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STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Appellant,

v

RAY JAMES FOSTER

Defendant / Appellee / Counter-Plaintiff.

SCT Docket No.161892
PRIOR Docket No. 157705
COA Docket No. 324853
Circuit Court No. 07-15064-DM

APPELLANT'S MOTION FOR REHEARING OR CLARIFICATION OF OPINION

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MOTION FOR REHEARING OR CLARIFICATION OF OPINION

Pursuant to MCR 7.311(F) Defendant / Appellee, Ray J. Foster seeks rehearing or clarification of this Court's April 5, 2022 opinion for the following reasons.

The Court concludes that "in February 2010, defendant became eligible for, and elected to receive, increased disability benefits, which included Combat-Related Special Compensation". See Slip Op. at 3. If the Court had appropriately reviewed its unanimous opinion from April 2020, which is law of the case as relates to the application of the rulings enunciated therein, it would have realized it acknowledged that Defendant was *already* 100 percent disabled before the 2008 judgment, and further that his disability pay and his disability *status* were *already* determined as of 2007. See *Foster v. Foster*, 505 Mich 151, 159, n 4; 949 NW2d 102 (2020). This Court stated:

> The Court of Appeals concluded that defendant became eligible to receive CRSC after entry of the consent judgment. This is contrary to defendant's testimony, and we have found nothing in the record to support this conclusion. Defendant testified at the September 30, 2010 show-cause hearing that he applied for CRSC when he applied to retire and that he received correspondence from the Veteran's Administration that he was approved to receive those benefits retroactive to October 2007. (emphasis added).

Any remand that applies the 2008 settlement agreement, which again, this Court has already acknowledged violated preexisting federal law, to wit, section 5301 of Title 38 (not "10" as the Court erroneously states, see Slip Op. at 16) (which *voids from inception* the 2008 consent judgment), must apply the proper facts, not those from the Court's revisionist history. See 505 Mich at 159, n 4; 170, n 51; and 172-73 (where this Court ruled that Defendant was already totally and permanently disabled in 2007, which was prior to the 2008 judgment; held that preexisting federal law applied to that judgment; and further held that 38 U.S.C. § 5301 voided the 2008 consent judgment, respectively), *cf.* Slip Op. at 3.

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Certainly, the Court would not contend that the trial court can undo Defendant's federal status and miraculously cure his disabilities to create a solvent wage earner. See, e.g., 42 U.S.C. § 659(a), (h)(1)(B)(iii) (excluding VA disability pay from being considered as "income"). Disabled veterans are not receiving remuneration for employment, they are receiving compensation for injuries they suffered fighting for the freedoms enjoyed by this nation's citizenry. Those benefits are *inviolate* and unreachable through any means. *Porter v Aetna Cas Co*, 370 US 159, 160-163 (1962) (holding that 38 U.S.C. § 3101 (renumbered as § 5301) voids any attempts by the state to circumvent the dictates of its provisions protecting veterans' disability pay from all equitable or legal means that might be employed to take them from the veteran, and reasoning that that these funds are personal entitlements meant for the maintenance and support of the veteran beneficiary and are considered "inviolate", i.e., untouchable).

Likewise, this Court can hardly assert with any degree of integrity that a *state court* can somehow suddenly make a Defendant's only income (his 100 percent VA disability pay) available or disposable in contravention of preexisting *federal law*, when, in fact, his disability pay at the time of the 2008 judgment had incepted and was then and now remains *off limits* and protected from *all legal and equitable* powers that a state court may seek to assert as against those benefits, "*due* or *to become due*," paid or to be paid in the future, and "either before or after receipt by the beneficiary". See, again, 38 U.S.C. § 5301(a)(1). See also 505 Mich 151 at 170, n 51 (wherein this Court *ruled* that *Howell v Howell*, 137 S Ct 1400, 1405 (2017), was merely a "clarification of *Mansell* [*v Mansell*, 490 US 581 (1989)]" and "[b]ecause *Mansell* was decided in 1989 – long before the parties were divorced – the date of the *Howell* opinion's issuance is of no matter) and *Howell*, 137 S Ct

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at 1404, stating that the 1981 rule of absolute federal preemption enunciated in *McCarty [v McCarty*, 453 US 210 (1981), "*still applies*". (emphasis added). Liberally construed as it must be as directed by the United States Supreme Court, § 5301 applies to all pay received or to be received, paid or to be paid, due or to become due. *Porter*, *supra* at 162. There is no temporal restriction or limitation in this language. In other words, no matter what a past judgment or decree might have said, if enforcing it causes a veteran beneficiary to part with these benefits, such enforcement would be and is unlawful.

