No. 129761

IN THE SUPREME COURT OF ILLINOIS

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

Plaintiff-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the Illinois Appellate Court, Third Judicial District, Appeal No. 3-22-0232.

There 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.

AMICUS CURIAE BRIEF OF ILLINOIS DEFENSE COUNSEL IN SUPPORT OF DEFENDANTS-APPELLANTS

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Statement of the Amicus' Interest

The Illinois Defense Counsel is a statewide association of attorneys who dedicate a significant amount of their practice to civil defense in Illinois. The IDC has a substantial interest in this case because the decision of the Illinois Supreme Court will impact every wrongful death case involving a spouse that has the potential to recover. Moreover, it could fundamentally change how claims are pursued and damages awarded in wrongful death cases.

The IDC submits that the proposed brief of *amicus curiae* demonstrates the harmful impacts of separating spousal loss of services from loss of consortium. Such separation wrongly encourages the monetization of individual elements of loss of consortium in contravention of this Court's longstanding view of consortium as a "conceptualistic unity" incapable of dismemberment into component parts, and renders Illinois an outlier among her sister states, potentially encouraging forum shopping.

Argument

I. Separating loss of services from loss of consortium wrongly encourages the monetization of the individual elements of loss of consortium rather than maintaining its conceptualistic unity as declared by this Court

While many states have included loss of services within loss of consortium claims, separating loss of consortium claims into its constituent parts is without precedent. *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 258 N.E.2d 230, 233, 235 (Ohio 1970) (listing states that include loss of services within loss of consortium claims). In line with these holdings, *Dini v. Naiditch*, 20 Ill. 2d 406 (1960), the seminal case for defining loss of consortium in Illinois, established that consortium includes not only material services but also includes "elements of companionship, felicity and sexual intercourse, all welded into a conceptualistic unity." *Id.* at 427.

The historical common law developed over decades is similar. *Clouston*, 258 N.E.2d at 235. From the outset, the Illinois Supreme Court has said that it is a "theoretician's boast" that material services and sentimental services could ever be separated. *Dini*, 20 Ill. 2d at 427-28. The Third District concedes that numerous courts have relied on this language and holding. *Passafiume v. Jurak*, 2023 IL App (3d) 220232 ¶¶ 39-41.

Illinois stands with its sister states in uniformly holding that material services and sentimental services should be considered together and not separately. In *Lambert v. Wrensch*, 399 N.W.2d 369 (Wis. 1987), the Wisconsin Supreme Court held that loss of material services is within a loss of consortium claim and a plaintiff cannot independently recover for loss of material services. *Id.* at 377-78. The Indiana Supreme Court in *Durham ex rel. Estate of Wade v. U-Haul International*, 745 N.E.2d 755 (Ind. 2001), held that loss of consortium includes loss of material services and is like the common-law loss of consortium claim when invoked in the wrongful death statute. *Id.* at 765-66. The Iowa Supreme Court has held that the statutory loss of services includes both the tangible and intangible consortium elements—and expressly rejects the division of the elements of loss of consortium adopted by the Third District herein. *Madison v. Colby*, 348 N.W.2d 202, 208-09 (Iowa 1984). Recovery is "for tangible and intangible elements as a unified whole." *Id.* at 209. The Michigan Supreme Court has likewise declared it "fundamentally erroneous to hold that consortium can be separated into material services and sentimental services." *Montgomery v. Stephan*, 101 N.W.2d 227, 231-32 (Mich. 1960).

