Affirmed and Opinion filed November 16, 2021.

In The

Fourteenth Court of Appeals

NO. 14-19-00658-CV

NIXON HOME CARE, INC., Appellant

V.

JOHN B. HENRY, III, AS GUARDIAN OF D.W., Appellee

On Appeal from the 129th District Court
Harris County, Texas
Trial Court Cause No. 2018-42230

O P I N I O N

A corporation challenges the trial court's denial of its motion under the Texas Medical Liability Act seeking dismissal of a claim asserted by the guardian of an incapacitated person who was allegedly sexually assaulted while participating in a program provided by the corporation for persons with mental retardation. The guardian did not serve an expert report under the Texas Medical Liability Act. Presuming without deciding that this program is a health care provider, the record does not show that the guardian's claim constitutes a health

care liability claim. Therefore, we affirm the trial court's order.

I. Factual and Procedural Background

D.W., an incapacitated adult who has the mental capacity of a seven-year-old child, participated in a program operated by appellant/defendant Nixon Home Care, Inc. ("Nixon"). D.W. participated in this program Monday through Friday from 8:00 a.m. to 4:00 p.m. while his mother was working. On or about August 18, 2016, while participating in the program, defendant Alfonso Bell, an adult with a physical disability but no mental disability, allegedly sexually assaulted D.W. in a restroom at Nixon's facility. Bell allegedly was also one of Nixon's customers.

Appellee/plaintiff John B. Henry, III, as guardian of D.W. (the "Guardian") filed suit in the trial court against Nixon and Bell. The Guardian alleged that Bell was a convicted sex offender when he sexually assaulted D.W. The Guardian alleged a negligence claim against Nixon based on Nixon's allegedly negligent failure to protect D.W. from sexual assault by its (1) failure to provide adequate security, (2) failure to do a background check to discover sexual predators; (3) exposing incapacitated persons to convicted sexual predators; and (4) failure to properly supervise its customers. The Guardian asserted a battery claim against Bell. The Guardian contends that his claim against Nixon is not a health care liability claim; therefore, the Guardian did not serve any expert report on Nixon under the Texas Medical Liability Act. *See* Act of May 24, 2013, 83rd Leg., R.S., ch. 870, §§ 2, 3(b), 4, 2013 Tex. Sess. Law Serv. Ch. 870 (current version codified at Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a)).

After answering, Nixon filed a motion under section 74.351(b) of the Civil Practice and Remedies Code asserting that it offered the Home and Community-Based Services program (the "Program"), which according to Nixon is "a home and community-based services waiver program for persons with mental retardation

adopted in accordance with Section 1915(c) of the federal Social Security Act" that falls within the statutory definition of "health care institution." *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(11)(I). Nixon argued that the Program fell within the statutory definition of "health care provider" and that D.W. was participating in the Program when he was allegedly sexually assaulted on August 18, 2016. *See id.* § 74.001(a)(11), (12). Contending that Nixon is a health care provider and that the Guardian's claim is a health care liability claim, Nixon asked the trial court to dismiss the Guardian's claim based on the undisputed fact that more than 120 days had passed since Nixon answered and the Guardian had not served any expert report in an attempt to satisfy the Texas Medical Liability Act's expert-report requirement. *See* Act of May 24, 2013, 83rd Leg., R.S., ch. 870, §§ 2, 3(b), 4, 2013 Tex. Sess. Law Serv. Ch. 870 (current version codified at Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a)); Tex. Civ. Prac. & Rem. Code Ann. §§ 74.001(a)(12),(13), 74.351(b) (West, Westlaw through 2021 R.S.). Nixon attached to its motion: (1) a copy of the Guardian's petition, (2) a copy of Nixon's answer, (3) an affidavit of Debora Nixon, Nixon's Executive Director, and (4) copies of certificates showing that Nixon is licensed under Chapter 103 of the Human Resources Code to operate an adult day care facility and to operate a "DAHS Facility."

The Guardian responded that although D.W. was a paying customer at Nixon's adult daycare facility, D.W. never received any medical care, health care, or treatment from Nixon. According to the Guardian, D.W. simply played games, watched television, and slept. The Guardian argued that Nixon is not a health care provider and that under *Ross v. St. Luke's Episcopal Hospital*, 462 S.W.3d 496 (Tex. 2015), the Guardian's claim is not a health care liability claim. The Guardian attached to his response: (1) an affidavit from D.W.'s mother, (2) a copy of a criminal complaint asserting good reason to believe that Bell committed

aggravated sexual assault against D.W.; and (3) a copy of the Guardian's petition.

