

No. 131411

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IN THE SUPREME COURT OF ILLINOIS

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ROBERT SCHILLING,	)	On leave to Appeal from the
	)	Appellate Court, Fourth District
Appellant,	)	Case No. 4-24-0520
	)	
v.	)	On Appeal from the Circuit Court
	)	of the Eighth Judicial Circuit,
QUINCY PHYSICIANS AND SURGEONS)	)	Adams County Case No. 18L53
CLINIC, S.C. D/B/A QUINCY MEDICAL )	)	
GROUP and KREG LOVE,	)	Honorable Scott D. Larson
	)	Judge Presiding
Appellees.	)	

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**BRIEF OF APPELLEES QUINCY PHYSICIANS AND SURGEONS CLINIC,  
S.C. D/B/A QUINCY MEDICAL GROUP AND KREG LOVE**

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## STATEMENT OF FACTS

### **I. Background.**

Plaintiff Robert Schilling was a type one diabetic, who had been diagnosed with diabetes on the day after his 13<sup>th</sup> birthday. (R1515). As of January 12, 2017, he was 46 years old and had lived with diabetes for over 30 years. At this time, Plaintiff was working as a fabricator for Quincy Metal Fabricators. (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 injury to his foot, Plaintiff sought treatment from his primary care provider Dr. Kreg Love, on January 12, 2017, reporting he was unable to walk correctly because of the pain in his foot. (E380). Dr. Love diagnosed Plaintiff with arthralgia of the left foot and cellulitis of the left lower extremity. (E380). Plaintiff returned to Dr. Love again on January 16, 2017, complaining of increased redness and pain and pain on the bottom of his foot, with swelling going up into his ankles. (E383). Dr. Love found that Plaintiff had not responded to the prior medication, and stopped it, prescribing a different medication. (E383). Dr. Love instructed Plaintiff to follow-up in 2-3 days if no improvement. (E383).

Plaintiff came back a week later, on January 23, 2017, reporting improved swelling, but excruciating pain in the foot. (E387). Dr. Love prescribed medication for the pain and continued to treat the infection. (E387, R1139-1141, R1144). Plaintiff called Dr. Love on January 25, 2017, stating his foot was still swollen. (E395). Dr. Love set up an appointment to see Plaintiff the next day. Plaintiff saw Dr. Love on January 26, 2017 (E397). Plaintiff

reported that he felt his foot was getting better but still not fully resolved. (E397). Dr. Love referred Plaintiff to a podiatrist, Dr. Freel. (R 1192-1193).

On January 30, 2017, Plaintiff saw Dr. Freel, a podiatrist, who x-rayed his foot and found he had fractured it. (R1304). Plaintiff was ordered to be non-weightbearing on his foot from that point on. (R1306-1307). Dr. Freel then referred Plaintiff to Dr. Stewart, an orthopedic surgeon that was employed by Defendant Quincy Medical Group ("QMG") at the time. (R1262).

Plaintiff saw Dr. Stewart on February 14, 2017. (E408). Dr. Stewart noted that Plaintiff had Charcot neuropathy with injury (without normal pain response due to neuropathy), which led to increased blood flow to the fractured area and caused microfractures leading to fragmentation and collapse of the bone as the Plaintiff continued to walk on it and, at this point, the "entire architecture of the midfoot has been destroyed." (E413).

Dr. Stewart performed multiple operations at Blessing Hospital in order to save Plaintiff's foot and noted in those 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 would treat Mr. Schilling and, after several surgeries, eventually amputated Mr. Schilling's foot below the knee. (E232-233). Dr. Stewart would also perform a stump revision of the below-the-knee amputation. (E282).

Plaintiff brought professional negligence claims against Defendant Love for his failure to diagnose/misdiagnosis of Plaintiff's broken foot, failed to make a differential diagnosis of broken bones, failed to instruct Plaintiff to be non-weightbearing, etc., during the January 2017 visits, alleging that said negligence caused Plaintiff to have his foot amputated due to Defendant Love's negligent acts. (C18-43). Trial began on October 23, 2023. (R144). The evidence was submitted to the jury for deliberation on November 1, 2023. (R2069).

