IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,322

JOHN INSINGA, as Personal Representative
of the Estate of MILDRED INSINGA, deceased,

Appellant,

vs.

MICHELLE 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 APPELLEE, HUMANA, INC.

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I.
STATEMENT OF THE CASE AND FACTS

Humana accepts appellant's statement of the case and facts except for the following area of disagreement:

Appellant's statement of the case and facts refers to Mr. Insinga's Affidavits, which suggested that Ms. Insinga, the deceased, relied upon Labella's representation that he had staff privileges at Biscayne Medical Center when she selected him as her physician. Appellant conveniently omits reference to Mr. Insinga's earlier deposition in which Mr. Insinga clearly stated that Ms. Insinga did not rely on Labella's representation that he was on the staff at the Biscayne Medical Center when she selected him as her physician.

> Q. Okay, but at least as far as the visit, the first visit, she didn't care whether he was a member of Biscayne Hospital or not?
>
> MR. HIRSH: Objection to the form.
>
> THE WITNESS: He mentioned that he was acquainted, that he -- he belonged to that hospital.
>
> BY MR. BEASLEY:
>
> Q. You understand what I am asking?
>
> She had not decided that she was going to walk out of his office had he not been a member of the hospital...
>
> MR. HIRSH: Hold on. Don't say a word. *Unless you are asking him did she tell him, if this doctor doesn't belong to that particular hospital I am walking out of the office*. Otherwise, I don't think the question is proper.
>
> BY MR. BEASLEY:

> Q: *You can answer your attorney's question,* then. Did she tell you that?
>
> A: *She didn't say anything,* If she liked the man, she would go to him, that is all.
>
> He seemed nice the first time we went there. He seemed like a good doctor.
>
> Q: And because of that, she decided to keep going with him?
>
> MR. HIRSH: Objection to the form of that question.
>
> THE WITNESS: That is all.
> (emphasis added) (R.-3-148).

In response to defendant's Motion for Summary Judgment, Mr. Insinga offered the following affidavit, which contradicts his earlier deposition.

> ...Dr. Michelle 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...
> (emphasis added) (R.-1-1-MP 52)

Then, when moving for rehearing, appellant offered the following eleventh hour, self-serving affidavit which explicitly contradicts the earlier deposition.

> 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. (emphasis added) (R. 2-38)

II.
ISSUE PRESENTED ON CERTIFIED QUESTION

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

III.
SUMMARY OF ARGUMENT

Florida does not recognize the corporate negligence doctrine. In fact, Florida has explicitly rejected the corporate negligence doctrine in substance, although not by name. The issue of whether a hospital owes a patient a duty to exercise due care in the selection of physicians has in fact been presented in *Snead v. Lejuene Road Hospital, Inc.*, 196 So. 2d 179 (Fla. 3d DCA 1967). In *Snead*, the Florida Third District Court of Appeals refused to allow a patient to sue the hospital on the theory that the hospital negligently permitted a doctor to operate on its premises. Therefore, *Snead* provides ample basis from which this Court should answer the certified question in the negative.

Alternatively, if this Court considers adopting the corporate negligence doctrine, it should not be adopted under the facts of this case. The majority of the jurisdictions that have adopted the corporate negligence theory have only adopted the theory in factual situations where the hospital has provided a physician to the patient, not where the patient has independently retained the services of a private physician who has hospital staff privileges. Mildred Insinga (hereinafter "Insinga") established her relationship with Michelle LaBella a/k/a Morton Canton (hereinafter "LaBella") as her private physician more than six

months prior to being admitted to Humana Hospital Biscayne (hereinafter "Humana"). Prior to this time, Humana had no contact with Mrs. Insinga nor was it involved in the selection of LaBella as Mrs. Insinga's private physician. To adopt the corporate negligence theory under these facts would unfairly broaden hospital liability and extend the theory far beyond its original scope. Such an adoption would only further inflame the present malpractice crisis of this state. Accordingly, even if this Court adopts the corporate negligence doctrine, it should not apply in the case sub judice.

IV.
ARGUMENT

A. FLORIDA DOES NOT RECOGNIZE THE CORPORATE NEGLIGENCE DOCTRINE

Despite appellant's rewording of the issue, the issue on appeal, as certified by the Eleventh Circuit Court of Appeal, is:

> Whether Florida law recognizes the corporate negligence doctrine and whether it would apply under the facts of this case.

