NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

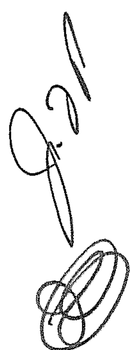
FIRST CIRCUIT

NO. 2006 CA 0005

DONALD W. ABSHIRE AND THE OTHER PETITIONERS NAMED HEREIN

VERSUS

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE STATE OF LOUISIANA, THROUGH THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE LOUISIANA INSURANCE GUARANTY ASSOCIATION; AND STANDARD ANALYTICAL SERVICE, INC.



CONSOLIDATED WITH

No. 2006 CA 0006

EDWARD J. APPLE AND THE OTHER PETITIONERS NAMED HEREIN

VERSUS

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE STATE OF LOUISIANA, THROUGH THE OFFICE OF FINANCIAL INSITUTIONS OF THE STATE OF LOUISIANA; THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE LOUISIANA INSURANCE GUARANTY ASSOCIATION; AND STANDARD ANALYTICAL SERVICE, INC.

and

ARTHUR A. LEWIS, LEONA LEWIS, LESTER A. SAUCIER, MARIE S. SAUCIER, FULGENCE PONTHIER, VERDIE F. PONTHIER, JOSEPH W. GOUDEAU, JR. RODIA L. GOUDEAU, NORRIS J. KIMBALL, JANET G. KIMBALL, STEWART J. AYMOND, MILDRED L. AYMOND, JOYCE GREMILLION, CRAIG P. ORTEGO, MARCELLA ORTEGO, LEWARD P. ORTEGO, ESSIE ORTEGO, HAZEL CHARRIER, ELDRED DESSELLE, SABIA DESSELLE, CRYSTAL JEANSONNE, WARREN GALLAND, LOUISE GALLAND, ELLA M. MILLIGAN, JOHN W. CHEEK, JANELL CHEEK, L.J. CHEEK, VERNA M. CHEEK, DOROTHY M. GUILLORY, GEORGE P. LEMOINE, HAZEL K. LEMOINE, DONALD L. RACHAL, DIANA DAUZAT RACHAL, SADIE C. FOGLE, GERMAINE CHATELAIN, HARDY J. LACOUR, JERALDINE D. LACOUR, NORMAN G. HAYMON, JEAN EVELYN JOHNSON, YVONNE LEWIS WELBORN, HAZEL T. FIRMIN AND CHARLES D. LEWIS

VERSUS

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE STATE OF LOUISIANA, THROUGH THE OFFICE

OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE LOUISIANA INSURANCE GUARANTY ASSOCIATION; AND STANDARD ANALYTICAL SERVICE, INC.

Judgment Rendered: November 3, 2006.

* * * * * *

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, State of Louisiana
Trial Court No. 377,713 c/w No. 412,265
Honorable Kay Bates, Judge

* * * * * *

JOSEPH JERRY MCKERNAN AND JOHN SMITH OF BATON ROUGE, LA; BRIAN D. BROOKS, MAYME AMELIA HOLT-BROWN AND DAVID P. SMITH OF ALEXANDRIA, LA; ALAN ZAUNBRECHER OF METAIRIE, LA; DAN B. McKAY, JR. OF BUNKIE, LA; AND JOHN GREGORY ODOM, CHARLES F. ZIMMER, II, AND JOHN ALDEN MEADE OF NEW ORLEANS, LA

COUNSEL FOR PLAINTIFFS/APPELLANTS DONALD W. ABSHIRE, ET AL

LAURENCE E. LARMANN, MICHAEL J. VONDENSTEIN, JOSEPH L. SPILMAN, III, CHARLES F. HARDIE, VI, AND P. MICHAEL BREEDEN OF METAIRIE, LA

COUNSEL FOR DEFENDANT/APPELLEE ADMIRAL INSURANCE COMPANY

TIMOTHY G. SCHAFER AND RACHEL S. KELLOGG OF LAFAYETTE, LA

COUNSEL FOR DEFENDANT/APPELLEE LEXINGTON INSURANCE COMPANY

STEPHEN C. CARELTON, JOHN B. DUNLAP, III, JAMES E. MOORE, JR., FAYE D. MORRISON, HENRY D.H. OLINDE, JR., AND HILLAR MOORE, III, OF BATON ROUGE, LA

