STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Appellee,

v

SCT Docket No.
COA Docket No. 324853
Circuit Court No. 07-15064-DM

RAY JAMES FOSTER

Defendant / Appellant / Counter-Plaintiff.

APPLICATION FOR LEAVE TO APPEAL (AFTER REMAND)

NOTICE OF HEARING

Respectfully submitted by:

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STATEMENT OF ORDERS BEING APPEALED

Pursuant to MCR 7.305, Petitioner seeks leave to appeal the March 22, 2018 Opinion of the Court of Appeals (**ATTACHMENT A**, *Foster v Foster (On Remand*), unpublished opinion per curiam of the Court of Appeals, issued March 22, 2018 (Docket No. 324853)**)**, which was issued on remand from this Court's instructions to consider the unanimous opinion by the United States Supreme Court in *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017).

Petitioner also seeks to appeal the March 14, 2018 order of the Court of Appeals denying Petitioner's Motion for a Stay and Termination of Bond. (**ATTACHMENT B**).

For purposes of issue preservation, Petitioner also seeks leave to appeal all prior rulings and opinions of the Court of Appeals (**ATTACHMENT C**, *Foster v Foster*, unpublished opinion per curiam of the Court of Appeals, issued October 13, 2016 (Docket No. 324853)), significant portions of the latter of which were reprinted in and made a part of the remand opinion despite this Court's November 15, 2017 Order VACATING the Court of Appeals' original judgment.

This Court may exercise jurisdiction over Petitioner's application pursuant to MCR 7.303(B)(1).

QUESTIONS PRESENTED

Pursuant to MCR 7.305(A)(1)(b) Petitioner presents the questions for review "related in concise terms to the facts of the case," as follows:

I.

This case returns from the Court of Appeals after remand with instructions from this Court to consider the United States Supreme Court's unanimous decision in *Howell v Howell*, 581 US ___; 137 S Ct 1400, 1405-1406; 197 L Ed 2d 781 (2017), which held state courts are preempted by federal law from requiring a retired military servicemember to reimburse or indemnify his or her former spouse in a marital property division in divorce proceedings for any financial losses suffered by the former spouse resulting from the servicemember's post-judgment waiver of retired pay to receive veterans' disability benefits to which he or she is entitled.

Did the Court of Appeals err in ruling that state courts in Michigan still have authority to do this notwithstanding the ruling in *Howell* by holding that Petitioner is required to indemnify Respondent when Petitioner waived his military retirement pay to receive Combat Related Special Compensation (CRSC) under 10 USC 1413a, a special compensation to which Petitioner is entitled due to his combat-related injuries and resulting disabilities, where such pay is not "disposable retired pay", the latter of which is the only veteran's benefit that can be considered as divisible marital property in state court divorce proceedings under the Uniform Services Former Spouses Protection Act (USFSPA), 10 USC 1408(a)(4)(A)(ii) and (c)(1)?

Petitioner Answers: Yes.

Respondent Answers: No.

Court of Appeals Answers: No.

II.

In *Howell*, 137 S Ct at 1403-1404 and 1405, the Court held that state courts had always been preempted from considering any veterans' benefits as divisible in marital property divisions in divorce proceedings except "disposable retired pay" under the USFSPA, 10 USC 1408(c)(1). The Court also stated that per 38 USC 5301(a)(1), state courts had no authority to "vest" these benefits in anyone other than the beneficiary, i.e., the veteran. *Id.* at 1405-1406. In *Mansell v Mansell*, 490 US 581, 587, n 6; 109 S Ct 2023; 104 L Ed 2d 675 (1989), because the Court held that the USFSPA preempted state courts from treating waived military retired pay as community property, the Court did not address whether 38 USC 3101 (later re-

designated as section 5301) independently protected other non-disposable veteran's benefits from state court orders dividing marital assets.

If, as the Court of Appeals held, CRSC benefits are not within the scope of benefits excluded from state court consideration as marital property under the USFSPA and *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017) (a holding which Petitioner does not concede and explicitly challenges in this application, see Question Presented I, *supra*), does 38 USC 5301 independently protect these funds from the jurisdiction and authority of state court orders that have the effect of forcing the Petitioner to pay them over to Respondent as "reimbursement" or "indemnity" in enforcing a marital property settlement agreement?

Petitioner Answers: Yes.

Respondent Answers: No.

Court of Appeals Answers: No.

III. and IV.

Federal law preempts (and has always preempted) state courts from ordering veterans to pay non-disposable benefits in satisfying marital property settlements in divorce proceedings. See *McCarty v McCarty*, 453 US 210, 228-229 and n 22; 101 S Ct 2728; 69 L Ed 2d 589 (1981) and *Mansell v* Mansell, 490 US 581, 595; 109 S Ct 2023; 104 L Ed 2d 675 (1989). In *Howell*, 137 S Ct at 1406, the Court held that this preexisting preemption applies to all veterans' disability payments, except for the veteran's "disposable retired pay," a share of which Respondent already receives from the Defense Finance and Accounting Service ("DFAS"). See 10 USC 1408(e)(1) ("[t]he total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay."). The Court also held that state courts cannot enforce orders that seek to indemnify or reimburse the veteran's former spouse for the latter's loss of the veteran's military retired pay where the veteran is required by law to waive that pay to receive disability pay; "such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *Howell*, 137 S Ct at 1406. The Court also found that 38 USC 5301 independently protects such funds by prohibiting state courts from "vesting" entitlement to them in anyone other than the beneficiary. *Id*. at 1405-1406, citing 38 USC 5301(a)(1).

The plain language of section 5301 also prohibits any collateral arrangements from securing an obligation on an agreement by the veteran to pay non-disposable veterans' benefits to another. 38 USC 5301(a)(3)(C).

In addition, Michigan law provides that a "bond" and any security therefor, automatically terminates upon satisfaction of the condition upon which the bond is

based, and the liability stated therein is extinguished. See *DeMyer v McGonegal*, 32 Mich 120, 126 (1875) (GRAVES, J.); *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 397; 554 NW2d 345 (1996); *Barresi v Barresi*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 21, 2015 (Docket No. 319739), pp 3-4, citing *Bruwer*, *supra* and MCR 3.604(I)(1) (**ATTACHMENT D**) A state court has no authority to change or otherwise modify the bond once it has been satisfied. *DeMyer*, *supra*; *Bruwer*, *supra*; *Barresi*, *supra*.

Pursuant to the Circuit Court's November 6, 2014 contempt order, Petitioner has been paying his former spouse $1000 per month from his only source of income – non-disposable veterans' disability benefits. (**ATTACHMENT E**, Circuit Court's November 6, 2014 Order) Plaintiff has now paid $1000 per month for 46 months (**July 2014 through May 2018**), making the amount of his total payments to his former spouse $46,000. This is $10,602.57 more than the challenged arrearages of $34,397.93 stated in the Circuit Court's order. See *id*.

These payments are secured by an "appearance bond" in the amount of $9500 that had been posted on June 23, 2014, and which was secured with a lien on Petitioner's mother's home. (**ATTACHMENT F**, Bond and Circuit Court Docket Entries) On July 30, 2014, Petitioner's attorney filed an appearance and contested the contempt proceedings. *Id*.

The Circuit Court subsequently denied a motion for a stay of payments pending Petitioner's appeal and for termination of the bond, changing the condition of the bond to be one securing Petitioner's continued payments. (**ATTACHMENT G**, Circuit Court's Order Denying Stay, January 16, 2015; **ATTACHMENT H**, Circuit Court Hearing Memorandum, March 19, 2015)

On February 26, 2018, as Petitioner's case was on remand in the Court of Appeals, Petitioner, who is also a Counter-Plaintiff in this action claiming recoupment and reimbursement, sought an immediate stay of enforcement of the Circuit Court's order forcing him to continue making these payments from his non-disposable disability pay.

In this same motion, Petitioner also sought nullification or termination of the "appearance" bond and to nullify the related lien. The Court of Appeals denied Petitioner's motion. (**ATTACHMENT B**)

The questions presented related to these facts and circumstances are as follows:

III.

Did the Court of Appeals err in denying Petitioner's motion for a stay of his ongoing payments where Petitioner has already paid more than the challenged arrearages, all of which has been proven to be unauthorized and unlawful because the order

under which Petitioner was required to make these payments is and has always been preempted by federal law?

Petitioner Answers: Yes.

Respondent Answers: No.

Court of Appeals Answers: No.

IV.

Did the court of Appeals err in denying Petitioner's motion to nullify or terminate the bond where he filed an appearance, thereby satisfying the condition of the bond, and where both federal statutory law, 38 USC 5301(a)(C)(3) and Michigan law prohibit the continuation of the bond and the lien securing it?

Petitioner Answers: Yes.

Respondent Answers: No.

Court of Appeals Answers: No.

STATEMENT OF THE CASE

Petitioner, Sergeant First Class (SFC) (retired) Ray J. Foster, is a veteran of the Iraq war who served two tours of duty as a combat infantry platoon leader (November 2003 to April 2004 and November 2005 to November 2006). (**ATTACHMENT I**, Petitioner's US Army DD214) On September 30, 2007, he retired after 22 years and five months of active duty service. *Id*. He was awarded the Purple Heart and Bronze Star medals, among others, for his injuries and actions while serving. *Id*.

While serving as a platoon leader of his infantry unit, he suffered injuries as the result of an improvised explosive device ("IED") attack on his convoy. (**ATTACHMENT J**, VA Medical Records – Evidence of Injury and Condition) His injuries included traumatic brain injury ("TBI"), back and leg injuries, and other physical and mental injuries. *Id.* Petitioner also suffers from severe post-traumatic stress syndrome ("PTSD"). *Id*.

Due to his service-connected injuries, Petitioner is classified as a 100-percent disabled, 100-percent unemployable veteran. As his injuries were incurred during combat, Petitioner qualified for and was awarded Combat-Related Special Compensation ("CRSC") under 10 USC 1413a, retroactive to 2007. (**ATTACHMENT K**, CRSC Benefits Award Letters)

After his retirement, Petitioner and Respondent were divorced. On December 3, 2008 a judgment of divorce was entered that required Petitioner to pay Respondent 50% of his military retired pay as part of a Property Settlement. (**ATTACHMENT L**, pp 4-5). The order stated, in pertinent part, as follows:

> If [Petitioner] *should ever become disabled*, either partially or in whole, then [Respondent's] share of [Petitioner's] entitlement shall be calculated *as if [Petitioner] had not become disabled*. [Petitioner] shall be responsible to pay, directly to [Respondent], *the sum to which she would be entitled if [Petitioner] had not become disabled*. [Petitioner] shall pay this sum to [Respondent] out of his own pocket and earnings, *whether he is paying that sum from his disability pay or*

> *otherwise, even if the military refuses to pay those sums directly to* [Respondent]. If the military merely reduces, but does not entirely stop, direct payment to [Respondent], [Petitioner] shall be responsible to pay directly to [Respondent] any decrease in pay that [Respondent] should have been awarded had [Petitioner] not become disabled, together with any Cost of Living increases that [Respondent] would have received had [Petitioner] not become disabled. Failure of [Petitioner] to pay these amounts is *punishable through all contempt powers of the Court*.
>
> [*Id*. (emphasis added).]

