AFFIRMED and Opinion Filed June 30, 2020

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-00827-CV

CHRISTINE FABER, INDIVIDUALLY AND AS HEIR AT LAW OF CARMELINA "MILLIE" SMITH, DECEASED, Appellant
V.
COLLIN CREEK ASSISTED LIVING CENTER, INC. D/B/A/ DAYSPRING ASSISTED LIVING COMMUNITY, Appellee

On Appeal from the 366th Judicial District Court
Collin County, Texas
Trial Court Cause No. 366-02547-2015

MEMORANDUM OPINION

Before Justices Pedersen, III, Reichek, and Carlyle
Per Curiam

Christine Faber appeals the trial court's dismissal of her action for failing to file an expert report. *See* TEX. CIV. PRAC. & REM. CODE § 74.351. We affirm by this memorandum opinion. *See* TEX. R. APP. P. 47.4.

Background

Faber's mother, Millie Smith, was a resident at Dayspring Assisted Living Community. Dayspring is owned and operated by Appellee Collin Creek Assisted Living Center, Inc. In May 2015, Faber went to pick her mother up at Dayspring.

She parked in Dayspring's parking lot and asked a Dayspring employee to help Smith to the car. Smith used a walker, and sat on it facing backwards as the Dayspring employee pushed her down the sidewalk outside Dayspring's entrance. Smith's walker got caught in a large crack in the sidewalk, causing her to fall and hit her head on the concrete. Smith died eight days later.

Faber sued Collin Creek in June 2015, asserting claims on her own behalf and on behalf of Smith's estate. Her original petition referenced the Dayspring employee's role in her mother's injury and alleged, among other things, that "Dayspring's lack of supervision and/or training" of employees and "failure to enact rules and regulations to ensure the safety of the transport of Dayspring patients, such as Ms. Smith, caused and produced Ms. Smith's injuries." In addition, she alleged Dayspring "fail[ed] to render adequate and timely aid." Her petition asserted claims for premises liability, negligence, negligent hiring, and emotional distress.

Collin Creek answered and, after the deadline for filing medical expert reports expired, moved to dismiss the action because Faber did not file one. *See* TEX. CIV. PRAC. & REM. CODE § 74.351. Faber amended her petition, removing references to Dayspring employees contributing to her mother's injury, and allegations that Dayspring breached its duties to ensure the safe transport of patients or "render adequate and timely aid." Faber's first amended petition asserts only claims based on the alleged defect in Dayspring's premises. She responded directly to Collin Creek's motion to dismiss by arguing her premises liability claim does not qualify

as a health care liability claim (HCLC), because Dayspring's duty to maintain its premises is separate and apart from any special duties owed to its patients.

The 219th Judicial District Court granted Collin Creek's motion to dismiss in January 2016. Faber pursued additional claims against remaining defendants, which were resolved against Faber on summary judgment almost two years later, after which she moved for a new trial against Collin Creek. A different trial court, the 366th, granted that motion, concluding there were questions as to whether Faber's claims should have been categorized as HCLCs. Collin Creek, in turn, filed both a "Second Motion for Dismissal Pursuant to Tex. Civ. Prac. & Rem. Code § 74.351" and an interlocutory appeal of the order granting a new trial. Before we dismissed that appeal for want of jurisdiction, the trial court reversed course, granting Collin Creek's second motion to dismiss. Faber appeals from the resulting judgment of dismissal.

Faber's claims were HCLCs and the failure to serve an expert report was fatal

If a plaintiff files a petition asserting HCLCs and fails to timely serve a statutorily compliant expert report, the trial court must dismiss. TEX. CIV. PRAC. & REM. CODE § 74.351(b). We review whether a claim is an HCLC de novo. *Bioderm Skin Care, LLC v. Sok*, 426 S.W.3d 753, 757 (Tex. 2014).

Under the Texas Medical Liability Act, an HCLC is any:

> 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.

TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13). "Health care" is "any act . . . 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). A licensed assisted-living center is a "health care provider" under the statute. *Id.* § 74.001(a)(11)(B), (a)(12)(A)(vii). Faber argues Dayspring should not be considered a "health care provider" because its contract with Smith said it "does NOT provide . . . healthcare services." Regardless of the services it may have contractually disclaimed an obligation to provide, Dayspring, a Type B assisted-living center licensed under Texas Health and Safety Code section 247, is a "health care provider." *See id.*

The "safety component of HCLCs need not be directly related to the provision of health care." *Tex. W. Oaks Hosp., L.P. v. Williams*, 371 S.W.3d 171, 186 (Tex. 2012). Rather, "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." *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 505 (Tex. 2015). There "must be a substantive nexus between the safety standards allegedly violated and the provision of health care." *Id.* at 504. "The Legislature, however, could not have intended that standards

of safety encompass all negligent injuries to patients." *Marks v. St. Luke's Episcopal Hosp.*, 319 S.W.3d 658, 664 (Tex. 2010).

