NO. 131411

IN THE

SUPREME COURT OF ILLINOIS

ROBERT SCHILLING	)	On leave to Appeal from the
	)	Appellate Court, Fourth District
Appellant,	)	Case No. **4-24-0520**
	)	
v.	)	There on Appeal from the Circuit
	)	Court for Adams County
QUINCY PHYSICIANS AND SURGEONS CLINIC, S.C. d/b/a QUINCY MEDICAL GROUP and KREG LOVE	)	Illinois, Eighth Judicial
	)	Circuit, Case No. 18L53,
	)	
	)	The Honorable
Appellee.	)	Scott D. Larson
	)	Judge Presiding
	)	

APPELLANT'S BRIEF

EDWARD J. PRILL ARDC#6271392
ANDREW L. MAHONEY ARDC#6334171
CROWLEY, PRILL & MAHONEY
3012 Division Street
Burlington, IA 52601
T: (319) 753-1330
F: (319) 752-3934
E: eprill@crowleyprillattorneys.com
E: amahoney@crowleyprillattorneys.com
COUNSEL FOR APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
4/30/2025 5:22 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

Page

NATURE OF THE CASE

Plaintiff Robert Schilling brought medical negligence claims against Dr. Kreg Love ("Defendant Love") and his employer, Quincy Physicians and Surgeons S.C. d/b/a Quincy Medical Group ("Defendant QMG"). Plaintiff, a type-1 diabetic of 30-plus years with neuropathy in his feet, suffered a foot injury/trauma and sought care from Dr. Love, a family practice physician. Plaintiff's treatment with Dr. Love spanned the course of five visits in January 2017. Plaintiff claimed he had fractured his foot and that Dr. Love was negligent for misdiagnosing his fracture as an infection. As a result of the misdiagnosis, Dr. Love allowed Plaintiff to keep walking on his foot, which caused a cascade of fractures in the arch of his foot (a condition called "Charcot foot") and led to an amputation below the knee.

Trial in this matter began on October 23, 2023. After the close of evidence, the jury began deliberating on November 1, 2023. The jury issued six notes, including a detailed note issued the morning of November 2, 2023, where the author of this note announced, the jury could not come to a unanimous verdict, the author promised to vote for a defense verdict against his or her own convictions for the sole purpose of returning a verdict. Plaintiff moved for a mistrial immediately, which was denied. The district court then gave the *Prim* instruction and, soon after, the jury returned a verdict for the defense as the author of the subject note promised.

Plaintiff requested more in-depth polling as there was no record the author of the note had changed their mind from their promise to return the verdict for an improper purpose. The trial court denied this request and stated the jury would only be asked "[w]as

this then and is this now your verdict?". During polling, one juror paused, sighed loudly, and responded hesitantly, "yes". Then the verdict was entered for the defense.

Plaintiff moved for a new trial on December 1, 2023, on the grounds of the trial court's denial of a grant of a mistrial, the denial of the request for further polling, and the denial of the requested jury instruction. This motion for new trial was denied by the Court per the order entered on March 6, 2024.

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion in denying Plaintiff's motion for a mistrial following receipt of the jury note when the author of the note promised to agree to a defense verdict against the author's beliefs, only to end deliberations?

2. Whether the trial court abused its discretion in denying Plaintiff's request for additional polling in order to determine whether the author of the note had changed their mind and was now voting for a defense verdict for a proper purpose.

JURISDICTION

On November 2, 2023, the trial court ruled from the bench, denying Plaintiff's three motions for a mistrial. (R2083-2123) On the same day, the trial court denied Plaintiff's request for additional polling. (R2112) The trial court entered judgment against Plaintiff on November 13, 2023. (C1504)

Plaintiff moved for a new trial pursuant to ILCS 735 5/2-1202(b) on December 1, 2023, citing the trial court's refusal to grant a mistrial, the denial of the request for additional polling, and the trial court's refusal to issue Plaintiff's requested jury instruction. (C1505-1540) The trial court denied the motion for a new trial on all grounds on March 6, 2024. (C1818) Plaintiff filed a timely notice of appeal on March 25, 2024. (C1819-1822)

Jurisdiction was conferred to the Fourth District Court of Appeals by Illinois Supreme Court Rule 303. On December 11, 2024, the Fourth District issued a Rule 23 Order affirming the decision of the trial court. No petition for rehearing or motion to publish was filed. Plaintiff filed a Petition for Leave to Appeal ("PLA") on January 14, 2025, pursuant to Illinois Supreme Court Rule 315. On March 26, 2025, the parties were notified that the Supreme Court of Illinois allowed the PLA.

STATEMENT OF FACTS

Plaintiff was a type one diabetic who was diagnosed just after turning thirteen. (R1515) As of January 12, 2017, he was forty-six years old and worked as a fabricator in a machine shop. (R1521-1522) Plaintiff was sweeping the floor at work when he rolled his ankle and felt a pop in his foot. (R1522-1523)

Following this trauma/injury to his foot, Plaintiff sought treatment from his primary care provider/family physician, Defendant Love, on January 12, 2017, reporting he was unable to walk correctly because of the pain in his foot. (E380) Defendant Love was well aware of Plaintiff's long-time diabetes as well as the substantial danger a foot injury posed to diabetics because of neuropathy. (R835-837) Defendant Love did not: order an x-ray; or document a foot injury as a differential diagnosis; or order Plaintiff to be non-weight bearing, but instead prescribed a simple antibiotic, thinking plaintiff had a foot infection (cellulitis). (R1139-1141, R1144, R1202-1203)

Over the next two weeks, Plaintiff would seek treatment from Defendant Love four more times, each time complaining of additional and/or worsening symptoms in his foot. (R1118-1119, R1139-1141, R1144, R1192-1193) (E387, E395, E397) Defendant Love continued treating the broken foot as simple cellulitis and didn't document a foot injury as a differential diagnosis, or order plaintiff to be non-weight bearing, and only prescribed some painkillers, before finally referring plaintiff to a podiatrist on January 26, 2017. *Id.*

Upon the referral, the podiatrist immediately discovered a foot fracture (R1304), and Plaintiff was referred to an orthopedic surgeon, Dr. Stewart. (R1262) Dr. Stewart diagnosed Plaintiff with Charcot neuropathy with injury and found that because Plaintiff was permitted to continue walking on his foot, this led to his foot being "destroyed".

(E413) Dr. Stewart attempted to save the foot through multiple surgeries and noted in plaintiff's records that plaintiff was "initially misdiagnosed"; then Dr. Stewart noted in her medical records that the diagnosis of Plaintiff's foot, that Plaintiff had a "missed Charcot midfoot fracture" on April 26, 2017, and on June 29, 2018, Dr. Stewart called it an "initially unrecognized" midfoot injury. (E31, 114, 282)

Dr. Stewart was unable to save Plaintiff's foot, which led to a below-the-knee amputation and extensive treatment afterward. (E232-233, E282)

Plaintiff brought professional negligence claims against Defendant Love for his failure (during the January 2017 visits) to diagnose/his misdiagnosis of Plaintiff's broken foot; Defendant Love's failure to make a differential diagnosis of broken bones; Defendant Love's failure to instruct Plaintiff to be non-weight bearing, etc., alleging that said negligence caused Plaintiff to have his foot amputated. (C18-43)

The trial began on October 23, 2023[1] (R144). The evidence was submitted to the jury for deliberation on November 1, 2023. (R2069)

I. The Deliberations and Juror Note.

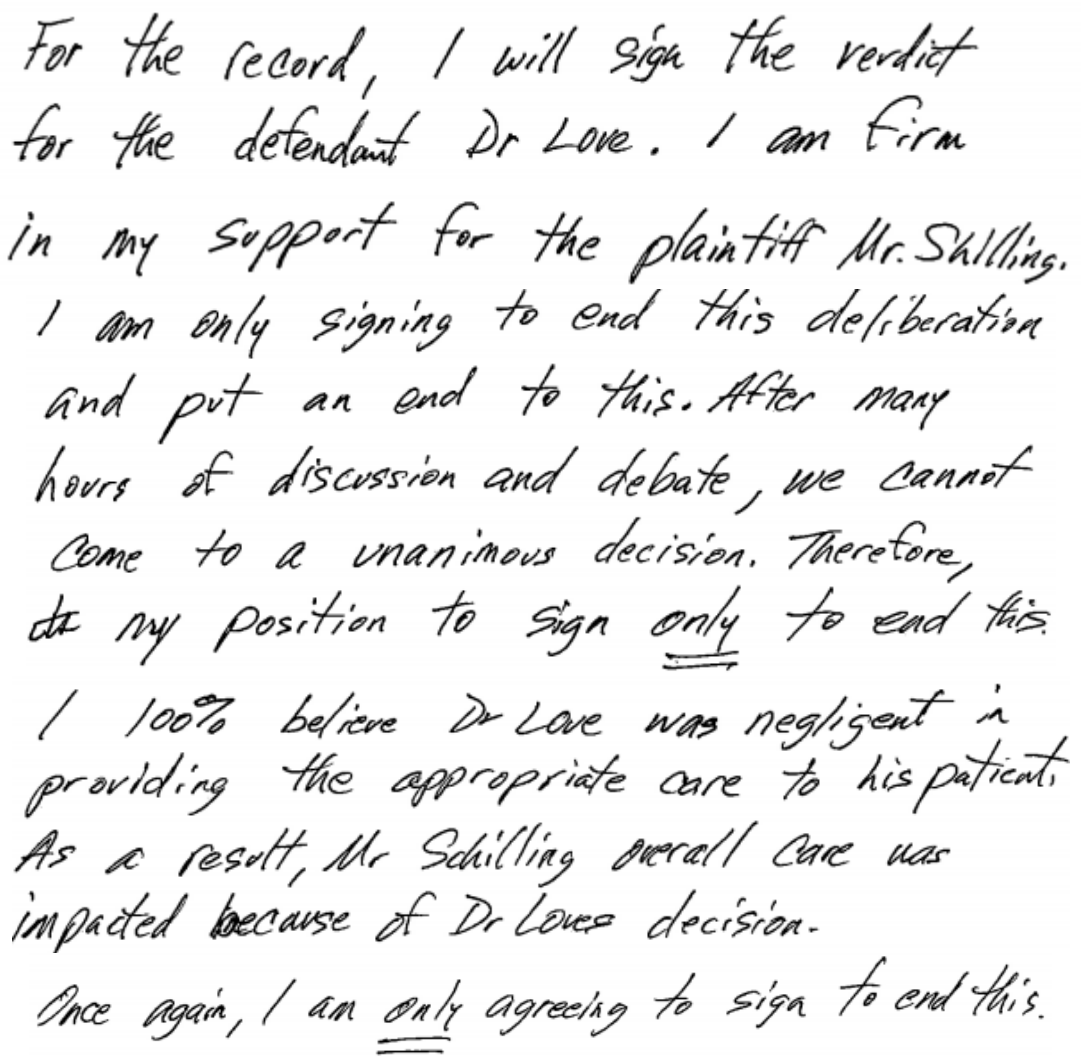
The jury began deliberating on November 1, 2023, at approximately 2:25 p.m. (R2069) The jury first sent a note at approximately 5:10 p.m. (R2070, CI5) Then the jury sent another note at 6:22 p.m. (R2072, CI6) Then, at approximately 7:00 p.m., the jury sent a note that stated as follows:

> "It is obvious that we will not come to an agreement unanimously. Sitting in here for hours and hours will not make a difference."

[1] Jury selection began the prior week on October 19, 2023.

(CI7, R2073) After consulting with the parties, the trial court informed the jury to keep deliberating and later released the jury for the day at 7:55 p.m. (R2073-2078)

The next morning, on November 2, 2023, the jury began deliberating at 9:02 a.m. and the jury sent a note at 9:40 a.m. setting forth as follows:


For the record, I will sign the verdict for the defendant Dr Love. I am firm in my support for the plaintiff Mr. Schilling. I am only signing to end this deliberation and put an end to this. After many hours of discussion and debate, we cannot come to a unanimous decision. Therefore, it is my position to sign only to end this. I 100% believe Dr Love was negligent in providing the appropriate care to his patient. As a result, Mr Schilling overall care was impacted because of Dr Loves decision.
Once again, I am only agreeing to sign to end this.

(CI8, R2082-2083)(the "Surrender Note")

Following receipt of the Surrender Note, Plaintiff timely moved for a mistrial as one juror promised to violate his or her oath to sign the verdict not based on the evidence and the law but only to end deliberations. (R2083-2085) This motion was denied by the trial court. (R2089)

The trial court then brought the jury back into the room, and the juror foreperson stated that the jury was deadlocked. (R2092) The trial court then issued the *Prim* instruction to the jury. (R2092-2094) The jury returned another note requesting clarification as to certain definitions from the jury instruction. (R2094-2096) Plaintiff again moved for a mistrial, which was denied. (R2097-2102)

At 11:00 a.m., the trial court was notified that the jury reached a verdict for the defense. (R2102-2103)

II. The Polling.

After being notified that the jury had reached a verdict, Plaintiff moved the trial court for additional polling. (R2103) Plaintiff's position was that, in order for a verdict to be proper, there must be some sort of indication that the author of the Surrender Note changed his or her mind from the clear and unequivocal promise to sign a defense verdict **only** to end deliberations. (R2103-2112) Plaintiff's request for additional polling was due to the unique nature of the Surrender Note.

The trial court notified the parties it would only ask one question: whether the defense verdict was the verdict of each juror, and then, if the juror answered "yes", there would be no further polling. (R2105-2112) The trial court refused to perform additional polling based on the idea that, provided an affirmative answer was given, no further polling was appropriate. *Id.*

During polling of the jury, one juror (number 34) was asked if the verdict was his, and he paused, sighed loudly, and answered in a hesitant tone, "yes". (R2103-2112, 2119-2121) Plaintiff made a record of the juror's demeanor immediately following this, and

neither the Defendants nor the trial court contested the characterization of the long pause, loud sigh, and hesitant response. (R2119-2121)[2]

After the polling was complete, the trial court did ask the juror foreperson to remain behind due to an irregularity on the verdict form. (R2117-2119) The trial court then individually questioned the foreperson in order to clarify what was written on the verdict form, specifically asking the foreperson if she had been coerced or forced to sign the document, which the foreperson denied. (R2119) Plaintiff again moved for a mistrial based on the same reasons. (R2119-2121) The trial court noted that the additional polling of just the foreperson was necessary to clarify the verdict form and to indicate that "she signed willingly the verdict form under no duress, coercion." (R2123) However, the trial court refused to poll further or individually poll the rest of the jury to ascertain whether there had been coercion or duress.

[2] Plaintiff's counsel did confer with the Adams County court reporter regarding obtaining an audio transcript of the file in order to submit as an exhibit. However, Plaintiff's counsel was informed that the court was prohibited from providing audio recordings to counsel. (C1511) As such, the audio is not part of the record.

STANDARD OF REVIEW

The standard of review for the grant or denial of a mistrial and post-trial motion is whether the district court abused its discretion. *Tirado v. Slavin*, 147 N.E.3d 939, 947, (Ill.App. 1 Dist., 2019).

As the court has discretion to determine the mode and manner of polling, this decision is reviewed for an abuse of discretion. *People v. Carter*, 155 N.E.3d 1157, 1164, (Ill.App. 3 Dist., 2020).

ARGUMENT

There are two issues before the Supreme Court in Plaintiff's appeal. The first issue is whether the trial court erred in failing to grant a mistrial following the issuance of the Surrender Note. The uniqueness of the Surrender Note is this provided the trial court and the parties with such clear insight into one juror's subjective rationale as to *why* this juror agreed to the verdict and, in this case, that rationale rose to the level of misconduct, created a non-unanimous verdict, and was a product of coercion.

The second issue is the trial court's refusal to conduct further polling of the jury in light of the Surrender Note. In light of the unique Surrender Note, the trial court refused to poll the jury beyond simply asking them "[w]as this then and is this now your verdict?" Then, with the Surrender Note being unrebutted on the record, one juror paused, sighed loudly, and hesitantly answered "yes" and the trial court refused to poll the jury further.

The failure to declare a mistrial and to poll the jury further constituted an abuse of discretion.

I. The Trial Court Erred by Denying Plaintiff's Motion for Mistrial.

The trial court erred by denying Plaintiff's motion for a mistrial upon receipt of the Surrender Note. A mistrial is when the judge brings the trial to an end, without a determination on the merits, because of a procedural error, serious misconduct during the proceedings, or a trial that ends inconclusively because the jury cannot agree on a verdict. *Redmond v. Socha,* 837 N.E.2d 883, 894 (Ill.,2005). The subject at the heart of Plaintiff's motions for a mistrial was the Surrender Note.

The Surrender Note was not a question, as juror notes tend to be, but rather a crystal-clear declaration by the author that he or she did not agree with a defense verdict and promised to agree to a defense verdict for the sole purpose of ending deliberations. This is unique as there is generally little insight into the subjective thoughts of jurors during the deliberative process. No case in Illinois comes close to a juror stating in a note, or otherwise, that they are "100%" convinced of a plaintiff's case, sets forth their belief in both deviation of the standard of care and causation, repeatedly sets forth their rationale and exact motivation for agreeing to a verdict, and is followed by an agreement to the verdict as promised. The issue with agreeing to the verdict as set forth is that it constituted a fulfillment of the author's promise.

Illinois law repeatedly sets forth that trial courts are not to delve too deeply into the juror's deliberative process or rationale. *State vs. Walker* 2021 WL 5865323 (Ill.App. 1 Dist., 2021). However, no precedent addresses what to do when a juror discloses their *precise* rationale, i.e., their subjective thoughts, via a long and detailed jury note. Cases such as *Walker* have contained communications by a jury where one or more jurors offer their perceptions regarding *other* jurors as to the *other* jurors refusing to follow the law or being hostile, but these are never subjective declarations. There is certainly no precedent as to what to do when that subjective rationale remains unrebutted in the record.

The defect created by the Surrender Note was not capable of being cured and required an immediate grant of a mistrial. Even if the Surrender Note could be cured, no action was taken to cure it. Every action taken by the trial court, from the issuance of the *Prim* instruction to the limited polling of the jury, simply permitted the author of the Surrender Note to fulfill his or her promise to agree to the verdict for an improper reason.

The important overriding question in this case is "What does it mean if this verdict is allowed to stand?" Despite the trial court's considerable discretion, if the trial court's decision is affirmed, it provides an untenable answer to the above question. If the verdict is allowed to stand in this case, the overarching message becomes that, provided a verdict is entered, that's all that matters. How the jury comes to sign the form becomes totally irrelevant. It means a juror may commit misconduct or abandon their beliefs on the record and, so long as they sign the verdict form, said misconduct or abandonment doesn't matter. This would also reflect negatively upon the idea of a unanimous verdict, which is required in Illinois.

A. Law governing mistrials.

Illinois courts have defined a mistrial as follows:

> A mistrial is defined as "either a trial 'that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings,' or a trial that 'ends inconclusively because the jury cannot agree on a verdict.'" *Redmond v. Socha,* 216 Ill.2d 622, 640, 297 Ill. Dec. 432, 837 N.E.2d 883 (2005) (quoting Black's Law Dictionary 1023 (8th ed. 2004)). "A motion for a mistrial is a procedural tool designed to cut short a trial for legal reasons which preclude a verdict and judgment." *McGrath v. Chicago & North Western Transportation Co.,* 190 Ill.App.3d 276, 279, 137 Ill. Dec. 725, 546 N.E.2d 670 (1989). "This motion prevents parties from getting two chances at a verdict." *McGrath,* 190 Ill.App.3d at 279, 137 Ill. Dec. 725, 546 N.E.2d 670. A motion for a mistrial must be made before a verdict is rendered; it is untimely if it is made either after the verdict is rendered or a judgment is entered on the verdict. *Joe & Dan International Corp. v. United States Fidelity & Guaranty Co.,* 178 Ill.App.3d 741, 745–46, 127 Ill. Dec. 830, 533 N.E.2d 912 (1988).

Burkhamer v. Krumske, 34 N.E.3d 1167, 1171 (Ill.App. 1 Dist., 2015). If a motion for a mistrial was made prior to the verdict, a party asking for a new trial has not waived the

issue. *McGrath v. Chicago and North Western Transp. Co.*, 546 N.E.2d 670, 673 (Ill.App. 1 Dist..,1989).

The principle underlying the requirement to grant a mistrial is further set forth in *Tirado v. Slavin*, 147 N.E.3d 939, 947 (Ill.App. 1 Dist., 2019) *Tirado* states that a mistrial should be granted when there is an occurrence of such character and magnitude as to deprive a party of a fair trial and the moving party demonstrates actual prejudice as a result. *Id.* In the present case, the Surrender Note presented an insurmountable obstacle as it constituted juror misconduct, created a non-unanimous verdict, and constituted coercion.

B. The Surrender Note constituted juror misconduct.

The Surrender Note constituted juror misconduct as the author refused to deliberate and promised to agree to a verdict for a manifestly improper reason. The author declared that he or she would not follow his or her oath and the law and would agree to a verdict in violence to his or her beliefs. Courts should be exceedingly vigilant and careful that no misconduct on the part of jurors would reflect any question on the honesty of their performance. *Miller v. Scandrett*, 63 N.E.2d 252, 255 (Ill.App. 2 Dist. 1945) The *Miller* court would continue that "[v]erdicts should not be set aside on mere suspicion that a juror has acted improperly…While parties are entitled to, and should have, unprejudiced jurors, yet verdicts should not be vacated on a charge of the misconduct of a juror, except on well-defined proof of the misconduct." *Id.* citing *Village of Genoa v. Riddle*, 132 Ill.App. 637, 639 (Ill.App. 2 Dis. 1907).

In the present case, the Surrender Note is exceedingly well-defined proof of misconduct in that: (1) the juror assured the Court he was going to enter a verdict solely to

end deliberations; and (2) this statement represents a clear unwillingness to continue deliberations or deliberate in good faith. The Third Circuit has held the following:

> A refusal to deliberate is a violation of a juror's oath. *Boone*, 458 F.3d at 329 (citing *United States v. Baker*, 262 F.3d 124, 130 (2d Cir. 2001) ("It is well-settled that jurors have a duty to deliberate.")). Moreover, nullification—a juror's refusal to follow the law—is a violation of the juror's sworn oath to render a verdict according to the law and evidence. *See United States v. Thomas*, 116 F.3d 606, 614–18 (2d Cir. 1997)

United States v. Fattah, 914 F.3d 112, 148 (C.A.3 (Pa.), 2019). In the present case, the unnamed juror assured the Court he or she was absolutely not going to follow the law and the instructions in order to sign a verdict supported by the law and the evidence. This was also a clear indication the author was not going to deliberate and change his or her mind. In fact, this unnamed juror violated the letter of the law in the *Prim* instructions, in that he or she abandoned his or her own beliefs for the sole purpose of rendering a verdict and ignored the evidence and the law in doing so. This is nullification in a civil trial. See, *e.g., People v. Smith,* 296 Ill.App.3d 435, 441 (1998) (jury nullification occurs when jurors choose to disregard the law and based on considerations that have no legal justification). A juror abandoning their convictions solely to return a verdict is the exact opposite of what Illinois requires of jurors. This principle can be seen at work in *Fattah*.

In *Fattah,* one juror accused another juror of misconduct, stating the other juror refused to vote in accordance with the law and would not listen to anyone. The court found these allegations against another juror contained "allegations of both a refusal to deliberate and a suggestion of nullification." *United States v. Fattah,* 914 F.3d at 148. The idea of one juror making accusations against another juror is an important distinction, as, in the present case, the author of the Surrender Note (not another juror) provided a subjective statement that the author *both* refused to deliberate and was committing nullification. Therefore, in

one respect, the jury misconduct in the present case was more defined and certain than it was in *Fattah,* as it was a subjective statement.

This misconduct may also be made clear if the author's rationale is changed. For example, if a trial court were to receive a juror note where a juror declared they were going to convict a defendant only because of their race, it seems obvious a conviction would not be allowed to stand. Certainly, it seems like a mistrial should be declared over this type of misconduct or, at the very least, a statement should be obtained from that juror providing assurances the juror was agreeing to the verdict for a proper reason.[3]

It is indisputable that the plain language of the Surrender Note constitutes misconduct. This is why the Appellate Court found it necessary to interpret the meaning of the Surrender Note to be something other than what the plain language of the Surrender Note actually says. For example, the Appellate Court stated "[h]owever, the juror who authored the Surrender Note plainly was taking his or her duties seriously, as he or she was passionate at that point in time, based on the evidence presented, that plaintiff proved his malpractice claim." (Opinion p.11) The Appellate Court further set forth that "[a] different reasonable interpretation is that the author simply wanted to the get the court's attention about the perceived deadlock" and the fact a verdict wasn't returned contemporaneously with the Surrender Note along with the length of deliberations "strongly suggests the Surrender note was a plea for guidance rather than confirmation that the author had truly and permanently abandoned his or her duties and convictions." (Opinion, p. 10) The Appellate Court even reasoned that the juror must have changed his or her mind after the

[3] Plaintiff argues a defect such as this, whether in the hypothetical or in the present case, cannot be cured.

Prim instruction was issued. (Opinion p. 14) This impliedly seems to acknowledge the plain language of the Surrender Note, as it stands, was improper.

The problem with the appellate court's analysis is the interpretation contradicts the plain language of the Surrender Note, which spells out an abandonment of the author's duties and convictions. The Appellate Court acknowledged the author of the Surrender Note was passionate that Plaintiff proved his malpractice claim, but indicates it was only "at that time" and further claimed the author was taking his or her duties seriously. However, the plain language of the Surrender Note contains explicit language from a subjective perspective that the author is *not* taking his or her duties seriously, as they are abandoning their convictions and oath to come to a verdict. If a juror is openly and unambiguously stating they intend to disregard their oath, the law, and the facts, then the juror cannot be taking their duties seriously.

The idea of interpreting the Surrender Note in order to fit the verdict is problematic as it is speculative. The Appellate Court stated the Surrender Note was simply an attempt to get the trial court's attention and was a plea for guidance. However, this is a *possible* interpretation that is unsupported by the plain language of the Surrender Note. Even if this was what the author of the Surrender Note did intend, the fatal flaw in this perspective is the dearth of evidence on the record supporting it. Basing the validity of the verdict on a possible interpretation almost creates a kind of fact dispute, raising the potential of other interpretations.

Plaintiff has considered other interpretations as to what the Surrender Note meant as well. Perhaps there were several holdouts, and the Surrender Note was a plea for help, and the fact the *Prim* instruction was issued pressured the other remaining jurors into

rendering a verdict for the defense. However, if this path of interpreting the Surrender Note is taken, then the issue before this Court is a factual dispute about which interpretation might be correct versus what the Surrender Note said. At the end of the day, this is all speculation. The trial court even stated as follows:

> So in further deliberation and further review, ***if*** **that juror did change their mind that was once certain that is no longer certain, that is the definite discretion of that particular juror.**

(R2122)(emphasis added) This is an admission the trial court did not know if the author of the Surrender Note changed his or her mind. Ultimately, we don't know what was in the juror's mind and can only rely upon the evidence on the record where the juror provided his or her subjective rationale. The issuance of the *Prim* instruction does not remedy this misconduct either.

The *Prim* instruction is not intended to be and is not a remedy for well-documented misconduct, it is an instruction meant to try to break a routine deadlock. The Appellate Court reasoned the juror must have listened to the *Prim* instruction and not abandoned their beliefs, citing Illinois law where courts presume jurors follow the instructions given to them. *First Midwest Bank v. Rossi,* 2023 IL App (4th) 220643, ¶ 174. However, the author of the Surrender Note didn't listen to the earlier instructions that instructed the author to make a decision based on the law and the evidence, why would the assumption be that the author, who previously abandoned his or her oath and refused to deliberate further, would listen this time in the absence of any evidence to the contrary?

As the Surrender Note constituted well-documented misconduct, the trial court erred by denying Plaintiff's motion for a mistrial.

