

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-002204-MR

JEWELL L. STRANGE, INDIVIDUALLY AND  
AS EXECUTRIX OF THE ESTATE OF  
JOHN B. STRANGE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 02-CI-006491

ALBERT KAHN ASSOCIATES, INC.;<sup>1</sup> AND  
TURNER CONSTRUCTION COMPANY

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \* \* \*

BEFORE: BARBER, MINTON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jewell L. Strange, Individually and as Executrix of the Estate of John B. Strange, bring this appeal from separate summary judgments entered October 6, 2004, by the Jefferson Circuit Court, dismissing her wrongful death action against Albert Kahn Associates, Inc. (Kahn) and Turner Construction Company (Turner). We affirm.

---

<sup>1</sup> The Notice of Appeal erroneously names this appellee as Albert Kahn & Associates, Inc.

On August 28, 2002, Strange filed a complaint in the Jefferson Circuit Court against, *inter alios*, Kahn and Turner. Therein, she alleged that her husband, John Strange, contracted lung cancer as a result of exposure to asbestos while employed at the General Electric Appliance Park (Appliance Park) in Louisville, Kentucky. John Strange died from lung cancer on December 9, 2001.

Strange specifically maintained that Kahn was the architectural engineering firm responsible for the design of Appliance Park. The construction began in the early 1950s. It was alleged that Kahn performed a total of fifty-two projects for Appliance Park from 1951 through 1970. Strange contended that Kahn used asbestos for pipe insulation, transit sidings, roof flashings, and high temperature generating equipment. Strange asserted that Kahn was negligent in its use of asbestos at Appliance Park. Strange also asserted that Turner, the general contractor for the construction of Appliance Park, was also negligent in installing asbestos during construction.

Thereafter, Kahn and Turner both moved for summary judgment. Strange responded to Kahn's motion for summary judgment but failed to respond to Turner's motion for summary judgment. On October 6, 2004, the circuit court entered separate summary judgments dismissing the claims asserted against Kahn and Turner. This appeal follows.

Strange contends the circuit court committed error by entering summary judgment dismissing her claims against Kahn. Summary judgment is proper where there exist no material issue of fact and movant is entitled to judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991).

In a well-reasoned opinion, the circuit court concluded:

Kahn does not dispute that the documents they prepared called for the use of asbestos containing products as an alternative. Both parties agree that asbestos was used during the construction of General Electric Appliance Park. Kahn denies knowing the danger of asbestos until the 1980's. . . .

Kahn contends that this case involves an allegation of professional negligence by architects and engineers. As such, Kahn believes Ms. Strange needs an expert witness to testify regarding the standard of care for architects and engineers during the time that Kahn was providing services at General Electric Appliance Park.

Ms. Strange presents two expert witnesses. Barry I. Castleman avers that the danger of asbestos was known prior to 1940. He further states that articles were published in scientific and medical journals during the 1930's and in other popular sources during the 1940's and 1950's. Mr. Castleman has a Masters in Environmental Engineering and a Doctorate of Science in Hygiene and Public Health. He has never been involved in the design or construction of a building.

Steven Berger, plaintiff's other expert witness, presents evidence of commercially available alternatives to asbestos during the time period that Kahn provided design drawings and specifications for General Electric Appliance Park. Mr. Berger has a Bachelor's degree in Chemical Engineering and a Masters in Civil Engineering. He has prepared architectural drawings and engineering drawings and specifications for underground storage tanks. His experience does not include preparing drawings or specifications for industrial or manufacturing facilities. He is aware that asbestos was commonly used in industrial facilities in American during the 1950's and 1960's.

Neither of Ms. Strange's two expert witnesses will testify regarding an architect or engineer's standard of care during the time Kahn provided services for General Electric Appliance Park. None of Ms. Strange's witnesses can state when Kahn knew about the danger of asbestos.

. . . .

Architects and engineers are licensed professionals in the Commonwealth of Kentucky. Ky. Rev. Stat. Ann. §323.020 and Ky. Rev. Stat. Ann. §322.040. These licensed professionals present themselves as having special knowledge, skill or expertise. A person who presents oneself as having special knowledge, skill or expertise must perform according to that profession's standards. Mullins v. Commonwealth Life Ins. Co., Ky., 839 S.W.2d 245, 249 (1992). If the professional does not meet the standards, then the professional may be liable under the tort principles. Id.

Expert testimony is not always necessary just because special learning, knowledge or experience is involved in the case. Commonwealth of Kentucky, Dept. of

Hwys v. Robbins, Ky., 421 S.W.2d 820 (1967). Ms. Strange believes the jury is qualified to determine if Kahn fell below the standard of care by specifying the use of asbestos when alternatives were available. Knowing that alternatives were available does not give the jury enough information to determine if Kahn fell below the standard of care.

