IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,322

JOHN INSINGA, as personal representative of the Estate of MILDRED INSINGA, deceased,

Appellant,

vs.

MICHELE LaBELLA, et al. and HUMANA, INC., d/b/a BISCAYNE MEDICAL CENTER,

Appellee.

_____/

ON DISCRETIONARY REVIEW OF A CERTIFIED QUESTION
FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLANT, JOHN INSINGA, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MILDRED INSINGA, DECEASED

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I.
STATEMENT OF THE CASE AND FACTS

On January 19, 1981, Mildred Insinga was admitted to Biscayne Medical Center, a hospital in North Miami, Florida, by an individual named Morton Canton--who held himself out to be a medical doctor, and who had adopted the name "Dr. Michele LaBella" (R. 1-1-MP28; 3-2).[1/] She died on February 6, 1981 (*id.*). It was subsequently discovered that Dr. LaBella was not a medical doctor; that he was a fugitive from justice in Canada, indicted for the manufacture and sale of illegal drugs; and that he had fraudulently obtained a medical license from the State of Florida and medical staff privileges at Biscayne Medical Center (*id.*; R. 1-10-Exh. 2). Mrs. Insinga's husband, John Insinga, in his capacity as personal representative of his late wife's estate, thereafter brought a wrongful death action against several defendants in state court, charging each with negligence which proximately caused Mrs. Insinga's death (R. 1-1-MP204). To the extent relevant here, the plaintiff's first amended complaint (as subsequently amended) contained a count against Humana, Inc., d/b/a Biscayne Medical Center, for negligently granting Dr. LaBella medical staff privileges at its hospital (R. 1-1-MP28; 1-15; 2-35).

During the course of the proceedings in state court, Humana moved for summary judgment (R. 1-1-MP9, 77). Humana's motion contended, in essence, that it owed no duty to the plaintiff to exercise care in granting medical staff privileges to Dr. LaBella. The

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[1/] As the Eleventh Circuit's opinion certifying this case reflects, this action was initially filed in state court and later removed to federal court. A copy of the state court file appears as an exhibit to the Petition for Removal, behind a page labelled "Material Pleadings" (R. 1-1). The state court file was not separately paginated in the original record on appeal. Because several references to that file will be necessary, and for the convenience of the parties and the Court, we have taken the liberty of paginating the state court file sequentially in the lower right-hand corner. References to those page numbers will be identified as R. 1-1-MP (page no.).

The plaintiff's first amended complaint (R. 1-1-MP28) inadvertently alleges that Mrs. Insinga was admitted to the hospital on November 18, 1980. This error was corrected at trial in plaintiff's counsel's opening statement to reflect an admission date of January 19, 1981 (R. 3-2).

plaintiff responded to Humana's motion by filing an affidavit on the duty and negligence issues, which stated in pertinent part as follows:

> 1. My name is Richard D. Bauer, M.D. I am a licensed physician in family practice. I am licensed to practice medicine in the State of Maryland. A copy of my curriculum vitae is attached hereto as Exhibit A and incorporated by reference as part of this affidavit. From January 1, 1975 to July 1, 1984, I was the Medical Director of Prince George's County Medical Center which is a hospital affiliated with the University of Maryland. During my tenure as medical director, my duties encompassed investigating and approving credentials of physicians seeking privileges at Prince George's County Medical Center. I am qualified to render opinions as to the standard of care with reference to allowing physicians to practice at hospitals, by education, training and experience.
>
> [materials reviewed omitted].
>
> 3. The standard of care among hospitals with reference to granting privileges to physicians to practice in such hospitals is the same in all metropolitan areas similar in size to Dade County, Florida, throughout the United States and I have knowledge of such standard of care.
>
> 4. Based upon my review of the aforementioned materials, I am of the opinion that Biscayne Medical Center departed from the acceptable and prevailing standard of care in allowing the non-physician, Morton Canton, to practice and attend to patients including the decedent, MILDRED INSINGA, at said hospital. [Factual basis for opinion omitted].
>
> 6. Based upon the foregoing and my education, experience and expertise with reference to a hospital's passing on the credentials of a physician seeking privileges at a hospital I feel that the standard of care required that Biscayne Medical Center carefully verify the supposed Dr. LaBella's identity and credentials following his interview with Dr. Sine. It appears from the record that Biscayne Medical Center did not do so and departed and fell below the acceptable and prevailing standard of care.

(R. 1-1-MP46-47).

Depositions and additional affidavits were also filed in opposition to the motion for summary judgment (R. 1-1-MP36, 37, 51). In one affidavit, expert opinion testimony of Dr. LaBella's negligence was presented (R. 1-1-MP38). In another, the issue of proximate causation was placed in factual dispute by Mr. Insinga, as follows:

> . . . Dr. Michele Labella (who I later found out was an imposter, Morton Canton) represented to my deceased wife, Mildred Insinga, and to me that he had staff privileges at Biscayne Medical Center. My deceased wife, Mildred Insinga, and I relied upon this representation in our decision to have him treat my wife including his treatment of my wife during her last illness for which she was hospitalized at Biscayne Medical Center. . . .

(R. 1-1-MP52). The record does not reflect any disposition of the motion for summary judgment.

After a number of procedural developments (which are detailed in the Eleventh Circuit's opinion certifying the case to this Court, and which are irrelevant to the issue certified for resolution), the case was removed to federal court. A jury trial of the plaintiff's claim against Humana commenced on August 25, 1986, before The Honorable Kenneth L. Ryskamp (R. 3-1). In his opening statement, plaintiff's counsel stated that he intended to prove that Dr. LaBella negligently diagnosed and treated Mrs. Insinga, who was 68 years old at the time--and that, with acceptable treatment, she would have had a 90% chance of survival. Counsel also stated that he intended to prove (1) that Dr. LaBella was not a doctor, but a criminal wanted in Canada who had assumed the identity of a dead Italian physician; (2) that Dr. LaBella had fraudulently obtained both a license from the State of Florida and medical staff privileges at the hospital; (3) that the physician who interviewed Dr. LaBella during the hospital's credentialing process found his story incredible and was highly suspicious of him, and that he requested the hospital's staff to verify his credentials carefully before granting him privileges; (4) that the hospital failed to follow its own procedures in verifying Dr. LaBella's application, and that it was negligent as a result; and (5) that the hospital's negligence in granting staff privileges to Dr. LaBella was a cause of Mrs. Insinga's death. (R. 3-2-14).

