STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff-Appellee,

v

RAY JAMES FOSTER,

Defendant-Appellant.

Supreme Court Docket No.: 157705
Court of Appeals Docket No.: 324853
Circuit Court No.: 07-15064-DM

APPELLEE'S RESPONSE OPPOSING APPLICATION FOR LEAVE TO APPEAL (AFTER REMAND)

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STATEMENT OF ORDER BEING APPEALED

The Order being appealed is the Consent Judgment of Divorce entered by the Trial Court on December 3, 2008 and the Unpublished Per Curium Opinion of the Michigan Court of Appeals dated October 13, 2016, in *Foster v Foster* Court of Appeals (Docket No. 324853) and the Unpublished Per Curium Opinion of Michigan Court of Appeals dated March 22, 2018 in *Foster v Foster* (Docket No. 324853).

QUESTIONS PRESENTED

I.

Whether The Issues Presented In This Appeal Involve Legal Principals Of Major Significance In Michigan And National Jurisprudence.

Plaintiff-Appellee says, "No"
Defendant-Appellant says, "Yes"

II.

Whether 38 USC 5301 Prohibits State Courts From Ordering A Service Member To Part With A Portion Of His/Her Disposable Nonmilitary Pay In Lieu Of Amounts Waived To Receive Such Pay.

Plaintiff-Appellee says, "No"
Defendant-Appellant says, "Yes"

III.

Whether The Consent Judgment Of Divorce Entered By The Trial Court Ordered Defendant-Appellant To Part With Federally Protected Disposable Funds Nor Does It Treat Non-Disposable Funds As A Part Of The Martial Property To Be Distributed As Part Of The Consent Judgment Dividing The Parties' Property.

Plaintiff-Appellee says, "No"
Defendant-Appellant says, "Yes"

IV.

Whether The Court Of Appeals Erred In Its Interpretation Of *Howell V. Howell* And Its Analysis As To Its Applicability To The Instant Action.

Plaintiff-Appellee says, "No"
Defendant-Appellant says, "Yes"

V.

Whether The Court Of Appeals Erred 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.

Plaintiff-Appellee says, "No"
Defendant-Appellant says, "Yes"
Court of Appeals says, "No"

STATEMENT OF THE CASE

This case involves Defendant-Appellant's attempts to evade/avoid an obligation he agreed to perform in a Consent Judgment of Divorce dated December 8, 2008 and a subsequent Order entered by the Trial Court on October 8, 2010. Those Orders were never appealed. Defendant-Appellant was subsequently held in contempt by the Trial Court on June 27, 2014. Defendant-Appellant filed a Claim of Appeal on December 1, 2014. The Michigan Court of Appeals affirmed the Trial Court ruling in an Unpublished Per Curium Decision on October 13, 2016 in *Foster v Foster* (Court of Appeals Docket No. 324853. (Defendant-Appellant's Attachment C).

Defendant-Appellant's initial Application for Leave to Appeal was filed on November 30, 2016 after the Court of Appeals affirmed the Trial Court's order holding him in contempt of court for failing to comply with the Consent Judgment of Divorce entered in 2008. (*Foster v. Foster,* Unpublished Per Curium of the Court of Appeals, issued October 13, 2016). The Application for Leave to Appeal the October 13, 2016 Order of the Court of Appeals was considered by this Court and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, the Order of the Court of Appeals was vacated and the matter was remanded to the Court of Appeals for reconsideration in light of *Howell v. Howell*, 581 U.S. _____; 137 S Ct 400; 197 L Ed 2d 781 (2017).

On March 22, 2018 the Court of Appeals once again affirmed the Trial Court's ruling. The Court of Appeals noted; "Given that the Supreme Court vacated the earlier opinion in its entirety, and in order to provide context for our discussion and analysis of *Howell*, we shall first set forth most of the previous opinion". (*Foster v. Foster*, (on remand) Unpublished Opinion Per Curium of the Court of Appeals, issued March 22, 2018, Docket No. 324853, Page 1). What followed in the Order on Remand is the Court of Appeals analysis of the facts, procedural history

and legal analysis as previously set forth in its Opinion and Order dated October 13, 2016. The only substantive difference is the Court's analysis and application of *Howell*.

STATEMENT OF FACTS

HEARING ON ENTRY ON FINAL JUDGMENT OF DIVORCE ON DECEMBER 8, 2008

TESTIMONY OF DEBORAH LYNN FOSTER

At the time of the hearing she was 45 years old and was employed as a registered nurse at a local nursing home. (Tr 4-5)

The consent judgment was a result of negotiations between Plaintiff and Plaintiff's and Defendant and Defendant's counsel. (Tr 6)

Under the Judgment of Divorce neither of them would receive alimony nor be able to make a claim for alimony in the future. (Tr 9-11)

She is able to support herself from the earnings as an RN and the amount she would receive from Defendant's military retirement pension.

Plaintiff was going to receive the marital home free and clear of any claim by Defendant. She was going to be responsible for paying any future utility bills, homeowners and casualty insurance, property taxes and maintenance or repair costs associated with her ownership. (Tr 11)

She would make an effort to have him released from the mortgage and if the bank wouldn't do that she would have 90 days for the date the judgment was filed with the clerk to refinance the mortgage on the marital home. (Tr 11-12)

She had a pension or retirement benefits. Defendant had an interest in military retirement benefits. She was being awarded 100% of the benefits she had accumulated through her

employment. She would be responsible for paying any tax obligations owing when she withdrew money from the retirement accounts awarded to her.

She was going to receive approximately half of that portion of the amount of benefits that had accrued in Defendant's military retirement account during the marriage. (Tr 14) She knew it wasn't going to be exactly 50-50 split because Defendant had served in the armed services before they were married on August 6, 1988. (Tr 14-15)

For purposes of calculating the split of Defendant's military pension, the parties agreed they were married for a period of 225 months. (Tr 15)

As indicated, both parties waived spousal support and agreed that Defendant's disability benefits were not subject to division by the Court because they were not considered marital property under federal law. Pursuant to the property settlement, Plaintiff was awarded fifty percent (50%) of Defendant's retirement pay or "disposable military retired pay" as calculated based on Defendant's creditable military service during the marriage. As the Court of Appeals noted in its Opinion and Order on Remand, the parties also agreed to the inclusion of the following provision in the Consent Judgment of Divorce, which the Court referred to as the offset provision:

"If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff 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 Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay

directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court."

Because there would be a delay between when the government started paying her benefits directly, he would pay her the amount of military retirement benefits she would be entitled to receive on or before December 1, 2008. He would make those payments until she was receiving those benefits directly from the government. (Tr 15)

To the extent there were tax consequences from his use of the military retirement benefits he would be responsible for paying any taxes on those funds. (Tr 16)

She was also going to receive any cost of living increases paid on the military retirement funds awarded to her. (Tr 16)

Plaintiff knew Defendant bought a survivor benefit which listed Plaintiff as a beneficiary. Defendant's military retirement provided the funds to pay for the survivor benefit. (Tr 16-17)

Defendant indicated he was going to cancel the survivor benefit. To the extent he got a refund for cancelling the survivor benefit, it would be put back into his military retirement account. That amount would be divisible and payable to both of them.