In January of 2009, the Defense Finance and Accounting Service ("DFAS") notified Petitioner that it was paying Respondent her share of his disposable retired pay under 10 USC 1408, the Uniform Services Former Spouses Protection Act (USFSPA). (**ATTACHMENT M**, Letter to Petitioner Notifying of DFAS Payments to Respondent, January 27, 2009). At this time, Respondent was receiving $811.62 per month, which represented 50% of Petitioner's disposable military retired pay. (**ATTACHMENT E**, November 6, 2014 Order)

In February of 2010, Respondent began receiving only $212.00 from DFAS. In April 2010, DFAS notified Respondent that because of Petitioner's waiver of military retired pay to receive his disability and CRSC pay, it had reduced the amount of disposable military retired pay that she was receiving pursuant to the USFSPA (**ATTACHMENT N**, Letter to Respondent Notifying of Payment Reduction, April 14, 2010).

Respondent filed a motion seeking enforcement of the Circuit Court's 2008 Judgment, claiming, per the terms of the judgment's marital property settlement, that Petitioner was responsible to make up the difference between what she had been receiving from DFAS and what she was then receiving due to the DFAS reduction. See **ATTACHMENT L**, pp. 4-5. The trial court entered an order finding Petitioner in contempt and ordered him to pay Respondent the difference.

In the Spring of 2014, Petitioner was arrested on a bench warrant for failure to make these payments to Respondent. On June 23, 2014, an appearance bond of $9500 was posted and a show cause hearing was set for June 27, 2014. (**ATTACHMENT F**, Bond and Circuit Court Docket Entries) Collateral for the bond is a lien being held by the bonding company, Great Lakes Bail Bonds, on Petitioner's ailing mother's home. *Id*.

On July 30, 2014, Petitioner's trial attorney, Michael Gawecki, filed an appearance on Petitioner's behalf in the Circuit Court and filed an objection to the proposed contempt order. *Id*., Trial Court Docket Entries No. 86-94. The Circuit Court entered a contempt order on November 14, 2014. (**ATTACHMENT E**, Circuit Court's November 6, 2014 Order)

On December 2, 2014, Petitioner timely appealed. On December 22, 2014, while Petitioner's appeal was already pending in the Court of Appeals, the Circuit Court held a hearing on a motion to stay Petitioner's payment obligations and to terminate the bond. (**ATTACHMENT O**, December 22, 2014 Hearing Transcript, pp. 3-4; 13-17) The Circuit Court concluded it did not have jurisdiction because the appeal had been filed and denied Petitioner's motion to stay his payment obligations and to terminate the bond. *Id*. See also **ATTACHMENTS G** and **H**.

On appeal, Petitioner argued, *inter alia*, that state courts were preempted by federal law from ordering veterans to indemnify former spouses for financial losses resulting from the veteran's waiver of retired pay to receive disability pay. Petitioner also argued that 38 USC 5301 independently protected his veterans' benefits from any legal process whatever, and the Circuit Court simply did not have jurisdiction or authority to order or otherwise force him to part with these monies, which are his only source of income. See Petitioner's Brief on Appeal, filed July 1, 2015 (citing, *inter alia*, 10 USC 1408, 38 USC 5301(a)(1) and (a)(3)(A); *McCarty v McCarty*, 453 US 210, 211-215; 101 S Ct 2728; 69 L Ed 2d 589 (1981); *Mansell v Mansell*, 490 US 581, 587, n

6; 109 S Ct 2023; 104 L Ed 2d 675 (1989); *King v King*, 149 Mich App 495, 499-500; 386 NW2d 562 (1986)) and Petitioner's Reply Brief, filed November 3, 2015.

Petitioner also specifically argued that the bond (which is secured by a lien on Petitioner's mother's home) violated 38 USC 5301(a)(3)(C), which prohibits and voids from inception "[a]ny agreement for collateral for security for an agreement" prohibited by that subsection. Brief on Appeal, p. 18. Finally, as Counter-Plaintiff-Appellant, Petitioner claimed an entitlement to recoupment and reimbursement of these funds that he has been paying per the Circuit Court's November 6, 2014 Order. *Id*.

On October 13, 2016, the Court of Appeals issued an unpublished opinion affirming the Circuit Court's orders. (**ATTACHMENT C**, *Foster v Foster*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 13, 2016 (Docket No. 324853) (MARKEY, P.J., and MURPHY and RONAYNE KRAUSE, JJ.). Relying on *Megee v Carmine*, 290 Mich App 551, 562; 802 NW2d 669 (2010) (MURPHY, C.J, and METER and SHAPIRO, JJ), in which the issue addressed was "whether a military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division where the military spouse makes a unilateral postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment," the panel held:

> [A] military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive case law from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the

> compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired. [*Megee*, 290 Mich App at 566-567, 574-575 (footnote omitted).]
>
> *Megee* governs and dictates, given the involvement of CRSC, that the offset provision in the consent divorce judgment is fully enforceable through the trial court's contempt powers. Defendant attempts to distinguish *Megee* on the basis that, because of the retroactive nature of the CRSC award, he effectively became entitled to and elected CRSC and waived retirement pay *prior* to entry of the divorce judgment, whereas *Megee* concerned a unilateral, *postjudgment* election to waive retirement pay and opt for CRSC. Defendant's argument construes *Megee* much too narrowly and misses the broader legal principle that emanates from *Megee*, which is that a state divorce court has the authority to divide waived retirement pay, which waiver resulted from a veteran's decision to elect CRSC, so long as the court does not directly order payment from CRSC funds.[1] Thus, assuming for the sake of argument that defendant's waiver of retirement pay and election of CRSC must be treated as having already occurred when the divorce judgment was entered, the offset provision contemplating the division of waived retirement benefits was nonetheless valid and enforceable under *Megee*.
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> [**ATTACHMENT C**, pp. 4-5 (emphasis in original) (footnote in brackets).]

Regarding Petitioner's argument that 38 USC 5301 prohibited the Circuit Court from exercising authority and jurisdiction over his VA benefits, the Court of Appeals first asserted that Petitioner had waived this argument because it was undeveloped in the pleadings.[2] Yet, the Court went on to address the substantive merits, stating:

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[1] The contempt order does not require payment from CRSC funds, nor do we construe the divorce judgment's offset provision as ordering payment from CRSC funds, and any such construction must be avoided.

[2] Bafflingly, the Court of Appeals ruled that Petitioner's arguments concerning 38 USC 5301 were "*woefully undeveloped*" and had been waived. **ATTACHMENT C**, p. 5 (emphasis added). Yet, Petitioner raised these arguments in his Docketing Statement filed with the Court of Appeals on April 2, 2015; in his Brief on Appeal in his first, second, and third questions presented, and in the first and second argument sections (see Brief on Appeal, filed July 1, 2015, Table of Contents, Argument and Analysis, section I and section II, page ii; Questions Presented I, II, and III, pages v and vi; Argument I, pages 5 through 8; and Argument II, pages 11 through 14. Petitioner expounded upon these arguments in his Reply brief. See Petitioner's Reply, November 3, 2015,

> 38 USC 5301(a)(1) speaks of precluding the assignment of benefits "except to the extent specifically authorized by law[.]" As noted above, the USFSPA generally permits the division of disposable retired pay in state divorce actions, and the instant dispute concerns the division of waived retirement pay, which the *Megee* panel held was proper under federal law when the waiver is in relation to a CRSC election. *Megee*, 290 Mich App at 566-567, 574-575.
>
> [*Id*., p. 5.]

On November 28, 2016, Petitioner timely applied for leave to appeal in this Court. See MSC Docket 154829. While Petitioner's original application was pending, the United States Supreme Court issued its *unanimous* opinion in *Howell v Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017). It ruled that federal law has always preempted state courts from considering anything other than a small portion of military retired pay, i.e., "*disposable* retired pay", when dividing marital property upon divorce between a former servicemember and his or her spouse. See *Howell*, 137 S Ct at 1403, citing 10 USC 1408(c)(1) (defining "disposable retired pay" as property that a state may choose to include as divisible property upon divorce) and 10 USC 1408(a)(4)(A)(ii) (stating that amounts deducted from disposable retired pay in order to receive disability benefits are not to be counted as such property). Thus, where a former servicemember waives his or her right to receive military retired pay to receive service-connected disability pay or any other military benefit to which he or she is entitled by federal law, the latter monies are not to be counted as or included in a former servicemember's "marital property" for purposes of dividing such property upon divorce. In *Howell*, the Court explained that federal law preempts and has always preempted

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pages 1 through 5, and footnote 1. In fact, Petitioner even directly addressed the argument countering the panel's ultimate reasoning concerning the meaning of the language "except to the extent specifically authorized by law" in his principal brief. See Brief on Appeal, p. 13. In other words, the Court of Appeals' substantive argument concerning 38 USC 5301, and its substantive conclusion as to why the statute did not apply, was anticipated and addressed in Petitioner's principal brief! It is hard to believe that an argument is "woefully undeveloped" when the Court of Appeals uses the precise counter-argument (albeit in error) to defeat the substantive claim.

state family law concerning marital property division upon divorce and that the USFSPA was a federal grant of authority to the states over only a *limited portion* of such benefits. *Howell*, 137 S Ct at 1405-1406, citing *McCarty v McCarty*, 453 US 210, 211-215; 101 S Ct 2728; 69 L Ed 2d 589 (1981).

The Court also specifically ruled that state courts could not avoid the effects of federal preemption by "describing the family court order as an order requiring [the servicemember] to 'reimburse' or 'indemnify' [the former spouse], rather than an order that divides property" because "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." *Id*. at 1406. "*All such orders are thus preempted*." *Id*. (emphasis added).

Citing 38 USC 5301(a)(1), the same provision cited by Petitioner in his original appeal, the Court also stressed that the former spouse had no "vested" interest in the servicemember's future benefits because "[s]tate courts cannot 'vest' that which (under governing federal law) they lack the authority to give." *Id*. at 1405.

