



available to the court.<sup>1</sup> Lindamood claims that the circuit court erred by not giving due weight to the fact that, while failing to designate an expert as required by the pretrial order, she had produced an expert witness report "long before" the deadline for designating her expert witnesses. She also claims that the circuit court failed to analyze the appropriate factors before dismissing her claim for failure to timely designate her expert witness.

In her complaint, filed on May 17, 2000, Lindamood alleged that Dr. Jamshidi negligently treated her deceased husband's neurological condition causing his death on November 9, 1996. In response to a discovery request, in October 2001, Lindamood produced a medical opinion report from an expert.<sup>2</sup> Thereafter, the case went into a period of inactivity.

On April 14, 2006, Dr. Jamshidi filed a motion to dismiss due to inactivity on the case for a period of more than three years. The circuit court denied the motion to dismiss for inactivity; on June 29, 2006, the court set a trial date of June 4, 2007 and entered a uniform pretrial scheduling order setting forth specific deadlines, including a deadline requiring Lindamood to designate her experts by March 6, 2007. When Lindamood did not file a designation of experts as required by the court's order, Dr.

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<sup>1</sup> The assignments of error contained in Lindamood's brief are different than those granted by the Court for appeal. "Only errors assigned in the petition for appeal will be noticed by this Court." Rule 5:17(c). On appeal, attorneys are not at liberty to change the wording of the granted assignment of error. See, e.g., Hudson v. Pillow, 261 Va. 296, 302, 541 S.E.2d 556, 560 (2001) (assignment of error on brief different from that contained in petition not considered).

<sup>2</sup> The medical opinion was produced to Dr. Jamshidi during discovery; it was not admitted into evidence. However, during the hearing on the motion to dismiss, Dr. Jamshidi's counsel admitted to receiving the document during discovery.

Jamshidi filed a motion to dismiss based upon Lindamood's failure to timely designate an expert. Lindamood responded that the date for formally designating her expert witnesses was not met through a mistake of her counsel, and provided an explanation concerning why the mistake occurred.

On May 4, 2007, the circuit court heard oral argument regarding the motion. Providing information concerning Lindamood's counsel's serious medical issues, Lindamood's attorney admitted that counsel "blew a deadline." Lindamood's counsel also, however, pointed out to the court that an expert had been identified in response to interrogatories in October 2001.

Dr. Jamshidi's counsel argued that even as of the beginning of the hearing, Lindamood still had not properly designated her experts. The court granted Dr. Jamshidi's motion to dismiss.

The purpose of a pretrial order requiring designation and identification of experts is to allow the parties to discover the opinions of the adverse expert witnesses in preparation for trial. Woodbury v. Courtney, 239 Va. 651, 654, 391 S.E.2d 293, 295 (1990). When a party fails to identify an expert witness as required by a pretrial order, that party is subject to sanctions under Rule 4:12. See id. Under Rule 4:12, the circuit court has the broad discretion to determine the sanctions to impose upon a party who fails to respond timely as required by a pretrial order. Id. Rule 4:12 allows a circuit court to impose just sanctions, including dismissing the action. Rule 4:12(b)(2)(C).

When a circuit court imposes sanctions pursuant to Rule 4:12, this Court accords deference to the circuit court's decision and will reverse its order only if there was an abuse of discretion. Walsh v. Bennett, 260 Va. 171, 175, 530 S.E.2d 904, 907 (2000). The question whether a circuit court has abused its discretion is fact-specific. Id. There are no specific factors that must be

considered by the circuit court in deciding the proper sanctions to impose.

In light of the above standards, we examine the facts underlying this appeal. This case had been pending for approximately seven years, and concerns a death that occurred in 1996. In May 2006, the circuit court denied a motion to dismiss because of inactivity, but in response thereto set a trial date and entered a pretrial order to insure the fair and expeditious trial of the matter. The pretrial order entered on June 29, 2006, provided Lindamood approximately eight months in which to designate her experts by March 6, 2007, ninety days before the trial date of June 4, 2007. Eight months is more than a sufficient time for a litigant to identify her expert witnesses. See Woodbury, 239 Va. at 654, 391 S.E.2d at 295 (finding five months to be more than sufficient time for designation).

It is undisputed that Lindamood failed to designate her expert witnesses prior to the deadline set by the pretrial order.<sup>3</sup> Lindamood's counsel became aware of his serious illness several months before the deadline for designation of her experts but failed to withdraw as counsel, associate another attorney, or request a continuance or an extension of the deadline. In fact, on the date of the hearing, May 4, 2007, Lindamood had yet to identify her expert as required by the pretrial order, even though the trial of the matter was scheduled for June 4, 2007.

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<sup>3</sup> Lindamood argues that the expert opinion she produced to Dr. Jamshidi in October of 2001 is sufficient to satisfy the pretrial designation requirement. However, Lindamood did not make the argument in the circuit court that previous discovery responses satisfied the requirements of the pretrial order. To the contrary, Lindamood's counsel admitted that he had missed the deadline concerning the designation of expert witnesses required by the pretrial order.

Lindamood did not comply with the court's pretrial order. Dismissal of her case with prejudice is a sanction permissible under Rule 4:12. See Brown v. Black, 260 Va. 305, 310-11, 534 S.E.2d 727, 729-30 (2000). Given the length of time the case had been pending, the court's denial of a previous motion to dismiss for inactivity, and Lindamood's failure to comply with the court's order despite being given eight months to do so, we hold that the circuit court did not abuse its discretion by imposing that sanction.

Accordingly, for the above reasons, we affirm the judgment of the circuit court. The appellant shall pay to the appellee thirty dollars damages.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk