AFFIRMED; Opinion Filed March 14, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00380-CV

LUTHERAN SOCIAL SERVICES OF THE SOUTH, INC., Appellant
V.
WINNIE BLOUNT, INDIVIDUALLY AND AS NEXT FRIEND OF P.B., MINOR CHILD, AND JOHN BLOUNT, INDIVIDUALLY AND AS NEXT FRIEND OF P.B., MINOR CHILD, Appellees

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-02429

MEMORANDUM OPINION

Before Justices Lang, Brown, and Schenck
Opinion by Justice Lang

In this interlocutory appeal, appellant Lutheran Social Services of the South, Inc. ("LSSS" or "Lutheran") challenges the trial court's denial of its motion to dismiss the claims asserted against it by appellees (collectively, "the Blounts") due to the Blounts' alleged failure to satisfy the expert report requirement of the Texas Medical Liability Act ("TMLA"). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West Supp. 2015); *see also Van Ness v. ETMC First Physicians*, 461 S.W.3d 140, 141 (Tex. 2015) (describing Chapter 74 of Texas Civil Practice and Remedies Code as "Texas Medical Liability Act"). Specifically, in two issues on appeal, LSSS contends (1) the trial court erred "in determining that LSSS was not a health care provider" and (2) the expert reports supplied by the Blounts "do not meet the requisites of the statute."

We decide against LSSS on its first issue. Consequently, we need not reach LSSS's second issue. The trial court's order is affirmed. Because the law to be applied in this case is well settled, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.2(a), 47.4.

I. FACTUAL AND PROCEDURAL BACKGROUND

The parties do not dispute that P.B. is the biological child of the Blounts and was born on September 21, 2011, with a congenital disorder known as "Apert syndrome." P.B. spent the first six months of his life in a hospital. In order to treat breathing difficulties resulting from P.B.'s disorder, doctors performed a tracheostomy "early on"[1] and inserted an endotracheal tube ("trach tube") in his neck. Prior to P.B. leaving the hospital, the Texas Department of Family and Protective Services ("TDFPS") determined he needed to be placed in foster care. TDFPS contracted with LSSS respecting the placement of P.B. in an appropriate foster home.

In early March 2012, LSSS selected James and Gay Lynn Burk ("the Burks") as foster parents for P.B. After the Burks completed training pertaining to P.B.'s care, P.B. was moved into the Burks' home. At that time, Epic Health Services, Inc. ("Epic") was hired to provide nursing staff for round-the-clock nursing care of P.B. while he resided with the Burks.

On March 17, 2012, two Epic nurses were on duty at the Burks' home. Upon hearing a "pulse alarm," one of the nurses went into P.B.'s room and found he was struggling to breathe. The nurses contacted the Burks, who were outside near the home, and also called 9-1-1. That emergency call was subsequently canceled when the Epic nurses were able to stabilize P.B.

Two days later, on March 19, 2012, an Epic nurse was with P.B. in his room. Mrs. Burk entered the room, noticed P.B. was in distress, and asked the nurse to check his trach tube. The nurse discovered the trach tube had become dislodged from its proper position. Mrs. Burk called 9-1-1. Prior to the arrival of emergency personnel, the nurse was able to stabilize P.B. by

[1] The record does not show the specific date of that procedure.

inserting a "back-up" trach tube. P.B. was taken to a hospital at that time for evaluation and later returned to the Burks' home.

A third incident occurred on March 26, 2012. According to the Blounts' last-filed petition in this case, at the time of that incident, an Epic nurse was in P.B.'s room training another Epic nurse. Mrs. Burk entered the room, noticed P.B. was in distress, and asked the nurses to check his trach tube. The nurses discovered P.B.'s trach tube had again become dislodged. A call was made to 9-1-1 and an emergency medical team arrived approximately thirteen minutes later and transported P.B. to a nearby hospital. Although P.B. survived, he allegedly suffered permanent brain damage as a result of being "deprived of adequate oxygen flow."

This lawsuit was filed by the Blounts on March 10, 2014, against (1) Epic and the individual nurses on duty during the March 26, 2012 incident described above; (2) LSSS; and (3) the Burks. Specifically, the Blounts asserted claims for "negligence" against LSSS[2] and the Burks and a "medical negligence" claim against Epic and the individual nurses. Additionally, the Blounts' last-filed petition contained a paragraph titled "Notice of Health Care Liability Claim" in which they stated, "Notice pursuant to § 74.001 et seq. of the Texas Civil Practice and Remedies Code has been sent. Plaintiffs do not believe that Defendant Lutheran is a healthcare provider. However, Plaintiffs have provided notice to Defendant Lutheran in an abundance of caution."

