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STATE OF MICHIGAN

IN THE SUPREME COURT

DEBORAH LYNN FOSTER,

Plaintiff/Appellee/Respondent,

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

vs.

RAY JAMES FOSTER,

Defendant/Appellant/Counter-Plaintiff/Petitioner

APPLICATION FOR LEAVE TO APPEAL (AFTER SECOND REMAND)

Respectfully Submitted:
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STATEMENT OF ORDER BEING APPEALED

The Court of Appeals erred in concluding that in all cases, and in this case in particular, state courts are deprived of subject matter jurisdiction when principles of federal preemption are applicable and that an error in the exercise of a court's subject matter jurisdiction can be collaterally attacked.

The Court of Appeals also erred in concluding that, in the instant case, Defendant did not engage in an improper collateral attack on the Consent Judgment because the trial court lacked subject matter jurisdiction to enforce the Consent Judgment with respect to the offset provision due to the principle of federal preemption.

Pursuant to MCR 7.305, Petitioner seeks leave to appeal the July 30, 2020 unpublished Opinion of the Court of Appeals, Docket No. 324853 issued on second remand from this Court so that the panel could address the effects of its April 29, 2020 Opinion on Defendant's ability to challenge on collateral review the terms of the applicable Consent Judgment of Divorce.

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

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QUESTIONS PRESENTED

This case returns, once again, from the Court of Appeals on second remand after instructions from this Court to address the effect of its April 29, 2020 holding on the trial court's subject matter jurisdiction to enter the Consent Judgment of Divorce containing the offset provision at issue and to address Defendant's ability to challenge the Consent Judgment on collateral review.

Pursuant to MCR 7.305(A)(1)(b) Petitioner presents the following questions for review.

I.

Did the Court of Appeals err in concluding that in all cases, and in particular this case, state courts are deprived of subject matter jurisdiction when principles of federal preemption are applicable and that an error in the exercise of a court's subject matter jurisdiction can be collaterally attacked?

Petitioner Answers: Yes

Respondent Answers: No

Court of Appeals Answers: No

II.

Did the Court of Appeals err in concluding that, in the instant case, Defendant did not engage in an improper collateral attack on the Consent Judgment because the trial court lacked subject matter jurisdiction to enforce the Consent Judgment with respect to the offset provision due to principles of federal preemption?

Petitioner Answers: Yes

Respondent Answers: No

Court of Appeals Answers: No

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I. APPELLATE HISTORY

This case was argued before this Court on October 3, 2019. This Court issued its Opinion and Order on April 29, 2020. This Court held that, "The trial court was precluded under federal law from including in the consent judgment the offset provisions on which plaintiff relies. The broad language of *Howell* (*Howell v.* Howell, ___ US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017)) precludes a provision requiring that plaintiff receive reimbursement or indemnification payments to compensate for reductions in defendant's military retirement pay resulting from his election to receive any disability benefits, including CRSC as provided for under Title 10." April 29, 2020 Opinion/Order, p. 21,

This Court also stated, "Nevertheless, we express no opinion on the effect our holdings have on defendant's ability to challenge, on collateral review, the consent judgment." The matter was remanded to the Court of Appeals so that the panel could address the effect of this Court's holdings on defendant's ability to challenge the terms of the consent judgment. April 29, 2020 Opinion/Order, p. 21.

Defendant-Appellant filed a Motion for Rehearing or Clarification of Opinion on June 29, 2020. That Motion was denied by Order dated July 24, 2020.

On July 30, 2020 the Court of Appeals, without the benefit of briefs or oral argument, issued an Opinion finding that defendant did not engage in an improper collateral attack on the consent judgment and that the trial court lacked subject matter jurisdiction to enforce the same.

Petitioner seeks leave to appeal the July 30, 2020 Court of Appeal's Opinion.

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The Court of Appeals has stated in two previous Opinions in this case, and without regard to the federal preemption issue, that Defendant on appeal presented arguments regarding alleged problematic factual findings and other legal shortcomings tied to the entry of the judgment of divorce. The Court of Appeals made it clear that it believed that Defendant's arguments were effectively and ultimately rooted in the judgment of divorce and its terms and that he never appealed the judgment and did not seek relief from it. The Court concluded in both of its prior Opinions issued in this case that Defendant, by appealing an order holding him in contempt, was engaging in an improper collateral attack on the divorce judgment. On second remand the Court of Appeals completely reversed its position concluding for the first time that the trial court lacked subject matter jurisdiction to enforce the judgment, and that the Defendant did not engage in an improper collateral attack on the divorce judgment.

