NO.

In The

Supreme Court of the United States

MARK CHAPMAN et al,

Petitioners,

v.

ACE AMERICAN INSURANCE COMPANY,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This insurance coverage case arose as a result of the death of a ten-year-old boy receiving substance abuse services under Florida's comprehensive statutory scheme to address substance abuse. Chapter 397 of the Florida Statutes gives specific statutory rights to clients who, by definition, receive substance abuse treatment and requires insurance coverage for providers of treatment. A complaint explicitly alleged duty, breach, and damages under the statute. Because there had not been a Florida state court decision directly applicable to the effect of the statutory insurance-requirement provisions on issues relating to the duty to defend, Petitioners requested certification to the Florida Supreme Court. The Eleventh Circuit denied certification without providing any analysis or reason.

The questions presented are:

1. Whether the Eleventh Circuit abused its discretion by requiring allegations not contained in Chapter 397 and by denying petitioners' motion to certify dispositive questions of first impression to the Florida Supreme Court when resolving the duty to defend without guidance from the courts of Florida.

2. Whether the Eleventh Circuit's decision reflected a clear misapprehension of summary judgement standards in precedent like *Tolan v. Cotton*, 572 U.S. 650 (2014), and violated Rule 56(c) by rejecting applicable facts.

PARTIES

The petitioners are Mark Chapman, individually and as personal representative of the Estate of Gregory Chapman, deceased, and the Estate of Barbara Chapman, deceased, Irene Chapman. The petitioners were Plaintiffs - Counter Defendants below.

Kathy and William Ruff and their daughter, Melissa LaGotte, were also Plaintiffs – Counter Defendants in the district court proceedings.

The respondent is ACE American Insurance Company, a Pennsylvania corporation formerly known as Cigna Insurance Company. The respondent was Defendant – Counter Claimant below. Petitioners acknowledge that the respondent is a corporate non-governmental entity that issues shares of its ownership interests publicly. So, Respondent may have a parent company, subsidiary, or other publicly held company (or shareholders of those companies) that own 10% or more of any stock in Respondent.

RELATED PROCEEDINGS

- *Chapman et al. v. ACE American Ins. Co.*, No.8:16-cv-02111-CEH-MAP, U.S. District Court for the Middle District of Florida, Tampa Division. Judgment entered June 21, 2018.

- *Chapman et al. v. ACE American Ins. Co.*, No. 18-12972, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered May 21, 2019

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PETITION FOR WRIT OF CERTIORARI

This case presents the Court with an opportunity to once again endorse the use of certification procedures when available to avoid constitutional concerns related to judicial federalism under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), to protect state legislation from federal court overreach, and to avoid the misapplication of state law to deprive a litigant of substantive rights without any clear recourse. Ensuring that state courts have an opportunity to resolve novel state-law questions has been repeatedly endorsed by this Court.

The case also provides the Court with an opportunity to reaffirm the need for federal courts to appropriately apply summary judgment standards under Federal Rule of Civil Procedure 56. *See Tolan v. Cotton*, 572 U.S. 650 (2014).

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit entered on May 21, 2019.

OPINIONS AND ORDERS BELOW

The May 21, 2019 opinion of the court of appeals is reported at 774 Fed. App'x 556 (11th Cir. 2019) and is reproduced in the Appendix at 1a-10a. The June 21, 2018 opinion of the district court is not reported but is available at 2018 WL 8459518 and reproduced in the Appendix at 11a-38a. The May 21, 2019 order of the

court of appeals denying petitioners' motion to certify questions of law is set out at 39a-40a. The August 27, 2019 order of the court of appeals denying petitioners' petitions for rehearing is set out at 41a-42a.

JURISDICTION

The Court of Appeals entered judgment on May 21, 2019. App. 1a-10a. A timely petition for rehearing and rehearing en banc was denied on August 27, 2019. App. 41a-42a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article III of the United States Constitution (implied). *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Section 397.305 of the Florida Statutes (1998) provides the following:

> **Legislative findings, intent, and purpose.–**
>
> (1) Substance abuse is a major health problem and leads to such profoundly disturbing consequences as serious impairment, chronic addiction, criminal behavior, vehicular casualties, spiraling health care costs, AIDS, and business losses, and profoundly affects the learning ability of children within our

schools and educational systems. Substance abuse impairment is a disease which affects the whole family and the whole society and requires specialized prevention, intervention, and treatment services that support and strengthen the family unit. This chapter is designed to provide for substance abuse services.

(2) It is the purpose of this chapter to provide for a comprehensive continuum of accessible and quality substance abuse prevention, intervention, and treatment services in the least restrictive environment of optimum care that protects and respects the rights of clients, especially for involuntary admissions, primarily through community-based private not-for-profit providers working with local governmental programs involving a wide range of agencies from both the public and private sectors.

(3) It is the intent of the Legislature to ensure within available resources a full continuum of substance abuse services based on projected identified needs, delivered without discrimination and with adequate provision for specialized needs.

(4) It is the goal of the Legislature to discourage substance abuse by promoting healthy lifestyles and drug-free schools, workplaces, and communities.

(5) It is the purpose of the Legislature to integrate program evaluation efforts, adequate administrative support services, and quality assurance strategies with direct service provision requirements and to ensure funds for these purposes.

(6) It is the intent of the Legislature to require the cooperation of departmental programs, services, and program offices in achieving the goals of this chapter and addressing the needs of clients.

(7) It is the intent of the Legislature to provide, for substance abuse impaired adult and juvenile offenders, an alternative to criminal imprisonment by encouraging the referral of such offenders to service providers not generally available within the correctional system instead of or in addition to criminal penalties.

(8) It is the intent of the Legislature to provide, within the limits of

appropriations and safe management of the correctional system, substance abuse services to substance abuse impaired offenders who are incarcerated within the Department of Corrections, in order to better enable these inmates to adjust to the conditions of society presented to them when their terms of incarceration end.

