

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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JUSTICE ABBOTT, joined by JUSTICE ENOCH, JUSTICE HANKINSON, and JUSTICE O'NEILL,
concurring.

The Court should consider whether the trial court had jurisdiction to set and conduct the hearing. The trial court issued an order after final judgment and after its plenary power expired, and the court of appeals granted mandamus relief based on its conclusion that the trial court lacked jurisdiction. The Court should resolve the controversy presented and decide whether a trial court whose plenary power has expired maintains continuing jurisdiction to consider whether unfiled discovery made confidential by a Rule 11 agreement and exhibits introduced at a summary jury trial include “court records” as defined by Texas Rule of Civil Procedure 76a. I would hold that because Rule 76a(7) provides trial courts with continuing jurisdiction over an intervenor’s attempt to gain or prevent access to court records at any time after judgment, a trial court necessarily has jurisdiction to determine whether unfiled discovery made confidential by a Rule 11 agreement includes court records. Similarly, a trial court has continuing jurisdiction to determine whether certain summary jury trial exhibits are “court records” within Rule 76a’s meaning. Because the court of appeals erroneously concluded that the trial court lacked jurisdiction, the court of appeals should not have

granted mandamus relief, and the cause should be remanded to the trial court to proceed with the hearing.

I

Justice Gonzales concludes that the court of appeals should not have issued mandamus relief because Kaiser did not show that it lacked an adequate appellate remedy.¹ In reaching this conclusion, Justice Gonzales first rejects the court of appeals' conclusion that mandamus was proper because the trial court's plenary jurisdiction over the original lawsuit had expired and the News's motion did not allege grounds for continuing jurisdiction. Justice Gonzales attempts to distinguish an order entertaining a Rule 76a motion from an order granting a new trial after the trial court's plenary power has expired, for which mandamus relief is proper. *See In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998). Instead, Justice Gonzales decides that Kaiser's challenge to the trial court's jurisdiction is more in the nature of a plea to the jurisdiction, for which mandamus relief is generally improper because appeal is an adequate remedy. ___ S.W.3d at ___.

The basis of Justice Gonzales's argument is that a Rule 76a proceeding is a "quasi-independent proceeding" in which the trial court "resolves distinct issues limited to the question of sealing or unsealing documents." ___ S.W.3d at ___. But the language of Rule 76a itself indicates that Rule 76a proceedings are not independent, but are part of the underlying litigation. A Rule 76a hearing involves the same parties and is part of the existing controversy. *See* TEX. R. CIV. P. 76a(4). Justice Gonzales notes that nonparties may intervene for the limited purpose of participating in the

¹ I agree with Justice Gonzales's conclusion that Rule 76a(8) expressly provides an appellate remedy from a trial court's order fully disposing of a Rule 76a motion, but that it does not provide an appeal from the court's order that does nothing more than set a Rule 76a hearing.

proceedings, but fails to recognize that the very nature of an intervention is that nonparties are entering an existing controversy between the parties. *See Highlands Ins. Co. v. Lumbermen's Mut. Cas. Co.*, 794 S.W.2d 600, 601 (Tex. App.—Austin 1990, no writ); *see also* BLACK'S LAW DICTIONARY 826 (7th ed. 1999). Further, Rule 76a(8) provides that any order disposing of a Rule 76a motion is severed from the case, indicating that a Rule 76a proceeding remains a part of the underlying litigation until the time the court enters such an order. *See* TEX. R. CIV. P. 76a(8). Thus, a Rule 76a hearing is not an independent proceeding, but remains a part of the existing controversy until such time as the motion is finally adjudicated by the trial court.

In the context of a trial court's denial of a plea to the jurisdiction, we have held that mandamus is improper because the denial is an incidental trial ruling rendered before final judgment and appeal is an adequate remedy. *See Abor v. Black*, 695 S.W.2d 564, 566-67 (Tex. 1985). But here we have a final judgment and the trial court has issued an order after its plenary power has expired unless Rule 76a gave it continuing jurisdiction. Accordingly, if the trial court lacked jurisdiction to set the hearing, mandamus would be an appropriate remedy because the proceeding would be a nullity, rendering appeal inadequate. *See Dickason*, 987 S.W.2d at 571. But if the trial court had jurisdiction, the court of appeals would have abused its discretion by issuing mandamus relief. *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985).

