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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

21 Slack & Davis, LLP  
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COURT OF APPEALS  
STATE OF NEW MEXICO  
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13 for Appellant

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

