for a new trial. The Hospital argues that a new trial should have been granted  
15 as a result of the alleged inadequacy of the jury instructions and the alleged  
16 misconduct of Plaintiffs’ counsel throughout the second trial. Because we have  
17 concluded that the jury instructions in this case were adequate, we only address the  
18 Hospital’s concerns regarding the alleged misconduct of Plaintiffs’ trial counsel.

1 {29} The rule in New Mexico has long been that “we will not disturb a trial court’s  
2 exercise of discretion in denying or granting a motion for a new trial unless there is  
3 a manifest abuse of discretion.” *State v. Garcia*, 2005-NMSC-038, ¶ 7, 138 N.M.  
4 659, 125 P.3d 638. Unless the district court’s decision to deny a motion for a new  
5 trial was “arbitrary, capricious, or beyond reason,” we will not reverse it on appeal.  
6 *State v. Desnoyers*, 2002-NMSC-031, ¶ 26, 132 N.M. 756, 55 P.3d 968, *abrogation*  
7 *on other grounds recognized by State v. Forbes*, 2005-NMSC-027, ¶ 6, 138 N.M.  
8 264, 119 P.3d 144.

9 {30} In support of its argument, the Hospital contends that Plaintiffs’ counsel  
10 inappropriately commented on an objection by the Hospital’s counsel, and the district  
11 court’s subsequent ruling misstated the law in front of the jury, made inappropriate  
12 statements in closing argument that called into question the integrity of the Hospital’s  
13 counsel and injected statements of personal belief, and quoted the Bible in closing  
14 argument. Although we do not necessarily condone the specific instances of the  
15 behavior of Plaintiffs’ counsel cited by the Hospital, we see no compelling reason to  
16 second-guess the district court’s decision to deny its motion for a new trial. The  
17 district court was given the opportunity to consider the extensive argument included  
18 in the Hospital’s motion and ultimately decided that a new trial was not warranted.

1 *See State v. Smith*, 2001-NMSC-004, ¶ 32, 130 N.M. 117, 19 P.3d 254 (“We rely  
2 upon the judgment of the trial court because [t]he trial judge is in a much better  
3 position to know whether a miscarriage of justice has taken place and his opinion is  
4 entitled to great weight in the absence of a clearly erroneous decision.”) (alteration  
5 in original) (internal quotation marks and citation omitted). Given our standard of  
6 review, we find no basis in concluding that the district court’s denial of the Hospital’s  
7 motion for a new trial was arbitrary, capricious, or beyond reason.

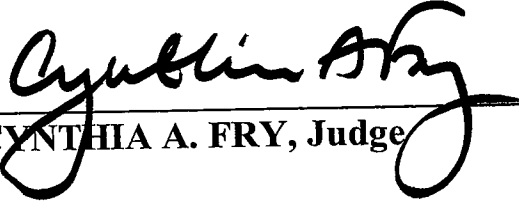
8 **CONCLUSION**

9 {31} With this opinion, we expressly adopt Section 411 of the Restatement (Second)  
10 of Torts as the law of New Mexico. We further conclude that the evidence presented  
11 at the second trial in this case was sufficient to establish the elements of Plaintiffs’  
12 claim under Section 411, the jury was adequately instructed on the law, and the  
13 district court did not err in denying the Hospital’s motion for a new trial. We  
14 therefore affirm.

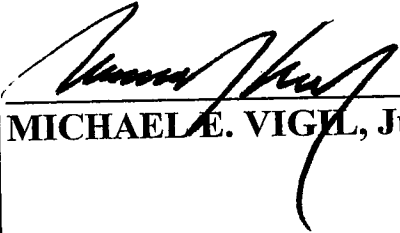
15 {32} **IT IS SO ORDERED.**

16   
17 **JAMES J. WECHSLER, Judge**

1 WE CONCUR:

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3 \_\_\_\_\_

CYNTHIA A. FRY, Judge

4   
5 \_\_\_\_\_

MICHAEL E. VIGIL, Judge