## **II. 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, C15). The jury sent another note at 6:22 p.m. (R2072, C16). Then, at approximately 7:00 p.m., the jury sent a note that stated "It is obvious that we will not come to an agreement unanimously. Sitting in here for hours and hours will not make a difference." (C17, R2073). After consulting with the parties, the trial court informed the jury to keep deliberating and later released the jury at 7:55 P.M. (R2073-2078).

The next morning, November 2, 2023, the jury began deliberating at 9:02 A.M. and the jury sent a note at 9:40 A.M., stating:

"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, its 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. Love's decision. Once again, I am only signing to end this."

(C18, R2082-2083) (this note is referred to in the Appellant's Brief as the "Surrender Note" and Appellee will refer to it as the same herein).

Following receipt of the Surrender Note, Plaintiff moved for a mistrial (R2083-2085). This motion was denied by the trial court (R2089).

The trial court brought the jury back into the room and the 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 instructions. (R2094-2096). Plaintiff again moved for a mistrial, which was denied. (R2097-2102). Later that morning, the trial court was notified that the jury had reached a verdict. (R2102-2103). The verdict was for the Defendants. (R2102-2103).

### **III. The Polling.**

After being notified the jury had reached a verdict, Plaintiff moved the trial court for additional polling. (R2103). Plaintiff's position was, in order for a verdict to be proper, there must be some sort of indication that the author of the note changed his or her mind about the Surrender Note. (R2103-2112).

The trial court notified the parties it would only ask one question of each juror, whether the defense verdict was the verdict of each juror, and then if the juror answered affirmatively, 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. (R2105-2112).

During the polling of the jury, when asked if the verdict was his or hers, each juror answered affirmatively. (R2114-2116). After 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 in order to clarify the verdict form and to indicate that "she signed willingly the verdict form under no duress, coercion." (R2123).

### **ARGUMENT**

Plaintiff presents two issues for this Court's consideration in his appeal. The first issue questions whether the trial court erred in not granting a mistrial following the issuance of the Surrender Note. Plaintiff contends the Surrender Note constituted juror misconduct, warranting a mistrial. However, this argument overlooks the trial court's discretion and the context in which the Surrender Note was issued. The trial court, having observed the proceedings and the jurors' conduct, was well within its discretion to deny a mistrial, as the circumstances did not indicate any misconduct.

The second issue challenges the trial court's decision not to conduct further polling of the jury in light of the Surrender Note, alleging the trial court abused its discretion. Plaintiff argues additional polling was necessary to ensure the verdict's validity. However, the trial court, being in the best position to assess the situation, determined further polling

was unnecessary. The trial court's decision was based on a comprehensive evaluation of the circumstances, including the jury's subsequent unanimous agreement on the verdict.

Therefore, the trial court did not err by denying the Motion for Mistrial or for its decision not to conduct further jury polling.

**I. The Trial Court Did Not Err by Denying the Motion for Mistrial.**

The trial court did not err by denying Plaintiff's Motion for Mistrial following the receipt of the Surrender Note. Contrary to Plaintiff's belief, the Surrender Note was not "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." (*See Appellant's Brief* at 12). Plaintiff's argument is purely speculative and fails to take into consideration all the circumstances surrounding the Surrender Note. As held by the appellate court, the Surrender Note is not a promise, guarantee, or assurance the author was returning an improper verdict. *Robert L. Schilling v. Quincy Physicians & Surgeons Clinic, S.C., d/b/a Quincy Medical Group and Kreg J. Love D.O.*, 2024 IL App (4<sup>th</sup>) 240520-U, ¶ 24. The verdict came after further questions from the jury, hours after the Surrender Note, and subsequent jury polling concluding all the jurors agreed to the verdict.

