No. _____

In the Supreme Court of the United States

DAVID DUNCAN,

Petitioner,

v.

GEICO GENERAL INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether federal courts are wrongfully developing and applying federal case law in derogation of the U.S. Constitution and the established U.S. Supreme Court precedent of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

PARTIES TO THE PROCEEDINGS

Petitioner David Duncan was the Plaintiff and Appellant below.

Respondent Geico was the Defendant and Appellee below.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 4

JURISDICTION 4

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 8

I. The Eleventh Circuit's Decision Contravenes the Decisions of This Court in Constructing, Applying, and Relying Upon Federal Common Law on Substantive Issues. 9

A. This Court Has Recently Reviewed the Applicability of the Erie Doctrine. 9

B. Differentiating Substantive from Procedural Issues. 11

C. The Lower Court Erred in Adopting and Applying Federal Law to a Substantive Issue, Leading to Unconstitutional Results. 13

CONCLUSION 14

APPENDIX

Appendix A Opinion in the United States Court of Appeals for the Eleventh Circuit (May 1, 2018) . . . . . App. 1

Appendix B Order and Final Judgment in the United States District Court, Middle District of Florida, Tampa Division (October 13, 2017) . . . . . App. 5

TABLE OF AUTHORITIES

CASES

Attorney's Title Ins. Fund, Inc. v. Regions Bank,
491 F. Supp. 2d 1087 (S.D. Fla. 2007) 12, 13

Berges v. Infinity Ins. Co.,
896 So. 2d. 665 (Fla. 2004) 14

Boston Old Colony Ins. Co. v. Gutierrez,
386 So. 2d 783 (Fla. 1980) 3, 13, 14

Cadle v. GEICO Gen. Ins. Co.,
838 F.3d 1113 (11th Cir. 2016) 6

Campbell v. Government Employees Ins. Co.,
306 So. 2d 525 (Fla. 1974) 13, 14

Chewning v. State Farm Mut. Auto. Ins. Co.,
Case No. 6:15-cv-821-Oral-28GJK
(M.D. Fla. 2015) 12

Composite Structures, Inc. v. Cont'l Ins. Co.,
560 F. App'x 861 (11th Cir. 2014) 13

Cousin v. Geico Gen. Ins. Co.,
166 F. Supp. 3d 1290 (M.D. Fla. 2015) 6

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) . . . . . *passim*

Gasperini v. Center for Humanities, Inc.,
518 U.S. 415 (1996) 11

Guaranty Trust Co. of New York v. York,
326 U.S. 99 (1945) 11

Hanna v. Plumer,
380 U.S. 460 (1965) 11

Harris v. GEICO General Ins. Co.,
961 F. Supp. 2d 1223 (S.D. Fla. 2013) 6

Higgins v. West Bend Mut. Ins. Co.,
85 So. 3d 1156 (Fla. 5th DCA 2012) 12

Klaxon Co. v. Stentor Elec. Mfg. Co.,
313 U.S. 487 (1941) 12

Manuel v. Convergys Corp.,
430 F.3d 1132 (11th Cir. 2005) 12

Mazzoni Farms v. E.I. Dupont De Nemours Co.,
166 F.3d 1162 (11th Cir. 1999) 13

Ragan v. Merchants Transfer & Warehouse Co.,
337 U.S. 530 (1949) 11

Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.,
559 U.S. 393 (2010) 9, 11

Walker v. Armco Steel Corp.,
446 U.S. 740 (1980) 11

Wojciechowski v. Allstate Property and Casualty Ins.,
Case No. 8:14-cv-3176-MSS-TBM
(M.D. Fla. Dec. 27, 2016) 6, 7

CONSTITUTION AND STATUTES

28 U.S.C. § 1254(1) 4

28 U.S.C. § 1652 5

28 U.S.C. § 2072 5

U.S. Const. amend. VII . . . . . *passim*

U.S. Const. amend. XIV 1, 3, 4, 14

OTHER AUTHORITIES

Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 Tex. L. Rev. 79 (Nov. 1993) 2

Thomas D. Rowe, Jr., Suzanna Sherry, Jay Tidmarsh, *Civil Procedure* (4th ed. 2016) . . 11, 13