COUNSEL FOR DEFENDANT/APPELLEE LOUISIANA DEPARTMENT OF INSURANCE AND OFFICE OF RISK MANAGEMENT

DAVID M. LATHAM, KEARY L. EVERITT AND MARIE G. EVERITT OF NEW ORLEANS, LA

COUNSEL FOR DEFENDANT/APPELLEE LOUISIANA OFFICE OF FINANCIAL INSTITUTIONS

PAUL D. PALERMO OF METAIRIE, LA

COUNSEL FOR DEFENDANT/APPELLEE WESTCHESTER FIRE INSURANCE COMPANY

C. MICHAEL PFISTER OF METAIRIE, LA; AND JON E. ELENIUS AND SUSAN M. LUTHER OF CHICAGO, IL

COUNSEL FOR DEFENDANTS/APPELLEES CONTINENTAL INSURANCE COMPANY AND CONTINENTAL CASUALTY COMPANY

ROBERT I. SIEGEL OF NEW ORLEANS, LA

COUNSEL FOR DEFENDANT/APPELLEE NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA

CHARLES ZIMMER, JOSEPH P. GUICHET, AND RALPH S. HUBBARD OF NEW ORLEANS, LA	COUNSEL FOR DEFENDANT/APPELLEE AMERICAN EXPRESS INSURANCE ASSOCIATION
GLENN L. LANGLEY OF SHREVEPORT, LA	COUNSEL FOR DEFENDANT/APPELLEE STANDARD INSURANCE COMPANY
GEORGE DENEGRE, JR. AND H.S. BARTLETT, III, OF NEW ORLEANS, LA	COUNSEL FOR DEFENDANT/APPELLEE DAIN RAUSCHER CORP.
DAVID SALLEY OF NEW ORLEANS, LA	COUNSEL FOR DEFENDANTS/APPELLEES UNITED STATES FIRE INSURANCE COMPANY, MARYLAND CASUALTY COMPANY, AND ZURICH INSURANCE COMPANY
ROY GOULD OF COVINGTON, LA	COUNSEL FOR DEFENDANT/APPELLEE GENERAL STAR NATIONAL INSURANCE COMPANY
JAMES M. GARNER AND MARTHA Y. CURTIS OF NEW ORLEANS, LA	COUNSEL FOR DEFENDANT/APPELLEE INSURANCE CO. OF NORTH AMERICA

****

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing, J concurs and assigns reasons.

PETTIGREW, J.

The plaintiffs herein appeal a judgment granting a motion to dismiss all petitioners who have not been deposed by the deadline provided in a consent order executed by the parties on September 23, 2002. For the following reasons, we reverse the judgment of the trial court and remand this matter for further proceedings.

FACTS

Over 1,000 individual owners of annuities, life insurance policies, and corporate notes ("plaintiffs") instituted these consolidated actions in 1991 and 1992 against the State of Louisiana, through the Departments of Insurance ("DOI") and the Office of Financial Institutions ("OFI"). Plaintiffs purchased their instruments from three Louisiana companies, namely Public Investors Life Insurance Company ("PILICO"), Public Investors Incorporated ("PICO"), and Midwest Life Insurance Company ("Midwest").[1] Plaintiffs allege that during the period of 1987 through 1991, the State of Louisiana, by and through OFI and DOI (hereinafter sometimes collectively referred to as the "State defendants"), either negligently, recklessly, maliciously, flagrantly, or intentionally acquiesced in the various company owners' criminal plans to transfer funds out of the companies in which plaintiffs invested and to use those funds to support affiliated, failing companies in which plaintiffs had no interest. Specifically, plaintiffs contend that OFI and DOI gave regulatory approval to these transactions in order to protect the Louisiana Insurance Guaranty Association ("LIGA") fund, which served as guarantor of the insurance companies that benefited from the illegal transactions. PICO, PILICO, and Midwest later collapsed, and plaintiffs' losses were not protected by LIGA.

Subsequent to the initiation of the litigation, the State defendants commenced discovery relating to the individual claims of plaintiffs. OFI noticed and completed the depositions of several plaintiffs in February 1996. Later, in August 2002, OFI and DOI

---

[1] Each company was an affiliate in the Southshore Holding Company financial and insurance group.

noticed five hundred forty seven plaintiffs for depositions by serving plaintiffs' counsel. Plaintiffs responded to the 2002 notices by filing motions to quash and for protective order, advising that they would not attend the depositions unless and until the trial court heard their objections. To the extent that plaintiffs' motions were not ruled upon prior to the dates of the noticed depositions, neither plaintiffs nor their counsel attended the depositions noticed for August and September 2002. Nevertheless, defense counsel attended and a *procès-verbal* was taken for each deponent, attesting that the depositions were noticed but that the deponents failed to appear and testify. Additionally, DOI and OFI filed three motions to either compel discovery or dismiss plaintiffs' claims on August 30, September 6, and September 19, 2002.

