

PERSPECTIVES



**KINERK
BEAL
SCHMIDT
DYER &
SETHI, P.C.**
Attorneys at Law

Kids and car seats... it's the law!

Of all the "baby gear" you buy, your child's car safety seat may be the most important — and the most confounding. Properly installed child safety seats reduce the risk of death by 71% for infants and by 54% for toddlers. Sadly, more than



half the children under five who died in vehicle crashes were unrestrained; of those who were restrained, 20% were merely buckled into adult seat belts.

Buying the right safety seat (second-hand and hand-me-down seats may not meet federal safety standards), installing it properly, and using it even for short trips are critical.

Selecting a car seat should be determined by the weight of the child.

- From birth to weighing at least 20 pounds, a baby must sit in an infant safety seat, facing backward in the car. This protects the baby from neck injuries.
- Children who weigh at least 20 pounds and are one year old should sit in a seat facing forward until age 4 or at a weight of 40 pounds. Harness straps should be threaded through the top slots of the car seat. The straps should be straight and the fit snug. The harness chest clip must be at the child's armpit level for proper placement.
- Children heavier than 40 pounds must be secured in a booster seat that uses the adult lap and shoulder belt. The shoulder belt should fit tightly against the child's chest and rest across the collarbone. The lap belt should lie across a child's upper thigh. A high-back booster seat is recommended if a car has a low seat back.
- A child should be placed in a booster seat until they

KBSDS convinces court to reinstate largest lasik eye verdict ever



Late last fall, Kinerk Beal Schmidt Dyer & Sethi was successful in convincing an Arizona Court to reinstate a \$4 million dollar verdict against University Physicians, Inc. (UPI) arising out of UPI's failure to properly measure a United Airline pilot's eyes before performing LASIK surgery on the pilot. If the pilot's eyes had been properly measured, UPI would have known that his pupils get too large in darkness for LASIK surgery. Proper measurements would have resulted in their telling him that he was not a candidate for this procedure. Instead, the procedure was conducted and the pilot was left with permanent eye damage; at night he sees halos, ghosting, and starbursts which make it impossible for him to continue his employment as a professional pilot.

However, following the trial, the plaintiff's chief medical expert witness was bombarded by criticism from fellow physicians for his willingness to testify against another LASIK surgeon and the

1790 East River Road
Suite 300
Tucson, Arizona
85718
www.kbsds.com

continued on page 2

continued on page 3



Kids and Car Seats, continued from page 1

weigh about 60 pounds or until the child is big enough to use the vehicle's lap and shoulder belts while sitting with his back against the vehicle's seat and his knees bent over the edge of the seat, feet touching the floor. This usually happens when the child reaches a height of 4'9".

No matter how safe the car seat, it has to be installed and used properly.

- Manufacturers provide detailed instructions on installation and correct usage. Parents, learn the specifics of using shoulder straps, how to use a chest clip, and how the straps can be adjusted.
- Always try out the seat in your car to make sure it's steady before driving with your child in it.
- Many local stores, such as Babies R Us, Baby USA and Aldrich will assist you with installation. Stop by your local fire station and have the folks there help you with your car seat.
- Fill out a car seat's registration card so that if the car seat is recalled for a defect you can be contacted. You may also contact the American Academy of Pediatrics for its annual list of child safety seats.

Car seats belong in the back.

The back seat is the safest place in case of a crash. If your car is equipped with a passenger-side airbag, all children age 14 and under should remain in the back seat. A passenger-side air bag can kill or injure a child when it deploys, even in a minor accident. If your child must be in the front seat, investigate having an air bag on-off switch installed in your car.

Set a good example.

An NHTSA study found that when the driver is wearing a seat belt, children are buckled in 87% of the time, but when the driver is unbuckled, the percentage of children belted in drops to only 24%. If you happen to see someone driving around with small children who are not in a car seat, call the "Buckle-Up-Baby" hotline at 1-800-505-BABY and give them the vehicle license plate number. The owner will be sent a packet of information encouraging car seat use.

