SUPREME COURT OF LOUISIANA

DOCKET NUMBER 2020-C-985

YVONNE RENEA BOUTTE,
Plaintiff-Respondent

versus

KEVIN LEE BOUTTE
Petitioner-Applicant.

Application for a Writ of Certiorari from a July 8, 2020
decision by the Court of Appeal, Third Circuit, State of Louisiana
Docket No. 19-734, affirming a decision of the
36th District Court for the Parish of Beauregard,
Civil Docket No. C-2010-1241-B, June 24, 2019
Judge C. Kerry Anderson presiding

OPPOSITION TO ORIGINAL APPLICATION FOR A WRIT OF CERTIORARI

FAMILY LAW MATTER

BY:

CHARLES G. BLAIZE, (#25575)
FREDERIC C. FONDREN, #23733
MAYHALL FONDREN BLAIZE
628 Wood Street
Houma, LA 70360
Telephone: 985-223-4725
Facsimile: 985-851-3069

COUNSEL FOR PLAINTIFF-RESPONDENT
YVONNE RENEA BOUTTE

APPELLEE'S STATEMENT OF THE CASE

Kevin Boutte's writ application represents the latest installment in his long-time quest to weasel out of what he has repeatedly promised to do: resume paying his ex-wife an amount equal to 43% of his military benefit. He thinks he has finally found the magic bullet: the 2017 case of *Howell v. Howell*, ___ U.S. ___, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017), in which the United States Supreme Court held that a state may not require a Veteran to indemnify his ex-wife for the loss of her portion of the Veteran's retirement pay caused by the Veteran's waiver of such retirement pay in order to receive service-related disability benefits.

As the court of appeal noted, however, *Howell* does not come into play at all, because the question is one of *res judicata*—not substantive application of the federal statutes governing the division of military benefits in divorce settlements. *Remarkably, in his entire writ application, Kevin doesn't address what the court of appeal characterized as the "only issue" before the court on appeal: "whether the trial court erred in finding that res judicata applied to a consent judgment in a family law case."* (Ct. Appeal J. at 3.)

Not only does Kevin's Michigan lawyer fail to discuss the Louisiana law of *res judicata*, but he fails to discuss the possible grounds under Louisiana law for nullifying his 2014 consent judgment. Perhaps that was by design, because none of the possible grounds apply in this case. Even if they did, it would not matter, because Kevin unquestionably "acquiesced" in the consent judgment, and is thus statutorily barred from attempting to nullify it.

As explained below, neither *Howell* nor the preemption doctrine presents any impediment to enforcing the consent judgment in which Kevin agreed to "resume" paying an amount to his ex-wife equal to 43% of his military benefits. Kevin's misbegotten writ application should be summarily denied.

APPELLEE'S RESTATEMENT OF THE FACTS

Kevin agrees in 2012 to pay Yvonne 43% of his "military retirement pay and/or benefit" in exchange for Yvonne's giving up permanent spousal support.

Kevin Boutte retired from the military in 2009, and his wife Yvonne Boutte filed a petition for divorce on December 21, 2010. (R. at 9-15, Pet. divorce.) The parties ended their initial litigation over the divorce and ancillary matters by entering into a consent judgment on

January 19, 2012 that entitled Yvonne to 43% of Kevin's "military retirement pay ***and/or benefit***." (R. at 49-51, 1/19/12 Consent J., emphasis added.)

At the time that the parties entered the 2012 consent judgment, both Yvonne and Kevin believed that she would be able to prove that Kevin was at fault because of his multiple infidelities, and establishing fault was a prerequisite for Yvonne to be entitled to permanent spousal support: a result that Kevin certainly did not want. (R. at 357-58, 376-81, Hr'g Tr.) Therefore, Kevin's agreement to pay the 43% was a critical element of the parties' negotiations; it was the reason why Yvonne agreed to only 30 months of spousal support rather than permanent support. (R. at 381.)

Kevin converts his military retirement pay to disability pay and stops paying Yvonne the agreed 43%.