The trial court held a hearing on Nixon's motion to dismiss, at which no evidence was submitted. The trial court did not rule at the hearing and stated that the parties would be allowed to file supplemental briefing. Nixon filed supplemental briefing and attached (1) an "Agreement for Day Habilitation Services" between New Hope Home Health Services and Nixon; (2) a printout from a government website describing "Home and Community-Based Services"; (3) a copy of title 40, section 49.205 of the Texas Administrative Code; and (4) a copy of title 40, section 98.206 of the Texas Administrative Code. The Guardian also filed supplemental briefing.

The trial court signed an order denying Nixon's motion to dismiss. Nixon timely filed this interlocutory appeal, asserting in one appellate issue that the Texas Medical Liability Act's expert-report requirement applies to this case. Under that issue Nixon argues that (1) Nixon Adult Day Care is a "health care provider" and (2) that the Guardian's claim against Nixon is a health care liability claim.

II. ANALYSIS

Health care liability claims are subject to the Texas Medical Liability Act's provisions, including its expert-report requirement. *See* Act of May 24, 2013, 83rd Leg., R.S., ch. 870, §§ 2, 3(b), 4; Tex. Civ. Prac. & Rem. Code Ann. §74.001(a)(13); *see also Lout v. The Methodist Hosp.*, 469 S.W.3d 615, 616–17 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Under the Act, a plaintiff asserting a health care liability claim must serve an expert report on each defendant physician or health care provider within 120 days after the date that defendant files an original answer. *See* Act of May 24, 2013, 83rd Leg., R.S., ch. 870, §§ 2, 3(b), 4. If the plaintiff fails to serve an expert report, the trial court must dismiss the plaintiff's claims on the defendant's motion. Tex. Civ. Prac. & Rem. Code Ann. §

74.351(b)(2).

We generally review a ruling on a motion to dismiss under the Texas Medical Liability Act for an abuse of discretion. *See Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios*, 46 S.W.3d 873, 875 (Tex. 2001). But we review de novo whether a particular claim constitutes a health care liability claim. *See, e.g., Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753, 757 (Tex. 2014). In conducting the review, we consider the entire record including the pleadings, motions and responses, and any evidence attached to the motions. *Ahmadi v. Moss*, 530 S.W.3d 754, 758 (Tex. App.—Houston [14th Dist.] 2017, no pet.). In determining the question, we examine the underlying nature and gravamen of the claim, rather than the way the plaintiff pleaded it. *Garland Community Hosp. v. Rose*, 156 S.W.3d 541, 543 (Tex. 2004). The burden rests on the party seeking dismissal to prove the plaintiff's claim amounts to a health care liability claim. *Houston Methodist Willowbrook Hosp. v. Ramirez*, 539 S.W.3d 495, 498 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

In the Texas Medical Liability Act the Legislature defined a health care liability claim as

> a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract. The term does not include a cause of action described by Section 406.033(a) or 408.001(b), Labor Code, against an employer by an employee or the employee's surviving spouse or heir.

Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(13). The Legislature also has defined some of the terms used in the definition of health care liability claim. "Health care" is defined as:

> any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement.

Id. § 74.001(a)(10). "Medical care" is defined as:

> any act defined as practicing medicine under Section 151.002, Occupations Code, performed or furnished, or which should have been performed, by one licensed to practice medicine in this state for, to, or on behalf of a patient during the patient's care, treatment, or confinement.

Id. § 74.001(a)(19). "Health care provider" is defined as:

> any person, partnership, professional association, corporation, facility, or institution duly licensed, certified, registered, or chartered by the State of Texas to provide health care, including . . . a health care institution . . . .

Id. § 74.001(a)(12)(A). "Health care institution" includes:

> an intermediate care facility for the mentally retarded or a home and community-based services waiver program for persons with mental retardation adopted in accordance with Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1396n), as amended

Id. § 74.001(a)(11)(I). "Intermediate care facility for the mentally retarded" is defined as "a licensed public or private institution to which Chapter 252, Health and Safety Code, applies." *Id*. § 74.001(a)(18).