Plaintiff correctly states Illinois law regarding the jury deliberation process. (*See Appellant's Brief* at 12). In Illinois, trial courts are not to delve too deeply into the juror's deliberative process or rationale. *People v. Walker*, 2021 IL App (1st) 200985-U, ¶ 44 ("[b]ecause we are not privy to jurors' subjective thoughts, we must examine the trial court's instructions to see if they likely "imposed such confusion or pressure on the jury to reach a verdict that the accuracy and integrity of the verdict returned becomes uncertain.").

However, Plaintiff states the Surrender Note was unlike *Walker* and actually gave the court a view into the author's subjective thoughts. Plaintiff goes so far as to label the Surrender Note as the author's precise rationale. At the same time, Plaintiff states any interpretation that does not fall into their view is considered speculation and cannot be allowed.

Plaintiff states no case in Illinois gives guidance on what to do in this situation. (*See Appellant's Brief* at 12). But as the trial court noted, this is not the first time in which jurors have reached a deadlock or even said they would return a verdict solely to be released from jury duty. Further, Illinois already has guidance for giving noncoercive instruction to juries who are dealing with a deadlock. As is the position of the Defendants, "this is precisely why the Court, not the jurors, decide when deliberations have been finalized and/or when coercion has occurred." (*Walker*, slip order at ¶48). The trial court used this guidance in determining whether a mistrial was unnecessary. Therefore, there was no juror misconduct surrounding the Surrender Note and the trial court did not err by denying the Motion for Mistrial.

**A. Law governing mistrials.**

As correctly stated by Plaintiff, 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 ending inconclusively because the jury cannot agree on a verdict. *Redmond v. Socha*, 216 Ill. 2d 622, 640 (2005) (citing Black's Law Dictionary). If a jury is deadlocked, a mistrial must be declared. *Id.* The court has discretion in determining if a jury is truly deadlocked. *People v. Andrews*, 364 Ill. App. 3d 253, 269 (2d. Dist. 2006).

"In determining how long a jury should be permitted to deliberate before a mistrial is declared and the jury is discharged, no fixed time can be prescribed, and great latitude must be accorded to the trial court in the exercise of its informed discretion." *People v. Wolf*, 178 Ill.App.3d 1064, 1066 (3d. Dist. 1989). The decision to grant a mistrial rests within the broad discretion of the trial court and its ruling will not be disturbed on appeal unless there is a clear abuse of that discretion. *People v. Taylor*, 2025 IL App (1st) 240275-U, ¶ 31.

**B. The Surrender Note was not juror misconduct.**

This case does not involve any evidence of jury misconduct. Plaintiff argues the Surrender Note was juror misconduct and was evidence of a juror who refused to deliberate and would deliver a verdict in opposition to his or her own beliefs. (*See Appellant's Brief* at 14). This argument is both wrong and misleading. There is no evidence that any jury nullification occurred, or a juror chose to disregard the law.

"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 (2d. Dist. 1945). Plaintiff contends the Surrender Note is juror misconduct that could not be cured and that the trial court should have declared a mistrial based on the Surrender Note. Plaintiff relies on the *Fattah* case to support his argument that the juror committed juror nullification. In *Fattah*, the court found there was juror misconduct after one juror accused another juror of misconduct following the refusal to follow the law. *United States v. Fattah*, 914 F.3d 112, 140-43 (3d. Cir. 2019). Plaintiff makes the drastic statement that this case is more defined and certain than in

*Fattah* as to juror misconduct. (See *Appellant's Brief* at 15). However, the juror who authored the Surrender Note was taking his or her duties seriously based on the evidence presented. The appellate court found this argument persuasive as well because it found the situation here was "a far cry from *United States v. Fattah*, 914 F.3d 112, 140-43 (3d Cir. 2019)." (*Schilling*, slip order at ¶ 25). The appellate court went on to explain that *Fattah* was a case where 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. *Id.* The case here does not resemble the facts in *Fattah*. The appellate court found the Surrender Note "was an indication the jury continued to view itself as deadlocked, not that a juror had committed misconduct." *Id.* The appellate court reasoned the juror must have listened to the *Prim* instruction and not abandoned their beliefs as Illinois courts presume jurors follow the instructions given to them. *First Midwest Bank v. Rossi*, 2023 IL App (4th) 220643, ¶ 174. Thus, the Surrender Note is not comparable to *Fattah* and was not evidence of juror misconduct.

