

Affirmed and Memorandum Opinion filed December 16, 2010.



In The

Fourteenth Court of Appeals

NO. 14-10-00030-CV

BRINDA REDWINE, Appellant

V.

VALERIE K. WRIGHT, M.D. AND ROBERT M. WRIGHT, M.D., Appellees

**On Appeal from the 170th District Court
McLennan County, Texas
Trial Court Cause No. 2009-2227-4**

MEMORANDUM OPINION

This appeal follows the trial court's dismissal of appellant's health care liability claim and its award of attorneys' fees to appellees. Appellant proceeds pro se, challenging the appropriateness of the dismissal on constitutional and statutory grounds. She also challenges the reasonableness of the award of attorney's fees. We will affirm.

Appellant Brinda Redwine ("Redwine") filed an original petition on June 26, 2009 against appellees Valerie K. Wright, M.D. and Robert M. Wright, M.D. (the "Wrights").

Her underlying action was a “health care liability claim” subject to Chapter 74 of the Civil Practice and Remedies Code. Under Chapter 74, a health care liability claimant must serve on each defendant a copy of a medical expert report no later than 120 days from the date of the original petition. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (West 2005 & Supp. 2009). The report must actually be served on the parties; a filing with the clerk’s office will not suffice. *See Kendrick v. Garcia*, 171 S.W.3d 698, 700, 704–05 (Tex. App.—Eastland 2005, pet. denied). If the expert report is not served within the prescribed period, the trial court, upon motion, must enter an order dismissing the claim and awarding reasonable attorney’s fees. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(b).

The parties agree that Redwine’s service deadline was Monday, October 26, 2009. On that date, Redwine filed a copy of her medical expert report with the county clerk’s office. She then attempted to mail a separate copy to the Wrights, only to arrive at the post office and discover that it had already closed. Ultimately, she did not effectuate service on the Wrights until she mailed a copy of the report on Thursday, October 29. The Wrights subsequently moved to dismiss the suit because service was made outside the statutory window of 120 days. The trial court granted the motion and awarded the Wrights \$6,617 in attorney’s fees. Redwine appeals on the following issues: (1) the constitutionality of her claim’s dismissal; (2) the applicability of a deadline-extension provision; and (3) the reasonableness of the award of attorney’s fees.

In her first issue, Redwine argues that the trial court’s dismissal violates her Sixth Amendment right to a jury trial. We overrule this issue, as the Sixth Amendment applies strictly to “criminal prosecutions.” U.S. Const. amend. VI; *see also Fields v. Metroplex Hosp. Found.*, No. 03-04-00516-CV, 2006 WL 2089171, at *3 n.4 (Tex. App.—Austin July 8, 2006, no pet.) (observing no Sixth Amendment violation upon dismissal of medical malpractice claim).

In her second issue, Redwine contends that service was timely because the Wrights received the expert report within the three-day extension period provided under Rule 21a of the Texas Rules of Civil Procedure. Redwine relies on the following language from the rule:

Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon by mail or by telephonic document transfer, three days shall be added to the prescribed period.

Redwine's argument is unavailing for two reasons. First, she failed to raise this issue to the trial court, and thus, has not preserved error for appeal. *See* Tex. R. App. P. 33.1. Second, even if error were preserved, Redwine's construction of the rule is still mistaken. Rule 21a will only extend a deadline if the prescribed period is triggered by "the service of a notice or other paper." In this case, the prescribed period is determined by statute, not the independent receipt of some other document. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a); *see also* *Awoniyi v. McWilliams*, 261 S.W.3d 162, 165 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (holding that Rule 21a will not extend the service period for a health care liability claimant under Section 74.351(a)). Therefore, Rule 21a is not applicable. Redwine's second issue is overruled.

In her third and final issue, Redwine challenges the award of attorney's fees, arguing that the amount was unreasonable and that the evidence was insufficient to prove the amount incurred. We review the amount of attorney's fees awarded under a legal sufficiency standard, overruling any challenge if more than a scintilla of evidence supports the disputed judgment. *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003); *Mitchell v. Methodist Hosp.*, No. 01-08-00898-CV, 2009 WL 5174186, at *9 (Tex. App.—Houston [1st Dist.] Dec. 31, 2009, pet. filed). Factors we consider when determining the reasonableness of a fee include: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly; (2) the likelihood that the acceptance of the particular employment will

preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

Counsel for the Wrights submitted two affidavits attesting to the reasonableness of his attorney’s fees: the first with his original motion to dismiss, and the second with his supplemental motion. In his first affidavit, counsel specifically mentioned that he had not undertaken any written discovery. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.351(s) (staying all discovery until service of the expert report); *see also* *Awoniyi*, 261 S.W.3d at 167–68) (remanding award of attorney’s fees where affidavit contained evidence of unsegregated fees). In both affidavits, counsel described the scope of services performed, and the amount of time spent in their performance. Counsel also attested that his hourly rate was “very reasonable” for an attorney of his experience—over twenty-three years of practice in Texas, and over thirteen in the field of medical malpractice. Redwine has offered nothing to controvert these affidavits. Because the affidavits are some evidence of the reasonableness of attorney’s fees, there is more than a scintilla of evidence to support the amount actually awarded. Accordingly, we overrule Redwine’s third issue.

The judgment of the trial court is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.