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.

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ARGUMENT

I. Plaintiff and His Amicus Concede Error by Failing to Defend the Third District's Challenged Ruling on the Merits.

As detailed in Dr. Jurak's Appellant's Brief, the Third District violated over a half century of Illinois Supreme and Appellate Court precedent by dismembering consortium into "tangible" and "intangible" components—and then allowing recovery of "tangible" lost household services beyond remarriage in wrongful death actions (but not common law loss of consortium actions). (AP Br., pp.9-23) Neither plaintiff nor his amicus argue that this challenged ruling is a correct statement of Illinois law under *Dini v. Naditch*, 20 Ill. 2d 406 (1960), *Carter v. Chicago & Ill. Midland Ry. Co.,* 130 Ill. App. 3d 431 (4th Dist. 1985), and their progeny. Indeed they cannot, as the Third District's ruling is a radical, unwarranted and unjust departure from a well-established body of Illinois law governing loss of consortium claims.

Plaintiff instead offers a litany of procedural waiver/ forfeiture and harmless error arguments purportedly entitling him to affirmance. (AE Br., pp.7-9, 14-33) But the Third District considered and rejected these arguments, finding that the trial court's failure to apply the *Carter* remarriage rule to lost household services was properly preserved for appellate review. *Passafiume v. Jurak,* 2023 IL App (3d) 220232, ¶ 30

(A12-13) This Court should likewise reject plaintiff's attempts to avoid examination of the Third District's failure to follow *Dini* and *Carter* on the merits. (See Point II, *infra*). Presumably, this Court granted leave to appeal to assess the propriety of the Third District's unprecedented departure from *Dini* and *Carter*, and not to sidestep the issue as erroneously urged by plaintiff.

ITLA's amicus brief takes a different but equally misguided tack. Like plaintiff, ITLA does not even attempt to argue that the Third District got it right in carving up the conceptualistic unity of consortium into "tangible" and "intangible" components and holding that the *Carter* remarriage rule does not apply to damages sought for lost household services in a wrongful death action—but does apply to those very same damages when sought in a common law loss of consortium action. *Passafiume*, 2023 IL App (3d) 220232, ¶¶ 68-77 (A28-32) ITLA instead argues that this Court should overrule *Carter* and its progeny entirely and find that "evidence of remarriage should be barred in actions arising out of a spousal death." (ITLA Br., p.11) This broad attack on *Carter* was never raised by the parties to this action and thus should not be considered by this Court. (See Point III.A., *infra*). If considered, it should be rejected as contrary to Illinois law as discussed in Point III.B. and C. below.

II. Plaintiff's Arguments Do Not Address the Third District's Unjustified Departure from *Dini* and the *Carter* Remarriage Rule and Do Not Warrant Affirmance.

Plaintiff asserts the same procedural arguments from his Third District appellee brief and Rule 315 Answer in seeking affirmance here. (AE Br., pp.7-33) These arguments were rejected by the Third District. *Passafiume,* 2023 IL App (3d) 220232, ¶ 30. (A12-13) Likewise, this Court had no reason to allow an appeal if this case were to be decided on any of the grounds urged by plaintiff. Each is refuted below.

A. The Standard of Review for the Measure of Recoverable Damages for Lost Household Services Under Illinois Law is De Novo.

The question of whether a plaintiff may recover for lost household services "independent of any recovery for loss of the marital relationship"—and beyond the date of remarriage—is a legal issue subject to de novo review. *Passafiume,* 2023 IL App (3d) 220232, ¶ 28 (citing *People v. Drum,* 321 Ill. App. 3d 1005, 1009 (4th Dist. 2001) (A11-12); *see also 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 ***."); *Hendricks v. Riverway Harbor Service St. Louis, Inc.*, 314 Ill. App. 3d 800, 808 (1st Dist. 2000)("[t]he issue of what law is used to assess damages is a question of law and is reviewed de *nova").*

Plaintiff's contention that "[t]here is no basis in this record for *de novo* review" (AE Br., p.8) ignores reality. The trial court decided—as a matter of law—that lost household services were not part of consortium damages but were instead akin to lost earnings and thus not subject to the *Carter* remarriage rule. (R74-75, 624, 635-43) The Third District held—as a matter of law—that the *Carter* remarriage rule does not apply to "tangible" lost household services sought as part of a loss of consortium claim in a statutory wrongful death action (but does apply to this "tangible" component in a common law loss of consortium action). Such determinations present purely legal questions subject to de novo review. *Tri-G,* 222 Ill. 2d at 252.