Plaintiff tries to rationalize his argument by asking this Court to engage in an entirely different hypothetical situation. He asks this Court to consider the implications if a court were to receive a juror note where the juror declared it was going to convict a defendant only because of their race. (See *Appellant's Brief* at 16). Plaintiff argues that a note like this is defective and cannot be cured and a mistrial must be declared. Plaintiff concedes that this is a hypothetical, but that does not negate the fact that this is still a made-up fact pattern not at issue here. *Id.* Defendants recognize there may be certain situations where a mistrial is necessary based on a note to the court. But 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. To apply a blanket rule that any note a juror sends describing any confusion or frustration should create a mistrial would erode the discretion of trial court judges, who are in the best position to make decisions based on the specific facts of the case.

Plaintiff makes the bold assertion it is "indisputable" that the Surrender Note constitutes misconduct and accuses the appellate court of creating interpretations of the Surrender Note beyond that of the words on the paper. (*Appellant's Brief* at 16). To support his argument, Plaintiff relies solely on the idea that the appellate court interpreted the Surrender Note "to be something other than what the plain language of the Surrender Note actually says." *Id.* What the appellate court actually did was interpret the Surrender Note based on the totality of the circumstances, a concept Plaintiff fails to recognize throughout his Brief. (*See Schilling*, slip order at ¶ 24). Plaintiff refuses to look beyond the plain language of the Surrender Note and take into account all other circumstances. For example, (1) the complexity of the case; (2) the original note; (3) jury deliberations for less than five hours on the first day; (4) the Surrender Note coming less than an hour after starting deliberations started the next morning; (5) the *Prim* instruction; (6) the further deliberation from the jury; (7) the additional questions asked by the jury; (8) the verdict; and (9) the subsequent affirmative polling of the jury. *People v. Hryciuk*, 5 Ill. 2d 176, 183 (1954) (finding the determination of juror misconduct must be determined upon each case's individual facts and circumstances).

This was a complex medical malpractice case that began on October 23, 2023, and the jury began deliberations on November 1, 2023. (R2069). The trial included six days of testimony from several experts. The jury issued several notes throughout its deliberations. On November 1, 2023, the jury submitted a note asking whether it was to read and interpret plaintiff's allegations of negligence as written or how they perceived it. (R2070). 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. (R2070-2071). Later that evening, the jury sent a note asking questions about the meanings of "negligence" and "standard of care." (R2072). With the parties' agreement, the court instructed the jury that those terms were defined in the instructions given previously. (R2072). Before breaking for the evening, 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." (R2073). At that point, neither the parties nor the court proposed giving the *Prim* instruction. (R2074). The trial court, in conjunction with all counsel, sent the jurors home shortly thereafter. (R2074-2078). The following morning, after the Surrender Note and a *Prim* instruction, 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." (R2095). Taking these events into consideration, the appellate court's rationale is not based off speculation or baseless interpretations, but the facts of the case.

Plaintiff's claims regarding the juror's alleged change of mind and the Surrender Note are speculative and unsupported by evidence. The verdict and juror polling demonstrate a consistent and unanimous decision, free from misconduct. The Surrender Note, when viewed in its full context, does not invalidate the verdict. Plaintiff's arguments fail to meet the necessary burden of proof that the trial court abused its discretion and should not be used to challenge the legitimacy of the jury's decision.

