No. 2—10—0225
Order filed April 8, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WILLIAM L. CONRADES III, as Executor of the Estate of Gwen Conrades, Deceased,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellant,	)	
v.	)	No. 05—LK—272
GENEVA FAMILY PRACTICE ASSOCIATES, ROBERT RIVERS, M.D., VALLEY MEDICAL AND CARDIAC, CLINIC, LTD., TIMOTHY WANG, M.D., VALLEY EMERGENCY CARE MANAGEMENT, LTD., STEPHEN, HOLTSFORD, M.D., SANTOSH GILL, M.D., and FOX VALLEY CARDIOVASCULAR CONSULTANTS, LLC.,	)	
Defendants-Appellees	)	
(Kane Cardiology, S.C. and Ross Van Dorpe, M.D., defendants.).	)	Honorable Robert B. Spence, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: Trial court erred when it engaged in an *ex parte* communication with a juror during jury deliberations, but plaintiff failed to raise the probability of prejudice; this court will not assume that duress or coercion was the cause of a juror's distress absent an allegation in the juror's affidavit of an improper extraneous outside influence; the trial court was not required to give the deadlocked jury instruction where the jury was not deadlocked; plaintiff's constitutional argument is forfeited; the trial court properly denied plaintiff's posttrial motion.

Plaintiff, William L. Conrades III, as executor of the estate of Gwen Conrades, Deceased, appeals from an order of the circuit court of Kane County denying his amended posttrial motion. We affirm.

BACKGROUND

This was a medical negligence case filed on May 19, 2005, by plaintiff. The case was heard by a jury, and the jury found in favor of all defendants (Kane Cardiology, S.C. and Dr. Ross Van Dorpe were voluntarily dismissed by plaintiff from the suit before trial). On April 24, 2009, plaintiff filed an amended posttrial motion. Attached to the motion was the affidavit of one of the jurors, Susan Stoffregen. The affidavit alleged as follows:

> "1. I am over the age 21 and I have personal knowledge of the facts stated here and I am competent to testify to these facts if called as a witness.
>
> 2. I served as a juror in the trial of *Conrades v. Geneva Family Practice, et al.*
>
> 3. On March 11, 2009, during a lunch break in the jury room, I was crying and was visibly upset.
>
> 4. Judge Spence's bailiff, Kathy, came into the jury room at this time. She saw me and I told her 'I cannot do this anymore.'

5. Immediately after I told this to the bailiff, she told me she would go tell Judge Spence.

6. A short time later, the bailiff returned and told me that the judge instructed her to tell me to 'Bear with it and see what you can do.'

7. Further affiant sayeth naught."

Using this affidavit, plaintiff alleged in his amended posttrial motion that the trial court erred when it did not inform and consult with the parties about the communication from juror Stoffregen. Plaintiff further alleged that the trial court erred when it failed to interview juror Stoffregen following her communication to the court. Finally, plaintiff urged that the trial court erred when it failed to give the jury the deadlocked-jury instruction.

In denying the amended posttrial motion, the trial court stated that it remembered juror Stoffregen as someone who took "copious notes," "pages and pages of notes," "more notes than any other juror during the trial." The trial court also recalled that juror Stoffregen "took her job [as a juror] very, very seriously." "She was very intense about it," the judge commented. The trial court noted that there was a great deal of emotion in the case, a great deal of "sympathy," and "very moving" testimony. The trial court concluded that juror Stoffregen's emotions were "part of the deliberative process," rather than the product of duress, coercion, or outside influence. The court found the fact that the jury, including juror Stoffregen, was polled, and the jurors reaffirmed their verdict, an important factor in determining that there was no duress or coercion. While the trial court wished in retrospect it had informed the attorneys of the juror communication and sought their advice in fashioning a response, the court found that its actions did not deprive plaintiff of a fair trial.

After plaintiff filed his amended posttrial motion, defendants moved to strike the Stoffregen affidavit on the basis that it improperly impeached the jury's verdict. The trial court granted the motion in part, insofar as the court would not consider it on the issue of whether the jury had been deadlocked.