B. Allowing Smith to Testify to $974,000 of Post-Remarriage Lost Household Services Damages Was Reversible Error.

Dr. Jurak maintains that Smith's economic opinions concerning the purported "marketplace value" of Lois's household services should not have been admitted at trial as such testimony wrongly monetizes consortium damages contrary to Illinois law and public policy. *See Patch v. Glover,* 248 Ill. App. 3d 562, 569 (1st Dist. 1993); *Fetzer v. Wood*, 211 Ill. App. 3d 70 (2d Dist. 1991).

Plaintiff claims that the rule against expert testimony valuing damages for loss of consortium applies only to *intangible* elements of loss

of consortium and that such testimony is permitted as to the value of *tangible* lost household services (AE Br., pp.11-14), citing *Williams BNSF Rwy. Co.*, 2015 IL App (1st) 121901-B. However, *Williams* is a FELA case where loss of consortium is not permitted. The *Williams* plaintiff was not seeking recovery for his wife's loss of services, but for tasks he could no longer do for himself. These tasks "ha[d] nothing do with Williams' relationship with his wife" so expert testimony was properly permitted on their marketplace value. *Williams,* 2015 IL App (1st) 121901-B, ¶¶ 26, 49.

Plaintiff's reliance on *Rasmussen v. Clark*, 346 Ill. App. 181 (1952), is likewise misplaced. *Rasmussen* did not involve a loss of consortium claim (the lost household services were provided by decedent son to his mother) and there was no expert testimony presented as to their value. *Rasmussen,* 346 Ill. App. 3d at 196-97. No Illinois appellate court has permitted Smith (or any other economist) to offer an opinion about the "marketplace value" of a non-economic loss sought as part of a loss of consortium claim. *See Patch,* 248 Ill. App. 3d at 569; *Fetzer*, 211 Ill. App. 3d at 85-86.

And for good reason. Placing an expert's "marketplace value" on acts of love and caring denigrates the marital relationship. *See 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) ("material services" performed by a spouse fall within the indivisible rubric of consortium, right alongside "companionship, felicity and sexual intercourse."). Plaintiff cannot distinguish *Patch* and *Fetzer* by claiming Smith's testimony was barred in those cases for being based on a "statistically average person." (AE Br., p.13) Smith valued Lois's lost household services "as if they were provided by a person unknown to the household" rather than a spouse. (C1099) He came up with an "hourly value" for Lois's housekeeping services that included many activities she did not perform such as painting, childcare, accounting, waitressing and chauffering. (C1100; R661-62) 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.*; R662-63)

This is exactly the type of generalized valuation rejected in *Patch* and *Fetzer*. *Patch,* 248 Ill. App. 3d at 569; *Fetzer*, 211 Ill. App. 3d at 85-86. It is not personal to the unique marital relationship between Paul and Lois and does not aid the jury in valuing Lois's lost services. *Id.* It is this personal, relationship-specific aspect of household services

performed for one's spouse that precludes expert testimony valuing these acts "as if performed by a stranger to the household." (C1099; R661-64)

Moreover, even if one assumes that Smith's economic opinions were admissible to establish the "marketplace value" of Lois's household services, the trial court still erred in permitting Smith's testimony calculating those damages for Lois's entire life span (some 40+ years) rather than ending as of the date of plaintiff's remarriage as required by the *Carter* rule. (R74-75, 624, 635-43) 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, 667-69)[1] The jury returned a $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.[2] (C918-19) (A1-9)

Plaintiff's assertion that this inflated award might not have included "any damage award for plaintiff's lost household services after

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[1] 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 plaintiff's remarriage (R995), 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, 667-69)

[2] 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)

he remarried…thereby warranting affirmance" (AE Br. p.11-12) lacks credibility. It should be rejected outright.

