IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,322

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

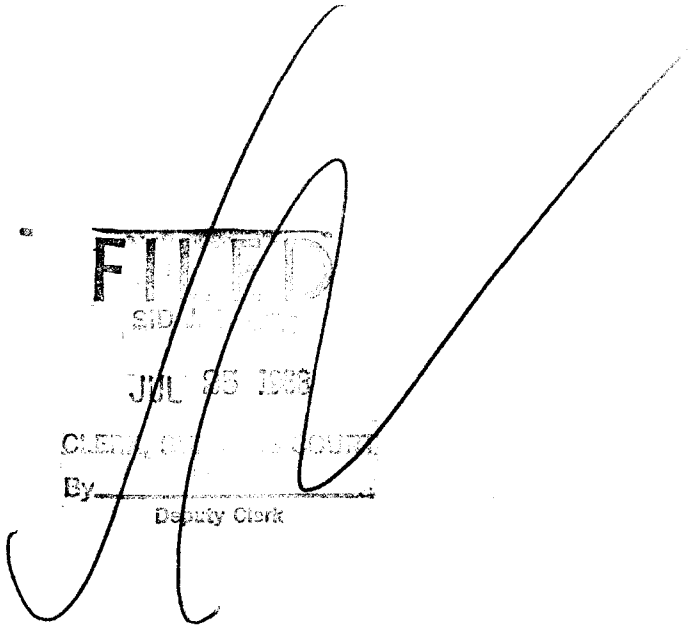
Appellant,

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

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

FREIDIN & HIRSH, P.A.
Suite 2500, 44 W. Flagler Street
Miami, Fla. 33130
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
800 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

Attorneys for Appellant

BY: JOEL D. EATON

TABLE OF CONTENTS

LAW OFFICES, PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

TABLE OF CASES

LAW OFFICES, PODHURST ORSECK PARKS JOSEFSBERG EATON MEADOW & OLIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780

AUTHORITIES

I.
STATEMENT OF THE CASE AND FACTS

It is unfortunate, but the hospital's brief is riddled with inaccuracies. The inaccuracies begin on page 1, where the hospital purports to quote from "Mr. Insinga's earlier deposition". Neither the deposition nor the quoted material are in the record. Counsel for the hospital did read a *portion* of the quoted material to the trial court during *argument* on the trial court's announcement of its intention to direct a verdict against Mr. Insinga before he had presented his case, but that portion of the deposition was read in a form considerably more abbreviated than represented in the hospital's brief (R. 3-147-49). In addition, of course, argument of counsel is simply not evidence. The hospital's restatement of the case and facts is therefore bottomed entirely upon evidence which is not in the record, and it should be ignored as a result.

In any event, the hospital is simply wrong that the deposition testimony upon which it improperly relies was "contradicted" by Mr. Insinga's subsequent affidavits. Fairly read, the portion of the deposition testimony upon which the hospital relies here was limited to the Insingas' *first visit* to Dr. LaBella; it does not address the Insingas' subsequent decision to allow Dr. LaBella to continue to treat Mrs. Insinga over the months that followed, and it does not address the Insingas' critical decision to allow Dr. LaBella to admit Mrs. Insinga into the defendant-hospital during the acute medical crisis requiring hospitalization, which occurred many months after the Insingas' first visit. Mr. Insigna's affidavits addressed those later decisions, not the first visit, so there is no contradiction at all.

Just as importantly, the hospital has forgotton that the issue presently before the Court does not arise out of a motion for summary judgment; it arises out of a directed verdict which the trial court granted on its own motion, after allowing Mr. Insinga to present only a limited portion of his case. If Mr. Insinga had been allowed to proceed as the rules contemplated, of course, he could have presented his version of the facts at trial, and the most that his deposition could have been used for was impeachment. Since

he was deprived of the opportunity to present any testimony at trial, however, he was clearly entitled to place in the record, by affidavit, what his testimony would have been had his case not been preempted by the directed verdict in issue here, and his prior deposition testimony can therefore be considered only as impeachment testimony here--not testimony which is entirely dispositive of the issue before the Court.[1/] And since a directed verdict is in issue here, we are also clearly entitled to a favorable view of the evidence here--which means that Mr. Insinga's affidavit testimony must be accepted as true here, and any inconsistencies in his deposition with which the hospital might have attempted to impeach him at trial must be considered entirely irrelevant to the issue before the Court. For all of these reasons, we believe the digression contained in the hospital's restatement of the case and facts should be entirely disregarded here.

