STATE OF MICHIGAN

IN THE SUPREME COURT

DAX ELLIOT CARPENTER,

Plaintiff / Appellant,

vs.

JULIE ELIZABETH CARPENTER,

Defendant / Appellee.

MSC Docket No.
COA Docket No. 344512
Circuit Court No. 08-929-DM

APPLICATION FOR LEAVE TO APPEAL

*****FILED UNDER AO 2019-6*****

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ORDER OR JUDGMENT APPEALED

Pursuant to MCR 7.305, Appellant seeks leave to appeal the decision of the Court of Appeals, *Carpenter v Carpenter*, Unpublished Per Curiam of the Michigan Court of Appeals, issued January 30, 2020 (Docket No. 344512) (Appendix (App) 1a – 8a).

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

QUESTIONS PRESENTED

Pursuant to MCR 7.305(A)(1)(b), Appellant presents the questions presented for review "related in concise terms to the facts of the case."

Under the Child Support Enforcement Act (CSEA) 42 USC 659(h)(1)(B)(iii), federal law excludes certain veteran's disability pay from being considered as remuneration for employment, i.e., as income available for satisfaction of state child support or spousal support orders. This federal exemption applies to non-retiree veterans who are in receipt of veterans' disability pay under Title 38 of the United States Code as a result of a service-connected disability. The federal government will refuse to honor *any* state court order or process requesting the federal government to pay these benefits over to another to satisfy a child support or spousal support / alimony order or award. Section 5301 of Title 38 of the United States Code (38 USC 5301) jurisdictionally sequesters and protects these monies, unless otherwise allowed by *federal* law. It provides that all veterans' benefits authorized to be paid to beneficiaries under Title 38 (which is the Title of the United States Code identifying the requirements and eligibility for veterans' benefits (including the disability benefits being paid to

Appellant in this case)) are protected from *all process* whatever (whether equitable or legal), either before or after receipt by the beneficiary.

The United States Supreme Court has held that this applies to a state court order directing that these benefits be paid by the disabled veteran to any other entity. *Ridgway v Ridgway*, 454 US 46, 60-62; 102 S Ct 49; 70 L Ed 2d 39 (1981), citing *Wissner v Wissner*, 338 US 655, 659; 70 S Ct 398; 94 L Ed 424 (1950) (citing 38 USC 454a (anti-attachment provision protecting veterans insurance benefits with the exact same language as anti-attachment provision of 38 USC 5301) and stating that a state court judgment ordering a diversion of future payments of benefits protected is the same as a seizure and "is in flat conflict with the exemption.")

With respect to veterans' disability benefits, the United States Supreme Court has recently (and unanimously) stated that federal law passed by Congress's enumerated military powers preempts all state law and that state courts do not have authority or jurisdiction over such monies *unless* federal law allows it. *Howell v Howell*, 581 US ___; 137

S Ct 1400, 1404-1407; 197 L Ed 2d 781 (2017), citing 38 USC 5301(a)(1).

This specific federal statutory law, 42 USC 659(h)(1)(B)(iii) and 38 USC 5301(a)(1), clearly and unambiguously exclude such benefits from state court authority or control.

The only federal law that allows an exception to the prohibition against divesting veterans of these specific dedicated monies is if the veteran is a recipient of disability pay in lieu of retired pay under 42 USC 659(h)(1)(A)(ii)(V), or, if, through the process of apportionment identified in 38 USC 5307, the Veterans Administration (VA) makes a decision that some of the veteran's disability benefits may be used in part for support of his or her dependents. See 38 USC 511.

Appellant is not a retiree and will never be eligible for retirement pay. As a totally and permanently disabled veteran, he is a recipient of VA disability pay under Title 38. Such pay is not considered income for child support or alimony per 42 USC 659(h)(1)(B)(iii). Therefore, these benefits are jurisdictionally protected from any process whatever (whether equitable or legal). 38 USC 5301(a)(1). A state court has no authority to vest that "which (under governing federal law) they lack

the authority to give. *Howell*, 137 S Ct at 1405-1406, citing 38 USC 5301(a)(1).

Further, a decision to apportion these specific funds by and between the veteran and his or her dependents can only be made by the VA. If such a decision is made, it is final, jurisdictionally exclusive and controlling and no other court or authority may contravene a decision to apportion veterans' benefits among the veteran beneficiary and his or her dependents. See 38 USC 511. Because of this exclusive jurisdiction and final adjudicative authority being vested in the VA, state courts are jurisdictionally barred from even considering these benefits in a state court divorce proceeding. Where there is no apportionment, state courts cannot simply order that these affirmatively protected funds be diverted from the veteran beneficiary to any other person or entity because such a diversion is contrary to the plain and unambiguous language of 38 USC 5301(a)(1). *Howell*, 137 S Ct at 1405-1406.

The questions presented under these circumstances are as follows:

I.

> Did the Court of Appeals err in affirming the trial court's decision to order that Appellant's veterans' disability pay be used in calculating his support obligations to Appellee?

II.

> Did the Court of Appeals err in concluding that Appellant was liable for sanctions and attorney fees where the trial court determined that the issues raised by Appellant might be worthy of appellate review in light of the United States Supreme Court's recent, unanimous opinion holding that federal law preempts state law in the area of division of veterans' benefits, including disability benefits, unless federal statutory law allows states to exercise authority and control over such funds?

Appellant Answers: Yes.

Appellee Answers: No.

Court of Appeals Answers: No.

SUMMARY OF ARGUMENTS

No greater deference has been accorded Congress than in its exercise of its enumerated Military Powers. *Rostker v Goldberg*, 453 US 57, 64-65; 101 S Ct 2646; 69 L Ed 2d 478 (1981). Indeed, when a court approaches legislation passed pursuant to these powers it is "not…merely a case involving the customary deference accorded congressional decisions" but rather it is a case that "arises in the context of Congress' authority over national defense and military affairs." *Id*. at 64. The legislation that Congress passes providing military benefits to servicemembers and veterans are included within the ambit of this deference. *McCarty v McCarty*, 451 US 210, 232, 233; 101 S Ct 2728; 69 L Ed 2d 589 (1981). In exercising these powers, it is Congress's "desire to afford as much material protection as possible to its fighting forces…." *Wissner*, 228 US at 660.

In 2017, the United States Supreme Court unanimously confirmed that in the area of the provisioning of benefits to servicemembers and veterans the rule of absolute preemption of state law in this area still applies, as it has historically. *Howell v Howell*, 581 US ___; 137 S Ct 1400, 1404; 197 L Ed 2d 781 (2017). Congress has only ever given

states *precise* and *limited* authority over veterans' benefits. *Id*. Otherwise, *McCarty's* rule of absolute, preexisting preemption "still applies." *Id*. From this state of preexisting and absolute preemption, state courts must consider whether Congress has conferred to the states the authority to act in a manner that affects the provisioning of these benefits.

Two federal statutes that address the disposition of these benefits are directly at issue in this case. One statute explicitly allows only a portion of military benefits paid to veterans to be counted as available income in determining a veteran's child support and spousal support obligations. See 42 USC 659(h)(1)(A)(ii)(V). That subdivision *allows* states to effectuate process and therefore count or otherwise include a veteran's disability pay received in lieu of a veteran's waived military retirement pay to be considered, like retirement pay itself, as "remuneration for employment". Consistent with the states *limited* authority, the amount of such pay paid to a disabled veteran can only be considered where the veteran is (1) entitled to retirement at all, and (2) where the veteran is only partially disabled such that the amount of disability pay he or she receives is in lieu of (a substitute for) retirement pay entitlement.

As clearly provided for in this statute, two requirements must be met for a state to be able to count these monies as "income" for purposes of including it in calculating a disabled veteran's support obligation to his or her former spouse or children. First, the veteran must be eligible for retirement. Retirement eligibility depends on, inter alia, years of service performed. For purposes of this case, Appellant is not entitled to retired pay because he did not serve for the requisite period of time in the military. Therefore, he is not and never will be entitled to retired pay. Thus, 42 USC 659(h)(1)(A)(ii)(V), which, for purposes of this case is the only Congressional lifting of the otherwise absolute preemption of state law in the area of federal veterans' benefits does not even apply. Appellant is not a recipient of any funds that would fall within the ambit of monies that are considered remuneration for employment. This is supported by the regulatory interpretations of this statute, as well as by the administrative policies implementing it by the administrative agency with exclusive jurisdiction to make decisions for claims for benefits by veterans and their dependents. See 38 USC 511. Because there is and never will be any retirement pay (a portion of which might be waived for disability pay), the federal statute then, in keeping with the absolute preemption of states over all other benefits (unless federal

law allows) *excludes* all other pure veterans' disability pay paid to disabled veterans who are (1) either not retirees having never served sufficient length of time to retire; or (2) recipients of pure Title 38 disability pay (100 percent disabled veterans who, even though they are eligible for retirement pay have incurred a service-connected disability sufficient to completely occlude their ability to ever receive what is considered remuneration for *past employment*). 42 USC 659(h)(1)(B)(iii). These monies are not pensions or pay for services previously rendered at all – they are funds designated for the servicemembers disabilities incurred in the service of his or her country

As stated, in this case, Appellant is not a veteran who will ever be eligible for retirement. Thus, the question of disability pay received in lieu of retired pay is not at issue. However, because he is 100 percent disabled, Appellant is a recipient of Title 38 VA disability pay, which is *excluded* by Congress from being considered available income. In these circumstances, the federal government will not honor or recognize a state court order that requires the veteran to use or otherwise include these as available funds in state court divorce proceedings concerning the disabled veteran's ostensible support obligations. Moreover, despite the fact that the Court of Appeals argued

that 38 USC 5301 does *not apply* to those benefits that are not considered income by 42 USC 659(h)(1)(B)(iii), 42 USC 659(a) clearly refers to 38 USC 5301 because it *excepts* from the sweeping jurisdictional prohibition of 38 USC 5301 those limited benefits that *may be considered* as remuneration for employment under 42 USC 659(h)(1)(A)(ii)(V), but *not* those under subsection (h)(1)(B)(iii). See 42 USC 659(a), which says notwithstanding 38 USC 5301 monies that are received by a disabled veteran a portion of which is in lieu of waived retired pay may be considered as remuneration for employment for satisfaction of child support or alimony payments. By next excluding (h)(1)(B)(iii) benefits from being considered as remuneration for employment, the exemption from the broad sweep of § 5301 does apply to these benefits.

