IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: APRIL 23, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2008-SC-000180-MR

FORD MOTOR COMPANY; FORD MOTOR COMPANY UAW RETIREMENT PLAN AND ITS ADMINISTRATOR — APPELLANTS

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2007-CA-002531-OA
BULLITT CIRCUIT COURT NO. 75-CI-04481

HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE, BULLITT CIRCUIT COURT, FAMILY COURT DIVISION — APPELLEES

AND

HOWARD SPARKS, NANCY SPARKS, MICHAEL D. GRABHORN AND JAMES D. WINCHELL — REAL PARTIES IN INTEREST

OPINION OF THE COURT

AFFIRMING

Ford Motor Company, Ford Motor Company UAW Retirement Plan, and its Administrator (hereinafter Ford) appeal the Kentucky Court of Appeals decision to deny Ford's request for a writ prohibiting Judge Spainhour of the Bullitt Circuit Court from finding Ford in contempt of court for failing to comply with prior court orders. Ford contends that the trial court did not have the authority to hold it in contempt because it is a nonparty, nonresident over which the court did not have jurisdiction. The Court of Appeals, however, found that the trial court acted within its authority when it held Ford in

contempt. Because trial courts have inherent power to enforce their court orders, including holding nonparties in contempt for violating such orders, we agree with the Court of Appeals that the trial court acted within its jurisdiction when it found Ford to be in contempt of court. Therefore, we affirm the Court of Appeals decision denying Ford's request for a writ of prohibition.

RELEVANT FACTS

This case originated with the divorce proceeding of Howard and Nancy Sparks. The Sparkses divorced in 1978, but did not finalize the division of their marital property until 1991. Initially, on September 26, 1991, the Bullitt Circuit Court entered a Qualified Domestic Relations Order (QDRO) specifying that Nancy was to receive one-half of Howard's pension plan benefits, which were based on Howard's employment at Ford Motor Company. Several years later, on May 5, 1998, the trial court entered an amended QDRO, which clarified Nancy's marital share of the pension plan and the survivor benefits. This 1998 order stated that a copy of the amended QDRO was to be served upon Ford's Plan Administrator and that it should remain in effect until further notice from the Bullitt Circuit Court. Neither Howard nor Nancy objected to the division of the benefits enumerated in the QDRO.

On August 1, 1998, Howard retired from Ford, and he and Nancy each began receiving his or her share of the pension benefits as set forth in the QDRO. Eight years later, on December 7, 2006, Ford notified Howard by mail that he had been receiving an overpayment in his monthly benefits, that his pension benefits would be decreased to reflect the overpayment, and that

Nancy's monthly benefits would be increased due to the recalculation. This recalculation resulted in Howard's monthly benefits decreasing by $212.40, in Nancy's benefits increasing by $212.40 per month, and in Nancy receiving a lump sum payment of $10,027.28. After Ford refused to abide by Howard's request that it follow the express terms of the 1998 QRDO, Howard brought a motion in the divorce proceeding in Bullitt Circuit Court on June 25, 2007. By this motion, in which Howard and Nancy Sparks were still the only named parties, Howard requested that the court enter an amended QDRO specifying the correct monthly amount owed to Nancy, enter a personal judgment against Nancy for the $10,027.28, grant an injunction preventing Nancy from disposing of the $10,027.28, and award Howard his attorneys fees and costs. In addition to filing this motion, Howard mailed a subpoena *duces tecum* to the record keeper of the Ford Retirement Plan on July 18, 2007, requesting that he produce certain documents related to the calculation of Howard's pension benefit. On that same day, Howard also delivered a "notice to take deposition *duces tecum*" to Ford's record keeper, notifying him that the deposition would occur in Louisville on July 27, 2007. Ford complied with Howard's subpoena *duces tecum* on August 3, 2007, and after Howard received the requested documents from Ford, he cancelled the previously scheduled deposition.

