No. 129761

In the

Supreme Court of Illinois

PAUL PASSAFIUME, as Independent Administrator of the Estate of LOIS PASSAFIUME, deceased,

Plaintiff-Appellee,

v.

DANIEL JURAK, D.O. and DANIEL JURAK, D.O., S.C.,

Defendants-Appellants.

On Leave to Appeal from the Illinois Appellate Court,
Third Judicial District, No. 3-22-0232.
There Heard on Appeal from the Circuit Court of the Thirteenth Judicial Circuit,
Grundy County, Illinois, No. 17 L 7.
The Honorable **Lance R. Peterson**, Judge Presiding.

BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS

TROY A. LUNDQUIST
STACY K. SHELLY
LANGHENRY, GILLEN, LUNDQUIST & JOHNSON, LLC
2400 Glenwood Avenue, Suite 200
Joliet, Illinois 60435
(630) 653-5775
tlundquist@lglfirm.com
sshelly@lglfirm.com

MELINDA S. KOLLROSS
CLAUSEN MILLER P.C.
10 South LaSalle Street
Suite 1600
Chicago, Illinois 60603
(312) 855-1010
mkollross@clausen.com

Counsel for Defendants-Appellants Daniel Jurak, D.O. and *Daniel Jurak, D.O., S.C.*

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS and STATEMENT OF POINTS AND AUTHORITIES

NATURE OF THE CASE

This is a medical malpractice action. Paul Passafiume sued Dr. Jurak and others asserting wrongful death and survival claims for alleged professional negligence concerning the care and treatment rendered to 34-year-old Lois Passafiume for a superficial blood clot diagnosed on August 11, 2014. Lois died of a pulmonary embolism five weeks later. Paul remarried on December 11, 2015, fifteen (15) months after Lois's death.

Over objection, Plaintiff was permitted to introduce expert testimony as to the purported "marketplace value" of lost household services and to calculate those damages for Lois's entire life span— some 40+ years—rather than ending as of the date of Plaintiff's remarriage. (The *Carter* rule).[1] This improper testimony increased Plaintiff's lost household services damages claim by nearly $1 million dollars. The jury returned an inflated $1.434 million lost earnings/lost household services award as a result, over $500,000.00 more than the highest amount supported by admissible evidence.

The Third District affirmed on the merits, holding that a spouse's lost household services damages can be segregated out from the

[1] *Carter v. Chicago & Ill. Midland Ry. Co.*, 130 Ill. App. 3d 431, 436 (4th Dist. 1985).

inseparable "conceptualistic unity" of spousal consortium declared by this Court in *Dini v. Naiditch*, 20 Ill. 2d 406 (1960)), and *extend past the date of remarriage in a spouse's loss of consortium claim* brought under the Wrongful Death Act—despite terminating upon remarriage in a common law loss of consortium action. It rejected this Court's *Dini* analysis as mere dicta, refused to apply the *Carter* rule that consortium damages end upon remarriage, and declined to follow appellate precedent expressly holding that as an indivisible element of consortium, lost household services damages sought in a wrongful death action terminate upon remarriage.[2]

ISSUE PRESENTED FOR REVIEW

1. The issue presented is whether damages for a spouse's lost household services terminate upon remarriage in a wrongful death action. The Third District answered this question in the negative, contravening this Court's precedent declaring that a spouse's lost household services are an inseparable element of consortium damages.

[2] *Dotson v. Sears, Roebuck & Co.,* 157 Ill. App. 3d 1036, 1044 (1st Dist. 1987) ("*Dotson I*"); *Dotson v. Sears, Roebuck & Co.*, 199 Ill. App. 3d 526, 527-528 (1st Dist. 1990) ("*Dotson II*")

JURISDICTION

Defendants bring this appeal from a judgment by the Third District Appellate Court pursuant to Illinois Supreme Court Rule 315. The Appellate Court entered its judgment on May 10, 2023. (A1) No petition for rehearing was filed. Defendants filed their Petition for Leave to Appeal within 35 days, on June 13, 2023. This Court granted that Petition by order dated September 27, 2023.

STATEMENT OF FACTS

I. Background Facts

Plaintiff sued medical providers including Dr. Jurak and his medical corporation (collectively "Dr. Jurak"), claiming Dr. Jurak breached the standard of care concerning management of Lois's blood clot. (C69-78) The case was tried to a jury July 13-21, 2021. (R68-1434)

A. Lost Household Services Claimed

Paul Passafiume testified Lois performed limited household services as follows:

> Q. Who was involved with a lot of the household duties?
>
> A. She pretty much did cooking. She'd clean the house, vacuuming, do our laundry. And then I mostly took out the garbage and mowed the grass. And then we both – like if we had flowers to plant or that, we would both do that.

(R982)

Plaintiff did not testify that he hired any third party or paid any expense to have any cooking, cleaning or flower planting done at any time after Lois passed. (R969-996) Plaintiff confirmed that he remarried in December 2015. (R995)

B. Smith's Valuation Opinions

Plaintiff's economist expert Stan Smith assumed that Lois would spend between 29.8 and 16.9 hours per week performing household services *until she was 74*, with the number of hours per week varying as she aged. (C1100)

Smith valued Lois's four decades of lost household services "as if they were provided by a person unknown to the household" rather than a spouse. (C1099) Smith came up with an "hourly value" for Lois's housekeeping services "based on the mean hourly earnings of "painters; child care workers; waiters and waitresses; private household cooks; laundry and dry cleaning workers; maids and housekeeping cleaners; landscaping and groundskeeping workers; bookkeeping, accounting and auditing clerks; and taxi drivers and chauffeurs" which is $14.99 per hour in year 2017 dollars." (C1100) He then added a "50 percent hourly non-wage component reasonably charged by agencies or free-lance individuals who supply such services on a part-time basis, and who are responsible for advertising, hiring and vetting, training, insuring and

bonding the part-time service provider, and who are also responsible for pay-related costs such as social security contributions, etc." (*Id.*)

Using this formula, Smith valued Lois's lost household services at $998,158. (C1101, C1121) This was more than the entirety of her past and future lost wages and benefits as the Village of Braceville Clerk, which totaled $913,881.00. (C1098-99, C1109)

II. The Trial Court Rulings

Dr. Jurak moved in limine to preclude Smith from offering expert testimony as to the monetary value of Lois's lost household services (cooking, cleaning, flower planting) and calculating the monetary value of such services past the date of Plaintiff's remarriage. (C1190, C1192-94, C1195-1232, C1235-52) Over objection, the trial court permitted Smith's testimony as to the purported "marketplace value" of the lost household services and to calculate those damages for Lois's entire life span (some 40+ years) rather than ending as of the date of Plaintiff's remarriage. (The *Carter* rule). (R74-75, R624, R635-43) This improper testimony prejudiced Dr. Jurak by increasing Plaintiff's lost household services damages claim by nearly $1 million dollars—from $24,808.00 to $998,158.00. (R643, R667-69)[3] The jury returned a $1.434 million lost

[3] Dr. Jurak made an offer of proof outside the jury's presence where Smith testified that if limited to the 15-month period between Lois's death and

earnings/lost household services award as a result, over $500,000.00 more than the highest amount supported by admissible evidence. (C918-19) (A1-9)

Dr. Jurak raised these errors in a timely post-trial motion, seeking a new trial or a remittitur in various amounts, which the trial court denied. (C1039-1979, C2091-92) (A9-11)

III. Third District Appellate Court Ruling

The Appellate Court affirmed on the merits, finding that Dr. Jurak had properly preserved his challenges to the admission of Smith's expert testimony and that the appeal involved an issue of law subject to de novo review. (A11-13, ¶¶ 28, 30)

After reviewing the "history of recovery for the loss of material services" and the "inclusion of consortium damages within a statutory wrongful death action" (A13-21), the Third District rejected this Court's *Dini* analysis that consortium is an inseparable conceptualistic unity as mere dicta, refused to apply the Fourth District's *Carter* rule that consortium damages end upon remarriage, and declined to follow First

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Plaintiff's remarriage, the value of Lois's lost household services would be only $24,808.00—$974,000 less than the $998,158.00 number Smith was permitted to tell the jury. (R643, R667-69)

District precedent (*Dotson I* and *Dotson II*) expressly holding that as an indivisible element of consortium, loss household services damages sought in a wrongful death action terminate upon remarriage. (A29-32, ¶¶ 69-77)

The Third District instead held:

> when a plaintiff chooses to seek damages for loss of consortium within a statutory wrongful death action, the classic elements of a statutory wrongful death action—loss of financial support and loss of material services—are preserved and remain subject to the supreme court's holding that remarriage must not affect the jury's determination of damages. See *Watson*, 54 Ill.2d at 500. The remaining elements of a loss of consortium claim, including "society, guidance, companionship, felicity and sexual relations," remain subject to the *Carter* rule of termination upon remarriage. See *Elliott*, 92 Ill. 2d 535 (describing consortium); see also *Carter*, 130 Ill. App.3d at 436 (the remarriage rule as applied to damages for loss of consortium).

(A28, ¶ 69)

The Appellate Court's analysis does not mention that *Watson* was decided before spousal loss of consortium claims were included within statutory wrongful death actions.[4] (A28, ¶ 69) It rejects the Fourth District's conclusion in *Carter* that *Elliott* implicitly overruled *Watson* in

[4] *Watson v. Fishbach*, 54 Ill. 2d 498, 499 (1973) (evidence of wife's remarriage improperly admitted in wrongful death action against defendant tavern keepers "for injury to plaintiff's means of support and for property damage" only—not loss of consortium).

part, as well as the First District's holding in *Dotson I* that *Elliott* mandates a finding that a spouse's lost household services are now recoverable in wrongful death actions only as part of a loss of consortium claim. (A22-27) The Third District also declined to follow *Dotson II*'s holding that lost household services sought in a wrongful death action terminate upon remarriage, criticizing *Dotson II*'s reliance on *Dini*. (A29-31)

Finally, the Third District rejected the longstanding rule that damages for lost household services must end upon remarriage by drawing a previously unrecognized distinction between a spouse's lost household services sought in a wrongful death action and those sought in a common law action for loss of consortium. (A31-32, ¶ 77) The Third District dismissed *Blagg v. Illinois F.W.D. Truck & Equip. Co.*, 143 Ill. 2d 188, 195 (1991); *Dini*, 20 Ill. 2d 406; and *Manders v. Pulice*, 102 Ill. App. 2d 468 (2d Dist. 1968), *aff'd* 44 Ill. 2d 511 (1970), stating that "[t]he instant plaintiff did not file a common law action for loss of consortium. He filed a statutory cause of action for wrongful death." (A31, ¶ 77) The Appellate Court did not explain why that should make a difference in the period of recovery allowed for the very same lost household services performed by a spouse as part of the marital relationship. (*Id.*)

ARGUMENT

This Court Should Affirm the *Carter* Rule That Recovery for a Spouse's Lost Household Services Terminates Upon Remarriage Like Other Elements of Consortium

Preliminary: Standard of Review

Whether recovery is allowed for the lost household services element of consortium damages extending beyond the date of remarriage is a question of law subject to de novo review. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 252 (2006)("[T]he measure of damages upon which the jury's factual computation is based is a question of law for the court ***."); *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 380 (1st Dist. 2000) (issues which are purely legal in nature are subject to de novo review); *Schandelmeier-Bartels v. Chi. Park Dist.*, 2015 IL App (1st) 133356, ¶25 ("Generally, we review a trial court's decision on a motion in limine for an abuse of discretion; however, where, as in this case, the only issue before the court involves a question of law, the standard of review is de novo.").

I. Household Services are Part of Consortium Damages

Illinois law has long held that consortium includes "**material services**, elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity." *Blagg v. Illinois F.W.D. Truck & Equip. Co.*, 143 Ill. 2d 188, 195 (1991) (*citing Dini v. Naiditch*, 20 Ill. 2d

406, 427 (1960)) (emphasis supplied). Household services performed by a spouse are "material services" subsumed within the conceptualistic unity of "consortium." Controlling Illinois Supreme and Appellate Court precedent so holds. As first noted in *Dini*, this Court stated that services by a spouse—including a wife's services in the home—are a part of consortium. *Dini,* 20 Ill. 2d at 422. Likewise, in *Manders v. Pulice,* 102 Ill. App. 2d 468, 474 (2d Dist. 1968), *aff'd* 44 Ill. 2d 511 (1970), the appellate court explained that Illinois recognizes, as part of a claim for loss of consortium, a husband's deprivation of services where his wife was rendered physically incapable of performing normal household chores for at least a five-month period. In *Blagg*, this Court relied on *Dini* to reiterate that the consortium claim made by the plaintiff wife included the recovery of expenses for such material services as the auto and household repairs that, prior to his injury, would have been performed by her husband but were now performed by hired help. *Blagg*, 143 Ill. 2d at 195.

The lost household services claimed by Plaintiff here—housekeeping chores such as cooking, cleaning, laundry—likewise constitute material services falling under the united, indivisible rubric of consortium damages. *Blagg,* 143 Ill. 2d at 195; *Dini*, 20 Ill. 2d at 422; *Manders*, 102 Ill. App. 2d at 474. Lois was not a hired cook, or a

professional maid, or a paid laundress. She performed these household services as acts of love and caring for her husband which was part and parcel of their marital relationship. *Id.*

Even Plaintiff admitted below—as he must—that household services are a part of consortium. (*See* C1999: "Plaintiff does not dispute defendants' assertion that household services are a part of loss of consortium").

II. A Spouse's Lost Household Services Damages Terminate Upon Remarriage Under the *Carter* Rule Because They Are an Indivisible Element of Consortium. They are Replaced by the New Spouse.

A. The *Carter* Rule

The *Carter* rule holds that loss of consortium damages end upon remarriage because consortium with the new spouse replaces that enjoyed with the former spouse, regardless of any differences in quality between the two spouses:

> So in the instant case, if loss of consortium is sought, it must be actual loss; that is, loss up to the time of remarriage. It may be true, as plaintiff argues, that consortium with the deceased spouse may have been of a different quality from that with the present spouse, but such speculations could lead only to Aristophanes' Nepheloccocygia.[5]

[5] From Aristophanes' play *The Birds*, meaning the amorphous "act of seeking and finding shapes in clouds" or "cloud cuckoo land." https://en.wiktionary.org/wiki/nephelococcygia (last visited 11/17/2023)

Carter, 130 Ill. App. 3d at 436.

This "remarriage rule" applies to all elements of consortium—including the lost household services at issue here. *See Dotson I,* 157 Ill. App. 3d at 1044, and *Dotson II*, 199 Ill. App. 3d at 527-528) (for purposes of determining damages of a surviving spouse in a wrongful death action, a claim for loss of material services is part of a loss of consortium claim and, as such, terminates upon remarriage; loss of consortium and claim for material services may not be separated).

Dotson was discussed in detail by *Pfeifer v. Canyon Constr. Co.*, 253 Ill. App. 3d 1017 (2d Dist. 1994). *Pfeifer* expressly acknowledges that consortium includes loss of material services and the two cannot be recovered separately. *Pfeifer,* 253 Ill. App. 3d at 1027 (citing *Dotson*, *Carter* and *Elliott*). While some material services are "more tangible in nature than such things as affection and companionship, they are also highly personal to, and generally flow from, the particular relationship between specific spouses. As such, they are properly part of consortium." *Id.* at 1030.