II.
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.

1. The Florida decisional law.

For ease of comprehension, we will abandon the format of our initial brief, and respond to the hospital's arguments in the order in which they appear in the hospital's

---

[1/] It is this fact, of course, that renders silly the hospital's characterization of Mr. Insinga's affidavit as "eleventh hour" and "self-serving". A litigant is clearly entitled to testify to his version of the facts, whether they are "self-serving" or not. Indeed, it is the rare litigant who does not testify to "self-serving" facts--and if the trial below had proceeded to conclusion, it is a certainty that the hospital would have adduced its own entirely "self-serving" evidence in defense. In addition, when a trial court directs a verdict against a litigant, on its own motion, and at the tenth hour of the litigation, there can certainly be nothing wrong with responding in the eleventh hour with evidence which the trial court should have allowed before directing a verdict. In any event, the evidence in Mr. Insinga's affidavit, as we explained in our initial brief, is relevant only to the issue of causation--not to the threshold duty issue. In addition, the question certified to this Court is a substantive one; the procedural aspects of this case belong to the Eleventh Circuit, which appears to have accepted the plaintiff's version of the facts in determining to certify the pending question.

brief. First, the hospital contends that the so-called "corporate negligence doctrine" "has been *soundly rejected* by the courts of this state" (emphasis supplied). In support of that contention (which is inaccurate--or, at the very least hyperbolic in the extreme) it refers the Court to *Beam v. University Hospital Building, Inc.*, 486 So.2d 672 (Fla. 1st DCA 1986)--which it inaccurately cites and describes as a decision of the District Court of Appeal, Fourth District. *Beam*, it says, notes that the "corporate negligence doctrine" has been widely recognized in other jurisdictions, but does not cite a Florida decision on the point. That is an accurate description of *Beam*, but we fail to understand how the absence of a citation to a Florida decision on the point means that the doctrine has been "soundly rejected" in Florida. It does not, of course. Moreover, as we noted in our initial brief, the "corporate negligence doctrine" *has* been recognized in prior Florida decisions, so the *Beam* court's silence on the issue is simply that--silence.[2/]

As its next piece of evidence for the "sound rejection" which it posits, the hospital cites (as we anticipated it would) *Snead v. LeJeune Road Hospital, Inc.*, 196 So.2d 179 (Fla. 3rd DCA 1967). We have previously conceded the problematical nature of that decision and distinguished it as best we could, so there is no need for us to replow that ground again. We note simply that a 21-year-old decision of a three-judge panel of a district court of appeal can hardly be deemed binding on this Court. We also note that, if *Snead* had spoken with the clarity which the hospital purports to find in it here, there would have been no need for the Eleventh Circuit to have asked this Court's opinion on the subject. In addition, of course, if *Snead* contains the holding attributed to it by the hospital, the legislature emphatically overruled it in 1985 for sound public policy reasons--reasons which should motivate this Court to hold in this case that, by 1981 at least,

---

[2/] *See Webb v. Priest*, 413 So.2d 43 (Fla. 3rd DCA 1982); *Williams v. Wometco Enterprises, Inc.*, 287 So.2d 353 (Fla. 3rd DCA 1973), *cert. denied*, 294 So.2d 93 (Fla. 1974); *Brien v. 18925 Collins Avenue Corp.*, 233 So.2d 847 (Fla. 3rd DCA 1970). *See* Restatement (Second) of Torts, §411. *See generally*, Annotation, *Negligence in Hiring Independent Contractor*, 78 A.L.R.3d 910 (1977).

Snead was no longer good law in Florida.[3/]

In short and in sum, the "corporate negligence doctrine" has not been "soundly rejected" in Florida, by any stretch of the hospital's hopeful imagination. There are several prior Florida decisions which recognize it; there is a recent statute which codifies it; and there is one ambiguous 21-year-old decision which may have rejected it, but which hardly makes itself clear on the point. What is clear, however, is that this Court has not had the opportunity to address the issue before. It has that opportunity now, of course, and the doctrine clearly ought to be considered on its merits, without the unnecessary distraction caused by the parties' arguments concerning the meaning of *Snead*. *Snead* adds next to nothing to the merits of the question presented here, and we therefore think it can be safely ignored.

