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CLAIMS LAW UPDATE

A SUPPLEMENT TO CLAIMS LAW COURSES IN CASUALTY, PROPERTY, WORKERS' COMPENSATION, FRAUD INVESTIGATION, AND AUTOMOBILE

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AEI CLAIMS LAW QUIZ

DOES AN INSURER HAVE A DUTY TO PROTECT AN INSURED TAKING PHOTOS OF AN ACCIDENT SCENE IN SUPPORT OF A CLAIM?

[Ref. Tort Concepts, Paras. 1.05 and 3.01; Good Faith Claims Handling, Para. 1.02]

FACTS: Lorraine Kenyon lost control of her car on a wet road and struck a guardrail. She wasn't injured, but the vehicle was inoperable. She called her husband, Theodore, and her auto insurer, Elephant Insurance Company, to report the accident. After a brief exchange about the accident and whether Kenyon was okay, Kenyon asked the insurance representative, "Do you want us to take pictures?" The insurance representative answered, "Yes, ma'am. Go ahead and take pictures. ...And we always recommend that you get the police involved but it's up to you whether you call them or not." There was no conversation about the time, place, or manner for taking the photos.

At some point, Theodore arrived at the scene of the accident. While his wife was still on the phone with the insurance representative, another driver lost control on the slick road and struck and killed Theodore who was off-road taking photos of Kenyon's vehicle. The other driver also collided with Kenyon's vehicle, which caused Kenyon to sustain injuries.

Kenyon filed wrongful death and survival actions against Elephant and the other driver. The Texas Supreme Court summarized her claims against Elephant, which were based on the breach of the duty of good faith and fair dealing, general negligence, and negligently assuming a duty of care when one did not exist:

> Against Elephant, she alleged several negligence theories – including ordinary negligence, negligent training and licensing, negligent undertaking, and gross negligence – and claims related to Elephant's handling of her claim for uninsured/underinsured motorist (UIM) benefits. All of the negligence claims were based, in whole or part, on Kenyon's contention that Elephant's call-center employee was negligent in "instructing" her to take unnecessary photographs of a single-vehicle accident because the instruction to do so substantially increased the risk of harm to Theodore. Kenyon argued that Elephant failed to train its first-notice-of-loss representatives to instruct insureds at the scene of an auto accident "in a safe and competent manner." Kenyon alleged that, due to the "special relationship" between an insurer and insured, Elephant had a general "duty to act as a reasonable and prudent insurance company" and breached that duty "when it instructed the insureds to take photographs from the scene." If such a duty did not already exist, she alleged that one arose when Elephant affirmatively acted to guide her through the post-accident claims process.

During discovery, the insurance representative who answered Kenyon's call testified that she was trained to obtain information about the accident and to encourage the insured to take photos of the accident scene, but was not trained to inquire about the insured's safety or to ask whether the insured was in a safe location. The trial court ultimately granted summary judgment in favor of Elephant on all claims except for Kenyon's UIM claim.

The appellate court reversed and noted that the insurer's duty of good faith and fair dealing could come into play because taking accident scene photos was related to "the processing or paying of claims," especially given that the policy required the insured to provide Elephant with all loss information as soon as practicable. More specifically, the appellate court believed that when an insured calls to report an accident an insurer has a duty to protect the insured's safety when it provides post-accident guidance. Finally, it found that even if there was no initial duty of care there was some evidence that Elephant assumed one, because the insured complied with the request to take photos in order to obtain policy benefits and it was this activity that increased the risk of harm to Theodore and ultimately contributed to his death.

QUESTION: Does an auto insurer owe a duty of care for the safety of an insured who is taking photographs of an accident scene in support of an insurance claim?

ANSWER: No, according to the Supreme Court of Texas in *Elephant Ins. Co. v. Kenyon,* 644 SW3d 137 (Tex. 2022). Deciding an issue of first impression, the court held that an insurer has no duty to process a single-vehicle accident claim without requesting photos of the accident scene, and asking or allowing the insured to do so was not a breach of the duty of good faith and fair dealing. Similarly, the insured's negligence claims failed because the act of taking photos did not increase the risk of foreseeable harm to the insured thereby requiring the insurer to give a warning or do anything else to protect the insured's safety. Finally, the insured's negligent undertaking claim was also rejected because the insurer did not undertake to direct or instruct the insured on how to go about taking the photos and, as a result, it assumed no duty of care.

The court began its analysis by rejecting the insured's claim that the insurer breached its duty of good faith and fair dealing. In so doing, the court acknowledged that a special relationship arises out of an insurance contract due to the unequal bargaining power of the insured and insurer. It also recognized that this special relationship necessitates a duty of good faith and fair dealing to protect an insured from an insurer engaging in "unscrupulous conduct," such as unreasonably delaying or denying benefits on valid insurance claims. The court, however, rejected the insured's argument that the duty applied to taking photos at the scene of an accident:

> The duty Kenyon urges the Court to adopt here bears no resemblance to the duty of good faith and fair dealing, which *Arnold* and its progeny have applied only to issues of timeliness and "unscrupulous" conduct in the investigation, processing, and payment of claims. Kenyon's negligence and gross negligence claims against Elephant for lack of appropriate "guidance" are not based on "unequal bargaining power," "the nature of insurance contracts," "taking advantage" of the insured's misfortunes, "bargaining for settlement or resolution of claims," or the deprivation of any contractually assured benefit. Neither the animating rationale for the duty of good faith and fair dealing nor any precedent supports extending its scope to encompass post-accident guidance inquiring about, ensuring, or protecting an insured's safety. In short, while an insurer owes an insured a duty of good faith and fair dealing, that duty is not applicable to the conduct alleged here.