C. The Admissible Evidence is Insufficient to Sustain the Jury's $1.434 Million Lost Earnings/Lost Household Services Award.

Plaintiff repeatedly argues that the errors below should be ignored or deemed harmless because the admissible evidence is sufficient to sustain the jury's challenged $1.434 million lost earnings/lost household services award. (AE Br., pp.7, 14-23) Plaintiff is mistaken.

The evidence does not support plaintiff's repeated assertion that the jury could have awarded $1.434 million for lost earnings alone. Smith testified that the present cash value of Lois's lost earnings—if she worked to age 67 and received salary increases far beyond those shown to have historically been given for her clerk position—was $913,881,00. (R641) There is no admissible evidence to support a lost earnings award over 50% ($520,144.00) higher than that amount. That the jury may award more or less than the amount opined by an expert does not alter the fact that there must be *evidence* to support a higher award. No such evidence exists here. No one testified that Lois would live and work years beyond her life expectancy as necessary to justify such an inflated award.

Plaintiff's claim that "the lay testimony of Paul Passafiume regarding the loss of household services was enough here to support the

verdict" (AE Br., p.22) is incorrect. Paul testified that Lois cooked, cleaned, did laundry and helped plant flowers. (R982) He also testified that he remarried in December 2015. (R995) Thus, the jury should have awarded 15 months of lost cooking, cleaning, laundry, and flower planting services.

Smith assessed the "marketplace value" of these services at $24,808.00. (R667-69) Plaintiff's cited cases suggest a somewhat lower value. *See McFarlane v. Chicago City Ry. Co.*, 288 Ill. 476, 482-83 (1919) ($2500 awarded for decedent's lost services); *Eggimann v. Wise*, 56 Ill. App. 2d 385, 389-90 (3d Dist. 1964) ($6000 awarded for lost household services performed by decedent including house painting, wallpapering, lifting house, digging a cellar, laying blocks for cellar walls, buying groceries, washing dishes, sweeping floors and purchasing clothing); *Doyle v. Jessup*, 29 Ill. 460 (1862)($800 awarded for loss of daughter's services); *Kosch v. Monroe*, 104 Ill. App. 3d 1085, 1095-96 (1st Dist. 1982)($50,000 awarded for loss of consortium where wife could not perform any housework, and had had no sexual relations with husband for 1.5 years).

The bottom line: Paul's testimony *does not* support an award of over half a million dollars for Lois's limited lost household services. The maximum the jury could have reasonably awarded for lost

earnings/household services was approximately $937,808 ($913,000 lost earnings + $24,808 lost household services to date of remarriage). The jury's award exceeded this amount by nearly $500,000. (C918)

D. Dr. Jurak Did Not "Invite Error" By Agreeing to Verdict Form B.

Verdict Form B did not "invite error." (AE Br., pp.26-27) The jury's excessive lost earnings/lost household services award did not result from the placement of these two recoverable damages elements on a single line—but the erroneous admission of Smith's testimony that the marketplace value of Lois's household services until the age of 78—four decades past plaintiff's 2015 remarriage—was $998,158.00. (R636-43) This inadmissible testimony wrongly and prejudicially inflated the value of Lois's lost household services by over $974,000. (R643, 667-69) Verdict Form B simply documented the result of that prejudicial evidentiary error. It did not produce it.

