No. 129761

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.*	) On 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 Dist.) No. 17 L 7)) Hon. Lance R. Peterson,) Judge Presiding.

BRIEF OF THE PLAINTIFF-APPELLEE, PAUL PASSAFIUME, AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF LOIS PASSAFIUME, DECEASED

Robert J. Napleton
David J. Gallagher
NAPLETON & PARTNERS
140 S. Dearborn, Suite 1500
Chicago, Illinois 60603
312.726.2699
bnapleton@rjnlawoffice.com
dgallagher@rjnlawoffice.com

Attorneys for the plaintiff-appellee, Paul Passafiume, as Independent Administrator of the Estate of Lois Passafiume

Lynn D. Dowd
LAW OFFICES OF LYNN D. DOWD
29 W. Benton Avenue
Naperville, Illinois 60540
630.665.7851
office@lynndowdlaw.com

ORAL ARGUMENT REQUESTED

E-FILED
2/13/2024 2:23 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

No. 129761

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.*	) On 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 Dist.) No. 17 L 7)) Hon. Lance R. Peterson,) Judge Presiding.

POINTS AND AUTHORITIES AND TABLE OF CONTENTS

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court soundly exercised its discretion in permitting Dr. Smith to testify as to the present cash value of loss of household services, and whether the defendants' objections thereto were forfeited.

2. Whether the defendants have failed to demonstrate any trial error as to the jury's award for lost household services because:

(a) they cannot establish that *any* damages were awarded for lost household services; and

(b) the defendants agreed to Verdict Form B;

(c) the jury was instructed, expressly, not to award any damages for loss of society after the date of the plaintiff's remarriage, and

(d) the general verdict rule provides an independent basis for affirming the jury award.

3. Whether the trial court soundly exercised its discretion in denying remittitur.

STATEMENT OF FACTS

THE JURY FOUND THE DEFENDANTS LIABLE

At the time of her death, Lois Passafiume was 34 years old. She had been happily married to Paul Passafiume for seven and a half years and was working as a clerk for the Village of Braceville. R. 971/11-17. Dr. Jurak was her treating physician. The plaintiff alleged that Dr. Jurak's acts and/or omissions were a proximate cause of her death. R. 1349/6-R1350/1. The jury found that Dr. Jurak was negligent, and that his negligence was a proximate cause of Lois Passafiume's death. R. C918.

THE LOST EARNINGS TESTIMONY OF DR. SMITH AND PAUL PASSAFIUME

The plaintiff presented Dr. Stan Smith, an economist, to render a professional opinion on damages. Dr. Smith estimated that the present cash value of Lois Passafiume's lost earnings was $913,881, on the assumption that she would work only until age 67, but that the figure would be higher if she continued working beyond that age. R. 641/2-21, 643/12-644/23. He testified that this amount included her lost earnings as well as her lost benefits, such as her IRA and social security contributions, and determined that each lost year of income had a value of "plus or minus" $28,500. R. 641/7-21, 643/12-644/1. He also testified as to other variables at play in his estimate for Lois Passafiume's lost earnings. For example, he testified that the $913,881 was "lowered" or "discounted" to represent present cash value (R. 640/11-20, 644/2-4), and that inflation could raise the amount above his estimate by two or three percent (R. 644/12-20). He further testified that, in light of these variables, $913,881 represented a "conservative" estimate of Lois's lost earnings to age 67. R. 644/21-23.

Paul Passafiume testified that, when he first met Lois, she was working at a restaurant where she had risen to the position of manager. R. 989/11-17. At the time of her death, the decedent was working as a clerk at the Village of Braceville, with hours from 9 am to 3 pm. R. 971/16-17, 973/15-16, 988/17-22. Paul testified that she "enjoyed" her job at the Village of Braceville and worked there from 2008 until her death in 2014. R. 988/17-22. The jury also heard the National Vital Statistics Report United States Life Tables which indicated that, at the time of her death, Lois Passafiume had a life expectancy of 48.2 more years. R. 996/18-997/17.

The defendants did not object to the lost earnings testimony of Dr. Smith or Paul Passafiume at trial, and no issue regarding any of the lost earnings testimony is raised by the defendants on appeal.

THE LOSS OF HOUSEHOLD SERVICES TESTIMONY OF DR. SMITH AND PAUL PASSAFIUME

Dr. Stan Smith, an economist with a Ph.D. from the University of Chicago, testified as an expert economist for the plaintiff, and wrote a textbook on the economic data he was going to analyze. R. 629, 638. He was retained to analyze the plaintiff's losses following the death of his wife, Lois. R. 634. Paul Passafiume remarried in December 2015. R. 995/2-4. Dr. Smith explained what earnings capacity was; the ability to work even if a person, such as a stay-at-home mom, is not working at a given moment. R. 635. Loss of household services, which economists have been analyzing for sixty years, R. 635, pertains to services rendered in and around the home, such as cooking, cleaning, mowing the law, painting, building decks and so forth. R. 636. These activities have value that economists can and do measure. R. 636. He utilized the deposition of Paul Passafiume along with an interview of Mr. Passafiume in forming his opinions. R. 649, 651. He did not calculate future inflation into his analysis. R. 654. He did include investment value which is the same thing as discount rate. R. 654. The data upon which he relied was typically, reasonably and customarily relied upon by experts in his field. R. 638. His opinions were to a reasonable degree of economic certainty. R. 640-41.

He explained what present cash value meant which he applied to the data relevant to the decedent. R. 639, 640. The calculation of the decedent's wages and benefits, for example, into certain future years would be discounted to the total value in today's

dollars. R. C640. The present cash value of decedent's lost earnings, calculated to ages 67, 70 and 72. R. 641. To age 67 the present cash value was $913,881. R. 641. For every year she lived thereafter, $28,500 should be added, and if she did not live that long, $28,500 should be deducted from $913,881. R. 641. He was not saying the decedent would work to age 67, but that age was based on the economic tables and the valuation reached was the present cash value if she worked a 30-hour week to age 67. R. 643. The tables he referenced at trial were attached to his Report. R. C1110-C1127. Table 5 was a present value of future wages. R. C657, C1114. The defendants made no objection to Dr. Smith's lost earnings testimony.

With regard to her lost household services, he calculated the value based on her life expectancy, explaining that, as long as one "can get out of bed" household services can be performed longer than working at a job. R. 642. The decedent's life expectancy was age 78. R. 642. In forming his lost household services opinions, Dr. Smith analyzed the mean hourly earnings of painters, waiters and waitresses, private household cooks, laundry and dry-cleaning workers, maids, housekeeping cleaners, auditing clerks, taxi drivers and chauffeurs who averaged $14.99 per hour, so he used that hourly wage in formulating the decedent's lost wages. R. 661-62. Dr. Smith had economic tables discussing how much time people spend on such activities; he used the government's statistics with respect to average hours in the household. R. 637-38, 664.

One of Dr. Smith's top economic analysts interviewed Mr. Passafiume who stated that the decedent did vacuuming, cleaning, cooking laundry, some yard work, gardening and paid the bills, she spent about two to three hours per day at the time she was working on those household services, R. 982, but when one retires, Dr. Smith

explained that the tables show that people increase the amount of time able to do household services by 2 ½ to 3 ½ hours per day. R 637, 642, 660. But, when one turns 75, the amount of time spent on household services "notches down just a little bit." R. 642. Dr. Smith used the statistical table and took the decedent's age to 78.3 reaching a present cash value of $998,157, with the number going up or down at a rate $34,000 depending on her health later in life. R. 643, 644. Defendants did not object to Paul Passafiume's testimony.

