

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

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DEBORAH LYNN FOSTER,

Supreme Court No.: 157705

Plaintiff/Counterdefendant-Appellee,

Court of Appeals No.: 324853

v

Dickinson County Circuit Court Case No.:  
07-015064-DM

RAY JAMES FOSTER,

Defendant/Counterplaintiff-Appellant.

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**BRIEF OF AMICUS CURIAE STATE BAR OF MICHIGAN, FAMILY LAW SECTION**

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**I. STATEMENT OF QUESTION PRESENTED**

Whether the principles set forth in *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), *reh'g denied*, *cert denied*, 498 US 806, 111 S Ct 237 (1990), and *Howell v Howell*, 581 US \_\_\_\_; 137 S Ct 1400; 197 L Ed 2d 781 (2017), prevent enforcement of a consent judgment of divorce involving combat-related special compensation (CRSC), 10 USC 1413a:

|                                |     |
|--------------------------------|-----|
| The Family Law Section answers | NO  |
| Appellant answers              | YES |
| Appellee answers               | NO  |
| The Court of Appeals answers   | NO  |

## II. STATEMENT OF INTEREST OF AMICUS CURIAE FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN

Michigan has many military families, and its family court system encourages the consensual resolution of divorce cases. The Family Law Section has an interest in ensuring that all family members are treated fairly in divorce and that consent judgments are enforceable. In this case, a party is making a collateral attack on their own agreement to evade their commitments. This undermines the concept of *res judicata* and would lead to unfair results.

The Family Law Section believes that the first two questions that the Court asked in its Order entered November 7, 2018, granting the application for leave to appeal and identifying issues to be addressed have been well covered by counsel for the parties and our input would be redundant. The Section, therefore, only addresses the Court's third question – whether the Court of Appeals was correct in upholding the Dickinson Circuit Court's contempt order against the defendant. Because proper application of *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989) and *Howell v Howell*, 581 US \_\_\_\_; 137 S Ct 1400; 197 L Ed 2d 781 (2017) do not prevent state courts from enforcing the agreement made by the parties and incorporated into their judgment of divorce, the decision of the Court of Appeals should be affirmed.

## III. BRIEF REVIEW OF KEY FACTS

The parties were divorced in December 3, 2008, ending a thirty-year marriage. They agreed to the terms of their judgment, which incorporated the terms of the property settlement the parties had previously negotiated. The judgment provided that the wife (Deborah) waived any claim to spousal support. In exchange, the judgment included the following provision to ensure Deborah a fair share of Ray's benefits, no matter what form they took:

“If Defendant should ever become disabled, either partially or in whole, then Plaintiff's share of Defendant's entitlement shall be calculated as if Defendant had not become disabled. Defendant shall be responsible to pay, directly to Plaintiff, the sum to which she would be entitled if Defendant had not become disabled.

Defendant shall pay this sum to Plaintiff out of his own pocket and earnings, whether he is paying that sum from his disability pay or otherwise, even if the military refuses to pay those sums directly to Plaintiff. If the military merely reduces, but does not entirely stop, direct payment to Plaintiff, Defendant shall be responsible to pay directly to Plaintiff any decrease in pay that Plaintiff should have been awarded had Defendant not become disabled, together with any Cost of Living increases that Plaintiff would have received had Defendant not become disabled. Failure of Defendant to pay these amounts is punishable through all contempt powers of the Court.”

Before entering the judgment, the trial court questioned Ray to make sure he understood the terms of the agreement and questioned Deborah to be sure she could support herself without spousal support. Her response, as conveyed at oral argument before the Court, was that with her earnings and the military pay, she could support herself.

After the judgment was entered Ray qualified for, and elected to receive, Combat Related Special Compensation (CRSC). In order to receive CRSC, Ray waived an equal amount of his military retirement pay. DFAS continued to send Deborah 50% of Ray’s military retirement pay, but was not authorized to send her any of the CRSC. This reduced the amount Deborah received from \$812 per month to \$212 per month. Deborah filed a motion with the court to enforce the Judgment of Divorce, and the court ordered Ray to pay Deborah the shortfall in accordance with the specific language of the judgment. Ray eventually fell behind in these payments. He appealed the trial court’s enforcement of his agreement, arguing that federal law protects him from having to comply with the judgment which embodied his part of the agreement, while allowing him to keep the benefit of the spousal support concessions that Deborah made.

#### IV. ARGUMENT

- A. ***Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), reh'g denied, cert denied, 498 US 806, 111 S Ct 237 (1990) establishes that although a state court may not divide military disability benefits as marital or community property, the court may enforce the parties' agreement regarding those benefits under the principles of *res judicata*.**

Major Mansell and his wife were divorced in California in 1979. Major Mansell was receiving military retirement pay, but waived a portion of that pay in favor of receiving non-taxable disability benefits. The parties negotiated an agreement which provided that Mrs. Mansell would receive an amount equal to 50% of Major Mansell's total military retirement pay, including the portion he had waived in favor of disability benefits.