Plaintiff had health insurance through her employment. She would be responsible for obtaining health coverage for herself in the future.

She would pay any amounts owed on property she was receiving. She would pay any indebtedness she incurred after November 20, 2007, the date she filed for divorce. (Tr 17) She would pay any credit card debt for any credit cards in her name. (Tr 17)

There were consolidation loans at a local credit union that she would be responsible for paying. (Tr 18)

She would pay any unpaid medical bills not covered by the health insurance coverage she had when the treatment was received. (Tr 18)

Defendant would pay any indebtedness owed on property being awarded to him He would pay any indebtedness he incurred after November 7, 2007, the date Plaintiff filed her complaint for divorce. He would pay any amounts owed on credit cards in his name. He would pay any amounts that weren't covered by a policy of health insurance in effect when the treatment was received. (Tr 18)

She understood that the Judgment of Divorce if accepted by the Trial Court would satisfy all claims she would have against the property the Defendant now owned or would own in the future. (Tr 20)

She acknowledged she and the Defendant, in conjunction with their lawyers had negotiated a settlement. (Tr 20-21)

The agreement was fair and equitable and she wanted the judge to approve it. (Tr 21)

TESTIMONY OF DEFENDANT

He heard Plaintiff's counsel going through the terms of the Consent Judgment of Divorce. Nothing covered was different than what he had agreed to in settling the case or what was contained in the Judgment of Divorce. (Tr 24)

He had an opportunity to review the Judgment of Divorce both personally and with his counsel. (Tr 24)

Given all the facts and circumstances of the marriage and now ultimately the divorce, the provisions of the divorce judgment were fair and equitable. He was asking the court to adopt them. (Tr 24)

He currently received disability benefits from the Veteran's Administration for injuries he sustained during his military service. (Tr 25)

CROSS EXAMINATION OF DEFENDANT BY THE COURT

Defendant's counsel explained there are 2 separate components to Defendant's military retirement. There is what a veteran receives for military retirement/pension based upon his rank and years of service or military disability benefits based on a percentage basis to determine the level of impairment with compensation based on rank and years of experience.

The provision set forth on page 4 of the divorce judgment under the heading Pension and Retirement Benefits indicates, "If the Defendant should ever became disabled either partially or in whole, Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled". (Tr26)

Plaintiff's counsel acknowledged that it was his understanding that if Defendant was determined to be completely disabled there was a way Defendant could defer some of his retirement benefits into disability benefits and those retirement benefits would no longer be subject to division. (Tr 26)

The provision didn't necessarily relate to the facts now because Defendant is already receiving some disability benefits from the Veteran's Administration and those disability benefits would not be subject to division. (Tr 26)

It was Plaintiff's counsels understanding Defendant might be able to have more of his military retirement income transferred to disability income.

Defendant's counsel indicated the provision in the divorce judgment addresses his military retirement income and in the future if Defendant became disabled and tried to transfer additional military retirement money over to his disability money which is not subject to division. Any transfers of money would not reduce the amount of money Plaintiff would be able to receive under the Judgment of Divorce. (Tr 27)

Defense counsel indicated it was his understanding the whole deferral system, i.e., allowing military retirement benefits to be deferred to military disability retirement would be ending in 2009. There would no longer be a means of deferring military retirement benefits to military disability benefits.

Plaintiff's counsel indicated the clause in the divorce judgment was a mechanism to try to prevent dissipation of the retirement benefits Plaintiff would be entitled to receive. (Tr 28)

The Court of Appeals in its Order on Remand concurred with this analysis when, in reference to the "offset provision" stated, "… the intent of [the offset provision] was simply to address a scenario in which Defendant became entitled to and accepted more disability benefits than currently being received, inversely diminishing the retirement benefits that were being divided and awarded to Plaintiff."

The Trial Judge addressed Defendant directly and inquired whether he was acknowledging that if he converted any of his military retirement pay to disability pay or his level of military retirement pay was reduced because the level of disability pay was increased the Court would have the ability to enforce payment of the amount Plaintiff was entitled to receive from his military retirement pay. The Defendant answered yes. Both counsel agreed that was a correct statement. (Tr 28)

The Court ruled the Veteran's Administration disability benefits were not part of the marital estate. (Tr 32)

Shortly after entry of the Consent Judgment of Divorce Defendant became eligible for and began receiving disability benefits which consequently reduced the amount of his retirement payments and the amount Plaintiff received from Defendant's military pay. Defendant failed to comply with the Judgment by not paying Plaintiff the difference between the reduced amount of retirement pay she received and the amount that she received at the time of the Consent Judgment of Divorce.

SHOW CAUSE HEARING HELD ON SEPTEMBER 30, 2010

HEARING ON PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE HELD ON SEPTEMBER 30, 2010

TESTIMONY OF DEBORAH FOSTER

She was divorced from the Defendant on December 8, 2008. She was awarded a portion of his military retirement. She began receiving retirement pay in April of 2009. The amount she received was $811.62. She continued to receive that sum until February of 2009. (Tr 7) In February of 2010 she received $859.05. (Tr 8)

On February 27, 2010, she received a postcard which indicated her payment was being adjusted downward to $211.00 or $212.00 a month. (Tr 8)

She contacted the Veteran's Administration to inquire why the payment was being reduced. (Tr 9) In response to her inquiry she received a letter. (Tr 9)

The Defendant did not pay her the differential between the $859.00 she had been receiving and the $211.00 her military retirement benefits had been reduced to. (Tr 10)

Since March of 2010 she only received $211.00 per month. (Tr 10)

When she was in the process of getting a divorce she became aware the Defendant had been notified he was receiving a disability. She was aware he had received a certain portion of disability. (Tr 11) She wasn't aware he had received a Combat Related Service Compensation (CRSC) award.