Dr. Smith's above valuations and numbers at the time of trial were dated. He based his calculations on a trial date of May 1, 2020, but due to Covid, the trial did not happen until the summer of 2021. R. 644. So, with inflation of about 2% - 3% since the original trial date, his calculations were "a little bit conservative." R. 644.

Defendants did not offer any expert on damages to rebut Dr. Smith or to rebut or to opine on any other economic evidence presented at trial.

VERDICT FORM B COMBINED DAMAGES FOR LOST EARNINGS AND LOST HOUSEHOLD SERVICES INTO A SINGLE LINE ITEM BY AGREEMENT OF THE PARTIES

Defendants agreed to the plaintiff's Verdict Form B with a single line item combining loss of household services and lost earnings and withdrew their own alternative verdict form. R. 1020/19-1021/5, 1030/3-8, 1223/11-19, C918.

PLAINTIFF'S INSTRUCTIONS BASED UPON IPI 3.08 AND IPI 31.04 WERE GIVEN WITHOUT ANY OBJECTION FROM DEFENDANTS

The jury was given the following instruction based on IPI 3.08:

> You have heard a witness give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way you judge the testimony from other witnesses. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony

> whatever weight you think it deserves considering the reasons given for the opinion, the witness's qualifications, and all other evidence in the case.

R. 1347/6-14. Plaintiff also gave instruction 18 (originally numbered 19), based upon IPI 31.04, with no objection from the defendants. R. C987. Instruction No. 18 stated, in subparagraph 11, the following:

> Plaintiff is not entitled to damages for loss of decedent's society and sexual relations after the date of remarriage, December 11, 2015.

R. C987, 1354/11-13.

THE AMOUNT AWARDED FOR THE LOST EARNINGS/LOSS OF HOUSEHOLD SERVICES COMBINED LINE ITEM WAS LESS THAN THE AMOUNT SUGGESTED BY PLAINTIFF'S EXPERT

At trial, Dr. Smith offered a "conservative" estimate that the present cash value of Lois's lost earnings until age 67 was "plus or minus" $913,881 (R. 641/14-21, 643/22, 644/21), and that an estimated value of loss of household services until age 78 was $998,158 (R. 643/3-8). If the jury had accepted Dr. Smith's suggested amounts without adjustment, the award for the line item combining these elements of damages would have been $1,912,039. Ultimately, the jury awarded plaintiff only $1,434,025 for the combined line item. R. C918. This was $478,014 less than the amount estimated by Dr. Smith.

THE TOTAL AMOUNT OF DAMAGES AWARDED BY THE JURY WAS LESS THAN THE TOTAL AMOUNT REQUESTED BY PLAINTIFF

During closing arguments, the plaintiff asked for a total award of damages in an amount between $4,924,178.34 and $7,324,178.34. R. 1277/20-21. Even before the twenty per cent reduction for contributory negligence, the jury's award of $2,121,914.34, was less than the lowest end of the range requested by the plaintiff. R. C918.

ARGUMENT

I. THE STANDARDS OF REVIEW WARRANT AN AFFIRMANCE.

A trial court shall only order a new trial where the verdict is against the manifest weight of the evidence, and the trial court's denial of a motion for new trial will only be reversed where there has been an abuse of discretion prejudicial to the defendant. *Steed v. Rezin Orthopedics & Sports Med*., 2021 IL 125150, ¶44; *Boll v. Chicago Park Dist*., 249 Ill. App. 3d 952, 958 (1991); *People v. Thomas*, 72 Ill. App. 3d 186, 201, 202 (1979). An abuse of discretion occurs only where no reasonable person would take the position adopted by the circuit court. *Dawdy v. Union Pacific R.R. Co*., 207 Ill. 2d 167, 177 (2003). A court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court feels that other results are more reasonable. *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). Defendants' contention that the *de novo* standard of review applies, (Def. Br. at 9), is manifestly incorrect for several reasons.

First, every ruling at trial is based on the court's understanding of the law applicable to the objection tendered at trial. So, if defendants' contention is correct that the court's decision to allow Dr. Smith to render expert testimony on the damages at issue is subject to *de novo* review, the abuse of discretion standard ceases to exist with respect to the admission of evidence. It is for this court to decide if *de novo* review is applicable to trial courts' rulings on the admissibility of evidence at trial.

Second, as detailed below and as ignored by the defendants, there was sufficient trial evidence presented to support the jury's general verdict on lost earnings alone rendering their claims of error about the jury awarding even one dollar for lost household

services damages unprovable. *Dillon v. Evanston Hosp*., 199 Ill. 2d 483, 491-92 (2002).

Third, while the damages a jury is to award is a legal standard, *see* Def. Br. at 9 (citing *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 252 (2006) (jury awarded over 50% more in compensatory damages than requested or proven)), here, there is no contention that the jury instructions and verdict form given to the jury were erroneous. Unlike in *Tri-G*, here, the jury was instructed with I.P.I. 31.04 which provided a correct, uncontested "measure of damages," namely, that:

> Plaintiff is *not* entitled to damages for loss of decedent's society and sexual relations *after the date of remarriage, December 11, 2015.*

R. C987, 627. Defendants have never contended that the jury did not follow the court's instructions. As such, there is no basis for any contention that the jury lacked "a" measurable basis upon which to determine its damage award. *Schandelmeier-Bartels v. Chicago Park Dist*., 2015 IL App (1st) 133356, ¶25, (Def. Br. 9), examined *res judicata* which has no applicability here. *Magna Trust Co. v. Illinois Cent. R.R.*, 313 Ill. App. 3d 375, 380 (2000), (Def. Br. 9), examined the Safety Appliance Act, the interpretation of a statute which is subject to *de novo* review. No statutory interpretation is at issue here. There is no basis in this record for *de novo* review.

Fourth, whether the defendants have preserved their claims of error with respect to the damages errors they assert are subject to this court's forfeiture standards. Defendants are not saved by the admonition that forfeiture is a limitation on the parties, not on the court, (*Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 504-05(2002)), because here, the defendants acquiesced in the precise circuit court rulings that they assert are erroneous. "A party cannot complain of an error which he induced the court to make *or*

to which he consented." *Math v. Katholi*, 191 Ill. 2d 251, 255 (2000) (emphasis added). The defendants received the exact jury instructions and verdict form on loss of consortium damages that they wanted. The defendants tendered no verdict form separating lost earnings from lost household services so that they could then prove to a reviewing court that the jury returned any award for lost household services. The defendants can never meet their burden on appeal of showing trial error, much less prejudicial error.

Lastly, this court's review of the record permits upholding the circuit court decision on any grounds supported by the record regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was correct. *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 192 (2007).

The standard of review in denying a new trial request is very deferential to the trial court. *Boll v. Chicago Park Dist*., 249 Ill. App. 3d 952, 958 (1991). It is elementary that when an appellant cannot prove that the verdict resulted from trial error, the new trial request should be denied. *People v. Thomas*, 72 Ill. App. 3d 186, 201, 202 (1979). Here, the trial court could not commit any "error" with respect to the jury awarding damages pursuant to the instructions and verdict form the defendants agreed be tendered.

II. THE TRIAL COURT SOUNDLY EXERCISED ITS DISCRETION IN ALLOWING DR. SMITH TO RENDER HIS UNREBUTTED ECONOMIC OPINIONS.

The defendants objected to the admissibility of Dr. Smith's testimony regarding the plaintiff's loss of household services after the date on which he remarried. R. C519, C520, C551. The trial court disagreed, finding that Dr. Smith could properly opine as to the present cash value of household services, because these losses are *tangible* and

quantifiable, and therefore, different from the *intangible* elements of loss of society. R. 623/8; 624/10. The circuit court's ruling was correct. The appellate court has provided a comprehensive and scholarly analysis of the law of loss of society, and explained, soundly, why expert testimony can be admitted to help the jury assess the tangible economic losses the plaintiff sustained. Out of respect to the court and the defense, the plaintiff will not reiterate the appellate court analysis, but will adopt it as if fully set forth herein and will tender the following, supplemental arguments.