After *Howell*, the Supreme Court issued two additional orders on the basis of its holding, vacating state court decisions that had ruled, consistent with the case that the Court of Appeals again relies on in its remand opinion here, *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010), that veterans could be forced to satisfy marital property divisions in divorce proceedings if they had waived retirement pay to receive Combat-Related Special Compensation (CRSC) (10 USC 1413a), which are the same type of benefits at issue in this case. Thus, according to *Howell*, the same rule of preexisting federal preemption applies to such state court orders. See *Merrill v Merrill*, ___ US ___; 137 S Ct 2156; 198 L Ed 2d 228 (2017), reh den at ___ US ___; 138 S Ct

30; 198 L Ed 2d 756 (2017) and *Cassinelli v Cassinelli*, ___ US ___; 138 S Ct 69; 199 L Ed 2d 2 (2017), reh den at ___ US ___; 138 S Ct 534; 199 L Ed 2d 410 (2017).[3]

While Petitioner's original application was pending in this Court, supplemental briefs were filed pursuant to MCR 7.312(I) to keep the Court apprised of the Supreme Court's treatment of these cases, as well as state court decisions that had, subsequent to the issuance of *Howell*, properly understood the Court's instruction on the broad application of preemptive federal law to marital property divisions in state court divorce proceedings and which had therefore reversed or overruled cases in those states holding otherwise. See MSC Docket No. 154829, Supplemental Authority Briefs filed as follows:

- December 12, 2017, Docket Entry No. 89 (advising the Court of the Supreme Court's granting of the petition for a writ of certiorari in *Howell*);

- May 22, 2017, Docket Entry No. 94 (advising the Court of the Supreme Court's unanimous decision in *Howell* and its subsequent order vacating the Arizona Supreme Court's decision in *Merrill v Merrill*, 238 Ariz 47; 362 P3d 1034 (Ariz 2015) (which had allowed indemnification orders in cases, like the instant one, involving a veteran's waiver of retirement pay to receive CRSC, see also, footnote 3, *supra*));

- October 3, 2017, Docket Entry No. 100 (advising the Court of the published decisions of the Minnesota Court of Appeals in *Berberich v Mattson*, 903 NW2d 233 (Minn Ct App 2017), lv den 2017 Minn LEXIS 694 (December 27, 2017) and the Maryland Court of

[3] In *Merrill*, on remand from the United States Supreme Court, the Arizona Circuit Court held, with respect to a waiver of retirement pay to receive CRSC pay that per *Howell* "state courts *cannot require indemnification for any financial loss resulting from one spouse's waiver of retired pay in favor of disability pay*." *In re Merrill*, Maricopa County Superior Court, Case No. DR 1991-092542 (March 15, 2018) **ATTACHMENT P**, p. 5 (emphasis added). Similarly, *In re Cassinelli (On Remand)*, 2018 Cal. App. LEXIS 177 (March 2, 2018) (**ATTACHMENT Q**), held that *Howell* effectively overruled California case law that had previously held state courts were allowed to use or count a retired servicemembers' disability or other military benefits (there as here, CRSC) to force the servicemember to reimburse or indemnify his or her former spouse for the latter's lost share. "Because CRSC pay is not retired pay – just as veteran's disability benefits are not retired pay – under FUSFSPA as construed in *Mansell* [*v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989)], a state court *does not have jurisdiction* to treat CRSC as community property." *Id.* at *13 (emphasis added), citing 10 USC 1408(a)(4), (c)(1); 10 USC 1413a(g); and DoD Financial Management Regulations 7000.14-R, vol. 7B, ch. 63 (Oct. 2017), § 630101.C.1, p. 63-4 (**ATTACHMENT R**).

Appeals in *Hurt v Jones-Hurt*, 2017 Md App 610; 168 A3d 992 (2017)). *Berberich*, *supra*, overruled *Gatfield v Gatfield*, 682 NW2d 632 (Minn 2004), which, like *Megee v Carmine*, 290 Mich App 551;802 NW2d 669 (2010), the case the Court of Appeals relies on here, had previously upheld Minnesota state court orders enforcing marital property settlements in divorce proceedings requiring former servicemembers to indemnify a former spouse for the latter's lost share of retirement pay when the servicemember waived his or her retirement to receive VA benefits. *Hurt v Jones-Hurt*, *supra*, overruled similar cases in Maryland.;

- October 12, 2017, Docket Entry No. 101 (advising the Court of the United States Supreme Court's order vacating the California Court of Appeals' decision in *In re Marriage of Cassinelli*, 4 Cal App 5th 1285; 201 Cal Rptr 3d 311 (2016), which also involved CRSC pay, as in this case, and which also had followed those cases like *Megee* (actually citing *Megee*, see 4 Cal App 5th at 1297) as being among those states that were in a "clear majority" which allowed indemnification of the former spouse where the veteran waived retirement pay to receive VA benefits, see also, footnote 3, *supra*); and

- November 1, 2017, Docket Entry No. 101 (advising the Court of the Tennessee Court of Appeals' decision in *Vlach v Vlach*, 2017 Tenn App LEXIS 717 (Tenn Ct App, October 27, 2017), which overruled prior Tennessee case law that had held that the former spouse's "vested interest" could not be unilaterally diminished by an act of the military spouse waiving retirement pay to receive VA benefits and held according to *Howell* that *both* the "vested interest" approach and the "indemnification" or "reimbursement" approach forcing the veteran to "make up" the former spouse's losses were no longer viable and were in fact preempted by federal law).

On November 15, 2017, this Court vacated the Court of Appeals' opinion instructing it to apply *Howell* to Petitioner's case. (**ATTACHMENT S**, November 15, 2017 Order of the Michigan Supreme Court). However, the Court said nothing concerning the relief Petitioner had sought in his application concerning the Circuit Court's standing order for Petitioner to continue paying Respondent, the "appearance" bond that had been issued in June 2014, the lien on Petitioner's mother's house, nor Petitioner's claim for recoupment and/or reimbursement as Counter-Plaintiff.

On November 29, 2017, undersigned counsel contacted the Circuit Court clerk and the bond company and sent both the Court's November 15, 2017 order requesting that the bond be terminated so that the lien on Petitioner's mother's house could be released. (**ATTACHMENT T**, Sworn Declaration of Carson J. Tucker, Attorney for Petitioner and November 29, 2017 email

correspondence) Both advised they would not honor this Court's order, but instead would wait for the Court of Appeals to issue its opinion. *Id*. ¶¶ 3-8. Undersigned counsel made a similar call to the Court of Appeals, which also would not recognize this Court's order as having any effect on the Circuit Court's order regarding Petitioner's ongoing payments or the bond. *Id*., ¶ 7. Undersigned counsel was told to file a motion seeking a stay and/or relief. *Id*., ¶ 8.

As the time to file a motion for reconsideration in this Court was approaching, undersigned counsel made the decision to file a Motion for Reconsideration or Clarification seeking, *inter alia*, this Court's guidance as to the effect of its Order vacating the Court of Appeals judgment on Petitioner's continuing obligations to pay Respondent, the status of the bond and the lien on Petitioner's mother's home, and Petitioner's claim for recoupment and/or reimbursement. MSC Docket No. 154829, Motion for Reconsideration or Clarification, filed on December 6, 2017, Docket Entry No. 106. Petitioner also filed a motion for immediate consideration. *Id*., Docket Entry No. 107. This Court issued an order denying Petitioner's motion on February 20, 2018.

On Monday, February 26, 2018, after the case had returned to the Court of Appeals, Petitioner filed a motion for a stay of the Circuit Court's order that he continue making payments to Respondent of $1000 per month pending disposition by the Court of Appeals and to terminate the "appearance" bond. (**ATTACHMENT U**, Motion for Stay and Termination of Bond, filed February 26, 2018 (attachments omitted)). Petitioner also filed a motion for immediate consideration, which was filed and served pursuant to MCR 7.211(C)(6). (**ATTACHMENT V**, Motion for Immediate Consideration, filed February 26, 2018 (attachments omitted)).

In his motion Petitioner argued (as he had in his original appeal) that since federal law completely preempted state law concerning disposition of marital property and prohibited state courts from ordering veterans to reimburse or indemnify their former spouses when the latter's

share of military retired pay was reduced by the veteran's waiver and since *Howell* had confirmed this, Petitioner could not be required to continue making these payments to Respondent. Petitioner also pointed out that the amount he had already paid Respondent (at that time $43,000) well exceeded the challenged arrearage in the Circuit Court's November 6, 2014 Order ($34,397.43) and that he was also a Counter-Plaintiff seeking recoupment and reimbursement of the amounts he has been wrongfully forced to pay. See **ATTACHMENT U**, pp. 3-5, 10, ¶¶ 8-10; 13-15, 17, and 37, *inter alia*; **ATTACHMENT V**, pp. 1-2, ¶¶ 2-3.

Petitioner also argued, again, as he had in his original appeal, that the payments, the bond and the lien contravened the plain language of 38 USC 5301 and therefore the Circuit Court's orders and enforcement of the bond constituted extra-jurisdictional acts, which were void from their inception. (**ATTACHMENT U**, p. 5, ¶ 18 and n 3) Finally, Petitioner argued that an "appearance" bond terminates automatically once its conditions are satisfied, and that since Petitioner's trial attorney appeared at the June 27, 2014 hearing, the bond was no longer in effect. Id., ¶¶ 18-21. In his motion, Petitioner simply asked the Court of Appeals to stay his continuing payments on the 7th of each month and/or to declare the bond null and void so that Petitioner could get the lien on his mother's house lifted.

Instead of giving Petitioner's motion immediate consideration, as he requested pursuant to the specific procedures outlined in MCR 7.211(C)(6), the Court of Appeals gave Respondent *two weeks* to respond, until March 12, 2018. Respondent did not file a response and on March 14, 2018, the Court of Appeals denied Petitioner's motion. (**ATTACHMENT B**).

On March 22, 2018, without requesting additional briefing or oral argument, the Court of Appeals issued its opinion on remand again affirming the Circuit Court's decision. (**ATTACHMENT A**) Just as it had done in its first decision, the panel once again relied on the

now wholly discredited *Megee v Carmine*, 290 Mich App at 566-567, 574-575, and, with the exception of two short paragraphs, reprinted much of its original opinion. The Court ruled:

> [A] military spouse remains financially responsible to compensate his or her former spouse in an amount equal to the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment. Importantly, we are not ruling that a state court has the authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay can come from any source the military spouse chooses, but it must be paid to avoid contempt of court. To be clear, nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired. [*Megee*, 290 Mich App at 566-567, 574-575 (footnote omitted).]
>
> ***
>
> Given that CRSC is at issue in the instant case, that *Howell* did not concern or analyze a waiver of retirement pay in favor of CRSC disability pay, and that *Megee* is on point and remains binding precedent, MCR 7.215(J)(1), we again affirm the trial court's ruling.
>
> [**ATTACHMENT A**, pp. 5, 7.]

Petitioner seeks leave to appeal the Court of Appeals' opinion.

GROUNDS FOR REVIEW

I. THE ISSUES IN THIS CASE INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE BECAUSE THE COURT OF APPEALS HAS REFUSED TO FOLLOW FEDERAL LAW EVEN AFTER THE UNITED STATES SUPREME COURT HAS ISSUED AN UNEQUIVOCAL AND CONTROLLING OPINION REJECTING THE COURT OF APPEALS' REASONING LEAVING MICHIGAN IN A STATE OF NONCOMPLIANCE WITH FEDERAL LAW

For at least 18 years, the State of Michigan has been ignoring preexisting and preemptive federal law. *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010), the only published decision in Michigan on the precise issue, ruled that a veteran can be forced to "reimburse" or "indemnify" his or her former spouse in a marital property settlement upon divorce where the former spouse's share of the veteran's military retired pay was reduced because of the veteran's waiver of retirement pay to receive non-disposable disability pay. The unanimous opinion of the United States Supreme Court in *Howell* explicitly rejected this reasoning and ruled that the states were (and always had been) preempted from doing this. *Howell*, 137 S Ct at 1403-1404 ("[F]ederal law, as construed in *McCarty*[*v McCarty*, 453 US 210, 211-215; 101 S Ct 2728; 69 L Ed 2d 589 (1981)], "completely preempted the application of state community property law to military retirement pay" and stating that since in the USFSPA "Congress excluded from its grant of authority [to state courts] the *disability-related* waived portion of military retirement pay…in respect to the waived portion of retirement pay, *McCarty*, with its rule of federal preemption, *still applies*." (text and citations in brackets added) (emphasis added).