After the 2012 consent judgment was executed, Kevin, who claims to suffer from PTSD, mood disorder, and cognitive disorder, applied in 2013 to have his retirement pay converted to a form of disability pay called Combat Related Special Compensation ("CRSC"). (R. at 279, CRSC decision letter.) This request was granted in early 2014. (*Id.*)[1] Because CRSC pay is generally not divisible as community property under federal law, the Defense Finance and Accounting Service ("DFAS"), which had been issuing payments for the 43% directly to Yvonne, stopped making payments to her. (R. at 306, 381-82.) When Yvonne notified Kevin about DFAS's action and asked him to resume the payment in accordance with the consent judgment, Kevin "said he was not going to pay it, and that he would see [her] in court." (R. at 383.) Despite knowing that the 43% was an important consideration in the settlement calculus, and despite knowing that both parties intended that Yvonne would receive these benefits until Kevin's death and that he would do nothing to stop this (R. at 358), Kevin refused to make any further payments to Yvonne after DFAS stopped making automatic payments to her. (R. at 327-28.)

[1] It was understood by the parties that Kevin's VA Disability pay was not part of the 2012 consent judgment, as evidenced by further language in the judgment referring solely to "pension benefits" or "retirement pay." (R. at 50-51.) At the time of the April 29, 2019 hearing, Kevin was receiving $3,139 monthly in VA Disability pay, and $1,481 monthly in CRSC pay. (R. at 346.) It is only Yvonne's entitlement to half of the $1,481 monthly CRSC pay that is in dispute; she has never claimed any share of the VA Disability pay.

A 2014 consent judgment requires Kevin to "resume" paying Yvonne 43% of his "military . . . benefit."

In response, Yvonne filed a Rule for Contempt and/or Rule for Allocation of Assets Pursuant to R.S. 9:2801.1. (R. at 54-56.) Kevin challenged this pleading raising Exceptions of No Cause of Action and No Right of Action, and arguing that he was not required to pay Yvonne any portion of the CRSC because it was not subject to division as community property. (R. at 285-93, Exceptions.) Kevin – who was at all times represented by counsel – withdrew his exceptions, and the parties agreed to a stipulated consent judgment that was signed by the trial court on June 6, 2014 and provided, *inter alia,* as follows:

> IT IS FURTHER ORDERED, ADJUDGED, DECREED AND STIPULATED that the parties agree that the defendant, KEVIN LEE BOUTTE, shall ***resume*** payment to the plaintiff, YVONNE RENEA BOUTTE of her forty three percent (43%) interest in the defendant's military retirement pay ***and/or benefit*** including cost of living expenses as ordered by the Consent Judgment and Voluntary Partition Agreement dated January 19th, 2012.

(R. at 77-78, emphasis added.)

Pursuant to this consent judgment, and in order to avoid sanctions for contempt, Kevin resumed paying 43% of his CRSC to Yvonne. (R. at 364, 373.)

In 2018, Kevin seeks to re-litigate whether he must continue paying 43% of his "retirement . . . benefit" to Yvonne.

On August 22, 2018 – more than four years after acquiescing to the 2014 consent judgment – Kevin filed a Petition for Declaratory Judgment, Alternative Petition to Annul Judgment, and Alternative Petition to Modify MDRO, seeking to re-litigate the issue he had raised in 2014 as to whether he was required to continue paying Yvonne 43% of his CRSC pay. (R. at 81-90). In response, Yvonne filed Exceptions of Res Judicata, No Cause of Action, and No Right of Action, and in the Alternative, Petition for Specific Performance and Injunctive Relief. (R. at 95-103.)

The trial court properly sustains the res judicata exception.

At the hearing of the exceptions on April 29, 2019, the trial court sustained the exception of *res judicata*, denying Kevin's 2018 Petition. (R. at 388-91.) As the trial court explained,

> [B]asically what Mr. Hesser is artfully trying to do for his client is the same thing that could have been argued on May 22nd, 2014, and that is under Federal law and the prior judgment in this matter, Mr. Boutte doesn't have to pay Ms. Boutte anything. And the parties

> agreed differently on May 22nd, 2014. Not only did the parties agree differently in a judgment based upon that stipulation was rendered, but Mr. Boutte has in accordance with that agreement and judgment continued to pay.