A. AN EXPERT CAN OPINE ABOUT TANGIBLE LOSS OF CONSORTIUM DAMAGES SUCH AS LOST HOUSEHOLD SERVICES.

The recovery of damages for the loss of household services has existed in Illinois for at least 160 years. *See*, *e.g*., *Doyle v. Jessup,* 29 Ill. 460 (1862). Loss of consortium includes recovery for loss of "material services," in addition to the intangible losses. *Countryman v. County of Winnebago*, 135 Ill. App. 3d 384, 388 (1985) (citing *Elliott v. Willis*, 92 Ill. 2d 530, 535 (1982), and other decisions). There is no authority for prohibiting expert testimony for *tangible* household services nor is the issue a double recovery of damages. At issue is whether an economic expert can aid a jury in its damage calculations and determination.

It is well-settled in Illinois that the loss of household services constitutes an actual, calculable, pecuniary loss suffered in wrongful death cases. *Rasmussen v. Clark*, 346 Ill. App. 181, 183, 196-197 (1952). The concept that loss of consortium includes both *tangible* and *intangible* components is not new and was recognized by the Illinois Supreme Court in *Elliott v. Willis*, 92 Ill. 2d 530, 540 (1982). Over a hundred years ago, the Illinois Supreme Court in *McFarlane v. Chicago City Ry. Co*., 288 Ill. 476, 482–83

(1919), found that a jury's calculation of a pecuniary loss cannot be calculated with certainty:

> There is no rule by which the pecuniary loss can be exactly determined, and the jury must therefore calculate the damages with reference to a reasonable expectation of benefit from the continuance of the life…. It is not required that the evidence shall afford data from which the extent of the pecuniary loss can be ascertained with certainty. Clearly, one of the elements of pecuniary loss is the personal service of the deceased.

Id. at 482-83. See also, IPI 32.03. Expert testimony is admissible when it will assist the trier of fact to understand the evidence or to determine a fact in issue. *Leonard v. Pitstick Dairy Lake & Park, Inc*., 124 Ill. App. 3d 580, 587 (1984). It is a long-established rule in Illinois that where an expert can clarify something for a jury, it is in the interest of justice to permit the testimony. *Goddard v. Enzler*, 222 Ill. 462, 470 (1906). So long as the opposing party has the opportunity to cross-examine the witness, and present his own countervailing expert and argument, no competent evidence should be barred. *Montefusco v. Cecon Const. Co*., 74 Ill. App. 3d 319, 323 (1979).

So here, there is no question that under Illinois law Dr. Smith's unrebutted economic opinions on lost household services were correctly admitted to "aid" the jury in deciding what, *if any*, damages should be awarded for the plaintiff's lost household services. The court expressly instructed the jury that it was not to award any damages for the plaintiff's loss of decedent's society and sexual relations *after* the date of remarriage, December 11, 2015. R. C987. As such, the defendants have made no showing or contention that the jury failed to adhere to the court's foregoing instruction or that the jury returned any damage award for plaintiff's lost household services after he remarried. The defendants have been unable to show reversible, prejudicial error with respect to the

verdict returned thereby warranting an affirmance.

Notwithstanding that the defendants have made no showing that the jury awarded anything for lost household services, Illinois law does not pose the barrier to Dr. Smith's opinions regarding a calculation of the lost household services that defendants assert. In *Rasmussen v. Clark*, 346 Ill. App. 181, 183, 196-197 (1952), a wrongful death case, the appellate court held that the law recognizes the lost household services as elements of pecuniary loss. At the time of the collision, decedent was forty-one years old and lived with his 63-year-old mother, the plaintiff, all of his life except when he was in the army. Plaintiff remarried many years ago after the death of the decedent's father. Plaintiff testified that her son, the decedent, gave her twenty-five dollars a week out of his wages; paid for the electricity, gas, and fuel used in the operation of the household; washed the storm windows and the other windows; cut the lawn and bushes; performed other duties about the home; and he made a weekly salary of sixty-six dollars. The court determined that the twenty-five dollar weekly contribution paid to his mother, the value of the utility bills he paid *and the value of the personal services which he rendered* were all to be considered under the law as elements of pecuniary loss. 346 Ill. App. At 196-97 (citing *McFarlane*) (emphasis added).

In *Pfeifer v. Canyon Constr. Co.*, 253 Ill. App. 3d 1017 (1993), the court discussed how loss of consortium can include "indefinitely measured damages" "unique to a marriage partner," such as guidance, companionship, felicity and sexual relations," the elements discussed in *Mitchell v. White Motor Co*, 58 Ill. 2d 159, 162 (1974), *Carter v. Chicago & I. M. R. Co*., 130 Ill. App. 3d 431 (1985), *Elliott v. Willis*, 92 Ill. 2d 530 (1982) and *Dini v. Naiditch*, 20 Ill. 2d 406 (1960). *Id*. at 1029. However, loss of

consortium includes tangible elements, such as, the loss of material services. *Countryman v. County of Winnebago*, 135 Ill. App. 3d 384, 388 (1985). The foregoing precedent reflects that there is no prohibition, and therefore no trial error, in allowing an expert to opine on the calculable loss of the *tangible* elements of the damages, such as household services. Likewise, under *McFarlane*, while expert testimony is not required for the calculation of lost household services, expert testimony is not precluded with respect to the *tangible* element of damages, loss of household services.

Dotson v. Sears, Roebuck & Co., 157 Ill. App. 3d 1036, 1044 (1987) (*Dotson I*) and *Dotson v. Sears, Roebuck & Co*., 199 Ill. App. 3d 526, 527-528 (1990) (*Dotson II*), do not support the defendants' contentions. (Defs. Br. 6-8). *Dotson I* and *Dotson II* found that the trial court improperly excluded evidence of remarriage, whereas, in our case, the jury heard that Paul Passafiume remarried. R. 995/2-4. Nothing in *Elliott v. Willis*, 92 Ill. 2d 530, 540 (1982); *Blagg v. Illinois F.W.D. Truck & Equip. Co*., 143 Ill. 2d 188, 195 (1991); *Balzekas v. Looking Elk*, 254 Ill. App. 3d 529, 537 (1993); or *Manders v. Pulice*, 102 Ill. App. 2d 468, 474 (1968), prohibited Dr. Smith's narrowly tailored expert testimony here as competent evidence for the *tangible* component of loss of consortium. The Illinois Supreme Court acknowledged that loss of consortium includes both *tangible* and *intangible* components. *Elliott*, 92 Ill. 2d at 540 (1982); *see also*, *Pfeifer v. Canyon Constr. Co*., 253 Ill. App. 3d 1017, 1029-1030 (1993). Because the value of *tangible* household services, unlike the *intangible* emotional components of loss of consortium, are calculable, an expert's testimony on the matter is permitted. *Martin v. Sally*, 341 Ill. App. 3d 308, 315 (2003). Moreover, Dr. Smith's opinions in our case, unlike *Fetzer* and *Patch*, were not based upon a statistically average person. Rather,

he based his specific estimates on the actual tasks performed by Lois Passafiume. R. 637/12-20, 643/3-8, 650/21-R651/5, 656/12-13, 660/10-14. Furthermore, Dr. Smith's opinions were based upon information normally relied upon by experts in making such calculations. R638/4-20.