On September 23, 2002, the trial court conducted a status conference to resolve discovery issues. At that time, the trial court advised that the State defendants had the right to take the depositions and mandated that the parties work out a discovery schedule. Accordingly, under the directive of the trial court, the parties executed a consent order on that date. Therein, the parties agreed that "[a]nyone who wishes to remain a plaintiff in this lawsuit must give a deposition by December 15, 2002, and these will be noticed by October 15, 2002."

On October 15, 2002, OFI and DOI noticed the depositions of over seven hundred plaintiffs, one hundred twenty-nine of which were completed between October 15 and December 15, 2002.[2] Thereafter, in January 2003, upon learning that the State had excess insurance coverage, plaintiffs notified the trial court of their intent to add the State defendants' insurance carriers as additional party defendants.[3] In light of this

[2] The notices of deposition and subpoenas duces tecum were served upon Charles F. Zimmer, II, counsel for plaintiffs. The actual date and time of the depositions were to be scheduled by plaintiffs' counsel.

[3] In January 2003, the parties participated in a mediation session. During mediation, plaintiffs discovered that International Insurance Company, Admiral Insurance Company, Lexington Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA, Aetna Casualty Surety Company, American Home Assurance Company, Continental Casualty Company, Federal Insurance Company, Continental Insurance Company, United States Fire Insurance Company, General Star National Insurance Company, The Home Insurance Company, Insurance Company of North America, Maryland Casualty Company, NAC Reinsurance Company, Royal Insurance Company of America, The Travelers Indemnity Company, Zurich Insurance Company, and American Excess Insurance Association were all from time to time excess insurers over primary liability coverage afforded by the Louisiana Office of Risk Management and the State of Louisiana during the period 1987 to 1991. The parties were ultimately unable to resolve their differences by mediation. Thus, pursuant to an eighth amended petition filed in March 2003, these insurers, along with the State of Louisiana Office of Risk Management Self Insurance Fund, were added as party defendants herein.

development, the trial court postponed the February 2003 trial date.[4] To date, trial has not been rescheduled.

Despite at least one offer from plaintiffs to make additional deponents available, OFI and DOI have declined to take any depositions subsequent to December 15, 2002. On November 8, 2004, almost two years after the consensual deposition cutoff date, DOI filed a motion to enforce the consent order dated September 23, 2002. Therein, DOI prayed for the dismissal of all plaintiffs not deposed on or prior to December 15, 2002.

ACTION OF THE TRIAL COURT

This matter came before the trial court on February 28, 2005, on the State defendants' motion to make the consent order executory. At that time, the trial court granted the motion in open court, finding that plaintiffs had not complied with the deadlines for discovery as provided by the September 23, 2002 consent order signed by the parties. The court dismissed all plaintiffs not previously deposed, less and except those petitioners substituted in place of previously deposed, deceased plaintiffs and non-deposed petitioners whose co-owners had been deposed. The court directed the parties to jointly compile a list of the dismissed plaintiffs and to submit a written judgment to the court.

Subsequent to the hearing, both plaintiffs and the State defendants submitted alternative judgments of dismissal. The proposed judgments differed insofar as plaintiffs identified two hundred sixteen dismissed petitioners and the State defendants identified three hundred sixty-one dismissed petitioners. Apparently in light of the material dispute, the trial court issued its own written judgment on July 25, 2005, containing broad language describing the class of petitioners dismissed. Specifically, the judgment provided for dismissal of "all Plaintiffs who have not been deposed by the

[4] This was actually the third continuation of the trial date. The original trial date, scheduled for March 1998, was continued in light of various exceptions filed by the State defendants. Thereafter, trial was reset for March 2002. However, in September 2001, the case was removed to the United States District Court for the Middle District of Louisiana, causing trial to be continued once again. Upon remand of the case by the federal court, the trial court issued an order rescheduling trial for February 10, 2003.

deadlines provided by the September 23, 2002 consent order signed by he [sic] parties, with the exception of parties who were substituted in place of deceased Plaintiffs who were previously deposed and non-deposed co-owners where at least one co-owner has been deposed."

On September 16, 2005, plaintiffs filed a motion seeking a devolutive appeal. On appeal, plaintiffs argue that the trial court erred in dismissing hundreds of petitioners without consideration of the jurisprudential factors for dismissal based on a discovery violation. Further, plaintiffs submit that the trial court's judgment is fatally flawed in that it fails to specifically identify the dismissed parties.