(R. at 388.)

The trial court further explained that the conversion to CRSC pay had *already occurred* by the time that Kevin litigated the issue in 2014 as to whether he was required to continue paying 43% of his military benefit. (R. at 389.) Thus, the issue that Kevin raised in 2018 (and in this appeal) about the CRSC pay is essentially the same issue as what he had already litigated in 2014. (*Id.*)

The court of appeal correctly affirms the trial court's ruling.

Kevin appealed. The only issue presented to the court of appeal was "whether the trial court erred in finding that res judicata applied to a consent judgment in a family law case." (Ct. Appeal J. at 3.) The court of appeal affirmed the trial court.

The court of appeal rejected Kevin's argument that the case was not "actually adjudicated" for *res judicata* purposes because the consent judgment did not expressly refer to disability pay. (*Id.* at 5-6.) The court noted that in light of the conduct of the parties and the reference in the consent judgment to "retirement pay and/or benefit," the "only logical conclusion" was that the matter of disability pay was adjudicated. (*Id.* at 6.) The court of appeal further explained that under Louisiana law, consent judgments settling property matters are adjudications. (*Id.* at 6-7.)

The court of appeal noted that in *Howell v. Howell*, ___ U.S. ___, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017), the Supreme Court held that military disability pay is not divisible as community property. But the court of appeal found that *Howell* did not apply because the issue had already been litigated. Thus, it affirmed the exception of *res judicata*. (*Id.* at 8.)

As explained below, both lower courts correctly applied the law of *res judicata*. Kevin's writ should thus be denied.

ARGUMENT

Section 1 explains that the lower courts correctly found that *res judicata* bars Plaintiff's attempts to re-litigate what was adjudged in 2014. Section 2 shows that there are no applicable mechanisms by which Kevin can nullify the judgment – especially since he acquiesced in the judgment. Finally, Section 3 shows that neither *Howell* nor the preemption doctrine precludes Louisiana courts from enforcing the consent judgment in which Kevin promised to "resume" paying an amount equal to 43% of his military disability pay to Yvonne.

1. The lower courts properly sustained the *res judicata* exception because Kevin's latest attempt to avoid paying any of his military benefit to his ex-wife is the same action he litigated back in 2014.

The trial court correctly applied the law of *res judicata*, which provides as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) *If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.*
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment

R.S. 13:4231 (emphasis added).

In 2014, Yvonne Boutte filed a Rule for Contempt and/or Rule for Allocation of Assets after Kevin Boutte had his military retirement pay converted to CRSC pay and then stopped paying any of his military benefits to Yvonne. (R. at 54-65.) In this pleading, Yvonne specifically alleged that Kevin had agreed to pay 43% of his "military retirement pay and/or benefit" in a 2012 consent judgment and had promised her that he would not do anything to interfere with her future receipt of these payments, but that he breached these obligations. (R. at 54-55.) Kevin filed exceptions to this Rule, arguing that he was no longer obligated to make

payments to Yvonne because he had his retirement pay converted to CRSC pay, and CRSC pay is not generally subject to division as a community asset. (R. at 68-76.)

The litigation over this issue ended in a consent judgment in which Kevin stipulated that he was in contempt of court, and that he would "resume" paying Yvonne 43% of his "military retirement pay and/or benefit" (and also that he would pay an arrearage from when he had stopped making payments). (R. at 77.) Under the *res judicata* statute, this judgment "in favor of the plaintiff" (Yvonne) regarding her entitlement to continue receiving 43% of Kevin's CRSC pay is "conclusive" between Kevin and Yvonne, and the "issue" of whether Kevin is required to continue paying Yvonne 43% of his CRSC pay cannot be re-raised. R.S. 13:4231. Thus, Kevin's attempt four years later to re-litigate precisely the same issue of whether he is required to continue paying Yvonne 43% of his CRSC pay, was properly rejected on *res judicata* grounds.

