

In The  
Supreme Court of the United States

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Jael Watts,  
*Petitioner,*  
v.

Michael K. Allen,  
*Respondent.*

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On Petition for Writ of Certiorari to the  
Supreme Court of Virginia

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**BRIEF IN OPPOSITION**

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## STATEMENT OF FACTS

This is a personal injury case arising from a January 23, 2015 motor vehicle accident involving Jael Watts (“Watts”) and Michael K. Allen (“Allen”). Watts alleges that she suffered injuries and property damage as a result of the accident, and filed suit in the Circuit Court for the City of Alexandria against Allen and his liability insurance carrier, USAA.

The Complaint failed to state a cause of action against USAA on any legal theory, and on April 12, 2017, the trial court granted a plea in bar and sustained a demurrer, dismissing Watts’ claim against USAA, with prejudice.<sup>1</sup> The trial court also dismissed the case against Allen, but granted Watts leave to amend. Watts then filed an Amended Complaint against Allen. Allen filed a timely Answer to the Amended Complaint, and issued written discovery to Watts.

Allen attempted to schedule Watts’ deposition by agreement; however, Watts did not respond to Allen’s requests for dates. Allen sent a letter to Watts on August 15, 2017 requesting dates.<sup>2</sup> Not receiving any response, Allen set Watts’ deposition for September 20, 2017, and sent a letter and Notice of Deposition to Watts. Watts provided no response, and did not appear at deposition.

Accordingly, Allen was required to file a motion to compel Watts’ deposition, which the trial

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<sup>1</sup> The Supreme Court of Virginia denied Watts’ Petition for Appeal on the issue of USAA’s dismissal. Watts subsequently filed a Petition for Writ of Certiorari with this Court, which is case number 18-412.

<sup>2</sup> Previously, Watts provided no e-mail or facsimile number to counsel.

court granted. Watts did not contact counsel prior to the motion, filed no opposition, and did not appear at the hearing. Allen mailed a copy of the October 11, 2017 Order to Watts, along with a new Notice of Deposition. Again, Watts provided no response of any kind to Allen. Watts subsequently failed to abide by the trial court's Order to appear for deposition, and Allen therefore filed a motion to dismiss, pursuant to Rule 4:12 of the Rules of the Supreme Court of Virginia. Again, Watts did not contact counsel prior to the motion, filed no opposition, and did not appear at the hearing. The trial court granted this motion on November 8, 2017, dismissing the case with prejudice.

On February 16, 2018, Watts filed a Petition for Appeal in the Supreme Court of Virginia, challenging the trial court's November 8, 2017 final Order dismissing the case. Allen filed a Motion to Dismiss on the basis that the Petition for Appeal was not filed within ninety (90) days of the entry of the Final Order. Watts claims that she did not receive adequate notice of the Motion to Compel or the Motion to Dismiss. Watts did receive adequate notice. The Petition for Appeal failed to identify any reversible error, and the Supreme Court of Virginia denied Watts' Petition for Appeal.

The Supreme Court of Virginia's ruling properly applied Virginia law and did not violate any constitutional right. Accordingly, Watts' Petition to this Court should be denied.

## LAW AND ARGUMENT

### A. Standard of Review

#### 1. Determination of sufficient notice pursuant to Rule 4:15(b) of the Rules of the Supreme Court of Virginia

A trial court's decision to grant leave is reviewed under an abuse of discretion standard. *See Va. Fin. Assocs. v. ITT Hartford Group, Inc.*, 266 Va. 177, 186 (2003) (holding that trial court did not abuse its discretion in declining to grant appellant leave to designate additional expert witnesses); *see also Bennett v. Sage Payment Solutions, Inc.*, 282 Va. 49, 54 (2011) (noting that “[w]e review a circuit court’s grant or denial of a party’s motion for leave to amend its pleadings...on an abuse of discretion standard”); *see also Loudoun Hosp. Ctr. v. Stroube*, 50 Va. App. 478, 509 (Va. App. 2007) (holding that because the depositions at issue could only be taken with leave of court, “the standard of review is whether the trial court abused its discretion in denying appellant's motion to take the depositions”).

