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publication in the New York Reports.

No. 200

Tina M. Holstein,
Respondent,

v.

Community General Hospital of
Greater Syracuse,
Appellant.

Myra I. Packman, for appellant.
John A. Cirando, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed,
with costs.

Plaintiff Tina Holstein commenced this medical
malpractice action seeking damages for injuries she sustained
based on the alleged negligence of an employee of defendant

Community General Hospital of Greater Syracuse (the Hospital). Following trial, the jury returned a verdict on liability, by a vote of five to one, in favor of Holstein and awarded approximately \$1.7 million in damages. After the verdict was announced, the Hospital requested that the jury be polled. In response, the court remarked: "Jury be polled? They have signed. They each have individually signed." The Hospital's counsel stated: "Okay. All right. Thank you" and the jury was dismissed. Two weeks later, the Hospital moved to set aside the verdict and requested a new trial. Supreme Court denied the motion and the Appellate Division affirmed Supreme Court's judgment awarding plaintiff damages (86 AD3d 911 [4th Dept 2011]).

In Duffy v Vogel, we held that a party has an absolute right to poll the jury and a court's denial of that right mandates reversal and a new trial (12 NY3d 169, 176-177 [2009]). In this case, however, it was not unreasonable for the trial court to conclude that the request had been withdrawn or waived in light of the nature of counsel's response to the judge's inquiry.

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Order affirmed, with costs, in a memorandum. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Pigott concur.

Decided November 20, 2012