Kevin's lead argument on appeal was that under R.S. 13:4232(B), *res judicata* does not apply to "an action for partition of community property and settlement of claims between spouses under R.S. 9:2801" unless the causes of action are "actually adjudicated," and according to Kevin, a consent judgment is not an "adjudication." (Appellant's Br. at 12-15.) The court of appeal properly rejected this argument. It cited *Riche v. Riche,* 09-1354 (La.App. 3 Cir. 4/7/10), 34 So.3d 1004, in which the court held that a compromise in a community settlement was "actually adjudicated," citing La. C.C. art. 3080, which precludes subsequent litigation on a matter that is compromised. The *Riche* court further noted that:

> Comment (b) to article 3080 provides that the preclusive effect of the article is tantamount to that of former article 3078, which provided that a transaction or compromise had the effect of a thing adjudged; therefore, res judicata would attach as though the document were a judgment.

Id. at 1008.

Other authorities showing that a consent judgment is an "adjudication" for purposes of R.S. 13:4232(B) include *Fletchinger v. Fletchinger*, 2010-0474 (La.App. 4 Cir. 1/9/11); 56 So.3d 403, 406. In *Fletchinger,* the trial court found that a consent judgment entered into by a husband and wife constituted a final judgment allocating all former community property between parties, and that *res judicata* precluded re-litigation in divorce proceedings of the proper allocation of certain property. *Id.* The trial court noted that the consent judgment was entered after "hours of

wrangling between the parties, their counsel, and the trial court" and that the relevant language in the consent judgment was "clear and unambiguous." *Id.*

The same thing is true in the instant case. The parties each filed pleadings on the issue of whether Kevin was required to continue paying Yvonne 43% of his CRSC benefit, and there was a hearing on May 22, 2014, culminating in stipulations and agreements between the parties that involved the superintendence of the trial court. (R. at 77-78, 2014 consent J.) The resulting consent judgment unambiguously stated that Kevin would "resume" paying Yvonne 43% of his "military retirement pay and/or benefit." (*Id.*) The *only* "military retirement pay and/or benefit" at issue was the CRSC pay, so there can be no doubt that the parties intended to conclude their litigation by Kevin's agreeing to "resume" paying Yvonne 43% of his military "benefit" which at this time existed only in the form of CRSC pay. Just like in *Riche*, the language in the consent judgment made it clear that Kevin and Yvonne did not reserve any other issues for litigation for a later date.

The 1991 comment to R.S. 13:4232 underscores that the exceptions of R.S. 13:4232(B) apply *only* when the "judgment is silent as to the actions in question." In the case at bar, the consent judgment is far from "silent as to the actions in question"; it very clearly addresses the sole "action in question" by stating that Kevin "shall resume payment" to Yvonne for 43% of his "military retirement pay and/or benefit." Thus, the court of appeal correctly found that "the only logical conclusion to be reached is that the benefits referenced in the 2014 Consent Judgment are the CRSCD benefits" – and that this issue was adjudicated for *res judicata* purposes. (Ct. Appeal J. at 6, 7.)

Other jurisdictions have similarly applied *res judicata* to bar a Veteran's challenge to a prior agreement concerning the vision of military benefits. *Edwards v. Edwards*, 132 N.E.3d 391, 396-97 (Ind. Ct. App. 2019). Kevin falsely claims that the *Edwards* court required the trial court to modify the judgment to reflect Kevin's view of federal law. It did not. The *Edwards* court simply held that *res judicata* barred the Veteran's challenge to his prior agreement – just as the court of appeal correctly found in the case at bar.

2. Kevin cannot assert an applicable Louisiana grounds for nullifying the consent judgment.

Just as Kevin fails to address the Louisiana law of *res judicata*, he fails to address the possible grounds for nullifying a judgment. And for good reason: none of them are applicable to the case at bar.