Unlike the lost material services—including the household services at issue herein—that flow from the marital relationship and are thereby encompassed within loss of consortium, lost financial support involves a spouse's future monetary earnings rather than provision of

services. *Id.* (*citing Elliott*, 92 Ill. 2d at 539-40). As *Pfeifer* explains, loss of consortium and loss of financial support are "distinct and independent components of the pecuniary damages recoverable under the Wrongful Death Act." *Id.,* 253 Ill. App. 3d at 1031. While loss of consortium might terminate upon remarriage, "remarriage is irrelevant to damages for loss of support." *Id.*

Pfeifer **does not** state that household services/material services qualify as financial support rather than consortium damages such that they can be recovered past the date of a spouse's remarriage. *Id.,* 253 Ill. App. 3d at 1030-31. On the contrary, *Pfeifer* expressly confirmed that tangible material services "are properly part of consortium." *Id.*, 253 Ill. App. 3d at 1030.

No Illinois case known to Dr. Jurak has ever held that household services provided by one spouse to another qualify as financial support within the meaning of the Wrongful Death Act. To the contrary, *Blagg, Dini,* and *Manders* unanimously confirm that such household chores and services performed by spouses as part of the marital relationship are "material services" encompassed within the conceptual unity of consortium. *Blagg*, 143 Ill. 2d at 195; *Dini*, 20 Ill. 2d at 422; *Manders,* 102 Ill. App. at 474.

In short, loss of financial support and loss of consortium are distinct and independent components of the pecuniary damages recoverable under the Wrongful Death Act. Household services constitute an indivisible element of consortium, **not** financial support. Plaintiff conceded that his loss of consortium damages ended as of the date of his remarriage in December 2015, effectively conceding that his alleged loss of household services likewise terminated at that time. (C1257) *See Dotson I* and *II, supra*.

The *Carter* rule has been followed in Illinois for nearly 40 years. Its rationale is sound. The lost household services, sentiments, companionship, and sexual relations provided by the former spouse are presumably now provided by the new spouse. *Id.*[6] The Third District's allowance of damages for lost household services past remarriage wrongly permits recovery for a loss that no longer exists. *Id*.

[6] This Court has stated in dicta that evidence of the surviving spouse's remarriage is relevant in loss of spousal consortium claims and terminates the right of a widower or widow to recover damages for loss of consortium. *See Simmons v. Univ. of Chicago Hosps. & Clinics*, 162 Ill. 2d 1, 14 (1994) (dicta.).

B. The Third District's Approach Contravenes This Court's View of Consortium as an Indivisible Conceptualistic Unity

In *Dini*, this Court stated that consortium "includes, *in addition to material services*, elements of companionship, felicity[,] and sexual intercourse, all welded into a conceptualistic unity." *Dini*, 20 Ill. 2d at 427 (emphasis added) The Court further declared it was nothing more than "a theoretician's boast" to say that the concept of consortium was "capable of dismemberment into material services and sentimental services" because such dismemberment was impossible. *Id*. at 427-28.

Yet that is precisely what the Third District has done here—adopted the "theoretician's boast" by dismembering Plaintiff's consortium claim into material and sentimental services and applying differing rules to the dismembered parts. The Opinion states:

> For the reasons that follow, we determine that, when a plaintiff chooses to seek damages for loss of consortium within a statutory wrongful death action, the classic elements of a statutory wrongful death action—loss of financial support and loss of material services—are preserved and remain subject to the supreme court's holding that remarriage must not affect the jury's determination of damages. See *Watson*, 54 Ill.2d at 500. The remaining elements of a loss of consortium claim, including "society, guidance, companionship, felicity and sexual relations," remain subject to the *Carter* rule of termination upon remarriage. See *Elliott*, 92 Ill. 2d 535 (describing consortium); see also *Carter*, 130 Ill.

> App.3d at 436 (the remarriage rule as applied to damages for loss of consortium)."

(A28, ¶ 69)

This Court should reject the Third District's dismembering approach and confirm the continued validity of *Dini* and this Court's view of consortium as an inseparable conceptualistic unity.

C. The First and Fourth Districts Correctly Followed *Dini*; The Third District Has It Wrong

The position espoused by Dr. Jurak herein accords with existing appellate precedent. The Fourth District held in *Carter* that *Elliott* implicitly overruled *Watson* in part, and that a plaintiff's consortium damages sought in a wrongful death action terminate upon remarriage the same as if sought in a common law action (the *Carter* rule). *Carter*, 130 Ill. App. 3d at 436. The First District Appellate Court held in *Dotson I* that following *Elliott* and *Carter,* a spouse's lost material services are recoverable in wrongful death actions only as part of a loss of consortium claim. *Dotson I*, 157 Ill. App. 3d at 1044. In *Dotson II*, the First District addressed the precise question at issue here and held that the plaintiff in a wrongful death action would be precluded from seeking damages for the loss of a spouse's material services beyond the date of remarriage. *Dotson II*, 199 Ill. App. 3d at 531.

The Third District's Opinion erroneously departs from this well-established precedent, refusing to apply the *Carter* rule to a spouse's lost household services sought in a wrongful death action upon its mistaken belief that such damages can be separated out from the conceptualistic unity of consortium declared by this Court in *Dini*. *Dini*, 20 Ill. 2d at 427. (A28-31, ¶¶ 69-77)

D. There Should Be No Distinction Between a Spouse's Lost Household Services Damages Sought in a Wrongful Death Action and a Common Law Loss of Consortium Action

The Third District's pronouncement that the *Carter* rule does not apply because Plaintiff sought lost household services damages in a statutory wrongful death action rather than a common law loss of consortium action (A31-32, ¶ 77) draws an illogical distinction without a difference. The Wrongful Death Act states that "the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, including damages for grief, sorrow, and mental suffering, to the surviving spouse and next of kin of such deceased person." 740 ILCS 180/2(a). Nothing in this language justifies differentiating lost household services sought in a common law consortium action from those sought in a wrongful death action.

Moreover, this Court expressly held in *Elliott* that loss of consortium damages are included within the "pecuniary injuries" compensable under the Wrongful Death Act. *Elliot*, 92 Ill. 2d at 539-40. Thus, there is no difference between a common law consortium claim and lost consortium damages sought in a wrongful death action. *Id.* Recovery for lost household services should terminate upon remarriage in either case under the *Carter* rule.

E. Equating a Spouse's Lost Household Services with Financial Support/Lost Wages is Legally Unsound and Contrary to Illinois Public Policy Prohibiting Double Recoveries.

The Third District equates the lost household services component of loss of consortium with lost wages/financial support to justify its stark rejection of the *Carter* rule and a half century of relevant Supreme and appellate court precedent. (A26-31, ¶¶ 65-76) But that is wrong. Illinois law includes "material services" performed by a spouse within the indivisible rubric of consortium, right alongside "companionship, felicity and sexual intercourse." *Blagg*, 143 Ill. 2d at 195 (*citing Dini*, 20 Ill. 2d at 427); *Pfeifer v. Canyon Constr. Co.*, 253 Ill. App. 3d 1017, 1030 (2d Dist. 1994) (tangible material services "are properly part of consortium.") Household chores are acts of love and caring between spouses in a marital relationship.

Viewing these acts as compensable services the same as if performed by a stranger to the household denigrates the marital relationship and undermines its unique character and value. *Pfeifer*, 253 Ill. App. 3d at 1031 (loss of consortium and loss of financial support are "distinct and independent components of the pecuniary damages recoverable under the Wrongful Death Act"; while loss of consortium might terminate upon remarriage, "remarriage is irrelevant to damages for loss of support."). No Illinois case has ever held that household services provided by one spouse to another qualify as financial support within the meaning of the Wrongful Death Act as the Third District appears to suggest here.

Before trial, even Plaintiff conceded that financial support is distinguishable from consortium damages:

> The loss of consortium reflects the loss of personal benefits and satisfaction the surviving spouse enjoyed as a result of a relationship with a particular person. That relationship and those benefits cannot be duplicated. The courts speak of a wife's "services in the home," services "as [the spouse's] wife." And "personal services." The courts' discussions do not include, even by implication, the concept of financial support. **While some material services are clearly more tangible in nature than such things as affection and companionship, they are also highly personal to, and generally flow from, the particular relationship between**

> **specific spouses. As such, they are properly part of consortium.**

(C1256-57) (emphasis supplied).

Viewed in this proper light, remarriage terminates all aspects of consortium, including the household services formerly performed by one spouse for the other as part of their particular, personal marital relationship. *Blagg*, 143 Ill. 2d at 195 (*citing Dini*, 20 Ill. 2d at 427); *Carter*, 130 Ill. App. 3d at 436; *Dotson I,* 157 Ill. App. 3d at 1044; *Dotson II*, 199 Ill. App. 3d at 527-528; *Pfeifer*, 253 Ill. App. 3d at 1030 (2d Dist. 1994).

The remarriage rule also accords with common sense, as the new spouse presumably provides household services highly personal to the unique marital relationship now shared with the plaintiff spouse. *Carter*, 130 Ill. App. 3d at 436. To hold otherwise would permit a double recovery of lost household services after remarriage, contrary to Illinois law barring double recovery. *Fed. Ins. Co. v. Binney & Smith, Inc.*, 393 Ill. App. 3d 277, 298 (1st Dist. 2009)("Illinois public policy prohibits double recovery" of damages).

G. A New Trial on Lost Household Services Damages or Remittitur is Required.

The trial court committed reversible error in admitting Smith's expert testimony on the value of Lois's household services running four

decades past the date of Plaintiff's remarriage. *See, e.g.*, *Dep't of Transp. v. Rasmussen,* 108 Ill. App. 3d 615, 624-26, 630 (2d Dist. 1982) (new trial on damages required where expert included and testified to non-recoverable damages elements in his valuation). A new trial on damages, limited to lost earnings/household services, or a remittitur is required to correct this error and the excessive, unsupported damages award it produced. *Stamp v. Sylvan,* 391 Ill. App. 3d 117, 126-28 (1st Dist. 2009) (court may grant a new trial on a specific element of damages only).

Remittitur has long been recognized as an efficient and effective alternative to a new trial on a single damages element as in this case. *See Kinzinger v. Tull*, 329 Ill. App. 3d 1119 (4th Dist. 2002) (jury award of $100,000 for past and future medical expenses remitted by $71,000 where record only supported past and future medical expenses of approximately $29,000); *Johanek v. Ringsby Truck Lines, Inc.*, 157 Ill. App. 3d 140, 156-57 (1st Dist. 1987) (jury's excessive $880,000 loss of consortium award for wife remitted to $500,000; wife to accept within 30 days or cause will be remanded for a new trial solely on the issue of damages on loss of consortium). *McElroy v. Patton*, 130 Ill. App. 2d 872, 877 (5th Dist. 1972) ("But where the verdict returned does exceed the proven damages, it must be corrected. The practice of entering or ordering a remittitur has long been an accepted practice in Illinois and

it has been consistently acknowledged to be promotive of both the administration of justice and putting an end to litigation.").

Here, the lost earnings/household services award should be reduced by the full amount of claimed lost household services incurred after the date of Plaintiff's remarriage, i.e. $973,350. This would yield a $460,675 lost earnings/household services award. In the alternative only, the award should be remitted to a maximum of $937,808 ($913,000 lost earnings + $24,808 lost household services to date of remarriage). This would be a $496,217 remittitur. *See Miyagi v. Dean Transportation, Inc.*, 2019 IL App (1st) 172933, ¶¶ 36, 47 (affirming trial court's entry of $3.65 million remittitur where "trial court found that that $7.3 million jury verdict for future medical expenses was excessive because it was not reasonably based on the evidence"). The judgment should accordingly be remitted to $724,181.48 or, in the alternative only, $1,201,314.48. If Plaintiff declines to accept the remittitur, a new trial on damages must be ordered. *Johanek*, 157 Ill. 2d at 156-57.

CONCLUSION

The Third District's Opinion allowing recovery of a spouse's lost household services damages beyond the date of remarriage in a wrongful death action contravenes this Court's longstanding view of consortium damages as a single, indivisible conceptualistic unity incapable of

dismemberment into component parts. The Third District's position erroneously departs from the First and Fourth Appellate Districts on the termination point for such damages; draws an illogical distinction between a spouse's lost household services sought in a wrongful death action and a common law loss of consortium action; undermines public policy by denigrating the marital relationship; and permits improper double recovery. It should be rejected.

Dr. Jurak accordingly urges this Court to: (1) reverse the appellate court's ruling that a spouse's lost household services damages do not end upon remarriage; (2) reverse the judgment entered on the jury verdict and the order denying Dr. Jurak's post-trial motion, vacate the jury's lost earnings/household services damages award, and remand this case for a new trial on this element of damages; or alternatively grant a remittitur in the amounts Dr. Jurak requested below and herein; and (3) allow such other and further relief as to which he may be entitled on appeal.

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Respectfully submitted,

/s/Melinda S. Kollross
Melinda S. Kollross

Melinda S. Kollross, ARDC #6211020
Clausen Miller P.C.
10 South LaSalle Street
Chicago, Illinois 60603-1098
Phone: (312) 855-1010
Fax: (312) 606-7777
Email: mkollross@clausen.com

Troy A. Lundquist #06211190
Stacy K. Shelly #6279783
Langhenry, Gillen, Lundquist
& Johnson, LLC
Joliet, Illinois 60435
Tel: (815) 726-3600
Email: tlundquist@lglfirm.com
shelly@lglfirm.com

Attorneys for Defendants-Appellants
Daniel Jurak, D.O. And Daniel Jurak, D.O., S.C.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 24 pages.

/s/Melinda S. Kollross
Melinda S. Kollross

APPENDIX

E-FILED
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CYNTHIA A. GRANT
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TABLE OF CONTENTS TO APPENDIX

2023 IL App (3d) 220232

Opinion filed May 10, 2023

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2023

PAUL PASSAFIUME, as Independent Administrator of the Estate of Lois Passafiume, Deceased,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-22-0232 Circuit No. 17-L-7
DANIEL JURAK, D.O., and DANIEL JURAK, D.O., S.C.,	)	Honorable Lance R. Peterson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BRENNAN delivered the judgment of the court, with opinion. Presiding Justice Holdridge and Justice Albrecht concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, Paul Passafiume, acting as an independent administrator of Lois Passafiume's estate, filed a complaint against, *inter alia*, defendant, Daniel Jurak, alleging medical malpractice and seeking recovery under the Wrongful Death Act (740 ILCS 180/2 (West 2014)).[1] Lois passed away at age 34. A jury found Jurak, Lois's primary care physician, negligent in his management

[1] Plaintiff also sought recovery under the Survival Act (755 ILCS 5/27-6 (West 2014)), not at issue here.

of her blood clot. The jury awarded $2,121,914.34 in damages, which was reduced to $1,697,531.48 based on its finding that Lois was contributorily negligent. Jurak only challenges the damages award. His primary argument is that the trial court erred by allowing the jury to consider damages for the loss of material services (*i.e.*, household chores) beyond the date of plaintiff's remarriage. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 A. Motions *in Limine*

¶ 4 Prior to trial, Jurak filed several motions *in limine* seeking to limit evidence concerning the value of lost household services beyond the date of plaintiff's remarriage, which occurred approximately 15 months after Lois's death. In motion *in limine* No. 20, Jurak moved to bar plaintiff's expert, economist Stan Smith, from offering opinions and calculations regarding plaintiff's loss of household services and family guidance/accompaniment. As to household services, Jurak argued that Smith's testimony was speculative in that it spoke more to general labor trends than to the specific household services provided by Lois. As to both household services and family guidance/accompaniment, Jurak also argued that, as part of a consortium claim, these elements were not amenable to expert testimony addressing the commercial value of those services. Jurak contended that such testimony was at best marginally relevant and had the potential to mislead the jury.