Following the hospital's opening statement, the plaintiff read several admissions into evidence--to the effect that Dr. LaBella was an imposter named Morton Canton, and not a medical doctor, and that the hospital had no obligation to grant him staff privileges

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merely because he was licensed by the State of Florida (R. 3-22-23). Immediately thereafter, the trial court interrupted the proceedings to question plaintiff's counsel concerning the basis for the cause of action asserted against the hospital; expressed its doubts as to the viability of a cause of action for negligently granting medical staff privileges; entertained argument on the point; and requested the opportunity to read the authority upon which the plaintiff was relying (R. 3-24-38).

During the course of this argument, plaintiff's counsel represented to the court that he would prove everything stated in his opening statement (R. 3-33). Following a recess, the court heard additional argument, during which plaintiff's counsel represented that he intended to prove that the hospital violated its own bylaws governing the credentialing of staff physicians (which were required by the Joint Committee for Accreditation of Hospitals), and that an expert would testify that the hospital breached the prevailing standard of care in granting staff privileges to Dr. LaBella (R. 3-48). The court then told plaintiff's counsel that he could present the witnesses which were lined up to testify that day, and that it would "revisit this legal question" at the end of the day (R. 3-49).

Because of the nature of the ruling which ultimately followed, we need not detail the afternoon's worth of evidence which followed--all of which came from employees or former employees of the hospital. Suffice it to say that the plaintiff proved that the hospital had a standard procedure in effect to verify the legitimacy and competence of physicians applying for staff privileges (R. 3-58-59, 67-76, 116-28); that this procedure was in its bylaws, and required by the Joint Committee on Accreditation of Hospitals (R. 3-64-65, 72-73, 91, 118-23); that the purpose of the procedure was to ensure that the hospital's patients received competent medical care, and to prevent precisely what had occurred to Mrs. Insinga (R. 3-116-17, 124-28, 140-41); and that the procedure required considerably more than the mere presentation of a license from the State of Florida (R. 3-59-60, 111, 122-23).

The evidence also proved that the physician who interviewed Dr. LaBella was suspicious of him, and told the hospital's staff that he should not be "passed" unless his credentials were very carefully confirmed (R. 3-83, 106-08); that, although one item in the hospital's standard procedure required confirmation from the applicant's medical school as an absolute precondition to granting staff privileges, the hospital never obtained any confirmation from the medical school in Italy from which Dr. LaBella represented he had obtained a degree (R. 3-74-75, 80-81-90, 103); that the hospital's Board of Trustees (not its medical staff) had the final word on whether Dr. LaBella was to be granted medical staff privileges (R. 3-114, 132, 138-40); and that the hospital had "lost" the file which it compiled during its screening of Dr. LaBella (R. 3-61-64, 79, 84-85).

At the conclusion of the afternoon's testimony, the trial court revisited the "legal question" it had previously raised. On the issue of proximate causation, plaintiff's counsel represented that Mr. Insinga would testify that he and Mrs. Insinga had relied upon Dr. LaBella's representation to them--that he had staff privileges at the hospital--in retaining him as Mrs. Insinga's physician (R. 3-145-46). The trial court then announced that it would assume (1) "that the hospital was negligent in screening the doctor"; (2) "that the doctor was negligent in treating the deceased"; and (3) "that the doctor who did the initial interview with Dr. LaBella would be negligent"--but that it found no basis in Florida law for the plaintiff's contention that the hospital owed a duty to Mrs. Insinga to exercise care in granting staff privileges to physicians (R. 3-150-51). Accordingly, and on its own motion, it directed a verdict in favor of the hospital before the plaintiff had an opportunity to present the remainder of his case (R. 3-150-52).[2/]

[2/] Plaintiff's counsel requested that the court reserve ruling and enter a judgment n.o.v. after the jury verdict, if necessary, because "Mr. Insinga is 84 years of age and he might be effectively denied any day in court by the appellate procedure" (R. 3-152). Unfortunately, although the court acknowledged, "that's a very appealing argument", it

Subsequently, on September 3, 1986, the trial court filed a written order which explained its reasoning in granting the directed verdict, and which entered final judgment in Humana's favor (R. 2-36). The written order, like the ruling made at trial, is bottomed solely upon the conclusion that the hospital owed Mrs. Insinga no duty of care. The plaintiff thereafter filed a timely motion for rehearing (and alternative motion for new trial), and an accompanying memorandum of law (R. 2-41). In connection with the motion and the memorandum, the plaintiff filed three depositions (which established the negligence of Dr. LaBella) and the affidavit of Mr. Insinga (which buttressed the plaintiff's position on the issue of proximate causation) (R. 3-37, 38 & Exhs.).

Mr. Insinga's affidavit was probably unnecessary, since the trial court directed a verdict solely on the "duty" element of the plaintiff's case. The affidavit was filed in an abundance of caution, however, since the trial court's "assumption" that the hospital was "negligent" did not necessarily include an assumption that the hospital's negligence was a proximate cause of Mrs. Insinga's death. Although proximate causation is not an issue here, in view of the narrow question certified to the Court, Mr. Insinga's affidavit is worth quoting in relevant part, because the hospital is apt to resurrect the issue in the guise of arguing the duty issue before the Court.

> 2. When my deceased wife, MILDRED INSINGA, became ill with her last illness had DR. LaBELLA been unable to have her hospitalized at BISCAYNE MEDICAL CENTER I would have sought another physician to have her hospitalized at BISCAYNE MEDICAL CENTER because of its proximity to our home. I would have retained another physician to have my deceased wife, MILDRED INSINGA, hospitalized at BISCAYNE MEDICAL CENTER rather than have her hospitalized somewhere else.