[2] The Blounts' claim against LSSS stated in a portion of their last-filed petition makes the following specific allegations:

> **NEGLIGENCE–DEFENDANT LUTHERAN**
> Defendant Lutheran owed and breached a duty of care owed to Plaintiffs. Defendant Lutheran failed to act as a reasonably prudent child-placement agency would under the same or similar circumstances. Defendant Lutheran's negligence was a proximate cause of the occurrence in question and Plaintiffs' damages. Defendant Lutheran was negligent in the following ways, each of which was a breach of the duty owed to the Plaintiffs and was a proximate cause of the occurrence in question and Plaintiffs' damages:
> a. Failing to administer a service plan pertaining to the oversight of the Minor Child;
> b. Failing to properly and adequately train and supervise its employees;
> c. Failing to oversee the foster parents provided to the Minor Child; and
> d. Failing to complete the necessary paperwork pertaining to the Minor Child's placement with James and Gay Burk.

(emphasis original).

The defendants timely filed separate general denial answers. Additionally, LSSS stated in part in its answer that "[p]leading further, alternatively, and by way of affirmative defense," it "intends to assert the following rights and limitations under the Texas Civil Practice and Remedies Code: . . . [c]ompliance with the § 74.351 requirement that Plaintiffs serve one or more expert reports not later than the 120th day after the date Plaintiffs Original Complaint was filed."

On approximately April 14, 2014, the Blounts served LSSS, Epic, and the individual nurses named as defendants with expert reports pursuant to section 74.351(a) of the TMLA. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a). LSSS filed timely objections to the sufficiency of those reports "[t]o the extent that the TMLA applies to Plaintiffs' claims against LSSS."[3] The trial court sustained those objections, in part, and, pursuant to the TMLA, allowed the Blounts an opportunity to cure the deficiencies. *See id.* § 74.351(c). Additional expert reports were timely filed by the Blounts on approximately September 5, 2014. LSSS filed objections to the sufficiency of the additional expert reports, which objections were sustained by the trial court on November 11, 2014.

On December 22, 2014, the Blounts filed a "Motion for Reconsideration and Motion for New Trial as to the Orders Relating to [LSSS]." In that motion, the Blounts asserted arguments respecting the sufficiency of their expert reports and, additionally, stated in part, "Plaintiffs file this Motion subject to and without prejudice to their position that [LSSS] is not a health care provider or institution to which any of the requirements of Chapter 74 of the Texas Civil Practice & Remedies Code apply, including Chapter 74's expert report requirement."

[3] Also, Epic and individual nurses filed timely objections to the expert reports separate from those of LSSS. Because Epic and the individual nurses are not parties to this appeal, we do not further address the procedural history respecting those objections.

Prior to a hearing or ruling on the Blounts' motion, LSSS filed a January 19, 2015 motion to dismiss the Blounts' claims against it pursuant to section 74.351(b) of the TMLA. *See id.* § 74.351(b) (if claimant in health care liability claim does not serve adequate expert report after opportunity to cure, trial court, on motion of affected health care provider, "shall . . . enter an order that . . . dismisses the claim with respect to the . . . health care provider, with prejudice to the refiling of the claim"). In its motion to dismiss, LSSS argued in part that it is a "health care provider" under the TMLA because (1) it "is a child placement agency that works in partnership with [TDFPS] to find foster and adoptive homes for children"; (2) it "has a full permit with the [TDFPS], and its foster care program provides treatment services for children with emotional disorders, mental retardation, primary medical needs, and pervasive development disorder"; and (3) in its "role as a placement agency for foster children," it "must evaluate and understand the needs of children being placed in homes" and "must also evaluate the medical training, knowledge, and abilities of potential foster parents to address the children's medical needs." Further, LSSS contended that although the Blounts "have pleaded their claims against LSSS under a theory of common law negligence," those claims "are actually health care liability claims and fall exclusively under the TMLA" because those claims "involve alleged departures from the accepted standards of health care and from the accepted standards of professional or administrative services directly related to health care."

