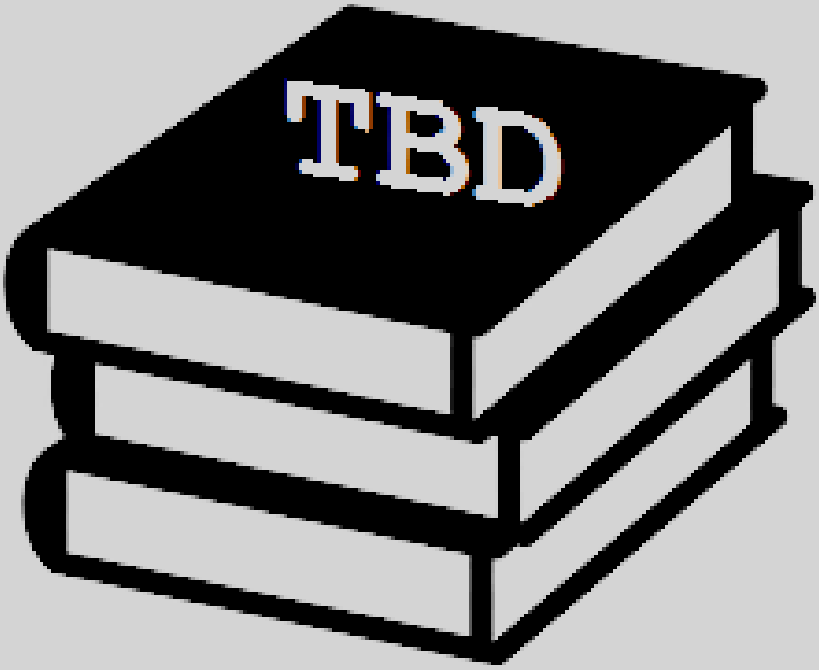
BUY™	SELL™	SHOP™



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)

BUY™	SELL™	SHOP™

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

COVENANT HOSPICE, INC.,

Appellant, **DCA Case Nos.:**
1D18-3909, 1D18-4797

v. L.T. DOAH Case Nos.**:**
17-6836RU, 17-4641 MPI

AGENCY FOR HEALTH CARE ADMINISTRATION,

Appellee.

_____/

COVENANT HOSPICE, INC.'S
MOTION FOR WRITTEN OPINION,
CLARIFICATION,
AND CERTIFICATION

Appellant, Covenant Hospice, Inc. ("Covenant"), pursuant to Florida Rule of Appellate Procedure 9.330(a)(2)(B), (C) and (D), respectfully moves this Court for a written opinion, clarification, and certification and as grounds therefore says:

WRITTEN OPINION AND CLARIFICATION

1. Uncertainty about the appropriate standard to be applied by the Administrative Law Judge ("ALJ"), the Agency for Health Care Administration ("AHCA"), and/or the federal government in audits reviewing the certification of patients as terminally ill has a significant chilling effect on the provision of hospice care. *See* Affidavit of Jeff Mislevy **[App. D]**

2. The chilling effect created by an inappropriately heightened standard with respect to access to care harms some of our communities' most vulnerable patients. It bars terminally ill patients from accessing a government benefit to which they are entitled. The result is that patients will die in pain, with uncontrolled symptoms, and without the multidisciplinary (spiritual, clinical, social, etc.) attention that hospice provides.

3. The Eleventh Circuit opinion, *United States v. AseraCare, Inc.*, 2019 WL 4251875 (11th Cir. Sept. 9, 2019), released after the briefing in this case, was provided to the Court as supplemental authority. *AseraCare* involved hospice provided under Medicare. But the same eligibility framework applies to both Medicare and Medicaid hospice eligibility.

4. In Florida, Medicaid services must be provided "in accordance with state and federal law." §409.905 and §409.906, Fla. Stat. The Florida Medicaid Hospice Services Coverage and Limitations Handbook provides in part: "Legal Authority—Hospice services are governed by Title 42, Code of Federal Regulations (C.F.R.), Part 418 [Medicare]," as well as Florida law.

5. *AseraCare* provided extensive discussion regarding interpretation of Part 418. Although not controlling, the Eleventh Circuit's interpretation of federal statutes and regulations, which are applicable in this case, should be accorded "unusual weight." *See, e.g., Wylie v. Investment Management and Research, Inc.*,

629 So. 2d 898, 900 (Fla. 4th DCA 1993). "This [procedure] has the virtue of establishing that the issue will be uniformly decided by both federal and state courts in the geographic area in which the state is located . . . ." *Id*. *accord Kasket v. Chase Manhattan Mortgage Corp.*, 759 So. 2d 726, 726 (Fla. 4th DCA 2000) (same); *c.f. Jackson v. State*, 636 So. 2d 1372, 1374 (Fla. 2nd DCA 1994) ("Florida's established rule of statutory construction [ ] recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as in the federal courts to the extent the construction is harmonious with the spirit of the Florida legislation'" (*quoting O'Loughlin v. Pinchback*, 579 So. 2d 788,791 (Fla. 1st DCA 1991))).

