

IN THE SUPREME COURT OF TEXAS

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No. 98-0907
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IN RE THE DALLAS MORNING NEWS, INC., RELATOR

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ON PETITION FOR WRIT OF MANDAMUS
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PER CURIAM

JUSTICE ABBOTT issued a concurring opinion in which JUSTICE ENOCH, JUSTICE HANKINSON, and JUSTICE O'NEILL joined.

JUSTICE GONZALES issued a concurring opinion in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, and JUSTICE OWEN joined.

JUSTICE BAKER issued an opinion concurring in part and dissenting in part.

Irene P. Henderson and others (collectively “Henderson”) sued the Kaiser Foundation Health Plan of Texas, Kaiser Foundation Hospitals, and the Kaiser Foundation Health Plan, Inc. (collectively “Kaiser”) alleging that Kaiser compromised the quality of care given to members of its health maintenance organization in an effort to cut costs and boost profits. To facilitate discovery, the parties agreed that Henderson would not disclose any documents produced and designated by Kaiser as confidential. The written agreement was filed with the court in compliance with Rule 11 of the Texas Rules of Civil Procedure, the rule governing agreements about pending litigation.¹ Kaiser produced numerous documents to Henderson under the rule 11 agreement without seeking

¹ All references to rules are to the Texas Rules of Civil Procedure.

either a rule 166b(5) protective order or a rule 76a sealing order.² Several months after the parties filed their rule 11 agreement, the court conducted a summary jury trial. After the jury returned a \$62 million verdict for Henderson, Kaiser and Henderson settled their claims for \$5.3 million, and the district court dismissed the suit with prejudice.

Nearly three months after the district court's plenary jurisdiction expired, The Dallas Morning News, Inc. intervened in the case under rule 76a and moved for access to documents used in the *Henderson* suit. The News sought access to some of the unfiled discovery that was the subject of the rule 11 agreement, as well as exhibits introduced at the summary jury trial. Kaiser moved to strike the News's intervention. After a hearing, the trial court concluded that, although it had not rendered a sealing order, it had continuing jurisdiction under rule 76a(7) to determine whether the documents sought were "court records" as defined by the rule, and ordered a hearing set to make this determination.

Kaiser petitioned the court of appeals for mandamus relief to have the order set aside, contending that the district court was without jurisdiction to issue it. Kaiser also filed a notice of appeal. In the mandamus proceeding, the court of appeals concluded that a motion seeking access to documents governed by a rule 11 agreement did not give the district court jurisdiction under rule 76a. Therefore, the court of appeals granted Kaiser's petition and directed the district court to vacate its order setting a hearing on the rule 76a motion and to take no further action on the motion.³ As far as the record before us shows, the appeal remains pending.

² Former rule 166b(5)(c) allowed discovery to be sealed by protective order in accordance with rule 76a's provisions. TEX. R. CIV. P. 166b(5)(c) (repealed 1999); see *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 524 (Tex. 1988). Rule 192.6 has replaced rule 166b(5) without changing this requirement. TEX. R. CIV. P. 192.6(b)(5).

³ *In re Kaiser Foundation Health Plan*, 997 S.W.2d 605 (Tex. App.—Dallas 1998, orig. proceeding).

The News then petitioned this Court for mandamus against the court of appeals. 42 Tex. Sup. Ct. J. 154, 156 (Nov. 19, 1998). The Court concludes that the court of appeals should not have granted mandamus relief. Accordingly, the court of appeals is directed to withdraw its order and deny Kaiser's petition for mandamus. The writ will issue only if the court of appeals fails to respond promptly.

Opinion delivered: December 16, 1999