(R. 2-38). The plaintiff's memorandum of law also made specific reference to, and asserted reliance upon, the affidavit of Dr. Richard Bauer, which had been filed in oppo-

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declined the plaintiff's request (R. 3-152-53). These protracted appellate proceedings have delayed that "day in court" even further, of course, so we insert a plea for expeditious ruling here, if at all possible.

sition to Humana's motion for summary judgment in the state court--and which we have previously quoted in relevant part at page 2 of this brief (R. 2-41-2-3).

The plaintiff's motion for rehearing was denied (R. 2-43), and a timely appeal followed to the United States Court of Appeals for the Eleventh Circuit (R. 2-44). The propriety of the directed verdict has been certified to this Court under Rule 9.150, Fla. R. App. P., in the form of the following certified question:

> WHETHER FLORIDA LAW RECOGNIZES THE CORPORATE NEGLIGENCE DOCTRINE AND WHETHER IT WOULD APPLY UNDER THE FACTS OF THIS CASE.

A copy of the Eleventh Circuit's opinion is appended to this brief for the convenience of the Court.

II.
ISSUE PRESENTED ON CERTIFIED QUESTION

Since the phrase "corporate negligence doctrine" is merely cryptic legalese until explained, we prefer to restate the issue presented here in plain language as follows:

> WHETHER THE DEFENDANT-HOSPITAL OWED A DUTY TO MRS. INSINGA TO EXERCISE REASONABLE CARE IN GRANTING MEDICAL STAFF PRIVILEGES TO THE IMPOSTER WHO ADMITTED HER TO THE HOSPITAL UNDER HIS CARE.

III.
SUMMARY OF THE ARGUMENT

The issue presented here is actually narrower than it appears. If the outrageous incident in suit had happened after 1985, rather than in 1981, the defendant-hospital would unquestionably have owed Mrs. Insinga precisely the duty of care which the plaintiff claimed below--because the legislature expressly said so when it enacted §768.60, Fla. Stat. (1985). There can therefore be no legitimate claim made here that the duty we seek is somehow inimical to the public policy of this State. The real question presented here is therefore simply this: whether the duty of care now made explicit by §768.60 existed under more general principles of Florida law in 1981, when the hospital granted medical staff privileges to an imposter who had no medical training at all. We believe

that the law recognized such a duty at that time--and that the trial court therefore erred in directing a verdict against the plaintiff on the ground that no such duty existed.

In Florida--according to earlier decisional law which had been codified by the legislature in §768.45(1), Fla. Stat., by 1981--the existence, the nature, and the extent of the duty of care owed by any given health care provider to a patient is not a question for judges; it depends solely upon the manner in which that duty has been defined by similar health care providers. "Duty" therefore depends upon expert testimony in a medical malpractice case--and, in this case, the hospital's duty was properly proven by a qualified expert. The directed verdict was therefore erroneous, for this simple reason alone.

Although we could probably rest our case on that point, it is worth noting that even if the expert testimony were not in the record, the hospital's duty is proven in several additional ways by the record. First, the plaintiff elicited testimony from the hospital's employees which established that it had assumed a duty to its patients by adopting standard procedures to verify the legitimacy and competence of physicians applying for staff privileges. In Florida, it is settled that one who assumes a duty is charged with an obligation to carry out that duty with reasonable care. Second, the record reflects that the hospital was required to assume the duty reflected in its own standard procedures by a national requirement promulgated by the Joint Committee on Accreditation of Hospitals, which serves as a ready substitute for the expert opinion testimony in this case. Third, and finally, the duty upon which the plaintiff's case was bottomed is squarely imposed by yet another Florida statute. For all of these reasons, it is simply beyond debate that the hospital owed the plaintiff a duty to exercise care in granting staff privileges to Dr. LaBella.

The reasoning expressed in the trial court's order explaining its directed verdict overlooks everything we have said above, and we therefore believe that the order misses the point. There are also simple answers to each reason which the trial court advanced

in support of its order. The "corporate negligence doctrine" has been universally accepted by every court which has considered the question in the last 20 years, and the fact that the question had not been squarely presented to any Florida appellate court on a prior occasion did not mean that the doctrine "had not been adopted in Florida". Instead, it required the trial court to predict how this Court would decide the question if it had been presented here. Given the universal acceptance of our theory of the case during the last 20 years, the duty imposed upon the hospital by statute, and the general rules governing recognition of duties in the law of Florida, we think that prediction should have been relatively easy to make.

We also believe that the trial court overlooked an important aspect of our argument below. While it is true in Florida that an employer (like a hospital) is not "vicariously liable" for the negligence of an independent contractor (like a physician), it is not true that an employer can *never* be held liable for damages caused by the negligence of an independent contractor. There is a well-settled exception to the general rule in Florida (which appears to be universally recognized). Where an employer knows or reasonably should have known that its independent contractor is incompetent or dangerous, or will not perform satisfactorily, the employer is *directly* (not vicariously) liable for damages caused by the independent contractor because of its negligence in hiring him. That, of course, is merely the "corporate negligence doctrine" widely adopted elsewhere, by another name--and it fits the instant case like a surgeon's glove.

We will address other aspects of the trial court's order, as well as the various responses which we anticipate from the defendant, in the argument section of the brief. We will urge in conclusion that the certified question should be answered in the affirmative.

IV.
ARGUMENT

THE TRIAL COURT ERRED IN DIRECTING A VERDICT AGAINST THE PLAINTIFF *SUA SPONTE*, ON THE GROUND THAT THE DEFENDANT-HOSPITAL OWED THE PLAINTIFF NO DUTY OF CARE IN GRANTING MEDICAL STAFF PRIVILEGES TO PHYSICIANS.