The hospital next contends that we have misread the prior Florida decisions to which we attributed an adoption of the "corporate negligence doctrine" by Florida courts. According to the hospital, the negligent hiring of an independent contractor gives rise only to *vicarious* liability, not direct liability. The hospital is wrong, of course, but before we demonstrate its error, we should ask, "So what?". If that is the law, then the hospital is "vicariously" liable for granting staff privileges to the incompetent imposter who killed Mrs. Insinga in this case, even if it is not vicariously liable for the medical malpractice which he committed to that end. We will settle for that if the hospital insists, but we think the Court would prefer to give a more accurate answer to the certified question--so we will demonstrate the error of the hospital's contention.

As we noted in our initial brief, there are numerous situations in which a defendant who cannot be found vicariously liable for the negligence of another can nevertheless be

---

[3/] Indeed, the 1985 statute may well be controlling here, if this Court follows its oft-announced rule that cases on appeal should be disposed of according to the law prevailing at the time of disposition. *See Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987). Arguably, the new statute is merely a remedial implementation of the legislature's prior imposition of the substantive duty we seek here in §395.0653, Fla. Stat. (1979).

held directly liable if its own negligence has contributed to the incident causing the plaintiff's injury--cases of negligent hiring, negligent entrustment, negligent supervision, and the like. To the decisions cited in our initial brief as illustrations of that point, we add the following recent decisions: *Walsingham v. Browning*, 13 FLW 1258 (Fla. 1st DCA May 25, 1988); *Guyton v. Howard*, 13 FLW 1094 (Fla. 1st DCA May 11, 1988).

The hospital has ignored all but one of the decisions upon which we initially relied, and has fashioned its peculiar contention upon a single, somewhat less than felicitously drafted, paragraph from *Williams v. Wometco Enterprises, Inc.*, 287 So.2d 353, 354 (Fla. 3rd DCA 1973), *cert. denied*, 294 So.2d 93 (Fla. 1974):

> . . . 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.

What the court meant by that, of course, was essentially the following:

> . . . We concluded [in *Brien v. 18925 Collins Avenue Corp.*, 233 So.2d 847 (Fla. 3rd DCA 1970)] 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 [in which case, the owner would be directly liable for its own negligence in employing the independent contractor].

If that is not already obvious to the Court, it will become obvious once the Court refers back to the decision which the *Williams* court was merely attempting to paraphrase--because it is perfectly clear from *Brien v. 18925 Collins Avenue Corp.*, 233 So.2d 847 (Fla. 3rd DCA 1970), that the negligent hiring of an incompetent independent contractor gives rise to direct liability--not merely vicarious liability.[4/]

[4/] *Williams* and *Brien* are not isolated cases. They derive from a long line of authority which holds that an employer may be found negligent (and therefore directly liable) when it has knowledge that an independent contractor is performing unsatisfactorily, but fails to take action to rectify the situation. *See Breeding's Dania Drug Co. v. Runyon*, 147 Fla. 123, 2 So.2d 376 (1941); *Maule Industries, Inc. v. Messana*, 62 So.2d 737 (Fla. 1953);

In the instant case, of course, we have pleaded and proven that the *hospital* was "guilty of negligence"--that the *hospital* "had or ought to have had notice of the dangerous propensities" of the totally incompetent imposter whom it allowed to practice medicine in its hospital. We have therefore pleaded and proven direct negligence on the part of the *hospital*, not merely negligence by the so-called Dr. LaBella for which we seek to hold the hospital vicariously liable--and we have therefore pleaded and proven the cause of action squarely recognized in *Brien*, as thereafter ambiguously paraphrased in *Williams*. We submit that it is the hospital which has misread *Williams*--not we who have misread the cases.