In keeping with its absolute control over veterans' benefits, Congress protected them from "all legal process whatever". 38 USC 5301(a)(1). The United States Supreme Court has recognized on many occasions that this language means a state court order attempting to force a veteran who is already in receipt of these monies to pay them over to another party or entity is prohibited. *Ridgway v Ridgway*, 454 US 46, 60-62; 102 S Ct 49; 70 L Ed 2d 39 (1981), citing *Wissner v*

Wissner, 338 US 655, 659; 70 S Ct 398; 94 L Ed 424 (1950) (citing 38 USC 454a (anti-attachment provision protecting veterans insurance benefits with the exact same language as anti-attachment provision of 38 USC 5301) and stating that a state court judgment ordering a diversion of future payments of benefits protected is the same as a seizure and "is in flat conflict with the exemption.")

When statutory language is clear, this Court as with the United States Supreme Court has only to apply the language of that statute to the facts of the case. Considering the absolute preemption of state law by Congress in the area of military benefits, if there is no provision in federal law that explicitly allows state courts to consider military benefits as income for purposes of calculating a veteran's support obligation, then that is the end of the matter – Congress has occupied the entire field under its enumerated military powers; its laws passed pursuant thereto are the supreme law of the land. US Const, Art VI, cl 2.

In 1987, *Rose v Rose*, 481 US 619, 625; 17 S Ct 2029; 95 L Ed 2d 599 (1987) held that state courts could force disabled veterans to use their VA disability to satisfy state court child support orders. In ruling

this way the Court relied, in part, on *In re Burrus*, 136 US 586, 594; 10 S Ct 850; 34 L Ed 500 (1890), in which the Supreme Court stated, generally, that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." However, *Burrus* was not addressing a conflict with a federal statue enacted by Congress under its enumerated military powers governing military benefits. In fact, as the Court acknowledged, there was no claim concerning the authority of the United States, or anyone acting thereunder, in contravention of the respective states' interests in the rights of custody of a minor child. *Id*. at 593-594.

Moreover, since *Burrus*, every case that has had occasion to address the conflict between (1) state family law and (2) the economic provisioning of military benefits to servicemembers, veterans and their family members, has ruled that federal law preempts all state law in this area. *Wissner v Wissner*, 338 US 655, 660-661; 70 S Ct 398; 94 L Ed 424 (1950); *United States v Oregon*, 366 US 643, 649; 81 S Ct 1278; 6 L Ed 2d 575 (1961); *McCarty v McCarty*, 453 US 210, 236; 101 S Ct 2728; 69 L Ed 2d 589 (1981), *Ridgway v Ridgway*, 454 US 46, 54-55; 102 S Ct 49; 70 L Ed 2d 39 (1981). *Mansell v Mansell*, 490 US 581,

587-95; 109 S Ct 2023; 104 L Ed 2d 675 (1989); *Hillman v Maretta*, 569 US 483, 491; 133 S Ct 1943; 186 L Ed 2d 43 (2013) (same); *Howell v. Howell*, 581 US ___; 137 S Ct 1400, 1404, 1405-1406; 197 L Ed 2d 781 (2017) emphasizing that "*McCarty*[, *supra*], with its rule of federal preemption, *still applies*" and citing 38 USC 5301(a)(1) as the federal statute that prohibits state courts from exercising jurisdiction or authority over any veterans' benefits other than those explicitly allowed for by Congress and stating further that "[s]tate courts cannot 'vest' that which (under governing federal law) they *lack the authority to give*. Cf. 38 USC 5301(a)(1)." (emphasis added). Indeed, in this area the federal government is deemed to occupy the entire field and the presumption is that federal law, not state law, prevails. It is an overstated conclusion, indeed a legal fiction, that states have retained control of family law, especially in the realm of the distributions of assets and liabilities by and between those with ostensible legal obligations to one another and/or to minor children for whom they are legally responsible. See Estin, Sharing Governance: Family Law in Congress and the States, 18 Cornell Journal of Law and Public Policy 267, 270 and n. 15 (Spring 2009). The volume of federal legislation dictating these issues can no

longer be "dismissed as exceptions, nor easily reconciled with the traditional view that family law belongs to the states." *Id*.

Secondly, since *Rose*, Congress has refined 42 USC 659, and has retained the precise and limited authority of states to consider only (1) disability pay received in lieu of a portion of retired pay as income, 42 USC 659(h)(1)(A)(ii)(V), and (2) "disposable" retired pay for purposes of "property" divisions upon divorce of a former servicemember and his or her spouse (assuming other conditions are met), 10 USC 1408. That's it. As explained by *Howell*, the lifting of the absolute preemption has been *by Congress* not the courts, and it has been *precise* and *limited*. *Howell*, 137 S Ct at 1404, citing *Mansell v Mansell*, 490 US 581, 587-95; 109 S Ct 2023; 104 L Ed 2d 675 (1989). Only *Congress* could overcome the absolute preemption "by enacting an affirmative grant of authority giving the States the power to treat" military benefits as available to state courts. *Howell*, *supra*. The Court made clear that this did not just apply to retired pay, but to all benefits given to veterans, including, of course, veterans' service-connected disability pay. *Howell*, 137 S Ct at 1406.

Since *Rose*, Congress has also amended the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), codified at 38 USC 501, et seq, and expanded the VA's jurisdiction – it now has exclusive jurisdiction and final adjudicative authority over claims for benefits by veterans or by anyone else claiming a right to such benefits. See 38 USC 511. Congress has also provided an avenue for allowing dependents to lodge such claims and to seek support from the veteran through the federal process of apportionment. 38 USC 5307.

Thus, the secondary rationale in *Rose* that some disability pay is supposed to be used for support of dependents has been subsumed in whole by the federal statutes that provide military members, veterans and their families and dependents with a "needs based" process to claim an entitlement to a portion of the veteran's Title 38 disability pay.

Since *Rose*, the Supreme Court has made clear time and again that only *Congress* can pass laws lifting the preexisting, absolute, and total preemption of federal law in this area. *Mansell*, *supra*; *Howell*, *supra*. Directly interpreting 38 USC 5301, a unanimous Court in *Howell* stated that state courts have no authority to vest these protected benefits in anyone other than the veteran. In keeping with the recognition that only

federal statutory law can lift the absolute preemption, the Court acknowledged that some benefits for *retirees* who waive retired pay *might be available* as alimony and/or child support. See *Howell*, 137 S Ct at 1406. "[State] [c]ourts remain[] free to take account of the contingency that *some* military retirement pay might be waived, or…take account of reductions in value when it calculates or recalculates the need for spousal support." *Id*. (emphasis supplied).

However, this statement recognized the limited wavier of Congress's absolute preemption – where the particular servicemember is retired or may retire (i.e., will be eligible for retirement, and waives a portion of such pay for disability) then, and only then, consistent with 42 USC 659 can a state court exercise *any* jurisdiction or authority over these funds. Otherwise, these monies are a personal entitlement and they are protected by the absolute sweep of 38 USC 5301.

Because this court must follow federal law, state courts have jurisdiction and authority to order veterans to use federal disability pay to pay child support and spousal support when, and only when, the veteran is also retired and has waived retirement pay to receive disability pay. This is consistent with 42 USC 659(h)(1)(A)(ii)(V) and

(h)(1)(B)(iii). In all other cases, federal disability payments paid by the United States to veterans for disabilities incurred during military service are off limits, not assignable, and cannot be subject to any legal process whatever. See 38 USC 5301. These funds are expressly protected by federal law pursuant to Congress' Article I enumerated powers, as expressed in positive legislation passed pursuant thereto. *Id*.

In this case, Appellant did not retire and is not entitled to retirement pay. He therefore can under no circumstance waive such retirement pay to receive his disability pay. He is among those veterans who have incurred service-related disabilities while serving on active duty without the time in service or longevity in their careers to ever qualify for military retirement pay. Therefore, he does not fit within the only federal exception that allows state courts to consider veterans' disability pay and thus, the trial court erred in concluding that he must use such pay to satisfy any state court orders of support and/or costs and attorneys fees. As this unambiguous federal law preempts state law in this very specific instance, the state court's order, to the extent that it exceeded its authority in contravening that federal law, may be challenged at any time because as the Michigan Supreme Court has held

on many occasions, where federal law preempts state law, the state courts lacks subject matter jurisdiction to enter a contravening order

The Court of Appeals decision to continue to follow *Rose* in light of these developments in the law, and, particularly, in the face of overwhelming, clear and applicable federal statutes that *prohibit* the use of these funds in *any legal process* whatsoever is error and must be reversed.

Likewise, the Court of Appeals ruling that Appellant's arguments were frivolous and entitled Appellee to sanctions in the trial court was also error.[1] The trial court acknowledged that it had not yet ordered Appellant to use his disability pay. In other words, it did not rule that Appellant had to use this disability pay to satisfy the child support order until it addressed the substantive legal arguments of the parties in this regard. It's ultimate order that Appellant do so is prospective only because it considered the argument as legitimate at the time it was made.

[1] The Court of Appeals denied a motion for sanctions filed by Appellee after its opinion was issued.

