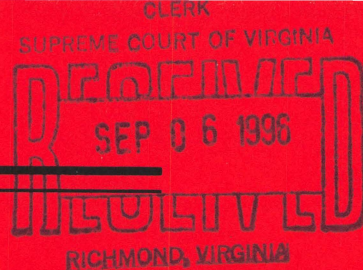


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IN THE

**Supreme Court of Virginia**

AT RICHMOND

RECORD NO. 960933

**ROBERT COURTLAND MOATES,**

*Appellant,*

v.

**JOHN W. HYSLOP, M.D., et al.,**

*Appellees.*

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**JOINT APPENDIX**

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**MOTION FOR JUDGMENT**

Plaintiff, Robert Courtland Moates, moves the Court for a joint and several judgment against defendants John W. Hyslop, M.D., Surgical Associates of Richmond, Inc.

in the amount of ONE MILLION DOLLARS (\$1,000,000.00), together with interest and the cost of this proceeding and in support of his motion for judgment, respectfully submits the following:

1. At all times relevant to this action, plaintiff was a resident of Chesterfield County, Virginia.

2. At all times relevant to this action, defendant John W. Hyslop, M.D. was a duly licensed physician practicing medicine in


the Commonwealth of Virginia, and holding himself out to the public and to the plaintiff as a physician and surgeon capable of furnishing that degree of skillful diagnosis, care and treatment as practiced by any ordinary and prudent physician and surgeon in the Commonwealth of Virginia.

3. At all times relevant to this action, defendant John W. Hyslop, M.D. acted as and was a member, agent and/or employee of defendant Surgical Associates of Richmond, Inc.



5. At all times relevant to this action, all those individuals, including but not limited to doctors, nurses, technicians, consultants and assistants, participating in the care and treatment of Robert Courtland Moates were agents, servants and/or employees of Surgical Associates of Richmond, Inc.,



6. That on or about October 2, 1991, Robert Courtland Moates was admitted to  Johnston-Willis Limited's hospital under the care of the defendant John W. Hyslop, M.D. for the removal of his gall bladder.

7. That on said date a general anesthesia was administered to Robert Courtland Moates by agents, servants and/or employees of Midlothian Anesthesia Associates, Inc. and a laparoscopic cholecystectomy was performed by the defendant John W. Hyslop, M.D.

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with the assistance of agents, servants and/or employees of the defendants Surgical Associates of Richmond, Inc. and Johnston-Willis Limited and Midlothian Anesthesia Associates, Inc.

8. That as a part of said surgical procedure CO2 gas was injected into the plaintiff's body.

\* \* \* the CO2 gas passed into the scrotum, testicles and right leg of the plaintiff.

\* \* \*

11. That the defendant John W. Hyslop, M.D. was also negligent in that he failed to advise the plaintiff that the procedure performed could cause injury to plaintiff's scrotum, testicles, right leg, nerves and cause a blood clot to form.

\* \* \*

13. That as a result of the negligence of the defendant: as aforesaid, plaintiff suffered painful swelling of his scrotum and right leg, has suffered severe and permanent nerve damage, was

caused to form a blood clot that was life-threatening and caused plaintiff to seek medical treatment and be hospitalized, has suffered and continues to suffer constant pain, can stand on his feet for only short periods of time, has been unable to work at his calling as he did before October 2, 1991, and has otherwise suffered losses and damages both physical and financial.

WHEREFORE, plaintiff demands judgment against the defendants/ and each of them jointly and severally in the sum of ONE MILLION DOLLARS (\$1,000,000.00), together with interest and costs.

TRIAL BY JURY IS REQUESTED.

ROBERT COURTLAND MOATES



#### GROUND OF DEFENSE

COMES NOW, the defendants John W. Hyslop, M.D. and Surgical Associates of Richmond, by their Counsel, and in answer to the Motion for Judgment filed in the above-referenced matter state as follows:

1. These defendants admit the allegations contained in Paragraphs 2, 3, 6, and 8 of the Motion for Judgment.

2. These defendants deny the allegations contained in Paragraphs 5, 9, 11, and 13 of the Motion for Judgment and demands strict proof thereof.

3. These defendants are without sufficient information or belief as to the truth or falsity of the allegation contained in Paragraphs 1 of the Motion for Judgment and therefore deny such allegations and demand strict proof thereof.



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4. These defendants admit the allegations contained in paragraph 7 of the Motion for Judgment, except that they deny that any agent of Surgical Associates of Richmond, Inc. other than Dr. Hyslop participated in the cholecystectomy.

ANY ALLEGATIONS not previously addressed are hereby denied.

THESE DEFENDANTS reserve the right to assert the following defenses should further investigation or discovery disclose a basis therefore:



**FIFTH DEFENSE**

That these defendants committed no acts of negligence or other violations of the standard of care.

**SIXTH DEFENSE**

Any negligence committed by these defendants is not a proximate cause of the plaintiff's injuries.

THESE DEFENDANTS reserve the right to rely on any other

defenses that through further investigation or discovery may become known during the course of this action as well as reserves the right to delete any defenses previously raised herein or amend any responses to allegations made herein should further investigation or discovery demonstrate that there is no basis for such defense or response to such allegation.

WHEREFORE, these defendants prays that this action be dismissed with prejudice, that they be awarded their costs and attorney's fees, and for any other further relief that this Court may deem appropriate.

**TRIAL BY JURY IS DEMANDED.**

\*

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**MOTION FOR SUMMARY JUDGMENT**

COME NOW THE DEFENDANTS, John W. Hyslop, M.D. and Surgical Associates of Richmond, Inc, by counsel, and move this Court for Summary Judgment on the following grounds:

1. This is a medical malpractice action involving alleged negligence in the performance of laparoscopic cholecystectomy (a relatively new surgical procedure), in preoperative discussion of the relevant risks and benefits associated with the surgical procedures, and in postoperative care.
2. The defendant, Dr. Hyslop, whose acts are the basis for claims of liability against the corporate defendant, is a surgeon and at all times applicable, was acting as a surgeon.
3. Under Virginia law, per Code § 8.01-581.20, the standard of care governing this case is the standard of the reasonably prudent *surgeon*, at the time and under the circumstances of this case. Only opinions of an expert in the standard of care applicable to a

surgeon are admissible in this case. Even in cases involving informed consent, the plaintiff must produce evidence of standard of care through such an expert witness. See Bly v. Rhoads, 216 Va. 645, 222 S.E. 2d 783 (1976).

4. Pursuant to Court order, the plaintiff has identified Kevin Keller, M.D. as his sole expert witness. Under the terms of the order, entered by agreement of counsel, the plaintiff may not call or rely upon any other witnesses.

5. Per Code § 8.01-581.20, in order to qualify as an expert in the applicable standard of care, Dr. Keller must be familiar with the standard of care of a surgeon practicing in Virginia at the time complained of (October, 1991) *and* "if he must have" had an active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action."

6. These defendants propounded to the plaintiff the enclosed Request for Admissions (see Exhibit A) and the plaintiff provided the enclosed responses (see Exhibit B).

7. The plaintiff offers argument in his response to request number 6 that his sole expert is somehow qualified to testify against Dr. Hyslop. However, the bare facts of the case, which brook no argument and are conclusively admitted in his responses, show that Dr. Keller has never received training or maintained a practice in Dr. Hyslop's or a related field. Furthermore, it stands to reason that if Dr. Keller has never performed surgery, he cannot be qualified in discussing the standard of care applicable to a surgeon in discussing the risks and benefits associated with the surgery or in proper postoperative therapy.

8. As a matter of law, Dr. Keller is not qualified to testify as an expert in the standard of care of a general surgeon.

9. Because the plaintiff has no qualified expert, he cannot make a prima facie case of negligence against Dr. Hyslop and Dr. Hyslop is entitled to summary judgment.

WHEREFORE, these defendants pray that summary judgment be entered in their favor and that this case be stricken from the docket.

JOHN W. HYSLOP, M.D.  
SURGICAL ASSOC. OF RICHMOND  
By Counsel



REQUEST FOR ADMISSIONS

COME NOW THE DEFENDANTS, John W. Hyslop, M.D. and Surgical Associates of Richmond, Inc., by counsel, and pursuant to Rule 4: of the Supreme Court of the State of Virginia, propound the following Request for Admissions.

1. Admit Kevin Keller, M.D. is a family practitioner.

RESPONSE:

2. Admit Kevin Keller, M.D. has never maintained an active clinical practice in general surgery.

RESPONSE:





PLAINTIFF'S RESPONSE TO REQUEST FOR ADMISSIONS

Comes now plaintiff, by counsel, and for his response to Request for Admissions propounded by defendants John W. Hyslop, M.D. and Surgical Associates of Richmond, Inc., states as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted. Dr. Keller has, however, observed the procedure.
6. Admitted; however, Dr. Keller is competent to testify as to the standard of care of physicians in Virginia as to informing

3. Admit Kevin Keller, M.D. referred Robert Moates to John Hyslop, M.D. for the laproscopic cholecystectomy which is the subject of this action.

RESPONSE:

4. Admit Kevin Keller, M.D. referred Robert Moates as stated in Paragraph 3 because Kevin Keller, M.D. had never performed laproscopic cholecystectomy.

RESPONSE:

5. Admit Kevin Keller, M.D. has never performed laproscopic cholecystectomy.

RESPONSE:

6. Admit Kevin Keller, M.D. is not competent to testify to the standard of care of a general surgeon in Virginia at the time sued upon.

RESPONSE:



**MEMORANDUM IN SUPPORT OF**  
**MOTION FOR SUMMARY JUDGMENT**

COME NOW THE DEFENDANTS, John W. Hyslop, M.D. and Surgical Associates of Richmond, Inc., by counsel, and offer the Court this Memorandum in Support of their Motion for Summary Judgment.

**INTRODUCTION**

In this medical malpractice case, the Court has ruled that the plaintiff has no expert qualified to testify as to the standard of care applicable to the defendant. The sole issue before this Court is whether the plaintiff can make a prima facie case by simply asserting, without expert testimony, that Dr. Hyslop negligently failed to give him proper preoperative advice.

The answer is no, for two reasons: First, the Supreme Court of Virginia, in Bly v. Rhoads, 216 Va. 645, 222 S.E.2d, 783 (1976), has ruled that such cases require expert testimony. Second, the plaintiff has not raised this complaint about Dr. Hyslop until the last minute, depriving the defendants of discovery and the opportunity to defend.

### **BACKGROUND**

In the December 18, 1995 hearing, the plaintiff conceded he had no expert testimony to opine Dr. Hyslop breached the standard of care. Instead, he represented to the Court that he can make out a prima facie case of negligence against the defendants by offering the following lay testimony: (1) that Dr. Hyslop was obligated to offer him choices for his gallbladder treatment before performing the laparoscopic cholecystectomy; and (2) that Dr. Hyslop failed to give him proper discharge instructions (that Dr. Hyslop failed to give him *any* instructions).

As demonstrated below, these subjects pertain to information which Dr. Hyslop allegedly *should have* communicated to the plaintiff, based on his education, training and experience as a surgeon, and especially his expertise regarding performance of and risks associated with laparoscopic cholecystectomy. By definition, these are standard of care questions, i.e., whether the reasonably prudent surgeon should have communicated some particular information to the plaintiff. Only an expert can address those issues.

Furthermore, inasmuch as the plaintiff has never advanced these theories of liability previously, he should not be permitted to advance them now, only after his sole expert has been disqualified, after the discovery deadline has lapsed and a mere month prior to trial.

### **ARGUMENT**

1. *The plaintiff's theory of negligence is nevertheless a standard of care issue, requiring expert testimony.*

The plaintiff contends that Dr. Hyslop told him "nothing" before his laparoscopic cholecystectomy regarding surgical options and that Dr. Hyslop told him "nothing" prior to his hospital discharge about postoperative care and activity. Since these allegations are made only

after the expiration of the discovery deadline, the defendants cannot address their truth or the quality of evidence to support them.

Nevertheless, the allegation that Dr. Hyslop said "nothing" in either situation is meaningless, unless Dr. Hyslop *should have told* the plaintiff *something*. And who will testify what Dr. Hyslop should have said? No one. The plaintiff has no expert.