The admissibility and scope of Dr. Stan Smith's economic opinions on lost household services has been reviewed in *Williams v. BNSF Ry. Co*., 2015 IL App (1st) 121901-B, ¶26, and was cited by the plaintiff in the circuit court proceedings. R. 627/13-18, C1993-C1996. In *Williams*, the court determined that Dr. Smith could provide expert testimony on decedent's lost household services as follows:

> Using standard methodology, Smith calculated [decedent's] loss of earnings, benefits, and the loss of the value of household services [decedent] could no longer perform. Smith testified that household services typically fall under one of three categories: food preparation, clothing care, and household maintenance and repair. Smith opined that the loss of value of household services over Williams' life expectancy was $657,601.

Williams at ¶26. Respectfully, this court should likewise find that Dr. Smith's testimony was appropriate to aid the jury in its damage determination.

B. THE JURY HAD AMPLE GROUNDS UPON WHICH TO RETURN ITS DAMAGE AWARD.

Defendants next summarily proclaim, as if it were an adjudicated fact, that the decedent provided her household services to the plaintiff as acts of love and caring for her husband. (Def. Br. at 11). There is no evidence in the Record to support the foregoing assertion that the decedent performed household services solely based on love.

(1) Dr. Smith's Loss of Tangible Household Services Testimony Supports the Verdict.

Dr. Smith provided the requisite foundation for his opinions. Dr. Smith's

testimony was based upon the exact type of information customarily relied upon by economic experts to determine lost household expenses. R. 638/4-20. *Montefusco v. Cecon Const. Co*., 74 Ill. App. 3d 319, 322–23 (1979). Dr. Smith's report, which set forth all of his opinions and the bases therefore, was marked as Defendants' Exhibit 44. R. C27, C1096-C1127, 661/7-13. His opinions also were based on an extensive interview with Paul Passafiume to obtain further details about the loss of household services. R. 649/19-20, 650/21-R651/5, 656/12-13, 660/10-24. Paul Passafiume stated that he and Lois lived in a three-bedroom one-bathroom single family home, and that Lois spent two to three hours per day vacuuming, cleaning, cooking, doing laundry, helping to pay bills, performing yard work, and gardening. R. 637/13-19. He testified that such interviews were routine, customary and necessary for damages experts in making their calculations. R. 637/12-20, 638/4-20, 650/21-651/5, 656/12-13, 660/10-14.

Dr. Smith estimated that the present cash value of the loss of household services for Lois Passafiume was $998,158, assuming she lived until age 78.3, based on a calculation of "plus or minus" $34,000 per year. R. 643/3-11. Dr. Smith defined household services generally as including cooking, cleaning, lawn mowing, painting, taking out the garbage, and/or whatever household services a particular person performs. R. 636/6-12. He testified that "we don't pay the wife to cook, we don't pay the husband to take out the garbage, but it has value and economists have been measuring that." R. 636/12-15.

Dr. Smith applied the information he gathered from Paul to the economic tables "typically and customarily relied upon by experts in the field" doing this type of analysis. R. 637/22-638/20. He also "relied on government statistics," and estimated a value of

$14.99/hour as the quantifiable amount for the household services actually performed by Lois Passafiume prior to her death. R. 662/10-14, 664/15-16. Based on the information specific to Lois, and the relevant tables and statistics, he calculated the present cash value of the lost household services. R. 638/21-640/20. He further testified that his estimate was "conservative," and could be higher due to inflation. R. 644/21-23. All of Dr. Smith's testimony was given to a reasonable degree of economic certainty. R. 640/21-641/1.

Dr. Smith knew exactly what tasks Lois performed, and consulted the requisite materials customarily relied upon by experts in the field to estimate the costs of that housework. R636/6-20, R637/12-20, R638/4-20. Dr. Smith's cost estimates were actually *reduced* in order to account for the locality where the Passafiumes lived and the "different types of services actually performed in the household," such that his final estimate was "very conservative." R. 661/7-13, C27, C1096-C1127. Dr. Smith's estimates were also based on data from the U.S. Bureau of Labor Statistics, as well as leading journals and authoritative books in his field. R. 636/6-20, 638/4-20, 642/15-643/11, 661/7-13, 982/5-13, C27, C1096-C1127. Thus, his opinions were based upon commonly used facts, data, and methodology in the field, and were linked specifically to Lois's actual household duties and were, therefore, admissible. R. 637/12-20, 638/4-20; *McKinney v. Hobart Bros. Co*., 2018 IL App (4th) 170333, ¶ 46.

Dr. Smith clarified this point and testified that he "used $14.99 an hour for all that [Lois Passafiume] did." R. 662/10. Indeed, Dr. Smith explained that his estimate was confined *only* to the services that Lois performed: "vacuuming, cooking, cleaning, laundry, help pay the bills," as well as "yard work and gardening." R. 637/12-20.

Moreover, it should be noted that there was trial testimony that Lois did assist with the bill paying, which is synonymous with "bookkeeping," one of the tasks which the defendants denied Lois performed. R. 637/16. Dr. Smith specifically testified that he did *not* use the Merry Maids number in his calculations:

> Q: Okay. And they referenced Merry Maids here. Why did you cite Merry Maids in the context of this case?
>
> A: My report has some boilerplate in it, so the number I used was around $20 an hour, $21 an hour. I only put a few sentences in there that says there are places that you can spend a lot more than that. I don't use that number.
>
> Q: So you didn't use [the Merry Maids] number for the hundred biggest cities in the country; you used a much lower number?
>
> A: I used the number appropriate for here, yes.

R. 665/18-666/4. Dr. Smith's trial testimony clearly demonstrates that his estimates were firmly tied to the tasks Lois actually performed and to the actual cost of living where she lived. R. 636/6-20, 637/12-638/-20, 650/21-651/5, 656/12-13, 660/10-14, 661/7-13, 662/10, 982/5-13, C27, C1096-C1127.

The cases relied upon by the defendants below did not support barring Dr Smith's household services testimony. *Patch v. Glover*, 248 Ill. App. 3d 562, 569 (1993) is not authority for the defendants' contentions. *Patch* criticized estimates for the "statistically average person," a metric *not* used in this case. Likewise, *Soto v. Gaytan*, 313 Ill. App. 3d 137, 148 (2000), is also distinguishable. *Soto* held that the recency of a medical exam could impact the admissibility of expert testimony, and that a chiropractor's testimony as to the permanency of plaintiff's injuries was properly excluded because he had not seen the plaintiff in four years. This narrow ruling has no application here. *Soto* did not adopt a blanket rule excluding experts, and instead applied a totality of the circumstances

approach to admissibility of medical experts. *Id*. at 147. Following the rationale of *Soto*, Dr. Smith's household services testimony was properly admitted here as it aided the jury in assigning a value to a *tangible* loss, was based on reliable and objective data (*e.g*. Bureau of Labor Statistics), accounted for the specific household services performed by Lois, and used the methodology generally accepted in the field. R. 636/6-20, 638/4-20, 661/7-13, 982/5-13, C27, C1096-C1127.

People v. Smith, 2012 IL App (1st) 102354, ¶70, (superseded by statute on other grounds), did not support the defendants' contentions, but supports the plaintiff here. *Smith*, (quoting, *People v. Contreras*, 246 Ill. App. 3d 502, 510 (1993)), states that "to lay an adequate foundation for expert testimony it must be shown that the facts or data relied upon by the expert are of a type reasonably relied upon by [experts] in that particular field in forming opinions or inferences." Here, Dr. Smith's testimony was indisputably based upon information customarily relied upon by economists in estimating the value of lost household services. R. 636/6-20, 638/4-20, 661/7-13, 982/5-13, C27, C1096-C1127. Thus, the trial court properly permitted Dr. Smith's testimony regarding lost household services, and any criticisms of his testimony go to its weight and credibility, and not its admissibility. *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 866-867 (2004).