The Legislature has not defined "safety" in the Texas Medical Liability Act, but the Supreme Court of Texas has construed the word according to its common meaning as "the condition of being 'untouched by danger; not exposed to danger; secure from danger, harm or loss.'" *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 501 (Tex. 2015) (quoting *Diversicare Gen. Partner, Inc. v. Rubio*,

185 S.W.3d 842, 855 (Tex. 2005)). A safety-standards claim need not be directly related to the provision of health care to qualify as a health care liability claim. *Ross*, 462 S.W.3d at 504. Yet, for a safety-standards claim to amount to a health care liability claim, "there must be a substantive nexus between the safety standards allegedly violated and the provision of health care." *Id*. That nexus must be more than a "but for" relationship.[1] *Id*.

The *Ross* court introduced seven non-exclusive considerations for courts to employ when analyzing whether a safety-standards claim amounts to a health care liability claim:

> 1. Did the defendant's alleged negligence occur while the defendant was performing tasks with the purpose of protecting patients from harm?
>
> 2. Did the injuries occur in a place where patients might be during the time they were receiving care, so that the obligation of the provider to protect persons who require special, medical care was implicated?
>
> 3. At the time of the injury was the claimant in the process of seeking or receiving health care?
>
> 4. At the time of the injury was the claimant providing or assisting in providing health care?
>
> 5. Is the alleged negligence based on safety standards arising from professional duties owed by the health care provider?
>
> 6. If an instrumentality was involved in the defendant's alleged negligence, was it a type used in providing health care?
>
> 7. Did the alleged negligence occur in the course of the defendant's taking action or failing to take action necessary to comply with safety-related requirements set for health care providers by governmental or accrediting agencies?

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[1] On appeal, Nixon asserts that the Guardian's claim against it is a health care liability claim based on an alleged departure from accepted standards of safety, to which the *Ross* legal standard for safety-standards claims applies. *See Ross*, 462 S.W.3d at 505. Nixon does not assert that the Guardian's claim is a health care liability claim based on an alleged departure from accepted standards of medical care or health care.

Id. at 505.

The *Ross* court stated that "[t]he pivotal issue in a safety[-]standards-based claim is whether the standards on which the claim is based implicate the defendant's duties as a health care provider, including its duties to provide for patient safety." *Id.* A safety-standards claim does not fall within the Act's provisions just because the underlying occurrence took place in a health care facility, the claim is against a health care provider, or both. *Id*. at 503.

A. What does the record show about the services that Nixon provided to D.W.?

Nixon asserts the Program is a home and community-based services waiver program for persons with mental retardation adopted in accordance with Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1396n), as amended. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(11)(I). Nixon argues that the Program is both a health care institution and a health care provider and that therefore Nixon is a health care provider. *See id*. § 74.001(a)(11)(I), (a)(12). We presume, without deciding, that each of these propositions is correct. We now examine the evidence before the trial court regarding the services provided to D.W. in the Program.

1. Debora Nixon's Affidavit

In her affidavit, Debora Nixon testified as follows:

- She is a registered nurse in the State of Texas.
- She is, and was at all times pertinent to this case, the Executive Director of Nixon Home Care, Inc.
- Nixon Home Care, Inc. operates Nixon Adult Day Care, an adult day care facility for individuals with intellectual disabilities.
- Nixon Adult Day Care is a licensed Adult Day Care Facility and Day Activity and Health Services Center ("DAHS") with the Texas Health

and Human Services Department.

- A DAHS license allows for facilities like Nixon Adult Day Care to provide day activity and health services including: skilled nursing and personal care services, health education and counseling, health monitoring, health-related services, medication, administration, physical rehabilitative services, nutrition services, transportation services, and other supportive services.
- Nixon Adult Day Care is licensed to provide day activity and health services to eligible clients through community-based Medicaid waiver programs for persons with mental retardation. One community-based services waiver program is the Program. To be eligible to provide Medicaid services for waiver programs like the Program, facilities, like Nixon Adult Day Care, contract to provide such services and must meet additional program requirements.
- D.W. was enrolled in the Program, a community-based waiver program for persons with mental retardation, and D.W. received specialized care and treatment for his mental disabilities from Nixon Adult Day Care.
- There are standards relating to the care, treatment, and protection of the persons with mental disabilities similar to D.W. enrolled in waiver programs for persons with mental disabilities.
- Standards related to such care, treatment, and protection include, but are not limited to, administering medications, obtaining medications from a pharmacy, retaining a medication profile record for each individual, requiring at least one Registered Nurse or Licensed Vocation Nurse working on site at least 8 hours per day, and employing sufficient licensed nursing staff on site to meet the nursing needs of the individuals. A professional staff person must remain at the facility when clients are present.
- The care, treatment, and protection of D.W. and those with similar mental disabilities in community-based waiver programs, require Nixon Adult Day Care's employees to undergo specialized training including, but not limited to: training in fire and disaster protection, first aid, and adult cardiopulmonary resuscitation ("CPR") course certification.
- Nixon Adult Day Care's employees make judgments about the care, treatment, and protection of D.W. and other persons with mental and

> physical disabilities in community-waiver programs for persons with mental retardation on a daily basis based on the mental and physical care each person required.