6. The ALJ's decision in this case, which was approved by AHCA, applied a standard of review for certification decisions different from the standard expressly stated in *AseraCare*. Based on arguments by AHCA's attorneys, the ALJ weighed the opinions of the government's peer reviewers against the opinions of Covenant's certifying doctors to determine which opinion she found more persuasive. **[*See, e.g.,* R. 409 ¶38** ("The undersigned finds Dr. McGrew more persuasive"); **R. 417 ¶58** ("Dr. Boskovic's opinion is more persuasive"); **R. 420 ¶65** ("The undersigned finds Dr. Boskovic's testimony more persuasive")**]** Whereas, *AseraCare* instructs that the standard to be applied is whether the certifying doctor's clinical judgment regarding a terminal prognosis represents a

reasonable interpretation of the relevant medical records. 2019 WL 4251875 at *12. "[W]ell-founded clinical judgments should be granted deference." *Id*. at *13. The ALJ provided no deference in this case to the Covenant doctors' clinical judgments.

7. "[T]he law is designed to give physicians meaningful latitude to make informed judgments without fear that those judgments will be second-guessed after the fact by laymen in a liability proceeding," 2019 WL 4251875 at *13, or by an ALJ in an overpayment proceeding.

8. It is clear that the ALJ in this case second-guessed Covenant's certifying physicians. This fact is especially evident in the case of the individuals peer reviewed by Dr. Komatz and Dr. Boskovic who both acknowledged that Covenant's certifying doctors were not wrong to find eligibility. Rather, Dr. Komatz and Dr. Boskovic simply disagreed. The ALJ applied the wrong standard, which AHCA in turn accepted. *See AseraCare*, 2019 WL 4251875 at *14 ("In light of our foregoing discussion, we concur with the district court's post-verdict conclusion that 'physicians applying their clinical judgment about a patient's projected life expectancy could disagree, and neither physician [ ] be wrong.' 'Nothing in the statutory or regulatory framework suggests that a clinical judgment regarding a patient's prognosis is invalid or illegitimate merely because

an unaffiliated physician reviewing the relevant records after the fact disagrees with that clinical judgment.'").

9. A written opinion will:

a. Provide a legitimate basis for the Florida Supreme Court to address a matter of great public importance—the appropriate standard of review to be applied by ALJ's reviewing hospice certification decisions; and

b. Provide guidance not only to AHCA and Covenant in this case but to all hospice providers now and in the future regarding whether they can rely on the reasonable clinical judgments of their doctors to determine hospice eligibility without the fear of being second-guessed by peer reviewers and an ALJ.

10. More than one-hundred hospices were subject to the same random audit as was Covenant. **[T. Vol. I 50:3-18]** These issues affect every hospice in Florida. More importantly, imposing an eligibility standard that is more rigorous than the law allows affects every person who has or in the future may suffer from a terminal illness.

11. A written opinion will clarify whether the standard of review applied by the ALJ in this case or the standard of review established by the Eleventh Circuit in *AseraCare* is the correct standard.

WHEREFORE, Covenant respectfully requests that this Court enter a written opinion, which clarifies the standard of review that must be applied by the ALJ when reviewing certification decisions.

CERTIFICATION

12. The appropriate standard of review with respect to hospice certification decisions is critical to both hospice providers and hospice beneficiaries. It is a matter of great public importance that hospice providers not be chilled in their efforts to provide appropriate hospice care to deserving citizens in the State of Florida during their final days of life. Medicaid patients suffering a terminal illness are some of the most vulnerable citizens for which Florida must provide protection. If hospices must worry about the government second-guessing the informed decisions of their doctors, vulnerable Florida citizens may go without the care they so desperately need. This is so because hospices not only will be required to reimburse the government for services the hospices have provided but they will be subject to penalties as well, which will have a significant chilling effect on their certification decisions.

13. Covenant suggests the following proposed certified questions are matters of great public importance:

a. Whether the documentary record underpinning a certifying physician's clinical judgment must prove the prognosis as a matter of medical fact.

b. Whether the physician's clinical judgment dictates eligibility as long as it represents a reasonable interpretation of the relevant medical records even though peer reviewers may have an opinion otherwise.

c. Whether deference must be given to the certifying doctor's clinical judgment where there is evidence in the medical records to support the certifying doctor's clinical judgment, making it inappropriate for an ALJ to *weigh* the opinion of a peer reviewer against the opinion of the certifying doctor to determine which opinion she finds more persuasive.

d. Whether, as a matter of law, where a peer reviewer agrees that a reasonable doctor could disagree about the terminal illness prognosis for a particular patient, the government has failed to prove its case.

e. Whether, after Amendment Six to the Florida Constitution, an ALJ, AHCA, or a court may give deference to AHCA's

interpretation of the Medicaid statutes and regulations and their application to a specific factual situation.