ASSIGNMENTS OF ERROR

On appeal, plaintiffs raise the following issues, or assignments of error, for consideration by this court:

(1) The district court ordered that hundreds of plaintiffs be dismissed for failure to comply with a discovery deadline without considering the factors the Louisiana Supreme Court requires be addressed before the ultimate discovery sanction of dismissal is imposed.

(2) To the extent the district court did consider any of the elements adopted by the Louisiana Supreme Court before imposing the draconian penalty of dismissal, it erred in concluding: (a) that each dismissed plaintiff willfully ignored her order, (b) that the defendants were prejudiced in any way by the lack of deposition testimony, (c) that a less harsh remedy was not more appropriate, and (d) that the individual plaintiffs participated in the violation of the Court's order.

(3) The district court failed to identify or consider each individual plaintiff that was dismissed, leaving confusion as to who still has a property right and who has lost that right based on the passing of a pretrial deadline.

LEGAL PRECEPTS

Louisiana Code of Civil Procedure article 1471 vests the trial courts with authority to impose an array of sanctions for failure to comply with discovery orders, including

dismissal of the action or proceeding or any part thereof.[5] Louisiana Code of Civil Procedure article 1473[6] provides that if a party fails to appear before the officer who is to take his deposition, after being served with proper notice, 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 dismiss the action in whole or in part as authorized under Article 1471(3).[7]

---

[5] Louisiana Code of Civil Procedure article 1471 provides:

> If a party or an officer, director, or managing agent of a party or a person designated under Articles 1442 or 1448 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Article 1469 or Article 1464, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.
>
> (2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.
>
> (3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.
>
> (4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.
>
> (5) Where a party has failed to comply with an order under Article 1464, requiring him to produce another for examination, such orders as are listed in Paragraphs (1), (2), and (3) of this Article, unless the party failing to comply shows that he is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

[6] Louisiana Code of Civil Procedure article 1473 provides:

> If a party or an officer, director, or managing agent of a party or a person designated under Articles 1442 or 1448 to testify on behalf of a party fails to appear before the officer who is to take his deposition, after being served with a proper notice, or to serve answers or objections to interrogatories submitted under Article 1457, after proper service of the interrogatories, or to serve a written response to a request for inspection submitted under Article 1461, 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 Paragraphs (1), (2), and (3) of Article 1471. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.
>
> The failure to act described in this Article may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Article 1426.

[7] Whereas the sanctions under Article 1471 are not triggered until a court has ordered the discovery, the sanctions under Article 1473 do not require a court order. **Smith v. 4938 Prytania, Inc.**, 2004-0833, p. 14 (La. App. 4 Cir. 1/26/05), 895 So.2d 65, 73.

The trial court has much discretion in imposing sanctions and its ruling will not be reversed absent an abuse of discretion. **Lirette v. Babin Farms, Inc.**, 2002-1402, p. 3 (La. App. 1 Cir. 4/2/03), 843 So.2d 1141, 1143. Each case must be decided upon its own facts and circumstances. **Benware v. Means**, 99-1410, p. 9 (La. 1/19/00), 752 So.2d 841, 847, on remand, 98-0203 (La. App. 1 Cir. 5/12/00), 760 So.2d 641, writ denied, 2000-2215 (La. 10/27/00), 772 So.2d 650. When a failure to make discovery occurs, it becomes incumbent upon the disobedient party to show that his failure was justified. **Allen v. Smith**, 390 So.2d 1300, 1302 (La. 1980).

Dismissal, however, is a draconian penalty that should be applied only in extreme circumstances. **Horton v. McCary**, 93-2315, p. 5 (La. 4/11/94), 635 So.2d 199, 203. Dismissal and default are generally reserved for those cases in which the client, as well as the attorney, is at fault. **Allen**, 390 So.2d at 1302 (La. 1980). In addition, the record must support a finding that the failure was due to willfulness, bad faith, or fault before dismissal of a plaintiff's claims is appropriate. **Horton**, 93-2315 at 6, 635 So.2d at 203.

In **Horton**, the Louisiana Supreme Court adopted from the federal courts four factors to consider before taking the drastic action of dismissal. Specifically, these factors are: (1) whether the violation was willful or resulted from inability to comply; (2) whether less drastic sanctions would be effective; (3) whether the violations prejudiced the opposing party's trial preparation; and (4) whether the client participated in the violation or simply misunderstood a court order or innocently hired a derelict attorney. **Horton**, 93-2315 at 6, 635 So.2d at 203. Louisiana courts of review have routinely applied the **Horton** factors to determine whether trial court judges have abused their discretion in dismissing claims.

