

RENDERED: March 21, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 94-CA-0445-MR

GLENN GODSEY

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS WINE, JUDGE
ACTION NO. 84-CI-5557

JAMES W. HOLLAND and CAROLYN HOLLAND

APPELLEES

OPINION
VACATING AND REMANDING

* * * * *

BEFORE: ABRAMSON, COMBS, and GUIDUGLI, Judges.

COMBS, JUDGE. Glen Godsey appeals a Jefferson Circuit Court order striking his answer and dismissing his counterclaims and cross-claims in an action filed against him and his co-defendant, Carolyn Holland, by James W. Holland, the appellee. On appeal we are asked to consider whether the trial court's action constituted an abuse of discretion. Upon review, we vacate and remand for further proceedings.

This action arose in 1984 regarding a dispute over the existence of a partnership. As Godsey observes, "[t]hrough ten

years of litigation[,], five different judges[,], and many assigned trial dates that were reassigned for various reasons[,], the case languished in the Jefferson Circuit Court until assigned for trial before the Honorable Thomas Wine." A review of the record indicates that during the lengthy pendency of the litigation, discovery controversies concerning early requests for the production of documents erupted repeatedly.

The renewed and most recent controversy began in August 1992, when John W. Holland, the appellee and plaintiff below, and the co-defendant, Carolyn M. Holland, joined in a motion requesting the court to continue the jury trial set for the following week. In support of this motion, the Hollands noted that settlement negotiations were ongoing and might prove fruitful and that, since Godsey had failed repeatedly to comply with certain discovery requests, their preparation for trial had been hindered. The court entered an agreed order continuing the jury trial until March 16, 1993, directing that all discovery be completed within sixty days.

Nothing appears of record again until February 4, 1993. On that date, James W. Holland filed a motion requesting that Godsey's counter-claim be dismissed, that Godsey be ordered to produce "all documents previously asked for by Plaintiff," and that other sanctions be entered. Lists of the requested items were attached to the motion.¹ On February 9, 1993, the trial

¹After reviewing the record, we note the tortuous history of the contested documents as follows: that requests for production date from 1984, 1986, and 1988; that those requests were directed

court ordered Godsey to deliver to the plaintiff the information detailed in the lists within twenty-four hours.

On February 25, 1993, the Hollands filed a joint-motion requesting the trial court to dismiss Godsey's counterclaim and cross-claim for failure to comply with the discovery order. Godsey responded with a memorandum reiterating his position that all proper discovery requests had been satisfied years before at a time when opposing counsel was allowed access to Godsey's business records. Godsey noted that former counsel for James W. Holland had sifted through paperwork for a number of hours and had made copies of each and every document that he believed pertained to the discovery requests. Furthermore, he noted that many of the requested tax documents remained in the possession of Carolyn Holland. The Hollands' motion to dismiss the claims was summarily denied on March 3, 1993.

The controversy was again revived when, on May 17, 1993, counsel for James W. Holland served notice that Godsey's deposition would be taken on May 20. Included in this same notice was another request that Godsey produce the documents detailed on the lists that had been submitted to the court in February 1993.² Godsey's deposition was taken on May 27, 1993.

-- at least in part -- to counsel who represented both Godsey and Carolyn Holland as co-defendants; and that the same attorney now presses this appeal against Godsey. The ethical dilemma implied in this peculiar alignment of the parties is not before this court; however, it certainly has caught our attention and created misgivings as to the apparent conflict.

²We note that this procedure did not comply with CR 30.02(5) because it did not allow the deponent the requisite 30 days after

During the course of the deposition, counsel for James W. Holland confirmed that Godsey had supplied or made available -- years earlier -- all the requested documents that had been in his possession. Counsel also confirmed that several of the requested documents were believed to be in the possession of Godsey's tax-preparer and co-defendant, Carolyn Holland.

When questioned by Carolyn Holland's attorney, Godsey agreed to produce documents related to several insurance policies as well as documents related to certain alarm services if it were possible for him to locate them. Additionally, he agreed to supply sales tax returns for 1987 and 1988. When Carolyn Holland's counsel attempted to make additional requests for production -- involving requests for documents that had never been made before, Godsey's counsel demanded that the requests be made formally and pursuant to the rules of civil procedure rather than loosely in the context of an on-going deposition.