C. The Surrender Note created a non-unanimous verdict.

The Surrender Note also led to a verdict that was not unanimous, which is contrary to the law as set forth in the Illinois Constitution. The right to a trial by a jury, as guaranteed under the Illinois Constitution, requires the verdict of the jury to be unanimous. *Sinopoli v. Chicago Rys. Co*., 316 Ill. 609 (1925); *Read v. Friel*, 327 Ill. App. 532 (1st Dist. 1946). The law recognizes only the unanimous verdict, and no other can be, directly or indirectly, introduced by the judiciary. *Lively v. Sexton*, 35 Ill.App. 417, 420 (Ill.App. 1 Dist. 1889) "Like the right to a trial by an unbiased jury, the right to a unanimous verdict is among the most fundamental of rights in Illinois." *People v. McGhee*, 964 N.E.2d 715, 723 (Ill.App. 1 Dist., 2012)

Illinois Courts have continued:

> The test of the sufficiency of a verdict is whether the jury's intention can be ascertained with reasonable certainty from the language used." *People v. Mack*, 167 Ill. 2d 525, 537, 212 Ill. Dec. 955, 658 N.E.2d 437 (1995). "In determining the meaning of a verdict, **all parts of the record will be searched and interpreted together.**" *People v. Caffey*, 205 Ill. 2d 52, 121, 275 Ill. Dec. 390, 792 N.E.2d 1163 (2001).

People v. Filipiak, 2023 WL 7102029, at *2 (Ill.App. 3 Dist. 2023)(emphasis added) In the present case, the Surrender Note is a direct and unrebutted impeachment of the verdict. The only way to shape the language of the Surrender Note into agreement with the verdict has involved heavy interpretation, i.e., changing the meaning of the Surrender Note itself. This is ultimately speculation. Our courts and juries do not base their decision upon speculation but upon evidence and the law. The unrebutted record in this case demonstrates the author of the Surrender Note declared he or she would vote for the defense for an improper reason and then voted for the defense. The fact that the jury was *forced* to continue deliberating after the Surrender Note was issued, which is when Plaintiff moved

for a mistrial, does nothing to change the meaning of the Surrender Note. Similarly, the fact another juror note was issued after the *Prim* instruction does nothing to indicate the author of the Surrender Note changed their mind and doesn't provide evidence that the author resumed deliberating. There is no evidence that the final juror note was from the author or the author had otherwise reconsidered his or her position.

As the verdict was not unanimous, the appellate court and trial court should be reversed.

D. Requiring further deliberations and/or issuing the *Prim* instruction after the Surrender Note was received was *per se* coercive.

The jury in this case was hopelessly deadlocked and a mistrial should have been declared. "If a jury is deadlocked, a mistrial must be declared." *Redmond v. Socha,* 837 N.E.2d 883, 894 (Ill. 2005); *See also People v. Howard*, 460 N.E.2d 432, 436 (Ill.App. 1 Dist., 1984)(when a jury is "hopelessly deadlocked, it is clearly proper to discharge the jury.")

The present case did not involve a routine deadlock where a jury simply voiced frustration or routine difficulty in coming to a verdict. Even the Appellate Court agreed this case went beyond a routine deadlock. (Opinion p. 10-11) In this case, the deadlock of the jury reached such a point that the author of the Surrender Note guaranteed he or she would abandon his or her duties and beliefs to come to a verdict. Any actions after this to push the jury to come to a unanimous verdict were inherently coercive. As such, the trial court abused its discretion, and a mistrial should have been declared.

1. The jury was deadlocked, necessitating a mistrial.

Illinois courts have noted there is no mechanical application or formula for when a deadlock warrants a mistrial but did note six non-exhaustive factors as guideposts, including: "(1) statements from the jury that it cannot agree, (2) the length of the deliberations, (3) the length of the trial, (4) the complexity of the issues, (5) the jury's communications to the judge, and (6) the potentially prejudicial impact of continued forced deliberations." *People v. Kimble*, 137 N.E.3d 799, 807 (Ill. 2019)

As far as the first factor is concerned, the jury's own statement that it is unable to come to a verdict "has been repeatedly considered the most important factor in determining whether a trial court abused its discretion in declaring a mistrial." *Id. at 808*. The *Kimble* court dealt with a jury that began to deliberate at 10:50 am and continued deliberating until 4:25 p.m., when the jury sent a note stating "[a]fter deliberating for five hours, and despite our best efforts, we are at an impasse." *Id. at 804*. The trial court also explained the bailiff had been told by the jury they were at an impasse earlier. *Id.* The trial judge then brought the jurors into the courtroom and asked them how long they had been at an impasse, and the jury indicated for four and a half to five hours. *Id. at 805*. The jury also indicated that further deliberations would not help. *Id.* The court then declared a mistrial.

In *Kimble* the Court noted that the jury made two statements indicating it was deadlocked and took time to clarify that the jury believed more time would *not* help in coming to a verdict. *Id.* In the present case, the jury deliberated for four and a half hours before sending a note at 7:00 p.m. indicating the jury saw no hope of coming to an agreement unanimously and that "[s]itting in here for hours and hours will not make a difference." This is highly similar to the *Kimble* case. On the next day, after deliberating

for some time, the jury issued the Surrender Note, which was a clear statement by the author that the jury could not come to a unanimous verdict and the only way to end deliberations was with violence to the author's own judgment and abandonment of his or her convictions. The Surrender Note was a way of indicating further deliberations were futile and was a clear indication the author did not intend to deliberate further.

This test was also dealt with in *People v. Richardson*, 233 N.E.3d 248, 257 (Ill.App. 2 Dist., 2022) *Richardson* echoed *Kimble* in that the most important factor was the first one, the statements from the jury that it cannot agree. *Richardson* involved a jury who deliberated and sent multiple questions and, six hours into deliberations, requested clarification on what the next step if there was not 100% agreement. *Id.* The trial court then issued the *Prim* instruction and, seven hours into deliberation, sent another note stating the jury voted four times and was unable to come to a unanimous decision, and the defense moved for a mistrial, which was denied. *Id.* The trial court then summoned the jury into the courtroom and learned the split was ten to two, then sent the jury back to deliberate for another nearly thirty minutes, and the defense moved for a mistrial again. *Id.* The trial court continued to check in and, finally, after roughly nine and a half hours of deliberations, the verdict came back as guilty. *Id.* The appellate court found the trial court abused its discretion by failing to grant a mistrial after the jury could not come to an agreement after the *Prim* instruction.

Richardson dealt with the second, third, and fourth factors as intertwined and examined the length of deliberations given the trial's duration and complexity. The analysis of these factors is more complex in the current case. The case of *Richardson* involved a two-day trial with approximately five hours of testimony. *Id.* In that case, the deliberations

exceeded the testimony. *Id.* The Second District Appellate Court noted the case was made more complex due to DNA evidence, etc. In the present case, it is highly unlikely that deliberations would exceed the length of the trial, as the trial was approximately a week and a half. However, the jury did deliberate for a long time before the Surrender Note was issued. As far as the complexity of the trial, it was a medical malpractice case, but the Surrender Note provided clear proof that, at the very least, the author understood the issues perfectly well, regardless of the time spent deliberating. The author explained the issues, his or her position on them, and then informed the trial court he or she was done deliberating.

As far as the fifth factor, the jury's communications to the judge, that is intertwined with factor one, as dealt with above. However, the sixth factor, the potentially prejudicial impact of continued deliberations, clearly weighs in favor of Plaintiff here as well. In *Richardson* the Second District noted that the trial court's decision to prolong the deliberations after the jury stated it could not agree "magnified the risk that jurors would consider the improper DNA evidence by adding pressure on the minority to confirm with the majority." *Id. at 258*. A similar principle occurred here where the author of the Surrender Note gave up on deliberating, and, in response, a *Prim* instruction, which in essence informs the jury to come to a decision, was issued. This notified the jury that it had to come to a decision. One assumes this would be a devastating message to any other jurors who may have been on plaintiff's side. One juror has already given up and the response was to "keep going anyway".

When a "jury is hopelessly deadlocked, it is clearly proper to discharge the jury." *People v. Howard*, 460 N.E.2d 432, 437 (Ill.App. 1 Dist., 1984) The fact the jury confirmed

the deadlock the next day after the Surrender Note was issued supports the idea the jury was hopelessly deadlocked already. *Id.* "A trial judge has the duty to provide guidance to a jury that is **not** hopelessly deadlocked." *People v. Pankey*, 374 N.E.2d 1114, 1116, (Ill.App. 4 Dist. 1978)(emphasis added). In the present case, the jury sent one note on November 1, 2023, stating that it didn't matter how long they would deliberate, they were not going to reach an agreement. The Surrender Note confirmed a unanimous verdict was impossible and any further orders to continue deliberations were inherently coercive as set forth below.

As stated above, even the Appellate Court seemingly acknowledged the language of the Surrender Note, as it stands without additional interpretation, was improper. This is because the Appellate Court reasoned that the juror must have changed their mind after the *Prim* instruction was issued. (Opinion p. 14) However, as stated above, the assumption that the author changed his or her mind is pure speculation.

The *Prim* instruction to a hopelessly deadlocked jury was not proper. The fact that the author saw the only way out of deliberations was to surrender his or her convictions is evidence that the deadlock was hopeless.

2. **Requiring further deliberations after the Surrender Note was received was *per se* coercion.**

The Surrender Note is a unique factor that proved coercion. Plaintiff was unable to find caselaw in Illinois (or any jurisdiction) where a juror sent such a clear and unambiguous declaration of support for one party yet promised to vote for the adverse party for the sole purpose of ending deliberations. The author's abandonment of their judgment and convictions for the sole purpose of returning a verdict already demonstrates the

presence of coercion and demanded the immediate grant of a mistrial. Juror coercion has been dealt with before in *People v. Wilcox*, 941 N.E.2d 461 (Ill.App. 1 Dist.,2010) The *Wilcox* court held "[c]oercion is a highly subjective concept that does not lend itself to precise definition or testing and, as a result, a reviewing court's decision often turns on the difficult task of ascertaining whether the challenged comments imposed such pressure on the minority jurors as to cause them to defer to the conclusions of the majority for the purpose of reaching a verdict." *Id. at 472*.

Wilcox involved a case where the jury revealed they were 11 to 1 on all four counts. *Id. at 473*. The trial court then sent back a non-*Prim* instruction telling the jury that they were sworn in as jurors and placed under oath and pledged to obtain a verdict, and they were to continue deliberations and obtain a verdict. The jury returned a verdict shortly after. The First Appellate Court found this was an *Allen* type charge and placed undue pressure on the dissenting juror to join the majority for the sake of reaching a verdict. *Id. at 473*. It was coercive because it "conveyed to the jurors that they must arrive at a verdict and did not leave open the option of returning no verdict if they were unable to reach a consensus. *Id.* It is this last holding in *Wilcox*, the idea of reaching a verdict no matter what, that is relevant to the present case.

In the present case, the author of the Surrender Note had already abandoned his or her convictions and the law prior to the *Prim* instruction being issued and informed the trial court as such. The author's intent was explicitly written out. "The principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration." *U.S. v. Blitch,* 622 F.3d 658, 668 (C.A.7 (Ill.) 2010) "The integrity of the jury's verdict must be protected from coercion, duress or influence." *People v. Gregory*,

540 N.E.2d 854, 857 (Ill.App. 2 Dist.,1989). The abandonment of the author's beliefs is evidence of coercion. This created a situation where the issuance of any instruction to continue deliberating, whether a *Prim* instruction or otherwise, was coercive.

The author began the Surrender Note by stating "[f]or the record", making a formal statement. Then the author elaborated, stating the author would sign a defense verdict, but the author was "firm in my support for the plaintiff, Mr. Schilling." These first two sentences alone would be enough to cast doubt upon the unanimity of a verdict, however, the author would continue stating, "I am only signing to end this deliberation and put an end to this. After many hours of discussion and debate, we cannot come to a unanimous decision. Therefore, its [sic] my position to sign **only** to end this." ("only" is underlined twice)(emphasis added) Here the author is setting forth his or her reasoning and elaborating the jury **cannot** come to a unanimous decision, and that the author is abandoning his or her convictions simply to return a verdict. The author makes it clear that it is the author's belief that the jury is not able to be unanimous, so the only way to come to a verdict is to abandon his or her beliefs and convictions.

If the above is not enough, the author continued, reaffirming his beliefs stating "I 100% believe Dr. Love was negligent in providing the appropriate care to his patient. As a result, Mr. Schilling['s] overall care was impacted because of Dr. Love['s] decision." The author elaborates on his or her thinking with remarkable clarity and conviction, stating his or her opinions regarding the evidence are "100%". However, the author did not stop there and finished with the sentence "[o]nce again, I am **only** agreeing to sign to end this." The author once again *guarantees* and *promises* to the trial court and the parties the authors will

only sign the verdict form to end deliberations. The author goes too far as to underline "only" twice.

The firmness with which the author conveyed his or her convictions certainly qualifies as an occurrence of such character and magnitude as to deprive a party of a fair trial, i.e., a unanimous jury verdict and a jury that would follow the law. Any instruction to the jury telling them to reach a verdict *after* a juror promised to abandon their beliefs in order to come to a verdict is coercion. It doesn't matter how the instruction is phrased, whether it is the *Prim* instruction or any other form. The jury had already given three indications it was deadlocked: (1) the note on 11/1/2023 telling the Court they could not reach a decision; (2) the Juror Note sent on 11/2/2023; and (3) the statement of the juror foreperson on 11/2/2023. The fact the *Prim* instruction tells a juror not to surrender their convictions is irrelevant as the surrender of those convictions was already of record.

The case of *U.S. v. Williams* is also helpful in this matter. 819 F.3d 1026, 1032 (C.A.7 (Wis.), 2016) In *Williams* the trial court polled a jury and one juror rejected the verdict. *Id.* The judge continued to poll the jury and the Court cited to caselaw that stated, "the weight of authority suggests that when the trial judge continues to poll the jury after one juror disagrees with the verdict, reversible error occurs only when it is apparent that the judge coerced the jurors into prematurely rendering a decision". *Id.*

The *Williams* Court noted after the juror rejected the verdict, the judge gave the instruction to the juror to continue with their deliberations until they have reached a unanimous verdict. *Id.* The *Williams* Court stated the polling of the jurors had revealed there to be one lone dissenter and the instruction to reach a unanimous decision pressured the lone juror to come to a verdict. *Id.* The *Williams* Court next held that when there is

only one lone dissenting juror, such instructions may become overly coercive as they pressure the lone dissenting juror to change his opinion. *Id.* The *Williams* Court further stated combinations of supplemental charges and polling could be coercive and was another factor to consider whether further deliberations might assist them in returning a verdict. *Id.*

Following the juror's dissent in polling and the Court issuing an instruction to continue deliberating, the jury returned a note indicating they had misunderstood the polling and came to a unanimous verdict. *Id.* The judge then asked the juror in additional polling that the trial court understood the juror had misunderstood the question and the juror confirmed she had, and then the verdict was entered. *Id.* The *Williams* Court found that the supplemental instruction to continue deliberating was coercive.

Williams is similar in the author of the Surrender Note appeared to be a minority holdout[4] and, as such, saw the only avenue to end deliberations was by caving to the majority. In the present case, the *Prim* instruction simply hammered home that the author of the Surrender Note needed to come to a verdict in order to end deliberations, meanwhile, the author had already abandoned his or her beliefs in order to come to a verdict. The present case does differ from *Williams* in that the documented surrender of convictions in the present case occurred prior to polling, and polling only served to affirm the author of the Surrender Note's promise. The fact the instruction in *Williams* was not a *Prim* instruction is not important, as in both cases, the *Prim* and non-*Prim* instructions made clear the jury was to keep deliberating until a verdict is reached.

[4] The author of the Surrender Note is assumed to be either the sole holdout or the part of a small minority. Had the author been part of the majority, it seems unlikely the author's abandonment of his or her convictions would lead to a unanimous verdict.

In looking at another state, Maryland, a somewhat similar occurrence took place in *Browne v. State*, 79 A.3d 410, 414, 215 Md. App. 51, 57 (Md. App., 2013). *Browne* held, similar to Illinois law, that "[u]nanimity is indispensable to the sufficiency of the verdict." *Id.* "The concept of unanimity embraces not only numerical completeness but also completeness of assent, i.e. each juror making his or her decision freely and voluntarily". *Id.* citing to *Caldwell v. State,* 164 Md. App. 612, 635, 884 A.2d 199 (2005) *Browne* involved one juror, Juror 281, who disclosed to the trial court that he or she was the holdout. *Id.* The court found when "a jury reveals it is deadlocked and volunteers the numerical breakdown of its split, there is an increased risk that the trial judge's remarks in response will be coercive." *Id. at 62*. *Browne* found that when the trial court is aware of the split and issues an *Allen* type charge, it has a coercive effect on minority jurors.

Browne differs from the present case in that the identity of the author of the Surrender Note was not known. However, it had a similar effect of putting pressure on the author (and potentially any jurors with the same position as the author, if any, who are the assumed minority in this case) that the jury wasn't leaving without a unanimous verdict.

The polling conducted by the Court cannot be said to have cured the defect either. While this is dealt with in more depth below, the polling as it occurred was irrelevant to determine the unanimity of the verdict. In the present case, the unnamed juror promised the Court and the parties he or she was going to surrender his or her beliefs and sign a verdict for the defense. The signed verdict form does nothing more than confirm the unnamed juror followed through on his or her word. Similarly, the polling of the jury by asking them "[w]as this then and is this now your verdict?" followed by the juror's eventual

answer "[y]es"[5] simply confirms the author's promise to sign a verdict form against his or her beliefs. (C1588:13– 1590:5)

It is exceedingly unusual that a juror's rationale is given in such detail. However, the fact remains that the author's abandonment of their convictions and the law remains unrebutted on the record. As such, given the totality of the circumstances stemming from the Surrender Note, all of this clearly demonstrates an occurrence of such character and magnitude that deprived the Plaintiff of a fair trial as the verdict was not unanimous and the Court should have granted the Plaintiff's request for mistrial based upon the above stated principals. Since the motion for mistrial was denied, Plaintiffs' motion for a new trial should have been granted.

II. The Trial Court Erred by Denying Plaintiff's Motion for Further Polling.

The trial court erred by refusing to conduct additional polling beyond asking the jurors "[w]as this then and is this now your verdict?" in light of the Surrender Note. Plaintiff's position is that a mistrial should have been declared prior to polling, and the defect created by the Surrender Note could not be cured. *See People v. Wilcox*, 941 N.E.2d 461, 474 (Ill.App. 1 Dist.,2010) (the polling of a formerly deadlocked jury does not cure the error of coercive instructions or establish a lack of prejudice) However, once the first motion for mistrial was denied, the defect created by the Surrender Note was still present and the trial court erred by failing to take any steps to correct that defect. The only polling that was conducted did nothing more than affirm the author of the Surrender Note fulfilled his or her promise to agree to the verdict for an improper reason. Even then, during the

[5] The response "Yes" was given by one juror with a hesitant tone and was preceded by a long pause and a loud sigh.

limited polling, one juror paused, sighed loudly, and hesitantly answered "yes", which is problematic in light of the Surrender Note.

The appellate court and Defendants have pointed out that this requires diving into the deliberations of a jury, which admittedly is a delicate and difficult matter. However, the fact that this is an inherently difficult subject only serves to support the idea the defect is not curable. If it is curable, then there would have to be some sort of additional detailed polling, whether done juror by juror or as a group. The only way to cure the defect would have been some sort of retraction or reconsideration of the Surrender Note by the author.

A. Further polling was necessary because of the Surrender Note

As deliberations continued, the circumstances of the Surrender Note created a clear need for more in-depth polling of the jury. The purpose of polling a jury is to "afford the juror, before the verdict is recorded, an opportunity for free expression unhampered by the fears or the errors which may have attended the private proceedings of the jury room. In conducting the poll, each juror should be examined to make sure that he truly assents to the verdict." *People v. Kellogg*, 397 N.E.2d 835, 837 (Ill., 1979). The 3rd Appellate District of Illinois held:

> "No court in this State has ever held it error to continue the poll after discovering a dissenting juror, nor is the questioning of the dissenter improper of itself. *On the contrary, it is apparent that the trial court has the duty to continue the poll and to fully inquire of each juror as to whether he concurs in or dissents from the verdict.*"

People v. Chandler, 411 N.E.2d 283, 288, 44 Ill. Dec. 314, 319, 88 Ill.App.3d 644, 649 (Ill.App. 1 Dist., 1980) (emphasis added) It is this last sentence of the *Chandler* case that requires focus, which is that when a dissenting voice is heard the trial court has a duty to

continue to poll and to fully inquire of each juror as to their position on the verdict. The case of *Ferry* stated as follows:

> The court also stated that if any juror showed any expression of doubt in response, the trial judge must then ascertain the juror's present intent by allowing him or her to express disagreement. Error occurs here when the juror is precluded from an opportunity to dissent **or if the juror has not assented to the verdict**.

Ferry v. Checker Taxi Co., Inc., 520 N.E.2d 733, 739 (Ill.App. 1 Dist.,1987) (emphasis added) Illinois courts have continued, stating:

> "This court has said that a verdict should be examined with a view to ascertaining the **intention of the jury in returning the verdict**. If it is otherwise supportable the verdict will be molded into form and made to serve **unless there is doubt as to its meaning**.

Marotta v. General Motors Corp., 483 N.E.2d 503, 506 (Ill.,1985)(emphasis added) citing to *Manders v. Pulice* 44 Ill.2d 511 (Ill.,1970).

In this case, the trial court had received a remarkably clear and unambiguous Surrender Note *prior* to polling. The Surrender Note was an unrebutted record demonstrating the intention of one juror behind returning the verdict, which was for a manifestly improper reason. In light of the Surrender Note and surrounding circumstances, the present situation is no different than if the trial court polled the jury and a juror had given the following hypothetical reply:

> Q. Was this and is this now your verdict?
>
> A. I am only agreeing to this verdict to end deliberations. I believe the defendant was negligent and his negligence harmed the plaintiff. However, we cannot come to an agreement and I am voting for the defendant for the **sole** purpose of ending deliberations even though I believe the defendant was negligent. So yes, it is my verdict.

Had this occurred there is no question at all that this would have created the need for a mistrial or, at the very least, further polling. In this hypothetical, even if the *Prim* instruction

were issued and the jury returned to deliberations, provided the jury came to the same verdict without some retraction, it would still be improper.

If the defect could be cured, it would require an affirmative statement or documentation by the author that he or she reconsidered his or her position and signed the verdict form for a proper reason in accordance with the author's beliefs and oath as a juror. The record remains unrebutted in that the only rationale given by the author for the verdict is a legally impermissible one.

B. One of the juror's expressed clear hesitance in polling, requiring further polling given the circumstances.

The record shows one of the jurors, in answering the trial court's question, answered by giving a long pause, sighing loudly, and then hesitantly stating "yes". This, in combination with the Surrender Note, required further polling. Illinois courts have noted the following regarding polling of jurors:

> The purpose of polling a jury is to determine whether any individual jurors have been coerced by the other members of the jury into returning a certain verdict. (*Goshey v. Dunlap* (1973), 16 Ill.App.3d 29, 34, 305 N.E.2d 648, 652.) Thus, when conducting the poll, the trial judge must be careful "not to hinder a juror's expression of dissent." (*Goshey,* 16 Ill.App.3d at 34, 305 N.E.2d at 652.)

Bianchi v. Mikhail, 640 N.E.2d 1370, 1378 (Ill.App. 1 Dist.,1994) The case of *People vs. Kellog* sets forth as follows:

> **[I]f a juror indicates some hesitancy or ambivalence in his answer**, then it is the trial judge's duty to ascertain the juror's present intent by affording the juror the opportunity to make an unambiguous reply as to his present state of mind. (*People v. Preston* (1979),76 Ill.2d 274, 26 Ill. Dec. 96, 391 N.E.2d 359.) Jurors must be able to express disagreement during the poll or else the polling process would be a farce and the jurors would be bound by their signatures on the verdict. Before the final verdict is recorded, a juror has the right to inform the court that a mistake has been made, or to ask that

> the jury be permitted to reconsider its verdict, or to express disagreement with the verdict returned. If the trial judge determines that any juror does dissent from the verdict submitted to the court, then the proper remedy is for the trial court, on its own motion if necessary, to either direct the jury to retire for further deliberations *Martin v. Morelock* (1863), 32 Ill. 485), or to discharge it (ABA Standards, Trial by Jury, sec. 5.5 (1968)).

People v. Kellogg, 397 N.E.2d 835, 837–38 (Ill., 1979) (emphasis added) Illinois courts have continued:

> "The trial judge not only hears the juror's response, but can observe the juror's demeanor and tone of voice." *Kellogg*, 77 Ill. 2d at 529. While polling for present intent, the trial court "must be careful not to make the polling process another arena for deliberations." *Kellogg*, 77 Ill. 2d at 529. If a juror does dissent from the verdict, "then the proper remedy is for the trial court, on its own motion if necessary, to either direct the jury to retire for further deliberations [citation], or to discharge it [citation]." *Kellogg*, 77 Ill. 2d at 528-29.

Pineiro v. Advocate Health and Hospitals Corporation, 2020 WL 6261216, at *13 (Ill.App. 1 Dist., 2020)

The trial court reasoned that it was only appropriate to ask, "[w]as this then and is this now your verdict?" and that further polling into the rationale or the existence of duress and/or coercion would be inappropriate unless a dissenting voice was raised. (R2105-R2113) Then, following this, one of the juror's demonstrated clear hesitation by a long pause, loud sigh, and a hesitant response of "yes".[6] Such a response on its own should have justified further polling by the trial court. However, the response is even *more* problematic in light of the Surrender Note. Whether the juror who responded with great hesitation was the author of the Surrender Note is unknown as no further polling was

[6] The record is clear neither the defense nor the court corrected or contested the record made by Plaintiff's counsel of the juror's conduct at the time the hesitant answer was given. Plaintiff's counsel did request an audio recording of the file but was informed, according to Illinois law, the audio file cannot be disclosed to counsel, just a transcript.

performed; however, it is clear that the Surrender Note should have created a heightened scrutiny of the answers of the jurors in addition to the necessity for further polling.

The error in refusing to poll the jury further is demonstrated further by the trial court's further rationale for refusing to poll the jury, which Plaintiff respectfully submits was error.

C. The trial court's rationale for not conducting further polling was erroneous.

The trial court's rationale for not conducting further polling was erroneous. The overarching rationale of the trial court, which is echoed in Defendants' arguments as well, is that it is improper to delve into the deliberations, i.e., that the jury deliberations are to be kept secret. Plaintiff does not dispute that this is usually the case. However, as set forth above, the uniqueness in this case is the subjective deliberative process of the author of the Surrender Note was etched into the record, and it contained misconduct, evidence of a non-unanimous verdict, and coercion. Furthermore, the Surrender Note remained completely unrebutted in the record.

In addition to examining misconduct, the threshold for intervention by a trial judge was dealt with in *United States v. Fattah*, 914 F.3d 112 (3d Cir.2019). In that case, the *Fattah* court noted:

> We recognized that "[i]t is beyond question that the secrecy of deliberations is critical to the success of the jury system." *Id.* at 329. But that secrecy abuts a competing interest—the jury's proper execution of its duties. That is, "a juror who refuses to deliberate or who commits jury nullification violates the sworn jury oath and prevents the jury from fulfilling its constitutional role." *Id.* Recognizing these competing interests, we declined in *Boone* to adopt a sweeping limitation on a trial court's ability to investigate allegations of misconduct during jury deliberations. *See id.*

> Consistent with the standard applied at other stages of criminal proceedings, *Boone* teaches that "where substantial evidence of jury misconduct—including credible allegations of jury nullification or of a refusal to deliberate—arises during deliberations, a district court may, within its sound discretion, investigate the allegations through juror questioning or other appropriate means."

Id. at 147. In *Fattah* the court noted that the questioning of jurors need not intrude into the deliberative secrecy or place pressure on the jurors. In *Fattah* the trial court questioned each juror individually and stated it did not want the juror to discuss the merits of the case or reveal the content of the deliberations, but merely questioned the jurors in response to allegations of misconduct, i.e. whether the jurors were discussing the evidence (not what the evidence was), whether the other juror was unwilling to follow instructions, etc. *Id. at 148*. These questions were compared to the case of *U.S. v. Kemp, 500 F.3d 257, 273 (C.A.3 (Pa.), 2007)*, where jurors were asked whether jurors were experiencing problems, whether jurors were discussing the evidence, whether jurors were following instructions, whether jurors were refusing to deliberate, and whether jurors were refusing to follow the court's instructions. *Id.* The Third Circuit held in *Fattah* that the questioning was appropriate and expressly informed each juror on multiple occasions that they shouldn't reveal the substance of the deliberations.