ANALYSIS

Whether Dismissal Was an Appropriate Remedy

On appeal, plaintiffs herein submit that there is nothing in the record to suggest that the trial court considered the **Horton** factors prior to granting the State defendants' motion to make consent order executory. Thus, plaintiffs argue that the

judgment of dismissal should be vacated and that the matter should be remanded for an evidentiary hearing.

Alternatively, if this court finds that the trial court weighed the **Horton** factors, plaintiffs contend that the trial court erred in dismissing the non-deposed plaintiffs from the litigation and that its judgment should be reversed. As to the first factor, plaintiffs argue that there is no evidence that plaintiffs intentionally disregarded the terms of the consent order. Rather, plaintiffs submit that many of the original plaintiffs were elderly at the time suit was filed fourteen years ago. Since that time, plaintiffs submit that many of the petitioners have died. Others, they argue, may be unaware of the consent order or were unable to promptly comply with it due to age or infirmity. In all events, plaintiffs submit that there is no evidence of bad faith or willful violation of the consent order.

With respect to the second **Horton** factor, plaintiffs submit that less drastic sanctions would be effective herein. Plaintiffs allege that the December 2002 deadline for depositions was largely chosen in contemplation of a February 2003 trial date. However, to the extent that the trial date has been continued and no new date has been set, plaintiffs contend that the defendants would not be prejudiced by a reasonable extension of the deposition cutoff date.[8] Furthermore, plaintiffs point out that an extended deadline would provide the non-deposed plaintiffs another opportunity to provide deposition testimony before their claims are lost or forfeited.

With respect to the third **Horton** factor, in light of the continued trial date, plaintiffs contend that the State defendants' trial preparation was not prejudiced by the failure of all plaintiffs to submit to depositions on or before December 2002. Plaintiffs argue that any notion of prejudice is belied by the State defendants' refusal to take

---

[8] Indeed, on December 12, 2005, the trial court issued a new scheduling order setting a fact discovery deadline of March 31, 2006. Pursuant to the express terms of that order, the court provided that all notices of deposition should be sent before expiration of that deadline but that the actual conduction of depositions may take place subsequent thereto for good cause shown.

additional depositions offered immediately after the deposition deadline[9] and that the State defendants have made it a practice to use discovery to needlessly increase the litigation costs. Moreover, plaintiffs submit that since they are merely the owners of instruments purchased from PILICO, PICO, and Midwest, they have little material information to add to the defendants' case.

As to the fourth and final **Horton** factor, plaintiffs argue that the non-deposed plaintiffs likely did not receive notice of the depositions or could not respond. Subsequent to the noticing of depositions on October 15, 2002, counsel for the plaintiffs sent certified letters to the most current address on file for each plaintiff that had not been deposed, and where it was determined that an address was inaccurate, a locating service was retained. As a result, over one hundred twenty depositions were scheduled and conducted in more than five cities between October and December 2002. Nevertheless, counsel was unable to reach many other petitioners. Since counsel was unable to contact many of the non-deposed petitioners, plaintiffs suggest that such parties could not have willfully violated the consent order.

Admiral Insurance Company, OFI, and DOI (hereinafter collectively referred to as the "appellees") have all filed separate briefs in opposition to the instant appeal. In their respective briefs, the appellees argue that the trial court is in the best position to determine the appropriate sanction to be imposed for violation of a court order and that the trial court should be given deference based upon his or her superior knowledge of the litigation history and the prior conduct of the parties. Citing **Nat'l Hockey League v. Metropolitan Hockey Club, Inc.**, 427 U.S. 639, 642-643, 96 S.Ct. 2778, 2780-2781, 49 L.Ed.2d 747 (1976), rehearing denied, 429 U.S. 874, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976, the appellees submit that the sanction of dismissal, although harsh, must be available to the trial court in appropriate cases, not merely to penalize those whose

[9] At a hearing on February 28, 2005, plaintiffs' counsel offered into evidence correspondence from plaintiffs' attorney, Charles F. Zimmer, III, to defense counsel, Jeff Rabb, dated January 8, 2003. In that letter, Mr. Zimmer memorialized an earlier conversation wherein Mr. Rabb stated that he refused to take depositions following the passing of the December 15, 2002 deadline.

conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to engage in such conduct in the absence of a strict deterrent.[10]

In the instant case, the appellees contend that plaintiffs never presented the **Horton** factors to the trial court and, therefore, that they are not appropriate for consideration by this court on appeal. However, even if this court finds that the **Horton** factors should be applied, the defendants argue that the proper result would be dismissal of all non-deposed plaintiffs.