In addition, the Court made clear that the "waived portion", includes all other veterans' federal disability benefits. *Howell*, 137 S Ct at 1406. As a natural result of this conclusion, the Court subsequently vacated the decisions of two additional cases (*Merrill v Merrill*, 238 Ariz 47; 362 P3d 1034 (Ariz 2015) and *In re Marriage of Cassinelli*, 4 Cal App 5th 1285; 201 Cal Rptr 3d 311 (2016), see also pp. 12-13 and footnote 3, *supra*), both of which concerned a veteran's receipt of

CRSC benefits in lieu of retired pay when the veteran, subsequent to the divorce, waived the retirement pay to receive the CRSC. The Court explained that the real question is not what type of benefit the veteran is receiving after the waiver, but rather whether he or she waived retirement pay to receive any other veteran's benefit. If the answer to this question is "Yes," then that is the end of the inquiry, because the *only* divisible asset that states have been given *discretion* by the USFSPA to consider is the "disposable" portion of military retirement pay and *nothing* else. 10 USC 1408(c)(1) ("a court may treat disposable retired pay payable to a member as property solely of the member or as property of the member and his spouse.") Federal law has always preempted state law concerning the disposition of such benefits in state court marital property divisions upon divorce. The former spouse is only entitled to the portion of disposable retirement pay remaining. There is no other right or entitlement to anything else.

In fact, relying on 38 USC 5301(a)(1), a statute that Petitioner has argued applies to his case from the beginning, the Court in *Howell* emphasized that state courts *never had authority* to "vest" an interest in these benefits in someone other than the beneficiary. *Howell*, 137 S Ct at 1405-1406.

Finally, as if these rulings were not conclusive enough, the Court specifically denounced the type of state court order at issue in this case, which was also the type approved by the published *Megee* opinion upon which the Court of Appeals relies. Thus, orders which seek to "reimburse" or "indemnify" the former spouse by requiring the veteran to make up the former spouse's losses with *any other monies* are invalid. In this regard, the Court stated:

> Neither can the State avoid *Mansell [v* Mansell, 490 US 581; 109 S Ct 2023 (1989)] by describing the family court order as an order requiring John to "reimburse" or to "indemnify" Sandra, rather than an order that divides property. The difference is semantic and nothing more. The principal reason the state courts have given for ordering reimbursement or indemnification is that they wish to restore the amount previously awarded as community property, *i.e.*, to restore that portion of retirement pay lost due to the postdivorce waiver. And we note that here, the amount of indemnification mirrors the waived retirement pay, dollar for dollar. Regardless of

> their form, such reimbursement and indemnification orders *displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress*. *All such orders are thus preempted*.
>
> [*Id*. at 1406 (emphasis added).]

The Court of Appeals also chose to ignore *Howell's* unequivocal rulings notwithstanding extensive post-*Howell* docket activity in this Court demonstrating the proper course of action, see discussion *supra* at pp 12-13 and footnote 3, *supra*, and including additional state court decisions released since, all of which one would think the Court of Appeals would have had access to or at least been aware of. Instead, with reasoning that has been soundly rejected by the United States Supreme Court, the panel issued an opinion which effectively continues to follow a published Michigan Court of Appeals decision that is violative of federal law (and which, in fact, *never was good law*).[4]

This Court of Appeals panel has been provided with two chances to bring Michigan into line with federal law. In both instances, even though it was provided with all the arguments necessary to make the right decision, it failed and chose instead to leave Michigan in a state of non-compliance with preemptive federal law. *Megee* was never good law. Yet, as the Court of Appeals

[4] Since *Vlach v Vlach*, 2017 Tenn LEXIS 717 (Tenn Ct App, October 27, 2017), which Petitioner informed this Court about on November 1, 2017, see MSC No. 154829, Docket Entry No. 101, at least two other state courts have acknowledged that their prior case law, which was consistent with *Megee*, had been wrong and was in fact preempted. See *In re Marriage of Tozer*, 410 P3d 835, 838 (Colo App 2017) (stating "[t]he *Howell* takeaway is clear. Military retirement disability benefits may not be divided as marital property, and orders crafted under a state court's equitable authority to account for the portion of retirement pay lost due to a veteran's post-decree election of disability benefits are preempted"); and *Brown v Brown*, 2018 Ala Civ App LEXIS 54, *14-16 (Ala App 2018) (federal law preempted marital property agreement providing that former spouse of retired servicemember would receive 25 percent of husband's disposable retirement benefits "without regard to any reductions or setoffs due to disability compensation or any other reason" and that former servicemember would "indemnify and reimburse" the spouse for any such loss and noting that *Howell* determined that those state courts that were enforcing such agreements were not abiding by federal law and all such orders were preempted).

chose to follow it, Michigan now remains in violation of the preemptive federal rule and thereby complicit in violating the rule of law.

This Court has the constitutional authority and indeed the duty to say what federal law requires and to abide by that law pursuant to the Supremacy Clause of the United States Constitution. *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994) (stating that "[w]here federal questions are involved [this Court] is bound to follow the prevailing opinions of the United States Supreme Court.") (internal citations omitted); *City of Detroit v Ambassador Bridge*, 481 Mich 29, 36; 748 NW2d 221 (2008). Indeed, where a state law proceeding is preempted by federal law the state court lacks subject matter jurisdiction and authority to act in a manner contrary to the prevailing federal rule. *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), overruled on other grounds by *Sprietsma v Mercury Marine*, 537 US 31; 123 S Ct 518; 154 L Ed 2d 466 (2002). It is necessary for this Court to address Court of Appeals' opinions "that misapplied constitutional principles and United States Supreme Court precedent…." *People v Bryant*, 491 Mich 575, 583, n 5; 822 NW2d 124 (2012). See also *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994) (stating: "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct.").

The legal principle that is of major significance and which therefore provides grounds for this Court's review is a lower court's refusal to follow United States Supreme Court precedent, even where that precedent specifically addressed and discredited the Court of Appeals' reasoning and rejected the outcome of identical cases upon which that reasoning was based. Also of significance and perhaps more important, is the underlying national interests that are served by following (not ignoring) the principles of federal preemption found in the Supremacy Clause and the United States Supreme Court precedent applying it. Federal law has always prohibited state courts from

ordering veterans to part with their protected benefits to satisfy marital property divisions in state court divorce proceedings because the veteran is deemed to need those benefits for his or her very subsistence and survival. *Howell*, 137 S Ct at 1403-1404; *McCarty*, 453 US at 224.

As of this moment, Michigan continues to violate these principles. History teaches that if this decision is left unchecked, Michigan will continue to trample on the rights of those whose service to our country has been proven and awarded. *Howell* put the states on notice that this "charade" is over and state courts cannot continue inventing ways to get around the prohibition of forcing veterans to part with their entitlement. This court must ensure Michigan follows the law.

II. THE COURT OF APPEALS' DECISION WAS CLEARLY ERRONEOUS

Howell held state courts are preempted from ordering former servicemembers to make up or reimburse former spouses for the latter's loss when the servicemember waives retirement pay to receive disability pay. *Howell*, 137 S Ct at 1405-1406. The status of the pay the veteran chooses to receive in lieu of the retired pay does not matter, because the states are preempted from ordering the veteran to indemnify or reimburse the former spouse for his or her losses. *Id*. The type of order does not matter either because the Court made clear that anticipatory orders designed to ensure that the former spouse will be "made whole," "reimbursed," or "indemnified" are violative of the principle that Congress sought to provide the veteran with a benefit that was a personal entitlement. *Id.* at 1403-1404 and 1406. Equity cannot be used to force the veteran to part with these monies because such orders have the same effect of depriving the veteran of the benefit that Congress intended to be solely for the veteran. *Id*. at 1406. "All such orders are thus preempted." *Id*.

As the Court of Appeals' opinion is directly and explicitly contrary to these principles, it is violative of preemptive federal law and clearly erroneous. Therefore, it cannot stand. *Ridgway v*

Ridgway, 454 US 46, 54-55; 102 S Ct 49; 70 L Ed 2d 39 (1981). A court commits clear error when it "incorrectly chooses, interprets, or applies the law." *Fletcher*, 447 Mich at 878.

III. THE COURT OF APPEALS DECISION WILL CAUSE (AND IS CAUSING) MATERIAL INJUSTICE

Howell specifically held that state courts could not issue, approve, recognize or enforce marital property divisions in divorce proceedings which require a disabled military veteran to reimburse or indemnify a former spouse when the latter's share of the former's retirement pay is reduced by operation of law when the veteran waives his retirement pay as a requirement to receive his or her disability benefits. The marital property agreement in the instant case required Petitioner to indemnify or reimburse Respondent for her "losses" when her entitlement to his retirement pay was reduced because he waived that "disposable" pay to receive "non-disposable" disability benefits, here in the form of Combat Related Special Compensation (CRSC).

As of today, Petitioner, who is a 100 percent disabled, 100 percent unemployable combat veteran suffering from severe and debilitating PTSD continues to abide by this preempted order. Upon the filing of this application, Petitioner has paid $46,000 to Respondent. This is $10,602.57 more than the challenged arrearages of $34,397.93 stated in the Circuit Court's order. See **ATTACHMENT E**. Indeed, since *Howell* clarified that preexisting federal law preempts such orders, Petitioner has actually paid $46,000 in excess of Respondent's entitlement and he has demanded and is entitled to recoupment of these funds.

Instead of being allowed the benefit of his personal entitlement as provided by Congress and as acknowledged by the United States Supreme Court, Petitioner is forced, on the threat of contempt and imprisonment, to continue making these payments. This is the case notwithstanding the Circuit Court's acknowledgment that Petitioner has no ability to earn a living and is indeed medically and mentally affected by his combat-related disabilities. (**ATTACHMENT W**, Circuit

Court Opinion on Child Support; Income Comparison Statements; and Garnishment Disclosures). Petitioner simply has no "disposable" income and Respondent is a registered nurse with a full-time job. *Id*.

Aside from the obvious injustice of ignoring federal law, the Circuit Court's order and the Court of Appeals' affirmance thereof continues to affect the day-to-day life of Petitioner, a severely disabled combat-veteran, by depriving him of the disability benefits to which he is entitled and which he most certainly needs. If this is not a material injustice, then it is hard to imagine what qualifies as such under the court rule.

IV. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH A DECISION OF THE UNITED STATES SUPREME COURT

Howell held that state courts were preempted from forcing retired servicemembers to reimburse or indemnify their former spouses for the latter's loss of military retired pay when the former servicemembers waive that pay to receive disability pay. In this case, the Court of Appeals issued a ruling that did precisely what the Supreme Court ruled state courts may not do.

As the Court of Appeals continues to give *Megee* precedential effect despite its direct conflict with this precedent, this Court's review is needed to correct this glaring deficiency in Michigan jurisprudence. As noted previously, this Court has acknowledged its obligation to correct legal error and to further ensure that Michigan complies with federal law. See *Betty*, 446 Mich at 276; *Ambassador Bridge*, 481 Mich at 36; *Bryant*, 491 Mich at 583, n 5; and *Fletcher*, 447 Mich at 878. If the Court of Appeals opinion stands, state law will be in violation of and therefore in noncompliance with preemptive federal law. This is an unacceptable outcome.

ARGUMENT AND ANALYSIS

I. HOWELL CONFIRMED FEDERAL LAW PREEMPTS (AND HAS ALWAYS PREEMPTED) STATE COURTS FROM DIVIDING VETERANS' BENEFITS AS "MARITAL PROPERTY" IN DIVORCE PROCEEDINGS ABSENT EXPRESS CONGRESSIONAL AUTHORIZATION. CONGRESS LIFTED THIS ABSOLUTE PREEMPTION ONLY FOR A PORTION OF MILITARY RETIRED PAY – DISPOSABLE RETIRED PAY – DEFINED IN THE UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT (USFSPA), 10 USC 1408(a)(4)(A)(ii) and (c)(1). STATE COURTS WERE AND ALWAYS HAVE BEEN PREEMPTED FROM REQUIRING VETERAN'S TO REIMBURSE OR INDEMNIFY FORMER SPOUSES WHERE THE VETERAN WAIVES HIS OR HER MILITARY RETIRED PAY TO RECEIVE DISABILITY PAY. DESPITE HOWELL'S UNEQUIVOCAL CORRECTION OF ERRANT STATE CASE LAW, THE MICHIGAN COURT OF APPEALS CHOSE TO CONTINUE TO ABIDE BY ITS OWN PUBLISHED OPINION IGNORING THE PREEMPTIVE FEDERAL RULE. THIS COURT MUST RESTORE MICHIGAN LAW TO A STATE OF COMPLIANCE WITH FEDERAL LAW.