Following the denial of the amended posttrial motion on February 4, 2010, plaintiff moved to supplement the record with a document setting forth the facts surrounding the court's communication with juror Stoffregen. On March 1, 2010, the trial court allowed the following document to be filed as a "Supplement to Record:"

> "On March 11, 2009, during lunch break, a verbal communication was reported by the bailiff to the court from juror Stoffregen. On this date, Judge Spence had early afternoon criminal sentencing responsibilities at the Kane County Judicial Center which required him to leave the Third Street Courthouse [,] leaving the jury under the supervision of Judge Brawka, who answered one or more questions posed by the jury.
>
> The court sent a verbal response back to the juror through the bailiff. Juror Stoffregen was not interviewed or questioned about the communication and no hearing or investigation was conducted into the communication or into the facts and circumstances related to the communication. The issue was not raised again by juror Stoffregen.
>
> The court did not inform the parties or counsel of the communication and they were not consulted regarding the communication or regarding the response to the communication.
>
> The court certifies that this supplement accurately describes the events that took place off the record regarding the communication from [j]uror Stoffregen."

The document was signed "Judge Robert Spence" and was dated 3/1/10.

This timely appeal followed.

ANALYSIS

Plaintiff raises five issues: (1) it was reversible error for the trial court not to investigate and disclose the communication by juror Stoffregen; (2) the trial court's *ex parte* communication with the juror was reversible error because the absence of prejudice is not clearly apparent; (3) the trial court's failure to exclude the possibility of duress or coercion as a cause of the juror's distress violated the constitutional guarantee of the right to trial by jury; (4) the trial court abused its discretion when it failed to give the deadlocked-jury instruction; and (5) the trial court erred in striking the affidavit of juror Stoffregen as it related to the issue of a deadlocked jury.

Plaintiff appeals from the order denying his amended motion for a new trial. The determination of whether a new trial should be granted rests within the sound discretion of the trial court, and we will not reverse absent an abuse of discretion. *Union Planters Bank v. Thompson Coburn LLC*, 402 Ill. App. 3d 317, 355-56 (2010).

Plaintiff initially contends that *Lowe v. Norfolk & Western Railway Co.*, 124 Ill. App. 3d 80 (1984), dictates a reversal in this case.[1] In *Lowe*, the trial court abused its discretion when it discharged a semihysterical juror without determining whether the juror's emotional condition was

[1]Defendants Geneva Family Practice Associates (Geneva) and Dr. Rivers point out that plaintiff includes the trial court's failure to disclose the communication as error in his statement of the issue, but argues only that the failure to inquire about duress or coercion requires reversal. Geneva and Dr. Rivers contend that plaintiff has forfeited the issue relating to disclosure. Our discussion deals with the substance of plaintiff's argument rather than his summary statement of the issue.

the result of duress or coercion, or whether it grew out of the deliberative process. Plaintiff interprets *Lowe* as holding that it is always an abuse of discretion requiring reversal where a trial court fails to investigate and rule out duress or coercion as the cause of juror upset. We disagree. *Lowe* is distinguishable for two reasons: (1) the juror's mental anguish was extreme, and (2) the trial court discharged the juror, altering the composition of the jury.

The juror in *Lowe* called the trial judge on the morning of the second day of deliberations and said she could not come to court; she was not ill, she was upset. *Lowe*, 124 Ill. App. 3d at 107. In response to the judge's directive, the juror came to the courthouse but refused to enter chambers if a court reporter was present. *Lowe*, 124 Ill. App. 3d at 108. The judge used another judge's chambers to speak with the juror, who had tears in her eyes and a shaking hand over her mouth. *Lowe*, 124 Ill. App. 3d at 108. The judge stated that he could not describe how upset the juror was. *Lowe*, 124 Ill. App. 3d at 108. When the judge told the juror he would excuse her but inform her of the verdict as a courtesy, the juror "violently shook her head, no," and tearfully said, "no, no, no." *Lowe*, 124 Ill. App. 3d at 108. The appellate court termed the juror's behavior "bizarre" and "suspicious"and concluded that the trial court abused its discretion in not inquiring into possible duress or coercion. *Lowe*, 124 Ill. App. 3d at 109-10.

In *Lowe*, the juror's distress was so extreme she could not enter the trial judge's chambers or speak coherently, or even tolerate being told the outcome of the trial. In our case, juror Stoffregen was in the jury room during a lunch break and was crying and "visibly upset." "Visibly upset" is not much of a description. It could mean only that she was mildly discommoded. The record reflects that the jury commenced deliberations the evening before, retired for the night, reconvened the next day, and returned a verdict in open court on March 11, 2009, at 4:31 p.m. Juror Stoffregen

completed deliberations with the rest of the jury. The transcript of the proceedings is included in the record, and it reveals that the foreperson indicated to the court that the jury had a verdict, whereupon the court read the verdict into the record. The court then read the jury's answers to special interrogatories. Plaintiff's counsel requested that the jury be polled. The clerk asked, "Was this then and is this now your verdict" and called on each juror by name to answer the question. Juror Stoffregen replied "Yes" when her name was called. Thus, the instant facts do not rise to the level of *Lowe*'s "bizarre and suspicious" circumstances.