Both Dr. Hyslop and his expert, Peter Brown, MD, will testify that the benefits of laparoscopic procedures include: they have fewer risks, are less expensive, require less recuperation time, and have a much lower incidence of deep vein thrombosis (DVT), the injury complained of here. Inasmuch as the plaintiff has no expert witness to even offer non-opinion, technical information regarding these surgical procedures, such factual testimony will be undisputed.

In the face of such facts, a lay jury simply cannot weigh the various risks and benefits to determine whether the plaintiff was denied crucial information. Only an expert can testify whether an open cholecystectomy offered any benefit to the plaintiff. Only an expert can testify to what those benefits would have been. Only an expert can compare those benefits to the dramatically higher risks involved in an open procedure. Only an expert can testify that Dr. Hyslop violated the standard of care in his communications with the plaintiff.

The same is true for postoperative instructions. Notwithstanding the plaintiff's signature on a discharge sheet, only a witness familiar with the postoperative risks of laparoscopic cholecystectomy can testify that there was some critical piece of information which Dr. Hyslop was required to provide and failed to.

Furthermore, the discharge sheet is part of the hospital chart and is signed by a nurse-employee of the hospital. Who will testify that the standard of care regarding discharge instructions imposes responsibility on the doctor, rather than on the hospital? Even if the plaintiff is permitted to testify that he was not informed and had a right to be, he cannot testify which of his health care providers had the relevant responsibility. Such would be a matter for experts, who by their education, training and experience are aware of common practice, i.e., the standard of care.

The Supreme Court decision in Bly v. Rhoads, 216 Va. 645, 222 S.E.2d 783 (1976), is directly on point. In Bly, the plaintiff alleged her physician failed to obtain informed consent prior to performing a hysterectomy. As here, the plaintiff alleged the defendant "failed to advise her that there were alternatives to the surgery" and that "the risks [of the surgery] were never explained" to her. As here, the plaintiff in Bly urged the Supreme Court to rule that under such circumstances expert testimony was unnecessary. The Court demurred:

We believe the better rule, which we now adopt, is to require a patient-plaintiff to show by qualified medical experts whether and to what extent information should be disclosed by the physician to his patient. ... In the informed consent phase of the action, the patient must produce ... expert testimony to identify and elucidate the risks of treatment and to establish the cause of any injury or disability suffered by the patient. ... It adds but little to his burden when he must also show by experts that prevailing medical practice requires disclosure of certain information, that the information is material to an informed decision on treatment, and that disclosure would not pose an unreasonable threat of detriment to the patient's well-being or to his ability to make a rational decision.

216 Va. 645, at 651, 222 S.E.2d 783, at 787.



2. *After failing to produce a qualified expert, the plaintiff too late advances the novel theory that Dr. Hyslop failed to provide proper preoperative and postoperative advice.*

This lawsuit was filed and served in December, 1994. On February 1, 1995, the defendants propounded interrogatories. Not until September 22, 1995, under court order, did the plaintiff respond to that discovery. A copy of that discovery response is attached as Exhibit 1. Except for court-ordered supplementation of responses concerning damages, there has been no supplementation of the plaintiff's discovery responses at any time.<sup>1</sup>

The Court's attention is directed to the plaintiff's answer to interrogatory #2, seeking a description of every wrongful act committed by Dr. Hyslop. No reference is made to informed consent. No reference is made to improper preoperative advice. No reference is made to improper postoperative advice.

The Court's attention is directed to the plaintiff's answer to interrogatory #10. In response to the request for identification of trial experts and their testimony, the plaintiff identifies Kevin Keller, M.D., but describes his area of testimony as being limited to Dr. Hyslop's negligence in performance of the surgical technique. Of course, this Court has ruled Dr. Keller will be permitted to offer no such opinions. The plaintiff does not say that Dr. Keller will be offered as a causation expert.

The Court's attention is directed to the plaintiff's answer to interrogatory #15, in which the plaintiff was asked to identify "all acts" which the plaintiff contends constitute failure to properly examine the patient preoperatively, as alleged in the Motion for Judgment. The

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<sup>1</sup> Under Rule 4:1, the plaintiff was under a duty to seasonably supplement his responses if he knew they were incorrect when made or became incorrect later. Since the new theory of liability is based on the plaintiff's personal experience at the time the cause of action arose, it seems reasonable to conclude that he was or should have been aware of the incompleteness of his responses prior to December 18, 1995.

plaintiff makes no reference to Dr. Hyslop's alleged failure to offer him a "preoperative choice."

The Court's attention is directed to the plaintiff's designation of Kevin Keller, M.D. as his sole expert witness, attached as Exhibit 2. The entire scope of Keller's anticipated testimony is that Dr. Hyslop negligently performed the laparoscopic cholecystectomy and that the failure to use compression stockings caused the blood clot complained of. (The "compression stockings" opinion does not even match the causation testimony in Dr. Keller's deposition which the plaintiff emphasized on December 18, 1995.)

Finally, the Court's attention is directed to the attached consent forms (Exhibit 3) and discharge instruction sheet (Exhibit 4). One document, designated "Consent to videotape laparoscopic cholecystectomy" specifically details the relative risks of open versus laparoscopic cholecystectomy. Mr. Moates' signature appears on page 3 of that document. Mr. Moates' signature also appears on the discharge instruction sheet, which contains instructions to the plaintiff for his recuperation, including follow-up care by Dr. Hyslop. Because the plaintiff raises the "lack of information" theory only after the time for discovery has run, the defendants have been denied a very simple, inexpensive and basic means of defense: sending these forms under Rule 4:11, seeking the plaintiff's admissions that they are complete, accurate and authentic. The consents are attached here not for the Court to take judicial notice of their content, but to demonstrate how the defendants have been cheated of proper discovery due to untimely notice of the plaintiff's latest theory.

As review of the attached discovery responses reveals, at no time during discovery of this case did the plaintiff ever advance the theory that Dr. Hyslop was negligent in "not saying

anything" preoperatively or postoperatively. Instead, the defendants have been consistently advised that this was a surgical malpractice case and they have conducted all discovery accordingly. Furthermore, they have gone to considerable expense and trouble to retain a surgical expert who is ready, willing and able to appear at trial and testify on their behalf.

Not until forced by this Court's (and Dr. Keller's own) repudiation of Keller's status as an expert did the plaintiff advance this latest theory, which he claims will allow him to make a prima facie case of negligence on lay testimony alone. But the defendants have never had the opportunity to discover this claim. The plaintiff has not been questioned in detail about the conversations between him and Dr. Hyslop, because there had never been any complaint about them until now. The defendants cannot even begin at this late date to prepare a cross examination of the plaintiff or interview witnesses who might rebut the plaintiff's claim. It would be manifestly unfair for the plaintiff to be permitted to abandon the case he has been trying to build for the past year, and shift to a brand new theory for which the defendants have no prepared defense.

### CONCLUSION

There are ample reasons favoring summary judgment for the defendants, and none against it. The plaintiff has abandoned the theory of recovery which he has advanced throughout the life of this claim, in favor of a new theory which the defendants have not had time to discover and for which they are unable to prepare a proper defense. Moreover, the inescapable corollary of the plaintiff's new theory -- that he was told nothing -- is that he should have been told something. Under Bly, only an expert familiar with the procedure, its risks and alternatives can testify to what, if anything, should have been communicated. Since

the plaintiff has no such expert, the plaintiff cannot make a prima facie case and summary judgment is appropriate.

Wherefore, the defendants pray that summary judgment be entered in their behalf and this action be dismissed, with prejudice.

JOHN W. HYSLOP, M.D.  
SURGICAL ASSOC. OF RICHMOND  
By Counsel



PLAINTIFF'S ANSWERS TO DEFENDANTS JOHN W. HYSLOP AND  
SURGICAL ASSOCIATES OF RICHMOND'S FIRST SET OF  
INTERROGATORIES DIRECTED TO PLAINTIFF

Plaintiff, for his answers to interrogatories, sets forth as follows:

1. Please state your full name, date and place of birth, marital status at the present and time of the occurrence, present residence address, and present business address, if any.

ANSWER: Robert Courtland Moates

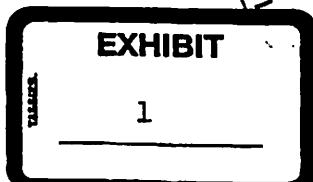
Date of Birth: October 6, 1934

Married to Nora Grace C. Moates, both before and after the occurrence.

Residence: 10418 Hull Street Road, Midlothian,  
VA 23112

Business: 10418 Hull Street Road, Midlothian,  
VA 23112

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2. Specify each act or omission of Dr. Hyslop which you contend deviated from the accepted standard of care, and as to each, identify separately the facts and medical opinions upon which you rely to support your contentions.

ANSWER:

Dr. Hyslop was negligent in that he permitted the CO2 gas to infiltrate into my scrotum and failed to take appropriate action resulting in the formation of a life threatening blood clot and permanent impairment to my leg. He should have anticipated the probable formation of a blood clot and initiated proper treatment.

3. If you contend that this Defendant made any oral or written statements on which you rely to support your allegations, identify each such statement specifically, setting it forth verbatim as to your best ability herein, and state when this defendant made such statement, to whom, and whether such statement was written or oral.

ANSWER: See Johnston-Willis Limited's medical records concerning my operation and subsequent hospitalization, as well as the records and correspondence of this defendant and statements made to Kevin A. Keller, M.D.

4. Have you been treated, examined or advised by any physician, therapist, psychiatrist, or medical specialist or hospitalized for any medical condition within the ten (10) years immediately preceding the occurrence identified in your Motion for Judgment? If so, with respect to each such condition, please state:

(a) The nature of each such condition for which you were treated, examined, advised or hospitalized;

(b) The names and addresses of each physician and the



inclusive dates within which you were under their care; and

(c) The names and addresses of each such hospital to which you were admitted and the inclusive dates of each such hospitalization.

ANSWER: Dr. W. P. Morrisette, G.P., Midlothian Family Practice  
Dr. Kevin A. Keller, G.P., ulcer  
June, 1990 - Dr. Ed. J. Ramsey - stomach pain, prescribed Losec  
Oct., 1990 - Johnston-Willis, Emergency Room - Dr. McMurtry - abdominal pain  
March 25, 1991 - Chippenham Hospital  
May 24, 1991 - Richmond Gastroenterology  
Sept. 24, 1991 - Dr. John W. Hyslop

5. Have you been treated, examined or advised by any physician, therapist, psychiatrist, or medical specialist or hospitalized for any medical condition since the occurrence identified in your Motion for Judgment? If so, with respect to each such condition, please state:

(a) The nature of each such condition for which you were treated, examined, advised or hospitalized;

(b) The names and addresses of each physician and the inclusive dates within which you were under their care; and

(c) The names and addresses of each such hospital to which you were admitted and the inclusive dates of each such hospitalization.

ANSWER:

Dr. Kevin A. Keller, relative to treatment for the blood clot formed in my leg as a result of the negligence of these defendants and others.

Jan. 1993	-	Dr. Robert Mitchell, gastroenterologist 7605 Forest Avenue, Richmond, Va. 23229 abdominal pain - ulcer diet
March, May, Sept. 1993	-	Dr. Kevin A. Keller; urinalysis
Aug., 1994	-	Dr. Kevin A. Keller; right foot and leg pain
Aug., 1994	-	Dr. Samuel D. Jessee, West end Orthopaedic 1400 Johnston-Willis Drive, Suite A Richmond, Va. right foot and leg pain

6. State in detail, separately and specifically, each and every injury you claim you suffered as a proximate cause of the alleged negligent treatment referred to in your Motion for Judgment.

ANSWER: I suffered severe and painful swelling and distension of my scrotum and right leg, formed a life-threatening blood clot, can no longer stand for long periods of time as required in my work, need to rest frequently, am limited in my social and recreational activities and my family life has been effected.

7. Identify by name, address and telephone number of every individual who has made oral or written statements to you or to another of which you are aware and on which you rely in support of your allegations as to Dr. Hyslop's negligence in connection with the matters complained of herein. As to each, please state the name and address of the person from whom such communication was received, the date on which it was received, the nature of such communication, and the present location of such communication or copies thereof.