¶ 5 In motion *in limine* No. 25, Jurak moved in the alternative to limit any of Smith's opinions and calculations regarding plaintiff's loss of household services to the period preceding plaintiff's remarriage. Jurak essentially argued as follows. Material services, *i.e.*, household services, were part of a consortium claim. Further, the components of a consortium claim—loss of material services, loss of society, loss of companionship, etc.—composed a conceptualistic unity that could

not be dismembered into material and sentimental benefits. That plaintiff was able to place a monetary value on the loss of household services does not, in Jurak's view, remove the loss of household services from a consortium claim. Damages for loss of consortium terminate upon remarriage (*Carter v. Chicago & Illinois Midland Ry. Co.*, 130 Ill. App. 3d 431, 436 (1985)), and, as household services were an indivisible part of a consortium claim, damages for loss of household services also terminate upon remarriage. Jurak relied on *Dotson v. Sears, Roebuck & Co.*, 157 Ill. App. 3d 1036 (1987) (*Dotson I*), and *Dotson v. Sears, Roebuck & Co.*, 199 Ill. App. 3d 526 (1990) (*Dotson II*) (First District cases interpreting *Elliott v. Willis*, 92 Ill. 2d 530 (1982)), in support of his position.

¶ 6 Plaintiff responded to Jurak's motion *in limine* No. 25 as follows. Plaintiff accepted *Carter*'s holding that damages for loss of consortium terminate upon remarriage. He continued, nevertheless, that loss of consortium and loss of financial support are distinct and independent remedies under the Wrongful Death Act. Damages for loss of financial support *do* continue beyond the date of remarriage. The loss of material services should be categorized as the loss of financial support rather than the loss of consortium. And, as the law permits damages for the loss of financial support to extend beyond the date of remarriage, Smith should be permitted to testify to opinions and calculations regarding plaintiff's loss of material services beyond the date of plaintiff's remarriage. Plaintiff relied on *Pfeifer v. Canyon Construction Co.*, 253 Ill. App. 3d 1017 (1993), in support of his position.

¶ 7 The trial court ruled as follows. As to motion *in limine* No. 20, it would allow the expert to testify to opinions and calculations regarding the loss of household services, but it would bar the expert from testifying to the same regarding the loss of family guidance/accompaniment. As to motion *in limine* No. 25, it would allow evidence, including expert testimony, concerning the

value of plaintiff's loss of household services beyond the date of plaintiff's remarriage. Addressing both rulings in conjunction, the court explained:

> "[T]he two cases are *Dotson* and *Pfeifer*. I've read them both. *** When you read *Pfeifer*, [the] logic to me [is] that these types of household services that can be easily quantifiable just like lost wages, just like financial support[.] *** [In contrast,] *Pfeifer* just cites Black's Law definition [of consortium], [and] it's all about personal, very personal relationship things that *** a jury is the only entity that can place a dollar amount on[.] [Y]ou can't have some expert quantify that [personal relationship], unlike financial support, unlike what it would cost to have your house cleaned, your dishes done[,] and your yard mowed. *So I am going to make a ruling that they are not part of loss of consortium* *** . So [Smith] will be allowed to testify beyond the remarriage date on that one portion, that household services portion that I allowed." (Emphasis added.)

¶ 8 B. Trial

¶ 9 At trial, Smith, qualified as an expert economist, testified that plaintiff retained him to analyze plaintiff's loss following Lois's death. Smith opined that the value of plaintiff's loss of financial support, calculated by taking Lois's lost wages plus Lois's lost employment benefits minus her personal consumption, was $913,881. Smith considered that Lois, who had a high school degree, had been working as a clerk for the Village of Braceville for the last seven years. The position was for 30 hours per week. Lois's salary had been rising at a steady rate and, in 2013, her last full year of employment, she earned $23,700. In addition, she received IRA and Social Security benefits. Smith accounted for continued salary growth, anticipating that Lois would be earning $35,000 in 2021. However, Smith also attributed a discount value to future earnings, explaining for example that the present cash value of $1000 to be received 10 years in the future might be

approximately $900 due to lost investment potential. Smith stated that his numbers should be adjusted upward 2 to 3% due to inflation that occurred from the 2020 date the analysis was completed to the 2021 date of the trial. Smith considered that Paul had stated that Lois enjoyed her job and planned to work as long as she remained healthy. Smith's total value of $913,881 was based on a retirement age of 67. However, if the jury believed that Lois would have retired at 57 or 77, they could subtract or add approximately $28,500 per year.

¶ 10 Smith further opined that the value of plaintiff's loss of household services was $998,158. Smith explained that economists have been placing economic values on household services for decades. Smith had received information from plaintiff about the nature of Lois's housekeeping. Lois and plaintiff had lived in a three-bedroom, single family home. Lois cleaned, cooked, did laundry, did yard work, and helped pay the bills. On average, she spent two to three hours per day doing these sorts of chores. Smith also considered data tables that projected over time how much time Lois might spend performing such tasks in the future.

¶ 11 Jurak's counsel unsuccessfully objected numerous times during Smith's testimony, stating "objection, motion *in limine*, preservation." One such objection occurred following Smith's testimony that he generally assumes a person will do some amount of housework for as long as the person is physically able.

¶ 12 On cross-examination, Smith further explained the $998,158 calculation for loss of household services. From his data, he knew that the average wage for those who perform household tasks, such as "painters, child care workers, waiters and waitresses, private household cooks, laundry and dry cleaning workers, maids, housekeeping cleaners, ***, auditing clerks, [and] taxi drivers and chauffeurs[,]" was $14.99 per hour. He determined that the tasks plaintiff reported Lois to have performed, dishes, laundry, and the like, fit into the aforementioned umbrella

category. Smith also added a non-wage component, explaining that employing such workers typically requires a 50% finders' fee. Smith was mindful that Braceville was a smaller community, and therefore, he did not consider higher fees in the range of $40 to $65 per hour that residents of large metropolitan areas pay for cleaning services.

¶ 13 Jurak's counsel then submitted an offer of proof by further questioning Smith. Smith clarified that he did not account for plaintiff's late December 2015 remarriage in calculating lost household services. Referring to his chart, however, Smith calculated that the damages through the end of 2015 for the loss of household services were $24,808.

¶ 14 Plaintiff testified that he and Lois were married in 2007, when he was 32 and she was 26. When plaintiff met Lois, she worked at McDonalds. At McDonalds, Lois had worked her way up to be a manager. In 2008, Lois began working as a clerk for the Village of Braceville. Lois enjoyed her job at the village, where she continued to work up until the time of her death.

¶ 15 On cross-examination, plaintiff testified that, after Lois's death in September 2014, he remarried in December of 2015. On redirect, over Jurak's objection, plaintiff further testified that his second marriage ended in divorce approximately 18 months later. Moreover, following Lois's death, he was sad, lonely, and "not good." By "not good," he meant that he "wasn't thinking right" and he was "all over the place."

¶ 16 C. Jury Instructions and Verdict

¶ 17 At the jury instruction conference, Jurak did not object to plaintiff's instruction Nos. 19 and 32. Instruction No. 19 was the standard Illinois Pattern Jury Instructions, Civil, No. 31.04 (rev. June 18, 2021) (hereinafter IPI Civil) "Measure of Damages—Wrongful Death—Adult Decedent—Widow and/or Lineal Next of Kin Surviving." IPI Civil No. 31.04 provides:

"If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the [lineal next of kin, [or] widow] of the decedent for the pecuniary loss proved by the evidence to have resulted to the [lineal next of kin] of the decedent. 'Pecuniary loss' may include loss of money, benefits, goods, services, [and] society [and sexual relations].

Where a decedent leaves [lineal next of kin], the law recognizes a presumption that the [lineal next of kin] have sustained some substantial pecuniary loss by reason of the death. The weight to be given this presumption is for you to decide from the evidence in this case.

In determining pecuniary loss, you may consider what the evidence shows concerning the following:

[1. What (money,) (benefits,) (goods,) (and) (services) the decedent customarily contributed in the past;]

[2. What (money,) (benefits,) (goods,) (and) (services) the decedent was likely to have contributed in the future;]

[3. Decedent's personal expenses (and other deductions);]

[4. What instruction, moral training, and superintendence of education the decedent might reasonably have been expected to give decedent's child had decedent lived;]

[5. Decedent's age;]

[6. Decedent's health;]

[7. Decedent's habits of (industry,) (sobriety,) (and) (thrift);]

[8. Decedent's occupational abilities;]

[9. The grief, sorrow, and mental suffering of [next of kin];]

[10. The relationship between [lineal next of kin, e.g. son] and [decedent].]

[11. The marital relationship that existed between [widow/widower] and [decedent].]

[Widow/widower] is not entitled to damages for loss of [decedent's] society and sexual relations after [date of remarriage]" *Id.*

Applied to the instant case, instruction No. 19 omitted as inapplicable paragraphs 4 (regarding a decedent's child) and paragraph 10 (regarding a plaintiff's lineal, non-spousal relationship to the decedent). Instruction No. 19 retained the instructions specific to the spousal relationship, including that the widower is not entitled to damages for the loss of the decedent's loss of society and sexual relations after the date of remarriage. The jury was also instructed that "society" was "the mutual benefits that each family member receives from the other's continued existence, including love, affection, care, attention, companionship, comfort, guidance, and protection." See IPI Civil No. 31.11.

¶ 18 Instruction No. 32 was IPI Civil No. 45.01B (approved Dec. 8, 2011), titled "Verdict Form B—Single Plaintiff and Defendant—Contributory Negligence—Less than 50%." IPI Civil No. 45.01B provides in pertinent part:

"First: Without taking into consideration the question of reduction of damages due to the negligence of [plaintiff's name], we find that the total amount of damages suffered by [plaintiff's name] as a proximate result of the occurrence in question is ____$, [itemized as follows:]" *Id.*

Applied to the instant case, instruction No. 32 combined lost earnings and lost household services as a single-line item and set forth the other categories of loss as follows:

"Medical and/or Funeral Expenses: $_____.

The Value of Earnings and Household Services Lost and the present cash value of the Earnings and Household Services reasonably certain to be lost in the future: $_____.

Pain and suffering (Lois): $_____.

Loss of Society for Paul Passafiume: $_____.

The Grief, Sorrow, and Mental Suffering of Paul Passafiume: $_____.

PLAINTIFF'S TOTAL DAMAGES: $_____."

¶ 19 The jury returned a verdict for plaintiff, reducing the judgment 20% to account for Lois's contributory negligence. Prior to the reduction, the jury's breakdown of damages had been as follows:

"Medical and/or Funeral Expenses: $12,139.34.

The Value of Earnings and Household Services Lost and the present cash value of the Earnings and Household Services reasonably certain to be lost in the future: $1,434,025.

Pain and suffering (Lois): $200,000.

Loss of Society for Paul Passafiume: $75,750.

The Grief, Sorrow, and Mental Suffering of Paul Passafiume: $400,000.

PLAINTIFF'S TOTAL DAMAGES: $2,121,914.34."

¶ 20 D. Jurak's Posttrial Motion

¶ 21 Jurak filed a posttrial motion, seeking a new trial or, in the alternative, a remittitur. Jurak argued that the trial court's evidentiary rulings on motion *in limine* Nos. 20 and 25[2] constituted reversible error. In Jurak's view, the court's error stemmed from its failure to recognize that household services, performed by a spouse as part of the marital relationship, were an element of consortium and, as such, were not subject to monetization by an expert and were not to be considered beyond the date of remarriage. Jurak continued that the remarriage issue, which had been set forth in motion *in limine* No. 25, represented "99 percent" of his motion.

¶ 22 Plaintiff responded that Jurak forfeited the remarriage issue because Jurak had consented to instruction No. 32, the verdict form that set forth lost earnings and lost household services as a single line item. Plaintiff further urged that the general verdict rule precluded recovery, in that Jurak cannot establish that the entire $1.4 million award for the combined category was not, in fact, for lost earnings alone. While the expert testified to $913,881 in lost wages, that number assumed a retirement age of 67 and did not account for increased hours or a promotion.

¶ 23 Jurak replied that, despite the combined structure of the verdict form, the prejudice was obvious. The expert testified to only $913,881 in lost wages. Therefore, Jurak believed that it was clear that the $1.4 million award was an excess verdict, which the jury reached in part due to its incorrect belief that it could consider evidence of nearly $1 million in lost household services beyond the date of remarriage. Jurak sought a new trial or, in the alternative, a remittitur and a new award to include only $913,881 for lost wages and approximately $25,000 for lost household services prior to the date of remarriage.

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[2] Posttrial, neither the parties nor the trial court consistently linked their arguments and analysis back to the identifying motion *in limine* numbers. We do so for clarity.

¶ 24 On May 10, 2022, the trial court denied Jurak's motion for a new trial on damages or, in the alternative, remittitur. As to motion *in limine* No. 20, the court explained that, under its reading of *Pfeifer*:

> "[H]ousehold services were tangible *** and more akin to lost earnings rather than the other amorphous elements of loss of consortium (loss of society, sexual relations, companionship). Further, this court [originally] concluded that the report of Dr. Smith along with his interview of [plaintiff] established a proper foundation for his testimony placing a monetary value on the household services of Lois. His opinions were in part based on objective information and statistics all properly disclosed in discovery. His testimony was subjected to vigorous cross-examination and the jury was free to accept or reject such testimony. Defendant could have offered expert testimony to rebut Dr. Smith but chose not to."

¶ 25 As to motion *in limine* No. 25, the trial court explained that Jurak did not properly preserve the remarriage issue because Jurak did not object to plaintiff's jury instruction No. 19, which limited damages for loss of society and sexual relations prior to the time of remarriage but did not limit damages for the loss of services prior to the time of remarriage. Also, Jurak did not object to plaintiff's jury instruction No. 32, verdict form B, which placed lost household services and as lost earnings on the same line but placed loss of society on a different line.

¶ 26 This timely appeal followed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, Jurak again argues that the trial court's evidentiary rulings on motion *in limine* Nos. 20 and 25 constituted reversible error. Ordinarily, evidentiary decisions are reviewed for an abuse of discretion. *People v. Drum*, 321 Ill. App. 3d 1005, 1009 (2001). A trial court abuses its

discretion when its decision is arbitrary, fanciful, or unreasonable. *People v. Patterson*, 2014 IL 115102, ¶ 114. However, this case also involves a legal question—whether the trial court properly understood a statutory wrongful death action to allow for a plaintiff to recover for the loss of material services independent of any recovery for loss of the marital relationship—which we review *de novo*. See *Drum*, 321 Ill. App. 3d at 1009.