Plaintiff contends that the fact that the juror in *Lowe* was discharged is not a distinguishing factor. We disagree. The court in *Lowe* relied on cases discussing good cause for discharge and stated, "The lesson of these authorities is that while the court by observation can determine good cause in the case of an emotionally upset juror, it must go one step further and make a sufficient inquiry to negate any element of coercion or duress." *Lowe*, 124 Ill. App. 3d at 109. Thus, the requirement to inquire is directly related to good cause for discharge of a juror.

Inquiry into a juror's impartiality was not required in *Golden v. Kishwaukee Community Health Services Center, Inc.*, 269 Ill. App. 3d 37 (1994), where a juror sent the trial court a note following the plaintiff's emotional testimony, saying she was finding it difficult to remain unbiased and requesting release from jury duty. The trial court explained to the juror that the defense would present experts and she would get a balanced view. *Golden*, 269 Ill. App. 3d at 47. The appellate court approved of the way the trial court handled the situation, and held that it was not compelled to make an inquiry as to whether the juror's emotional condition was the result of coercion or duress. *Golden*, 269 Ill. App. 3d at 48. The appellate court also stated that "[w]hatever difficulty the juror encountered was demonstrably overcome by her participation in a unanimous verdict." *Golden*, 269

Ill. App. 3d at 48. Here, juror Stoffregen did not actually request release from the jury, and she participated in a unanimous verdict, which she reaffirmed when she was polled.

At oral argument, plaintiff contended that we must assume duress or coercion, because an aggrieved party can never prove otherwise, given the prohibition against juror affidavits disclosing the jurors' deliberative process. This argument misses the point. If we cannot inquire into the deliberative process, then we cannot assume anything about what occurred in deliberations, either. In the absence of allegations of an improper outside extraneous influence on juror Stoffregen, we must assume that the cause of her distress was the deliberative process itself. Accordingly, the trial court in the instant case did not abuse its discretion when it failed to inquire as to the reason for juror Stoffregen's distress.

Plaintiff's second contention is that the trial court's *ex parte* communication with juror Stoffregen requires reversal because the absence of prejudice is not clearly apparent. Plaintiff relies on *People v. Childs*, 159 Ill. 2d 217 (1994), where our supreme court held, in part, that to sustain a jury's verdict following an improper *ex parte* communication between the judge and the jury, it must be apparent that no injury resulted from the *ex parte* communication. *Childs*, 159 Ill. 2d at 234. *Childs* placed the burden of proving that any error in the giving or the substance of an *ex parte* response is on the prosecution. *Childs*, 159 Ill. 2d at 234. *Childs* was a criminal case where the defendant's right to be present and right to counsel were implicated. Neither of those concerns is present here.

Our opinion in *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338 (2006), governs this case. In *Wolfe*, a negligence case, we held that the aggrieved party must first raise the probability of prejudice resulting from a court's unauthorized *ex parte* communication with a juror. *Wolfe*, 364 Ill. App. 3d

at 355. The probability of prejudice is established where the unauthorized conduct relates to a crucial issue in the case. *Wolfe*, 364 Ill. App. 3d at 355. Once a party establishes the probability of prejudice, the presumption of prejudice arises and the burden shifts to the opposing party to establish that the outside influence was harmless. *Wolfe*, 364 Ill. App. 3d at 355. Here, the communication between the trial court and juror Stoffregen was not about a crucial issue in the case. Consequently, plaintiff has not raised the probability of prejudice, and there is no presumption or shifting of the burden. Plaintiff's only response to the charge defendants make, that he has failed to demonstrate how he was prejudiced by the *ex parte* communication, is to deny that it is his burden to do so under *Childs*.

When we examine plaintiff's argument closely, it is apparent that he is not claiming a *Wolfe*-type violation, that the trial court's communication constituted an improper outside influence. Plaintiff is alleging that the judge's inquiry did not go far enough.

