

SUPREME COURT OF THE STATE OF NEW YORK

1 COUNTY OF ONONDAGA

2 -----X

3 TINA HOLSTEIN, : Index No.

4 Plaintiff, : 2008-7434

5 -vs- :

6 COMMUNITY GENERAL HOSPITAL : MOTION

7 OF GREATER SYRACUSE, :

8 Defendant. :

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June 24, 2010  
Onondaga County Courthouse  
401 Montgomery Street  
Syracuse, New York 13202

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B E F O R E :

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HON. JAMES P. MURPHY,

15

Supreme Court Justice

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A P P E A R A N C E S :

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1 COURT CLERK: Recall case number 2, Tina M.  
2 Holstein versus Community General Hospital.

3 THE COURT: Counsel, if you'd note your  
4 appearance for the record, please.

5 MS. DANCKS: Therese Dancks on behalf of the  
6 hospital.

7 MR. DeFRANCISCO: Jeff DeFrancisco on behalf  
8 of plaintiff.

9 THE COURT: Miss Dancks, do you want to be  
10 heard?

11 MS. DANCKS: Thank you, Judge. Good  
12 morning.

13 THE COURT: Good morning.

14 MS. DANCKS: This is a post-trial motion to  
15 set aside the verdict, Judge. We make three points  
16 for reasons for having the verdict set aside. The  
17 first point is the failure to poll the jury. The  
18 Court of Appeals in *Duffy v. Vogel* has very clearly  
19 stated that it is a substantive and absolute right  
20 of a party to have the jury be polled. It's clear,  
21 strong language that once the poll is requested  
22 it's error to not grant the polling --

23 THE COURT: In that case the Court denied  
24 the request to poll, correct?

25 MS. DANCKS: The language was strikingly

1 similar to the language that -- the colloquy that  
2 went on in this case, Judge. That court said to  
3 the request to be polled, All the responses were  
4 unanimous. You want to hear each one say that, the  
5 verdict sheet speaks for itself. It's really not  
6 necessary. In this case the Court said --

7 THE COURT: Well, then there was a ruling,  
8 wasn't there?

9 MS. DANCKS: The Court immediately  
10 discharged the jury.

11 THE COURT: Well, at least in the way it's  
12 reported, the Court of Appeals took it to say that  
13 the trial court denied the request to poll the  
14 jury, correct?

15 MS. DANCKS: Based upon that colloquy, as I  
16 understand the reading of that case, Judge.

17 THE COURT: And where did I deny that  
18 request?

19 MS. DANCKS: You -- the Court indicated the  
20 jury be polled, same question as do you want to  
21 hear each one say that? They have signed. They  
22 have each individually signed --

23 THE COURT: What was the response of defense  
24 counsel?

25 MS. DANCKS: Defense counsel said. Okay.

1 All right. Thank you.

2 THE COURT: And you take that as a denial?

3 MS. DANCKS: What the Court said, the Court  
4 effectively denied the request by referencing the  
5 verdict sheet, just as the Court did in the *Duffy*  
6 case. That's our position. And there was no  
7 affirmative or -- no affirmative withdrawal or  
8 waiver by defense counsel of the request. The  
9 statement of, Okay. All right. Thank you is an  
10 acknowledgment of an understanding of the Court's  
11 ruling.

12 THE COURT: Or it's a withdrawal, an  
13 acquiescence to the question of whether or not you  
14 want the jury polled.

15 MS. DANCKS: There's no requirement in *Duffy*  
16 that the jury polling be requested twice, Judge.  
17 There's nothing in -- the Court of Appeals is very  
18 clear on that, that once it's requested --

19 THE COURT: I did not see anything in *Duffy*  
20 where the defense lawyer arguably withdraw their  
21 request.

22 MS. DANCKS: And in this case it was -- and  
23 it's our position that the statement of defense  
24 counsel was an acknowledgment of the Court's ruling  
25 and not a withdrawal of the request. It can't be

1 withdrawn by innuendo, Judge. *Duffy* makes it very  
2 clear that once a jury poll --

3 THE COURT: You're saying it can be denied  
4 by innuendo but apparently it can't be withdrawn by  
5 innuendo.

6 MS. DANCKS: There's no innuendo when the  
7 Court references the jury verdict and that they've  
8 each individually signed. That's almost exactly  
9 what was said in the *Duffy* case. That's our  
10 position, Judge. The cases cited by plaintiff's  
11 counsel, the *Farhart* case, for example, the Court  
12 there faulted counsel for not taking an exception  
13 to the Court's ruling. Since that case was decided  
14 CPLR 4017 makes it very clear that there's no  
15 requirement that counsel note an exception.