Appellant has not cited one case in which a Florida court has in any way suggested that Florida law recognizes the corporate negligence doctrine and admits that the doctrine has not been adopted. In fact, the corporate negligence doctrine in substance, if not in name, has been soundly rejected by the courts of this state.

Only one Florida court has ever mentioned the corporate negligence doctrine by name. In *Beam v. University Hospital Building, Inc*, 486 So.2d 672 (Fla. 4th DCA 1986), the Fourth District Court of Appeal referred to the corporate negligence doctrine, citing cases in other jurisdictions and no cases in Florida. In *Beam, supra*, plaintiff sued the defendant hospital, asserting the tort of negligent selection of a financially incompetent physician. In *Dicta*, the Fourth District Court of Appeal stated:

> Cases from several jurisdictions have recognized a tort concerning hospital selection of *medically* incompetent physicians, under the doctrine of "corporate negligence". *See generally*, Annot., 51 ALR 3d 981 (1973). It is true that the corporate negligence doc-

> trine is premised on the notion that it is foreseeable that a hospital's failure to properly investigate an applicant for staff privileges would present a foreseeable risk of harm to the hospital's patients. *Johnson v. Misericordia Community Hospital*, 99 Wis.2d 708, 301 NW 2d 156, 164 (Wis. 1981).... Corporate negligence is said to be based on "increased public reliance on hospitals" for "the highest possible quality" medical care *Pedroza v. Bryant*, 101 Wash. 2d 226, 677 P.2d 166, 169 (Wash. 1984).

Id. at 673. Arguably, if the corporate negligence doctrine was recognized or adopted in Florida, the *Beam* court would have referred to a Florida decision. Instead, the *Beam* court only referred to decisions from other jurisdictions and an American Law Reports article.

Indeed, the *Beam* court could not refer to a Florida decision that adopted the corporate negligence doctrine because the duty which appellant seeks here, which is part of the corporate negligence doctrine, was rejected in *Snead v. LeJeune Road Hospital*, 196 So.2d 179 (Fla. 3d DCA 1967). In *Snead*, plaintiff sued a doctor for malpractice. Additionally, plaintiff sued the hospital in which the malpractice occurred, relying upon both the doctrine of respondeat superior and the hospital's alleged direct negligence in permitting the physician to perform operations on its premises. Summary Judgment was entered in favor of the hospital, while the malpractice action against the physician remained pending.

In *Snead*, the issue on appeal was whether the Plaintiff could proceed on either of the theories asserted. As the *Snead* court stated:

> Upon review, the appellant urges error in the summary judgment in favor of the hospital, contending that the hospital was liable under one or both of the above theories...

Id. It is clear that the court affirmed on the basis that the hospital could not be liable on either the theory of respondeat superior or the theory that the hospital was negligent in permitting the physician to operate on its premises. Indeed the *Snead* court stated:

> It is apparent that the appellant did not charge the hospital with active negligence causing the alleged injury, but bottomed its case principally upon the doctrine of respondeat superior and negligence in permitting the physician to use the facilities of the hospital. *No error has been made to appear in these respects* (emphasis added).

Id. The cases cited by the *Snead* court after the above quote concerned whether the plaintiff could sue a hospital for the negligent acts of independent contractors. Not only did the court reject the theory of respondeat superior consistent with the authorities cited, but the court also rejected the theory predicated upon the alleged negligence of the hospital in permitting the physician to perform operations on its premises, which is the corporate negilgence doctrine.

In a footnote, appellant unsuccessfully attempts to offer another explanation for the *Snead* opinion. To understand appellant's mistaken interpretation, we must again quote *Snead*:

> Upon review, the appellant urges error in the summary judgment in favor of the hospital, contending that the hospital was liable under

> one or both of the above theories, and relies heavily upon the recent cases of Holl v. Talcott, Fla. 1966, 191 So.2d. 40; Scanlon v. Litt, Fla 1966, 191 So.2d. 553; Visingardi v. Tirone, Fla. 1967, 193 So.2d. 601; Hoder v. Sayet, Fla. App. 1967, 196 So.2d. 205....

Appellant then suggests that since the cases cited in the above quote deal with the sufficiency of affidavit proof, this was the real issue in the case. Of course, appellant omits reference to other cases cited by *Snead* which confirm that a hospital will not be held responsible for the acts of an independent contractor physician. Obviously, on appeal, the *Snead* plaintiff tried to finess the fact that the case could not proceed under the theories asserted by suggesting that there was a genuine issue of material fact that precludes Summary Judgment. Of course, this argument was unsuccessful in *Snead* because regardless of whether there was a genuine issue of material fact, the plaintiff could not sue the hospital under the theories asserted. Therefore, despite appellant's efforts in this case to ignore the *Snead* finding, it is clear that the Third District Court of Appeal rejected the theory that a hospital could be sued for negligently permitting a physician to operate on its premises, thereby rejecting the corporate negligence doctrine.