Plaintiff's argument that Dr. Jurak was required to tender alternative jury instructions, special interrogatories and a different verdict form with separate lines for lost earnings and lost household services likewise fails. As explained by the Third District in rejecting this same forfeiture argument below, Dr. Jurak preserved his argument that the trial court erred in allowing the jury to consider damages for

lost household services beyond the date of remarriage by objecting at trial and in his posttrial motion. *Passafiume,* 2023 IL App (3d) 220232, ¶ 30 (A12-13) Dr. Jurak was not required to tender alternative jury instructions controverting the trial court's "decision, prior to the instructions conference, that damages for loss of household services did not end upon remarriage." *Id*. (A13)

Plaintiff's cited case are inapposite. Each concerns alleged error in the jury instructions tendered or verdict forms given. *See, e.g., People v. Herron*, 215 Ill. 2d 167 (2005) (reading of IPI Criminal 4th No. 3.15); *Cruthis v. Firstar Bank, N.A.*, 354 Ill. App. 3d 1122, 1136-37 (5th Dist. 2004) (verdict form's failure to separate different elements of damages); *People v. Lenker*, 6 Ill. App. 3d 335, 341-42 (1st Dist. 1972) (instructing jury upon the proper standard for determining defendant's guilt where evidence is entirely circumstantial); *Westis v. Aughinbaugh*, 6 Ill. App. 2d 94, 99-100 (2d Dist. 1955)(giving one instruction and refusing another); *Gille v. Winnebago County Housing Auth.*, 44 Ill. 2d 419, 427 (1970)(failure to adequately instruct jury on use of the verdict forms); *Kinka v. Harley-Davidson Motor Co.*, 36 Ill. App. 3d 752, 758 (1st Dist.1976) (instructional error regarding assumption of risk).

Dr. Jurak has not raised such a challenge here.

E. The General Verdict Rule Does Not Apply.

Plaintiff's contention that the general verdict rule warrants affirmance likewise lacks merit. The rule provides that "[a] general verdict on several counts will not be reversed or set aside if at least one of those counts is sufficient to support the verdict." *Pavilon v. Kaferly*, 204 Ill. App. 3d 235, 249 (1st Dist. 1990). Thus, for example, a general verdict was upheld in *Stark v D & F Paving Co*., 55 Ill. App. 3d 921, 923, 927-28 (2d Dist. 1977), where plaintiff alleged both negligence and willful and wanton misconduct counts. The court found the evidence sufficient to support a finding for plaintiff on his negligence count and that the jury's award of zero punitive damages indicated its verdict was not based upon the insufficient willful and wanton claim. *Id*.

This case does not involve a general verdict involving multiple counts, but rather a finding for plaintiff on each specified count, including a single line item encompassing two separate damages elements (lost earnings and lost household services) recoverable on plaintiff's wrongful death claim. (C918) (A34)

Even assuming, *arguendo*, the propriety of stretching the general verdict rule to potentially encompass this situation involving damages elements rather than causes of action, it has no bearing on whether the trial court erred in admitting Smith's monetizing testimony and

permitting calculation and recovery of lost household services damages beyond plaintiff's date of remarriage. And while the rule could potentially impact the question of prejudice, it does not do so here where the admissible evidence *does not* support a $1.434 million award for lost earnings alone.

Plaintiff's contention that special interrogatories were required to ascertain what portion of the award was for lost household services (AE Br., pp.29-31) fails for the same reasons. Whether the trial court erred in admitting Smith's challenged testimony *does not* depend on the amount awarded for lost household services. As for prejudice, the entire $1.434 million award could only be attributed solely to lost earnings (thereby rendering the evidentiary errors harmless) if the evidence was sufficient for the jury to award $1.434 million for lost earnings alone. It was not.

Significantly, none of plaintiff's cited cases apply the general verdict rule or hold special interrogatories are required in the context of challenging a combined damages award such as that at issue herein. Indeed, the only remotely relevant case plaintiff cites, *Statler v. Catalano*, 167 Ill. App. 3d 397 (5th Dist. 1988), supports Dr. Jurak. In *Statler*, the appellate court held that the trial court's error in including an improper damages element in its instructions would be deemed

harmless where: (1) the value of the improper element ($956) was minimal when compared to the $55,841 actual damages awarded; (2) it was unclear from the general verdict whether any amount had been awarded for the improper element, and (3) the damages awarded were not excessive and conformed to the evidence. *Statler*, 167 Ill. App. 3d at 405.