The supreme court in *Ross* promulgated seven non-exclusive considerations to employ when analyzing whether a safety-standards claim is an HCLC:

> 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?

Ross, 462 S.W.3d at 505.

Two *Ross* factors clearly support concluding that Faber's claim is an HCLC:

- Smith's injuries occurred while the employee was pushing her to the car with the purpose of protecting her from harm.

- Smith was receiving a form of health care from Dayspring's employee.

Other factors lean toward concluding the claims were HCLCs:

- Smith was on the sidewalk near the parking lot, not in a place patients might regularly be during the time they were receiving care and thus, not necessarily implicating the provider's obligation to protect persons who require special medical care. But because Smith was a Dayspring resident, because her daughter had requested Dayspring's employee to help walk her to the car, and because the employee undertook that care, the sidewalk in front of the facility temporarily became an area where Smith received a type of health care specific to the type that a facility like Dayspring exists to provide, triggering Dayspring's obligation to protect its patient, a person requiring special care.

- Dayspring claims the safety standards Faber complains of arise from professional duties it owed. Faber says any business would be required to follow the same standards it complains of: maintaining a sidewalk free from unreasonably dangerous conditions. Though we agree that Dayspring owed Smith the same duty it owed invitees, such as her daughter, it also owed its resident, Smith, a duty as the entity providing her assisted living services. *See SE Tex. Cardiology Assocs. v. Smith*, 593 S.W.3d 743, 748 (Tex. App.—Beaumont July 11, 2019, no pet.) (describing this dual duty situation).

- The fall occurred in the course of Dayspring's employee's compliance with safety-related regulations for Type B assisted living facilities. *See* 26 TEX. ADMIN CODE § 553.3(c) (describing characteristics of patients in Type B facilities);[1] 40 TEX. ADMIN CODE §§ 46.41 (a), (b)(1)(H) (requiring Type B facilities to provide assistance transferring patients and with their ambulation), (b)(3) (discussing Type B facility transport and escort requirements); 92.41(c) (requiring a resident assessment and individual service plan). These regulations define the breadth of the assisted living facility's duties and are potential fodder for an expert report.[2]

[1] This section was previously at 40 TEX. ADMIN CODE § 92.3(c).

[2] Faber suggests that the Legislature could not have intended to require a medical expert qualified to provide testimony about improper sidewalk maintenance. We have given voice to this valid complaint in cases where the gravamen of the plaintiff's claim is "unrelated to the provision of health care to the patient population or to anyone else" and when requiring an expert report "would amount to an exercise in futility." *See Baylor Univ. Med. Ctr. v. Lawton*, 442 S.W.3d 483, 486–87 (Tex. App.—Dallas 2013, pet. denied) (nurse alleged workplace injuries caused by raw sewage and chemicals poured to address it).

- Finally, Dayspring characterizes the walker Smith was using as an "instrumentality" used in health care. Faber says concrete mix, trowels, paint, and paintbrushes were the relevant "instrumentality" because the premises defect, the sidewalk, caused her to fall, not the walker. We agree with Dayspring that the walker was an instrumentality used in providing health care.

Weighing the *Ross* factors indicates, in this specific case, that the substantive nexus between Faber's claims and the relevant safety standards makes them HCLCs. *See Ross*, 462 S.W.3d at 504.

Our conclusion might well be different if Smith had not been a patient. *See Galvan v. Memorial Hermann Hosp. Sys.*, 476 S.W.3d 429, 432–33 (Tex. 2015). Galvan slipped on water in a hallway at a hospital while visiting a patient. The supreme court rejected the hospital's claim that infection control, based on state and federal law requiring it to maintain floors against spreading infection, was the nexus between Galvan's claims and health care. *Id.*[3] The supreme court came to a similar conclusion in another case when a non-patient tripped on floor mats in a hospital

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Faber could have found an expert qualified to opine on several topics, including that Dayspring contributed to Smith's injuries by breaching a duty to: (1) provide uniform and well-maintained walkways for its assisted-living residents who may have difficulty ambulating; (2) adopt and implement appropriate policies and procedures designed to ensure the identification and remediation of potential ambulatory hazards; (3) train employees offering ambulatory assistance to identify and avoid potential hazards to prevent falls; and (4) render appropriate aid to residents who suffer an injury as a result of a fall. The regulations at issue here provide a template for the duties Dayspring owed.