—Dev K. Sethi

Additional Resources:

American Academy of Pediatrics – www.aap.org
National Safe Kids Campaign – www.safekids.org
Consumer Product Safety Commission – www.cpsc.gov
National Highway Traffic Safety Administration – www.nhtsa.gov

Save a Life This Summer: Protect Children From Drowning

According to the National Center for Disease Control (CDC), drowning is the second leading cause of injury-related death for children between the ages of one and 14 in the United States. In ten states, including Arizona, drowning surpasses all other causes of death for children age 14 and under.

Children under age one most often drown in bathtubs, buckets, or toilets (another reason to keep the toilet lid closed!).

Children one to four, most often drown in residential swimming pools. Of these children, most were last seen in the home, had been out of sight less than five minutes, and were in the care of one or both parents at the time.

For every child who drowns, three receive emergency department care for non-fatal submersion injuries. More than 40% of these children require hospitalization. Non-fatal incidents can cause brain damage that results in long-term disabilities ranging from memory problems and learning disabilities to the permanent loss of basic functions.

When you are at the beach or lake this summer, and particularly when you are at your own pool or neighbor's pool, your first priority should be to watch your child and everyone else's children. Make sure that your pool and all pools you visit are properly fenced to prevent access by small children. Teach your child to swim as soon as possible. If the adults are going inside, make all of the kids get out of the pool and go inside too. Make sure you and your kids learn CPR. Visit the National Center for Injury Prevention and Control's web site, an arm of the CDC at www.cdc.gov/ncipc for more information on safe swimming this summer.

—Jim H. Dyer

Reinstate lasik verdict

continued from page 1

resulting multi-million dollar verdict. He was likewise asked to step down from the Board of Directors of his LASIK eye surgery company, the largest such company in North America. Consequently, the expert contacted the defense attorney in the case and attempted to recant his testimony. Because of this, the trial court granted defendant's Motion for New Trial.



Steve Post, plaintiff

KBSDS appealed and convinced the Arizona Court of Appeals the trial court was wrong. As a consequence, the trial court's order granting a new trial was overturned. The defendants then petitioned relief from the Arizona Supreme Court. KBSDS successfully opposed this petition. Finally, late last fall the trial court denied new motions for new trial filed by the defendants and reinstated the \$4 million dollar verdict which KBSDS collected for their client in December of 2004.

The latest development in lasik eye surgery cases

On the heels of Kinerk, Beal, Schmidt, Dyer & Sethi successfully reinstating the largest jury verdict (\$4,000,000) in a LASIK eye surgery case ever in the United States, the Arizona Court of Appeals recently addressed an issue of great importance in future cases both in the field of LASIK surgery as well as other professional negligence cases: whether an expert witness's personal practices are admissible evidence.

The case addressing this issue, *Smethers v. Campion*, 108 P.3d 946 (Ariz. Ct. of App., March 22, 2005) (review pending) involved a LASIK eye surgery patient who was a contact lens wearer before surgery. It is fairly well known that wearing contact lenses will change the shape of the wearer's eyes and may temporarily improve a patient's vision even while not wearing the contact lenses. It is important that a patient not wear contact lenses for several weeks before undergoing LASIK eye surgery so that his or her eyes will return to their normal shape and uncorrected vision. It is equally important that the physician test and measure the eyes after the patient has discontinued wearing contacts so that the laser is programmed properly to correct the patient's actual vision before surgery.

In *Smethers*, the physician failed to take these measurements and test the patient's eyes. Instead, the laser was set based upon measurements taken of the eyes while the patient was still a contact lens wearer. Consequently, the laser cut too deep resulting in overcorrection of the patient's eyes and permanent vision problems.

At trial, the plaintiff's medical expert testified to the importance of measuring and testing the eyes after contacts had not been worn for some time. The defendant physician called an expert who testified that it was not unreasonable for the treating doctor not to measure and test the eyes just before the surgery, after the patient had discontinued wearing contact lenses for some period of time.

