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COURT OF APPEALS

STATE OF NEW YORK

HOLSTEIN,

Respondent,

-against-

No. 200

COMMUNITY GENERAL HOSPITAL OF
GREATER SYRACUSE,

Appellant.

20 Eagle Street
Albany, New York 12207
October 17, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 today with number 200, Holstein v. Community General
3 Hospital of Greater Syracuse.

4 Counsel, would you like any rebuttal time?

5 MS. PACKMAN: A minute, yes. Thank you.

6 CHIEF JUDGE LIPPMAN: A minute? Go ahead.
7 You're on.

8 MS. PACKMAN: Thank you. If it please the
9 court, my name is Myra Packman, representing the
10 defendant-appellant hospital in this appeal.

11 Very simple question which has been
12 presented to this court today for determination, and
13 that is whether, under the circumstances of this
14 case, it was reversible error requiring a new trial
15 for the court to - - - the trial court - - -

16 CHIEF JUDGE LIPPMAN: Can you - - - can you
17 waive the request to poll?

18 MS. PACKMAN: You can waive the request,
19 either by not making it - - -

20 CHIEF JUDGE LIPPMAN: Can you make a
21 request and then say it's okay?

22 JUDGE CIPARICK: Withdraw it?

23 MS. PACKMAN: You can definitely withdraw
24 the request. But it has to be expressed.

25 JUDGE CIPARICK: And it wasn't - - -

1 JUDGE PIGOTT: Why, if you could be silent

2 - - -

3 JUDGE CIPARICK: - - - expressed here - - -

4 JUDGE PIGOTT: I'm sorry, Judge.

5 MS. PACKMAN: I'm sorry?

6 JUDGE CIPARICK: It wasn't expressed here?

7 She said, okay, all right, thank you. That's not
8 expressed?

9 MS. PACKMAN: I don't think we need to
10 reach the issue of whether that is expressed or not
11 because that does raise issues that I don't believe
12 are before the court.

13 JUDGE CIPARICK: And she didn't pursue it?
14 She didn't pursue it either.

15 CHIEF JUDGE LIPPMAN: What's before - - -

16 MS. PACKMAN: She didn't - - -

17 CHIEF JUDGE LIPPMAN: - - - what's before -
18 - -

19 MS. PACKMAN: - - - she didn't - - -

20 CHIEF JUDGE LIPPMAN: - - - the court,
21 counsel?

22 MS. PACKMAN: I'm sorry?

23 CHIEF JUDGE LIPPMAN: What's before the
24 court, in your mind?

25 MS. PACKMAN: Before the court, in my mind,

1 is whether or not that absolute right to have the
2 jury polled upon request attaches at the moment that
3 the request is made.

4 CHIEF JUDGE LIPPMAN: Yes. But you agree
5 that if you asked for polling and then said gee,
6 that's okay, I don't really want the jury to be
7 polled, that would be okay, right?

8 MS. PACKMAN: I believe it has to be
9 expressed like that. Never mind, Judge - - -

10 JUDGE PIGOTT: Well, in ninety-nine - - -

11 MS. PACKMAN: - - - I withdraw it, or
12 something to that effect. But if it's - - - but if -
13 - - I'm sorry, Your Honor.

14 CHIEF JUDGE LIPPMAN: Judge Pigott, go
15 ahead.

16 JUDGE PIGOTT: Please finish. I was going
17 to say ninety-nine out of a hundred cases, nobody
18 polls the jury. You got the jurors who sign their
19 verdict sheet, and everybody goes home. Sometimes
20 you're mad - - - at least half of the people are
21 dissatisfied customers. But you just leave.

22 And when you want to poll the jury, usually
23 you're angry about something, and you say Judge, I -
24 - - you know, I want them to tell me. I want the
25 jury to be polled.

1 And in this case, there was a request, and
2 then he said, well, they've already signed it, you
3 know, and oh, okay, that's - - - and that's it. I
4 mean, this isn't some huge Constitutional
5 confrontation, is it? It's just the end of the case.