Plaintiff is not proposing the trial court or any Illinois court be forced to question jurors at length about the deliberations, and it would clearly not have been appropriate to delve into the subject matter of deliberations here. For example, even though the Surrender Note contained the author's opinion as to negligence as causation, the trial court should not have questioned the author or any other juror on the opinions as to the facts of the case as set forth within. However, much as the questioning in *Fattah*, it would have been appropriate to question the jurors after the Surrender Note was issued. Similar to *Fattah*

or *Kemp*, the trial court should have asked whether jurors were experiencing problems, whether the jurors were discussing the evidence, following instructions, and, most importantly, whether jurors were refusing to deliberate or follow the court's instructions. Plaintiff would argue that, in order to cure the defect presented by the Surrender Note, the author would need to make some type of retraction and statement that they were not following the Surrender Note. This would be akin to the trial court in *Fattah* individually questioning the at-issue juror about the juror's conduct, not the subject of deliberations. This would have allowed a correction of the record.

This questioning also mirrored what the trial court did with the foreperson in this case. The trial court individually questioned the foreperson regarding an irregularity on the verdict form and even asked the foreperson if she had been coerced or forced to sign the document, which the foreperson denied. It was an error by the trial court to refuse to apply this same rationale to the Surrender Note, which was a far more objective indicator of juror misconduct, a non-unanimous verdict, and coercion.

CONCLUSION

Plaintiff would respectfully request this Honorable Court reverse the Fourth District Court of Appeals' Rule 23 Order issued on December 11, 2024, declare a mistrial, and remand this case back to the trial court for a retrial on the merits.

Respectfully submitted,

By: /s/ Edward Prill
EDWARD J. PRILL ARDC#6271392
ANDREW L. MAHONEY ARDC#6334171
CROWLEY, PRILL & MAHONEY
3012 Division Street
Burlington, IA 52601
T: (319) 753-1330
F: (319) 752-3934
E: eprill@crowleyprillattorneys.com
E: amahoney@crowleyprillattorneys.com

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10721 words.

Date April 30, 2025 /s/ Edward Prill
Edward J. Prill

EDWARD J. PRILL ARDC#6271392
CROWLEY, PRILL & MAHONEY
3012 Division Street
Burlington, IA 52601
T: (319) 753-1330
F: (319) 752-3934
E: eprill@crowleyprillattorneys.com

NOTICE OF FILING AND PROOF OF SERVICE

Under undersigned being first duly sworn, deposes and states that on April 30, 2025, there was electronically filed and served upon the Clerk of the above Court and the below counsel of record, the Brief of Appellant Robert Schilling. Service of the Brief will be accomplished through the filing manager, Odyssey eFileIL.

Attorney for Appellees, Quincy Medical Group, and Kreg Love
Mr. James Hansen
Schmiedeskamp, Robertson, Neu & Mitchell LLP
525 Jersey Street
Quincy, IL 62301
jhansen@srnm.com

Under penalties as provided by law pursuant under 735 ILCS 5/1-109 of the Code of Civil Procedure, the undersign certifies that the statements set forth in this instrument are true and correct.

Date April 30, 2025 /s/ Edward Prill
Edward J. Prill

EDWARD J. PRILL ARDC#6271392
CROWLEY, PRILL & MAHONEY
3012 Division Street
Burlington, IA 52601
T: (319) 753-1330
F: (319) 752-3934
E: eprill@crowleyprillattorneys.com

APPENDIX

TABLE OF CONTENTS TO APPENDIX

Pages

COMMON LAW RECORD

REPORT OF PROCEEDINGS – TABLE OF CONTENTS

IMPOUNDED RECORD - TABLE OF CONTENTS

Page 1 of 1

IMPOUNDED RECORD - TABLE OF CONTENTS

Page 1 of 1

Section	Page
IMPOUNDED COMMON LAW RECORD SECTION	CI 3 - CI 9

EXHIBITS – TABLE OF CONTENTS

FILED
12/1/2023 2:24 PM
LORI GESCHWANDNER
CLERK OF THE CIRCUIT COURT
ADAMS COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ADAMS COUNTY, ILLINOIS

Robert L. Schilling	)	Case No: 2018L53
	)	
Plaintiff,	)	
	)	
Vs.	)	
	)	
Quincy Medical Group and Dr. Kreg Love	)	
	)	
	)	
Defendants.	)	

PLAINTIFF'S MOTION FOR NEW TRIAL PURSUANT TO ILCS 5/2-1202(b)

NOW COMES the Plaintiff, ROBERT L. SCHILLING, by and through his attorneys, CROWLEY & PRILL, and in support of his MOTION FOR NEW TRIAL PURSUANT TO ILCS 5/2-1202(b) requests the Court grant the following relief:

I. RELIEF REQUESTED

a. Grant the Plaintiff's Motion for New Trial following the Court's denial of the Plaintiff's timely motions for mistrial on November 2, 2023, made pursuant to the Court's receipt of specific juror notes identifying a verdict would not be unanimous;

b. Grant the Plaintiff's Motion for New Trial following the Court's denial of the Plaintiff's timely motions for mistrial on November 2, 2023, for the Court's denial of Plaintiff's request for additional and more specific polling of the jury after the Court's receipt of specific juror notes;

c. Grant the Plaintiff's Motion for New Trial following the Court's denial of the Plaintiff's timely motions for mistrial on November 2, 2023, following the Court's confirmation of a deadlocked jury;

d. Grant the Plaintiff's Motion for New Trial for the Court's refusal to provide Plaintiff's requested jury instructions of "misdiagnosis" based upon the clear evidence and testimony at trial; and

e. Provide any other relief deem just and equitable by this Honorable Court.

II. INTRODUCTION

Jury trial of this case began on October 19, 2023, with the commencement of jury selection. The jury was fully selected on the next day October 20, 2023, and then sworn by this Court. The presentation of evidence began on Monday, October 23, 2023, with the conclusion of evidence on Tuesday, October 31, 2023. Closing arguments were completed on Wednesday, November 1, 2023 and the case was submitted to the jury at about 2:25 p.m. that afternoon. During the course of the trial, the Court and counsel for both parties discussed matters such as jury instructions and completed a formal jury instruction conference on Monday, October 30, 2023. During deliberations, the jury submitted multiple notes to the Court several of which creates the primary purpose for Plaintiff's Motion for New Trial. The Jury returned a verdict on Thursday, November, 2, 2023, finding in favor the Defendants. The Court entered a judgment in favor of the Defendants on November 13, 2023.

III. LAW GOVERNING MOTION FOR NEW TRIAL AND DECLARATION OF MISTRIAL

Illinois courts permit a motion for a new trial pursuant to ILCS 735 § 5/2-1202, specifically 5/2-1202(b), applies to jury trials which states as follows:

> **Relief desired after trial in jury cases, heretofore sought by reserved motions for directed verdict or motions for judgment notwithstanding the verdict, in arrest of judgment or for new trial, must be sought in a single post-trial motion. Relief after trial may include the entry of judgment if under the evidence in the case it would have been the duty of the court to direct a verdict without submitting the case to the jury, even though no motion for directed verdict was made or if made was denied or ruling thereon reserved. The post-trial motion must contain the points relied upon, particularly specifying the grounds in support thereof, and must state the relief desired, as for example, the entry of a judgment, the granting of a new trial or other appropriate relief. Relief sought in post-trial motions may be in the alternative or may be conditioned upon the denial of other relief asked in preference thereto, as for example, a new trial may be requested in the event a request for judgment is denied.**

Illinois has long recognized a motion for a new trial following a motion for mistrial. Tirado v. Slavin, 147 N.E.3d 939, 946, 439 Ill. Dec. 264, 271, 2019 IL App (1st) 181705, ¶ 23 (Ill.App. 1 Dist., 2019).

> Illinois courts have defined a mistrial as follows:
>
> > A mistrial is defined as "either a trial 'that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings,' or a trial that 'ends inconclusively because the jury cannot agree on a verdict.'" *Redmond v. Socha,* 216 Ill.2d 622, 640, 297 Ill.Dec. 432, 837 N.E.2d 883 (2005) (quoting Black's Law Dictionary 1023 (8th ed. 2004)). "A motion for a mistrial is a procedural tool designed to cut short a trial for legal reasons which preclude a verdict and judgment." *McGrath v. Chicago & North Western Transportation Co.,* 190 Ill.App.3d 276, 279, 137 Ill.Dec. 725, 546 N.E.2d 670 (1989). "This motion prevents parties from getting two chances at a verdict." *McGrath,* 190 Ill.App.3d at 279, 137 Ill.Dec. 725, 546 N.E.2d 670. A motion for a mistrial must be made before a verdict is rendered; it is untimely if it is made either after the verdict is rendered or a judgment is entered on the verdict. *Joe & Dan International Corp. v. United States Fidelity & Guaranty Co.,* 178 Ill.App.3d 741, 745–46, 127 Ill.Dec. 830, 533 N.E.2d 912 (1988).

Burkhamer v. Krumske, 34 N.E.3d 1167, 1171, 393 Ill.Dec. 639, 643, 2015 IL App (1st) 131863, ¶ 18 (Ill.App. 1 Dist., 2015) If a motion for a mistrial was made prior to the verdict, a party asking for a new trial has not waived the issue. McGrath v. Chicago and North Western Transp. Co., 546 N.E.2d 670, 673, 137 Ill.Dec. 725, 728, 190 Ill.App.3d 276, 279 (Ill.App. 1 Dist.,1989)

Illinois Courts have further held a "mistrial should be granted when there is an occurrence of such character and magnitude as to deprive a party of a fair and the moving party demonstrates actual prejudice as a result. Tirado v. Slavin, 147 N.E.3d 939, 947, 439 Ill.Dec. 264, 272, 2019 IL App (1st) 181705, ¶ 31 (Ill.App. 1 Dist., 2019)

ILCS 735 § 5/2-1202(c) establishes that parties have 30 days after the entry of judgment or the discharge of the jury, if no verdict, to file a motion for post-trial relief making this motion timely filed.

IV. BACKGROUND FACTS/THE TRIAL PROCEEDINGS

A. THE JUROR NOTE

The jury began deliberating on November 1, 2023 at approximately 2:25 p.m. (Exh. 1, p. 3:19-21) The jury wrote three questions regarding interpretation of the evidence and regarding standard of care, receiving the first at approximately 5:10 p.m. and two at the same time at 6:22 p.m. (Exh. 1, p. 3:19-21, 6:12-23) Then, at approximately 7:00 p.m., the jury sent a note that stated as follows:

> **"That is it is obvious that we will not come to an agreement unanimously. Sitting in here for hours and hours will not make a difference."** (emphasis mine)

Upon receipt of this note, the Court consulted with counsel for both parties and after discussion issued the following response:

"Please continue your deliberations. We will check in with you shortly."

(Exh. 3-jury notes, Exh. 1 p. 7:9 – 9:2) The jury continued deliberating until approximately 7:55 p.m. upon which it was dismissed for the night. (Exh. 1, p. 9:10-24).

It is Plaintiff's recollection that the reason for the above response by the Court was multi-factorial including the fact that the Jury had been at the Courthouse since approximately 8:30 a.m. that day, that the Jury had been deliberating for about four and a half hours at that point, and the fact that it was getting late in the evening. These matters were all discussed by counsel and the Court before providing the above response to the Jury. The Court advised counsel for the parties that it would give the Jury until about 8 p.m. that first night of deliberations to continue with deliberations and if no verdict by that time, the Court would dismiss the jury for the evening. At this point of deliberations, although it was informally discussed the Court nor the

parties felt it was needed or appropriate to issue a full *Prim* instruction with the expectation that with continued deliberations beginning the following day, the Jury would be able to reach a verdict.

The jury returned the next morning to begin deliberations at 9:02 a.m. and the jury sent a note soon after at 9:40 a.m. (Exh. 2, p. 2:9-15). The note sent at 9:40 set forth as follows:

> **For the record, I will sign the verdict for the defendant, Dr. Love. I am firm in my support for the plaintiff, Mr. Schilling.**
>
> **I'm only signing to end this deliberation and put an end to this. After many hours of discussion and debate, we cannot come to a unanimous decision. Therefore, my position to sign only to end this.**
>
> **I 100 percent believe Dr. Love was negligent in providing the appropriate care to his patient. As a result, Mr. Schilling overall care was impacted because of Dr. Love's decision. Once again, I am only, agreeing to sign to end this.**

(Exh. 3, p. 5) (emphasis mine and added to word "only" as the actual juror who wrote the note underlined the word "only" twice)

Following receipt of this note, Plaintiff properly moved for a mistrial as this note from one of the jurors clearly identified that if a verdict were to be reached likely on behalf of the Defendants the verdict would not be unanimous and the prospective juror signing the verdict form would be in violation of his/her oath to sign the verdict form based upon a conclusion of the evidence and law and not to simply end the deliberations because the Jury was clearly deadlocked and unable to reach a unanimous verdict. It is without question, the law in Illinois requires a unanimous verdict be reached for a proper verdict and judgment to be entered by the Court. This motion was denied by the Court. (Exh. 2, p. 3:12 – 10:19)

The Court then brought the jury back into the courtroom and the foreperson was asked if the jury was deadlocked, to which the foreperson confirmed that it was. (Exh. 2, p. 12:1 – 14:9) The Court then gave the jury the *Prim* instruction, which states as follows:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, **it is necessary that <u>each juror agree to it</u>**. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Illinois Pattern Jury Instruction No. 1.05(emphasis added)

Following these actions taken by the Court and the clear indication that the Jury was deadlocked as confirmed by the juror note and the verbal confirmation by the foreperson, the Plaintiff again properly moved for a mistrial noting that there was nothing to indicate the juror or jurors, who expressed a clear intent to sign the verdict form for an improper reason and against the instructions, had changed his/her mind(s). The motion for mistrial was again denied by the Court. (Exh. 2, p. 17:4 – 22:20)

At roughly 11:00 a.m. the Court was notified the Jury had reached a verdict. (Exh. 2, p. 23:1-4) Before the verdict was given to the Court, and based upon the totality of the circumstances identified herein, and the clear signs that a verdict was not unanimous, the Plaintiff, anticipating a defense verdict, moved for additional polling of the jury in order to determine if the juror had changed his/her mind(s) about the clear and unequivocal intent to sign

a defense verdict **only** to end deliberations. Plaintiff requested polling beyond the general one question poll about whether this is each juror's verdict as simply asking the juror if it is their verdict did not clarify the juror's intention to agree to a defense verdict **only** to end deliberations but one or more jurors disagreed with the verdict with absolute certainty. Plaintiff proposed such polling was necessary due to the unique nature of a juror note stating with such certainty they had a dissenting opinion and assured the Court they were going to sign the verdict for the incorrect reason in contravention of their oath and the jury instructions, which was to sign the verdict form **only** to end deliberations. The Court informed the parties they would ask the one question of each juror if it was their verdict and, if answered in the affirmative, would go no further. (Exh. 2, p. 27:13 – 33:20) In essence, the Court denied the Plaintiff's request for further polling and inquiry that the verdict was in fact unanimous given the totality of the circumstances of the deliberations and conclusion of this trial.

During the polling of the jury, one juror, number 34, was asked if the verdict was his and he paused, sighed loudly, and answered in a hesitant tone "yes". Neither the Court nor defense counsel disputed or contradicted the record created by Plaintiff's counsel regarding the pause, sigh, and hesitant expression of the word "yes" by juror number 34.[1] Plaintiff again for for a mistrial, which was denied by the Court. (Exh. 2, p. 40:17 – 43:23)

In this case and given the totality of the circumstances, the Court could have easily discovered which juror wrote the note and then confirmed that the *Prim* instruction provided by the Court after the note was published in fact cured the jurors state of mind and clear intent to violate his/her oath to reach his/her own verdict and decision and not be coerced or to not sing a verdict to merely end deliberations and for no other reason. This additional polling could have

[1] Plaintiff's counsel conferred with the Adams County court reporter regarding obtaining an audio transcript of the file in order to submit as an exhibit. However, Plaintiff's counsel was informed that court reporters are prohibited from providing audio recordings to counsel.

been in a number of ways including by bringing in each individual juror and asking these confirmation questions.

Despite the Court's decision to deny this request for additional polling, the Court noticed that the foreperson had signed both the Plaintiff's verdict form and the Defendant's verdict form. In response to this, the Court kept the foreperson after the rest of the jury was dismissed and questioned the foreperson as to her signatures on both verdict forms. The foreperson provided an explanation and the Court then dismissed that juror from service and entered the verdict.

B. JURY INSTRUCTIONS

As the parties proceeded through trial the Mr. Schilling called Dr. Love to testify in Plaintiff's case-in-chief. Dr. Love openly admitted he "missed the diagnosis of a fracture", which was a key point of liability in this case as follows:

> Q. So, Dr. Love, do you believe there is a difference between the word misdiagnosis and missing a diagnosis?
> A. Absolutely.
> Q. What's the difference?
> A. Missing a diagnosis would be not diagnosing something, not offering a diagnosis for a condition. That's not the best way of wording it. So we'll use the situation if there are two diagnoses and you correctly identify one of them but don't -- don't identify the other, you would be missing a diagnosis but you would not have misdiagnosed anything. **Misdiagnosing would be providing an incorrect diagnosis.**

(Exh. 4, p. 94:10-20) Dr. Love would then testify that he did not agree that "misdiagnosis" means "a diagnosis made or a conclusion made eventually is not the correct one":

> Q. I asked her how did you define the word misdiagnosed. Her answer was with a diagnosis made or the conclusion made eventually is not the correct one. Do you recall that?
> A. I don't but sure.
> Q. That's what Dr. Stewart testified to in this case.
> A. Okay.
> Q. Do you agree with her definition of the word

misdiagnosis?
A. **I do not.**

(Exh. 4 p. 96:14-22) Dr. Love disagreed that a misdiagnosis was providing a diagnosis that was not the correct one. Then Dr. Love clearly and unequivocally defined "misdiagnosis" as "providing an incorrect diagnosis" and that he "missed the diagnosis" of the fracture:

Q. So let's go back to page 64, line 14 and we've talked about this already. This is a question that I just asked you. As we sit here today, Dr. Love, do you believe that you misdiagnosed Mr. Schilling's diagnosis in 2017. Your answer was I don't know that I would say missed diagnosed as there's no evidence that there wasn't a cellulitis ***so I missed the diagnosis of a fracture***. I then said okay; right?
A. Yes.
Q. What did you say next?
A. But misdiagnosis would mean that I had an incorrect diagnosis and there's no evidence to that.
Q. Okay. So you say in July of 2019 that misdiagnosis means incorrect diagnosis; correct?
A. I'm sorry. Did you say missed diagnosis or misdiagnosis?
Q. You're saying as we read this deposition transcript, your answer is but misdiagnosis would mean that I had an incorrect diagnosis.
A. **Correct**.
Q. Isn't that exactly what Dr. Stewart said in her deposition transcript?
A. She made a statement that I had missed -- misdiagnosed the patient.
Q. When Dr. Stewart that I just read to you testified about the definition of misdiagnosis, she said it is not the correct one; right?
MR. HANSEN: I'm going to object. We have gone over this. It has been asked and answered.
THE COURT: Overruled.
BY MR. PRILL:
Q. Correct?
A. Go ahead and repeat that.
Q. It's not the correct diagnosis; correct? That's what -- that's how Dr. Stewart defined misdiagnosis?
A. **She said that misdiagnosis was not the correct diagnosis.**
Q. Yes. I'm asking you. That's what I just told you;

right?
A. Yes, that's what you just told me.
Q. And you said in July of 2019 that misdiagnosis would mean that I had an incorrect diagnosis; correct?
A. Yes, that's what I said.
Q. I'm sorry. I interrupted you. *Is there any difference in your mind between having an incorrect diagnosis and having not a correct diagnosis?*
A. **No.**
Q. Same thing; right?
A. **Yes.**
Q. Okay. And you then go on to state in July of 2019 there's no evidence to that; correct?
A. Yes.
Q. Do you agree that Dr. Stewart's testimony is evidence?
A. Evidence to what?
Q. Is it evidence in this case because she said it?
A. It is evidence in this case.
Q. So when you said in July of 2019 that you missed the diagnosis of a fracture, is that the same thing as failing to diagnose the fracture?
A. **Yes.**

(Exh. 4, p. 98:20 - 100:19) Dr. Love clearly provided evidence that: (1) he defined misdiagnosis as providing an incorrect diagnosis; (2) there's no difference between having an incorrect diagnosis and not having a correct diagnosis; (3) he missed the diagnosis of the fracture; and (4) he failed to diagnose the fracture.

During the trial Plaintiff moved to submit jury instructions to reflect that Dr. Love "misdiagnosed" the broken bones as one of the prongs of the Jury Instruction 11. Defendants objected and said that "failure to diagnose" was more appropriate. The Court refused to permit Plaintiff to utilize the word "misdiagnose" in the jury instructions even in light of Dr. Love's testimony establishing there was grounds for use of the word "misdiagnosis".

Plaintiff also made a claim for failure to make a differential diagnosis, which was on the jury instructions submitted to the jury. Despite this, Plaintiff was still unable to use the term "misdiagnosis" on the jury instructions.

VI. ARGUMENT

There are three issues before the Court in Plaintiff's motion for new trial. The first issue is requesting a new trial based on the Court's denial of Plaintiff's motion for a mistrial following the issuance of the Juror Note. The second issue is the Court's denial of Plaintiff's request to conduct further polling of the jury in light of the Juror Note. The third issue is the Court's refusal to permit the word "misdiagnosis" in the jury instructions submitted to the jury.

The first issue is unique and may be a matter of first impression insofar as Plaintiff's counsel is aware. The Juror Note was not a question but rather an unambiguous declaration by a juror or possibly jurors that they did not believe in the same verdict as other jurors, that the juror(s) was 100% certain the defendant was negligent and at fault, and assured the Court that he/she was signing the verdict form **only** to end deliberations. This is a unique situation as Illinois protects the deliberative process from the use of post-verdict affidavits regarding deliberations, etc. However, in this case the parties were granted a rare insight and there was a written record created that a juror was going to sign the verdict form for an improper reason, i.e. the verdict would not be unanimous and against his/her oath.

The defect created by the Juror Note was not one that could be cured and required an immediate grant of a mistrial. Even if the defect created by the Juror Note could be cured, no action taken after it, whether it be the *Prim* instruction or the limited polling of the jury, generated any evidence that the unnamed juror changed his/her mind. In fact, the issuance of the

Prim instruction and the unnamed juror actually *signing* the verdict form, *exactly* as he or she *promised* they would do, is confirmation that the verdict was not unanimous. If the defect could be cured, the only way would be an unequivocal declaration by the juror that they had reconsidered their position and he/she was agreeing to the verdict for a proper reason.

The second issue is intertwined with the first. The limited polling served no purpose other than to cement the fact that the unnamed juror did exactly as they promised they would do, which was agree to a verdict for wholly improper reasons. The Court should have polled the jurors and determined which juror wrote the note and investigated whether or not the juror had changed their position and was agreeing to the verdict for a proper and lawful reason. Even this process does not cure the definitiveness of the note and the error created by denying Plaintiff's motion for mistrial. However, if a note evidencing such a strong state of mind is able to be cured to avoid mistrial, further polling would have been one such way to potentially cure such a defect in the juror deliberations.

Undoubtedly, the Juror Note created such a defect as to deprive Plaintiff of a fair trial and Plaintiff suffered prejudice as a result. Plaintiff did not receive a fair trial as there was not a unanimous verdict. One juror sent a clear, unambiguous note that they were compromising their beliefs in order to return a verdict purely to end deliberations. Obviously, this prejudiced Plaintiff as well as the verdict entered was for the defense.

Finally, Plaintiff's request the court declare a new trial on the denial of Plaintiff's request to submit their proposed jury instruction, which included the term "misdiagnosed" rather than "failed to diagnose". The evidence and the law support the idea that a party is entitled to submit jury instructions that are supported by the evidence and the refusal to allow such a jury instruction was in contrast to this principle.

A. The Court should have declared a mistrial following the Juror Note, in which the unnamed juror assured the Court the verdict would not be unanimous.

The right to a trial by jury, as guaranteed under the Illinois Constitution, requires that the verdict of the jury be unanimous. Sinopoli v. Chicago Rys. Co., 316 Ill. 609, 147 N.E. 487 (1925); Read v. Friel, 327 Ill. App. 532, 64 N.E.2d 556 (1st Dist. 1946). The law recognizes only the unanimous verdict, and no other can be, directly or indirectly, introduced by the judiciary. Lively v. Sexton, 35 Ill.App. 417, 420, 1889 WL 2608, at *2 (Ill.App. 1 Dist. 1889) "Like the right to a trial by an unbiased jury, the right to a unanimous verdict is among the most fundamental of rights in Illinois." People v. McGhee, 964 N.E.2d 715, 723, 358 Ill.Dec. 46, 54, 2012 IL App (1st) 093404, ¶ 24 (Ill.App. 1 Dist., 2012)

Illinois Courts have continued:

> The test of the sufficiency of a verdict is whether the jury's intention can be ascertained with reasonable certainty from the language used." *People v. Mack*, 167 Ill. 2d 525, 537, 212 Ill.Dec. 955, 658 N.E.2d 437 (1995). "In determining the meaning of a verdict, all parts of the record will be searched and interpreted together." *People v. Caffey*, 205 Ill. 2d 52, 121, 275 Ill.Dec. 390, 792 N.E.2d 1163 (2001).

People v. Filipiak, 2023 IL App (3d) 220024, ¶ 13, 2023 WL 7102029, at *2 (Ill.App. 3 Dist., 2023)

The difficulty facing the Court in this case is the unique nature of the Juror Note. The present situation is akin to a juror affidavit received *prior* to the deliberations ending and a *Prim* instruction being issued. Illinois law has held, a verdict cannot be impeached by testimony or affidavits relating to the motive, method, and process of jury deliberations. Eskew v. Burlington Northern and Santa Fe Ry. Co., 958 N.E.2d 426, 445, 354 Ill.Dec. 683, 702, 2011 IL App (1st) 093450, ¶ 65 (Ill.App. 1 Dist., 2011) However, this line of precedent covers the idea of obtaining juror affidavits *after* a verdict is reached. In this case the Juror Note assured the Court the juror

would sign a verdict form in direct contrast to his 100% certain beliefs in the Defendants' negligence before the verdict was entered.

There is also the line of cases dealing with legally inconsistent verdicts. *See* Redmond v. Socha, 837 N.E.2d 883, 894, 297 Ill.Dec. 432, 443, 216 Ill.2d 622, 640 (Ill.,2005) The principles in this are illustrative of the current situation as the Juror Note is unquestionably inconsistent with the verdict. However, this precedent, so far as Plaintiff's counsel is aware, has not been used in conjunction with a note from the jury assuring the verdict would be entered for an improper reason and against the juror's beliefs.

The thread underlying all of these cases and the Illinois Constitution itself is the sanctity of unanimous jury trials. This requirement is paramount. When the unanimity of a jury has been completely and totally compromised by a note or other communication from the juror it represents an occurrence of such character and magnitude that it deprives a party of a fair trial as Illinois residents are entitled to a unanimous jury verdict. To refuse to order a mistrial when a juror has set forth the certainty of his beliefs and provided a written record emphatically and repeatedly promising that the juror is signing a verdict for a manifestly improper reason is error as it clearly prejudices the party whom the verdict was rendered against, i.e. Mr. Schilling. The uniqueness of this note is a difficult prospect neither party nor the Court expected. However, the clear arc of Illinois law governing the sanctity of unanimous jury trials demands that a new trial be granted in light of the clear and unambiguous Juror Note.

1. The Court should have declared a mistrial upon receiving the Juror Note and permitting further deliberations was coercive.

The present situation is an unprecedented situation for this Court insofar as Plaintiff's counsel is aware. In the present case there was a clear, unambiguous assurance from the juror(s) that they would sign the verdict for an improper reason. This is perhaps most analogous to

polling a jury before deliberations where a juror gives a definitive statement in response to polling that they are signing the verdict purely to end deliberations and they are 100% firm in their convictions that a party was negligent and their negligence caused injury to the plaintiff. Then, without the juror ever indicating they changed their mind, the juror did exactly what they promised they would do and signed a jury verdict form for the defendant.