PETITION FOR WRIT OF CERTIORARI

Exactly 80 years ago, following their landmark decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), The United States Supreme Court introduced what is now referred to as the Erie Doctrine, which holds that a federal court must apply state law for substantive issues dealing with nonprocedural aspects of litigation in diversity jurisdiction cases. This mandate was necessary for circumstances that involved a federal court obtaining jurisdiction over a proceeding due to diversity of citizenship. The Erie doctrine has provided federal courts a clear and easy to follow regulation since its inception; yet, while this directive has been well established for now eight decades, many federal courts have still erroneously implemented federal law to decide substantive issues. This type of behavior creates rulings that (1) violate the United States Constitution, specifically the Seventh and Fourteenth Amendments, (2) directly contradict the United States Supreme Court, and (3) hinder the American legal system from providing justice to those it seeks to protect.

As a result of this dereliction, federal courts have begun to create and, consequently, implement "federal common law" to substantive issues. This creates controversy due to the United States Supreme Court specifically declaring in *Erie* that there is no federal common law. The allowance of such practice would translate to Congress having the power to declare substantive rules of common law applicable in a state whether it be commercial law or a part of the law of torts. The United States Supreme Court recognized the folly in this by ruling that "[w]hether the law of the

state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie*, 304 U.S. 64, 78 (1938).

The lack of consensus amongst the federal courts on following this precedent has not only violated the United States Supreme Court's ruling, but has also reestablished and perpetuated the unfair tactic of "forum-shopping." This tactic is heavily discouraged by courts to the extent that a discretionary power, *Forum Non Conveniens* (literally translating to "forum not agreeing"), was created, allowing courts to dismiss a case where another court, or forum, is more appropriate and better suited to hear it. In fact, the United States Supreme Court's goal of the Erie doctrine was to promote litigant fairness by discouraging forum-shopping. (Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon*, 72 Tex. L. Rev. 79 (Nov. 1993)). It has been long acknowledged that the Erie doctrine seeks to prevent parties from using diversity jurisdiction to avoid state laws and policies and was implemented in order to control corporate litigation tactics. Nevertheless, due to the development of federal common law on substantive issues, forum-shopping remains a common practice.

Amongst these instances lies petitioner David Duncan. Despite the necessary and proper application of the Erie Doctrine, the United States District Court for the Middle District of Florida chose to apply federal law to a substantive issue in Mr. Duncan's case. Thereafter, upon appeal, even after acknowledging its awareness that "[i]n diversity cases, we apply the

substantive law of the forum state," the United States Court of Appeals for the Eleventh Circuit reiterated the lower court's opinion and, again, chose to apply federal common law, from their own district nonetheless, to a substantive issue. (Appendix B). In doing so, the Eleventh Circuit rejected petitioner's argument that the district court's ruling wrongfully ignored established state common law precedence when determining the proper body of law to apply and, therefore, violated Mr. Duncan's Seventh Amendment right to a jury trial. Accordingly, the Eleventh Circuit, by not only rejecting this argument, but for also committing the same error, has violated Mr. Duncan's Seventh Amendment right to a jury trial and, contemporaneously, violated Mr. Duncan's Fourteenth Amendment right to equal protections of the law.

The Eleventh Circuit's decision is considerably problematic and concerning because it opens the door for subsequent cases and legal matters to also experience instances of federal courts wrongfully applying federal law to substantive issues and forum-shopping. The Florida Supreme Court opinion of *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783 (Fla. 1980), should control the instant case and not any federal common law developed, relied on, and followed in derogation of the rule of federalism. The Court should intervene now before this disregard for the Erie Doctrine and unconstitutional injustice continues and prompts future rulings.

David Duncan respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this matter.

OPINIONS BELOW

The opinion of the Court of Appeals is not published, but is included in Petitioners' Appendix (Pet. App.) at A. The district court's order granting respondent's motion for summary judgment is not published, but is included in Pet. App. at B.

JURISDICTION

The Eleventh Circuit issued its opinion on May 1, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Trial by Jury Clause states: "In Suits at common law … the right of trial by jury shall be preserved." U.S. Const. amend. VII.

The Due Process Clause states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. amend. XIV.

The Rules of Decision Act states: "The laws of the several states, except where the Constitution or

treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

The Rules Enabling Act states:

> "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title."