ANSWER: Kevin A. Keller, M.D., these defendants' records and correspondence and Johnston-Willis Limited's records and correspondence.

8. Please state the names and addresses of all persons, other than your attorneys and your treating physicians, with whom you have discussed or to whom you have furnished a written statement of the circumstances or the events complained of herein

or the extent of the injuries which you claim to have suffered as a result thereof.

ANSWER: My wife, Nora Grace C. Moates

Kenneth R. Chandler  
1121 Black Heath Road  
Midlothian, VA 23113  
379-0224

9. Please state the name, residence address, business address and current telephone number of each person who has personal knowledge of the matters alleged in the Motion for Judgment, the events giving rise to the occurrence which is the subject matter of this law suit and of the injuries and/or damages claimed by you as a result of the alleged negligence of Dr. Hyslop.

ANSWER: Myself, my wife, my attorney and Kenneth R. Chandler

10. Please state the name and address of each person you expect to call as an expert witness at the trial and, as to each such person, the subject matter on which said expert is expected to testify; the substance of the facts and opinions to which each such expert is expected to testify, and as to each, summarize the grounds of each such opinion; and for each such expert witness, the expert's professional qualifications.

ANSWER: Kevin A. Keller, M.D., who will testify regarding the negligence of the defendants in permitting gas to enter into my scrotum and leg causing the formation of a blood clot and subsequent disability, etc. My attorney has discussed my case with other physicians and I will update my answer when he selects the other expert or experts he intends to use.

11. Describe each and every duty, function, or activity the performance of which you allege has been impaired by your condition

or injury, specifying the inclusive dates of said impaired performance.

ANSWER: I suffered severe and painful swelling of my scrotum and right leg, I can no longer stand for any period of time, I need to rest frequently and my family life has been effected. I was unable to work for six months. My ability to work or perform duties essential to manage a retail store owned by me has been reduced. I am unable to engage in social and recreational activities as before, as well as my home life. I have pain, swelling, lack of mobility, itching, can't stand on my feet for more than a few minutes without severe pain; pain all the time.

12. With respect to all damages you claim arising out of this occurrence, itemize and date all past, continuing, and future medical expenses claimed by you, all claims for actual and anticipated lost wages and income (listing the names, addresses, and telephone numbers of each employer or business involved) and every other loss or damage claimed by you, not previously specified, including an assessed dollar value for each and an explanation of your method of computation.

ANSWER: I am in the process of compiling medical expenses and have requested the information from my insurance carrier. I was unable to work for six months. I have a reduced ability to work or perform duties essential to manage a retail store which I own. My work as a gunsmith requires prolonged standing, which I am no longer able to do to the extent I was in the past; consequently, I can earn less money in a given day. The amount varies. I would estimate it at between \$150 - \$200 per day; sometimes less.

13. Describe in detail the nature and extent of your anticipated future medical needs and costs, and identify the physician(s) upon whom you rely for these recommendations and estimates.

ANSWER:

Kevin A. Keller, M.D. is in a position to answer this interrogatory better than I.

14. Identify all employers for the five (5) years preceding your responses to these interrogatories. Include in your response:

- (a) The name and address of the business;
- (b) the name of your supervisor;

(

(c) the dates of your employment;

(d) the titles and job descriptions held by you at each employer;

..-  
.. ANSWER: Gunsmith and self-employed owner of Bob Moates Sport Shop, Inc.,  
10418 Hull Street Road  
.. Richmond, VA 23112

15. State in detail and with particularity all acts of omission and/or commission which you contend constitute Dr. Hyslop's "failure to properly examine" you as alleged in Paragraph 12 of your Motion for Judgment.

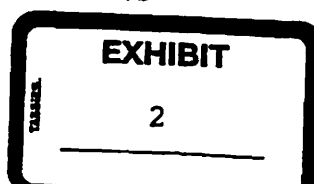
ANSWER: Dr. Hyslop failed to conduct a complete pre-surgery physical examination of plaintiff. Had he done so, he would have discovered the likelihood of the CO2 gas escaping into areas of the plaintiff's body causing plaintiff's injury and subsequent disability.



PLAINTIFF'S DESIGNATION OF EXPERT WITNESSES

Comes now plaintiff, by counsel, and for his designation of expert witnesses whom he may call to testify at trial, states as follows:

Kevin A. Keller, M. D., who will testify regarding the negligence of the defendants in permitting gas to enter into plaintiff's scrotum and leg causing the formation of a blood clot and subsequent disability. The failure to place sequential compression stockings at the time of laproscopic surgery would have prevented the deep venous thrombosis.





## CONSENT TO VIDEOTAPED LAPAROSCOPIC CHOLECYSTECTOMY

(Please Read This Form Carefully and Completely Before Signing)

I, John H. Robert Moates, wish to have laparoscopic cholecystectomy performed at Johnston-Willis Hospital by Dr. John H. Hogg (hereinafter referred to as "my surgeon").

### General Information

I understand that laparoscopic cholecystectomy involves removal of the gallbladder and stones through a one-half inch umbilical (belly-button) incision and three or four small (approximately one-quarter inch) incisions in the upper abdomen. I understand that a laser or cautery is used to cut the gallbladder away from its attachments to the liver and bile ducts, and a laparoscope is used to visualize the operation.

I understand that the laparoscope is a long, tubular instrument with a light at one end and a miniature video camera attached to the other end. I understand that the laparoscope will be inserted through the umbilical incision.

I understand that the laser is an instrument that generates a concentrated light beam that can be used for cutting and coagulation (controlling bleeding).

I understand that the cautery is an instrument that converts electricity to energy for cutting and coagulation (controlling bleeding).

### Risks

I understand that laparoscopic cholecystectomy is a relatively recent procedure and that exhaustive studies of this procedure are unavailable. Consequently, it is unknown at this time whether the complication rate with laparoscopic cholecystectomy is higher than, equal to, or lower than the complication rate with conventional gallbladder surgery.

I understand that laparoscopic cholecystectomy involves many of the risks associated with conventional gallbladder surgery. These risks include, but are not limited to: bleeding, infection or abscess formation, injury to the bile ducts, leaving stones behind in the main bile duct, infection of the incision sites, perforation of the large or small bowel, and other severe or life-threatening complications.

I also understand that laparoscopic cholecystectomy involves risks not associated with conventional gallbladder surgery. For example, I understand that there is a risk when the laparoscope is inserted through the umbilicus and into the abdominal cavity. These instruments may puncture the intestine, blood vessels, or other abdominal organs. Should this occur, I understand that the abdomen would be opened and the injury repaired. This would require a termination of the laparoscopic operation and continuation of the operation as a conventional gallbladder surgery.

I understand that shoulder pain and bloating from the air inserted into the abdomen during the procedure are common complaints after most laparoscopic surgery.

30

I also understand that there is a chance of burning the intestine, blood vessels, or other abdominal organs with the laser or cautery. Should this occur, I understand that the abdomen would be opened and the injury repaired. This would require a termination of the laparoscopic operation and continuation of the operation as a conventional gallbladder surgery.

I understand that laparoscopic cholecystectomy is a relatively recent procedure and that other risks may also exist that are unforeseeable.

I understand that I will be given general anesthesia prior to the procedure. I understand that general anesthesia carries with it certain risks, including nausea, vomiting, drug reactions, lack of oxygen, lung complications (including pneumonia), and death.

I give my surgeon permission to convert the procedure into conventional gallbladder surgery, if he determines that the operation cannot be performed through the laparoscope. I understand that my surgeon will make this decision during the operation based on a number of different factors such as the ability to safely identify important blood vessels and bile ducts, the presence of adhesions (scar tissue), unusual gallbladder anatomy, the presence of other intra-abdominal disease, bleeding, or equipment failure. An x-ray of the bile ducts connected to the gallbladder may be performed during the operation if deemed necessary by my surgeon.

#### Potential Benefits

I understand that the potential benefits of this operation include a shortened hospital stay and a shortened convalescent period after surgery, allowing return to work and activities sooner than with conventional gallbladder surgery. I also understand that my scars may be less prominent with this procedure than with conventional gallbladder surgery. However, I also recognize that each patient responds to surgery differently and these benefits may not occur in my particular case.

#### Alternatives

My choice of this operation is entirely voluntary. I understand that there are other methods of treatment for gallstones, e.g., conventional gallbladder surgery. I understand that conventional gallbladder surgery is an open procedure involving an incision, often several inches long, in the abdomen. The benefits, risks, and other complications of alternative procedures, and of no treatment, have been explained with me by my surgeon, and I have had what I believe to be a sufficient opportunity to discuss these other options with him, including the asking of questions.

#### Videotaping

I understand that the laparoscope allows my surgeon to make a videotape of the operation. I understand that my face will not be shown and that I will not be identified by name in this videotape. I give my surgeon permission to videotape my operation and to use the videotape for teaching other patients or surgeons about these techniques.

#### Consent

I have had the opportunity to discuss with my surgeon this operation and alternative treatments, both in general and specifically in regards to my situation. My surgeon has given me ample opportunity to ask questions on specific points, and he has answered those questions to my satisfaction.

I agree to undergo laparoscopic cholecystectomy. I agree to conventional gallbladder surgery should my surgeon deem it necessary. I agree to any emergency surgery that

might arise during this procedure. I agree to videotaping of my procedure and to my physician's use of the videotape as described above.

SIGNATURE

Robert CourHand Moater

DATE

9/25/91

PATIENT'S NAME

Robert CourHand Moater

WITNESS

Linda Almaraz, RN

051

AT GUARANTY AGREEMENT - ASSIGNMENT  
INSURANCE BENEFITS AUTHORIZATION TO  
RELEASE MEDICAL INFORMATION

PATIENT'S NAME

DATE OF SERVICE

REGATES, BEERT COURTLAND S-N  
R 056 PAOT  
ADM - 10/02/91  
CR-HYSLGP JOHN W  
B1-110074301  
B-10/06/1934  
MR-216719  
SSN-225408290

FOR VALUE RECEIVED and in consideration of services rendered and to be rendered to the above-named patient, the undersigned jointly and severally guarantee payment to Johnston-Wilks Hospital, hereinafter referred to as "Hospital," of all charges incurred and to be incurred on behalf of said patient with the Hospital from the date of service shown above and within a two-year period thereafter.

It is understood and agreed between the Hospital and the undersigned that:

(1) upon demand by the Hospital the undersigned agree to pay the entire balance due the Hospital under the terms of this agreement.

(2) in the event that the undersigned fail to pay the demand and the account or accounts are turned over to an attorney for collection, they hereby agree to pay all collection costs and expenses including, but not limited to attorney's fees of twenty-five percent (25%) of the balance due.

(3) this agreement is not to be construed as a novation or accord and satisfaction and does not relieve any persons of any liability to which they would otherwise be subjected by law.

(4) the Hospital may make a repayment agreement with any one or more of the undersigned or any other person liable for the payment of the bill, which agreement shall be considered ancillary to and not be construed as limiting or modifying the liability of any person liable for the charges and which agreement shall not be construed as in any way limiting the right to continue collection action against any person liable for the charges covered hereby.

(5) if Medicare: I certify that the information given by me in applying for payment under Title XVIII of the Social Security Act is correct; I authorize any holder of medical or other information about me to release to the Social Security Administration or its intermediaries or carriers any information needed for this or a related Medicare claim. I request that payment of authorized benefits be made on my behalf. I assign the benefits payable for physician services to the physician or organization furnishing the services or authorize such physician or organization to submit a claim to Medicare for payment to me. If Medicaid: The patient liability for hospital charges shall not include "covered charges" payable to the hospital in the patient's behalf by the Virginia Medical Assistance Program ("Medicaid").

(6) the undersigned hereby assign unto the Hospital, with regard to its charges, and the Physicians, with regard to their charges, any and all rights and benefits the undersigned may have under any policy of insurance (hospitalization, major medical, automobile, workman's compensation, or any other) and hereby authorize the Hospital and/or Physicians, to release whatever medical information necessary to perfect a claim under such policy, and further direct any such insurance company to make payment of benefits direct to the Hospital and/or Physicians or its attorney.