6 MS. PACKMAN: I think that what you have
7 here is a question of whether - - - the case that
8 this court determined in *Duffy v. Vogel* is so
9 controlling as to take away from the trial court the
10 right to - - - without it being expressed - - - and
11 by expressed is: never mind, Judge, I withdraw my
12 request - - - that it retains - - -

13 JUDGE PIGOTT: Well, to affirm - - - I
14 agree with you. To affirmatively - - - for the Court
15 to say look, you know, you may want to poll, but I'm
16 - - - you know, it's late; you know, I'm not keeping
17 this jury; you know, I'm not going to do it, is - - -
18 I would think *Duffy* would apply.

19 But in most cases, don't you agree, I mean,
20 when you have the people actually sign on each one of
21 the questions and this one was five to one, and it
22 was the same one each time, there was no mystery?

23 MS. PACKMAN: That has been raised in every
24 - - - most of the cases that deal with polling of the
25 jury, that's exactly what the trial judge has said.

1 Yeah, but they signed the sheet. And that's what - -
2 - in every case, whether it's Duffy or Ward or all
3 the other - - -

4 JUDGE GRAFFEO: So what are you looking
5 for? An automatic reversal rule?

6 MS. PACKMAN: That's basically what Duffy
7 said.

8 JUDGE GRAFFEO: As soon as there's a
9 request to poll the jury, if the judge hesitates or -
10 - -

11 MS. PACKMAN: If the judge doesn't - - -

12 JUDGE GRAFFEO: - - - declines, then that -
13 - - you end up with a reversal?

14 MS. PACKMAN: That's what Duffy says.

15 CHIEF JUDGE LIPPMAN: Your rule - - - your
16 - - -

17 JUDGE GRAFFEO: And that - - -

18 CHIEF JUDGE LIPPMAN: I'm sorry.

19 JUDGE GRAFFEO: - - - and that works in
20 civil cases? We need that rule in civil cases where
21 we have individual signatures on the special
22 verdicts?

23 MS. PACKMAN: That's the law that this
24 court has enunciated one year before this trial was
25 held.

1 CHIEF JUDGE LIPPMAN: Your rule is that
2 once you ask for it, unless there's an expressed
3 withdrawal, that's it; that the rule attaches, and
4 we're finished?

5 MS. PACKMAN: Correct.

6 JUDGE PIGOTT: When would you veto - - -

7 JUDGE CIPARICK: And that the error
8 requires reversal and a new trial?

9 MS. PACKMAN: Correct.

10 JUDGE JONES: Does it matter that the trial
11 court did not explicitly rule on it?

12 MS. PACKMAN: The trial court - - - you
13 know, you have ambiguo - - - we'll deal with the
14 ambiguity here. What the judge says can be
15 determined - - - that's what the - - - that's what
16 the Appellate Division dissent said, that it was
17 ambiguous what the judge said; it was ambiguous what
18 trial counsel said. In that kind of circumstance,
19 though, when you have an absolute right, any
20 ambiguity has got to go to the holder of the absolute
21 right.

22 JUDGE SMITH: Why?

23 MS. PACKMAN: I'm sorry?

24 JUDGE SMITH: Why can't the judge
25 interpret, yeah - - - interpret okay, thank you, as

1 meaning okay, never mind?

2 MS. PACKMAN: I think you have to go with
3 the person - - - the party that has the absolute
4 right. I think it was inappropriate for the judge -
5 - -

6 JUDGE PIGOTT: Do you think she thought
7 that?

8 MS. PACKMAN: - - - to question it in the
9 first place. I'm sorry, Your Honor. What's that?

10 JUDGE PIGOTT: Do you think she thought
11 that? I mean, do you think that at the time she said
12 okay, never mind, that she said I know have an
13 absolute right here, and I'm not waiving it in any
14 way by saying okay, never mind, and the court then -
15 - -