The hospital next contends that, even if we are correct that Florida recognizes a direct cause of action for the negligent hiring of an independent contractor, we have no cause of action on the facts in this case because the Insingas, rather than the hospital, "hired" Dr. LaBella. In our judgment, the hospital is looking through the wrong end of the telescope. If Dr. LaBella had negligently caused Mrs. Insinga's death in his own office, the hospital's position might well be correct. *See, e. g., Pedroza v. Bryant*, 101 Wash.2d 226, 677 P.2d 166 (1984). That is not what happened, however. Mrs. Insinga's illness was too serious to be treated in Dr. LaBella's office; it required specialized intensive treatment of the kind that could only be provided in a hospital. A patient cannot be admitted into a hospital without the authority of a treating physician, however, and it was only because Dr. LaBella had been admitted to membership on the hospital's "staff" that he was able to admit her there (as a patient of both himself *and* the hospital). It is that "staff" membership with which we are quarreling here, not Dr. LaBella's negligence--and that was a privilege extended to Dr. LaBella by the *hospital*, not by the Insingas. The question is whether any cause of action exists against the hospital for negligently extend-

---

Maldonado v. Jack M. Berry Grove Corp., 351 So.2d 967 (Fla. 1977); *Peairs v. Florida Publishing Co.*, 132 So.2d 561 (Fla. 1st DCA 1961); *Bialkowicz v. Pan American Condominium No. 3, Inc.*, 215 So.2d 767 (Fla. 3rd DCA 1968), *cert. denied*, 222 So.2d 751 (Fla. 1969).

ing that "staff" privilege, and that question simply has nothing to do with who picked Dr. LaBella to treat Mrs. Insinga.

The point can be put in a different way. In the law of hospital malpractice, there are two kinds of "staff" physicians--staff physicians who are directly employed by the hospital, and staff physicians whose relationship vis-a-vis the hospital is considered to be that of independent contractor. *See Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987); *Reed v. Good Samaritan Hospital Ass'n, Inc.* 453 So.2d 229 (Fla. 4th DCA 1984). Therefore, vis-a-vis the hospital, Dr. LaBella was either an employee or an independent contractor. And, although the legal consequences which attach to these two different statuses are considerably different, the fact remains that when either type of "staff" physician admits a patient to a hospital, he is acting on behalf of the hospital, under a privilege granted by the hospital, and the admitted patient becomes a patient of both the hospital and the "staff" physician.

Viewed from that perspective, Dr. LaBella was clearly an independent contractor of the hospital, with admission privileges granted to him by the hospital, privileged to render services there in conjunction with the additional services provided by the hospital to their mutual patient--not an independent contractor of the Insingas. For purposes of the question before the Court--whether the hospital negligently granted "staff" privileges to Dr. LaBella--the focus clearly must be upon Dr. LaBella's status vis-a-vis the hospital, not the Insingas; and it therefore becomes entirely irrelevant that the Insingas, rather than the hospital, may have initially picked Dr. LaBella to treat Mrs. Insinga there.

2. The scope of the corporate negligence doctrine.

The hospital next contends that, if this Court declines its invitation to become a minority of one on the issue presented here, it should at least limit the scope of the "corporate negligence doctrine" to those cases in which the hospital has provided the physician to the patient, and not extend it to cases in which the patient has selected the physician. It bottoms this proposed limitation upon *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)--which, it claims, limits application of the doctrine to cases in which the physician is an *employee* of the hospital. *Darling* does not contain that limitation, however. Indeed, *Darling* would have been an entirely unnecessary exercise if its "staff" emergency room physician had been an employee, because the hospital would automatically have been vicariously liable for that employee's negligence under the doctrine of *respondeat superior*--and there would have been no need whatsoever for the plaintiff to have pursued the separate theory of direct liability against the hospital which the Illinois Supreme Court ultimately endorsed.

Notwithstanding the obviousness of that proposition, the hospital has managed to find three decisions which have misread *Darling* that way--a 1972 Montana decision, and two decisions of intermediate Illinois appellate courts, decided in 1968 and 1973. There is no need for extended exegesis of the error of those three decisions here, however, because the Illinois Supreme Court has already rather emphatically declared them erroneous for us--by *reversing* the 1973 decision upon which the hospital has inappropriately bottomed its argument here (a fact which we trust the hospital simply overlooked, rather than purposefully withheld from the Court). The reversal came in *Collins v. Westlake Community Hospital*, 57 Ill.2d 388, 312 N.E.2d 614 (1974), where the Illinois Supreme Court disagreed with the reading of *Darling* upon which the hospital now relies, and held that the "corporate negligence doctrine" applied in a case where the "staff" physician was an independent contractor, rather than an employee of the hospital, and where the physician had been selected by the patient. In addition, *see Johnson v. St. Bernard Hospital*, 79 Ill.App.3d 709, 399 N.E.2d 198 (1979). So much for the hospital's misreading of *Darling*.[5/]