**C. The verdict was unanimous.**

The Illinois Constitution guarantees the right to trial by jury and requires the verdict of the jury to be unanimous. *Sinopoli v. Chicago Rys. Co.*, 316 Ill. 609 (1925). This is well-founded law that Defendants do not dispute. However, Plaintiff incorrectly attempts to state the Surrender Note "proves" that the verdict here was not unanimous. (*See Appellant's Brief at 19*). In his argument, Plaintiff relies on *Filipiak*:

"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, 527, 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. Plaintiff argues the contents of the Surrender Note invalidate the entire verdict because it is a "direct and un rebutted impeachment of the verdict." (*See Appellant's Brief at 19*). Plaintiff states the only way to find otherwise involves changing the plain meaning of the Surrender Note, which is speculation. *Id.*

Plaintiff was afforded all the rights under the Illinois Constitution to a unanimous verdict. During the trial, the jury returned a verdict in favor of the Defendants and all twelve

jurors signed the verdict form confirming this verdict. This verdict came after a *Prim* instruction to the jury and after several more hours of deliberation. Moreover, all twelve jurors answered affirmatively when they were subsequently polled about their verdict. The trial court and appellate court both followed the guidance from *Filipiak*. Looking at all parts of the record together, the sufficiency of the verdict based on the evidence and record was reasonably upheld. Plaintiff's argument is pure speculation that the juror did not or could not have changed his or her mind after writing the note, and as Plaintiff stated himself, "Our courts and juries do not base their decision upon speculation but upon evidence and law." (*Appellant's Brief* at 19).

The Surrender Note does not prove the verdict was not unanimous. Plaintiff's argument to the contrary relies on the idea that a juror can never change his or her mind. As stated above, trial courts cannot delve into a jury's deliberative process. (*Walker*, slip order at ¶ 44). It is absolutely possible that a juror could change his or her mind, especially given the court providing a *Prim* instruction and the jury deliberating further. Therefore, the Surrender Note did not create a non-unanimous verdict.

**D. The trial court's instructions were not coercive.**

Plaintiff argues the trial court was coercive because: 1) the jury was deadlocked; and 2) because of that deadlock any instruction given by the court had to be coercive. This argument lacks a logical foundation and fails to consider the role of the trial court in guiding the jury towards a fair and impartial verdict.

It is within the trial court's discretion to determine which instructions will be given, and its decision will not be disturbed absent an abuse of discretion. *Bruntjen v. Bethalto Pizza, LLC*, 2014 IL App (5th) 120245, ¶ 152. Abuse of discretion is dependent upon

whether the instructions fairly, fully, and comprehensively inform the jury of the relevant legal principles based on the circumstances. *Id.*

Even though the appellate court agreed that the Surrender Note was not routine, it still found the trial court acted within its discretion not to grant a mistrial. "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." (*See Schilling*, slip order at ¶ 24). The appellate court acknowledged more went into this situation than just the Surrender Note. As stated previously, the trial court was also looking at: (1) the complexity of the case; (2) the original note; (3) jury deliberations for less than five hours on the first day; (4) the Surrender Note coming less than an hour after deliberations started the next morning; (5) the *Prim* instruction; (6) the further deliberations from the jury; (7) the additional questions asked by the jury; (8) the verdict; and (9) the subsequent affirmative polling of the jury. Thus, the trial court did not abuse its discretion in giving further instructions to the jury.

### **1. The jury was not deadlocked.**

Trial judges have the duty to provide guidance to a jury that is not hopelessly deadlocked. *People v. Prim*, 53 Ill.2d 62, 64 (1972). 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 it is "hopelessly deadlocked." *People v. Green*, 91 Ill.App.3d 1085, 1090 (1st Dist. 1980).

Plaintiff looks to the factors laid out in *Kimble* to argue there was a deadlock that warranted a mistrial. These factors 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." *Kimble*, 2019 IL 122830 at ¶ 38 .