Moreover, the trial court explicitly recognized that *Howell* had been issued in 2017, well after *Rose*, and that it directly addressed the issue of federal preemption of state law in the area of veterans' benefits. Given the language of the unanimous court in *Howell* that (1) *Congress* is the only entity that can pass legislation *lifting* the absolute preemption of state law by federal law in this area, see 137 S Ct at 1404, citing *Mansell*, *supra*; (2) that only where *military retirees* waive retired pay can a state court consider a substitution for the former spouse's lost property interest (in the waived disposable retirement) by considering an increase in alimony to be paid from the portion of disability funds received in lieu of the waived retired pay (because only those are considered available remuneration for employment by Congress in 42 USC 659(h)(1)(A)(ii)(V), see 137 S Ct at 1406; and (3) otherwise, all veterans' benefits are personal entitlements and subject to the sweeping jurisdictional protection from state court authority in governing federal law by way of 38 USC 5301(a)(1), 137 S Ct at 1405-1406, the arguments posited by Appellant were far from frivolous, vexatious, or meritless. The trial court even considered that a higher court might disagree on the federal preemption issue.

Finally, the decision of this Court must follow preemptive federal law when it is plain and discernible without resort to judicial distortion. The Court of Appeals' decision reflects the philosophy that judges should endure whatever interpretive fictions it takes to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people's decision to give *Congress* "[a]ll legislative Powers" enumerated in the Constitution." US Const Art I, § 1. They made Congress, not the courts, and not even the Supreme Court, responsible for both making laws and mending them. The courts hold only the judicial power to pronounce the law as Congress has enacted it. They lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw Supreme Court Justices out of office if they dislike the solutions they concoct. The Supreme Court has stated that its "task is to apply the text, not to improve upon it." *King v Burwell*, ___US___; 135 S Ct 2480, 2505; 192 L Ed 2d 483 (2015).

Every interpretive convention that has been devised to get around 42 USC 659 and 38 USC 5301 has been debunked because they are all contorted to avoid the plain and unambiguous language. *Howell* pointed the state courts in the right direction. For over 30 years prior to that decision, rather than apply the plain and unambiguous language of

federal law *limiting* the rights of trial courts to divide veterans' benefits and recognizing that federal law has protected these benefits from the earliest days of the Republic for those veterans who have survived after being incapacitated in the service of defending the nation, 32 states "interpreted" the law to deprive veterans of these entitlements. That is, for over 30 years, the decisions of a majority of state courts (in many cases the highest appellate courts in those jurisdictions) were wrong. The damage done to these veterans that have suffered under these decisions cannot be quantified. The Supreme Court's unanimous decision in *Howell* provides the road map for state courts to find their way back to compliance with the supreme federal law that they have a duty to obey and apply. Appellant seeks leave to appeal the Court of Appeals decision to this Court so that it may take this opportunity to lead the way for other states to follow.

STATEMENT OF THE CASE

Appellant initially challenged use of his veterans' disability benefits in the calculation of his child support obligation to his former spouse in response to a motion filed by Appellee to increase support payments. Both Appellant and Appellee filed briefs to present this issue to the Circuit Court.

Appellant's trial brief on this issue was initially filed on July 31, 2017. In that brief, Appellant explained that he was a combat veteran of the Iraq war. (Trial Brief, 07/31/2017). He was honorably discharged as a private first class after three years of service. *Id*. at 1-2. He was discharged because he was injured and disabled as a result of his military service. *Id*. at 2. He has been classified as a 100 percent disabled veteran. *Id*.

Appellant was not able to retire, nor will he ever be able to claim retirement pay from the military because he did not attain the qualifying years in service. *Id*. Appellant therefore does not receive monies as remuneration for any employment he held with the United States military; he receives no "disposable retired pay" under the Uniformed Servicemembers Former Spouses Protection Act (USFSPA), 10 USC

1408. *Id*. Per 5 CFR 581.103(b)(13), only "disability *retired* pay" is subject to state child support and spousal support orders. (emphasis added). Subsection (c)(7) also specifies that monies subject to such orders include only "compensation for a service connected disability" where the "former member of the Armed Forces who is in receipt of *retired* or *retainer* pay *if the former member* has waived either the entire amount or a portion of the retired or retainer pay in order to receive such [disability] compensation." *Id*., citing 5 CFR 581.103(c)(7) (emphasis added). See also 42 USC 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii).

Appellant's trial brief further explained that 42 USC 659(a); (h)(1)(A)(ii)(V) and (h)(1)(B)(iii) statutorily codified the classification of Appellant's specific type of disability benefits as being off limits to state court orders for child and/or spousal support. *Id*. at 2-3. In addition to not being eligible for retirement, Appellant explained he had never waived a portion of military retired pay in order to receive his service-connected VA disability benefits. *Id*. He further argued that his service-connected disability benefits were not based on his earnings and did not constitute retired pay or retainer pay. *Id*. Michigan only allows, as federal law requires, consideration of disposable income. *Id*. at 3.

Appellant further argued that *Rose v Rose*, 481 US 619, 625; 17 S Ct 2029; 95 L Ed 2d 599 (1987), did not apply to his specific circumstances. *Id*. at 3-6.

Appellant also argued that 38 USC 5301 protected the specific disability benefits he receives. *Id*. at 7. Subsection (a)(1) of this provision states: "Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary."

In a reply brief filed on August 7, 2017, Appellee argued that the statutes and regulations cited by Appellant did not apply to the circumstances of his case. Appellee's Reply Brief, 08/07/2017, p. 2. Appellee did not address 42 USC 659(h)(1)(B)(iii). Appellee further argued that since Appellant was not required to waive retired pay to receive VA benefits, none of the case law cited in support of Appellant's position applied. *Id*. Appellee argued that *Rose v Rose*, 481

US 619, 625; 17 S Ct 2029; 95 L Ed 2d 599 (1987), applied and meant that Appellant's veterans disability pay could be considered in a state court support order. *Id*. at 3. Therefore, Appellee argued that the total amount of Appellant's veterans disability pay could be counted as income and included along with any other regular income for the purposes of the amount of child support under the state mandatory child support guidelines. *Id*.

Appellee also obliquely addressed, without citing the language of, 38 USC 5301 claiming that it did not protect Appellant's disability benefits. *Id*. at 4. In a conclusory statement, Appellee stated: "The [state] Court's ability to consider VA disability benefits as income is not compromised or called-into-question[sic] by any court decision, statute or regulation. Indeed, the U.S. Supreme Court has already so held in a case that is factually identical." *Id*. (no citations provided).

As it relates to Appellant's appeal, Appellee concluded with the statement of the issues, inter alia, the Circuit Court should address:

> [W]hether the VA disability benefits received by Plaintiff since May 12, 2013 are includible in his income for purposes of calculating the child support guidelines during that period. The Michigan Child Support Guidelines expressly include these benefits as income. These guidelines are provisions are mandatory. The U.S.

> Supreme Court found all federal statutes and regulations relating to these benefits do not modify or affect the operation of the guidelines. [*Id*. at 4.]

On September 20, 2017, the Friend of the Court issued a "proposed" order. (App 11a – 19a), concluding:

> 1. The Veterans disability benefits received by Plaintiff father since May 12, 2013 are includable in his income for purposes of calculating Plaintiff father's child support obligation utilizing the Michigan Child Support Guidelines.
>
> 2. The calculation of Plaintiff father's child support obligation shall be based on the Veterans disability income received by Plaintiff father retroactive to May 12, 2013. The Referee specifically finds that Plaintiff father intentionally misrepresented and intentionally failed, refused and/or neglected to disclose the true nature of his income since that date. Moreover, the Referee believes Plaintiff father conceded to retroactive application of the correct amount of his income for purposes of the calculation of his child support obligation.
>
> 3. The correspondence provided by the Veteran's Administration detailing the amount of Veterans disability benefits received by Plaintiff father shall be used to determine the actual total income received from May 12, 2013 to the present for purposes of calculating Plaintiff father's child support obligation, utilizing the Michigan Child Support Guidelines.
>
> 4. The Uniform Child Support Order entered by the court shall include a determination of the appropriate amount of child support arrearages owed by Plaintiff father, and a schedule to repay the same.

5. To effect the award of sanctions against Plaintiff father pursuant to MCR 2.114, Counsel for Defendant mother shall prepare and submit a statement to Plaintiff and the Friend of the Court stating the amount of hours he has expended representing Defendant mother regarding this child support matter. The Referee shall then issue a separate proposed order regarding MCR 2.114 sanctions under the 21-day rule.[2] (App 17a – 18a)

Appellant timely filed objections to this proposed order in accordance with the Michigan Court Rules and the matter was set for a hearing before the Circuit Court. That hearing was conducted on February 28, 2018. (App 20a – 41a) The Circuit Court addressed Appellant's substantive arguments concerning whether federal law applied to his particular situation and in light of new case law from the United States Supreme Court, *Howell v Howell*, 581 US ___; 137 S Ct 1400, 1404-1407; 197 L Ed 2d 781 (2017) 137 S Ct 1400 (2017) preempted state law and jurisdictionally prohibited the state court from forcing him to use his VA disability pay in the calculation of his child support obligation.

Appellant's trial counsel stated that the question of law concerned whether the Eaton County Friend of the Court could take Appellant's

[2] MCR 2.114 was repealed on May 30, 2018, effective September 1, 2018. The language concerning the imposition of sanctions was transferred to MCR 1.109(E). Administrative Order No. 2002-37.