Turning to the claims of negligence and gross negligence the Texas Supreme Court recognized that the threshold issue in any negligence suit is the existence and scope of the defendant's duty of care. The court began by reviewing the standard used to determine whether a duty exists:

> To determine whether a duty exists and what its parameters are, we apply what are commonly called the "*Phillips* factors." This inquiry requires us to "weigh the risk,

> foreseeability, and likelihood of injury against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." In making this assessment, we also consider "whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm." Here, the relevant risk of harm is a car running over a pedestrian standing adjacent to a roadway taking pictures of an accident scene.

Applying the law to the facts, the court first noted that the insurer had no control over the actions of the third party driver and that there was no evidence that the insurer was responsible for Theodore being at the scene of the accident. More importantly, however, the court emphasized that "foreseeability" in the context of determining the existence and scope of a duty of care not only encompasses recognizing the existence of a "general danger" but also the "specific danger" that caused the insured's harm. This was important because the court ultimately concluded that while there is a general danger associated with standing on the side of the road, that danger is not increased by the activity of taking photos:

> The general danger of getting hit by a car may be reasonably foreseeable if an insured is "instructed" to take pictures at the scene of an automobile accident or if such a request is issued without also warning the insured to "be careful" or without first inquiring whether the insured believes it is safe to do so. But that is true only because the danger of getting hit by a car when standing on the side of a road exists regardless of the activity being undertaken at the time and regardless of the care one is taking for one's own safety. The danger is no more or less foreseeable because photographs are being taken. The likelihood of injury was no greater than if Kenyon had exited her vehicle to depart the scene or if she was standing on the side of the road talking to a tow-truck driver or a first responder.
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> The risk of harm to a third party not involved in the accident who arrives on scene at some later point in time, like Theodore, is not reasonably foreseeable. ...Foreseeability requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury. ...Even if the insurer encourages the insured to go ahead and take pictures, there is no reason for an insurer to anticipate that the insured will do so in dangerous conditions or circumstances.

The court also concluded that if the accident was foreseeable to the insurer it would be equally foreseeable, if not more foreseeable, to the insureds both of whom "were better situated to contemporaneously assess their physical safety and act accordingly." The court implied that the hazards the insureds faced were open and obvious and that there is no duty to warn of open and obvious dangers.

Finally, the court dismissed the insured's claim for the negligent undertaking of a duty. The court began its analysis by recognizing the key issue was whether the insurer acted in a way that required the imposition of a duty where one otherwise would not exist. Answering the insured's phone call and telling the insured to take photographs of the accident scene, in and of itself, did not give rise to a duty to protect the insured. More importantly, there was no evidence that the insurer directed the insured on how to go about taking the photos:

> Further, Kenyon does not allege, and the record does not contain any evidence, that Elephant's employee undertook to guide the Kenyons through the process of taking photographs – the activity Kenyon alleges increased the risk of physical harm. For instance, Kenyon does not contend (and the record does not contain any evidence) that Elephant's employee undertook to direct her or Theodore as to when and how to take any pictures. Elephant's employee also did not offer Kenyon or Theodore any safety advice, and Kenyon testified that she did not request any safety advice nor rely on Elephant's employee to provide it. Finally, not giving a safety warning is an omission, not an undertaking. In short, neither Elephant nor its call-center employee undertook necessary

protective action, and Kenyon did not detrimentally rely on anything Elephant's employee said (or did not say) with regard to ensuring the safety of person or property.

In short, neither the insurer nor it's representative engaged in any affirmative actions or conduct that would necessitate taking steps to protect the insured.

CONCLUSION: On a matter of first impression, the Texas Supreme Court held in *Elephant Ins. Co. v. Kenyon*, that an auto insurer was not liable for an insured's death that occurred while taking photos of an accident scene in support of an insurance claim. It's clear from the court's ruling that this situation does not encompass the insurer's duty of good faith and fair dealing because it has nothing to do with the insurer's superior bargaining position, its failure to treat the insured fairly and honestly, or its failure to defend or indemnify the insured in a third party claim. The insured's negligence claims were more complicated because the existence and breach of a duty of care will almost always depend on the specific facts of the claim. The court, however, determined that the underlying facts and surrounding circumstances in *Kenyon* did not create a duty for the insurer to protect the insured at the accident scene, especially since the insurer did not direct the insured on how to take the photos or offer any related safety advice. Finally, the insurer did not assume a duty of care merely by answering the insured's call and instructing or allowing the insured to take photos of the accident. While it's unclear whether the court would ever recognize such a claim, at the very least the insured would have to prove the existence of an affirmative act beyond merely requesting photos in support of the claim. Such an act did not occur in this case.