In Louisiana, a judgment can be annulled for vices of form or substance. La. C.C.P. art. 2001. The only recognized vice of substance is when the judgment was obtained by fraud or ill practices. La. C.C.P. art. 2004(A). Kevin has never alleged fraud or ill practices, much less provided evidence of such, and even if he had, his claim would be prescribed since it wasn't brought within a year of discovery of it. La. C.C.P. art. 2004(B).

The only possible vices of form are set forth in La. C.C.P. art. 2002(A):

> A. A final judgment shall be annulled if it is rendered:
>
> (1) Against an incompetent person not represented as required by law.
>
> (2) Against a defendant who has not been served with process as required by law and who has not waived objection to jurisdiction, or against whom a valid judgment by default has not been taken.
>
> (3) By a court which does not have jurisdiction over the subject matter of the suit.

Kevin fails to directly raise any of these grounds. He indirectly raises the third of these grounds, implying in his writ application that the state courts lacked subject-matter jurisdiction over his claim because federal law preempts state law with respect to the division of military benefits upon divorce. This conflates an alleged legal error with a lack of jurisdiction. Louisiana courts unquestionably have jurisdiction to divide assets in a divorce, even when some of the assets are governed by "preempt[ive]" federal law. *E.g.*, R.S. 9:2801.1. A "purported violation" of preemptive federal rules governing divisibility of military disability benefits upon divorce "does not" strip courts of subject-matter jurisdiction. *Tarver v. Reynolds*, No. 2:18-CV-1034-WKW, 2019 WL 3889721, at *6 (M.D. Ala. Aug. 16, 2019) (citing decisions of numerous different state courts). *See also Edwards*, 132 N.E.3d at 395-96.

In any event, even if the Louisiana state courts lacked subject-matter jurisdiction regarding the 2014 consent judgment, Kevin is barred from raising such grounds to nullify the judgment, because he undisputedly "acquiesced" in the consent judgment. La. C.C.P. art. 2003 (providing that a defendant "who voluntarily acquiesced in the judgment . . . may not annul the

judgment on any of the grounds enumerated in Article 2002"). Kevin simply does not have a viable avenue to avoid the promise he made to Yvonne.

3. *Howell* provides no impediment to enforcing Kevin's agreement to "resume" paying Yvonne payments pursuant to their settlement agreement.

Kevin's keystone argument is based on the 2017 case of *Howell v. Howell*, ___ U.S. ___, 137 S.Ct. 1400, 197 L.Ed.2d 781 (2017). In *Howell*, the Court held that a state court may not order a Veteran to indemnify a divorced spouse for the loss of the divorced spouse's portion of the Veteran's retirement pay caused by the Veteran's waiver of such retirement pay to receive service-related disability benefits. *Howell,* 137 S.Ct. at 1402. In other words, if a property settlement includes military retirement pay, and the Veteran later waives part of that retirement pay in order to receive CRSC pay, the Veteran is not required to pay the divorced spouse part of the CRSC pay in order that the recipient spouse will continue receiving the same amount. Rather, the recipient spouse has no "vested interest" in receiving an amount equal to her original share of the retirement pay, because the retirement pay was always subject to the "contingency" that it could be waived and converted to CRSC pay. *Id.* at 1404-06.

Contrary to Kevin's narrative, however, "*Howell* does not hold that a state court cannot enforce a property division by ordering a service member who unilaterally stops making payments the service member was legally obligated to make to resume those payments and pay arrearages." *Gross v. Wilson*, 424 P.3d 390 (Alaska 2018).