(7) the undersigned hereby authorize any agency or employee of the U.S. Government, any state government, or any municipal government to release to the Hospital and/or Physicians, its employees and/or its attorney, any and all information concerning any governmental program under which the above-named patient is or may be qualified to receive benefits due and further authorize payment of any and all such benefits direct to the Hospital and/or Physicians.

(8) for the purpose of this document, the singular shall mean the plural, and the plural shall mean the singular.

(9) if any part of this document is invalid or is declared to be invalid, said invalidity shall not affect the operations and effectiveness of any other provisions of this document.

(10) the undersigned hereby state that for the purpose of the assignments and authorizations contained herein, a photocopy of the original executed document shall be as valid as the original and any and all persons affected by the assignments and/or requesting an authorization are hereby directed to honor said copy.

(11) the physicians and dentists practicing at Johnston-Wilks Hospital are licensed and qualified to practice in the Commonwealth of Virginia; these practitioners provide medical care at this Hospital and other area hospitals, but they are not agents or employees of the Hospital.

WITNESS the following signature and seal:

*[Signature]*

Date

9-26-91

Signatures Witnessed By:

052

BI-110074301

B-10/06/1934

48-216719

ROOM-

SSN-225408290

**CONSENT AND AUTHORIZATION  
FOR MEDICAL, SURGICAL AND/OR NURSING CARE**

The consent and authorization of the undersigned is hereby given to Johnston-Wills Hospital, (the Hospital), and to any and all physicians or surgeons, (the Doctor), attending \_\_\_\_\_ (the Patient), and to whomsoever the Hospital and/or the Doctor may reasonably designate as associates, assistants, staff, interns, residents, nurses, technicians, attendants, agents, servants or employees, (the Assistant):

- (1) to render to the patient such hospital, medical, surgical, psychiatric, nursing, X-ray, laboratory, diagnostic and therapeutic care, services, treatment, anesthesia, tests and procedures as may be necessary for the treatment of the condition of the patient in accordance with reasonably prudent local medical and hospital standards, practices and procedures even though no emergency exists and even though different in kind from those specifically heretofore or hereafter authorized and even though involving different risks and results;
- (2) to obtain blood for Human Immunodeficiency Virus (H.I.V.) and Hepatitis testing as deemed necessary to provide proper medical case management and health care worker protection. Except as provided by law, informed consent will be obtained from you or your next of kin before testing is done.
- (3) to preserve or dispose of, in accordance with the Hospital's usual procedure, any specimens, tissues or members that are removed from the patient;
- (4) to cause, in the regular course of the Hospital's business, the original copy of any and all hospital records and papers of the patient to be recorded, reproduced or copied by microfilm, photograph or other process and the original thereafter to be destroyed;
- (5) to dispose of, in accordance with the Hospital's usual procedure, personal valuables not claimed from the Hospital office to which they may be entrusted within thirty days after the patient leaves the Hospital, without notice to the owner; and
- (6) to report such communicable, infectious, toxic, or other disease processes as provided for by the Code of Virginia and any then current regulations.

It is the understanding, agreement and certification of the undersigned that:

- (1) the practice of medicine and surgery is not an exact science and that no guarantees or assurances have been made concerning the results of treatment;
- (2) the Hospital shall not be responsible for any property, including but not limited to money, dentures, jewelry, and clothing of the patient unless same shall be entrusted to the Hospital at the time of admission for safekeeping, and
- (3) the undersigned has read and fully understands the meaning of the consequences of the foregoing paragraphs

DATE 9-26-91WITNESS 7 on H

X Robert Courtland  
PATIENT OR RESPONSIBLE PARTY

(If the patient did not sign, state reason therefor and relationship to the patient or responsible party.)

I hereby authorize Dr. J. Hylop and/or such assistants as may be selected by him, to perform the following procedure(s):

Laparoscopic Cholecystectomy with laser, possible  
open cholecystectomy

The procedure(s) (has) (have) been explained to me by Dr. J. Hylop. I have been made aware of certain risks and consequences that are associated with the procedure(s) and the possibility of complications from the procedure(s).

If any conditions are discovered at the time of the procedure(s) that were not recognized before the procedure(s) and in the judgement of the doctor call for a procedure in addition to those herein contemplated. I authorize said doctor, his assistant, or his designee to do whatever he may consider necessary and proper under the circumstances, with the exception of

None  
(If NONE, so state)

I acknowledge that no guarantees or assurances have been made to me concerning the results of the procedure(s) referred to herein and there is no contract or agreement between Dr. J. Hylop and me as to any such results.

I understand that the physicians and dentists practicing at Johnston-Willis Hospital are licensed and qualified to practice in the Commonwealth of Virginia. I am aware that these practitioners provide medical care at this Hospital and other area hospitals, but they are not agents or employees of the Hospital.

I consent to the administration of anesthetic(s) with the exception of None  
(If NONE, so state) to be administered by either an anesthesiologist or a nurse anesthetist under the direction and supervision of an anesthesiologist.

I consent to the administration of blood and blood products and whatever medications are indicated with the exception of Granysin  
(If NONE, so state)

I consent to the preservation or disposal, in accordance with the hospital's usual procedure, of any specimens, tissues, or members that are removed with the exception of None  
(If NONE, so state)

I hereby certify that I have read all of the foregoing consent form, fully understand it, and any questions I may have had have been answered to my satisfaction. All of the blanks were filled in before I signed this consent and I have voluntarily executed the form by signing my name below.

Linda Almaraz, Jr  
(Witness of Signature)

Robert M. Cates  
(Signature of Patient)

TE: IF PATIENT IS UNABLE TO SIGN OR IS A MINOR, COMPLETE THE FOLLOWING: PATIENT (IS A MINOR) \_\_\_\_\_ YEARS OF AGE) (IS UNABLE TO SIGN BECAUSE):

Date: 9/27/91 Time: 3:05 a.m.  
p.m.

(Reason for which patient is unable to sign)

(Witness of Signature)

(Signature of person authorized to consent for patient)

(Relationship to patient)

Date: \_\_\_\_\_ Time: \_\_\_\_\_ a.m.  
p.m.

RM 150 (11/89)

JOHNSTON-WILLIS HOSPITAL  
CONSENT AND AUTHORIZATION TO SURGICAL  
OR OTHER PROCEDURE

MCATES ROBERT COURTLAND S.  
M 056 PRCT ADM- 10/02/91  
CR-HYSLCP JOHN W  
BI-110074301 B-10/06/1934  
MR-216719 ROOM-  
SSN-225408290 048

(PATIENT IDENTIFICATION)



ORIGINAL

1

1 VIRGINIA:

2 IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

3  
4  
5 ROBERT COURTLAND MOATES

6 vs.

7 Case No. CL94-1548

8 JOHN W. HYSLOP, M.D.

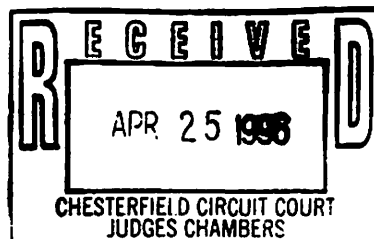
9 and

10 SURGICAL ASSOCIATES OF RICHMOND:

11  
12 Complete transcript of MOTIONS in the above, when  
13 heard on December 18, 1995, before Honorable T. J. Hauler,  
14 Judge.

15  
16  
17  
18  
19  
20  
21  
22  
23 INGE SNEAD & ASSOCIATES, LTD.  
24 Registered Professional Reporters  
25 4444 Arrowhead Road  
Richmond, VA 23235  
TEL. (804) 272-7054 - FAX (804) 272-6006

37





1                   NOTE: The case was called to be heard at  
2                   8:30 A.M. The court reporter having been duly  
3                   sworn, the hearing was begun, viz:

4                   MS. MICHAEL: Your Honor, good morning. I  
5 am Karen Michael with McGuire, Woods, representing  
6 Johnston-Willis Hospital.

7                   THE COURT: Good morning.

8                   MS. MICHAEL: Your Honor, Johnston-Willis  
9 Hospital has pending this morning a motion for summary  
10 judgment. Basically, Your Honor, the plaintiff has admitted  
11 that he doesn't have any witness who is expert who will  
12 testify against Johnston-Willis Hospital.

13                   Johnston-Willis Hospital has drafted an  
14 order for summary judgment, Your Honor, which the plaintiff  
15 has endorsed over objection. Your Honor, the plaintiff can't  
16 prove its case. He has no experts to testify against  
17 Johnston-Willis Hospital and the trial is set for January.  
18 The time for obtaining an expert has passed. And, therefore,  
19 Your Honor, summary judgment is appropriate. I make the  
20 motion to grant it.

21                   MR. BOWLES: I have endorsed it over  
22 objection, Your Honor. I basically have not been able to  
23 come up with witnesses that will criticize what the hospital  
24 did.

25                   THE COURT: And although you don't agree

1 to summary judgment, you don't have any matters to present in  
2 opposition, is that it?

3 MR. BOWLES: That is correct. The  
4 objection is to protect myself for the record.

5 THE COURT: All right.

6 NOTE: Ms. Michael left the hearing.

7 THE COURT: Mr. McConnell, good morning.  
8 You are asking for summary judgment for Dr. Hyslop?

9 MR. MCCONNELL: I am, Your Honor. I have  
10 two motions on this issue before the Court. The first is  
11 simply a motion to exclude expert testimony, which is based  
12 on the deposition of the only expert witness designated by  
13 the plaintiff prior to the lapse of the deadline to do so.

14 The other is a motion for summary judgment  
15 which is based on responses to request for admissions. The  
16 deposition transcript has been submitted to the Court and  
17 made a part of the record. The responses to the request for  
18 admissions in the motion for summary judgment were exhibits  
19 to the motion for summary judgment, therefore, they are also  
20 part of the record.

21 I don't know if during the procedural  
22 history of this case Your Honor has ever been apprised of the  
23 factual background of this case. Briefly, I would like to do  
24 so. The plaintiff is Robert Moates and he was seen by his  
25 family practitioner, Kevin Keller, for gallbladder attacks.

1 Dr. Keller referred him to Dr. Hyslop. Dr. Hyslop met with  
2 him in his office, checked him out and decided that he was a  
3 candidate for laparoscopic cholecystectomy. That is the  
4 removal of the gallbladder through laparoscopic rather than  
5 the open procedure. Mr. Moates was admitted to the hospital  
6 and the laparoscopic cholecystectomy was performed.

7 I'll advise Your Honor that in this case,  
8 as is typical in cases of laparoscopic cholecystectomy, very,  
9 very small incisions are made, and in order to visualize the  
10 peritoneal cavity to perform the procedure, carbon dioxide  
11 gas is administered to the abdomen, it's called insufflation.  
12 What it amounts to, it inflates the abdomen so that there is  
13 room to see around in there.

14 In this case, when Mr. Moates awoke in the  
15 recovery room, some of the CO2 gas had apparently leaked  
16 subcutaneously into his scrotum and his scrotum was swollen.  
17 Apparently, while it is unusual for it to occur in that way,  
18 it is not at all unusual for CO2 gas to leak subcutaneously.  
19 CO2 gas is something that is present in all of our bodies at  
20 all times, and it is absorbed and it's not a matter of great  
21 concern. subsequent to his discharge from the hospital, Mr.  
22 Moates apparently developed a DVT, a deep vein thrombosis, in  
23 one of his legs.

24 It is the allegation of the plaintiff that  
25 Dr. Hyslop improperly failed to obtain an informed consent

1 prior to performing the laparoscopic cholecystectomy, and  
2 upon discharge from the hospital, did not properly advise the  
3 plaintiff on what his postoperative recuperative activity  
4 should be. That, I think is a pretty fair statement of the  
5 case without trying to couch it in terms to favor one side or  
6 the other.

7                   The standard of care in this case is the  
8 standard of care of the reasonably prudent surgeon practicing  
9 in Virginia at the time of the acts complained of. Surgeons  
10 perform laparoscopic cholecystectomy. Surgeons are advised  
11 of the procedures, of the risks involved in the procedures  
12 and the benefits to be gained from them. Surgeons are the  
13 ones who obtain informed consent preoperatively.

