



Supreme Court Watch

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Passing Notes and a Sigh, While *Prim*, Is Not Proper Grounds for a Mistrial

In *Robert L. Schilling v. Quincy Physicians and Surgeons Clinic, S.C., d/b/a Quincy Medical Group, et al.*, the Illinois Supreme Court, in a unanimous opinion, has further outlined where not declaring a mistrial is proper. 2026 IL 131411. The *Prim* instruction (IPI Civil No. 1.05) was read and provided to the jury briefly before a unanimous but questioned verdict was reached. Plaintiff's counsel made three motions for a mistrial that were not granted. This should provide some comfort should you find yourself in the unenviable position of after a lengthy trial, during the angst-filled jury deliberations, to be faced with a potential mistrial. Moreover, this is not just the court agreeing with the trial court's discretion, but guidelines as to what depictions of unwillingness of the jury to deliberate means for communications with a jury seemingly threatening to be deadlocked. The case also serves as an analysis of the argument that plaintiffs may make in similar circumstances to forego a defense verdict: that the *Prim* instruction is coercive to the impaneled jury.

It is important to recognize that there remains no mechanical formula for consideration of a mistrial. *Schilling*, 2026 IL 131411, ¶ 38. In a time where the attention spans of jurors is being measured through the lens of consumption of short social media videos, perhaps the time to suggest the reading of the *Prim* instruction as sooner in deliberations is going to be a recurring theme into the future.

The trial that led to these deliberations took just over one week. Plaintiff had a medical malpractice claim in which his leg was ultimately amputated below his knee following a post-surgery infection. *Id.* ¶ 4. Plaintiff alleged the treating physician misdiagnosed a fracture in plaintiff's foot, and that continued use eventually led to his leg amputation. *Id.* ¶¶ 5-6. Approximately 6 years later, the matter went to jury trial in late October 2023. The trial had six days of testimony that included the treating physician and a number of experts. *Id.* ¶ 6.

Over the course of the two days and approximately seven hours of deliberations by the jury, plaintiff's counsel requested a mistrial three times, and the impaneled jury was read the *Prim* instruction once before returning with a unanimous vote for the defendant.

The jury was impaneled shortly after 2 o'clock in the afternoon, following the sixth day of trial. Deliberations continued into the evening, with questions of meanings of negligence and standard of care. *Id.* ¶ 6. At 7 o'clock that evening, the jury provided a note "[i]t is very obvious that we will not come to an agreement unanimously. Sitting in here for hours and hours will not make a difference." Less than an hour later, the court discharged the jury for the evening, following an agreed response to the jury to "[p]lease continue your deliberations. We will check back in with you shortly." *Id.* ¶ 7.

The following morning, the jury resumed deliberations, and less than an hour later, what became known as the "surrender note" was submitted by an unidentified juror. *Schilling*, 2026 IL 131411, ¶ 8. The note stated:

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.**

Id. ¶ 8.

Following the note, defense counsel requested the *Prim* instruction, the plaintiff's counsel sought a mistrial. Plaintiff's counsel contended that while a *Prim* instruction may have been appropriate with the note of the previous evening stating that a difference would not be made, that following the note, a mistrial was appropriate.

The *Prim* instruction, IPI Civil No. 1.05 was read to the jury and provided 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.

Id. ¶ 9; IPI Civil No. 1.05.

Plaintiff's counsel again moved for a mistrial, following the initial reading of the *Prim* instruction. Approximately ten minutes into continued deliberations, another note was sent by the jury, asking questions about "deviation from standard of care" and "professional negligence," and a deposition. *Id.* ¶ 10.

Approximately 40 minutes later, the jury reached a verdict. *Id.* ¶ 12. All jurors were polled, and all answered "yes," but one juror both hesitated and with a loud sigh, answered "yes." *Id.* ¶¶ 13-14. Plaintiff's counsel then suggested the exacerbated juror may well have been the author of the Note, and again moved for a mistrial. *Schilling*, 2026 IL 131411, ¶ 14. The motion for mistrial by plaintiff's counsel was denied. *Id.*

Plaintiff's counsel made a post-trial motion for a new trial arguing that a mistrial should have been declared when the trial court received the note. *Id.* ¶ 15.

As dramatized as the note was by plaintiff's counsel and the plaintiff's bar in *amici* to the court, the appellate court pointed out that the note was not contemporaneous with a verdict, but was after an additional six hours of deliberations, and still awaited a response from the court. In short, it was a request for guidance instead of a statement of true futility. *Id.* ¶ 25.

The court considered two arguments of the plaintiff as to whether the trial court denying plaintiff's motion for mistrial following the note was in error. The court analyzed both of plaintiff's arguments, based on plaintiff's characterizing the note as "a promise, guarantee, or assurance that he or she would return a verdict based on a manifestly improper reason,



as well as plaintiff's argument that the note constituted juror misconduct that should have led to the granting of a mistrial. *Id.* ¶¶ 24-25. The court rejected both of those arguments, agreeing with the appellate court that a reasonable interpretation of the note was, as there was a wait for a response from the trial court, that the note sought guidance instead of being a statement that deliberations could not continue. *Id.* ¶ 25.

Next, the court considered plaintiff's claim the trial court erred in refusing to conduct additional polling of the jury. *Schilling*, 2026 IL 131411, ¶ 44. While the court acknowledged that the trial court is to hear the juror's response, as well as to observe the demeanor and tone of the juror in polling, that the trial court has discretion in determining that the juror has freely assented to the verdict. *Id.* ¶ 47.

In considering the note, the court observed that the juror at the time of polling had an opportunity to disclose any mistake, coercion, or dissent. *Id.* ¶ 49. As with other issues, this was primarily fact-based. The court found that the juror's long pause and loud sigh before answering yes to the polling did not require that polling continue, as it was unambiguous. *Id.* ¶ 56. The court looked to a lack of noted desire by the juror to note disagreement or ask to change their vote. *Id.* ¶ 56.

Finally, the court considered plaintiff's claim that the *Prim* instruction was coercive to the jury following the note. *Id.* ¶ 43. The court found the facts of the case itself supported the appellate court's opinion that the *Prim* instruction was used as intended, to provide guidance to a deadlocked jury, and not inherently coercive. *Id.* ¶ 43.

In short, this is a refreshing of the standards in what behaviors by impaneled jurors do not constitute grounds for a mistrial.

About the Author

John C. Hanson, an Associate with *HeplerBroom LLC* in Edwardsville, focuses his practice on the defense of litigation involving personal injury, products liability, insurance law, governmental matters, and election law. Prior to joining HeplerBroom, Mr. Hanson served as a Madison County Assistant State's Attorney, with experience in both civil and criminal matters. In addition to his State's Attorney experience, he handled the defense of commercial and toxic tort litigation as an associate in a large St. Louis metro-area firm. Mr. Hanson earned his J.D. from Southern Illinois University School of Law, his M.A. from Eastern Illinois University, and a B.S. from Southern Illinois University—Edwardsville.

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