¶ 29 Specifically, Jurak argues that a loss of consortium includes material services; material services are inseparable from other elements of consortium; as part of the consortium, material services share the same elusive traits as other consortium elements that render expert, fair-market valuation inappropriate; and like any other element of consortium, damages for the loss of material services terminate upon remarriage. Jurak's argument fails primarily because he incorrectly equates a statutory wrongful death action, which plaintiff filed, with a common law loss of consortium action, which plaintiff did not file.

¶ 30 Before we discuss differences in these causes of action, we must preliminarily address the trial court's forfeiture determination. We disagree that Jurak failed to preserve his argument that the trial court erred in allowing the jury to consider damages for the loss of household services beyond the date of remarriage. Jurak objected at trial and in a posttrial motion. See *Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002) (when the court denies a motion *in limine*, the party must make an objection at trial to preserve the issue on appeal); 735 ILCS 5/2-1202(e) (West 2014) (following a civil jury trial, any party who fails to seek a new trial in his or her posttrial motion waives the right to apply for a new trial). Expecting Jurak to offer as an alternative to jury instruction No. 19—which specified that damages for loss of society and sexual relations ended upon remarriage—an instruction that damages for loss of society, sexual relations, *and* household services end upon remarriage places too great a burden on Jurak as a litigant and makes little sense

in the context of this case. Jurak already argued *in limine* and objected at trial that evidence concerning damages for lost household services should not extend beyond remarriage. The court had made its decision, prior to the instruction conference, that damages for loss of household services did not end upon remarriage. We also disagree that Jurak's failure to offer an alternative to instruction No. 32, verdict form B, resulted in forfeiture of the material services and remarriage issues. Placing lost earnings and lost household services on the same line merely made it more difficult to discern prejudice resulting from the admission of the evidence pertaining to household services. However, as we determine that the trial court did not err in admitting the evidence, we need not address prejudice.

¶ 31 A. History of Recovery for the Loss of Material Services

¶ 32 Historically, both statutory wrongful death actions and common law loss of consortium actions allowed recovery for the loss of a material services formerly performed by the decedent spouse. However, statutory wrongful death actions allowed for damages beyond the date of a plaintiff's remarriage whereas common law loss of consortium actions did not. In 1982, the supreme court held that a plaintiff was permitted to seek damages for loss of consortium within a statutory wrongful death action. See *Elliott*, 92 Ill. 2d at 541. Remarriage was not an issue in *Elliott*. Since *Elliott*, four key appellate cases—*Carter* (Fourth District), *Dotson I* and *Dotson II* (First District), and *Pfeifer* (Second District)—have addressed new challenges associated with the admission of evidence concerning material services and the ability to recover for the loss of material services beyond the date of a plaintiff's remarriage. We address these cases to the extent they inform the premises underlying our analysis.

¶ 33 1. Pre-*Elliott* Cases Under the Wrongful Death Act: *Watson*

¶ 34 We first consider pre-*Elliott* actions brought under the Wrongful Death Act. Section 2(a) of the Wrongful Death Act, which in pertinent part has remained constant since before *Elliott*, provides:

> "Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the surviving spouse and next of kin of such deceased person. In every such action the jury may give such damages as they shall deem a fair and *just compensation with reference to the pecuniary injuries resulting from such death* ***." (Emphasis added.) 740 ILCS 180/2(a) (West 2014).

See also *Elliott*, 92 Ill. 2d at 534 (citing Ill. Rev. Stat. 1975, ch. 70, ¶ 2).

¶ 35 A growing body of case law has addressed what constitutes a pecuniary injury under the Wrongful Death Act. A decedent's lineal next of kin and spouse are presumed to have suffered pecuniary loss upon the decedent's wrongful death. *Hall v. Gillins*, 13 Ill. 2d 26, 31 (1958). The loss of material services formerly performed by the decedent for her lineal next of kin and spouse has long been recoverable as a pecuniary loss in wrongful death actions. See *Dodson v. Richter*, 34 Ill. App. 2d 22, 24 (1962) (the decedent was a wife and mother of teenage and adult children who performed work in and about the family home—including washing, gardening, cooking, making clothing, tending livestock, and helping the husband with his bookkeeping—and the loss of these services were recoverable as a pecuniary loss); *McFarlane v. Chicago City Ry. Co.*, 288 Ill. 476 (1919); see also IPI Civil No. 31.04. The remarriage of the plaintiff, or the possibility thereof, does not affect damages recoverable for the wrongful death of the deceased spouse. *Watson v. Fischbach*, 54 Ill. 2d 498, 500 (1973). The rationale is that a defendant should not be permitted to introduce evidence, for the purpose of mitigating damages, that shows the plaintiff

has received a benefit incident to the complained-of injury from a collateral independent source. *McCullough v. McTavish*, 62 Ill. App. 3d 1041, 1048 (1978).

¶ 36 2. Pre-*Elliott* Cases in Common Law for Loss of Consortium: *Dini*

¶ 37 We next consider pre-*Elliott* actions in common law for loss of consortium. Unlike a wrongful-death action, which may be filed by a lineal next of kin or a spouse, a loss-of-consortium action can only be filed by a spouse. Black's Law Dictionary has defined consortium as a " 'conjugal fellowship' " between husband and wife and the right of each to " 'the company, society, co-operation, affection, and aid of the other in every conjugal relation.' " *Pfeifer*, 253 Ill. App. 3d at 1028 (quoting Black's Law Dictionary 280 (5th ed. 1979)). Black's Law Dictionary defines the loss of consortium as " 'loss of society, affection, assistance, and conjugal fellowship, and includes the loss or impairment of sexual relations.' " *Id.* (quoting Black's Law Dictionary 280 (5th ed. 1979). Merriam-Webster defines conjugal as "of or relating to the married state or to married persons and their relations." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/conjugal (last visited May 2, 2023) [https://perma.cc/YFG9-E8AU]. Consortium is unique to the marriage partner. *Mitchell v. White Motor Co.*, 58 Ill. 2d 159, 162 (1974). The elements of loss of consortium have been described as "indefinitely measured damages." *Coulter v. Renshaw*, 94 Ill. App. 3d 93, 96-97 (1981).

¶ 38 Despite the amorphous and highly personal nature of consortium, there is support in the case law for the inclusion of material services, *i.e.*, household services or chores, as an element of loss of consortium. In *Dini*, the supreme court recounted the history of the common law action for loss of consortium in the context of deciding, for the first time, that the action was not exclusive to husbands. *Dini v. Naiditch*, 20 Ill. 2d 406 (1960). Prior to *Dini*, only husbands could file an action for loss of consortium: "Since the husband was entitled to his wife's services in the home,

as he was to those of any servant in his employ, if he lost those services through the acts of another, that person had to respond in damages." *Id.* at 422. The *Dini* court determined that, as a wife is no longer her husband's chattel, the law must accordingly change to recognize that "a husband's right to the conjugal society of his wife is no greater than hers, [and] an invasion of the wife's conjugal interests merits the same protection of the law as an invasion of the husband's conjugal interests." *Id.* at 429-30.

¶ 39 In defending its position, the *Dini* court addressed the concern of double recovery. *Id.* at 426-27. The *Dini* court recognized that granting the wife a cause of action for loss of consortium may result in a double recovery for the same injury if, for example, the husband sought recovery in an action for his diminished ability to support his family. *Id.* at 426. It responded with language that would be cited for decades to come: "This argument emphasizes only one element of consortium—the loss of support. Consortium, however, includes, *in addition to material services*, elements of companionship, felicity[,] and sexual intercourse, all welded into a conceptualistic unity." (Emphasis added.) *Id.* at 427. It continued that any conceivable double recovery for the loss of support can be obviated by deducting from the computation of damages in the consortium action any compensation for the loss of support in the other action. *Id.*

¶ 40 The *Dini* court also recognized the concern of its opponents that, while an action for loss of consortium is grounded in the husband's historic right to the services of his wife, wives have not, historically, had a corresponding right to the services of their husbands. *Id.* at 427-28. It responded that, if the wife's action was to be historically grounded in sentimental services only, then so be it—other causes of action, such as alienation of affection, also allow damages for sentimental services. *Id.* at 428. It continued, in another oft-cited proposition, that the contrary position "gratuitously assumes that the concept of consortium *is capable of dismemberment* into

material services and sentimental services—which is but a theoretician's boast." (Emphasis added.) *Id.* at 427-28.

¶ 41 Numerous courts have relied on *Dini*'s language that a common law action for loss of consortium includes the loss of material services. See, *e.g.*, *Blagg v. Illinois F.W.D. Truck & Equipment Co.*, 143 Ill. 2d 188, 195 (1991) (citing *Dini*'s language without discussion or direct application); *Manders v. Pulice*, 102 Ill. App. 2d 468, 472 (1968). However, this language has problematic underpinnings. As recognized by the court in *Pfeifer*, the *Dini* court was not asked to decide whether the loss of financial support or material services were components of consortium. *Pfeifer*, 253 Ill. App. 3d at 1030-31. As the *Pfeifer* court held and as both parties accept in the instant case, the loss of financial support falls squarely outside a consortium claim. *Id.* at 1031. The loss of financial support is not an amorphous, highly individualized claim but a tangible and ascertainable pecuniary damage classically sought in a wrongful-death suit. *Id.* at 1030. The problem with the *Dini* quote is that, in placing the arguably more personalized "material services" within the consortium claim, it equated the loss of material services with the loss of financial support—a loss which both parties agree is not a component of the consortium damages.

¶ 42 In addition, numerous courts have relied upon *Dini*'s language that the concept of consortium is not capable of dismemberment into its material and sentimental components. See, *e.g.*, *Dotson II*, 199 Ill. App. 3d at 529. The *Dini* dissent observed certain inconsistencies in the majority's position, including that, on the one hand, the majority discounted the risk of double recovery by noting that a court could deduct from the consortium claim damages for components of consortium that had already been accounted for in other causes of action and, on the other hand, cautioned that the components of consortium could not be separated. *Dini*, 20 Ill. 2d at 434 (Schaefer, C.J., dissenting). It would seem to us that, by saying that it is impossible to separate the

elements of a loss of consortium claim, we are also saying something about those elements—that they are amorphous. In contrast, the lost services that have classically been pursued in statutory wrongful death actions—mending clothes, tending livestock—appear to us to be rather concrete, and, as the trial court found, are amenable to economic valuation in a manner that the highly personalized elements of consortium are not.

¶ 43 3. The Inclusion of Consortium Damages Within a Statutory Wrongful Death Action: *Elliott*

¶ 44 We now turn to *Elliott*, where our supreme court held that a plaintiff was permitted to seek damages for loss of consortium within a statutory wrongful death action and, in so doing, brought about changes to the wrongful-death IPI instructions. *Elliott*, 92 Ill. 2d at 540-41. In *Elliott*, the plaintiff brought a statutory wrongful death action after her husband was killed in a car accident. *Id.* at 533. During the jury instruction conference, the defendants proposed a modified version of Illinois Pattern Jury Instructions, Civil, No. 31.07 (2d ed. 1971) (hereinafter IPI Civil 2d No. 31.07), which read: "In determining pecuniary injuries, you may *not* consider *** the loss of [the] decedent's society by the widow and next of kin." (Emphasis in original and internal quotation marks omitted.) *Elliott*, 92 Ill. 2d at 533. The trial court gave the instruction over the plaintiff's objection. *Id.* The jury awarded $4500 in relation to the wrongful death action, which was the stipulated value of the husband's car. *Id.* The plaintiff appealed, arguing, *inter alia*, that the trial court erred in refusing to instruct the jury on the plaintiff's loss of consortium. *Id.* at 534.

¶ 45 The supreme court agreed. *Id.* at 540-41. Because its holding represents a critical turning point in the case law, and because our reading of *Elliott* differs from that of the *Dotson* courts', we quote extended portions of the *Elliott* analysis:

"[T]he question with which we are faced is whether loss of consortium is compensable as a 'pecuniary injur[y]' under the Wrongful Death Act.

[Plaintiff] and defendants agree that consortium is unique to a marriage partner [citation]. It includes society, guidance, companionship, felicity, and sexual relations. [Citations.]

Hall v. Gillins [13 Ill. 2d 26 (1958)] and *Knierim v. Izzo* [22 Ill. 2d 73 (1961)], where this court previously examined common law actions brought to recover for loss involving destruction of the family unit, are particularly helpful. The court reasoned in both of those decisions that since the remedy sought in each case was not significantly different from the statutory remedy available under the Wrongful Death Act, which allows compensation for 'pecuniary injuries,' *a common law action in tort would not be recognized*." (Emphasis added.) *Id.* at 534-35.

Further,

"In *Knierim*[, 22 Ill. 2d at 82-83], the court relied upon *Hall* in finding 'that the differences between an action for loss of consortium resulting from the death of a husband and an action for pecuniary loss under the Wrongful Death Act are *not sufficiently significant to warrant us recognizing the action for loss of consortium as an additional remedy* available to the widow.'

In addressing the loss of consortium issue in *Knierim* the court reiterated our words in *Hall* that '*** [t]he term "pecuniary injuries" has received an interpretation that is broad enough to include most of the items of damage that are claimed by the plaintiffs in this case.' [Citation.] While neither *Knierim* nor *Hall* explicitly held that loss of consortium was to be considered by the jury in deciding what the appropriate amount of damages was,

it is apparent that *the court denied the common law counts in both actions* because the remedy available in the preemptive wrongful death statute allowed compensation for the injuries alleged." (Emphases added and internal quotation marks omitted.) *Id.* at 536.

Finally,

"It is true that damages for loss of consortium are not capable of being given the detailed in-depth analysis that an expert can be called upon to testify about in calculating a decedent's professional worth where future earnings of an individual employed in a particular field can be measured with precision and particularity. Just the same the damages for loss of a husband's society, companionship and sexual relations are not immeasurable. All of the elements that comprise what is considered to be loss of consortium may not be the most tangible items, but a jury is capable of putting a monetary worth on them. *Therefore, to be consistent with the broad interpretation of 'pecuniary injuries' under the Wrongful Death Act [citation] we find loss of consortium to be included.*

The purpose of the Wrongful Death Act is to compensate the surviving spouse and next of kin or the pecuniary losses sustained due to the decedent's death. [Citations.] It is intended to provide the surviving spouse the benefits that would have been received from the continued life of the decedent. The jury should have been instructed that the value of the decedent's companionship and conjugal relations could be considered in computing the damages to be recovered." (Emphasis added.) *Id.* at 539-40.

¶ 46 The *Elliott* court then specifically addressed the changes that should be made to the standard IPI instructions applicable in statutory wrongful death actions:

"In view of our holding it is clear that the jury was not properly instructed on the measure of damages. The language of IPI Civil [(2d)] No. 31.07 that indicates that in

determining 'pecuniary injuries' the jury may not consider '[t]he loss of decedent's society by the widow and next of kin' is no longer valid. In determining the pecuniary value of a spouse under IPI Civil [(2d)] No. 31.04 the society, companionship and conjugal relationship that constitute loss of consortium are factors that the jury may consider." *Id.* at 541.

¶ 47 4. Post-*Elliott*. Appellate Decisions

¶ 48 Since *Elliott*, four appellate court decisions have addressed challenges arising from the inclusion of consortium damages within a statutory wrongful death claim. These are *Carter*, *Dotson I*, *Dotson II*, and *Pfeifer*.