14                   When follow-up care is involved, as it  
15 always is, surgeons are the ones who provide the follow-up  
16 care. Surgeons are the ones who are in the position of  
17 expertise to advise the patient, this is what you should do,  
18 this is what you shouldn't do, this is when you need to call  
19 me.

20                   Someone who has never performed  
21 laparoscopic cholecystectomy is not in a position to do that.  
22 Someone who is not a surgeon is not in a position to evaluate  
23 the behavior of someone who is.

24                   I'll represent to the Court that not all  
25 general surgeons perform laparoscopic cholecystectomy. The

1 first expert I approached to review this case for me said, I  
2 can't be an expert for you, I don't do this procedure.

3 The physician identified by the plaintiff  
4 is the family practitioner who referred him to the surgeon  
5 for the performance of the procedure, and gave some follow-up  
6 treatment to him. However, I'll also point out to Your  
7 Honor, that when Mr. Moates developed his deep vein  
8 thrombosis and the family practitioner admitted him into the  
9 hospital, he did not treat him alone. He felt the need for a  
10 specialist. So he called my client. So, the actions of this  
11 family practitioner have shown that he is not an expert. And  
12 then there is the deposition which is before Your Honor.

13 It is not unusual in medical malpractice  
14 cases, either in a pretrial proceeding such as this, or  
15 during the course of the trial when a proffered expert is  
16 sitting in the witness chair, for the defendant or for  
17 either party to suggest that while the witness claims he is  
18 an expert, because he lacks certain qualifications or  
19 information he is not an expert as a matter of law.

20 This is not the case here, Your Honor. In  
21 this case, not only does the witness lack the qualifications  
22 and the expertise, in this case the witness himself says, I  
23 am not an expert. The deposition transcript is replete with  
24 statements by Dr. Keller that he is not a surgeon; that he  
25 has never performed laparoscopic cholecystectomy; that he is

1 not familiar with the way surgeons advise their "lap chole"  
2 patients, either preoperatively or post operatively. During  
3 my examination that was the consistent response to the  
4 questions that I posed to the witness. When I completed my  
5 initial examination of the expert, of Dr. Keller, Mr. Bowles  
6 asked him some questions. And even before he would remark to  
7 Mr. Bowles what his opinions were on certain things, he would  
8 preface his remark with, "My nonexpert opinion" is such and  
9 such. And that's in there. And I can point them out  
10 specifically to Your Honor. I don't know if Your Honor has  
11 had a chance to review the transcript. It's all in there.  
12 Nowhere does he admit to expertise on this subject matter.

13 We are talking, basically, about an  
14 informed consent issue. Bly versus Rhoads holds that even in  
15 an informed consent issue expert opinion is necessary.

16 Now, I will certainly concede, as I must  
17 under the state of law in Virginia, that there are cases  
18 where no expert testimony is required, such as the failure  
19 to remove a sponge during an operative procedure. There are  
20 things that are part of common knowledge and lay people can  
21 evaluate. But whether certain risks ought to be discussed  
22 with a patient preoperatively, whether certain risks and  
23 behavior ought to be discussed with the patient  
24 postoperatively, depends upon a person having special  
25 knowledge of what risks are posed by a particular procedure

1 and what the best way is to counter those risks, and whether  
2 there isn't some law diminishing returns or risk to giving  
3 certain advice. And, obviously, there is risk to every  
4 procedure. But physicians are not required to say before  
5 they give you stitches under a local anesthetic there is a  
6 risk of death with this procedure. It's up to the expert to  
7 evaluate what ought to be addressed and why it ought to be  
8 addressed, and Dr. Keller testified in his deposition he  
9 cannot answer questions about that.

10 To simply give one example, Your Honor, I  
11 refer you to Page 37 of the deposition transcript.

12 THE COURT: Let me get that. All right.

13 MR. McCONNELL: At this point, I had  
14 already done my initial examination of Dr. Keller, and Mr.  
15 Bowles has then done an examination of Dr. Keller, eliciting  
16 opinions which, as I have said, Dr. Keller prefaced with, "My  
17 nonexpert opinion," and I simply asked him this question to  
18 follow up Mr. Bowles.

19 "Due to the nature of your experience  
20 which we have been over at some length, you don't  
21 know what general surgeons do say when they are  
22 discharging their patients postoperatively, what  
23 they should say postoperatively, or in this case,  
24 what Dr. Hyslop did say postoperatively, isn't that  
25 correct?"

"Yes."

"That's all I have."

That's what it comes down to. He simply doesn't know. He may be a fine family practitioner, but there is a reason why 8.01-581.20 says what it does. It ought to be in the same or a related field of practice. And Dr. Keller, by his own testimony, says that does not include him.

Thank you, Your Honor.

THE COURT: Thank you.

MR. BOWLES: If Your Honor please, to make things a bit simpler, I have no witness that will criticize the way the procedure was done, although the Motion for Judgment did raise that issue. So he is certainly entitled to a partial summary judgment on that issue.

But there are two other issues. And that is, what Dr. Hyslop told Moates afterwards and what he told him before the operation. And I would like to address the latter situation first.

Moates' testimony when his deposition was taken is, "He never told me anything. I was so sedated that I have no -- he never told me anything about what I should do when I go home." Moates' wife was present. She understands English very poorly. She said, "Dr. Hyslop never told me what I should do with my husband."



1                   It will be a jury issue as to whether he  
2 was told anything. So the issue of criticizing what he was  
3 told, the issue in this case is, the plaintiff will say, "I  
4 was told nothing." And then you go to the opinion of the  
5 family practitioner, and remember, the family practitioner is  
6 like the service manager in an automobile repair shop. He is  
7 the guy that has made the diagnosis of what the problem is.  
8 Dr. Hyslop has not diagnosed the problem. Dr. Keller has  
9 said this man has trouble with his gallbladder, and then he  
10 goes to the technician to have it removed. That's basically  
11 the situation we have here.

12                   Now, Dr. Keller has testified under oath  
13 when asked this question by Mr. McConnell, "But the question  
14 I need to ask today, is it your opinion to a reasonable  
15 degree of medical certainty that the gas leak from the  
16 insufflation caused the blood clot?" And the answer is,  
17 "Yes." Now, he is entitled with his training and experience,  
18 and explains in his deposition what his training and  
19 experience is, to make such a diagnosis to tie together that  
20 the escape of the gas caused the blood clot.

21                   Then we back up to at the time this was  
22 done in 1991, it's a relatively new procedure, although Dr.  
23 Hyslop has said he has done approximately 150 of them. And  
24 you have two choices. You can go by this method, with what I  
25 would call buttonhole surgery, or you can do what Tommy Johns

1 did to me and leave me with a scar that goes from one side to  
2 the other.

3 Now, that option was never presented to  
4 Mr. Moates. Mr. Moates was never told you can do it this  
5 way, or you can do it that way. And in addition to that, he  
6 was never told that the gas might escape into your scrotum  
7 and you will wind up in the recovery room with a scrotum that  
8 is the size of a basketball. He was never told that as a  
9 result of the escape of the gas you may wind up so that you  
10 can no longer stand up and do your work as a gunman; that  
11 you can't stay on your feet.

12 Now, my adversary relies upon Bly against  
13 Rhoads, but there is a very interesting statement in Bly  
14 against Rhoads that occurs on Page 649. It says, "We concur  
15 in this latter statement concerning the necessity of expert  
16 testimony." And that is a dispute as to what way Virginia is  
17 going to go in this field. "Further, we would agree that a  
18 patient plaintiff can establish by lay testimony," and not  
19 expert testimony, "that his physician did not disclose  
20 particular risk information and that he, the patient, had no  
21 knowledge of the risk. We would also agree that in some  
22 cases lay testimony might be competent to show the adverse  
23 consequences following treatment, and we can envision  
24 situations, albeit relatively infrequent, when from ordinary  
25 human knowledge and experience the necessity of disclosure is

1 so obvious that expert testimony should not be required."  
2 And that's exactly the case you've got here.

3                   You have the choice of doing this procedure  
4 two ways. And that was never explained to Mr. Moates. And  
5 Mr. Moates in his deposition will testify, if he had just  
6 told me that this could happen, and I can't do my work like I  
7 used to, and I can't engage in the Civil War Re-enactment as  
8 General Lee like I used to, I would never have had this  
9 procedure done this way, because you don't have to worry  
10 about the infusion gas problem when you go in the normal way.  
11 And that's simply why this case doesn't set itself up for  
12 summary judgment.

13                   It does set itself up for summary  
14 judgment, Your Honor, with regard to any criticism of the  
15 procedure itself. I think the defendant is entitled to  
16 summary judgment on the limited issue of the procedure  
17 itself. But otherwise, as to informed consent and whether he  
18 told him anything afterwards, Moates and his wife will say he  
19 told them nothing. Now that's a jury issue. As to whether  
20 Dr. Hyslop should have realized the man is so doped up that  
21 he doesn't understand what I am saying, and that the wife who  
22 is Philippino doesn't understand enough English to understand  
23 what is being said, that's a jury issue, Your Honor.

24                   THE COURT: Here is the problem I've got,  
25 and this is what I need addressed. You don't have anyone who

1 can testify as to what Dr. Hyslop should have told him.

2 MR. BOWLES: I don't need it.

3 THE COURT: Well, are you not assuming  
4 then that there is some required disclosure? You are  
5 assuming that is a given, that with this procedure there is a  
6 certain measure of required disclosure?

7 MR. BOWLES: And a form was taken and  
8 given to Mr. Moates, and it talks about the possibility of  
9 some congestion afterwards in the chest, but it doesn't say  
10 that you run these risks that threaten his ability to make a  
11 living. And I think the Bly case says if you are in the  
12 realm where the exception comes, and that certainly is this  
13 case.

14 THE COURT: What if an expert were to say  
15 that the attendant risk of this particular occurrence was so  
16 infinitesimally small as to be a negligible risk?

17 MR. BOWLES: Well, when I took Dr. Hyslop's  
18 deposition he said, yes, this could happen, the gas can escape  
19 and you can wind up with thrombosis from it.

20 THE COURT: As you pointed out, you know,  
21 I can get a minor cut that will require two sutures to close  
22 it, and because of that, those two sutures, and because of  
23 the attendant risk of infection, I could lose my arm, I could  
24 lose my life as a result of that. So the attendant risk to  
25 that is so infinitesimally small, you know, would a physician,

1 would a surgeon be duty-bound to say, now, you know, if I  
2 suture you for this wound, you could die. You could develop  
3 an infection, and that infection could lead to gangrene, and  
4 that gangrene could be fatal to you. I am asking that  
5 rhetorically. I don't know the answer to that, Mr. Bowles.

6 MR. BOWLES: I think under those  
7 circumstances that somebody treating you for a minor cut to  
8 your hand, probably doesn't have to advise you that if  
9 everything is stacked up against you, you might be dead  
10 tomorrow morning. I do think that when you have a new  
11 procedure, a new way of doing something that has been done  
12 for years, and if the choice of how to do it is made by the  
13 doctor and the patient is never consulted as to which way do  
14 you want to go, and one way involves the risks which the  
15 doctor admits are there, that produced the end result that  
16 the patient now has, and the other way there was no risk of  
17 this happening this way.

18 THE COURT: Now, Dr. Keller, is he going  
19 to testify?

20 MR. BOWLES: Well, Dr. Keller, first of  
21 all, he has never testified before at all, because when Mr.  
22 McConnell asked him if he realized that he was listed as an  
23 expert witness, he said no. He was very unsure. It was the  
24 first time he has ever testified to my knowledge. But  
25 Dr. Keller will testify that, "I made the diagnosis, I sent

1 him to Dr. Hyslop. Dr. Hyslop is the one that made the  
2 decision as to which way to go." Moates will say, "I was  
3 never given a choice as to which way to go. And as far as  
4 the aftercare treatment, I was never told." It's not a  
5 question of whether what he said was adequate, it's the fact  
6 that the man never received the message.

7 THE COURT: And you say he is going to  
8 testify or you expect he would testify that the thrombosis or  
9 the clot was caused by the insufflation?