(9) It is the intent of the Legislature to provide for assisting substance abuse impaired persons primarily through health and other rehabilitative services in order to relieve the police, courts, correctional institutions, and other criminal justice agencies of a burden that interferes with their ability to protect people, apprehend offenders, and maintain safe and orderly communities.

(10) It is the purpose of the Legislature to establish a clear framework for the comprehensive provision of substance abuse services in the context of a coordinated and orderly system.

(11) It is the intent of the Legislature that the freedom of religion of all citizens shall be inviolate. Nothing in this act shall give any governmental entity

jurisdiction to regulate religious, spiritual, or ecclesiastical services.

Section 397.403(1)(d) of the Florida Statutes (1998) provides the following:

> **License application.**--
>
> (1) Applicants for a license under this chapter must apply to the department on forms provided by the department and in accordance with rules adopted by the department. Applications must include at a minimum:
>
> * * *
>
> (d) Proof of liability insurance coverage in amounts set by the department by rule.

Section 397.501 of the Florida Statutes (1998) provides, in relevant part:

> **Rights of clients.**--Clients receiving substance abuse services from any service provider are guaranteed protection of the rights specified in this section, unless otherwise expressly provided, and service providers must ensure the protection of such rights.
>
> * * *

(3) RIGHT TO QUALITY SERVICES.--

(a) Each client must be delivered services suited to his or her needs, administered skillfully, safely, humanely, with full respect for his or her dignity and personal integrity, and in accordance with all statutory and regulatory requirements.

* * *

(10) LIABILITY AND IMMUNITY.--

(a) Service provider personnel who violate or abuse any right or privilege of a client under this chapter are liable for damages as determined by law.

(b) All persons acting in good faith, reasonably, and without negligence in connection with the preparation or execution of petitions, applications, certificates, or other documents or the apprehension, detention, discharge, examination, transportation, or treatment of a person under the provisions of this chapter shall be free from all liability, civil or criminal, by reason of such acts.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

Chapter 397 of the Florida Statutes was part of a comprehensive effort by the Florida Legislature to address the significant economic and societal costs of substance abuse. *See* Fla. Stat. § 397.305. The health and safety of clients is expressly made a purpose of the statute and a part of a delineation of "Client Rights" the Florida Legislature gave to those receiving substance abuse treatment. *See* Fla. Stat. §§ 397.305, 397.501. A client is defined in Fla. Stat. § 397.311(6) as "a recipient of alcohol or other drug services delivered by a service provider. . . ."

Section 397.403(d) requires insurance and it is followed by Section 397.501 which provides the declaration of "Client Rights" which must be ensured by the service provider. Providers must provide proof of insurance to cover those rights and have continuous coverage with yearly proof of liability insurance. *See* Fla. Stat. § 397.403(d). That insurance is an important part of the way service providers "ensure" "Client Rights" as required by Section 397.501. The statute requires insurance for providers, and DCF continually reviews a provider's insurance for that reason. *See* Fla. Stat. §§ 397.403(d), 397.321(6). The regulations existing at the time Taylor was being licensed reflect, *inter alia*, that DCF considered insurance ensuring client's health and safety when renewing licenses.

B. FACTUAL BACKGROUND

Robert Taylor, d/b/a Recovery Concepts, was providing substance abuse services to minors prior to the time that the Chapmans came to Taylor. Mark Chapman testified that the Chapmans had been getting medication treatment from a pediatrician and then a psychiatrist to address their son's ADHD. The parents were not happy with the treatment, because, despite repeated requests for help, the approach never changed. It was not helping their 10-year-old son, Gregory, and caused major medication-related mood swings that caused him to act out in troubling ways. Major Gary Terry of the Hillsborough County, FL Sheriff's Office (HCSO) came into the dive shop that Mr. and Mrs. Chapman owned, and they discussed Gregory's problems. Terry told them to contact someone in the HCSO who then referred them to Robert Taylor. This was routinely done by the HCSO, primarily for juvenile substance abuse. The Chapmans met Taylor in December 1997. Mark Chapman further testified about how Taylor explained the services he would provide. To Chapman, who was completely unfamiliar with these areas, Taylor seemed knowledgeable. He saw brochures about the services Taylor provided. It claimed Taylor specialized in compulsive and addictive behavior.

Taylor was interested in knowing all the medications that Gregory was taking. Taylor said Gregory's medications were large doses for a small child. Taylor "very adamantly" took the position that

Gregory should not be taking an anti-depressant, Paxil. Dr. Walter Afield, a psychiatrist who provided substance abuse counseling among many other psychiatric services to minors and adults, testified as an expert psychiatrist, mental health provider, and substance abuse provider in the case the family filed against DCF related to Gregory's death. Dr. Afield testified that drug or alcohol treatment more often includes advice on legal medications as opposed to illegal ones. Afield opined that Taylor's treatment and advice to the Chapmans was substance abuse counseling. However, it was bad advice.

The counseling Taylor gave Gregory Chapman which directly caused his death was the counseling he gave to substance abuse clients. Gregory's mother, Barbara Chapman went to the majority of sessions with Gregory and Taylor. Much of the detail of the meetings with Taylor was provided by Dr. Afield who had kept extensive notes of his treatment of Mrs. Chapman following Gregory's death. Of significance to the injuries in this case, Taylor used a tactic on Gregory he used with his other substance abuse clients. He told 10-year-old Gregory that he needed to do what his parents said and follow their advice or else he could be put into a residential (drug or alcohol) facility by Taylor which was so bad that they removed your shoelaces so that you did not hang yourself. Other substance abuse clients testified to similar admonitions during group substance abuse sessions which scared themselves and others, especially the

younger clients. Dr. Afield opined that this was outrageous advice which directly killed Gregory. On the day of his death, May 8, 1998, Gregory Chapman broke an expensive figurine of his parents and he was sent to his room. Shortly thereafter, his mother found him in his room where he had hung himself with a Tai Kwon Do belt. Dr. Afield's testimony showed that Taylor gave substandard treatment that was not what Gregory was entitled to under § 397.501(3)(a). The jury found DCF liable for the harm Taylor caused under § 397.501(10).