Debora[2] stated that a DAHS license allows facilities like Nixon Adult Day Care to provide skilled nursing services, health monitoring services, health-related services, and physical rehabilitative services. Significantly, Debora did not testify as to what services Nixon provided under the Program in general or as to what services Nixon provided to D.W. specifically. Debora did not address whether Nixon provided D.W. nursing services, health monitoring services, health-related services, or physical rehabilitative services. Debora stated that D.W. was enrolled in the Program "and received specialized care and treatment for his disabilities from [Nixon Adult Day Care]." Debora referred generally to the care, treatment, and protection of D.W, but she did not state what Nixon did to provide care, treatment, or protection to D.W. or what services D.W. received under the Program.

Debora did not address whether any care, treatment, or protection that D.W. received included an act defined as practicing medicine under section 151.002 of the Occupations Code, performed or furnished by one licensed to practice medicine in Texas for, to, or on behalf of a patient. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.001(a)(19) (defining "medical care"). Debora did not address whether any care, treatment, or protection that D.W. received included an act or treatment performed or furnished for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement. *See id*. § 74.001(a)(10) (defining "health care"). Neither the term "care" nor the term "treatment" necessarily involves medical care or health care. *See Lutheran Social Servs. of the South, Inc. v. Blount*, No. 05-15-00380-CV, 2016 WL 1019191, at *9–10 (Tex. App.—Dallas

[2] To distinguish Debora Nixon from Nixon Home Care, Inc., we refer to her by her first name.

Mar. 14, 2016, pet. denied) (mem. op.); *Shiloh Treatment Center, Inc. v. Ward*, 510 S.W.3d 36, 39–40 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (concluding that treatment services, including treatment services for "Mental Retardation," are not necessarily health care services). Without more information, any care, treatment, and protection provided to D.W. could have been directed to his basic need for shelter, nutrition, socialization, interpersonal skills, care for personal health and hygiene, supervision, and education, which without more would not constitute medical care or health care. *See Blount*, 2016 WL 1019191, at *9–10 (concluding that services limited to meeting a person's basic need for shelter, nutrition, socialization, interpersonal skills, care for personal health and hygiene, supervision, and education are not heath care or medical care); *Shiloh Treatment Center, Inc.*, 510 S.W.3d at 39–40 (same as *Blount*). Debora did not refer to D.W. as a "patient," nor did she refer to other participants in the Program as "patients." Debora did use the word "clients" to refer to participants in community-based Medicaid waiver programs for persons with mental retardation.

Debora's statement that D.W. was enrolled in the Program "and received specialized care and treatment for his disabilities from [Nixon Adult Day Care]." provides a conclusion, but Debora does not provide the underlying facts to support the conclusion. Therefore, this statement is conclusory and constitutes no evidence that D.W. received medical care, treatment, or health care. *See Lenox Barbeque and Catering, Inc. v. Metropolitan Transit Auth. of Harris Cnty.*, 489 S.W.3d 529, 535 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *Pipkin v. Kroger Texas, L.P.*, 383 S.W.3d 655, 670 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

In sum, Debora did not testify as to what services D.W. received in the Program, and she did not provide any evidence that D.W. received medical care or health care as part of the Program.

2. Certificates

Nixon submitted a copy of a certificate showing that Nixon is licensed under Chapter 103 of the Human Resources Code to operate an adult day care facility and a copy of a certificate showing that Nixon is licensed under Chapter 103 of the Human Resources Code to operate a "DAHS Facility." Neither of these certificates addresses the services D.W. received in the Program, or whether D.W. received medical care or health care as part of the Program.

