ISSAC CRAFT, TYRIS FIELDS, DEVON M. CHARLES, KENT HARDY, MATTHEW W. RUCKER, AND ERVIN BLATCHER, JR.	*	**NO. 2008-CA-0915**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS	*	**STATE OF LOUISIANA**
LARD OIL COMPANY, INC., ACM LEASING, LLC, FEDERATED LIFE INSURANCE COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, A/K/A THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL.	*	
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BONIN, J., DISSENTS WITH WRITTEN REASONS.

I respectfully dissent. While it is clear to me that the trial judge was patient and gracious in affording the plaintiffs' *lawyer* more than reasonable opportunity to comply with the court-ordered discovery, I am nonetheless impelled to conclude on the basis of the record before us that the dismissal with prejudice of Mr. Obioha's clients' case constitutes an abuse of discretion. There is nothing in the record before us from which we can reasonably conclude that the litigants, as opposed to their lawyer, were in any way culpable in the failure to comply with the court's order to answer the interrogatories. "If the record does not contain evidence that the noncompliance was attributable to the party's fault, the court has abused the wide discretion afforded to it by LSA-C.C.P. art. 1471." *Columbia Homestead Association v. Arnoult,* 615 So.2d 1, 3 (La. App. 4 Cir. 1992).

In *Horton v. McCary,* 93-2315 (La. 4/11/94), 635 So.2d 19, 203-204 the Louisiana Supreme Court described a dismissal of a lawsuit as a "draconian" penalty "which should be applied only in extreme circumstances." Dismissal is "reserved for those cases in which the client, as well as the attorney, is at fault." A

factor to be considered is "whether the client participated in the violation or simply misunderstood a court order or *innocently hired a derelict attorney*." (emphasis added) The Supreme Court remanded the *Horton* case for the trial court to determine whether "the clients were innocent parties" or "individually responsible for the incomplete and incorrect responses to court-ordered discovery" in order to determine whether sanctions were appropriate against the clients, or litigants.

When the Supreme Court did approve the harsh sanction of dismissal it was where the client was "directly and solely responsible for the failure to comply with the discovery order which led to the dismissal." *Hutchinson v. Westport Insurance Corporation*, 04-1592, p. 3 (La. 11/8/04), 886 So.2d 438, 440.[1]

In my view, we should adhere to the disposition set out in *Smith v. 4938 Prytania, Inc.*, 04-0833, pp. 12-13 (La. App. 4 Cir. 1/26/05), 895 So.2d 65, 72 and, because of the insufficient evidence in the record before us, remand the matter to the trial court for a hearing to determine whether the disobedience to the court-ordered discovery was the fault of the clients, the fault of the lawyer, or their shared fault. If the trial court finds that the clients were at fault or shared in the fault, it should also determine whether they were "aware of the most severe sanctions that could be imposed against" them. *Smith* p. 13, 895 So.2d at 72.

I am not unmindful of then Justice Kimball's dissent in *Horton,* 635 So.2d at 205 in which she discussed that our system of representative litigation entitles a trial judge to accept counsel's statement as true that "the failure to comply with the discovery order rested with the defendants and not their counsel." However, I am also mindful of the factual situation reported in *Lane v. Kennan,* 04-2118 (La. App. 4 Cir. 4/27/05), 901 So.2d 630 which is uncannily similar to this case. In *Lane* we reversed a dismissal with prejudice because we had "no evidence whether Lane

[1] See also *Benware v. Means*, 99-1410, p. 9 (La. 1/19/00), 752 So.2d 841, 847 in which drastic sanctions were appropriate as the defendant was an attorney representing himself in a legal malpractice case.

personally participated in the violation, simply misunderstood a court order, or innocently hired a derelict lawyer." The lawyer in *Lane* is Mr. Obioha.

I therefore respectfully dissent.