[3] Faber contends her claims should not be considered HCLCs because she amended her complaint to focus solely on the defect in Dayspring's premises. "There is an important distinction in the relationship between premises owners and invitees on one hand and health care facilities and their patients on the other. The latter involves health care." *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 850 (Tex. 2005). Even in the absence of non-premises liability negligence claims against the facility, the law will require an expert report when, as here, the claim is a HCLC. *See id.* at 854.

lobby. *See Reddic v. E. Tex. Med. Ctr. Reg'l Health Care Sys.*, 474 S.W.3d 672, 676 (Tex. 2015).

The Tyler court recently came to a similar conclusion, finding no HCLC when a man slipped on liquid in the cafeteria of a skilled nursing facility after meeting his girlfriend there for lunch. *See S. Place SNF, LP v. Hudson*, No. 12-19-00405-CV, 2020 WL 1528052, at *4 (Tex. App.—Tyler Mar. 31, 2020, no pet. h.). Our friends in Beaumont recently considered a patient's premises liability claim after a man tripped over a scale in his doctor's office. *See SE Tex. Cardiology Assocs.*, 593 S.W.3d at 745. The scale was on the ground in an area the patient passed walking from the examination room after he saw the doctor, the patient was accompanied by a nurse, and the area was one where close relatives or associates were sometimes allowed to accompany patients. Concluding the facility owed the man duties both as a business invitee and as a patient, the court held the factors weighed in favor of concluding this was an HCLC. *Id.* at 748–49.

A final case merits attention as a contrast to our decision: a patient, Ramirez, slipped on water walking down a hospital hallway after her doctor had seen her and ordered her to go have an x-ray done on a different floor in the building. *Houston Methodist Willowbrook Hosp. v. Ramirez*, 539 S.W.3d 495, 497 (Tex. App.—Houston [1st Dist.] 2017, no pet.). Concluding this was not a HCLC, the court noted Ramirez was in an area accessible to the public, that the importance of cleanliness in hospitals does not demonstrate how Ramirez's claims implicated duties specific

to health care providers, and thus that the hospital owed her only the duties owed by a business premises owner generally. *Id.* at 500. *Ramirez* does not strongly enough counsel against Faber's claims being HCLCs: Ramirez was at the hospital unrelated to her mobility; Smith remained at Dayspring, at least in part, due to her diminished mobility. And Ramirez walked unaccompanied; Smith was being pushed by a Dayspring employee in her walker, further to the point that her mobility was an issue.

Faber's failure to provide an expert report is fatal here. We overrule her first two issues, affirming the trial court's dismissal.

There is no deadline for filing the motion to dismiss here

Faber also contends the district court abused its discretion by granting Collin Creek's second motion to dismiss because the second motion was not filed within the statute's 21-day deadline. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(a). The 21-day deadline applies only to objections based on timely served expert reports, not to motions based on a plaintiff's complete failure to serve an expert report. *See Victoria Gardens of Frisco v. Walrath*, 257 S.W.3d 284, 290 (Tex. App.—Dallas, pet. denied). We overrule Faber's third issue.

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Having overruled each of Faber's issues, we affirm the trial court's judgment of dismissal.

PER CURIAM

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHRISTINE FABER, INDIVIDUALLY AND AS HEIR AT LAW OF CARMELINA "MILLIE" SMITH, DECEASED, Appellant

No. 05-18-00827-CV V.

COLLIN CREEK ASSISTED LIVING CENTER, INC. D/B/A/ DAYSPRING ASSISTED LIVING COMMUNITY, Appellee

On Appeal from the 366th Judicial District Court, Collin County, Texas Trial Court Cause No. 366-02547-2015.
Opinion delivered Per Curiam. Justices Pedersen, III, Reichek, and Carlyle participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Collin Creek Assisted Living Center, Inc. d/b/a/ Dayspring Assisted Living Community recover its costs of this appeal from appellant Christine Faber, Individually and as Heir at Law of Carmelina "Millie" Smith, Deceased.

Judgment entered this 30th day of June, 2020.