Moreover, as this Court ruled in its 2020 opinion in this case, subsection (a)(3) of 5301 applies where a disabled veteran agrees or consents to dispossess himself, and that agreement is reduced to a judgment. See *Foster*, 505 Mich 151, 172-73. As pointed out by undersigned during oral argument in this case, that latter provision also *voids from inception* any violating agreements. Since Defendant was already disabled in 2007 and was already an entitled recipient to restricted, i.e., off limits, 100 percent VA disability pay in the way of CRSC, no subsequent state court order or judgment could legitimately direct Defendant to use that pay to divert it to someone who is not, by federal law, entitled to it. In other words, such decree was void from its inception because it purported to force Defendant to do something that he never had an obligation to do and which is prohibited and void as a result of the federal statute.

In its historically zealous defense of insurance companies and commercial parties to contracts, this Court has had no problem applying the concept of void ab initio to nullify the obligation of the party otherwise bound by a contract's terms. See, e.g., *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012) (listing a host of circumstances in which a commercial party or insurance company may unilaterally declare its contractual obligations

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void from inception – including when a contract is *illegal* or prohibited by statute or public policy – as is the case here).

Here federal law prohibits the state from enforcing any agreement wherein the disabled veteran will be forced either directly or indirectly to use those benefits to pay another. All such orders are preempted because they frustrate the purposes and objectives of Congress. See *Howell*, 137 S Ct at 1401-02. A state court cannot "vest" that which it has no authority to give. *Id*. at 1405. This was stated very plainly by the Court in *Howell*, and it cited 38 U.S.C. § 5301 as the statutory provision prohibiting such misappropriation. *Id*. Yet here, even while having already acknowledged that § 5301 applies to the 2008 consent judgment in this case, the Court has ignored Defendant's arguments to this effect; an argument that was raised in his original docketing statement in the Court of Appeals in 2014 and most recently at oral argument before this Court in November.

Even more surprising is this Court's lackluster effort to find even a creative way to ignore its first opinion in this case, which unequivocally held that federal law *always preempted state law* in this particular area, and that 38 U.S.C. § 5301 *directly applied* to the case. See 505 Mich 151 at 170, n 51 and 172-73. The Court's opinion falls well short of acknowledging the law of the case established by its first opinion, and this deficiency will only serve to confuse the trial court and state courts throughout the state of Michigan when dealing with veterans' disability pay.

In any event, since, as this Court already acknowledged, the consent judgment was unlawful (that is, *illegal*) under 38 U.S.C. § 5301, and that provision explicitly "voids from inception" any such decrees, there is little the trial court can do on remand but declare that to be the case, and bring Defendant's 14 years of misery of having been abused by a state

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system and legal apparatus that seeks to take his federal veterans' disability pay; his only means of sustenance, to a merciful end. However, this Court's failure to reconcile its first opinion and the rulings that must necessarily follow therefrom with this current iteration will only lead to confusion and more litigation. Defendant has no obligation to use his disability pay to satisfy a decree that this Court has already ruled was against federal law, which law further explicitly states that any such agreement upon which such a decree might be based is considered "void from inception". 38 U.S.C. § 5301(a)(1) and (3)(A) and (C). Again, this provision must be liberally construed to protect the veterans' interests. *Porter*, *supra* at 162.