16 MS. PACKMAN: She didn't say "never mind".

17 JUDGE PIGOTT: - - - dismissing - - -

18 MS. PACKMAN: Because if the - - -

19 JUDGE PIGOTT: - - - well, dismissing the
20 jury at that point.

21 JUDGE CIPARICK: Okay, all right.

22 MS. PACKMAN: If we're going to go into
23 what it was that she said, which is, "Okay, all
24 right, thank you," in her mind - - - and this is set
25 forth in the post-trial motions - - - she believed

1 that the judge made a ruling. And you know, it's - -
2 - you don't - - -

3 CHIEF JUDGE LIPPMAN: You can't infer that
4 what she was saying was okay, all right, thank you,
5 never mind?

6 MS. PACKMAN: "Never mind" is not here.

7 CHIEF JUDGE LIPPMAN: I understand.

8 MS. PACKMAN: And that is - - -

9 CHIEF JUDGE LIPPMAN: I'm asking you - - -

10 MS. PACKMAN: - - - exactly the point.

11 CHIEF JUDGE LIPPMAN: - - - you can't infer
12 from what we're seeing that that's basically what was
13 being said?

14 MS. PACKMAN: I think that you can infer
15 that she accepted that he had ruled against her.

16 JUDGE PIGOTT: Usually, in these cases - -
17 - I don't mean to keep talking about usually - - -
18 but when you talk to the jurors afterwards, you know,
19 if you can't believe that, once again, you've lost
20 the case, they say something. And then all of a
21 sudden you go back to the court and you say, Judge,
22 you know, this may say five to one, but I was just
23 talking to juror number 4, and she said she was on
24 the Internet, and the reason why she voted the way
25 that she did was because she saw something. And I

1 want to make a motion to set this as - - - there's
2 something other than everybody folding up their - - -
3 I'm almost done - - - folding up their folders and
4 putting them in their briefcases and going home. I
5 mean, it seems - - -

6 MS. PACKMAN: Except that she did ask for
7 the polling here. I would understand what Your Honor
8 is saying, if it weren't for the circumstance that
9 she unequivocally asked for the polling. If she had
10 not asked for it in the first place, that happens all
11 the time, they talk to a juror afterwards. But she
12 did ask. And she never expressly - - -

13 JUDGE CIPARICK: The dissent says - - -

14 JUDGE GRAFFEO: What - - - what - - -

15 MS. PACKMAN: - - - withdrew it.

16 JUDGE CIPARICK: The dissent said that the
17 judge's response constituted a ruling. Is that your
18 position, there was a ruling?

19 MS. PACKMAN: That's correct. And that's
20 what counsel - - - trial counsel, defense counsel
21 believed that it was as well, when she said okay.

22 JUDGE CIPARICK: Did it sound like a
23 ruling?

24 MS. PACKMAN: I'm sorry?

25 JUDGE CIPARICK: Did it sound like a

1 ruling? He said, "Jury be polled? They have signed.
2 They have individually signed." Does that sound like
3 a ruling?

4 MS. PACKMAN: We can't hear the judge's
5 voice.

6 JUDGE SMITH: But most rulings don't have
7 question marks in the transcript.

8 MS. PACKMAN: And unfortunately, the trans
9 - - - there's two different transcripts. There's two
10 different - - - one that has a question mark, and
11 there's one that doesn't. We didn't even get into
12 that. The thing - - -