On August 10, 2007, the trial court held a hearing on Howard's pending motion regarding the amended QDRO. Following this hearing, the court denied Howard's request for an amended QDRO because the 1998 QDRO was clear on its face. However, the trial court also determined that the Ford Plan

Administrator had unilaterally altered the benefits owed to each party in violation of the 1998 QDRO entered by the court. Therefore, on August 29, 2007, the court granted Howard's oral motion requesting that Ford show cause as to why it should not be held in contempt for failing to follow the court's prior orders, and it ordered the Plan Administrator for the Ford Retirement Plan to appear before the court on September 28, 2007. The trial court's order was served on Ford through its Kentucky agent for service of process. Ford's Plan Administrator refused to appear at this show cause hearing and Ford's counsel argued on Ford's behalf that the trial court had no jurisdiction over Ford because it was not a party to the divorce proceeding and it was not a corporate resident of Kentucky.[1]

Due to Ford's refusal to appear, the trial court re-scheduled the show cause hearing for October 29, 2007. Again, Ford refused to appear at this hearing, relying instead on its counsel's argument that the trial court did not have jurisdiction over Ford to require it to appear as a witness at a deposition.[2] In response, the trial court clarified that the show cause hearing related to Ford's failure to abide by the court's prior QDRO, not its failure to appear at a deposition. After Ford assured the trial court that it would be prepared in the future, the trial court re-scheduled the show cause hearing again for December 14, 2007. However, for the third time, Ford refused to make a formal

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[1] We note that in a dissolution proceeding, the trial court may join additional persons as parties. KRS 402.150(6) (stating that "[t]he court may join additional parties proper for the exercise of its authority to implement this chapter").

[2] As noted previously, Howard cancelled the deposition after Ford produced the requested documents on August 3, 2007.

appearance. Despite Ford's failure to appear, the trial court proceeded with the show cause hearing.

After determining that Ford had been properly served with a notification to appear and that it had jurisdiction over Ford to enforce its prior orders, the trial court found Ford to be in contempt of court for violating its prior court orders. The court imposed on Ford a $5,000 fine, plus $250 per day until Ford appeared in court to explain the new QDRO calculations. Shortly after this finding of contempt, on December 17, 2007, Ford filed its petition for a writ of prohibition with the Court of Appeals. On March 5, 2008, the Court of Appeals denied Ford's petition, concluding that the trial court had the authority "under CR 45.05(3) to compel the personal attendance of Ford's plan representative at the December 14, 2007 show cause hearing, and upon the failure to appear, to hold Ford in contempt." This appeal followed.

ANALYSIS

One justification for granting a writ of prohibition is if an appellate court finds that "the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court." Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). This Court then reviews an appellate court's finding that the trial court acted within or outside of its jurisdiction *de novo*. Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004). Here, Ford contends that the trial court acted outside its jurisdiction because a court cannot attain jurisdiction over a nonparty, nonresident simply by serving them with a subpoena. Ford explains that

despite the fact that the trial court may have personal jurisdiction over it, the court has no authority to require nonresident nonparties to appear as witnesses in court or to require their presence at a deposition. Although Ford's recitation of the law regarding subpoenas for witnesses generally may be correct, Ford's argument fails to recognize that the trial court's finding of contempt is not based on Ford's failure to appear as a witness in court or at a deposition; rather, it is based on Ford's failure to comply with the court's prior QDRO. Because a trial court has the authority to enforce its own orders, including holding nonparties in contempt for violating such orders, we conclude that the Court of Appeals was correct (albeit for the wrong reasons) and Ford is not entitled to a writ of prohibition in this case.

In Wallace v. Sowards, 313 Ky. 360, 231 S.W.2d 10, 12 (1950), the Court stated that "[i]t is a well-established rule that a person may be bound by the terms of a judgment even though he is not a party to the suit, and his failure to comply with such a judgment may constitute contempt." The Wallace case is based on the arrest of the defendant, Marksberry, for hunting without a license in violation of Kentucky's gaming laws. Id. at 11. After Marksberry pled guilty, the district court confiscated his shotgun and turned it over to Wallace, who was the Director of the Kentucky Division of Game and Fish. Marksberry appealed the district court's order of confiscation, in which the Commonwealth was the other named party. The circuit court in turn reversed the lower court's order and declared that Marksberry's shotgun should be returned to him. The circuit court personally served on Wallace a copy of this order; Wallace,

however, refused to comply with it. The circuit court then ordered Wallace to show cause as to why he should not be held in contempt for failing to abide by its order. After failing to provide sufficient cause, the circuit court found Wallace to be in contempt. Id.