In reaching this conclusion, the Court of Appeals disregarded the fact that Defendant waited roughly six years from the time the divorce judgment was entered to file an appeal seeking relief from a provision he had agreed to. In support of this delay, Defendant has argued that all types of federal preemption deprive state courts of subject matter jurisdiction and that an order preempted by federal law can be challenged, nullified and attacked at any time, even after the deadline to appeal has run. This sweeping assertion was not, at any step in this case, supported by legal authority. This argument also ignores the concept of res judicata.

II. FACTS AND PROCEDURAL HISTORY

Defendant, Ray Foster, commenced service in the United States Army in 1985, prior to his marriage to Plaintiff, Deborah Foster. During the marriage, Defendant was deployed in the Iraq War and suffered serious and permanently disabling combat injuries. Thereafter, Defendant continued his military career and, after more than 22 years of service, he retired in September

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2007. Because Defendant was injured during combat, he was eligible for CRSC under 10 USC 1413a and Defendant applied for CRSC around the time of his retirement. In February 2008, Defendant received notice that he was eligible for CRSC retroactive to October 2007.

Plaintiff filed for divorce in November 2007, and a final Consent Judgment of Divorce was entered in December 2008. Before entering that Judgment, the trial court conducted a hearing regarding the proposed Consent Judgment. Defendant testified that he was receiving both military retirement pay and military disability benefits based on his combat-related injuries. The litigants, through counsel, agreed that Defendant's disability benefits were not subject to division by the Court because they were not marital property under federal law. At the time of the divorce, Plaintiff was gainfully employed as a registered nurse.

The proposed property settlement awarded Plaintiff 100% of any interest she acquired in retirement and pension benefits as a result of her employment during the marriage. Plaintiff also waived any claim that she may have had to spousal support, based in large part because of the interest she was receiving in Defendant's military pension. The agreement was that Plaintiff was to receive 50% of Defendant's disposable retirement pay that accrued during the marriage. The parties also agreed to the inclusion of the following provision (the offset provision) in the proposed Consent Judgment:

> 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 has 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.

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At the divorce hearing, the trial court inquired as to why the language of this provision suggested that Defendant was not currently receiving any disability benefits when, in fact, he was. Counsel explained that it was intended to apply in the event that Defendant was offered an increase in disability benefits because such an increase would diminish the retirement benefits owed to Plaintiff under the proposed settlement. The trial court inquired into Defendant's understanding of this provision:

> The Court: "… Mr. Foster, you do acknowledge that if you were to defer any of your current military retirement pay or convert it to disability pay, or if your military retirement pay were reduced because the level of your disability pay was increased, you acknowledge this Court's ability to enforce payment to Ms. Foster [of] the level of benefits that she would be entitled [to] presently from your retirement pay?
>
> Defendant: "Yes."

No specific amounts were mentioned at the hearing or in the actual Consent Judgment. Pursuant to the terms of the Consent Judgment, Plaintiff received slightly more than $800 per month until February 2010. When Defendant began receiving CRSC, his disposable retirement benefit amount was reduced, and Plaintiff's monthly payment was reduced to a little more than $200.

Defendant failed to pay Plaintiff the difference between the reduced amount of retirement pay she received beginning in February 2010 and the amount that she had received shortly after entry of the Consent Judgment. Consequently, numerous hearings took place in the trial court over several years, all of which were designed to compel Defendant to pay Plaintiff the difference between the amount Plaintiff would have been entitled to under the Consent Judgment had Defendant not received CRSC and the amount Plaintiff actually received after the government commenced paying Defendant CRSC. These proceedings culminated in the order from which Defendant appealed that found him in contempt of court for failure to pay Plaintiff in

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compliance with the Consent Judgment. The court ordered him to pay Plaintiff $1,000 per month, with $812 credit as current payments due under the Consent Judgment and $188 to be credited against the arrearage of $34,398 until the arrearage was paid in full. Defendant had been paying Plaintiff in monthly installments since the contempt order was entered. Payments were guaranteed by an "appearance bond" in the amount of $9,500 and secured with a lien on his mother's home.

