

# A week in the life of Superior Court

*Two civil cases offer a window on the judicial process*

By **Thelma O'Brien**/*The Commons*

NEWFANE—What goes on behind the doors of Windham County Superior Court, the imposing 1825 Greek Revival structure on the Newfane green?

The Vermont judiciary website describes the state's Superior Courts as "trial courts where civil matters such as breach of contract, eviction, foreclosure, personal injury, land disputes, medical malpractice and wrongful death cases are heard." Appeals from the Probate Court are also heard in Superior Court.

During two cases observed over five days of observation in April, juries heard charges of medical malpractice in the last three days of the first trial and accusations of construction fraud in the start of the next.

If it can be said that any trial is straightforward, the malpractice case against Roger Dietrich, M.D., a surgeon once affiliated with Brattleboro Memorial Hospital, had a mainly orderly trajectory, though complex in parts and about matters that took place in 2004.

The suit against Dietrich was brought by a former patient, Timothy Holt.

In contrast, the \$1.3 million fraud alleged in the construction case by a condominium association, Vantage Point, a 30-year-old, 60-unit, three-building complex, against Stratton Association Management, is anything but simple.

That action against the condominium management, which not only involved the change from one management company to another but also the facility's owner in the same action, brought charges against a now-defunct third-party contracting firm, RAB, which had hired people to restucco the buildings.

According to Rich Carroll, clerk of the court, two jury trials in two weeks is far from typical. The jurisdiction might not see two jury trials in a year.

Following is a snapshot of the legal process at work in the two trials from those few recent days.

## **Did infections kill a marriage?**

Timothy Holt appeared on the morning of Thursday, April 15, in court with his estranged wife, Diane, who had a filed a loss of consortium claim and was also a plaintiff in the case, and his mother.

Holt had been sick for 18 months, eventually diagnosed with diverticulitis, a painful condition caused by inflamed pouches called diverticula in the lower or part of the large intestine called the sigmoid colon

# A week in the life of Superior Court

*Two civil cases offer a window on the judicial process*

*Previous page*

Dr. Dietrich operated on Holt's sigmoid colon July 9, 2004, at Brattleboro Memorial Hospital. All of the facts from then on, until July 16, when he required a second operation, were in dispute.

Holt and his lawyers from Affolter Gannon & Rose in Essex Junction claimed that standards of care after the operation were not met. They claimed Holt suffered unduly, undergoing a colostomy on July 16, because of infections resulting from leaking of the colon into the abdominal cavity.

At one point after Holt went home, he collapsed and was taken to Dartmouth Hitchcock Hospital, suffering from possible toxic shock because of wound infections.

Holt and his legal team claimed that signs of infection were evident soon after the first operation. Had Dr. Dietrich been paying correct attention, they charged, Holt would have been less sick and suffered less. Further, he would not have lost his wife, who balked at Holt's condition and subsequently left the marriage — the basis for his loss-of-consortium claim.

In a pretty-evenly-matched ping-pong game, claims and counter claims flew from the witness box, experts on both sides taking the positions you might expect from either the plaintiff or defendant (at a cost of about \$5,000 for the court day, plus other fees for examining records and for expenses).

The experts were mainly doctors with surgical training similar to Dr. Dietrich's, or in infectious diseases. A litany of their credentials was recited during each appearance for either side.

The two sides battled contentiously over signs of infection and when they appeared and disappeared; X-rays that did or did not show air in Holt's abdomen and chest; white blood cell counts, fever, blood pressure, heart rate and others; and how those vital statistics were interpreted as good or bad.

The defense, argued by John Monahan from the firm Dinse, Knapp & McAndrew in Burlington, claimed there never was a natural progression of these symptoms; they might be bad on the 13th and good on the 14th and never, until the 16th, warranted re-operating.

The plaintiff claimed the x-rays showed early on the presence of air in the abdominal cavity, a precursor to pneumoperitoneum, the most common cause of which is a perforation of some abdominal structure, such as the intestine, or from an anastomotic leak, a leak from the very section of the bowel that was joined together following removal of diseased sections of Holt's colon.

The plaintiff claimed the delay of the second operation, and, further, the decision not to get a CT scan of Holt's abdomen, which would have shown the presence of air and other damage. A required colostomy later became

infected and brought Holt to Dartmouth Hitchcock with signs of toxic shock from an infection brought on by a form of staph. The colostomy was later closed.

