No. 19-689

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

REPLY BRIEF FOR THE PETITIONERS

JOSEPH D. MAGRI
Counsel of Record
SEAN M. MCFADDEN
MERKLE & MAGRI, P.A.
5601 Mariner Street, Ste. 400
Tampa, FL 33609
(813) 281-9000
jmagri@merklemagri.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

REPLY BRIEF FOR THE PETITIONER

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 Legislature expressly made ensuring the health and safety of clients[1] a purpose of the statute and a part of the delineation of "Client Rights" given to those receiving substance abuse treatment. *See* Fla. Stat. §§ 397.305, 397.501.

Under Chapter 397, providers must provide proof of insurance covering those client rights and show continuous coverage through yearly proof of liability insurance to obtain and maintain a license to provide substance abuse services. The Department of Children and Family Services (DCF) annually 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 licensed reflect, *inter alia*, that DCF considered insurance ensuring client's health and safety when renewing licenses. There was no Florida case law and certainly no Florida Supreme Court precedent addressing the certified questions Petitioner proposed to the Court of Appeals for the Eleventh Circuit. These questions were indisputably determinative of the cause. The Eleventh Circuit abused its discretion by rejecting Petitioners' pre-decision motion.

The Complaint expressly alleged duty, breach, and damages under Fla. Stat § 397.501(3)(a) which

---

[1] "Client" is defined by Fla. Stat. § 397.311(6) as "a recipient of alcohol or other drug services delivered by a service provider . . . ."

made Respondent's insured liable under Section 397.501(10). Subsequent allegations expressly alleged substance abuse treatment actions taken by Respondent's insured that caused 10-year-old Gregory Chapman's death. Unrebutted sworn affidavits, testimony, and documents established: (1) Gregory Chapman was a "client" under Chapter 397 and entitled to statutory protections; (2) Respondent's insured was liable under Section 397.501(10) for substance abuse treatment that breached the standard of care under Section 397.501(3)(a); and (3) the insured's breach resulted in Gregory Chapman's wrongful death. When analyzing Respondent's duties to defend or indemnify, the courts below considered neither these allegations nor the supporting evidence, in violation of both Florida law and *Tolan v. Cotton,* 572 U.S. 650 (2014).

ARGUMENT

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

In response to this question, the Respondent refers to *Lehman Brothers v. Schein*, 416 U.S. 386, 392 (1974) to suggest that certification is simply a matter of judicial discretion and that the Eleventh Circuit actually considered the statute and rejected Petitioners' "unsupported public policy argument."

Respondent then purports (on pg. 12) to distill the Petitioners' first proposed certified question into what the Respondent believes is the question's "essence": "how should a statute be interpreted?' Rather, the first proposed certified question was:

> 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)?

Respondent next describes its interpretation of the "essence" of the second proposed certified question as "how should an insurance policy be interpreted?" The second proposed certified question was actually:

> 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[?]

Lehman Bros. held that where, as here, a certification procedure is available, "resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant state. When federal judges in New York attempt to predict uncertain Florida law, they act, as 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." As discussed in the Petition at pp. 29-30, both the Florida Constitution and the Florida Rules of Appellate

Procedure authorize certification where the questions of state law 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); *see also* Fla. R. App. P. 9.150(a).

Neither the Eleventh Circuit nor the Respondent addressed those issues. The Eleventh Circuit rejected certification without providing any analysis of whether the questions were determinative of the cause or whether there was controlling precedent of the Florida Supreme Court. Respondent attempts to fill the gap by misconstruing Petitioner's questions and asserting – without support — that *Nunez v. Geico General Insurance Company*, 117 So. 3d 388, 391-92 (Fla. 2013) (quoting *Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1089 n.1 (Fla. 2010)) decided that *all* non-automobile liability insurance policies "are not subject to statutory parameters and are simply a matter of contract not subject to statutory requirements." *Compare* 117 So. 3d at 391-92 (distinguishing PIP insurance as "markedly different from homeowner's/tenants insurance, property insurance, life insurance, and fire insurance, which are not subject to statutory parameters and are simply a matter of contract not subject to statutory requirements").

Respondent's conversion of "homeowner's/tenants insurance, property insurance, life insurance, and fire insurance" to expressly include *all* non-automobile liability insurance is a bridge too far, especially where insurance is statutorily required. *Nunez* and *Custer* made no findings limiting insurance policies under Chapter 397 or *all* non-automobile liability insurance policies that *are* subject to statutory parameters.

Respondent also joins the Eleventh Circuit panel by failing to recognize that Chapter 397, like various automobile liability insurance legislation, is part of a broad spectrum of civil and criminal statutes that the Florida Legislature passed to address a specific, legislatively-recognized problem. There is no statute relating to homeowners/tenants insurance, property insurance, life insurance and fire insurance that make State agencies review each homeowner's or landlord's insurance as part of yearly licensing renewal designed to ensure client's health and safety. By contrast, Fla. Stat. § 397.501 expressly delineates statutory rights of "clients" that providers must ensure.[2]

Respondent references Section 397.501 *only* in quoting Petitioner's first certified question, but refuses to address the statutory language in its Brief. Section 397.501 begins by stating providers must ensure the protection of the rights guaranteed by Section 397.501 and ends with liability provisions in Section 397.501(10). That Section enumerates several important rights including Section 397.501(3)(a) which mandates:

> 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.