10 MR. BOWLES: Yes, he will. He already has  
11 testified to that.

12 THE COURT: And he does that to the  
13 exclusion of any other possible--

14 MR. BOWLES: To the exclusion of any other  
15 possibility, based on the history and his knowledge of the  
16 patient. He says that in his deposition on Page 21, Your  
17 Honor. The question begins at Line 2, the answer is 6. And  
18 prior to that, he says, "I rule out any other possibility."

19 THE COURT: Where did he say that?

20 MR. BOWLES: Oh, the questioning begins--

21 THE COURT: I am on Page 21. I see where  
22 he agrees that--

23 MR. BOWLES: He says, "Yes."

24 THE COURT: Right. He says the clot was  
25 caused by the insufflation. Where does he rule out any

1 other?

2 MR. BOWLES: He says here, Your Honor, let  
3 me find it.

4 THE COURT: Yes, I need that.

5 MR. BOWLES: Excuse my fumbling. I had it  
6 marked but I can't read my own note. What he does say, Your  
7 Honor, is, that based on the history of Moates, what he told  
8 me, what I know about my patient, this is the only cause in  
9 my opinion.

10 THE COURT: That's what I need to see.  
11 Where is that, Mr. McConnell?

12 MR. McCONNELL: I don't recall his  
13 testimony being couched that way. I am not saying it wasn't,  
14 but because I don't recall it that way I don't think I can  
15 locate it.

16 MR. BOWLES: He says at 21 on Page 18, "I  
17 think it is a good possibility." And then the question is,  
18 "Something a little stronger than a good possibility?" "I am  
19 the doctor that made the diagnosis. One of the possibilities  
20 is in making diagnoses, is I remember talking to him about  
21 it, the gas, the fact that he is postoperative. So even if  
22 he is mobile he couldn't be possibly that mobile. All of  
23 those things possibly contributed to it. But then there are  
24 other things taken during the history that have nothing to do  
25 with it. And, again, I remember him, or saying to him, if

1 that's the case, it's just unfortunate, because getting in to  
2 get this thing taken care of was a bear," and he goes on and  
3 the sum and substance of the line of questioning by Mr.  
4 McConnell is that it is the opinion based on the history he  
5 took from him and his knowledge of the patient, that this is  
6 because, with a reasonable degree of medical certainty, which  
7 he sums up in the simple answer, "Yes," on Page 21, Your  
8 Honor.

9 THE COURT: It seems like we are making a  
10 quantum leap to that.

11 MR. McCONNELL: I also point out, Your  
12 Honor, that right now Mr. Bowles is addressing causation  
13 issues rather than standard of care issues.

14 MR. BOWLES: And then there is some of  
15 that on Page 21.

16 (Off-the-record discussion between the  
17 Court and the Clerk)

18 Judge, the best example I've ever seen of  
19 that was Judge Cravens on the Fourth Circuit. He has now  
20 passed away. I was the second case up, and the lawyer from  
21 Baltimore was the first case, Judge Cravens asked him to turn  
22 to Page 7 of his brief, Line 6, and how do you spell  
23 indistinguishable, and it absolutely destroyed the man's  
24 argument.

25 THE COURT: Yes, it was over at that



1 point.

2 MR. BOWLES: The whole effect of the  
3 question of the thing I asked if that is his opinion, and he  
4 is qualified to give such an opinion.

5 THE COURT: If he can testify that as a  
6 general practitioner, and I'll agree with you, if the tenor,  
7 and I've got to review these depositions here, but if the  
8 tenor of his testimony is that as a general practitioner he  
9 can say that to a reasonable degree of medical certainty the  
10 thrombosis was a direct result of the insufflation, you might  
11 get that in. I don't know if a general practitioner can  
12 testify to that.

13 MR. BOWLES: Well, he makes those  
14 diagnoses with the situation. He is the one that diagnosed  
15 the ball bladder problem.

16 THE COURT: Because if we get to trial on  
17 this and he says, well, yeah, it could have been, but it  
18 could also have been other causes, you get stricken, you  
19 understand that.

20 MR. BOWLES: I realize that, Your Honor.

21 THE COURT: I mean it never gets to the  
22 jury.

23 MR. BOWLES: I know that. I don't expect  
24 him to say that.

25 THE COURT: Well, first of all, let's deal

1 with the easy issue. On the causation factor the motion for  
2 summary judgment is granted.

3 MR. McCONNELL: The causation is the  
4 issue, Your Honor, we were just dealing with, whether the  
5 insufflation caused--

6 THE COURT: No. I am talking about on the  
7 operative negligence of Dr. Hyslop.

8 MR. McCONNELL: Okay, the standard.

9 THE COURT: The standard of care, I am  
10 sorry. You were right and I was wrong. That's what I meant,  
11 the standard of care. His actual mechanical performance of  
12 the operation.

13 MR. McCONNELL: What about standard of  
14 care on advice to the patient? I have not had a chance to  
15 respond to some of Mr. Bowles' remarks, and I don't know  
16 whether the Court cares to hear from me again on the issue or  
17 not.

18 THE COURT: No, I think it is pretty  
19 clear. He can't testify to the standard of care because he  
20 said he didn't know.

21 MR. McCONNELL: Right. That, and his  
22 testimony was that that extended beyond the performance of  
23 the procedure, and also to the advice given preoperatively  
24 and postoperatively. He couldn't have said it any more  
25 clearly.

1 MR. BOWLES: Your Honor, I don't think  
2 Dr. Keller, based on what he said, can say what Dr. Hyslop  
3 should or should not have told Moates.

4 THE COURT: Right, because he is not an  
5 expert.

6 MR. BOWLES: But my position is, I don't  
7 need an expert when you come down to informed consent, when  
8 the choice of which way you go is made by the surgeon. The  
9 patient is never given the option.

10 THE COURT: And he is going to testify  
11 that there are two options?

12 MR. BOWLES: And there are two options.

13 THE COURT: But he can't testify that one  
14 option is better than the other option?

15 MR. BOWLES: He can testify that he was  
16 never told that this result could come from the second  
17 option, the one chosen by the surgeon, and would not come  
18 from the first.

19 THE COURT: Maybe the risks attendant to  
20 the first procedure are so much greater than the second.  
21 That's the question.

22 MR. BOWLES: But they are different.

23 MR. McCONNELL: Your Honor, I can address  
24 that point. I can tell you right where that is going to lead  
25 us if that's where Mr. Bowles and the Court decide to take

1 this thing, is, you have a choice between a laparoscopic  
2 procedure and an open procedure and the whole point of the  
3 laparoscopic procedure, which will only be able to be  
4 established by expert surgical testimony--

5 THE COURT: I agree.

6 MR. McCONNELL: --is that the open  
7 procedure has the risks of the laparoscopic procedure  
8 multiplied an untold number of times, because you are talking  
9 about laying that belly open. The risk of infection, the  
10 period of hospitalization, the period of inactivity, which is  
11 a direct and most common contributing factor to the  
12 development of deep vein thrombosis. All that testimony is  
13 going to be there. And whether Dr. Hyslop should have  
14 recommended an open procedure as an equal and viable option  
15 compared to a candidate for a laparoscopic procedure, is  
16 purely expert testimony. There is no getting around that.

17 And I would also submit that if I put an  
18 expert witness on the stand, he will testify it would have  
19 been a violation of the standard of care to go with an open  
20 procedure without giving laparoscopic a try.

21 MR. BOWLES: I think the case, Your Honor,  
22 falls within the exception that I read to you from Page 649  
23 of the Bly case.

24 THE COURT: When are we up for trial on  
25 this?

1 MR. BOWLES: The 22nd and 23rd of January.

2 THE COURT: I've got to review these  
3 depositions again. Did either of you submit me a memo?

4 MR. McCONNELL: Mine was simply a motion,  
5 Your Honor, in which I detailed my argument.

6 MR. BOWLES: If the Court would like a  
7 brief, I will be glad to.

8 THE COURT: I need as much help as I can  
9 get, Mr. Bowles.

10 MR. BOWLES: Not because it is Christmas,  
11 but because I have got to take depositions in the Amtrak  
12 cases all of this week and all of what is left of the  
13 following week. Could I have two days into the new year?

14 THE COURT: I will be honest with you, at  
15 this point I am not committed to summary judgment in this  
16 thing but I am leaning that way. I am leaning that way. I  
17 just don't see what Dr. Keller can testify to. You need to  
18 point out in your depositions that he nailed this thrombosis  
19 exclusively to the insufflation and to no other cause--

20 MR. McCONNELL: You've already -- I am  
21 sorry, Your Honor. You've already seen the best Dr. Keller  
22 has to offer.

23 THE COURT: --to a reasonable degree of  
24 medical certainty. Now if he can do that, but I think he can  
25 testify. I think if he can say to a reasonable degree of

1 medical certainty, although I don't know what went wrong in  
2 terms of the procedure because I am not a general surgeon,  
3 you know, I can't testify that this thrombosis is a direct  
4 result of that surgery and is an attendant risk to that  
5 surgery. I don't know if he can say that.

6 MR. BOWLES: Your Honor, you put me in a  
7 slightly strange position, because summary judgment cannot be  
8 supported by deposition testimony unless the plaintiff agrees  
9 to it. And I would only agree to the use of that deposition  
10 for this limited purpose.

11 Perhaps the easier way would be for me to  
12 obtain an affidavit from Dr. Keller that specifically states  
13 what the Court's concern is. I mean by agreeing to use the  
14 deposition, which can't be used without my consent or motion  
15 for summary judgment, I don't want to box myself in.

16 THE COURT: No, but Mr. McConnell submits  
17 that on the motion in limine, isn't that why that was  
18 submitted? Or was that just the prejudice beyond the motion  
19 for summary judgment, or for both reason?

20 MR. McCONNELL: The deposition transcript  
21 was submitted to support the motion to exclude Dr. Keller's  
22 testimony. It is my position that if that motion is granted,  
23 then summary judgment lies. The summary judgment motion,  
24 Your Honor, which we really not argued, is based on the  
25 response to the request for admission.

1 THE COURT: I don't think there is any  
2 question that he is excluded as an expert in general surgery.

3 MR. BOWLES: I agree.

4 THE COURT: I mean that motion is granted,  
5 and it's conceded, and he says as much in his deposition.  
6 Now I am supposed to exclude these depositions from my mind  
7 as we embark into summary judgment, which I'll do, and the  
8 record should so reflect.

9 MR. McCONNELL: Well, again, Your Honor,  
10 it's my position that since he cannot testify as to standard  
11 of care, this case is ripe for summary judgment this minute,  
12 because Mr. Moates cannot establish through lay testimony  
13 that the standard of care required he be given a choice.  
14 That's the issue, that the standard of care required that he  
15 be given a choice. And since he cannot offer that evidence,  
16 summary judgment lies right now.

17 MR. BOWLES: I am not saying that the  
18 standard of care says he should have been given a choice or  
19 not a choice.

20 THE COURT: But he should have been told  
21 something.

22 MR. BOWLES: But that he should have been  
23 told what can happen from this. When Dr. Hyslop, when his  
24 deposition was taken, has said gas can escape anywhere.

25 THE COURT: Let me understand you. The

1 plaintiff's position in this case is, I wasn't told anything.  
2 I didn't have anything to evaluate. I didn't know that there  
3 was a second option available to me.

4 MR. BOWLES: Yes.

5 THE COURT: Therein lies the negligence.

6 MR. BOWLES: Yes.

7 THE COURT: So it doesn't make any  
8 difference what I might have been told, I was just not given  
9 a choice.

10 MR. BOWLES: Correct. Now what he is told  
11 is on a form, on a piece of paper.

12 MR. McCONNELL: Your Honor, the issue here  
13 is not his-- Another way to phrase what Mr. Bowles has just  
14 said, other than I wasn't told anything, is, I should have  
15 been told something.

16 THE COURT: Should have been told  
17 something.

18 MR. McCONNELL: That's right. Now, before  
19 we get into causation, it's not just something. I mean he  
20 could have said, wear purple socks on the day of surgery, he  
21 has been told something. Obviously, that's not going to do  
22 it. What should he have been told before we even reach the  
23 causation issue, because it has to be something that pertains  
24 to that. That's standard of care, what should he have been  
25 told. It's inescapable.