#### 2. Imposition of discovery sanctions pursuant to Rule 4:12

A trial court's decision to impose sanctions pursuant to Rule 4:12 for failure to comply with a discovery order is reviewed under an abuse of discretion standard. *Nolte v. MT Tech. Enters., LLC*, 284 Va. 80, 92 (2012). An abuse of discretion can occur in the following ways: “1) when a relevant factor that should have been given significant weight

is not considered; 2) when an irrelevant or improper factor is considered and given significant weight; 3) and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.” *Nolte*, 284 Va. at 90 (citing *Landrum v. Chippenham & Johnston-Willis Hosps., Inc.*, 282 Va. 346, 352 (2011)).

The trial court “generally exercises broad discretion in determining the appropriate sanction for failure to comply with an order relating to discovery.” *Nolte*, 284 Va. at 92 (citing *Walsh v. Bennett*, 260 Va. 171, 175 (2000) (internal quotations omitted)). The Supreme Court of Virginia has stated that “[i]n evaluating whether the trial court abused its discretion, we do not substitute our judgment for that of the trial court. Rather, we consider only whether the record fairly supports the trial court’s action.” *Nolte*, 284 Va. at 92 (citing *AME Fin. Corp. v. Kiritsis*, 281 Va. 384, 393 (2011) (internal quotations omitted)).

B. The trial court did not abuse its discretion in finding that Watts received sufficient notice of the Motion to Compel and the Motion to Dismiss.

Pursuant to Rule 4:15(b) of the Rules of the Supreme Court of Virginia, absent leave of court, civil motions in Virginia “shall be in writing and served at least seven days before the hearing.” Rule 4:15(b). “Whenever a party is required or permitted under these Rules, or by direction of the court, to do an act within a prescribed time after service of a paper upon counsel of record, three (3) days shall be



added to the prescribed time when the paper is served by mail...” Rule 1:7 (emphasis added).

Here, Allen mailed the Motion to Compel to Watts on September 25, 2017, sixteen (16) days prior to the hearing. Allen mailed the praecipe for the hearing on October 4, 2017, seven (7) days prior to the hearing. Watts received sufficient notice of the hearing. Rule 4:15(b). Similarly, Watts received sufficient notice of the Motion to Dismiss and praecipe for the hearing, both of which were mailed to Watts on October 31, 2017, eight (8) days prior to the hearing.

Moreover, Rule 4:15(b) grants the trial court discretion to grant a party leave to amend the seven day notice period. Rule 4:15(b). Such an exercise of discretion is not error in this case.

Here, Watts filed no response to the Motion to Compel or to the Motion to Dismiss. Nor did Watts contact counsel or the court prior to either hearing to request a continuance.<sup>3</sup> Despite having the telephone number for Allen’s counsel, Watts made no attempt to call Allen’s counsel to indicate that she was unavailable for either hearing, or to advise that she needed additional time to prepare a response. Watts did not appear at either hearing. Watts’ violation of the trial court’s Order to appear at deposition and her failure to contest the Motion to Dismiss are not the result of inadequate notice, but instead reflect an apparent abandonment of the case.

Finally, Rule 1:7 does not require a party to provide an additional three days’ notice when serving a pleading; rather, the rule applies to a party’s response deadline after service of the original

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<sup>3</sup> Watts states in her Answers to Defendant’s Interrogatories that she holds a juris doctorate degree.

papers on that party. Rule 1:7. Watts' argument that ten (10) days' notice is required in advance of a hearing is mistaken.

Therefore, the trial court did not err in granting Allen's Motion to Dismiss. Allen requests that the Petition be denied.

C. The trial court's granting of Allen's Motion to Dismiss did not violate Watts' Virginia or federal Due Process rights, and the trial court committed no error.