Defendant appealed in the Court of Appeals, arguing that the trial court erred by not finding Plaintiff's attempts to enforce the Consent Judgment were preempted by federal law. The Court of Appeals concluded that the matter was not preempted by federal law and affirmed the trial court's contempt order. In addition, the Court of Appeals noted that, "Defendant's arguments are effectively and ultimately rooted in the judgment of divorce and its terms. However, he never appealed that judgment nor has he moved for relief from the judgment, MCR 2.612. Thus, defendant is engaging in an improper collateral attack on the divorce judgment." October 13, 2016 Court of Appeals Opinion, p. 1. Defendant sought leave to appeal to this Court. In lieu of granting leave to appeal, the Court vacated the judgment of the Court of Appeals and remanded the case to that Court for reconsideration in light of the opinion of the Supreme Court of the United States in *Howell v. Howell*. On remand, the Court of Appeals again affirmed the trial court's finding of contempt, concluding that *Howell* did not overrule the Court of Appeals' decision in *Megee*. The panel reasoned that *Howell* was distinguishable because it involved general service-connected disability benefits and because the *Howell* opinion rested squarely on the language in former 10 USC 1408(a)(4)(B), which provided – and still provides in 10 USC 1408(a)(4)(A)(ii) – that "disposable retired pay" means a member's total monthly retired pay less amounts that "are deducted from the retired pay… as a result of … a waiver of retired

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pay required by law in order to receive compensation under title 5 or title 38." The Court of Appeals also observed that the *Megee* decision distinguished CRSC from general service-connected disability pay found in Title 38 on the basis of CRSC's staus as *Title 10* compensation. Given that CRSC is at issue in the instant case, and that *Howell* did not concern or analyze a waiver of retirement pay in favor of CRSC, the Court of Appeals concluded that *Megee* was on point and remained binding precedent. The Court of Appeals again concluded that, "Defendant's arguments are effectively and ultimately rooted in the judgment of divorce and its terms; however, he never appealed that judgment, nor has he moved for relief from that judgment, MCR 2.612. Citations omitted. (The defendant's failure to appeal the original divorce judgment precluded collateral attack on the merits of the judgment and effectively constituted a stipulation to its provisions). Indeed, defendant agreed to the very provision in the divorce judgment that he now assails." March 22, 2018 Opinion On Remand, p. 2.

Defendant again sought relief in this Court. This Court granted his application for leave to appeal to consider the federal preemption question, the continuing viability of *Megee*, and the propriety of the contempt order entered against Defendant.

As stated, this case was argued before this Court on October 3, 2019. This Court entered its Opinion and Order on April 29, 2020. The matter was remanded a second time to the Court of Appeals so that the panel could address the effects of the April 29, 2020 ruling on the Defendant's ability to collaterally attack the Consent Judgment.

III. GROUNDS FOR REVIEW

In this case the Court of Appeals has disregarded a long standing principle that a judgment of a court of general jurisdiction, like the Family Court in the instant action, with the parties before it, and with power to grant or refuse to grant relief in the case presented, though

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the judgment is contrary to law as expressed in the decisions of the Supreme Court the terms of a statute, is at most only an erroneous exercise of jurisdiction, and as such is impregnable to an assault in a collateral proceeding. *Jackson City Bank & Trust Co. v. Frederick*, 271 Mich. 583 (1935). A collateral attack has been defined as an attempt to avoid the effect of a judgment in some incidental proceeding not provided by law for the express purpose of attacking it. A direct attack is an attempt to avoid or correct a judgment in a proceeding instituted for that purpose. Seeking relief from a judgment pursuant to MCR 2.612, would be a direct attack on the judgment. The Defendant's failure to appeal or seek relief from the consent Judgment precluded collateral attack on the merits of the judgment and effectively constituted a stipulation to its provisions, including the offset provision at issue.

In a concurring Opinion issued in this case, Justice Viviano stated, "The purpose of my concurrence is to properly frame the inquiry, to clarify our caselaw, and to point to some of the pertinent authorities that may aid the Court of Appeals in resolving this complex and jurisprudentially significant issue." Concurring Opinion of Justice Viviano, p. 19 (emphasis added). It appears based on the length of the Opinion issued without the benefit of briefs and oral argument, that the jurisprudentially significant aspect of the issue before it was missed by the Court of Appeals.

There is no more concise argument in support of Petitioner's position on each of the stated questions and establishing the grounds for this Application than Justice Viviano's concurring Opinion which is set forth herein in support of this Application for Leave to Appeal.

THE PARTIES' DIVORCE JUDGMENT IS FINAL AND MAY NOT BE MODIFIED UNLESS THE FAMILY COURT DID NOT HAVE SUBJECT-MATTER JURISDICTION OVER THE PARTIES' DIVORCE ACTION

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Although some portions of a divorce judgment are subject to modification, such as alimony or child support, the property-settlement provisions of a divorce judgment "are final and, as a general rule, cannot be modified." *Colestock v. Colestock*, 135 Mich App 393, 397; 354 NW2d 354 (1984), citing *Boucher v. Boucher*, 34 Mich App 213; 191 NW2d 85 (1971). Thus, "[a] judgment of divorce dividing marital property is res judicata and not subject to collateral attack, even if the judgment may have been wrong or rested on a subsequent overruled legal principle." *Colestock*, 135 Mich App at 397-398, citing *McGinn v. McGinn*, 126 Mich App 689; 337 NW2d 632 (1983).