1 THE COURT: Your motion is granted as far  
2 as the exclusion of Dr. Keller as an expert.

3 MR. BOWLES: As a surgeon.

4 THE COURT: Yes, as a surgeon. Now, I let  
5 you present what you can between now and the 2nd of January  
6 or shortly thereafter. We need to have another hearing on  
7 this. Do you have any request for admission, any answers to  
8 interrogatories, or any of the good things that I need to  
9 consider?

10 MR. McCONNELL: Well, Your Honor, since  
11 the Court brings that up, I have been sort of thumbing  
12 through here trying to see what I can find.

13 THE COURT: I mean things that I might  
14 properly consider on a summary judgment motion.

15 MR. McCONNELL: None of the recovery  
16 responses, answers to interrogatories, that sort of thing, I  
17 believe make any reference to this theory of recovery. That,  
18 well, just what Mr. Bowles has said, that this is why he is  
19 entitled to go to a jury on this thing. This is new since  
20 I've deposed Dr. Keller.

21 THE COURT: Okay. Mr. McConnell, prepare  
22 an order on the motion that I just granted. And we need to  
23 get another early morning hearing scheduled on this, or do  
24 you just want me to decide it on the submissions?

25 MR. BOWLES: I would prefer to submit it

1 and be heard as well, Your Honor.

2 THE COURT: All right, then what I need  
3 for the two of you to do is get with Mrs. Thompson, please,  
4 and schedule a time when we can do this.

5 I think in all fairness, I've got to tell  
6 you, Mr. Bowles, I am right on the verge of granting summary  
7 judgment. But I also want to advise you that every time I've  
8 done this, I have been reversed. So you can take some solace  
9 in the fact that if I grant summary judgment in this case,  
10 the Supreme Court probably will reverse it.

11 MR. BOWLES: Well, Your Honor, that  
12 realization is why both of us brought a reporter today.

13 But as you pointed out before, and as I am  
14 aware, I don't have the easiest case in the world.

15 THE COURT: No, you don't. And I'll give  
16 you the courtesy of whatever submissions either side wants to  
17 make between now, and pick a date, gentlemen.

18 MR. BOWLES: Well, Monday of the first  
19 week is New Year. So, would Friday of that week be  
20 sufficient?

21 THE COURT: That will be fine with me.  
22 Does that suit you, Mr. McConnell?

23 MR. McCONNELL: That is fine with me.

24 THE COURT: All right. And then we'll  
25 schedule another hearing.

1 MR. McCONNELL: I advise Mr. Bowles and  
2 Your Honor right now as far as scheduling that hearing is  
3 concerned, we are set for the very beginning of the fourth  
4 week in January is when this trial starts.

5 The second week of January I have a  
6 two-day medical malpractice trial on the 9th and 10th, and  
7 then I have a separate two-day medical malpractice trial on  
8 the 11th and 12th, and even when I am not in Court I am going  
9 to get ready for the trials.

10 THE COURT: Of course. I understand that.

11 MR. BOWLES: I have a similar problem.

12 THE COURT: You know I will accommodate  
13 you all. Just as the sun breaks the horizon, it doesn't make  
14 any difference to me. If you want to do this at 6 o'clock in  
15 the morning, 7 o'clock in the morning, and I realize that  
16 doesn't help you all that much, except to give you a time  
17 when you can do it as opposed to being able to be prepared  
18 not only for that but for the other trial responsibilities  
19 that both of you have. But I can make the time for you,  
20 that's not the problem. The problem would be your other  
21 responsibilities, and you all will have to juggle those the  
22 best way you can.

23 All right. May I have an order in the  
24 next couple of days?

25 MR. McCONNELL: Yes. I have one right now

1 that states that he is excluded. Well, "Came this day on my  
2 motion to exclude, the motion is granted." But it's not  
3 specific with regard as to standard of care, that sort of  
4 thing.

5 THE COURT: It needs to be specific.

6 MR. BOWLES: Thank you, Your Honor. Have  
7 a good Christmas.

8 THE COURT: The same to both of you.

9 All kidding aside, I do want to preserve  
10 the record for both sides on this. I think that is part of  
11 my responsibility and obligation. I am not going to inhibit  
12 either side to from making a record.

13 So, make the order as complete and  
14 comprehensive as it needs to be.

15 MR. BOWLES: Thank you, Your Honor.

16 MR. McCONNELL: Thank you, Your Honor.

17

18 HEARING CONCLUDED

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**BRIEF IN OPPOSITION TO DEFENDANTS'**  
**MOTION FOR SUMMARY JUDGMENT**

Rule 3:18 Rules of Supreme Court of Virginia provides in part "Summary Judgment shall not be entered if any material fact is genuinely in dispute" (emphasis added). Further, the case of Slone v. GMC, \_\_\_ Va. \_\_\_, 457 S.E.2d 51 (1995) holds that summary judgment is a drastic remedy which is available only where there are no material facts genuinely in dispute.

The Court has granted defendants partial summary judgment and ruled that Dr. Keller cannot testify as to the standard of care applicable to a "general surgeon". The Court has not ruled that Dr. Keller is prohibited from testifying as to the standard of care of physicians in general in the care of their patients.





The depositions of the defendant Hyslop and Dr. Keller clearly show that there are material facts genuinely in dispute.

Defendants' counsel took Dr. Keller's deposition on December 13, 1995. The following are excerpts from Dr. Keller's deposition that clearly show that in Dr. Keller's opinion the "gas leak from the insufflation caused the blood clot" and that Dr. Keller is qualified to give such an opinion:

"Q. Do you have any opinions about whether Dr. Hyslop was negligent?

A. Not negligent in what he did, but after the surgery, and again, this is what had transpired, I did not see Mr. Moates in the hospital, I saw him two weeks or so after the surgery when he had the complication and came in and said gee, why is my leg killing me.

And after examining him I thought he had a deep vein thrombosis of the leg, and that's what I admitted him into the hospital for." (p. 4)

\*\*\*

\*\*\* I think the inter-operative period it was documented that he had gas that had leaked into the subcutaneous tissue, the gas that was used to inflate the abdomen. And it was, when Mr. Moates had asked me, you know, how did this happen, this is two weeks later, I haven't been

doing anything. I was told to rest at home. That's all I've been doing. What's the matter with my leg?

And I said well, I think you may have a blood clot. How could that happen? Well, sometimes it can happen after surgery. I said it may have been a complication of that gas causing excessive pressure.

I mean, I think I went back and forth a couple of times, because I think Mr. Moates was trying to figure out what happened, how did this thing happen, how did he get this thing. Because he had never had problems with blood clots before.

And I said one of the things that could have happened was probably the pressure from the gas could cause a decrease in the flow of blood from the lower extremity, possibly causing -- the surgery that he had, since he was up and ambulating a few hours later, doesn't necessarily cause people to have blood clots. It's one of the nice things.

However, any surgery has the complication of somebody getting a deep vein thrombosis. And since he had no previous history, I felt that maybe the obstruction from that may have been the cause of it, because he had quite a bit.

Again, I did not see it in the hospital, but I think it was in Mr. Moates' record that the lower abdomen and the scrotum was quite inflamed or enlarged due to the gas." (pp. 5, 6)

\*\*\*

Q. Do you have any criticisms of the way Dr. Hyslop managed the care of Mr. Moates?

A. I think only in the follow-up, I think the problem that Mr. Moates was having was that, at least as it was relayed back to me, was the nonchalance.\*\*\*" (p. 9)

\*\*\*

" Q. Let me try to summarize what I understand you to say, Doctor. And if I get this wrong, then please correct me.

Whatever criticism you have of the way Dr. Hyslop managed Mr. Moates' care would be limited to the way Dr. Hyslop communicated with the patient once the patient began to experience a post-operative complication?

A. Right.

Q. And you have no specific criticism of the actual medical treatment that Dr. Hyslop provided, it was simply a matter of communication?

A. Right, except for the leaking of the gas." (p. 10)

\*\*\*

" \*\*\* all he was told was that some of this gas leaked out and you have this problem and it should resolve. You shouldn't have any problems with it. It should just go away.

When he had the problem with it, it seemed that the explanation was not along the lines that maybe it could have been caused by that. \*\*\*" (p. 11)

\*\*\*

"So I don't know if it was discussed prior to the



surgery. \*\*\* " (p. 11)

"Q. Are you familiar with the procedure of the insufflation of the abdomen for purposes of laparoscopic cholecystectomy?

A. Only in that the tube is inserted, and I believe it's carbon dioxide is put into the abdomen." (pp. 11, 12)

\*\*\*

"Q. You've never performed that insufflation procedure?

A. No.

Q. Have you ever observed it performed?

A. Yes." (p. 12)

\*\*\*

"Q. You don't have any opinions about whether the insufflation was performed properly, do you?

A. No, I mean except that I guess it leaked. \*\*\* " (p. 12)

\*\*\*

"Q. Is it your opinion, Doctor, to a reasonable degree of medical certainty that it was the leak from the insufflation which caused the blood clot?

A. Only, I mean only because from a medical standpoint when we take histories, not to get too wordy, but I mean, you know, when I approach a deep vein thrombosis, there's questions that we ask about that and to try and look for a precipitating factor, you know, as far as smoking or women on estrogen pills, prolonged bed rest or obesity or etc., etc.,

etc.

The only thing that I could come up with at the time when Mr. Moates was asking me well, what is this thing, how could it happen. Because again, he thought he came in thinking he had had a cramp in his leg. But when I had measured him and checked him out, unfortunately that didn't seem to be the case.

I told him after surgery you can get these things. And if you're laying in bed a long time, although when you have a laparoscopic cholecystectomy that's usually not the case, because you're up and ambulating so fast. But what else could do it.

I said well, maybe when your scrotum was as big as a basketball and there was pressure from that, that may have caused some blockage slowing down the flow of blood similar to somebody with bad blood vessel disease. That may have caused it.

Q. Doctor, is that just sort of your way of working your way through a medically educated guess at what might have happened? Or are you testifying and telling me today under oath that to a reasonable degree of medical certainty that's what happened with Mr. Moates?

A. Again, I think it's kind of out of my realm. It was my opinion that that was a good possibility that it caused it, because I couldn't think of another reason why he would have had the problem.

Q. You do not consider yourself an expert in arriving at a conclusion of what caused this blood clot? I ask that question because you said it was out of your realm.

A. I mean I'm not an expert, but I think probably we treat -- most of the deep vein thromboses can be either medical or surgical treatment, so it's not something that's foreign to me. It's just the cause and whether or not leaking gas causing that kind of inflation in a groin and pressure would cause that to happen.

You know, I don't know, but it was the only thing, it was the only explanation at the time. Maybe Mr. Moates might remember, but I can't think of any other explanation that I could come up with, because nothing else went along with it, you know." (pp. 13, 14, 15)

\*\*\*

" \*\*\* Let me ask you this: Do you feel like you have enough information to say to a reasonable degree of medical certainty that the gas leak from the insufflation caused the DVT?

A. I think it's a good possibility.

Q. Well --

A. You need something a little bit stronger than that. Again, I think if I -- again, I'm the doctor that made the diagnosis. One of the possibilities that exists in making that diagnosis, I remember talking to him about it, the gas, the fact that he is post-operative, so even if he's mobile he

couldn't be possibly that mobile. All of those things possibly contributed to it.

But then there are other things taken during the history that have nothing to do with it. And again, I remember saying to him if that's the case, it's just unfortunate, because getting him to get this thing taken care of was a bear. He was not anxious about having this thing removed, yet he was living with pain for years with it.

And I said of all the people to have something like that happen to you, it would only happen to him. And I remember that kind of conversation going on. And then I got him off to the hospital to get the test, but there was nothing else. Again, I can't remember there being any other reasons that I could think of in asking Mr. Moates what could have contributed to it, you know, what would have made it happen.

Q. Well, I understand. I think, the sort of differential approach that you took to this to try and come up with, I don't know, I don't want to put words in your mouth, Doctor, your best guess of what it is or what caused it.

