

# Independent doctors say hospital thwarts competition

**Dan D'Ambrosio**, Free Press Staff Writer 8:48 a.m. EST November 28, 2016



(Photo: GLENN RUSSELL/FREE PRESS)

COLCHESTER - Days after they opened Northeastern Reproductive Medicine in a glass-and-granite building on Water Tower Hill, Doctors Christine Murray and Peter Casson were sued by the University of Vermont Medical Center.

The complaint drafted by Eric Miller — now U.S. attorney for Vermont — alleged that Murray and Casson tried to steal patients from the medical center, where they had run the infertility program for nearly two decades.

The lawsuit included five counts of breach of contract and one count of trade secret misappropriation.

"The whole thing was just terrifying," Murray said. "We had signed off on loans on this place for \$2 million, which I suppose isn't much to them, but our houses were on the line."

The lawsuit brought by UVM Medical Center against Northeastern Reproductive Medicine is just one of several examples detailing what independent doctors in Vermont say has been decades of the hospital consolidating its power, and using that power to crush competition. The medical center's monopoly has led to higher costs for health care, fewer choices for patients, and long waits for appointments with specialists, according to these doctors.

Dr. Stephen Leffler, chief medical officer at UVM Medical Center, says the hospital has no agenda to limit competition.

"I would say by our size we occasionally bump up against other people and what they are doing," Leffler said. "I really feel it's not that we're trying to hurt them. We're trying to make sure we do the right things for our patients, the population we serve, and our academic mission. In a small state, that makes you feel big."

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From left, Dr. Greg McCormick of Ophthalmic Consultants of Vermont in South Burlington, Dr. Peter Casson of Northeastern Reproductive Medicine in Colchester, and Amy Cooper, executive director of HealthFirst in Winooski and partner in a proposed surgery center. All three say the University of Vermont Medical Center has interfered with their efforts to provide health care as independent businesses. (Photo: RYAN MERCER/FREE PRESS)

Leffler said compared to other academic medical centers across the country, UVM Medical Center is in the "very bottom cheapest decile" of the cost of care, according to annual studies by the Association of American Medical Colleges and Council of Teaching Hospitals and Health Systems.

A 2010 study by Arrowhead Health Analytics in Fall River, Massachusetts, commissioned by UVM Medical Center, showed the hospital had low per capita costs relative to the rest of Vermont. An annual quality ranking by Vizient University HealthSystem Consortium placed UVM Medical Center in the top 20 hospitals nationwide for the 6th year in a row.

In its lawsuit against Northeastern Reproductive Medicine, UVM Medical Center claimed a patient complained about an "unsolicited call" from Northeastern Reproductive Medicine, asking her to schedule an appointment.

"We knew we hadn't done that," Murray said. "I would never pick up a phone and say to somebody, 'Come and see me.' We're not selling cars."

The patient was said to be upset because her private health information had been shared with Northeastern Reproductive Medicine without her consent. Leffler said the hospital immediately surveyed its electronic health data and found that Northeastern Reproductive Medicine had accessed the medical records of more than 300 patients.

"Based on that we asked the courts to put a temporary restraining order in place," he said.

Attorney Robert O'Neill, who represented Casson and Murray, disputes Leffler's accounting of events. Northeastern Reproductive Medicine did call the patient in question, he said, but only because the hospital had sent her test results to the clinic.

"Their records showed they sent us the lab results," O'Neill said. "If anybody did something wrong with this patient, it was the hospital."

O'Neill also acknowledged that Northeastern accessed the medical records. He said "none of those accesses were actionable," however, which is why the judge dismissed the case "with prejudice," meaning it could never be brought back to court.

Furthermore, O'Neill said, the hospital did not need a restraining order to block access to its medical records. In fact, he said, the hospital had already cut off access before it filed the lawsuit.

"If they believed they could prove my clients solicited patients they needed to pursue that to the nth degree, because it would have been inappropriate," O'Neill said.

Instead, the hospital dropped its case, first against Murray and then against Casson, but not before the doctors spent more than \$100,000 defending themselves over five months, from November 2014 to March 2015.

"It was to destroy us," Casson said of the lawsuit. "Because we were at a financially vulnerable time."

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**Dr. Peter Casson** opened Northeastern Reproductive Medicine in Colchester with partner Dr. Christine Murray. They were sued by the University of Vermont Medical Center. (Photo: RYAN MERCER/FREE PRESS)

Leffler said the hospital dropped its lawsuit because it had achieved its goals.

"The restraining order was issued, they stopped getting into patient records here, after that we settled," he said. "That's all we really wanted out of that."