16 *Farhart* involved a noncommittal response from the  
17 Court, Well, it's a unanimous verdict, is what the  
18 Court said. It's almost identical to what the  
19 Court said in *Duffy*. All of the responses were  
20 unanimous is what the court said in *Duffy*. And  
21 *Farhart* is contrary to the Court of Appeals holding  
22 in *Duffy* to the effect that polling of the jury is  
23 an absolute right and if it's requested and it's  
24 denied it's reversible error.

25 THE COURT: I agree with you.

1 MS. DANCKS: With regard to the second point  
2 of our motion, Judge, the verdict being against the  
3 weight of the evidence, the hospital's expert is  
4 the only one who testified about the depth of the  
5 sciatic nerve. There was a one-inch needle and the  
6 testimony was that the nerve is three inches down  
7 from the surface. The medical records did not show  
8 that the plaintiff's complaints were caused by the  
9 injection. It's only -- it was only based on  
10 plaintiff's claims that she felt it was related.  
11 She testified that she didn't see where the  
12 injection was given. The nerve conduction studies,  
13 both the one done by Dr. Aziz about six months or  
14 so after the alleged injury and the one done two  
15 weeks before trial, showed no indication of injury  
16 to that right nerve root -- or, excuse me -- the  
17 right nerves going down the leg. The medical  
18 records showed that she never complained about it  
19 in the hospital, she never complained about it for  
20 the first three visits with medical professionals  
21 after, and then the first time she complains about  
22 it is about 47 days after discharge and that  
23 particular physician questioned what the cause of  
24 it was. There was no specific statement in that  
25 medical record indicating that the cause was the

1 needle injection. It was --

2 THE COURT: Counsel, you're giving -- I  
3 understand your rendition of your expert proof and  
4 I assume in a minute Mr. DeFrancisco is going to  
5 give me a rendition of his expert proof. How is  
6 that -- isn't a jury allowed to pick and choose  
7 which expert they believe?

8 MS. DANCKS: They are allowed to pick and  
9 choose, but what my point is that the credible  
10 evidence is that the injection did not cause this  
11 injury.

12 THE COURT: That's your argument based on  
13 your experts, but there clearly was testimony by  
14 qualified doctors and nurses that it did.

15 MS. DANCKS: Right, I understand that,  
16 Judge, and what I'm saying is that that testimony  
17 was not credible based upon the one-inch needle.  
18 It has to be three inches -- the nerve is three  
19 inches down from the surface.

20 THE COURT: One of the witnesses testified,  
21 several testified to the jetting effect of the  
22 injection and also the caustic nature of the  
23 whatever, of the phenergan and one mentioned the  
24 needle, the needle being -- so it certainly -- that  
25 expert was contrary to all the nurses and people

1           who said there's a finite area where you're  
2           supposed to do this injection. They were all  
3           trained that way and that one expert was contrary  
4           to that. So it strikes me to say that somehow that  
5           one expert is more credible than all of the others  
6           is not a decision for anybody to make other than a  
7           jury.

8           MS. DANCKS: Well, that's our position,  
9           Judge. And then with regard to the award not being  
10          reasonable, the plaintiff testified that she's  
11          still going about her daily life. She's employed  
12          in substantially the same manner as she was before  
13          this alleged injury. She had back complaints prior  
14          to this injury that were -- that she partially  
15          related to her work, that she --

16          THE COURT: During labor, all during her  
17          labor, her prior labors.

18          MS. DANCKS: And after delivery, after the  
19          first delivery, Judge, she complained about back  
20          complaints and went to see a chiropractor, in fact.  
21          She remains able to carry on with her daily  
22          activities, her work. She assists with taking care  
23          of the children. She assists with the children's  
24          development. She assists with household chores.  
25          And the jury awarded pain and suffering for into

1 the future for 50 years. There's nothing in the  
2 medical records to support that conclusion with  
3 regard to the pain and suffering for that length of  
4 time. In fact, the only thing in the medical  
5 records is Dr. Aziz's notation that it would  
6 resolve in a year or two. Plaintiff's expert --

7 THE COURT: There's testimony clearly it's  
8 permanent.

9 MS. DANCKS: Plaintiff's expert did offer an  
10 opinion, but he did not examine the plaintiff or  
11 conduct any diagnostic tests on her. He testified  
12 about nerve damage and how it occurs, but not about  
13 this particular plaintiff.