In 1983 Major Mansell petitioned the trial court to modify the judgment of divorce to only require him to pay 50% of the military retirement pay he received, with no consideration of the retirement pay he waived in order to receive disability benefits. He believed that the U.S. Supreme Court decision in *McCarty v McCarty*, 453 US 210; 101 S Ct 2728; 69 L Ed 2d 589 (1981) prohibited the trial court from any consideration of his veteran's disability benefits. The trial court disagreed, and was affirmed by the California Court of Appeal, 5 Civ No F002872 (Jan. 30, 1987). The California Court of Appeal held that the Uniformed Services Former Spouses Protection Act (USFSPA), 10 USC 1408, legislatively overruled *McCarty* and that federal law no longer preempted state community property law as it applied to military retirement pay. The California Supreme Court denied Major Mansell's petition for review.

The U.S. Supreme Court reversed the California court in *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989). The court held that the USFSPA did not legislatively overrule *McCarty*, but only carved out specific exceptions to federal preemption. The USFSPA allowed state courts to treat disposable military retirement or retainer pay as community property, but it did not extend that allowance to veteran's disability benefits. Because the California court

incorrectly held that it had jurisdiction to divide all military retirement pay, including amounts that were waived in favor of veteran's disability benefits, the U.S. Supreme Court reversed their decision and remanded the case for further proceedings not inconsistent with their opinion.

Importantly, those "further proceedings" were guided by footnote 5 of the court's opinion, which provides:

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

When the case returned to the California trial court, Mrs. Mansell argued that modification of the terms of the property settlement incorporated in the judgment of divorce was barred by *res judicata*. The trial court agreed, and this ruling was upheld on appeal, *Mansell v Mansell*, 216 Cal App 3d 937; 265 Cal Rptr 227 (1989). Even though the original trial court did not have authority to divide the disability benefits, the husband "consented to said act when he signed the stipulated property settlement agreement, and he is therefore barred from complaining." 265 Cal Rptr at 233.

Major Mansell petitioned the U.S. Supreme Court for certiorari but was denied, *Mansell v Mansell*, 498 US 806; 111 S Ct 237 (1990), which left the California order in place. Major Mansell could be required to pay his ex-wife a portion of the military retirement pay he had waived in favor of receiving veteran's disability benefits, not because the court could treat those benefits as marital property, but because of his agreement which had been entered into a judgment and never appealed. Enforcement of the agreement based on state law principles of *res judicata* was permissible, and did not invoke any issues of federal law.

The military retirement provision in *Foster* is very similar to the provision in *Mansell* and should be treated similarly. It was incorporated into the divorce judgment based on the agreement of the parties, and the judgment was never appealed. The trial court may refuse to modify the property division in the judgment of divorce as a matter of *res judicata*.

**B. *Howell v Howell*, 581 US \_\_\_\_; 137 S Ct 1400; 197 L Ed 2d 781 (2017) followed *Mansell* and emphasized that the provision for division of military retirement pay in the judgment of divorce must be adhered to, and cannot be modified by the court.**

In *Howell, supra*, the judgment of divorce awarded the wife 50% of the disposable military retirement pay. When the husband qualified for veteran's disability benefits and chose to waive part of his military retirement pay in favor of those benefits, the ex-wife's payments were reduced. She asked the court to modify the judgment to increase her percentage of the military retirement pay to make up for the reduction, even though the judgment did not provide for any adjustment. The U.S. Supreme Court found *Mansell, supra*, to be controlling authority, and held that state courts had no authority to treat veteran's disability benefits as marital or community property. Whether the state court called it indemnification or reimbursement, the court could not change the judgment to recoup any portion of the veteran's disability benefits that the court had no authority over. *Howell* is materially different from *Mansell* because the judgment did not have any provision to account for waived military retirement pay. In *Howell*, the court was not enforcing the judgment, but was attempting to modify the judgment. *Res judicata* did not apply in that circumstance.

In section II of its opinion in *Howell*, the Supreme Court noted that the military retirement pay provision of the judgment of divorce did not account for a possible waiver of military retirement pay. In acknowledging some potentially unfair results, the Court noted:

“But we note that a family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement

pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support.”

*Howell*, *supra*, 137 S Ct at 1406. Thus, *Howell* allows state courts to take potential future waivers of military retirement pay into account at the time of the judgment in order to ensure a fair result. This could take the form of a reservation of spousal support or, if the service member wanted to avoid spousal support, a method to calculate the payments to the spouse regardless of the waiver.

*Howell*’s emphasis on the permissibility of a state court enforcing the original judgment supports the circuit court’s enforcement of the judgment in *Foster*. In addition, *Howell*’s suggestion that family courts take potential waivers of military retirement pay into account in their initial determination is exactly what was done in the *Foster* judgment of divorce. *Howell* continues *Mansell*’s recognition of *res judicata* and justifies affirming the Court of Appeals in *Foster*.

## V. CONCLUSION

The Family Law Section notes that the distinction between enforcing a consent judgment, based on rules of *res judicata*, is fundamentally different from amending a judgment in a way that contravenes federal law, even if amendment is based on equitable principles. In *Foster*, like *Mansell* and unlike *Howell*, only enforcement is necessary to the just resolution of the case. The Court of Appeals should be affirmed, and Mr. Foster held to perform his promise just as Ms. Foster is held to her interdependent waiver of spousal support.

Respectfully submitted,



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