(2) Dr. Smith's Lost Earnings Testimony, Alone, Fully Supports the Verdict.

Defendants did not contest the plaintiff's right to recover Lois Passafiume's lost earnings. A review of the testimony presented at trial supports a finding that the $1,434,025 could have been for lost earnings alone, Dr. Smith, testified that a "conservative" estimate of the present cash value of Lois Passafiume's lost earnings was $913,881, assuming that she would have continued working 30 hours per week, and

retired at age 67. R. 641/14-16, 644/15-23. Dr. Smith also testified that this number included her combined earnings and benefits (R. 641/8-9), and that the number had been "lowered" or "discounted" to represent present cash value (R. 640/11-20, 644/2-4). Based on these factors, Dr. Smith opined that the amount of lost earnings for each year until her retirement would be "plus or minus $28,500," meaning that if the jury concluded that her age of retirement and hours worked per week exceeded his suggestions, then the total number for lost earnings would be higher than his estimate. R. 641/17-21, 643/12-644/1. He also testified that inflation could raise the amount above his estimate by two or three percent. R. 644/12-20.

Based on the factual foundation and data Dr. Smith provided, the jury could have determined that the decedent would have worked longer than age 67. Dr. Smith estimated her life expectancy to be 78.3 years, so the jury was free to award damages beyond the age of 67. The jury could have applied the other variables described by Dr. Smith and Paul Passafiume, such as, Lois working more hours per day, receiving pay raises and/or promotions, and applying higher interest rates, and based upon that, reasonably calculated her lost earnings at $35,000 per year. If so, then the award for lost earnings alone would be $1,435,000, almost spot-on to the damage award returned. In this way, the jury's award for lost earnings alone could have reasonably been $1,434,025, rather than the $913,881 estimated by Dr. Smith.

The jury was not bound to calculate her lost wages based on the minimum hourly wage of $14.99 per hour. The jury had the discretion to calculate a higher minimum wage. Dr. Smith's valuation of the decedent's annual wages of $28,500 was not a limitation on the jury. The jury could have calculated a higher annual valuation. The 2%

- 3% inflation factor of Dr. Smith enabled the jury, based on its collective wisdom and experience, presciently to determine that a much higher inflation factor had to be factored into its damage determination. But the plaintiff need not prove what the jury actually did; plaintiff need only show that the evidence fully supports a finding that the jury returned a verdict for lost earnings alone. In contrast, it is the defendants' burden on appeal to demonstrate that the jury awarded any damages for loss of household services beyond the date of remarriage. Defendants can never make any such showing. They did not present an expert to refute Dr. Smith's opinions or to refute that the lost earnings evidence could not, on its own, substantiate the damage award. The defendants tendered no alternative verdict form nor a special interrogatory to provide this court with a factual basis for their contentions. The defendants' contentions remain meritless. The evidence reasonably supported an award of $1,434,025 for lost earnings alone, even if Dr. Smith's lost household services testimony had been barred.

Defendants did not object to Dr. Smith's lost earnings testimony. Defendants did not present their own damages expert to refute Dr. Smith, and never even suggested an alternate amount to the jury. The defendants' failure to rebut Dr. Smith's lost earnings testimony is not a proper basis for overturning a general verdict. Faced with a similar issue, the court in *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 867 (2004), held that "[t]estimony offered by expert witnesses is to be judged by the same rules of weight and credibility applied to testimony of other witnesses, which are questions of fact for a jury, and, in the absence of evidence to the contrary, the jury chose to credit [plaintiff's expert's] opinions in this case." See also *Morus v. Kapusta*, 339 Ill. App. 3d 483, 492 (2003).

The only case cited by the defendants regarding lost earnings evidence was *Carlson v. City Constr. Co.*, 239 Ill. App. 3d 211 (1992), which has no application here. In Carlson, the court found that the trial testimony did not support the jury award where the basis for the plaintiff's expert's lost earnings opinion was an assumption that the plaintiff's decedent would have been an engineer. *Id.* at 231. Carlson found that such a basis was speculative as the decedent had not even applied to college at the time of his death, much less attended, and that the mere "ambition" to be an engineer was not enough to warrant lost earnings at that level. Id. In our case, however, the jury heard how Lois had worked at the Village of Braceville for several years and that she enjoyed it; thus, her lost earnings were "reasonably certain to occur." *Id.*; R. 988/17-22. Moreover, in Illinois, expert testimony as to lost earnings is not even required. *Antol v. Chavez-Pereda*, 284 Ill. App. 3d 561, 573 (1996).

Based on the foregoing, it is evident that the jury could have awarded the $1,434,025 in damages solely for lost earnings, even without Dr. Smith's testimony regarding the value of household services. Dr. Smith went beyond the minimum requirements needed to establish household services as described in *McFarlane v. Chicago City Ry. Co*., 288 Ill. 476, 482–83 (1919), and actually provided "data" to assist the jury in calculating a figure appropriate to the loss suffered. The jury was not bound by Dr. Smith's estimates and could award any amount *higher or lower* than his suggested amount consistent with the evidence presented and its own conclusions therefrom. R. 1347/6-14. *See also*, *Velarde v. Illinois Cent. R.R. Co*., 354 Ill. App. 3d 523, 540 (2004). Defendants' arguments go to the weight and credibility of Dr. Smith's testimony, not its admissibility, and as such, must be rejected. *Compton v. Ubilluz*, 353 Ill. App. 3d

863, 866-867 (2004). The trial court's entry of judgment on the verdict must be affirmed as it was supported by trial evidence. *Maple v Gustafson*, 151 Ill. 2d 445, 454 (1992).

(3) Plaintiff's Testimony Supports the Verdict.

Even without the expert testimony of Dr. Smith, the lay testimony of Paul Passafiume regarding the loss of household services was enough here to support the verdict. R. 982/7-13. It bears repeating that the defendants have never refuted that the plaintiff's loss of household services are recoverable in this case. Thus, even assuming *arguendo* that Dr. Smith's testimony should have been barred, allowing it was harmless error, as the jury could have awarded damages for lost household services based solely on the testimony of Paul Passafiume. *Nassar v. County of Cook*, 333 Ill. App. 3d 289, 303 (2002).

By not raising at trial or on appeal any objection to the sufficiency of Paul's household services testimony, the defendants have forfeited any argument to the that evidence. *Janisco v. Kozloski*, 261 Ill. App. 3d 963, 966 (1994). Paul testified that Lois "pretty much did the 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." R. 982/7-13. This testimony alone was enough to support an award for the loss of household services. *McFarlane v. Chicago City Ry. Co*., 288 Ill. 476, 482–83 (1919).

Relying on *McFarlane*, the court in *Eggimann v. Wise*, 56 Ill. App. 2d 385, 389-90 (1964), permitted similar evidence of loss of household services performed by decedent "including the painting of the house, and papering walls, lifting the house, digging a cellar, and laying blocks for cellar walls, buying groceries, washing and wiping

dishes, and sweeping floors, and purchasing clothing" as bases for establishing pecuniary damages. Nowhere in their brief do the defendants question or even address the sufficiency of Paul Passafiume's testimony regarding the services his wife performed. Moreover, had the defendants advanced such an argument, it would fail. Indeed, the court rejected this exact argument in *Hudnut v. Schmidt*, 324 Ill. App. 548, 550 (1954), awarding damages even where the evidence was "very meager." *See also, Doyle v. Jessup*, 29 Ill. 460 (1862) (holding that even "the most trivial service has always been held sufficient").