28 U.S.C. § 2072

STATEMENT OF THE CASE

1. On November 12, 2013, Mr. David Duncan was operating his vehicle on a public road in Mulberry, Polk County, Florida, when Ms. Isabel Gomez-Diego unexpectedly and abruptly pulled into his path, causing a collision. Ms. Gomez-Diego fled the scene and was later found to be at fault in this accident. Duncan sustained serious and permanent injuries from this motor vehicle collision, but Ms. Gomez-Diego did not carry any bodily injury coverage. Fortunately, Duncan's policy included Uninsured/Underinsured Motorist

coverage through his automobile insurance carrier, Geico, in the amount of $10,000.00; however, Geico only offered $1,500.00 and refused to offer more. As a result, Duncan filed suit against Geico on April 24, 2014.

2. Duncan presented his case to a Polk County Jury in Florida State Court. On January 28, 2016, the jury found in favor of Duncan and awarded him with a verdict against Geico in the amount of $300,000.00. The amount was later conformed to Duncan's UM/UIM policy limits of $10,000.00. On December 9, 2016, Duncan filed an Amended Complaint in the state court to include a count of bad faith against Geico.

3. On January 3, 2017, Geico filed its Notice of Removal under the grounds of diversity of citizenship, transferring the case to the United States District Court for the Middle District of Florida. Geico then, not surprisingly given the history of such favorable treatment by the federal courts, moved for summary judgment.

4. On October 13, 2017, the district court concluded that Geico did not act in bad faith in the handling of Duncan's UM claim as a matter of law, granted their Motion for Summary Judgment, and entered a Final Judgment on that same day. The district court disregarded Florida law and instead based its ruling on a federal case: *Cadle v. GEICO Gen. Ins. Co.*, 838 F.3d 1113 (11th Cir. 2016). The district court also acknowledged three additional federal cases as persuasive authorities in its ruling: *Harris v. GEICO General Ins. Co.*, 961 F. Supp. 2d 1223 (S.D. Fla. 2013); *Cousin v. Geico Gen. Ins. Co.*, 166 F. Supp. 3d 1290 (M.D. Fla. 2015); and *Wojciechowski v. Allstate Property and Casualty Ins.*, Case No. 8:14-cv-3176-

MSS-TBM (M.D. Fla. Dec. 27, 2016). These are all federal cases which do not completely follow Florida law.

5. On November 8, 2017, Duncan timely filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit, which accepted jurisdiction. Duncan also filed his Brief for the Eleventh Circuit shortly thereafter in December of 2017. Duncan, in his Brief, under the section identified as "Statement of the Issues," presented three (3) issues for determination. Issues two (2) and three (3) read as follows:

> 2. Whether a Federal Court's holding that contradicts Florida's insurance bad faith laws establishes federal common law and violates the Erie doctrine.
>
> 3. Whether the district court's granting of Appellee's [Geico] Motion for Summary Judgment violates Mr. Duncan's Seventh Amendment right.
>
> (Appellant Brief).

6. Issues two (2) and three (3) were given virtually no consideration in the Eleventh Circuit's opinion to the extent that only a fragment of a sentence was utilized in order to address these serious concerns, in which it was simply stated that "Duncan has no right to present his claim to a jury under the Seventh Amendment." (Appendix B). The Eleventh Circuit concluded their opinion affirming the district court's ruling.

REASONS FOR GRANTING THE PETITION

The question of whether the federal courts are wrongfully developing and applying federal case law to substantive issues has received a lack of consideration in contemporary times. Consequently, federal courts continue to participate in this practice and are getting away with it uncorrected. Even when the issue is identified before the courts (i.e. the Eleventh Circuit), they have elected to ignore this blatant contradiction to the United States Supreme Court and its authority. Due to their inaction to act accordingly with the Erie doctrine, federal courts have inevitably encouraged forum-shopping.

Given the Erie doctrine's unambiguous language forbidding this practice, as well as the desire of the United States Supreme Court to prevent forum-shopping, intervention from this Court is warranted and necessary to eradicate federal common law and once again restore the authority that the Erie Doctrine has possessed for eighty (80) years: state law should be supreme.