On July 22, 1993, the Hollands again filed a joint-motion requesting the trial court to dismiss Godsey's counterclaims and cross-claims as a sanction for his failure to produce those documents which had been requested in the notice of deposition and those documents which had been requested during the course of the deposition. On February 22, 1994, this motion was granted, and Godsey's answer was stricken. In addition, his

the service of the request for documents to respond to the request as required by CR 34.02(2).

counterclaims and cross-claims were dismissed. It is from this order that Godsey appeals.

While the trial court did not designate the rule upon which the dismissals were based, the provisions of CR 37 set forth the sanctions that comprise the arsenal of a trial court in its response to a litigant's failure to make discovery. It appears that CR 37.04 provided the basis for the sanctions since CR 37.02(2)(c) applies solely to situations where there has been a failure of a party to comply with an order of court. Sublett v. Hall, Ky, 589 S.W.2d 888 (1979). Since the trial court refused to sanction Godsey in March 1993, we assume that there were no outstanding orders with which he had not complied. There were no orders compelling discovery entered after that date.

We presume that the court's action was predicated instead on the provisions of CR 37.04(1), which provides in relevant part as follows:

If a party . . . fails . . . (c) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (a), (b) and (c) or Rule 37.02.

The sanctions provided for in CR 37.02 include the penalties ordered by the trial court.

In light of the failure of counsel for appellees to make requests for production in compliance with rule 34.02, we find that Godsey's failure to respond does not justify the imposition of the harsh sanctions that followed.

First we address the request for production joined with the notice of deposition served on Godsey by James W. Holland. As we noted above, this request did not conform to the requirements of CR 30.02(5). While CR 30.02(5) allows for the notice to a party deponent to be accompanied by a request to produce documents, it directs specifically that the request must be made in accord with CR 34. And, while CR 34.02 allows a party upon whom a request for production is served to file a written response within 30 days after the service of the request, Godsey's deposition was scheduled to be taken within three (3) days of the notice. (In fact, the deposition was taken only seven (7) days following service of the request for production.) Since the request for production did not conform to the time requirements of CR 34, by failing to afford Godsey thirty days in which to respond, we conclude that Godsey was not bound to produce the documents at his deposition.

For the sake of completeness, we should add that while Godsey might have applied for a protective order in this instance as provided by CR 26.03, we cannot find that his election not to do so prejudices his position here. In March 1993, the trial court had entered an order specifically denying sanctions against Godsey despite James Holland's contention that he had failed to comply with requests for documents. (These same requests would later be included in the notice of deposition here under discussion). By refusing to enter sanctions against Godsey, the trial court was apparently persuaded by Godsey's explanation

that sufficient discovery had been made since he had presented all the requested documents that were in his possession. Having secured a ruling from the trial court that sanctions against him were not appropriate, we believe that Godsey was safe in assuming that adequate discovery had been made with respect to these requests and that further requests for the same material would not be made. We do not believe that Godsey was under an obligation to reiterate his position and to continually protest the Hollands' repeated requests for production of the same documents including those joined with the notice of deposition.

Next, we address the requests for production that were made during the course of the deposition. Counsel for Carolyn Holland was well aware that Godsey's counsel did not view this oral demand as a proper vehicle for the request for production of documents. While it is a common practice to ask for documents during a deposition and often to receive promises that the documents will, indeed, be produced, counsel assumes the risk of non-compliance under the literal dictates of the discovery rules. Assurances informally secured in this manner may be honored as a matter of professional courtesy. However, they are not mandated and cannot be the premise for imposing sanctions that flow from an omission where the civil rules have not been properly invoked. We do not read the provisions of CR 37 to include a remedy or to imply a reprisal for the failure of a deponent to make discovery under these circumstances.

For the foregoing reasons, the order of the Jefferson Circuit Court striking the appellant's pleadings is vacated and the matter is hereby remanded for further proceedings.

ALL CONCUR.

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