VA benefits into consideration. (App 23a, ll. 4-7) The Circuit Court asked whether veterans' administration benefits were covered by what state law allowed. *Id*., ll. 7-12. Appellant's trial counsel explained that there were "two types of veterans' benefits…the veterans' benefits that me, being a service member and being eligible for retirement pay – get injured while on duty – so I can waive my retirement pay and receive VA benefits in lieu of retirement…." *Id*., ll. 18-22. Appellant's trial counsel then tried to explain that Appellant's VA disability benefits were not such pay. *Id*. "Congress…has protected the veterans' benefits that are received not in lieu of retirement but for the disability, strictly for the disability, 100 percent." (App 27a, ll. 6-11)

Appellee's trial counsel then countered by arguing that *Rose v Rose,* 481 US 619, 625; 17 S Ct 2029; 95 L Ed 2d 599 (1987) was the controlling case – "decided in 1987…that specifically held that veterans' disability benefits not only are susceptible to child support, but that federal law that requires states to have child support guidelines require its inclusion." (App 28a – 29a) Appellee's counsel argued that there was "no merit to the claim that these benefits are not susceptible to child support calculations, are not income for purposes of the child support guidelines in Michigan or any other state." (App 29a, ll. 10-13)

The Circuit Court noted that it had not yet entered any orders requiring inclusion of VA disability benefits, asking Appellee's counsel: "So, the higher support's not in place right now?" (App 31a, p. 12, ll. 19-25)

The Circuit Court then turned back to Appellant's counsel to engage on the very issue of the applicability of *Rose*, *supra*. "What about this *Rose* case?" (App 32a – 33a, p. 13, l. 20) Appellant's counsel argued that *Rose* was 30 years old and had been "superceded[sic] by *Howell*".

The Circuit Court ultimately denied Appellant's motion and allowed the order to enter increasing the Appellant's child support obligation to include the veterans' disability benefits he claims were not to be included in the calculation of his child support obligation – going forward. The Circuit Court concluded its reasoning by stating:

> [I]t looks here that veterans' administration benefits are income…. Income is income, and all income has to be included…. I don't believe in…technicalities taking someone's right away from having justice. And so, I'm not ruling because you filed your objection late. I'm ruling because there's no case law that I've seen that supports your position.
>
> And if this *Howell* case actually overrules *Row[sic]* and it says – and – and if Congress has indicated that this income does not have to be calculated for child support, then…the Court of Appeals can reverse me, and then all the judges

in Michigan can know that there's a new case in the land. (App 35a – 36a)

Appellant filed a claim of appeal. He argued that federal law preempts state law concerning the disposition of his federal benefits based on the precise classification of his status as a non-retiree recipient of veterans' disability benefits. See 10 USC 1408; 42 USC 659; and 38 USC 5301. If federal law preempted state law, Appellant argued, Michigan state courts lack subject matter jurisdiction and authority to enter an order that is contrary to such preemptive federal law. *Henry v Laborers' Local 1191*, 495 Mich 260, 287, n 82; 848 NW2d 130 (2014) (stating "preemption is a question of subject-matter jurisdiction"; "as such this Court must consider it"; and "preemption is a claim that the state court has not power to adjudicate the subject matter of the case".) Therefore, as a threshold matter, Appellant argued that the reviewing court (the Court of Appeals) had to consider whether subject matter jurisdiction was lacking in the lower court's ruling where it is contended that the ruling contravened preemptive federal law. *Arbuckle v GM LLC*, 499 Mich 521, 532; 885 NW2d 232 (2016). Such a ruling, Appellant contended, would mean that the trial court could never have considered his disability pay in calculating his obligation (either past, present, or future).

The Court of Appeals affirmed. It reasoned that *Rose v Rose*, 481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987) applied because the Court held there that VA disability pay could be included as income by state courts. (App 5a) The court reasoned that 42 USC 659(h)(1)(B)(iii) did not preclude the state court from counting as income a veteran's disability pay. (App 6a) The court then reasoned that because 42 USC 659 only applies to a state's right to garnish a veteran's disability pay, the fact that the state is prohibited from garnishing veteran's benefits not considered income by that provision did not mean that the benefits were off limits to state courts. In this regard, the Court concluded "that plaintiff's benefits cannot be garnished is not dispositive of whether they can be considered for the purpose of calculating child support obligations." (App 6a)

The Court ignored Appellant's argument that 38 USC 5301 independently protected his benefits from any legal process.

The Court also misstated the argument Appellant raised concerning *Howell*, stating that Appellant only argued that *Howell* supports the proposition that veteran's disability pay remains expressly protected by 38 USC 5301(a)(1). (App 6a) While this proposition is true because

Howell reaffirmed that pre-*Rose* United States Supreme Court case law that held that *all federal law* preempts *all state law* in the area of disposition of military benefits, and thus, only federal law can say when a particular benefit is available to a state court for consideration, *Howell* also specifically said that *federal law* must be consulted *before* a state court can make a determination of whether the specific benefits to which the veteran is entitled are available for consideration as income. In such cases, 38 USC 5301 applies to *all state court process* (equitable or legal) and *jurisdictionally prohibits* state courts from considering funds both before and after receipt, *unless otherwise authorized by federal (not state) law*. See 38 USC 5301(a)(1). Section 659(h)(1)(B)(iii) clearly excludes the VA disability benefits at issue from being considered income. The federal government will not pay such benefits to a state court in compliance with an order that requests funds directly from the federal government, 42 USC 659(h)(1)(B)(iii), and 38 USC 5301 directly and explicitly prohibits a state court from forcing a veteran to pay these monies over to another.

Thus, applied to the benefits at issue in his case, Congress *has indeed indicated* that Appellant's veterans disability benefits are not income and may not be subject to calculations for child support awards

in state domestic relations proceedings, and *Howell did rule* that with respect to such disability benefits, 38 USC 5301 erects a jurisdictional bar to a state court's exercise of authority over such funds. Appellant provides the following arguments in support of his application.

ARGUMENTS

I. APPELLANT IS A DISABLED VETERAN WHO IS NOT A RETIREE AND THEREFORE NOT A RECIPIENT OF RETIRED PAY OR DISABILITY PAY IN LIEU OF RETIRED PAY, BUT RATHER HE IS A RECIPIENT OF PURE VETERANS' DISABILITY PAY. AS SUCH 42 USC 659 AND 38 USC 5301 ARE FEDERAL LAWS PASSED BY CONGRESS PURSUANT TO ITS ARTICLE I ENUMERATED "MILITARY POWERS" THAT PREEMPT STATE LAW PROHIBITING STATE COURTS FROM CONSIDERING APPELLANT'S DISABILITY PAY FOR PAYMENT OF CHILD SUPPORT AND/OR SPOUSAL SUPPORT. THE COURT OF APPEALS ERRED IN CONCLUDING APPELLANT WAS RESPONSIBLE TO PAY APPELLEE USING THESE FUNDS.

A. Standard of Review

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

B. Applicable Law

1. The Supremacy Clause

The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof…shall be the supreme Law of the Land; and the Judges in every State *shall be bound* thereby, any Thing in the Constitution or Laws of any State to

the Contrary notwithstanding." US Const, art VI, cl 2 (emphasis added). Federal law preempts state law where Congress has intended to foreclose any state regulation in the subject matter regardless of whether state law is consistent or inconsistent with federal standards. *Oneok Inc v Learjet Inc*, 135 S Ct 1591, 1594-1595; 191 L Ed 2d 511 (2015). See also *Mich Canners & Freezers Ass'n v Agric Mktg & Bargaining Bd*, 467 US 461, 469; 104 S Ct 2518; 81 L Ed 2d 399 (1984) (internal citations omitted), accord *Hisquierdo v Hisquierdo*, 439 US 572, 582-83; 99 S Ct 802; 59 L Ed 2d 1 (1979). This is known as "field preemption". *Arizona v United States*, 567 US 387; 132 S Ct 2492, 2502-2503; 183 L Ed 2d 351 (2012). In such cases, the "States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." *Id*. at 2501. When a state law is preempted by federal law, the state law is "without effect." *Maryland v Louisiana*, 451 US 725, 746; 101 S Ct 2114; 68 L Ed 2d 576 (1981). See also *Kalb v Feuerstein*, 308 US 433, 440, n 12; 60 S Ct 343; 84 L Ed 370, 375 (1940). Justice Story said of this latter phrase that it "was but an expression of the necessary meaning of the former [that the Constitution and laws made in pursuance thereof shall be the supreme

law], introduced from abundant caution, to make its obligation more strongly felt by the state judges" and "it removed every pretence, under which ingenuity could, by its miserable subterfuges, escape from the controlling power of the constitution." Story, Commentaries on the Constitution, vol II, § 1839, p 642 (3d ed) (1858).

Where Congress passes legislation pursuant to its enumerated Article I powers, state law must yield under the Supremacy Clause. *Ridgway v Ridgway*, 454 US 46, 54-55; 102 S Ct 49; 70 L Ed 2d 39 (1981). Indeed, state courts have no *subject matter jurisdiction* where their actions are preempted by federal law. *Henry v Laborers' Local 1191*, 495 Mich 260, 287, n 12; 848 NW2d 130 (2014). This is because, as Chief Justice Marshall said long ago: "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436; 4 L Ed 579 (1819) (MARSHALL, CJ) (emphasis added).

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

Congress' authority for enacting veterans' benefits legislation springs from its enumerated "War Powers" or "Military Powers". US

Const, art I, sec 8, cls 12-14. See, e.g., *Wissner v Wissner*, 338 US 655, 660-661; 70 S Ct 398; 94 L Ed 424 (1950); *United States v Oregon*, 366 US 643, 649; 81 S Ct 1278; 6 L Ed 2d 575 (1961) ("Congress undoubtedly has the power – under its constitutional powers to raise armies and navies and to conduct wars – to pay pensions…[to] veterans."); *Johnson v Robison*, 415 US 361, 376, 385; 94 S Ct 1160; 39 L Ed 2d 389 (1974). Congress has exercised legislative authority in these premises since the earliest days of the Republic. See, e.g., *Hayburn's Case*, 2 US (Dall) 409, 1 L Ed 436, 2 Dall 409 (1792) (discussing the Invalid Pensions Act of 1792). See also Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 Wash L Rev 227, 228 (1977); Waterstone, *Returning Veterans and Disability Law*, 85:3 Notre Dame L Rev 1081, 1084 (2010). Where Congress explicitly relies on this power, the Supreme Court has perhaps nowhere else accorded Congress greater deference". *McCarty v McCarty*, 453 US 210, 236; 101 S Ct 2728; 69 L Ed 2d 589 (1981), citing *Rostker v Goldberg*, 453 US 57, 64-65; 101 S Ct 2646; 69 L Ed 2d 478 (1981). As with all matters of federal preemption, where Congress acts in furtherance of its enumerated

constitutional powers under Article I, state law must yield. *Ridgway*, 454 US at 55.