The principle underlying the requirement to grant a mistrial is set forth in Tirado v. Slavin, 147 N.E.3d 939, 947, 439 Ill.Dec. 264, 272, 2019 IL App (1st) 181705, ¶ 31 (Ill.App. 1 Dist., 2019). *Tirado* states that a mistrial should be granted when there is an occurrence of such character and magnitude as to deprive a party of a fair trial and the moving party demonstrates actual prejudice as a result. *Id.* There is no Illinois law directly on point that Plaintiff's counsel was able to locate applying the circumstances of a juror note promising to enter a verdict for a manifestly improper reason to this principle in Illinois or any other jurisdiction. However, the most analogous case Plaintiff's counsel could locate is People v. Arroyo, 2023 IL App (1st) 220769-U, ¶ 44, 2023 WL 6276349, at *8 (Ill.App. 1 Dist., 2023) In *Arroyo* the jury quickly returned a verdict convicting the defendant and the jury was polled after, to which one juror responded it was not her verdict and the defendant moved for a mistrial, stating "we can't browbeat a person into [a verdict]. *Id. at 4*. The trial court then determined the verdict was not unanimous and, as the jury had only been deliberating for 30 minutes, and had the jury to continue to deliberate despite a 13-hour day so far. *Id. at 4-5*. The jury then sent two more notes from the juror in question indicating she was unable to make a decision and had a question about the evidence. *Id.* The jury then returned a verdict of guilty.

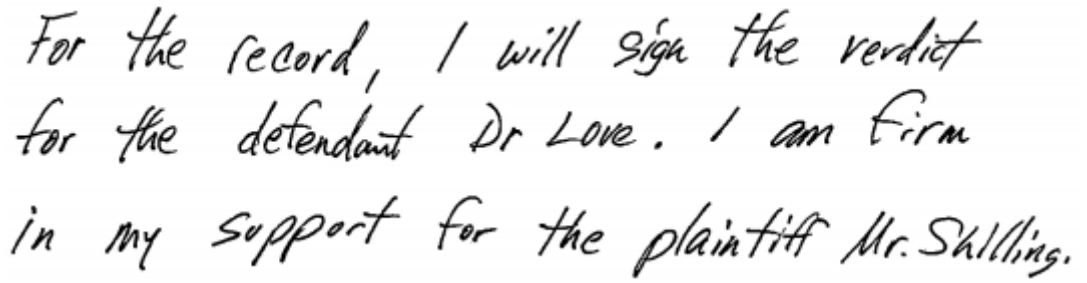
The *Arroyo* court noted the following regarding deliberations of the jury:

> Impermissible coercion occurs when jurors "surrender their honest opinions for the mere purpose of returning a verdict." *United States v. Williams*, 819 F.3d

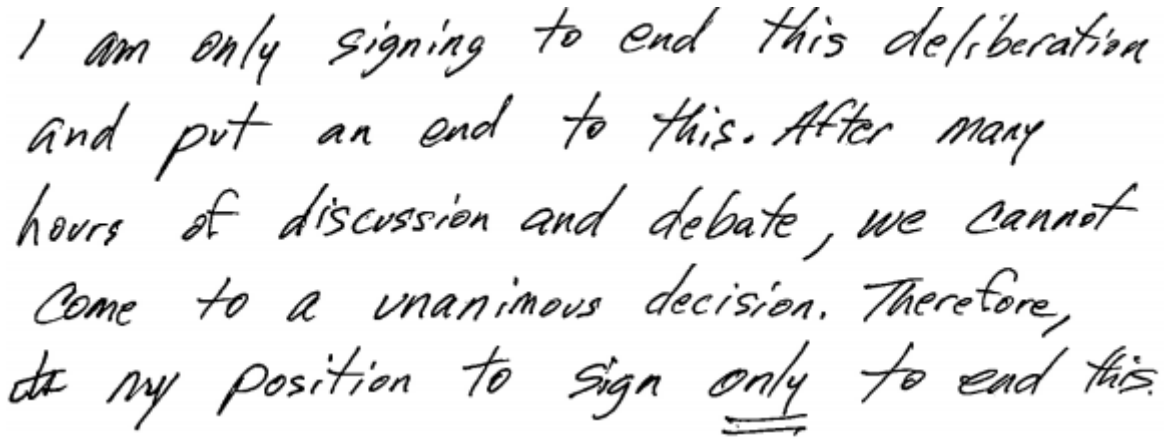
> 1026, 1030 (7th Cir. 2016). To evaluate potential coercion, a reviewing court should look to the totality of the circumstances. *Lowenfield*, 484 U.S. at 250. If the totality of the circumstances presents a clear impermissible risk of juror coercion, it can be presumed that the error prejudiced the defendant and seriously affected the fairness of the proceedings. *United States v. Banks*, 982 F.3d 1098, 1102 (7th Cir. 2020). The inquiry is objective and should focus on the situation facing the juror, not the intent of the party or the judge whose actions created that situation. *United States v. Blitch*, 622 F.3d 658, 668 (7th Cir. 2010).

Arroyo, 2023 WL 6276349, at *8. The present case is most similar to the *Arroyo* case in that the unnamed juror unquestionably surrendered his or her honest opinions for the mere purpose of returning a verdict. The juror's intent was explicitly written out. "The principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration." U.S. v. Blitch, 622 F.3d 658, 668 (C.A.7 (Ill.),2010)

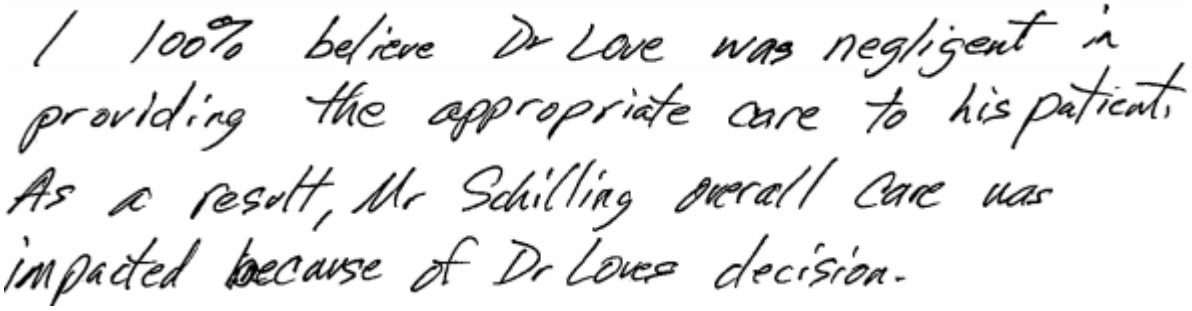
In the present case the Juror note began stating:



(Exh. 3, p. 5)(emphasis added) In the first paragraph the unnamed juror is declaring his **firm** conviction for Mr. Schilling and these two sentence alone would be enough to potentially raise a mistrial on their own as this reveals an inherent belief the juror is being forced to compromise their own beliefs. However, the unnamed juror continued:



(Exh. 3, p. 5) The unnamed juror definitively set forth his reasoning for signing the verdict form and the inability of the jury to come to a unanimous decision. This was not a vague statement that the jury was having difficulty coming to a unanimous decision, this was the unnamed juror's declaration of intent that he was going to sign a defense verdict **only** to end deliberations. Once again, this should be enough for a mistrial but the juror *continued* to elaborate:



(Exh. 3, p. 5) Here, the unnamed juror goes so far as to declare his is absolutely certain, giving the figure of **100%**, of Dr. Love's negligence. The juror goes on to state Mr. Schilling's care was impacted because of Dr. Love's conduct, which gives the juror's opinions on both breach of the standard of care and causation. If an argument could be made as to any sort of ambiguity in the preceding two paragraphs, the unnamed juror goes so far as to provide his/her exact line of thinking, declaring to the Court and the parties he is absolutely, certainly, incontrovertibly, and unarguably convinced of Dr. Love's negligence and that it impacted Mr. Schilling's health.

The unnamed juror did not stop there however, he finished with one sentence:

(Exh. 3, p. 5) The unnamed juror once again *guarantees* and *promises* to the Court and the parties his or her exact motivation for signing the verdict form, solely to end deliberations rather than his or her beliefs.

It is undisputable that the juror created a detailed and specific record of the fact that he/she was going to surrender his/her honest convictions for the mere purpose of returning a verdict. The uniqueness and firmness of the unnamed juror's convictions certainly qualifies as an occurrence of such character and magnitude as to deprive a party of a fair trial, i.e. a unanimous jury verdict. It is also just as undisputable that juror being forced to return a verdict for a manifestly improper reason is coercion. Every action taken after this further cemented the unnamed juror's guarantee to return a verdict for an impermissible reason and cemented the coercion.

The issuance of the *Prim* instruction cannot cure this error and, even if it could, it did not. The first paragraph of the *Prim* instruction reminded this juror that the only way deliberations were going to end is through a unanimous verdict, and the jury had already given three indications it was deadlocked: (1) the note on 11/1/2023 telling the Court they could not reach a decision; (2) the Juror Note sent on 11/2/2023; and (3) the statement of the juror foreperson on 11/2/2023. The fact the *Prim* instruction tells the jurors not to surrender their honest convictions does not cure the defect created by the Juror Note either as the unnamed juror had already unequivocally and explicitly surrendered his/her honest convictions *prior* to the *Prim* instruction being issued. In other words, this juror saw no way out of deliberations other than to sign a verdict form against his or her beliefs, sent a note explicitly detailing as such, and the response the unnamed juror was the *Prim* instruction telling the juror to come to a verdict anyway.

The case of U.S. v. Williams is instructive in this matter. 819 F.3d 1026, 1032 (C.A.7 (Wis.), 2016) In *Williams* the Court polled a jury and one juror rejected the verdict. *Id.* The judge continued to poll the jury and the Court cited to caselaw that stated "the weight of authority suggests that when the trial judge continues to poll the jury after one juror disagrees with the verdict, reversible error occurs only when it is apparent that the judge coerced the jurors into prematurely rendering a decision". *Id.*

The *Williams* Court noted that, after the juror rejected the verdict, the judge gave the instruction to the juror to continue with their deliberations until they have reached a unanimous decision verdict. *Id.* The *Williams* Court continued stating the polling of the jurors had revealed there to be one lone dissenter and the instruction to reach a unanimous decision pressured the lone juror to come to a verdict. *Id.* The *Williams* Court next held that when there is only one lone dissenting juror such instructions may become overly coercive as they pressure the lone dissenting juror to change his opinion. *Id.* The *Williams* Court further stated that combinations of supplemental charges and polling could be coercive and a factor to consider was whether further deliberations might assist them in returning a verdict. *Id.*

Following the juror's dissent in polling and the Court issuing an instruction to continue deliberating, the jury returned a note indicating they had misunderstood the polling and came to a unanimous verdict. *Id.* The judge then asked the juror in additional polling that he understood that she had misunderstood the question and the juror confirmed she had the verdict was entered. *Id.* The *Williams* Court found that the supplemental instruction to continue deliberating was coercive.

In the present case the *Prim* instruction or any other instruction to the jury to continue to deliberate would be coercive. The *Prim* instruction is proper if a jury gives a routine indication,

it is having difficulty coming to a decision, but that is not this case. *Williams* differs in that a *Prim* instruction was not given but rather another instruction. However, the effect was of giving a *Prim* instruction *after* a juror unequivocally and firmly declared they had surrendered their honest convictions for the sole purpose of entering a verdict is no different. The heart of the *Prim* instruction is to tell the jury it's their job to come to a verdict, which this juror already promised he/she was going to do for an improper reason. As such, the *Prim* instruction here merely reinforced the juror's improper intent as they knew they had to deliberate until a verdict was reached.

Similarly, the polling conducted by the Court cannot be said to have cured the defect. While this is dealt with in more depth below, the polling as it occurred was irrelevant to determine the unanimity of the verdict. In the present case the unnamed juror promised the Court and the parties he was going to surrender his beliefs and sign a verdict for the defense. The signed verdict form does nothing more than confirm the unnamed juror followed through on his word. Similarly, the polling of the jury by asking them "Was this then and is this now your verdict?" followed by the juror's eventual answer "Yes"[2] simply confirms the juror's promise to sign a verdict form against his beliefs. (Exh. 2, p. 34:13 – 36:5)

Whatever actions occurred in the jury room the only available evidence indisputably shows that the juror signed the verdict form for an improper reason, which was **only** to end deliberations. The issuance of the *Prim* instruction and the instruction for the jury to keep deliberating only served to further coerce the juror into following through with the surrender of his belief in order to return a verdict. As such, given the totality of the circumstances stemming from the juror note, all of this clearly demonstrates an occurrence of such character and magnitude that deprived the Plaintiff of a fair trial as the verdict was not unanimous and the

[2] The response "Yes" was given with a hesitant tone and was preceded by a long pause and a loud sigh.

Court should have granted the Plaintiff's request for mistrial based upon the above stated principals when the Plaintiff moved before the verdict was reached. Since the motion for mistrial was denied, Plaintiffs' motion and request for a new trial should be granted as the verdict was not unanimous and should be granted for the same reasons as the motion for mistrial was made.

2. Plaintiff's request for further polling should have been granted in order to determine whether the defect created by the Juror Note could be cured, especially in the light of one juror's clear hesitation in response to polling.

Plaintiffs do not take the position that the defect created by the Juror Note is one that could be cured. A mistrial should have been declared at this point. However, once the mistrial was denied, the defect created by the Juror Note was still present and the only thing left to do was to attempt to cure the defect at that point.[3] As deliberations continued, the circumstances of the Juror Note created a clear need for further polling of the jury. Further adding onto the necessity to poll was the clear hesitation by one juror in responding to the poll. One juror clearly paused for an extended period of time, sighed loudly, and responded with a hesitant "yes".

Illinois Courts have noted the following regarding polling of jurors:

> The rules governing the polling process are the same in both criminal and civil trials. (See *People v. Rehberger* (1979), 73 Ill.App.3d 964, 968, 29 Ill.Dec. 838, 841, 392 N.E.2d 395, 398; *779 *Ferry v. Checker Taxi Co., Inc.* (1987), 165 Ill.App.3d 744, 753, 117 Ill.Dec. 382, 388, 520 N.E.2d 733, 739.) Before a verdict is accepted and recorded, the parties to the action have an absolute right to poll the jury as to whether each individual juror agrees with the verdict. (*Rehberger,* 73 Ill.App.3d at 968, 29 Ill.Dec. at 841, 392 N.E.2d at 398.) The purpose of polling a jury is to determine whether any individual jurors have been coerced by the other members of the jury into returning a certain verdict. (*Goshey v. Dunlap* (1973), 16 Ill.App.3d 29, 34, 305 N.E.2d 648, 652.) Thus, when conducting the poll, the trial judge must be careful "not to hinder a juror's expression of dissent." (*Goshey,* 16 Ill.App.3d at 34, 305 N.E.2d at 652.)

[3] By taking a position on what the Court should have done Plaintiff is not waiving their argument that the defect created by the Juror Note was capable of being cured. Plaintiff will discuss "curing" the defect repeatedly throughout this Motion and no such arguments are waiver of Plaintiff's position that the defect was not curable.

Bianchi v. Mikhail, 640 N.E.2d 1370, 1378, 204 Ill.Dec. 21, 29, 266 Ill.App.3d 767, 778–79 (Ill.App. 1 Dist.,1994) The case of *People vs. Kellog* sets forth as follows:

> [I]f a juror indicates some hesitancy or ambivalence in his answer, then it is the trial judge's duty to ascertain the juror's present intent by affording the juror the opportunity to make an unambiguous reply as to his present state of mind. (People v. Preston (1979),76 Ill.2d 274, 26 Ill.Dec. 96, 391 N.E.2d 359.) Jurors must be able to express disagreement during the poll or else the polling process would be a farce and the jurors would be bound by their signatures on the verdict. Before the final verdict is recorded, a juror has the right to inform the court that a mistake has been made, or to ask that the jury be permitted to reconsider its verdict, or to express disagreement with the verdict returned. If the trial judge determines that any juror does dissent from the verdict submitted to the court, then the proper remedy is for the trial court, on its own motion if necessary, to either direct the jury to retire for further deliberations Martin v. Morelock (1863), 32 Ill. 485), or to discharge it (ABA Standards, Trial by Jury, sec. 5.5 (1968)).

People v. Kellogg, 397 N.E.2d 835, 837–38, 34 Ill.Dec. 163, 165–66, 77 Ill.2d 524, 528–29 (Ill., 1979)

Illinois courts have continued:

> "The trial judge not only hears the juror's response, but can observe the juror's demeanor and tone of voice." *Kellogg*, 77 Ill. 2d at 529. While polling for present intent, the trial court "must be careful not to make the polling process another arena for deliberations." *Kellogg*, 77 Ill. 2d at 529. If a juror does dissent from the verdict, "then the proper remedy is for the trial court, on its own motion if necessary, to either direct the jury to retire for further deliberations [citation], or to discharge it [citation]." *Kellogg*, 77 Ill. 2d at 528-29.

Pineiro v. Advocate Health and Hospitals Corporation, 2020 IL App (1st) 191638-U, ¶ 52, 2020 WL 6261216, at *13 (Ill.App. 1 Dist., 2020) When a trial court is faced with a dissenting juror, Illinois courts have held as follows:

> "No court in this State has ever held it error to continue the poll after discovering a dissenting juror, nor is the questioning of the dissenter improper of itself. *On the contrary, it is apparent that the trial court has the duty to continue the poll and to fully inquire of each juror as to whether he concurs in or dissents from the verdict.*" (Emphasis added.)

Chandler, 88 Ill.App.3d at 649, 44 Ill.Dec. at 319, 411 N.E.2d at 288. It is this last sentence of the *Chandler* case that requires focus, which is that when a dissenting voice is heard the trial court has a duty to continue to poll and to fully inquire of each juror as to their position on the verdict.

The case of *Ferry* stated as follows:

> The court also stated that if any juror showed any expression of doubt in response, the trial judge must then ascertain the juror's present intent by allowing him or her to express disagreement. Error occurs here when the juror is precluded from an opportunity to dissent **or if the juror has not assented to the verdict**.

Ferry v. Checker Taxi Co., Inc., 520 N.E.2d 733, 739, 117 Ill.Dec. 382, 388, 165 Ill.App.3d 744, 753 (Ill.App. 1 Dist.,1987)(emphasis added) Illinois courts have continued, stating:

> "This court has said that a verdict should be examined with a view to ascertaining the **intention of the jury in returning the verdict**. If it is otherwise supportable the verdict will be molded into form and made to serve unless there is doubt as to its meaning.

Marotta v. General Motors Corp., 483 N.E.2d 503, 506, 91 Ill.Dec. 157, 160, 108 Ill.2d 168, 176 (Ill.,1985) citing to Manders v. Pulice 44 Ill.2d 511, 256 N.E.2d 330 (Ill.,1970),

The present situation requires taking the Juror Note and the conduct of the juror during polling into account in the decision to further poll the jury. The firm conviction of the note and the promise to sign the verdict for an improper reason in violation of the unnamed juror's own beliefs and oath created the necessity to further poll the jury. In light of the Juror Note and surrounding circumstances, the present situation is no different than had the trial court polled the jury and the unnamed juror was questioned in the following hypothetical circumstance:

> Q. Was this and is this now your verdict?
>
> A. I am only agreeing to this verdict to end deliberations. I believe the defendant was negligent and his negligence harmed the plaintiff. However, we cannot come

> to an agreement and I am voting for the defendant for the sole purpose of ending deliberations even though I believe the defendant was negligent. So yes, it is my verdict.

If the above circumstance occurred in any sort of similar fashion, it is unquestionable that this would not be acceptable to accept a juror's vote for a verdict. In this hypothetical, even if the *Prim* instruction were issued and the jury returned to deliberations and later came to the same verdict without any indication the juror had changed their opinion it would still be improper.

If the defect could be cured it would require an affirmative statement or documentation by the juror that created the Juror Note that he/she reconsidered his/her position and was signing the verdict form for a proper reason in accordance with his/her beliefs and oath as a juror. The only record at this time is the juror's promise to sign the verdict for a legally impermissible reason.

The present situation is compounded by the clear hesitation expressed in one of the juror's responses. As set forth above, one of the juror's responses to the question "Was this and is this now your verdict?" included a long pause, a loud sigh, followed by a juror's hesitant response of "yes". Such a response on its own should have justified further polling by the trial court. However, the response is even *more* problematic in light of the Juror Note. Whether the juror who responded with great hesitation was the juror who wrote the note is unknown as no further polling was performed, however, it is clear that the Juror Note should have created a heightened scrutiny of the answers of the jurors in addition to the necessity for further polling.

Plaintiff requests the Court grant a new trial on the basis of the failure to conduct further polling, which was clearly required given the circumstances.

3. The jury was deadlocked and a mistrial should have been declared.

A mistrial is when the judge brings the trial to an end, without a determination on the merits because of a procedural error, a serious misconduct during the proceedings, or a trial that ends inconclusively because the jury cannot agree on a verdict. Redmond v. Socha, 837 N.E.2d 883, 894, 297 Ill.Dec. 432, 443, 216 Ill.2d 622, 640 (Ill.,2005) "If a jury is deadlocked, a mistrial ***must*** be declared. *Id.* (emphasis added)

In the present case the jury was hopelessly deadlocked. The jury sent one note on November 1, 2023 stating that it didn't matter how long they would deliberate, they were not going to reach an agreement. The following morning on November 2, 2023, the Juror Note was sent where the juror indicated the jury was so deadlocked that he or she was going to sign a verdict form for the **sole** reason of ending deliberations. This was confirmed by the jury foreperson, who indicated the jury was deadlocked as well.

This is the very definition of a hung jury. The jury in this case deliberated for so long and couldn't agree on the verdict with the parties dug into their respective positions in such a way that the unnamed juror who wrote the Juror Note felt and, for all he knew, the only way to end deliberations was to agree to a verdict in violation of his own beliefs. As such, a mistrial should have been declared.

4. A juror agreeing to a verdict they have documented they do not agree with is juror misconduct and necessitates a new trial.

Courts should be exceedingly vigilant and careful that there is no misconduct on the part of jurors that would reflect any question on the honesty of their performance. Miller v. Scandrett, 63 N.E.2d 252, 255, 326 Ill.App. 631, 637 (Ill.App. 2 Dist. 1945) The Miller court would continue that "[v]erdicts should not be set aside on mere suspicion that a juror has acted improperly…While parties are entitled to, and should have, unprejudiced jurors, yet verdicts

should not be vactated on a charge of the misconduct of a juror, except on well-defined proof of the misconduct." *Id.* citing to Village of Genoa v. Riddle, 132 Ill.App. 637, at page 639.

In the present case the note by the juror represents clear misconduct in that: (1) the juror assured the Court he was going to enter a verdict solely to end deliberations; and (2) this statement represents a clear unwillingness to continue deliberations or deliberate in good faith in such a way where he was willing to reverse his opinion. The Third Circuit has held the following:

> A refusal to deliberate is a violation of a juror's oath. *Boone*, 458 F.3d at 329 (citing *United States v. Baker*, 262 F.3d 124, 130 (2d Cir. 2001) ("It is well-settled that jurors have a duty to deliberate.")). Moreover, nullification—a juror's refusal to follow the law—is a violation of the juror's sworn oath to render a verdict according to the law and evidence. *See United States v. Thomas*, 116 F.3d 606, 614–18 (2d Cir. 1997)

United States v. Fattah, 914 F.3d 112, 148 (C.A.3 (Pa.), 2019) In the present case, the unnamed juror assured the Court he was *not* going to follow the law and the instructions in following his beliefs and signing a verdict supported by the law and the evidence. This was also a clear indication he was not going to deliberate and potentially change his or her mind and his assurance was clear, he or she was going to enter a verdict *solely* to end deliberations. In fact, this unnamed juror violated the letter of the law in the *Prim* instructions in that he or she violated his or her own beliefs for the sole purpose of rendering a verdict rather than following the evidence and the law.

As there was clear juror misconduct, a new trial is warranted.

5. The verdict in light of the Juror Note is analogous to a compromise verdict.

The jury's verdict, when read in light of the Juror Note, is no different than a compromise verdict. A verdict of the jury which indicates that "compromises were made on damages and

liability cannot be allowed to stand". Svetanoff v. Kramer, 400 N.E.2d 1, 3, 35 Ill.Dec. 864, 866, 80 Ill.App.3d 575, 578 (Ill.App. 1 Dist., 1979) Although the present situation is not a compromise verdict in the sense of liability versus damages, it is a compromise verdict in the sense there is clear evidence that at least one member of the jury compromised his position in order to arrive at the verdict, similar to the process of a compromise verdict. As such, the verdict should not stand and a new trial should be declared.

6. The Court' reasoning for denying the three motions for mistrial was incorrect.

Plaintiff respectfully submits the reasoning for the Court's refusal to declare a mistrial was flawed for three reasons. First, in the initial motion for a mistrial the Court reasoned that the Juror Note reflected a simple deadlock to be cured by the *Prim* instruction. Second, the next motion for a mistrial contained similar reasoning, that this was a simple deadlock rather than an assurance by the unnamed juror they would violate their oath and vote against their principles. Third, the final motion for a mistrial was denied as the Court reasoned this deliberative process happens in every trial and jurors change their minds often. This is error as there was no documentation of a mind being changed.

When Plaintiff first moved for a mistrial, immediately after the Court and the parties received the Juror Note, the Court reasoned as follows:

> The Court's had the opportunity to consider the note, all the facts and circumstances surrounding the deliberation and based on – on that, oftentimes the Court doesn't have something as tangible as this. Just get a note that they're unable to come to a decision, unanimous decision and often is the case, you know, folks, keep at it until, as 1.05 indicates, until the Court is able to ascertain that there is a deadlock. This note provides the Court with that information that the jury appears to be deadlocked. Again, even after breaking and separating from their deliberations last night and restarting the deliberations this morning, after about 20, 25 minutes or so in their deliberations, then we have this note. I think, based on that, I'll deny the motion for mistrial and I believe that the procedure is set out

> in the Pattern Jury Instructions and the Court should not ascertain if this is a numerical division.

(Exhibit 2, p. 9:10 – 10:5) Essentially, the Court's rationale was the Juror Note was a simple note that the jury was unable to come to unanimous decision, i.e. that the jury was deadlocked which triggers the issuance of the *Prim* instruction, which instructs the jury to come to a verdict. The Court's rationale was similar when Plaintiff moved for a mistrial the second time, which was that the jury was deadlocked and the issuance of the *Prim* instruction rather than declare a mistrial was proper. (Exhibit 2, p. 21:17 – 22:20)

The third time Plaintiff moved for a mistrial, after the verdict was entered and the request for more extensive polling was denied, the Court offered the following reasoning for its denial of the third motion for mistrial:

> The Court will deny the request for a mistrial. I think the process has been one that occurs in every true deliberation where there is not an immediate unanimous verdict and decision by the jurors. There is certainly going to be sort of the ebb and flow of jurors reconsidering, changing their minds and the like. We have -- it has been revealed to us through a comment about a particular juror indicating that at that point in time, it was that juror's belief that -- well, that juror's statement amongst others that the document speaks for itself. That there -- there was a desire to find for the plaintiff but would sign a verdict only to end this as Mr. Prill has paraphrased as well.
>
> So not often, this Court hasn't had that issue before, that such a thought process by a juror is reduced to writing. I have to believe that that thought process has occurred in numerable jurors that are certain of their position.
>
> They are brought in to indicating obviously at the point that the jurors were brought in, there was no verdict at that point in time. The Court gave the *Prim* instruction which, as Mr. Hansen has indicated, goes into that very issue, please review and reexamine your positions and even change your position if you believe that -- that it is warranted. Also, to stand by your -- your honest opinion on the case.
>
> So in further deliberation and further review, if that juror did change their mind that was once certain that is no longer certain, that is the definite discretion of that particular juror. So the only qualification that the Court can make is to further poll those jurors after a verdict so then the juror has to sign the verdict on the dotted line so to speak and then in addition to that is further clarification, further opportunity for a juror to indicate a dissenting opinion orally polled in court and then to go further than that and not accept that juror's answer that is

> both on written form and orally I think is-- is beyond the scope of the Court and delving into the decision making process for each particular juror.

(Exhibit 2, p. 41:22 – 43:23)

The common theme underlying all three denials of the mistrial motions is the basic idea that the situation the Court and the parties was faced with was that of a routine deadlock, i.e. where there was some indication that the jury was having difficulty coming to a decision, which could be cured by a routine *Prim* instruction. However, the Juror Note was not a simple, routine signal of deadlock. The Juror Note was an assurance by the unnamed juror they intended to violate their oath and vote in violation of their own beliefs for the sole purpose of ending deliberations. The unnamed juror went so far as to repeatedly and emphatically state how firm their convictions were in this regard.

Plaintiff does not believe such an assurance as contained within the Juror Note can be cured and take the position this is automatic grounds for a mistrial. Assuming *arguendo* that the defect created by the Juror Note is curable, the Court only had two options once the Juror Note was submitted: (1) declare a mistrial; or (2) cure the defect created by the Juror Note.