3. Affidavit of D.W.'s Mother

The Guardian attached to his response to Nixon's motion to dismiss an affidavit from D.W.'s mother. She testified as follows:

- D.W. is an incapacitated adult who has the mental capacity of a seven-year-old child.
- D.W. attended Nixon's adult day care center as a customer during weekdays, which was paid for by Medicaid.
- D.W. would be present at Nixon's adult day care facility from 8:00 a.m. to 4:00 p.m., while D.W.'s mother was at work.
- At all times material hereto, while D.W. was one of Nixon's customers, D.W. simply played games, slept, and watched television.
- The Nixon facility was nothing more than an adult day care facility, which D.W.'s mother used to watch over D.W. while she was at work.
- At no point in time while D.W. attended Nixon's facility did D.W. ever receive medical care or treatment from any Nixon employee.
- On the date of the occurrence made the basis of this suit, D.W. did not receive any medical care or treatment from any Nixon employee.

Even presuming that the last two statements are conclusory and no evidence, D.W.'s mother testified that at all times material hereto, while D.W. was one of Nixon's customers, D.W. simply played games, slept, and watched television. Thus, D.W.'s mother's affidavit contains evidence that supports a conclusion that

D.W. did not receive medical care, treatment, or health care as part of the Program, and her affidavit contains no evidence supporting the opposite conclusion.

4. Statements by Nixon's Attorney

In Nixon's reply to the Guardian's response to the motion to dismiss, Nixon's attorney stated that D.W. "had a medications record chart on file (as required by state and federal law) and was under the care of licensed medical professionals described above." The "licensed medical professionals" to which Nixon's attorney referred apparently are "one Register[ed] Nurse . . . or Licensed Vocational Nurse . . .and . . . sufficient licensed nursing staff on site to meet the nursing needs of the individuals." Nixon's attorney also stated that D.W. "received periodic medical screenings." Nixon's lawyer also implied that D.W. was a "patient." None of these unsworn statements of counsel in Nixon's reply was tendered as evidence, and none of them constitute evidence. *See In re Russo*, 550 S.W.3d 782, 789 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding). On appeal, Nixon does not rely on these statements, and it would not be proper for this court to rely on these statements as evidence that D.W. received medical care, treatment, or health care. *See id.*

5. The Day Habilitation Agreement

Before the trial court denied its motion to dismiss, Nixon filed supplemental briefing with attached documents. One of these documents was entitled "Agreement for Day Habilitation Services" (the "Agreement"). No evidence before the trial court authenticated this document or explained what it is. In Nixon's briefing, its attorney stated that this document is an agreement between Nixon and New Hope Home Health Services, Inc., in which Nixon contracted with New Hope to provide day habilitation services to individuals from New Hope accepted into Nixon's adult day care center. According to the Agreement's text, Nixon and New

Hope entered into the Agreement "to specify the responsibilities of both parties for the provision of [d]ay habilitation services to individuals from New Hope who have been accepted by The Nixon Adult Day Center." Neither the Agreement nor any other evidence before the trial court showed that D.W. was an individual from New Hope who had been accepted by The Nixon Adult Day Center.

The Agreement states that it contains "a description of support and services that are offered to an individual." In the document, New Hope agrees to "provide recommendations for the completion of any appropriate vocational/training components of the Individualized Habilitation Plan, status reports, on the IP goals/objectives, and behavior/incident and medication data on a monthly basis." No evidence explained what "the Individualized Habilitation Plan" is or addressed whether such a plan ever had a vocational/training component. No evidence before the trial court showed that D.W. was subject to "the Individualized Habilitation Plan." New Hope also agrees to "[n]otify The Nixon Adult Day Center of staffing dates, proposed changes in training, behavioral issues, or changes in *client* status in the day service program."[3] The Agreement uses the term "client" rather than the term "patient."

In the Agreement, Nixon Adult Day Care agrees to:

- interact[] face-to-face with an individual to assist the individual in achieving objectives to:
    - acquire, retain or improve self-help skills, socialization skills or adaptive skills that are necessary [] for the individual to successfully reside, integrate and participate in the community; and
    - reinforce a skill taught in school or professional therapies;
- transport[] an individual between settings at which day habilitation is provided to the individual;

[3] Emphasis added.

- assist[] an individual with his or her personal care activities if the individual cannot perform such activities without assistance.