Noting that *Snead* is "problematical" to appellant's position, appellant has tried to distinguish *Snead*. First, appellant refers to the fact that the plaintiff in *Snead* did not charge the hospital with "active" negligence in causing the injury. Therefore, appellant contends that *Snead* is distinguishable because in

the instant case appellant has charged the hospital with active negligence in the form of a breach of the hospital's duty to exercise reasonable care in granting staff privileges to its staff physicians. This argument is illogical and erroneous, if not ridiculous. When *Snead* referred to "active" negligence, it is obvious the court referred to negligence in medical care provided by the hospital itself as opposed to vicarious liability for negligent treatment rendered by an independent contractor physician. More importantly, *Snead* involved the same type of negligence that appellant asserts in this case: that the hospital negligently permitted a physician to practice on its staff or in its facility. Clearly, *Snead* cannot be distinguished on the basis that appellant in this case has charged the hospital with a different type of negligence than the plaintiff in *Snead*. In neither instance did the hospital *cause* the injury - the doctor allegedly did - and in *Snead* there was no cause of action for negligently allowing the doctor to practice on the hospital's premises.

Finally, appellant tries to distinguish *Snead* by suggesting that *Webb v. Priest*, 413 So.2d 43 (Fla. 3d DCA 1982), "explicitly" recognizes the duty appellant seeks here, thereby rendering *Snead* no longer relevant since *Webb* and *Snead* are Third District Court of Appeal decisions and *Webb* is more recent. In *Webb*, the plaintiff was examined in the defendant hospital's emergency room by two doctors. Plaintiff sued both the doctors and the hospi-

tal, alleging negligence. The trial court entered a directed verdict in favor of the defendant hospital because the doctors were not employees of the hospital and appeared to be independent contractors. On appeal, the Third District Court of Appeal held the trial court erred in directing a verdict in favor of the defendant hospital because there was evidence suggesting the doctors were apparent agents of the defendant hospital. Then, in a footnote, the *Webb* court stated:

> The general rule in Florida is that an owner or employer will not be held liable for acts of an independent contractor. Exceptions to the general rule, as carved out in Florida decisions, are where... (4) the owner/employer knew or had reason to know that the independent contractors would not perform in a satisfactory manner....

Id. at 47. It is from this footnote that appellant boldly asserts the *Webb* court has included this exception in the list of theories available to a plaintiff in a suit against the hospital to recover damages caused by the negligence of a staff physician. Obviously, the footnote quoted above, in the context of the opinion, does not "explicitly" make this exception part of a list of theories available to the plaintiff in this lawsuit as appellant contends.[1]

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[1] Obviously, if *Webb* "explicitly" recognized the duty appellant seeks here, the Eleventh Circuit Court of Appeal would not have had to certify a question to this court.

Further, contrary to appellant's argument, the above footnote does not even recognize the duty appellant seeks here. Under this exception the employer is held *vicariously* liable for the independent contractor's negligent acts, not directly liable for negligence in hiring the independent contractor as appellant contends. In *Williams v. Wometco Enterprises, Inc.*, 287 So.2d 353 (Fla. 3d DCA 1973), *cert. denied*, 294 So.2d 93 (Fla. 1974), the Third District Court of Appeal stated:

> We concluded that the owner of real property who hires a security corporation would not be *vicariously liable* for the negligent discharge of a firearm by the employee of the independent contractor, absent a showing that the owner had or ought to have had notice of the dangerous propensities of the guard employed by the security corporation. (emphasis added).

Id. at 354. Thus, this exception does not recognize a duty owed to third persons to exercise care in the selection of independent contractors for which the owner is held liable if the duty itself is breached. Rather, this exception clearly holds the owner vicariously liable if the owner hires an independent contractor known to be incompetent or dangerous.

Clearly, this exception should not be applicable in this case. First, as discussed above, it would impose vicarious liability on the hospital. As this court stated in *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987), if a doctor is found to be an independent contractor, the hospital cannot be found vicariously liable for any negligence on the doctor's part:

> We note, too, that in practice no such unfairly imposed "direct liability" will be ordinarily found; if the doctor is found to be an independent contractor, the hospital may not be found liable for any negligence on his part, *and in fact will not properly be a party in the case*. (emphasis added).