But when we have our trial on this thing, we have rules of admissibility, and the Court pays very close attention when people are offering opinions instead of testifying to facts. Okay, there's a difference between a fact and an opinion. And only certain people are allowed to give opinions in court, experts, and even an expert giving an

opinion in court, only certain opinions are allowed to be given in court.

And if you come in and you say you know, this is my best guess or this is what I think is most likely or something like that, there may be problems with admissibility. But what does come in is an opinion rendered to a reasonable degree of medical certainty. And if you have such an opinion, I want to know about it. If you don't have that level of certainty, I want to know that.

And you're the only person who can answer that question, and I'll be happy to give you a minute to chew on it so you can sort of think about how strongly you feel about it.

But the question that I need answered today is: Is it your opinion to a reasonable degree of medical certainty that the gas leak from the insufflation caused the blood clot?

A. Yes." (pp. 18, 19, 20, 21)

\*\*\*

" \*\*\* Except as a medical doctor who has to take sometimes people who have a deep vein thrombosis, most of the ones that I have are medical, but certainly any of my patients that have surgery, I would say that I always check on them post-operatively to see if they're getting any tenderness, because that's a post-operative risk of a complication. Whether or not to put special stockings on them, whether or not they need anticoagulation pre or post-operatively, those

are the things that they expect us to do as a medical doctor.

\*\*\*" (p. 29)

\*\*\*

On the issue of informed consent, Dr. Keller's deposition clearly shows that plaintiff's concern was that Dr. Hyslop didn't tell him what he needed to know in order to make an intelligent decision as to whether to have the procedure or not.

\*\*\*

" \*\*\* I think his frustration was that he could [sic] did not tell him that this could happen, that if it did happen, what does it mean. \*\*\*"

\*\*\*

"Well, when Mr. Moates developed the deep vein thrombosis, he complained to you that Dr. Hyslop didn't tell him that could happen. Is that right?

A. Yes."

\*\*\*

The plaintiff has testified that he would not have had the surgery had he known that what happened to him could have happened to him and Dr. Hyslop has admitted in his deposition and in his response to request for admissions that he never told him either that the gas could escape into his scrotum or that a deep vein thrombosis could result from the gas so escaping.

Once again, plaintiff would remind the Court of the language found on page 649 and 650 in the case of Bly v. Rhodes, 216 Va. 645, 222 S.E.2d 783 (1976).

Further, we would agree that a patient-plaintiff can establish by lay testimony that his physician did not disclose particular risk information and that he, the patient, had no knowledge of the risk. We would also agree that in some cases lay testimony might be competent to show the adverse consequences following treatment. And we can envision situations, albeit relatively infrequent, where from ordinary human knowledge and experience the necessity of disclosure is so obvious that expert testimony should not be required.

Plaintiff is entitled to have his case go to a jury on the issues of:

1. was he properly informed as to the risks under the language of Bly, supra;
2. did the insufflation cause the deep vein thrombosis;
3. were plaintiff and his wife advised at all as to post-operative activity; and
4. the amount of damages plaintiff is entitled to recover.

Summary judgment is inappropriate in this case.

**ORDER**

**CAME THIS DAY THE PARTIES**, by counsel, upon the defendants' Motion for Summary Judgment. Upon consideration whereof, the motion is granted in part and defendants are awarded partial summary judgment as to any claim that the performance of the surgery upon the plaintiff was negligent in any way and such claim is hereby stricken from plaintiff's Motion for Judgment and dismissed, with prejudice.

**IT IS SO ORDERED.**

**ENTER:**

1 / 5 / 96

A COPY, TESTE:  
JUDY L. WORTHINGTON, CLERK

BY

DEPUTY CLERK







**ORDER**

CAME THE PARTIES, BY COUNSEL, on December 18, 1995 and January 5, 1996 on the defendants' Motion for Summary Judgment, and same was briefed and argued.


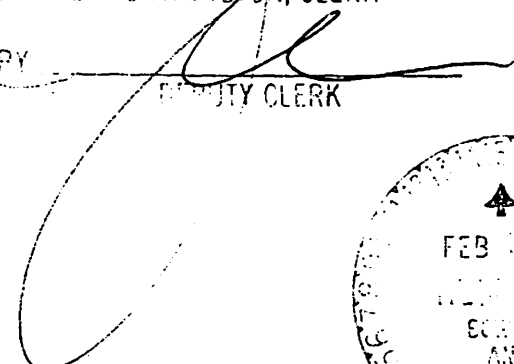
Upon consideration whereof, the motion is granted. Summary judgment is ordered in favor of the defendants and this case is ordered stricken from the docket.

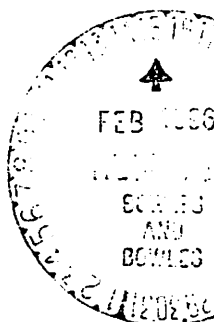
IT IS SO ORDERED.

ENTER:

2 / 7 / 96

I ask for this:

  
\_\_\_\_\_  
JUSTICE  
JUSTICE WORTHINGTON, CLERK  
BY  DEPUTY CLERK



Seen and objected to:



#### WRITTEN STATEMENT OF FACTS

Comes now the plaintiff Robert Courtland Moates, by counsel, and for his written statement of fact, testimony and other incidents of the case pursuant to Rule 5:11(c) Rules of Supreme Court of Virginia, sets forth as follows:

Plaintiff, who owns and operates Bob Moates Gun Shop, in 1991 was having severe and recurrent pain in his chest, abdomen and upper back. He went to his family doctor, Kelvin Keller, M.D. Dr. Keller diagnosed the cause of plaintiff's problem as being either an inflamed gall bladder or gall stones and made arrangements for plaintiff to be seen by the defendant, John W. Hyslop, M.D., who is a general surgeon affiliated with the defendant Surgical Associates of Richmond. Dr. Hyslop performed an examination of plaintiff and discussed generally the risks inherent in the performance of a laparoscopic cholecystectomy and did not discuss

with the plaintiff the option of conventional surgery. Dr. Hyslop has admitted that at no time did he inform the plaintiff that the CO<sub>2</sub> gas used to inflate plaintiff's abdomen could leak into his scrotum causing it to swell to a huge size or that a deep thrombosis could result from the insufflation. The surgery was performed at Johnston-Willis Hospital on October 2, 1991, during which gas did escape into plaintiff's scrotum causing it to swell to a huge and painful size. Plaintiff's claim that the surgery was improperly performed was subject to a partial summary judgment and plaintiff has not appealed from that order. Plaintiff was discharged from Johnston-Willis Hospital and claims that neither he nor his wife were given any instruction by Dr. Hyslop regarding post-operative care activity, etc. Dr. Hyslop has no recollection of what he told the plaintiff but he assumes he gave the usual discharge instructions. Plaintiff developed a deep venus thrombosis in his right leg and as a result, is unable to perform the work of a gunsmith, which requires constant standing, to the same extent that he could prior to the surgery. Plaintiff's family physician, Kelvin Keller, M.D., has given his professional opinion that the plaintiff's swollen scrotum and subsequent deep venus thrombosis were caused by the CO<sub>2</sub> gas insufflation.

Defendants filed a motion for summary judgment founded upon responses to requests for admission \*

to which plaintiff objected, and the Court sustained \*  
defendants' motion for summary judgment on the bases that Bly v. Rhodes, 216 Va 645, 222 S.E. 2d 783 (1976), required that plaintiff \*

provide expert testimony that Dr. Hyslop had not adequately informed plaintiff of the risks attendant to the surgery when he failed to inform the plaintiff of the possibility of the occurrences, i.e. painful and swollen scrotum and the deep vein thrombosis which has incapacitated plaintiff and, further, that plaintiff had to provide expert testimony that the failure to give plaintiff any discharge instruction was negligent, to which actions of the Court defendant objected during oral argument and by endorsement of the Order of February 7, 1996, it being plaintiff's position that the expert testimony was unnecessary under the language in Bly, supra:

Further, we would agree that a patient-plaintiff can establish by lay testimony that his physician did not disclose particular risk information and that he, the patient, had no knowledge of the risk. We would also agree that in some cases lay testimony might be competent to show the adverse consequences following treatment. And we can envision situations, albeit relatively infrequent, where from ordinary human knowledge and experience the necessity of disclosure is so obvious that expert testimony should not be required.



**DEFENDANT/APPELLEE'S OBJECTION TO  
PLAINTIFF/APPELLANT'S "WRITTEN STATEMENT OF FACTS"**

COME NOW THE DEFENDANTS/APPELLEES (collectively, "Dr. Hyslop"), by counsel, and pursuant to Rule 5:11 of the Supreme Court of Virginia, objects to the Plaintiff/Appellant's "Written Statement of Facts" as erroneous and incomplete. More particularly, Dr. Hyslop objects as follows:

1. The Written Statement of Facts asserts: "Dr. Hyslop . . . did not discuss with the plaintiff the option of conventional surgery." Dr. Hyslop objects as follows:

a. The statement is argumentative. There was no evidence that open cholecystectomy was "conventional" as opposed to laparoscopic cholecystectomy.

b. The statement is erroneous. In his deposition, Dr. Hyslop was unable to recall whether open cholecystectomy was discussed in conjunction with laparoscopic cholecystectomy.

2. The Written Statement of Facts asserts "Dr. Hyslop has admitted that at no time did he inform the plaintiff that the Co2 gas used to inflate plaintiff's abdomen could leak into his scrotum causing it to swell to a huge size or that a deep thrombosis could result from the

insufflation." Dr. Hyslop objects because he has never admitted or been asked to admit any such thing. A copy of the request for admissions to which the Statement apparently refers is attached.

3. The Written Statement of Facts asserts: "The surgery was performed at Johnston-Willis Hospital on October 2, 1991, during which gas did escape into plaintiff's scrotum causing it to swell to a huge and painful size." Dr. Hyslop denies that the swelling was as described, but concedes the plaintiff would have offered personal testimony to that effect, thus presenting a conflict in the evidence.

4. The Written Statement of Facts fails to assert that the liability issue in this case was the standard of care of the reasonably prudent surgeon practicing in Virginia in 1991.

5. The Written Statement of Facts fails to assert that the parties consented to an order by which the parties were given deadlines to identify all expert witnesses expected to be called at trial. Said deadlines passed. The plaintiff failed to identify a witness who had ever been trained in or had a clinical practice in surgery of any kind. The plaintiff never sought an extension of that deadline nor ever proffered to the court the name of a qualified surgeon.

6. The Written Statement of Facts asserts that the trial court ruled "that plaintiff had to provide expert testimony that the failure to give plaintiff any discharge instruction was negligent." Instead, the trial court ruled that only a qualified expert could offer testimony of what should have been said under the applicable standard of care.

7. The Written Statement of Facts fails to assert that the trial court ruled that as a Family Practitioner and "non-surgeon," Kevin Keller, M.D. was not qualified to testify to

standard of care as to surgery, cholecystectomy, preoperative discussion, informed consent vis-à-vis cholecystectomy or postoperative patient instructions.



**DEFENDANTS, JOHN W. HYSLOP AND SURGICAL  
ASSOCIATES OF RICHMOND'S ANSWERS TO  
PLAINTIFF'S REQUEST FOR ADMISSIONS**

COME NOW, the defendants, John W. Hyslop and Surgical Associates of Richmond, Inc., by counsel, and file the attached as and for their Request for Admissions propounded by the plaintiff.

1. Admit that you never advised Robert Courtland Moates prior to the laparoscopic cholecystectomy surgery that the CO2 gas might escape into his scrotum causing it to swell.

Admitted.

2. Admit that the prevailing standard of care would have required you to have done so.

Denied.

3. Admit that you never advised Robert Courtland Moates prior to the laparoscopic cholecystectomy surgery that a deep vein thrombosis might result from such surgery.

Admitted.

4. Admit that the prevailing standard of care would have required you to have done so.

Denied.

## **ASSIGNMENT OF ERROR**

**The trial court erred in entering its order of February 7, 1996 (R., p. 192) granting summary judgment based upon its holding that appellant was required to present expert testimony concerning the issue of informed consent as to the risks attendant to the procedure involved and appellees' alleged failure to give appellant or appellant's wife any discharge instructions.**