When Murray and Casson left UVM Medical Center, the hospital sent letters to their patients, acknowledging their departure and reassuring patients that "our team will continue to provide you with the high-quality fertility care and full range of reproductive services on which you have come to depend." There was no mention of Northeastern Reproductive Medicine.

Leffler said UVM Medical Center had no obligation to inform patients where Casson and Murray had gone.

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**Dr. Stephen Leffler, chief medical officer at University of Vermont Medical Center. (Photo: RYAN MERCER/FREE PRESS)**

"Our obligation is to say they left the practice but we're still going to have a practice here," he said. "I would think they would advertise in some way for the new practice. I don't see that as our obligation."

An American Medical Association opinion says patients should be notified when a physician leaves a group practice, "and that the notice should provide the physician's new address and should offer patients 'the opportunity to have their medical records forwarded to the departing physician at his or her new practice location.'"

"The Opinion goes so far as to find it unethical to withhold from a patient information about his or her physician's new practice," wrote the authors of a medical/legal brief published in *The Journal of Medical Practice Management* in the March/April 2010 issue.

"From a moral and best interest of the patient's point of view, I can think of no reason why an institution would not want to let its patients know where the patients' physicians are," O'Neill said.

### **Sabotaged real estate deal**

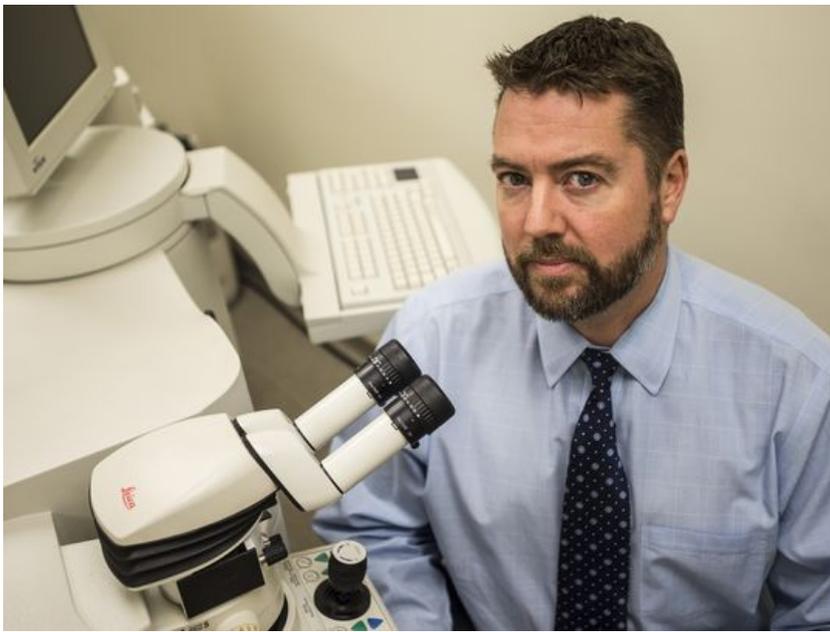
Dr. Gregory McCormick is an eye surgeon and a partner in Ophthalmic Consultants of Vermont, an independent practice in South Burlington. A graduate of the medical school at the University of Vermont, McCormick joined the practice in 2006. He claims UVM Medical Center and a local developer denied him a clinic of his own by sabotaging his effort to build an ambulatory surgery center.

By 2009, Ophthalmic Consultants was reaching a crisis point because of the lack of operating room time available at the Burlington hospital.

"We simply could not reasonably keep getting our work done with the access we had at UVM," McCormick said. "There was not enough getting done per day to keep up with our surgical volumes and not enough operating room days available."

McCormick said at the Fannie Allen campus of UVM Medical Center, the most cataract surgeries he ever did in one day was 11. In the proper setting, with two rotating operating rooms available to him, McCormick said he can perform 28 surgeries in a day.

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**Dr. Greg McCormick of Ophthalmic Consultants of Vermont in South Burlington.** (Photo: RYAN MERCER/FREE PRESS)

The answer, McCormick and his partners decided, was to open their own ambulatory surgery center. There are more than 5,000 licensed ambulatory surgery centers in the United States, where a wide variety of surgeries are performed on an outpatient basis, including cataract removal — McCormick's bread and butter.

New England has 175 ambulatory surgery centers, including 29 in New Hampshire and 17 in Maine. New York has another 116 surgery centers. Vermont has one — The Eye Surgery Center on Hinesburg Road in South Burlington, restricted to a few types of eye surgery.

Vermont ranks 50th in the nation for ambulatory surgery center procedures by state, according to Modern Healthcare, an industry trade publication. McCormick and other independent doctors blame the University of Vermont Medical Center's opposition to surgery centers.

Early in 2011, McCormick and his partners attempted to open Vermont's second ambulatory surgery center.