[5/] The hospital's reliance upon *Jeffcoat v. Phillips*, 534 S.W.2d 168 (Tex. Civ. App. 1976), is misplaced for essentially the same reason. *Jeffcoat* was effectively overruled three years ago by *Park North General Hospital v. Hickman*, 703 S.W.2d 262 (Tex. Civ. App. 1985), *rnre* [writ refused, no reversible error].

The hospital is also in error in contending that some of the remaining 16 decisions upon which we initially relied support the peculiar limitation which it seeks to impose upon the "corporate negligence doctrine" here. (To our initial list of 17, we add the following recent Pennsylvania decision: *Thompson v. Nason Hospital*, 535 A.2d 1177 (Pa. Super. 1988).)[6/] We have reread each of those decisions carefully. In only *two* of them does it appear from the circumstances of the case that the "staff" physician was probably provided by the hospital, rather than selected by the patient--but neither decision turns on this fact in any way.[7/] In contrast, six of the decisions upon which we initially relied expressly state that the patient selected the physician, not the hospital.[8/] The rest of the decisions simply do not say, one way or the other.[9/] And the reason that none of these decisions makes any issue of who selected the physician is that it simply does not matter where the "corporate negligence doctrine" is concerned. The limitation which the hospital seeks to have imposed on the doctrine here simply cannot be extracted from the decisions themselves; it is a limitation superimposed upon the decisions by the hospital's own wishful thinking--nothing more.

If we are correct that the question of who selected the physician is irrelevant to the question of whether the physician was negligently granted "staff" privileges, then the hospital's digression upon Mr. Insinga's deposition and affidavit testimony (the impro-

---

[6/] We also add the following related annotation: Annotation, *Hospital's Failure to Supervise Doctor*, 12 A.L.R.4th 57 (1982).

[7/] *See Darling, supra; Benedict v. St. Luke's Hospitals*, 365 N.W.2d 499 (N.D. 1985).

[8/] *See Park North General Hospital v. Hickman*, 703 S.W.2d 262 (Tex. Civ. App. 1985), *rnre; Pedroza v. Bryant*, 101 Wash.2d 226, 677 P.2d 166 (1984); *Foley v. Bishop Clarkson Memorial Hospital*, 185 Neb. 89, 173 N.W.2d 881 (1970); *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).

[9/] Of the seven decisions cited in footnote 2 of the hospital's brief (as cases in which the hospital purportedly supplied the physician), five of them actually fall into this third category of cases, in which the decisions are simply silent on the point. One of the cases--*Foley*--belongs in the category in which the patient selected the physician. Only one--*Benedict*--has been accurately read.

priety and inaccuracy of which we have already discussed, at the outset of this brief) is irrelevant to the issue at hand as well. We should also note that the legislature's recent codification of the "corporate negligence doctrine" in the context presented here--in §768.60(1), Fla. Stat. (1985)--does not draw the peculiar distinction which the hospital has attempted to superimpose upon the doctrine here. The statute unambiguously states that "hospitals . . . have a duty to assure . . . 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 those duties" (emphasis supplied). "Staff and personnel" clearly means *both* (1) independent contractors admitted to membership on a hospital's "staff" and (2) a hospital's physician-employees--and nowhere does the statute state that this duty is owed only when the hospital provides the independent contractor to the patient, and not when the patient selects the physician. Since the legislature has already spoken unambiguously on the point, we submit that the Court should have no difficulty in following suit.