Plaintiffs believe the correct path was to declare a mistrial as set forth above and will not restate those arguments here. An affirmative promise by a juror to violate their oath and enter a verdict for a legally improper reason in direct opposition to their beliefs and how they interpret the evidence and the law is automatic grounds for a mistrial. Any attempts to cure a guarantee made with such detail cannot remove the taint of the note upon the deliberation process. An attempt to cure would implicitly raise the idea of coercion of the juror and whether or not the juror would be answering any further questioning for the sole purpose of carrying out their promise, i.e. enter a verdict for a legally improper reason. However, Plaintiff will assume the defect can be cured for the sake of argument.

The Court's rationale for denying the mistrial is based on the assumption the defect created by the Juror Note is able to be cured. In this case the Court is likely correct that many deliberations certainly involve ebbs and flows where parties do change their minds. However, the critical distinction here is there was a written record provided of one juror's rationale and there was absolutely no evidence, whether a note, polling, or anything else that the juror had changed his position. Only one position was documented and any potential argument or position that the unnamed juror changed their mind is pure speculation without any evidentiary support. In fact, any argument that the juror changed their mind is contraindicated by the plain language of the Juror Note as the unnamed juror assured the Court and the parties, they would enter a verdict for the defense for an improper reason. This was followed by the entry of a defense verdict. Therefore, it would also be necessary for there to be a record that the juror was entering the verdict for a proper reason, i.e. that the verdict was entered an accordance with their beliefs.

The only way to cure the defect created by the Juror Note would be for an affirmative statement of some type that the juror who wrote the note changed his/her position and a statement that the verdict was entered in accordance with the juror's beliefs. This could have been accomplished during polling. All that would have been required would have been to ask the jurors questions to determine: (1) which juror wrote the note; (2) whether the juror had reconsidered his position or still held the same beliefs regarding the evidence and the law; (3) if the juror had reconsidered his position regarding the evidence and the law, whether the juror was entering the verdict in accordance with his or her beliefs. If the juror gave this or some other definitive statement that their position had changed and the verdict was being entered for a proper reason, then the defect is cured.

There is one part of the Court's order that is particularly relevant here:

> So in further deliberation and further review, ***if*** **that juror did change their mind that was once certain that is no longer certain, that is the definite discretion of that particular juror.**

(Exhibit 2, p. 42:21-24)(emphasis added) The key word here is "if". This statement by the Court was made after the verdict was entered. This acknowledgment notes that the Court does not know *if* the unnamed juror *actually did* change his or her mind before entering the verdict. This is because there is no evidence on the record stating, implying, intimating, or anything of the nature that the juror changed their mind from their promise to enter a verdict for an improper reason in violation of their oath and the law. All evidence supports the conclusion the juror did exactly what they promised.

In a nutshell, it appears the Court reasoned in denying the motions for mistrial that the fact that the juror who wrote the note on the morning of November 2 and then continued with very limited deliberations after the *Prim* instruction was given by the Court and then signed the verdict form for the Defendants and then upon limiting polling affirmed his/her verdict cured any concern of the impact or effect of the Juror Note. The Plaintiff argues given the totality of the circumstances, even though those things happened on November 2 before the verdict was provided to the Court, there is simply no evidence or information that the juror actually signed the verdict form for any other reason than the exact reason provided in the Juror Note. The limited polling of the jury that was done by the Court did not confirm that the juror actually signed the verdict form based upon a belief that the defense should prevail. During the additional deliberations after the *Prim* instruction was given there was not any confirmation that the juror was now convinced that a defense verdict was proper in his/her mind. What is unique about this situation is that the juror announced his/her decision before the verdict to sign the form for one explicit reason despite his/her beliefs that the Plaintiff should prevail. It is true that in most

situations the Court nor the parties know the so-called ebbs and flows of deliberations and because courts and parties don't know that thinking or that process, courts accept a verdict form signed by all jurors as the collective agreement and finding. But, in the case a juror announced his/her clear intention and belief with the exact reason why he/she was signing the verdict form for the improper reason which should have triggered an immediate mistrial. Once the juror announced his/her intention to sign the verdict form solely for that reason, any verdict was automatically tainted and was not unanimous. In other words, the verdict can no longer be trusted as being fully unanimous and cannot be considered a proper verdict signed by all jurors because of his/her announcement that the verdict was **only** being signed to end deliberations and not because he/she felt a verdict should be for the defense. Illinois law requires the verdict be signed by all jurors because of their belief that one party prevailed over the other. This did not happen in this case.

In addition, once the juror announced his/her intention to sign the verdict form solely for the reason stated in the note in question, the Court by its own admission simply did not make any efforts to confirm that the juror had in fact changed their mind. So, the Court nor the parties have any information or clarification that the juror did in fact sign the verdict form on behalf of the defense for the proper reason and that continued deliberations actually allowed that juror to change their mind despite being 100% clear as to the reason why they were signing the verdict form for the defense. Justice cannot stand for a verdict where a juror announces his/her state of mind and announces that a verdict will be signed **only** to end deliberations and there is no confirmation that that juror's true state of mind was changed because of the Court's involvement through the *Prim* instruction and further limited polling. Once the Court became aware of that juror's clear state of mind, there is no expectation that any steps taken by the Court can alter

his/her state of mind and furthermore at the very least nothing that confirms the state of mind was actually changed and because the juror note said what it said the Court should have taken additional steps to confirm this was in fact a proper, unanimous decision after further deliberation and the motions for mistrial should have been granted.

A mistrial should have been declared as the defect of the Juror Note could not be cured. However, even if it could be cured, there is no evidence it was cured and the only available evidence points to the juror agreeing to the entry of a verdict for an impermissible reason. As such, a new trial should be granted.

B. The Court should have issued Jury Instruction 11 to include the term "misdiagnosed".

The trial Court erred when it failed to offer Plaintiff's requested instruction to include the term "misdiagnosed" in accordance with the evidence and the law. In the present case Plaintiff requested Instruction No. 11 include the word "misdiagnosed" rather than failed to diagnose as the term "misdiagnosed" was supported by the evidence. Parties are "entitled to have the jury instructed on the issues presented, the principles of law to be applied and the necessary facts to be proved to support its verdict. **The threshold for giving an instruction in a civil case is "not a high one**."" Mikolajczyk v. Ford Motor Co., 901 N.E.2d 329, 348, 327 Ill.Dec. 1, 20, 231 Ill.2d 516, 549 (Ill., 2008)(emphasis added)(internal citations and quotations omitted) "All that is required to justify the giving of an instruction is that there is some evidence in the record to justify the theory of the instruction. The evidence may be insubstantial." *Id.* "It is, therefore, well established…a plaintiff is entitled to an instruction setting out her own theory of the case, based on her theory of liability and her chosen method of proof". *Id.*

In the present case Plaintiff made an argument, well supported by the evidence, including Dr. Love's testimony, that Dr. Love had misdiagnosed Plaintiff. This was supported by Dr. Love's testimony, which paired with Dr. Honaker's testimony regarding the failure to diagnose. Nonetheless, Plaintiff's instruction was refused by the trial court.

Illinois courts have dealt with the concept of the term "misdiagnosis" before. In the case of *Willis* the Court went so far as to state a "differential diagnosis that is not chosen and/or treated as the ultimate diagnosis is a misdiagnosis by definition." Willis v. Khatkhate, 869 N.E.2d 222, 230, 311 Ill.Dec. 548, 556, 373 Ill.App.3d 495, 504–05 (Ill.App. 1 Dist., 2007) The entire premise of the *Willis* case is the physician failed to make the ultimate diagnosis and therefore failed to offer proper treatment. *Id.* Therefore, by the very law in Illinois, the term "misdiagnosis" or "misdiagnosed" is the correct terminology to use in the present circumstance where Dr. Love failed to make the ultimate diagnosis and failed to offer proper treatment as a result. The evidence supported this and Plaintiff was entitled to have the instruction that framed his theory of the case.

This instruction is particularly important as the jurors were struggling to understand Jury Instruction No. 11. (Exh. 3, p. 1-2) The jurors were not clear as to how they were to read and interpret the questions as written or in light of how they perceived the evidence. This is particularly important as to Dr. Love's testimony where he was turned around and ultimately ended up admitting that there was no difference between misdiagnosing, i.e. providing an incorrect diagnosis as Dr. Love defined it, and Dr. Stewart's definition, which was not providing a correct diagnosis. In other words, Dr. Love himself became confused about the terminology in an attempt to distance himself from the word "misdiagnosis" and ultimately admitted he missed the diagnosis. This perfectly comports with *Willis* where it defines a misdiagnosis as the

differential diagnosis that was not chosen or treated. Therefore, unquestionably under the law, Plaintiff was entitled to have the term "misdiagnosis" utilized in the jury instructions as it is a perfect encapsulation of the facts of this case.

As this was the first issue the jury had in deliberations and clearly confused them. As such, Plaintiff requests the Court grant a new trial and permit the use of the term "misdiagnosed" to be used in Jury Instruction No. 11.

VII. Conclusion

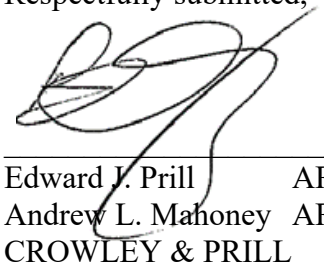
Plaintiff requests the Court GRANT its motion for a new trial based on the fact that a mistrial should have been declared. This is a unique and, as far as Plaintiffs' counsel is aware, a completely unprecedented situation. The Juror Note contains such a clear and unequivocal statement regarding the mindset of the juror regarding negligence in this case combined with such a clear guarantee the unnamed juror would agree for a verdict for a manifestly improper reason. This creates a defect that cannot be cured and a mistrial is necessary.

Whether the defect can be cured (Plaintiff maintains it cannot) is irrelevant to the analysis regardless as nothing was done to cure the defect. In order to cure the defect, there would have to be documented evidence by the juror who wrote the Juror Note that they had reconsidered their position and now were agreeing to the verdict in accordance with their beliefs/for a proper reason. All that was done was give the jurors the *Prim* instruction, which did nothing to evidence any reconsideration or offer contrary evidence to the motivation behind the agreement to the verdict by the unnamed juror.

This is an important case as it heavily centers around the constitutional right to a unanimous jury in Illinois. If a defect such as the Juror Note is permitted to stand alongside a verdict it undermines the very foundation and credibility of unanimous jury verdicts. In essence,

to allow this verdict to stand would mean that *any* comment by a juror regarding their beliefs or motivations in polling or in notes is irrelevant to the courts of Illinois provided they sign the verdict form itself. Any note, regardless of the content, could simply be cured by a *Prim* instruction and an eventual verdict, even if the note contained any amount of evidence of impropriety by a juror or jurors. A signed verdict form is not something that should be obtained at any cost, it should reflect the intent of the jurors in coming to a verdict. As that did not happen here, a mistrial was appropriate and a new trial should be granted.

Respectfully submitted,



Edward J. Prill ARDC#6271392
Andrew L. Mahoney ARDC#6334171
CROWLEY & PRILL
3012 Division Street
Burlington, IA 52601
T: (319) 753-1330
F: (319) 752-3934
eprill@crowleyprillattorneys.com
amahoney@crowleyprillattorneys.com

ATTORNEYS FOR Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on *Friday, December 01, 2023*, the undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses, as set forth below:

by: ____ U.S. Mail ____ Fax X EDMS ____ Overnight _____ E-mail

Copy to:

Mr. James Hansen
Schmiedeskamp, Robertson, Neu & Mitchell LLP
525 Jersey St.
Quincy, IL 62301
jhansen@srnm.com
Attorney for Quincy Medical Group and Kreg Love

//s// Ed Prill
Ed Prill – Attorney

FILED
12/19/2023 4:11 PM
LORI GESCHWANDNER
CLERK OF THE CIRCUIT COURT
ADAMS COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT

ADAMS COUNTY, ILLINOIS

ROBERT L. SCHILLING, Plaintiff, v. QUINCY PHYSICIANS & SURGEONS CLINIC, S.C. d/b/a QUINCY MEDICAL GROUP and KREG J. LOVE, D.O. Defendants.	)	No. 2018 L 53

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR NEW TRIAL

COMES NOW Defendants Kreg J. Love, D.O. and Quincy Physicians & Surgeons Clinic, S.C., d/b/a Quincy Medical Group, by and through their attorneys, Schmiedeskamp Robertson Neu & Mitchell LLP, and for their Response to Plaintiff's Motion for New Trial hereby state as follows:

Background

Plaintiff filed a Motion for New Trial pursuant to ILCS 5/2-1202(b) following a medical malpractice jury trial which took place from October 19, 2023, to November 2, 2023. At the conclusion of trial, the jury unanimously found in favor of the Defendants regarding the care and treatment provided by Dr. Kreg Love in January of 2017. The jury reached their verdict after deliberating on the afternoon and evening of November 1 and morning of November 2. During deliberation, the jury sent multiple notes authored by an unknown juror(s) which ranged from asking questions to providing status updates regarding their deliberations. With each note, the Court brought the attorneys for both parties together and worked through the appropriate response which was then communicated to the jurors via a written note or in person additional instruction.

During this deliberation, two notes relating to the status of deliberations were sent to the Court. These notes, the author(s) of which is still unidentified, form the basis of Plaintiff's first two points of their Motion for New Trial. The argument, essentially, challenges the autonomy of the jury in reaching their decision based upon the statements provided in the notes and their alleged impact on the ability for a jury to reach a unanimous decision. To further challenge the jury's verdict, Plaintiff sought to have the Court conduct additional inquiries of the jurors. The Court declined to do so. Instead, the Court noted all twelve jurors agreed to sign the verdict form and answered this Court's polling question in the affirmative, indicating they had each determined voting in favor of the Defendants to be the appropriate verdict given the evidence and applicable law.

Plaintiff also challenges the Court's refusal to amend their own proposed jury instruction the day deliberations began. Plaintiff sought to have subpart (e) of Jury Instruction 11 modified to allege misdiagnosis instead of failing to diagnose the alleged broken bone(s) in Plaintiff's foot. Plaintiff asserts that the instruction, as given, was confusing and misleading to the jury relative to their proposed instruction which was denied. As a result of one or more of his arguments, Plaintiff believes he is entitled to a new trial. This is incorrect.

Jury Deliberation

Plaintiff's first arguments pertain to the jury deliberation in this case. After the jury began deliberating, they sent two notes Plaintiff believes justify a new trial in this matter. First, an unknown juror sent a note indicating the jury would be unable to reach a unanimous agreement on the evening of November 1, 2023. (See Page 4 of Juror Deliberation Notes, attached as Exhibit A). The Court, by agreement of both parties, wrote back to the jurors and instructed them to continue deliberating. (See Pages 7-8 of November 1, 2023, transcript, attached as Exhibit B). The

Court also stated it would check in shortly. (See Page 8 of Exhibit B). This was added because the Court intended to let the jury go home for the evening about an hour after that note was written. At no point during the conversation regarding this note did Plaintiff, Defendant, or the Court discuss the idea of a "deadlock" or the necessity of a "*Prim*" instruction. The Court, by agreement, ordered the jury to continue deliberating upon receipt of the last note on November 1, 2023. (See Page 4 of Exhibit B). The jury was then released for the evening and ordered to return the next morning to continue deliberations.

The next morning, the Court received a note from an unknown juror who expressed he/she was firm in their belief Dr. Love was negligent, but he/she would agree to sign a verdict form for the Defendants to end deliberations. (See Page 5 of Exhibit B). This note led to a conversation by Plaintiff, Defendants, and the Court which resulted in the Court confirming the jury was deadlocked and issuing a *Prim* instruction, codified now as Illinois Pattern Jury Instruction 1.05. This was done after Plaintiff moved for a mistrial, claiming it would be impossible to reach a unanimous verdict after the juror's note. That same belief is the basis for the majority of his Motion for New Trial.

Plaintiff incorrectly asserts this is a matter of first impression in Illinois. As the Court noted during deliberations, this is certainly not the first time jurors have said they could not reach a verdict or even said they would only do so to be released from jury service. That is precisely why the Court, not the jurors, decide when deliberations have finalized and/or when coercion has occurred. *People v. Walker*, 2021 WL 5865323, ¶48 (Ill.App. 1 Dist., 2021). *Walker* is a case from the First District which bears striking similarities to the one before the Court here.

The Court in *Walker* released the jury to deliberate in a criminal case where Levant Walker had been charged with residential burglary. *Walker* at ¶2-4. The jury was given the case at 3:30

P.M. on November 14, 2019. *Id*. at ¶32. Around 5:00 P.M., the jury sent back their first note which contained a series of questions regarding additional evidence they wished to review and clarification on some of the legal terms at issue. *Id*. The Court convened the parties, and it was decided the Court would instruct the jurors to apply the law as given in the instructions and to consider all the evidence and exhibits in their possession. *Id*. at ¶34. Shortly after, around 5:30 P.M., the jury sent another note requesting a copy of the transcripts from the trial and the Court advised jurors to rely on their notes and memories because transcripts were unavailable. *Id*. at ¶35.

Just before 6:00 P.M., a third note stated "despite thorough deliberations, we are unable to reach a unanimous decision. Thank you." *Id*. at ¶36. The Court asked the parties if they would like to have the *Prim* instruction issued at that time and neither party objected. *Id*. The Court brought the jury in and gave them the *Prim* instruction as found in the Illinois Pattern Jury Instructions.[a] *Id*. Following the instruction, the jury retired to deliberate until 7:00 P.M. when the Court released them for the night. *Id*. at ¶37.

When the jury returned the next morning[b], they sent another note which read, "Dear Judge, some members of the jury find the Defendant not guilty due to the fact they believe the law was misapplied by the Prosecution in this case. What do we do in this case?" *Id*. at ¶38 They also asked, "What do we do if someone is convinced their own opinion of what burglary [is] over the law?" *Id*. The Court responded by instructing them the correct, applicable law was the law as given by the Court, not what someone in the jury believed and they had all agreed to follow the law as part of their duties as jurors. *Id*. at 39. The Court brought the jury into the courtroom to provide this admonishment in person, instead of via note. *Id*.

[a] It should be noted the Court in *Walker* utilized the criminal instruction, but all relevant portions are identical to those of the civil instruction.
[b] The time in which many of the events of the second day of deliberation took place is not contained within the record.

Shortly after the jury was released, the Court received another note which stated, "The jury environment is too hostile. We cannot come to a conclusion." *Id*. at ¶40. At that point, the State sought to question the jurors to identify the dissenting juror and have them removed in favor of an alternate, but the Court declined and instead issued the *Prim* instruction a second time. *Id*. at ¶41. The record indicates no further notes were passed, and the jury returned a unanimous guilty verdict. *Id*. at 42. The Court polled each juror individually and all of them confirmed this was his or her verdict. *Id*.

On appeal, Mr. Walker argued the Court coerced the jury into reaching a verdict since they had "repeatedly" stated they were deadlocked. *Id*. at ¶43. The First District found this unpersuasive. *Id*. at ¶52. The Appellate Court noted:

> ". . .a 'trial court has discretion to have the jury continue its deliberation even though the jury has reported it is deadlocked and will be unable to reach a verdict." *Id*. at "trial court has discretion to have the jury continue its deliberation even though the jury has reported it is deadlocked and will be unable to reach a verdict.' Moreover, 'a trial judge has the duty to provide guidance to a jury that is not hopelessly deadlocked.' A trial judge's decision to continue deliberations will be reversed only if it is an abuse of the court's discretion, even where the jury has reported to the court that it is 'hopelessly deadlocked.' And an abuse of discretion exists 'only where the trial court's ruling is so arbitrary or fanciful that no reasonable person would take the view adopted by the trial court.'" *Id*. at 43, internal citations omitted.

The Court of Appeals held the trial judge has the authority to continue deliberations so long as that instruction is "simple, neutral, and not coercive." *Id*. at 44, quoting *Ferro,* 195 Ill. App. 3d at 293. "The test for determining whether the trial court's comments to the jury were improper is whether, under the totality of the circumstances, the language used by the court actually interfered with the jury's deliberations and coerced a guilty verdict." *Id*. quoting People v. McCoy, 405 Ill. App. 3d 269, 275 (2010). The First District acknowledged it is impossible to know a juror's subjective thoughts, so instead the question of coercion hinges on whether the instructions

provided "imposed such confusion or pressure on the jury to reach a verdict that the accuracy and integrity of the verdict returned becomes uncertain." *Id.*

The Court of Appeals highlighted that even though the jury, individually and as a collective, noted on multiple occasions they could not reach a verdict, even claiming at one point there was hostility in the jury deliberation room, the Court was proper in its handling of the situation. *Id*. at ¶46-47. The Court utilized *Prim* without additional commentary to ensure the jury was properly instructed to continue deliberations, but "do not surrender your honest conviction." *Id*. at ¶49. Further, the Court polled the jury to confirm the verdict was each juror's own. *Id*. at 46.

In spite of Mr. Walker's arguments that the jury reported it was deadlocked and some jurors were convinced of his innocence, the Appellate Court held that:

> '"**There is no requirement that a mistrial be declared because of the jurors' inability to come to a unanimous verdict immediately,' and a trial court is not 'required to accept a jury's assessment of its own ability to reach a verdict.**'" *Id*. at ¶48, quoting *People v. Logston*, 196 Ill. App. 3d 30, 33 (1990), emphasis added.

The similarities between *Walker* and this case are striking. Just as with *Walker*, the jury here deliberated for two days. In both, the jurors indicated potential deadlock on the first evening before reiterating an even stronger belief that a decision could not be reached the following morning. *Walker* even had allegations of hostility among the jurors, presumably in an attempt to pressure the dissenting member(s) to join the majority. The Court in *Walker*, just as here, worked diligently and carefully to tailor its messages to the jurors to avoid any potential for coercion.

Both Courts relied on citing the law to the jury, encouraging them to continue deliberations, and utilized the appropriate model instruction when necessary. In both instances, the jurors were then able to work through the case, reach a unanimous verdict, and confirm that verdict during the polling process. *Walker* is on point in this matter and reiterates what this Court has already stated, jurors stating they are stuck in deliberations is not dispositive and they can, and often do, change

their minds. This is not evidence of coercion, but proof positive the jury system works as intended and the *Prim* instruction is and was effective.

Plaintiff's position regarding the juror notes is premised on the idea that they constitute some sort of irreversible position of a juror which constitutes an automatic right to a new trial. This position not only assumes a substantial amount of information Plaintiff does not and cannot know, like even which juror had this alleged belief, but also that this individual juror is incapable of changing their mind. Further, Plaintiff asks this Court to assume the juror was somehow coerced into agreeing to join the majority, sign the corresponding verdict form, and then lie to the Court during the polling process. Plaintiff has no basis for supporting this position beyond the note which says the juror is certain of something, but this would hardly be the first time in history, much less jury deliberations, someone was certain of something right up until the moment they decided to change their mind. There is nothing in the record, or Plaintiff's Motion, proving any juror was coerced improperly to reach the unanimous verdict.

Plaintiff even takes these assumptions a step farther, arguing there was never any evidence the juror changed his or her mind. (See Page 11 of Motion for New Trial). This is patently false and ignores the only actual evidence of the individual jurors' final decisions the Court does have, their verdict and polling. Plaintiff cannot say we have no proof someone changed their mind in the face of a signed statement saying they did and an affirmative answer confirming the same to the Court. Instead, Plaintiff tries to claim they know the juror only signed the verdict to end deliberations, referencing the note, but that is not sufficient to overcome their own signature and affirmation.

The Court, following the law in Illinois, provided the *Prim* instruction which exists exactly for these types of situations. When jurors say they cannot reach a unanimous verdict, are given

Prim, and then, after further deliberation, reach an outcome, that is the system working as intended. Plaintiff cannot assume the juror in question did not, using their own autonomy and decision-making power, reconsider the evidence and move from their once firm position. In fact, we have evidence the jury was deliberating and debating the issues at hand after *Prim* because the Court received an additional note seeking clarification for things it appears they were discussing. The Court has no authority to supersede the autonomy of the jury in this case, just like in *Prim*.

While *Prim* is an often-cited case, its facts and holding are relevant and important to the instant case. *Prim* was the Illinois Supreme Court's first major foray into the world of "hammer" or "*Allen*" instructions. *People v. Prim*, 53 Ill.2d 62, 76 (Ill. 1972) and *Allen v. United States* (1896), 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528. Andrew Prim was convicted by a unanimous jury of his peers for the offenses of armed robbery, attempted armed robbery, and murder related to a robbery of a bus gone wrong in 1968 in Chicago. *Id*. at 63-64. After roughly four hours of deliberation, the jury was brought into the courtroom and the Court admonished them to continue deliberating. *Id*. at 72-72. After that admonishment, the jury needed only fifteen minutes to finally reach a unanimous verdict. *Id*. at 72. The Illinois Supreme Court, as part of their opinion, ordered "that hereafter the trial courts of this State when faced with deadlocked juries comply with the Standards suggested by the American Bar Association Minimum Standards Relating to Jury Trials above set forth." *Id*. at 76, citing their own proposed instruction at 75-76. This decree, and their proposed instruction, remain the law of Illinois today.

Much like *Prim*, the jury in this case found itself at an impasse they stated could not be overcome. Such a situation is precisely when *Prim* shall issue. Plaintiff attempts to argue that once a jury declares itself deadlocked, the Court must simply throw up its hands and declare an immediate mistrial. (See Page 25 of Motion for New Trial, citing *Redmond v. Socha*, 216 Ill.2d

622, 640 (Ill.,2005)). Plaintiff completely mischaracterizes *Redmond* to arrive at this conclusion. The quote taken from *Redmond* is in the context of timing of a motion for mistrial, not a command to the courts dictating when a mistrial "must" be ordered. *Redmond* at 640. The Court's analysis is summarized where it concluded he did not forfeit his right to appeal the verdict due to an alleged untimely motion for mistrial, not that the Court had a duty to declare the mistrial upon the first indication of deadlock. *Id*. at 641.

Plaintiff's rationale and reading of *Redmond* is inconsistent with the law, common sense, and the very operation of jury deliberations. Look no further than the existence of the *Prim* instruction which is titled "Deadlocked Jury" and is to only be given once the jury indicates it is deadlocked. (See Illinois Pattern Jury Instruction 1.05 and Notes on Use). The appropriate practice in Illinois for a judge facing a deadlocked jury is to, "in its discretion, proffer some guidance, including the giving of a supplemental instruction." *Preston ex rel. Preston v. Simmons*, 321 Ill.App.3d 789, 799 (Ill.App. 1 Dist.,2001), citing *People v. Lee*, 303 Ill.App.3d 356, 636 (Ill.App. 1 Dist.,1999). The question then becomes whether there exists any coercion of the jurors in the Court's instructions. *People v. Arroyo*, 2023 WL 6276349, ¶44 (Ill.App. 1 Dist., 2023).

Plaintiff cites *Arroyo* as an analogous case to the one before the Court, but he is mistaken. The similarity between *Arroyo* and this case is not factual, but in the rule to be applied. The Court in *Arroyo* found the trial court there was coercive because it acted in a manner which was deemed to be coercive by not utilizing the appropriate instruction. *Arroyo* at ¶49. In fact, the Court in *Arroyo* noted that a *Prim* instruction would have served to "lessen the coercive factors at play." *Id*. The Court in *Arroyo* did not determine jurors cannot change their minds, but instead reiterated the Court must protect and guide jurors in a non-coercive manner, advocating for exactly the steps taken by the Court in this case. *Id*. In essence, *Arroyo* provides a framework for properly handling

a jury who is having trouble reaching a unanimous decision and this Court performed its duties precisely within those parameters as required by the law, not in contradiction of it.

Plaintiff follows his argument on *Arroyo* by citing a federal precedent regarding juror coercion. (See Page 16 of Motion for New Trial). The citation they include declares a juror may not be coerced into their verdict. *U.S. v. Blitch*, 622 F.3d 658, 668 (C.A.7 (Ill.),2010). Defendants do not dispute the idea that a coerced verdict is improper, but instead argue Plaintiff has not and cannot demonstrate the verdict in this case was coerced. Plaintiff's own case says coercion occurs where "the court's communications pressured the jur[ors] to surrender their honest opinions for the mere purpose of returning a verdict." *Id*. at 668, quoting *United States v. Crotteau*, 218 F.3d 826, 835 (7th Cir.2000) and *United States v. Kramer*, 955 F.2d 479, 489 (7th Cir.1992). That did not occur in this case.