¶ 49 a. *Carter*

¶ 50 In *Carter*, the appellate court affirmed the manner in which the trial court handled the plaintiff's remarriage when the plaintiff sought consortium damages within his statutory wrongful death action. *Carter*, 130 Ill. App. 3d at 435. The trial court had given the plaintiff two options. *Id.* Under the first option, the plaintiff would be permitted to seek damages for loss of consortium but he would also be required to inform the jury of his remarriage. *Id.* The jury would receive instructions that the loss of consortium damages would be calculated only to the date of remarriage but that remarriage would not affect any other element of damages or liability. *Id.* Under the second option, the plaintiff could withhold the fact of his remarriage from the jury, but he would not be permitted to seek damages for loss of consortium. *Id.* The plaintiff elected the second option and, in choosing "not to include loss of consortium as an element of damage[,] [he] thus insured that the fact of his remarriage would not be brought to the attention of the jury." *Id.*

¶ 51 The plaintiff appealed, arguing that, under *Watson* and *Elliott*, the trial court should have permitted him to seek damages for loss of consortium and instruct the jury that his remarriage was

irrelevant to the determination of damages. *Id.* at 436. The plaintiff correctly noted that, per *Watson*, remarriage was irrelevant to a determination of damages in a wrongful death suit. *Id.* The plaintiff then appeared to argue that, because *Elliott* did not purport to limit *Watson*, then, when *Elliott* allowed damages for loss of consortium to be brought within a wrongful death suit, those consortium damages were subject to the same rules as other damage elements of the wrongful death suit—*i.e.*, they were not subject to limitation based on remarriage—and were no longer subject to the rule governing common law action for loss of consortium that damages be calculated only to the date of remarriage. *Id.*

¶ 52 The appellate court disagreed. *Id.* In a brief analysis, it noted that when, as in *Elliott*, the supreme court announces a new principle of law, it overrules, *sub silentio*, all prior conflicting authority. *Id.* The appellate court continued that, as to the damage element of consortium only, a plaintiff's remarriage will affect the jury's determination of damages within the wrongful death claim. *Id.* The appellate court rejected the plaintiff's argument that, because consortium with the deceased spouse may have been of a different quality from that with the present spouse, a different result was warranted. *Id.* Thus, it concluded, the trial court's decision to give the plaintiff two options—seek consortium damages but disclose the circumstance of remarriage to the jury, or forgo consortium damages and keep the circumstance of remarriage from the jury—was "sensible and logical." *Id.*

¶ 53 b. *Dotson I*

¶ 54 In *Dotson I*, the appellate court interpreted *Elliott* as mandating that material services are now recoverable in wrongful death actions *only* as part of a loss of consortium claim. *Dotson I*, 157 Ill. App. 3d at 1044. In *Dotson I*, the plaintiff's wife was killed by an explosion following a repair to a clothes dryer performed by the defendant's employee. *Id.* at 1039. The plaintiff brought

a statutory wrongful death action. *Id.* at 1040. He wished to keep the fact of his remarriage from the jury, so he withdrew his request for consortium damages. *Id.* at 1043. Nevertheless, the trial court allowed the plaintiff to testify to the quality of his marriage to the decedent for the purpose of showing what material services were lost. *Id.* The jury awarded $1.7 million in the wrongful death suit. *Id.* at 1040. The defendant appealed, arguing that the trial court erred in allowing the plaintiff to testify to the quality of his marriage; the testimony was ostensibly offered to show proof of the decedent's material services but was in reality offered to show a loss of society. *Id.* at 1043.

¶ 55 The *Dotson I* court agreed with the defendant, and it went a step further. *Id.* It wrote:

> "[E]ven if the quality of [plaintiff's marriage to decedent] was relevant to the claim for loss of [the decedent's] material services, such evidence was precluded by [plaintiff's] withdrawal of his loss of consortium claim. Contrary to the understanding of the trial court, a loss of consortium claim includes a claim for loss of material services." *Id.*

¶ 56 To explain its ruling, the *Dotson I* court recounted the developing law: (1) claims for a spouse's services in the home have traditionally been recoverable in wrongful death actions (*McFarlane*); (2) evidence of remarriage was irrelevant to a determination of damages in wrongful death actions (*Watson*); (3) *Elliott* allowed plaintiffs to seek damages for loss of consortium within wrongful death actions (*Elliott*); and (4) *Carter* held that *Elliott* implicitly overruled *Watson* in part, in that, moving forward, the circumstance of remarriage was relevant to a determination of damages for loss of consortium within a wrongful death action. *Id.* at 1043-44.

¶ 57 From this, the *Dotson I* court inferred:

> "Although neither *Elliott* nor *Carter* explicitly hold that a claim for loss of a spouse's material services is henceforth incorporated into the now recoverable claim for loss of consortium in a wrongful death action, they must be construed to such effect. While

Elliott did not mention the material services component of the loss of consortium claim, it affirmed an appellate court decision which held that the trial court should have given the jury an instruction on loss of consortium, '*i.e.*, *lost services*, society, companionship and sex.' (Emphasis added.) (*Elliott v. Willis*[, 89 Ill. App. 3d 1144, 1145 (1980)].) Moreover, the supreme court noted that consortium 'includes society, guidance, companionship, felicity and sexual relations. (*Elliott*[, 92 Ill. 2d [at] 535], citing *Dini*[, 20 Ill. 2d 406].) That case, in turn, observed that consortium includes 'in addition to *material services*, *** companionship, felicity and sexual intercourse, all welded into a conceptualistic unity' and that consortium was incapable of separation into the 'material and sentimental services.' (Emphasis added.) [*Dini*, 20 Ill. 2d at 427-28].

From these cases, we conclude that material services have always been a component of a claim for loss of consortium and that the allowance of their recovery in wrongful death actions prior to *Elliott* was a necessary departure from this general rule. We further conclude that *Elliott mandates a finding that material services are now recoverable in wrongful death actions only as part of a loss of consortium claim*. As such, the trial court erred when it allowed evidence of the quality of the [plaintiff's] marriage as evidence that [the decedent's] services to [the plaintiff] would have continued in the future. Because [the plaintiff] withdrew his claim for loss of consortium, which under *Elliott* included his claim for loss of material services, this evidence was irrelevant to the issue of the amount of damages to which [the plaintiff] was entitled. This error requires a reversal of the $1,700,000 award to the estate of [the decedent] and a new trial." (Emphases added and in original.) *Id.* at 1044.

¶ 58 The *Dotson I* court added: "Having concluded that [the plaintiff] could not separate a claim for loss of material services from a claim for loss of consortium, we also conclude that to the extent the trial court allowed [the plaintiff] to advance a claim for such services it should have allowed evidence of his remarriage." *Id.* at 1045.

¶ 59 c. *Dotson II*

¶ 60 The *Dotson II* court addressed the plaintiff's appeal from the second trial. This time, the plaintiff argued that the trial court erred in instructing the jury to limit damages for lost material services to the loss sustained from the time of decedent's death to the time of the plaintiff's remarriage. *Dotson II*, 199 Ill. App. 3d at 527. The appellate court held that the determination that material services were recoverable only as part of a loss of consortium claim was law of the case. *Id.* at 528. Further, the *Dotson II* court defended the *Dotson I* rationale by noting that (1) historically, the common law recognized a loss of consortium action in the husband for the loss of his wife's services; (2) the *Dini* court held that material services were an element of loss of consortium; and (3) the *Dini* court also held that the elements of consortium are welded into an inseparable, conceptualistic unity. *Id.* at 529-31. Because of this, the court concluded, "after *Elliott*[,] remarriage limits a claim for material services as much as it limits any other element of consortium." *Id.* at 531.

¶ 61 Though *Dotson II* may have initially appeared to retreat from *Dotson I* when it referred to its earlier holding as the law of the case (*id.* at 528), it later went one step further than its initial determination that a plaintiff could pursue a claim for material services so long as he disclosed the fact of his remarriage (*Dotson I*, 157 Ill. App. 3d at 1045). *Dotson II* ultimately concluded that a plaintiff would be precluded from seeking damages for the loss of material services beyond the date of remarriage. *Dotson II*, 199 Ill. App. 3d at 531.

¶ 62 d. *Pfeifer*

¶ 63 In *Pfeifer*, the trial court limited damages to the date of remarriage for the loss of the decedent spouse's financial support within a wrongful death action. 253 Ill. App. 3d at 1026. The appellate court reversed, explaining that *Watson* controlled over *Dotson I* and *Dotson II*. *Id.* at 1026-31. In particular, the appellate court stressed that the loss of financial support and the loss of consortium are distinct and independent components of the pecuniary damages recoverable under the Wrongful Death Act. *Id.* at 1031. *Watson* had held that remarriage does not affect damages recoverable in a wrongful death action, and this applies equally to the loss of financial support. *Id.* at 1027. Further, the defendant "cannot escape application of the [*Watson*] rule by attempting to recast financial support as either a type of material service or as an element of loss of consortium separate from but similar to the 'material services' which were at issue in *Dotson*." *Id.* at 1027-28.

¶ 64 The *Pfeifer* court recognized the language in *Dini* placing material services in the consortium basket and appearing to equate material services with loss of financial support. *Id.* at 1030-31 (" '[t]his argument emphasizes only one element of consortium—the loss of support' " (quoting *Dini*, 20 Ill. 2d at 427)). The *Pfeifer* court reasoned, however, that the above-quoted comment appeared in a *dicta* portion of the *Dini* decision, the main point of which had been merely to establish that a wife's claim to loss of consortium is equal to that of a husband's. *Id.* at 1031. The *Pfeifer* court concluded that, if the *Dini* court had been squarely faced with the question of whether financial support was an element of consortium, it would not have made the comment. *Id.* at 1031.

¶ 65 In support of its holding, the *Pfeifer* court synthesized the case law pertaining to the definitions of consortium and material services within a consortium claim. *Id.* at 1029-30. It contrasted consortium and material services within a consortium claim with financial support:

"[T]he *Dotson* court, which held that material services were a component of a claim for loss of consortium, perceived such services as unique to a marital relationship ***.

The concept of consortium, as it emerges from the cases, *consists primarily and essentially of intangible elements which are unique, and very personal, to any given marriage*. The loss of consortium reflects the loss of personal benefits and satisfactions the surviving spouse enjoyed as a result of a highly individualized relationship with a particular person. That relationship and those benefits cannot be duplicated. As for material services, we note first that the courts speak of a wife's 'services in the home,' services 'as [the spouse's] wife,' and 'personal services.' The courts' discussions do not include, even by implication, the concept of financial support. Too, while some material services are clearly more tangible in nature than such things as affection and companionship, they are also highly personal to, and generally flow from, the particular relationship between specific spouses. As such, they are properly part of consortium.

In contrast, financial support lost due to the wrongful death of a spouse is totally tangible. Financial support is wholly unlike the elusive and highly personal characteristics of consortium. It does not flow from, is not unique to, and does not depend upon the relationship between particular spouses." (Emphasis added.) *Id.*

¶ 66 The *Pfeifer* court readily distinguished the damages at issue in the case before it—lost financial support—with those at issue in *Dotson I* and *Dotson II*—lost material services. Unlike us, they were not called upon to agree or disagree with the inferences made by the *Dotson* courts. Nevertheless, we agree with *Pfeifer* that *Watson* continues to be good law and the general rule in statutory wrongful death actions. With the exception of damages for loss of consortium within a wrongful death action, a plaintiff's remarriage may not affect a jury's determination of damages

in a wrongful death action. We also take away that the concept of consortium "consists primarily and essentially of intangible elements which are unique, and very personal, to any given marriage." *Id.* at 1029.

¶ 67 B. Application to the Instant Case

¶ 68 The aforementioned cases demonstrate that financial support and material services have, historically, been recoverable under a statutory wrongful death action. On a parallel track, common law has, historically, recognized a cause of action for loss of consortium, which also has been said to include material services. The supreme court in *Elliott* allowed for a plaintiff to seek damages for loss of consortium within a statutory wrongful death action. However, as *Elliott* was not a remarriage case, it did not instruct upon the consequences of remarriage to a jury's determination of damages when a plaintiff chooses to seek damages for loss of consortium (in which remarriage is a guiding consideration) within a statutory wrongful death action (in which remarriage may not be considered).

¶ 69 For the reasons that follow, we determine that, when a plaintiff chooses to seek damages for loss of consortium within a statutory wrongful death action, the classic elements of a statutory wrongful death action—loss of financial support and loss of material services—are preserved and remain subject to the supreme court's holding that remarriage must not affect the jury's determination of damages. See *Watson*, 54 Ill. 2d at 500. The remaining elements of a loss of consortium claim, including "society, guidance, companionship, felicity and sexual relations," remain subject to the *Carter* rule of termination upon remarriage. See *Elliott*, 92 Ill. 2d 535 (describing consortium); see also *Carter*, 130 Ill. App. 3d at 436 (the remarriage rule as applied to damages for loss of consortium).

¶ 70 As stated in *Pfeifer*, the concept of consortium "consists primarily and essentially of intangible elements which are unique, and very personal, to any given marriage." *Pfeifer*, 253 Ill. App. 3d at 1030. *Elliott* named these elements as "society, guidance, companionship, felicity and sexual relations," and "society, companionship[,] and [the] conjugal relationship." *Elliott*, 92 Ill. 2d at 535, 541. These core components of consortium are what had not been recoverable in statutory wrongful death actions prior to *Elliott*, and, with their addition, the common law action for loss of consortium was no longer necessary as a separate cause of action in the same suit.

¶ 71 The parties focus on the fact that, in instruction No. 32 (IPI Civil No. 45.01B), plaintiff placed lost earnings and lost household services on the same line and Jurak did not object. Equally important, however, is that IPI Civil No. 31.04 places the loss of services and the loss of the marital relationship on separate lines, a formulation that followed from the supreme court's analysis in *Elliott*. *Elliott*, 92 Ill. 2d at 541. Thus, *Elliott* offers additional support for our holding in that services, a traditional element of a statutory wrongful death action, are distinct from the remaining elements of consortium. This defeats a critical premise in the *Dotson* decisions.

¶ 72 The *Dotson* decisions hang on the support-and-material-services language in *Dini*, which, as *Pfeifer* noted, was set forth in *dicta*, and on the idea that the consortium is a conceptualistic unity which cannot ever be broken into its various components. However, as noted, the support-and-material-services language in *Dini* has problematic underpinnings. Moreover, the conceptualistic-unity language in *Dini* was not iron clad.

¶ 73 To the contrary, the *Dini* court forecast that, when brought in conjunction with another cause of action, a trial court may need to deduct damages from the otherwise unbreakable conceptualistic unity of consortium to avoid double recovery. *Dini*, 20 Ill. 2d at 427. Here, plaintiff has not brought a consortium action in addition to a wrongful death action, but he seeks damages

for consortium within a wrongful death action. As *Elliott* instructs, if one cause of action versus the other—a statutory wrongful death action versus a common law loss of consortium—must bend from its historical pure form, it is the common law loss of consortium action. This must be the case where, as here, the plaintiff filed a statutory wrongful death action, not a common law loss of consortium action. In fact, in *Elliott*, the supreme court favorably recounted that, when the plaintiff in *Knierim* chose to pursue pecuniary losses under the Wrongful Death Act, the common law action for loss of consortium "would not be recognized." *Elliott*, 92 Ill. 2d at 535-36.

