No. 129761

IN THE
SUPREME COURT OF ILLINOIS

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

Plaintiff-Respondent,

vs.

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

Defendants-Petitioners.

On Petition for 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.

AMICUS CURIAE BRIEF BY ILLINOIS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-RESPONDENT

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POINTS AND AUTHORITIES

BRIEF *AMICUS CURIAE*

INTRODUCTION

The Illinois Trial Lawyers Association submits this *amicus curiae* brief in support of the plaintiff Paul Passafiume. Like most men whose spouses die, Mr. Passafiume remarried within two years of his wife's death. Danielle S. Schneider, Paul A. Sledge, Stephen R. Shuchter & Sidney Zisook (1996) Dating and Remarriage over the First Two Years of Widowhood, *Annals of Clinical Psychiatry*, 8:2, 51-57, DOI: 10.3109/10401239609148802. His wife Lois died due to defendant's negligence. He has lost consortium with Lois. Lois died in September 2014; Paul remarried in December 2015. Within 18 months, that marriage ended in divorce. Paul was unmarried at the time of trial. *Passafiume v. Jurak*, 2023 IL App (3d) 220232, ¶ *15.* Nevertheless, the jury heard evidence about the remarriage (not the subsequent divorce) and the jury was instructed that Paul's loss of society ended on the date of his remarriage. It is a cruel irony that the second marriage was an unhappy one and resulted in divorce after 18 months.

Illinois law announced *without analysis* in the 1985 *Carter v. Chicago I.M.R. Co.,* 130 Ill. App. 3d 431 (4th Dist. 1985) terminates much of Paul's damages because he remarried. That is wrong and contrary to the careful analyses of courts around the country. The fact of Paul's remarriage should have been excluded from evidence and the jury

instruction, cutting off damages for loss of society and sexual relations upon remarriage, tracking *Carter,* should not have been given. *IPI Civil 31.04.*

ARGUMENT

I.
BEFORE *CARTER*, THE REMARRIAGE OF A SPOUSE WAS INADMISSIBLE IN WRONGFUL DEATH CASES IN ILLINOIS.

This Court twice ruled in 1973 that evidence of remarriage was not admissible. *Hardware State Bank v. Cotner*, 55 Ill. 2d 240, 248-249 (1973); *Watson v. Fischbach*, 54 Ill. 2d 498, 503 (1973). However, this Court unfortunately wrote:

> And, we believe, the plaintiff's right to a trial free from factors irrelevant to the issues of liability and damages is adequately assured by the fact that the judge will in his initial identification of the parties state the fact of remarriage, identify the new spouse and advise the prospective jurors that the plaintiff's remarriage is not to be considered by them on the issues of liability or damages. *Watson, id.*

Putting a fact that is "irrelevant to the issues of liability and damages" before a jury, respectfully, is a poor rule to follow. The risk that jurors will let that irrelevant fact play a role in their decision making is far too great to permit.

II.
CARTER CHANGED THE LAW ANNOUNCED BY THIS COURT IN *HARDWARE STATE BANK* AND *WATSON.*

Beverly Carter died when a train struck her van. Her surviving spouse sought damages for loss of consortium and for loss of support. Before the trial, he remarried. The trial judge gave plaintiff's counsel a Hobson's choice: 1) if plaintiff withdrew the claim for loss of consortium, evidence of remarriage will be barred, or 2) if consortium damages are sought, the remarriage will be admissible, and the consortium damages

terminate on the date of remarriage. The consortium claim was withdrawn, and the jury did not hear about the remarriage. Plaintiff received a disappointing verdict that was upheld on appeal.

Plaintiff argued that the trial court ignored the *Watson* rule that remarriage was irrelevant on the issue of damages. *Carter, supra* at 436. The Appellate Court, however, pointed to *Elliott v. Willis,* 92 Ill. 2d 530 (1982) which postdated *Watson,* and which for the first time allowed loss of consortium or loss of society damages in wrongful death cases. *Carter* did not follow *Watson* saying, without citing authority, "[w]hen the supreme court announces a new principle of law [*Elliot*], it must be understood that all prior authority in conflict therewith [*Watson*] becomes enervated, whether specifically or *sub silentio."* This was an overreach. *Elliott* had nothing to do with remarriage. It did not address *Watson* and nothing about *Elliott* should have affected the *Watson* rule that remarriage is not admissible on the issues of liability or damages.

The *Carter* court concluded, again without citing authority, that consortium damages must end on remarriage. The court's reliance on the obscure Nephelococcygia is hardly legal authority.[1] *Carter, id.* The trial and

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[1] Nephelococcygia: The act of seeking and finding shapes in clouds. https://en.wiktionary.org/wiki/nephelococcygia#:~:text=The%20act%20of%20seeking%20and%20finding%20shapes%20in%20clouds.

In Aristophanes' comedy "The Birds," an imaginary city built in the clouds by the birds at the instigation of two Athenians and represented both as a fantastic caricature of Athens in the poet's day and as a sort of Philistine

appellate courts in *Carter* had a duty to follow this Court's precedent in *Watson* and *Hardware State Bank.* It wrongly chose to evade those precedents.