A. Standard of Review

Whether federal law preempts state law is a question of law to be reviewed *de novo* by this Court. *Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014).

B. Applicable Law

1. The Supremacy Clause

The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof…shall be the supreme Law of the Land; and the Judges in every State *shall be bound* thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." US Const, art VI, cl 2 (emphasis added). Federal law preempts state law where Congress has intended to foreclose any state regulation in the subject matter regardless of whether state law is consistent or inconsistent with federal standards. *Oneok, Inc v Learjet, Inc*, 135 S Ct 1591, 1594-1595; 191 L Ed 2d 511 (2015). See also *Mich Canners & Freezers Ass'n v Agric Mktg & Bargaining Bd*, 467 US 461, 469; 104 S Ct 2518; 81 L Ed 2d 399 (1984) (internal citations omitted), accord *Hisquierdo v Hisquierdo*, 439 US 572, 582-83; 99 S Ct 802; 59 L Ed 2d

1 (1979). This is known as "field preemption". *Arizona v United States*, 567 US ___; 132 S Ct 2492, 2502; 183 L Ed 2d 351 (2012). In such cases, the "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id*. at 2501. When a state law is preempted by federal law, the state law is "without effect." *Maryland v Louisiana*, 451 US 725, 746; 101 S Ct 2114; 68 L Ed 2d 576 (1981).

2. Veterans' Benefits Spring from Congress' Enumerated War Powers

Congress' authority for enacting veterans' benefits legislation springs from its enumerated "War Powers" or "Military Powers". US Const, art I, § 8, cls 12-14. See, e.g., *United States v Oregon*, 366 US 643, 649; 81 S Ct 1278; 6 L Ed 2d 575 (1961) ("Congress undoubtedly has the power – under its constitutional powers to raise armies and navies and to conduct wars – to pay pensions…[to] veterans."); *Johnson v. Robison*, 415 U.S. 361, 376, 385 (1974). Congress has exercised legislative authority in these premises since the earliest days of the Republic. *See, e.g.*, *Hayburn's Case*, 2 US (Dall.) 409, 1 L. Ed. 436, 2 Dall. 409 (1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey, 52 Wash. L. Rev. 227, 228 (1977); Waterstone, *Returning Veterans and Disability Law*, 85:3 NOTRE DAME L. REV. 1081, 1084 (2010). Where Congress explicitly relies on this power, the Supreme Court has perhaps nowhere else accorded Congress greater deference. *McCarty*, 453 US at 236, citing *Rostker v Goldberg*, 453 US 57, 64-65; 101 S Ct 2646; 69 L Ed 2d 478 (1981).

3. Federal Law Concerning Military Benefits Completely Preempts State Domestic Relations and Family Law

It follows from the foregoing that while "the whole subject of domestic relations between husband and wife belongs to the laws of the States and not to the laws of the United States," and

"state family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden," "the application of community property law conflicts with the federal military retirement scheme" and is completely preempted. *McCarty v McCarty*, 453 US at 220, 223, citing *Hisquierdo*, 439 US at 581 (internal quotation marks omitted). See also *Ridgway v Ridgway*, 454 US at 54, citing *McCarty*, *supra* and *Hisquierdo*, *supra* and stating that "[n]otwithstanding the limited application of federal law in the field of domestic relations generally…, this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, *rights and expectancies* established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." (emphasis added).

In *McCarty*, the Court ruled Congress had *completely* preempted state law from treating veterans' benefits as marital property in state court divorce proceedings. In this unique field, the Court explained, Congress had historically intended *all* military benefits to be property of the servicemember. *Id*. at 228. After explaining the historical underpinnings of veterans' benefits and that in this area of the law, Congress has occupied the entire field of state law, the Court noted that veterans' retirement benefits were the personal entitlement of the retiree. 453 US at 232. Thus, the Court held state courts are not free to reduce the amounts that Congress had determined are necessary for the retired servicemember. *Id*. at 233. Finally, since Congress intended all pay to reach the beneficiary, state courts could not attach or assign funds to satisfy a property settlement incident to the dissolution of a marriage. *Id.* at 228. The Court denounced state court decisions that had the effect of attaching funds or approving anticipatory indemnity or reimbursement provisions, the latter of which were deemed to be just another way of depriving the former servicemember of

his or her entitlement. *Id*. at n 22. The Court stated: "It is clear that the injunction against attachment is not to be circumvented by the simple expedient of an offsetting award." *Id*.

4. The USFSPA Lifted Preemption Only for Marital Property Division

In 1982, Congress recognized a *limited* exception to federal pre-emption in the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408. See *Mansell v Mansell*, 490 US 581, 587-95; 109 S Ct 2023; 104 L Ed 2d 675 (1989), accord *King v. King*, 149 Mich App 495, 499-500; 386 NW2d 562 (1986). The USFSPA allowed state courts to treat only one small portion of veterans' benefits (disposable military retirement pay) as property subject to division under the respective states' pre-existing community or equitable property laws. 10 USC 1408(c)(1); *Mansell*, 490 US at 594-95. All other military benefits (non-disposable retirement benefits (defined in 10 USC 1408(a)(4)(B) and (c)(1)), disability benefits, and special compensation incident to military service remained federally protected veterans' benefits. With respect to the latter, state courts are simply "without power to treat [them] as property divisible upon divorce." 10 USC 1408(a)(4)(B); *Mansell*, *supra* at 588-89; *King*, 149 Mich App at 499-500.

5. State Court Manipulation to Avoid Mansell

After *Mansell*, some state courts (including Michigan in the form of *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010)) began fashioning "equitable" remedies or approving orders that required servicemembers to indemnify or reimburse their former spouses for the loss caused by the retired servicemembers waiver of retirement pay to receive disability pay. In large part, the reasoning of these state courts was that they could not be preempted from ordering the retired servicemember to make up the loss to his or her former spouse, as long as the order did not specify that the money was to come from the servicemember's non-disposable veterans' benefits. According to these state courts *Mansell's* prohibition that they could not treat military veterans'

benefits as "divisible" assets for marital property divisions in divorce proceedings did not preclude them from allowing indemnity or reimbursement orders so long as such orders did not specify where the servicemember was to get the money to make up the deficiency. Indeed, the Court of Appeals in this case adhered to this reasoning by continuing to follow the *Megee* opinion. (**ATTACHMENT A**, p. 6).

6. Howell v Howell

The United States Supreme Court revisited the issue in *Howell*. A unanimous Court in a four-page opinion simply reconfirmed that state courts never had jurisdictional authority to order veterans to part with their "non-disposable pay", i.e., waived military retirement pay, disability pay, and special compensation. *Howell*, 137 S Ct at 1403-1406, citing 10 U.S.C. 1408 (a)(4)(B) and (c)(1); 38 U.S.C. 5301; *Mansell*, *supra*; and *McCarty*, *supra*. State courts are therefore preempted (and have always been preempted) by federal law from ordering (or requiring) a veteran to indemnify his or her former spouse using non-disposable military retirement and disability pay. *Id*. at 1404 ("*McCarty*, with its rule of federal preemption still applies.").

Importantly, *Howell* clarified that this rule of absolute preemption applies regardless of when the veteran chooses to receive such pay. *Id*. at 1405. It prohibits state courts from ordering indemnity, offsets, reimbursements, or approving any other form of anticipatory agreement designed to evade the potential reduction in the former spouse's future payments. *Id*. at 1406. It protects waived retirement pay, disability pay, and any other special compensation designated by Congress for the sole use and benefit of the veteran. *Id*. Last, but not least, this rule pre-existed and survived the USFSPA's limited exception which gives state courts jurisdictional authority over "disposable retired pay" *only*. Thus, former spouses *never* had a vested interest in the

veteran's non-disposable property. *Id*. at 1405-1406, citing 10 U.S.C. 1408(c)(1); 38 U.S.C. 5301; and *Mansell*, 490 US at 589.

Howell's confirmation that states have always been preempted in this area, see 137 S Ct at 1404, is also important because as the Court has previously explained, where it simply reiterates what the law is it applies retroactively, because the law never changed. In such instances, it is the states that went astray of the prevailing federal rule. See *Yates v Aiken*, 484 US 211, 217-18; 108 S Ct 534; 98 L Ed 2d 546, 554 (1988). Certainly, this rule applies with even greater force where the legal ruling under consideration has been invalidated on the grounds of preexisting, preemptive federal precedent. See *McCarty*, 453 US at 219, n 22, citing *Dahnke-Walker Milling Co v* Bondurant, 257 US 282, 288-289; 42 S Ct 106; 66 L Ed 239 (1921). In such cases the state court, having been presented with the preemptive federal law, has an obligation to grant the relief requested. *Id*.

Where federal pre-emption applies to bar a state court's actions, a reviewing court must address the preemptive effect of the federal law on the lower court's jurisdiction because state courts do not have subject matter jurisdiction to enter orders contrary to the federal mandate. *Ridgway*, 454 US at 54-55; *McCarty*, 453 US at 219-220 and n 12. *A priori* such orders are "void, and therefore unenforceable." *McCarty*, *supra*, citing *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921) and *Japan Line, Ltd. v. County of Los Angeles*, 441 US 434, 440-41; 99 S Ct 1813; 60 L Ed 2d 336 (1979). Such orders "frustrate[] the deliberate purpose of Congress [and] *cannot stand*." *Ridgway*, *supra* at 55 (emphasis added).

This Court has similarly ruled that where federal law preempts state law under the Supremacy Clause it "invalidates" state law that interferes with the federal law. *Beek v City of Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2014) (stating "[w]hen a state law is preempted by federal law, the

state law is 'without effect.'" *Id*. (emphasis added). Where a state court's order requires what federal law forbids absolute or "impossibility" preemption applies. *Id*. at 12, citing, *inter alia*, *Mutual Pharm Co Inc v Bartlett*, 570 US ___, ___; 133 S Ct 2466, 2476-77; 186 L Ed 2d 607 (2013), accord *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997) (stating "[s]tate courts are deprived of subject matter jurisdiction where the principles of federal preemption apply") (emphasis added), overruled on other grounds in *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002).