14 THE COURT: Anything further?

15 MS. DANCKS: No.

16 THE COURT: Mr. DeFrancisco.

17 MR. DeFRANCISCO: Judge, I'll try be as  
18 brief as possible with regard to these issues.

19 The first issue with regard to the polling  
20 of the jury, as, I think, you indicated, there does  
21 not appear to be any type of curable issue. One,  
22 there was no objection placed on the record. There  
23 was no denial of the request nor was there any  
24 future, I guess, resubmission to yourself to renew  
25 that request. Despite defense counsel's argument



1 actually here.

2 THE COURT: Okay.

3 MR. DeFRANCISCO: But there was no objection  
4 placed on the record nor was there any denial of  
5 the request. Again, the *Farhart* case is exactly on  
6 point. I won't, again, go through all the  
7 specifics, but again, the Court cited that case,  
8 they didn't deny the request, no ruling was made on  
9 it nor did counsel at any time, again, ask the  
10 Court to have the jury polled, and I believe that's  
11 identical. For the record the citation of that is  
12 283 AD 977.

13 The second issue in regards to the liability  
14 of, you know, inconsistent with the weight of the  
15 evidence, we obviously disagree with that. As Your  
16 Honor indicated, the jury's findings were obviously  
17 a question of fact for them. We presented  
18 causation experts, a causation expert who gave  
19 medical opinions within a reasonable degree of  
20 medical certainty. The defense counsel presented  
21 an expert who obviously gave opinions contrary to  
22 that. Clearly, there was a question of fact to be  
23 raised. As Your Honor indicated, it seems like  
24 defense counsel's expert was actually contrary to  
25 pretty much the testimony of every other witness

1 who presented here. There were nurses who  
2 testified that we want to avoid that certain area  
3 where the injection is given to avoid nerve damage  
4 and that doctor for some reason says it's  
5 impossible to get that type of nerve damage there,  
6 completely inconsistent with all of the other  
7 evidence that was presented before the Court. You  
8 know, I think another important point that was  
9 brought up when I questioned that doctor. I asked,  
10 you know, well, if the needle didn't cause that  
11 specific injury what alternative cause was there  
12 for the injury just to see what he would present to  
13 the jury, and his response was, Well, I don't know.  
14 I don't want to speculate. So the only thing that  
15 was presented to the jury is a needle injury and  
16 there's no alternative cause for it. Clearly, you  
17 know, there's more than enough evidence for a jury  
18 to find in favor of the plaintiff. On the issue of  
19 permanency, our expert opined, and was actually  
20 consistent with Dr. Aziz's records, nerve injuries,  
21 if they're going to heal, is within one to two year  
22 time period. Obviously, the nerve did not heal.  
23 There's also evidence that her condition has gotten  
24 worse because she went from a negative EMG study to  
25 a positive EMG study consistent with radiculitis.

1 which she did not have before.

2 Despite defense counsel's arguments she had  
3 a history of back pain, it was only the times she  
4 was pregnant, as Your Honor indicated. Five or six  
5 years ago she did see a chiropractor, but she never  
6 needed any other treatment for that. So on the  
7 issue of causation and permanency there clearly is  
8 enough evidence in the record to support a finding  
9 in our case for the plaintiff.

10 In regards to the jury award amount, the  
11 Judge read -- you read the instruction to the jury  
12 what the life expectancy of the plaintiff would be,  
13 which is 50 years. Although 1.7 million dollars is  
14 a lot of money, the future pain and suffering part  
15 of that is 1.55, and if you actually divide that  
16 out over five years it's only \$84 a day. Now, the  
17 testimony on this issue in regards to the extent of  
18 the future pain and suffering, as Your Honor is  
19 aware and is in my moving papers, I mean, there's  
20 times where she's complaining that the pain is so  
21 bad that she wishes her leg was amputated. That in  
22 conjunction with the fact she has worsening EMG  
23 studies, her condition is worsening, she was unable  
24 to do substantially the same thing she was able to  
25 do before. Testimony from her husband in regards

1 to how this has affected her family, the side  
2 effect from medication, etcetera, etcetera -- I  
3 won't go into any further detail. It's all in my  
4 moving papers -- but certainly the future award of  
5 damages is fair based on the issues. There's also  
6 been no question of whether or not she will be able  
7 to go back to work with her worsening condition.

8 And lastly, I just wanted to mention too,  
9 ever since this trial concluded some weeks ago  
10 she's actually on new medications. She spent over  
11 \$700 of her own money to obtain these new  
12 medications and she also has three other nerve  
13 blocks which are pending in the short term, which,  
14 as my papers reference, risk of bleeding,  
15 infection, death. So she's going to have to  
16 undergo a lot of treatment in the future. She went  
17 through a lot and, unfortunately, she's still going  
18 to go through a lot so the jury award for future  
19 pain and suffering is more than sufficient.