In *Buczkowski v. Buczkowski*, 352 Mich 216, 222-223; 88 NW2d 416 (1958), this Court examined whether a spouse could move to vacate a separate-maintenance decree when the moving spouse did not appeal the decree, had already accepted money under the settlement, and waited four years after entry of the decree to assert defects with it. The sole challenge to the decree was that the court lacked jurisdiction to enter it because it contained a legally invalid provision. *Id.* At 220-221. The Court declined to vacate the decree, explaining as follows:

> We are cited to no authority to support this contention and it is manifestly in error. The court had jurisdiction of the parties and it had jurisdiction of the subject matter of the suit, that is, support and maintenance. Having such jurisdiction it also had jurisdiction to make an error if, indeed, it did…
>
> The failure to distinguish between "the erroneous exercise of jurisdiction" and "the want of jurisdiction" is a fruitful source of confusion and errancy of decision. In the first case the errors of the trial court can only be corrected by appeal or writ of error. In the last case its judgments are void, and may be assailed by indirect as well as direct attack. * * * The judgment of the court of general jurisdiction, with the parties before it, and with power to grant or refuse relief in the case presented, though (the judgment is) contrary to law as expressed in the decisions of the supreme court or the terms of a statute, is at most only an erroneous exercise of jurisdiction, and as such is impregnable to an assault in a collateral proceeding.
>
> The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were

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> correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. It must constantly be borne in mind, as we have pointed out in *Jackson City Bank & Trust Co. v. Fredrick*, 271 Mich 538, 544[; 260 NW 908 (1935)], that:
>
> > There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in exercise of undoubted jurisdiction, in which case the action of the trial court is not void although it may be subject to direct attack on appeal. This fundamental distinction runs through all the cases.
>
> [*Buczkowski*, 351 Mich at 221-222 (cleaned up).]

This Court has often cited *Jackson City Bank* for this proposition, including most recently last term in *In re Ferranti*, 504 Mich 1, 22; 934 NW2d 610 (2019), in which the Court quoted the very next paragraph from that case:

> "[W]hen there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist. But in cases where the court has undoubted jurisdiction of the subject matter, and of the parties, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack, yet the judgment or decree is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed from. It may not be called in question collaterally." [*Ferranti*, 504 Mich at 22, quoting *Jackson City Bank*, 271 Mich at 544-545].

In *McGinn*, a case also involving military pensions, the Court of Appeals explained the importance of finality in the context of divorce judgments:

> Public policy demands finality of litigation in the area of family law to preserve surviving family structure. To permit divorce judgments which have long since become final to be reopened so as to award military pensions to the husband as his separate property would flaunt the rule of res judicata and upset settled property distributions upon which parties have planned their lives. The consequences would be devastating, not only from the standpoint of the litigants, but also in terms of the work load of the courts. [*McGinn*, 126 Mich App at 693 (citation omitted).]

As defendant appears to concede, these finality concerns are certainly implicated in this case because defendant's assertion of federal preemption as a defense to a contempt proceeding

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brought to enforce the offset provision in the parties' divorce judgment is a collateral attack on a final judgment. See generally *Kirby v. Mich High Sch Athletic Ass'n*, 459 Mich 23; 585 NW2d 290 (1998) (noting that "[a] party must obey an order entered by a court with proper jurisdiction, even if the order is clearly incorrect, or the party must face the risk of being held in contempt").

Therefore, in order to modify his divorce judgment in this collateral proceeding, defendant must establish that the type of federal preemption at issue deprives state courts of subject-matter jurisdiction. See *Hillsdale Co Senior Servs, Inc. v. Hillsdale Co.*, 494 Mich 46, 51 n 3; 832 NW2d 728 (2013) ("[T]he [l]ack of jurisdiction of the subject matter may be raised at any time and the parties to an action cannot confer jurisdiction by their conduct or action nor can they waive the defense by not raising it.") (quotation marks and citation omitted). But instead of focusing his analysis on whether the federal statutes governing veterans' and military disability benefits deprive the state courts of subject-matter jurisdiction, defendant makes the sweeping assertion that all types of federal preemption deprive state courts of subject matter jurisdiction. See Defendant's Brief on Appeal (February 27, 2019) at 2. Defendant's assertion is demonstrably incorrect. And, as defendant acknowledges, the issue could also have implications far beyond this case if the entire spectrum of federal-preemption claims could potentially be raised to mount collateral attacks on final judgments in myriad types of cases. See Defendant's Brief on Appeal (February 27, 2019) at 6 (There should be no doubt that an order… preempted by federal law is void and may be attacked, challenged, and nullified at any time, even on appeal, indeed, even after the time for appeal has passed."). Not all types of federal preemption deprive state courts of subject-matter jurisdiction and the Court of Appeals conclusion in this case that the trial court lack subject matter jurisdiction to enforce the judgment of divorce is wrong as a matter of law.