The Court should not remand this case to the trial court to conduct the hearing without commenting on the jurisdiction issue. Because the court of appeals considered the question of jurisdiction and issued a writ of mandamus on that basis, that question is presented for our review and it is proper for us to consider that question by mandamus. *See id.* (Supreme Court's mandamus jurisdiction encompasses determining whether the court of appeals abused its discretion in granting

mandamus relief based upon an abuse of discretion in the trial court); *see also In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998). Justice Gonzales instead concludes that “it would be premature to decide the [jurisdiction issue] at this incipient stage of the controversy.” ___ S.W.3d at ___. I fail to see how the question of the trial court’s jurisdiction is at an “incipient stage” when both the trial court and the court of appeals have decided the issue and it is ripe for our review. The trial court ruled that it has continuing jurisdiction and granted the News’s motion to obtain access to the records by setting a hearing to determine whether the documents are court records within Rule 76a. The court of appeals concluded that the trial court lacked jurisdiction to entertain the News’s motion because the court’s plenary power had expired and the News’s motion did not allege a basis for continuing jurisdiction, and the court of appeals granted mandamus relief on that basis.

The Court should consider whether the court of appeals improperly granted mandamus relief based on its finding that the trial court lacked jurisdiction. Accordingly, I turn to whether the trial court had jurisdiction under Rule 76a(7) over the News’s request for access to court records.

II

In 1990, this Court adopted Rule 76a in response to legislation mandating that it establish guidelines for sealing court records in civil cases. *See* TEX. GOV’T CODE § 22.010. Rule 76a “creates a presumption that all court records are open to the public.” *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 523 (Tex. 1998); *see* TEX. R. CIV. P. 76a(1). To further that presumption, the Rule provides that “court records” may be sealed from the public only upon a showing that (a) “a specific, serious and substantial interest . . . clearly outweighs [both the] presumption of openness [and] any probable adverse effect that sealing will have upon the general public health or safety,” and (b) “no

less restrictive means than sealing records will . . . protect the specific interest asserted.” TEX. R. CIV. P. 76a(1). Any person may intervene as a matter of right to be heard on the sealing issue. TEX. R. CIV. P. 76a(4), (7).

Rule 76a(7) grants trial courts continuing jurisdiction “to seal or unseal court records” upon the motion of a party or intervenor. It states:

Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. A court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order. An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order.

TEX. R. CIV. P. 76a(7).

Rule 76a defines “court records” to include “discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety.” TEX. R. CIV. P. 76a(2)(c); *see Kepple*, 970 S.W.2d at 523. The News contends that the unfiled discovery made confidential by Kaiser’s Rule 11 agreement contains documents that meet this definition. It seeks to have the trial court determine whether “court records” are included in the unfiled discovery and, if so, to “unseal” the records. The News also seeks to have exhibits that were introduced as evidence at the summary jury trial declared “court records” subject to Rule 76a. The issue therefore is whether Rule 76a(7) gives the trial court jurisdiction to hear the News’s motion to intervene to obtain disclosure of “court records” that may be contained in either the unfiled discovery that is subject to the Rule 11 agreement or the summary jury trial exhibits introduced in the *Henderson* litigation.

A

In construing a rule of civil procedure, we look first to the rule’s plain language. *See, e.g., Burrhus v. M&S Supply, Inc.*, 933 S.W.2d 635, 640 (Tex. App.—San Antonio 1996, writ denied); *see also Missouri Pac. R.R. Co. v. Cross*, 501 S.W.2d 868, 872 (Tex. 1973). Both Kaiser and the News argue that the plain language of Rule 76a supports their respective positions. The News argues that Rule 76a(7)’s plain language gives the trial court continuing jurisdiction to determine if the documents are court records. Despite the fact that no sealing order has been issued, the News asserts that any records in the discovery have been “sealed” insofar as the public is completely barred from inspecting them. Thus, argues the News, Rule 76a(7) allows it to “intervene as a matter of right at any time . . . after judgment to . . . unseal court records.” TEX. R. CIV. P. 76a(7).

In response, Kaiser argues that the trial court does not have jurisdiction to conduct the Rule 76a hearing requested by the News because no “sealing” has occurred within the meaning of Rule 76a. The Rule’s language, Kaiser asserts, makes continuing jurisdiction to unseal court records contingent upon the trial court’s first issuing a sealing order. Although Rule 76a(7)’s first sentence grants continuing jurisdiction to *seal* court records, Kaiser contends that the second sentence requires that a sealing order be issued before the court gains continuing jurisdiction to *unseal*. Because the trial court issued no sealing order, Kaiser argues that the trial court’s jurisdiction to hear the News’s motion expired with its plenary power.

