No. 23-5406

IN THE

SUPREME COURT OF THE UNITED STATES

Kecia Porter **Petitioner**

USAA Casualty Insurance Co. **Respondent**

On petition For Writ of Certiorari
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONFOR WRIT OF CERTIORARI

KECIA PORTER/PRO SE
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QUESTIONS PRESENTED

1. Whether the 7th Circuit's decision is Under Color of Law Title 18, U.S.C., Section 242 an in error, contrary to well settled law, finding respondent was ***"substantially prejudiced"*** by petitioner's actions or inaction while not defending the insured or subrogation rights in a primary action; has been established as a question of fact to be decided by a jury and is not appropriate for summary judgment
2. Whether a federal court must follow the decisions of the state's highest court in summary judgment; that a question of prejudice presents a genuine issue of material fact which should be before a jury and not for summary judgement.
3. Whether well-settled law in Illinois Supreme court rule that **unless** the alleged breach of the *"cooperation clause" finding substantial prejudice,* the insurer in defending the insured in the **primary action**, it is **not** a defense under the contract.
4. Whether respondent's failure to plea "prejudice" as an affirmative defense, was "untimely" then is waived or forfeited(**F.R.8(C**)the magistrate's decision, Under the color of law Title 18, prejudiced the petitioner and violated the petitioner's right due process and equal protection.
5. Whether the 7th Circuit abused its discretion, arbitrarily and capriciously affirmed district courts misapplication of Rule56.2 *Notice to Pro Se litigants* "...*it learned that Porter did not receive the requisite notice it directed USAA to mail the notice to her and granted Porter 30 days leave to amend*..

When the movant fails to comply then "the district court **must** do so.

6. Is a 30- day notice to "file additional evidence "improper notice" if no Rule 56.2 is attached and notice does not warn petitioner of consequences of not responding.
7. Has a pro se litigant been "properly noticed" if she never received 30-day notice, the record shows no proof of mailing or delivery, violates due process and equal protection.
8. Whether movant's alleged breach of "cooperation" is contested by petitioner's filing more than 50 documents, pursuant to ***28 U.S Code sec1746*** declaration on "personal knowledge" presents a genuine issue of material fact
9. Whether filing documents on "personal knowledge" pursuant to **28 U.S Code sec1746** classified as "exhibits," denied petitioner's due process
10. Can a magistrate, under color of Law Title 18 U.S.C., Sec. 242 arbitrarily without motion, allow respondent to correct the record 8 months after all briefing when pro se litigant received no notice of Rule 56.2 per record.
11. Whether the District and 7th Circuit courts abuse its discretion denying pro se petitioner counsel when ***"exceptional circumstances"*** existed due to **COVID** and the complexities of litigation were not considered.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Porter vs. Lopez-Alba, Case No. 11M1302289
Circuit Court of Cook County (2012)
assigned new Case No. 14M1302575 (2014)
Judgement January 2017

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was MAY 30, 2023.

☒ No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C., Sec. 242: makes it a crime for a person acting under color of any law to willfully deprive a person of a right or privilege protected by the Constitution or laws of the United States; include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official's lawful authority.

5th /14th Amendment Due Process Rights: procedural; no one shall be "deprived of life, liberty or property without due process of law. The constitutional requirement that when the federal government acts in such a way that denies a citizen of a life, liberty, or property interest, the person must be given notice, the opportunity to be heard, and a decision by a neutral decision-maker.

Fourteenth Amendment Equal Protection: 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.

STATEMENT OF THE CASE

In 2009 Porter was in a MVA as a passenger driven by her ex-husband. Porter was the only person injured in the accident. It was determined through arbitration that the at-fault driver, carried policy limit of $20,000 liability insurance. Porter was covered as a passenger in a covered vehicle under Kelly Porter's policy with USAA, policy limits of $100,000($100,000/$200,000) and PIP medical benefits. USAA failed to pay any "reasonable" PIP medical benefits. Porter also was covered by USAA by her own UIM policy limits of $100,000/$200,000. On June 29, 2016 Porter was awarded policy limits of $20,000 in arbitration against one defendant, Lopez.