On cross-examination, the plaintiff's attorney sought to ask the defendant's expert about his personal practices. The plaintiff's lawyer had learned during a deposition that this expert always measured and tested patients' eyes right before surgery, after they had discontinued wearing contact lenses for some period of time. Nevertheless, the expert testified that a failure to measure a patient's eyes after discontinued contact use was not unreasonable. The plaintiff's attorney argued that the jury ought to be allowed to weigh the credibility of the expert's testimony on this point, in light of his own personal practices. The trial court disagreed and did not allow this questioning to occur in

continued on page 4



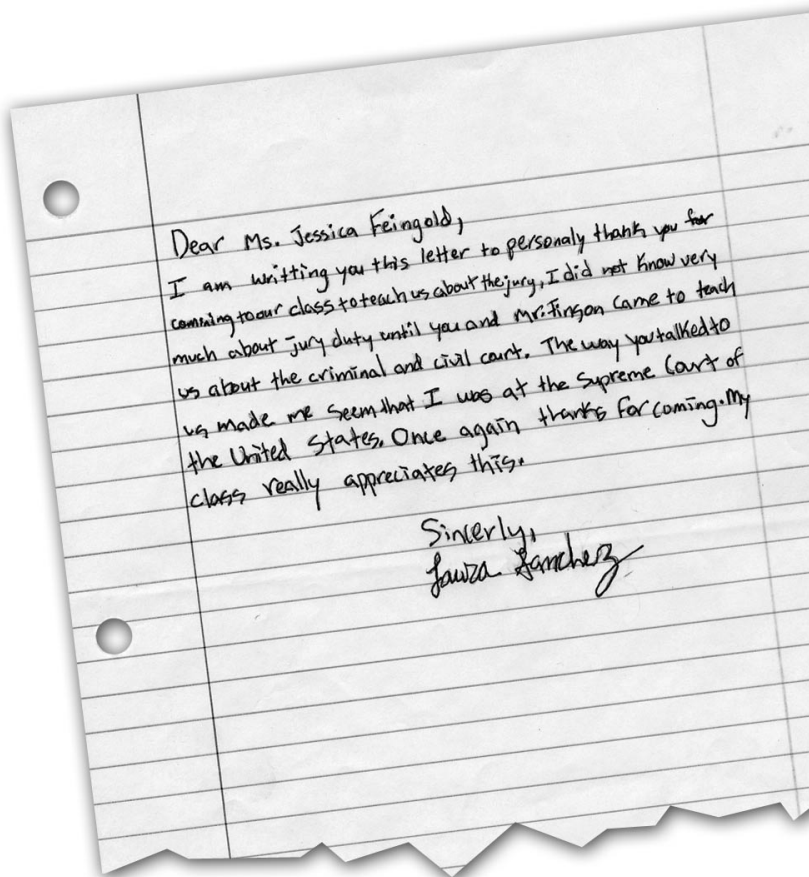


Lasik eye surgery cases, continued from page 3

front of the jury. On appeal, the Arizona Court of Appeals reversed the trial court and held that the personal practices of an expert witness are admissible at trial to assist the jury in evaluating the credibility of the expert witness, what the standard of care in the industry really is, and to determine whether the expert witness is contradicting himself.

This case is of great import not only in LASIK eye surgery cases but in all cases of professional negligence. It is not uncommon for a defendant's expert witness to testify that the defendant has not committed negligence or acted unreasonably, despite the fact that the defendant's conduct is inconsistent with the customary practices of the expert. This contradiction between what the expert testifies to and what he or she actually does in practice certainly is relevant to the jury's evaluation, not only as to what the true standard of care is in the industry but also as to what extent the expert is being forthright with the jury. This case will no doubt require experts in professional negligence cases to think twice before testifying that another professional has exercised reasonable care even though he or she did not conduct themselves as the expert does.

—Ted A. Schmidt



KBSDS – In the Community

Kati Rhea, daughter of Sher Rhea, Legal Assistant, graduated this May with a B.S. in Business and Economics from the University of Kentucky and first in her class from the Lexington Police Academy. She was the only female in her Academy class. Her future plans include business school in the fall while working for the Lexington Police Department and ultimately a career with the FBI or DEA.

