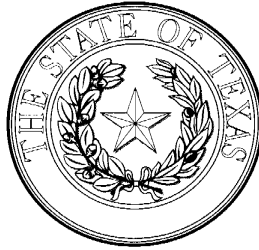


Opinion issued August 13, 2020



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-19-00559-CV

**SCOTT LINDBERG, Appellant
V.
SCOTT CALLAHAN, Appellee**

**On Appeal from the 458th District Court
Fort Bend County, Texas
Trial Court Case No. 19-DCV-262220**

MEMORANDUM OPINION

Appellant Scott Lindberg filed a petition to take a pre-suit deposition of appellee Scott Callahan pursuant to Texas Rule of Civil Procedure 202. As part of that proceeding, the trial court requested to review in camera a recording and transcript of a conversation between Lindberg and Callahan. Lindberg filed a

supplemental petition and attached the unofficial transcript. Callahan, who already had a motion to seal the court documents pending before the trial court, filed an emergency motion, asking the trial court to strike the supplemental petition and to seal the supplemental petition and transcript. The trial court granted Callahan's motion to strike, and it likewise ordered that the supplemental petition and transcript be sealed. The trial court subsequently denied Lindberg's petition to take a pre-suit deposition.¹

In his sole appellate issue, Lindberg argues that the trial court abused its discretion "by sealing court records without a public hearing, without evidence, without notice to the public, and without an explanation as required by Texas Rule of Civil Procedure 76a." Because we conclude that the trial court did not abuse its discretion in striking Lindberg's filing and ordering that the related documents be filed under seal, we affirm.

Background

In December 2018, Lindberg, his minor son, and Callahan met to discuss Lindberg's son's alleged bullying of Callahan's minor daughter. Lindberg recorded the conversation without Callahan's knowledge. Callahan became aware of the recording's existence after Lindberg provided it to law enforcement.

¹ Lindberg does not challenge the trial court's denial of his petition to take a pre-suit deposition in this appeal.

In May 2019, Lindberg petitioned to take a pre-suit deposition of Callahan pursuant to Rule of Civil Procedure 202.² He asserted that, at the December 2018 meeting, Callahan “used language which appeared to be intended to cause fear, intimidation and distress to [Lindberg] and his entire family.” Lindberg asserted that he “immediately reported these threats to the proper law enforcement community,” and he sought to take Callahan’s deposition “to determine if claims of assault by threat or any other type of harassment claims, or threats should be pursued against Callahan” and “to allow [Lindberg] to make a full evaluation of potential claims without filing unnecessary suits or naming an unnecessary defendant.” Lindberg attached affidavits from both himself and his wife, averring that Lindberg was present when Callahan used the threatening language and that it caused the family to experience fear and to seek help from law enforcement.

Callahan responded to the petition by filing, on May 24, 2019, a “Motion to Seal Court Records and Proceedings” pursuant to Rule of Civil Procedure 76a, governing the sealing of court records. Callahan’s motion to seal asserted that, because the suit deals with allegations regarding bullying among minors, Lindberg’s

² Rule 202 provides that a person may file a petition to obtain an order authorizing the taking of a pre-suit deposition “to perpetuate or obtain testimony . . . for use in an anticipated suit” or “to investigate a potential claim or suit.” TEX. R. CIV. P. 202.1; *see id.* R. 202.2 (stating requirements for petition). “Rule 202 is not a license for forced interrogations. Courts must strictly limit and carefully supervise pre-suit discovery to prevent abuse of the rule.” *In re Wolfe*, 341 S.W.3d 932, 933 (Tex. 2011) (orig. proceeding).

petition involved facts that would require the disclosure of “an overwhelming amount of highly sensitive, private, personal . . . information not only for [Lindberg’s] three minor children, and [Callahan’s] minor children, but also for a significant number of . . . non-party minor children” and “their siblings and families who were witnesses to the underlying incidents.” Callahan also filed an answer asking the trial court to deny Lindberg’s petition. Among other arguments, Callahan pointed out that Lindberg “failed to inform the Court that he recorded the December 4, 2018 conversation between himself, his minor son, and [Callahan]. Thus, if a potential claim or suit existed, it would already either exist or not exist on the audio recording.”

The record also contains a written “Notice of Hearing on Respondent’s Motion to Seal Court Records and Proceedings,” containing the information required by Rule 76a(3)’s notice provision.³ The notice was filed May 30, 2019, and it indicated that the hearing would occur on June 28, 2019. The certificate of

³ Rule 76a(3) sets out notice requirements, including that the movant “shall post a public notice” stating “that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant.” TEX. R. CIV. P. 76a(3). Rule 76a(4) provides the requirements for the hearing, including that it be “open to the public” and occur “not less than fourteen days after the motion is filed and notice is posted.” *Id.* R. 76a(4). Rule 76a(6) provides requirements for an order on a motion to seal court records. *Id.* R. 76a(6).

conference contained a certification that a copy of the notice was served to the “Fort Bend County Courthouse” by “hand delivery and posting” as of May 30, 2019.