The notice of claims that was sent to Respondent for the Chapmans and the Amended Complaint

---

[2] The policy DCF, the regulatory agency, approved for Taylor had three parts with a $1 million policy limit.

expressly allege that Taylor failed to provide Petitioners with those statutorily 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. Pet. 9-12.

After denying certification of questions to the Florida Supreme Court, the panel's decision, like the district court's below, ignored the language of Section 397.501(3)(a) and settled principles of Florida law that *are* applicable to an insurer's duty to defend. The decision also contradicted Florida's four-corners rule, and adopted a rule of reformation to do away with substance abuse counseling allegations in the complaint otherwise applicable to the Chapmans. *See Jones v. Fla. Ins. Guar. Ass'n.*, 908 So. 211 435, 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).

As discussed in the Petition (pp. 21-36), the Panel erred by overlooking, indeed changing, the language of Chapter 397 and denying certification to the Florida Supreme Court.

Here, as in automobile cases, one must read the statutes requiring coverage *in pari materia*. "Related statutory 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." *Edwards v. Thomas*, 229 So.3d 277

(Fla. 2017) (citations omitted). Respondent's position is that statutorily-required liability insurance does not have to cover the statutorily-proscribed conduct that makes a provider liable under the statute. However, "[a] basic of statutory construction provides that the legislature does not intend to enact useless provisions, and courts should avoid readings that could render part of a statute meaningless." *Id.* Section 397.403(d) requires insurance (approved by the regulatory agency) and it is followed by § 397.501 which provides a declaration of client rights which must be ensured.[3]

When, as here, those client rights are violated, civil liability results under § 397.501(10). Under Florida law that is negligence per se. *See DeJesus v. Seaboard Coast Line R.R. Co.*, 281 So.2d 198, 201 (Fla. 1973). That liability has to be covered by Respondent's insurance. Respondent may not whittle away at those rights and protections through limitations and exclusions. *See Young v. Progressive Se. Ins. Co.*, 753 So.2d 80, 83 (Fla. 2000).[4]

---

[3] Chapter 397, like PIP, is part of a comprehensive effort by the legislature to prevent and address a major societal problem; here it is substance abuse. *See* Section 397.305.

[4] Statutorily-required coverage is clearly not limited to automobile cases. Worker's Compensation Insurance is not limited to employee's automobile injuries. *Travelers Indem. Co. v. PCR, Inc.*, 899 So.2d 779 (Fla. 2004). By way of further example, cases from other states reject Respondents arguments. *See Montgomery Cnty. Bd. Of Educ. v. Horace Mann Ins. Co.*, 860 A.2d 909 (Md. 2004) (reading a duty to defend into a policy and finding a statutory mandate for a county board to have comprehensive liability insurance to be "as much a compulsory insurance requirement as the mandatory motor vehicle liability

Thus, Petitioners agree that PIP, UM, and other statutorily-required insurances differ from policies not required by statute, to the extent that a statute's mandate or purpose cannot be ignored. Like PIP, UM, and other such statutes, Chapter 397 is designed for the protection of statutorily-identified injured persons, not for the benefit of insurance companies or providers or personnel who cause injury to others. *See Young*, 753 So.2d at 83. Indeed Section 397.501 does not simply protect clients from mere negligence. It protects them from other conduct that occurs during the course of their substance abuse treatment. *Compare* §§ 397.501(3) and 397.501(10). Respondent's personal injury policy contains provisions that help cover this conduct as well.

Respondent's argument is that, even though (1) liability insurance is required to provide substance abuse services, (2) by a statute that guarantees protection for enumerated client rights as well as (3) provides them a civil cause of action against insured providers who violate those rights; (4) insurers can avoid coverage required by Chapter 397 for claims (5) by innocent third-party beneficiary clients (6) injured by conduct for which its insured provider is expressly liable under the statute.

---

insurance"); Britamco Underwriters, Inc. v. A & A Liquors of St. Cloud, 649 N.W. 2d 867 (Minn. Ct. App. 2002) (applying the concept that policy provisions must not contravene applicable statutes to liquor-liability insurance required under a dram shop statute); *Younger v. Mo. Pub. Entity Risk Mgmt. Fund*, 957 S.W.2d 332 (Mo. Ct. App. 1997) (using the principles of statutory interpretation to apply the concept to statutorily-required insurance for medical malpractice liability that "supersedes the agreement of the parties").

This result so fundamentally affects client's rights it must be addressed by the Florida Supreme Court.