Similarly, in wrongful death actions, loss of consortium constitutes a "pecuniary injury." *Elliott v. Willis*, 92 Ill.2d 530, 540 (1982). The court in *Dotson v. Sears, Roebuck & Co.*, 199 Ill. App. 3d 526 (1st Dist. 1990), noted that "inseparability of consortium into its various elements was at the heart of the *Elliott* court's decision." *Dotson*, 199 Ill. App. 3d at 530. The Third District's

affirmance of the trial court separating recovery of material services from the other elements of consortium represents an unnecessary and dangerous shift from this longstanding precedent. In *Pfeifer v. Canyon Construction Co.*, 253 Ill. App. 3d 1017 (2nd Dist. 1993), the court noted that material services are "highly personal" and "generally flow from, the particular relationship between specific spouses." *Id.* at 1030. The court contrasted material services such as "services in the home" with financial support, showing that the courts have already drawn the intentional distinction between what can be separated from a loss of consortium claim and what cannot. *Id.*

The Third District held that material services are not unique to the marital relationship merely because children and parents can also recover for material services in a wrongful death action. This rests on an erroneous assumption that spousal "material services" can be reduced to the cost of hiring outside help for the household. Yet we intuitively know that one spouse doing laundry or preparing a meal for their husband or wife is different from hiring a cook or a laundress to perform the same task. Spouses perform household chores for each other as part of the marital relationship. They are acts of love and caring, not paid labor. The Third District's holding would force courts and juries to evaluate every chore that a deceased spouse did and assign it a tangible monetary value. This would force juries to evaluate the costs of everything from maid service, to lawnmowing to dishwashing to childcare to a potential endless list of household tasks. Plaintiff even presented an expert at trial who testified as to the cost of household chores by comparing it to how much outside help would cost. The court is effectively forcing juries to ask if the monetary value of a spouse is dependent on how many tasks the spouse did around the house. That has never been the law in Illinois, nor should it be.

Monetizing individual elements of spousal consortium leads to a slippery slope. Taken to its logical extreme, loss of consortium claims would be separated into its constituent parts with

economic substitutes for companionship and sexual relations. That is not where this Court or State should be headed. Neither the common law nor the criminal law could support such a recovery for sexual services. *See Medley v. Strong*, 200 Ill. App. 3d 488, 492-94 (4th Dist. 1990) (holding that an unmarried plaintiff could not recover for loss of consortium and that there is no independent tort claim for lost sexual services).

II. Separating loss of material services from loss of consortium would render Illinois an outlier among its sister states and encourage forum shopping

As noted above, Illinois' sister states have uniformly rejected an independent recovery for loss of material services separate from loss of consortium. *See Lambert*, 399 N.W.2d at 377-78; *Durham*, 745 N.E.2d at 765-66; *Madison*, 348 N.W.2d at 208-09; *Montgomery*, 101 N.W.2d at 231-32. Many other states have recognized that loss of material services is tied into a loss of consortium claim. *See, e.g.*, *Bellard v. South Central Bell Telephone Co.*, 96-1426, p. 21 (La. App. 3 Cir. 8/27/97), 702 So. 2d 695 (Louisiana); *Archer v. Roadrunner Trucking Inc.*, 1997-NMSC-003, ¶ 4, 122 N.M. 703, 930 P.2d 1155 (New Mexico); *Clouston*, 258 N.E.2d at 233, 235 (listing cases that included loss of services within loss of consortium).

Dismembering loss of material services from loss of consortium represents a significant and unnecessary break from longstanding Illinois precedent and the uniform position of Illinois' sister states in how claimants under the Wrongful Death Act are compensated. This would encourage forum shopping as potential plaintiffs could recover for both loss of material services and loss of consortium in Illinois courts while in other jurisdictions, plaintiffs could only recover for loss of consortium. Such forum shopping would stretch Illinois judicial resources even further than they are at present by encouraging the filing of wrongful death suits in Illinois to potentially gain larger awards and allow the monetary evaluation of material services to be admitted. This approach is contrary to Illinois precedent and public policy. It should be rejected by this Court.

Conclusion

WHEREFORE, for the foregoing reasons and upon the authorities cited herein, the Illinois Defense Counsel respectfully requests that this Court reverse the judgment below and order a new trial on damages where the plaintiff can only recover for his claim of loss of consortium and cannot also independently recover for loss of material services.

Respectfully submitted,

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Rule 341(c) Certificate of Compliance

I certify that this brief conforms 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, and the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to brief under Rule 342(a), is five pages.

Respectfully submitted,

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