We believe that the trial court erred in directing a verdict against the plaintiff *sua sponte*, on the ground that the hospital owed Mrs. Insinga no duty of care. The trial court's explanation for the directed verdict is contained in a written order at R. 2-36. The order reasons that the plaintiff's cause of action "rests upon the corporate negligence doctrine" which has been recognized in numerous states; that the plaintiff could not cite a single Florida case recognizing the doctrine, and the doctrine therefore "had not been adopted in Florida"; that, in any event, the "corporate negligence doctrine" made sense only where the hospital provided the physician to the plaintiff, and not where the plaintiff selected the physician; and that the court could not understand how a hospital could be held directly liable for negligently granting staff privileges to an incompetent independent contractor, if it would not be vicariously liable for that independent contractor's negligence. There are simple answers to these concerns, to which we shall return in a moment. For the moment, we intend to demonstrate that the trial court's order misses the point.

The point is a relatively simple one, because all of the trial court's concerns are directly refuted by §768.60(1), Fla. Stat. (1985), which reads as follows:

> (1) All health care facilities, including hospitals and ambulatory surgical centers, as defined in chapter 395, have a duty to assure comprehensive risk management and the competence of their medical staff and personnel through careful selection and review, and are liable for a failure to exercise due care in fulfilling these duties. These duties shall include, but not be limited to:
>
> (a) The adoption of written procedures for the selection of staff members and a periodic review of the medical care and

> treatment rendered to patients by each member of the medical staff;
>
> (b) The adoption of a comprehensive risk management program which fully complies with the substantive requirements of s. 395.041 as appropriate to such hospital's size, location, scope of services, physical configuration, and similar relevant factors;
>
> (c) The initiation and diligent administration of the medical review and risk management processes established in paragraphs (a) and (b) including the supervision of the medical staff and hospital personnel to the extent necessary to ensure that such medical review and risk management processes are being diligently carried out.
>
> Each such facility shall be liable for a failure to exercise due care in fulfilling one or more of these duties when such failure is a proximate cause of injury to a patient.

Because of this statute, there can be no legitimate claim made here that the duty we seek is somehow inimical to the public policy of this State. This statute--which was merely one of perhaps dozens enacted by the legislature in the last decade in its continuing effort to codify the common law of medical malpractice against tinkering by the judiciary--was not enacted until 1985, however, so the real question presented here is simply this: whether the duty of care now made explicit by §768.60 existed under more general principles of Florida law in 1981, when the defendant-hospital granted medical staff privileges to an impostor who had no medical training at all. We believe that this duty of care did exist under those general principles of Florida law.[3/]

[3/] Because §768.60 did not *change* any pre-existing statute, it cannot reasonably be inferred from its enactment that the law was otherwise before its enactment. Given the general principles of Florida law which we will discuss *infra*, all of which fully support the specific duty which we seek here, the only reasonable inference from the statute's enactment was that it was meant to codify existing law against the vagaries of the judicial process, or to clarify what may not have been clear and to safeguard against misapprehension of the existing law. *See, e. g., State ex rel. Szabo Food Services, Inc. v. Dickinson*, 286 So.2d 529 (Fla. 1973); *Florida Patient's Compensation Fund v. Mercy Hospital, Inc.*, 419 So.2d 348 (Fla. 3rd DCA 1982).

It is also worth noting that this statute did not change the hospital's standard procedures one whit. As we shall demonstrate *infra*, the hospital was already in full compliance with this statute in 1981, because there was another statute in existence at that time which required essentially the same thing--and because the hospital's own bylaws,

1. The general principles of Florida law.

In Florida, the existence, the nature, and the extent of the duty of care owed by any given health care provider to a patient is not a question for judges; it depends solely upon the manner in which that duty has been defined by similar health care providers. That general principle of the nature of a health care provider's duty is thoroughly settled. This Court long ago observed that neither judges nor juries are competent to determine the nature of a health care provider's duty on a given set of facts: "Obviously, except in rare cases, neither the court nor the jury can or should be permitted to decide, arbitrarily, what is or is not a proper diagnosis or an acceptable method of treatment of a human ailment." *Atkins v. Humes*, 110 So.2d 663, 667 (Fla. 1959). *Accord*, *Bir v. Foster*, 123 So.2d 279 (Fla. 2nd DCA 1960).

It logically followed from this early observation that (except in cases where the negligence issue is a matter of common sense and ordinary judgment) the nature and extent of a health care provider's duty is to be determined solely by expert medical testimony on the subject:

> A physician, whether he be a general practitioner or specialist, is under a duty to use ordinary skills, means and methods recognized as necessary and customarily followed in a particular type of case according to the standard of those who are qualified by training and experience to perform similar services in the community. To determine what skills, etc., are necessary and customarily followed in the community normally requires expert testimony by those physicians who perform similar services in the community.

Salinetro v. Nystrom, 341 So.2d 1059, 1061 (Fla. 3rd DCA 1977). *Accord*, *Gooding v. University Hospital Building, Inc.*, 445 So.2d 1015 (Fla. 1984); *Wale v. Barnes*, 278 So.2d 601 (Fla. 1973); *Ritz v. Florida Patient's Compensation Fund*, 436 So.2d 987 (Fla. 5th

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its accreditation requirements, and the prevailing standard of care imposed essentially the same duty. The hospital is therefore in no position to claim that this statute was a purposeful *change*, meant to replace some pre-existing *contrary* law. The most that it can fairly argue here is that the statute created a duty upon which the law was previously silent, which is the argument to which we intend to respond.

DCA 1983), *review denied*, 450 So.2d 488 (Fla. 1984); *Pohl v. Witcher*, 477 So.2d 1015 (Fla. 1st DCA 1985); *Brooks v. Serrano*, 209 So.2d 279 (Fla. 4th DCA 1968); *Musachia v. Terry*, 140 So.2d 605 (Fla. 3rd DCA 1962).

There are numerous additional decisions--all of which make clear that this general proposition of the common law applies not merely to physicians, but to hospitals as well: *Hunt v. Palm Springs General Hospital, Inc.*, 352 So.2d 582 (Fla. 3rd DCA 1977); *Sprick v. North Shore Hospital, Inc.*, 121 So.2d 682 (Fla. 3rd DCA), *cert. denied*, 123 So.2d 675 (Fla. 1960); *Mercy Hospital, Inc. v. Larkins*, 174 So.2d 408 (Fla. 3rd DCA 1965); *Lab v. Hall*, 200 So.2d 556 (Fla. 4th DCA 1967).