¶ 74 Indeed, the *Dotson* courts' logic that, because the elements of consortium exist in an unbreakable unity, a plaintiff in a statutory wrongful death suit can only seek damages for loss of material services as part of a loss of consortium claim, would make more sense conceptually if *Elliott* had held that the statutory wrongful death action would be subsumed within a consortium claim, not the other way around.

¶ 75 Thus, we decline to follow the *Dotson* decisions for at least two reasons: (1) *Dotson* interprets *Elliott* to have limited the relief available under the Wrongful Death Act, when, in our view, *Elliott* (which was not a remarriage case) intended to expand the relief available under the Wrongful Death Act while eliminating the need for a separate, common law loss of consortium action; (2) *Dotson* potentially eliminates, or at least changes the character of, previously available relief for one class of litigants (a plaintiff spouse in a wrongful death action) but not for another class of litigants (a plaintiff lineal next-of-kin in a wrongful death action). For example, under *Dotson*, a plaintiff spouse cannot seek damages for lost material services outside his request for consortium damages. In attempting to prove or describe the lost material services, the plaintiff spouse would be relegated to highly personal, non-market valuations of the same. See *Elliott*, 92 Ill. 2d at 540. However, a plaintiff child or parent would be able to seek damages for lost material

services and submit market-value evidence of the same. Similarly, a plaintiff spouse who does not wish to pursue damages for loss of the marital relationship, and in exchange keep his remarriage from the jury, cannot seek damages for lost material services, even though lost material services have always been recoverable under a statutory wrongful death action. However, a plaintiff child or parent, for whom loss of the marital relationship is inapplicable, could seek damages for lost material services. In this way, material services are not unique to the marital relationship. *Cf. Mitchell*, 58 Ill. 2d at 162 (consortium is unique to the marriage partner).

¶ 76 Our holding is consistent with *Williams v. BNSF Ry. Co.*, 2015 IL App (1st) 121901-B, ¶ 49. *Williams* provides guidance in that it, too, examines a plaintiff's ability to recover consortium damages within a statutory cause of action—there, the Federal Employers' Liability Act (FELA) (45 U.S.C. § 51 (2006)). *Williams* instructs that a plaintiff in a FELA action may not recover consortium damages but may recover for lost household services, the latter having "nothing to do with [the plaintiff's] relationship with his wife and the effect [the plaintiff's] injuries had on that relationship." *Williams*, 2015 IL App (1st) 121901-B, ¶ 49. Thus, *Williams* did not agree with the *Dotson* rationale that a claim of damages for lost material services was an indivisible part of a claim for loss of consortium such that, if damages for loss of consortium were not sought or could not be sought, neither could damages for lost material services.

¶ 77 In sum, we reject Jurak's argument that damages for loss of material services must end upon remarriage. Aside from the *Dotson* cases, which are problematic for the reasons stated, Jurak relies primarily on case law concerning the common law action for loss of consortium. See, *e.g.*, *Blagg*, 143 Ill. 2d at 195; *Dini*, 20 Ill. 2d 406; *Manders*, 102 Ill. App. 2d 468. The instant plaintiff did not file a common law action for loss of consortium. He filed a statutory cause of action for wrongful death. The case law addressing that cause of action—primarily *Watson* and *Elliott*, both

supreme court cases—control. Because we have held that the trial court properly allowed plaintiff to recover for loss of material services independent of his recovery for loss of consortium, *i.e.*, loss of the marital relationship, we need not address Jurak's argument that, as a part of the consortium, material services share the same elusive traits as other consortium elements that render expert, market valuation inappropriate.

¶ 78 As a final matter, to the extent that Jurak continues to argue that Smith's testimony concerning household services was improper even outside the consortium context, we disagree. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ill. R. Evid. 702 (eff. Jan. 1, 2011). To be admissible, expert testimony must be supported by an adequate foundation, showing that the facts or data relied upon by the expert are of a type relied upon by experts in the relevant field. Ill. R. Evid. 703 (eff. Jan. 1, 2011); *Wilson v. Clark*, 84 Ill. 2d 186, 193-96 (1981). In this case, as the trial court stated: "[Smith's] opinions were in part based on objective information and statistics all properly disclosed in discovery. His testimony was subjected to vigorous cross-examination and the jury was free to accept or reject such testimony. Defendant could have offered expert testimony to rebut Dr. Smith but chose not to." There is no error here.

¶ 79 III. CONCLUSION

¶ 80 The judgment of the circuit court of Grundy County is affirmed.

¶ 81 Affirmed.

Passafiume v. Jurak, 2023 IL App (3d) 220232

Decision Under Review:	Appeal from the Circuit Court of Grundy County, No. 17-L-7; the Hon. Lance R. Peterson, Judge, presiding.
Attorneys for Appellant:	Troy A. Lundquist and Stacy K. Shelly, of Langhenry, Gillen, Lundquist & Johnson, LLC, of Joliet, and Melinda S. Kollross, of Clausen Miller P.C., of Chicago, for appellants.
Attorneys for Appellee:	Robert J. Napleton and David J. Gallagher, of Motherway & Napleton, LLP, of Chicago, and Lynn D. Dowd and Jennifer L. Barron, of Law Offices of Lynn D. Dowd, of Naperville, for appellee.

VERDICT FORM B

We, the jury, find for Paul Passafiume, Independent Administrator of the Estate of Lois Passafiume, deceased, and against the defendants, Daniel Jurak, D.O. and Daniel Jurak, D.O., S.C., and further find the following:

First: Without taking into consideration the question of reduction of damages due to the negligence of the decedent, Lois Passafiume, we find that the total amount of damages suffered by Paul Passafiume, Independent Administrator of the Estate of Lois Passafiume, deceased, as a proximate result of the occurrence in question is $ 2,121,914.34, itemized as follows:

Medical and/or Funeral Expenses	$ 12,139.34
The Value of Earnings and Household Services Lost and the present cash value of the Earnings and Household Services reasonably certain to be lost in the future	$ 1,434,025
Pain and Suffering (Lois)	$ 200,000
Loss of Society for Paul Passafiume	$ 75,750
The Grief, Sorrow, and Mental Suffering of Paul Passafiume	$ 400,000
PLAINTIFF'S TOTAL DAMAGES	$ 2,121,914.34

Second: Assuming that 100% represents the total combined negligence of all persons whose negligence proximately contributed to the plaintiff's damages, including the decedent, Lois Passafiume, and Daniel Jurak, D.O., we find that the percentage of such negligence attributable solely to decedent, Lois Passafiume, is 20 percent (%).

Third: After reducing the total damages sustained by the plaintiff by the percentage of negligence attributable solely to Lois Passafiume, we assess the plaintiff's recoverable damages in the sum of $ 1,697,531.48.

C 918

FOREPERSON

C 919

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

NO. 17 L 7

PAUL PASSAFIUME, Ind. Adm of the Estate of LOIS PASSAFIUME

vs.

DANIEL JURAK D.O. S.C. AND DANIEL JURAK D.O.

FILED

JUL 21 2021

Carri Trotter
GRUNDY COUNTY CIRCUIT CLERK

ORDER

This cause coming to be heard on a jury trial commencing on 7/12/21 and ending on 7/21/21 the jury having reached its verdict in favor of the plaintiff and against the defendants. Over Defendant's Objection as to entering judgment and as to costs, It is hereby ordered judgment in the amount of $1,697,531.48 IT Hereby entered in favor of the plaintiff and against the defendants. Court costs are assessed in favor of the plaintiff and against the defendants. Defendants are entitled to a set off in the amount of $40,000.00 pursuant to his settlement with Morris Hospital.

It is hereby ordered this matter is set for hearing on August 12, 2021 at the hour of 1:30 pm for calculation of prejudgment interest pursuant to 735 ILCS 5/2-1303(c).

DATE 07-21-21

Lam A. Peterson C 920
JUDGE

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

NO. 17L7

PAUL PASSAFIUME Ind Adm
of the Estate of LOIS PASSAFIUME

vs.

DANIEL JURIAK D.O AND
DANIEL JURAIC D.O S.C

FILED
AUG 12 2021
Carol Teaffer
GRUNDY COUNTY CIRCUIT CLERK

ORDER

This matter coming to be heard on the calculation of prejudgment interest pursuant to 735 ILCS 5/2-1303(c) the Court having conducted a hearing and being fully advised in its premises

(1) It is hereby ordered prejudgment interest is calculated in the amount of $ 5721.89 pursuant to 2-1303(c) over Defendants' objections as stated in open Court;

(2) Defendants' Motion Regarding Tolling of Post-Judgment interest while trial transcript being Prepared and application of set-off as it Pertains to Post-Judgment interest are both preserved and shall be addressed during Post-Trial Motions

DATE 8-12-21

JUDGE

C 1036

TAR

STATE OF ILLINOIS)
) SS:
COUNTY OF GRUNDY)

IN THE CIRCUIT COURT OF THE 13TH JUDICIAL CIRCUIT
GRUNDY COUNTY - ILLINOIS

PAUL PASSAFIUME, As Independent Administrator of the Estate of LOIS AKAU-PASSAFIUME, Deceased,

Plaintiff,

- vs - 17 L 7

DANIEL JURAK, D.O. and DANIEL JURAK, D.O., S.C.,

Defendants.

REPORT OF PROCEEDINGS had in the above-entitled cause before the HONORABLE LANCE R. PETERSON, Judge of said Court, on the 23rd day of February, 2022.

APPEARANCES:

MR. ROBERT J. NAPLETON

MR. DAVID J. GALLAGHER

Attorneys at Law

Appeared on behalf of the Plaintiff;

MR. TROY A. LUNDQUIST

Attorney at Law

Appeared on behalf of the Defendants.

ASLO PRESENT: ATTORNEY MS. LYNN D. DOWD

THE COURT: All right. Good morning

MR. NAPLETON: Good morning.

MR. LUNDQUIST: Good morning.

THE COURT: 17 L 7, Passafiume versus Jurak. And this cause comes before the Court on defendant's post-trial motion, motion for a new trial with regard to damages and/or remittitur. Actually it's a motion for a new trial period, the motion for a new trial damages or a motion for remittitur. And the parties had provided a courtesy copy of the motions and various materials which the Court has received. I've read all the pleadings, some of the case law for today, and looked through things that I thought I needed to. I know it's been seven or eight months ago, but it's all still pretty fresh; the narrow issue dealing with Stan Smith and his testimony, it's still pretty fresh. We dealt with it at the motions in limine. So, Mr. Lundquist.

MR. LUNDQUIST: Thank you, your Honor. Good morning. Again, your Honor, thank you for your time and consideration of this. Obviously it's difficult to present arguments suggesting that things should have been ruled upon differently. We do that with the utmost respect. And I say that at the beginning because, you know, as I think I said at one of our things we did not do

a shotgun approach here. We do not want to throw a number of things at your Honor. This is a very focused issue. We've limited the post-trial motion issue to preserving the record on the interest issues, and I would certainly raise all of those here and refer to the briefs for those positions. The only thing that I'll mention on the record as far as the prejudgment interest is the gist of the argument is that juries are asked to make plaintiffs whole, and when they render a verdict, that's what they're doing. The legislature has chosen to enact the prejudgment interest statute which essentially adds more damages to the jury's verdict, which presumably if the jury is doing their job, which we assume they do, they're making plaintiff whole. So that's why among other things the prejudgment interest argument I think the legislature's actions fail.

But having said that, I want to get to the point here. As you know, we focused our issues with the discussion on Stan Smith, and at trial plaintiffs argued that Stan Smith's opinions and that the household services element were not consortium and ultimately it was determined that the household services were to be treated in the same fashion as the lost wages, and that's what occurred. Stan Smith, over our objection in the motions

in limine of the plaintiff were denied, was allowed to testify to the jury of present expert testimony of $998,158 in household services that he had monetized. So we argued then and we argue now that it was inappropriate for Smith to be allowed to monetize those issues, and I still believe that, and we've cited all the case law on that point. But I think if we move to the bigger issue which is before the Court allowing it all, the seminal issue, but then it was compounded by the fact that Smith was allowed to testify to the household services damages beyond the date of Mr. Passafiume's remarriage, which was approximately 15 months after his wife's death. In the briefs, plaintiffs in their response brief state specifically that they do not dispute defendant's assertion that household services are a part of loss of consortium. So contrary to what was argued at trial that's now been conceded and admitted by the plaintiff. So it's not even in dispute household services are elements of loss of consortium and is essentially Black Letter Law, Carter versus Chicago is one of the cases we cited, but there's numerous cases including the jury instructions that support that consortium damages end upon remarriage.

So Stan Smith was allowed to testify as an

expert to inadmissible damages, and plaintiffs argue that yes, we concede household services are consortium, but there's no prejudice here; there's no damage. Well, that makes no sense, your Honor. You heard Stan Smith's testimony and he was allowed to testify to essentially a million dollars of inadmissible damages. He explained his economic theory and his math and how he valued the hourly wage of Ms. Passafiume based on caretakers, professional limo drivers, professional chefs, professional painters, and, you know, landscapers, and then he extrapolated that in front of the jury over her life, which that was admittedly now inappropriate. So the plaintiffs argue that it is not prejudicial. I don't know how that can be. The Rasmussen case that we cited among others state when an expert is allowed to testify to inadmissible damages a new trial is in order. You can't undo that by simple argument or other parts of the trial. I mean, experts, that was the only expert testimony they heard and it was inadmissible beyond the date of remarriage.

The other arguments that plaintiffs made are that household services and wage loss were on the same line on the verdict form, therefore, we've waived the ability to make this argument. That's not true. There was zero evidence at trial presented by the plaintiff of

lost wages other than what Stan Smith testified to. That was the entirety. Plaintiffs had the opportunity to search the record, file the response. They haven't cited anything in their response in terms of other evidence regarding the wage loss other than what Stan Smith testified to, and Stan Smith said her wage loss was $913,881. So we have an ascertainable amount. It's very clear from the record. That means that the remainder of the items on that line, the only thing they can be are household services. So we can identify what household services are. We know what those numbers are because those are the only two things that fit into that and there's no evidence from any place other than Stan Smith. And one question which we cited to Mr. Passafiume about household services and he testified to the same things that Stan Smith had valued. I think plaintiffs used that as a foundation attempt for Smith's testimony. So there's nothing new or additional that you're being asked to speculate about. So it's very clear what the jury did. They awarded $1,434,025 on that line and we know that $913,881 of that is the lost wages. So the remainder is the prejudice to the defendant because the jury should not have heard household services beyond the date of remarriage.

So I appreciate your consideration of this, Judge, and to have the plaintiffs argue there's no prejudice, as you know, we've had post-trial meetings with you. This was an excess verdict. The prejudice to Dr. Jurak is real and tremendous in terms of dollars and it's very clear where it came from. We've not attacked any other areas of the jury's verdicts or other rulings that you made in evidence, but this particular one the jury should not have heard Stan Smith testify to a lifetime of household services loss, and that was tremendously prejudicial to Dr. Jurak and we ask that there be a new trial (inaudible.) period. In the alternative a new trial as to damages or in the alternative to that, that the Court determine that there should be a remittitur, I have trouble saying that word, remittitur of the amount. Thank you, Judge.

THE COURT: All right. Thank you.