For factors one and five, the trial court was well within its discretion to give a *Prim* instruction and order the jury to keep deliberating based on the facts in this case. There was a note sent just a few hours into deliberations saying the jury was deadlocked. The Surrender Note came the next day after the jurors started deliberations again. As the appellate court stated, it would be reasonable for the trial court to see this Surrender Note as an extension of the original note and for it to be a plea for guidance rather than jury misconduct. (*See Schilling*, slip order at ¶ 24). Plaintiff claims the Surrender Note is automatically jury misconduct without taking any of these other factors into consideration.

The second, third, and fourth factors all weigh in Defendants favor too. The parties presented this complex medical case over six days. When the original note was sent, it was late in the day, after the jurors had deliberated for hours, and the jury was sent home soon after. The Surrender Note at issue came less than an hour after the jury started deliberating the next day. It was reasonable for the court to urge the jurors to keep deliberating after the presentation of so much evidence and over complicated medical topics.

For the sixth factor, there was no prejudicial impact on further deliberations. The trial court did not determine the jury was "hopelessly deadlocked" as Plaintiff suggests. (*See Appellant's Brief* at 24). As the appellate court stated, the trial court had the discretion to assess whether the jury truly was deadlocked. (*Schilling*, slip order at ¶ 27). The court went on to state it is not surprising that considering the complexity of the trial the jury

could not come to a consensus within the first few hours. *Id.* Thus, the trial court was well within its discretion to give the *Prim* instruction.

## **2. The instruction for further deliberations was not coercive.**

The trial court's decision to give the jury a *Prim* instruction was not coercive. "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." *People v. McCoy*, 405 Ill.App.3d 269, 275 (1st Dist. 2010). Plaintiff attempts to require the trial court to accept the juror's statement in the Surrender Note as definitive before the *Prim* instruction was given and abandons the idea that the juror could change his or her mind through further deliberations. Plaintiff provides no evidence that the juror did not change his or her mind, despite the evidence presented he or she did. The juror not only agreed to the verdict but also signed the verdict and verbally asserted that the verdict was his or hers. (R2114-R2116). This is not evidence of any coercion, but rather direct proof that the *Prim* instruction worked as intended and was effective in facilitating jury deliberations. (*Schilling*, slip order at ¶ 24).

When jurors say they cannot reach a unanimous verdict, they are given *Prim*, and then, after further deliberations, when reaching 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, there is evidence the jury was deliberating and debating the issues after

*Prim* because the Court received an additional note with questions seeking clarification for things it appears they were discussing. (R2094-2096).

Plaintiff states any instruction, *Prim* or otherwise, was coercive because the author of the Surrender Note stated they would sign a verdict only to end it. (*See Appellant's Brief* at 26-27). In that argument, Plaintiff essentially 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 or 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 unreasonable and unsupported by the facts and the law. Also, the appellate court determined the trial court was careful not to be coercive in its instruction. (*Schilling*, slip order at ¶ 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." *Id.*

As discussed by the appellate court, a *Prim* instruction is given to avoid the possibility of coercion, not for coercion. (*Schilling*, slip order at ¶ 28). Further, trial courts are given broad discretion to determine whether circumstances require a mistrial. *Id.* 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).

The trial court adhered to the procedures outlined in the committee notes to IPI Civil No. 1.05, ensuring its response to the Surrender Note was not coercive. (*Schilling*, slip order at ¶ 26). For instance, when Plaintiff's counsel suggested questioning jurors

specifically about the Surrender Note, the court rightly declined. *Id.* As the appellate court pointed out, such questioning could have revealed the note's author and whether they were the sole dissenting juror. *Id.*; *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). Thus, there is no merit to Plaintiff's position that the *Prim* instruction was coercive. The trial court acted within its discretion by giving the *Prim* instruction rather than immediately declaring a mistrial.

## **II. The Trial Court Did Not Err by Denying Plaintiff's Motion for Further Polling.**

The trial court's decision to poll the jury was an appropriate response to the Surrender Note, and the trial court did not err by not initiating more in-depth jury polling. Plaintiff's position is that if the "defect" of the Surrender Note could be cured, it would have to be by some sort of retraction or reconsideration by the same juror who wrote the note that he or she recanted the Surrender Note. (*See Appellant's Brief* at 31). The trial court conducted polling of the jury, but Plaintiff claims the trial court erred in not continuing the polling to determine which juror wrote the Surrender Note.