She and the Defendant were not living together when he separated from the military. She lived in Dickinson County, Michigan and he lived in Colorado Springs, Colorado. (Tr 11)

He had separated from the military sometime in October of 2007. She filed for divorce in November of 2007. During that time he was receiving disability pay. (Tr 12)

She knew he was trying to receive disability pay. In trying to resolve the divorce, various retirement situations were discussed. They finally agreed that the military would determine the amount of military retirement pay she would receive. The military determined that amount to be $811.00. If his disability status were to change, he agreed to pay her the difference between the amount she was entitled to and the amount she was receiving. Otherwise, there would have been further proceedings involving alimony and other issues. (Tr 13-14)

They decided the military would make the determination with regard to the amount she was entitled to receive. No dollar amount was mentioned at the divorce hearing. (Tr 14)

The benefits came after the divorce was finalized. In the interim she was receiving less than he had been paying before the military began making payments to her. Defendant did not make up the shortfall so a hearing was going to occur with regard to his failure to pay the shortfall but Defendant paid the amount owed before a hearing could be held. (Tr 14-15)

She believes Defendant took certain steps to reduce the amount of money she received. (Tr 15)

On April 14, 2010, she received a letter from the Defense Finance and Accounting Service. It indicated a portion of Defendant's retirement pay was being paid to her directly in an amount necessary to comply with the court order as long as the amount being paid didn't exceed 45% of Defendant's disposable retirement pay. (Tr 17)

She understood she would get 50% of Defendant's disposable retirement pay based upon the length of her marriage and the length of Defendant's service. (Tr 17) She would also receive a cost of living allowance. (Tr 17)

When the Judgment of Divorce was entered, Defendant agreed he would pay her $539.00 a month while she waited for the government to pay her directly. (Tr 18) Defendant missed making partial payments to her for January, February and March of 2009. Once she knew what her monthly award was going to be Defendant still did not pay the differential for those months. She had to petition the Court to have Defendant show cause why he hadn't made the payments. Defendant did not disagree with the $811.00 per month figure she was supposed to receive. (Tr 21)

A check from Defendant to Plaintiff dated August 5, 2009 in the amount of $1,639.49 was marked as an exhibit. (Tr 21)

TESTIMONY OF RAY JAMES FOSTER

He wasn't employed. He served in the military for 25-30 years. He separated from the military on October 1, 2007. He lived in Colorado Springs, Colorado. (Tr 23)

When he separated from the military he held the rank of Sargent Fist Class. He was promoted to that rank on September 1, 2004. (Tr 24)

He served in combat in Iraq from November of 2003 through April of 2004. He returned to combat from November of 2005 to November of 2006. He was involved in actual combat situations. (Tr 25)

After November of 2006 he returned to Colorado Springs. Within a year he separated from the military. (Tr 26) When he separated from the military he would be entitled to military retirement pay. (Tr 27)

He was aware of something called CRSC, which stands for Combat Related Service Compensation. He would receive that as a result of being injured in combat. He applied for that before he separated from the military in October of 2007. (Tr 27)

In November of 2007 his wife began divorce proceedings. (Tr 28) At the time of the divorce he was receiving military retirement pay. In February of 2008 he received a notice he was going to be receiving CRSC because he had been injured in combat.

He received a letter in February of 2008 that he was going to receive CRSC because of his combat related injuries. (Tr 29) The effective date of those benefits was October of 2007. (Tr 30) He thought he showed that letter to his attorney. He told him he was going to be awarded that money. He was deemed to be 60% disabled, 50% for post-traumatic stress disorder and 10% for arthritis of the spine. (Tr 30-31)

He was divorced on December 8, 2008. On that date a Consent Judgment of Divorce was entered. The first time he saw the finished document was about 10 minutes before the hearing. (Tr 31-32)

Plaintiff had some sort of pension or retirement benefit. She received 100% of her retirement benefit. (Tr 32)

The divorce judgment indicated Plaintiff would receive or be awarded 50% of any military retirement benefit. Specifically awarded a percentage of the Defendant's disposable military to be computed by multiplying 50% times the fraction. The section in the divorce judgment concluded by indicating Plaintiff, as the former spouse, would receive a portion of his military entitlement with regard to cost of living increases. (Tr 33) Defendant understood that.

The divorce judgment then went on to indicate if he should ever become disabled, Plaintiff's share of his retired military pay would be calculated as if he had not become disabled. He indicated he did not understand that language. He had already been told that before December 8, 2008, the date the divorce judgment was entered, that he was going to-receive some type of combat disability pay. (Tr 34)

He claimed he didn't understand the language in the divorce judgment. He thought if he became more disabled then he already was that he would continue to pay whatever the difference was between what she was awarded and the amount her benefit would be reduced by if he became more disabled and it caused the amount she was entitled to receive being reduced. No dollar amount was mentioned. (Tr 35)

He hadn't made any effort after December 3, 2008 to defer any of his military retirement pay. He had not had any communications with the Veteran's Administration or anyone else to defer any of his military entitlement pay. He didn't instruct anybody to communicate that on his behalf to anyone else. (Tr 36)

He didn't ask anyone to convert part of his military retirement pay to disability pay. His military retirement pay had already been converted to CRSC. (Tr 37) The level of his disability has not been increased since February 5, 2008.

He doesn't know if he brought the February 5, 2008 letter from the Veteran's Administration about his award to Plaintiff's attention. (Tr 37-38) He does remember telling his attorney about the letter. He also told his attorney that the amount being sent to Plaintiff would be reduced. Nobody told him how much his CRSC would amount to in dollars. (Tr 38)

He didn't believe if he received an award for CRSC that he would be required to give Plaintiff money. (Tr 39) He was just waiting for the CRSC to kick in. (Tr 39) It kicked in after the divorce. (Tr 39)

He has been receiving CRSC benefits since June of 2009. He has also received disposable military retirement pay. Plaintiff is now receiving the percentage of his disposable military retirement pay she's entitled to receive under federal law. He hasn't done anything to interfere with the percentage of military retirement pay Plaintiff is entitled to receive under federal law. (Tr 40)

He is receiving the award he was notified he would be receiving in February of 2008. (Tr 41)

The April 14, 2010 letter from the Veteran's Administration to Plaintiff indicating the amount she was receiving would be reduced was not sent to him. He had never seen it before the date of the hearing. He didn't do anything to cause the letter to be sent to Plaintiff. (Tr 41)

Defendant had never seen the paystub indicating her portion of Defendant's military retirement pay was being reduced to $212.00 a month. (Tr 42) He didn't call the Veteran's Administration and tell them what to do with his benefits. (Tr 43)

His disability pay was factored into his income for purposes of determining his child support.