14. The Eleventh Circuit opinion in *Aseracare, Inc.*, answered questions 2.a.-2.d. Question 2.a. was answered in the negative. Questions 2.b.-2.d. were answered in the affirmative.

WHEREFORE, Covenant respectfully requests that this Court certify the above questions as matters of great public importance.

/s/ Terrie L. Didier

J. NIXON DANIEL, III
Florida Bar No. 228761
Email: jnd@beggslane.com
Secondary Email: ch@beggslane.com
TERRIE L. DIDIER
Florida Bar No.: 0989975
Email: tld@beggslane.com
Secondary Email: aeh@beggslane.com
BEGGS & LANE, RLLP
501 Commendencia Street (32502)
P.O. Box 12950
Pensacola, FL 32591-2950
Telephone: (850) 432-2451
Facsimile: (850) 469-3331

Bryan K. Nowicki, Esq.
Joshua D. Taggatz, Esq.
Reinhart Boerner Van Durren s.c.
22 East Mifflin Street, Suite 600
Madison, WI 53701-2018
Telephone: (608) 229-2218
Facsimile: (608) 229-2200
bnowicki@reinhartlaw.com
jtaggatz@reinhartlaw.com

Attorneys for Appellant
COVENANT HOSPICE, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Covenant Hospice, Inc.'s Motion for Written Opinion, Clarification, and Certification* has been furnished to the following counsel of record via the Florida courts' e-filing portal this 12th day of November, 2019:

Angela D. Miles, Esq. Marion Drew Parker, Esq. Christopher B. Lunny Radey Law Firm 301 S. Bronough Street, Suite 200 Tallahassee, FL 32301-1722 Email: amiles@radeylaw.com dparker@radeylaw.com clunny@radeylaw.com Secondary: sspringfield@radeylaw.com dgueltzow@radeylaw.com *Attorneys for Appellee* **Agency For Health Care Administration**	Shena L. Grantham, Esq. Thomas M. Hoeler, Esq. Tracy Cooper George, Esq. Chief Appellate Counsel Nicholas A. Merlin, Senior Attorney Agency for Health Care Administration Mail Stop 3 2727 Mahan Drive Tallahassee, FL 32308 Email: shena.grantham@ahca.myflorida.com thomas.hoeler@ahca.myflorida.com tracy.george@ahca.myflorida.com nicholas.merlin@ahca.myflorida.com Secondary: lesley.smith@ahca.myflorida.com catherine.belmont@ahca.myflorida.com *Attorneys for Appellee* **Agency For Health Care Administration**

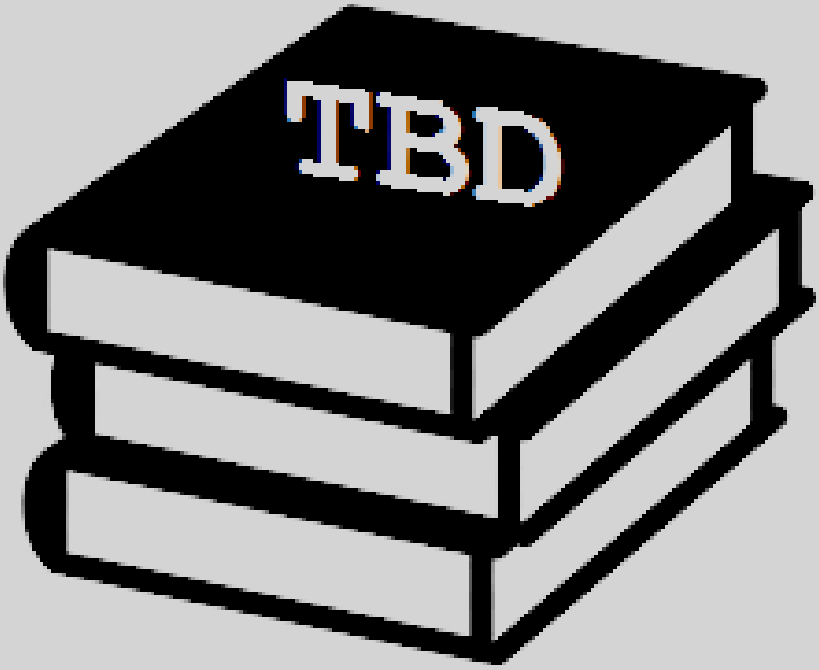
/s/ Terrie L. Didier
TERRIE L. DIDIER
Florida Bar No.: 0989975

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief was prepared using a Times New Roman 14-point font in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Terrie L. Didier
TERRIE L. DIDIER
Florida Bar No.: 0989975
BEGGS & LANE

BUY™	SELL™	SHOP™



SELL YOUR OWN SAMPLES

(help others get the justice that they deserve)

BUY™	SELL™	SHOP™