Gregory Chapman committed suicide on May 8, 1998. Major Terry again became involved when Taylor sought to get the Chapman's to pay for an expert from California to testify that his death was not suicide. The Chapmans and others were instrumental in having Taylor appropriately investigated and prosecuted. As a result, Taylor was ultimately arrested and convicted.

These facts come primarily from undisputed sworn testimony in a trial against the Florida Department of Children and Families (DCF), which was tried as a case within a case and produced in discovery in this case. Numerous complaints were made about Taylor from psychologists and families of people harmed or defrauded by Taylor. Those complaints were ignored by DCF who failed to respond to them and failed to use specific statutory and regulatory powers given to address this situation. As a result, Taylor continued to harm children and families. Subsequently, the

Chapmans were referred to Taylor, whose treatment caused Gregory's death. The negligence of DCF was addressed by various witnesses. The Chapman's, Dr. Walter Afield, and certain other witnesses who received substance-abuse treatment from Taylor addressed the treatment Gregory received which violated §397.501(3)(a) and which caused his death. The district court refused to consider the sworn testimony or other authenticated documents from the DCF case for reasons which violate Fed. R. Civ. P. 56(c). *See Langston v. Johnson*, 478 F.2d 915, 918 n.17 (D.C. Cir. 1973) (citing cases); *accord Beiswenger Enters. Corp. v. Carletta*, 46 F. Supp. 2d 1297, 1299 (M.D. Fla. 1999); *see also Tolan*, 572 U.S. at 656-57.

The Underlying Suit

In December 1999 the Chapmans notified ACE of claims against Taylor and Dr. Lori Shriner, a psychiatrist with a duty to supervise Taylor under Chapter 397. Shriner ultimately settled. On February 16, 2000 ACE responded to Taylor by denying coverage and refusing to defend the action. In pertinent part the letter denying coverage provided:

> Please refer specifically to the definition of "Professional Services" which means those services you are licensed to provide. Since you were not licensed to provide drug and alcohol counseling to children or family counseling, we must advise you that

> there is no coverage provided to you regarding the two captioned claims.

On November 9, 2009 an Amended Complaint was filed in Taylor's case and the materiality of most paragraphs arises only under Chapter 397.[1] As to the Chapmans agreeing to Taylor's treatment under Chapter 397, paragraph 33 alleges the Chapmans "hired" Taylor because of a referral by the Hillsborough County Sheriff's Office (HCSO) and Taylor's representations of his experience "as a substance abuse provider . . .".

The Amended Complaint alleges Taylor's duties as a substance abuse counselor, and that he breached those duties when providing substance abuse services which resulted in Gregory Chapman's death:

> 26. At all material times Robert Taylor and Concepts owed a duty to Gregory Chapman and Melissa Lagotte

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[1] Indeed, the District Court used several of these (¶s 10, 12, 13, 14, 15, 16 and 18) to deny coverage to an innocent third-party beneficiary of Taylor's policies with ACE by improperly finding Taylor's substance abuse license void or voidable for fraud. This holding violated Florida public policy protecting innocent third-party beneficiaries. *Everglades Marina, Inc. v. Am. E. Dev. Corp.*, 374 So. 2d 517, 518-19 (Fla. 1979); *Vasques v. Mercury Cas. Co.*, 947 So.2d 1265, 1268-69 (Fla. 5th DCA 2007); *Flores v. Allstate Ins. Co.*, 819 So. 2d 740, 744-45 (Fla. 2002). It also violated law applicable to the duty to defend, because it implied the existence of an exclusion for unestablished fraud which would prevent coverage for services performed under an existing non-revoked license. *See Ranger Ins. Co. v. Culberson*, 454 F.2d 857, 860-61 (5th Cir. 1972).

pursuant to Fla. Stat. § 397.501(3) to provide services suited to their needs, administered skillfully, safely, humanely with full respect for their dignity and personal integrity and in accordance with all statutes and regulatory requirements. Taylor and Concepts breached that duty as hereinafter set forth and are liable as determined by law under Section 397.501(10).

27. Robert Taylor and Concepts had a duty to provide the mental health and substance abuse counseling at a level of care, skill and treatment which in light of all relevant circumstances is recognized as acceptable and appropriate by reasonably prudent mental health and substance abuse counselors. Taylor and Concepts breached that duty as hereinafter set forth.

29. During the course of individual and "group sessions", it was the custom and practice of Robert Taylor to brag that he had connections with law enforcement and the judiciary in Hillsborough County and wielded sufficient influence to direct that a juvenile be arrested and jailed on

criminal charges. During such sessions, it was also his custom and practice to call juveniles liars who denied drug involvement and to tell the group as a whole that when they were sent to jail, they would have to give up their shoe laces so they did not hang themselves.

30. From time to time in private individual therapy sessions, Robert Taylor threatened to have minors locked up or sent to a boot camp if they misbehaved where their shoe laces would be removed to prevent suicides, because it was a bad place. Robert Taylor told the parents their children needed to be threatened and punished.

33. At all material times and in reliance on the referral by the Sheriff's Office and Robert Taylor's representations of his competence as a substance abuse provider and mental health counselor for minors, the Plaintiffs, employed Robert Taylor's services to treat as the case may be Gregory Chapman and Melissa Lagotte, and paid him fees for such services. Moreover, as part of this treatment Taylor would say he had to counsel their families.