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

Such legislation directly addresses and preempts state law, even in domestic family law matters, an area in which federal courts have traditionally deferred to state courts. *Ridgway*, *supra* at 54. There, the Court noted "[n]otwithstanding the limited application of Federal law in the field of domestic relations generally, this Court even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies [of servicemembers and veterans] established by Federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." Thus, "a state divorce decree, like other law governing the economic aspects of domestic relations, must give way to *clearly conflicting* federal enactments." *Id*. at 55 (emphasis added). See also *Hillman v Maretta*, 569 US 483, 491; 133 S Ct 1943; 186 L Ed 2d 43 (2013) (same). Absolute federal preemption of state law in these matters still applies. *Howell v. Howell*, 581 US ___; 137 S Ct 1400, 1404, 1405-1406; 197 L Ed 2d 781 (2017) emphasizing that "*McCarty*[, *supra*],

with its rule of federal preemption, *still applies*" and citing 38 USC 5301(a)(1) as the federal statute that prohibits state courts from exercising jurisdiction or authority over any veterans' benefits other than those explicitly allowed for by Congress and stating further that "[s]tate courts cannot 'vest' that which (under governing federal law) they *lack the authority to give*. Cf. 38 USC 5301(a)(1)." (emphasis added).

It follows from the foregoing that while "the whole subject of domestic relations between husband and wife belongs to the laws of the States and not to the laws of the United States," and "state family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden," "the application of community property law conflicts with the federal military retirement scheme" and is completely preempted unless Congress has otherwise provided. *McCarty v McCarty*, 453 US at 220, 223, citing *Hisquierdo*, 439 US at 581 (internal quotation marks omitted). See also *Ridgway*, 454 US at 54, citing *McCarty*, *supra* and *Hisquierdo*, *supra* and stating that "[n]otwithstanding the limited application of federal law in the field of domestic relations generally…, this Court, even in that area, has not

hesitated to protect, under the Supremacy Clause, *rights and expectancies* established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." (emphasis added).

In *McCarty*, the Court ruled Congress had *completely* preempted state law from exercising jurisdiction or authority over veterans' benefits in state court divorce proceedings. In this unique field, the Court explained, Congress had historically intended *all* military benefits to be property of the servicemember. *Id*. at 228. After explaining the historical underpinnings of veterans' benefits and that in this area of the law, Congress has occupied the entire field of state law, the Court noted that veterans' retirement benefits were the personal entitlement of the retiree. *Id*. at 232. Thus, the Court held state courts are not free to reduce the amounts that Congress had determined are necessary for the servicemember without reference to federal law. *Id*. at 233. Finally, since Congress intended all pay to reach the beneficiary, state courts could not attach or assign funds to satisfy a property settlement incident to the dissolution of a marriage. *Id.* at 228, citing and referring to the anti-attachment provisions, 38 USC 3101, the predecessor of 38 USC 5301.

4. The USFSPA Lifted Preemption Only for Marital Property Division

In 1982, after *McCarty*, Congress recognized a *limited* exception to federal pre-emption in the USFSPA, 10 USC 1408. See *Mansell v Mansell*, 490 US 581, 587-95; 109 S Ct 2023; 104 L Ed 2d 675 (1989), accord *King v King*, 149 Mich App 495, 499-500; 386 NW2d 562 (1986). The USFSPA allowed state courts to treat only one small portion of veterans' benefits (disposable military retirement pay) as property subject to division under the respective states' pre-existing community or equitable property laws. 10 USC 1408(c)(1); *Mansell*, 490 US at 594-95. All other military benefits (non-disposable retirement benefits (defined in 10 USC 1408(a)(4)(B) and (c)(1)), disability benefits, and special compensation incident to military service remained federally protected veterans' benefits.

5. Federal Legislation Provides When State Courts Can and Cannot Count Disability Pay Towards a Former Servicemembers' Child Support and Spousal Support Obligations

Title 10 USC 1408, the USFSPA and 42 USC 659 the CSEA, represent a Congressional lifting of this absolute preemption over state law. See *Howell*, 137 S Ct at 1404. These provisions provide, in certain

specific cases, that state courts may count a portion of a veterans' disability benefits towards his or her marital property, child support and/or spousal support obligations in divorce proceedings. See 10 USC 1408(a)(4)(A)(ii); (d)(1); (e)(6); 42 USC 659(h)(1)(A)(ii)(V).

However, 42 USC 659(h)(1)(B)(iii) specifically excludes from this allowance disability benefits paid to a disabled military veteran who is not a retiree and who has therefore not waived retirement pay to receive disability pay. In such case, 38 USC 5301 further provides an affirmative jurisdictional protection of veteran's disability benefits and a positive prohibition on the exercise of subject matter jurisdiction by state courts over veterans' disability benefits and prohibits "any legal process whatever" from being used to force or otherwise redirect such benefits to anyone other than the federally designated beneficiary. Where benefits are protected by this provision, state courts have no power or authority to order that they vest in anyone other than the designated beneficiary. *Howell*, 137 S Ct at 1406, citing 38 USC 5301(a)(1).

In 1987, the United States Supreme Court ruled state courts could include veteran's disability benefits when considering a veteran's child

support obligations for retiree veterans. See *Rose v Rose*, 481 US 619, 625; 17 S Ct 2029; 95 L Ed 2d 599 (1987), citing 42 USC 659. In 1999, however, Congress specifically amended 42 USC 659 and added, *inter alia*, subsection (h)(1)(B)(iii) *excluding* from this lifting of absolute federal preemption a certain class of veterans (those who are not eligible for retirement and who therefore receive no retirement pay and do not and cannot waive retirement pay to receive disability pay). See 10 USC 1408(a)(4)(A)(ii); (d)(1); (e)(6) and 42 USC 659(h)(1)(A)(ii)(V); (h)(1)(B)(iii). See also 42 USCA 659, 2011 bound volume (detailing the amendment). This positive federal legislation when read in conjunction with 38 USC 5301, and which was passed after *Rose*, *supra*, simply precludes state courts from exercising *any* jurisdiction or authority over veteran's disability benefits paid to these individuals. Of course, where Congress in the exercise of its enumerated Article I powers passes legislation that directly changes precedent of the United States Supreme Court, the federal statutory law will prevail as the authoritative final word in the constitutional hierarchy. *King v Burwell*, ___US___; 135 S Ct 2480, 2505; 192 L Ed 2d 483, 511-12 (2015).

Moreover, as such benefits are authorized by the Secretary of Veterans Affairs, they are protected further by 38 USC 5301 from any legal process whatever. The latter statute removes jurisdictional authority of state courts over funds that are protected within this provision. Section 5301 is to be liberally construed to effectuate its purpose. *Porter v Aetna Cas. & Sur Co*, 370 US 159, 162; 82 S Ct 1231; 8 L Ed 2d 407 (1962).

C. Analysis

As most recently acknowledged by the Court in *Howell*, *supra* at 1406, federal law says when a state court may order a former servicemember to use some of his or her disability pay (specifically when he or she waives retirement pay to receive disability pay) to satisfy state court child support and spousal support orders. *Id*., citing 10 USC 1408(e)(6) and *Rose*, *supra*. Federal law also says when such pay is protected from any legal process whatever, including assignment, garnishment, and/or indemnity or reimbursement orders. *Id*. at 1405-1406 (citing 38 USC 5301(a)(1) and stating "state courts cannot 'vest' that which (under governing federal law) they lack the authority to give. Cf. 38 USC 5301(a)(1) (providing that disability

benefits are generally nonassignable).”). See also 42 USC 659(h)(1)(B)(iii).

Federal law, through the USFSPA, 10 USC 1408, 42 USC 659 and 38 USC 5301, prohibit disposition of any federally authorized benefits, that is benefits designated via Article I enumerated powers of Congress by federal statute for the benefit and use of the veteran (i.e., retirement pay, disability pay, and retirement pay that may be waived to receive disability pay, *inter alia*), *except* for a specific portion reserved for payment of alimony and child support only from *waived pay received by military retirees*. See 10 USC 1408(a)(4)(B) and (e)(6); 42 USC 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii); and 38 USC 5301(a)(1).

To explain how this applies to Appellant and, more importantly, how it restricts what a state court can and cannot do (i.e., what “authority and jurisdiction” it has), one must walk through each of the relevant sections of these controlling federal statutes.

Section 1408(a)(2) of the USFSPA first describes court orders that are subject to the federal allowances and limitations as:

> [A] final decree of divorce, dissolution, annulment, or legal separation issued by a court…(including a final decree *modifying* the terms of a previously issued

> decree…, or a support order…which provides for (i) payment of child support (as defined in…42 USC 659(i)(2));[and] (ii) payment of alimony (as defined in…42 USC 659(i)(3)).
>
> [10 USC 1408(a)(2) (emphasis added).

Section 1408(d)(1) then defines where a court's order is recognized by the federal government to satisfy a child support and/or spousal support order:

> After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony…specifically providing for the payment of an *amount of the disposable retired pay* from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) *from the disposable retired pay of the member to the spouse or former spouse…in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order* and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order.
>
> [*Id*. (emphasis added).]