The Blounts filed a response to LSSS's motion to dismiss in which they stated in part,

> LSSS's argument is incorrect because it assumes that any license from the State of Texas places an entity under the umbrella of Chapter 74. However, LSSS must connect the purpose of its license to the provision of health care. . . . [LSSS] does not offer evidence that it actually has a current permit, and it does not identify the statute authorizing the permit or explain any of the licensed activities to which this permit relates. In fact, LSSS has produced no evidence of any kind to support its claim that it is a health care provider. . . . In contrast, the case law supports Plaintiffs' argument that LSSS is not a health care provider because LSSS has offered no proof that it provides medical treatment of any kind or that its employees have received any medical training.

In a reply to the Blounts' response, LSSS argued in part that it is a health care provider "because it assesses the medical needs of children in conjunction with physicians to ensure that children placed in foster homes receive the required care and treatment to meet their unique medical needs." Further, attached to LSSS's reply as an exhibit was a three-page printout of a "search result" from the TDFPS website showing a list of "Operation Details" posted by TDFPS pertaining to LSSS (the "TDFPS website printout"). That list of "Operation Details" included, in part, the following:

> Operation Type: Child Placing Agency–Adoption Services
>
> Operation/Caregiver Name: Lutheran Social Services of the South, Inc.
> . . . .
> Programmatic Services: Child Care, Assessment, Respite Child Care
>
> Treatment Services: Emotional Disorders, Mental Retardation,
> Primary Medical Needs, Pervasive Development Disorder
>
> Type of Issuance: Full Permit

After a hearing, the trial court granted the Blounts' motion for reconsideration and new trial as to LSSS and denied LSSS's motion to dismiss. The trial court specified that both of those rulings were based on its "finding that LSSS is not a health care provider as defined by Chapter 74 of the Texas Civil Practice and Remedies Code." This interlocutory appeal timely followed. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (West Supp. 2015) (allowing for interlocutory appeal of order denying relief sought by motion under section 74.351(b) of TMLA).

II. APPLICABILITY OF TMLA

A. Standard of Review

Generally, an appellate court reviews a trial court's ruling on a motion to dismiss under the TMLA for an abuse of discretion. *See, e.g., Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52

(Tex. 2002); *Fudge v. Wall*, 308 S.W.3d 458, 460 (Tex. App.—Dallas 2010, no pet.). However, when the resolution of an issue on appeal requires the interpretation of a statute, an appellate court applies a de novo standard of review. *See, e.g., Tex. W. Oaks Hosp., LP v. Williams*, 371 S.W.3d 171, 177 (Tex. 2012); *Fudge*, 308 S.W.3d at 460.

B. Applicable Law

When interpreting a statute, an appellate court attempts to ascertain and give effect to the intent of the legislature. *See, e.g., F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683 (Tex. 2007). Where the statutory text is clear, an appellate court presumes the words chosen are "'the surest guide to legislative intent.'" *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010) (quoting *Entergy Gulf States v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009)). In doing so, we first look to the definitions prescribed by the legislature and any technical or particular meaning the words have acquired. *See* TEX. GOV'T CODE ANN. § 311.011(b) (West 2013).

The TMLA defines "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." TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13). The Texas Supreme Court has observed that this statutory definition contains three elements:

> (1) a physician or health care provider must be a defendant; (2) the claim or claims at issue must concern treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care; and (3) the defendant's act or omission complained of must proximately cause the injury to the claimant.

Bioderm Skin Care, LLC v. Sok, 426 S.W.3d 753, 758 (Tex. 2014) (quoting *Tex. W. Oaks Hosp.*, 371 S.W.3d at 179–80). "No one element, occurring independent of the other two, will recast a claim into a health care liability claim." *Id.*

A "health care provider" is defined in the TMLA 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: (i) a registered nurse; (ii) a dentist; (iii) a podiatrist; (iv) a pharmacist; (v) a chiropractor; (vi) an optometrist; (vii) a health care institution; or (viii) a health care collaborative certified under [the Texas Insurance Code]." TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12)(A). "The term includes: (i) an officer, director, shareholder, member, partner, manager, owner, or affiliate of a health care provider or physician; and (ii) an employee, independent contractor, or agent of a health care provider or physician acting in the course and scope of the employment or contractual relationship." *Id.* § 74.001(a)(12)(B); *see also Fudge*, 308 S.W.3d at 461 (list of persons and entities that constitute "health care providers" in section 74.001(a)(12) is not exhaustive). Additionally, the TMLA defines "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."[4] TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(10).