Alexandra Phillips, daughter of Bea Flesher, Legal Secretary, is a rising senior at Rincon High School and the recent recipient of two outstanding honors: 2005 Eddie Leon Student Player of the Year Award and 2004 Arizona Daily Star Student of the Week. We look forward to more great things from Alexandra.

KBSDS attorneys Burt Kinerk, Ted Schmidt, and Jessica Feingold recently visited local schools as part of the "We the Jury" program sponsored by the Pima County Bar Association, Young Lawyers Division. Attorneys were placed in local schools to teach students the importance of jury service, the rights afforded by the United States Constitution, and the value of continued education.

In addition to the hard work **Karen Finson**, R.P.H., Legal Assistant, puts in at the office, she volunteers as a Court Appointed Special Advocate (CASA) to represent the best interests of abused and neglected children involved in court proceedings. More CASA volunteers are needed. Log onto www.pimacountycasa.org/ for information.



KINERK

BEAL
SCHMIDT
DYER &
SETHI, P.C.

Attorneys at Law

MORE PERSPECTIVES

Caring for your tires is caring for your car, ...and the people who ride in it.

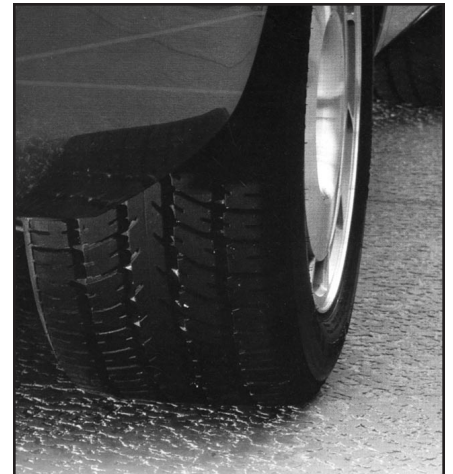
No matter how careful a driver you are, or how crashworthy you perceive your vehicle to be, a critical factor in vehicle safety is tire maintenance and care. Tires are directly responsible for the control of your vehicle. All road forces are funneled through your tires and so any weakness in those tires reduces or even eliminates your ability to maintain safe control of the vehicle. Improperly inflated or worn tires also decrease your fuel efficiency. In the wake of the Firestone tire recall that began in 2000, consumers are paying closer attention to inflation levels and tread depth on their tires. Now consumers are being urged to pay attention to an additional factor: born-on dates.

European and some Japanese car manufacturers have long warned consumers that tires are perishable. Ford recently announced that it is urging drivers to replace tires after six years, regardless of wear. According to research conducted by Ford scientists following the Firestone recall, a tire's internal structure weakens as it ages which can result in tire failure. Driving in hot climates (like Arizona) and heavy loading of vehicles speeds this aging process. To be a careful driver means that you should also be especially vigilant about tire maintenance and integrity.

The tire industry as a whole takes the position that tread depth is more important to monitor than tire age. However, the tire industry has much to lose if consumers begin demanding only the freshest tires. The National Highway Traffic Safety Administration is currently examining Ford's data and is developing a test designed to simulate the effects of aging on tires.

Ford's new stance is directly related to the wave of deadly crashes involving Ford Explorers and Firestone Tires. As a result of many successful lawsuits against the companies, Ford is now taking action designed to keep their consumers safer. Keep in mind however, that an expiration date does not replace the need for proper tire care and maintenance. Drivers must continue to monitor inflation levels and tread depth on their tires, even when new.

—Jessica E. Feingold



How to Find A Tire's Age:

- Look for the letters "DOT" on the sidewall. This indicates compliance with applicable safety standards set by the U.S. Department of Transportation.
- Adjacent to these letters is the tire's serial number, which is a combination of up to 12 numbers and letters. The last characters are numbers that identify the week and year of manufacture. For example, 1504 means the fifteenth week of the year 2004.
- Don't get frustrated if you can't find these characters. The numbers are printed on only one side of the tire, which sometimes is the one facing inward when the tire is mounted on the wheel.
- If you have tires that are more than 6 years old, consider getting new ones, regardless of the tires' visible wear

1790 East River Road

Suite 300

Tucson, Arizona

85718

www.kbsds.com