In applying the **Horton** factors, the appellees contend that the plaintiffs have continuously used dilatory tactics to delay trial due to their own lack of diligence in preserving their claims, including their most recent act of adding the insurance defendants on the eve of the February 2003 trial date. In this sense, the appellees submit that plaintiffs' failure to schedule and complete the noticed depositions constitutes a willful violation of the consent order. The appellees argue that the alternate sanctions are equally harsh, including the award of costs for some four hundred depositions in favor of the State defendants.[11] Also, appellees argue that since trial was scheduled for February 2003 at the time the consent order was executed, the violation of that order could have potentially required the defendants to face surprise testimony from one or more of the non-deposed plaintiffs or, even worse, an adverse judgment based on unsubstantiated claims. Moreover, the appellees argue that it would be unduly prejudicial to allow plaintiffs to disregard the very terms of discovery

---

[10] In **Nat'l Hockey League**, the United States Supreme Court held that the record established, under the circumstances, that the district judge did not abuse his discretion in finding bad faith on the part of the plaintiff for failing to timely answer interrogatories and in concluding that the extreme sanction of dismissal was appropriate by reason of the plaintiff's flagrant bad faith and its counsel's callous disregard of its responsibilities. **Nat'l Hockey League**, 427 U.S. at 643, 96 S.Ct. at 2781.

[11] The defendants attached the affidavit of Carla D. Collins, the office administrator of defense firm Simoneaux, Carleton, Dunlap & Olinde, LLC, as Exhibit B to the Motion to Make Order of Dismissal for Failure to Comply with Discovery Order Executory. Therein, Collins certified that she reviewed the client bill in connection with determining legal fees and expenses associated with the preparation for and the taking of plaintiff depositions in August through December 2002, along with the motions to dismiss those plaintiffs who did not appear at their depositions and the Motion to Make Order of Dismissal for Failure to Comply with Discovery Order Executory dated November 9, 2004. Specifically, Collins certified that the legal fees totaled $63,989.00 and that expenses totaled $34,296.17, not including September 2002 court reporter fees that were not available at the time of execution of the affidavit. A detailed breakdown of the totals, however, was not included. Additionally, although not pertinent to the resolution of this appeal, since the plaintiffs filed for a protective order as to the depositions noticed in August and September 2002, there may be some defense for their failure to appear for those depositions.

to which their counsel consented. Lastly, to the extent that plaintiffs have failed to remain in close contact with their counsel, the appellees argue that plaintiffs should not be able to use their own lack of due diligence as an excuse for failure to comply with the consent order.

Considering the arguments of the litigants, the parties are correct in the assertion that this is a court of review, not one of first impression. La. Const. art. V, § 10. Nevertheless, that does not preclude this court from correcting errors of law in considering an issue previously adjudicated by the trial court and properly raised on appeal. Thus, regardless of whether the lower court considered the factors set forth by the Louisiana Supreme Court in **Horton**, this court may consider those criteria in determining whether the trial court abused its discretion.[12]

Applying the **Horton** factors herein, it is apparent that the non-deposed plaintiffs did not willfully disregard the terms of the consent order. Indeed, given the large number of petitioners herein, there is no evidence of record that the plaintiffs were even made aware of the consent order and/or received the notices of deposition served on their counsel. Rather, at the hearing on February 28, 2005, John Gregory Odom, counsel for plaintiffs, explained that he was unable to locate a number of the deponents to notify them of the depositions and analogized attempts to communicate with his clients to "herding cats." Moreover, even if each of the plaintiffs had been notified, it is not apparent from the terms of the consent order that dismissal would result from failure to submit to depositions.