Paragraph 35 alleged various resulting injuries including death. All of these paragraphs are brought together and incorporated into Count I- Wrongful Death by ¶40. That count formed the basis of Taylor's negligence in the DCF case and of the consent judgment the Chapmans and Taylor later entered into. It alleges, in pertinent part, various aspects of Gregory's condition before alleging:

> 47. Due to his medical condition for which he was receiving no competent treatment, Gregory Chapman, from time to time, would steal coins or break objects. Taylor threatened to have Gregory jailed or sent to boot camp if he repeated such conduct.
>
> 48. Taylor's treatment threats caused Gregory to experience great fear, anxiety and mental distress that he would be jailed or sent to boot camp for mischievous conduct which was compulsive.
>
> 50. The Defendants further breached their duties to Plaintiffs in the manner of treatment of their minor son, Gregory Chapman, in that Taylor uttered threats to Gregory Chapman that he would be arrested and jailed on criminal charges and/or sent on the orders of Taylor to a boot camp which was so bad they

> removed your shoelaces to prevent one hanging themselves, and otherwise making false threats and statements for the purpose of inducing fear in Gregory Chapman. On May 31, 1998, after breaking a figurine with a ball in his home, and fearing he would be jailed or sent to boot camp, Gregory Chapman hung himself.
>
> 51. As a direct and proximate result of the Defendants' conduct, as herein described, Gregory Chapman suffered severe and extreme emotional distress, fear, anxiety, apprehension, humiliation and despair as to cause him to take his own life.

Petitioners had pled negligence per se[2] and damages by alleging, *inter alia*, a breach of the statutory duty of care to a client under Chapter 397's Statement of Client Rights, and Gregory Chapman's resulting death. However, ACE again refused defense, *inter alia*, because of Taylor's lack of a license to treat

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[2] *See DeJesus v. Seaboard Cost Line R. Co.*, 281 So. 2d 198, 201 (Fla. 1973). If ACE questioned whether facts supported substance abuse treatment, only ADHD treatment, or some other mental health counseling, they should have defended with reservation to see how facts developed. *See e.g., Lime Tree Vill. Cmty. Club Ass'n, Inc. v. State Farm Gen. Ins. Co.*, 980 F.2d 1402, 1406 (11th Cir. 1993).

minors, despite the fact that he was licensed under Chapter 397 and the policy only required a license. ACE also raised coverage exclusions for the first time.

On January 28, 2011 ACE was also provided notices of an upcoming case management conference which would specifically address four areas including all aspects of discovery, trial, Taylor's continued assertion of the Fifth Amendment while in prison, and settlement. The letter also summarized the results of the case filed against DCF, its relation to Taylor's case and informed ACE that co-plaintiff Melissa Lagotte became an adult during her treatment by Taylor.[3]

On February 18, 2011, ACE again refused to defend. ACE stated it continued to stand by its position coverage does not exist for the reasons stated in the February 16, 2000 and March 11, 2010 letters. It then raised Petitioners alleged unlicensed mental health counseling and that Taylor did not have any valid licenses because of misrepresentations as alleged in the Amended Complaint ¶18. Id.

C. PROCEEDINGS BELOW

The present case arose out of Appellant's breach of contract action against ACE seeking to enforce a

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[3] The jury awarded $5,991,890 to the Chapmans against DCF for its negligence for not taking action against Taylor which, in turn, allowed for Taylor's treatment of Chapman. Ultimately, the judgment against DCF was overturned on the basis of sovereign immunity. *Dep't of Children and Family Servs. v. Chapman*, 9 So. 3d 676 (Fla. 2d DCA 2009). That decision did not question the reasonableness of the jury verdict.

Consent Judgment in the case of Chapman v. Taylor, No. 99-06242 originally filed in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, as assignees of Taylor and innocent third-party beneficiaries of Taylor's insurance policy. Mediation documents showed that consent judgment was based directly upon the Count I wrongful death count against Taylor. The amount of the consent judgment was directly based upon the jury verdict in the DCF case. There was no issue as to its unreasonableness or lack of good faith.

ACE removed the case to Federal Court under 28 U.S.C. § 1332, claiming diversity of citizenship. Each party filed motions for summary judgment. The District Court granted summary judgment for ACE and disposed of all claims in an Order entered on June 21, 2018 and made final and appealable by Judgment entered that same date. Appellants filed a timely Notice of Appeal on July 16, 2018. The Panel affirmed the District Court's decision on May 21, 2019.

On Appeal Petitioners requested certification to the Florida Supreme Court under Fla. Const. art. V, § 3(b)(6), Fla. Stat. § 25.031, and Fla. R. App. P. 9.150 of the following proposed questions of law:

1. Does the statutory and regulatory scheme of Chapter 397 of the Florida Statutes, including Fla. Stat. § 397.403(d)'s obligation of liability insurance coverage, require liability

insurance that covers the service provider's liability under Fla. Stat. § 397.501(3)(a) and (10)?

2. Must insurance coverage provided to a substance abuse provider pursuant to the statutory and regulatory scheme of Chapter 397 of the Florida Statutes be interpreted in light of the provisions of Chapter 397.

The Chapman, et al. v. ACE Panel affirmed the lower court's decision on duty to defend, indemnity and left in place its consent judgment, or *Coblentz*, decision. It determined, contrary to Florida law, that an insurer's duty to defend can be based upon consideration of selective allegations which it found do not require defense, while ignoring allegations which require coverage. It also determined that it can choose one alternative claim which it determined does not require defense while ignoring another which does. The Panel determined that the Chapmans: had only sued Taylor for breach of his duty as a mental health provider; failed to allege they hired Taylor to provide substance abuse services; and failed to allege Taylor breached his duties as a substance abuse services provider, while only citing certain allegations in the complaint (¶s 10, 19a, 36, 43, 49).[4]

[4] The Panel used ellipses that accentuated its argument but diminished the relation of the actual allegations to the substance

REASONS FOR GRANTING THE WRIT

The Florida Supreme Court has stated that courts should examine such statutes in order to determine whether a condition or exclusion limits coverage and whether its enforcement would be against public policy. Months before the decision the Chapmans sought certification to the Florida Supreme Court (February 1, 2019) of those and other statutory issues and on May 21, 2019 the Panel denied Appellants' motion without analysis or reason.