MR. NAPLETON: Bob Napleton for the plaintiff along with Lynn Dowd. Judge, I'm going to kind of pass the floor to Lynn when it deals with the loss of household services and the lost wages and the Stan Smith issue. But just in the name of judicial resources, allocation of your time and your resources, we're talking about this prejudgment interest issue. We're talking about a little

over $5,000, and quite frankly I think it's silly to address very complicated, complex, constitutional issues, equal protection, three readings in the House, right to trial by jury, special legislation, these are really granular or complex concepts, and I don't think, you know, it really even justifies your time to be quite honest with you. So what I'm going to tell you and I'm going to tell the defense is that the plaintiffs are willing to supply the defendants with a release/satisfaction of Paragraph 1 of the August 12th, '21 order. If you recall, that's the order in which you awarded prejudgment interest of $5,700 or thereabouts. So I think quite frankly it's a moot point. I'm looking at a stack of briefs about, you know, 8 to 10 inches high. I bet you over half of that stack deals with the prejudgment interest issue, so I just want to kind of take that away from your consideration respectfully in the name of judicial resources. Thank you.

THE COURT: All right. Thanks. That would have been better a week ago, but okay.

MR. NAPLETON: On the other issue I'm going to turn the table over to Lynn.

MS. DOWD: Good morning, your Honor.

THE COURT: Good morning.

MS. DOWD: For the record, again, my name is Lynn Dowd and I would like to respond to the plaintiff's request for post-trial relief with respect to the verdict and the damages, et cetera, but to do so, just to highlight some critical facts, $2.121 million was the entire verdict of which $1.434 and change was allocated to lost future earnings and household services. And the award -- the essence of their appeal -- excuse me -- their post-trial claim is really directed towards the award for the household services. That entire request is problematic for several reasons, and I would like to address that, but to do so I would just like to remind everyone that on this post-trial motion the Pedrick standard governs that all of the evidence has to be viewed in the light most favorable to the plaintiff and any and all reasonable inferences that can be drawn from the evidence must be drawn in favor of the plaintiff. A new trial on damages standard is whether the evidence was against the manifest weight of the evidence and we are going to -- we've submitted in our brief and today we do not believe the defendants have met their very high burden of meeting either of these goals. So with respect to their essential claim of error on the household services issue, a couple things I just would like to highlight,

and, one, if the Court would indulge me, you know, in reading the record I've had the benefit of coming in as an outsider and giving it kind of a cold read, and back on July 15th at Pages 3 and 4 in the transcript your Honor made a statement about this, and it reflects all the work that all the parties put into it and your Honor did and you kind of summed up the issue this way. I'm going to quote. "Household services. I've read the briefs submitted by the defendant. The bottom line is the two cases are Dotson and Pfeifer. I've read them both. And here's my ruling: I believe that when you read Pfeifer, when you read them both, but when you read Pfeifer, that the logic to me that these types of household services that can be easily quantifiable just like lost wages, just like lost financial support, if you understand all the logic behind the pecuniary damages and loss of consortium and all of the cases that have been cited," and the Court goes on, but essentially leading up to that certain components of the loss of consortium claim, the household services provided by the decedent are tangible and quantifiable, and, therefore, and that's consistent with the Supreme Court ruling from over a hundred years ago, the McFarlane, 288 Illinois at 476, where the court said one of the elements of pecuniary loss is the personal

services of the decedent. So there's different types of loss of consortium elements and different types of damages that the jury was uniquely called upon to put a number on and that was their goal. So the defendants take issue with the jury's award of 1.4 million for the loss of earnings and household services. But here's the problem in their entire post-trial claim for relief. It's not a waiver issue. They failed to perfect this claim of error in a number of ways. Number 1, we start with the jury instructions. They accepted plaintiff's verdict form B which combined the lost earnings and the lost household services award. They said on the record they accepted it; they withdrew any other instructions they had; they had the opportunity for purposes of perfecting a claim of error to tender proposed alternative instructions which separated lost earnings and the lost services award. And this is critical.

THE COURT: The instruction separated them.

MS. DOWD: They could have issued separate instructions for a different line item for each one of those, because what they've done today and throughout their entire brief is they're speculating and they're arguing to the Court trying to persuade you that the jury must have done something. They had to do this. When we

hear those terms speaking in the subjunctive, that's by definition speculation. They've got to prove what the jury did, and we know what the jury did because we can look at the concrete four corners of the verdict form. They returned an award of 1.4 million allocated to both of those claims and it was well below what the plaintiffs requested in closing argument.

Now, because of that, there's no way for the Court to today determine what if any amount the jury awarded for household services. Based on this verdict form all of it could have gone to lost earnings; all of it could have gone to household services. It could have been some combination or zero could have been awarded to household services. And that's their problem. They have to prove the amount and they can't. They go to Dr. Smith's testimony where he testified that the lost earnings were $914,000. That was his opinion. And we know from the case law that the jury could take his opinion, which he said was conservative, and he did lay the foundation for his opinion based on his employees' interviews with the decedent's husband, Paul, which was perfectly appropriate, experts can have -- we can all have our staffs do some legwork and interview work for us and then we can evaluate them as an expert. The life tables,

various treatises, there was a lot of data, and also the testimony of Paul. So he did lay a foundation under Wilson v. Clark for his opinion of $914,000 for lost earnings and the law says the jury could award more or they could award less on that alone. So based on that lost earnings testimony and the underlying data in support of it, the jury could have totally awarded the 1.4 million to lost earnings. And again, under Pedrick, that is a very -- not just reasonable, but justifiable inference that can be drawn from this jury verdict form and tender the instructions that we must draw that inference in favor of the plaintiff.

The defendants, again, they could have tendered alternative jury instructions to break this down and to prove up for purposes of post-trial and appellate relief what the breakdown was and then make their argument, but they didn't do it. But they had another opportunity to perfect this claim of error to help the Court and any reviewing court understand what happened, but they didn't do that, and that would have been with the tool of special interrogatories. I'm not talking about general verdict. We can discuss that and debate that, but there's nothing to stop them from also tendering special interrogatories to the jury asking the simple questions

did we prove lost earnings, did the plaintiff prove lost household services. If so, what are the amounts you're allocating. There's a variety of different questions they could have fashioned to prove up what if anything the jury did. And I would remind the Court that after the jury instruction conference the next morning your Honor came back and asked them again, your Honor gave them a second opportunity, we've done the conference; is everybody in agreement. Is this acceptable and they said yes. So they did have the benefit of thinking about this overnight and they could have come back the next morning and asked your Honor to tender special interrogatories, but they didn't do that.

With respect to -- again, I had mentioned the jury was at liberty to award a higher amount than Dr. Smith's of the $913,000 and under Pedrick we should, we must infer that they did. The jury received an instruction that they didn't have to accept any of the testimony of Dr. Smith and that could have well pertained to the loss of household services testimony he provided. The admission of his testimony was with your Honor's sound discretion and allowing him to testify on the household services portion was appropriately and correctly within your discretion, because the purpose of an expert is to

aid the jury. So with respect to the household services portion he gave another opinion and he gave the data underlying his opinion and broke it down and the jury was free to accept it in whole or reject it completely, and as we sit here today, the defendant can't prove what if anything the jury did with that testimony of Dr. Smith. So while there's a lot of interesting discussions about household services and what they mean, as we sit here today, the cold hard fact is it doesn't matter because now we're post-trial. They've got this verdict and this verdict form and they cannot establish that the jury even awarded a nickel for household services. What we can -- again, just to summarize, the $1.5 million verdict can be justified based on Dr. Smith's testimony, the plaintiff Paul Passafiume's testimony and the underlying data that this pertained to lost earnings, lost earnings even after the remarriage and that's authorized under Pfeifer and possibly there could be a component part for a household services. The defendants in their brief have advocated a figure of $25,000. Maybe that's what the jury awarded, but that's the problem. They can't establish what if anything the jury awarded for household services.

And one other thing I would just like to say regarding the loss of consortium issue, again, looking at

the jury instructions, the defendants for another reason have no claim of error because they received -- I mean, the jury was given an instruction that the loss of consortium ends on remarriage. So despite what the plaintiffs have argued throughout the trial, they got the instruction that they wanted and the law says the jury is presumed to follow the Court's instructions. So, again, because they received that instruction and they've made no argument about that instruction, the jury was told that they could only calculate the loss of consortium damages up to the point of remarriage. So again that undercuts their entire argument that the jury had to award $900,000 or some other figure.

With respect to any of the other issues, we'll stand on our brief unless of course your Honor has some questions. Thank you very much.

THE COURT: Let me ask you this. I thought since the issue Mr. Lundquist spent most of his argument on was the issue of household services, the value of those be ordered beyond the remarriage date, the 15, 16 months before he was remarried. I thought that was his big issue I heard from his argument.

MS. DOWD: They made that argument, but it's a meritless argument because they have no factual basis in

this record to make that argument as the record stands. I'm sorry. Are you talking about the lost earnings, your Honor, or the household services?

THE COURT: Household services beyond the remarriage date.

MS. DOWD: Well, again, just citing to Pfeifer, the Pfeifer court held that remarriage is irrelevant to damages for loss of financial support, but he's argued about that. And, again, I would just go back to the fact that I'm stuck with that there was a jury instruction telling the jury that the damages terminated upon remarriage. I mean, I understand all the arguments today, but they received that jury instruction and that's the instruction the jury got, so the fact of the matter is the jury in following the Court's instructions did not make an award past the date of remarriage and all the evidence supports the allocation on that one line item going to lost earnings. And the earnings -- the law says the lost earning calculation can go beyond the date of marriage.

MR. NAPLETON: May I just chime in, Judge, real quick?

THE COURT: Sure.

MR. NAPLETON: In my closing argument, I remember distinctly, it's in the record, I indicated to the jury,

hey, these are suggested figures, okay, and I'm suggesting 1.9 for that one line item, I got about 75 percent of that, so clearly the jury knew they could adjust it either way. Also, the jury also got an instruction on life expectancy. Hey, you know the instruction, life table says she can live to age 78, which I was a little surprised, you know, given she died at age 34, but you can adjust that figure up or down, you ultimately decide how long she's going to live and you decide how long she was going to work as a clerk for the Village of Braceville. So certainly there's a scenario. It wasn't testified, but there is a scenario where the jury says, no, she's going to live past 78, she had a great work ethic, she had a great job and, you know, she was the type to work until age 85, I don't know. We just don't know. The point is it's completely within their discretion as I suggested to them.

Stan's number, that $998,000, that only took her to age 67. So that's where Lynn's coming from that there can be -- this award could have been all lost wages, but even if there's some household services, Pfeifer says that's allowed. And your comment, Lynn started out her argument, your comment, hey, there's two cases, I agree with this Pfeifer and Dotson. Pfeifer postdated Dotson.

Your statement was Pfeifer controls this issue. Why? Because it's calculable. It's tangible. You can put a pen and paper to it and come up with a number just like --

THE COURT: Yeah. That part I'm comfortable with. What I just sort of thought the focus of -- the thrust of 90 percent of Mr. Lundquist was the idea of I guess what you're saying is the possibility that the jury assessed an award for lost services, those household services beyond the date of remarriage and that they couldn't do that beyond the date of the marriage. I thought that's what I understood 89 percent of his argument.

MR. LUNDQUIST: 99.

THE COURT: Okay.

MS. DOWD: Your Honor, respectfully I think that is 99 percent of their argument, but no disrespect to counsel, the fact of the matter is under Pedrick and the law and the jury verdicts as we stand here today their entire argument about household services is unfortunately legally irrelevant, because as the law stands, we can for purposes of the post-trial motion and going forward we can and must infer that the entire award went to lost wages.

THE COURT: Mr. Lundquist?

MR. LUNDQUIST: Thank you, Judge. Just for the record, we could argue about Pfeifer and Dotson one and

Dotson two and Elliott and all the other cases that have been cited, I'm not waiving those positions. I still believe that Smith should not have been allowed to monetize any of this. However, without waiving that, your Honor has addressed 99 percent of what we're focusing on here is the impact of not only allowing the testimony but then allowing what -- I didn't hear really anything from the plaintiffs arguing that it was okay for Smith to testify to damages beyond remarriage. They aren't even trying to support that.

MR. NAPLETON: We object to that, Judge, strongly.

MR. LUNDQUIST: Well, there's nothing in their briefs that says that. In fact, their briefs say that household services are consortium damages and Ms. Dowd said today accurately that the jury instructions informed and instructed the jury that loss of consortium ends at remarriage. The problem is two-fold. Number 1, the jury doesn't know that household services, which is what they're being asked to award money for, are consortium. They're told on one hand and plaintiff admits that consortium ends at remarriage; they concede for purposes of today that household services are consortium. The jury was told not to award consortium after remarriage but the -- they heard evidence from an expert about a million

dollars worth of loss of consortium that continued past remarriage, and the plaintiffs really haven't even adequately addressed that. All they're trying to argue is that they want you to speculate about the verdict and oh, the jury could have awarded more than $913,000 for lost wages. Your Honor heard the trial. The plaintiffs in their post-trial motion response have not cited to a single item in the transcript of testimony that would support wage losses of more than $913,000. I'm willing to accept that that's what the jury gave and we're not criticizing that. This isn't about the wage loss. So anything on that line item over $913,000 has to be household services because that's the only other thing that's on that line. I'm not saying what they, you know, could have done or anything like that. I'm saying what they clearly did based on the evidence. There really even hasn't been a response to what the real assertion of error was. The jury heard evidence from an expert of inadmissible testimony. The case law unfortunately is clear when that happens a new trial is in order. And that's what occurred here. I'm happy to address any other questions, your Honor, but, you know, without waiving the original admission of Stan Smith's testimony the real problem here was that it was compounded and he was allowed

to testify to all this money that he shouldn't have been allowed to testify to. We can't undo that. Thank you, Judge.

MR. NAPLETON: Briefly, I know it's 10:30 and you got another matter. I just want to go back to your comment about the logic of Pfeifer and why you basically chose Pfeifer as the controlling case law.

THE COURT: I will save you time. I'm comfortable with my ruling that an expert can and should be able to monetize, itemize as long as there's a proper foundation, household services. I'm still good with that. That I'm still comfortable with that even though I know there's not a lot out there. We'll let the appellate court, we'll see if we're making anything new or clarifying things down the road. Maybe we will. That I'm not -- I've been comfortable with that ruling from the beginning. And I will always remind both sides, just mention, but I granted the defense motion in limine in part. Stan Smith's report covered all sorts of stuff and I ruled that some of it was just too speculative, just didn't in my discretion, my assessment of it wasn't sound enough to let it go to a jury; that portion of his report and his testimony is what I ruled was -- did have proper foundation, was logical, did make sense when you look at other areas experts are

allowed to monetize. And I'm good with that. That part of the motion I can't imagine that I'm going to grant because I still think I was right then and I still think I'm right on that. I think -- but his point was should Stan Smith have been allowed to testify to that monetization that I'm saying is logically and evidentiary-wise proper, but under the rule nothing past the remarriage should he have only been able to testify to the date of remarriage when it comes to household services.