13 JUDGE CIPARICK: So it should be "Jury be
14 polled?" Is that it?

15 MS. PACKMAN: Jury be polled?

16 JUDGE READ: It sounds like he's saying,
17 why would you do that? They signed a sheet?

18 JUDGE CIPARICK: Yeah.

19 JUDGE READ: Isn't that what it sounds
20 like?

21 MS. PACKMAN: It sounds to me like - - - it
22 sounds to me like they already signed. Okay, Judge,
23 thank you.

24 JUDGE READ: Yeah, so what - - -

25 CHIEF JUDGE LIPPMAN: Was it - - -

1 JUDGE READ: - - - the use of polling them?
2 They've already signed. We know where they stand.

3 MS. PACKMAN: And therefore, denied. And
4 that's how counsel took it. I still - - -

5 JUDGE READ: And she said okay, fine.

6 MS. PACKMAN: I still go back to once you
7 ask for that polling, and the judge - - -

8 CHIEF JUDGE LIPPMAN: Do you think - - -

9 MS. PACKMAN: - - - questions it or
10 comments - - - I'm sorry.

11 CHIEF JUDGE LIPPMAN: - - - counsel - - -
12 if she - - - if it was viewed as a ruling, wouldn't
13 you think that the lawyer would have said, "but I
14 have an absolute right to poll," rather than just say
15 thank you?

16 MS. PACKMAN: That I can't answer, Your
17 Honor. You know - - -

18 JUDGE SMITH: Or at least say - - -

19 MS. PACKMAN: - - - why people say things
20 that they do - - -

21 JUDGE SMITH: - - - or at least the lawyer
22 could have said, all right, I accept Your Honor's
23 ruling.

24 MS. PACKMAN: But she didn't say that.

25 JUDGE SMITH: I mean, if you want - - - if

1 you're trying to get a nice error for appeal, that's
2 what you do, right? You say okay, I accept Your
3 Honor's ruling, and run out the door as fast as you
4 can.

5 MS. PACKMAN: I can't - - - I can't change
6 what is in the transcript. I wish that she had said
7 that.

8 JUDGE GRAFFEO: Can you explain - - -

9 MS. PACKMAN: I'd have an easier time.

10 JUDGE GRAFFEO: - - - can you explain what
11 it is about polling that you think is important to
12 this case? I mean, it - - - you know, this was a
13 public verdict. It was published, as we talked about
14 in Duffy. What was the polling going to do here that
15 your client didn't have by the individual signatures?

16 MS. PACKMAN: I think that it's important
17 to note that this case is different from example
18 Duffy, where in Duffy - - - may I continue?

19 CHIEF JUDGE LIPPMAN: Yes. Answer the
20 question, counselor.

21 MS. PACKMAN: All right. Whereas in Duffy,
22 it was a unanimous decision, very long verdict sheet,
23 lots of questions, and each question was read when
24 the verdict was read in Duffy. In this situation,
25 you're Memorial Day afternoon, it's a quarter to 5,

1 it's a five to one ruling, the verdict has come down
2 on a very short - - -

3 JUDGE PIGOTT: Well, but this is a short -
4 - -

5 MS. PACKMAN: - - - deliberation.

6 JUDGE PIGOTT: - - - this was a short - - -

7 MS. PACKMAN: There was something - - -
8 something not right here, trial counsel thought.

9 JUDGE PIGOTT: But wasn't - - - I mean,
10 this - - -

11 MS. PACKMAN: So she wanted to hear each
12 person say what it was. I'm sorry, Your Honor.

13 CHIEF JUDGE LIPPMAN: Judge Pigott?

14 JUDGE PIGOTT: This was a short - - - this
15 was a short trial.

16 MS. PACKMAN: It was a short trial.

17 JUDGE PIGOTT: It only took them four
18 hours, right? I mean, they didn't spend a whole lot
19 of time reaching their verdict and - - -

20 MS. PACKMAN: Well, even less. Because
21 they had - - -

22 JUDGE PIGOTT: That's what I mean.

23 MS. PACKMAN: - - - they had items read
24 back to them.

25 JUDGE PIGOTT: Yes.

1 MS. PACKMAN: They didn't really have it
2 until - - -

3 JUDGE PIGOTT: So it's not like there was
4 three days of deadlock and, you know, and formal
5 notes to the judge saying, you know, we're hopelessly
6 deadlocked and, you know, he's got to give them
7 another charge, and they come back and they - - -
8 this one was - - -

9 MS. PACKMAN: Something was - - -

10 JUDGE PIGOTT: - - - a dream.

11 MS. PACKMAN: - - - something didn't sit
12 well with trial counsel. You know, you have five to
13 one. It feels rushed. Something didn't - - -

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MS. PACKMAN: - - - she wanted to hear each
16 of them say it. There were questions back and forth.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.