Mindful that the defendants carry the non-delegable burden of demonstrating the jury, in fact, returned a damage award for lost household services "after the date of remarriage," which they cannot, the verdict can be affirmed for any reason supported by the record even if the lower court's reasoning was flawed. *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 192 (2007). Paul Passafiume's testimony alone was sufficient to support an award for the loss of household services. *Kosch v. Monroe*, 104 Ill. App. 3d 1085, 1095-1096 (1982). Additionally, because the jury did not adopt the numbers suggested by Dr. Smith, it is reasonable to conclude that the jury award for household services, if any, was based upon the testimony of Paul Passafiume. Thus, the defendants cannot show prejudice resulting from Dr. Smith's testimony. *Malawy v. Richards Mfg. Co*., 150 Ill. App. 3d 549, 563 (1986).

III. DEFENDANTS CANNOT ESTABLISH ANY ERROR WITH RESPECT TO THE DAMAGE AWARD BECAUSE THEY AGREED TO VERDICT FORM B.

Without trial error there is no basis for an appeal. *La Salle Nat. Bank v. City of Chicago*, 3 Ill. 2d 375, 378 (1954). The defendants' appeal presumes that the jury

awarded damages for household services. Fatal to the defendants' presumption is the fact that Verdict Form B does not show that the jury awarded anything at all for lost household services. R. C918. Moreover, the defendants agreed to Verdict Form B which combined lost earnings and lost household services into a single line item, and even went so far as to withdraw his own alternative verdict form. R. 1020/19-1021/5, 1030/3-8, 1223/11-19, R. C918. Not only did the defendants affirmatively consent to the wording of that line item at trial, they did not take issue with the wording of Verdict Form B on appeal. The foregoing renders the jury's damage determination on the combined line item of Verdict Form B error free.

Here, as a legal condition precedent to asserting any claim of error with respect to the damages awarded for lost household services, the defendants are required to show that such an award was even made. In this appeal, defendants only offer arguments from their attorneys as to what, allegedly, the jury must have done. Argument of counsel is not evidence. *Johnson v. Lynch*, 66 Ill. 2d 242, 246 (1977). The defendants have no expert of their own to cite in support of their contentions as to how the jury, allegedly, must have allocated damages. As such, in the absence of other evidence of record to support their arguments, such as the jury instructions or the verdict form, the defendants remain unable to show any trial error, much less prejudicial trial error. Here, the defendants should have and could have tendered an additional or alternative verdict form that separated the loss of household services and the lost earnings into two distinct line items, so that this court could determine what, if any, allocation of the award was for lost household services. *People* v. *Lenker*, 6 Ill. App. 3d 335, 341-42 (1972); *Kinka v. Harley-Davidson Motor Co.*, 36 Ill. App. 3d 752, 758 (1976). The defendants could have tendered a non-

I.P.I. jury instruction on the issue, but they did not.

The appellate court determined that requiring the defendants to present any such verdict form would have placed "too great a burden" on defendants. Respectfully, the appellate court erred in the foregoing finding. First, tendering an alternative jury instruction to preserve a claim of error is a legal requirement. *Barry v. Owens-Corning Fiberglas Corp.*, 282 Ill. App. 3d 199, 205 (1996). But also, here, the defendants did tender their own jury instructions but then withdrew them. R. 1020/19-1021/5, 1030/3-8, 1223/11-19, C918. Asking the jury to combine lost earnings with loss of household services on Verdict Form B was a concerted or strategic decision the defendants made. Illinois law does not permit the defendants to now complain about their inability to establish that the jury returned any damages for loss of household services after remarriage.

In short, the defendants cannot demonstrate that the award for lost household services was too high when they cannot establish that even a single dollar was awarded for lost household services. The defendants did not propose a verdict form with a separate line item for lost household services and even withdrew his alternative instruction thereby acquiescing, expressly, to the Verdict Form B tendered. Nevertheless, the defendants proceed to allege on appeal that the trial court erred by allowing the jury to enter a verdict pursuant to the agreed upon verdict form. This is not error.

Significantly, the defendants' agreement to utilize Verdict Form B did not occur in the frenzied atmosphere that sometimes characterizes jury instruction conferences. Rather, the transcript reflects that court and counsel thoughtfully considered the parties' positions on this point. Indeed, the next day, the trial court even went so far as to

specifically re-confirm defense counsel's agreement to the wording of the combined line item on the verdict forms, including plaintiff's tendered Verdict Form B, as follows:

> [Pl. Counsel]: So we've reflected verdict form A and B. And we also modified line item 2, a little lengthier verbiage about loss of earnings and household services, and this should cover it. In form it was approved yesterday. We just need to add that one line item.
>
> [The Court]: Sure. So the first question for Mr. Lundquist and Ms. Hess [defense counsel] is do you agree that the second line item was correctly amended?
>
> [Def. Counsel]: Yes.

R. 1223/10-19. By agreeing to the language of "the second line item," which combined lost household services and lost earnings (R. C918), and withdrawing his own verdict form, the defendants cannot object on appeal to the damages awarded pursuant to the combined line item on Verdict Form B. *People v. Herron*, 215 Ill. 2d 167, 175 (2005). See also, *Cruthis v. Firstar Bank, N.A.*, 354 Ill. App. 3d 1122, 1136-1137 (2004) (holding that the defendants forfeited their right to object to a verdict form's failure to separate different elements of damages when he failed to submit an alternative verdict form). A trial court does not commit error when instructing the jury with the exact instructions an appellant approved in the trial court. *People v. Lenker*, 6 Ill. App. 3d 325, 341-42 (1972); *Westis v. Aughinbaugh*, 6 Ill. App. 2d 94, 99-100 (1955).

Thus, there can be no error here stemming from the combined line item as defendants failed to claim at the instruction conference that any verdict form other than Verdict Form B should have been tendered. *Gille v. Winnebago County Housing Auth.*, 44 Ill. 2d 419, 427 (1970). Defendants agreed to Verdict Form B and cannot now "seek to take advantage" of this acquiescence. *Moore v. Jewel Tea Co.*, 46 Ill. 2d 288, 294 (1970). Lastly, under the doctrine of invited error, "a party cannot complain of error

which that party induced the court to make or to which that party consented." *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004). The rationale behind this doctrine is that "it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings." Id. Here, the defendants agreed to Verdict Form B so there can be no error.

A. THE JURY COULD HAVE, RIGHTLY, AWARDED MORE THAN THE PLAINTIFF REQUESTED FOR LOST EARNINGS.

The record reflects that the jury had an evidentiary basis for awarding *more* than the amount requested for lost earnings. Dr. Smith's testimony provided the jury with sufficient evidence to support the entire line-item award for lost earnings only. *Stark v. D & F Paving Co.*, 55 Ill. App. 3d 921, 927-8 (1977); *Statler v. Catalano*, 167 Ill. App. 3d 397, 405 (1988). According to the unrebutted testimony of Dr. Smith, the amount for lost earnings could be higher than his estimate based on a variety of factors, such as, whether Lois worked more hours per week, whether she retired later, and whether percent increases for inflation were included. R. 641/17-21, 643/12-R644/1, 644/12-23. Moreover, the jury could have reasonably adjusted Dr. Smith's $28,500/year lost earnings estimate upwards, as a jury may determine present cash value by itself. "[T[here is no requirement in Illinois that plaintiff introduce actuarial or statistical evidence to guide the jury in determining the present cash value of future lost earnings." *Crabtree v. St. Louis-San Francisco Ry. Co.*, 89 Ill. App. 3d 35, 39 (1980). Thus, it is clear that the jury had "ample basis" for awarding $1,434,025 for lost earnings alone, and nothing for household services. *Levin v. Welsh Bros. Motor Serv.*, 164 Ill. App. 3d 640, 655 (1987).