C. Analysis

In Michigan, the "case" that went astray of preemptive federal law was *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010). There, in an opinion written by then Chief Judge Murphy (who was also on the panel of the Court of Appeals in this case), consistent with those other state courts that had refused to follow the dictates of *McCarty* and *Mansell*, and the USFSPA, the Court held that as long as the state court did not specify where the money was to come from, in other words, as long as the trial court did not specify that his or her obligation to a former spouse was to be paid from his non-disposable disability pay then no infraction of the USFSPA occurred. The panel ruled:

> We hold that *a military spouse remains financially responsible to compensate his or her former spouse in an amount equal to* the share of retirement pay ordered to be distributed to the former spouse as part of a divorce judgment's property division when the military spouse makes a unilateral and voluntary postjudgment election to waive the retirement pay in favor of disability benefits contrary to the terms of the divorce judgment. Conceptually, and consistently *with extensive caselaw from other jurisdictions, we are dividing waived retirement pay in order to honor the terms and intent of the divorce judgment*. Importantly, we are not ruling that a state court has the authority to divide a military spouse's CRSC, nor that the military spouse can be ordered by a court to pay the former spouse using CRSC funds. Rather, the compensation to be paid the former spouse as his or her share of the property division in lieu of the waived retirement pay *can come from any source the military spouse chooses, but it must be paid to avoid contempt of court*. To be

> clear, *nothing in this opinion should be construed as precluding a military spouse from using CRSC funds to satisfy the spouse's obligation if desired*.
>
> [*Id*. at 574-575 (emphasis added).]

Thus, like this "extensive caselaw from other jurisdictions" *Megee* held that as long as the order did not specify where the money was going to come from, the former servicemember had to pay, even if this meant paying with the only income he or she had available. A former servicemember, like Petitioner in this case, who is 100 percent disabled and 100 percent unemployable could be forced to pay his or her only source of income over to a former spouse, no matter where the money was coming from. Such orders were fully enforceable through the contempt and arrest powers of state courts. The Court of Appeals continues to adhere to this reasoning as it concluded *Megee* was still good law. (**ATTACHMENT A**, p. 7).

At oral argument in *Howell*, Chief Justice Roberts questioned the Solicitor General who, at that time, was supporting those states employing this reasoning:

> CJ: It seems to me that – in other words, you're saying – you're basically saying there's no real substance to this law [the USFSPA]. All the court has to do is find some charade to get to the same result.
>
> I mean, would it be all right under your view if they say, okay, you get 50 percent of – all the – no disability payments yet. You get 50 percent of the retirement pay. Listen to me. But in the event that there is disability pay – there are disability payments that result in a reduction of the military pay, I appreciate that I cannot divide the disability pay, but your share of the retirement pay is going to go up as if we were diving the disability pay. Is that good or bad?
>
> ***
>
> SG: Well – well, Your Honor, I think it – it is – it is okay to the extent that the court is applying its generally applicable principles of property division to treat the portion that is available under federal law.
>
> CJ: The court wants to make sure that the spouse, whether wife or husband, receives half of the military retirement pay, and that – and going forward. So she does – he or she does exactly what I set forth; says, okay, you're

entitled to half. But if there's disability pay, you're entitled to an additional amount exactly equal to half of the disability pay.

SG: Well, yes. I think the statue expressly contemplates fixed sum awards. And so the – the –

CJ: So you have a law that says – you have a law that says you can't divide disability pay, and yet, you say it's okay to say, well, I'm not going to divide it, but I'm just going to award you an amount equal to what it would be if I divided it.

SG: Well, let me be clear.

CJ: That's the sort of thing that gives, you know, law a bad name. It's just –

(Laughter.)

CJ: It makes a charade out of the statute.

[**ATTACHMENT X**, Oral Argument Transcript, April 20, 2017.]

And indeed, the trial court's order in this case did just this, stating:

> [Respondent] is awarded one hundred percent (100%) of any interest she has acquired in any retirement and pension benefits as a result of any employment she has held during her marriage to [Petitioner].
>
> [Respondent] is awarded fifty percent (50%) of any military retirement benefits the parties have acquired as a result of military employment with the armed forces of the United States during the parties marriage to each other.
>
> The [Respondent] is awarded a percentage of the [Petitioner's] disposable military retired pay, to be computed by multiplying fifty percent (50%) times a fraction, the numerator of which is two-hundred twenty five (225) months of marriage during the member's creditable military service, divided by the member's total number of months of creditable military service. [Respondent] shall receive this portion of [Plaintiff's] military entitlement, together with Cost of Living increases.
>
> If [Petitioner] *should ever become disabled, either partially or in whole,* then [Respondent's] share of [Petitioner's] entitlement shall be calculated *as if [Petitioner] had not become disabled.* [Petitioner] *shall be responsible to pay, directly to [Respondent], the sum to which she would be entitled if [Petitioner] had not become disabled*. [Petitioner] *shall pay this sum to [Respondent] out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to [Respondent]*. If the military merely reduces, but does not entirely stop, direct payment to

> [Respondent], [Petitioner] *shall be responsible to pay directly* to [Respondent] any decrease in pay that [Respondent] should have been awarded had [Petitioner] not become disabled….
>
> [**ATTACHMENT L**, Judgment of Divorce, pp. 4-5 (emphasis added).]

Howell unanimously held that this practice was and has always been prohibited. State courts cannot fashion or approve alternative remedies which force servicemembers to make up the amount lost by the former spouse as a result of the servicemember's decision to waive his or her military retirement entitlement to receive his or her disability entitlement. *Howell*, 137 S Ct at 1406. As the Court of Appeals' decision continues to adhere to this reasoning, it is error and must be reversed.

The Court of Appeals argument that because CRSC pay is not considered retirement pay and not a benefit payable under Title 5 or Title 38 under the USFSPA is also irrelevant. See **ATTACHMENT A**, p. 7. It is a federally designated veterans' benefit and therefore, unless it is considered "disposable retired pay" as defined in 10 USC 1408(a)(4)(A)(ii) and (c)(1), which is the *only* pay that state courts have discretion to consider as a marital asset in divorce proceedings, it is, like all other veterans' benefits, off limits.

Moreover, *Howell* held that its absolute rule of preemption applied *a fortiori* to disability pay as well as waived retirement pay. 137 S Ct at 1406. CRSC is special compensation based on a servicemembers' combat-related *disability*. See generally, 10 USC 1413a(c), (e). See also **ATTACHMENT R**, DoD Financial Management Regulations 7000.14-R, vol. 7B, ch 63 (Oct. 2017), § 630101.

If there is any doubt that *Howell* meant to exclude CRSC pay from consideration as marital property, one has only to look at the Court's subsequent orders. It issued two additional orders vacating state court decisions that had ruled, consistent with *Megee*, *supra*, that state courts were not precluded from forcing veterans to indemnify or reimburse their former spouses, even if that

meant using CRSC benefits. See *Merrill v Merrill*, ___ US ___; 137 S Ct 2156; 198 L Ed 2d 228 (2017) and *Cassinelli v Cassinelli*, ___ US ___; 138 S Ct 69; 199 L Ed 2d 2 (2017), reh den at 138 S Ct 534; 199 L Ed 2d 410 (2017). On remand in the *Cassinelli* matter, the California Supreme Court ruled, consistent with *Howell*, that CRSC could not be considered in marital property distributions upon divorce, "[b]ecause CRSC is not retired pay – just as veteran's disability benefits are not retired pay – under FUSFSPA as construed in *Mansell*, a state court *does not have jurisdiction to treat CRSC as community property*." *In re Marriage of Cassinelli*, ___Cal Rptr 3d___; 2018 Cal. App. LEXIS 177, at *13 (Ct App, Mar. 2, 2018) (emphasis added). Instructive of the evolution of this issue is the opinion of the California Court of Appeals that was ultimately reversed, which, like the Court of Appeals here, followed the line of reasoning in *Megee* (actually citing it) that has been denounced by *Howell*. See *In re Marriage of Cassinelli*, 4 Cal App 5th 1285, 1294-1299; 210 Cal Rptr 3d 311 (Cal App 2016). For additional discussion of the remands in both *Merrill* and *Cassinelli*, see footnote 3, *supra*.

Apparently, the Court of Appeals missed these United States Supreme Court orders, even though Petitioner brought them (and other state court decisions following *Howell*) to the attention of this Court before its remand. See discussion at 13-14, *supra*.

Moreover, the suggestion that because Petitioner's compensation is CRSC, which is not mentioned in the USFSPA as being excluded from consideration as marital property, means that it still can be so considered is wrong on several critical fronts.

First, most importantly, as reconfirmed by *Howell*, because *all* state law is preempted by federal law in this area; or, put another way, since federal law occupies the entire field, only Congress can lift such preemption to allow state courts to order distribution of such funds to someone other than the beneficiary. What remains is the *status quo ante*, that is, state courts have

no authority to declare veterans' benefits as divisible "property" and they also have no authority to force an ostensibly "equitable" redistribution of the marital estate when the servicemember exercises his or her right to receive protected veterans' benefits.

Second, the USFSPA specifically only allows consideration of "disposable retired pay". 10 USC 1408(a)(4)(A)(ii) and (c)(1). As all other monies and assets are excluded, there is no exception for CRSC benefits, or any other veterans' benefits for that matter.

Third, as already mentioned, Congress went out of its way to exclude CRSC from being considered as "retired pay". See 10 USC 1413a(g) ("[p]ayments under this section *are not retired pay*.") (emphasis added). Therefore, pursuant to pre-existing federal law, as stated in *Howell*, CRSC is not (and never was) available for consideration or calculation as marital property because it does not fit within the definition of the only federal exception to absolute preemption in the USFSPA; to wit, "disposable retired pay". See 10 USC 1408(c)(1). If it is not "retired" pay, then it is not "disposable". Indeed, when Congress created the CRSC benefit in 2002, well after the USFSPA, it ensured it would never be considered retirement pay subject to disposition as marital property under the USFSPA by specifically stating so. See 10 USC 1413a(g). See also **ATTACHMENT R**, DoD Financial Management Reg., § 630101.C.1, p. 63-4 ("CRSC is *not retired pay*, and it *is not subject to the provisions of 10 USC 1408 relating to payment of retired or retainer pay in compliance with court orders*.") (emphasis added). This means that CRSC *may not* be considered a marital asset, not, as the Court of Appeals here implies, that it is just another potentially available asset from which the servicemember may use to "reimburse" or "indemnify" his or her former spouse. See **ATTACHMENT A**, pp. 6-7.

Finally, and perhaps more to the overall point, in adhering to *Megee*, the Court of Appeals completely ignores the thrust of *Howell*. *Howell* held that state courts cannot equitably redistribute

the marital estate after the fact. It does not matter whether the state court's order identifies veterans' benefits that are considered "off limits" under the USFSPA (which, by the way, the Circuit Court's Order in this case does, see **ATTACHMENT L**, pp. 4-5). If the order has the same effect of dispossessing the veteran of his or her personal entitlement, it is prohibited, period.

In other words, as *Howell* put it, characterizing an order as being one for "indemnity" or "reimbursement" is a "semantical" distinction that has no bearing on the prohibited outcome. "Regardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted." *Howell*, 137 S Ct at 1406.

In light of *Howell's* complete denunciation of all state court orders that purport to equitably redistribute a veterans' obligations after the fact, it is hard to imagine how the Court of Appeals could have concluded that there is any room left for the states in these premises. Petitioner submits *Megee* was wrong, was always preempted by federal law, and must be overruled to restore Michigan to a state of compliance with the rule of law.

II. 38 USC 5301 INDEPENDENTLY PROTECTS PETITIONER'S CRSC BENEFITS FROM "ANY LEGAL PROCESS WHATEVER" AND STATE COURTS LACK JURISDICTION AND AUTHORITY TO ORDER VETERANS TO PART WITH THESE BENEFITS BY FORCING THE VETERAN TO USE THESE MONIES TO INDEMNIFY OR REIMBURSE A FORMER SPOUSE FOR HIS OR HER LOSSES WHEN THE VETERAN WAIVES RETIREMENT PAY TO RECEIVE OTHER VETERANS' BENEFITS

A. Standard of Review

Application of a statute and interpretation thereof is a question of law that this Court reviews *de novo*. *Ameritech Mich v PSC (In re MCI)*, 460 Mich 396, 413, 596 NW2d 164, 175 (1999).