McCormick's first step was to acquire a certificate of need from the Vermont Department of Banking, Insurance, Securities and Health Care Administration, which oversaw the process before the Green Mountain Care Board was created. McCormick described the process as the most onerous in the nation. A study this year by the Mercatus Center at George Mason University in Virginia said Vermont has more laws governing certificates of need than any other state.

"Clearly there is more work to be done in explaining to legislators and health care policymakers about the potential limiting effects these laws have on achieving high-quality, low-cost health care," the Mercatus report concludes.

Certificates of need were created by the federal government in the 1970s to ensure that spending on new health care facilities was justified. After the federal mandate for certificates of need was dropped in 1987, 14 states stopped requiring certificates of need. Vermont was among the states that retained the process.

To meet one of the state's requirements, Ophthalmic Consultants would have to produce a complete proposal for a building and all associated costs, plus a "firm address."

### **It's the hospital's call**

McCormick began looking for a developer to work with, but said he found most were uninterested, given the uncertainty of the certificate of need process. Pizzagalli Properties proposed a site on Tilley Drive in South Burlington where the University of Vermont Medical Center has an orthopedics and rehabilitation center and a cardiology campus built by PC Construction, formerly Pizzagalli Construction.

Pizzagalli Properties offered a one-acre lot on Tilley Drive it was willing to take offline while McCormick's application wended its way through the process.

McCormick said he and his partners spent well over \$100,000 working on detailed plans and paying consultants to complete the certificate of need application for their surgery center. The building would cost more than \$2 million, making it "relatively expensive," McCormick said, but still viable.

"We agreed to move forward with the plan," he said.

Then came the poison pill. A clause in the lease from Pizzagalli stipulated McCormick's property could never be used for anything but an eye surgery center. The clause gutted the property's resale value, killing the deal.

"We were denied a place to work, without even the opportunity to ask the state permission," McCormick said.

When he objected to the clause, McCormick was told if he allowed Pizzagalli to ask Fletcher Allen Health Care — now known as UVM Medical Center — for permission to build the surgery center, the clause would be removed.

"As mentioned, they are a large client of ours and this is something we should ask them about," Pizzagalli's Bob Bouchard said in a March 30, 2011 email — part of a series of emails obtained by the Burlington Free Press from McCormick.

McCormick was flabbergasted. He told Bouchard Fletcher Allen would never agree to the surgery center. Bouchard assured him that Pizzagalli had influence with the hospital.

"Dear Mr. McCormick: Well you were correct," Bouchard wrote in an email on April 20, 2011. "Fletcher Allen Health Care opposes the installation of a ASC/Ophthalmology Surgery Center on Lot 8 at Mountain View Office Park."

Unprepared to start back at square one on a new location with no guarantee of success, McCormick and his partners reached an agreement with their competitor to operate at The Eye Surgery Center, the only ambulatory surgery center in Vermont.

Bouchard declined to discuss the transaction with McCormick, referring questions to UVM Medical Center.

Dr. Leffler acknowledged the hospital wanted the property McCormick was trying to lease, and said Pizzagalli was "generally aware" UVM Medical Center intended to build an outpatient facility there. The hospital is currently going through the certificate of need process before the Green Mountain Care Board to buy additional land on Tilley Drive that includes McCormick's one-acre site.

"If Dr. McCormick wanted to, he could have put in a certificate of need somewhere else," Leffler said. "We were interested in buying that piece of property for bigger purposes in the long run."

### **Surgery center 'unnecessary'**

Amy Cooper has spent the past 17 months before the Green Mountain Care Board, trying to get a certificate of need for an ambulatory surgery center she and several partners want to build near Costco in Colchester. Cooper said her group of doctors has spent about \$240,000 so far on the application process.

Cooper came to Vermont in June 2013 from New York City, where she worked as a management consultant, mostly in the health care industry. She became executive director of HealthFirst, the association of independent doctors in Vermont, in 2014.

Looking around the health care environment in the state, Cooper noticed Vermont had "hardly any lower cost, independently owned settings of care," she said. Based on her experience working with health care systems around the country, Cooper believed ambulatory surgery centers saved money and delivered excellent care.

"Surgery centers are certainly the right place for routine procedures to happen from a patient convenience perspective," Cooper said. "From a patient safety perspective, the risk of infection is much lower in a small outpatient setting than in a large hospital. From a cost perspective, it's indisputable (that surgery centers save money)."

In March 2014 an independent congressional agency reported to Congress that ambulatory surgery centers are cheaper than hospital outpatient departments.

The Medicare Payment Advisory Commission cited the example of Medicare payments for cataract surgeries in 2012, pegged at \$964 in an ambulatory surgery center compared to \$1,672 in a hospital outpatient department.