Nor can we infer prejudice from the record. Juror Stoffregen's affidavit does not say that other jurors were present to witness her crying or her statement to the bailiff. Her statement, "I cannot do this anymore," did not indicate duress or coercion, or even that her state of mind was related to the case rather than some personal problem. The trial court observed the juror, commented on how hard working she was, and also noted that the three-week trial had been emotional. Plaintiff concedes that whether or not prejudice resulted from the *ex parte* communication turns on whether coercion and duress were the cause of the juror's distress. Plaintiff also concedes that we can only speculate that perhaps the juror environment was contaminated. That the juror continued to deliberate and affirmed her verdict when polled negates any inference of prejudice. Accordingly, the trial court's unauthorized *ex parte* communication does not require reversal.

Plaintiff next contends that the trial court's failure to exclude the possibility of duress or coercion as a cause of the juror's distress violates the Illinois Constitution's guarantee of a right to trial by jury. Plaintiff's entire argument is two paragraphs, and he cites no authority other than for the general proposition that the right to trial by jury applies in both criminal and civil cases. We deem this argument forfeited because it violates Supreme Court Rule 341(h)(7) (eff. Sept. 1, 2006), which requires the contentions of the appellant and the reasons therefor, with citation to authorities. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010). This court is not a repository where the burden of argument and research may be dumped, and this court will not scour the record to develop an argument for a party. *New v. Pace Suburban Bus Service*, 398 Ill. App. 3d 371, 384 (2010).

Plaintiff next argues that the trial court, once it received juror Stoffregen's message, was obliged to give the jury IPI Civil (2006) No. 1.05, the deadlocked jury instruction. Plaintiff asserts that Stoffregen's statement "I cannot do this anymore" signaled that the jury was deadlocked. Before we address the issue of the jury instruction, we will consider a threshold issue raised by plaintiff: that the trial court improperly struck the juror's affidavit insofar as it related to whether the jury was deadlocked. Defendants moved to strike the affidavit on the basis that it went to the deliberative process of the jury and was inadmissible to impeach the jury's verdict. The trial court granted the motion to strike in part, ruling that the court would not consider the affidavit on the issue of whether the jury was deadlocked.

There are two broad categories of situations in which jurors' affidavits are offered to impeach a jury's verdict: (1) where it is attempted to prove by a juror's testimony the motive, method, or process by which the jury reached its verdict; and (2) where the testimony of a juror is offered as

proof of conditions or events brought to the attention of the jury without any attempt to show its effect on the jurors' deliberations or mental processes. *Wolfe*, 364 Ill. App. 3d at 352. The first category is almost, without exception, inadmissible. *Wolfe*, 364 Ill. App. 3d at 352. However, a juror is permitted to testify to matters that fall within the second category, whether extraneous prejudicial information was improperly brought to the jury's attention, or whether any outside influence was improperly brought to bear upon any juror. *Wolfe*, 364 Ill. App. 3d at 353. The affidavit in the instant case falls under the second category and was admissible to prove the judge's *ex parte* communication with juror Stoffregen. We agree with defendants, and with the trial court, that nothing in Stoffregen's affidavit can be construed as saying the jury was deadlocked. However, we cannot say that the trial court abused its discretion in disregarding anything in the affidavit that may relate to the numerical division of the jurors. Such a revelation would pertain to the jurors' deliberations or mental processes. In this respect, the trial court was exercising caution.

Having determined that juror Stoffregen's statement did not indicate that the jury was deadlocked, we hold that the trial court was not required to give the deadlocked-jury instruction. Moreover, the record, aside from the affidavit, shows that the jury was not deadlocked. This was a three-week medical malpractice trial involving numerous defendants and complex issues, including the cause of the plaintiff's decedent's death. The jury began deliberating on the evening of March 10, 2009, for about two hours before it retired for the night. We do not know at what hour it resumed deliberations on March 11, but the parties estimate the jury had deliberated only six or seven hours when the lunch-break communication between juror Stoffregen and the bailiff occurred. Then, at 4:31 p.m., according to the clerk's memorandum, the jury returned a unanimous verdict. The jury sent five notes to the court, and none of those notes indicated it was having trouble

resolving the controversy. Only one note related to the evidence; the others related to scheduling and housekeeping matters such as whether the jury could write on the instructions. None of the jurors, when polled, hesitated in affirming their verdict.

In sum, we agree that the trial court's *ex parte* communication with juror Stoffregen was improper. However, there is no showing that this communication prejudiced plaintiff. Accordingly, we hold that the trial court did not abuse its discretion in denying the amended posttrial motion, and we affirm the judgment of the circuit court of Kane County.

Affirmed.