Porter fired her attorney after being pressured to sign a full- release with USAA and Lopez's insurer for less than the tortfeasor's policy limit. The judge ruled that USAA willingness to pay $5,000 on behalf of Lopez then demand Porter sign a full-release must include language to show Porter's signature will not forfeit her rights under "pending UIM claims" of Kelly Porter and her own. USAA knowingly misrepresented facts of policy provisions relating to coverages; telling Porter that her UIM was subject to $75.000 off-set. $25,000 is available. Porter had a $100,00 UIM. October 31,2017, USAA hired law offices of SpyratposDavis LLC to demand an EUO of Porter "*citing a need for medical records from 2009 MVA, 2013 and 2015 MVA*. Liability was fixed in the primary action. Porter signed several releases of records. USAA claimed that their attorneys "destroyed" Porter's medical records from 2009 through 2016. USAA failed to preserve evidence.i.e spoilage. USAA's first demand for Porter to sit for an EUO was October 31,2017. That request was aborted by USAA's attorney Chadwich W. Buckner. USAA claims adjuster, Arthur Cancino III contacted Porter confirming he had necessary medical records to assess the UIM claim(s). USAA was in possession of more than 2,000 pages of Porters medical records from 2006-2017 but, denied having records. USAA made a settlement offer of $25,000 November 29, 2017, telling Porter she had forfeited $75,000 of her UIM policy. Porter's counter-offered was denied. On February 21,2018 SparatoDavis LLC sent a new request for EUO to Porter. Porter maintained that USAA had waived its right to demand a EUO after accepting liability, engaging in negotiations and aborted the first request. USAA 2nd request came 16 weeks, 114 days later

Oct31,2017-Feburary 21,2018. Under undue pressure, Porter agreed to come attend scheduled EUO. Porter scheduled transportation with PACE disability services; for pick-up and return home. On April 11,2018 Porter attended the EUO, **516 days** between Porter's filing for UIM benefits and convening an EOU. The EUO questions were centered on prior lawsuits filed in Cook County and allegations of pre-existing medical knee conditions. Porter had no pre-existing conditions. Later, Porter again, sent a letter to attorneys for USAA alleging they had waived any right to EUO. The EUO is contraindicated for Porter due to medical conditions; she suffers with post-concussion syndrome, which affects her memory. After talks with USAA halted, Porter asked USAA to arbitrate the issues. USAA ignored the request. Porter filed lawsuit in Cook County Circuit Court, which was removed to Northern District of Illinois, **28U.S.C. sec. 1446(b)** Diversity Citizenship. USAA filed for summary judgment in May 21,2021. The Motion for Summary Judgment was fully briefed on July 30, 2021.Feburary 22,2022 the magistrate gave USAA until February 25,2022 to prove they had sent Porter the required notice of Rule 56.2 but, they had misrepresented the facts. There was no poof in the record of Porter being noticed. March 1, 2023 USAA amended its answer's to *"plaintiff's statement of additional facts*. On March 2,2022 USAA filed into the record an "untimely" notice of Rule 56.2 but, Porter never received it. The record contains no proof/certificate of mailing. On March 9,2022 judge docket gave Porter 30- days to file additional documents,7th Circuit cites, *" given defendant's undisputed failure to comply with L.R.56.2..."* however, Porter **never** received the 30- day notice therefore, she was unable to

comply. The record shows that the district court's notice does not inform Porter of any consequences and Rule 56.2 is not attached and no proof/certificate of mailing in the record. August 11,2022 Summary Judgment in favor of the Defendant, USAA CIC, District court citing, "*Any reasonable jury would find that defendant was "substantially prejudiced".* The magistrate adapted USAA's rendition of the facts. The magistrate failed to *make all inferences in the light most favorable to the nonmovant.* Judgment in favor of USAA is tantamount to a "**questionable windfall,**" against public policy and at the expense of the public. USAA never pled "prejudice" and "prejudice" is not a defense under this claim, as it is not a primary action per the law Illinois Supreme Courts. On August 25,2022 Porter filed a timely appeal. Porter was denied counsel. On May 30,2023, the order of the district court was **affirmed by the 7th Circuit Court of Appeals citing, "** *The district court entered Summary Judgment for USAA... found* ***undisputed*** *evidence that Porter breached her duty.,*." "*USAA was prejudiced by her to cooperate because it could not determine which injuries were caused by the 2009 accident*..." Porter had filed into the record, more than 50 documents pursuant to **28 U.S Code sec1746**, declaration of "personal knowledge which was classified by the district court as **"exhibits,**" to dispute USAA's claims and in support her claims. Porter now filed this appeal to the U.S Supreme Court.