Moreover, the opinion delivered by the Eleventh Circuit contributes to an unconstitutional act by denying an American citizen his rights to a trial by jury and equal protection of the law. If this ruling by the Eleventh Circuit is upheld, Duncan will be denied a right recognized as significant and essential by the Founding Fathers of this country.

This Court should grant the petition and reverse the court below.

I. The Eleventh Circuit's Decision Contravenes the Decisions of This Court in Constructing, Applying, and Relying Upon Federal Common Law on Substantive Issues.

As this Court established back in 1938: (1) there is no federal general common law, (2) the law[1] to be applied by federal courts in any diversity case was the law of the state, (3) and to not follow this provision would create an unconstitutional assumption of powers by federal courts that invades state autonomy and prevents uniformity in administering state law. *Erie*, 304 U.S. 64, 78.

A. This Court Has Recently Reviewed the Applicability of the Erie Doctrine.

In 2010, the United States Supreme Court reviewed the case of *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co*., 559 U.S. 393 (2010). In this case, issues relating to the Erie doctrine were presented. Justice Ginsburg went into significant detail on the applicability of the Erie Doctrine in her opinion:

> "Although we have found Erie's application 'sometimes to be a challenging endeavor,' *Gasperini*, 518 U. S., at 427, two federal statutes mark our way. The first, the Rules of Decision Act, [footnote omitted] prohibits federal courts from generating substantive law in diversity actions. See *Erie*, 304 U. S., at 78. Originally enacted as part of the Judiciary Act of 1789, this restraint serves a policy of prime importance to

[1] Except in matters governed by the U.S. Constitution or by acts of Congress.

our federal system. We have therefore applied the Act 'with an eye alert to . . . avoiding disregard of State law.' *Guaranty Trust Co. v. York*, 326 U. S. 99, 110 (1945). The second, the Rules Enabling Act, enacted in 1934, authorizes us to 'prescribe general rules of practice and procedure' for the federal courts, but with a crucial restriction: 'Such rules shall not abridge, enlarge or modify any substantive right.' 28 U.S.C. §2072. Pursuant to this statute, we have adopted the Federal Rules of Civil Procedure. In interpreting the scope of the Rules … we have been mindful of the limits on our authority. [Citations omitted].

If a Federal Rule controls an issue and directly conflicts with state law, the Rule, so long as it is consonant with the Rules Enabling Act, applies in diversity suits. See *Hanna*, 380 U. S., at 469–474. If, however, no Federal Rule or statute governs the issue, the Rules of Decision Act, as interpreted in Erie, controls. That Act directs federal courts, in diversity cases, to apply state law when failure to do so would invite forum-shopping and yield markedly disparate litigation outcomes. *See Gasperini*, 518 U. S., at 428; *Hanna*, 380 U. S., at 468. Recognizing that the Rules of Decision Act and the Rules Enabling Act simultaneously frame and inform the Erie analysis, we have endeavored in diversity suits to remain safely within the bounds of both congressional directives."

Shady Grove, 559 U.S. 393 (2010) (dissenting opinion).

Justice Ginsburg's in-depth analysis on this issue provides much support for Duncan in this matter. It demonstrates the circumstances in which the Erie doctrine applies to an issue and instances in which it does not. For Duncan, according to Ginsburg, the Erie doctrine must apply, due to no Federal Rule or statute governing the issue of bad faith. Thus, Florida law should have been applied by the Eleventh Circuit.

B. Differentiating Substantive from Procedural Issues.

Erie remains a bedrock principle of the American Judicial system. In most instances, *Erie* is applied without controversy or difficulty. It is universally accepted that, in absence of controlling federal law, a federal court will apply the relevant state's substantive law. But, *Erie* has generated serious difficulties in the borderland between substance and procedure, leading to U.S. Supreme Court cases *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Hanna v. Plumer*, 380 U.S. 460 (1965); *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996); and *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010). (Thomas D. Rowe, Jr., Suzanna Sherry, Jay Tidmarsh, *Civil Procedure*, 604 (4th ed. 2016)). However, these cases debated the appropriateness of the Erie doctrine when developing and applying it in procedural context, not substantive. This is because developing and applying *Erie* in a substantive context is not a complex effort. In short,

substantive law is the "substance of the case," and procedural law provides the "procedure" that would be best to handle the substance of each particular case.