No evidence before the trial court showed that Nixon Adult Day Care provided these services to D.W. In any event, services limited to meeting a person's basic need for shelter, nutrition, socialization, interpersonal skills, care for personal health and hygiene, supervision, and education are not heath care or medical care. *See Blount*, 2016 WL 1019191, at *9–10; *Shiloh Treatment Center, Inc.*, 510 S.W.3d at 39–40. The Agreement also states that the "Day Program" will serve meals and snacks to "their individuals." In the Agreement, New Hope agrees to pay The Nixon Adult Day Care Center "$28.41 per day, five days a week." Even though no individual or guardian is a party to the Agreement, a provision in the Agreement recites that "[t]he individual and the Guardian authorize the Provider to obtain appropriate medical care for the individual when necessary or desirable." The Agreement does not address the services D.W. received in the Program, or whether D.W. received medical care or health care as part of the Program.

6. Three Other Documents

Nixon also attached to its supplemental briefing a document apparently printed out from the Texas Health and Human Services website. This document describes "Home and Community Based Services," which the document says is a Medicaid waiver program. This document describes which Texas residents may participate in this program and what services may be provided in this program. This general document does not show that D.W. participated in the program described. This document does not address the services D.W. received in the Program, or whether D.W. received medical care or health care as part of the Program. Nixon did not submit any documentary evidence showing D.W.'s enrollment or participation in the Program or documenting any receipt of medical care or health care by D.W.

Nixon also attached to its supplemental briefing copies of sections 49.205 and 98.206 title 40 of the Texas Administrative Code. These legal authorities do not constitute evidence as to the services D.W. received in the Program, or whether D.W. received medical care or health care as part of the Program.

7. Conclusion

No evidence in the record shows (1) what services D.W. received in the Program, (2) that D.W. received medical care or health care while participating in the Program, (3) that while participating in the Program D.W. was a patient receiving medical care or treatment, or (4) that D.W. was a patient who was confined.

B. Does the record show that the Guardian's claim is a safety-based health care liability claim based on application of the *Ross* considerations?

Nixon asserts that under the *Ross* legal standard, the Guardian's claim against Nixon is a health care liability claim based on an alleged departure from accepted standards of safety. *See Ross*, 462 S.W.3d at 505. In *Ross*, the plaintiff sued the defendant hospital after she slipped and fell in the hospital's lobby as the floor was being cleaned and buffed. *See id*. at 499. Concluding the plaintiff did not assert a health care liability claim, the supreme court noted that (1) the plaintiff was not seeking, receiving, or providing health care when she fell; (2) the area where the plaintiff fell was not where patients would be during treatment; and (3) the record did not show the cleaning and buffing of the floor were for the purpose of protecting patients. *Id*. at 505.

We now consider the facts of this case under the considerations provided in *Ross*:

1. Did the defendant's alleged negligence occur while the defendant was performing tasks with the purpose of protecting patients from harm?

The record evidence does not show that D.W. or the other people participating in the Program were patients. The record evidence does not show that D.W. received medical care or treatment while participating in the Program, or that while participating in the Program D.W. was confined. Thus, the record evidence does not establish that D.W. received health care while participating in the Program. *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(10) (defining "Health care" as any act or treatment performed or furnished, or that should have been performed or furnished, by any health care provider for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement"); *Belmont Village Hunters Creek TRS, LLC v. Marshall*, No. 01-18-00984-CV, —S.W.3d—,—, 2020 WL 4873563, at *7–8 (Tex. App.—Houston [1st Dist.] Aug. 20, 2020, pet. denied); *Hill Country San Antonio Management Servs., Inc. v. Trejo*, 424 S.W.3d 203, 210–11 (Tex. App.—San Antonio 2014, pet. dism'd). Nixon did not establish that when D.W. was allegedly sexually assaulted in a restroom at Nixon's facility, Nixon was performing tasks with the purpose of protecting patients from harm. *See Belmont Village Hunters Creek TRS*, 2020 WL 4873563, at *7–8; *Trejo*, 424 S.W.3d at 210–11.

Nixon asserts that D.W. was under the care and supervision of Nixon Adult Day Care for the entire day on which the alleged sexual assault occurred. Nixon asserts that Nixon Adult Day Care makes judgments about the care, treatment, and protection of D.W. and others under its care. As to this consideration, Nixon does not assert that D.W was a patient or that Nixon or Nixon Adult Day Care provided D.W. with medical care or health care. Nor does Nixon contend that evidence before the trial court established any of these assertions. We conclude that the first

consideration weighs against finding the Guardian's claim against Nixon to be a health care liability claim.

2. Did the injuries occur in a place where patients might be receiving care, so that the obligation of the provider to protect persons who require special, medical care was implicated?