REASONS FOR GRANTING THE PETITION

Rule 56.2 is clear that Pro se must be noticed but, here no notice was delivered me; forced to engage in the judicial process because of COVID, "proper notice" was detrimental. The implications are against public policy and inequitable. Next, ordinary automobile insurance policy is affected with considerations of public interest. The implications are that this decision conflicts with public policy and protecting the innocent injured third party-plaintiff/petitioner. The insurer, USAA is given a questionable windfall at the public's expense. I paid premiums on time and for more than 15yr. This judgement failed to acknowledge my cooperation. The final judgement under the color of law Title 18, deprives me of all constitutional rights and protections as a person with disabilities. This will forever change the rule of law of "substantial prejudice" must be an insurer defending the insured in a "primary action" to first party actions and permits an alleged lack to be fatal not technical. This is a win for insurance companies.

The issue Rule 8 (C): The insurer never plead "*prejudice*" which prejudiced me as I could not reply, therefore, denied me due process. Rule 8 (C).The district circuit court's ruling in an abused its discretion and misapplication of law.

1. I have emphatically denied, all alleged "*breach of cooperation.*" ***(Apx B, pg753)****: plaintiff responds that a reasonable jury could find she did not breach...because her attendance at the first EUO constitutes "substantial evidence of her attempt to cooperate..."* The record supports my claims

(125,127,128)(62#14) the dispute is a genuine issue of material fact. Illinois court follow *Piro*, *"prejudice" is a question of fact..".* The judgement should be reversed!

2. **The issue**: Breach of "*cooperation clause*" is **not** a defense in Illinois unless the alleged breach substantially prejudices the insurer in "defending its insured" in "defending the **primary** action" against the injured-third party claimant. This action was brought by me for failure of my insurer to pay the UIM(under insured motorist)claim, after the at-fault driver paid personal injury claim. **Reasons to grant the petition: The ruling is contrary** under Illinois law, whether the insurer was prejudiced, is a question of fact, not appropriate for summary judgment. It is well settled law that invoking the cooperation clause as a defense is only a defense in "**primary action**". The Supreme Court of Illinois applies: "...*to enable the insurer to determine whether there is a defense to a claim growing out of the accident and if so to properly defend it*. In this case, the insurer assumed no risk of collusion between the insured and injured-party. **Case :** The 7th Circuit decision is inconsistent and contradicts controlling Illinois appellant court decisions : ***Piro,* 162 Ill. App.3d N.E.2d** Held: *judgment in favor of the insurer, remanded to the trial court... the insurer demonstrated the existence of a question of fact as to whether it was prejudiced, the issue became one of substantial compliance and was for the jury.* **M.F.A. Mutual Insurance Co.v. Check (1977), 66 Ill.2d,Held:** *there was no breach of the cooperation clause that substantially prejudices the insurer in defending the primary action, it is **not** a*

defense under the contract. ***Piser v. State Farm Mt. Aut. Ins. Co.*, 405 Ill. App. 3d (1st Dist. 2010):** *"This is the test to be employed in our courts where the issue is a breach of the cooperation clause is not a defense under the contract, unless the alleged breach of the cooperation clause substantially prejudices the insurer in defending the primary action."* These decisions conflict with the judgment in my case, finding "substantial prejudice" although, not a primary action. USAA, insurer has nothing at risk and needs no defense. **State Farm Mutual Auto Ins. Co. v. Walker,F.2d Ct of App, 7th Cir: Held**: *An insurer is not prejudiced unless the breach produced a judgment less favorable to it in the tort. suit.* Illinois courts have historically examined the issue of an insured's failure to appear for an EUO(examination under oath) or failure to produce documents under the cooperation clause analysis, whether the carrier was prejudiced. ***(ApxB,pg753):plaintiff responds that a reasonable jury could find she did not breach...because her attendance at the first EUO constitutes "substantial evidence of her attempt to cooperate..."*** I sat for an EUO and deposition which supports cooperation (663). Courts have routinely allowed for an insured to sit for an EUO to cure any lack of corporation claims. Illinois Appellate Courts decisions is inconsistent with the 7th Circuit's decision not to "cure" any defect. The record supports USAA waived its request (**Doc#1,649**) **Crowell v. State Farm Fire Cas. Co. 259 Ill. App. 3d. N.E.2d (Ill. App.Ct. 1994):** *Plaintiff offered to submit to a sworn deposition and answer relevant questions. We reverse summary judgment entered in favor of defendant and*