B. Applicable Law

1. Purpose and Interpretation of 38 USC 5301

This statutory prohibition springs from Congress's war powers for purposes of protecting veterans' benefits. *Atlanta v Stokes*, 175 Ga 201, 210-212; 165 SE 270 (Ga 1932); *In re Ballard's Estate*, 293 NYS 31, 32-33; 161 Mis 785 (NY 1937). Its purpose was to afford "continuous support" of persons suffering because of their military service. *Yake v Yake*, 183 A 555; 170 Md 75 (Md 1936).

The Supreme Court has stated 38 USC 5301 is to be liberally construed to protect funds granted by Congress "for maintenance and support for beneficiaries thereof" and such funds "remain inviolate." *Porter v Aetna Cas. & Sur Co*, 370 US 159, 162; 82 S. Ct. 1231; 8 L. Ed. 2d 407 (1962). Such payments are exempt "either before or after receipt by the beneficiary". *Id.* As such, "[t]he monies which are paid are preserved by statute for the sole use of the veteran, 'regardless of the technicalities of title and other formalities.'" *American Training Serv's, Inc v Veterans* Admin, 434 F Supp 988, 995-96 (DNJ 1977), citing *Porter*, supra. Thus, "[a]ny legal formulation or arrangement which could dilute or evade the literal and historical thrust of the statute's protective provisions must be viewed with appropriate caution." *Id.*

2. The Plain Language of 38 USC 5301

All issues concerning application of a statute begin with its language. Relevant to this case, 38 USC 5301(a)(1) states:

> Payments of benefits *due* or *to become due* under any law administered by the Secretary [of Veterans Affairs] shall not be assignable *except to the extent specifically authorized by law*, and such payments *made to*, or *on account of, a beneficiary…shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt* by the beneficiary…." (emphasis added).

Section (a)(3)(A) further provides:

> This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation…*enters into an agreement* with another person under which agreement such other person acquires for consideration *the right to receive such*

benefit by payment of such compensation…such agreement *shall be deemed to be an assignment and is prohibited*." (emphasis added).

3. CRSC is a Benefit Authorized by the Secretary of Veterans Affairs Within the Meaning of 38 USC 5301(a)(1)

Combat-related special compensation (CRSC) benefits under 10 USC 1413a are authorized by the Secretary of Veterans Affairs (VA) to be paid to former servicemembers for their service-connected disabilities incurred during combat and wartime service. 10 USC 1413a. See also *Adams v United States*, 126 Fed Cl 645, 647-648 (2016) (citing 10 USC 1413a(e) and stating CRSC benefits are based on a "combat-related disability" that is "compensable *under the laws administered by the Secretary of Veterans Affairs*") (emphasis added).

These benefits are not retired pay. 10 USC 1413a(g). Therefore, they are not disposable pay subject to marital property divisions by state courts under the USFSPA. *Howell*, 137 S Ct 1401-1406. *Merrill v Merrill*, ___ US ___; 137 S Ct 2156; 198 L Ed 2d 228 (2017) and *Cassinelli v Cassinelli*, ___ US ___; 138 S Ct 69; 199 L Ed 2d 2 (2017), reh den at 138 S Ct 534; 199 L Ed 2d 410 (2017) (remanding on the basis of *Howell* to apply to CRSC benefits). See also discussion at pp 13-14 and footnote 3, *supra*.

4. Howell Ruled that 38 USC 5301(a)(1) Divests State Courts of Authority Over Benefits Protected Under that Provision

The United States Supreme Court reserved decision on this very issue in *Mansell*, 590 US at 587, n 6, stating "[b]ecause we decide that the [USFSPA] precludes States from treating as community property retirement pay waived to receive veterans' disability benefits, we need not decide whether the anti-attachment clause, [38 USC] § 3101 [(subsequently recodified as § 5301)], independently protects such pay." However, *Howell* answered this question by ruling that state courts could not exercise authority over *any* non-disposable benefits under 38 USC 5301(a)(1). *Howell*, 137 S Ct at 1405. The Court said: "State courts cannot 'vest' that which (under governing

federal law) they lack authority to give. Cf. 38 USC 5301(a)(1) (providing that disability benefits are generally non-assignable)."

C. Analysis

The Court of Appeals concluded here that CRSC benefits are not included within the benefits that are "off limits" or "non-disposable" under the USFSPA because they are not benefits under Title 5 or Title 38. See **ATTACHMENT A**, p. 7. While Petitioner does not concede this, and expressly challenges it by way of the arguments presented in Issue I, if the Court of Appeals' conclusion that CRSC benefits are outside the scope of USFSPA is correct, the question remains whether 38 USC 5301 independently protects CRSC benefits from the reach of state courts.

In its original opinion, and incorporated into its remand opinion, the Court of Appeals ruled since the USFSPA did not preclude the trial court's order, i.e., because *Megee* allowed it, 38 USC 5301 did not apply to prohibit an order forcing Petitioner to use his CRSC benefits to make up for that portion of his military retired pay waived to receive those benefits. See **ATTACHMENT A**, pp. 6-7; **ATTACHMENT C**, p. 5. The Court reasoned that the language in 38 USC 5301 that state courts were prohibited from exercising authority over these funds "except to the extent specifically authorized by law" meant that since Michigan state law in the form of the now debunked *Megee* opinion allowed such orders, the federal prohibition did not apply. **ATTACHMENT A**, pp. 6-7; **ATTACHMENT C**, p. 5 (stating "38 USC 5301(a)(1) speaks of precluding the assignment of benefits 'except to the extent specifically authorized by law[.]' As noted above, the USFSPA generally permits the division of disposable retired pay in state divorce actions, and the instant dispute concerns the division of waived retirement pay, which the *Megee* panel held was proper under federal law when the waiver is in relation to a CRSC election. *Megee*, 290 Mich App at 566-567, 574-575.")

Of course, *Howell* itself vanquished this argument. State courts cannot exercise authority over benefits that are protected by 38 USC 5301. *Howell*, 137 S Ct at 1405. Since only "disposable retired pay" may be considered a marital asset under the USFSPA, see 10 USC 1408(a)(4)(A)(ii) and (c)(1), and CRSC benefits are not considered retired pay, they are not "disposable". See 10 USC 1413a(g). See also **ATTACHMENT R**, DoD Financial Management Reg., § 630101.C.1, p. 63-4 ("CRSC is *not retired pay*, and it *is not subject to the provisions of 10 USC 1408 relating to payment of retired or retainer pay in compliance with court orders*.") (emphasis added).

The Court of Appeals' rationale concerning 38 USC 5301 is even more suspect because the whole point of federal preemption is that state law must yield. *Beek v City of Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2014). If it were so easy to suppress binding federal statutory law passed under Congress' enumerated Article I powers by simply relying on a suspect state-court opinion that defies that federal law as the "exception" referred to in the federal law, state courts could routinely employ this sophistic convention. Fortunately, it is well documented that this "exception" refers to other *federal* provisions. The USFSPA, as mentioned, allows state courts to exercise authority over benefits that are considered disposable, only. Thus, a portion of a former servicemember's "disposable retired pay" may be partitioned as marital property upon divorce, 10 USC 1408(a)(2)(B)(iii) and (a)(4)(A)(ii) and (c); and a portion of "waived retired pay" may be considered for payment of child support and/or spousal support awards, respectively. 10 USC 1408(a)(2)(B)(i) and (ii), (d)(1) and the Child Support Enforcement Act (CSEA), 42 USC 659(a) and (h)(1)(A)(ii)(V) (state courts may consider a portion of retired pay waived for receipt of disability pay for child support and/or spousal support awards). But, that is it. All other veterans' benefits are off limits to state courts. CRSC benefits are based on a "combat-related disability"

that is "compensable *under the laws administered by the Secretary of Veterans Affairs*" *Adams v United States*, 126 Fed Cl 645, 647-48 (2016) (emphasis added), citing 10 USC 1413a(e).

Howell ruled that state courts that had previously held, like *Megee*, that an indemnification order or reimbursement order that has the effect of forcing a former servicemember to part with his protected funds were wrong and 38 USC 5301(a)(1) was again cited by the Court to prohibit such outcomes. *Howell*, 137 S Ct at 1405. See also *Ridgway v Ridgway*, 454 US at 53-56 (holding that the anti-attachment provision (identical in all respects to 38 USC 5301) protected a servicemember's designation of a beneficiary (his current spouse) to receive his life insurance benefits, that a state court could not impose a "constructive trust" on the proceeds in favor of the servicemember's former spouse, stating that such measures by state courts "fail[] to give effect to the unqualified sweep of the federal statute," and that such anti-attachment provisions "ensure[] that the benefits actually reach the beneficiary[,] preempts all state law that stands in its way[,] protects the benefits from legal process '[notwithstanding] any other law of any State[,] prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy." (internal quotations and brackets removed). The Court in *Ridgway* noted it found "nothing to indicate Congress intended to exempt claims based on *property settlement agreements* from the strong language of the anti-attachment provision." *Id*. at 52 (emphasis added).

Moreover, 38 USC 5301 permanently protects veterans' non-disposable military retirement and disability benefits against "any legal process" whatever. 38 U.S.C. 5301(a)(1). So ironclad is this statutory protection that it even bars agreements entered into by the veteran to pay these funds to another. 38 USC 5301(a)(3)(A). Thus, a state court order based on the veteran's own agreement

to pay non-disposable, non-assignable income is in contravention of this provision and, as such, "prohibited".

Since the Court in *Howell* noted that 38 U.S.C. 5301 applied to the military veteran's non-disposable benefits, the agreement in the instant case (as well as any judgment or order arising from that agreement) would be prohibited to the extent it requires Petitioner to pay non-disposable benefits to his former spouse. Petitioner's non-disposable veterans' benefits are his sole and only source of income and are protected by 38 USC 5301. They cannot be subjected to redistribution of any kind. Preemptive federal law voids a state court's judgments or orders regardless of their form. See *Howell*, 137 S Ct at 1406 (stating "such…orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress" and "[a]ll such orders are thus pre-empted.").

In addition to the plain language of 38 U.S.C. 5301, the Supreme Court's pronouncements in *Howell* and *Rose v. Rose*, 481 US 619, 630-636; 107 S Ct 2029; 95 L Ed 2d 599 (1987) demonstrate that a state court simply cannot exercise jurisdiction or authority over non-disposable, non-assignable veterans' benefits in marital property divisions in divorce proceedings. In *Rose*, *supra* at 631-633, the Court examined the case law from *Wissner v. Wissner*, 338 US 655, 660; 70 S Ct 398; 94 L Ed 424 (1950) through *Ridgway*, *supra*, and noted where marital property division of veterans' benefits is concerned, state courts cannot order any other disposition of these benefits than that designated by Congress because it would violate 38 USC 770(g), which, the Court noted, was "a prohibition identical in all pertinent respects to [38 USC] 3101" (the predecessor of 38 U.S.C. 5301).