Section (a)(4)(A)(ii) next defines "disposable retired pay" as "the total monthly retired pay to which a member is entitled less amounts which…are deducted from the retired pay of such member…as a result of a waiver of retired pay required by law in order to receive [disability] compensation under title 5 or title 38". *Id*. (bracketed information

provided for context). So far, under these provisions, Congress *authorizes* state courts (and in fact recognizes orders from state courts) dividing "disposable retired pay" to satisfy child support and spousal support orders. What is also important about this definition is that it leads to a consideration of when a state court may *also* force a veteran to pay to his or her former spouse *some* of his or her *disability pay* that the veteran receives when he or she waives retirement pay in a child support or spousal support scenario.

Consider from the discussion on applicable federal law, that federal law preempts, and has always preempted, state law in this specific area: family law and domestic relations law where federal military benefits (retirement and disability) are concerned, *unless* otherwise provided by Congress. *Wissner*, *Hisquierdo*, *McCarty*, *Rose*, *Mansell*, and finally, *Howell*, *inter alia*, each contain this statement of the absolute rule concerning disposition of federal benefits authorized by Congress under its enumerated Article I "war" powers. In 1982, Congress then *lifted* this preemption for veterans benefits only for a small subset of circumstances by passage of the USFSPA. It allowed a division of a portion of a former servicemembers "disposable retired pay". In conjunction with the CSEA, it also allowed a division of veterans'

disability pay for payment to former spouses for child support and spousal support, but only for those former servicemembers who are entitled to claim retired pay, and who have waived that retirement pay to receive disability pay. See 42 USC 659(h)(1)(B)(iii). Otherwise, "*McCarty* with its rule of federal preemption still applies." *Howell*, 137 S Ct at 1404. In other words, unless Congress has made an exception to the preexisting federal preemption that exists by virtue of its enumerated powers under Article I of the Constitution and as enforced by the Supremacy Clause, federal law prohibits exercise by state courts over protected federal benefits.

Now, consider the USFSPA and CSEA. 10 USC 1408 and 42 USC 659 represent a Congressional lifting of this absolute preemption. These provisions (and accompanying federal regulations and policy) spell out in plain language when federal veterans disability pay may and may not be subject to state court legal process.

Section 659 constitutes federal recognition of state court authority over otherwise federally protected veterans' disability benefits, which recognition allows state courts to garnish or order through legal process that the veteran use disability pay to satisfy a child support or spousal

support order. Subsection (a) simply lays out the federal government's "[c]onsent to support enforcement", as follows:

> Notwithstanding any other provision of law (including…section 5301 of Title 38…)…moneys (the entitlement to which is based upon *remuneration for employment* [i.e., retirement benefits based on years in service]) due from or payable by, the United States…to any individual, including members of the Armed Forces of the United States, shall be subject, in like manner and to the same extent as if the United States…were a private person, to withholding in accordance with State law…and to *any other legal process*…to enforce the legal obligation of the individual to provide child support or alimony.
>
> [42 USC 659(a) (emphasis added) (bracketed information provided for context, see 5 CFR 581.103 defining disposable income and remuneration for employment).]

However, sections 659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii) go on to clearly separate VA disability pay into two categories, one category that is subject to this withholding and legal process, and one category that is not, as follows:

> (h) Moneys subject to process.
>
> (1) In general. Subject to paragraph (2) [moneys already pre-excluded for tax and personal debt purposes not relevant here], moneys payable to an individual which are considered to be based upon remuneration for employment [and thus fall within subsection (a) as being subject to legal

> process by state courts], for purposes of this section…
>
> (A) ***consist of***…
>
> (iii) periodic benefits…or other payments…
>
> (V) by the Secretary of Veterans Affairs as compensation for a service-connected disability paid by the Secretary to a former member of the Armed Forces ***who is in receipt of retired or retainer pay if the former member has waived a portion of the retired pay or retainer pay in order to receive such compensation***;…
>
> (B) ***do not include any payment***…
>
> (iii) of periodic benefits under title 38, United States Code [where Title 38 (an expansive Title in the United States Code addresses the requirements of and provision for service-connected disability benefits)], except as provided in subparagraph (A)(ii)(V) [addressing those disability benefits that ***may be*** counted where they are received when the veteran actually is entitled to retired pay and waives that retired pay to receive that Title 38 disability pay, see 38 USC 5305]."
>
> [*Id*. (emphasis added) (bracketed information provided for context).]

Although the Court of Appeals concluded this case is governed by *Rose*, *supra*, that is simply not true. First, as noted, *Rose* was a 1987 decision and the amended language of 42 USC 659 did not exist. Per the 1999 amendment to 42 USC 659, adding (h)(1)(B)(iii), Appellant

fits within the category of those veterans whose disability pay is *excluded* from all consideration as disposable income (or remuneration for employment) by state courts to pay spousal support and/or child support. Appellant is not a retiree, did not waive retired pay to receive disability pay, and receives only disability pay authorized by the Secretary of Veterans Affairs under Title 38. These benefits are further protected by the positive language of 38 USC 5301 from "all legal process whatever".

The positive enactments by Congress apply directly to this case. While this may appear, at first glance, to be a convoluted statutory argument, as it relates to those servicemembers who were never eligible for retirement (because they did not have the requisite length of time in service (and the rank achieved therewith) to be able to collect retirement pay), but who are still entitled to disability benefits under Title 38 because they were injured and incurred service-connected disabilities during their active duty service, the federal provisions allowing state courts to order servicemembers to use their federal disability pay for child support or spousal support *are not applicable*. It is also noteworthy to point out the distinction is made between "remuneration for employment", i.e., income, where retirement pay, and even

disability pay that replaces retired pay due to a waiver under 38 USC 5305, is considered to be received as a result of the servicemembers time in service, resulting pension eligibility and amount, i.e., his or her prior employment; whereas, the pure Title 38 disability pay for service-connected disability is *not considered remuneration for employment* because it is paid to the servicemember due to his or her injuries incurred during service, not because of time in service, i.e., employment. Federal regulations also confirm this. 5 CFR 581.103(c)(7) mirrors 42 USC 659 and states that "[m]oneys which are subject to garnishment" include "[a]ny payment by the Secretary of Veterans Affairs as compensation for a service-connected disability paid by the Secretary to a former member of the Armed Forces *who is in receipt of retired or retainer pay if the former member has waived either the entire amount or a portion of the retired or retainer pay in order to receive such compensation*. In such cases, *only that part of the Department of Veterans Affairs payment that is in lieu of the waived retired pay or waived retainer pay is subject to garnishment*." (emphasis added).

In sum, there are two categories of federal veterans' disability benefits for purposes of this analysis:

(1) disability pay that can be taken by states to pay child support and alimony orders, but only if the veteran is also a recipient of retirement pay, and only if he or she waives that pay to receive VA disability pay. 42 USC 659(h)(1)(A)(ii)(V). In this situation, and in this situation only, the statutes, 10 USC 1408 and 42 USC 659, allow states to order that a percentage of the VA disability pay be paid to satisfy such orders; and

(2) disability pay that cannot be taken by the states to pay such orders, because the veteran is not also a recipient of military retired pay – these funds – pure VA disability pay and/or VA authorized special compensation – are protected by federal law from all legal process that the states might employ against the veteran. 42 USC 659(h)(1)(B)(iii). See 38 USC 5301(a)(1).

With respect to this second category of pay, pursuant to 38 USC 5301(a)(1), states may not attach, seize, garnish, or otherwise effect any legal process (equitable or otherwise) whatever with respect to these types of funds. Relevant to this case, 38 USC 5301(a)(1) states plainly:

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

This statutory prohibition springs from Congress's Military Powers for purposes of protecting veterans' benefits. *Atlanta v Stokes*, 175 Ga 201, 210-212; 165 SE 270 (Ga 1932); *In re Ballard's Estate*, 293 NYS 31, 32-33; 161 Mis 785 (NY 1937). Its purpose was to afford "continuous support" of persons suffering because of their military service. *Yake v Yake*, 183 A 555; 170 Md. 75 (Md 1936). The Supreme Court stated 38 USC 5301 is to be liberally construed to protect funds granted by Congress "for maintenance and support for beneficiaries thereof" and such funds "remain inviolate." *Porter v Aetna Cas. & Sur Co*, 370 US 159, 162; 82 S. Ct. 1231; 8 L. Ed. 2d 407 (1962). Such payments are exempt "either before or after receipt by the beneficiary". *Id.* As such, "[t]he monies which are paid are preserved by statute for the sole use of the veteran, 'regardless of the technicalities of title and other formalities.'" *American Training Serv's Inc v Veterans* Admin, 434 F Supp 988, 995-96 (DNJ 1977), citing *Porter*, supra. Thus, "[a]ny legal formulation or arrangement which could dilute or evade the literal and historical thrust of the statute's protective provisions must be viewed with appropriate caution." *Id*.

As noted by the Supreme Court in *Howell*, veterans' benefits are a personal entitlement. 137 S. Ct. at 1403, citing *McCarty*, 453 U.S. at

224. Unless federal law lifts the preemptive effect of legislation providing veterans with such benefits, the states cannot exercise authority over these funds. *Howell* ruled that pursuant to this provision, state courts could not exercise authority over *any* non-disposable veterans' benefits under 38 USC 5301(a)(1). *Howell*, 137 S Ct at 1405. The Court said: "State courts cannot 'vest' that which (under governing federal law) they lack authority to give. Cf. 38 USC 5301(a)(1) (providing that disability benefits are generally non-assignable)." The court also noted that equity cannot be used to force the veteran to part with these monies because such orders have the same effect of depriving the veteran of the benefit that Congress intended to be solely for the veteran. *Id*. at 1406. "All such orders are thus preempted." *Id*. See also *Ridgway v Ridgway*, 454 US at 53-56 (holding that under the anti-attachment provision (identical in all respects to 38 USC 5301) a state court could not impose a "constructive trust" on the proceeds in favor of the servicemember's former spouse, stating that such measures by state courts "fail[] to give effect to the unqualified sweep of the federal statute," and that such anti-attachment provisions "ensure[] that the benefits actually reach the beneficiary[,] preempts all state law that stands in its way[,] protects the benefits from legal process

'[notwithstanding] any other law of any State[,] prevents the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy." (internal quotations and brackets removed).