remand. ***Piro v. Pekin Ins. Comp*, 162 Ill. App. 3d (5th Dist. 1987)**: *In reversing the circuit court, the appellate court focused on the aspects of the insured's conduct it found to be cooperative.* Other Courts conflict with 7th Circuit decisions that an insured should forfeit its policy due to immaterial or technical deficits without a trial. ***C-Suzanne Beauty Salon, Ltd. v. General Ins. Co. of America*, 574 F. 2d(2d Cir. 1978)**,:*The insurer moved for summary judgment on the basis that the insured failed to submit to examination. The motion was denied and the insured was ordered to sit for(EUO) examination under oath, the insurer showed no prejudice.* The decision of the 7th circuit to allow USAA "**unjust enrichment**" which forfeits my policy is in direct conflict with other courts that will not allow forfeit as "prejudice" is an issue of fact to be decided by a jury. ***(ApxB,753 ,pg5para2)**: Plaintiff argues that the defendant waived its right to ...EUO condition is abatement not forfeiture).* In construing the cooperation clause, the New York Court of Appeals has held that *"a breach which will defeat a recovery cannot be based upon technical or unimportant omissions or defects..." followed by willful and fraudulent withholding of information but, not by summary judgment, by trial.* In ***Mortgage Affiliates Corp. v. Commercial Union Ins. Co., 27 A.D.2d,N.Y.S.2d (1967**:The court ordered dismissal of the action, but it made its order conditional the sanction of dismissal would not be applied if the plaintiff complied with the policy within 20 days. Illinois held similar conditions. **Crowell v .State farm fire &cas.631 N.E 2dill.app.1994: Held:** Reversed, grant of summary judgment to insurer where*

the trial court failed to allow the insured to "cure his noncompliance" with his duty to cooperate before entry of summary judgment. whether the insurer was prejudiced by the delay, is a question of fact which is ***not*** *appropriate for summary judgement.* ***Roberts Oil Co. v. Transam. Ins. Co.*****, 113 N.M. P.2d (1992) Held:** *the insurer* "must demonstrate *substantial prejudice as a result of a material breach of the insurance policy by the insured before it will be relieved of its obligations under a policy.*

3. **The issue: Rule 56.2:** The 7th circuit, federal and state courts agree that non-represented party must receive Rule 56.2. In this case, the magistrate judge failed to follow the long standing rule, *"... given defendant's undisputed failure to comply with L.R.56.2..."* Although she was aware of the failure of USAA to send local rules, Rule 56.2 to me; the magistrate choose not to send me the rules herself. This decision under the color of law **Title 18 U.S.C., Sec. 242**, arbitrary and capricious because the magistrate instead, "...*directed USAA to mail the notice to her."* However, I never received it. I was prejudiced by lack of notice and filed no affidavits, pursuant to **28 U.S Code sec1746** file declaration on "personal knowledge(**Apx B,742**): "...*plaintiff responded to defendant's motion for summary judgment ...by filing ...exhibits list with more than 70 pages..."(125,127,128)* (**Apx** D).
4. **The Issue**: Per docket the district court gave 30 days to me to file additional documents(**742**) but, I never received any notices. Per the record, this notice was "improper" because it did not inform me of any consequences of not

replying; although I did not receive notice, the decision of the 7th Circuit in Ross conflicts with my decision as Ross was reversed. **In Ross v. Franzen, 777 F.2d(7th Cir):** *The magistrate failed to give notice of consequences. Held: Ross was denied a fair and just disposition of his claim. Ross was Reversed* but, no that decision was made in my case by the 7th circuit. **Reasons to grant the petition:** The decision in my case notice of Rule 56.2 is inconsistent and directly conflicts with 7 circuits own rulings in **Ross v. Franzen and Lewis v. Faulkner**. 7th cir. decision is against public policy. Persons without attorneys look to the court to adhere to its own rules and provide safeguards when attorneys do not. Rule 56.2 must be given to a pro se litigant to try to balance the beams of power. Courts ruled that the notice of Rule 56.2 should be included in the appellant record if notice was given. I never received the courts 30-day notice per the record and there is no proof of mailing.; if notice is important then it should be sent certified/ return receipt. The county was in the mist of COVID and reports of mail delivery were greatly impacted, this should constitute "extreme circumstances"? The notice was defective, and no Rule 56.2 is attached to the magistrate docket entry. **Cases contrary**: These cases would be contrary to the 7th circuit court's position, ***Bryant v. Madigan (1996)* 7 Cir:** The court's notice gave additional time to submit material by Fed.R.Civ.P. 56," but did not say anything about the consequences of not responding. 7th Cir. ruled summary judgment must be reversed based on the "defective notice." In my case, **(7 Cir, pg4, para4)**