The February 5, 2008 disability award letter indicated his disability pay was going to begin within 60 days of the award letter. (Tr 45)

His disability pay didn't kick in until long after the 60 days expired. He thinks his disability pay kicked in sometime in 2008. He doesn't think it was before he had gotten divorced. Then he testified he guessed his disability had kicked in before the divorce was started. He believes he was getting disability pay for not being a combat soldier before the CRSC was paid to him. His attorney knew he was receiving disability, he had told him from the very beginning. (Tr 48) That was never talked about in court. Nobody knew how much military retirement pay Plaintiff would be entitled to under the formula they had agreed to. The amount of months of credit Plaintiff would be entitled receive and no one was really aware of how much military retirement pay she would receive based upon the formula they had agreed upon. The parties agreed to let the government make the calculation about how much Plaintiff would receive. He thought it would be about $539.00 a month. (Tr 47) His lawyer couldn't give him a dollar amount with regard to what Plaintiff could receive. He found out the government determined she was entitled to $811.00 a month. He didn't ever object that too much money was being taken out of his check. All of the calculations involving the amount of the differential that was owed were based on the fact that $811.00 a month was the correct amount. (Tr 48)

A letter from the Defense Finance and Accounting Service, Retired and Annuity Pay Division sent a letter to the Plaintiff was marked as Exhibit 2. The letter indicated the reduction in her military retirement benefits was due to an increase in Defendant's VA Disability. (Tr 49) Defendant indicated his CRSC was approved when he was in the service and getting ready to retire. (Tr 49) When Plaintiff was awarded the $811.00 a month in military retirement pay by the Defense Finance and Accounting Service his military retirement pay was still more than after

he paid for a Supplemental Survivor Benefit. (Tr 50) The amount she was awarded was less than one-half of his military retirement pay. (Tr 51) When he was going through court he understood that Plaintiff would get a percentage and if his disability went up she would still be getting paid the difference of that amount. So whatever his disability went up at the time she would still be getting paid the difference of that amount. If his disability went up he would still be paying her that amount. (Tr 51) He didn't indicate he thought the government was wrong when Plaintiff was awarded $811.00 a month out of his retirement. When the government cut Plaintiff's military retirement benefits by approximately $600.00 in 2010, he got back dollar for dollar the amount that was taken away from Plaintiff. (Tr 52) He told Judge Slagle he understood what Judge Slagle was asking him at the conclusion of the divorce hearing. (Tr 53) He admitted telling Judge Slagle the Judge had the authority to enforce payment of retirement benefits to Plaintiff from his retirement pay. (Tr 54)

To his knowledge he was never advised that there had been an increase in the percentage of his disability. (Tr 55)

In May of 2010 he began receiving $600.00 more than he had received the preceding month.

Sometimes the government puts out paperwork that says you are awarded something but it takes a while for it to kick in. Defendant indicated he had been overpaying Plaintiff for all the months from the date of divorce in December 2008 through May of 2010. (Tr 56)

The Trial Judge asked the Defendant to look at the last paragraph of Exhibit 2, which was addressed to the Plaintiff. The Trial Judge indicated the last paragraph said, "The reduction in your February 2010 payment was due to an increase in the retired members VA Disability." (Tr 56) "This is considered a lawful authorized deduction." (Tr 57) Defendant knew he w**as** getting

additional pay because he was starting to get his CRSC because he had been in combat. (Tr 57) Defendant testified that the increase in pay he received in 2010 is the result of the disability detailed in the letter of February of 2008. (Tr 57)

Defendant acknowledged that he testified he was receiving non-combat related disability at the time the divorce was going on and at the time the judgment was entered. (Tr 60)

TESTIMONY OF JAMES HIGDON

Defendant and his counsel offered the testimony of James Higdon, who appeared by telephone. The witness was employed as an attorney at a law firm in Texas. (Tr 67) He indicated he does quite a lot of military retirement related issues, post-divorce enforcement and clarification actions and has written and spoken on those issues. (Tr 67)

The letter of February of 2008 indicated Mr. Foster was receiving some CRSC benefits. The document indicates he had a combat related disability rating of 60% in October of 2007.

You have to have a VA Disability rating and if all or part of the VA Disability combat related then you are due entitled to receive CRSC and VA Disability benefits. The VA Disability and CRSC disability rating don't correlate directly because some VA Disability rating may or may not be combat related. (Tr 71)

Defendant was being paid some VA Disability when he was released from the military. (Tr 71) He was also receiving disposable military income. Then he was awarded CRSC and the amount of money plaintiff was receiving was reduced. Under 10 USC 1408, the definition of disposable retired pay is gross retirement pay. To determine disposable income you deduct money if the service member has selected a survivor benefit coverage. That didn't happen in this case. If the service member has elected survivor benefit coverage which is deducted right off the top of the service member's gross retirement pay. When the service member is awarded CRSC

the amount of money that went to Plaintiff would be reduced. VA Disability pay would be increased by reducing disposable retirement pay. (Tr 72) A service member receiving a medical disability that also comes off the gross retirement pay to determine the disposable amount of retirement pay. (Tr 72) Disposable military retirement pay is what that is called. (Tr 73) There is no prohibition under federal law that prohibits a court from dividing disposable retirement pay. (Tr 73)

To the extent that the service member was receiving CRSC it would reduce the amount of disposable retirement pay. (Tr 74) The amount of CRSC the service member received would be increased from his disposable military retirement pay which comprises the amount the non-military divorcing spouse can expect to be divided. (Tr 74)

You have until 2014 when a service member has a VA Disability percentage in excess of 50% he will incrementally going to receive VA Disability and retirement pay so that in 2014 the theory is he will receive 100% of his VA Disability pay. (Tr 75)

When a service member qualifies for CRSC, the government starts taking money from the veteran's military retirement pay which is divisible and converting it to military disability payments which aren't divisible. (Tr 75)

It takes the government time to catch up to the veteran and pay him his CRSC. It takes the government time to get all the paperwork done. (Tr 76)

When Mr. Foster was divorced he was receiving some sort of disability and he was also receiving military retirement. When he began receiving CRSC it would reduce the amount of retirement money Mrs. Foster was to receive. (Tr 76)

As the disposable amount of retirement pay is reduced the benefit the non-military spouse would receive would also be reduced. (Tr 78)

In February of 2008, Defendant received his CRSC award letter. At that point Defendant would have been approved for CRSC benefits. At the point where he had received CRSC benefits the judgment provided the disposable military retirement pay Plaintiff would receive was on the basis of a percentage the was determined by when they started sending her the money. (Tr 79)

If the CRSC kicked in after they started sending her checks, it would reduce the amount of money Plaintiff would receive. The CRSC is a dollar for dollar disposable replacement for military retired pay. The disposable military retirement pay would decrease and CRSC is not subject to division under federal law. (Tr 79)

A letter dated April 14, 2010 was marked as an exhibit. The disposable retirement pay referenced in the letter does not refer to any of the CRSC benefits. At the very bottom of the letter's first page and at the very top of the second page it indicates, "The reduction in your February payment March 1, 2010 was due to the increase in the retired members VA Disability. This is considered a lawful authorized deduction and should have affected your pay." (Tr 81)

When the Defense Finance and Accounting Service is prohibited from paying retirement pay and either disability compensation or CRSC, the CRSC trumps and it will be subtracted and offset from the ordinary military retirement pay. (Tr 82) That's why they use the term due to an increase because the ordinary military retirement benefits are being offset to a lower number and the disability and or CRSC benefits are increased in an amount equal to the amount the military retirement benefits are being reduced. (Tr 83)

He didn't know when the Defendant would have first started receiving CRSC disability benefits pursuant to the award letter dated February 5, 2008. (Tr 84) (Defendant's Exhibit 1) (Tr 84) The letter indicated that Defendant should start receiving benefits within 60 days of the date

of the letter. And if that had happened, it would have been before the divorce. If the Defense Finance and Accounting Service had started making payments before the divorce the April 14, 2010 letter (Exhibit 2) would not indicate Plaintiff's benefits would be reduced because of an increase in the Defendant's disability.