Section 74.351(a) of the TMLA states that a claimant asserting a health care liability claim must, not later than 120 days after the date the defendant's original answer is filed, serve on that party or his attorney an expert report that meets the requirements set forth in section 74.351. *Id.* § 74.351(a). If such an expert report is not served within the time period specified in

[4] "Medical care" is defined in the TMLA 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." TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(19).

the TMLA, the trial court, on the motion of the affected physician or health care provider, shall enter an order dismissing the claim as to that defendant with prejudice. *Id*. § 74.351(b). The burden is on the party seeking dismissal to show that it is a health care provider. *Shiloh Treatment Ctr., Inc. v. Ward*, No. 01-14-00626-CV, 2015 WL 1825757, at *2 (Tex. App.—Houston [1st Dist.] Apr. 21, 2015, no pet.); *Akhter v. Smooth Solutions DFW One, LLC*, No. 04-11-00263-CV, 2012 WL 3776481, at *3 (Tex. App.—San Antonio Aug. 31, 2012, no pet.) (mem. op.).

A "child-placing agency" means "a person, including an organization, other than the natural parents or guardian of a child who plans for the placement of or places a child in a child-care facility, agency foster home, agency foster group home, or adoptive home." *See* TEX. HUM. RES. CODE ANN. § 42.002(12) (West 2013). "No person may operate a . . . child-placing agency without a license issued by [TDFPS]." *Id*. § 42.041(a) (West Supp. 2015). "'[A]ssessment services' means the determination of the placement needs of a child who requires substitute care." *Id*. § 42.0425(c). "[A] child-placing agency may not provide assessment services unless specifically authorized by [TDFPS] rule." *Id*. § 42.0425(a).

Chapter 749 of title 40 of the Texas Administrative Code contains TDFPS's "Minimum Standards for Child-Placing Agencies." *See* 40 TEX. ADMIN. CODE ANN. §§ 749.1–.4267 (West, Westlaw through 41 Tex. Reg. No. 11742014). Section 749.61 of that chapter is titled "What types of services does [TDFPS] Licensing regulate?" *Id*. § 749.61. That section states in part,

> We regulate the following types of services:
>
> (1) Child-Care Services—Services that meet a child's basic need for shelter, nutrition, clothing, nurture, socialization and interpersonal skills, care for personal health and hygiene, supervision, education, and service planning;
>
> (2) Treatment Services—In addition to child-care services, a specialized type of child-care services designed to treat and/or support children:
>
> (A) With Emotional Disorders . . . ;

(B) With Intellectual Disabilities . . . ;

(C) With Pervasive Developmental Disorder . . . ;[and]

(D) With Primary Medical Needs, who cannot live without mechanical supports or the services of others because of life-threatening conditions, including:

(i) The inability to maintain an open airway without assistance. This does not include the use of inhalers for asthma;
(ii) The inability to be fed except through a feeding tube, gastric tube, or a parenteral route;
(iii) The use of sterile techniques or specialized procedures to promote healing, prevent infection, prevent cross infection or contamination, or prevent tissue breakdown; or
(iv) Multiple physical disabilities including sensory impairments; and

. . . .
(3) Additional Programmatic Services, which include:
. . . .

(B) Assessment Services Program—Services to provide an initial evaluation of the appropriate placement for a child to ensure that appropriate information is obtained in order to facilitate service planning[.]

Id.

C. Application of Law to Facts

In its first issue, LSSS contends "[t]he trial court erred in determining that LSSS was not a health care provider which otherwise subjects Plaintiffs to the expert report requirements for a claim under the [TMLA]." According to LSSS, (1) the list of persons and entities expressly described as constituting "health care providers" in section 74.001(12) of the TMLA is "non-exclusive" and (2) that provision is "very broad and includes LSSS." Specifically, LSSS asserts (1) it "was licensed and certified by the State of Texas to provide assessment services, which includes assessing the medical needs of children in conjunction with physicians," and (2) "the 'administrative' services provided in connection with P.B.'s medical needs; the certification of LSSS with a 'primary medical needs' permit; and the nature of Plaintiffs' allegations against

LSSS focusing on the oversight and training related to P.B.'s medical condition clearly demonstrate that LSSS was a health care provider in this case."