Here, by contrast, the value of the erroneous damages was enormous—$974,000 compared to a $1,434,025.00 award—; the verdict included lost household services as a specific line item with lost earnings; and the $1.434 million awarded *is* excessive and unsupported by admissible evidence. Plaintiff's attempts to avoid review on the merits must accordingly be rejected. *See Kinzinger v. Tull*, 329 Ill. App. 3d 1119, 1129-30 (4th Dist. 2002); and *Blockmon v. McClellan*, 2019 IL App (1st) 180420, ¶21.

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

Over two-thirds of the jury's $2,121,914.34 verdict—$1,434,025.00—was awarded for lost earnings and lost household services. (C918-19) This award is excessive and unsupported by the admissible evidence. It was the product of Smith's inadmissible expert opinions, which wrongly valued Lois's lost household services *running*

four decades past the date of plaintiff's remarriage at $998,158—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; R641)

Plaintiff's claim that the $1.434 million award is supported by admissible evidence and shielded from scrutiny by the general verdict rule fails for the reasons discussed at Points II.C and II.E., *supra.* A new trial on damages, limited to lost earnings/household services, or a remittitur is required to correct the trial court's reversible 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); *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). See also AP Br., pp.20-22.

That the jury awarded less than suggested by Smith and requested by plaintiff's counsel in closing does not render the $1.434 million award reasonable where Smith was wrongly permitted to testify to nearly a million dollars in improper, non-recoverable lost household services post-dating plaintiff's remarriage. (R643) *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").

III. ITLA's Amicus Attack on the *Carter R*emarriage Rule Was Not Raised by the Parties and Should Not Be Considered by This Court. If Considered, It Should Be Rejected as Contrary to Illinois Law and Public Policy.

A. An Amicus Cannot Raise New Issues

"[A]n *amicus* takes the case as he finds it, with the issues framed by the parties." *Burger v. Lutheran General Hosp.*, 198 Ill. 2d 21, 61-62 (2001) (citing *People v. P.H.,* 145 Ill. 2d 209, 234 (1991)). Here, the parties to this lawsuit—including plaintiff Paul Passafiume—agreed that the *Carter* "remarriage rule" announced in 1985 and subsequently embodied in Illinois Pattern Jury Instruction 31.04, applied to plaintiff's loss of consortium claim at least with respect to loss of society and loss of sexual relations. IPI (Civil) 31.04, Notes on Use. *See* C1192-1194 (Defendant's Motion in Limine #19 "to bar any claim for damages or evidence thereof following the date of Paul Passafiume's remarriage"); C1257 ("While plaintiff concedes defendant's motion in Limine No. 19 as it relates to loss of consortium, he does not concede his claim for loss of financial support after his remarriage."); and C2003 ("Plaintiff does not dispute that loss of consortium ends upon remarriage, per *Carter*….").

The parties disagreed whether the remarriage rule applies to one element of loss of consortium, namely, household services. That was the issue argued in the trial and appellate courts and the issue presented in Dr. Jurak's Petition for Leave to Appeal upon which this Court granted review. (C1040-41, 1054-57, 1248-58, 1373-76, 1516-1521, 2003-04; see also Plaintiff's Appellee Brief in Appeal No. 3-22-0232, pp.31-36) No party argued below that *Carter* should be overruled and the longstanding remarriage rule abandoned for all aspects of consortium, including loss of society and lost sexual relations. *Id.* Plaintiff's appellee brief in this Court does not so contend; it contains no substantive discussion of *Carter* or the remarriage rule. (AE Br., pp.7-33)

ITLA now raises this issue for the first time in its *amicus curiae* brief, asking that the *Carter* line of cases be overruled and evidence of a surviving spouse's remarriage be excluded in wrongful death cases. (ITLA Br., pp.1-2, 10-11)

This Court has consistently rejected comparable attempts by *amici* to raise issues not raised by the parties to the action. *See Oswald v. Hamer*, 2018 IL 122203, ¶ 41 (declining plaintiff's supporting *amici*'s invitation to discard the "no set of circumstances" test in determining the facial constitutionality of legislation where "plaintiff herself does not raise this issue"); *Karas v. Strevell,* 227 Ill. 2d 440, 450-451 (2008)