"Moreover, (ambulatory surgery centers) offer patients additional advantages over (hospital outpatient departments), such as more convenient locations and shorter waiting times," the report continued.

Cooper had what she thought was a great idea: Build an ambulatory surgery center. But when she brought the idea up at various meetings with health care providers, most notably UVM Medical Center, Cooper was in for a surprise.

"It was not as enthusiastically received by all parties here as you might have expected," she said. "When there is an unfriendly incumbent hospital who would prefer to have everything done under their roof, that makes it more difficult for other settings like this to crop up."

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**Amy Cooper, executive director of HealthFirst in Burlington.** (Photo: RYAN MERCER/FREE PRESS)

Cooper decided to press ahead anyway. She polled the members of HealthFirst and found eight doctors willing to open a surgery center at a cost of \$5 million. Another eight doctors are committed to performing surgeries in the center. The center would offer services in gastroenterology, obstetrics and gynecology, pain management, orthopedics and general surgery. About 60 percent of its business would be performing colonoscopies.

"These procedures are typically what goes on at surgery centers across the country," Cooper said.

On July 2, 2015, Cooper submitted a certificate of need application for The Green Mountain Surgery Center to the Green Mountain Care Board. Both Northwestern Medical Center in St. Albans, and the Vermont Association of Hospitals and Health Systems, representing 17 hospitals in Vermont, including the University of Vermont Medical Center, oppose the application.

The Vermont Association of Hospitals and Health Systems warned the surgery center would hurt its members financially. The association also worried about the "detrimental" impact the surgery center could have on "critical health reform efforts to move away from fee-for-service payments."

"The members of VHHS have literally invested millions of dollars and an untold number of hours of time on payment reform," the hospital association letter stated. "The GMSC's application to establish a market driven fee-for-service ambulatory service center, which can cherry pick outpatient surgery services outside of this payment system and the hospital regulatory structure, is directly contrary to and undermines this effort."

Leffler, the chief medical officer at UVM Medical Center, said the surgery center is simply not needed.

"If you look across the state right now, hospitals have said we have approximately the right capacity in our (operating rooms) and surgeons to do the care that needs to be done," Leffler said.

Leffler further believes building the surgery center could drive costs up by creating more demand for medical services. He said studies by The Dartmouth Institute have shown "over and over again" that increasing capacity for medical care above what a region needs "causes increased utilization."

Lastly, Leffler worries that Green Mountain Surgery Center patients will end up in UVM Medical Center's emergency room.

"When (Green Mountain Surgery) patients have complications and after hours needs, where are they going?" he said. "Are they coming to our emergency department? If they are, how are we going to have their records? Are we going to have the things we need to provide good care?"

Cooper said the surgeons at the surgery center will have "24-hour responsibility" for their patients. She said she is also investigating how to "electronically interface" with local hospitals to transmit patient records.

"I already talked with our electronic medical record vendor about building bridges to local hospitals, which they have done in several markets," Cooper said. "It requires collaboration with the hospital."

Green Mountain Surgery Center has received 18 letters of support for its certificate of need application, from local businesses, the Town of Colchester, and the Boys and Girls Club. All of the letters mention lower cost and increased choice as reasons to approve the center. The letter from Ted Castle, president of Rhino Foods in Burlington, contradicts the notion that the surgery center isn't needed.

"We support our local hospitals, but have heard from our employees about how long it takes to get appointments because the UVM Medical Center is so busy," Castle writes.

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*(Photo: Free Press file )*

Castle says the cost of outpatient procedures at the hospitals "quickly depletes" the medical reimbursement plans he provides for his employees, and says he believes the surgery center will provide a more affordable choice for his workers.

Amy Cooper says she's been amazed by the outpouring of support her proposal has received from "regular Vermonters," and employers; and that she's been stunned by the lack of support from large institutions like UVM Medical Center. Cooper said the Shumlin administration has seemed unwilling to engage in a conversation about the surgery center and its potential impact. Gov. Peter Shumlin did not respond to calls and emails from the Burlington Free Press for comment.

Cooper is in the midst of responding to the seventh round of questions concerning Green Mountain Surgery Center from the Green Mountain Care Board, which will determine whether the center receives a certificate of need.

"We are hopeful that after this, the board will have enough information to deem our application closed and proceed to a hearing and a decision," Cooper said.

Cooper hopes to have a decision by spring, nearly two years after applying.

Board Chairman Al Gobeille said by his count, the Green Mountain Surgery Center application is on Day 64, explaining that "the clock does not move while the applicant is answering questions." The Care Board has 90 days to process an application.

"Admittedly these take a long time, but they take a long time for every application that is contested," Gobeille said.

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