The Trial Court referenced the April 14, 2010 letter on the first page where it is indicated about midway down the first page, "an authorized deduction includes but is not limited to VA Disability amount waived in order to receive compensation under Title 5 or 38 of the United States Code". (Tr 87)

Title 38 is a provision under VA Disability payments are authorized. Title 38 is the authorization to receive VA Disability payments. (Tr 89)

He already had a disability rating. The issue was what portion of his disability would be determined to be combat related before they started paying CRSC. (Tr 90) As the witness understood it if he made an application today he would receive retroactive CRSC benefits back to the date he had originally qualified for VA Disability benefits. (Tr 90)

He didn't know when Defendant's application had been processed. It takes a long time for some of the benefits to kick in. He didn't know whether it would take 2 plus years for the benefits to kick in. (Tr 90)

He would have no way of knowing how long it would take for the benefits to kick in. (Tr 91)

He couldn't state with any degree of certainty that the VA Disability referred to in the April 14, 2010 letter (Defendant's Exhibit 2) was in fact CRSC. (Tr 92) Defendant would have to had some form of disability rating before he could qualify for CRSC disability. (Tr 92) There is in fact a benefit to having disability qualified as CRSC because it results in increased

compensation. There is a financial benefit in having a veteran's disability classified as combat related. (Tr 93) A disabled veteran has the option of having his military disability pay converted into CRSC. Some forms of military disabilities are treated as combat related disabilities almost immediately. (Tr 94)

The benefit of being awarded combat service related compensation is that it is not divisible and it is not taxable. There is no difference between CRSC and the other forms of military disability. (Tr 95)

The CRSC rating is based upon the portion of a service disability that is service connected. Only those portions of a disability are capable of being converted to CRSC. There is a set formula used to convert military disability to CRSC. If you have had a CRSC disability and a certain level of military disability you might get more than if you had a VA disability. (Tr 97)

The veteran would get a portion of his retirement pay based upon the formula set forth in the percentage in the Judgment of Divorce. The other items wouldn't be divisible. (Tr 98)

The Court questioned Defendant's counsel with regard to whether the amount of disability benefits Defendant was receiving even though his actual disability hadn't increased. (Tr 114) The Court went on to note it was clear Defendant was receiving more money for his disability. Defendant's counsel acknowledged that might be the case. Defendant's counsel also acknowledged he isn't sure what Defendant had received for benefits and what he was receiving now. (Tr 115) The Court found Defendant had a decision indicating he would be awarded but he wasn't being paid the benefits he had been awarded at the time of the divorce. The notice did not indicate he was being awarded a particular sum of money. (Tr 115) The Court indicated it didn't want to re-litigate the entire property issue. (Tr 115)

Defense counsel acknowledged that it took forever to give Defendant his CRSC benefits. (Tr 116)

The Trial Court indicated Defendant was going to get his CRSC benefits but nobody knew it was going to come in part from what Plaintiff would otherwise receive. (Tr 116) Plaintiff knew she was going to get part of the military retirement benefit and that had already been reduced a certain extent by the disability pay he (Defendant) was receiving at the time. The Trial Judge indicated there was no way he could be convinced that she know or should have known that her portion of the disposable military retirement benefit was going to be reduced in the future because his disability pay was going to be increased due to him receiving CRSC. (Tr 117)

The Trial Court indicated Defendant believed he disclosed his CRSC award to his divorce attorney. Defendant did not say he had disclosed that to his attorney. (Tr 118)

The Court noted the Defendant had failed to disclose his disability pay when the information was requested by the Friend of the Court regarding any income he received. (Tr 119) It was later learned Defendant was receiving disability and he had not disclosed that to the Friend of the Court. (Tr 119)

SHOW CAUSE HEARING OF JUNE 27, 2014

The Court noted Defendant had been held in contempt of court on April 26, 2011. The order following that hearing was entered on May 11, 2011.

The Court noted Plaintiff had filed a motion to have Defendant show cause as to why he should not be held in contempt for failing to obey the lawful orders of the Court entered on December 3, 2008 and October 8, 2010. Defendant failed to appear for that hearing after been served with notice of the hearing and the order to appear. (6/27/2014 Tr 3)

The Court advised Defendant was held in contempt because he failed to appear for the hearing. The Court indicated it was giving the Defendant an opportunity to explain why he hadn't appeared. (Tr 4) The Court also noted it hadn't found Defendant in contempt because he didn't make the payments the Court had ordered him to make in the order dated May 10, 2010. (Tr 4)

The Defendant indicated he hadn't appeared on the date of the hearing because of a doctor's appointment at the VA in Colorado which had been scheduled months in advance. He indicated he provided the Court with information and a letter from the VA. (Tr 5) The Court noted the defendant had not filed a motion for a continuance. The Court reminded the Defendant that if he was going to represent himself he would be held to the same standards as an attorney. (Tr 5) The Court advised the Defendant the appropriate procedure would be to file a motion to adjourn the hearing. (Tr 6)

The Court noted Defendant had been personally served with the motion and notice of hearing. (Tr 7)

The Court indicated it would not hold Defendant in contempt for failing to appear. The Court noted the issue of whether he had violated the court order by failing to make payments he had been ordered to make. (Tr 7)

Defendant indicated that on the date of the divorce hearing he wasn't capable of making an informed decision because of his medical and mental status. (Tr 8) He was not of sound mind to make decision about his disability benefits. Defendant indicated his divorce lawyer didn't represent him properly. Defendant also indicated he paid his divorce lawyer and the counsel who represented him in post-judgment legal proceedings over $23,000.00. (Tr 9)

Plaintiff's counsel reminded the Court a Consent Judgment of Divorce was entered. Both parties testified they understood what they had agreed to in the judgment of divorce, what they had agreed to was fair and they wanted the Court to approve their agreement. If the terms in the judgment weren't acceptable the parties would have had hammered out an agreement with terms that would have been much different. Plaintiff's counsel noted Defendant wasn't claiming there had been a mutual mistake or fraud. There was no basis for undoing the judgment. Although Defendant had lawyers representing him, neither of his counsel appealed any of the Court's decisions. The amount Defendant was in arrears to Plaintiff was $39,000.00. (Tr 11) Defendant should not be permitted to re-litigate issues that were covered by the judgment of divorce in 2008 and 2010. (Tr 12)

Defendant indicated his case fell under federal law and he shouldn't have to pay the amounts ordered in the judgment of divorce. He was handed the judgment of divorce and told to sign it 5 minutes before the divorce hearing. Defendant did not know about federal law as it relates to his military disability benefits. (Tr 13)

The Court indicated the issues in question had been litigated, re-litigated and never appealed. The Court had entered orders and the Defendant had not followed those orders. The Court held Defendant in contempt for not following those orders. The Defendant was in front of him now because he had been arrested on a bench warrant the Court had issued because of his failure to comply with Court orders. Defendant was continuing to raise arguments that were previously raised and rejected by the Court. (Tr 14)

The Court noted a consent judgment had been entered. Defendant agreed to make payments out of his own pocket. Defendant was not ordered to assign a portion of his disability benefits to Plaintiff. The judgment of divorce didn't assign any of Defendant's military

disability benefits to Plaintiff. The Defendant had opportunities to appeal and failed to do so. (Tr 15-16)

Defendant wouldn't have signed the Consent judgment of Divorce if he was aware of the federal law.

