

## Texas Justices Say Insurer Owed No Legal Duty In Fatal Crash

By **Hope Patti**

Law360 (April 22, 2022, 4:48 PM EDT) -- The Texas Supreme Court reversed an intermediate appellate court's ruling Friday that an insurer owed a duty to its insured to issue a safety warning about taking photos at the scene of a car accident, saying the policyholder's negligence claims fail without an applicable legal duty.

The state justices reinstated a trial court's summary judgment ruling in favor of Elephant Insurance Co., which found the insurer had no duty to ensure the safety of policyholder Lorraine Kenyon or her husband while guiding her through the post-accident claims process.



The Texas Supreme Court reversed a lower appeals court decision that had ruled against an insurer after a fatal accident, finding that the policyholder's negligence claims fail because the insurer does not owe a duty of care. (Photo by John Deacon/courthouses.co)

Kenyon was involved in a single-car accident in 2016 when she lost control on a rain-slick road and struck a guardrail. While she was on the phone with an Elephant representative, Kenyon's husband, Theodore, arrived at the scene and began taking photos of the damage. Theodore Kenyon was fatally struck by another driver who lost control of a vehicle.

"Even if Elephant's employee had some real or perceived measure of control at the time, she did not have a duty to warn of obvious dangers because Kenyon and Theodore had superior knowledge of the

conditions and the best opportunity to avoid the harm," Justice John Phillip Devine said. "Any benefit of imposing a duty to warn or inquiring about the insured's safety is negligible at best."

Lorraine Kenyon, whose injuries were not life-threatening, later filed a wrongful death and survival action against Elephant and the other driver. She asserted several claims for negligence against the insurer, as well as claims relating to Elephant's handling of her request for uninsured and underinsured motorist benefits, according to court filings.

The trial court subsequently granted summary judgment to Elephant, finding that the insurer owed no duty to the Kenyons with respect to the negligence and gross negligence claims.

Kenyon filed an interlocutory appeal, arguing that the insurer had a duty to exercise reasonable care in providing post-accident guidance so as not to increase the risk of harm to an insured. In a split decision, a three-judge panel for the Fourth District Court of Appeals affirmed the trial court's ruling.

But on rehearing, the full appeals court reversed the ruling as to Kenyon's negligence and gross negligence claims in a divided opinion and held that Elephant does owe a duty of care to its insureds.

Kenyon argued that the "special relationship" between an insurer and insured gives rise to a duty of care, the court said, and Elephant agreed that the nature of insurance contracts results in a special relationship that imposes a duty on insurers to act fairly and in good faith.

However, in Friday's opinion, the Texas high court said it agreed with the insurer that the duty of good faith and fair dealing does not encompass the negligence that Kenyon alleged.

Justice Devine said the duty that Kenyon urges the court to adopt "bears no resemblance" to the duty of good faith and fair dealing, which applies only to "issues of timeliness and 'unscrupulous' conduct in the investigation, processing and payment of claims."

The duty of good faith and fair dealing does not apply to post-accident guidance ensuring an insured's safety, the justice said.

The risk of getting hit by a car while standing on the side of the road would have existed regardless of the activity being carried out, which, in this case, was taking photos of the damage, the justice said.

The risk of harm to Theodore Kenyon, a third party who was not involved in the initial accident, was not reasonably foreseeable to the insurer, Justice Devine said, though, if it were, the risk would have been equally if not more foreseeable to someone in the Kenyons' position.

The court also rejected Kenyon's assertion that the insurer owed a duty under a negligent-undertaking theory, saying Elephant and its call-center employee did not engage in an "affirmative course" of action necessary for the protection of the insured nor did Kenyon rely on the employee's guidance to ensure her safety. Justice Devine added that the employee's failure to give a safety warning is an omission, not an undertaking.

Justice Evan A. Young said in a concurring opinion, in which he was joined by Justice Jimmy Blacklock, that the "court's clear and well-written opinion faithfully and accurately applies our precedents regarding the judiciary's role in creating new duties under the tort of negligence." Justice Young suggested, however, that in an appropriate case, the court should reexamine how it approaches the question of new tort duties.

Elizabeth Brabb, counsel for Elephant, told Law360 in an email that the insurer and its legal team are "pleased that the Texas Supreme Court properly and unanimously declined to expand the existing duties of insurers and affirmed the original judgment of the trial court and panel, refusing to hold Elephant responsible for this tragic accident."

"We continue to express our sincerest condolences to the Kenyon family," she concluded.

Counsel for Kenyon did not immediately respond to a request for comment Friday.

Justices John Phillip Devine, Evan A. Young and Jimmy Blacklock sat on the appeals panel.

Elephant is represented by Richard W. Espey of Espey & Associates PC, by Michael W. Eady, Roger D.

Higgins and Elizabeth Z. Brabb of Thompson Coe Cousins & Irons LLP and by Nissa M. Dunn of Houston Dunn PLLC.

Kenyon is represented by Ryan G. Anderson of the Law Offices of Ryan G. Anderson PLLC, by Jason J. Thompson of the Thompson Law Firm and by Daniel J.T. Sciano and Grant McFarland of Tinsman & Sciano Inc.

The case is Elephant Insurance Co. LLC v. Lorraine Kenyon, case number 20-0366, in the Supreme Court of Texas.

--Editing by Emma Brauer.

Update: This story has been updated with comment from Elephant's counsel.