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CONTRARY TO THE OPINION RENDERED BY THE COURT OF APPEALS, NOT ALL TYPES OF FEDERAL PREEMPTION DEPRIVE STATE COURTS OF SUBJECT-MATTER JURISDICTION

The law in this area has been aptly summarized as follows:

> State courts have subject-matter jurisdiction over federal preemption defenses. The preemption doctrine does not deprive state courts of subject matter jurisdiction over claims involving federal preemption unless Congress has given exclusive jurisdiction to a federal forum.
>
> Accordingly, where state and federal courts have concurrent jurisdiction over a federal cause of action, and a state proceeding on such cause of action presents a federal preemption issue, the proper course is to seek resolution of that issue by the state court. Similarly, there are some cases in which a state law cause of action is preempted by federal law, but only a state court has jurisdiction to so rule. A finding of preemption will generally not remove the case from the jurisdiction of the state court but will only alter the law applied by that court. [21 CJA Courts, § 272 (citations omitted).]

It is well settled that "[s]tate courts are adequate forums for the vindication of federal rights." See *Burt v. Titlow*, 571 US 12, 19; 134 S Ct 10; 187 L Ed 2d 348 (2013). See *id.* ("The States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.") (cleaned up). See also *Office Planning Group, Inc. v. Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 493; 697 NW2d 871 (2005) ("It has long been established that, so long as Congress has not provided for exclusive federal-court jurisdiction, state courts may exercise subject-matter jurisdiction over federal-law claims whenever, by their own constitution, they are competent to take it. State courts possess sovereignty concurrent with that of the federal government, subject only to limitations imposed by the Supremacy Clause. Thus, state courts are presumptively competent to assume jurisdiction over a cause of action arising under federal law. If concurrent jurisdiction

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otherwise exists, subject-matter jurisdiction over a federal-law claim governed by state law.") (cleaned up).

Notably, these same principles apply when federal courts are analyzing whether a preemption claim deprives the federal courts of subject-matter jurisdiction. In *Violette v. Smith & Nephew Dyonics, Inc.*, 62 F3d 8, 11 (CA 1, 1995), cert den 517 US 1167 (1996), the defendant argued for the first time on appeal that the plaintiff's state-law products-liability claims were preempted by certain provisions of a federal statute. Relying upon *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 US 380; 106 S Ct 1904; 90 L Ed 2d 389 (1986), the defendant argued that "preemption is a jurisdictional matter which cannot be waived and may be raised at any time." *Violette*, 62 F3d at 11. Distinguishing between "choice-of-forum" and "choice-of-law" preemption, the federal court explained:

> [W]here Congress has designated another forum for the resolution of a certain class of disputes, such as the National Labor Relations Board in *Davis*, such designation deprives the courts of jurisdiction to decide those cases. Where, however, the question is whether state tort or federal statutory law controls, preemption is not jurisdictional and is subject to the ordinary rules of appellate adjudication, including timely presentment and waiver. [*Id*. at 11-12 (citation omitted).]

Since the type of preemption at issue in *Violette* presented a "choice-of-law" questions, it was "not… jurisdictional, and was waived when not presented in the district court." *Id*. at 12.

The Court of Appeals correctly explained the two-part preemption inquiry as follows:

> Where preemption exists,… state courts will not always be prevented from acting. A litigant may still enforce rights pursuant to the Federal law in state courts unless the Constitution or Congress has, expressly or impliedly, given a Federal court exclusive jurisdiction over the subject matter. *Mondou v. New York, N H & H R Co.*, 223 US 1; 32 S Ct 169; 56 L Ed 327 (1912); *Claflin v. Houseman*, 93 US 130; 23 L Ed 833 (1876). See Hart and Wechsler, *The Federal Courts and The Federal System* (2d ed), pp 427-438. Thus, we must determine whether Congress has preempted states from legislating or regulating the subject matter of the instant case, and, if it has, whether it has also vested exclusive jurisdiction of that subject matter in the Federal court system. [*Marshall v. Consumer Power Co.*, 65 Mich App 237, 244-245; 237 NW2d 266 (1976).]