The appellant in *Blitch* specifically argued the Court should have issued an instruction which is nearly identical to *Prim*, including the language commanding jurors not to surrender their own beliefs. *Id*. at 669, see also *U.S. v. Silvern*, 484 F.2d 879, 883 (C.A.7 (Ill.),1973). The *Blitch* Court's entire opinion and criticism of the trial court is they did not issue a non-coercive instruction when faced with a deadlock, like *Prim*. *Id*. at 671. *Blitch* supports this Court's actions during deliberation in this case because the Court here did precisely what *Blitch* demands.

Plaintiff's last case they claim supports their position regarding deliberations is another federal holding from the Seventh Circuit. (See Page 19 of Motion for New Trial). Plaintiff asserts *Williams* stands for the principle that commanding a jury to return to deliberate until they reach a unanimous verdict after polling reveals they are not unanimous is coercive. (See Page 19 of Motion for New Trial). Again, the issue addressed on appeal in *Williams* is not the idea that jurors cannot be directed to deliberate further, but the manner and method the Court utilizes cannot be coercive.

U.S. v. Williams, 819 F.3d 1026, 1032-1033 (C.A.7 (Wis.), 2016). In doing so, that Court notes the importance of an instruction which contains a command to the jurors that they preserve their honest beliefs. *Id*. The Appellate Court even goes so far as noting an instruction which mirrors *Prim* has been held noncoercive by the United States Supreme Court. *Id*. at 1033, citing *Lowenfield v. Phelps*, 484, 549-552 U.S. 231 (U.S.La.,1988).

Again, the honest and correct reading of Plaintiff's own cited case is the test for juror coercion is measuring the Court's directions and words to determine if those were coercive. In this case, the Court gave the legally required instruction, as written, without any additional commentary. Plaintiff has no case which suggests a *Prim* instruction which is properly given is coercive. Instead, they have cited multiple cases at both the state and federal level which support exactly the opposite. There is no case cited by Plaintiff, and none found by Defendants, which claims a juror's vote cannot be changed during deliberation where a Court gives fair, noncoercive instructions. Such precedent does not exist because Courts are vested with the power to do exactly that, issue instructions which direct the jury to continue deliberations without coercing a specific verdict. Just as with any other instruction to a jury, the Court's place is to issue the proper instruction and trust the jury to follow the law accordingly. That is the very principle which underpins the entire jury process, an inherent faith in the jury to do what they are instructed. The Court in this case properly instructed the jury, per *Prim*, to "not surrender [their] honest conviction" while they "re-examine [their] own views." (Illinois Pattern Jury Instructions 1.05).

Ultimately, Plaintiff has put forward no evidence, precedent, or law which demonstrates any juror was coerced into changing their mind. Instead, Plaintiff asks this Court to (1) assume a juror cannot change their mind, (2) assume the juror was lying when they agreed to the verdict, (3) assume the juror was lying when he/she signed the verdict form, and (4) assume the juror was

lying when they confirmed to the Court it was their verdict. Such speculation is not only unreasonable but unsupported by the facts and the law.

Jury Polling

No party disputes Plaintiff was entitled to a polling of the jury after the verdict was submitted, but Plaintiff asked the Court to go a step further and interrogate all jurors to determine who wrote the notes in question in an attempt to further confirm they had changed their vote. (See Pages 26-32 of November 2, 2023, trial transcript, attached as Exhibit C). Plaintiff believes such interrogation would have possibly caused at least one juror to change their answer from the affirmative to the negative, while also claiming that such a process would not have been coercive. While questioning a juror until they change their answer is the very definition of coercion, Defendants still address Plaintiff's arguments.

As noted, the Plaintiff's requested questioning creates an inherently coercive process. If the Court receives a yes and questions a juror until they receive a no, that is coercion. Certainly, grilling each juror until one of them cracks and confesses to writing an anonymous note would have been improper and Plaintiff has provided no case which supports such a practice. At trial, Plaintiff cited *Chandler* for the Court, but did so with an incorrect interpretation. (See Pages 26-32 of Exhibit C). In *Chandler*, the Court at the trial level prohibited a juror from expressing himself fully and completely during the polling process. *People v. Chandler*, 88 Ill.App.3d 644, 650-651 (Ill.App. 1 Dist., 1980). The Appellate Court highlighted the key to jury polling is that each juror has a fair, unfettered opportunity to dissent if they feel it is necessary. *Id*. The process for polling is also addressed in *Chandler*:

> " The manner in which the poll and subsequent questioning are conducted is largely within the trial court's discretion and the trial judge must be mindful of his influence over the jury and avoid influencing or coercing the juror." *Id*. at 650, see also *People v. Kellogg*, 77 Ill.2d 524, 528 (Ill., 1979) ("The very purpose of the formality of polling is to afford the juror,

> before the verdict is recorded, an opportunity for "free expression unhampered by the fears or the errors which may have attended the private proceedings" of the jury room.").

This precedent clearly establishes the Court has discretion to dictate how the polling is conducted, so long as each juror has an opportunity to dissent. Plaintiff has not provided any argument, facts, case, or law demonstrating the Court's question prohibited any juror from dissenting, but instead insists the Court should have pushed beyond that to delve into each juror's mind and actions. The Court, in properly conducting the post-deliberation polling, asked each juror a simple question and provided each juror a full and complete opportunity to answer without interruption or interference. That is precisely what is required under *Chandler*, nothing more.

The Court's decision to decline to conduct a more intrusive process was well grounded because "it is not the duty of the court to delve into the jurors' decision-making process." *People v. Cabrera*, 116 Ill.2d 474, 489 (Ill.,1987). Instead, the Court must give "the jurors sufficient opportunity to state whether they were in agreement or disagreement with the jury's verdict." *Id*. That is precisely what the Court did in this instance. *Cabrera* involves facts not dissimilar to the ones before this Court. A juror gave an answer the appealing party argued was ambiguous when she attempted to provide additional commentary and thoughts on the verdict. *Id*. at 488-489. The Court instructed her to provide only a yes or no answer, to which that juror ultimately answered yes. *Id*. The Appellant had moved for the Court to allow that juror to expand upon her answer given her desire to do so, but the Supreme Court of Illinois held such an inquiry is not the place of the Court. *Id*.

The Appellant in *Cabrera* also attempted to submit an affidavit of that juror recanting her affirmation of the verdict, which the trial and appellate courts all disregarded. *Id*. at 490-491. It is not disputed that such an affidavit is inappropriate, but the Supreme Court of Illinois provided further clarity when it indulged the hypothetical. In doing so, the Court stated:

> "Even if we were to consider [the juror]'s statement, our review indicates that there is no showing in that statement that, at the time [the juror] was polled, she wanted to change her verdict." *Id*. at 491.

Plaintiff attempts to twist this line of reasoning by suggesting this Court should supersede the jurors' written verdict and affirmative responses in favor of a prior statement written by an unknown person, but doing so is improper. The Supreme Court of Illinois is clear that we look at the answer provided so long as it is freely given, and the Court would be improper to attempt to delve further. In this case, all twelve jurors answered in the affirmative unambiguously. Plaintiff attempts to muddy the jurors' answers by fixating on a single juror's mannerisms in answering with an unequivocal "yes."

Plaintiff attempts to read this juror's mind by guessing at what he was thinking or communicating when he "clearly paused for an extended period of time, sighed loudly, and responded with a hesitant 'yes'." (See Page 21 of Motion for New Trial). This Court deferred to that juror, as it did with each one, when they said that it was their true and correct verdict. To support their position, Plaintiff relies on *Kellogg*. In *Kellogg*, the Illinois Supreme Court was presented with a juror who had answered the polling question by stating, "Yes. Can I change my vote?" *People v. Kellogg*, 77 Ill.2d 524, 527 (Ill., 1979). The Court then asked the juror again if that was her verdict and she stated, "Yes, sir." *Id*. The Supreme Court of Illinois took exception to the trial court's decision not to answer that juror's question or investigate further. *Id*. at 528-530. First, the Court noted the trial court maintains discretion regarding the form of the "**question** to be asked" *Id*. at 528, emphasis added to the singular. Only after a juror indicates hesitancy or ambivalence does the Court have an obligation to investigate further. *Id*. This can occur by observation of the juror's "demeanor and tone of voice." *Id*. at 529. While these are things to consider, that is not the entire analysis to be done.

"The trial court judge must be careful not to make the polling process another arena for deliberations." *Id*. While each juror must be free to express themselves, the Court must be mindful of the "influence of the trial judge on the jury" because "jurors are ever watchful of the words that fall from him." *Id*. quoting *Bollenbach v. U.S.*, 326 U.S. 607, 612 (U.S. 1946). As such, the Court must be careful to "avoid the possibility of influencing or coercing the juror." *Id*. The Supreme Court of Illinois noted the judge influenced the juror in *Kellogg* by refusing to answer her question about changing her vote, but that is very different than the case before this Court.

Unlike *Kellogg*, this case contains no actual evidence the juror in question was coerced into his decision. The Court is not asked to determine, for example, whether he was happy with his verdict or even whether he had reservations regarding the verdict he signed; instead, the only question before this Court is whether that juror was coerced into his decision, signature, or answer. At no time did that juror indicate that was the case. While he may have paused or sighed, Plaintiff can only speculate as to why he did so. The Court took the jurors at their word when they signed the verdict form and confirmed those signatures, which is consistent with the law. The Court's decision to not interrogate any jurors beyond the answers they provided is supported by the law and the facts as the Court perceived them. Accordingly, Plaintiff's request for a new trial on this point must be denied.

The Court stated after polling the jury:

> "I think the process has been one that occurs in every true deliberation where there is not an immediate unanimous verdict and decision by the jurors. There is certainly going to be sort of the ebb and flow of jurors reconsidering, changing their minds and the like. We have -- it has been revealed to us through a comment about a particular juror indicating that at that point in time, it was that juror's belief that -- well, that juror's statement amongst others that the document speaks for itself. That there -- there was a desire to find for the plaintiff but would sign a verdict only to end this as [Plaintiff's attorney] has paraphrased as well. . .

> So the only qualification that the Court can make is to further poll those jurors after a verdict so then the juror has to sign the verdict on the dotted line so to speak and then in addition to that is further clarification, further opportunity for a juror to indicate a dissenting opinion orally polled in court and then to go further than that and not accept that juror's answer that is both on written form and orally I think is -- is beyond the scope of the Court and delving into the decision making process for each particular juror." (See Page 42-43 of Exhibit C).

This Court's comments echo two important policies already established under Illinois law. First, it is virtually impossible for a Court to predict what jurors are thinking or what they will do, so instead the Court must look to the things it can know, measure, and control when assessing a jury's verdict. *Preston ex rel. Preston v. Simmons,* 321 Ill.App.3d 789, 800 (Ill.App. 1 Dist.,2001). The Court must do so "**because it is extremely difficult for a reviewing court to determine a jury's subjective thoughts, the test of whether instructions are prejudicial ultimately must turn on whether the instruction imposed such confusion or pressure on the jury to reach a verdict that the accuracy of its verdict becomes uncertain**." *Id.* citing *People v. Gregory*, 184 Ill.App.3d 676, 681-682 (Ill.App. 2 Dist.,1989) and *People v. Pankey*, 58 Ill.App.3d 924, 927 (Ill.App. 4 Dist., 1978), emphasis added. This is especially true because "coercion is a highly subjective concept that does not lend itself to precise definition or testing." *People v. Wilcox,* 407 Ill.App.3d 151, 163 (Ill.App. 1 Dist.,2010), citing *People v. Branch,* 123 Ill.App.3d 245, 251 (Ill.App. 1 Dist.,1984). As discussed above, there can be no argument the Court in this case instructed the jury in a way which "imposed confusion or pressure" to reach a verdict when the Court relied only on the appropriate, approved instruction which was created for a situation just like the one this Court faced.

The second important point this Court noted was the simple fact that this situation, when viewed as a whole, is not unique from many other jury trials. While it is true a juror voiced their unwillingness to waiver before later doing so, that sort of change of heart is not uncommon or

unfair to either party. We cannot know what was said or done to sway that juror's mind, but we also cannot assume it was improper where we have no evidence to support such a claim. A mistrial should be granted when there is an occurrence of such character and magnitude as to deprive a party of a fair trial and the moving party demonstrates actual prejudice as a result. *Tirado v. Slavin*, 2019 IL App (1st) 181705, ¶31 (Ill.App. 1 Dist., 2019), citing *Bianchi v. Mikhail*, 266 Ill.App.3d 767, 777 (Ill.App. 1 Dist.,1994). There is nothing so extreme in this case that it can be said either party was denied a fair trial, much less that Plaintiff has met his burden of demonstrating it. Plaintiff quotes *Tirado* in his Motion for New Trial but does so without providing the proper context to define and understand what "such character and magnitude" looks like. (See Page 15 of Motion for New Trial).

The Court in *Tirado* cites a prior case in which something significant enough occurred to warrant a mistrial. *Id*. at ¶32, citing *Campbell v. Fox*, 113 Ill.2d 354 (Ill.,1986). During the opening statements of that trial, a juror passed out and had to be revived by the Defendant, a doctor on trial for medical malpractice. *Campbell* at 357. On appeal, the Court held that "it [was] doubtful whether the jurors could make a dispassionate evaluation of the defendant's testimony after witnessing his attempt to render immediate treatment to one of their fellow jurors." *Id*. at 359.

Watching a doctor, accused of negligence, save the life of a fellow juror before being asked to hear evidence regarding that doctor's competence could certainly unfairly predispose the jury. Having a juror express, via a mid-deliberation note, they are wrestling with their decision to join their eleven fellow jurors in a unanimous verdict before ultimately deciding to do so, is not. A juror changing their vote during deliberations is not "of such a character and magnitude" that it "deprive[d] a party of a fair trial," but instead is simply a "process. . .that occurs in every true deliberation." *Tirado* at ¶31 and Page 41 of Exhibit C.

Jury Instruction 11

Plaintiff's proposed Jury Instruction 11, subpart (e) leading up to the final day of trial and beginning of deliberations was as follows:

> "e. Failed to diagnose broken bones in Plaintiff Robert Schilling's left foot in one or more of the January 2017 encounters;" (See Plaintiff's October 31, 2023, Proposed Instruction 11, attached as Exhibit D).

This language tracked with five of the other six subparts which all operated utilizing an opening of "Failed to. . . " clause which was followed by an alleged violation of the standard of care. This instruction mirrors the report of Plaintiff's standard of care expert, Dr. Richard Honaker. The day of closing arguments, Plaintiff attempted to amend that subpart to state:

> "e. Misdiagnosed the broken bones in Plaintiff Robert Schilling's left foot in one or more of the January 2017 encounters;" (See Plaintiff's November 1, 2023, Revised Proposed Instruction 11, attached as Exhibit E).

The Court heard arguments regarding the proposed change on the morning of November 1, 2023. Plaintiff argued the modified instruction more closely mirrored the testimony of Dr. Kreg Love and they should be allowed to make the change because such a change was merely "semantics." Defendant argued the proposed modified language misstated the testimony of the Plaintiff's standard of care expert, Dr. Honaker, there was insufficient evidence a misdiagnosis had occurred, and the change was unnecessary. The Court took the arguments of counsel into consideration and ruled the proposed modification would not be approved. The Court, noting the issue was close and previously addressed as the misdiagnose v. missed the diagnosis debate, held "failed to diagnose" more closely mirrored the testimony he had heard, and it was consistent with the other subparts.

Plaintiff argues Dr. Love used the phrase "misdiagnosed" within his own testimony, which should have allowed for them to utilize that word as part of their jury instructions. This essentially

raises two questions which must be answered to address Plaintiff's appeal for a new trial. First, did Dr. Love negligently fail to diagnose broken bones in the foot? Second, if he did, is that properly described as missing the diagnosis or a misdiagnosis? The jury, through their verdict, answered the first question already. They held Dr. Love did not fail to diagnose broken bones in Plaintiff's foot. This ends the analysis right here. The jury was unconvinced that Dr. Love was negligent in this regard and, as such, he was not found liable.

Plaintiff attempts to argue the jury only reached this conclusion because they "were struggling to understand Jury Instruction 11." (See Page 34 of Motion for New Trial). They cite the first two notes written by the jurors during deliberations. (See Pages 1-2 of Exhibit A). While the first question was written regarding Jury Instruction 11, neither note indicates subpart (e) was of particular concern or confusion. (See Pages 1-2 of Exhibit A). Plaintiff asks this Court to assume that even though the notes say, "A thru G," the jury must have only been wondering about (e). (See Pages 1-2 of Exhibit A). Further, the Court must then assume the confusion existed because the instruction was not modified as Plaintiff had proposed. Plaintiff is without proof or basis for either of those assumptions.

Even if the Court is willing to take the logical leaps Plaintiff demands, the second question at issue still cuts against Plaintiff. The debate between failing to diagnose, missing the diagnosis, and misdiagnosing Plaintiff were brought up multiple times during this trial. Plaintiff unsuccessfully attempted to prove he had broken his foot prior to his visits with Dr. Love in January of 2017 and Dr. Love then missed a diagnosis or failed to diagnose his broken foot. Plaintiff sought to characterize this as a misdiagnosis, but Defendants pushed back. Defendants argued we cannot know if the foot was broken at any point in January 2017 while Plaintiff was seen by Dr. Love and that you cannot misdiagnosis something that was not there.

In support of their position, Plaintiff's cite two cases. (See Pages 33-35 of Motion for New Trial). First, Plaintiff cites a case which stands for the position that instructions should be given when requested so long as there is evidence to support such an instruction. *Mikolajczyk v. Ford Motor Co.*, 231 Ill.2d 516, 549 (Ill., 2008). While *Mikolajczyk* does allow for Plaintiff to submit instructions, it does not have any requirement the Court utilize the language proposed within that instruction. *Id*. Instead, the Court held the instruction must " clearly and fairly instruct the jury." *Id*. citing *Snelson v. Kamm*, 204 Ill.2d 1, 27 (Ill., 2003). Going further, the Illinois Supreme Court noted "[i]t is within the discretion of the trial court to determine which issues are raised by the evidence presented and which jury instructions are thus warranted." *Id*. quoting *Brdar v. Cottrell, Inc.*, 372 Ill.App.3d 690, 704 (Ill.App. 5 Dist.,2007). The Court absolutely has the right and power to tailor the instructions to its interpretation of the facts and case, not just to take the Plaintiff's proposed instruction verbatim. The Court acted properly by accepting an instruction which was supported by the evidence but tailoring the language to appropriately match as well.

The proper measure for evaluating the Court's decision regarding the issuance of instructions can be found in *Chraca v. Miles*, 2011 WL 10068844, ¶23. (Ill.App. 1 Dist.,2011). The Court in *Chraca* begins by noting the trial court has the "sound discretion" to "give or refuse a tendered jury instruction." *Id*., see also S*chultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill.2d 260, 273 (Ill.,2002). This discretion is only abused when the instructions, taken as a whole, fail to "fairly, fully and comprehensively" notify the jury of the "relevant legal principles." *Id*. What's more, a new trial is only necessary where a party can demonstrate it suffered "**serious prejudice** to its right to a fair trial due to the court's failure to give a tendered jury instruction." *Id*. citing *Truszewski v. Outboard Motor Marine Corp.*, 292 Ill.App.3d 558, 560 (Ill.App. 1 Dist.,1997), emphasis added. This Court must not "presume reversal is warranted" even

if the jury was misled by the instructions without a showing by Plaintiff "the jury was improperly influenced" by the same. *Id*. citing *Foley v. Fletcher*, 361 Ill.App.3d 39, 50 (Ill.App. 1 Dist.,2005). In sum, Plaintiff must demonstrate the jury was improperly influenced by the Court's instruction as given such that the instructions, as a whole, cannot be said to have "fairly, fully and comprehensively apprised the jury of the relevant legal principles." *Id*. Plaintiff absolutely cannot demonstrate such abuse of discretion in this case.

The second case Plaintiff cites in their Motion regarding this issue also works against his claim. The Court in *Willis* was asked to address a similar factual scenario in which a Plaintiff alleged a Defendant failed to diagnose Hodgkin's lymphoma. *Willis v. Khatkhate*, 373 Ill.App.3d 495, 504 (Ill.App. 1 Dist., 2007). There was a similar debate in that case regarding a missing of the diagnosis or a misdiagnosis and the court found Plaintiff's claim was "premised on a failure to diagnose the decedent's Hodgkin's lymphoma." *Id*. The Court went on to say, "a differential diagnosis that is not chosen and/or treated as the ultimate diagnosis is a misdiagnosis by definition." *Id*. at 504-505. This means, according to the First District in *Willis*, a failure to diagnose and a misdiagnosis are the same thing. As such, they are interchangeable since they are able to be used to describe identical situations.

If this Court is persuaded by *Willis*, then Plaintiff's entire challenge to the changing of the language is moot because the language would be identical. Plaintiff cannot complain the Instruction given was confusing or misleading because *Willis*, if followed, says it is the same regardless. In short, Plaintiff's own case stands for the proposition the two phrases are interchangeable so there can be no harm in choosing "failed to diagnose" over "misdiagnosed." As a result, the Court must deny Plaintiff a new trial based upon the language of subpart (e) of Jury Instruction 11.

Conclusion

Plaintiff cannot support a Motion for New Trial for any of the reasons listed in his Motion and, as such, all requests should be denied. Plaintiff has not provided a sufficient basis to support a Motion for New Trial for not being allowed to change the verdict form to say "misdiagnosis." The Court, utilizing its discretion, found such a change was unwarranted, a decision supported by the facts, law, and precedents. As such, Plaintiff is not entitled to a new trial on this issue.

Plaintiff also asks this Court to speculate into the minds of the jurors to reverse an unequivocal, unanimous verdict rendered against him. Plaintiff must show a juror, was coerced and such coercion occurred due to the Court's instructions. The Court issued the *Prim* instruction, as written. As such, the Court certainly did not coerce any juror in this matter. Plaintiff's attempts to have the Court coerce a juror to change their vote, via a post-verdict interrogation, are equally unsupported under the law. Defendants ask this Court to deny Plaintiff's Motion for New Trial in its entirety.

By: /s/ James A. Hansen
James A. Hansen, #6244534
Kevin S. Bross, #6343635
Schmiedeskamp Robertson Neu & Mitchell LLP
Attorneys for Defendants Quincy Physicians & Surgeons Clinic, S.C. d/b/a Quincy Medical Group and Kreg J. Love, M.D.
525 Jersey
Quincy, IL 62301
Telephone: (217) 223-3030
Facsimile: (217) 223-1005
E-mail: jhansen@srnm.com; kbross@srnm.com

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2023, I electronically filed the foregoing with the Clerk of the Court using the e-file system which will send notification of such filing to the following:

Edward J. Prill (attorney for Plaintiff) EPrill@crowleyprillattorneys.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non e-file participants: None.

By: /s/ James A. Hansen
James A. Hansen, #6244534

FILED
1/11/2024 10:51 AM
LORI GESCHWANDNER
CLERK OF THE CIRCUIT COURT
ADAMS COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ADAMS COUNTY, ILLINOIS

Robert L. Schilling	)	Case No: 2018L53
	)	
Plaintiff,	)	
	)	
Vs.	)	
	)	
Quincy Medical Group and Dr. Kreg Love	)	
	)	
Defendants.	)	

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR NEW TRIAL PURSUANT TO ILCS 5/2-1202(b)

NOW COMES the Plaintiff, ROBERT L. SCHILLING, by and through his attorneys, CROWLEY & PRILL, and in support of his REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF's MOTION FOR NEW TRIAL PURSUANT TO ILCS 5/2-1202(b) states as follows:

INTRODUCTION

There is one fatal mistake that runs through all of Defendants' arguments and analysis. This fact is brushed over and is not addressed in any arguments Defendants proffer. There are two absolutely unequivocal and unambiguous statements by the author of the Juror Note stating as follows:

> "I am only signing to end this deliberation and put an end to this. After many hours of discussion and debate, we cannot come to a unanimous decision. Therefore, its [sic] my position to sign **only** to end this.
>
> …
>
> Once again, I am **only** agreeing to sign to end this."

(Exh. 3 to Motion to New Trial, p. 5, the words "only" are not in bold in the Juror Note but are underlined twice) This clear declaration and promise by the unnamed juror to enter a verdict for a manifestly improper reason unravels every argument the Defendants make. This juror's firm

declaration is a promise that the juror will not agree to a verdict based on the evidence or the law, the evidence, or the juror's convictions, but *only* and *solely* for the purpose to end deliberations. The rest of the Juror Note provides additional context that the author of the note is firm in his/her convictions regarding the facts and the evidence. If this case were a routine expression of deadlock, such as "we are having trouble coming to a verdict", then Defendants' arguments would be compelling and likely correct. However, this is simply not the case.

Defendants' arguments regarding the process of jury deliberation are backwards. Their arguments boil down to the idea that it is pure speculation on the part of Plaintiff to guess the rationale of the unnamed juror when he/she entered a verdict on behalf of the defense. This demonstrates a fundamental misapplication of the term "speculation" to the facts at hand. The rationale was explicitly documented in detail. Taking a juror at their word is not "speculation." However, it would be speculation in the above situation to assume that the juror voted for the defense for some other reason, which was never documented. Speculation that the author of the note changed their rationale would not only be speculation, but it would be contrary to the record. In other words, Plaintiff's argument merely states the uncontradicted words of the Jury Note should be taken at face value.

Defendants' argument regarding the jury polling process in part unravels their argument regarding jury deliberation and supports Plaintiff's contention that the defect created by the Juror Note was not curable. Defendants argue that any further polling of the jury beyond the simple question "[w]as this and is this now your verdict?" would inherently create coercion unintentionally supports Plaintiff's argument that the defect created by the Juror Note could not be cured by polling. Once the Juror Note was received a mistrial should have been declared upon motion by the Plaintiff.

JURY DELIBERATIONS

The Juror Note necessitated the granting of a mistrial upon motion by the Plaintiff immediately after it was received. Defendants go to great efforts in their Response to gloss over the fact that the Juror Note contained two unequivocal declarations by the unnamed juror that he/she was compromising his/her beliefs and agreeing to the verdict for an improper reason. Defendants repeatedly attempt to portray the Juror Note as a run-of-the-mill note as dealt with in *Walker* or *Blitch*, which involves a routine deadlock where a jury signals they are at an impasse. The Juror Note is a clear and unequivocal statement that at least one juror has already abandoned his/her convictions and is going to agree to a verdict for a manifestly unlawful purpose. It is not a routine deadlock that is the issue. The juror has already been coerced to abandon the law, his/her oath, and his/her convictions.

The uniqueness of this issue is downplayed by Defendants in their Response. Defendants state "this is certainly not the first time jurors have said they could not reach a verdict or even said they would only do so to be released from jury service", arguing that this is not a matter of first impression. (Response, p. 3) However, Defendants cite *no authority* supporting this statement. Not one case cited by the Defendants include anything close to the scenario where a juror sent a note telling the Court they firmly believed in the negligence of one side and were abandoning their convictions solely to end deliberations. Defendants cite to the case of *People v. Walker* in support of their argument. 2021 WL 5865323, ¶48 (Ill.App. 1 Dist., 2021) Such a citation is improper as *Walker* was filed under Supreme Court Rule 23 and is not precedent except as permitted under Rule 23(e)(1). No showing has been made that this case fits under the exceptions of Rule 23(e)(1) and it clearly does not. As such, any arguments Defendants make in regard to *Walker* should be

disregarded. As they were raised, Plaintiff will respond to this argument briefly out of an abundance of caution.

The closest *Walker* comes to the current situation is where a juror sent a note about what to do *if* someone was convinced of their own opinion of what burglary is over the law. However, such a statement comes nowhere close to an unequivocal statement by a juror they had already abandoned their convictions and were going to agree to a verdict for an improper reason. None of the other cases cited by Defendants come close to their contention that this issue is something Illinois courts have dealt with before.

Defendants' then attempt to summarize Plaintiff's arguments (incorrectly) by stating Plaintiff's are requesting the Court to: "(1) assume a juror cannot change their mind, (2) assume the juror was lying when they agreed to the verdict, (3) assume the juror was lying when he/she signed the verdict form, and (4) assume the juror was lying when they confirmed to the Court it was their verdict. Such speculation is not only unreasonable but unsupported by the facts and the law." (Response, p. 11-12) Defendants are engaging in a straw man fallacy here, where Defendants are misrepresenting Plaintiff's position in order to "knock down" this position Plaintiff's have not adopted. This is easier than addressing Plaintiff's actual arguments, which Defendants fail to do.

Taking the first point, which is Defendants' contention that Plaintiff is asking the Court to assume a juror cannot change their mind. This argument is not only conjured out of thin air, but Defendant goes on to argue in the "Jury Polling" argument that Plaintiff is asking the Court to interrogate the unnamed juror until they changed their mind. Therefore, Defendants are both arguing Plaintiff's position is that a juror cannot change their mind while simultaneously arguing that Plaintiff wanted the juror to change their mind. This is nonsensical.