Nothing in the record shows that the restroom in which D.W. was allegedly sexually assaulted was a place where patients might be receiving care. Nixon does not claim that patients might be receiving care in the restroom. We conclude that the second consideration weighs against finding the Guardian's claim against Nixon to be a health care liability claim.

3. At the time of the injury (a) was the claimant in the process of seeking or receiving health care or (b) was the claimant providing or assisting in providing health care?

We address the third and fourth *Ross* considerations together. As previously stated, the record evidence does not show that D.W. or other people participating in the Program were patients, nor does it demonstrate that D.W. received medical care, treatment, or health care while participating in the Program. *See Belmont Village Hunters Creek TRS, LLC*, 2020 WL 4873563, at *7–8. The record evidence does not show that at the time of his alleged injury (1) D.W. was in the process of seeking or receiving health care, or (2) D.W. was providing or assisting in providing health care. Nixon contends that D.W. was not a visitor and was under the care of Nixon Adult Day Care when he was allegedly sexually assaulted. Nixon does not assert that D.W. was seeking health care, providing health care, or assisting in providing health care. To the extent Nixon argues that D.W. was in the process of receiving health care in the restroom, the record evidence does not show that D.W. received health care while participating in the Program. *See Belmont Village Hunters Creek TRS, LLC*, 2020 WL 4873563, at *7–8; *Trejo*, 424 S.W.3d at 210–11. We conclude that the third consideration and the fourth consideration

weigh against finding the Guardian's claim against Nixon to be a health care liability claim.

4. Is the alleged negligence based on safety standards arising from professional duties owed by the health care provider?

The Guardian bases his negligence claim against Nixon on Nixon's allegedly negligent failure to protect D.W. from sexual assault. Nixon asserts that its alleged negligence is necessarily based on safety standards that arise from professional duties that Nixon Adult Day Care owes as an establishment that cares for mentally disabled individuals. The Guardian asserts that the alleged negligence of Nixon is not based on safety standards arising from professional duties owed by the health care provider but rather is based on Nixon's failure to provide adequate security, failure to properly supervise its customers, and failure to do background checks on its customers, all of which are common negligence allegations applicable to all types of facilities and businesses. We presume, without deciding, that the fifth consideration weighs in favor of finding the Guardian's claim to be a health care liability claim.

5. If an instrumentality was involved in the defendant's alleged negligence, was it a type used in providing health care?

No instrumentality was involved in Nixon's alleged negligence. Thus, we conclude that the sixth consideration is neutral and does not weigh in favor or against finding the Guardian's claim to be a health care liability claim.

6. Did the alleged negligence occur in the course of the defendant's taking action or failing to take action necessary to comply with safety-related requirements set for health care providers by governmental or accrediting agencies?

Nixon asserts that the seventh consideration weighs in favor of finding the Guardian's claim to be a health care liability clam because regulations (1) require an adult day care program to provide "health, social, and related support services in

a protective setting"; and (2) require a facility such as Nixon Adult Day Care to protect the safety of individuals under its care. But, the only authorities Nixon cites for these alleged regulatory requirements are the definition of "Adult day care program" and "Protective setting" in the 2015 version of title 40, section 98.2 of the Texas Administrative Code. *See* 40 Tex. Admin. Code § 98.2(4), (63) (2015). The cited portions of this section provide as follows:

> The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.
>
> . . .
>
> **(4)** Adult day care program—A structured, comprehensive program that is designed to meet the needs of adults with functional impairments through an individual plan of care by providing health, social, and related support services in a protective setting.
>
> **. . .**
>
> **(63)** Protective setting—A setting in which an individual's safety is ensured by the physical environment or personnel (staff).

Id. The cited provisions define two terms used in title 40, chapter 98 of the Texas Administrative Code. Neither of these provisions articulates a requirement for health care providers. *See id*. Nixon has not shown that its alleged negligence occurred in the course of Nixon's taking action or failing to take action necessary to comply with safety-related requirements set for health care providers by governmental or accrediting agencies. We conclude that the seventh consideration weighs against finding the Guardian's claim against Nixon to be a health care liability claim.