Id. at 601. Similarly, in *Reed v. Good Samaritan Hospital Association, Inc.*, 453 So.2d 229 (Fla. 4th DCA 1984), the Fourth District Court of Appeal held:

> However, the law is clear that if the doctor is "an independent contractor, that shield[s] the hospital from vicarious liability."

Id. at 230.

The second reason why this exception is not applicable in this case is that Mrs. Insinga hired the independent contractor - not the hospital. Clearly, although courts describe a private doctor with practicing privileges as an independent contractor when discussing the hospital's liability, the doctor cannot be characterized as the *hospital's* independent contractor, since the hospital does not hire or pay the physician. Humana merely granted privileges to Labella, who at the time was licensed by the Board of Medical Examiners and had practicing privileges at other hospitals. Humana did not hire or pay Labella. Mrs. Insinga hired and paid Labella.

B. SHOULD THIS COURT HOLD THAT FLORIDA RECOGNIZES THE CORPORATE NEGLIGENCE DOCTRINE, IT SHOULD NOT BE APPLICABLE WHERE THE PATIENT SEEKS MEDICAL CARE FROM A PRIVATELY RETAINED PHYSICIAN.

As the trial court noted, the corporate negligence doctrine is only appropriate in situations where the hospital provides a

doctor to the patient. (R.3-150-51). The rationale of the doctrine clearly indicates that the doctrine's scope should be limited in this manner. In *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 211 N.E. 2d. 253 (Ill. 1965), *cert. denied*, 383 U.S. 946, 88 S. Ct. 1204, 16 L. Ed. 2d 209 (1966), the leading case on corporate negligence, the Illinois Supreme Court explained the rationale for the corporate negligence doctrine:

> The conception that the hospital does not undertake to treat the patient, does not undertake to act through *its doctors* and nurses but, undertakes instead simply to procure them *to act upon their own responsibility*, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. *They regularly employ on a salary basis a large staff of physicians*, nurses and interns as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary by legal action. Certainly, the person who avails themselves of hospital facilities *expects that the hospital will attempt to cure him*, not that its nurses or other employees will act on their responsibility. (emphasis added.)

211 N.E.2d at 257. The above quote reveals concern for the modern day occurrence where the hospital employs doctors on a salary basis and provides a doctor to a patient, who looks to the hospital for medical treatment. The emphasized portions evidence this fact. Because of this trend, the corporate negligence doctrine was created to impose a duty on the hospitals to supervise its employee physicians. However, the trend is not necessarily

the rule. Today, hospitals still grant practicing privileges to private doctors. Where this occurs, the hospital does expect the independent contractor physician to be responsible for his own acts, thereby insulating the hospital from any vicarious liability, contrary to the passage referred to above.

Thus, based on the rationale supporting the corporate negligence doctrine, this doctrine should only be applicable when the patient seeks care from the hospital, which provides a doctor to treat the patient. In the leading case on corporate negligence, *Darling*, *supra*, the plaintiff was treated in the hospital's emergency room. Plaintiff alleged the hospital was negligent by failing, through its medical staff, to exercise adequate supervision over the treatment rendered by an emergency room doctor. The *Darling* court held the defendant hospital had a duty to review the patient's treatment and require consultation with appropriate medical staff members as needed. It is from this ruling that the corporate negligence doctrine arose.

Clearly, at its inception, the corporate negligence doctrine was similar to respondent superior - both are based on the right to control and supervise the employee physician. Respondeat superior imposes liability on the master where the servant is acting within the scope of his employment and the master has the right to *control* or *supervise* the employee's work. As stated in the comment to the Restatement of Agency, 2d, § 216:

> A principal is often subject to liability for the unauthorized conduct of an agent with

> respect to matters which ... *he has a right to direct* ... Liability is normally based upon apparent authority or when the servant is aided in accomplishing the tort by the existence of the agency relationship. (emphasis added)

Whereas respondeat superior imposes liability on the employer because the employer has the right to control or supervise the employee, corporate negligence creates a duty to supervise and imposes direct liability on the employer for breach of this duty. In *Darling, supra*, the duty imposed on the hospital to supervise its employee physician is based on the right to control the employee-physician. Indeed, in *Hull v. North Valley Hospital*, 159 Mont. 375, 498 P. 2d 136 (Mont. 1972), the Montana Supreme Court noted that the *Darling* rule on corporate negligence was simply respondent superior:

> A close examination of appellant's authority reveals some distinguishing differences from the factual situation in the instant case. In *Darling*, an 18 year old boy with a broken leg was taken to the hospital emergency room and treated by a doctor on duty. This doctor was not employed by the plaintiff, but rather by the hospital and furnished by the hospital.
>
> In other words, the doctor in *Darling* was an employee of the hospital and the court's holding concerning the hospital's duty to supervise "staff" doctors is based on respondent superior and staff doctors there should be distinguished from unpaid "staff" doctors in Montana.