The record indicates that the trial court held a hearing on June 28, 2019, the date identified in the notice for the hearing on Callahan’s motion to seal. There is no reporter’s record from this hearing, but the docket sheet contains a notation from the trial court that the “[i]ssue regarding sealing [the] record is not ripe at this time.” The trial court scheduled another hearing for July 18, 2019.

At the July 18, 2019 hearing, Callahan informed the trial court that Lindberg had made a recording of the December 2018 conversation and argued that Lindberg’s petition to take a Rule 202 deposition should be denied because the recording “would be the best evidence of what was said or not said.” Callahan argued it would be a misuse of Rule 202 to require him to testify under oath “to say what he said before if they already have a recording of it.” The trial court stated on the record that it would like to review the recording before ruling, and it asked Lindberg if he could transcribe it and send the court a digital copy, stating “I’ll give you my email so you can do that.” The trial court expressed its intention to “listen to [the recording] in chambers” rather than “in open court.”

The next day, July 19, 2019, Lindberg filed a supplemental petition and appended the transcript to the filing, rather than email it to the trial court for in camera review. Callahan filed an emergency motion requesting an “immediate,

telephone conference” regarding Lindberg’s filing of the supplemental petition and attached transcript. Callahan moved the trial court to “strike [Lindberg’s supplemental petition and attached transcript] and prevent it from being included into the public record unless and until the Court rules on” Callahan’s pending motion to seal.” Callahan also asked that the trial court grant the motion to seal.

The trial court held an emergency telephonic hearing. There is no reporter’s record of this hearing. However, later that same day, the trial court signed an order granting Callahan’s “emergency motion for immediate telephone hearing and motion to strike [Lindberg’s] supplement to verified petition to take Rule 202 deposition” and “emergency motion to grant [Callahan’s] motion to seal.” It ordered that Lindberg’s “Supplement to the Verified Petition to Take Videotaped Deposition Pursuant to Texas Rule of Civil Procedure 202, and the [transcribed] audio recording attached as an Exhibit thereto are struck.” The court further ordered those documents sealed pursuant to Rule 76a.

The trial court subsequently denied Lindberg’s petition to take a pre-suit deposition of Callahan. Lindberg does not challenge this ruling; rather, Lindberg filed this appeal of the trial court’s ruling striking his supplemental petition and sealing the supplemental petition, attached transcript, and related documents. *See* TEX. R. CIV. P. 76a(8) (providing that orders signed pursuant to Rule 76a are considered final, appealable judgments).

Trial Court's Sealing Order

In his sole appellate issue, Lindberg argues that the trial court abused its discretion “by sealing court records without a public hearing, without evidence, without notice to the public, and without an explanation as required by Texas Rule of Civil Procedure 76a.” Thus, Lindberg’s complaint assumes that the provisions of Rule 76a apply to the trial court’s order here; however, Rule 76a is not the only source of a trial court’s authority to seal documents or provide protection to parties during discovery.

Rule of Civil Procedure 192.6, among other provisions, grants authority for a trial court to make orders sealing or protecting discovery:

To protect the movant from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights, the court may make any order in the interest of justice and may—among other things—order that . . . the discovery be undertaken only by such method or upon such terms and conditions or at the time and place directed by the court [or] the results of discovery be sealed or otherwise protected, subject to the provisions of Rule 76a.

TEX. R. CIV. P. 192.6(b)(4)–(5); *see also In re Collins*, 286 S.W.3d 911, 919 (Tex. 2009) (trial court has discretion to grant protective order to control nature and form of discovery). Trial courts likewise have discretion to determine whether in camera inspection is necessary.⁴ *See In re M-I L.L.C.*, 505 S.W.3d 569, 578–80 (Tex. 2016)

⁴ Lindberg argues in his reply brief that the trial court never requested that the transcript be submitted in camera. However, the trial court stated on the record at the July 18 hearing that it wanted Lindberg to email the recording and transcript so

(orig. proceeding); *In re Strategic Impact Corp.*, 214 S.W.3d 484, 488 (Tex. App.—Houston [14th Dist.], orig. proceeding).

Rule 76a provides additional, stricter procedures for sealing documents that qualify as “court records.” *See Gen. Tire, Inc. v. Kepple*, 970 S.W.2d 520, 524 (Tex. 1998) (“To the extent that discovery, whether filed or unfiled, is a ‘court record’ under Rule 76a, the court must follow the stricter standards of that rule to limit its dissemination.”). The procedures of rule 76a apply only to court records as defined in the rule, and multiple courts have held that a trial court errs in invoking Rule 76a’s procedures before determining whether the documents in question were “court records” as defined in the rule. *Kepple*, 970 S.W.2d at 521–22, 524; *Biederman v. Brown*, 563 S.W.3d 291, 302 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *see also Tex. Voices for Reason & Justice, Inc. v. City of Argyle*, No. 02-16-0052-CV, 2017 WL 1173837, at *2 (Tex. App.—Fort Worth Mar. 30, 2017, no pet.) (mem. op.) (“The language of Rule 76a does not authorize trial courts to apply Rule 76a before making the threshold determination of whether particular documents, like unfiled discovery, are court records subject to the rule.”); *Roberts v. West*, 123 S.W.3d 436, 440 (Tex. App.—San Antonio 2003, pet. denied) (“Before a trial court

that the court could review it in chambers. *See* BLACK’S LAW DICTIONARY 763 (7th ed. 1999) (defining “In camera” as: “1. In the judge’s private chambers. 2. In the courtroom with all spectators excluded”).

decides whether a Rule 76a hearing and order are necessary, it must determine whether the documents in question are ‘court records.’”).