For a safety-standards claim to amount to a health care liability claim, "there must be a substantive nexus between the safety standards allegedly violated and the provision of health care." *Ross*, 462 S.W.3d at 504. The record evidence does not show that D.W. received medical care, treatment, or health care while

participating in the Program. *See Belmont Village Hunters Creek TRS, LLC*, 2020 WL 4873563, at *7–8; *Trejo*, 424 S.W.3d at 210–11. Thus, the record does not show a substantive nexus between the safety standards allegedly violated and the provision of health care. *See Ross*, 462 S.W.3d at 504–05. "The pivotal issue in a safety[-]standards-based claim is whether the standards on which the claim is based implicate the defendant's duties as a health care provider, including its duties to provide for patient safety." *Id.* at 505. The record evidence does not show that D.W. or the other people participating in the Program were patients. The record does not establish that the standards on which the Guardian bases his claim against Nixon implicates any duties by Nixon to provide for patient safety.

Nixon relies on the Supreme Court of Texas's opinion in *Diversicare General Partner, Inc. v. Rubio*. *See* 185 S.W.3d 842, 849–55 (Tex. 2005). In that case a patient living in a nursing home sued the nursing home alleging that the nursing home failed to provide 24-hour nursing services from a sufficient number of qualified nursing personnel to meet the plaintiff's total nursing needs. *See id*. at 849. The plaintiff in *Rubio* asserted claims based on alleged sexual assaults of the plaintiff by another patient living in the nursing home. *See id*. at 850–51. The record in Rubio reflected that the defendant was providing health care to the plaintiff, who was a patient living at the defendant's nursing home. *See id*. In today's case, the record evidence does not show that D.W. or the other people participating in the Program were patients. The record evidence does not show that D.W. received medical care, treatment, or health care while participating in the Program. The *Diversicare* opinion is not on point.

Nixon also relies on the Thirteenth Court of Appeals's opinion in *Educare Comm. Living–Texas Living Center, Inc. v. Celedon*. *See* No. 13-08-00461-CV, 2009 WL 3210950, at *2–3 (Tex. App.—Corpus Christi Oct. 8, 2009, no pet.)

(mem. op.). In *Celedon* the parents of a mentally disabled adult woman alleged that a mentally disabled man sexually assaulted their daughter while both of them were participating in an adult day care program operated by one of the defendants. *See id*. at *1. The court held that the defendants were health care institutions and health care providers and that the parents' claims were health care liability claims. *See id*. at *2–3. Though the alleged facts made the basis of the *Celedon* suit are similar in several respects to the alleged facts made the basis of the Guardian's claim against Nixon, the *Celedon* opinion does not mention or analyze the evidence submitted by the defendants in support of their motion, and the *Celedon* case was decided before the Supreme Court of Texas in *Ross* modified the legal standard applicable to safety-standards claims. *See Ross*, 462 S.W.3d at 504–05; *Celedon*, 2009 WL 3210950, at *2–3. The *Celedon* opinion is not on point.

A claim does not fall within the Texas Medical Liability Act's provisions just because the underlying occurrence took place in a health care facility, the claim is against a health care provider, or both. *Ross*, 462 S.W.3d at 503. On balance, based on the *Ross* considerations we conclude that Nixon did not show that Nixon's alleged failure to protect D.W. from sexual assault is substantively related to the provision of medical care or health care. *See Belmont Village Hunters Creek TRS, LLC*, 2020 WL 4873563, at *7–8, *11; *Houston Methodist Willowbrook Hosp.*, 539 S.W.3d at 500, 502; *Brazos Presbyterian Homes, Inc. v. Rodriguez*, 468 S.W.3d 175, 179–80 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *Trejo*, 424 S.W.3d at 211–12. The record evidence does not show that D.W. or the other people participating in the Program were patients. *See Belmont Village Hunters Creek TRS, LLC*, 2020 WL 4873563, at *7–8, *11; *Shiloh*, 510 S.W.3d at 39. The record does not establish that the standards on which the Guardian bases his claim against Nixon implicate any duties by Nixon to provide for patient safety.

See Belmont Village Hunters Creek TRS, LLC, 2020 WL 4873563, at *7–8, *11; *Shiloh*, 510 S.W.3d at 39. We conclude that the record does not show that the Guardian's claim is a health care liability claim.

III. Conclusion

Because the record does not show that the Guardian's claim is a health care liability claim, the trial court did not err in impliedly determining that the Texas Medical Liability Act's expert-report requirement does not apply to this case or in denying Nixon's motion to dismiss under the Texas Medical Liability Act. Therefore, we overrule Nixon's sole issue and affirm the trial court's order denying Nixon's motion to dismiss.

/s/ Randy Wilson
Justice

Panel consists of Justices Zimmerer, Poissant, and Wilson.