The Blounts respond that the trial court was correct in concluding LSSS is not a "health care provider" for purposes of the TMLA for three reasons: (1) "a child-placing agency like LSSS does not fit within the statute's list of persons and entities that are health care providers" because it is "not similar in type or function to any of the listed persons or entities"; (2) "LSSS failed to prove that it is licensed by the State of Texas to 'provide health care' within the meaning of the statutory definitions" and "neither LSSS's permit nor the regulations that govern it can supply the missing evidence"; and (3) in *Shiloh,* the First Court of Appeals in Houston "reject[ed] the same type of arguments that LSSS is making here" and concluded that "an entity with even closer ties to health care than a child-placing agency—a licensed residential treatment center for children with mental health needs—is not a health care provider as a matter of law."

As described above, the TMLA defines "health care provider" as "any person [or] . . . corporation . . . duly licensed, certified, registered, or chartered by the State of Texas to provide health care," including certain persons and entities expressly listed.[5] TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12)(A). It is clear from the language of section 74.001(a)(12)(A) that the general requirement of being "duly licensed, certified, registered, or chartered by the State of Texas to provide health care" is primary to any consideration respecting similarity to the persons and entities expressly listed thereafter. *See id.* Therefore, we begin our analysis by considering whether LSSS has demonstrated it meets the general requirement of being "duly licensed,

[5] LSSS did not assert in the trial court, and does not contend on appeal, that it constitutes one of the entities expressly listed in section 74.001(a)(12)(A). Nevertheless, the Blounts state in their brief in this Court that one of the specific entities listed in section 74.001(a)(12), a "health care institution," includes "eleven different types of hospital-related facilities, only one of which is even arguably relevant here—'a home and community support services agency.'" *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(11)(E) (listing entities included in term "health care institution"). In turn, section 74.001(a)(14) defines a "home and community support services agency" as a "licensed public or provider agency to which Chapter 142, Health and Safety Code, applies." *Id.* § 74.001(a)(14). The Blounts contend in part that "LSSS is not this type of agency" because "child-placing agencies are not covered by Chapter 142 of the Health and Safety Code." LSSS does not mention or address section 74.001(a)(11)(E), section 74.001(a)(14), or the Texas Health and Safety Code in its appellate briefing. Further, LSSS does not assert, and the record does not show, that LSSS is a "licensed public or provider agency to which Chapter 142, Health and Safety Code, applies."

certified, registered, or chartered by the State of Texas to provide health care." *Id.*; *see also id.* § 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").

LSSS argues in part (1) it is "duly licensed pursuant to Chapter 42 of the Texas Human Resources Code as a child-placement agency" and (2) pursuant to the human resources code, "[TDFPS] oversees a detailed set of regulations that govern LSSS, including the licensing and scope of the licenses that it provides to its licensees."[6] Further, LSSS argues (1) it is "certified as a 'primary medical needs' treatment provider" and "specifically licensed to provide treatment services for children with 'primary medical needs'" and (2) it is "also certified to provide assessment services, including a medical assessment pursuant to its permit issued by the State of Texas." In support of those arguments, LSSS cites the TDFPS website printout, which it describes as "a document from [TDFPS] establishing licensure and certifications from the State of Texas." According to LSSS,

> This is a certification for the placement of children, like P.B., who are deemed to be "fragile" children with medical conditions requiring particular care in their placement, management and assessment of the children. The license permit indicates the types of services that LSSS can provide. The services shown on the permit include: Emotional Disorders, Mental Retardation, *Primary Medical Needs*, and Pervasive Development Disorder.

(emphasis original).

Specifically, as to "primary medical needs," LSSS asserts that, based on the definition of that term in administrative code section 749.61(2)(D), "P.B.'s condition is clearly in the nature of 'primary medical needs.'" *See* 40 TEX. ADMIN. CODE ANN. § 749.61(2)(D). Further, LSSS

[6] LSSS's citations in support of those assertions include the provisions of the human resources code described above. Additionally, LSSS cites section "42.003(3)" of the human resources code. Section 42.003 of that code, titled "Reference to Child-Care Institution," consists, in its entirety, of a single sentence: "A reference in law to a 'child-care institution' means a general residential operation." *See* TEX. HUM. RES. CODE ANN. § 42.003 (West 2013). There are no subsections to that provision. *See id.*

argues in part (1) "[t]he LSSS permit includes this particular certification and it has, therefore, been certified to provide this treatment service"; (2) "[t]he allegations in this case all relate to how well these 'primary medical needs' were handled by the care providers—by LSSS and/or the foster care parents, who were trained and placed by LSSS on behalf of P.B."; and (3) LSSS "is duly licensed and registered by the State of Texas as to 'primary medical needs.'"