On appeal to Kentucky's then highest court, Wallace argued that because he was not a formal party to the proceedings against Marksberry, the trial court had no jurisdiction over him and its orders had no affect on him. Id. at 12. The court disagreed and held instead that persons "directed by a judgment to do or refrain from doing some act are under a duty to comply therewith, even though they are not formal parties to the proceeding or named in the order." Id. at 13. The court also stated that the case for Wallace's contempt was strengthened because the trial court specifically mentioned his name in the order and provided notice to him of the judgment by personally serving on him a copy of the order. Id.

The same concept is embodied in Kentucky Rule of Civil Procedure 71 which states:

> When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

Thus, if an order may be "lawfully enforced" against a person, it is not necessary that he be a party.

As in Wallace, supra, Ford had notice of the QDRO entered by the trial court, was specifically named in the order, and was required to distribute Howard's benefits according to its terms. The 1991 QDRO entered by the Bullitt Circuit Court required the clerk to forward the QDRO by certified mail to Ford so that it would have notice of the agreed upon division. The Ford Motor Company and the Administrator of the Retirement Plan were specifically mentioned in the 1991 QDRO and ordered to carry out certain actions: the Plan Administrator was directed to notify the parties when he received the QRDO, to segregate the funds to be paid, to inform the parties of the procedures used to determine if the order is "qualified," and to advise the parties whether the order was found to be "qualified." Furthermore, in the final QDRO entered on May 5, 1998, the trial court stated that its order was meant to qualify as a QDRO under the Retirement Equity Act of 1984, that a copy of the order was to be served on Ford's Plan Administrator, and that the order was to take effect immediately and remain in full force until a further order from the court.

Despite the fact that Ford is not a party to the Sparks' divorce proceeding, Ford was named in the QDRO and ordered to comply with its terms in dividing Howard's retirement benefits. When Ford stopped complying with this QDRO, the trial court was within its authority to order Ford to show cause as to why it should not be held in contempt for failing to abide by the QDRO. At that point, under CR 71 Ford was "liable to the same process for enforcing obedience to the order as if [it] were a party," and thus service of the circuit

court's show cause order on Ford's Kentucky agent for service of process was sufficient notice to bring Ford before the court. Although it is true, as the dissent points out, that service might also have been made directly upon the Plan Administrator, the Plan, or the appropriate Plan Trustee, Ford, as sponsor of the Plan and as the ultimate source of the Sparkses' benefits, was a proper target of the court's show cause order.[3]

Moreover, although Ford frequently refers to its nonresident status as relevant to the trial court's enforcement of its orders, Ford is clearly subject to personal jurisdiction in Kentucky under the three-part test enunciated in Mohler v. Dorado Wings, Inc., 675 S.W.2d 404 (Ky. App. 1984). Ford purposefully availed itself of the privilege of acting in Kentucky by operating two large assembly plants and employing thousands of employees here; the QDRO dispute arose from Ford's Kentucky activities, i.e. its handling of a Kentucky retiree's pension benefits; and Ford's acts have a substantial enough connection to Kentucky (indeed their sole effect is in Kentucky) to make the exercise of jurisdiction reasonable. Under these circumstances, Ford's nonresident status does not insulate it from the reach of a Kentucky circuit court order.

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[3] Ford's publication provided to employees explains that "legal process may be served upon the Plan Administrator or the Agent for Service of Legal Process." Although the Secretary of Ford in Dearborn, Michigan, is identified as the agent that does not negate the fact that under Kentucky law the Plan Administrator may also be served through Ford Motor Company's registered agent in Kentucky.

CONCLUSION

Because Ford was subject to the trial court's orders and never appeared at the scheduled hearing to demonstrate why it should not be held in contempt, the court had proper grounds to punish Ford for refusing to comply with its prior orders. Thus, the trial court was not acting outside of its jurisdiction in holding Ford in contempt, and a writ of prohibition is not justified. The Court of Appeals decision is hereby affirmed.