498 P. 2d at 141.

On the other hand, an employer does not have the right to supervise or control the work of an independent contractor:

> It is a general rule that an employer is not liable for the torts of an independent contractor or the latter's servants over whom he reserves no control and direction over the work. This rule of non-liability of an employer is based upon a theory that the characteristic incident of the relation created by an independent contract is that the employer does not possess the power of controlling the person employed as to the details of the stipulated work, and it is, therefore, a necessary judicial consequence that the employer should not be answerable for an injury resulting from the manner in which the details of the work are carried out by the independent contractor.

2 Fla. Jur. 2d § 109 *Agency and Employment (1977)*.

Accordingly, Illinois courts refuse to apply the *Darling* rule unless the physician is an employee of the hospital. In *Lundahal v. Rockford Memorial Hospital Association*, 93 Ill. App. 2d 461, 235 N.E. 2d 671 (Ill. App. Ct. 1968), the Illinois Second District Court of Appeal stated:

> The plaintiffs cite the *Darling* case (ibid.) in support of their contention that the hospital was negligent in its failure to require consultation between Dr. Paynter and members of its staff. In the *Darling* case, however, the treating physician was an employee placed by the hospital on emergency duty subject to its supervision. [Here] Dr. Paynter was not employed by the hospital, was not an agent of it and not subject to its supervision.

235 N. E. 2d at 674-675. Likewise, in *Collins v. Westlake Community Hospital*, 12 Ill. App. 3d 847, 299 N. E. 2d 326 (Ill. App. Ct. 1973), *rev'd on other grounds*, 577 Ill. 2d 388, 312 N.E.2d 614 (Ill. 1974), Illinois' First District Court of Appeal also refused to apply *Darling* when the physician was not an employee of the hospital:

> Plaintiff cites *Darling v. Charleston Hospital*... and relies heavily upon the facts in that case and the finding of the court that the hospital was liable. However, there are substantial differences between the two cases. In *Darling*, plaintiff sustained a broken leg and was treated by one Dr. Alexander, a hospital employee... on the other hand, in the case before us... there was no evidence that the doctor was an employee.

299 N. E. 2d at 328.

Most courts that have adopted the corporate negligence doctrine have done so only in situations where the hospital provides a doctor.[2] Indeed, the majority rule is that absent an employee-employer relationship, the hospital will not be found liable for granting or continuing surgical privileges where the patient has retained the doctor without assistance from the hospital:

> We adhere to the majority rule and hold that where it is shown that no employer-employee, principal-agent, partnership, or joint venture relationship exists between the hospital and the physician, the hospital is not liable for granting or continuing surgical privileges where the patient has chosen the physician and the hospital is not otherwise liable.

Jeffcoat v. Phillips, 534 S.W. 2d 168 (Tex. Civ. App. 1976).

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2 *Benedict v. St. Luke's Hospital*, 365 N.W. 2d 499 (N.D. 1985); *Utter v. United Hospital Center, Inc.*, 236 S.E.2d 213 (W.Va. 1977); *Tucson Medical Center, Inc. v. Misevch*, 113 Ariz. 34, 545 P.2d 958 (Ariz. 1976); *Mitchell County Hospital Authority v. Joiner*, 229 Ga. 140, 189 S.E.2d 412 (Ga. 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 (Neb. 1970).

We now return to the *Darling* quote which explains the rationale for the corporate negligence doctrine because we anticipate that appellant will reply that the instant case falls within that rationale. The *Darling* court stated:

> The conception that the hospital does not undertake to treat the patient, does not undertake to act through *its doctors* and nurses but undertakes instead simple procure them to act upon their responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, to far more than furnish facilities for treatment. *They regularly employ on a salary basis a large staff of physicians* nurses and interns as well as administrative and manual workers, and they charge patients for medical care and treatment, collecting for such services, if necessary by legal action. Certainly, the person who avails themselves of "hospital facilities" expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility. (emphasis added).