Defendant indicated a Calvin Murphy would testify in support of his position. (Tr 17)

The Court noted Mr. Murphy had not testified at any of the earlier proceedings. The Court indicated it could jail Defendant until he could figure out a way to pay the monies he owed Plaintiff. Defendant had thumbed his nose at the Court's order for 4 years. He had the right to appeal the Court's orders. He could ask for leave to appeal but he hadn't done that either. (Tr 18)

The Court asked Defendant how he was going to pay what he owed Plaintiff. Defendant said he could make payments on the amount he owed Plaintiff. (Tr 19)

Defendant was sworn in as a witness to offer testimony about his ability to pay. (Tr 21) He was not currently employed. (Tr 22) He receives over $5,000.00 a month in disability pay; that's his retirement and disability combined together. Plaintiff was entitled to receive a portion of his military retirement pursuant to the judgment of divorce. All of his retirement pay was converted into disability pay. He chose to do that. (Tr 23) He made that choice before his divorce. (Tr 23-24)

He began converting his military pay when he got a letter from the VA indicating his CRSC disability date was effective October of 2007. That was before the judgment of divorce was entered on December 3, 2008.

Plaintiff filed for divorce in November of 2007. After he was divorced he received a letter dated December 8, 2009, which indicated he was receiving service related disability

benefits in the amount of $1,507.00. (Tr 25-26) He was also receiving his military retirement pay of more than $2,000.00 a month. The letter indicated he had a disability rating of 80%. His retirement pay was based on 20 years of service. Subsequently he was able to convert his military retirement pay to disability pay. He could have paid from his military retirement pay without having to tap into his disability pay at all. (Tr 26-27) That's why the Army was sending Plaintiff a check for over $800.00 a month. Before he was court ordered he also sent her payment himself. (Tr 28)

When he converted his military retirement pay into disability payments there wasn't enough money remaining in his military retirement pay to make payments to Plaintiff in the amount of more than $800.00 per month. (Tr 28) He had military retirement benefits Plaintiff could have been paid from if he hadn't converted those benefits to disability benefits. He acknowledged he had also been making payments to Plaintiff for the military retirement pay she was entitled to receive. (Tr 28)

He now receives over $5,000.00 a month when his military retirement and disability payments are combined into one payment for his disability benefits. He doesn't get military retirement pay any more. (Tr 29) All the money he receives is tax free income. He had over $5,000.00 a month to payments of $859.00 to Plaintiff. (Tr 30-31) He has a mortgage and bills to pay. His mortgage is over $2,000.00 a month. The value of the home is $190,000.00. He makes bi-weekly payments. (Tr 31) His mortgage is 10 years. He also has a child support payment for a child he has in Colorado. He also has food and utility bills. (Tr 32) He pays his mother $1,000.00 a month. (Tr 34) That would be paid off in 5 months. (Tr 35)

The Court advised Defendant he would need to figure out what he was going to pay Plaintiff or he would be going to jail. (Tr 37-38)

Defendant also owns a 2005 Harley free and clear. (Tr 40)

The Court ordered Defendant to pay Plaintiff $1,000.00 a month. (Tr 41) As long as the payments are made his bond will remain in effect. In the event he misses any payments the Court indicated it would revoke the bond. (Tr 42)

Defendant then reiterated he didn't know anything about the federal law before he signed the consent judgment and went to the hearing on the entry of the final judgment of divorce. He found out about federal law later. (Tr 42-43)

Further proceedings were scheduled for September 22, 2014. (Tr 51)

HEARING PURSUANT TO COURT'S ORDER OF JULY 28, 2014

A hearing was held on September 22, 2014. At the hearing the Court was given confirmation Defendant was current on the $1,000.00 a month payment he was ordered to make on June 27, 2014.

The parties agreed that Defendant owed Plaintiff the sum of $34,397.92 in back military retirement payments. The matter was scheduled for another hearing on December 19, 2014. (Tr 31)

HEARING ON NOVEMBER 19, 2014
REGARDING OBJECTIONS TO PROPOSED ORDER

Plaintiff's counsel filed to an objection with regard to some of the language proposed in an order drafted by Defendant's third counsel. (Tr 15)

During the hearing Defendant's third counsel made comments about the Defendant's ability to appeal the Trial Court's decision.

It was hard for Defendant's counsel to reach back and get something fresh to work with. It's hard as a party's third counsel to reach back and pull up issues that are stale. He wanted an order to be entered so if Defendant wanted to file an appeal of right he could do that as a legal

remedy. That way Defendant and his counsel wouldn't have to keep coming back and reaching into the pile. He wanted to "unstale" some of the issues so they would be ripe for appeal. (Tr 16)

I don't think the appellate courts are going to review this case on the ruling from the second attorney on the motions to reconsider and whatnot from 2011 and 2012. (Tr 16)

Presumably, Defendant's counsel meant the Consent Judgment of Divorce which was entered on December 3, 2008, and the motion heard on September 30, 2010.

The Trial Court responded by indicating it couldn't allow a party's second, third or fourth attorney to re-litigate issues that had been decided when the remedy is to appeal. (Tr 17)

HEARING ON DECEMBER 22, 2014

The Court had scheduled a review hearing to determine whether the Defendant was making the payments he had agreed to make pursuant to a schedule established by the Court. (Tr 3)

The Court has scheduled the hearing to determine whether it would provide Defendant relief from the bond restrictions the Court had previously established.

Defendant's counsel indicated the issue of Defendant making payments would be rendered moot because Defendant had filed an appeal and the Court would no longer have jurisdiction to order Defendant to make the payments. (Tr 5-6)

Defendant's counsel claimed a Claim of Appeal had been filed and the Court indicated it had no record of that nature in the Family Court's file. (Tr 7)

The Court indicated if an appeal had been filed it would no longer have jurisdiction to modify the bond it had entered. The bond would remain in full force and effect.