Further exacerbating this confusion, the Court completely disregards the law that it has already established in this case. It has already ruled that Defendant was disabled and entitled to his disability pay *before* the 2008 judgment. See 505 Mich at 170, n 51. It has already ruled that the prevailing, i.e., applicable, federal law applied to preempt state law *before* that judgment was entered. See *id.* at 159, n 4. Despite these established and irrefutable premises, the Court utterly ignores their significance, and, unsurprisingly, ignores the direct effects of 38 U.S.C. § 511, which was amended to unequivocally remove concurrent equity jurisdiction from state courts when dealing with whether and to what extent a disabled veteran's pure VA disability pay can even be subject to a claim. After the United States Supreme Court's anomalous and short-lived decision in *Rose v Rose*, 481 U.S. 619 (1987), Congress passed the Veterans Judicial Review Act (VJRA) of 1988 and amended 38 U.S.C. § 511 to ensure that going forward, if any party claimed an entitlement to restricted federal disability pay being received by a veteran, the Secretary of Veterans Affairs (the VA) had exclusive jurisdiction to consider such a deviation of pre-appropriated

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federal dollars. The funds of the government are dedicated by Congress through its enumerated powers to be put to a specific use and for a specific purpose. McCarty, 453 US 201, 229, n 23 (quoting *Buchanan v Alexander*, 4 How 20 (1845), in which the Court stated: "The funds of the government are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended.") This quote means that if state courts are allowed to apply whatever doctrines of judicial equity or convenience they can concoct to circumvent the laws established by Congress under its enumerated military powers to appropriate funds for servicemembers, retirees, and disabled veterans, then the federal government will cease to be able to fulfill its functions per its reserved enumerated powers as agreed to by the states and the federal government in the great charter that is our Constitution.

The Supremacy Clause guarantees the protection of certain individual rights as against state encroachment. If a state court acting under its own fantastical visions of power and equity could make a different distribution of those pre-appropriated, pre-designated funds, then the functioning of the federal government would indeed cease to exist. *McCarty*, *supra*; *Buchanan*, *supra*. More to the point, the Court in *Howell* expressly noted that the absolute federal preemption in this particular subject that it had enunciated in *McCarty still applies* and so, before a state court can exercise authority over these federal appropriations, it must have *federal authority* through a specific and limited *federal statute* to do so. See 137 S Ct at 1403-1404 ("federal law, as construed in *McCarty*, completely preempted the application of state community property law" and Congress can overcome this preemption only by "enacting an affirmative grant of authority giving the States the power" to treat

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even disposable military benefits as a divisible and therefore distributable asset among veterans and former spouses in state court divorce proceedings). There is no such statute. If the state court enforces anything upon Defendant here it is in direct contravention of this preexisting preemption principle because Defendant *has no funds* that have been *excepted* by Congressional act from the sweeping and absolute preemption principles of federal law.

Here, of course, not only has the state not been given such authority with respect to the benefits at issue in this case; to "vest" that which it cannot give, but affirmative legislation exists to forever and unequivocally *bar* the state courts or *any party* from invading these sequestered funds to the detriment of the beneficiary. Put another way, the *state* can never authorize a contravention of preemptive federal law. Since Defendant was *already* 100 percent disabled before the 2008 judgment, and because *all* of his income prior to that date consisted of pure VA disability pay, benefits which are and always have been off limits absent *federal statutory authority*, if the trial court on remand were to conclude that it could reinstate an obligation upon Defendant, that in itself would be an unlawful misappropriation of these funds, and patently illegal. Utilizing a doctrine of judicial convenience to get around this is a futile endeavor because it fails to acknowledge the hierarchy established by the Constitution and in doing so ignores the plain language of the Supremacy Clause. See *Martin v Hunter's Lessee*, 14 US 304, 347-49 (1816) (wherein Justice Story noted of the dictates in the Supremacy Clause "notwithstanding" any state court judgment or law to the contrary, that this guarantees against "judges of equal learning and integrity" from differently interpreting and applying federal law and if the whims of state policy could override this concern then the "public mischiefs what would attend such a state of things would be truly *deplorable*.") (emphasis added).