This provision independently protects veterans' benefits from state-court orders in marital property divisions. See *Rose*, *supra* (noting that the purpose of 5301 is to "prevent the deprivation

and depletion of the means of subsistence of veterans who are dependent upon these benefits as the main source of their income"). Such benefits are not assignable or disposable "by or under *any legal or equitable* process whatever *either before or after receipt by the beneficiary*". 38 USC 5301(a)(1) (emphasis added); *Howell*, *supra* at 1405. Therefore, any state court order dividing marital property upon divorce which dispossesses a veteran of these federally protected benefits violates this statute and is simply *ultra vires* of the court's authority and jurisdiction. *Howell*, *supra*; *Rose*, *supra*.

The Court in *Ridgway* stated "anti-attachment provisions generally…ensure[] that the benefits actually reach the beneficiary…[and they] pre-empt[] *all state law that stands in [their] way*. [They] protect[] the benefits from legal process '*notwithstanding any other law of any State*' [and] prevent[] the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy." *Ridgway*, 454 U.S. at 61 (emphasis added). Noting the "unqualified sweep" of this provision, the Court stated its language is presented "in the broadest of terms, any 'attachment, levy, or seizure by or under *any legal or equitable process whatever*,' whether accomplished '*either before or after receipt* by the beneficiary'" is prohibited. *Id*. (emphasis added). Any "diversion, as directed by the state court, of future payments to be received by the beneficiary would be a 'seizure' prohibited by the anti-attachment provision." *Id*. at 55. As noted by the Court in *Ridgway*, the same preemption principle was followed in *McCarty*. *Id*.

In *Howell*, the Court recognized 38 USC 5301 was enacted by Congress to prevent state courts from exercising authority over these benefits. *Howell*, *supra* 1405 (state courts never had "legal power to extinguish" the veteran's entitlement and could not, *a priori* "'vest' [in the former spouse]

that which (under governing federal law[, i.e., 5301(a)(1)] they *lack authority to give*.") (emphasis added).

This sweeping application of 38 USC 5301 is not new. Many other state courts have ruled that it presents a jurisdictional bar to state courts from ordering veterans to part with protected funds. A judgment rendered with respect to funds protected by this provision is void precisely because the court has no *prima facie* jurisdiction to assert authority over these funds. *Howell*, 137 S Ct at 1405. Veterans administration benefits covered by this statute do not lose their exempt status once paid to the beneficiary. Section 5301 specifies that exemption applies "either before or after receipt by the beneficiary." See *In re McFarland*, 790 F3d 1182 (11th Cir 2015). Further, veterans' disability benefits are nonmarital assets and are not subject to being classified as marital property upon dissolution of the marriage. *In re Marriage of Hapaniewski*, 107 Ill App 3d 848, 438 NE2d 466, 469 (Ill App 1982). Unlike personal injury or workers' compensation benefit, veteran's disability benefits are not considered to be property in a proceeding for dissolution of marriage, since they are *statutorily exempt* (per 38 USC 5301) from *all claims* other than claims of the United States and are not divisible or assignable. *In re Marriage of Bornstein*, 359 NW2d 500, 504 (Iowa App 1984). See also *Rickman v Rickman*, 605 P2d 909, 911-912; 124 Ariz 507 (Ariz App 1980) (monies received from the Veterans Administration for service-connected disabilities were husband's separate property following dissolution of marriage, hence courts *lacked jurisdiction* to award one half thereof to former spouse).

Thus, under this provision, state trial courts are without power in divorce property settlements to divide the beneficiary's disability compensation benefits with former spouse so long as benefits were paid to beneficiary under federal law, and thus contempt adjudications attempting to enforce such provisions of a divorce decree have been ruled *void* and *unenforceable*. *Ex Parte Pummill*,

606 SW2d 707 (Tex App 1980). See also *Ex Parte Johnson*, 591 SW2d 453 (Tex 1979) (award to divorced wife of 50 percent of husband's anticipated future disability benefits from the Veterans Administration conflicted with clear intent of Congress that such benefits be solely for the use of the disabled veteran, and diversion of such future payments was in conflict with the exemption provision, 38 USC 5301, thus, under the Supremacy Clause, divorced husband could not be imprisoned for contempt in failing to make such preempted payments to his former wife).

The federal scheme for military retirement which preempts state domestic relations and community property law precludes state courts from treating portion of a spouse's military retirement pay, which is waived in order to receive veteran's disability benefits, as community property subject to division in marital property dissolution action. *In re Marriage of Costo*, 203 Cal Rptr 85 (1984) (applying 38 USC 5301).

When 38 USC 5301 applies to the particular benefit at issue – here CRSC benefits authorized and administered by the Secretary of Veterans Affairs, see *Adams*, 126 Fed Cl at 647-648 – state courts do not have jurisdiction to order the beneficiary to pay them pursuant to a property settlement to former spouse. *Reed v Reed*, 481 P2d 125 (Colo App 1971).

Thus, 38 U.S.C. 5301 applies to this case notwithstanding the consent agreement or any subsequent orders. A state court order that is preempted by federal law is an extra-jurisdictional, *ultra vires* act. It is void *ab initio* to the extent its terms violate that federal law. Therefore, it may be challenged and nullified at any time. State courts never had authority over non-disposable veterans' benefits as identified by federal law, 38 USC 5301(a)(1), and thus, orders purporting to force veterans to part with these monies in marital property dispositions upon divorce may be attacked at any time. *Howell*, 137 S Ct at 1405.

Petitioner continues to argue that 38 USC 5301 independently protects his disability pay and special compensation from any state court attempts to redistribute them. Section 5301 prohibits a state court from exercising any legal process whatever with respect to benefits authorized by the Secretary of Veterans Affairs. It also prohibits agreements by the beneficiaries to dispossess themselves of such funds. Finally, it forbids any collateral arrangement from being used to secure a promise to pay what are essentially these inalienable federal benefits. Where 38 USC 5301 is found to apply, it places a jurisdictional limitation on the state court's ability to exercise authority over the protected funds.

Despite decades of state court tergiversation concerning whether and to what extent state courts could manipulate federal law to force veterans to part with those benefits that are protected by 38 USC 5301 and which, through Congress' War Powers have always been so protected, see, *inter alia*, *Stokes*, 175 Ga at 210-212; *Wissner*, 338 US at 660; *Ridgway*, 454 US at 46, the Supreme Court's decision in *Howell*, which is directly applicable to the instant case because the circuit court ordered petitioner to part with his veterans' disability benefits (his waived military retired pay) and his disability pay (which is CRSC) to satisfy a marital property settlement with his former spouse, reaffirmed that state law in this subject matter has always been preempted. *Howell*, *supra* at 1404 "*McCarty* with its rule of federal preemption *still* applies." (emphasis added).

III. and IV.

THE COURT OF APPEALS ERRED IN REFUSING TO STAY PETITIONER'S ONGOING PAYMENTS PER THE CIRCUIT COURT'S FEDERALLY PREEMPTED ORDERS AND IN REFUSING TO CANCEL AN "APPEARANCE" BOND WHEN PETITIONER APPEARED THROUGH HIS COUNSEL AT THE 2014 CONTEMPT PROCEEDINGS AND WHERE COLLATERAL SECURING THE BOND IS BASED ON AN AGREEMENT TO PAY NON-DISPOSABLE VETERANS' BENEFITS IN CONTRAVENTION OF 38 USC 5301(a)(3)(A) and (C)

A. Standard of Review

A court's refusal to enter a stay and/or issue or cancel a bond is reviewed for abuse of discretion. *People v Bailey*, 169 Mich App 492, 499; 426 NW2d 755 (1988). A court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). This argument also concerns application of 38 USC 5301(a)(3)(A) and (C), which is reviewed *de novo*. *Ameritech Mich v PSC (In re MCI)*, 460 Mich at 413.

B. Applicable Law

Title 38 USC 5301(a)(3)(A) and (C) provide:

> This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation…*enters into an agreement* with another person under which agreement such other person acquires for consideration *the right to receive such benefit* by payment of such compensation…such agreement *shall be deemed to be an assignment and is prohibited*…."
>
> Any agreement or *arrangement for collateral* for security for an agreement that is prohibited under subparagraph (A) is also prohibited and *is void from its inception*." (emphasis added).

In addition, Michigan law provides that a "bond" and any security therefor, automatically terminates upon satisfaction of the condition upon which the bond is based and the liability stated therein is extinguished. See *DeMyer v McGonegal*, 32 Mich 120, 126 (1875) (GRAVES, J.);

Bruwer v Oaks (On Remand), 218 Mich App 392, 397; 554 NW2d 345 (1996); (**ATTACHMENT D**, *Barresi v Barresi*, unpublished opinion per curiam of the Michigan Court of Appeals, issued May 21, 2015 (Docket No. 319739), pp 3-4, citing *Bruwer*, *supra* and MCR 3.604(I)(1). A state court has no authority to change or otherwise modify the bond once it has been satisfied. *DeMyer*, *supra*; *Bruwer*, *supra*; *Barresi*, *supra*.

C. Analysis

Pursuant to the Circuit Court's November 6, 2014 contempt order, Petitioner has been paying his former spouse $1000 per month from his only source of income – non-disposable veterans' disability benefits. (**ATTACHMENT E**, Circuit Court's November 6, 2014 Order) Plaintiff has now paid $1000 per month for 46 months (July 2014 through May 2018), making the amount of his total payments to his former spouse $46,000. This is $10,602.57 more than the challenged arrearages of $34,397.93 stated in the Circuit Court's order. See *id*. These payments are ostensibly guaranteed by an "appearance bond" in the amount of $9500 that had been posted on June 23, 2014, and which was secured with a lien on Petitioner's mother's home. (**ATTACHMENT F**, Bond and Circuit Court Docket Entries)

On July 30, 2014, Petitioner's attorney filed an appearance and contested the contempt proceedings. *Id*. Therefore, under Michigan law, the "bond" was satisfied at that moment and there is no longer a basis to execute on said bond or to continue to hold the lien on Petitioner's mother's home. *DeMyer*, *supra*; *Bruwer*, *supra*; *Barresi*, *supra*. The Court of Appeals abused its discretion by refusing to cancel or otherwise nullify this bond and thereby terminate the surety's obligation.

Moreover, the plain language of section 5301 prohibits any collateral arrangements from securing an obligation by the veteran to pay non-disposable veterans' benefits to another. 38 USC 5301(a)(3)(A) and (C). Petitioner's only source of income is non-disposable veterans' benefits

under 38 USC 5301. As noted in *Howell*, 137 S Ct at 1405, 38 USC 5301(a)(1) prohibits state courts from ordering veterans to reimburse or indemnify former spouses where the veteran receives non-disposable pay protected by that statute in lieu of military retired pay. Since Petitioner's benefits are protected by this provision and *Howell* unequivocally so held, the Court of Appeals erred in refusing to cancel the bond and stay Petitioner's payment obligations. This is especially relevant as Petitioner is claiming a right to recoupment.

RELIEF REQUESTED

Petitioner respectfully requests the Court to reverse the Court of Appeals and overrule *Megee v Carmine*, which in light of the Supreme Court's unanimous opinion in *Howell v Howell*, is no longer good law; order that Petitioner's payments to Respondent cease; cancel the "appearance" bond and the lien securing it; and order that Petitioner be allowed to recoup those federal funds that he has paid in contravention of preemptive federal law.

In the alternative, Petitioner respectfully requests that the Court grant his application for leave to appeal on the grounds and for the reasons stated herein and, pending such review, order that Petitioner's payments to Respondent cease and that the "appearance" bond and the lien securing it be nullified.

Respectfully submitted by:

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