The verdict also reveals that the jury did not adopt Dr. Smith's estimates, as the

total amount awarded was far less than the amount suggested by him (R. 641/14-16, 643/3-11), or by plaintiff's counsel, who requested a total damages award in the range of $4,924,78.34 to $7,324,178.34. R. 1277/20-21. Likewise, plaintiff's counsel specifically advised the jury that the estimates given were merely "suggested figures," and that the jury could award more or less than the amount suggested by the expert, stating: "[y]ou are within your rights as a collective group to come up with what numbers you think represents [sic] justice." R. 1271/21-23. In Illinois, juries are not bound by the calculations of experts and, "it is of no consequence to the validity of an award that it differs from an estimate of damages made by an expert." *Cerveny v. American Fam. Ins. Co.*, 255 Ill. App. 3d 399, 407 (1993); see also, *Velarde v. Illinois Cent. R.R. Co.*, 354 Ill. App. 3d 523, 540 (2004).

Other instructions support a finding that the $1,434,025 for the combined line item on Verdict Form B could have been for lost earnings alone. The trial court instructed the jurors, consistent with IPI 3.08, that they are not bound by an expert's calculations, and that Illinois law permits them to award the damages for lost earnings in the amount which they deem appropriate. R. 1347/6-14. Illinois courts have long recognized that it is well within the province of a jury to award an amount higher than suggested for the present value of lost earnings. *Briante v. Link*, 184 Ill. App. 3d 812, 814 (1989). The record shows that the defendants simply cannot meet their burden of showing that they sustained any reversible error, regardless of their contentions about the circuit court's rulings on the damages at issue.

B. THE GENERAL VERDICT RULE WARRANTS AN AFFIRMANCE.

Under the general verdict rule in effect at the time of trial, if the evidence adduced at trial supports any of the grounds for recovery asserted, even if one ground of recovery is defective, the verdict should be affirmed.

> If several grounds of recovery are pleaded in support of the same claim, whether in the same or different counts, an entire verdict rendered for that claim shall not be set aside or reversed for the reason that any ground is defective, if one or more of the grounds is sufficient to sustain the verdict; nor shall the verdict be set aside or reversed for the reason that the evidence in support of any ground is insufficient to sustain a recovery thereon, unless before the case was submitted to the jury a motion was made to withdraw that ground from the jury on account of insufficient evidence and it appears that the denial of the motion was prejudicial.

735 ILCS 5/2-1201(d). See also, *Witherell v. Weimer*, 118 Ill. 2d 321, 329 (1987). See also, *Dillon v. Evanston Hosp*., 199 Ill. 2d 483, 492 (2002). Since at least as far back as 1866, the Illinois Supreme Court has held that "a general verdict is an answer to all the counts." *Parker v. Fisher*, 39 Ill. 164, 168 (1866). The purpose of the general verdict rule is to preserve the jury verdict so long as there is an evidentiary basis for it.

Here, the tangible loss of consortium claim was predicated on two grounds of recovery: lost earnings and lost household services. The evidence tendered at trial supports either ground of recovery rendering defendants unable to show prejudicial, reversible error. Defendants tendered no Special Interrogatory to prove that the jury awarded any money to the lost household services claim nor to refute that the damage verdict can stand on the lost earnings ground for recovery. As such, under 735 ILCS §5/2-1201(d) and the supporting case law, the entire amount awarded for the combined line item of damages at issue "will not be set aside" because there is sufficient evidence to support the line-item award for lost earnings alone. See also, *Stark v. D & F Paving*

Co., 55 Ill. App. 3d 921, 927-8 (1977) and *Statler v. Catalano*, 167 Ill. App.3d 397, 405 (1988).

Here, because the agreed Verdict Form B, (R. C918), combined lost earnings and lost household services into a single line item, the general verdict rule means that the entire $1,434,025 awarded for that line item should be affirmed. The evidence supports a finding that the entire award was for lost earnings alone. Under the general verdict rule, where two theories of recovery (lost earnings and household services) are combined together in one line item and only one of those theories is contested (household services), the court is required to conclude that the jury has awarded the total amount for the uncontested basis only. 735 ILCS §5/2-1201(d); *Dillon*, 199 Ill. 2d at 491-92; *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 870-871 (2004).

Defendants submitted no special interrogatory to the jury asking which portion of the line item was for lost earnings and which portion was for lost household services. Thus, the entire award for that line item can be attributed to lost earnings, rendering the defendants' claim of error legally irrelevant pursuant to the general verdict rule. Likewise, in *Stark v. D & F Paving Co.*, 55 Ill. App. 3d 921, 928 (1977), the court held that where a defendant fails to submit a clarifying special interrogatory to determine if the verdict was based upon the alleged unproven theory (damages for loss of household services, in our case), rather than the proven theory (lost earnings, in our case), they cannot subsequently "argue that this court must presume that the verdict herein was founded on the [alleged] unproven" theory. If the defendants wanted to know what portion of the line item was attributed to which element of damages, they should have submitted a special interrogatory asking the jury to apportion the elements within the line

item in the event that the jury awarded damages. The defendants declined to do so. Thus, the defendants cannot now ask this court to retroactively speculate on the allocation of damages.

Where, as here, a defendant raises a defense to an element of damages inextricably bound with another element of damages in the verdict form, he "must submit special interrogatories to determine whether any error in an alleged erroneous instruction could have affected the verdict." *Allen v. Sarah Bush Lincoln Health Center*, 2021 IL App (4th) 200360, ¶122; see also, *Lazenby v. Mark's Constr., Inc*., 236 Ill. 2d 83, 101 (2010) and *Pavilon v. Kaferly*, 204 Ill. App. 3d 235, 250 (1990). Moreover, it is well-established black letter law that the general verdict for the plaintiff must not be disturbed where the defendant failed to tender special interrogatories, and even withdrew his own verdict form and agreed to the one submitted to the jury. *Obermeier v. Northwestern Memorial Hosp.*, 2019 IL App (1st) 170553, ¶51; *Arient v. Alhaj-Hussein*, 2017 IL App (1st) 162369, ¶¶ 44-45. Defendants tendered no special interrogatory, but could have, to determine if the jury awarded any amount at all for lost household services.

IV. THE DEFENDANTS' MOTION FOR REMITTITUR WAS PROPERLY DENIED BY THE TRIAL COURT.

Defendants fail to identify the standard of review for a remittitur. (Defs. Br. 20-2). The standard of review for deciding whether the trial court erred in denying remittitur is abuse of discretion. *Buckholtz v. MacNeal Hosp*., 337 Ill. App. 3d 163, 167 (2003); *Diaz v. Legat Architects, Inc*., 397 Ill. App. 3d 13, 45 (2009) ("[a] ruling on a motion for a remittitur is reviewed for an abuse of discretion"). Here, defendants have failed to demonstrate that the appellate court abused its discretion in denying their motion for a

remittitur because the damages awarded were supported by competent evidence adduced at trial.

In Illinois, "a damages award will not be subject to remittitur where it 'falls within the flexible range of conclusions which can reasonably be supported by the facts' because the assessment of damages is primarily an issue of fact for jury determination." *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 412 (1997) (quotation omitted). It is well-settled in Illinois that, following a jury trial, a trial court "does not have authority to enter or order a remittitur unless the prevailing party litigant consents thereto." *McElroy v. Patton*, 130 Ill. App. 2d 872, 877 (1970). The plaintiff here did not consent to remittitur as the award was fully supported by the evidence adduced at trial. *Jacobs v. Yellow Cab Affiliation, Inc*., 2017 IL App (1st) 151107, ¶¶132-133; see also*, Velarde v. Illinois Cent. R.R. Co*., 354 Ill. App. 3d 523, 543 (2004).