After the verdict, Plaintiff sought further interrogation of the jurors to cure the alleged coercion of the jury. (R2111). The trial court asked each juror, "[w]as this then and is this now your verdict?" to which each juror answered "yes." (R2114-R2116). However, Plaintiff believes further inquiry would lead to the juror admitting they wrote the Surrender Note. Rather than accepting the jurors' answers as they were given, Plaintiff believes the trial court should be required to then probe into each juror to determine if they had changed

their mind in delivering the verdict. But as the appellate court held, "[t]he 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." (*Schilling*, slip order at ¶ 37). Based on the circumstances, the trial court's method of polling was appropriate. *People v. Kellogg*, 77 Ill. 2d 524, 528 (1979) ("Was this then and is this now your verdict?" has often been used in Illinois"); *People v. Carter*, 2020 IL App (3d) 170745, ¶¶ 15, 28 (finding no defect in polling where each juror affirmatively answered when asked, "[W]as this your verdict when you signed it and is it still your verdict[?]").

**A. The Surrender Note did not necessitate further polling.**

The circumstances around the Surrender Note did not necessitate more in-depth polling of the jury. In support of his position to the contrary, Plaintiff cites *Chandler* and states the 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*, 88 Ill.App.3d 644, 649 (1st Dist. 1980). Plaintiff also cites *Marotta*:

"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.*, 108 Ill.2d 168, 176(1985). "It is not the duty of the court to delve into the jurors' decision-making process." *People v. Cabrera*, 116 Ill. 2d 474, 489 (1987). Further, "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." *Id.* at 490.

When the jury polling was conducted, each juror answered that such verdict was and is their verdict. (R2114-R2116). The trial court gave each juror the opportunity to dissent, but such dissent did not occur. The trial court properly conducted post-deliberation polling and allowed each juror the opportunity to answer without interruption or interference, as is required by the trial court.

Under the holding in *Cabrera*, the Court's decision to decline conducting a more intrusive process was well grounded because there was no duty to continue doing so. Instead, the Court must give "the jurors sufficient opportunity to state whether they were in agreement or disagreement with the jury's verdict." *Cabrera*, 116 Ill. 2d at 489. That is precisely what the trial court did in this instance. Each juror was given sufficient opportunity to verbally assent or dissent to the verdict. The appellant in *Cabrera* also attempted to submit an affidavit of the 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.

Following the holding in *Cabrera*, it would have been inappropriate for the trial court to require more questioning of the jurors on their verdict since there was no evidence at the time of polling that any juror wanted to change their verdict.

In an attempt to bolster his argument, Plaintiff presented this Court with the following hypothetical polling question and answer:

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.

*(See Appellant's Brief at 32).*

Defendants concede that if this hypothetical situation happened during polling, then further polling might be appropriate. But it did not happen, even after the trial judge gave the juror the opportunity to do just that. Each juror stated the verdict was their verdict and their verdict alone. Plaintiff's hypothetical juror answer goes beyond what is reasonable and suggests this Court should supersede the jurors' written verdict and affirmative responses in favor of a prior statement written by an unknown person. However, there is no evidence that is appropriate here, and doing so would be improper.

Simply, there was nothing to cure because there was no defect. Plaintiff's argument that an affirmative statement or documentation by the author that he or she reconsidered her position from the Surrender Note was unnecessary given the verdict and all the affirmative answers from the jurors when asked about the verdict.

**B. There is no evidence of clear juror hesitancy requiring further polling.**

Plaintiff argues the record reflects that a juror showed hesitancy during polling by "giving a long pause, sighing loudly and then hesitantly stating "yes." (*Appellant's Brief at 33*). However, Plaintiff's assertion is inherently subjective. Such observations are open to

individual interpretation and do not provide concrete evidence of the juror's thoughts or intentions. The perception of a "long pause" or a "loud sigh" can vary significantly from one observer to another, and these behaviors do not necessarily indicate uncertainty or disagreement with the verdict.