The hospital (and its amici) also contend hyperbolically that recognition of the "corporate negligence doctrine" will "only aggravate the present medical malpractice crisis from which this state suffers" and cause "a further rise in the health care costs of this state".[10/] The hospital's suggestion is bottomed, of course, upon the supposition that the so-called "crisis" is caused by plaintiffs seeking redress from malpractice, rather than the underlying malpractice itself. We think it far more likely that the "crisis", if it exists at all, is caused by excessive malpractice, rather than the actions brought to

---

10/ The hospital's additional contention--that adoption of the doctrine would be "absurd", because it "would impose a duty on hospitals to supervise each and every one of its staff members' office practice"--deserves no more than a footnote in response, because it is silly. The doctrine clearly does no such thing. It requires a hospital to exercise care to ensure that its "staff" physicians are competent, and it applies only when those "staff" privileges have been utilized and a patient has been admitted to the hospital as a result. It clearly does not require active supervision of "each and every one of its staff members' office practice". *See Pedroza v. Bryant*, 101 Wash.2d 226, 677 P.2d 166 (1984).

redress the injuries caused by the malpractice. We need not debate the point, however, because the legislature has already spoken with clarity on the point--when, in *response* to the so-called "crisis", it codified the "corporate negligence doctrine" in §768.60(1), in an effort to reduce the incidence of malpractice occurring in Florida hospitals.

If adoption of the "corporate negligence doctrine" is perceived by the legislature as an appropriate response to the so-called "crisis", then it can certainly be judged an appropriate response to that "crisis" by this Court. In short, since the enactment of §768.60(1) as a means of reducing malpractice represents the present public policy of this state, this Court should find itself hard pressed to announce, as the hospital asks, that the doctrine is inimical to the public policy of this state. Clearly, crisis or no, adoption of the doctrine represents good public policy--which is why *every* jurisdiction which has ever considered the question has adopted the doctrine.[11/] We respectfully submit that this Court should add Florida to that steadily-growing list, rather than remit it to the dark ages of corporate irresponsibility as a minority of one.

3. The scope of the certified question.

In an effort to finesse the several alternative bases which we proposed for recognition of a duty of care on the facts in this case, the hospital suggests that our alternative arguments "clearly go beyond the scope of the certified question". We disagree. Although the Eleventh Circuit did ask "[w]hether Florida law recognizes the corporate negligence doctrine and whether it would apply under the facts of this case", it qualified this formulation of the question as follows: "We do not intend the particular phrasing of this question to limit the Supreme Court of Florida in its consideration of the problem posed by the entire case" (slip opinion, p. 15).

11/ In the interest of economy, and because of the unanimity of the cases, we simply string-cited the cases to the Court without expounding upon their rationales. Several of them contain extensive discussions of the public policy reasons supporting the doctrine, to which we refer the Court--in lieu of what may well be unnecessary argument upon the point here in view of the legislature's recent action.

The "problem posed by the entire case" is, of course, the propriety of the trial court's conclusion that the hospital owed Mrs. Insinga no duty of care on the facts in this case. If that duty existed in the law of Florida on any of the several alternative grounds we have proposed, whether denominated the "corporate negligence doctrine" or not, then the directed verdict was erroneous--and this Court clearly should say so. Otherwise, it will have failed to decide the issue squarely presented by the case. In our judgment, that proposition is too obvious to require extended argument, so we will turn to the hospital's remaining arguments.

The hospital contends that §395.0653, Fla. Stat. (1979), has no purpose other than to prevent discrimination against various schools of medicine. In support of that contention, it quotes subsections (1) and (2) of the statute, and then concludes that these subsections of the statute express no "concern for the 'competence' of a hospital's medical staff". Of course, the hospital has failed to inform the Court that the statute contains a third subsection, which reads as follows:

> (3) Within 180 days after July 1, 1979, the governing body of every hospital shall set standards and procedures to be applied by the hospital and its medical staff in considering and acting upon applications for staff membership or professional privileges. These standards and procedures shall be available for public inspection.

It is this aspect of the statute upon which we relied, of course, and this aspect of the statute clearly expresses concern for the competence of physicians admitted to staff membership. The hospital's argument concerning the scope of the other two subsections of the statute is therefore merely a straw man, and beside the point as a result.