Also, there is no evidence that the defendants were prejudiced by the failure of plaintiffs to submit to depositions prior to December 15, 2002. First, plaintiffs are merely owners of notes and policies purchased from PILICO, PICO, and Midwest. In this sense, the individual plaintiffs do not appear to possess any information critical to

---

[12] In applying the **Horton** analysis, a consent order should not be given, per se, any additional weight due to its consensual nature. Even when the discovery deadlines arise out of a consent order, dismissal remains an ultimate sanction. See **Chandler v. Mallinckrodt, Inc.**, 527 So.2d 516, 518 (La. App. 3 Cir. 1988).

the defense of the claims of illegal transfer of funds. Second, the State defendants admittedly were able to depose a number of plaintiffs between August and December 2002, and there is no evidence that the non-deposed plaintiffs would have had anything new to add to the testimony already taken.[13] Third, since the February 2003 trial date was ultimately continued and has not been reset, the defendants' trial preparation was not hindered. To the contrary, the defendants have refused to conduct depositions subsequent to December 15, 2002, despite offers from some plaintiffs to appear and testify.

The instant case is analogous to the facts previously considered by this court in **Lirette v. Babin Farms, Inc.**, 2002-1402 (La. App. 1 Cir. 4/2/03), 843 So.2d 1141. In **Lirette**, a workers' compensation claimant filed a disputed claim for compensation and his employer filed a motion to dismiss the lawsuit after the claimant failed to attend two depositions. At the hearing on the motion to dismiss, the claimant's attorney alleged that her client's absence from the first scheduled deposition was due to problems with transportation and that the claimant did not receive the letter she sent him regarding the second deposition until the day after the deposition. Following the hearing, the Office of Workers' Compensation Administration dismissed the lawsuit with prejudice, and the claimant appealed. On appeal, this court gave credibility to the statements of the plaintiffs' counsel at the hearing on the motion to dismiss. Additionally, this court pointed out that the record showed that the claimant's attorney did not send him a letter informing him about the second scheduled deposition until four days before the deposition was set to take place, and even then, the letter was sent to a post office box and not the claimant's residence. Under those facts and circumstances, this court concluded that the record did not contain sufficient evidence of the claimant's willful disobedience, bad faith, or fault, in order to justify the ultimate penalty of dismissal. In addition, the court stated that claimant's counsel might have contributed to claimant's failure to appear at the second deposition. Thus, this court reversed the judgment of

[13] In total, the State defendants have taken over five hundred depositions of individual plaintiffs.

dismissal, and remanded the matter to the Office of Workers' Compensation for further proceedings.

A sanction of dismissal involves property rights and, therefore, should be reserved for the most culpable conduct. **Horton**, 93-2315 at 6, 635 So.2d at 203. Given the lack of any evidence herein that the plaintiffs willfully disobeyed the consent order and that the defendants were prejudiced by the failure of all plaintiffs to appear for depositions, we conclude the trial court abused its discretion in dismissing the plaintiffs at issue. This is particularly true in a case, such as the one at hand, in which the defendants noticed over seven hundred depositions to take place during a two-month period of time just prior to the third trial date despite the fact that they had on several previous occasions indicated that they were ready to proceed to trial. Accordingly, the judgment of the trial court is reversed and the matter is remanded to the trial court.

Whether the Judgment Contained Proper Decretal Language

Further, plaintiffs argue on appeal that the judgment of dismissal is deficient, because it does not specifically identify which plaintiffs have been dismissed. To the extent that this court finds that the trial court abused its discretion in granting the motion to dismiss, the plaintiffs' argument as to the sufficiency of the judgment is moot. Accordingly, this court will pretermit consideration of the issue of whether the judgment contained proper decretal language.

CONCLUSION

In conjunction with the appeal, plaintiffs filed a motion to supplement on January 27, 2006, seeking to supplement the record with the following: (1) hearing transcript dated May 2, 2005; (2) motion to quash outstanding subpoenas for depositions and documents dated August 23, 2002; (3) scheduling order dated December 12, 2005; and (4) proposed orders submitted by both plaintiffs and the state defendants on April 26, 2005. By action dated May 30, 2006, the motion to supplement was referred to the

appeal panel. In considering the merits of the appeal, we hereby grant the plaintiffs' motion to supplement.[14]

Moreover, for reasons more fully discussed above, we reverse the judgment of the trial court dated July 25, 2005, dismissing the claims of all plaintiffs who have not been deposed, either personally or through the testimony of a co-owner or predecessor in interest, by the deadline provided by the September 23, 2002 consent order. The case is remanded to the trial court for proceedings consistent herewith.

APPELLANT-PLAINTIFFS' MOTION TO SUPPLEMENT THE RECORD OF THE DISTRICT COURT GRANTED; JUDGMENT REVERSED AND REMANDED.