Plaintiff repeatedly makes the argument that, if the Juror Note were able to be cured[1], it would have to be done by some sort of affirmative statement that the unnamed juror changed their mind. ("The only way to cure the defect created by the Juror Note would be for an affirmative statement of some type that the juror who wrote the note changed his/her position and a statement that the verdict was entered in accordance with the juror's beliefs.")(Motion for New Trial, p. 30) Of course a juror can change their mind. The entire thrust of Plaintiff's argument is the unnamed juror made an unequivocal declaration that they would agree to a defense verdict for an improper purpose and then the unnamed juror agreed to a defense verdict, exactly as they promised they would do. The problem in the present case is not whether or not a juror *can* change their mind, it is the complete absence of evidence that the unnamed juror *did* change their mind as to their legally improper rationale.

This leads into the second point Defendants attribute to the Plaintiff, which is the idea that the juror was lying when the juror agreed to the verdict. Once again this is a straw man fallacy. It is unclear how Defendants missed central argument of Plaintiff's Motion. This central argument is the author of the note promised they would agree to a verdict for a legally improper reason and kept true to their word. Plaintiff never denies the author of the note entered a verdict for the defense. The issue is the rationale for doing so, which was following through on their declaration. If a juror stated they were voting to convict a defendant because they were African American and then voted to convict the defendant, the question is not whether the jury was telling the truth when they agreed to the verdict. The problem is the rationale for the vote.

[1] Plaintiff's argument remains consistent in that Plaintiff does not believe the defect created by the juror note can be cured. Any arguments regarding curing the defect are made *arguendo*.

The Defendants same mistaken logic plagues their points where they claim Plaintiff argued that the unnamed juror was lying when he/she signed the verdict form and/or when they confirmed it was his/her verdict. Plaintiff is not stating the unnamed juror lied during any of these instances, rather that the unnamed juror was telling the truth when they provided their declaration that they would vote for the Defendants in direct violation of his/her convictions and in contravention of their oath and the law.

This leads to the final point Defendants make, which is that Plaintiff's argument is based upon "speculation". This argument is dismantled easily by comparing the respective positions of the parties. Plaintiff presented the idea there was clear evidence the unnamed juror documented in the Juror Note that he/she was agreeing to a defense verdict **only** to end deliberations. Plaintiff then argued that the declarations contained within the Juror Note should be accepted as true and that the unnamed juror fulfilled his/her promise to agree to a verdict for an improper reason. Defendants never deny nor cast doubt upon the Juror Note. However, Defendants' argument requires this Court to assume the unnamed juror did in fact change their mind for the rationale for their vote when *no evidence is given to support this*. Is it speculation to take the juror's declarations at face value? Or is it speculation to assume, without any evidence, that the author of the Jury Note changed their rationale from what was documented to some undefined yet conveniently legally proper rationale for their vote?

Defendants fail to address the stated rationale set forth in the Juror Note and focus on the vote itself. It is telling the Defendants never even attempt to argue the rationale in the Juror Note would be acceptable.

JURY POLLING

Defendants once again miss the entire point of Plaintiff's Motion when they address the polling of the jury. Defendants ignore the myriad of times where Plaintiff carefully sets out that the defect created by the Juror Note was incapable of being cured by polling or otherwise. Plaintiff's position is that a mistrial should have been declared after Plaintiff moved immediately after the Juror Note was received. Plaintiff then repeatedly sets forth that, assuming *arguendo* the defect created by the juror note could be cured, it would have to be some sort of affirmative statement that the juror changed his/her mind and was agreeing to the verdict for a proper, lawful reason. This is because a documented rationale by a juror that he/she was agreeing to the verdict for an unlawful reason cannot be allowed to stand unrebutted by the record. This is why some sort of affirmative statement the unnamed juror had changed his/her mind would be required. As there was no note from the same unnamed juror that they had changed their mind and would be agreeing to a verdict for a lawful purpose, the only avenue left would be to attempt to ascertain some sort of statement during polling to provide a legally appropriate justification for the verdict.

Once again Defendants attempt to assign arguments to Plaintiff that Plaintiff had never made. Defendants argue that Plaintiff raised the concept of polling simply to get a juror to change their mind from voting for a defense verdict. It is not clear what argument Defendants are responding to when they make this argument but it is not Plaintiff's Motion for a New Trial. Plaintiff made the following argument in his Motion:

> The only way to cure the defect created by the Juror Note would be for an affirmative statement of some type that the juror who wrote the note changed his/her position and a statement that the verdict was entered in accordance with the juror's beliefs. This could have been accomplished during polling. All that would have been required would have been to ask the jurors questions to determine: (1) which juror wrote the note; (2) whether the juror had reconsidered his position or still held the same beliefs regarding the evidence and the law; (3) if the juror had reconsidered his position regarding the evidence and the law, whether the juror was

> entering the verdict in accordance with his or her beliefs. If the juror gave this or some other definitive statement that their position had changed and the verdict was being entered for a proper reason, then the defect is cured.

(Motion for New Trial, page 30)[2] It is unclear how Defendants could so blatantly miss this but Plaintiff never said the jury should be polled and "grilled" until they changed their answer. If Defendants' unfounded speculation is correct, that this unnamed juror changed their mind after writing the jury note, then that must be documented in order to correct the record. The lack of any evidence providing so much as a tenuous inference that the author of the Juror Note changed their mind from their promise to vote for a legally improper reason is problematic.

Defendant's analysis of *People v. Cabrera* is mistaken. 508 N.E.2d 708, 714, 108 Ill.Dec. 397, 403, 116 Ill.2d 474, 490 (Ill.,1987) *Cabrera* involved a juror asking to provide clarification to the question "[w]as this and is this now your verdict?", to which the trial court demanded a "yes" or "no" answer. *Id.* It was only *after* the verdict was entered the defendant entered a sworn statement by the juror into evidence in an attempt to impeach the verdict. *Id.* The Supreme Court of Illinois stated that "[i]t is clear that a statement by a juror, taken after the jury has rendered its verdict, has been polled in open court, and has been discharged, will not be admitted to impeach a juror's verdict." *Id. at 491*. The *Cabrera* Court does nothing whatsoever to address what a trial court should do when it receives a juror note or even a statement *prior* to being polled.

The fact that a juror's subjective rationale for agreeing to a verdict was documented in the Court record is what turns Defendants analysis on its head and is what creates a heightened emphasis on the juror's pause, sigh, and hesitant "yes" in responding that it was his verdict. Plaintiff doesn't presume to know what the sighing juror was thinking and ultimately does not know if this was the same juror who wrote the note, however, it is illogical to take the position that

[2] Once again, this argument was made *arguendo* assuming the defect could be cured.

an unnamed juror's declaration that he/she would agree to a verdict for a clearly improper reason is simply meaningless in the context of polling the jury. As Defendants themselves note, "[o]nly after a juror indicates hesitancy or ambivalence does the Court have an obligation to investigate further." (Defendants' Response, p. 14 citing to *People v. Kellogg*, 77 Ill.2d 524, 528 (Ill., 1979)) In this case there was a clear indication of hesitancy combined with the unequivocal declarations in the Juror Note. At the very least this demands further investigation.

The declarations in the Juror Note also undoes Defendants' arguments regarding coercion. The Juror Note indicated the juror had *already* abandoned his convictions, the law, and the facts and was going to agree to a defense verdict ***only*** to end deliberations. The coercion is complete at this point. Polling is only raised by Plaintiff as a potential opportunity to cure the documented coercion in the record.

Defendants' mistaken analysis continues in the recitation and breakdown of the Court's comments after polling the jury. Defendant cites to *Preston ex rel. Preston v. Simmons*, which stated "**because it is extremely difficult for a reviewing court to determine a jury's subjective thoughts**, the test of whether instructions are prejudicial ultimately must turn on whether the instruction imposed such confusion or pressure on the jury to reach a verdict that the accuracy of its verdict becomes uncertain. 321 Ill.App.3d 789, 800 (Ill.App. 1 Dist.,2001)(emphasis added)(Defendants' Response, p. 16) That is the unique aspect of the Juror Note, *it is not difficult to determine a juror's subjective thoughts here as they are documented thoroughly and unambiguously*. Plaintiff is unable to find another case where a jury note so clearly declared the juror was abandoning the law, the facts, and his/her convictions in order to agree to a verdict.

Defendants go on to argue that this situation, when viewed as a whole, is not unique from many other jury trials. If this is the case, why weren't Defendants able to offer one single, solitary

example from any jurisdiction in the United States where this situation had occurred? Defendants argue that a juror voiced their unwillingness to waiver before later doing so and that sort of change of heart is not uncommon. That is not what happened here. The problem in this case is there is no evidence the juror *did* waiver. The juror did exactly what they promised they would do, vote for a defense verdict. Not only did the juror do what he/she promised he/she would do but there was no evidence on the record the juror had deviated from his/her word. This is why failure to poll further was error, because it allowed the unnamed juror's note to go unrebutted and the defect created by the Juror Note was cemented into the record.

Defendants' final argument in response to the jury polling topic is that an error such as this was not of great enough character and magnitude as to deprive Plaintiff of a fair trial. In light of the Juror Note, this would mean that the unanimity of jury trial in Illinois is not necessary. Defendants cite to the case of *Tirado v. Slavin* in support. 2019 IL App (1st) 181705, ¶31 (Ill.App. 1 Dist., 2019) However, a doctor rendering aid to a juror during opening statements is radically different than a juror sending a note informing the Court he/she was voting in direct violation of his/her oath by disregarding the facts and the law and was voting **only** to end deliberations. The present situation involves the sanctity of unanimous jury trials as set forth in the Illinois Constitution. The case in *Tirado* involves potential influence of a jury by the actions of a party. These are apples and oranges.

Defendants end this argument with a citation that perfectly summarizes the inapplicability of their arguments and the reason why Plaintiff's arguments must prevail. Defendants stated that a "juror **changing their vote** during deliberations is not of such character and magnitude that it deprive[d] a party of a fair trial, but instead is simply a process that occurs in every true deliberation." (Defendants' Response p. 17)(internal citations and quotations omitted, emphasis

added) The inclusion of the language "changing their vote" is where Defendants' argument strays from the present situation. The Juror Note does not say "I am leaning towards voting for the Plaintiff" followed by a vote for a defense verdict. If that happened then there is a very different argument and then it could be argued that this unnamed juror did change their vote, which does happen. Instead, the Juror Note contained an unequivocal declaration that the unnamed juror was going to vote for the defense for a legally improper reason. The issue is the failure to poll cemented the idea the only documented reason for the juror voting for the defense was for a legally improper one.

As there was never any evidence the author of the Juror Note changed his/her mind then the only question left is whether a juror's statement that he/she was abandoning the law, the facts, and their convictions, for the sole reason of ending deliberations was a permissible reason to agree to a verdict? Plaintiff argues it is not. "[A] verdict should be sustained where the intention of the jury can be ascertained from the verdict with reasonable certainty…" *People v. Manning*, 50 N.E.2d 118, 119, 320 Ill.App. 143, 147 (Ill.App. 1 Dist. 1943) Similarly, a jury must "decide the case strictly on the evidence as presented in the courtroom." *People v. Taylor*, 462 N.E.2d 478, 482, 78 Ill.Dec. 359, 363, 101 Ill.2d 377, 386 (Ill., 1984) Neither was done here.

Defendants seemingly attempt to make the point that all is cured by the *Prim* instruction but this fails to take into account the fact the juror had *already* abandoned his convictions, abandoned his/her charge to decide the case based on the facts and the law, and promised to agree to verdict for an improper reason. The language of the *Prim* instruction includes the following language:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.

> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

(Illinois Pattern Jury Instructions – Civil 1.05) The Juror Note contained multiple violations of the *Prim* instruction before the *Prim* instruction was even issued. The Juror Note promised a verdict that did not represent the considered judgment of the author of the Juror Note. The Juror Note promised a verdict that was returned with violence to the unnamed juror's individual judgment. The Juror Note promised a verdict that did not agree to the verdict upon impartial consideration of the evidence, rather the author discarded the notion of returning a verdict based upon the evidence as the author believed the evidence to be contrary to the verdict. The Juror Note promised a verdict that would be rendered by surrendering the author's honest conviction as to the evidence solely to return a verdict. Once the Juror Note was issued, it was clear the continued deliberations of the jury did not serve a purpose other than to force a verdict.

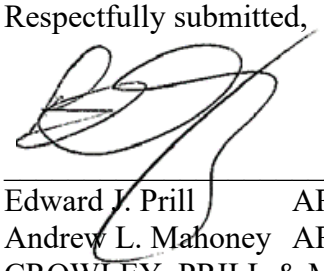
This is why the issuance of the *Prim* instruction *after* the Juror Note was delivered was coercive. Illinois appellate courts have held that issuance of the *Prim* instruction may be coercive and the test is whether, "upon examination of all the facts, the language used in the instruction coerced or interfered with the deliberation of the jurors to the prejudice of the defendant or hastened the verdict. There is less danger of coercion when the instruction is given to a jury which has not reached a deadlock." *People v. Plantinga*, 477 N.E.2d 1299, 1305, 87 Ill.Dec. 771, 777, 132 Ill.App.3d 512, 521 (Ill.App. 1 Dist.,1985)(internal citations and quotations omitted) This is

why Plaintiff repeatedly makes the argument the defect created by the Juror Note could not be cured. The Juror Note poisoned the deliberations and it was a hung jury before the *Prim* instruction was ever issued.

The error in the polling arises because nothing was ever done to offer an antidote to the poisoned process. Giving a juror who abandoned his convictions and his oath and promised to agree to a verdict to end deliberations the instruction that it is his/her responsibility to come to a verdict does nothing to cure the poison.

Defendants' arguments regarding jury polling ultimately support Plaintiff's contention that the defect created by the Jury Note could not be cured. The idea of obtaining an affirmative statement from a juror where the juror abandons his documented, legally improper reasoning for agreeing to a verdict is inherently messy and raises too many questions regarding coercion, etc. Therefore, the defect cannot be cured and a mistrial should have been declared.

Respectfully submitted,



Edward J. Prill ARDC#6271392
Andrew L. Mahoney ARDC#6334171
CROWLEY, PRILL & MAHONEY
3012 Division Street
Burlington, IA 52601
T: (319) 753-1330
F: (319) 752-3934
eprill@crowleyprillattorneys.com
amahoney@crowleyprillattorneys.com

ATTORNEYS FOR Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on *Thursday, January 11, 2024*, the undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses, as set forth below:

by: ____ U.S. Mail ____ Fax X EDMS ____ Overnight _____ E-mail

Copy to:

Mr. James Hansen
Schmiedeskamp, Robertson, Neu & Mitchell LLP
525 Jersey St.
Quincy, IL 62301
jhansen@srnm.com
Attorney for Quincy Medical Group and Kreg Love

//s// Ed Prill_____
Ed Prill – Attorney

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
ADAMS COUNTY, ILLINOIS

ROBERT L. SCHILLING,

Plaintiff,

v.

QUINCY PHYSICIANS & SURGEONS CLINIC, S.C. d/b/a QUINCY MEDICAL GROUP and KREG J. LOVE, D.O.

Defendants.

No. 2018 L 53

ORDER

Cause called for hearing on Plaintiff's Motion for New Trial on February 21, 2024. Parties appear by and through counsel. The Court having received the written submittals of the parties and having heard oral argument, hereby finds and orders as follows:

1. Plaintiff's Motion for New Trial pursuant to 735 ILCS 5/2-1202(b) is hereby denied and the relief requested by Plaintiff in his Motion is hereby denied;

2. Pursuant to Illinois Supreme Court Rule 303, now that the Motion for New Trial is denied as of the date of this order, the Judgment entered by the Court in this matter on November 13, 2023, shall be deemed a final and appealable judgment.

So Ordered.

Enter: 3/6/24

Judge Scott D. Larson

c: Edward J. Prill
James A. Hansen

I hereby certify that a copy hereof was:
Mailed, postage prepaid ☐ Faxed ☐
Personally delivered ☐ Emailed ☐
SAO ☐ PO ☐ Counsel ☒
Plaintiff ☒ Defendant ☒
3/6/24 Date
Deputy Clerk

This form is approved by the Illinois Supreme Court and is required to be accepted in all Illinois Appellate Courts.

Instructions

Check the box to the right if your case involves parental responsibility or parenting time (custody/visitation rights) or relocation of a child.

Just below "Appeal to the Appellate Court of Illinois," enter the number of the appellate district that will hear the appeal and the county of the trial court.

If the case name in the trial court began with "In re" (for example, "In re Marriage of Jones"), enter that name. Below that, enter the names of the parties in the trial court, and check the correct boxes to show which party is filing the appeal ("appellant") and which party is responding to the appeal ("appellee").

To the far right, enter the trial court case number, the trial judge's name, and the Supreme Court Rule that allows the appellate court to hear the appeal.

☐ THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a).

APPEAL TO THE APPELLATE COURT OF ILLINOIS

FOURTH **District**

from the Circuit Court of

Adams **County**

In re

ROBERT L. SCHILLING

Plaintiffs/Petitioners *(First, middle, last names)*

☑ **Appellants** ☐ **Appellees**

v.

QUINCY PHYSICIANS & SURGEONS CLINIC, S.C., d/b/a QUINCY MEDICAL GROUP and KREG J. LOVE, D.O.

Defendants/Respondents *(First, middle, last names)*

☐ **Appellants** ☑ **Appellees**

Trial Court Case No.: 2018L53

Honorable SCOTT D. LARSON
Judge, Presiding

Supreme Court Rule: Rule 303

NOTICE OF APPEAL (CIVIL)

In 1, check the type of appeal.

For more information on choosing a type of appeal, see *How to File a Notice of Appeal.*

1. Type of Appeal:

☑ Appeal
☐ Interlocutory Appeal
☐ Joining Prior Appeal
☐ Separate Appeal
☐ Cross Appeal

In 2, list the name of each person filing the appeal and check the proper box for each person.

2. Name of Each Person Appealing:

Name: ROBERT (*First*) L. (*Middle*) SCHILLING (*Last*)

☑ Plaintiff-Appellant ☐ Petitioner-Appellant

OR

☐ Defendant-Appellant ☐ Respondent-Appellant

Name: _____
First *Middle* *Last*

☐ Plaintiff-Appellant ☐ Petitioner-Appellant

OR

☐ Defendant-Appellant ☐ Respondent-Appellant

In 3, identify every order or judgment you want to appeal by listing the date the trial court entered it.

3. List the date of every order or judgment you want to appeal:

11/02/2023
Date

11/13/2023
Date

03/06/2024
Date

In 4, state what you want the appellate court to do. You may check as many boxes as apply.

4. State your relief:

☐ reverse the trial court's judgment *(change the judgment in favor of the other party into a judgment in your favor)* and ☐ send the case back to the trial court for any hearings that are still required;

☑ vacate the trial court's judgment *(erase the judgment in favor of the other party)* and ☑ send the case back to the trial court for a new hearing and a new judgment;

☐ change the trial court's judgment to say: _____

☑ order the trial court to: GRANT PLAINTIFF'S MOTION FOR NEW TRIAL AND INSTRUCT THE COURT TO ADD MISDIAGNOSIS TO THE JURY INSTRUCTIONS.

☐ other: _____

and grant any other relief that the court finds appropriate.

If you are completing this form on a computer, sign your name by typing it. If you are completing it by hand, sign by hand and print your name. Fill in your address, telephone number, and email address, if you have one.

/s/ Edward J. Prill
Your Signature

Edward J. Prill
Your Name

3012 Division Street
Street Address

Burlington, Iowa 52601
City, State, ZIP

eprill@crowleyprillattorneys.com
Email

3197531330
Telephone

6271392
Attorney # (if any)

All appellants must sign this form. Have each additional appellant sign the form here and enter their complete name, address, telephone number, and email address, if they have one.

Additional Appellant Signature

/s/ Andrew L. Mahoney
Signature

Andrew L. Mahoney
Name

3012 Division Street
Street Address

Burlington, Iowa 52601
City, State, ZIP

amahoney@crowleyprillattorneys.com
Email

3197531330
Telephone

6334171
Attorney # (if any)

GETTING COURT DOCUMENTS BY EMAIL: You should use an email account that you do not share with anyone else and that you check every day. If you do not check your email every day, you may miss important information, notice of court dates, or documents from other parties.

PROOF OF SERVICE ***(You must serve the other party and complete this section)***

In **1a**, enter the name, mailing address, and email address of the party or lawyer to whom you sent the document.

In **1b**, check the box to show how you sent the document, and fill in any other information required on the blank lines.

In **1b**, check the box to show how you are sending the document.

CAUTION: If you and the person you are sending the document to have an email address, you **must** use one of the first two options. Otherwise, you may use one of the other options.

In **c**, fill in the date and time that you sent the document.

In **2**, if you sent the document to more than 1 party or lawyer, fill in **a**, **b**, and **c**. Otherwise leave **2** blank.

1. I sent this document:
   a. To:
      Name: James (*First*) Middle Hansen (*Last*)
      Address: 525 Jersey St (*Street, Apt #*) Quincy (*City*) Illinois (*State*) 62301 (*ZIP*)
      Email address: jhansen@srnm.com
   b. By:
      - [x] An approved electronic filing service provider (EFSP)
      - [ ] Email *(not through an EFSP)*

      Only use one of the methods below if you do not have an email address, or the person you are sending the document to does not have an email address.
      - [ ] Personal hand delivery to:
        - [ ] The party
        - [ ] The party's family member who is 13 or older, at the party's residence
        - [ ] The party's lawyer
        - [ ] The party's lawyer's office
      - [ ] Mail or third-party carrier
   c. On: 03/21/2024 (*Date*)
      At: 05:00 (*Time*) [ ] a.m. [x] p.m.
2. I sent this document:
   a. To:
      Name: (*First*) (*Middle*) (*Last*)
      Address: (*Street, Apt #*) (*City*) (*State*) (*ZIP*)
      Email address:
   b. By:
      - [ ] An approved electronic filing service provider (EFSP)
      - [ ] Email *(not through an EFSP)*

      Only use one of the methods below if you do not have an email address, or the person you are sending the document to does not have an email address.
      - [ ] Personal hand delivery to:
        - [ ] The party
        - [ ] The party's family member who is 13 or older, at the party's residence
        - [ ] The party's lawyer
        - [ ] The party's lawyer's office
      - [ ] Mail or third-party carrier
   c. On: (*Date*)
      At: (*Time*) [ ] a.m. [ ] p.m.

In 3, if you sent the document to more than 1 party or lawyer, fill in a, b, and c. Otherwise leave 2 blank.

3. I sent this document:

a. To:

Name: _____
First *Middle* *Last*

Address: _____
Street, Apt # *City* *State* *ZIP*

Email address: _____

b. By:

☐ An approved electronic filing service provider (EFSP)

☐ Email *(not through an EFSP)*

Only use one of the methods below if you do not have an email address, or the person you are sending the document to does not have an email address.

☐ Personal hand delivery to:

- ☐ The party
- ☐ The party's family member who is 13 or older, at the party's residence
- ☐ The party's lawyer
- ☐ The party's lawyer's office

☐ Mail or third-party carrier

c. On: _____
Date

At: _____ ☐ a.m. ☐ p.m.
Time

Under the Code of Civil Procedure, 735 ILCS 5/1-109, making a statement on this form that you know to be false is perjury, a Class 3 Felony.

If you are completing this form on a computer, sign your name by typing it. If you are completing it by hand, sign by hand and print your name.

I certify that everything in the Proof of Service is true and correct. I understand that making a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

/s/ Edward J. Prill
Your Signature

Edward J. Prill
Print Your Name

ARDC#6271392
Attorney # (if any)

2024 IL App (4th) 240520-U

NO. 4-24-0520

FILED
December 11, 2024
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ROBERT L. SCHILLING, Plaintiff-Appellant, v. QUINCY PHYSICIANS & SURGEONS CLINIC, S.C., d/b/a QUINCY MEDICAL GROUP and KREG J. LOVE, D.O., Defendants-Appellees.	))))))))	Appeal from the Circuit Court of Adams County No. 18L53 Honorable Scott D. Larson, Judge Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed a judgment in favor of defendants in a medical malpractice action where the trial court acted within its discretion by (1) denying plaintiff's counsel's motions for a mistrial, (2) refusing to conduct further polling of the jury, and (3) using the phrase "failed to diagnose" rather than the word "misdiagnosed" in a jury instruction.

¶ 2 Plaintiff, Robert L. Schilling, filed this medical malpractice action against defendants, Dr. Kreg J. Love, D.O., and his employer, Quincy Physicians & Surgeons Clinic, S.C, d/b/a Quincy Medical Group. The jury returned a verdict in favor of defendants. Plaintiff appeals, arguing the trial court should have (1) declared a mistrial, (2) polled jurors more extensively following the verdict, and (3) given a jury instruction that used the word "misdiagnosed" rather than the phrase "failed to diagnose" to recite plaintiff's allegations of negligence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The issues plaintiff raises on appeal do not require us to present a detailed overview of the evidence. It will suffice to say the following. Between January 12 and 26, 2017, plaintiff, who was diabetic, sought treatment for left foot pain and swelling with his primary care physician, Dr. Love. Dr. Love treated plaintiff with antibiotics for an infection (cellulitis) before eventually referring him to a podiatrist. On January 30, 2017, the podiatrist ordered an X-ray and discovered plaintiff had multiple fractures, which required surgeries and ultimately amputation of his foot.

¶ 5 Summarized briefly, plaintiff's theory was that Dr. Love was negligent for failing to order an X-ray and failing to instruct plaintiff not to bear weight on the affected foot. According to plaintiff, had his fractures been diagnosed sooner through an X-ray, he would have recovered without surgery or amputation. Defendants' theory was that Dr. Love properly treated plaintiff for cellulitis, which was the most likely cause of the symptoms at the time. Defendants also contended it was impossible to know whether plaintiff's outcome would have been different had Dr. Love ordered an X-ray or instructed plaintiff not to bear weight on the affected foot.

¶ 6 Plaintiff's complaint alleged that Dr. Love "[f]ailed to diagnose" the fractures. During trial, plaintiff took the position that such failure to diagnose inherently constituted a misdiagnosis. At the jury instructions conference, plaintiff tendered an instruction that included the proposition that he claimed defendants were negligent in that they "[f]ailed to diagnose broken bones." However, plaintiff tendered an alternative to this instruction that included the proposition that he claimed defendants were negligent in that they "[m]isdiagnosed the broken bones." Defense counsel objected to the alternative instruction on three bases: (1) there was no testimony that Dr. Love misdiagnosed broken bones, (2) this instruction was confusing and misleading, and (3) the word "misdiagnosed" came from the medical records of plaintiff's surgeon, who was not offered as a standard-of-care expert. Plaintiff's counsel argued that this was an issue of semantics, as a

failure to diagnose was the same thing as a misdiagnosis. Plaintiff's counsel also told the trial court he was "not sure there was ever confirmation or not about" the cellulitis and that he was "just referencing the misdiagnosis of the broken bones." The court ruled it would instruct the jury about a failure to diagnose rather than a misdiagnosis. The court reasoned it did not want to confuse the jury or have the jury read too much into the word "misdiagnosed," as there was no evidence here of "what you would traditionally consider a misdiagnosis." The court added: "I think it's improper to use misdiagnosed here when we're talking about the negligence of a family practice physician and the [word] misdiagnosis came from the expert testimony of the orthopedic surgeon." Despite the court's ruling, and without an objection from the defense, during closing argument, plaintiff's counsel asserted the jury could decide what it meant and whether it was important that plaintiff's surgeon used the word "misdiagnosed."

¶ 7 After six days of testimony, the jury began its deliberations at 2:25 p.m. on November 1, 2023. At 5:10 p.m., the jury submitted a note asking whether it was to read and interpret plaintiff's allegations of negligence "as they are written or as we preceive [*sic*] the evidence." With the parties' agreement, the trial court instructed the jury that the instructions contained the law and the jury's job was to determine and apply the facts to the law. At 6:22 p.m., the jury sent a note asking questions about the meanings of "negligance" [*sic*] and "standard of care." With the parties' agreement, the court instructed the jury that those terms were defined in the instructions given previously. At 7 p.m., the jury submitted the following note: "It is very obvious that we will not come to an agreement unanimously. Sitting in here for hours and hours will not make a difference." Neither the parties nor the court proposed giving a *Prim* instruction at this point, which is a pattern instruction designed for purportedly deadlocked juries. See Illinois Pattern Jury Instructions, Civil, No. 1.05 (approved Dec. 8, 2011) (hereinafter IPI Civil No. 1.05);

People v. Prim, 53 Ill. 2d 62 (1972). Rather, the parties agreed to provide the following response to the jury: "Please continue your deliberations. We will check in with you shortly." At 7:55 p.m., the court discharged the jury for the evening.