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Defendant cites *Henry v. Laborers' Local 1191*, 495 Mich 260; 848 NW2d 130 (2014), for the proposition that federal preemption deprives state courts of subject-matter jurisdiction. In *Henry*, after observing that the defendants first raised the issue of preemption in the Court of Appeals, the Supreme Court stated that "preemption is a question of subject-matter jurisdiction" and that, "[a]s such, this Court must consider it." *Id.* at 287 n 82. Although the Court's statement that "preemption is a question of subject-matter jurisdiction" was made without qualification, the above statements were supported by the following quotation from *David*, 476 US at 393: "A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court." Thus, the Court's assertion was made in the context of *Garmon* preemption and was indisputably correct in that context since Congress has established an exclusive federal forum, the National Labor Relations Board, to adjudicate certain claims under the National Labor Relations Act (NLRA). And, even if the Court purported to make such a broad holding, it would be dicta since it was "not necessarily involved nor essential to determination of the case…" See *World Architects & Engineers v. Strat*, 474 Mich 233, 232 n 3; 713 NW2d 750 (2006) (quotation marks and citation omitted). For these reasons, *Henry* may not be properly read as supporting defendant's sweeping assertion that all types of preemption deprive the state courts of subject-matter jurisdiction.

Defendant and the Court of Appeals also cite *Ryan v. Brunswick Corp*, 454 Mich 20, 40; 557 NW2d 541 (1997), in which after finding the plaintiff's common-law products-liability claims were preempted under the Federal Boat Safety Act (FBSA), 46 USC 4301 *et seq.*, this Court held that "summary disposition pursuant to MCR 2.116(C)(4) and (C)(8) was proper." In reciting the applicable legal principles, the Court stated that "[w]here the principles of federal

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preemption apply, state courts are deprived of subject matter jurisdiction." *Id.* at 27. However, the Court did not cite any authority whatsoever for this assertion. Nor did the Court address whether Congress had designated a federal forum for resolution of these types of disputes. And, in any event, the Court's preemption holding in *Ryan* was abrogated by *Sprietsma v. Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002), which held that the FBSA does not expressly or implicitly preempt state common-law claims. In light of the ambiguous nature of the Court's holding (noted above), the lack of authority for it, and its abrogation by the United States Supreme Court, the jurisdictional assertion in *Ryan* does not carry much precedential weight. Finally, and perhaps most significantly, such a broad reading of this one statement in *Ryan* would conflict with the holdings and basic jurisdictional principles set for the in *Office Planning Group* and other cases finding that our state courts have concurrent jurisdiction over certain claims governed by federal law. It would also leave Michigan citizens without any forum to enforce federal laws when Congress has conferred exclusive jurisdiction upon state courts to enforce them.

Thus, contrary to the sweeping assertions in defendant's brief to this Court, and to the conclusion reached by the Court of Appeals in its July 30, 2020 Opinion, not all federal preemption deprives state courts of subject-matter jurisdiction. Instead, state courts are only deprived of jurisdiction when Congress has designed a federal forum for resolution of the class of disputes at issue.

FEDERAL LAW DOES NOT DEPRIVE STATE COURTS OF SUBJECT-MATTER JURISDICTION OVER THE TYPE OF VETERANS' AND MILITARY DISABILITY BENEFITS AT ISSUE IN THIS CASE

In *McCarty v. McCarty*, the United States Supreme Court held that "upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay

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pursuant to state community property laws." *McCarty v. McCarty*, 453 US2 210, 211; 101 S Ct 2728; 69 L Ed 2d 589 (1981). In response, Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408, which permits state courts to treat veterans' "disposable retired pay" as divisible property during divorce proceedings. 10 USC 1408(c).

In *Mansell v. Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), the United States Supreme Court addressed whether the USFSPA allows state courts to treat retirement pay waived by a retired service member in order to receive disability benefits as property divisible upon divorce. The Court rejected the civilian spouse's argument that the USFSPA was intended to broadly reject *McCarty* and completely restore to state courts the authority they had prior to *McCarty*. *Id.* at 588, 593-594. Instead, the majority found that the USFSPA only partially superseded *McCarty*, holding that "the Former Spouses' Protection Act does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Id.* at 594-595. Importantly, in a footnote, the *Mansell* Court discussed the state court's application of the doctrine of res judicata:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement from being reopened. *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981). The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. 5 Civ. No. F002872 (Jan. 30, 1987). Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore property before us. [*Mansell*, 490 US at 586 n 5.]

