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## *Defense lawyer asks for new trial in \$4 million LASIK verdict*

by Marilyn Haddrill Contributing Editor

*Expert witness Jeffery J. Machat, MD, told a judge that he erred in earlier testimony regarding the effective optical zone in LASIK surgery performed on a commercial airline pilot.*

Expert witness Jeffery J. Machat, MD, of Toronto mistakenly presented erroneous information during a May trial that led to a \$4 million jury verdict against United Physicians Inc. (UPI) of Tucson, Ariz., Machat testified at an August evidentiary hearing.

Machat was a witness for former commercial airline pilot Steve Post, who sued UPI after he said his night vision was impaired following LASIK. Machat acknowledged during August testimony that he left a voice message for the UPI surgeon who performed the LASIK procedure, Robert Snyder, MD, following the May 9 verdict:

“I regret the day I got involved with this and I should have gotten smarter sooner. I should not have listened to the lawyers,” he said.

UPI lawyer Jeff Campbell, JD, of Phoenix, is now asking Pima County Superior Judge Kenneth Lee for a new trial, based on Machat’s recanting of some former testimony. Oral arguments from Campbell and co-counsels for the plaintiff, Bob Beal, JD, and Ted Schmidt, JD, of Tucson, were scheduled Sept. 18 in Tucson.



Defense attorney Jeff Campbell with Jeffery J. Machat, MD

During the August evidentiary hearing, Machat described events leading to what he described as a mistaken impression regarding the effective optical zone treatment sizes for the Visx Star S2 excimer laser (3.1 software). During the May trial, Machat had testified that the pilot’s pupil sizes (various measurements ranged from 5 to 7.5 mm) were too large for the 6.5 mm Visx setting, which he said created an effective optical zone of 5.5 mm. Machat said this was too small for the pilot’s corneal steepness, pupil size and –4 to –5 D myopia.

Machat said he learned he was wrong about the Visx system's effective optical treatment zone only after the trial had ended and the jury verdict was rendered. Machat now says that the Visx effective treatment zone for Post was 6.5 mm, appropriate for the pilot's pupil size. Based on this information, Machat now says the pilot did not require special warning prior to undergoing LASIK.

"I learned I was wrong in terms of the Visx laser and it would have changed my opinion substantially," Machat testified in August. "I certainly did not anticipate that the trial would result in such a large jury verdict, or that it would portray Dr. Snyder in such a bad light. I certainly felt personally responsible."

Machat said he discovered his error when he attended the American Society of Cataract and Refractive Surgery conference in June, where he talked to colleagues and Visx company officials.

Machat said the misunderstanding also was based on different definitions of what constitutes "moderate myopia," which lowers optical zone treatment size. When Machat informally talked to Visx vice president of research and development Carol F.H. Harner, PhD, at a fall 2001 conference, Machat said she confirmed that the Visx system creates an effective optical zone of 5.5 mm in a patient with moderate myopia.



**Jeffery J. Machat, MD, takes the stand during hearing**

"I felt quite comfortable after speaking to Carol Harner ... so I had no reason to doubt myself," Machat said.

But Machat said he found out at the ASCRS conference that his definition of moderate myopia (beginning at  $-3$  D) differed from that of colleagues and the Visx official who define moderate myopia as beginning at  $-6$  D.

Machat also testified that the error in testimony could have been avoided had Visx officials responded to requests for information from him and Post's attorneys immediately prior to the trial.

Post's attorney, Schmidt, referred to published information authored by other experts indicating that optical treatment zones decrease as degrees of myopia increase. Schmidt also asked Machat if he had been subjected to verbal abuse by colleagues following the verdict, hinting that this might have influenced his change of testimony.

"I have many colleagues who are very upset with me," Machat said. "I have patients who are upset with me. I have corporate members who are upset with me. They thought it was irresponsible of me..."

Machat is chief surgeon and a founder of TLC Laser Eye Centers.

“Have you been cursed?” Schmidt asked.

“Yes.”

“Verbally assaulted — at the [ASCRS] conference, for example?”

“Yes.”

“As a result of this, have you been asked to resign from the advisory board of TLC?”

“Yes.”

Earlier in his testimony, Machat described a meeting with the TLC attorney, CEO and medical director following the trial and jury verdict.

“We all were very concerned that I could have testified to something that was so inaccurate,” Machat said.

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**Contact Information**

**Beal:** 520-790-5600, fax 520-790-1163

**Campbell:** 602-322-1600, fax 602-252-4431

**Machat:** 416-362-2732, fax 416-362-1370