20 THE COURT: Anything further?

21 MS. DANCKS: Your Honor, briefly, Judge.  
22 Just on that last point. That is not part of the  
23 record, those statements that he just made in terms  
24 of the subsequent treatment. And just to address  
25 the Court's question on did the Court hold the

1 jury, the clerk -- the last thing the clerk said  
2 is, That concludes the verdict sheet, Your Honor,  
3 and then the Court said, At this time this  
4 concludes your service, and started to dismiss the  
5 jury. The end of it was, You're excused at this  
6 time. That's when counsel asked that the jury be  
7 polled. There was a denial and then the Court  
8 said, Okay. Thank you. You're excused, to the  
9 jury.

10 THE COURT: Thank you. There's one thing I  
11 want to make very clear, two points in making my  
12 decision here. One that was addressed in the paper  
13 but didn't come up in oral argument was that  
14 somehow the jury was unduly pressured to reach a  
15 verdict because the verdict came back at 4:32 or  
16 something like that. And I want to make very clear  
17 that my policy has been, as it was here, is at 4:15  
18 I came down and took the bench to tell the  
19 attorneys that essentially I was going to bring the  
20 jury in and make them aware of their options,  
21 whether or not -- and ask them whether or not they  
22 thought additional time would be helpful or, if  
23 not, they would resume their deliberations on the  
24 next business day, which in this case was over a  
25 weekend. As I had taken the bench and had a brief

1 discussion with counsel as to how to proceed there  
2 was actually a knock at the door and the court  
3 attendant informed us that they had a verdict. At  
4 no time prior to the jury coming in the room had  
5 there been any discussion by me with them  
6 concerning the end of the day or their options.  
7 So I don't know how they could be pressured by  
8 anything that occurred in the courtroom because  
9 they were not aware of that.

10 With regard to the polling issue, I believe  
11 the transcript to be entirely accurate in the sense  
12 that there was a request by defense counsel to poll  
13 the jury. Frankly, that surprised me because I  
14 have been down here and not -- don't recall ever  
15 having received a request to poll the jury, to  
16 which I then asked counsel to repeat and said, Poll  
17 the jury with a question mark, which I think is  
18 clearly in the transcript. And I mentioned as a  
19 question, They've all signed the verdict sheet?  
20 To which counsel, in my mind, withdrew her request.  
21 There was never an intention expressed to me to go  
22 forward at that time. And to now take the position  
23 that somehow that was a denial, I think, is really  
24 fictitious. What really happened was there was no  
25 request and it was withdrawn. I rendered no

1 ruling. I did not deny the request to poll the  
2 jury. I didn't grant the request. I simply  
3 questioned counsel regarding the request so I  
4 understood it. Clearly, at that time had there  
5 been any objection raised to that, then the *Duffy*  
6 case would come in and the fact that they have a  
7 right to it and everything else. But this is not  
8 the *Duffy* case. This case is about preserving an  
9 objection for the record and that did not happen  
10 here. I did not rule on it, and counsel, in my  
11 mind and after reviewing the transcript, clearly  
12 waived any request to poll the jury so I'm denying  
13 the motion in that regard.

14 With regard to the jury running contrary to  
15 the weight of evidence, I just can't see -- I deny  
16 it. There was medical proof on both sides of this  
17 case. It was a very contested case with regards to  
18 liability. A number of medical professionals  
19 testified. The readback from the jury actually  
20 wanted to see the qualifications of the doctors,  
21 which I thought particularly astute since they were  
22 being asked to look at and evaluate and believe one  
23 testimony over the other. Clearly they found the  
24 way they found and based on the credible evidence I  
25 think was appropriate. So I'm denying the request

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in that regard.

With regard to the award of damages, albeit that it's high, certainly in discussions before and after trial or before trial, you know, there was always the issue of permanency and the fact that this involved a 34-year-old plaintiff. In reading the charge to them on loss of enjoyment of life I think the jury, frankly, awarded exactly consistent with the Pattern Jury Instruction on loss of enjoyment of life. There was ample testimony from the plaintiff as to how this has disrupted her life and her family's life and, therefore, I believe the jury verdict to be high but certainly appropriate given her young age, so I'm denying the request.

If you would submit an order then,  
Mr. DeFrancisco.

MR. DeFRANCISCO: Yes, Your Honor.

THE COURT: Thank you.

MS. DANCKS: Thank you, Judge

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

I, Colleen Havill Reed, an Official Reporter in the Fifth Judicial District, State of New York, do hereby certify that the foregoing is a true and complete transcript of my stenographic notes taken in the above-entitled matter, held at the time and place first above-mentioned.

DATED: June, 2010



Colleen Havill Reed  
Senior Court Reporter