If there were ever any doubt about that, the doubt was clearly removed by the Florida legislature when, in its continuing effort to codify the common law of medical malpractice, it codified the central principle of all of the foregoing decisions with the following unambiguous statute--which indisputably governs the instant case:

> In any action for recovery of damages based on the death or personal injury of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider as defined in s. 768.50(2)(b), the claimant shall have the burden of proving by the greater weight of evidence that the alleged actions of the health care provider represented a breach of the accepted standard of care for that health care provider. *The accepted standard of care for a given health care provider shall be that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances.*

Section 768.45(1), Fla. Stat. (1979) (emphasis supplied). The definition of "health care provider" in §768.50(2)(b), Fla. Stat. (1979), includes "hospitals licensed under chapter 395". The defendant is indisputably a hospital required to be licensed under Chapter 395, and the standard of care set forth in §768.45 is just as clearly the standard of care to which it is bound in the instant case, even if the common law were inconsistent on the point (which it is not). *See Somer v. Johnson*, 704 F.2d 1473 (11th Cir. 1983).

In other words, the duty of care owed by the hospital in this case depended upon

expert testimony, not upon the existence of a prior judicial decision on the subject. And that duty was established in this case by the affidavit of a qualified expert, Dr. Richard Bauer, which states: "the [prevailing national] standard of care required that Biscayne Medical Center carefully verify the supposed Dr. LaBella's identity and credentials following his interview with Dr. Sine", and that the hospital's failure to do so "departed [from] and fell below the acceptable and prevailing standard of care".[4/] According to §768.45(1) and the decisional law cited at pages 12-13 *supra*, this testimony, by itself, established the hospital's duty to Mrs. Insinga in this case. The point is really no more difficult than that.

Although we could probably rest our case on Dr. Bauer's affidavit, it is worth noting that even if his affidavit were not in the record, the hospital's duty is proven in several additional ways in this case. First, as we noted in our statement of the case and facts, the plaintiff elicited testimony from the defendant's employees and former employees which established that it had assumed a duty to its patients by adopting standard procedures to verify the legitimacy and competence of physicians applying for staff privileges; that this procedure was in its bylaws; and that the purpose of the procedure was to ensure that its patients received competent medical care, and to prevent precisely what had occurred to Mrs. Insinga.

In Florida, it is thoroughly settled that, even in cases where the common law of negligence does not impose a duty of care, if one undertakes to act for the benefit of

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[4/] The affidavit is quoted at greater length at page 2 of this brief. Since the trial court granted a directed verdict *sua sponte* after the plaintiff's opening statement and before the plaintiff had an opportunity to present his entire case (and after the plaintiff represented that he would present the testimony of this expert if allowed)--and since the Eleventh Circuit's opinion asks for an answer to the certified question on the entire record--we take it to be indisputable that we are entitled to both the benefit of this affidavit and a liberal interpretation of it here. *See, e. g., Best v. District of Columbia*, 291 U.S. 411, 54 S. Ct. 487, 78 L. Ed. 882 (1934); *Fidelity & Deposit Co. v. Maryland v. Southern Utilities, Inc.*, 726 F.2d 692 (11th Cir. 1984).

another, the law charges him with a duty to carry out his undertaking with reasonable care:

> One who enters on the doing of anything intended with risk to the persons or property of others is held answerable for the use of a certain measure of caution to guard against the risk * * * It is the duty of every artificer to exercise his art rightly and truly as he ought.

Banfield v. Addington, 104 Fla. 661, 140 So. 893, 896 (1932).

Since that pronouncement, Florida courts have routinely recognized the proposition that one who assumes a duty is charged with an obligation to carry out that duty with reasonable care. *See, e. g., Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982); *Vendola v. Southern Bell Telephone & Telegraph Co.*, 474 So.2d 275 (Fla. 4th DCA 1985), *review denied*, 486 So.2d 597 (Fla. 1986); *City of Tamarac v. Garchar*, 398 So.2d 889 (Fla. 4th DCA 1981) (en banc); *Kaufman v. A-1 Bus Lines, Inc.*, 416 So.2d 863 (Fla. 3rd DCA 1982); *Cox v. Wagner*, 162 So.2d 527 (Fla. 3rd DCA), *cert. denied* 166 So.2d 755 (Fla. 1964); *Barfield v. Langley*, 432 So.2d 748 (Fla. 2nd DCA 1983); *Fidelity & Casualty Co. of New York v. L. F. E. Corp.*, 382 So.2d 363 (Fla. 2nd DCA 1980); *Padgett v. School Board of Escambia County*, 395 So.2d 584 (Fla. 1st DCA 1981); *Shealor v. Ruud*, 221 So.2d 765 (Fla. 4th DCA 1969). In short, whether the decisional law of Florida imposed a specific duty of care upon the hospital or not, the hospital owed a duty of care to Mrs. Insinga because it had assumed that duty itself.

Second, the record reflects that, as a precondition to accreditation by the Joint Committee on Accreditation of Hospitals, the hospital was required to assume the duty which is reflected in its own standard procedures. This national requirement serves as a ready substitute for Dr. Bauer's expert opinion that the prevailing national standard of care included such a duty. Third, and finally, the duty to adopt "standards and procedures" governing the screening of physician applicants for staff privileges to ensure their legitimacy and competency was imposed on the hospital in this case in 1981 by

§395.0653, Fla. Stat. (1979).[5/] That this duty is owed to the public is made clear by the same statute, which requires that the "standards and procedures" adopted by the hospital be "available for public inspection". That this duty is owed to the public is also made clear by §395.02, Fla. Stat. (1979), which expresses the legislature's intent very clearly on that point.