The defendants have not presented any evidence that the award was excessive *per se.* The defendants do not question the amounts awarded by the jury for lost earnings, pain and suffering, loss of society or grief, sorrow, and mental suffering. C918. Rather, the defendants' entire motion for remittitur was predicated *only* on the amount awarded for loss of household services allegedly after the date of remarriage. Their argument is predicated on their mathematical computations and assumptions that have no basis in fact, but instead, are based on the defendants' desired interpretation of the jury's basis for its award and arguments of defense counsel. Arguments of counsel are not evidence. *Johnson v. Lynch*, 66 Ill. 2d 242, 246 (1977). Defendants tendered no expert to support their argument or interpretations of the evidence. Defendants tendered no special interrogatory to ascertain whether the jury awarded anything for the lost household

services after the date of marriage. Accordingly, the problem with defendants' computations is that, as detailed above, there is an alternative, evidentiary basis for this court to conclude that the entire award was for lost earnings. The entire award has a factually sound basis fully supported by the evidence.

However, the fact that the award for lost household services was combined on Verdict Form B with lost earnings (which are not contested by Dr. Jurak) is fatal to the defendant's motion. As detailed above, defendants can never show that the jury awarded anything for household services. The evidence presented at trial supports a finding that the jury awarded the entire $1,434,025 for lost earnings See *e.g*., *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 491-92 (2002); *McGovern v. Kaneshiro*, 337 Ill. App. 3d 24, 39 (2003). Without demonstrating that the jury awarded any amount for lost household services, all of the defendants' arguments regarding the sufficiency or admissibility of expert testimony on lost household services are irrelevant. Dr. Smith's lost household services testimony was properly permitted, and, even if, for the sake of argument, it was not, Paul Passafiume's testimony was sufficient basis for the jury's award for lost household services, if any.

V. THE ILLINOIS DEFENSE COUNSEL'S ARGUMENTS ARE MERITLESS.

The Illinois Defense Counsel, ("IDC"), contends that separating loss of household services from loss of consortium encourages monetization of loss of consortium damages. IDC Br. at 1-4. The IDC also contends that Illinois stands alone among sister states thereby encouraging forum shopping. IDC Br. at 4. The IDC's contentions about sister states and alleged forum shopping argument are meritless. In response, the plaintiff

adopts and incorporates the Illinois Trial Lawyer Association's arguments set forth in its *amicus curaie* brief.

In response to the alleged monetization of the individual elements of the loss of consortium elements, respectfully, the IDC is incorrect. Nothing in the lower court decisions encourages the monetization of the individual elements of loss of consortium. The lower courts very carefully delineated the household services to which an expert could testify to aid the jury in its resolution of the issues. The IDC's argument constitutes nothing more than baseless argument of counsel which is not evidence. *Johnson v. Lynch*, 66 Ill. 2d 242, 246 (1977). Neither the defendants nor the IDC cite any expert testimony to support their contentions nor to controvert Dr. Smith's testimony.

CONCLUSION

Wherefore, the Plaintiff-Appellee, PAUL PASSAFIUME, as Independent Administrator for the Estate of LOIS PASSAFIUME, deceased, respectfully requests that this court:

1. Affirm the judgment entered on the jury's verdict;

2. Affirm the circuit court's denial of the defendants' post-trial motion; and accordingly,

3. Deny any all requests for relief of the defendants.

Respectfully submitted,

/s/*Lynn D. Dowd*//

One of the attorneys for the Plaintiff-Appellee, PAUL PASSAFIUME, as the Independent Administrator of the Estate of LOIS PASSAFIUME, deceased

Robert J. Napleton
David J. Gallagher
NAPLETON & PARTNERS
140 S. Dearborn, Suite 1500
Chicago, IL 60603
(312) 726-2699
bnapleton@rjnlawoffice.com
dgallagher@rjnlawoffice.com

Of Counsel:
Lynn D. Dowd
LAW OFFICES OF LYNN D. DOWD
29 W. Benton Avenue
Naperville, IL 60540
(630) 665-7851
office@lynndowdlaw.com

RULE 341 CERTIFICATION

Pursuant to Supreme Court Rule 341(c), 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 35 pages.

Respectfully submitted,

/s/ Lynn D. Dowd

APPENDIX

Illinois Official Reports

Appellate Court

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

Appellate Court Caption	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.
District & No.	Third District No. 3-22-0232
Filed	May 10, 2023
Decision Under Review	Appeal from the Circuit Court of Grundy County, No. 17-L-7; the Hon. Lance R. Peterson, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	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. 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.

Panel

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 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

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

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

[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.

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.

¶ 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 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 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.*

¶ 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.

IN THE ILLINOIS APPELLATE COURT
THIRD JUDICIAL DISTRICT

PAUL PASSAFIUME, as Independent Administrator of the ESTATE OF LOIS PASSAFIUME, Deceased,	)	
Plaintiff-Respondent,	)	
vs.	)	No. 129761
DANIEL JURAK, D.O. and DANIEL JURAK, D.O., S.C.,	)	
Defendants-Appellants.	)	

NOTICE OF FILING AND CERTIFICATE OF SERVICE

To: See Attached Service List

Please take notice that on February 13, 2024 before 4:30 pm, the undersigned electronically filed via the court's Odyssey EfileIL system and pursuant to the supreme court rules, with the Clerk of the Illinois Supreme Court, the Plaintiff-Appellee's BRIEF, a copy of which is enclosed and attached herewith.

The undersigned further certifies pursuant to ILCS 5/1-109 that on February 13, 2024 before 4:30 pm, she served electronically, via the court's electronic Odyssey filing system and via email, a copy of this Notice of Filing and a copy of the above BRIEF. 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.

Respectfully submitted,

/s/Lynn D. Dowd//

One of the attorneys for the Plaintiff-Respondent, PAUL PASSAFIUME, as Independent Administrator of the ESTATE OF LOIS PASSAFIUME, Deceased

Lynn D. Dowd
LAW OFFICES OF LYNN D. DOWD
29 W. Benton Avenue
Naperville, Illinois 60540
630.665.7851
office@lynndowdlaw.com

SERVICE LIST FOR 129761

Counsel for the defendants-appellants:

Melinda S. Kollross
CLAUSEN MILLER P.C.
10 S. LaSalle St.
Chicago, IL 60603
312.855.1010
mkollross@clausen.com

Troy Lundquist
Anastasia Hess
LANGHENRY, GILLEN, LUNDQUIST & JOHNSON, LLC
2400 Glenwood Avenue
Suite 200
Joliet, IL 60435
815.726.3600
tlundquist@lglfirm.com
ahess@lglfirm.com

Counsel for the Illinois Defense Counsel;

Donald Patrick Eckler
Joshua W. Zhao
FREEMAN MATHIS & GARY, LLP
33 N. Dearborn St.
Suite 1430
Chicago, Illinois 60602

Counsel for the Illinois Trial Lawyers' Association:

Bruce R. Pfaff
PFAFF, GILL & PORTS, LTD.
ITLA Amicus Committee Chair
One E. Wacker Dr.
Suite 3310
Chicago, IL 60601-1918
312.828.9666
eservice@pgptrials.com

Amber Konow
VINKLER LAW OFFICES, LTD.
20 N. Clark St.
Suite 3100-A
Chicago, IL 60602
630.655.9545
ack@vinklerlaw.com