

IN THE SUPREME COURT OF TEXAS

No. 98-0907

IN RE THE DALLAS MORNING NEWS, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

Argued on March 3, 1999

JUSTICE GONZALES concurring, in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, and JUSTICE OWEN join.

The Court unanimously agrees that the court of appeals abused its discretion by issuing mandamus. I believe that because the real party in interest here had an adequate remedy by appeal, the court of appeals abused its discretion by intervening. I would not go so far as Justice Baker, who contends that every order rendered in connection with a Texas Rule of Civil Procedure 76a matter is immediately appealable. Nor can I join Justice Abbott's position that despite the existence of an appellate remedy, mandamus is appropriate to decide the substantive issue about jurisdiction. I would not resolve the rule 76a issues in this case piecemeal, but reserve opinion about them for an appeal should one prove necessary.

I

In the present controversy, The Dallas Morning News, Inc. is seeking access to documents used in a lawsuit by several individuals against certain health maintenance organizations and related entities and persons. After a jury trial the case settled and the trial court dismissed it. About four months later, the Morning News intervened and moved for court-ordered access to documents

involved in the prior litigation. One group of defendants, Kaiser Health Plan of Texas and others, moved to strike the Morning News' intervention. After a hearing on Kaiser's motion to strike the intervention, the trial court recited that it had jurisdiction under rule 76a(7), denied Kaiser's motion to strike, and set a hearing date to decide if the requested documents are “court records” as that term is used in rule 76a. Kaiser sought mandamus from the court of appeals and also filed a notice of appeal. Concluding that the trial court lacked jurisdiction, the appellate court granted a writ ordering the trial court to vacate the setting. Kaiser's appeal remains pending in the court of appeals.

II

The threshold question is whether a mandamus petition was a proper vehicle to challenge the trial court's order assuming jurisdiction and setting a hearing date to determine if certain documents are court records potentially disclosable under rule 76a. Mandamus is an extraordinary remedy, available only if the relator shows (1) an abuse of discretion and (2) the lack of an adequate appellate remedy. *See Walker v. Packer*, 827 S.W.2d 833, 840-44 (Tex.1992). Reviewing courts must not issue mandamus to control or correct a trial court's incidental ruling if the harm, if any, can be remedied on appeal. *See Abor v. Black*, 695 S.W.2d 564, 566 (Tex. 1985). Rule 76a(8) expressly provides for an appellate remedy:

8. Appeal. Any order (or portion of an order or judgment) relating to sealing or unsealing court records shall be deemed to be severed from the case and a final judgment which may be appealed by any party or intervenor who participated in the hearing preceding issuance of such order. The appellate court may abate the appeal and order the trial court to direct that further public notice be given, or to hold further hearings, or to make additional findings.

TEX. R. CIV. P. 76a(8).

Despite the existence of an appellate remedy, the court of appeals held that mandamus was

proper because the trial court's plenary jurisdiction over the original lawsuit had expired and that the Morning News' motion did not allege grounds for the trial court's continuing jurisdiction under rule 76a(7). I recognize that previously we have held that mandamus is proper to remedy an order granting a new trial after the trial court's plenary power expired. *See In re Dickason*, 987 S.W.2d 570, 571 (Tex. 1998). However, I disagree with Justice Abbott's position that an order entertaining a rule 76a motion is analogous to an order granting a new trial on the merits. If a trial court grants a new trial after its plenary power has expired, the parties are forced to needlessly relitigate the same issues. *See Buttery v. Betts*, 422 S.W.2d 149, 151 (Tex. 1967). Proceedings following a void new trial order not only waste everyone's time and resources, they add nothing that could change the result on appeal. A plea to the jurisdiction, however, is generally made at the pleading stage. *See* 2 MCDONALD TEXAS CIVIL PRACTICE § 9:11, at 307-08 (Allen et al. eds., 1992 ed.). If the trial court denies the plea, the appellate court will consider the issue on appeal in light of a fully developed record. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 478 (Tex. 1993); *Peek v. Equipment Serv. Co.*, 779 S.W.2d 802, 804 (Tex. 1989).

Although a rule 76a proceeding involves prior or ongoing litigation, it is a quasi-independent proceeding. Persons disinterested in the outcome of the underlying litigation, such as the media, may intervene as a matter of right. *See* TEX. R. CIV. P. 76a(7). The court in a rule 76a proceeding resolves distinct issues limited to the question of sealing or unsealing documents. The trial court has not yet reached any of these issues, because the proceedings have been interrupted at the pleading stage.