To determine whether the degree of care and skill exercised by a professional in a given case meets the standard of care, the act or failure to act is judged by the quality of professional conduct customarily provided by members of that profession. Daugherty v. Runner, Ky., 581 S.W.2d 12, 16 (1979). Although alternatives to asbestos were available, there is no indication that specifying the use of asbestos during the 1950 or 1960's fell below an architect or engineers standard of care. An expert witness with knowledge regarding design drawings and specifications for buildings built during the 1950 and 1960's is necessary to help the fact finder determine the standard of care and whether Kahn met that standard of care.

Ms. Strange's negligence action requires the establishment of a duty, the breach of that duty and consequent injury. Illinois Central R.R. v. Vincent, Ky., 412 S.W.2d 874, 876 (1976). Ms. Strange has failed to establish an architect or engineer's standard of care during the 1950 or 1960's. Therefore, she has failed to establish Kahn's duty or that Kahn breached a duty.

Strange asserts the circuit court erred by concluding that an expert witness was required to establish Kahn's standard of care. In a professional negligence case, expert testimony is ordinarily required to establish the standard of care; an

exception is recognized where the negligence of the professional is so apparent that a layperson would have no difficulty recognizing it. Baptist Health Care Systems, Inc. v. Miller, \_\_\_ S.W.3d \_\_\_ (Ky.App. 2005). Stated differently, an expert is required to establish the standard of care, unless such standard is within the common knowledge of laypersons.

Strange seems to be arguing that expert testimony is unnecessary in this case because the common knowledge exception is applicable. We disagree. In our opinion, it was incumbent upon Strange to present expert testimony establishing the standard of care of a professional architect or engineer in the 1950s when Kahn designed Appliance Park. Indeed, the proper standard of care applied to architects and engineers in the early 1950s regarding the use of asbestos in commercial construction is not within the common knowledge of laypersons. Moreover, as pointed out by the circuit court, Strange's experts, Dr. Barry Castleman and Steven Berger, did not testify concerning the standard of care applicable to an architect or engineer in the 1950s. Considering the complete absence of expert testimony upon Kahn's standard of care and that such standard is not within the common knowledge of laypersons, we conclude that the circuit court properly entered summary judgment dismissing Strange's claims against Kahn.

Strange also argues the circuit court committed error by entering summary judgment dismissing its claims against Turner. As pointed out by Turner, Strange failed to file a response to the summary judgment and an opposing affidavit. Strange counters that a response is unnecessary and that the issues are preserved by filing the notice of appeal. We agree that the issues are preserved for review but believe the case of Singleton v. Board of Education of Harrodsburg, 553 S.W.2d 848 (Ky.App. 1977) to be dispositive. Therein, the Court commented that "[i]t has long been the law in Kentucky that a motion for a summary judgment, supported by affidavit . . . with no counter-affidavit being filed and no response being made thereto, is properly granted." Id. at 851. Absent a counter-affidavit, we do not believe Strange has shown disputed issues of material fact sufficient to preclude summary judgment. Under the authority of Singleton, we are of the opinion the circuit court properly granted summary judgment dismissing Strange's claims against Turner.

We view Strange's remaining contentions to be moot or without merit.

For the foregoing reasons, the summary judgments of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph D. Satterley  
John R. Shelton  
SALES TILLMAN WALLBAUM  
CATLETT & SATTERLEY, PLLC  
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLANT:

Kenneth L. Sales  
SALES TILLMAN WALLBAUM  
CATLETT & SATTERLEY, PLLC  
Louisville, Kentucky

BRIEF FOR APPELLEE ALBERT KAHN  
ASSOCIATES, INC.:

James M. Gary  
Russell H. Saunders  
Patrick W. Gault  
WEBER & ROSE, P.S.C.  
Louisville, Kentucky

BRIEF FOR APPELLEE TURNER  
CONSTRUCTION COMPANY:

Rebecca F. Schupbach  
Rania M. Basha  
WYATT, TARRANT & COMBS, LLP  
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE  
ALBERT KAHN ASSOCIATES, INC.:

Russell H. Saunders  
Patrick W. Gault  
WEBER & ROSE, P.S.C.  
Louisville, Kentucky

ORAL ARGUMENT FOR APPELLEE  
TURNER CONSTRUCTION COMPANY:

Rebecca F. Schupbach  
WYATT, TARRANT & COMBS, LLP  
Louisville, Kentucky