Notably, in analyzing the allegations of the complaint and making its duty to defend decision, the Panel ignored Chapter 397 of the Florida Statutes.[5] Chapter 397 specifically required insurance for a substance abuse services provider in order for that provider to receive a license. Fla. Stat. § 397.403(d). In this case ACE provided that insurance. The DCF

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abuse claims in the complaint. The panel further criticized Petitioners' failure to allege Gregory "struggled with substance abuse".

[5]Except to claim mental health counseling (Fla. Stat. Chapter 491) is divorced from substance abuse counseling (Fla. Stat. Chapter 397). First, ¶26's allegation of duty and breach comes directly from Section 397.501(3)(a) not Chapter 491. Indeed, no liability provision from 491 is even referenced in the complaint. Second, one cannot provide substance abuse services without some mental health counseling. The Chapter 397 license includes the ability to provide some related mental health counseling. Fla. Stat. § 397.311(1). A copy of the then existing statute is part of the appellate record.

had regulations requiring its investigators to review that insurance in determining whether the provider could protect client's rights. 10E.16.004(a)(b) and 65D-30.001 et seq. Chapter 397 contained a specific section protecting "Client's Rights". Fla. Stat. § 397.501. A statutory duty of care arose under the statement of Client's Rights which was applicable to ACE as the insured's service provider. Fla. Sta. §§ 397.501(3)(a) and (10). Clients were not defined as individuals with a substance abuse problem or "who struggled with substance abuse", but rather individuals who "received substance abuse treatment". Fla. Stat. § 397.311(6). In requiring an allegation that "Gregory struggled with substance abuse", the Panel's decision alters the statutory liability language, and, at the very least, creates a question of first impression under Chapter 397, in particular Sections 397.501(3)(a) and (10) as it relates to the duty to defend. It also contradicts other Florida Supreme Court cases relating to: (1) statutory construction, *Edwards v. Thomas,* 229 So. 3d 277 (Fla. 2017) (provisions must be read together to achieve a consistent whole, and where possible, courts must give full effect to all statutory provisions in harmony with one another); (2) cases which distinguish between insurance policies providing coverage mandated or controlled by statute; (3) whether Chapter 397 addresses issues like substance treatment and ancillary mental health counseling, or the type of protection "clients" were ensured of by the

legislature; and (4) avoids the actual facts testified to by Dr. Afield.

Therefore, the panel's decision failed to consider allegations in the amended complaint that show the Chapmans hired Taylor for substance abuse treatment (¶ 33 of the amended complaint) and that alleged Taylor specifically breached the statutory standard of care for substance abuse providers (Fla. Stat. § 397.501(3)(a) (¶ 26 of the amended complaint) and numerous paragraphs which describe the factual bases of the breach of that duty of care and not some alternative mental health standard. (See ¶¶s 29, 30, 33, 47, 48, 50, 51). Those allegations are incorporated into Count I wrongful death. The Panel also violated Florida's four corners rule by reforming allegations of substance abuse to only be applicable to co-plaintiffs who had settled, when the words in the complaint are clearly applicable to all plaintiffs (footnote 3 even though it is discussing counts other than wrongful death). Contrary to Florida law, the decision does not require an insurance company to defend if: there is at least one allegation to which there would be coverage; there is any basis for imposing liability upon the insured that falls within coverage; if allegations are partially within and partially outside coverage; or when a complaint comes within coverage "at least marginally and by reasonable implication." The decision undermines uniformity of decisions and creates confusion for lower courts as to the proper

standard to apply when analyzing an insurer's duty to defend in Florida.

The Panel's duty to defend decision ultimately included in footnote 5 a finding that there was no duty to indemnify. Given these decisions the Panel did not address allocation under the Coblentz Agreement. ACE's indemnity argument that there was "no evidence" that Gregory Chapman "was provided substance abuse counseling by Taylor," may have affected the Panel's assertion of a missing allegation in the complaint contrary to a reasonable reading of paragraphs 33, 26, 29, 30, 33, 47, 48, 50 and 51, all of which are incorporated in the wrongful death count. On the merits it is particularly troubling because the undisputed testimony from Mark Chapman, admissible treatment notes from Barbara Chapman and testimony from a treating/expert psychiatrist engaged, *inter alia,* in substance abuse treatment and mental health therapy, was that Gregory Chapman was receiving substance abuse treatment from Taylor. Several witnesses who received substance abuse treatment from Taylor testified that Taylor used the same substance abuse treatment tactic on them which the expert testified resulted in Gregory's death. As for the complaint, this is captured in ¶¶s 26, 29, 30, 32, 42, 48, 50 and 51. None of this was mental health counseling and certainly not exclusively such.

The Panel's decision also left in place a District Court decision that: (1) contradicts Florida Supreme Court precedent protecting the rights of innocent