III.
OUT OF STATE CASES ALMOST UNIFORMLY BAR EVIDENCE OF REMARRIAGE IN WRONGFUL DEATH CASES.

A. Rationale

Other than Wisconsin and Mississippi, American courts uphold the rule that evidence of remarriage is inadmissible in wrongful death cases. *Admissibility Of Evidence Of, Or Propriety of Comment As To, Plaintiff Spouse's Remarriage, Or Possibility Thereof, In Action For Damages For Death Of Other Spouse,* 88 ALR3d 926. Neither *Carter* nor any Illinois cases that followed it cited any of these authorities or the reasons for the exclusionary rule. It is unclear whether the plaintiff in those cases raised the good policy reasons to exclude evidence of remarriage because the opinions are silent on those points.

Utopia full of gross enjoyments; hence, in literary allusion, cloudland; fools' paradise.
https://www.wordnik.com/words/nephelococcygia.

Nephelococcygia 1: (Literally, "Cloudcuckoosville") Interpreting the shapes of clouds. 2: La-la land, a dream land cut off from reality. "Harold's boss told him that he was engaging in more than a bit of Nephelococcygia after he asked for such a large raise in spite of his division's poor performance." https://www.arcamax.com/knowledge/vocabulary/s-887091.

Historically, the refusal to consider the surviving spouse's marital status in wrongful death cases has been attributed to three avenues of thought. One view is that damages should be calculated as of the time of death. See *Comment, Remarriage and Wrongful Death*, 50 Marq. L. Rev. 653 (1969). Another reason to exclude evidence of remarriage has been that the decedent's contributions relative to the contributions of the new spouse would be too speculative to calculate accurately. See *e.g., The City of Rome,* 48 F.2d 333 (2d Cir. 1930); *Hightower v. Dr. Pepper Bottling Co.,* (La. App.) 117 So.2d 642 (1959). Lastly, and most often, it is advanced that the collateral source rule, which disallows evidence of payments to the injured party from other sources to be credited against the tortfeasor's liability, should be invoked to exclude evidence of remarriage. See D. Dobbs, *Remedies § 8.6* (1973); see also *Annot.,* 87 A.L.R.2d 252 (1963); J. Stein, *Damages and Recovery § 250* (1972); W. Prosser, *Law of Torts 930-31* (3rd ed. 1964). Simply stated, the collateral source rule requires that:

> Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable." *Restatement (Second) of Torts* § 902(2) (1979). See also, *Michael v. Cole,* 122 Ariz. 450, 595 P.2d 995 (1979). *Taylor v. So. Pac. Trans. Co.,* 637 P.2d 726, 130 Ariz. 516 (1981).

Carter thought comparing the contributions to the survivor's life that the deceased made with those of the next spouse made was speculative. *Carter,* however, did the opposite of what other courts did with that speculation. Other states have held that remarriage is inadmissible

because to say the second spouse replaces the first is speculative (and indecent). *Carter* took the same problem, speculation, and concluded the remarriage wipes out the loss of consortium suffered by the survivor. *Carter* has no good company in American jurisprudence.

In Illinois, the next of kin of the decedent are determined at the time of death. If one of the next of kin die shortly after the deceased, that does not eliminate that person's estate from recovery of the wrongful death damages to which she would have been entitled but for her untimely death. *Booker v. LAL*, 312 Ill. App. 3d 170, 174 (1st Dist. 2000).

Illinois robustly follows the collateral source rule. *Wills v. Foster*, 229 Ill. 2d 393, 399-400 (2008). Payments or benefits received from a source collateral to the defendant are inadmissible and do not diminish plaintiff's damages. *Id.* This Court relied on *Restatement (Second) of Torts § 920A(2), Wilson v. Hoffman Group, Inc.,* 131 Ill.2d 308, 320 (1989), and *Arthur v. Catour,* 216 Ill. 2d 72 (2005).

All these reasons argue in favor of this Court overruling *Carter,* finding that evidence of remarriage should be barred in actions arising out of a spousal death.

B. Representative out of state cases.

These cases hold evidence of remarriage is inadmissible: *Adams v. Davis,* 578 S.W. 2d 899, 902 (Ky. App. 1979); *Barth v. B.F. Goodrich Tire Co.,* 265 Cal. App. 2d 228, 71 Cal. Rptr. 306, 313 (Cal. App. 1968); *Bradfield v. Administrator of Burgess' Estate,* 233 N.W. 2d 541, 543 (Mich.

App. 1975)(but in *voir dire* counsel can ask if jurors know the widow's new spouse without disclosing the relationship); *Bell Aerospace Corp. v. Anderson,* 478 S.W. 2d 191, 200 (Tex. Ct. App. 1972); *Fudge v. City of Kansas City,* 239 Kan. 369, 379 (1986); *Kenney v. Liston,* 760 S.E. 2d 434, 443 (W. Va. 2014)(inadmissible as a collateral source); *Kimery v. Public Serv. Co. of Okla.,* 562 P. 2d 858, 859-860 (Okla. 1977) (remarriage or the possibility thereof are inadmissible); *Randles v. Indiana Patient's Compensation Fund,* 860 N. E. 2d 1212, 1232 (Ind. App. 2007); *Seaboard Coast Line R. Co. v. Hill,* 270 So. 2d 359, 360-361 (Fla. App. 1972), *partially overruled by statute discussed in Smyer v. Gaines,* 332 So. 2d 655, 658-659 (Fla. App. 1976); *Taylor v. Southern Pacific Transportation Co.,* 130 Ariz. 516, 637 P.2d 726, 730 (1981).