II. 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.

With regard to the second question, Respondent argues (on pg. 10) that "this case does not involve any conflicting facts whatsoever" and "[t]he *only* relevant facts that the Eleventh Circuit considered were the Petitioners' allegations in the Underlying Suit and the terms of the ACE Policy." Remarkably, Respondent quotes (on pgs. 7-8) some of the paragraphs the panel relied upon – complete with ellipses that omit references to "substance abuse" – to wholly convert the Complaint into a mental health counseling complaint governed by Fla. Stat. Chapter 491, rather than a substance abuse services complaint under Fla. Stat. Chapter 397. More importantly, the Respondent completely ignores, as did the panel below, the "relevant facts" in paragraphs 26 (alleging negligence per se under Section 397.501(3)(a)), 27, 29, 30, 33 (alleging Plaintiffs employed Taylor's services to treat Gregory Chapman and paid Taylor fees for such services "in reliance on the referral by the Sheriff's Office and Robert Taylor's representations of his competence as a substance abuse provider . . ."), 35, 40, 47, 48, 50, and 51. Paragraphs 29, 30, 47, 48, and 50 allege substance abuse treatment that Dr. Afield testified caused Gregory's death. *See* Pet. 9-17.

Under *Tolan*, those allegations are competing facts which must be considered when deciding a duty to defend. In this regard, *Tolan* follows exactly Florida's duty to defend caselaw. *See, e.g.*, 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").

Respondent also fails to address the district court's refusal to consider sworn affidavits, testimony in certified transcripts, and authenticated documents (including Taylor's Chapter 397 licenses since 1995) in violation of Fed. R. Civ. P. 56(c) and *Tolan*, supra. Pet. 38-39. Respondent admits it objected to this appropriate evidence, but simply asserts (in footnote 4, on page 11), "neither the district court nor the Eleventh Circuit ever ruled on any of ACE's objections." However, that evidence was offered by the Petitioner and neither the District Court nor the Eleventh Circuit discussed any of that evidence when holding there was no duty to indemnify.

The testimony of Mark Chapman, Dr. Afield, and Barbara Chapman's treatment notes, along with the testimony of other recipients of Taylor's substance abuse treatment is admissible evidence for summary

judgment purposes. It establishes duty, breach, and damages under Sections 397.501(3)(a) and (10). That is an indemnifiable claim. *See* Pet. 9-12.

Relying upon its objections, the Respondent also submitted no contrary evidence in the District Court. On appeal, it advanced the argument that ADHD counseling is not drug abuse or alcohol abuse counseling selectively citing a Florida statute that defines "Substance abuse" as "the misuse or abuse of, or the dependence on alcohol, illicit drugs, or prescription medications". Respondent italicized "misuse or abuse," but ignored the inclusion of "dependence on . . . prescription medication". "Dependence" means "the state of relying on or needing someone or something for support, or the like." Webster's Universal College Dictionary Gramercy Books, New York, 1997. Here, doctors prescribed medications that Gregory and his parents relied on or needed and that caused major troublesome mood swings Taylor claimed he could treat. Dr. Afield provided his formal opinion that in 1997 and 1998 substance abuse services covered both legal and illegal drug use. Despite its obvious materiality to the DCF trial, DCF's subject matter expert did not disagree with Dr. Afield's opinions. However, without any evidence or court discussion, that testimony has been ignored when considering indemnity. Allegations in the complaint, which captured duty, breach, and damage have also been ignored.[5]

---

[5] In its Brief, Respondent makes several statements which imply something it never actually argues. For example, it points out that the lawsuit against ACE was not filed for four years after

the Consent Judgment. Given the fact that the statute of limitations was 5 years in this case, and that no latches defense was advanced by Respondent one wonders why the issue was raised. The underlying case and related cases together with numerous appeals went on for more than 14 years. Criminal proceedings that involved numerous clients of Taylor, including the surviving Chapmans who were an integral part, also went on for more than 14 years through appeals in every available forum, under every available theory, until a successful federal court habeas reduced his sentence. Respondent's claims file contained a newspaper article relating to Taylor's arrest a few months after Gregory's death which signaled the prospect that many potential clients of his might come forward with claims. As for claims in these proceedings, Respondent received notices of the underlying and related cases and the status of the underlying case, including the amended complaint, hearings on various issues, and potential settlement efforts along with continued requests for Respondent's involvement. Respondent also references Taylor's criminal conviction without pointing out, very significantly, that this and the finding of fraud occurred after Gregory Chapman was treated and died and was not known by these innocent third-party beneficiaries of their policy. *Everglades Marina, Inc. v. Am. E. Dev. Corp.*, 374 So. 2d 517 (Fla. 1979). Similarly, the Complaint never alleged Taylor did not have a license as a substance abuse provider under Chapter 397 and an allegation of his licensure status was not required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH D. MAGRI
Counsel of Record
SEAN M. MCFADDEN
MERKLE & MAGRI, P.A.
5601 Mariner St., Ste. 400
Tampa, FL 33609
(813) 281-9000

Counsel for Petitioners

February 12, 2020