third-party beneficiaries who are victims of fraud unexcluded from coverage by contract, *Everglades,* 374 So. 2d at 518-19; (2) rejected the decades long precedent in Florida holding that coverage is governed by policy language and not arguments arising outside the policy, *Ranger Ins. Co. v. Culbertson,* 454 F.2d 857, 860-861 (5th Cir. 1971), *cert denied*, 407 U.S. 916 (1972) (holding that an insured pilot with a valid and effective student certificate at the time of a crash was holding a "proper pilot certificate" even "though at the time of the crash he was carrying a passenger in violation of restrictions on the face of the student certificate and in violation of FAA regulations"); (3) accepted arguments that policies can be reformed by inferring provisions or exclusions not in the policy against insureds or innocent third-party beneficiaries contrary to Florida case law, *Everglades,* 374 So. 2d at 518-19; *Flores*, 819 So.2d at 744; *Vasques*, 947 So. 2d at 1268-69; (4) contradicted Florida case law on the inapplicability of intentional conduct exclusions to unintentional injuries which would include a child's suicide that facts unequivocally show was not expected or intended from the standpoint of the insured, *see Prudential Prop. & Cas. Ins. Co. v. Swindal*, 622 So. 2d 467, 472 (Fla. 1993); (5) rejected as "evidence" sworn testimony and affidavits of people, available for trial, including those from another case (the DCF case) when deciding a summary judgment despite Fed. R. Civ. P. 56(c) and case law, *see Langston*, 478 F.2d at 918 n.17 (D.C. Cir. 1973) (citing cases); *accord Beiswenger*, 46 F. Supp. 2d

at 1299 (M.D. Fla. 1999) ("Trial testimony, even when from a proceeding in which the parties, subject matter, and counsel are not the same can be used because it is sworn testimony which is at least as reliable as that found in affidavits.") (citing *Langston*); and (6) will increase litigation in Florida and obstruct, or undermine consent judgment settlements which are undisputedly both reasonable and made in good faith by failing to recognize that allocation legally can, and in this case clearly did, occur outside the Consent Judgment in mediation related settlement documents.

Significantly as it relates to this petition, any reasonable reading of Section 397.501(3)(a) would have precluded the court's decision in at least (1), (2), (3), and (4), above. It would have also avoided the court's failure to consider the negligence per se allegations in paragraphs 26, 29, 30, 33, 35, 47, 48, 50 and 51 of the complaint. Finally, certification would have addressed whether the required liability insurance policy matched the service provider's liability under Sections 397.501(3)(a) and (10).

I. The Panel abused its discretion by failing to certify questions to the Florida Supreme Court.

By not certifying the questions to the Florida Supreme Court, the Eleventh Circuit has significantly impaired the rights of "clients" that state legislation specifically sought to ensure under Section 397.501.

The court revised the statute away from providing rights to recipients of substance abuse treatment. It has limited those covered by the statute to persons who "struggled with substance abuse". The Florida Supreme Court should be the first to determine whether such changes can be made to Chapter 397. The Florida Supreme Court should also be the first to determine whether Chapter 397 requires insurance coverage to ensure the protection of delineated rights of clients or must be construed as limited by clauses implied into the insurance contract after a lawsuit is filed.

Petitioners moved for certification below. The Eleventh Circuit panel denied petitioners motion but provided no analysis of the factors.

As a matter of state-federal comity, the federal courts have the responsibility to give due deference to the state courts in interpreting their own laws. Certification would respect the explicitly stated interests of the Florida Legislature in enacting Chapter 397. There is no serious dispute that Chapter 397 of the Florida Statute was alleged to have been violated. The Eleventh Circuit's decision cites to no case law interpreting Chapter 397. Therefore, this Court should permit the Florida Supreme Court to decide whether the statute is limited to clients who "struggled with substance abuse," despite the words of the statute.

Whether to certify a question is a matter of discretion. However, "[d]iscretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). This Court has repeatedly encouraged certification of questions to state courts. *See, e.g., Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960) (citing *Allegheny Cnty. v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959) ("[W]e have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law.")); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) ("[R]esort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law ... we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction.").

The Eleventh Circuit decided dispositive questions of first impression regarding the meaning and interpretation of Chapter 397, which is part of a comprehensive scheme, without taking the preferential first step of asking the Florida courts to provide an accurate picture of what, exactly, Chapter 397 means or intends. *See Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1894–95 (2018) (SOTOMAYOR, J., dissenting). As noted by this

Court, federal courts should be particularly hesitant to speculate as to possible constructions of state law when "the state courts stand willing to address questions of state law on certification." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78–79 (1997) (internal quotation marks omitted). As noted by this court, certification "save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros.*, 416 U.S. at 391. Affording the Florida Supreme Court the opportunity to issue a definitive interpretation would be most consistent with considerations of comity, federalism, and judicial restraint.

The Florida Constitution authorizes the United States Courts of Appeal to certify questions about state law to the Florida Supreme Court if the questions are "determinative of the cause and for which there is no controlling precedent of the supreme court of Florida." Fla. Const. art. V, § 3(b)(6). Correspondingly, under the Florida Rules of Appellate Procedure, this Court "may certify 1 or more questions of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida." Fla. R. App. P. 9.150(a); *see also* Fla. Stat. § 25.031 (authorizing the Florida Supreme Court to receive and answer certified questions or propositions of state law from federal appellate courts, including any circuit court of appeals of the United States). This

Court may certify questions of law either on own motion or on motion of a party. *See id.*

"Substantial doubt about a question of state law upon which a particular case turns should be resolved by certifying the question to the state supreme court." *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1268 (11th Cir. 2003); *see also Morales v. Zenith Ins. Co.*, 714 F.3d 1220, 1234 (11th Cir. 2013) (certifying questions of law in insurance dispute to the Florida Supreme Court because the appeal depended on resolution of unsettled Florida law); *Intervest Constr. of Jax, Inc. v. Gen. Fid. Ins. Co.*, 662 F.3d 1328, 1332-33 (11th Cir. 2011) (certifying questions of law where there was no controlling precedent from the Florida Supreme Court and resolution of the contrasting interpretations of the policy language raised by the parties was determinative of the cause in this case"); *U.S. Fid. Guar. Co. v. Liberty Surplus Ins. Corp.*, 550 F.3d 1031, 1034-35 (11th Cir. 2008) (certifying questions of law where the issue presented in this appeal was unsettled under Florida law"); *Miller v. Scottsdale Ins. Co.*, 410 F.3d 678, 681 (11th Cir. 2005) ("Rather than predict how this question of Florida law should be decided, we certify the issue to the Florida Supreme Court for a definitive statement.").