(striking ITLA *amicus* argument to abandon fact pleading where no party challenged fact pleading standard); *Bruns v. City of Centralia*, 2014 IL 116998, ¶15, fn. 1 (declining to consider immunity issue raised by the Illinois Municipal League "where City does not argue that it is immune from liability under the Tort Immunity Act"); *Burger*, 198 Ill. 2d at 61-62 (2001) (declining to address *amicus* ISBA's sole argument that statutory provisions violate the single subject rule of the Illinois Constitution "because the issue of the single subject rule was not raised by the parties to this action"); *Frye v. Medicare-Glaser Corp.,* 153 Ill. 2d 26, 30 (1992) (refusing to consider *amici*'s argument that Court should place an affirmative duty on pharmacists to counsel consumers on the dangerous side effects of prescription drugs "as the parties have never raised the issue" and plaintiff conceded in her complaint and throughout the appeals process that pharmacists do not have such a duty); *Archer Daniels Midland Co. v. Industrial Comm'n,* 138 Ill. 2d 107, 117 (1990) (refusing to consider *amicus*'s suggestion that subject rehabilitation program was not appropriate "as the parties never raised the issue" and the only issue before the Court was whether the employer was justified in terminating benefits based on the appellant's failure to cooperate in said rehabilitation course).

As this Court declared in *Burger*, issues not raised by the parties

to the appeal are not the proper province of *amicus curiae* and should not be addressed by the Court:

> [a]n *amicus curiae* is not a party to the action but is, instead, a 'friend' of the court. As such, the sole function of an *amicus* is to advise or to make suggestions to the court."; … Indeed, "[a]n *amicus* takes the case as he finds it, with the issues framed by the parties."….Accordingly, because the issue of the single subject rule was not raised by the parties to this action, we decline to address it,

Burger, 198 Ill. 2d at 62 (citations omitted).

ITLA's *amicus* argument attacking *Carter* and the longstanding remarriage rule in Illinois likewise has no place in this action. The validity of the remarriage rule was not raised by the parties and thus is not properly before the Court. *See Karas*¸ 227 Ill. 2d at 450-51 (granting defendants' motion to strike portion of ITLA *amicus* brief urging the Court to abandon fact pleading in favor of notice pleading where "no party to this case has argued for the elimination of fact pleading."). It should not be considered in this appeal.

B. The Longstanding *Carter* Remarriage Rule Has Been Reaffirmed by Illinois Reviewing Courts and Adopted in IPI (Civil) 31.04

ITLA's unprecedented *amicus* attack on the *Carter* remarriage rule ignores the development of Illinois law governing loss of consortium claims over the past forty years. In 1982, this Court determined that the

Illinois Wrongful Death Act permitted recovery for loss of consortium. *See Elliott v. Willis,* 92 Ill. 2d 530 (Ill. 1982). Consortium includes society, guidance, companionship, felicity, and sexual relations. *Elliott*, 92 Ill. 2d at 535. It is unique to a marriage partner. *Id.* Prior to *Elliott,* damages for loss of consortium had not been recoverable in wrongful death actions.

In 1985, the Illinois appellate court established that damages for loss of consortium terminate upon the surviving spouse's remarriage, regardless of the potential differences between the deceased and new spouses. *See Carter,* 130 Ill. App. 3d at 436 ("If loss of consortium is sought, it must be actual loss; that is, loss up to the time of remarriage. It may be true . . . 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.").

In *Dotson v. Sears Roebuck & Co.*, 157 Ill. App. 3d 1036, 1043-44 (1st Dist. 1987) *(Dotson I),* and *Dotson v. Sears Roebuck & Co.*, 199 Ill. App. 3d 526, 529-31 (1st Dist. 1990) *(Dotson II),* the Illinois appellate court held that a claim for loss of material services was a component of a claim for loss of consortium. The *Dotson I* court relied on language in *Elliott* and *Dini* (20 Ill. 2d 406, 427-28), for the further proposition that consortium could not be divided into its various components. In

other words, damages for loss of any of the individual elements that make up consortium could not be recovered separately; they could be recovered only insofar as they were part of a claim for loss of consortium.