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As is consistent with its very superficial and feeble treatment of Defendant's arguments throughout its opinion, the Court also fails to acknowledge that federal law removes the authority from the state to control or otherwise divert these federally appropriated benefits. In his multiple briefs before this Court, Defendant has made the unremarkable proposition that where a state court that has no authority to rule upon a particular issue (whether the lack of such authority is an attack on jurisdiction or some other ostensibly original "source" of power), any such attempt on the part of the state court to do so would be *void ab initio*. Defendant has also argued the very basic elements that separated the sovereign authority of the state and the federal government upon the signing by the states of the convention. The state *surrendered* its sovereign and therefore original authority, i.e., jurisdiction, when it signed the charter to which it agreed to be bound. While that document allowed nearly unlimited, non-enumerated power to remain with the state over its own domestic affairs, those powers specifically enumerated and reserved to the federal government are "complete in itself, may be exercised to its utmost extent, and acknowledges *no limitations*, other than are prescribed in the constitution" itself. See *Gibbons v Ogden*, 22 US 1, 196 (1824). And particularly with respect to all military affairs governed by Article I, section 8, clauses 11 through 14 (the Military Powers), US Const Art I, § 8 cls 11-14, which the Supreme Court has stated time and again (and which Defendant has pointed out to this Court in the dozens of briefs filed in this case) includes all legislation respecting benefits paid to military servicemember and veterans, the state, even in matters of the economic relations of parties in domestic and family law proceedings, must give way. See, e.g., *Ridgway v Ridgway*, 454 US 46, 54-55 (1981) (stating specifically that "a state divorce

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decree, like other law governing the economic aspects of domestic relations, must give way to clearly conflicting federal enactments.").

Here, there is the added protection of an affirmative statute that this Court has already held applies which *voids from inception* any attempt on the part of the parties or the courts to interfere with the federal disposition of the federally appropriated benefits to the designated federal beneficiary. See 38 U.S.C. § 5301(a)(3)(A) and (C). There is zero logic in the Court's most recent ruling because it makes no attempt whatsoever to deal with the inevitable outcome that must obtain if preexisting federal law is to be respected. Indeed, surprisingly, or perhaps tellingly in an effort to hide from the full effect of its first opinion in this case, the Court dedicates only *two sentences* to explain it, even though that opinion overruled decades of family law in Michigan, and, in keeping with the United States Supreme Court's unanimous opinion in *Howell*, affirmed the sweeping breadth of federal preemption in this particular area of the law. See Slip Op. at 5 (last paragraph, penultimate sentence) and 7 (last full sentence).

So, however the Court characterizes Defendant's attack on the final judgment here, it is of no consequence to the inevitable consequence that federal law requires prohibiting the state court from using *"any legal or equitable*" means to access these restricted benefits. 38 U.S.C. § 5301(a)(1). The fact that any such decrees as are at issue in this case are void from inception allows the party to ignore it as if it never existed, especially since it could only ever be applied to Defendant's preexisting (that is pre-judgment) entitlement to benefits that federal law *never* allowed the state courts to touch in the first place. See *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 537-38; 872 NW2d 412 (2015).

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Finally, and again, perhaps tellingly, the Court in its effort to downplay the inevitable and sweeping effect of its first opinion, utterly ignores that the statute it has already unanimously ruled applied in these cases itself voids from inception *any* agreement on the part of the veteran beneficiary – and as this Court also unanimously ruled, the consent judgment in this case was such an agreement as is covered by that provision. Instead, the Court makes unconvincing and vague references to the concept of voidness. While Defendant has contended all along that the 2008 judgment was "void" per 38 U.S.C. § 5301, he has also specifically referred the Court on multiple occasions to subsection (a)(3)(A) and (C), which, again, *voids from inception* any agreements on the part of anyone whereby a veteran beneficiary is dispossessed of federally appropriated and protected benefits. Indeed, at oral argument, undersigned counsel pointed out to the Court that since it had already ruled 38 U.S.C. § 5301 applied, it had to apply the language of that provision voiding from inception the decree in this case. Undersigned counsel has also pointed out multiple times that the Supreme Court ruled long ago that this provision is to be "liberally construed" in the veteran's favor so that the funds that it seeks to protect are to remain *inviolate* . *Porter*, *supra* at 162.