"giving that she filed no documents... we do not see how she was prejudiced by the late disclosure. **Lewis v. Faulkner, (7th Cir.1982) and Ross v. Franzen, (7th Cir.1985)**: 7th Cir found that, *"... the district court itself did not correct that situation".* **Lewis v. Faulkner(7th Cir. 1982):***If notice is not given to the unrepresented parties, granting summary judgment may be invalid."* A reasonable opportunity presupposes notice. The 7th Circuit's decision is direct conflicts with these district courts: ***Ruotolo v. IRS, 28 F.3d (2d Cir.1994: Held:*** *summary judgment should not be entered by default against a pro se plaintiff who has not been given any notice requiring the filing of opposing memoranda within 21 days of motion, where court had not advised plaintiffs of the rule. Reversed.* **Phillips v. U.S. Board of Parole, U.S.App.D.C.F.2d (1965).** Appellant in this case was not represented by counsel; *nothing in the record indicates that he was notified that failure to respond to appellees' motion and affidavit would result in the entry of summary judgment against him.*

5. **Fraud, bad- faith and vexatious conduct:** *First-party bad faith is an intentional tort that "typically occurs when an insurance company consciously engages in wrongdoing during its processing or paying of policy benefits to its insured."* **Hein v. Acuity, 731 N.W.2d (S.D. 2007)**.USAA concealed its intent to void my UIM insurance policy(**684**). I submitted documents (**680**) which proved beyond doubt that USAA paid $5,000 on behalf of at-fault driver to third-party claimant is not "underinsured" if the settlement from

the tortfeasor is less than the policy amount. But, the Circuit Court ordered USAA to specify in the release that no pending UIM claim's will be voided by the release(**636,para6)(681, 684para1st line**). USAA then misrepresented coverage under the policy; specifically, that USAA was entitled to $75,000 off-set(**684,pg56)**, thereby reducing my $100,000 policy to an available amount of $25,000(**638**) for reimbursement for injuries sustained of more than $100,000(**703**). USAA denied any waiver of EOU (**Doc#1**) **Downing v. Wolverine Insurance Co., Ill. App.**: *Rights under the policy may be lost by waiver or estoppel.* When the insurer's vexatious conduct is supported by unreasonable delay; USAA waited 516 days between Porter's filing for UIM benefits in 2016 and convening an EOU April 2018, "unreasonable delay". **Reasons to grant the petition:** The decision by the 7th Circuit that USAA should be relieved of its duty to pay under the policy when "prejudice is not a defense and is inconsistent with Illinois Supreme ***MFA Mutual Ins. Co.*** An insurance company is liable for bad faith "*only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis*"). USAA never denied the claims to avoid proof of bad faith. The record and **Doc#1** prove of waiver. Once again USAA invested in "alternative facts." Although the court should draw all inferences in the light most favorable to the party opposing the motion, the court failed to do so. **This question of bad faith is generally one for the finder of fact.** These 7th Circuit decision is inconsistent with these cases. **Dakota, Minn. & E. R.R., 771**

N.W. 2d . *Issues of fact should be for a jury to decide not in Summary judgement.* ***Oregon Auto. Insur. Co. v. Salzberg (1975), Wash.2d:*** *manifested in public policy consideration would be diminished, discounted, or denied if the insurer were relieved of its responsibilities. No prejudice concerning its investigation, presentation and defense of the tort case. Such relief, absent prejudice, would be tantamount to a questionable windfall for the insurer at the expense of the public. Illinois Supreme Court agreed:* ***MFA Mutual Ins. Co. v. Cheek, NE 2d, Ill: Supreme Ct. 1977****: Such relief, absent a showing of prejudice, would be tantamount to a questionable windfall for the insurer at the expense of the public.* Under the color of law **Title 18 U.S.C., Sec. 242**, the magistrate violated my due process rights and equal protection having not been properly served Rule 56.2

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted, on this 14 day of August, 2023

Kecia Porter Kecia Porter

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