[14] In response to plaintiffs' motion to supplement, defendants DOI, OFI, and the Louisiana Office of Risk Management likewise filed an ex parte motion to supplement the record on February 14, 2006. Therein, defendants objected to plaintiffs' motion to supplement, arguing in part that the May 2, 2005 hearing transcript offered by plaintiffs was incomplete. Defendants moved to supplement the record with the missing pages of the May 2, 2005 transcript and a complete copy of the transcript from the hearing on February 28, 2005, as to the state defendants' motion to make consent order executory. The trial court granted the defendants' ex parte motion to supplement by virtue of an order dated February 16, 2006.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 0005

DONALD W. ABSHIRE AND THE OTHER PETITIONERS NAMED HEREIN

VERSUS

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE STATE OF LOUISIANA, THROUGH THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE LOUISIANA INSURANCE GUARANTY ASSOCIATION; AND STANDARD ANALYTICAL SERVICE, INC.

CONSOLIDATED WITH

No. 2006 CA 0006

EDWARD J. APPLE AND THE OTHER PETITIONERS NAMED HEREIN

VERSUS

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE STATE OF LOUISIANA, THROUGH THE OFFICE OF FINANCIAL INSITUTIONS OF THE STATE OF LOUISIANA; THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE LOUISIANA INSURANCE GUARANTY ASSOCIATION; AND STANDARD ANALYTICAL SERVICE, INC.

and

ARTHUR A. LEWIS, LEONA LEWIS, LESTER A. SAUCIER, MARIE S. SAUCIER, FULGENCE PONTHIER, VERDIE F. PONTHIER, JOSEPH W. GOUDEAU, JR. RODIA L. GOUDEAU, NORRIS J. KIMBALL, JANET G. KIMBALL, STEWART J. AYMOND, MILDRED L. AYMOND, JOYCE GREMILLION, CRAIG P. ORTEGO, MARCELLA ORTEGO, LEWARD P. ORTEGO, ESSIE ORTEGO, HAZEL CHARRIER, ELDRED DESSELLE, SABIA DESSELLE, CRYSTAL JEANSONNE, WARREN GALLAND, LOUISE GALLAND, ELLA M. MILLIGAN, JOHN W. CHEEK, JANELL CHEEK, L.J. CHEEK, VERNA M. CHEEK, DOROTHY M. GUILLORY, GEORGE P. LEMOINE, HAZEL K. LEMOINE, DONALD L. RACHAL, DIANA DAUZAT RACHAL, SADIE C. FOGLE, GERMAINE CHATELAIN, HARDY J. LACOUR, JERALDINE D. LACOUR, NORMAN G. HAYMON, JEAN EVELYN JOHNSON, YVONNE LEWIS WELBORN, HAZEL T. FIRMIN AND CHARLES D. LEWIS

VERSUS

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE DEPARTMENT OF INSURANCE OF THE STATE OF LOUISIANA; THE STATE OF LOUISIANA, THROUGH THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE OFFICE OF FINANCIAL INSTITUTIONS OF THE STATE OF LOUISIANA; THE LOUISIANA INSURANCE GUARANTY ASSOCIATION; AND STANDARD ANALYTICAL SERVICE, INC.

DOWNING, J., concurs and assigns reasons

I concur in the opinion. I agree with the analysis and disposition; however, I disagree with the disposition of the deficiencies in the judgment. The majority opinion dismisses as moot the plaintiffs' argument as to the sufficiency of the judgment's decretal language. The questions regarding the validity of the judgment, however, raise jurisdictional issues that must be addressed. In the absence of a valid judgment, this court lacks jurisdiction. **Laird v. St. Tammany Parish Safe Harbor**, 02-0045, p.3 (La.App. 1 Cir. 12/20/02. Further, a final appealable judgment must contain decretal language, **and it must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered**, and the relief that is granted or denied. *See* **Carter v. Williamson Eye Center**, 01-2016 (La.App. 1 Cir. 11/27/02), 837 So.2d 43.

Here, the judgment is so vague as to the plaintiffs dismissed that the parties cannot even agree on the number. How could any of the dismissed plaintiffs know if they are affected or not? Our appellate jurisdiction cannot attach to this imprecise judgment. We have no appellate jurisdiction to consider the issues raised on appeal.

Even so, this is an appropriate time for us to exercise our supervisory jurisdiction to review the assignments of error due to the time this matter has been lingering, the undue delays that remanding this matter would cause in this complex, unwieldy litigation, and the dictates of judicial efficiency. Accordingly, I consider this matter as a writ under our supervisory jurisdiction. In so doing, I would grant the writ and adopt the majority's resolution of the issues before us.