As noted previously, while the Supreme Court in *Howell* recognized the exception for child support and spousal support, citing *Rose v. Rose*, 481 US 619; 107 S Ct 2029; 95 L Ed 2d 599 (1987), the latter case did not address the precise federal statutory language, which under Congress' enumerated Article I powers would preempt state law. It also did not address, as *Howell* did, the principle that it is in fact federal law that preempts state law *unless* Congress lifts the preemption and allows states to exercise authority over these benefits. This is, and always has been the default position. *Howell*, 137 S Ct at 1404, citing *Mansell*, *supra*. *Mansell* and *Howell* came out after *Rose*, but solidified that the default position is not that the states are presumed to have authority, but rather that federal preempts state law even in this area traditionally reserved to the states when we are addressing the provision of military benefits to our nation's servicemembers and veterans.

The precise exclusion in 42 USC 659(h)(1)(B)(iii) was not addressed in and present for consideration by the Court in *Rose*. Federal statutory law now excludes disability pay (other than that portion received if the veteran is also a recipient of retirement pay). Compare, 42 USC 659(h)(1)(A)(ii)(V) with 42 USC 659(h)(1)(B)(iii), and *Rose*, *supra* 634-635, interpreting the now-repealed 42 USC 662(f)(3) (the predecessor section), which *did not contain this exclusion* in subsection (h)(1)(B)(iii). When *Rose* was decided, Congress had not written in this flat exclusion for non-retiree veterans' disability pay. See *Rose*, *supra* at 644-647, White, J., dissenting. Moreover, the Court in *Howell* was addressing the circumstance of a servicemember who is entitled to retired pay and waives that retired pay to receive the disability pay. That is not the case here.

Moreover, the United States Supreme Court recently confirmed in *Howell* that, contrary to the statement, where Congress has pursuant to its enumerated Article I powers prohibited the disposition by state courts of federal disability benefits, state courts have no authority or jurisdiction to enter an order directing a contrary disposition. *Howell*, 137 S Ct at 1405-1406. The Court cited 38 USC 5301(a)(1) and clearly ruled it applies directly to state court orders seeking to compel the

veteran to use disability benefits to pay the former spouse, and not just to garnishment, creditors or attachment proceedings.

The purpose of Congress in enacting 38 USC 5301 was to "prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income." *Rose*, 481 U.S. at 630. For a very limited time (after *Rose v. Rose*), the *judicial* allowance to state courts to force veterans to use their disability pay for child support and spousal support appears to have applied across the board to all disabled veterans. However, Congress realized this worked an inequitable result on a certain subset of disabled veterans; namely those who had been injured and rendered disabled and unable to serve before they had acquired years in service sufficient to also have the financial support and economic security of retirement pay. For this subset of veterans, which, due to the last 3 decades of up-tempo, high-volume deployment and military operations in which the United States has been involved are the largest population of disabled veterans in existence, the significance of this cannot be understated. See Trauschweizer, 32 International Bibliography of Military History 1 (2012), pp. 48-49 (describing the intensity of military operations commencing in the 1990's culminating in full-scale military

involvement in Iraq and Afghanistan during the past three decades). See also VA, Trends in Veterans with a Service-Connected Disability: 1985 to 2011, Slide 4 at: http://www.va.gov/vetdata/docs/QuickFacts/SCD_trends_FINAL.pdf.

Indeed, the country is no longer only faced with the waning population of disabled veterans from the post-Vietnam era and prior. *Rose* was, as noted, a 1987 case, and it necessarily addressed an entirely different population of aging and disabled veterans. Since 1990, there has been a 46 percent increase in disabled veterans, placing the total number of veterans with service-connected disabilities above 3.3 million as of 2011. VA, Trends, *supra*. By 2014, the number of veterans with a service-connected disability was 3.8 million. See U.S. Census Bureau, Facts for Features at: http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff23.html. As of March 22, 2016, the number of veterans receiving disability benefits had increased from 3.9 million to 4.5 million. *Id*. See also VA, National Center for Veterans Analysis and Statistics, What's New at: https://www.va.gov/vetdata/veteran_population.asp. Also, since 1990, there has been a remarkable increase in veterans with disability ratings of 50 percent of higher, with approximately 900,000 in 2011. VA,

Trends, *supra* at slide 6. That same year, 1.1 million of the 3.3 million total disabled veterans had a disability rating of 70 percent or higher. *Id*.

Finally, the disability numbers and ratings for younger veterans has markedly inclined. Conducting an adjusted data search, 570,400 out of 2,198,300 non-institutionalized civilian veterans aged 21 to 64 had a VA service-connected disability at 70 percent or higher in the United States in 2014. See Erickson, W., Lee, C., von Schrader, S. Disability Statistics from the American Community Survey (ACS) (2017). Data retrieved from Cornell University Disability Statistics website: www.disabilitystatistics.org. Thus, according to this data analysis, half of the total number of veterans with a disability rating greater than 70 percent are between 21 and 64 years of age.

The National Veterans Foundation found that over 2.5 million Marines, Sailors, Soldiers, Airmen and National Guardsmen served in Iraq and Afghanistan. Of those, nearly 6,600 were killed, and over 770,000 have filed disability claims. See http://www.nvf.org/staggering-number-of-disabled-veterans/. Yet another study shows nearly 40,000 service members returning from

Iraq and Afghanistan have suffered traumatic injuries, with over 300,000 at risk for PTSD or other psychiatric problems. These veterans face numerous post-deployment health concerns, sharing substantial burdens with their families.

These staggering numbers are, in part, a reflection of the nature of wounds received in modern military operations, modern medicine's ability to aggressively treat the wounded, and modern transportation's ability to get those most severely wounded to the most technologically advanced medical treatment facilities in a matter of hours. Fazal, Dead Wrong? Battle Deaths, Military Medicine, and Exaggerated Reports of War's Demise, 39:1 International Security 95 (2014), pp. 95-96, 107-113. Physical injuries in these situations are understandably horrific. *Id*. See also Kriner & Shen, Invisible Inequality: The Two Americas of Military Sacrifice, 46 Univ. of Memphis L. Rev. 545, 570 (2016). However, many veterans also suffer severe psychological injuries attendant to witnessing the sudden arbitrariness and indiscretion of war's violence. Zeber, Noel, Pugh, Copeland & Parchman, Family perceptions of post-deployment healthcare needs of Iraq/Afghanistan military personnel, 7(3) Mental Health in Family Medicine 135-143 (2010). As one observer has stated: "assignments can shift rapidly from

altruistic humanitarian work to the delivery of immense deadly force, leaving service members with confusing internal conflicts that are difficult to integrate. During deployment, even medical personnel are at times compelled to use deadly force to protect themselves, their patients, and their fellow soldiers." Finley, Fields of Combat: Understanding PTSD Among Veterans of Iraq and Afghanistan (Cornell Univ. Press 2011).

Combat-related post-traumatic stress symptoms (PTSS), with or without a diagnosis of post-traumatic stress disorder (PTSD) can negatively impact soldiers and their families. These conditions have been linked to increased domestic violence, divorce, and suicides. Melvin, Couple Functioning and Posttraumatic Stress in Operation Iraqi Freedom and Operation Enduring Freedom – Veterans and Spouses, available from PILOTS: Published International Literature On Traumatic Stress. (914613931; 93193). See also Schwab, et al., War and the Family, 11(2) Stress Medicine 131-137 (1995).

Such conditions are exacerbated when returning veterans must face stress in their families caused by their absence. Despite the amazing cohesion of the military community and the best efforts of the larger

military family support network, separations and divorces are common. Families, already stretched by this extraordinary burden, are often pushed beyond their limits causing relationships to break down. Long deployments, the daily uncertainty of not knowing whether the family will ever be reunited, and the everyday travails of civilian life are difficult enough. A physical disability coupled with mental and emotional scars brought on by wartime environments make the veteran's reintegration with his family even more challenging. Finley, *supra*.

This younger population of disabled veterans are not entitled to retirement pay because they were injured or wounded during the first few years of their service to the country. Like Appellant, who was only a private first class when he was injured, many disabled veterans in this population do not and will never have the financial security and economic assurances of a retirement pension and all the other benefits that come with being classified as retired. When it became apparent that this growing subset of disabled veterans were also being subjected to having their disability benefits taken by state courts to satisfy support orders in domestic relations cases, Congress acted to differentiate this class of veterans by amending the CSEA and adding 42 U.S.C. §

659(h)(1)(A)(ii)(V) and (h)(1)(B)(iii) distinguishing the two subsets of veterans and the two classes of disability benefits, those which are available to former spouses and minor children from the former group of retiree veterans and those that are not from the latter group of non-retiree veterans.

Because federal law has always preempted state law in this very specific circumstance, any state-court domestic relations order awarding support (child and/or spousal) would be void and unenforceable, both going forward and retroactively. In this case, Appellant's federal disability benefits are specifically excluded from consideration as remuneration for employment, and therefore as income, by 42 USC 659(a); (h)(1)(A)(ii)(V); and (h)(1)(B)(iii). As such, these benefits are jurisdictionally protected from *any legal process* whatever by 38 USC 5301.

Federal law is very clear and has been changed since *Rose v. Rose*. As the Circuit Court noted in this case, if federal law protects the monies that Defendant-Appellee is claiming are due, then the outcome of this case would be different. (App 35a – 36a). The Circuit Court had

all the arguments presented to it, but it did not realize their jurisdictional and legal significance.