211 N.E. 2d at 257. Clearly, the above emphasized portions of the *Darling* decision reflect the reason for imposing a duty on the hospital to supervise its physicians: hospitals now employ doctors, paying their salaries, and the patients look to the hospital to cure them. In the instant case, none of these factors are present. Labella *was not* employed by the defendant hospital and Mrs. Insinga *did not* look to the hospital for medical care. Mrs. Insinga sought medical care from LaBella, at his office, for more than six months before she was admitted to the hospital. (R.-1-1-MP29)

No doubt, appellant will contend that Mrs. Insinga relied on Labella's staff privileges at Humana when hiring Labella. Appellant will rely on the eleventh hour, self-serving affidavit that directly contradicts appellant's earlier deposition. Nevertheless, neither the tainted affidavit[3] nor Mr. Insinga's earlier deposition place this case within the rational for the corporate negligence doctrine. First, as stated in appellant's earlier deposition, Mrs. Insinga intended to hire LaBella regardless of whether he had staff privileges at Humana:

> MR. HIRSH: Hold on. Don't say a word. Unless you are asking him did she tell him, if this doctor doesn't belong to that particular hospital I am walking out of the office. Otherwise, I don't think the question is proper.
>
> BY MR. BEASLEY:
>
> Q. You can answer that you can answer your attorney's question, then. Did she tell you that?
>
> A: ***She didn't say anything. If she liked the man, she would go to him, that is all.*** (R.-3-148) (emphasis added).

Second, even if we accept the eleventh hour self-serving affidavit as proof of Mrs. Insinga's reliance on Labella's staff privi-

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3 A party's affidavit, which repudiates an earlier deposition, does not create a jury issue to defeat an opponent's motion for summary judgment: *Andrews v. Midland National Insurance Company*, 208 So.2d 136 (Fla. 3d DCA 1968) *cert. denied*, 212 So.2d 878 (Fla. 1968); *Tri-County Produce Distributors, Inc. v. Northeast Production Credit Association*, 160 So.2d 46 (Fla. 3d DCA 1963).

leges at Humana, it clearly cannot be said that Mrs. Insinga looked to Humana to cure her. Mrs. Insinga retained defendant Labella on May 27, 1980 as her physician for care and treatment. Labella continued this private doctor/patient relationship with Insinga for over six months before Mrs. Insinga was admitted to defendant's hospital. At most, the eleventh hour self-serving affidavit proves Mrs. Insinga looked to Humana because Humana was close to her home.

> I would have sought another physician to have her hospitalized at Biscayne Medical Center because of its proximity to our home. (R.2-38)

This clearly does not establish a legal duty upon Humana which extends to Mrs. Insinga.

Therefore, if adopted, the corporate negligence doctrine should not be applicable to this case because Mrs. Insinga did not look to the hospital for care and the hospital did not provide a doctor. Clearly, this case does not come within the rationale for the true corporate negligence doctrine as originally expressed in *Darling, supra*. This court should not follow the minority that has extended this doctrine beyond reason to include cases in which the patient independently seeks medical treatment from a privately retained physician.[4]

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4 *Johnson v. Misericordia Community Hospital*, 99 Wis.2d 708, 301 N.W.2d 156 (Wis. 1981); *Bost v. Riley*, 44 N.C App. 638, 262 S.E.2d 391 (N.C. Ct. App. 1980).

We criticize the minority that extends the corporate negligence doctrine to the privately retained physician situation for the following reasons. First, these courts ignore the rationale for the corporate negligence doctrine as stated in *Darling, supra*. These courts blindly extend the doctrine to situations where the patient does not look to the hospital, but rather to the private physician, for medical care. We also criticize these decisions because this extension clearly extends respondeat superior to situations involving independent contractors, despite statements by these courts that this duty, with respect to independent contractor physicians, is separate and distinct from respondeat superior. Clearly, the hospital is not being held liable for breaching its duty to assure the competence of physicians. This "breach" does not injure the patient. Rather, the doctor's malpractice injures the patient. Once the doctor commits malpractice, *then* the hospital becomes liable *for that malpractice*. These courts can call it what they wish; but they are holding the hospital vicariously liable for the physician's malpractice. As the Third District Court of Appeal stated in *Williams, supra*:

> We concluded that the owner of real property who hires a security corporation would not be *vicariously liable* for the negligent discharge of a firearm by the employee of an independent contractor, absent a showing that the owner had or ought to have had notice of the dangerous propensities of the guard employed by the security corporation. (emphasis added).

