

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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Argued on March 3, 1999

JUSTICE BAKER, concurring and dissenting.

The issue in this case is the relief available to a party challenging a trial court's order assuming jurisdiction and ordering a hearing under Rule 76a of the Texas Rules of Civil Procedure. I agree with Justice Gonzales' conclusion that Rule 76a(8) mandates an appeal, not mandamus, from Rule 76a orders. But Justice Gonzales also concludes that, under the facts here, Kaiser's appeal is premature. I disagree with that conclusion. I would hold that Rule 76a(8) as written is broad enough to cover an order such as we have here and that such an order is immediately appealable. Accordingly, I would vacate the court of appeals' order granting writ of mandamus and remand this cause to the court of appeals to decide the controversy under appellate standards of review.

I. BACKGROUND

In this case, the trial court concluded that although it had not entered a sealing order, it maintained continuing jurisdiction under Rule 76a(7) to determine whether the documents the News sought were court records and scheduled a hearing to make a determination. The court entered this

order on June 24, 1998. On July 10, 1998, Kaiser filed a mandamus in the Fifth District Court of Appeals in Dallas, alleging that the trial court's order was void and requested the court of appeals to grant mandamus and set aside the trial court's order. On July 14, 1998, Kaiser also filed an appeal under Rule 76a(8) requesting the same relief requested in Kaiser's previously filed mandamus.

On August 27, 1998, the court of appeals, without reference to Rule 76a(8) or the pending appeal, conditionally granted the writ and ordered the trial court to vacate its June 24 order and to take no further action with regard to the News' motion. ____ S.W.2d at _____. The News filed a petition for mandamus in this Court requesting the Court to vacate the court of appeals' order and reinstate the trial court's order scheduling a Rule 76a hearing.

II. GUIDING RULES AND PRINCIPLES

A. RULE 76A

Rule 76a provides the guiding rules and principles for sealing court records. *See Upjohn Co. v. Freeman*, 847 S.W.2d 589, 590 (Tex. App.--Dallas 1992, no writ); *Dunshie v. General Motors Corp.*, 822 S.W.2d 345, 347 (Tex. App.--Beaumont 1992, no writ). Rule 76a provides:

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.

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

On the appeal of a trial court order under Rule 76a, the reviewing court reviews the ruling under the abuse of discretion standard. *See Upjohn Co. v. Freeman*, 906 S.W.2d 92, 95 (Tex. App.--Dallas 1995, no writ).

B. MANDAMUS — ADEQUATE REMEDY BY APPEAL

Mandamus will not issue where there is a clear and adequate remedy at law such as a normal appeal. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992); *State v. Walker*, 679 S.W.2d 484, 485 (Tex. 1984). As this Court has repeatedly stated, mandamus is intended to be an extraordinary remedy, available only in limited circumstances. *See Walker*, 827 S.W.2d at 840. Mandamus will issue only in situations involving manifest and urgent necessity and not for grievances that may be resolved by other remedies. *See Walker*, 827 S.W.2d at 840; *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989).

A reviewing court lacks jurisdiction to issue mandamus to supervise or correct a trial court's incidental rulings when there is an adequate appellate remedy. *See Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990); *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958). The requirement that persons seeking mandamus establish the lack of an adequate appellate remedy is a "fundamental tenet" of mandamus practice. *See Walker*, 827 S.W.2d at 840; *Holloway*, 767 S.W.2d at 684. This fundamental tenet is well-settled. *See Walker*, 827 S.W.2d at 840.

III. ANALYSIS

If the facts of a particular case meet the criteria of Rule 76a(8), the aggrieved party has a remedy at law by appeal. The criteria under Rule 76a(8) are: (1) *any order . . .* (2) *relating to sealing or unsealing court records . . .* (3) *may be appealed* (4) *by any party or intervenor* (5) *who participated in the hearing preceding issuance of such order.* *See TEX. R. CIV. P. 76a(8).* These criteria are met in this case. On June 17, 1998, the trial court held a hearing and both Kaiser and the News participated. That hearing preceded the trial court's order entered on June 24, 1998. That

order related to the sealing or unsealing of court records. Under a plain reading of Rule 76a(8), the right of appeal applies to *any* order that *relates* to sealing or unsealing.¹ This language does not require that the court’s order actually involve sealing or unsealing. Hence, under a plain reading of this Court’s own rule, Kaiser’s remedy to challenge the trial court’s order was an appeal rather than a mandamus. And, Kaiser’s appeal of the order, which *related* to sealing or unsealing, was not premature.

When the court of appeals ruled, it had before it both an original proceeding seeking mandamus and an appeal directly attacking the trial court’s order. In choosing the original proceeding to remedy the perceived error, the court of appeals ignored a fundamental tenet of writ practice. Issuing mandamus is not authorized when the relator has an adequate remedy by appeal. *See Holloway*, 767 S.W.2d at 684; *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985). The court of appeals abused its discretion when it chose the original proceeding instead of the pending appeal as the means for considering the perceived error the trial court committed. *See Holloway*, 767 S.W.2d at 684. Accordingly, the court of appeals should have decided the controversy under appellate standards of review based on Kaiser’s appeal and should have dismissed Kaiser’s petition for mandamus for want of jurisdiction. *See Bell Helicopter*, 787 S.W.2d at 955.²

¹ Justice Gonzales relies heavily on Rule 76a(6) for his holding that Kaiser’s appeal was premature. Rule 76a(6) refers to “a motion relating to sealing or unsealing.” *See* TEX. R. CIV. P. 76a(6). But Rule 76a(8) refers to *any* order relating to sealing or unsealing. *See* TEX. R. CIV. P. 76a(8). If Rule 76a(8) allowed only appeals from Rule 76a(6) orders, it would say “the order” instead of any order.

² I disagree with the rationale Justice Abbott’s concurrence employs to conclude that the Court should resolve the merits of the controversy. Simply put, whether one agrees or disagrees with the court of appeals’ decision on the merits, as a threshold matter, the court of appeals abused its discretion when it chose the original proceeding instead of the pending appeal as the means for considering the perceived error the trial court committed. *See Holloway*, 767 S.W.2d at 684.

IV. CONCLUSION

The court of appeals should have dismissed Kaiser's mandamus petition for want of jurisdiction and, instead, it should have decided this case based on Kaiser's appeal of the trial court's order under the standard of review of an appeal. Accordingly, I would set aside the court of appeals' order and remand the cause to the court of appeals to decide the controversy on Kaiser's appeal under appellate standards of review.

James A. Baker, Justice

OPINION DELIVERED: December 16, 1999