On remand in *Mansell*, the California Court of Appeal rejected the veteran spouse's argument that the "judgment was void for want of subject matter jurisdiction." *In re Marriage of Mansell*, 217 Cal App 3d 219, 227; 265 Cal Rptr 227 (1989). The California Court of Appeal characterized the *McCarty* holding as merely "that state courts were bound to apply federal law in determining the character of military pension benefits. There was no divestiture of

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jurisdiction." *Id.* at 228. The United States Supreme Court subsequently denied the petition for certiorari. *Mansell v. Mansell*, 498 US 806 (1990).

One prominent commentator describes the denial of the second petition for certiorari as "one of the most important facts in all of the *Mansell* litigation," explaining as follows:

> It shows that footnote 5 in the *Mansell* opinion is more than mere words. The Court did not merely state in the abstract that division of military benefits under state law principles of res judicata was outside the scope of federal appellate jurisdiction; it refused to reverse *or even review on the merits* a state court decision applying those principles. It reached this result even though the net effect of the second California decision was to reach (under a different supporting theory) the exact same end result as the first California decision – a decision which the Supreme Court had reversed in a published decision. Together with footnote 5 in the published opinion, the Court's denial of review is a very strong statement that division of military benefits on a theory of res judicata is not prohibited by federal law.
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> * * *
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> If *McCarty* and *Mansell* did involve subject matter jurisdiction, the husband in *Mansell* would have been right; the original order dividing benefits outside the scope of the USFSPA *would* have been void. The Supreme Court's unanimous refusal to hear the case a second time, and its sudden acquiescence in a result which it had so recently reversed, combined with the language of footnote 5 of the published opinion, suggest strongly that the Supreme Court agreed with the courts of California. *McCarty* and *Mansell* state a rule of substantive federal law, and not a rule of subject matter jurisdiction. [2 Turner, Equitable Distribution of Property (4th ed.), § 6:6, pp 54-55.]

Shortly after *McCarty* was decided, the United States Supreme Court was presented with an issue similar to that in the present case. In *In re Marriage of Sheldon*, the California Court of Appeal declined to apply *McCarty* retroactively. *In re Marriage of Sheldon*, 124 Cal App 3d 371, 376-384; 177 Cal Rptr 380 (1981). The military spouse filed a petition for certiorari. See *Sheldon v. Sheldon*, 456 US 941 (1982). Specifically, one of the issues raised was:

> Does federal preemption of state community property laws regarding division of military retirement pay render state judgments void for lack of subject matter jurisdiction where such judgments were entered after Congress had preempted area of law? [Turner, § 6:6, p 49.]

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The United States Supreme Court dismissed the appeal "for want of a substantial federal question." *Sheldon*, 456 US at 941. Unlike denial of a petition for certiorari, "[a] dismissal for want of a substantial federal question is an adjudication on the merits, and it carries the same precedential value as a full opinion." Turner, § 6:6, p 49, citing *Hicks v. Miranda*, 422 US 332, 344; 95 S Ct 2281; 45 L Ed 2d 223 (1975) (emphasis omitted). Therefore, according to the author, *Sheldon* "establish[es] that the ruling in *McCarty* does not apply retroactively and that decisions which erroneously divide preempted benefits are not void for lack of subject matter jurisdiction." Turner, § 6:6, p 49 (emphasis omitted).

As the author explains, because *McCarty* is not retroactive and thus does not void final state court orders, military benefits can be divided by state courts under the law of res judicata:

> Initial division of military benefits must be made under federal substantive law, which requires that the benefits be awarded only to the service member and not to the former spouse. If the service member requests that the state court apply federal substantive law, and the state court instead applies state substantive law, *McCarty* requires that the state court decision be reversed. But if the service member never raises the issue – if he or she allows the state court to enter an erroneous order dividing military benefits under state substantive law, as happened in most of the pre-*McCarty* cases – *Shelson* recognizes that *McCarty* does not support reversal of the state court judgment. Federal *substantive* law controls the issue, but under either federal or state procedural rules, a decision which is based upon the wrong substantive law cannot be collaterally attacked after it becomes final. [*Id*. at 50].

The author notes that "[a] strong majority of state courts have recognized, often in reliance upon postremand history of *Mansell*, that the doctrine of *McCarty* and *Mansell* is a rule of federal substantive law only. *Id.* at 55. And, perhaps of even more relevance here, "[a] strong majority of state court cases likewise hold that military benefits of all sorts can be divided under the law of res judicata." *Id.* at § 6:9, p 72. The issue of res judicata was not presented in *Howell v. Howell*, 581 US ___; 137 S Ct 1400; 197 L Ed 2d 781 (2017), and therefore, *Howell* does not appear to provide any guidance on this issue.