287 So.2d at 354.

Appellant argues that we cannot legitimately argue against the adoption of the corporate negligence doctrine, and its extension to the independent contractor situation, because appellant contends that §768.60(1), Fla. Stat. (1985) adopts corporate negligence and covers this situation. However, this statute's legislative history, as well as the case law construing it, does not clearly indicate whether the statute would apply to a situation involving a privately retained physician. Nevertheless, the statute was enacted in 1985 and the law in Florida as of 1981, when this case arose, clearly holds that no cause of action exists in this case. *Snead, supra*.

If this court disagrees with *Snead, supra*, and/or interprets §768.60, Fla. Stat. (1985) to cover situations with the privately retained physician, the result would be absurd. First, it would impose a duty on hospitals to supervise each and every one of its staff members' office practice. Second, in a state that suffers from an alarming malpractice crisis, each and every hospital that grants practicing privileges to a particular doctor could be named in any malpractice action against that doctor, regardless of where the negligence occurs. This would only aggravate the present medical malpractice crisis from which this state suffers. Third, it follows that physicians will have less incentive to obtain adequate insurance once they realize that the deep pocket of the hospital is involved, causing a further rise in the health care costs of this state.

C. ADDITIONAL ARGUMENTS RAISED BY APPELLANT, WHICH EXCEED THE SCOPE OF THE CERTIFIED QUESTION, DO NOT IMPOSE THE DUTY APPELLANT SEEKS.

Appellant has asserted a number of arguments that clearly go beyond the scope of the certified question. First, appellant half-heartedly suggests that the duty it now seeks was in fact imposed on the hospital by §395.0653, Fla.Stat. (1979).[5] There are several reasons why appellant is clearly wrong. This statute addresses the denial of staff privileges solely on the basis that the applicant may be from a different school of medicine, such as podiatry or dentistry. §395.0653, Fla.Stat. (1979) reads in pertinent part:

> (1) Any hospital licensed under this chapter in considering and acting upon applications for staff membership or professional clinical privileges shall not deny the application of a qualified doctor of medicine licensed under chapter 458, doctor of osteopathy licensed under chapter 459, doctor of dentistry licensed under chapter 466...
>
> (2)...In making such recommendations and in delineation of privileges, each applicant shall be considered on an individual basis pursuant to criteria applied equally to all other disciplines.

Undoubtedly, the focus of the above statute is to establish hospital guidelines for reviewing applications so as to prevent

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5 We characterize this argument as half-hearted for two reasons: 1) It is clearly wrong, as described in the text that follows and 2) Appellant's next argument is that Humana assumed the duty, which appellant now says was already imposed. We cannot understand how one can assume a duty already imposed.

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discrimination against various schools of medicine. *See Carida v. Holy Cross Hospital Inc.*, 427 So.2d 803 (Fla. 4th DCA 1983); *Sarasota County Public Hospital Board v. El Shahawy*, 408 So.2d 644 (Fla. 2nd DCA 1981); *Feminist Woman's Health Center v. Mohammad, M.D.*, 586 F.2d 530, 544 (5th Cir. 1978), *reh'g denied*, 591 F.2d 1343 (5th Cir. 1979). There is no concern for the "competence" of a hospital's medical staff, as currently expressed in §768.60, Fla.Stat. (1985).

Further, §395.0653, Fla.Stat. (1979) did not impliedly create a private cause of action as appellant suggests. Appellant refers to §395.02, Fla.Stat. (1979) to suggest that §395.0653, Fla.Stat. (1979), quoted above, was intended to create a private cause of action for breach of the duty to assure the competence of a hospital's medical staff. §395.02, Fla.Stat. (1979) states:

> The purpose of this chapter is to provide for the development, establishment, and enforcement of standards:
>
> (1) For the care and treatment of individuals in hospitals or ambulatory surgical centers and,
>
> (2) For the construction, maintenance, and operation of hospitals or ambulatory surgical centers, which, in the light of advancing knowledge, will promote safe and adequate treatment of such individuals in hospitals or ambulatory surgical centers.

This statute does not create a cause of action in favor of appellant. As this court stated in *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985):

> Legislative enactments for the benefit of the general public do not automatically create an independent duty to either individual citizens or specific class of citizens. *Restatement (Second) of Torts* §288 comment b (1964).