MR. NAPLETON: Right. And I get it down. You now drill down. We take a granular approach. And that's where Pfeifer comes in. The headnote on Pfeifer says remarriage is irrelevant to damages for loss of financial support. Okay. And Pfeifer was a lost wage case. You extended Pfeifer to the realm of household services, but the point of Pfeifer, the last word on the subject by our court's review was you can get into loss of financial support beyond remarriage. It's different than the loss of society, love and affection, all those intangibles. This is tangible. And, therefore, I think that Pfeifer was the last word. You mentioned it right on the transcript; you were spot on in citing Pfeifer because Pfeifer supports the idea that you can claim loss of

household services, loss economic damages, lost wages beyond date of remarriage. Loss of financial support comes in front of the jury even if the surviving husband became remarried. So we're hanging our hats on Pfeifer just like you hung your hat on that ruling on July 15th, I believe, and logically it makes sense.

MR. LUNDQUIST: And, Judge, this is where the problem lies because that's the argument they made at trial and ultimately -- and this is why the two were put together on the verdict form. We're not saying that ultimately giving your ruling that that was wrong; you treated household services the same as loss of income, which is what Mr. Napleton's arguing and trying to get you to do again right now; the problem is that's not what they argued in their briefs. In their briefs the plaintiffs have conceded very plainly that household services are consortium. They're not loss of support. I'm not arguing that wage loss, loss of support should get cut off. You appropriately ruled under the case law. I think it's crazy, but that's what the case law says, the loss of support can continue past remarriage. I get that. That's why Stan Smith was allowed to testify to lost wages of $913,000. The case law supports that. The problem is just as Mr. Napleton argued back in July, he's trying to

equate household services under Pfeifer and apply that same logic. You allowed it to be monetized. Respectfully we disagree, but I respect that decision. I understand why. I understand your logic then and now. I do. But it's still loss of consortium. It doesn't change its spot. Household services are consortium damages by Black Letter Law. They have to end at remarriage. We had a motion in limine asking for that. It was denied. I objected at trial. That was overruled. We did the offer of proof and we determined that the amount of damages Stan Smith under your ruling should have been allowed to testify to was about $25,000, not almost a million, which is what the jury heard. That is prejudice and the case law says very plainly when an expert is allowed to testify to inadmissible elements of damages a new trial is in order. So we ask and encourage and plead with the Court to correct this situation, and the way to do it is to order a new trial or to suggest and find that a remittitur down to that $25,000 amount of the excess is appropriate. Thank you, Judge.

THE COURT: All right. Thank you. All right. Let me go back and re-read a few things. How about March 24th at 3:00? That's back-up to a jury. I don't have a problem going further out if it doesn't bother you. What

about April 18th at 11:30 or 11:15?

MR. NAPLETON: Judge, I'm going to check the 24th. Maybe we can be back -- I will be back from Indianapolis. I can be here at 3:30 on the 24th.

MR. LUNDQUIST: 24th should be fine at 3:30.

MR. NAPLETON: Very good.

THE COURT: All right.

MR. NAPLETON: Thanks for your time, Judge.

THE COURT: Thank you all.

MR. LUNDQUIST: Judge, thank you.

MS. DOWD: Thank you.

MR. NAPLETON: Judge, you need an order on this, right?

THE COURT: If you want just a quick one-liner setting it to that date.

(Proceeding concluded.)

STATE OF ILLINOIS)
) SS:
COUNTY OF GRUNDY)

I, SARA E. OLSON, hereby certify that I reported stenographically the proceedings had at the hearing in the above-entitled cause, and that the above and foregoing is a true, correct, and complete transcript of my stenographic notes so taken at the time and place hereinbefore set forth.

Date: 7.15.22

Sara E Olson

SARA E. OLSON, CSR

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

No. 2017 L 7

PAUL PASSAFIUME, As Independent)
Administrator of the Estate of LOIS)
PASSAFIUME, Deceased.)
)
Plaintiff,)
)
v.

DANIEL JURAK, D.O. and)
DANIEL JURAK, D.O., S.C.,)
)
Defendants.)

DECISION

This cause has come before the court on the defendant's motion for a new trial as to damages or a remittitur of damages. The court has considered the written and oral arguments of the parties as well as the authorities cited. For the following reasons the defendant's motion must be denied.

Defendant argues that plaintiff's expert, Dr. Stan Smith should not have been allowed to offer testimony placing a monetary value on household services. This court ruled that reading the logic in *Peifer v. Canyon Construction Co.*, 253 Ill. App. 3d 1017, 1029-30 (1994) that household services were tangible, specific, and more akin to lost earnings rather than the other amorphous elements of loss of consortium (loss of society, sexual relations, companionship). Further this court

concluded that the report of Dr. Smith along with his interview of Paul Passafiume established a proper foundation for his testimony placing a monetary value on the household services of Lois. His opinions were in part based on objective information and statistics all properly disclosed in discovery. Having heard Dr. Smith's testimony the court's decision has not changed. His testimony was subjected to vigorous cross examination and the jury was free to accept or reject such testimony. Defendant could have offered expert testimony to rebut Dr. Smith but chose not to.

Plaintiff also argues that the court erred by letting Dr. Smith testify to the monetary value of household services beyond the date of Paul Passafiume's remarriage. However, at the jury instruction hearing Defendant failed to object to plaintiff's instruction number 19 which instructed the jury on the law regarding this issue. Plaintiff's instruction 19 specifically limits damages for loss of society, and sexual relations to the time before the remarriage, but does not for household services. In fact, defendant did not offer an alternative version of the instruction containing his position as to the law on this issue and agreed to plaintiff's instruction. Further, defendant did not object to plaintiff's number 32, verdict form B, which places household services on the same line with lost earnings. However, the loss of society element of consortium is set forth on a separate line. This comports with the plaintiff's position on this issue. Defendant did not offer a proposed verdict form B which expressed his position on this issue. Defendant did not properly preserve the issue regarding date of remarriage and the issue has been waived.

By agreement of the parties this court's August 12, 2021 order awarding prejudgment interest of $5,721.89 is hereby vacated.

The defendant's post-trial motion is otherwise denied.

ENTER: 05-16-22

DATE: Lan R Bruno

C 2092

FILED
6/8/2022 2:42 PM
Corri Trotter
Grundy County Circuit Clerk
By: CT

NO._____

APPEAL TO THE ILLINOIS APPELLATE COURT
THIRD JUDICIAL DISTRICT

FROM THE CIRCUIT COURT OF THE 13TH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PAUL PASSAFIUME, As Independent Administrator of the Estate of LOIS PASSAFIUME, Deceased,	)	
Plaintiff,	)	Case No. 2017 L 7
v.	)	
DANIEL JURAK, D.O. and DANIEL JURAK, D.O., S.C.,	)	
Defendants.	)	

NOTICE OF APPEAL

Defendants-Appellants, DANIEL JURAK, D.O. and DANIEL JURAK, D.O., S.C. ("Defendants"), by their attorneys, LANGHENRY, GILLEN, LUNDQUIST & JOHNSON, LLC and CLAUSEN MILLER, P.C., hereby appeal to the Illinois Appellate Court, Third Judicial District, from the following: (1) the July 21, 2021 jury verdict in favor of Plaintiff and against Defendants in the amount of $1,697,531.48 and the Order entering Judgment thereon less a $40,000.00 setoff entered by the trial court on or about July 21, 2021 (Exhibit A) and any and all orders leading thereto; and (2) the May 10, 2022 Decision of the trial court denying Defendants' post-trial motion (Exhibit B) and any and all orders leading thereto (excluding that portion of the Decision vacating by agreement of the parties the court's August 12, 2021 Order awarding prejudgment interest of $5,721.89).

By this appeal, Defendants will ask the Illinois Appellate Court to:

1. Reverse and vacate the July 21, 2021 jury verdict and Judgment entered thereon and the May 10, 2022 Decision denying Defendants' post-trial motion; and
2. Order a new trial on damages only; or alternatively,
3. Enter a substantial remittitur in the amount of $973,350, or in the further alternative only, $496,217, thereby reducing the amount awarded for lost Earnings/Household Services to $460,675 or, alternatively, $937,808, and ordering entry of a remitted judgment in the amount of $724,181.48, or in the alternative only, $1,201,314.48; and
4. Enter any such other and further relief as it deems appropriate and to which Defendants may be entitled on appeal.

Respectfully submitted,

DANIEL JURAK, D.O. and
DANIEL JURAK, D.O., S.C., Defendants

By: *Troy A. Lundquist*
One of Their Attorneys

Troy A. Lundquist #06211190
Langhenry, Gillen, Lundquist & Johnson, LLC
2400 Glenwood Avenue, Suite 200
Joliet, Illinois 60435
(815) 726-3600
tlundquist@lglfirm.com

Of Counsel:
Melinda S. Kollross #6211020
Clausen Miller P.C.
10 South LaSalle Street, Suite 1600
Chicago, Illinois 60603
(312) 606-7608
mkollross@clausen.com

Of Counsel:
Robert Marc Chemers
Pretzel & Stouffer, Chartered
One South Wacker Drive, Suite 2500
Chicago, Illinois 60606
(312) 578-7548
rchemers@pretzel-stouffer.com

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state that I caused to be served, the foregoing with enclosures referred to thereon, if any, by e-mailing copies to the attorneys of record at their addresses of record before 5:00 p.m. on the 8th day of June, 2022.

Troy A. Lundquist

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

GRUNDY COUNTY, ILLINOIS

NO.

PAUL PASSAFIUME, Ind. Adm of the Estate of LOIS PASSAFIUME

VS.

DANIEL JURAK D.O. S.C. AND DANIEL JURAK D.O

ORDER

This cause coming to be heard on a jury trial commencing on 7/12/21 and ending on 7/21/21, the jury having reached its verdict in favor of the plaintiff and against the defendants. Over Defendant's Objection as to entering judgment and as to costs, It is hereby ordered judgment in the amount of $1,697,531.44 is hereby entered in favor of the plaintiff and against the defendants. Court costs are assessed in favor of the plaintiff and against the defendants. Defendants are entitled to a set off in the amount of $40,000.00 pursuant to his settlement with Morris Hospital.

It is hereby ordered this matter is set for hearing on August 12, 2021 at the hour of 1:30 pm for calculation of prejudgment interest pursuant to 735 ILCS 5/2-1303(c)

EXHIBIT A

DATE 07-21-21

C 2114

JUDGE

EXHIBIT
1

FILED
JUL 21 2021
GRUNDY COUNTY CIRCUIT CLERK

VERDICT FORM B

We, the jury, find for Paul Passafiume, Independent Administrator of the Estate of Lois Passafiume, deceased, and against the defendants, Daniel Jurak, D.O. and Daniel Jurak, D.O., S.C., and further find the following:

First: Without taking into consideration the question of reduction of damages due to the negligence of the decedent, Lois Passafiume, we find that the total amount of damages suffered by Paul Passafiume, Independent Administrator of the Estate of Lois Passafiume, deceased, as a proximate result of the occurrence in question is $ 2,121,914.34, itemized as follows:

Medical and/or Funeral Expenses	$ 12,139.34
The Value of Earnings and Household Services Lost and the present cash value of the Earnings and Household Services reasonably certain to be lost in the future	$ 1,434,025
Pain and Suffering (Lois)	$ 200,000
Loss of Society for Paul Passafiume	$ 75,750
The Grief, Sorrow, and Mental Suffering of Paul Passafiume	$ 400,000
PLAINTIFF'S TOTAL DAMAGES	$ 2,121,914.34

Second: Assuming that 100% represents the total combined negligence of all persons whose negligence proximately contributed to the plaintiff's damages, including the decedent, Lois Passafiume, and Daniel Jurak, D.O., we find that the percentage of such negligence attributable solely to decedent, Lois Passafiume, is 20 percent (%).

Third: After reducing the total damages sustained by the plaintiff by the percentage of negligence attributable solely to Lois Passafiume, we assess the plaintiff's recoverable damages in the sum of $ 1,697,531.48.

FOREPERSON

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST	)	
Plaintiff/Petitioner	)	Reviewing Court No: 3-22-0232
	)	Circuit Court No: 2017L7
	)	Trial Judge: Judge Lance Peterson
v	)	
	)	
	)	
KRYZA, MICHAEL MD ET AL	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 11

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST Plaintiff/Petitioner	)	Reviewing Court No: 3-22-0232
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COMMON LAW RECORD - TABLE OF CONTENTS

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST	)	
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COMMON LAW RECORD - TABLE OF CONTENTS

Page 3 of 11

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST	)	
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COMMON LAW RECORD - TABLE OF CONTENTS

Page 4 of 11

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST Plaintiff/Petitioner	)	Reviewing Court No: 3-22-0232
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KRYZA, MICHAEL MD ET AL Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 5 of 11

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST	)	
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	)	
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KRYZA, MICHAEL MD ET AL	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 6 of 11

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST	)	
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v	)	
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KRYZA, MICHAEL MD ET AL	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 7 of 11

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST Plaintiff/Petitioner	)	Reviewing Court No: 3-22-0232
	)	Circuit Court No: 2017L7
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v	)	
KRYZA, MICHAEL MD ET AL Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 8 of 11

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST Plaintiff/Petitioner	)	Reviewing Court No: 3-22-0232
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v	)	
KRYZA, MICHAEL MD ET AL Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 9 of 11

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST Plaintiff/Petitioner	)	Reviewing Court No: 3-22-0232
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v	)	
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COMMON LAW RECORD - TABLE OF CONTENTS

Page 10 of 11

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

PASSAFIUME, PAUL AS IND ADM OF EST	)	
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v	)	
	)	
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KRYZA, MICHAEL MD ET AL	)	
Defendant/Respondent	)	

COMMON LAW RECORD - TABLE OF CONTENTS

Page 11 of 11

INDEX TO REPORTS OF PROCEEDINGS

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
GRUNDY COUNTY, ILLINOIS

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v	)	
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KRYZA, MICHAEL MD ET AL	)	
Defendant/Respondent	)	

EXHIBITS - TABLE OF CONTENTS

Page 1 of 2

E-FILED
Transaction ID: 3-22-0232
File Date: 8/9/2022 3:20 PM
Matthew G. Butler, Clerk of the Court
APPELLATE COURT 3RD DISTRICT

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
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GRUNDY COUNTY, ILLINOIS

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v	)	
KRYZA, MICHAEL MD ET AL Defendant/Respondent	)	

EXHIBITS - TABLE OF CONTENTS

Page 2 of 2

NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

PAUL PASSAFIUME, as Independent Administrator of the Estate of LOIS PASSAFIUME, deceased, *Plaintiff-Appellee,*	)	
vs.	)	No. 129761
DANIEL JURAK, D.O. and DANIEL JURAK, D.O., S.C., *Defendants-Appellants.*	)	

The undersigned, being first duly sworn, deposes and states that on December 4, 2023, the Brief and Appendix of Defendants-Appellants was electronically filed and served upon the Clerk of the above court. On December 4, 2023, service will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

Robert J. Napleton
David J. Gallagher
MOTHERWAY & NAPLETON, LLP
bnapleton@mnlawoffice.com
dgallagher@mnlawoffice.com

Lynn D. Dowd
Jennifer L. Barron
LAW OFFICES OF LYNN D. DOWD
ldowd@msn.com
jbarron@barronlegalltd.com

Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Melinda S. Kollross
Melinda S. Kollross

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

E-FILED
12/4/2023 10:07
CYNTHIA A. GRANT
SUPREME COURT CLERK

/s/ Melinda S. Kollross
Melinda S. Kollross