18 MS. PACKMAN: She didn't feel comfortable.

19 CHIEF JUDGE LIPPMAN: You'll have some
20 rebuttal time. Thanks, counsel.

21 MS. PACKMAN: Thank you.

22 CHIEF JUDGE LIPPMAN: Counselor?

23 JUDGE CIPARICK: If she did - - - if she
24 really wanted to hear them give their individual
25 expression of what their vote was, what should she

1 have done?

2 MR. CIRANDO: She should have answered the
3 judge's question. Because the transcript that's
4 relied on for the 4404 motion contains a question
5 mark. And so the judge's voice, as heard by the
6 court reporter was, "Poll the jury?" in the form of a
7 question, Your Honor. And she never - - - okay, all
8 right, thank you, is not the answer to a question.

9 I was going to stand up here and say that
10 when I got the first question from the court, okay,
11 all right, thank you, and sit down. But I don't
12 think that would have been polite.

13 CHIEF JUDGE LIPPMAN: So is that - - - do
14 you think that's her answer, that in effect, she's
15 saying, oh, they signed it already; therefore, it's
16 okay? Acquiescence? Is that the way you view it?

17 MR. CIRANDO: Okay. It's okay. Yes. Yes.

18 JUDGE GRAFFEO: And that's how you get
19 around the Duffy precedent?

20 MR. CIRANDO: Well, the court did say in
21 Duffy that you can waive it by not asking for it.

22 JUDGE CIPARICK: And this is an expressed
23 waiver?

24 MR. CIRANDO: This is an implied waiver,
25 because she was - - - well, this would be an

1 expressed waiver, yes. She was asked a question and
2 she didn't answer the question. She says, okay. So
3 he said I never made a ruling. And - - -

4 JUDGE SMITH: Well, okay. I mean, the fact
5 that she didn't answer the question, I'm not sure
6 that helps you. Maybe that means she didn't take it
7 as a question; she took it as a ruling.

8 JUDGE GRAFFEO: We did say in Duffy - - -

9 MR. CIRANDO: No.

10 JUDGE GRAFFEO: - - - it's an absolute
11 right. That's why I - - -

12 MR. CIRANDO: It's an absolute right. Yes.

13 JUDGE GRAFFEO: - - - in answering Judge
14 Smith's question.

15 MR. CIRANDO: It's - - - she did not answer
16 the judge's question, I submit. And if she had
17 answered the judge's question, she should - - - her
18 answer should have been, to preserve the record:
19 yes, poll the jury.

20 CHIEF JUDGE LIPPMAN: But once counsel - -
21 - once the question is asked, did that put the judge
22 on notice, really, that you're dealing with an
23 absolute right situation, and what goes through the -
24 - -

25 MR. CIRANDO: The j - - -

1 CHIEF JUDGE LIPPMAN: - - - what should go
2 through the judge's mind when he recognized, oh,
3 they're asking for something and counsel has an
4 absolute right to it?

5 MR. CIRANDO: I think the judge says, I
6 wanted to make sure I understood what you said, so I
7 asked you did you want me to poll the jury. And she
8 never - - - she never responded.

9 CHIEF JUDGE LIPPMAN: Or she - - - or, from
10 your perspective, it's an acquiescence?

11 MR. CIRANDO: In him - - -

12 CHIEF JUDGE LIPPMAN: Yes.

13 JUDGE GRAFFEO: Why would - - -

14 MR. CIRANDO: - - - not going forward.

15 JUDGE GRAFFEO: Why would the judge
16 hesitate? When you're asked to poll the jury, why
17 shouldn't the rule be that the judge begins to poll
18 the jury, or asks the court clerk to poll the jury?

19 MR. CIRANDO: We didn't - - - in this case,
20 we didn't get to that point because as he said, I
21 want to understand what you said.