The *Dotson II* court followed *Carter* in holding that a claim for material services, since such services were an element of consortium, were limited by remarriage to the same extent as any other element of consortium. Thus, the plaintiff in *Dotson II* could not avoid the effect of remarriage on a loss of consortium claim by characterizing his action as one for material services. *See Pfeifer v. Canyon Constr. Co.*, 253 Ill. App. 3d 1017, 1027 (2d Dist. 1994); *see also Martin v. Illinois C. G. R.R,* 237 Ill. App. 3d 910, 922 (1st Dist. 1991) ("It is well settled that recovery for loss of consortium terminates upon the remarriage of the surviving spouse.").

The *Carter* remarriage rule became part of the Illinois Pattern Jury Instructions (Civil) 31.04 in 1992. IPI 31.04 provides in pertinent part as follows:

> [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].

The Notes on Use states:

> Use only those factors 1-11 which are applicable to the facts of this case. If the surviving spouse has remarried, the bracketed paragraph should be utilized to insert the date of the remarriage. *See Carter v. Chi. & Ill. Midland Ry. Co.*, 130 Ill.App.3d 431, 474 N.E.2d 458, 85 Ill.Dec. 730 (4th Dist. 1985).

This instruction has been in use for over three decades and plaintiff agreed parenthetical 11 applied in this case. (C2003)

The *Carter* remarriage rule accords with common sense and Illinois public policy. 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).

ITLA cites *Simmons v. University of Chicago Hosps. & Clinics*, 162 Ill. 2d 1 (1994), as support for overruling *Carter*. (ITLA Br. p.9-10) It is not. As this Court explained in *Simmons*, having more children after losing a child *is not* comparable to remarriage after losing a spouse:

> It is clear from this analysis that evidence of subsequent children is not relevant to a claim under the Wrongful Death Act for loss of society of a deceased child. The 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. Moreover, as the appellate court noted:
>
> "In order to accept the argument, one must first accept the notion that the loss suffered by a parent upon the death of a child is somehow ameliorated with the birth of a subsequent child, a notion we categorically reject." 247 Ill. App. 3d at 183.
>
> Defendants also argue that this conclusion is contrary to the principles applicable to the analogous area of loss of consortium. Defendants note that appellate decisions have held that evidence of a subsequent remarriage is relevant in loss of spousal consortium claims and, in fact, terminates the right of a widower or widow to recover damages for loss of consortium. This is so, defendants argue, even though the aggrieved party's relationship with the new spouse might be on an entirely different nature and quality. See *Martin v. Illinois Central Gulf R.R.* (1991), 237 Ill. App. 3d 910, 922, 179 Ill. Dec. 177, 606 N.E.2d 9; *Dotson v. Sears, Roebuck & Co.* (1987), 157 Ill. App. 3d 1036, 1044-45, 110 Ill. Dec. 177, 510 N.E.2d 1208; *Carter v. Chicago & Illinois Midland Ry. Co.* (1985), 130 Ill. App. 3d 431, 436, 85 Ill. Dec. 730, 474 N.E.2d 458.
>
> We disagree and note that the relationship between parent and child is different from that of husband and wife. The parent-child relationship is not replaceable and is not limited to the society of only one child. Every child is unique, and the loss of society a parent suffers upon a child's death cannot be replaced with the society of a child subsequently born.

Simmons, 162 Ill. 2d at 14-15.

ITLA's reliance on cases excluding evidence of cohabitation is likewise unavailing as "consortium" is limited to the marital relationship. *Elliott*, 92 Ill. 2d at 535.

