

NONPRECEDENTIAL DISPOSITION

To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

**For the Seventh Circuit
Chicago, Illinois 60604**

Submitted May 26, 2023*

Decided May 30, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 22-2510

KECIA PORTER,
Plaintiff-Appellant,

v.

USAA CASUALTY INSURANCE
COMPANY,
Defendant-Appellee.

Appeal from the United States District
Court for the Northern District of
Illinois, Eastern Division.

No. 19 CV 3912

Heather K. McShain,
Magistrate Judge.

ORDER

Kecia Porter sought compensation from her insurer, USAA Casualty Insurance Company, for injuries she suffered in a car accident. Porter brought a state-law action against USAA in Illinois court for breach of contract as well as vexatious or unreasonable conduct in delaying payment. USAA removed the case based on diversity

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

jurisdiction. The district court entered summary judgment for USAA, concluding that no reasonable jury could find that Porter satisfied her duty under the insurance policy to cooperate with USAA during its investigation of her claims. We affirm.

In 2009, Porter was riding in a car, driven by her then-husband, that collided with another vehicle. She submitted claims under her then-husband's policy with USAA, asserting that she injured her back, neck, knee, and shoulder in the accident. The processing of her claims apparently was protracted and, in 2017, at court-mandated arbitration with the other vehicle's driver, Porter agreed to receive \$20,000—of which \$5,000 would come from USAA—and release all claims arising out of the accident.

By then, Porter also had submitted to USAA a claim for additional medical benefits under her own policy's underinsured motorist coverage. She contended that she continued to suffer persistent pain because of the accident.

One requirement under her policy is that the insured "cooperate with [USAA] in the investigation ... of any claim or suit." Relatedly, the policy requires the insured to submit "as often as [USAA] reasonably require[s] ... to examination under oath." Based on these provisions, a claim examiner sent Porter a request for records from medical providers whom Porter had identified as treating her injuries. Though she turned over some records documenting her neck and shoulder pain, the claim examiner received no medical records of her back or knee injuries, nor did he receive records from the primary-care provider who treated her after the accident. After Porter testified in a deposition that she had been in car accidents in 2013 and 2015, the claim examiner requested that Porter sit for an examination under oath to determine whether the 2009 accident was the source of her injuries.

In 2018, Porter sat for the examination (which, she says, lasted around two hours) but had to leave early to catch a prearranged ride home. She then sent the insurer a cease-and-desist letter in which she accused USAA of using the investigation as an excuse to delay payment. USAA replied and asked that the hearing be continued so that the extent of her injuries, for which there were no medical records, could be assessed. Porter did not respond to USAA's requests for a follow-up appointment to complete the examination.

Porter, who is an Illinois citizen, then sued USAA in Illinois state court for breaching the insurance contract and for vexatiously or unreasonably delaying payment. *See* 215 ILCS § 5/155(1) (2004). She sought the maximum policy limit of

\$200,000. USAA, a citizen of Texas, removed the suit based on diversity jurisdiction. 28 U.S.C. §§ 1332, 1441.

USAA then moved for summary judgment on grounds that Porter's refusal to perform her obligations under the insurance policy—specifically, to cooperate in the investigation of her insurance claim—was a valid defense under Illinois caselaw to her claims. USAA, however, did not send Porter the notice that must be served upon pro se litigants opposing a summary judgment motion. See *Timms v. Frank*, 953 F.2d 281, 285 (7th Cir. 1992); N.D. ILL. R. 56.2. Upon learning of this omission, the district court ordered USAA to provide the requisite notice to Porter; the court also granted Porter leave to supplement her summary judgment materials within 30 days. But she filed nothing further.

The district court entered summary judgment for USAA. With regard to Porter's breach-of-contract claim, the court found the evidence undisputed that Porter breached her duty to cooperate with USAA in its investigation of her claim. The court explained that any reasonable jury would find that USAA exercised a reasonable degree of diligence in seeking her participation in the continued examination under oath, and that Porter's absence at the examination reflected a willful refusal to cooperate with USAA. The court also determined that any reasonable jury would find that Porter's conduct frustrated USAA's attempts to investigate the claim, and that USAA was prejudiced by her refusal to cooperate because it could not determine which injuries were caused by the 2009 accident. Finally, the court concluded that no reasonable jury could find that USAA's behavior was vexatious or unreasonable when it delayed payment of her claim while completing its investigation.

On appeal, Porter maintains that she substantially cooperated with USAA by sitting for part of the examination under oath and delivering a sufficient number of medical records to USAA. But as the district court concluded, Porter submitted no evidence from which a reasonable jury could find that she performed her material obligation under the policy to cooperate. Under Illinois law (which governs this dispute, see *Am. Bankers Ins. Co. v. Shockley*, 3 F.4th 322, 327 (7th Cir. 2021)), an insured's duty to cooperate obligates her to "disclose all of the facts within [her] knowledge and otherwise to aid the insurer in its determination of coverage under the policy." *Piser v. State Farm Mut. Auto. Ins. Co.*, 938 N.E.2d 640, 647 (Ill. App. Ct. 2010). The refusal to cooperate must also be willful. See *United Auto. Ins. Co. v. Buckley*, 962 N.E.2d 548, 556 (Ill. App. Ct. 2011). The undisputed evidence showed a willful refusal to cooperate: Porter refused USAA's requests to return for a continued examination under oath; she

later cut off communication with the company; and she reasserted her unwillingness to cooperate by sending the company a cease-and-desist letter.

Still, USAA can succeed on this defense only if it proves that it was substantially prejudiced by Porter's noncooperation. *See Piser*, 938 N.E.2d at 648; *Am. Access Cas. Co. v. Alassouli*, 31 N.E.3d 803, 808 (Ill. Ct. App. 2015). But the district court rightly concluded that USAA was substantially prejudiced. It was undisputed that Porter's claim required USAA to ascertain that her injuries traced back to the 2009 accident (and not one of the more recent accidents), and this inquiry could be carried out only with the benefit of additional medical records, including a completed examination under oath.

Porter next maintains that USAA waived its cooperation provision because she had the impression USAA was satisfied with the examination and needed nothing further from her. But the record shows that USAA explained to Porter its need for additional medical records and a continued examination under oath, and Porter does not identify any evidence suggesting otherwise. On this record, no reasonable jury could find that USAA waived the policy's cooperation clause.

Finally, Porter contends that the district court abused its discretion by not sanctioning USAA for failing to provide her the required *Timms* notice for pro se litigants. *See* 953 F.2d at 285; N.D. ILL. R. 56.2. Had she received the notice, she says, she would have filed additional materials (which she did not specify) to oppose summary judgment. But the district court did not err. The court, as soon as it learned that Porter did not receive the requisite notice, directed USAA to mail the notice to her and then granted her 30 days' leave to amend her summary judgment materials. Given that she filed no documents in response to the court's invitation, we do not see how she was prejudiced by the late disclosure.

AFFIRMED