Additionally, as to "assessment," LSSS argues it "was licensed and certified by the State of Texas to provide assessment services, which includes assessing the medical needs of children in conjunction with physicians." According to LSSS,

> This assessment is carried out by working together with a physician in determining the care and treatment to be required of the foster parents to ensure that the unique medical needs of the child are met. Indeed, as part of the admission assessment requirements, LSSS had to provide some medical training through various agents in order to allow the foster parents to care for P.B., who was a "Primary Medical Needs" case.

In support of those arguments, LSSS cites section 749.3895(1)(A) of the administrative code, which provides in part that an assessment report by a child-placing agency must include "[t]he child's basic health status, as determined under the supervision of a licensed physician." 40 TEX. ADMIN. CODE ANN. § 749.3895(1)(A). Further, LSSS asserts (1) "[t]he regulations [applicable to child-placing agencies] provide that if the licensee intends 'to provide treatment' for the 'admission' of a 'primary needs' child, it must include an assessment by a physician or other medical professional to confirm the special needs placement under the particular circumstances" and (2) "[i]n the case of a 'primary medical needs' child such as P.B., the regulations govern how the licensee conducts the 'medical assessment.'" In support of those assertions, LSSS cites provisions from a chart contained in section 749.1135 of the administrative code. *Id.* § 749.1135. That chart provides in part,

> "When you admit a child for treatment services, you must do the following, as applicable: If . . . you intend to provide treatment services for a child with primary medical needs,

(A) The admission assessment must have a licensed physician's signed, written orders as the basis for the child's admission. There must also be an evaluation from the physician, a nurse practitioner, or a physician's assistant that confirms that the child can be cared for appropriately in a foster home setting and that the foster parents have been trained to meet the needs of the child and demonstrated competency.

(B) The written orders must include orders for: (i) Medications; (ii) Treatments; (iii) Diet; (iv) Range-of-motion program at stated intervals; (v) Habilitation, as appropriate; and (vi) Any special medical or developmental procedures.

(C) The admission assessment must include the reason(s) for choosing treatment services for the child.

Id.

Finally, LSSS contends in part that this case is "readily distinguishable" from *Shiloh* because (1) unlike this case, *Shiloh* did not involve "a permit and certification for 'primary medical needs'" and (2) based on the chart contained in section 749.1135 of the administrative code described above, "it is clear that [FSSS's] permit involves 'medical services.'" *See id.*; *Shiloh*, 2015 WL 1825757.

In *Shiloh*, defendant Shiloh Treatment Center, Inc. ("ST") and several affiliates (collectively, "Shiloh") operated a group of residential facilities for young people with mental disabilities. *Id*. at *1. A resident of one of those facilities, Destin Ward, walked off the campus of the facility and was severely injured when he was hit by a car. Ward filed a lawsuit against Shiloh. *Id*. According to his petition, "[t]he residential facility where Destin Ward was housed failed to have an adequate alarm to alert . . . his immediate staff" and "the staff inadequately supervised Destin Ward allowing him to leave and wander the neighborhood and ultimately be run over and severely injured." *Id*. Shiloh moved to dismiss Ward's claims on the ground that those claims were health care liability claims and Ward had not satisfied the expert report requirements of the TMLA. *Id*. Following the trial court's denial of its motion to dismiss, Shiloh filed an interlocutory appeal. The court of appeals affirmed, based on its conclusion that

"Shiloh did not demonstrate—on this appellate record—that it was a health care provider." *Id*. at *2.

In reaching its conclusion, the court of appeals in *Shiloh* observed (1) ST was licensed by TDFPS as a "residential treatment center" pursuant to chapter 78 of title 40 of the Texas Administrative Code, which chapter contains TDFPS's "Minimum Standards for General Residential Operations," *see* 40 TEX. ADMIN. CODE ANN. §§ 748.1–.4767; (2) a "general residential operation" is defined in the Texas Human Resources Code as "a child-care facility that provides care for more than 12 children for 24 hours a day" (citing TEX. HUM. RES. CODE ANN. § 42.002(4)); and (3) the permit issued to ST "specifically lists: 'Type[s] of Treatment Services[:] Emotional Disorders[,] Mental Retardation[, and] Pervasive Developmental Disorders.'" *Shiloh*, 2015 WL 1825757, at *3–4.