A state court that rules incorrectly on a matter preempted by federal law acts in excess of its jurisdiction. *Henry*, 495 Mich at 287, n 82. Such rulings, and the judgments they spring from, including all subsequent contempt and related orders (which would cover the sanctions award here) are *void ab initio* and exposed to collateral attack. The United States Supreme Court has said as much: "That a state court before which a proceeding is competently initiated may – by operation of supreme federal law – lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system." *Kalb*, 308 US at 440, n 12. "The States cannot, in the exercise of control over local laws and practice, vest state courts with power to violate the supreme law of the land." *Id.* at 439. "States have *no power*…to retard, impede, burden, or *in any manner control*, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436; 4 L Ed 579 (1819) (MARSHALL, CJ) (emphasis added). Absent such power, any attempt

by state courts to impede the operation of federal laws must be considered a nullity and void. *Kalb*, *supra*.

This Court has the constitutional authority and indeed the duty to say what federal law requires and to abide by that law pursuant to the Supremacy Clause of the United States Constitution. *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994) (stating that "[w]here federal questions are involved [this Court] is bound to follow the prevailing opinions of the United States Supreme Court.") (internal citations omitted); *City of Detroit v Ambassador Bridge*, 481 Mich 29, 36; 748 NW2d 221 (2008). It is necessary for this Court to address lower court decisions that "misapplied constitutional principles and United States Supreme Court precedent…." *People v Bryant*, 491 Mich 575, 583, n 5; 822 NW2d 124 (2012). See also *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994) (stating: "When a court incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct.").

II. BECAUSE FEDERAL LAW PREEMPTS STATE LAW AND JURISDICTIONALLY PROHIBITS THE STATE COURT FROM CONSIDERING APPELLANT'S DISABILITY PAY FOR CALCULATION OF ANY CHILD SUPPORT OR SPOUSAL SUPPORT AWARD THE AWARD OF SANCTIONS (ATTORNEYS FEES AND COSTS) WAS NOT JUSTIFIED AND THE CIRCUIT COURT'S AWARD OF SANCTIONS WAS ALSO ERROR BECAUSE IT WAS BASED ON THE MISTAKEN ASSUMPTION THAT THERE WAS NO MERIT TO APPELLANT'S ARGUMENTS.

A. Standard of Review

This Court reviews a trial court's decision to award attorney fees and its determination of the reasonableness of the fees for an abuse of discretion. *Teran v Rittley*, 313 Mich App 197, 208; 882 NW2d 181 (2015), citing *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). A trial court abuses its discretion when it selects an outcome that is "outside the range of reasonable and principled outcomes." *Id*. This Court reviews a trial court's findings of fact underlying the attorney fee award under the "clear error" standard. *Id*. "A finding is clearly erroneous if the Court is left with a definite and firm conviction that a mistake has been made." *Cassidy v Cassidy*, 318 Mich App 463, 479; 899 NW2d 65 (2017). Questions of law concerning the attorney fees award are reviewed *de novo*. *Teran*, *supra* at 208.

A trial court's finding that a claim was frivolous is reviewed for clear error. *In re Attorney Fees & Costs*, 233 Mich App 694, 701; 593 NW2d 589 (1999). "A trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*.

B. Applicable Law

The party requesting attorney fees has the burden of showing facts sufficient to justify the award. *Borowsky v Borowsky*, 273 Mich App 666, 687; 733 NW2d 71 (2007). See also *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010). Michigan follows the American rule concerning attorney fees and costs (sanctions). Sanctions may only be awarded by statute or court rule. *Featherston v Steinhoff,* 226 Mich App 584, 592-593; 575 NW2d 6 (1997).

C. Analysis

The rule originally cited as justifying an award of sanctions in this case was MCR 2.114. The trial court entered a judgment on the sanctions award for what it deemed were meritless and frivolous arguments. This would have been awarded under MCR 2.114, which has been repealed and essentially transferred to MCR 1.109(E). Such

awards are not to be punitive. *Id*. Pursuant to MCR 2.114(F) (now MCR 1.109(E)), a party pleading a frivolous claim is subject to costs as provided in MCR 2.625(A)(2), which states that "costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

This Court has held where a legal argument is asserted for the first time and has not been directly addressed, and where there is at least statutory and case law supporting it, even if rejected by the Circuit

Court or this Court, ultimately, is not so lacking in legal merit as to support a conclusion that plaintiff's action was frivolous. *AG v Harkins*, 257 Mich App 564, 576-77; 669 NW2d 296 (2003) "Sanctions are not required and should not be imposed merely because the legal argument advanced by a litigant is rejected by the court." *Id*. Where, as here, there is no developed case law on the exact application of 42 USC 659(h)(1)(B)(iii) and 38 USC 5301, and where the unanimous Supreme Court decision in *Howell* held in 2017 that 38 USC 5301 would divest a state court of the jurisdiction and authority to award federal veterans disability pay to a former spouse where Congress has not authorized such an award, sanctions under MCR 1.109(E) and/or MCR 2.625 are not warranted. Indeed, in this case, the Circuit Court expressed a willingness to arrive a different conclusion if Congress and the United States Supreme Court considered the specific disability benefits at issue as non-disposable veterans' disability benefits that were not to be subjected to state court support awards in domestic relations proceedings. (App 35a – 36a)

Moreover, where federal law preempts state law, and the state court entered an order or award contrary to such law, it had no jurisdiction or authority to do so and its award of sanctions based on that void order

would also be void. Where the original judgment of a court is void, subsequent orders dependent upon the ostensible legitimacy of the original order will not be sustained. *Bowie v Arder*, 441 Mich 23, 57; 490 NW2d 568 (1992). "Where the order which is alleged to have been violated was made without jurisdiction, and required what the court had no right to require as a matter of legal authority, of course it has no force…." *Haines v Haines*, 35 Mich 138, 143 (1876) (CAMPBELL, J). See also *Lessee of Hickey v Steward*, 44 US (3 How) 750, 762; 11 L Ed 814 (1845) and 1 Freeman, Judgments (5th ed) (1925), § 322, pp 643-645.

The Michigan Supreme Court has long held where federal law occupies the field and preempts state law, "[t]he State courts are without jurisdiction in the most elementary sense." *Town & Country Motors Inc v Local Union No 328*, 355 Mich 26, 54-55; 94 NW2d 442 (1959). The Court continued: "The order of the court being void for want of jurisdiction over the subject matter, we cannot remit to such court the fruitless task of ascertaining whether or not certain acts of the defendants constituted a "contempt" of the void order." *Id*. The sanctions award was based on the reasoning that Appellant's argument was devoid of legal merit.

However, Appellant has demonstrated plain language of federal law that applies directly to his circumstance. Thus, his arguments cannot be deemed meritless or frivolous under this Court's prior enunciations of those standards. *Harkins*, *supra*.

Moreover, if federal law preempts state law in this particular circumstance, the Circuit Court would not have had subject matter jurisdiction to enter an order contrary to the prevailing federal law. Thus, any subsequent orders based on that void order would be equally void. *Bowie*, *supra*; *Haines*, *supra*; *Town & Country Motors*, *supra*.

CONCLUSION

As noted previously, federal law preempts state law concerning disposition of VA disability pay unless Congress has lifted that authority. Congress does so in limited and precise ways. The USFSPA does it with respect to a portion of disposable retired pay, only. The CSEA does it with respect to a portion of disability pay that is received in lieu of waived retired pay. 42 USC 659(h)(1)(A)(ii)(V). Otherwise, 42 USC 659(h)(1)(B)(iii) says that pure disability pay is not to be counted as income. Furthermore, Congress has explicitly and broadly protected these benefits from any legal process whatever. 38 USC 5301.

This includes any state court order that would require these funds to be paid over to another by the veteran.

Appellant is a non-retiree, disabled veteran. Therefore, he is the recipient of 100-percent pure VA service-connected veterans' disability benefits paid under Title 38. He is not a recipient of, nor is he eligible for, military retired pay. Therefore, he has not waived retired pay to receive disability pay. See 42 USC 659(h)(1)(B)(iii); 5 C.F.R. § 581.103(c)(7). The disability benefits that Appellant does receive are those addressed in 42 USC 659(h)(1)(B)(iii). As these benefits are protected by federal law pursuant to 38 USC 5301(a)(1) from any legal process whatever, whether paid in the past, due or to become due, state courts have a continuing obligation to comply with preemptive federal law and must ensure these funds are received by the beneficiary, and not included in or made a part of any calculation of spousal support and/or child support, or attorney fee award.

Howell held state courts are prohibited from "vesting" entitlement to these benefits in anyone other than the beneficiary. *Id*. at 1405-1406, citing 38 USC 5301(a)(1). As these benefits cannot be directly or indirectly subjected to legal process, they cannot be "counted" or

otherwise used in calculating spousal support or child support in any proceeding in which Appellee seeks to have them included.

Federal law preempts state law in this area. Where federal law preempts state law, Michigan courts have long held that subject matter jurisdiction is lacking, and the court may issue a ruling contrary to the prevailing federal law. Such orders that emanate from such unauthorized rulings may also be attacked as void. This would, of necessity, include the order awarding sanctions against Appellant. His arguments are supported by the plain and unambiguous language of 42 USC 659(h)(1)(B)(iii) and 38 USC 5301, both of which were cited by him and presented as supporting his contention that his disability benefits under the circumstances of his particular case cannot be included in his child support obligations to Appellee. Therefore, his arguments were not frivolous or meritless.

RELIEF REQUESTED

Appellant respectfully requests that this Court grant leave to appeal or summarily reverse the Court of Appeals and hold the federal disability pay he receives is not to be counted as income, nor used or

otherwise considered in calculating his support obligations to Appellee, and Appellee's counsel is not entitled to sanctions.

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CERTIFICATE OF COMPLIANCE

In accordance with Administrative Order No. 2019-6, this brief contains 15,109 words (as identified by the Microsoft Word "word count" function) and was prepared using the proportional font typeface Times New Roman set at 14-point.