

# Construction Law

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## Contract Protects Construction Company from Liability in Wrongful Death Action

*Rogers v. Texas Sterling Construction, L.P.*, No. 14-05-01061-CV, 2007 Tex. App. LEXIS 2408 (Tex. App.—Houston [14th Dist.] Mar. 29, 2007).

While walking towards a bus stop, Leroy Brown tripped and fell over an exposed piece of reinforcing bar sticking out of the concrete sidewalk in front of a supermarket where the defendant, Texas Sterling Construction, was performing construction. Brown was admitted to the hospital with a spinal fracture and died one week later. The plaintiff, Brown's estate representative, brought a wrongful death and a survival action against Texas Sterling, arguing the company negligently failed to: (1) safeguard pedestrians from work materials; (2) take necessary steps to protect Brown from ongoing construction work; (3) take proper measures to block pedestrians from walking in the construction area; and (4) provide proper and safe means of crossing the street or catching a bus. Texas Sterling filed a motion for summary judgment, arguing the plaintiff failed to present any evidence that it owed Brown a duty of care. The trial court granted Texas Sterling's motion and the plaintiff appealed.

As evidence of duty, the plaintiff pointed to the contract between Texas Sterling and the Houston Metropolitan Transit Authority wherein Texas Sterling assumed responsibility for reconstruction of a portion of the road and obligated Texas Sterling to provide "safety in the area." The plaintiff also relied on the deposition testimony of Texas Sterling's risk manager who stated the company had the "ultimate responsibility" to keep the area safe, clear, clean and functional, and that the company would be responsible if it did not keep the sidewalk debris-free. Finally, the plaintiff relied on the testimony of the emergency medical technicians (EMTs) who treated Brown at the scene. The EMTs stated that the area where the incident occurred was under construction and no warnings or barriers were in place.

Texas Sterling's chief counter-argument was that the sidewalk area where Brown was injured was located beyond the work area as defined by the express language of the contract. Thus, Texas Sterling was not responsible for the sidewalk and not liable for Brown's injuries and death. Texas Sterling rebutted the plaintiff's reliance on its risk manager's testimony, stating that the plaintiff's reliance was misplaced because the risk manager repeatedly testified that the accident scene was outside the scope of the contract.

The court first noted that because Texas Sterling did not own the sidewalk, it was imperative for the plaintiff to establish the company exercised control over the area. Both the contract and deposition testimony repeatedly referred to Texas Sterling's duty as applying only to the contractually-defined "job site" or "work area" and, according to the plain terms of the contract, the accident site did not fall within the contractually-defined work area. Additionally, the court noted that the EMTs' testimony only created speculation or surmise as to whether Texas Sterling controlled the area. Accordingly, the appellate court affirmed the lower court, holding the plaintiff failed to present evidence that Texas Sterling controlled the area and thus owed Brown a duty of care.



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