In Illinois, the polling of a jury is basic to the legal system and a unanimous verdict. *People v. Wheat*, 383 Ill. App. 3d 234, 237 (2d. Dist. 2008). Its purpose is "to determine whether the verdict has in fact been freely reached and remains unanimous." *Id.* "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." *Kellogg*, 77 Ill. 2d at 528.

There is no objective evidence to support the claim that the juror was uncertain or disagreed with the verdict. The juror's verbal affirmation of "yes" when asked if the verdict was theirs is the only clear, objective indication of their agreement with the verdict. Without additional evidence, such as a direct statement from the juror expressing doubt or disagreement, Plaintiff's interpretation remains speculative. The juror's verbal confirmation of the verdict should be given precedence over any perceived non-verbal cues. Any finding to the contrary would force judges to interpret and scrutinize any and all juror movements such as eye rolls, twitches, scratches, stretches, yawns, head movements, sneezes, or even batting an eyelash. Such behaviors are inherently subjective and prone to misinterpretation, essentially forcing judges to become mind readers. The focus should remain on the objective measure of relying on a juror's verbal affirmation or dissent.

If judges are forced to interpret all non-verbal cues during polling, it will inevitably open the floodgates of post-verdict litigation. This would create an impossible standard for judges to apply, and any gesture or involuntary action could be used as grounds for appeal. Therefore, to preserve the efficiency and fairness of the judicial system, any scrutiny during jury polling should be limited to the objective record of a juror's spoken words during the poll.

**C. Illinois law provided the trial court with adequate rationale to not conduct further polling.**

The trial court was correct for not conducting further polling. Plaintiff's argument hinges on the assumption the Surrender Note is a clear indicator of misconduct, a non-unanimous verdict, and coercion. However, the note itself does not provide substantial evidence of these claims. Without concrete proof of misconduct, questioning jurors could be seen as an overreach and an unnecessary intrusion into the deliberative process. As discussed by the appellate court:

"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[?]"") (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." (*Schilling*, slip order at ¶ 37).

Plaintiff relies on *Fattah* and *U.S. v. Kemp*, but those cases involved specific allegations of juror misconduct that warranted limited questioning. In contrast, there is no substantial evidence of such misconduct here. The trial court's decision not to question

jurors was consistent with maintaining the balance between addressing misconduct and preserving the sanctity of the jury deliberation. Unlike in *Fattah* and *Kemp*, where there were credible allegations requiring judicial intervention, the present case does not present a similar level of concern that would necessitate breaching the confidentiality of jury deliberations.

Further, the trial court's decision to ask additional questions of the foreperson was appropriate. 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. (*Schilling*, slip order at ¶ 37).

The Supreme Court of Illinois is clear that we look at the answer provided so long as it is freely given, and a trial court's determination regarding the verdict will not be set aside unless the trial court's conclusion is clearly unreasonable. *Kellogg*, 77 Ill. 2d at 528. ("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"). In this case, all twelve jurors answered in the affirmative unambiguously. Therefore, there was no reason to do further jury polling, and the trial court did not abuse its discretion in that regard.

**CONCLUSION**

For the foregoing reasons, Defendants-Appellees-Respondents, Quincy Physicians & Surgeons Clinic, S.C. d/b/a Quincy Medical Group and Kreg Love, D.O., respectfully ask this Court to affirm the Fourth District Court of Appeals' Rule 23 Order issued on December 11, 2024.

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**SUPREME COURT RULE 341(c) 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 contained in the Rule 341(d) cover, the Rule 341(c) Certificate of Compliance, and the Certificate of Service, is 25 pages.

By: /s/James A. Hansen  
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**PROOF OF SERVICE**

I hereby certify that on the 2<sup>nd</sup> day of June, 2025, 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:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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