C. ITLA's Non-Illinois Cases Are Unpersuasive

ITLA's contention that "*Carter* has no good company in American jurisprudence" (ITLA Br., p.7) is wrong. At least two other states also admit evidence of remarriage. *See Campbell v. Schmidt,* 195 So. 2d 87, 90 (Miss. 1967); *Jensen v. Heritage Mut. Ins. Co.*, 127 N.W.2d 228 (Wisc. 1964). As the Wisconsin Supreme Court explained in *Jensen:*

> These were all proper facts for the jury to have taken into consideration in making their awards for pecuniary loss and for loss of society and companionship. Defendant stresses the early remarriage of plaintiff wife. The possibility of marriage or remarriage is always an element which it is proper for the jury to consider in determining damages in a wrongful-death action. *Prange v. Rognstad* (1931), 205 Wis. 62, 236 N.W. 650, and *Sipes v. Michigan Central R. Co.* (1925), 231 Mich. 404, 204 N.W. 84. This being so, it necessarily follows that where the possibility has become an actuality by time of trial the jury should be permitted to consider such fact in assessing damages. We are not impressed by the rationale of *Coleman v. Moore* (D.C., D.C. 1952), 108 Fed. Supp. 425, cited by plaintiff Wright, that a jury, in fixing damages for wrongful death, must consider only the facts that exist at date of death, and may not take into account a remarriage before trial.

Jensen, 23 Wis. 2d at 355.[3]

And while ITLA lists a dozen states that exclude evidence of remarriage in wrongful death actions (ITLA Br., pp.7-8), none are like Illinois where loss of consortium damages are limited by the spouse's remarriage—*but loss of financial support damages are not*. *Pfeifer*, 253 Ill. App. 3d at 1027. Indeed, financial support appears to be the main focus of these non-Illinois cases and explains their reliance on the collateral source rule to justify excluding evidence of remarriage. *See, e,g, Adams v. Davis*, 578 S.W.2d 899, 902 (Ky. App. 1979) (wrongful death damages equal "value of the destruction of the power of the decedent to earn money"); *Wiesel v. Cicerone*, 106 R.I. 595, 600 (1970) ("earnings of the deceased are the essential factor" in determining wrongful death damages); *Dubil v. Labate*, 52 N.J. 255, 261 (1968) (measure of damages under wrongful death act is "deprivation of a reasonable expectation of a pecuniary advantage").

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[3] See also William C. Harvin, *The Collateral Source Rule — Abandonment or Modification*, 10 Judges J. 28, 29 (April 1971) (advocating allowing evidence of remarriage because "the jury in appraising the loss does not know that there is a new spouse whose earnings will supplant those which have been lost. A jury should not be misled into believing that the 'light of her life' has gone out and will remain forever extinguished, when in fact she has already struck another match.").

The bottom line: nothing in these non-Illinois cases warrants overruling *Carter*.

CONCLUSION

Neither plaintiff nor his amicus can defend the Third District's erroneous dismembering of consortium and unprecedented departure from the *Carter* remarriage rule in wrongful death actions. But skirting the issue on other grounds, or jettisoning the *Carter* remarriage rule entirely, is not the answer. This Court can and should uphold decades of established Illinois precedent holding that household services performed by one spouse for another fall within the indivisible conceptualistic unity of consortium, and that loss of consortium damages—including lost household services—terminate upon the surviving spouse's remarriage because the new spouse now provides consortium within the marital relationship. To hold otherwise would denigrate the marital relationship and condone an impermissible double recovery of damages.

For the reasons set forth herein and in Dr. Jurak's opening brief, Dr. Jurak urges this Court to: (1) reverse the Third District'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.

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 reply brief, excluding the pages or words containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance and the certificate of service is 5,930 words.

Dated: March 11, 2024

*/s/*Melinda S. Kollross

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. DANIEL JURAK, D.O. and DANIEL JURAK, D.O., S.C., *Defendants-Appellants.*	)	No. 129761

The undersigned, being first duly sworn, deposes and states that on March 11, 2024, the Reply Brief of Defendants-Appellants was electronically filed and served upon the Clerk of the above court. On March 11, 2024, service will be accomplished electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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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
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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.

/s/ Melinda S. Kollross
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