The hospital also contends that, even if the statute did create a duty to exercise care in the credentialling of physicians, it did not create a cause of action for the plaintiff because it was enacted for "the benefit of the general public" rather than a specific class of citizens. In support of that contention, it relies upon a dictum in *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So.2d 912 (Fla. 1985), in which this Court relied in turn upon §288 of the Restatement (Second) of Torts. We have no quarrel with

either *Trianon Park* or §288. They are simply inapposite here, because the statute upon which we rely is not the type of statute embraced by §288. It was clearly enacted for the benefit of only those persons admitted to hospitals by physicians admitted to "staff" membership in those hospitals, and it was clearly designed to prevent precisely what happened to Mrs. Insinga in this case. It therefore falls squarely within §286 of the Restatement (Second) of Torts, not within §288--and it therefore provides an appropriate standard of care in this case.

The hospital also contends that we cannot bottom any duty upon the standards imposed upon the hospital by the Joint Committee on Accreditation of Hospitals, or upon the standards the hospital imposed upon itself in its own bylaws--as required by §395.0653(3)--because the record does not contain the standards. This contention, like many of the contentions which preceded it, is simply inaccurate. The Joint Committee's requirements and the requirements of the bylaws were the subject of extensive testimony at trial, and that testimony can be found at the record references given for it in our initial brief (R. 364-65, 72-73, 91-92, 118-24). In addition, of course, we remind the Court that the trial court directed a verdict against us before we were able to present much of our case, so any inadequacy in the record on the specifics of these requirements simply cannot be held against us here.

Finally, the hospital contends that our reliance upon the common law of medical negligence--codified at the time of the incident in suit by §768.45(1), Fla. Stat. (1979)--is misplaced. It argues that the issue is so simple that a layman could decide it without the aid of expert testimony; that, in any event, the issue involves an "administrative function" rather than medical treatment; and that the trial court could therefore conclude that no duty had been breached, notwithstanding that we proved a breach of the accepted standard of care with expert testimony (which is precisely what §768.45(1) required). Unfortunately, this argument conflates a number of separate strands of a medical negligence action into one, and it requires a considerable amount of unravelling before an

appropriate response can be directed to it. We will spare the Court the exercise, however, because the contention is desperate on its face.

There is far more than a mere "administrative function" within the common knowledge of laymen at issue in this case. What is at issue is the determination of whether a physician is competent to treat patients with illnesses of such severity that hospitalization is required, in a hospital which must approve an application for "staff" membership before the physician can admit the patient. The competence of a professional has always been a subject upon which expert testimony has been required, because neither judges nor laymen have the qualifications necessary to make such a determination. (Although, the hospital is probably correct that, in this case at least, Dr. LaBella's *incompetence* was so glaring that a layman would recognize it at once, given the necessary facts--which is a telling admission of its own outrageous incompetence in granting him "staff" privileges to treat Mrs. Insinga).

In any event, the answer to the hospital's desperate contention is in the plain language of §768.45(1), Fla. Stat. (1979). That statute expressly applies to negligence actions against hospitals, and it authorizes the recovery of damages if a "breach of the accepted standard of care" is proven to a jury's satisfaction by expert testimony provided by a "similar health care provider". That statute says all that the "corporate negligence doctrine" says, and more, and the hospital has advanced no good reason here why that statute did not impose a duty upon it to conform its conduct to the "accepted standard of care"--whether the "corporate negligence doctrine" had previously been recognized in Florida, by that or any other name. Since our expert testimony proved, in effect, that the "accepted standard of care" was precisely the standard of care now recognized in 18 other jurisdictions under the name "corporate negligence doctrine", we continue to believe that the directed verdict which the hospital received was erroneous because of §768.45(1). And for that reason, and for the several additional reasons urged in our initial brief, we respectfully urge the Court to say so.

III.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 22nd day of June, 1988 to: Christopher E. Knight, Esquire, Fowler, White, Burnett, Hurley, Banick & Strickroot, P.A., 501 City National Bank Bldg., 25 W. Flagler Street, Miami, Fla. 33130; and to William A. Bell, Esquire, 208 South Monroe Street, P.O. Box 469, Tallahassee, Fla. 32302.

Respectfully submitted,

FREIDIN & HIRSH, P.A.
Suite 2500, 44 W. Flagler Street
Miami, Fla. 33130
-and-
PODHURST, ORSECK, PARKS, JOSEFSBERG,
EATON, MEADOW & OLIN, P.A.
800 City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

Attorneys for Appellant

BY: Joel D. Eaton
JOEL D. EATON