¶ 8 The jury recommenced deliberations at 9:02 a.m. on November 2, 2023. At 9:40 a.m., a juror who was never identified submitted the following handwritten note, which the parties refer to in their appellate briefs as the "Surrender Note":

> "For the record, I will sign the verdict for the defendant Dr[.] Love. I am firm in my support for the plaintiff Mr. Shilling.
>
> I am only signing to end this deliberation and put an end to this. After many hours of discussion and debate, we cannot come to a unanimous decision. Therefore, it's my position to sign *only* to end this.
>
> I 100% believe Dr[.] Love was negligent in providing the appropriate care to his patient. As a result, Mr[.] Schilling['s] overall care was impacted because of Dr[.] Love[']s decision.
>
> Once again, I am *only* agreeing to sign to end this." (Emphases in original.)

Plaintiff's counsel moved for a mistrial, arguing the Surrender Note showed the jury was deadlocked and that any forthcoming verdict would be a product of undue influence. Defense counsel, on the other hand, requested the trial court give the jury a *Prim* instruction. Plaintiff's counsel contended a *Prim* instruction might have been appropriate the previous night but that the issue raised by the Surrender Note was "incurable."

¶ 9 The trial court denied the motion for a mistrial and explained to the parties it would give a *Prim* instruction without seeking to ascertain the numerical division of the jury. The court denied plaintiff's counsel's request to attempt to determine which juror authored the Surrender

Note. The court brought in the jury, confirmed with the foreperson that she believed the jury was deadlocked, and provided the following *Prim* instruction both orally and in writing:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous. It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case."

The jury returned to its deliberations at 10:10 a.m.

¶ 10 At 10:20 a.m., the jury sent the following note: "Please provide clarification of the phrase 'deviation from standard of care' and 'professional negligence.' Is this to be interpreted as 'neglect?' WE NEED A CLEAR INTERPRETATION! What exhibit is Dr[.] Honnakers [*sic*] deposition? Would like to review." With the parties' agreement, the trial court provided the following response to these questions: "The information requested is contained in the jury instructions you have been provided[.] The exhibits for you to review are in your possession."

¶ 11 While the jury was still deliberating, plaintiff's counsel reiterated his request for a mistrial based on the Surrender Note. The trial court denied this motion.

¶ 12 At 11 a.m., the jury informed the trial court it had reached a verdict. Plaintiff's counsel requested the court poll the jurors before the verdict was announced. The court ruled it would poll the jurors afterward by asking each person whether this was then and is now his or her verdict. The court explained to the parties that if any juror provided a dissent or a "qualified answer" during polling, the court would have a further discussion with that juror outside the presence of the other jurors. Plaintiff's counsel responded that although he did not object to this procedure, he believed the Surrender Note indicated a juror already had a "dissenting opinion." Thus, plaintiff's counsel proposed that even if all jurors indicated during polling that this was then and is now their verdict, the court should ask each juror whether he or she wrote the Surrender Note; upon identifying the author, the court should ask that juror whether he or she had changed his or her opinion since writing the Surrender Note. The court denied plaintiff's counsel's request for enhanced polling of this nature.

¶ 13 The jury returned a verdict for defendants signed by all 12 jurors. However, the foreperson also signed an incomplete verdict form for plaintiff before crossing out her name. The trial court's clerk asked each juror whether this was then and is now his or her verdict. All jurors responded, "Yes." The court discharged the jury but asked the foreperson to stay. Upon questioning by the court, the foreperson explained she signed the verdict form for plaintiff erroneously. She confirmed that the defense verdict was her decision, and nobody forced her or coerced her to sign a verdict for defendants.

¶ 14 After the trial court discharged the foreperson, plaintiff's counsel stated for the record that juror No. 34 (who was not the foreperson) gave "a clear and obvious hesitation" and sighed loudly before saying "Yes" to the clerk's question during polling. Neither defense counsel nor the court disputed plaintiff's counsel's representation that juror No. 34 hesitated and sighed.

Plaintiff's counsel renewed his motion for a mistrial and asked the court not to accept the verdict. The court denied those requests, reasoning that (1) sentiments like those documented in the Surrender Note are likely often expressed during jury deliberations though not reduced to writing and (2) it would improperly delve into the jury's decision-making process to question jurors after they answered "Yes" to the clerk's polling question. The court entered a judgment on the verdict.

¶ 15 Plaintiff filed a postjudgment motion, which the trial court denied. The court reconfirmed its views that it appropriately (1) gave a *Prim* instruction in response to the Surrender Note, (2) denied plaintiff's counsel's request for enhanced polling, and (3) refused to instruct the jury using the word "misdiagnosed." Plaintiff filed a timely notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 A. Requests for a Mistrial

¶ 18 Plaintiff maintains the trial court abused its discretion by failing to declare a mistrial upon receiving the Surrender Note. Plaintiff's central points are: (1) he was deprived of his right to a unanimous jury verdict, as the Surrender Note showed that a juror disagreed with the verdict and would side with the majority merely to end deliberations; (2) the Surrender Note was indicative of juror misconduct; (3) the *Prim* instruction was inherently coercive in light of the Surrender Note and because the jury was already hopelessly deadlocked; and (4) the verdict was an improper "compromise verdict." A common theme through plaintiff's argument is that the juror who authored the Surrender Note made a promise, guarantee, or assurance to return a verdict based on improper considerations. Plaintiff submits this juror fulfilled such a promise and that it would be speculation to assume the juror changed his or her opinions during deliberations after receiving the *Prim* instruction.

¶ 19 Defendants respond that the trial court properly denied plaintiff's counsel's motions for a mistrial and provided a *Prim* instruction. In defendants' view, plaintiff merely speculates that the juror who wrote the Surrender Note did not change his or her opinions during deliberations after receiving the *Prim* instruction.

¶ 20 Generally, "[a] mistrial should be granted when there is an occurrence of such character and magnitude as to deprive a party of a fair trial and the moving party demonstrates actual prejudice as a result." *Tirado v. Slavin*, 2019 IL App (1st) 181705, ¶ 31. One such example is where a trial court determines the jury is "hopelessly deadlocked." *People v. Wolf*, 178 Ill. App. 3d 1064, 1066 (1989). Whether to declare a mistrial is a matter committed to the "sound discretion of the trial court." *Slavin*, 2019 IL App (1st) 181705, ¶ 29. A reviewing court will not reverse such a decision absent an abuse of discretion, which occurs where "no reasonable person would take the view adopted by the trial court." *Slavin*, 2019 IL App (1st) 181705, ¶ 29.

¶ 21 Trial courts are in the best position to evaluate whether continued deliberations will allow the jury to reach a just verdict. *People v. Kimble*, 2019 IL 122830, ¶ 37. Some factors a court may consider in deciding whether to declare a mistrial based on jury deadlock include: " '(1) statements from the jury that it cannot agree, (2) the length of the deliberations, (3) the length of the trial, (4) the complexity of the issues, (5) the jury's communications to the judge, and (6) the potentially prejudicial impact of continued forced deliberations.' " *People v. Richardson*, 2022 IL App (2d) 210316, ¶ 40 (quoting *Kimble*, 2019 IL 122830, ¶ 38).

¶ 22 If a trial court does not believe a mistrial is warranted based on deadlock, the court must avoid employing "coercive means" to pressure the jury to reach a verdict. *Kimble*, 2019 IL 122830, ¶ 37. One historically common method of coercion was to tell jurors who held a minority viewpoint they should reevaluate their positions and consider that the jurors in the majority heard

the same evidence. *Prim*, 53 Ill. 2d at 73. Sensitive to the possibility of coercion, in *Prim*, our supreme court adopted the American Bar Association's standards for addressing potentially deadlocked juries. *Prim*, 53 Ill. 2d at 75-76. Those standards are codified as IPI Civil No. 1.05:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But, do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case."

¶ 23 Upon a close review of the circumstances here, we hold that the trial court did not abuse its discretion by denying plaintiff's counsel's requests for a mistrial. The parties took six days to present their evidence, much of which was medical testimony. Approximately four and a half hours into its first day of deliberations on November 1, 2023, the jury submitted a note that stated: "It is very obvious that we will not come to an agreement unanimously. Sitting in here for hours and hours will not make a difference." Although the court would have been within its discretion to give the *Prim* instruction at this point, neither party asked for such instruction. Rather,

cognizant that the jury would soon be sent home for the evening, the parties agreed to tell the jury: "Please continue your deliberations. We will check in with you shortly."

¶ 24 Thirty-eight minutes after the jury recommenced its deliberations on November 2, 2023, the trial court received the Surrender Note:

> "For the record, I will sign the verdict for the defendant Dr[.] Love. I am firm in my support for the plaintiff Mr. Shilling.
>
> I am only signing to end this deliberation and put an end to this. After many hours of discussion and debate, we cannot come to a unanimous decision. Therefore, it's my position to sign *only* to end this.
>
> I 100% believe Dr[.] Love was negligent in providing the appropriate care to his patient. As a result, Mr[.] Schilling['s] overall care was impacted because of Dr[.] Love[']s decision.
>
> Once again, I am *only* agreeing to sign to end this." (Emphases in original.)

Contrary to what plaintiff asserts, the Surrender Note was not necessarily a promise, guarantee, or assurance that the author was intent on returning a verdict for an improper purpose. A different reasonable interpretation is that the author simply wanted to get the court's attention about the perceived deadlock, especially considering the court did not provide any guidance when the jury first declared itself deadlocked the previous night. Significantly, after approximately six hours of deliberations, the jury did not return a verdict contemporaneously with the Surrender Note, but instead awaited a response from the court. This strongly suggests the Surrender Note was a plea for guidance rather than confirmation that the author had truly and permanently abandoned his or her duties and convictions. Although plaintiff is correct that the Surrender Note was not something

that is "routine" in a jury trial, the court reasonably rejected plaintiff's counsel's suggestion that the situation was incurable and required declaring an immediate mistrial.

¶ 25 For the same reasons, plaintiff's claim that the Surrender Note evinced juror misconduct is unpersuasive. "Courts should be exceedingly vigilant and careful that there is no misconduct on the part of jurors that would reflect any question on the honesty of their performance." *Miller v. Scandrett*, 326 Ill. App. 631, 637 (1945). Here, plaintiff contends that "(1) the juror assured the Court he was going to enter a verdict solely to end deliberations" and "(2) this statement represents a clear unwillingness to continue deliberations or deliberate in good faith in such a way where the author was willing to reverse his or her opinion." However, the juror who authored the Surrender Note plainly was taking his or her duties seriously, as he or she was passionate at that point in time, based on the evidence presented, that plaintiff proved his malpractice claim. This is a far cry from *United States v. Fattah*, 914 F.3d 112, 140-43 (3d Cir. 2019), a case plaintiff cites in which a juror purportedly had an axe to grind with the government, refused to listen to other jurors, screamed at them, put his hand on a fellow juror, and told a deputy he was intent on a hung jury. Here, the trial court reasonably viewed the Surrender Note as an indication the jury continued to view itself as deadlocked, not that a juror had committed misconduct.

¶ 26 The trial court was careful to follow the procedures outlined in the committee notes to IPI Civil No. 1.05 and to avoid any response to the Surrender Note that could be deemed coercive. For example, plaintiff's counsel requested the court question jurors about the Surrender Note. The court properly refused to do so, as this likely would have identified both the author of the note and whether the author was the lone holdout. See IPI Civil No. 1.05, Committee Note (establishing that before giving this instruction, a court should question the foreperson about

whether the jury is able to reach a verdict but avoid soliciting information about the numerical division of the voting). Some courts have suggested that when a court learns both the numerical division of a purportedly deadlocked jury and the identities of the jurors holding the minority viewpoint, that increases the risk that jurors in the minority may feel the court is singling them out through further instructions. See *United States v. Williams*, 547 F.3d 1187, 1207 (9th Cir. 2008) (recognizing the possible coercive effect of instructing a jury to continue deliberating when the court knows both the numerical split of the jury and the identities of the jurors holding the minority viewpoint). Here, the court acted within its discretion by limiting its inquiry to asking the foreperson whether she believed the jury was deadlocked. When she responded in the affirmative, the court gave the *Prim* instruction.

¶ 27 Plaintiff argues the *Prim* instruction was unwarranted, as the jury was already hopelessly deadlocked by the time the trial court received the Surrender Note. However, the court had discretion to assess whether and when the jury was hopelessly deadlocked. Considering the length and complexity of this trial, it is not surprising the jury failed to reach a consensus within the first five or six hours of deliberations. We also consider that the jury had not been given a *Prim* instruction before the court received the Surrender Note. *Contra Richardson*, 2022 IL App (2d) 210316, ¶¶ 41, 43 (holding that the trial court should have declared a mistrial where jury deliberations exceeded the length of the trial testimony and where the jury declared itself deadlocked after being given a *Prim* instruction).

¶ 28 Plaintiff maintains the *Prim* instruction itself was coercive in light of the Surrender Note. This argument is untenable, as our supreme court adopted this instruction specifically to avoid the possibility of undue coercion and trial courts are given broad discretion to determine whether circumstances require a mistrial. When a court determines a jury should be instructed on

a subject, the court must use the pattern instruction approved by our supreme court unless such instruction "does not accurately state the law." Ill. S. Ct. R. 239(a) (eff. Apr. 8, 2013). Thus, there is no merit to plaintiff's position that the *Prim* instruction was coercive.

¶ 29 Accordingly, we hold that the trial court acted within its discretion by giving the *Prim* instruction rather than declaring a mistrial upon receiving the Surrender Note.

¶ 30 Plaintiff also presents arguments about events that happened after the trial court gave the *Prim* instruction. Specifically, plaintiff argues he was deprived of his right to a unanimous verdict, the verdict was akin to an improper "compromise verdict," and it would be speculation to assume the author of the Surrender Note changed his or her opinion about the case during subsequent deliberations. These arguments are unpersuasive. Plaintiff was not deprived of his right to a unanimous verdict, as all 12 jurors signed a verdict for the defense and all jurors answered in the affirmative when asked whether this was then and is now their verdict. Additionally, in a strictly legal sense, an improper "compromise verdict" is where a jury assesses damages far lower than what the uncontested evidence warrants, thus raising suspicions that the jury did not actually agree about liability. See *Svetanoff v. Kramer*, 80 Ill. App. 3d 575, 578 (1979). Here, the jury returned a verdict for the defense and awarded plaintiff no damages. There was no discrepancy between liability and damages, so this does not meet the criteria for an improper "compromise verdict."

¶ 31 Plaintiff's argument about speculation does not change our analysis. Juries deliberate in private, so courts are not privy to the discussions. The premise of plaintiff's contention regarding speculation is that the juror who authored the Surrender Note made a promise, guarantee, or assurance that he or she would return a verdict for the defense despite his or her convictions and then fulfilled that promise. We repeat, an unknown juror wrote the Surrender Note

before the trial court gave a *Prim* instruction, which expressly informed jurors not to surrender their honest conviction as to the weight or effect of evidence solely because of the opinion of fellow jurors or for the mere purpose of returning a verdict. We presume that jurors follow the instructions given to them. *First Midwest Bank v. Rossi*, 2023 IL App (4th) 220643, ¶ 174. After being given the *Prim* instruction, the jury continued its deliberations, asked for clarification regarding the law governing the merits of the case, and returned a verdict for the defense. All jurors then indicated during polling that this was then and is now their verdict. Under the circumstances, plaintiff's point about speculation does not convince us the court abused its discretion by denying a mistrial.

¶ 32 B. Plaintiff's Counsel's Request for Additional Polling

¶ 33 Plaintiff next argues that in light of the Surrender Note, the trial court erred by refusing to poll the jury beyond asking each juror whether this was then and is now his or her verdict. Plaintiff submits it was also "problematic" that one juror "sighed loudly, and hesitantly answered 'yes' " during poling. Plaintiff notes that the court questioned the foreperson about coercion, and he contends the court should have done the same for all the jurors. Plaintiff proposes that if additional polling of the jury was inappropriate, that only supports his previous argument that the court should have declared a mistrial upon receiving the Surrender Note.

¶ 34 Defendants respond that the trial court properly refused to conduct further polling of the jury after each juror answered "Yes" to the clerk's question. According to defendants, pauses and sighs do not require additional polling. Defendants argue that additional polling would have intruded on the jurors' decision-making process.

¶ 35 Our supreme court has said the following about polling juries:

"When a jury is polled, each juror should be questioned individually as to whether the announced verdict is his own. The poll should be conducted so as to obtain an unequivocal expression from each juror. [Citation.] The very purpose of the formality of polling is to afford the juror, before the verdict is recorded, an opportunity for free expression unhampered by the fears or the errors which may have attended the private proceedings of the jury room. [Citation.] In conducting the poll, each juror should be examined to make sure that he truly assents to the verdict. [Citation.]

The trial court may use its discretion in selecting the specific form of question to be asked in the polling process as long as a juror is given the opportunity to dissent. The double-barreled question used in this case, 'Was this then and is this now your verdict?' has often been used in Illinois. [Citation.] We see nothing wrong with using this question in polling the jury. However, if a juror indicates some hesitancy or ambivalence in his answer, then it is the trial judge's duty to ascertain the juror's present intent by affording the juror the opportunity to make an unambiguous reply as to his present state of mind. [Citation.] Jurors must be able to express disagreement during the poll or else the polling process would be a farce and the jurors would be bound by their signatures on the verdict. Before the final verdict is recorded, a juror has the right to inform the court that a mistake has been made, or to ask that the jury be permitted to reconsider its verdict, or to express disagreement with the verdict returned. If the trial judge determines that any juror does dissent from the verdict submitted to the court, then the proper remedy is for the trial court, on its own motion if necessary, to either direct the jury to retire for

further deliberations [citation], or to discharge it [citation]." (Internal quotation marks omitted.) *People v. Kellogg*, 77 Ill. 2d 524, 527-29 (1979).

Nevertheless, courts "must be careful not to make the polling process another arena for deliberations." *Kellogg*, 77 Ill. 2d at 529.

¶ 36 When reviewing a challenge to polling procedures, we must keep in mind that the trial court was tasked with determining whether each juror freely assented to the verdict. *Kellogg*, 77 Ill. 2d at 529. Whereas we review the cold record, the trial court heard each juror's response and observed each juror's demeanor and tone of voice. *Kellogg*, 77 Ill. 2d at 529. We will overturn a verdict based on polling procedures only where "the interrogation precludes the opportunity to dissent or if the record reflects that the juror in the poll has not in fact assented to the verdict." *Kellogg*, 77 Ill. 2d at 529. "A trial court's determination as to a juror's voluntariness of his assent to the verdict will not be set aside unless the trial court's conclusion is clearly unreasonable." *People v. Cabrera*, 116 Ill. 2d 474, 490 (1987).

¶ 37 We hold that the trial court's method of polling the jury was not clearly unreasonable and did not amount to an abuse of discretion. The question the clerk asked each juror—whether this was then and is now his or her verdict—is a standard polling question that has been approved by our courts. See *Kellogg*, 77 Ill. 2d at 528 (our supreme court saw "nothing wrong" with this question); *People v. Carter*, 2020 IL App (3d) 170745, ¶¶ 15, 28 (finding no defect in polling where each juror answered in the affirmative when asked, " '[W]as this your verdict when you signed it and is it still your verdict[?]' "). Significantly, no juror here responded to the polling question by manifesting dissent to the verdict or providing an ambiguous answer. *Contra Kellogg*, 77 Ill. 2d at 529-30 (additional polling was required where a juror asked during polling whether she could change her vote); *People v. Beasley*, 384 Ill. App. 3d 1039, 1044-45,

1049 (2008) (additional polling was required where a juror responded to the question " '[I]s this your verdict?' " by shaking his head and saying, " 'Um—I have to say, yes, I guess.' "). We recognize the parties seem to agree that juror No. 34 paused and sighed before answering "Yes" when asked whether this was and is his verdict. We remain mindful that the trial court had the opportunity to hear this juror's response and to observe his demeanor and tone of voice (*Kellogg*, 77 Ill. 2d at 529) but did not discern a need to question him further. We cannot substitute our judgment for the trial court's as to whether juror No. 34 exhibited such a degree of hesitancy during his response as to justify further questioning.

¶ 38 Moreover, plaintiff directs our attention to no case holding that a juror pausing or sighing during polling requires a trial court to continue polling that juror. To the contrary, case law establishes that a juror must either express dissent to the verdict or provide an ambiguous response to require the court to continue polling that juror. See *People v. McDonald*, 168 Ill. 2d 420, 461, 463 (1995) (no additional polling was necessary where a juror said that, "[r]eluctantly," this was and is his verdict at a death sentence hearing); *Cabrera*, 116 Ill. 2d at 489-90 (where a juror answered "Yes" when asked whether this was and is her verdict, there was no need to conduct further polling, even though this juror also attempted to explain herself before being cut off by the trial court); *Ferry v. Checker Taxi Co.*, 165 Ill. App. 3d 744, 748, 753 (1987) (although a juror initially "expressed some doubt as to the verdict" when questioned by defense counsel, because all jurors subsequently told the trial court that this was then and is now their verdict, there was no need for additional polling); *People v. Herron*, 30 Ill. App. 3d 788, 789, 791-92 (1975) (no error in accepting a verdict where one juror responded to the question " 'Was this and is this now your verdict?' " by saying, " 'It wasn't, but it is.' "). As stated in *People v. Hill*, 14 Ill. App. 3d 20, 22 (1973): "We do not see how hesitating before answering 'Yes' can be construed to be an answer

of 'No.' If the hesitation proves anything it is that the juror was careful about her answer." Here, the purpose of polling was satisfied, as the jurors each had an " 'opportunity to disclose any coercion, mistake, or dissention from the verdict announced.' " *Carter*, 2020 IL App (3d) 170745, ¶ 28 (quoting *People v. Williams*, 97 Ill. 2d 252, 308 (1983)).

¶ 39 In arguing that the polling was insufficient, plaintiff relies heavily on the circumstances surrounding the Surrender Note. In his reply brief, plaintiff goes so far as to assert: "The fact the Surrender Note was issued prior to polling should be treated as if one of the jurors had read the contents of the Surrender Note verbatim into the record during polling before stating 'yes.' " However, plaintiff cites no case law indicating that events occurring before the jury reaches a verdict are relevant to a challenge of polling procedures. As we discussed in the preceding section, a juror wrote the Surrender Note before the trial court gave a *Prim* instruction, before the jury reached a verdict, and before the court polled the jury about the verdict. By obtaining affirmative responses from each juror indicating this was then and is now their verdict, the court assured there was no dissent to the verdict and that it was not the product of coercion. That is what the law governing polling requires.

¶ 40 Plaintiff proposes the trial court should have continued its polling to obtain "an affirmative statement or documentation by the author [of the Surrender Note] that he or she reconsidered his or her position and was signing the verdict form for a proper reason in accordance with the author's beliefs and oath as a juror." However, absent a manifestation of dissent or an ambiguous answer during polling, the court reasonably determined that identifying and interrogating the author of the Surrender Note was unnecessary. Again, a court "must be careful not to make the polling process another arena for deliberations." *Kellogg*, 77 Ill. 2d at 529; see *Freeman v. City of Chicago*, 2017 IL App (1st) 153644, ¶¶ 23-28, 75 (finding no abuse of

discretion where (1) the jury returned an initial verdict, (2) a juror indicated during polling that she was under duress and did not want this to be her verdict, (3) the trial court allowed the jury to continue deliberating the next morning, (4) the jury returned a second identical verdict after only five to seven additional minutes of deliberating, (5) all jurors indicated that this was their verdict, and (6) the trial court entered judgment on the second verdict).

¶ 41 The trial court's decision to ask additional questions of the foreperson does not change our analysis. The foreperson signed conflicting verdict forms but crossed her name out on one. The court acted within its discretion by ensuring the foreperson meant to sign a verdict for the defense. The circumstances did not require the court to conduct a broader inquiry of the entire jury to ascertain the author of the Surrender Note.

¶ 42 C. Jury Instruction

¶ 43 Finally, plaintiff argues the trial court erred by refusing to use the word "misdiagnosed" in an instruction outlining plaintiff's allegations of negligence. According to plaintiff, there was a basis in the evidence to use the word "misdiagnosed." Citing *Willis v. Khatkhate*, 373 Ill. App. 3d 495, 504-05 (2007), plaintiff further submits that failures to "make the ultimate diagnosis" and to "offer proper treatment" inherently constitute a misdiagnosis. Citing one of the jury notes, plaintiff asserts that "the jurors were struggling to understand" the instruction containing the phrase "failed to diagnose."

¶ 44 Defendants respond that the trial court properly used the phrase "failed to diagnose" rather than "misdiagnosed." According to defendants, the verdict for the defense shows the jury determined Dr. Love did not negligently fail to diagnose plaintiff's fractures, which means there is no issue about any misdiagnosis. Defendants submit that plaintiff's point about "misdiagnosed" being synonymous with "failed to diagnose" proves plaintiff suffered no prejudice from the way

the court instructed the jury ("[I]f the terms are interchangeable and the same, it would not have made a difference.").

¶ 45 "[C]ivil litigants are entitled to have the jury instructed on the issues presented, the applicable legal principles, and the facts that must be proved to support a verdict." *Bailey v. Mercy Hospital & Medical Center*, 2021 IL 126748, ¶ 41. " 'While the threshold for permitting an instruction in a civil case is modest, the standard for reversing a judgment based on failure to permit an instruction is high,' " as the trial court has discretion as to which instructions to use. *Bailey*, 2021 IL 126748, ¶ 41 (quoting *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007)). When determining whether the court abused its discretion, we consider whether the instructions, taken as a whole, were sufficiently clear, not misleading, and fairly and correctly stated the law. *Bailey*, 2021 IL 126748, ¶ 42. "Ultimately, a reviewing court should grant a new trial only when the trial court's refusal to give a tendered jury instruction results in serious prejudice to the party's right to a fair trial." *Bailey*, 2021 IL 126748, ¶ 42.

¶ 46 We hold that the trial court did not abuse its discretion when instructing the jury. Both versions of the subject instruction plaintiff tendered apparently were derived from Illinois Pattern Jury Instructions, Civil, No. 20.01 (approved Aug. 24, 2023), which identifies the issues in the pleadings and directs courts to "[s]et forth in simple form without undue emphasis or repetition those allegations of the complaint as to the negligence of the defendants which have not been withdrawn or ruled out by the court and are supported by the evidence." (Emphases omitted.) In his complaint, plaintiff alleged Dr. Love "[f]ailed to diagnose" his fractures. The trial evidence was undisputed that Dr. Love never diagnosed fractures, but instead treated plaintiff with antibiotics for cellulitis. Plaintiff's counsel told the court during the discussion on the subject jury instruction that he was "not sure there was ever confirmation or not about" the cellulitis and that

he was "just referencing the misdiagnosis of the broken bones." Given that plaintiff's counsel conceded it was unknown whether plaintiff had cellulitis when he saw Dr. Love, the word "misdiagnosed" had the potential to mislead or confuse the jury, inviting the jury to focus on whether plaintiff had cellulitis when the real dispute was whether Dr. Love was negligent for missing the fractures. The court also appropriately recognized that part of plaintiff's counsel's basis for wanting to use the word "misdiagnosed" was that plaintiff's surgeon, who was not a standard-of-care expert, used that word. Furthermore, plaintiff's reliance on *Willis* does not convince us that the court abused its discretion under the circumstances presented. The appellate court in *Willis* addressed a question regarding tort immunity, not a discretionary ruling on a jury instruction.

¶ 47 Plaintiff has also failed to demonstrate prejudice from the way the trial court instructed the jury. His assertion that the jury struggled to understand the subject instruction is unfounded, as the jury never asked any question specifically about the phrase "failed to diagnose." Moreover, if plaintiff is correct that failure to diagnose is inherently a misdiagnosis, then he suffered no prejudice from the court using a synonymic phrase. We further note that during closing argument, plaintiff's counsel asserted the jury could decide what it meant and whether it was important that plaintiff's surgeon used the word "misdiagnosed" in her medical records. Thus, despite the court's ruling regarding the subject jury instruction, plaintiff got his point across to the jury that he believed Dr. Love misdiagnosed him.

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the trial court's judgment.

¶ 50 Affirmed.