The due process clauses of both the Virginia and federal constitutions provide that "no person shall be deprived of life, liberty, or property without due process of law." *Etheridge*, 237 Va. at 103; U.S. Const. amend. XIV, § 1; Va. Const. art. I, § 11. Procedural due process "guarantees a litigant the right to reasonable notice and a meaningful opportunity to be heard," *Etheridge*, 237 Va. at 97 (citing *Parratt v. Taylor*, 451 U.S. 527, 540 (1981) (rev'd on other grounds)); it does not create constitutionally-protected interests. *Leis v. Flynt*, 439 U.S. 438, 441 (1979). Substantive due process hinges on the reasonableness of a law, based on the rights it affects. *See, e.g., Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

Courts may dismiss an action, or impose other sanctions tantamount to dismissal, where a party violates an order compelling her to provide or permit discovery, including failure to appear for the party's deposition. Fed. R. Civ. P. 37(b)-(d); *e.g., Rabb v. Amatex Corp.*, 769 F.2d 996, 999-1000 (4th Cir. 1985). Dismissal does not violate a party's due process rights unless the party establishes that her

failure to comply with the discovery order was due to inability, rather than willfulness, bad faith, or any fault. *Societe Internationale Pour Participations v. Rogers*, 357 U.S. 197, 212 (1958).

Here, there is no evidence that Watts' violation of the trial court's order compelling her deposition was due to her inability to comply, rather than willfulness, bad faith, or fault. The trial court found that Watts received sufficient notice of both hearings. Watts was not denied a reasonable opportunity to be heard on the Motion to Compel or the Motion to Dismiss. The trial court's sanction of dismissal was appropriate, consistent with Virginia Rules 4:15(b) and 4:12, and did not violate Watts' federal or Virginia due process rights.

Therefore, the trial court did not err in granting Allen's Motion to Dismiss. Allen requests that the Petition be denied.

D. The trial court did not abuse its discretion in dismissing the case as a sanction due to Watts' violation of the trial court's Order to appear for deposition.

Pursuant to Rule 4:12(b) of the Rules of the Supreme Court of Virginia, "[i]f a party...fails to obey an order to provide or permit discovery...the court in which the action is pending may make...[a]n 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. Rule 4:15(b)(2)(C); *see, e.g., Brown v. Black*, 260 Va. 305, 311 (2000) (holding that a trial court may dismiss an action where a party fails to comply with an order compelling discovery).

Here, the trial court entered an Order October 11, 2017 compelling Watts to appear to have her deposition taken on October 25, 2017.<sup>4</sup> Watts violated the trial court's Order and failed to appear for her deposition. At no time prior to either deposition date did Watts contact Allen's counsel to advise that she was unavailable. In response, Allen filed a motion requesting that the case be dismissed pursuant to Rule 4:12. The trial court acted appropriately and within its discretion, and entered an Order dismissing the case.

Therefore, the trial court did not err in granting Allen's Motion to Dismiss. Allen requests that the Petition for Appeal be denied.

### CONCLUSION

The trial court committed no error by granting Allen's Motion to Dismiss pursuant to Rule 4:12. The hearing was properly noticed pursuant to Rule 4:15(b) and did not violate Watts' right to due process. The trial court acted properly and did not abuse its discretion in determining that the case should be dismissed pursuant to Rule 4:12, in light of Watts' refusal to appear for deposition. The Supreme Court of Virginia properly denied Watts' Petition for Appeal. This ruling is consistent with Virginia law and does not violate any constitutional right. For these reasons, Allen respectfully requests

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<sup>4</sup> Previously, Allen's counsel sent Watts a letter requesting available dates for her deposition. Watts did not respond, and Allen's counsel therefore noticed her deposition. Watts did not appear on that date, despite having notice, and she did not contact counsel. Allen therefore filed the October 11, 2017 Motion to Compel.

that this Court deny Watts' Petition for Writ of Certiorari.

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