Gross is remarkably on point with the case at bar. In *Gross*, the parties entered a court-mediated settlement agreement whereby the Veteran agreed to pay his ex-wife 50% of all of his military pay. *Id.* at 401. The agreement provided that the payments would continue throughout the Veteran's life, and that if the Veteran or the military did anything that would reduce the ex-wife's share of the retirement pay, the Veteran would reimburse his ex-wife for the reduction. *Id.* at 393. Just like Kevin, the Veteran in *Gross* "stopped paying [his ex-wife] the amount she was entitled to pursuant to the property division" on grounds that he had waived retirement pay in favor of disability pay. *Id.* at 401. The ex-wife filed a motion to enforce the settlement, and the lower courts ordered the Veteran to "resume" paying his ex-wife pursuant to their agreement. *Id.*

On appeal, the *Gross* court began by considering whether there was a procedural basis under Alaska law for the Veteran to attack the enforcement of the divorce settlement—an analysis that is very similar to the discussion *supra* part 2 regarding the Louisiana bases for nullifying a final judgment (including consent judgments in a divorce proceeding). Just as Kevin has not asserted a valid basis under Louisiana law for nullifying the 2014 Consent Judgment, *supra* part 2, the *Gross* court found that the Veteran "has asserted no valid basis under [Alaska law] for bringing a collateral attack on the property division more than a year after he voluntarily agreed to it." *Id.* at 399. (Notably, the *Gross* court found that even if the divorce decree erroneously applied federal law by dividing the Veteran's disability pay, this did not mean that the lower court lacked subject-matter jurisdiction or that the decree was void. *Id.* at 397.)

The *Gross* court next considered whether the lower court impermissibly required the Veteran to "indemnify" his ex-spouse. *Id.* During the pendency of the appeal, *Howell* was decided. *Id.* at 400. The *Gross* court recognized that *Howell* prevents a state court from ordering a Veteran to "indemnify" his spouse for retirement benefits waived to receive disability pay. But the *Gross* court found that *Howell* does *not* prevent a court from ordering a Veteran to "resume monthly payments" as ordered pursuant to a settlement agreement. *Id.* Thus, under the reasoning of *Gross*, *Howell* does not extend so far as to interfere with the 2014 consent judgment that ordered Kevin to "resume payment" to Yvonne pursuant to their agreement that he pay her 43% of his entire "military . . . benefit" including CRSC pay.

When Kevin agreed to pay Yvonne 43% of his military retirement pay "and/or benefit," he did so with eyes wide open, after he had already converted his military retirement pay to disability pay. Regardless of whether the consent judgment was in error, it is now a valid final judgment, and as the *Gross* court pointed out, *Howell* does not bar state courts from enforcing such a judgment by requiring a Veteran who unilaterally stops making payments he was required to make under that judgment to resume making those payments.

CONCLUSION

Just like in *Gross*, Kevin's and Yvonne's 2014 consent judgment is a final judgment. Kevin did not assert valid grounds for nullifying the judgment (nor could he, since he acquiesced in it). Therefore, *res judicata* bars Kevin from coming back to court several years later to

challenge it. As the *Gross* court held, *Howell* poses no impediment to enforcing the very type of consent judgment that Kevin freely entered into. Accordingly, Kevin's writ should be denied.

Respectfully Submitted:

MAYHALL FONDREN BLAIZE

/s/Charles G. Blaize
CHARLES G. BLAIZE (#25575)
FREDERIC C. FONDREN (#23733)
Appeal Counsel
628 Wood Street
Houma, LA 70360
Telephone (985) 223-4725
Facsimile (985) 851-3069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing opposition to writ of certiorari has this day, 21st day of August, 2020, been served upon the following by hand delivery and/or fax and/or electronic mail and/or by placing in U.S. mail, postage prepaid and properly addressed:

Honorable Renee R. Simien
Clerk, Third Circuit Court of Appeal
1000 Main Street
Lake Charles, LA 70615

Judge C. Kerry Anderson
36th Judicial District Court
P.O. Box 1148
DeRidder, LA 70634

KEVIN BOUTTE, THROUGH HIS ATTORNEYS:

Carson J. Tucker (Michigan Bar No. P62209)
Pro Hac Vice (admission pending)
Lex Fori PLLC pro bono for Trinity Advocates
117 N. First St., Suite 111
Ann Arbor, MI 48104

David Hesser
Hesser & Flynn, LLP
2820 Jackson Street
Alexandria, LA 71301

/s/ Charles G. Blaize
FREDERIC C. FONDREN
CHARLES G. BLAIZE, JR.