# A week in the life of Superior Court

*Two civil cases offer a window on the judicial process*

*Previous page*

The defense claimed antibiotics and other measures were taken to ameliorate Holt's condition and that a CT scan was not necessary and could have been dangerous given the dyes used. Had everything happened as the plaintiff claimed from post operation to the day of the second surgery, the patient would have been a lot sicker and maybe at death's door soon after the surgery, the hospital's legal team asserted.

## **Closing arguments**

Closing arguments began Monday afternoon at 1 p.m. with attorney Mike Gannon telling the jury that Holt and his wife, Diane, were modest, simple people who enjoyed activities like boating, skiing, and walking their dog.

Diane Holt was absent from the court on Monday.

And if it weren't for the "but fors" presented in this case the couple would still be enjoying one another's company, Gannon said. Holt's illness and treatment had resulted in the "total lack of intimacy" between the couple.

"Tim," Gannon continued, "became ashamed of his body," and Diane felt "all this conflict, all this guilt" because she found she couldn't act as Tim's caregiver.

"That ended their relationship," Gannon said.

He also spoke of the obvious signs to the plaintiff's experts of Holt's deteriorating condition, in all probability an anastomotic leak, what he called "the world's worst complication." He said there were enough red flags to warrant a CT scan.

"There was no reason not to do a test," he said.

"There is a remarkable refusal to accept responsibility," in this case, Gannon said, describing in more detail the symptoms and other signs of Holt's condition.

He told the jury in the event they determine a deviation from the standard of care, Holt should be awarded total damages of about \$800,000 to compensate him for lost wages and medical bills.

"All the plaintiff's doctors agree that deviation occurred and that for three days [Tim] sat in his own waste," Gannon said in his 35-minute closing.

# A week in the life of Superior Court

*Two civil cases offer a window on the judicial process*

*Previous page*

In nearly 70 minutes, Monahan sometimes appeared angry or exasperated as he defined what he considered proof of Dr. Dietrich's responsible care post-operation, repeating the medical information he'd presented during trial, taking issue with every point the patient's attorney made.

If Holt's condition had been as bad as the plaintiff claimed, "why wasn't he already dead?" Monahan asked.

Monahan was especially harsh about the loss of consortium Gannon had emphasized, noting that Holt was beset by other medical problems and that the bowel operation was just one of many physical deficits.

He pointed out Diane Holt left the marriage and didn't tell her husband where she was going, that there was no communication for months, and she'd come back only to get her dog.

"Actions speak louder than words," Monahan said, adding that Holt couldn't blame Dietrich for the failed marriage.

Gannon, in reply, said if Dietrich had paid as much attention to his patient as Monahan just had in his closing, "we wouldn't be here."

## **Reaching the verdict**

The jury retired to deliberate about 3 p.m., following Judge John Wesley's jury instructions.

They returned about 6:30 p.m., marking only one answer out of six on the special verdict form:

"Was Dr. Dietrich negligent...?"

Their answer: "No."

That was enough to release Dietrich from the other five counts.

# A week in the life of Superior Court

*Two civil cases offer a window on the judicial process*

*Previous page*

Meanwhile, Jeff Smith, a member of the jury, reported in a post-verdict conversation that the principal cause for the jury's verdict in favor of the doctor had to do with Holt and "how he's tried suing before."

Smith confirmed that information about previous lawsuits had never been put in evidence during the trial but was in Holt's medical record.

Gannon, in a later conversation, seemed startled by the juror's revelation about his client. "It's not true," he said.

If jurors did not take the plaintiff's history into account, they were forbidden from knowing about the defendant's.

The court ordered suppression of information relating to four previous malpractice suits against Dr. Dietrich (all resolved in his favor) as well as complaints from female co-workers of inappropriate behavior but never pursued, and the fact that the doctor agreed to attend anger management classes.

## **Was synthetic stucco to blame?**

The courthouse activity then moved from health care to finding whom to stick with a \$1.3 million exterior stucco repair bill.

"Vantage Point condos are 2 bedroom condos that are nestled in a wooded area," the ski resort's website reads. "They were built from 1982-1983 and just were recently newly re-sided."

The tenants' group at Vantage Point was suing Stratton Association Management (SAM), the relevant manager of the complex.

SAM, in turn, was suing RAB, a construction company no longer in business, according to the defendant's lawyer, Antonin Robbason of Miller Faignant & Behrens in Rutland.