Petitioners proposed certified questions satisfied the criteria of Fla. Const. art. V, § 3(b)(6) and Fla. R. App. P. 9.150(a). The Eleventh Circuit should have certified the questions to the Florida Supreme Court for a definitive interpretation of the statutory scheme

of Chapter 397. The motion set forth the reasons why: (A) the proposed question was determinative of the cause, (B) there is no controlling precedent of the Florida Supreme Court, and (C) public policy implications favored certification.

The failure to certify questions can have an significant adverse impact on the substantive rights of citizens of Florida It has deprived the Chapmans of substantive rights without any clear recourse.[6]

Under Florida law, in cases involving statutorily-mandated or controlled coverage, "analogies to cases interpreting coverages that are not statutorily mandated, such as provisions in fire, life and property insurance policies, may not necessarily be illuminating in guiding [the Court's] analysis." *Flores*, 819 So. 2d at 745. In fact, the Florida Supreme Court has repeatedly distinguished between general insurance policies and policies providing coverage mandated or controlled by Statute. *See Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 229, 232-34 (Fla.1971) (stating that automobile liability insurance and uninsured motorist coverage obtained to comply

[6] This decision is contrary to other circuits who have shown support for certification where there is an absence of controlling precedent or where the state law on an issue is unsettled. *See, e.g., Puckett v. Rufenacht, Bromagen & Hertz, Inc.*, 903 F.2d 1014 (5th Cir. 1990); *Holmes v. Amerex Rent-A-Car*, 113 F.3d 1285 (D.C. Cir. 1997); *Hatfield ex rel. Hatfield v. Bishop Clarkson Mem'l Hosp.*, 701 F.2d 1266 (8th Cir. 1983).

with or conform to the law cannot be narrowed by the insurer through exclusions contrary to the law); *Salas v. Liberty Mut. Fire Ins. Co.*, 272 So. 2d 1, 5 (Fla. 1972) (finding insurance coverage issued pursuant to statute not susceptible to the attempts of the insurer to limit or negate the protection afforded by law); *Flores*, 819 So. 2d at 745 (noting that courts have an obligation to invalidate exclusions on coverage that are inconsistent with the purpose of the statute that mandates coverage); *see also Diaz-Hernandez v. State Farm Fire & Cas. Co.*, 19 So. 3d 996, 1000 (Fla. 3d DCA 2009) (invalidating a policy provision because it was against the public policy of the statute); *Vasques*, 947 So.2d at 1269 (stating that restrictions on statutorily mandated coverage must be carefully examined because exclusions that are inconsistent with the purpose of the statute are invalid). In *Nunez v. Geico Gen. Ins. Co.*, 117 So. 3d 388, 393 (Fla. 2013), the Florida Supreme Court stated courts should examine whether the condition or exclusion limits coverage and whether its enforcement would be against public policy.

In this case, ACE's policy does not exclude coverage; however, the panel held that coverage was barred without even considering the Chapter 397 allegations. Case law and statutory public policy should preclude that. It was alleged that the Petitioners suffered injury and damage while receiving substance abuse treatment. Section

397.501(3)(a), which was explicitly alleged, directly covers that injury and damage.

The legislative findings, intent, and purpose are set forth in Section 397.305. In short, Chapter 397, like various automobile requirements, is part of a broad spectrum of civil and criminal statutes that the Florida Legislature has passed to address substance abuse problems. Because of its significance as part of the overall response to the problems recognized by the Legislature, Chapter 397 contains specific statutory provisions guaranteeing "rights" for substance abuse clients. Those statutes include the requirement that a substance abuse provider have insurance in order to obtain a license. Fla. Stat. § 397.403(d). The DCF Site Visits and the applicable regulations establish DCF looked at Taylor's insurance when it licensed him just as it looks at other providers' to ensures the health and safety of clients.

Section 397.501 begins by stating providers must ensure the protection of such rights. That Section continues with several important rights including Section 397.501(3)(a). The notice of claims that were sent to ACE for the Chapmans and the Amended Complaint expressly allege that Taylor failed to provide Petitioners with those enumerated rights. The notice for the Chapmans and paragraph 26 of the amended complaint expressly allege duty, breach, and damages under Section 397.501(3)(a). Subsequent paragraphs allege specific facts including the ones Dr. Afield testified caused Gregory's death.

By not certifying questions to the Florida Supreme Court, the panel, as did the district court decision, proceeded to ignore Section 397.501(3)(a) and settled principles applicable to an insurer's duty to defend. This contradicted Florida's four-corners rule, and the panel adopted a rule of reformation to do away with the applicability of substance abuse counseling allegations in the complaint otherwise applicable to the Chapma. *See Jones v. Fla. Ins. Guar. Ass'n.*, 908 So. 2d 435, 442-36 (Fla. 2005); *McCreary v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 758 So. 2d 692, 695 (Fla. 4th DCA 1999); *Baron Oil Co. v. Nationwide Mutual Fire Ins. Co.*, 470 So.2d 810, 813-14 (Fla. 1st DCA 1985); *Klaesen Bros., Inc. v. Harbor Ins. Co.*, 410 So. 2d 611, 613 (Fla. 4th DCA 1982).

By failing to consider Chapter 397 and certify issues to the Florida Supreme Court, the decision also contradicted the following cases: *Mullis,* 252 So. 2d at 232-34; *Salas*, 272 So. 2d at 5; *Flores,* 819 So. 2d at 745; *Diaz-Hernandez*, 19 So.3d at 1000; *Vasques,* 947 So.2d at 1269; *Nunez*, 117 So. 3d at 393; *DeJesus*, 281 So.2d at 201; *Young v. Progressive Se. Ins. Co.*, 753 So.2d 80, 83 (Fla. 2000); *Travelers Indem. Co. v. PCR, Inc.* 889 So. 2d 779 (Fla. 2004).