Rule 76a states that certain “court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of . . . a specific, serious and substantial interest which clearly outweighs” the presumption of openness, that “any probable adverse effect that sealing will have upon the general public health or safety,” and that “no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.” TEX. R. CIV. P. 76a(1).

Relevant here, Rule 76a(2) defines “court records” as including “all documents of any nature filed in connection with any matter before any civil court, except”:

- (1) documents filed with a court in camera, solely for the purposes of obtaining a ruling on the discoverability of such documents;
- (2) documents in court files to which access is otherwise restricted by law;
- (3) documents filed in an action originally arising under the Family Code.

TEX. R. CIV. P. 76a(2)(a).

“Court records” also include

discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government, except

discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

TEX. R. CIV. P. 76a(2)(c).

Thus, the presumption of openness and the special procedures outlined in Rule 76a apply only to “court records” as defined in that rule. *See id.* R. 76(a)(1)–(2), (9) (“Access to documents in court files not defined as court records by this rule remains governed by existing law.”); *Kepple*, 970 S.W.2d at 524; *Biederman*, 563 S.W.3d at 302. We review both protective orders and Rule 76a decisions under an abuse of discretion standard. *Kepple*, 970 S.W.2d at 526.

Lindberg argues that the trial court erred in sealing the supplemental petition and attached transcript in violation of the procedures and substantive requirements of Rule 76a. We conclude, however, that the supplemental petition and transcript are not “court records” as contemplated by Rule 76a. While Rule 76a broadly defines “court record” as including “all documents of any nature filed in connection with any matter before any civil court,” it expressly excepts “documents filed with a court in camera, solely for the purposes of obtaining a ruling on the discoverability of such documents” from that definition. TEX. R. CIV. P. 76a(2)(a)(1). The trial judge requested that Lindberg email the recording and transcript, stating that he intended to review them in his chambers to aid in ruling on Lindberg’s request to compel a Rule 202 deposition. When Lindberg filed the transcript with the trial court clerk, rather than email it for in camera review, the trial court struck the filing and sealed

the related supplemental petition with the attached transcript and related hearing record so that it could consider the transcript and recording in camera.

Lindberg does not contest that the trial court had discretion to require that the documents be submitted in camera or to strike documents filed in contravention of the trial court's request. *See, e.g., Greenhalgh v. Serv. Lloyds Ins. Co.*, 787 S.W.2d 938, 939 (Tex. 1990) (reviewing trial court's decision to strike pleading amendment for abuse of discretion); *In re Strategic Impact Corp.*, 214 S.W.3d 484, 488 (Tex. App.—Houston [14th Dist.], orig. proceeding) (holding that trial court has discretion in determining whether in camera inspection is necessary); *see also In re Collins*, 286 S.W.3d at 919 (recognizing that trial court has discretion to grant protective order to control nature and form of discovery).

The effect of the trial court's rulings here, made in connection with Callahan's motion to seal and Lindberg's filing of certain documents, is that the protected documents were documents filed with the court in camera to aid the trial court in determining whether to permit the discovery requested by Lindberg. Thus, they fall within Rule 76a(2)'s exception providing that such documents are not considered court records. *See* TEX. R. CIV. P. 76a(2)(a)(1). Because we conclude that the documents were not "court records," the trial court did not abuse its discretion in sealing the documents without following the strict procedures provided for by that

rule.⁵ See *Kepple*, 970 S.W.2d at 521–22, 524; *Biederman*, 563 S.W.3d at 302; *Tex. Voices for Reason*, 2017 WL 1173837, at *2; *Roberts*, 123 S.W.3d at 440; see also TEX. R. CIV. P. 192.6 (providing that trial court “may make any order in the interest of justice,” including orders that “the discovery be undertaken only by such method or upon such terms and conditions” ordered by court, or that discovery “be sealed or otherwise protected, subject to the provisions of Rule 76a”); *Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998) (holding that appellate court must uphold trial judge’s discovery ruling if there is any legitimate basis for it); *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (holding that, in absence of findings of fact or conclusions of law, we conclude that trial court made all findings necessary to support its ruling, and we affirm ruling on any legal theory supported by evidence).

We overrule Lindberg’s sole issue on appeal.

⁵ We also note that, at least with regard to Rule 76a’s notice and hearing requirements, Lindberg’s complaint that the trial court sealed the documents “without a public hearing, without evidence, [and] without notice to the public” is not supported by the record. The record indicates that Callahan provided written notice to the parties and that the notice was posted at the Fort Bend County Courthouse. The record further indicates that the trial court held a hearing as provided in the notice.

Conclusion

We affirm the order of the trial court.

Richard Hightower
Justice

Panel consists of Justices Goodman, Landau, and Hightower.