Acting for Stratton was William Leckerling of Lisman, Webster & Leckerling in Burlington, and representing Stratton Association Management was Andrew Maass of Ryan, Smith & Carbine in Rutland.

Among the issues discussed in court during this particular week: the traditional understanding of stucco.

# A week in the life of Superior Court

*Two civil cases offer a window on the judicial process*

*Previous page*

The two sides debated about whether most people thought of stucco as an inch-or-so thick wall covering that has been used copiously since the Renaissance, whether a new stucco substitute, or synthetic stucco, was viable and reliable, and what was the accepted system of applying “synthetic stucco” (the defendants’ preferred terminology) or “fake stucco” (the plaintiff’s word).

All four walls of the exterior of the three buildings are now covered in Hardiplank, a synthetic mixture that has been made to resemble wood. The new material replaces the synthetic stucco that had been applied to the exterior walls.

Instead of being applied over two other layers of foam insulation and a glass-fiber reinforced layer of a cement base mixed with polymer, the synthetic stucco had been applied on top of the plywood siding of the building, which had been covered only by a layer of mesh, according to expert architects and builders testifying for the prosecution.

The two-bedroom condos, over their life in boom and bust economies, have ranged in price from about \$110,000 to upwards of \$275,000. They all sold, and subsequently, many have been resold.

The direct application of the synthetic stucco to the mesh and plywood siding caused rot and leaks, as well as worse problems in areas around doors, and windows, and flashing.

Doors and windows must be sealed to prevent water from seeping behind the outer layer of synthetic stucco, a measure that was not done or not done properly, according to the plaintiff.

The plaintiff argued it had been more expensive to replace the defective stucco than it would have been to do it right to begin with.

But, the defense argued, the repair work far exceeded the scope of repairing the damage.

The defense argued that judging 24-year-old buildings by modern standards and codes was wrong and defended the synthetic stucco. “This product performed pretty darn well for 25 years,” the defense claimed.

The plaintiff took the position that damage to the building began many years ago and had required many repairs.

## **Keeping the water out**

An expert witness for the plaintiff, Peter Morgan, a contractor and a builder, testified that he had done repair work at the complex and believed the system used to apply the synthetic stucco was faulty.

# A week in the life of Superior Court

*Two civil cases offer a window on the judicial process*

*Previous page*

“The basics of the system are incompatible,” Morgan said. “You must keep moisture off the wood.”

He also said he had reported this flaw to Kathy Harper, a Stratton employee and at the time in charge of maintenance at the condo complex, and was unaware if she reported that to anyone.

Another plaintiff expert witness, architect Albert Russell, reiterated Morgan’s view but allowed that using the three-layered system — of insulation and cement and mesh and then synthetic stucco — would work if applied properly. He drew for the jury a diagram of how to properly apply synthetic stucco.

Asked what he had found on the Vantage Point buildings, he replied, “No building paper [one of the layers in one of the synthetic stucco systems], no insulation, no mesh. It was not appropriate. Moisture rots out framing and causes mold.”

How long would it take to deteriorate?

“The problems would have started immediately; sometimes it takes years to show up,” Russell testified.

The defense strategy seemed to focus more on the extent of the repairs than on the relative value of synthetic stucco, with lawyers asking Russell if the public, by looking at the walls, would be able to tell if it was synthetic stucco. The architect thought one could.

The defense showed a picture of a wall with windows that displayed an obvious seam where the imitation stucco was joined. Mr. Russell said, “That’s a clue this is not stucco.”

## **Performance in court**

Friday afternoon continued with testimony from a condo owner who was also, for sometime, president of the condo board, and from another condo owner who had died after his deposition was taken.

Patrick Monroe, a part-time actor recruited by the plaintiff, read the deceased’s deposition for the court.

Monroe brought the courtroom up short with his quiet performance of an 82-year-old man, a retired banker, who’d bought a condo for \$111,725 some 25 years before and who had no use at all for the shenanigans the deposition questions seemed to imply.

He’d looked at other condos but knew he wanted the one he bought at Vantage Point.

“I had a lot of confidence and trust. There was an aura of strength at Stratton. The main thing was trust and the price. We were downsizing from a house on the mountain, and you have this belief here about who’s running the show.”

### **The verdict**

After another four days, the trial of Vantage Point Condominium Association against Stratton Management Association ended, and the jury awarded Vantage Point more than \$1.4 million in the late afternoon of April 29. The third-party defendant in the case, RAB, was not held liable.

Court officers said they thought this the largest jury award in Windham Superior Court.