Minton, CJ.; Abramson, Cunningham and Venters, JJ., concur.

Scott, J., dissents by separate opinion in which Noble and Schroder, JJ., join.

SCOTT, JUSTICE, DISSENTING: For reasons that the majority has confused "subject matter jurisdiction" with "service" and "jurisdiction over the person," I must dissent. Everybody wants it done – wants it done right now! But nobody wants to do it right!

The majority Opinion assumes that Ford Motor Company is the entity allegedly violating the court's previous Qualified Domestic Relations Order (QDRO), rather than the Ford Motor Company UAW Retirement Plan, and its Administrator (hereinafter the Plan).[4] Yet, qualified pension, profit-sharing and stock bonus plans are held and operated under a trust. See 26 U.S.C. § 401(a). This trust is a separate legal entity, separate and apart from Ford Motor Company, the employer (plan sponsor), who must make the monetary

[4] This also assumes that the rules of an extensively regulated national retirement plan are, in fact, being violated – something that has yet to be established.

contributions to the Ford Motor Company Trust Fund for the benefit of its employees. Benefits from the Plan are managed by the Plan Administrator. The trust fund is managed by its trustee, Fidelity Management Trust Company of Boston, Massachusetts.

Service may be made upon the Plan Administrator, the Plan, or the trustee via service upon the Secretary of Ford Motor Company, the Ford Motor Trust Fund (given the identity of the particular plan), or the trustee, Fidelity Management Trust Company, or via service upon either, through the Kentucky Secretary of State under the Kentucky Long Arm Statute. KRS 454.210(3).

Notably, 29 U.S.C. § 1132(d)(1) provides:

> An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subp|o|ena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

As to jurisdiction, 29 U.S.C. § 1132(e)(1) provides:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 U.S.C.A. § 1132(a)(1)(B) provides that a participant or beneficiary *may bring a civil action* "to recover benefits due to him under the terms of his plan,

to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(7) provides that "a State [may] enforce compliance with a qualified medical child support order[.]"

Thus, plainly this action is cognizable in Kentucky and Kentucky courts may acquire personal jurisdiction over the appropriate entity. Mohler v. Dorado Wings, Inc., 675 S.W.2d 404, 405-406 (Ky. App. 1984). Yet, the courts have not done so in this instance and I find no comfort on this issue in the majorities reliance on Wallace v. Sowards, 313 Ky. 360, 231 S.W.2d 10 (1950), which dealt only with *actual service on a Kentucky resident.* Here, we have no service. See Wilder v. United Mine Workers of America, 346 S.W.2d 27, 29 (Ky. 1961) ("The trial court correctly concluded that it lacked jurisdiction of the res and of the trustees and that service upon Barnes and Ridings was not service upon either of them.").

Plainly then, the mailing and faxing of notices and subpoenas to non-parties, who were non-residents of the Commonwealth of Kentucky, to appear before the Bullitt Circuit Court was improper service. And, service upon the CT Corporation in Louisville, Kentucky, Ford Motor Company's actual agent for service of process in Kentucky, was not actual service upon the Plan or Plan Administrator, since their actual agent for service of process is a person, the *Secretary* of Ford Motor Company (in Dearborn, Michigan), not Ford Motor Company.

Having pointed out my difficulty with service, I can understand the human desire to fix this problem – and fix it now. But, imagine the difficulties national pension plan administrators and trustees would have responding immediately to "show cause" orders from 3,000 different courts in fifty (50) states (and several districts) — not to mention the costs! "[A] trust which has beneficiaries located in our many states should not be subjected to possible diverse orders from the courts of any one of those states." Wilder, 346 S.W.2d at 29. Management of such a magnitude of diverse problems commands an orderly process. See 29 U.S.C. § 1132 (d)(1) and (e)(1).

For the reasons stated, I would avoid this mess, and all its subsequent expense and appeals, and issue the Writ — and then we will get the right parties, issues, and "service."

Noble, J., and Schroder, J., join this dissent.

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