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One case exemplifies the difficulty the courts have had in applying the law in this complex area. In *Biondo v. Biondo*, 291 Mich App 720; 809 NW2d 397 (2011), the Court of Appeals allowed the defendant to challenge enforcement of the Social Security equalization provision in his divorce judgment on federal-preemption grounds, even though it rejected his claim – similar to the one appellant is making here – that 42 USC 407 of the Social Security Act, 42 USC 301 *et seq.*, divests the state courts of subject-matter jurisdiction in divorce cases. The Court stated as follows:

> In reaching this conclusion, we specifically reject James Biondo's suggestion that the circuit court did not possess subject-matter jurisdiction to enter the terms of the parties' consent judgment of divorce. That federal law has preempted a portion of the parties' consent judgment of divorce in no matter deprives the circuit court of subject matter jurisdiction in this divorce matter. The Social Security Act simply does not divest state courts of subject-matter jurisdiction in divorce cases. Rather, the Supremacy Clause preempts state laws regarding the division of marital property only to the extent they are inconsistent with 42 USC 407(a). The Michigan Supreme Court has explained this distinction as follows:
>
> > The loose practice has grown up, even in some opinions, of saying that a court had no "jurisdiction" to take certain legal action when what is actually meant is that the court had no legal "right" to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of *res judicata* to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity. [*Buczkowski v. Buczkowski*, 350 Mich 216, 222; 88 NW2d 416 (1958)].
>
> Although the circuit court erred by ordering the social security equalization, it did not exceed its subject matter jurisdiction in doing so. Const 1963, art 6, § 13; MCL 552.6(1). [*Biondo*, 291 Mich App at 727-728].

Apparently not recognizing the finality implications of its finding that the trial court had subject-matter jurisdiction to enter the parties' divorce judgment, the Court held that, on remand, the circuit court could modify the property-settlement provisions of the divorce judgment on the ground that inclusion of the Social Security equalization provision was a mutual mistake. However, the court did not cite or discuss the applicability of MCR 2.612, the court rule that

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governs requests for relief from a final judgment, or explain why, if that rule was applicable, the one-year limitations period for requests on the ground of mistake did not apply. See MCR 2.612(C)(1)(a) and (C)(2). Nor did the Court discuss *Sheldon*, footnote 5 in *Mansell*, or the other authorities noted above holding that federal retirement benefits may be divided on a theory of res judicata.

The Defendant-Appellant makes this sweeping statement in his brief to this Court, "Since only retired pay is 'disposable' and therefore 'divisible' under USFSPA any state court order that allows or forces division of any other veteran's benefits (those benefits considered non-disposable, which include disability pay and, necessarily CRSC pay, which is based on the service member's combat-incurred disability), is and always has been preempted by federal law because Congress has total and absolute authority over the designation and provision of veteran's benefits under Article 1, Section 8, Clauses 12 through 13 of the US Constitution." Appellant's Brief, p 5). No legal authority is cited in support of this assertion. As Justice Viviano concluded, Defendant's sweeping assertion that all types of federal preemption deprive state courts of subject-matter jurisdiction is "… demonstrably incorrect." Concurring Opinion, p.5.

Not all types of federal preemption deprive state courts of subject-matter jurisdiction and the Court of Appeals conclusion that the trial court lacked subject-matter jurisdiction to enter, and enforce, the Consent Judgment of Divorce is wrong as a matter of law.

RELIEF REQUESTED

In its March 22, 2018 Opinion the Court of Appeals in its final analysis of Appellant's argument noted, "Finally, defendant poses arguments regarding alleged mistakes of fact by the trial court, along with purported fraud and unconscionable advantage, all tied to the procurement of the divorce judgment. These arguments are an improper and untimely attempt to relitigate the

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divorce action that was settled years ago, absent appeal, and the arguments are therefore rejected." March 22, 2018, p 6.

The Court of Appeals' July 30, 2020 Opinion/Order gives Defendant, and others that may be similarly situated, the ability to sit on their rights for a substantial period of time only to then seek relief to the detriment of the other spouse that had been receiving and relying on the benefits being paid pursuant to a consent judgment of divorce for their financial stability.

Petitioner respectfully requests that this Court reverse the Court of Appeals July 30, 2020 Order and find that not all types of federal preemption deprive state courts of subject-matter jurisdiction, and that Defendant's appeal of the contempt was, in fact, an improper collateral attack on the Consent Judgment of Divorce.

In the alternative, Petitioner respectfully requests that this Court grant her Application for Leave to Appeal for the reasons stated herein and pending review, order that Defendant be precluded from filing any action to recoup funds he has paid to Plaintiff pursuant to the terms of the Judgment of Divorce.

Respectfully submitted by:

/s/ Adam L. Kruppstadt

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