

RENDERED: OCTOBER 22, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001178-MR

SHAWN M. SMITH, ADMINISTRATOR  
OF THE ESTATE OF MICHAEL SMITH,  
DECEASED

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE IRV MAZE, JUDGE  
ACTION NO. 06-CI-010320

LOUISVILLE AND JEFFERSON COUNTY  
METROPOLITAN SEWER DISTRICT;  
JAMES C. ADKINS AND GREG HICKS

APPELLEES

OPINION  
AFFIRMING

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

BEFORE: KELLER, MOORE AND STUMBO, JUDGES.

STUMBO, JUDGE: Shawn M. Smith, Administrator of the Estate of Michael Smith, (hereinafter “Appellant”) appeals from an Opinion and Order of the Jefferson Circuit Court sustaining the Summary Judgment motion of the Louisville

and Jefferson County Metropolitan Sewer District (“MSD”). Appellant argues that the circuit court improperly resolved a genuine issue of material fact by determining that Michael Smith (hereinafter “Smith”) was a trespasser on the real property of MSD when he fell to his death, thus precluding his estate from recovery. In the alternative, Appellant maintains that even if Smith’s status at the time of the fall was a question of law, the circuit court contravened Kentucky law by finding that he was a trespasser. We conclude that Smith’s status as a trespasser was a question of law properly determined by the circuit court, and accordingly affirm the Opinion and Order granting Summary Judgment.

On the evening of September 17, 2006, or the early morning of September 18, 2006, Smith was apparently walking on Lampton Street in Louisville, Kentucky toward his home on Morton Street. It is believed that Smith walked through an area of dense vegetation and accidentally fell head first into a 16-foot deep concrete drainage canal owned and maintained by MSD. The canal is part of a drainage system referred to in the record as the Beargrass Creek Improvement, and it is situated on an easement granted to MSD by the Louisville/Jefferson County Metro Government. Smith died as a result of the fall, and his body was discovered on the morning of September 18, 2006, by two MSD employees. An autopsy indicated that Smith died of a closed head injury sustained in a fall. He had alcohol and cocaine in his system at the time of death.

Smith's estate, acting through the Appellant, filed the instant wrongful death action against MSD in Jefferson Circuit Court. The Appellant alleged that the drainage canal was a hazard which MSD effectively concealed by failing to erect any fence or barricade, failing to post warning signs, failing to provide any lighting, and by allowing dense vegetation to grow along the banks of the hazard. MSD responded with a general denial, and subsequently filed a motion for Summary Judgment. In support of the motion, MSD argued that Smith was a trespasser to whom it owed no legal duty to warn of potential hazards, that there was no genuine issue of material fact and that it was entitled to a Judgment as a matter of law.

Upon considering MSD's motion and the Appellant's response thereto, the circuit court rendered an Opinion and Order on June 3, 2009, granting Summary Judgment in favor of MSD. As a basis for the Judgment, the court determined that Smith was a trespasser because he did not have permission to enter the canal area nor did he enter the canal area for the purpose for which the canal was maintained. The court concluded that Smith was a trespasser to whom MSD owed no duty to warn. It found no genuine issue of material fact precluding the entry of Summary Judgment in favor of MSD, and this appeal followed.

The Appellant now argues that the circuit court committed reversible error in sustaining MSD's motion for Summary Judgment. He argues that the circuit court improperly resolved a question of material fact which should have

been reserved for the jury, to wit, whether Smith was properly characterized as a trespasser at the time of his death. He contends that Smith was a licensee to whom MSD owed a duty to warn, because it is clear that Smith did not *intentionally* enter the canal area. Additionally, the Appellant argues that Smith could not be a trespasser because the purported trespass occurred on public land.

For the same reasons, the Appellant goes on to argue that even if Smith's status at the time of his death were a question of law properly reserved for the trial court's determination, the trial court contravened Kentucky law by improperly concluding that Smith was a trespasser. He again bases this argument on his contention that Smith did not possess the requisite intent to be properly characterized as a trespasser. He seeks an Order reversing the Summary Judgment and remanding the matter for further proceedings.