There was therefore a statute which required the hospital to do exactly what the Joint Committee on Accreditation required it to do, exactly what it itself assumed the duty to do, and exactly what Dr. Bauer said all hospitals do--which should put the question to rest. *See deJesus v. Seaboard Coast Line Railroad Co.*, 281 So.2d 198 (Fla. 1973) (violation of statutorily-imposed duty is actionable negligence); *Bondu v. Gurvich*, 473 So.2d 1307 (Fla. 3rd DCA 1985), *review denied*, 484 So.2d 7 (Fla. 1986) (regulation requiring hospital to maintain and furnish patient records creates duty which, if breached, supports cause of action). *See generally*, 38 Fla. Jur.2d, *Negligence*, §§50-54 (and decisions cited therein).

Finally, lest the forest be obscured by our focus on the trees, we should remind the Court that there is nothing particularly difficult about the determination of whether an enterprise capable of doing injury should have a duty to be reasonably careful; as a general rule, duties are recognized whenever reasonable people would find them important to prevent foreseeable injury:

> Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

Smith v. Hinkley, 98 Fla. 132, 123 So. 564, 566 (1929); *Carter v. Livesay Window Co.*, 73

[5/] The current version of this statute, which does not differ in substance, can be found at §395.011, Fla. Stat. (1987).

So.2d 411, 413 (Fla. 1954); *Green Springs, Inc. v. Calvera*, 239 So.2d 264, 265-66 (Fla. 1970). *See Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982).

The defendant-hospital already has a duty to exercise reasonable care in numerous other aspects of its day-to-day operations--in hiring its employees, in providing nursing care, in preparing meals, in filling prescriptions, in following physicians' orders, in maintaining its operating room equipment, in driving its vehicles, and the like. It is really very little to ask that it also be required to exercise reasonable care in determining that the physicians whom it admits to membership on its staff are competent (or, at minimum, given the facts in this case, that they at least be physicians), because the public at large undeniably looks upon the granting of such privileges as professional verification of the medical competence of those persons. Indeed, that is probably the *primary* way in which laymen determine the competence of their physicians--and, on the facts in this case, that is precisely the reason the Insingas decided to rely on Dr. LaBella.

We therefore believe that the public would be flabbergasted, or at least badly disillusioned, if the Court were to hold as the hospital will insist here--that it may grant medical staff privileges to anyone, without reasonable investigation of their bona fides (indeed, that it may authorize a criminal imposter to practice medicine in its facility), with absolute impunity, and with no accountability whatsoever to a person who reasonably relies on those expertly-conferred credentials in selecting his or her physician, and who are injured or killed as a result. In our judgment, common sense--which already appears to be at the heart of the several general principles of Florida law we have previously discussed--simply compels a contrary conclusion: the hospital owed Mrs. Insinga the perfectly ordinary duty to exercise reasonable care in all its activities, including its decision to grant medical staff privileges to Dr. LaBella.

2. The "corporate negligence doctrine".

We return to the trial court's order. We note first that the trial court was correct

in recognizing that the duty for which the plaintiff contended in this case has been widely recognized in this country, under the (poorly descriptive) name of "corporate negligence doctrine". *See, e. g., Blanton v. Moses H. Cone Memorial Hospital, Inc.*, 319 N.C. 372, 354 S.E.2d 455 (1987); *Benedict v. St. Luke's Hospitals*, 365 N.W.2d 499 (N.D. 1985); *Pedroza v. Bryant*, 101 Wash.2d 226, 677 P.2d 166 (1984); *Johnson v. Misericordia Community Hospital*, 99 Wis.2d 708, 301 N.W.2d 156 (1981); *Utter v. United Hospital Center, Inc.*, 236 S.E.2d 213 (W. Va. 1977); *Tuscon Medical Center, Inc. v. Misevch*, 113 Ariz. 34, 545 P.2d 958 (1976); *Mitchell County Hospital Authority v. Joiner*, 229 Ga. 140, 189 S.E.2d 412 (1972); *Moore v. Board of Trustees*, 88 Nev. 207, 495 P.2d 605, *cert. denied*, 406 U.S. 879, 93 S. Ct. 85, 34 L. Ed.2d 134 (1972); *Gridley v. Johnson*, 476 S.W.2d 475 (Mo. 1972); *Foley v. Bishop Clarkson Memorial Hospital*, 185 Neb. 89, 173 N.W.2d 881 (1970); *Darling v. Charleston Community Memorial Hospital*, 33 Ill.2d 326, 211 N.E.2d 253 (1965), *cert. denied*, 383 U.S. 946, 88 S. Ct. 1204, 16 L. Ed.2d 209 (1966); *Park North General Hospital v. Hickman*, 703 S.W.2d 262 (Tex. App. 1985); *Raschel v. Rish*, 110 A.D.2d 1067, 488 N.Y.S.2d 923 (1985); *Elam v. College Park Hospital*, 132 Cal. App.3d 332, 183 Cal. Rptr. 156 (1982); *Kitto v. Gilbert*, 39 Colo. App. 374, 570 P.2d 544 (1977); *Ferguson v. Gonyaw*, 64 Mich. App. 685, 236 N.W.2d 543 (1975); *Corleto v. Shore Memorial Hospital*, 138 N.J. Super. 302, 350 A.2d 534 (1975). *See generally*, Annotation, *Hospital's Liability for Negligence in Selection or Appointment of Staff Physician or Surgeon*, 51 A.L.R.3d 981 (1973) (and pocket part).

The hospital did not cite a single decision to the trial court from any state which had rejected this line of authority. Neither did the hospital cite a single decision to the Eleventh Circuit which had rejected this line of authority. Neither will the hospital be able to cite a single decision to this Court which has rejected this line of authority. As far as we have been able to ascertain, *every* court which has *ever* considered the question (and there are *seventeen* states represented above) has adopted the duty which we seek

here. If this Court concludes that no such duty existed in Florida in 1981, it will be the *only* court which has ever reached such a conclusion. Although this Court certainly has the power to declare itself a minority of one, we submit that the hospital will have to make a far more persuasive case than it will be able to make here to convince this Court to disagree with *everyone* who has ever considered the question.