Id. at 917. If this statute did in fact create a cause of action in favor of appellant, §768.60, Fla.Stat. (1985), which explicitly creates a private cause of action when the hospital breaches its duty to assure the competence of its medical staff, and such breach injures a patient of an employee physician, would not have been necessary. Finally, it cannot be said that §768.60, Fla.Stat. (1985) replaced §395.0653, Fla.Stat. (1979) because §395.011, Fla.Stat. (1987) replaced and repeats §395.0653, Fla.Stat. (1979).

Second, appellant suggests that as a pre-condition to accreditation by the Joint Committee on Accreditation of Hospitals, the hospital was required to assume the duty appellant now seeks. Neither appellant's brief nor the record clearly reflects what duty has been established, or if so, when, by the Joint Committee on Accreditation of Hospitals for credentialling staff members and as a result we are unable to ascertain what duty appellant is claiming Humana owed Insinga. However, it is apparent that the purpose of the standards of the Joint Commission on Accreditation of Hospitals is to provide for a hearing and appellate review mechanisms for denial of staff appointments to physicians, not to develop a duty owed by the hospital to private patients of independent physicians to properly credential such physicians. Indeed, the Fourth District Court of Appeals stated:

> The standards of the Joint Commission of Accreditation of Hospitals (JCAH) to which the statute referred and which apply to private hospitals were predicated on fairness of hearing and appellate review mechanisms.

Carida v. Holy Cross Hospital, Inc., 427 So.2d 803, 805 (Fla. 4th DCA 1983).

Third, appellant argues that Humana assumed a duty of care which extends to Mrs. Insinga by the adoption of procedures in its by-laws to verify the credentials of staff physicians. The record does not reflect that any such duty ever existed in the by-laws. Further, any duty that may arise out of the hospital by-laws would not extend to those who sought medical care from someone other than the hospital itself. Mrs. Insinga sought the care of LaBella and not Humana when she initially sought care and treatment. Humana did not in any way provide a doctor to Mrs. Insinga.

Finally, appellant argues that expert testimony established that Humana owed Insinga a duty of care in this case. Appellant cites *Atkins v. Humes*, 110 So.2d 663, 667, (Fla. 1959); *Accord*, *Bir v. Foster*, 123 So.2d 279 (Fla. 2d DCA 1960) to suggest the duty of care owed by any given health care provider to a patient is not a question for judges, but depends solely upon the manner in which that duty has been defined by similar health care providers or, in other words, experts called at trial. Obviously, the instant case does not involve an issue of whether a proper diagnosis was made or whether an acceptable method of treatment was conducted by the defendant hospital. The question before

this Court is whether Humana owed a duty to Mrs. Insinga to properly credential independently retained staff physicians. The determination of the existence of this duty is a legal question which was properly decided by the trial court. 57 Am.Jur.2d *Negligence* §§36, 37; 38 Fla.Jur.2d *Negligence* §120.

Atkins, *supra*, recognizes an expert is not needed to describe the applicable standard of care for all aspects of the case. As the *Atkins* court states:

> But jurors of ordinary intelligence, sense and judgment are in many cases, capable of reaching a conclusion, without the aid of expert testimony, in a malpractice case involving a charge of negligence in the application or administration of an approved medical treatment.

110 So. 2d at 666. The issue before the trial court dealt with the administrative function of credentialling staff physicians and did not concern medical treatment. Accordingly, the trial judge was qualified and did not need expert testimony to determine whether a duty existed in this case. Therefore, the trial court properly ruled, in accordance with *Snead*, *supra*, that no cause of action existed.

CONCLUSION

For all the foregoing reasons, we respectfully submit that Humana had no duty to assure the competence of a private physician that Humana did not provide to Mrs. Insinga. Most respectfully, the certified question should be answered in the negative.

Respectfully submitted,

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By:
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 9th day of June, 1988 to: JOEL EATON, ESQ., Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., 25 West Flagler Street, Suite 800, Miami, Florida 33130 and JEFF HIRSH, ESQ., Freidin & Hirsh, P.A., 44 West Flagler Street, Suite 2500, Miami, Florida 33130.

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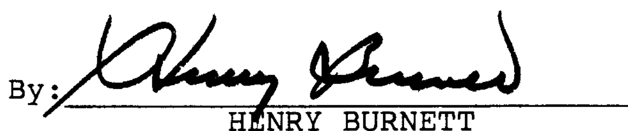
By: 
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