The Panel erred by overlooking, indeed changing, the language of Chapter 397 and denying certification to the Florida Supreme Court.

Finally, it is notable that lawsuits against the HCSO and DCF were dismissed due to sovereign immunity under state of Florida law. In DCF, due to various appeals and other legal delays, three different trial level judges allowed the DCF case to go forward under *Dep't of Health and Rehabilitative Servs. v. Yumani*, 529 So. 2d 258 (Fla. 1988). The Second District Court of Appeals, however, dismissed the case under Florida's sovereign immunity law. The Florida Supreme Court denied review on a 4-to-3 vote. *Chapman v. Fla. Dep't of Children & Families*, 19 So.3d 310 (Table) (Fla. 2009). However, all of these results were reached by Florida courts considering Florida law.

In the current case, ACE removed the case to federal court on diversity grounds, as was its right. Respondent, *inter alia*, attacked Taylor, his crimes, his alleged fraud, and argued that, although Taylor was licensed under Chapter 397 that had only one license, it argued he did not have the kind of license he needed. It also argued that sworn testimony and authenticated exhibits from the DCF case, upon which the Chapmans relied to address indemnity and other factual issues, were not admissible for summary judgment purposes under Rule 56(c). The district court's order appears to have been influenced by many of these arguments and did not apply Florida Supreme Court case law which protected innocent third-party beneficiaries even in the face of criminal conduct

absent an express contractual provision supporting a lack of coverage. *Everglades,* 374 So. 2d at 518-19.[7]

On appeal, these issues were briefed but without oral argument the key issue seemed to become whether Chapter 397 was even applicable to the Chapmans with a demand for allegations not required by Chapter 397 itself. Notably, these arguments would have been applicable in the DCF case, but no Florida court determined that they were applicable. Likewise, the contributory fault of the Chapmans was alleged and litigated in the DCF case, and based on that evidence, DCF dropped the defense just prior to submission to the jury.

The central issues of this case related to Chapter 397 need to be resolved under Florida law by the Florida Supreme Court. It is Florida, not Pennsylvania or other states, who will live with the insurance industry's reaction to a case of critical importance to Florida. *See* Fla. Stat. § 397.305. It is Florida's legislature that needs to know what <u>its courts</u> reason about these issues.

II. The Panel's Decision Violates Tolan v. Cotton and FRCP 56

By selectively applying, overlooking and reforming the allegations in the amended complaint, the panel's

[7] The district court even confused Taylor's alleged fraud in obtaining a state license with his non-fraudulent obtaining of insurance, despite the parties' stipulation that ACE was not asserting a misrepresentation defense to the policy.

decision violates *Tolan v. Cotton,* 572 U.S. 650, 656-57 (2014). Moreover, its requirement that there be an allegation that "Gregory struggled with substance abuse" is contrary to Section 397.501(3)(a). The amended complaint's allegation of a violation of 397.501(3)(a) as well as factual allegations of duty, breach, and damages required ACE to at least defend until it determined that Gregory was not a client under Chapter 397. On what basis did the panel or ACE believe that he cannot? No basis was cited. ACE, however, argued that the actual facts showed Gregory could not establish that he was a substance abuse client. In doing so, ACE claimed that the sworn testimony and authenticated documents from the DCF trial could not be considered. That position violates Federal Rule of Civil Procedure 56(c).

The Panel erred by selecting allegations it felt alleged mental health counseling to find no duty to defend. It overlooked more and stronger allegations of substance abuse counseling. *See* ¶¶s 26, 27, 29, 30, 39, 47, 48, 50, and 51, supra. Under Florida law a liability insurer's duty to defend arises when the complaint "alleges facts that fairly and potentially bring the suit within policy coverage." *Jones*, 908 So.2d at 443. If the allegations of the complaint leave any doubt regarding the duty to defend, the question must be resolved in favor of the insured requiring the insurer to defend. *Baron Oil*, 470 So.2d at 813-14; *see also Jones*, 908 So.2d at 444; *Klaesen Bros.*, 410 So. 2d at 613 (holding that a complaint is sufficient to invoke

the duty to defend when it alleges conduct that comes within coverage of the policy "at least marginally and by reasonable implication").

The panel's duty to defend decision fails to address allegations of breach and damages covered by Chapter 397 of the Florida Statutes, which contains the statutory duty of care. Its breach was negligence per se, and does not require an allegation that "Gregory struggled with substance abuse". The Panel erroneously required this unnecessary language while ignoring the language of ¶¶ 26 et seq. which is far more precise than the mental health allegations the Panel credits.

Having denied Petitioners' duty to defend rights, it left in place the district court's decision on the duty to indemnify. That decision also rejected sworn evidence contrary to Fed. R. Civ. P. 56 (c) and *Tolan, supra.* "It is well-settled that a certified transcript of judicial or administrative proceedings may be considered on a motion for summary judgment." *Langston,* 478 F.2d at 918 n.17 (citing cases); *accord Beiswenger,* 46 F. Supp. 2d at 1299 ("Trial testimony, even when from a proceeding in which the parties, subject matter, and counsel are not the same can be used because it is sworn testimony which is at least as reliable as that found in affidavits.") (citing *Langston).* It also left in place contradictions on whether allocation of a Consent Judgment can be made outside the Consent Judgment contrary to *Duke v. Hoch,* 468 F.2d 973, 976 (5th Cir. 1972) (applying Florida law); *Arnett v. Mid-*

Continent Cas. Co., No. 8:08-CV-2373-T-27EAJ, 2010 WL 2821981, at *5-6 (M.D. Fla July 16, 2010); *Mid-Continent Cas. Co. v. C-D Jones & Co. Inc.*, No. 3:09CV565/MCR/CJK, 2013 WL 12081104, at *5 (N.D. Fla. Aug. 6, 2013).

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the judgment and opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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