Shiloh argued in the court of appeals that "because its child-care license includes treatment services," it was "licensed . . . to provide health care" pursuant to the TMLA. *Id*. at *3. Also, Shiloh relied on the regulatory definition of "residential treatment center" as "[a] general residential operation for 13 or more children or young adults that exclusively provides treatment services for children with emotional disorders." *Id*. at *4 (citing 40 TEX. ADMIN. CODE ANN. § 748.43(40)).

In rejecting Shiloh's arguments, the court of appeals stated in part, "Although [ST] was authorized to provide treatment services for emotional disorders, this alone cannot be enough to make it a health care provider." *Id*. The court of appeals observed (1) the regulatory definition cited by Shiloh "says nothing about the kind or degree of treatment services rendered" and (2) although mental care facilities licensed under certain provisions of the Texas Health and Safety Code are specifically identified in the TMLA as "health care providers," ST was not licensed under those provisions, but rather was licensed pursuant to the human resources code. *Id*. at *3–

4. Further, the court of appeals reasoned that while "[a] pedicurist may be said to 'treat' a callous; a yoga instructor may be said to 'treat' anxiety; [and] a teacher may be said to 'treat' a learning difference," "none are automatically health care providers rendering medical treatment to patients." *Id*. at *4 (citing *Skloss v. Perez*, No. 01-08-00484-CV, 2009 WL 40438, at *4 (Tex. App.—Houston [1st Dist.] Jan. 8, 2009, no pet.) (mem. op.) (licensed professional counselor was health care provider because she was licensed to provide medical treatment to patients)). Additionally, the court of appeals stated in part,

> . . . According to [TDFPS], treatment services are "a specialized type of child-care services designed to treat and/or support children." 40 TEX. ADMIN. CODE § 748.61(2) (West 2015) (emphasis added). "Child-care services [means] services that meet a child's basic need for shelter, nutrition, clothing, nurture, socialization, and interpersonal skills, care for personal health and hygiene, supervision, education, and service planning." *Id*. § 748.61(1). This suggests that these services are general in nature and not medical services.
>
> . . . .
>
> In addition, the record contains no evidence that [ST] actually provided any medical care or treatment to Ward or any other person. There is no indication of how many members of Shiloh's staff, if any, were medical personnel. There is no evidence regarding the extent that medical personnel controlled or influenced any child-care services rendered to Ward. There is no medical documentation from [ST] in the record. . . .
>
> . . . .
>
> Given the sparse record evidence, we cannot conclude that [ST] was "duly licensed, certified, registered, or chartered by the State of Texas to provide health care."

Id. at *3–4.

Like ST in *Shiloh*, LSSS is (1) licensed by TDFPS pursuant to the human resources code to provide "treatment services" for certain categories of children and (2) subject to TDFPS regulations in the administrative code respecting such services. Although LSSS is a "child-placing agency" governed by the regulations in chapter 749 of title 40 of the administrative code, rather than a "general residential operation" governed by the chapter 748 regulations cited in *Shiloh*, the language of the provisions in those two chapters respecting "types of services"

licensed is substantially identical.[7] Specifically, section 749.61 describes "treatment services" and "child-care services" in language identical to that in section 748.61, thus "suggest[ing] these services are general in nature and not medical services." *Id.* at *3; *see* 40 TEX. ADMIN. CODE ANN. § 749.61.

LSSS argues that the TDFPS website printout shows "LSSS was licensed to provide care for, among other things, 'primary medical needs,'" and "[s]uch licensure clearly implies an 'act or treatment' concerning medical issues as to LSSS, which was absent in the *Shiloh* court's review of the evidence." However, we cannot agree with LSSS's position that *Shiloh* is materially distinguishable based on the term "primary medical needs" in LSSS's "licensure." Nowhere does the TDFPS website printout state LSSS is "licensed to provide care for, among

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[7] Section 748.61 is titled "What types of services does [TDFPS] Licensing regulate?" and provides in part as follows:

> We regulate the following types of services:
>
> (1) Child-Care Services—Services that meet a child's basic need for shelter, nutrition, clothing, nurture, socialization and interpersonal skills, care for personal health and hygiene, supervision, education, and service planning;
>
> (2) Treatment Services—In addition to child-care services, a specialized type of child-care services designed to treat and/or support children:
>
> (A) With Emotional Disorders, . . . ;
>
> (B) With Intellectual Disabilities, . . . ;
>
> (C) With Pervasive Developmental Disorder, . . .; [and]
>
> (D) With Primary Medical Needs, who cannot live without mechanical supports or the services of others because of life-threatening conditions, including:
>
> (i) The inability to maintain an open airway without assistance. This does not include the use of inhalers for asthma;
> (ii) The inability to be fed except through a feeding tube, gastric tube, or a parenteral route;
> (iii) The use of sterile techniques or specialized procedures to promote healing, prevent infection, prevent cross-infection or contamination, or prevent tissue breakdown; or
> (iv) Multiple physical disabilities including sensory impairments; and
>
> . . . .
> (3) Additional Programmatic Services, which include:
> . . . .
>
> (C) Assessment Services Program—Services to provide an initial evaluation of the appropriate placement for a child to ensure that appropriate information is obtained in order to facilitate service planning[.]

40 TEX. ADMIN. CODE ANN. § 748.61.

other things, primary medical needs." Rather, as described above, the TDFPS printout states in part "Treatment Services: Emotional Disorders, Mental Retardation, Primary Medical Needs, Pervasive Development Disorder." Section 749.61, which specifically pertains to the "types of services" regulated by TDFPS respecting child-placing agencies, describes three types of services: "Child-Care Services," "Treatment Services," and "Programmatic Services." 40 TEX. ADMIN. CODE ANN. § 749.61. Further, that section describes "Treatment Services" as "a specialized type of child-care services designed to treat and/or support children: (A) With Emotional Disorders . . . ; (B) With Intellectual Disabilities . . . ; (C) With Pervasive Developmental Disorder . . . ;[and] (D) With Primary Medical Needs." *Id.* Thus, the phrase "primary medical needs" pertains to a category of children for which LSSS is licensed to provide "treatment services." Nothing in the TDFPS website printout or the administrative provisions cited by LSSS specifically describes the "treatment services" LSSS is licensed to provide to that category of children or any other.

Additionally, as to the "assessment services" LSSS is licensed to provide, those services are described in section 749.61(3)(B) as "[s]ervices to provide an initial evaluation of the appropriate placement for a child to ensure that appropriate information is obtained in order to facilitate service planning[.]" *Id.* The language of that provision, on its face, does not pertain to health care. *Id.* Further, the administrative code requires in part that (1) a written assessment report by a child-placing agency must include "[t]he child's basic health status, as determined under the supervision of a licensed physician" and (2) an admission assessment for a child with "primary medical needs" must include "a licensed physician's signed, written orders as the basis for the child's admission" and "an evaluation from the physician, a nurse practitioner, or a physician's assistant that confirms that the child can be cared for appropriately in a foster home setting and that the foster parents have been trained to meet the needs of the child and

demonstrated competency." *Id*. § 749.1135. However, the record contains no evidence respecting LSSS's employment of, or affiliation with, any licensed physician, nurse practitioner, physician's assistant, or other medical care provider.

On this record, we conclude LSSS has not met its burden to demonstrate it was "licensed, certified, registered, or chartered by the State of Texas to provide health care." TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12)(A); *Shiloh*, 2015 WL 1825757, at *4. Therefore, LSSS is not a health care provider for purposes of the TMLA. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(12)(A); *Shiloh*, 2015 WL 1825757, at *4.

We decide against LSSS on its first issue.

III. CONCLUSION

We decide LSSS's first issue against it. In light of our disposition of that issue, we need not reach LSSS's second issue.

The trial court's order is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

LUTHERAN SOCIAL SERVICES OF THE SOUTH, INC., Appellant

No. 05-15-00380-CV V.

WINNIE BLOUNT, INDIVIDUALLY AND AS NEXT FRIEND OF P.B., MINOR CHILD, AND JOHN BLOUNT, INDIVIDUALLY AND AS NEXT FRIEND OF P.B., MINOR CHILD, Appellees

On Appeal from the 192nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-14-02429.
Opinion delivered by Justice Lang, Justices Brown and Schenck participating.

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

It is **ORDERED** that appellees WINNIE BLOUNT, INDIVIDUALLY AND AS NEXT FRIEND OF P.B., MINOR CHILD, AND JOHN BLOUNT, INDIVIDUALLY AND AS NEXT FRIEND OF P.B., MINOR CHILD recover their costs of this appeal from appellant LUTHERAN SOCIAL SERVICES OF THE SOUTH, INC.

Judgment entered this 14th day of March, 2016.