

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001680-MR

LISA M. GILBERT, IN PERSON AND
AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF GARY WAYNE GILBERT
(DECEASED), AND LISA M. GILBERT,
AS PARENT AND NEXT FRIEND OF
JEREMY GILBERT, CRISTINE GILBERT,
AND ALYSSA GILBERT, ALL MINORS

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE HUGH ROARK, JUDGE
ACTION NO. 96-CI-00634

ABDULAH R. WHITE; CHERYL LEWIS, AS
LEGAL GUARDIAN AND NEXT FRIEND OF
SHANTE L. HARRIS, A MINOR;
JEFFREY D. PETERS; TIMOTHY PATRICK
HUFFMAN; CARRIE JAMES, AS PARENT
AND NEXT FRIEND OF LAWAN SHE'RIFF
JAMES, A MINOR; ANTWON BUTLER ELLIS,
A MINOR; LOUISE MANSFIELD, AS PARENT
AND NEXT FRIEND OF ERIC L. MANSFIELD,
A MINOR; DAVID BEASLEY; AND
WILLIAM HENRY D.B.A. SMITHING GUN SHOP

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Lisa M. Gilbert, in person and as personal
representative of the estate of Gary Wayne Gilbert (deceased),

and Lisa M. Gilbert, as parent and next friend of Jeremy Gilbert, Christine Gilbert, and Alyssa Gilbert, all minors (Gilbert), brings this appeal from an order of the Hardin Circuit Court entered May 21, 1998, refusing to set aside orders of dismissal entered April 7, 1998. We affirm.

Gary Wayne Gilbert (Gary) was shot and killed on April 24, 1995, during a burglary at his home. On April 23, 1996, Gilbert filed a complaint against a number of defendants, including co-appellees, David Beasley (Beasley) and William Henry d/b/a Smithing Gun Shop (Henry), alleging that the defendants in some manner contributed to Gary's murder. Beasley and Henry were not involved in the murder. Beasley, who owned the house where the murder occurred, was made a defendant under the theory that he was guilty of negligent misconduct for not providing ample lighting and adequate security. Henry was sued for negligently and wantonly allowing his daughter and others to steal the murder weapon from his gun shop.

On January 3, 1997, Beasley's counsel submitted interrogatories. They were never answered. On February 12, 1997, Gilbert's counsel moved to withdraw. An order was entered on February 19, 1997, granting the motion. On March 4, 1997, Beasley's counsel wrote to Gilbert asking her if she planned to seek new representation from another attorney and advised her that if she had a new lawyer to have him/her contact him. This correspondence was never answered. On March 5, 1998, counsel for Beasley filed a Motion to Dismiss, stating that he had received no response to interrogatories and no response to the letter. Counsel for Henry filed a Motion to Dismiss at approximately the

same time. From the record, it appears that Gilbert offered no resistance to the motions. Separate orders dismissing Beasley and Henry were entered in this case on April 7, 1998. The claim against Henry was dismissed for lack of prosecution under Ky. R. Civ. Proc. (CR) 77.02, while the claim against Beasley was dismissed "pursuant to CR 37 and/or CR 77.02." Because there was no motion or order to compel dismissal under CR 37, we consider both dismissals under CR 77.02. The court denied Gilbert's motion to set aside the dismissals, thus precipitating these appeals.

Seeking to set aside the dismissals, Gilbert offered no excuse other than a problem with securing new counsel. We deem this excuse insufficient and perceive no abuse in the trial court's action either in dismissing the actions under CR 77.02 or in refusing to set aside the dismissals.

For the foregoing reasons, the order of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE BEASLEY:

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