Thus, Kaiser's challenge to the trial court's jurisdiction is more in the nature of a plea to the trial court's jurisdiction to entertain a rule 76a matter. Generally, appeal is adequate to remedy a trial

court's denial of a plea to jurisdiction. *See In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 375 (Tex. 1998). Mandamus should not issue when appeal is an adequate remedy. *See id.*

III

Justice Baker concludes that Kaiser's appeal, presently pending in the court of appeals, demonstrates that Kaiser possesses an adequate appellate remedy. While I agree that Kaiser's appellate remedy is adequate, I disagree that the appeal presently pending is ripe.

Justice Baker argues that rule 76a(8)'s statement that a party may appeal "any order" or portion of an order "relating to sealing or unsealing," means any order is immediately appealable. Such a construction leads to the absurd result that every decision a trial court makes involving rule 76a proceedings, no matter how routine or trivial, may be immediately appealed. A court only acts through its orders and judgments. *See City of Hurst v. City of Colleyville*, 501 S.W.2d 140, 143 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.). Moreover, under this construction, every ruling is deemed severed and final as soon as it is rendered. Consequently, the appellate timetable would immediately begin to run on every order when the trial court signs it. The rules do not contemplate such a chaotic appellate system.

We may not read the phrase "any order . . . relating to sealing or unsealing" in isolation from the rest of the rule. We derive the meaning of the rule as a whole and not from isolated phrases. *See Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). I conclude that the rule, when read as a whole, means that once a trial court renders an order fully disposing of a rule 76a motion, then that order and all related matters may then be appealed. First, subsection (8) anticipates that the appeal will be taken only after a rule 76a hearing, because it provides for an appeal "by any party

or intervenor who participated *in the hearing preceding issuance of such order.*” TEX. R. CIV. P. 76a(8)(emphasis added). Second, the rule suggests an appeal of an order following a rule 76a(4) hearing, not a hearing on some tangential matter. Third, the rule contemplates a hearing following public notice required by rule 76a(3). Fourth, the remainder of rule 76a(8) provides for abatement of an appeal for “further public notice,” “further hearings,” and “additional findings.” These provisions are inconsistent with an appeal of an order merely setting a hearing.

Rule 76a(6) also militates against a construction that “any” order relating to sealing or unsealing is appealable. Subsection (6) provides the prerequisites of an order on a “motion relating to sealing or unsealing court records.” Despite its broad language, the rule cannot apply to ancillary motions that arguably relate to sealing or unsealing court records, such as the order here setting a hearing. Under subsection (6), the trial court must make findings about the reasons for sealing or unsealing court records, and the time period they will remain sealed. Such requirements are nonsensical if applied to an order setting a hearing date. Consequently, when read in context, rule 76a(8) must be construed as providing for an appeal only after the trial court has issued an order granting or denying the relief the Morning News requested under rule 76a.

Thus, Kaiser must wait to assert its appellate remedy, but that fact alone does not make appeal inadequate; “an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.” *See Walker*, 827 S.W.2d at 842 (Tex. 1992). Kaiser did not allege any special circumstances showing that appeal is an adequate remedy. Consequently, the court of appeals should not have issued mandamus.

IV

Because Kaiser has not shown an inadequate appellate remedy, we need not consider whether

the trial court abused its discretion. *See Bay Area Citizens*, 982 S.W.2d at 375. While the Court agrees on the existence of an appellate remedy, Justice Abbott contends that mandamus is appropriate to resolve the jurisdictional disputes here, presumably for judicial efficiency. I disagree for the same reasons we do not review pleas to jurisdiction by mandamus. If his view were to prevail, we may expect that relators will routinely claim jurisdictional problems to obtain mandamus review of rule 76a proceedings. It would be premature to decide the rule 76a issues at this incipient stage of the controversy. The trial court should be permitted to proceed and decide the issues before it. Once it has done so, if an appeal is still necessary, the appellate court can resolve all issues at once, on a fully developed record.

V

To summarize, rule 76a(8) provides for an appellate remedy that can only be exercised after a trial court has issued an order finally adjudicating a rule 76a motion. If the trial court should issue some interim order which causes harm that cannot be undone on appeal, then perhaps mandamus would be appropriate. Without such a showing, however, the appellate courts should not get involved until the trial court renders an order deciding the merits of the Morning News' motion. Because the court of appeals abused its discretion, I concur with the Court's decision to conditionally grant the writ.

Alberto R. Gonzales
Justice

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