The Court also ignores that Defendant specifically pointed out that *Mansell* and pre-*Howell* cases never applied § 5301 to a state court order decreeing that a disabled veteran part with his benefits and pay them over to another as a divisible asset in state court divorce proceedings. The fact that *Howell* and this Court did apply that provision alters what a state court can and cannot do going forward– as the Court stated in *Howell*, state courts have no authority to vest veterans' disability benefits in anyone other than the federally designated beneficiary, period. *Howell*, 137 S Ct at 1404, 1405, citing and

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applying 38 U.S.C. § 5301. Those prior cases that the Supreme Court approved of in dicta which had addressed whether the state court could use state doctrines of mere convenience like res judicata or collateral estoppel to continue to enforce judgments that violated federal law never applied § 5301. In fact, *Mansell*, the very case this Court cites for the proposition that the Supreme Court allowed the state doctrine of res judicata to control, specifically declined to apply § 5301. 490 US at 587, n 6. *Howell* did finally apply this provision and the Court stated that it removes all authority from the state to control or divert these funds. Obviously, state common-law policies of res judicata and collateral estoppel *mean nothing* where a federal statute that the Supreme Court of the United States and this Court acknowledge applies explicitly says that any decree purporting to disposes the veteran of those funds is void from inception. See 38 U.S.C. § 5301(a)(1) and (3)(A) and (C).

CONCLUSION AND RELIEF REQUESTED

Unfortunately, rehearing is required because the Court's opinion fails to mesh with the first opinion's ruling *which is law of the case* that Defendant was already disabled prior to the judgment, and thus, was already entitled to receive 100 percent disability pay. The trial court will be addressing funds over which it has no authority.

Second, the Court failed to recognize the that the statute that it ruled in its first opinion applies to the trial court's decree actually "*voids from inception*" the consent judgment. An instrument that is void from inception admits of no equitable exceptions. *Epps v 4 Quarters Restoration LLC*, 498 Mich 518, 537-38; 872 NW2d 412 (2015). Further, the Supreme Court of the United States mandates that this provision is to be liberally construed to protect the veteran's benefits and that these funds are to be considered inviolate. *Porter*, *supra* at 162. Again, the trial court can do nothing but recognize and apply the federal statute this

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Court has already ruled applies to this case. *Howell* held that a state court cannot use equity to get around the strict prohibitions of federal law. Without some statement by this Court reaffirming its first opinion and enforcing the clear admonition to the states by the Court in *Howell*, the trial court is bound to attempt to do indirectly what it can never do directly – dispossess Defendant of his only means of subsistence – his federal veterans' disability pay.

Third, given the overwhelming majority of state cases post-*Howell* (and several pre-*Howell*) of which Defendant has made the Court aware, which have held in one way or another that principles of res judicata or collateral estoppel mean nothing when preexisting federal law protecting veterans' benefits is applicable, this Court's opinion in its current state serves as the perfect exemplar of Justice Story's stark warning that allowing state courts to dictate their own ways to contravene the Supremacy Clause leads to diverse results, all of which are deplorable for those that are supposed to be protected by these basic, fundamental, and well known principles of American constitutional law. See *Martin*, *supra*. Given that this Court has already concluded that 38 U.S.C. § 5301 applies, has already recognized that Defendant was entitled to disability pay and status before the 2008 judgment, there is nothing for the trial court to rule upon.

For the foregoing reasons, Defendant requests this Court to grant rehearing, or alternatively to clarify that since the consent judgment in this case is contrary to 38 USC § 5301 and therefore by the very language of that latter federal provision "void from its inception", the only issue for consideration by the trial court on remand should be the extent to which Defendant is entitled to reimbursement of the disability benefits he has paid under this illegal agreement.

Alternatively, the Court should grant rehearing, conclude, as it should have done originally, that it improvidently granted Plaintiff's appeal, and dismiss the case altogether. The Court of Appeals came to the right conclusion despite its opinion regarding jurisdiction – the state simply has no authority over Defendant's disability pay, and as that was and remains his only source of income since before the 2008 judgment, the latter is "void from inception".

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