These cases hold that remarriage evidence is inadmissible about damages but allow mention of the new spouse's name can be made in *voir dire* while instructing jury remarriage is not relevant to their decisions: *Wisel v. Cicerone,* 106 R.I. 595 (1970); *Groesbeck v. Napier,* 275 N.W. 2d 388 (Iowa 1979); *Elmahdi v. Ethridge,* 987 S.W. 2d 366, 369 (Mo. App. 1999); *Dubil v. Labate,* 52 N.J. 255, 261 (N.J. 1968).

In two states, evidence of remarriage is allowed: *Campbell v. Schmidt,* 195 So. 2d 87, 90 (Miss. 1967) and *Jensen v. Heritage Mutual Ins. Co.,* 127 N.W.2d 228, 234 (Wisc. 1964). Neither court provided any analysis of policy reasons for their decisions.

IV.

EVIDENCE IN COHABITATION AND LOSS OF CHILD CASES IN ILLINOIS

This Court has not addressed the admissibility of evidence that a surviving spouse is living in a committed, unmarried relationship after the wrongful death. Nevertheless, such evidence is not generally admissible. The two relevant Illinois cases, *McClain v. Owens-Corning,* 139 F.3d 1124 (1998) and *Martin v. Ill.C.G.R.R.,* 237 Ill. App. 3d 910 (1st Dist. 1991), hold that evidence of cohabitation is not admissible. "[W]e find that whether or not McClain is cohabiting with someone is irrelevant to the question of the loss she suffered as a result of her husband's death." *Martin, supra* at 1129.

Out of state courts agree. Asking the widower on trial, "are you contemplating remarriage?" is improper and the objection was rightly sustained. *Gallo v. So. Pac. Co.,* 43 Cal. App. 2d 339, 346—347 (1941). *Accord, Davis v. Liesenfeld,* 240 NW2d 548, 549 (Minn 1976) (intention to remarry properly excluded); *Dimmey v. Wheeling,* 27 W Va 32 (1885). Living with another woman after the survivor's wife died not admissible. *Bloomington v. Holt,* 361 NE2d 1211, 1219 (Ind. App. 1977).

When parents lose a child due to a tort, the question arises about the admissibility of any afterborn children to the family. This was the situation in *Simmons v. University of Chicago Hosps. & Clinics,* 162 Ill. 2d 1 (1994). The trial court excluded evidence that the parents had two children after Toussant Simmons died. This Court rightly affirmed that

decision writing, "[t]he fact that subsequent children were born to plaintiffs is irrelevant to the issue of benefits the decedent might have been expected to contribute to the parents had the deceased lived." *Simmons, supra* at 13. The same rationale here applies to Paul Passafiume.

The defense in *Simmons* argued that the *Carter* decision suggested a different result, but this Court rebuffed that attempt. *Simmons, supra* at *15.* In distinguishing *Carter* and progeny, this Court did not discuss whether those cases were rightly determined, but rather simply repeated defendant's contentions before rejecting them. *Simmons, supra* at 14-15.

In these analogous situations, Illinois law excludes evidence of any "replacement" child or companion. Rightly so. No person can replace another. The relationship that Paul had with Lois Passafiume was unique and different from the relationship he has with the woman he married after Lois died. He is entitled to compensation for loss of consortium for the extent of his and Lois's life expectancies, irrespective of remarriage. To hold otherwise would be to discriminate against those who remarry in favor of those who do not.

CONCLUSION

The judgment below can be affirmed on any basis found in the record. *Leonardi v. Loyola University of Chicago,* 168 Ill. 2d 83, 97 (1995) ("As a reviewing court, we can sustain the decision of a lower court on any grounds which are called for by the record, regardless of whether the lower court relied on those grounds and regardless of whether the

lower court's reasoning was correct"). The error of which defendant complaints, allowing loss of material services evidence post remarriage, is no error if the evidence of remarriage should not have been received in the first place. The only reason such evidence was received was *Carter,* which was wrongly decided, and which should be overruled by this Court.

Respectfully Submitted,

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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 or words contained in 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 11 pages.

/s/Bruce R. Pfaff

CERTIFICATE OF SERVICE

I, Bruce R. Pfaff, certify that I electronically filed the foregoing Illinois Trial Lawyers Association Brief Amicus Curiae with the Clerk of the Illinois Supreme Court, on February 13, 2024, via Odyssey eFileIL.

I further certify that on February 13, 2024, an electronic copy of the Illinois Trial Lawyers Association's Brief Amicus Curiae is being served on the following counsel of record via Odyssey eFileIL:

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Under penalties as provided by law pursuant to Sec 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), I certify that the statements set forth in this instrument are true and correct.

/s/ Bruce R. Pfaff