Returning to the trial court's order, we note that it was also correct in observing that we could not cite a Florida appellate court decision which had specifically followed the line of authority cited above.[6/] Neither, however, did the hospital cite a single Florida appellate court decision which had rejected the line of authority cited above. In our judgment, this absence of square authority on the point did not require a conclusion that the duty upon which the plaintiff's cause of action depended "had not been adopted in Florida". Instead, it required the trial court to predict how this Court would decide the question if it had been presented here, in accordance with this Court's general admonition that, "[w]here a case is new in instance, but not in principle, it is the duty of the court to apply remedies applicable to cases coming within existing principles, even though the principle has not before been applied". *Woodbury v. Tampa Waterworks Co.*, 57 Fla. 243, 249, 49 So. 556, 564 (1909). And given the universal acceptance of our theory of the case by every appellate court in the country which has considered the question in the last 20 years, coupled with the general principles of Florida law which we have previously discussed, that prediction should have been relatively easy to make. This Court is now faced with that same task, of course, and we submit that the announcement

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6/ We did cite a recent Florida appellate court decision in which this line of authority was noted (with no apparent reservation about its propriety), but in which it was found irrelevant to the quite different claim of negligence at issue in the case (failure to ensure that staff physicians have malpractice insurance): *Beam v. University Hospital Building, Inc.*, 486 So.2d 672 (Fla. 1st DCA 1986). The lack of express disapproval of the line of authority noted in *Beam* is arguably helpful to our position here, but we obviously cannot rely upon it as dispositive.

which it will be required to make will be just as easy, especially when those general principles of Florida law--including §768.45(1), Fla. Stat. (1979)--are factored into the determination.

Before the determination is finally made, however, we ask the Court to take note of an aspect of our argument which the trial court overlooked below. It is true in Florida, as the trial court observed, that a physician granted staff privileges at a hospital is generally considered an "independent contractor" vis-a-vis the hospital. It is also true that, as a general rule, an employer is not "vicariously" liable for the negligence of an independent contractor (and we did not contend otherwise below). *See Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987); *Reed v. Good Samaritan Hospital Ass'n*, 453 So.2d 229 (Fla. 4th DCA 1984). It is not true, however, that an employer can *never* be held liable for damages caused by the negligence of an independent contractor. There is a well-settled exception to the general rule in Florida.

Where an employer knows or reasonably should have known that its independent contractor is incompetent or dangerous, or will not perform satisfactorily, the employer is *directly* (not vicariously) liable for damages caused by the independent contractor because of its negligence in hiring him. *See, e. g., Webb v. Priest*, 413 So.2d 43 (Fla. 3rd DCA 1982); *Williams v. Wometco Enterprises, Inc.*, 287 So.2d 353 (Fla. 3rd DCA 1974), *cert. denied*, 294 So.2d 93 (Fla. 1974); *Brien v. 18925 Collins Avenue Corp.*, 233 So.2d 847 (Fla. 3rd DCA 1979). This exception to the rule would appear to be universal. *See* Restatement (Second) of Torts, §411.

That, of course, is merely the "corporate negligence doctrine" adopted by the line of authority upon which we relied above, by another name--and it fits the instant case like a surgeon's glove, because an unqualified fraud impersonating a dead physician is *prima facie* incompetent and dangerous. Although this exception to the general rule does not appear to have arisen in the Florida decisional law in the precise context presented

here, no good reason suggests itself why it should not be applied in this context--and at least one Florida court has included the exception in a list of theories available to a plaintiff in a suit against a hospital to recover damages caused by the negligence of a staff physician: *Webb v. Priest, supra.* We therefore submit that there is an ample basis in Florida law for recognizing the plaintiff's cause of action in this case, notwithstanding that the issue has not been squarely presented or decided before--and this ample basis should provide a comfortable foundation upon which to rest the announcement which we urge upon this Court.

While we are on the subject of the "corporate negligence doctrine" and its incorporation into the law of Florida, we should briefly anticipate an argument which the defendant made in the Eleventh Circuit, and which it will no doubt make again here. The defendant argued that *Snead v. LeJeune Road Hospital, Inc.*, 196 So.2d 179 (Fla. 3rd DCA 1967), rejects our position that the "corporate negligence doctrine" is alive and well in the context presented here. We disagree. Although *Snead* is arguably problematical to the position we have taken here, it is far too ambiguous to be authority on the issue presented here--and it is certainly not controlling upon the issue, since this Court is free to disagree with it. In the first place, *Snead* makes it clear that the plaintiff "did not charge the hospital with active negligence causing the alleged injury". 196 So.2d at 179. In contrast, we have charged the hospital in this case with active negligence causing injury--active negligence in the form of a breach of its duty to exercise reasonable care in granting staff privileges to its staff physicians. Second, although *Snead* does uphold a summary judgment in favor of a hospital on a claim bottomed upon alleged "negligence in permitting the physician to use the facilities of the hospital" (*id.*), it does not *hold* that a hospital owes its patients no duty to exercise care in the credentialing of staff physicians; from all that appears, it may well have affirmed the hospital's summary judgment solely because the hospital had made an uncontroverted factual showing that it

was not negligent.[7/]

In any event, if *Snead* stands for the proposition which the hospital will purport to cull from it, it can be ignored here--for three reasons. First, as we have previously noted, there is a subsequent decision of the same district court which explicitly recognizes the duty which we seek here, which would seem to render *Snead* no longer relevant. *See Webb v. Priest*, 413 So.2d 43 (Fla. 3rd DCA 1982). Second, as we have also noted, there are numerous decisions which hold that the nature and extent of a health care provider's duty of care is essentially a question of fact, dependent upon expert medical testimony, not a question of law--and those decisions obviously control the point in issue here, not *Snead*. Third, and more importantly, the common law duty recognized in those decisions was codified before 1981 by §768.45(1), Fla. Stat. (1979)--and that codification of the principle upon which the hospital's duty depends in this case clearly overruled any contrary intimation which *Snead* might have made a decade earlier. *See Somer v. Johnson*, 704 F.2d 1473 (11th Cir. 1983). We therefore think that *Snead* can safely be ignored here; at minimum, it can hardly be deemed to provide a persuasive answer to the question which this Court has been asked to answer here.