22 JUDGE SMITH: What was ambiguous about what
23 she said?

24 MR. CIRANDO: He under - - - he didn't
25 understand it in the context of - - - what he said

1 was - - - excuse me a second - - - "I then asked
2 counsel to repeat, and said 'poll the jury' with a
3 question mark. To which counsel, in my mind,
4 withdrew her request. There was never an expression
5 - - - intention expressed to me to go forward at the
6 time" - - -

7 JUDGE SMITH: Well, why did the judge think
8 it necessary for her to ask twice? Why did he ask
9 her to repeat? She said as clear as you can say,
10 "poll the jury".

11 MR. CIRANDO: I don't recall ever having
12 received a request to poll the jury, and I would just
13 want to be sure what I was doing. That's what he
14 said. And, you know, taking his remarks at face
15 value, I don't think we should put, on this record,
16 form over substance and allow - - - require a new
17 trial.

18 CHIEF JUDGE LIPPMAN: Counsel, in your
19 experience, how often is a request made to poll the
20 jury?

21 MR. CIRANDO: Every time - - -

22 CHIEF JUDGE LIPPMAN: In your neck of the
23 woods?

24 MR. CIRANDO: Every time in a criminal
25 case. Civil cases, I think it's very, very slim.

1 CHIEF JUDGE LIPPMAN: Um-hum.

2 MR. CIRANDO: I think it depends on the
3 case, I think, really.

4 JUDGE PIGOTT: It does, in my experience,
5 having lost a good number of them, when they come
6 back and find negligence and no proximate cause, you
7 want them to say that to your face, because they do
8 it often enough.

9 MR. CIRANDO: I kept getting the not guilty
10 verdicts when I was in the DAS office. That's why
11 they put me in appeals. And I - - -

12 JUDGE GRAFFEO: And here you are.

13 MR. CIRANDO: And here are I am. But I
14 don't know what else to say, Your Honor. I think the
15 - - - since there was no ruling, I don't think
16 there's even a question of law to allow the appeal to
17 be here.

18 JUDGE GRAFFEO: Do you think there should
19 be a different rule for the civil cases than criminal
20 cases?

21 MR. CIRANDO: You mean if they ask - - -

22 JUDGE GRAFFEO: If this was a criminal
23 case, and the defense attorney said exactly what the
24 hospital attorney said here, would you also view that
25 as a waiver and say that defendant didn't have a

1 right to poll the jury?

2 MR. CIRANDO: I would say that depen - - -
3 in accordance with the way the judge explained what
4 he did, I think it would have been - - - would have
5 been correct in the criminal aspect as well.

6 JUDGE GRAFFEO: So the application should
7 be similar - - -

8 MR. CIRANDO: Yes.

9 JUDGE GRAFFEO: - - - for both?

10 MR. CIRANDO: And, you know - - - and I
11 know we can't apply - - - in criminal cases you
12 always apply the harmless error rule, but I know we
13 can't - - - we can't do that today - - -

14 JUDGE CIPARICK: And what happens if
15 there's no request? It's deemed waived, if there's
16 no request?

17 MR. CIRANDO: Right. You have to ask for
18 it. Yes. And if the judge is confused, and he asks
19 you a question, you should answer his question. I
20 don't think - - - you know, we get to a point where
21 on this side, it may be a contest between the
22 attorneys, but when you involve the court, it's not a
23 game of gotcha with the court. It's - - - you should
24 be up front with the court and let him know what you
25 want the judge to do. And if there's any doubt by

1 the judge, you should say, Judge, this is what I want
2 you to do, and that wasn't done here.

3 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
4 you.

5 Counselor, rebuttal?

6 MS. PACKMAN: No thank you.

7 CHIEF JUDGE LIPPMAN: That's it? Thank you
8 both. Appreciate it.

9 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Holstein v. Community General Hospital of Greater Syracuse, No. 200 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

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Date: October 25, 2012