A brief recess was taken and Defendant's appellate counsel called into the court. (Tr 9)

The Court indicated it would not stay enforcement of the order being appealed. The Court noted it had attempted to conduct an enforcement proceeding regarding the judgment of divorce back in 2011. The Defendant had ignored that and it wasn't until the Defendant had come into Dickinson County and was arrested on a bench warrant that he appeared back in front of the Court. (Tr 14)

The judgment is still there and Defendant's delay in seeking to address the judgment has resulted in the accumulation of what the Court deemed to be an arrearage under the judgment. (Tr 15)

After much discussion, the Court indicated its orders remained in full force and effect and any request for a stay at this time would be denied for the reasons stated on the record. (Tr 18)

ANALYSIS

THE DECISION OF THE COURT OF APPEALS

Defendant-Appellant filed his Claim of Appeal with the Michigan Court of Appeals on December 1, 2014.

On October 13, 2016, the Michigan Court of Appeals issued a Per Curium Unpublished Opinion (Defendant-Appellant's Attachment A) in this case affirming the decision of the Trial Court to hold Defendant-Appellant in contempt for failing to live up to the terms and conditions of the Consent Judgment of Divorce he agreed to on December 8, 2008, which required him to pay the amount of military retirement pay Plaintiff-Appellee was determined to be entitled to receive by the government under the Judgment of Divorce in the event her portion of the military retirement pay would be reduced because Defendant-Appellant converted some of his retirement pay to disability pay.

The Court of Appeals opinion citing *Kosch v Kosch*, 233 Mich App 346, 592 NW2d 434 (1999) noted Defendant-Appellant's arguments were effectively rooted in the Judgment of Divorce and its terms. (Defendant-Appellant's Attachment C, page 1) The Court noted Defendant-Appellant never appealed the Judgment of Divorce or moved for relief from that Judgment. Defendant-Appellant's failure to appeal the original divorce judgment precluded a collateral attack on the merits of the judgment and effectively constituted a stipulation to its provisions. The Opinion noted Defendant-Appellant had agreed to the very provision in the 2008 divorce judgment he was attempting to attack through his 2015 appeal. (Defendant-Appellant's Attachment C, page 1)

As this Court previously noted in its opinion, *Allen v Garden Orchards, Inc.,* 437 Mich 497, 471 NW2d 352 (1991):

> "While a party may assert inconsistent claims or defenses when that party concedes the validity of a claim or defense and there is a disposition on that basis to the detriment of the other party the doctrine of estoppel will protect the other party against the subsequent assertion of the conceded claim in the future."

Plaintiff-Appellee relied to her detriment on the Consent Judgment of Divorce. she did not pursue a claim for spousal support since Defendant-Appellant agreed that she was entitled to a half interest in his military retirement pay. Defendant-Appellant did not timely appeal the December 8, 2008 Consent Judgment of Divorce or the Trial Court's determination Defendant-Appellant was obligated to pay Plaintiff-Appellee the amount of her portion of Defendant-Appellant portion of the military retirement benefits had been reduced when Defendant-Appellant converted some of his retirement pay to disability pay.

Based upon his failure to timely appeal the 2008 Consent Judgment of Divorce and the Trial Court's decision interpreting the Judgment in 2010, Defendant-Appellant's Application for Leave to Appeal now attempts to challenge the Consent Judgment of Divorce and the May 11, 2010 Order of the Trial Court should be denied.

The Per Curium Opinion of the Court of Appeals also denied Defendant-Appellant's appeal on the merits on the basis of *Mcgee v Carmine,* 290 Mich App 551, 802 NW2d 669 (2010), which the Court of Appeals correctly determined to be the controlling case on the issue and the law as it exists in the State of Michigan.

The Court of Appeals also rejected the arguments Defendant-Appellant made regarding the impact of 38 USC 5301 on the issues of nonassignability and the exempt status of veteran's benefits by deeming them to be waived after describing those arguments as being, "woefully undeveloped." (Defendant-Appellant's Attachment C, page 5)

Last, but not least, the Court of Appeals rejected Defendant-Appellant's claim of mistake of fact made by the Trial Court along with claims of purported fraud and inconsiderable

advantage tied to the procurement of the Consent Judgment of Divorce characterizing them as an improper and untimely effort to relitigate the judgment that was settled years ago without appeal.

The Court of Appeals also noted Defendant-Appellant's assertion that the Trial Court was factually mistaken with regard to whether Defendant-Appellant was under a disability at the time of the hearing where the Consent Judgment of Divorce was entered was "belied" by the record.

ARGUMENT I

THE ISSUES PRESENTED BY THIS APPLICATION FOR LEAVE APPEAL DO NOT INVOLVE LEGAL PRINCIPLES OF STATE LAW THAT HAVE BEEN CLEARLY ESTABLISHED BY THE COURTS OF THE STATE OF MICHIGAN AND THE PARTIES' CONSENT JUDGMENT OF DIVORCE ENTERED BY THE TRIAL COURT AND THE TRIAL COURT'S SUBSEQUENT ORDER AND THE PER CURIUM OPINION AND ORDER OF THE COURT OF APPEALS IN THIS MATTER ARE CONSISTENT WITH AND SUPPORTED BY THE LAW AS IT EXISTS IN THE STATE OF MICHIGAN.

IF THE ISSUES PRESENTED BY THIS APPLICATION FOR LEAVE TO APPEAL DO INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE OF MICHIGAN CLEARLY ESTABLISHED LEGAL PRINCIPLES OF MICHIGAN LAW WERE USED AS THE RULES OF DECISION TO DECIDE THE ISSUES RAISED BY THIS APPLICATION FOR LEAVE TO APPEAL.

The Application for Leave to Appeal is an untimely attempt to collaterally attack a Consent Judgment of Divorce and a May 11, 2010 Order of the Trial Court interpreting the Consent Judgment which were never appealed.

Granting the Application for Leave to Appeal would encourage the filing of Applications for Leave to Appeal to relitigate state law issues that should have already been appealed and decided under Michigan's Rules of Appellate Procedure any time the United States Supreme Court grants a Writ of Certiorari.

Granting the Application for Leave to Appeal would also defeat the law of the case doctrine because it would apply a decision from the 2016-2017 term of the U.S. Supreme Court to a case which would have been decided under the case law in effect in Michigan in 2008 or 2010.

There is no need for the Court to grant this Application for Appeal.

The issues raised by this Appeal were correctly decided by the Court of Appeals using existing Michigan law in effect in 2010. *Mcgee, supra.*

Defendant-Appellant's Application for Leave to Appeal requests that this Court consider the practical realities of the post-service life of the combat veteran and grant the Application.

Plaintiff/Appellant and her counsel recognize and respect the sacrifices all veterans make for the benefit of all of us.

However, the Application for Leave to Appeal ignores the fact that Congress recognized the contribution former spouses made to the veterans and the parties children when it enacted the Uniform Services Former Spouses Protection Act (USFSPA) in 1982 in response to the United States Supreme Court's Decision in *McCarty v McCarty*, 453 U.S. 210, (1981) which held that former spouses of members of the uniformed services had no right to receive any portion of a veteran's military retirement pay.