3. Some miscellaneous points.

Two additional aspects of the trial court's order deserve a brief response. The trial court expressed puzzlement as to how a defendant could be directly liable when it could not be vicariously liable. The simple answer to this apparent puzzle is that a defendant is directly liable if it breaches a duty owed to the plaintiff and causes damage, whether it is vicariously liable for someone else's breach of a separate duty or not. If the hospital

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[7/] Given the decisions upon which the plaintiff relied in *Snead--Holl v. Talcott*, 191 So.2d 40 (Fla. 1966), and *Visingardi v. Tirone*, 193 So.2d 601 (Fla. 1967), both of which deal exclusively with the sufficiency of affidavit proof on the merits to support a summary judgment in a medical malpractice case--this would appear to be the most likely explanation for the bottom line in *Snead*.

owed Mrs. Insinga a duty to exercise care in granting staff privileges to Dr. LaBella, then it is simply irrelevant that it is not also vicariously liable for Dr. LaBella's breach of the different duty which he owed separately to Mrs. Insinga. *See, e. g., Rupp v. Bryant*, 417 So.2d 658 (Fla. 1982) (school board can be held directly liable for negligent supervision of students, notwithstanding that it is not vicariously liable for students' misbehavior); *Nova University, Inc. v. Wagner*, 491 So.2d 1116 (Fla. 1986) (similar); *Langill v. Columbia*, 289 So.2d 460 (Fla. 3rd DCA 1974) (owner of firearm can be held directly liable for negligently entrusting firearm to another, notwithstanding that he is not vicariously liable for other's negligence); *Horn v. I.B.I. Security Service of Fla., Inc.*, 317 So.2d 444 (Fla. 4th DCA 1975), *cert. denied*, 333 So.2d 463 (Fla. 1976) (same).

While we are on this subject, we should also anticipate a related argument which the hospital raised in the Eleventh Circuit--that Mrs. Insinga was only Dr. LaBella's patient, and not *its* patient. We called that contention "silly" in the Eleventh Circuit, and if it is raised again here, we think that characterization will remain justified. Mrs. Insinga was, to be sure, Dr. LaBella's patient--but she was also clearly the hospital's patient as well. She was admitted to the hospital as a patient; she was attended by the hospital's nurses; and she was billed for her room, her use of the hospital's operating facilities, and for numerous other expenses incurred during her hospitalization. She was clearly the hospital's patient as a matter of fact (unless the hospital's bill for services was entirely fraudulent), notwithstanding that her primary care and treatment was rendered by a staff physician who may have occupied the status of an independent contractor. The law is clear that the hospital cannot be found *vicariously* liable for that independent contractor's negligence, but nothing in that body of law supports the notion that Mrs. Insinga was not also the hospital's patient--and therefore owed a separate duty of care independent of that owed her by Dr. LaBella.

The trial court also opined that the "corporate negligence doctrine" embraced by the decisions upon which we have previously relied applies only where the hospital provides the physician to the patient, and not where the patient selects the physician. There is arguably a better reason for recognizing the duty in the former situation, as opposed to the latter, since "reliance" is clear in the former and may or may not exist in the latter. The decisions adopting the doctrine do not draw the distinction, however, and a number of them impose the duty even where the patient has selected the physician. Frankly, we see no need to draw such a distinction, since injury in the hospital at the hands of an incompetent staff physician is equally foreseeable in both cases.

Moreover, we remind the Court that the evidence in this case reflects that Mr. and Mrs. Insinga relied upon Dr. LaBella's staff privileges at Biscayne Medical Center in selecting him as Mrs. Insinga's physician--and that, had he not possessed those credentials, they would have selected another physician. The element of "reliance" supporting recognition of the duty in the former situation therefore clearly exists on the facts in this case, notwithstanding that the Insingas, rather than the hospital, "selected" Dr. LaBella--because the evidence reflects that Dr. LaBella was "selected" by the Insingas only because he was first "selected" for staff membership by the hospital. The hospital's negligence in granting Dr. LaBella staff privileges was therefore a competent producing cause of both Mrs. Insinga's selection of Dr. LaBella and her death--and, in our judgment, the question of who selected the physician becomes an irrelevant one on those facts.

V.
CONCLUSION

For all of the foregoing reasons, we respectfully submit that the defendant owed Mrs. Insinga the same duty of care in granting medical staff privileges to Dr. LaBella in 1981 that it now undeniably owes to everyone by virtue of §768.60, Fla. Stat., and that the trial court erred in directing a verdict against the plaintiff on the ground that no such duty existed. Most respectfully, the certified question should be answered in the

affirmative.[8/]

VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 12th day of May, 1987, to: Henry Burnett, Esq., Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., 501 City National Bank Bldg., 25 W. Flagler Street, Miami, Fla. 33130.

Respectfully submitted,

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-and-
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BY: Joel D. Eaton
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[8/] We remind the Court that an affirmative answer to the certified question will not represent a conclusion that the hospital is liable, because the issue of whether the hospital exercised reasonable care has yet to be tried. What this Court recently said in a similar case--in which it recognized a duty of care in circumstances far more problematical than those presented here--might therefore provide an appropriate disclaimer in the instant case:

> We assume for purposes of this opinion that the Center is a socially desirable enterprise, and we express no view as to whether it was negligent. Neither do we pass judgment on the issue of proximate causation. We merely hold that a facility in the business of taking charge of persons likely to harm others has an ordinary duty to exercise reasonable care in its operation to avoid foreseeable attacks by its charges upon third persons. If reasonable care is exercised, there can be no liability. The alternative, the exercise of no care or unreasonable lack of care, subjects the facility to liability.

Nova University, Inc. v. Wagner, 491 So.2d 1116, 1118 (Fla. 1986).