I disagree with the parties that the language of Rule 76a plainly dictates either result. The first sentence of Rule 76a(7) states that “[a]ny person may intervene as a matter of right at any time before or after judgment to seal or unseal court records.” *Id.* This broad language is an implicit grant of jurisdiction over an intervenor’s attempt “to . . . unseal court records.” Kaiser contends that

this jurisdiction is limited to instances where the records have been sealed by court order. But the language of the Rule is not so limited. Rule 76a does not define what constitutes “sealing” for the purpose of determining when a court may unseal. Clearly the term includes court orders issued under Rule 76a; but the Rule does not state whether the grant of continuing jurisdiction applies *only* when such a court order has issued. And, contrary to Kaiser’s contention, the second sentence of Rule 76a, which states that “[a] court that issues a sealing order retains continuing jurisdiction to enforce, alter, or vacate that order,” does not necessarily limit a court’s continuing jurisdiction to situations in which the court has issued a sealing order. It does not automatically follow from the second sentence that a court that does not issue a sealing order does not have continuing jurisdiction. Instead, the second sentence could be read not as a limitation on the court’s jurisdiction, but simply a clarification that a court retains jurisdiction to alter or enforce any sealing order it issues, or to vacate it when it is no longer necessary.

Accordingly, I conclude that the Rule’s language is ambiguous. Thus, it is proper to consider the purpose of the Rule in construing it. *See Ludwig v. State*, 931 S.W.2d 239, 242 (Tex. Crim. App. 1996) (“A court may consider the purpose behind the rule as an aid to construction.”).

B

The obvious intent of Rule 76a(7)’s first sentence is to allow courts continuing jurisdiction to determine whether certain court records should be subject to, or shielded from, public disclosure. *See Kepple*, 970 S.W.2d at 523; TEX. R. CIV. P. 76a(1). This principle remains constant without regard to the method by which court records are sealed. The absence of a preexisting court order sealing documents cannot deprive courts of continuing jurisdiction to unseal “court records” that

have been effectively sealed by a Rule 11 agreement or some other means. To hold otherwise would undermine both the purpose and the presumption embodied in Rule 76a. The Rule's purpose is to ensure public access to "court records"; the presumption is that all "court records" are open to the public. *See* TEX. R. CIV. P. 76a(1); *Kepple*, 970 S.W.2d at 523-24.

The Rule's use of the words "seal or unseal" flows from the general proposition underlying Rule 76a: that the public has access, both before and after judgment, to "court records" unless the court enters a sealing order consistent with Rule 76a's sealing requirements. Rule 76a(7) effectuates this animating principle by granting the trial court continuing jurisdiction to allow or prevent access to "court records." It is the question of access, not some earlier decision on that question, that gives the trial court jurisdiction. Thus, I would hold that Rule 76a(7), which grants continuing jurisdiction to unseal without reference to any particular sealing method, applies to "unseal court records" whether those records were sealed by court order following Rule 76a, some other rule, or by private agreement. The trial court has continuing jurisdiction to hear the News's motion to intervene to determine whether the unfiled discovery contains "court records" within Rule 76a's meaning and whether any of the summary jury trial exhibits are court records. Any "court records" revealed are presumptively open to the public; however, the court also has jurisdiction to seal those records, following Rule 76a's requirements.

III

Kaiser argues alternatively that the News has waived its right to intervene. Kaiser points to the fact that the Rule 11 agreement was filed in court, and contends that the News, which was covering the *Henderson* litigation, had notice that discovery potentially containing "court records"

was being sealed.

The third sentence of Rule 76a(7) provides:

An order sealing or unsealing court records shall not be reconsidered on motion of any party or intervenor who had actual notice of the hearing preceding issuance of the order, without first showing changed circumstances materially affecting the order.

TEX. R. CIV. P. 76a(7). Nothing in the record indicates that the News had *actual* notice of the Rule 11 agreement. Moreover, the Rule plainly contemplates actual notice of a public hearing conducted according to Rule 76a(4). Nothing approaching a public hearing accompanied Kaiser's filing of the Rule 11 agreement among its court papers.

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For the foregoing reasons, I would hold that the trial court had jurisdiction to set a hearing on the News's Rule 76a motion to determine whether the documents sought by the News are "court records" within the meaning of Rule 76a. Accordingly, the court of appeals should not have granted mandamus relief, and the cause should be remanded to the trial court to proceed with the hearing.

GREG ABBOTT
JUSTICE

OPINION DELIVERED: December 16, 1999