Federal courts, including the Eleventh Circuit, have identified and dealt with these circumstances in Florida for years. As determined by the Eleventh Circuit, "a federal court sitting in diversity will apply the choice of law rules for the state in which it sits." *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1139 (11th Cir. 2005) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). The instant case sat in Florida, where "[c]ontract choice of law principles apply to bad faith actions." *Higgins v. West Bend Mut. Ins. Co.*, 85 So. 3d 1156, 1158 (Fla. 5th DCA 2012).

Under Florida's contract choice-of-law principles, the doctrine of *lex loci contractus*[2] applies to "[q]uestions bearing on the interpretation, validity, and obligation of contracts," while "questions related to the manner or method of performance under a contract are determined by the law of the place of performance." *Id*. In *Higgins*, the Fifth District Court of Appeal expressly held that *lex loci contractus* applies to first-party bad faith claims because such claims "present an issue more akin to coverage" — "a substantive question, rather than a performance-based one." *Chewning v. State Farm Mut. Auto. Ins. Co.*, Case No. 6:15-cv-821-Oral-28GJK (M.D. Fla. 2015) (quoting *Higgins*, 85 So. 3d 1156, at 1159). See also *Attorney's Title Ins. Fund, Inc. v. Regions Bank*, 491 F. Supp. 2d 1087, 1093 (S.D.

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[2] The doctrine of *lex loci contractus* holds that the law of the place where a contract was entered into should be applied to decide any issue arising out of that contract.

Fla. 2007) ("Florida law indisputably governs the substantive issues in a case where the federal court's jurisdiction is based on diversity of citizenship."); and *Mazzoni Farms v. E.I. Dupont De Nemours Co.*, 166 F.3d 1162, 1164 (11th Cir. 1999) (applying Florida's choice-of-law rules in a diversity case).

Therefore, the law of the state in which the contract was formed – which is Florida – applies to Duncan's first-party bad faith claim and, as such, the question of an insurer's failure to act in good faith with due regard for the interests of the insured is a substantive issue.

C. The Lower Court Erred in Adopting and Applying Federal Law to a Substantive Issue, Leading to Unconstitutional Results.

The substantive issue in question for Duncan is whether Geico acted in bad faith in the handling of his claim. As demonstrated above, and as described by *Erie*, the applicable authority in this matter is the state of Florida. With that being so, the voice adopted by the state as its own – whether it be of its Legislature or of its Supreme Court – should utter the last word. (Thomas D. Rowe, Jr., Suzanna Sherry, Jay Tidmarsh, *Civil Procedure*, 604 (4th ed. 2016)).

In applying Florida law, the Court looks "first for case precedent from the Florida Supreme Court." *Composite Structures, Inc. v. Cont'l Ins. Co.*, 560 F. App'x 861, 864 (11th Cir. 2014). Accordingly, the Florida Supreme Court has repeatedly held that the question of failure to act in good faith with due regard for the interests of the insured is for the jury to decide. *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980); *See also Campbell v. Government*

Employees Ins. Co., 306 So. 2d 525, 529 (Fla. 1974) ("[b]ad faith in a factual situation of this kind [failure to settle an insurance claim] is not a matter of law but a question of fact for the jury"); and *Berges v. Infinity Ins. Co.*, 896 So. 2d. 665, 672-3 (Fla. 2004) (Where material issues of fact which would support a jury finding of bad faith remain in dispute, summary judgment is improper). This clear language concerning the Florida courts' position on this matter was extended to the Eleventh Circuit in Duncan's Brief; yet, the Eleventh Circuit chose to ignore this and ruled that Duncan had no right to present his claim to a jury.

Clearly, had the Eleventh Circuit followed the Erie doctrine, *Boston Old Colony* would have been applied and Duncan's case would have been reserved for determination by a jury. With the Eleventh Circuit failing to do so, Duncan's Seventh and Fourteenth amendments were violated.

The question presented here is of great importance. Considering the disregard demonstrated by federal courts with respect to the Erie doctrine and the ensuing damage it generates by promoting forum-shopping, this case has the potential to bring much needed clarity and guidance to this area of law. Certiorari is absolutely proper and necessary here to preserve our country's long established rules of federalism and to preserve a citizen's right to jury trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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