Having closely examined the record and the law, and having heard the oral arguments of counsel, we find no basis for reversing the Summary Judgment on appeal. Historically, visitors upon property have been placed in one of three categories which determine the scope of the duty owed by the land possessor to the visitor. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). These categories are trespasser, licensee and invitee. *Id.* A trespasser is one who comes upon the land without any legal right to do so. *Id.* See also, KRS 381.231. A licensee is one who comes upon land with the consent of the land owner, and an invitee is generally defined as one who comes upon the land in some capacity connected

with the business of the possessor. *Id.* Other case law has defined a licensee as a person entering the land with permission but not for the purpose for which the property is maintained. *Scuddy Coal Company Inc. v. Couch*, 274 S.W.2d 388 (Ky. App. 1955).

Kentucky law limits the ability of persons to recover for injuries sustained while trespassing. KRS 381.232 provides that the owner of real estate shall not be liable to a trespasser for injuries sustained by the trespasser on the real estate of the owner, except for injuries that were intentionally inflicted by the owner or his agent. Conversely, a possessor of land owes a licensee the duty of reasonable care either to make the land as safe as it appears, or to disclose the fact that it is as dangerous as he knows it to be. *Perry v. Williamson*, 824 S.W.2d 869, 874 (Ky. 1992). And finally, the possessor owes an invitee the duty to discover and warn of dangerous conditions. *Id.*

The Appellant argues that the circuit court erred in failing to conclude that a question of fact existed as to whether Smith was a trespasser or licensee at the time of his death. We are not persuaded by this argument. Evidence was adduced that MSD is the possessor of the Beargrass Creek Canal, and that Smith entered the parcel without any lawful authority or invitation from MSD. This evidence, which is set out in the record, provides a rational basis for the circuit court's conclusion that Smith was trespassing at the time of his death. Similarly, we find no support in the case law or statutory law for the Appellant's argument

that Smith may not properly be characterized as a trespasser unless evidence is adduced that he intended to trespass. That is to say, intent is not an element of trespass. See generally, *Chesapeake & Ohio Railway Company v. Butcher's Administrator*, 263 Ky. 45, 91 S.W.2d 551 (Ky. App. 1936), wherein a decedent killed by a passing train was found to be a trespasser even though evidence was produced that he was placed on the railroad track after an assault.

The determination of whether Smith was a trespasser or licensee is a question of law because “. . . the relevant facts are undisputed and the issue . . . becomes the legal effect of those facts.” *Revenue Cabinet v. Comcast Cablevision of the South*, 147 S.W.3d 743 (Ky. App. 2003). The circuit court properly adjudicated Smith's status as a question of law, and we are not persuaded by the Appellant's contention that the circuit court improperly resolved a question of fact, nor contravened Kentucky law by determining that he was a trespasser.

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). “Even though a trial court may believe the party opposing the motion may

not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres* at 781.

When viewing the record in a light most favorable to the Appellant and resolving all doubts in his favor, we must conclude that the circuit court properly determined that MSD was entitled to Summary Judgment. The circuit court’s conclusion that Smith was a trespasser to whom no duty was owed is supported by the facts and the law. No genuine issue of material fact remains for adjudication, and the circuit court properly determined that MSD was entitled to a judgment as a matter of law. As such, we find no error.

For the foregoing reasons, we affirm the Opinion and Order of the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mat A. Slechter  
Louisville, Kentucky

BRIEF FOR APPELLEE,  
LOUISVILLE AND JEFFERSON  
COUNTY METROPOLITAN  
SEWER DISTRICT:

Laurence J. Zielke  
Nancy J. Schook  
Louisville, Kentucky

Gerald A. Neal  
Louisville, Kentucky

NO BRIEFS WERE FILED FOR  
APPELLEES, JAMES C. ADKINS  
AND GREG HICKS