In *Mansell v Mansell,* 490 US 581, (1989), the Court interpreted the USFSPA in a fashion that prevented state courts from treating as community property the portion of military retirement pay a veteran had waived in order to receive increased military disability pay. The veteran in *Mansell* had waived a portion of his military retirement pay before he was divorced. That is not the situation in this case.

In *Mansell*, the Supreme Court held that the USFSPA's "plain and precise" language granted state court's the authority to treat disposable retirement pay as divisible community property.

The Court noted the USFSPA was a rare instance where Congress displaced state authority by legislating in a domestic relations matter which is traditionally preeminently a matter of state authority.

Although the Amicus Curiae Brief filed by the Solicitor General on behalf of the United States urged the Supreme Court to grant leave to hear this case it did so on the basis that

conflicting decisions of various state courts need to be brought into conformity on an issue of federal law. The Solicitor General took the position on behalf of the United States that the USFSPA does not preempt a state court indemnification order based on a former spouse's state law vested right to a share of a veteran's military retirement pay. (Defendant-Appellant's Initial Application for Leave to Appeal filed November 30, 2016, Attachment F, pages 8-11)

ARGUMENT II

38 USC 5301 PROHIBITS STATE COURTS FROM ORDERING A SERVICE MEMBER TO PART WITH A PORTION OF HIS/HER DISPOSABLE NONMILITARY PAY IN LIEU OF AMOUNTS WAIVED TO RECEIVE SUCH PAY.

The Court of Appeals dismissed that argument in this case without deciding it because they held the argument was waived because it was woefully undeveloped. Defendant-Appellant's Attachment C, page 5)

In addition, the Court of Appeals held that argument was an improper collateral attack on the Consent Judgment of Divorce. (Defendant-Appellant's Attachment C. page 5)

This Court should not allow Defendant-Appellant to resurrect this argument by granting his Application for Leave to Appeal.

The facts of this case clearly establish the Consent Judgment of Divorce entered by the Trial Court on December 8, 2008 awarded her a portion of Defendant-Appellant's military retirement pay as determined by the governmental agency administering those benefits. (Defendant-Appellant's Attachment L, pages 4-5)

Defendant-Appellant agreed to that provision in the Consent Judgment.

In April of 2009, Plaintiff-Appellee was awarded $811.62 of Defendant-Appellant's military retirement pay by the federal agency administering those benefits.

In February of 2010, the amount of military retirement pay Plaintiff-Appellee received was increased due to a cost of living increase to $859.05 a month. (Page 8 of the transcript of the hearing held on September 30, 2010)

On February 27, 2010, Plaintiff-Appellee was notified her share of the military retirement benefits was being reduced to $211.00 a month. (Page 8 of the transcript of the proceeding held on September 30, 2010)

Clearly, Plaintiff-Appellee's share of Defendant-Appellant's military retirement benefit was reduced after December 8, 2008 when the Consent Judgment of Divorce was entered.

ARGUMENT III

Whether The Consent Judgment Of Divorce Entered By The Trial Court Did Not Order Defendant-Appellant To Part With Federally Protected Disposable Funds Nor Does It Treat Non-Disposable Funds As A Part Of The Martial Property To Be Distributed As Part Of The Consent Judgment Dividing The Parties' Property.

The Court of Appeals held the issue was not preserved because it constitutes an improper collateral attack on the 2008 Consent Judgment of Divorce and or in the alternative that Defendant-Appellant's argument that 38 USC 5301 imposes a "continuing" prohibition on state court orders and authority over federally protected funds was waived because it was woefully undeveloped.

Defendant-Appellant essentially argues he should unilaterally be allowed to interfere with Plaintiff-Appellee's vested right to military retirement pay after the Consent Judgment of Divorce he agreed to was entered on December 8, 2008. His argument ignores and defeats the strongly expressed intent of Congress when it enacted the USFSPA in 1982.

ARGUMENT IV

Whether The Court Of Appeals Erred In Its Interpretation Of *Howell V. Howell* And Its Analysis As To Its Applicability To The Instant Action.

Defendant-Appellant's interpretation of *Howell* is that:

1. The only divisible asset that states have been given discretion under applicable federal law to consider is the "disposable" portion of military retirement pay and nothing else.

2. State courts never had authority to "vest" an interest in Title 38 benefits in someone other than the beneficiary.

3. 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.

Defendant-Appellant asserts that the Court of Appeals on remand has ignored "*Howell's* unequivocal rulings", has failed to make "… the right decision", and "… chose instead to leave Michigan in a state of non-compliance with preemptive federal law." (Page 20)

Defendant-Appellant further argues, "As of this moment, Michigan continues to force veterans to part with their protected benefits to satisfy marital property divisions in state court divorce proceedings and that if this division is left unchecked, 'Michigan will continued 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 entitlements.'" (Application, Page 22)

The Defendant-Appellant, in all of his legal analysis, ignores the language of the Consent Judgment of Divorce, that he agreed to, which states:

"If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had

> not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled. Defendant shall pay this sum to Plaintiff 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 Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court."

Defendant was questioned by the Trial Court Judge about the offset language of the Judgment. He acknowledged that if he were to defer any of the benefits that he was receiving at the time of the final hearing or convert it to disability pay or if his retirement pay were reduced because the level of his disability was increased, the Court's ability to enforce payment to Plaintiff, the level of benefits that the parties agreed that she would receive from his retirement pay.

With that in mind, and notwithstanding the decision in *Howell*, the Court of Appeals stated; "We are not ruling that a state court has the authority to divide a military spouse's Combat-Related Special Compensation (CRSC) nor that the military spouse can be ordered to pay the spouse using CRSC funds. Rather, the compensation to be paid to 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." (Opinion on Remand, Page 5)

This is consistent with the terms of the Judgment of Divorce wherein Defendant agreed to pay Plaintiff a sum certain each month calculated based on his years of creditable military service during the term of the marriage.

The Court, simply put, is ordering Defendant-Appellant to comply with the terms of a Court Order that he stipulated to. There is no material injustice.

ARGUMENT V

Whether The Court Of Appeals Erred 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.

The Trial Court set bond at $9,500.00 cash or surety based on Defendant-Appellant's failure to appear for scheduled court appearances and for not complying with the terms of the Judgment. The Judge stated on the record, "I set the bond amount. The fact that his mother's house is security for the bond really doesn't have anything to do directly with my Court Order." While the Defendant-Appellant may be in compliance with the terms of the Judgment of Divorce presently, the only assurance of continued compliance is the bond. Defendant-Appellant was given an opportunity to address the issue of the required security for the bond with the bonding agency.

RELIEF REQUESTED

For all the reasons set forth above, Plaintiff-Appellee Deborah Foster requests that this Court deny Defendant-Appellant's Application for Leave to Appeal on all of the issues he seeks to have leave granted for.

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Date: June 27, 2018

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