



## The Voice

### And The Defense Wins

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On February 24, 2015, the United States Court of Appeals for the Seventh Circuit affirmed a summary judgment ruling in favor of CIBA Vision Corporation (now part of Alcon), holding that the plaintiff had failed to prove that the CIBA contact lenses that allegedly caused his eye injuries were defective. *Kallal v. CIBA Vision Corporation*, No. 13-1786 (7th Cir. Feb. 24, 2015). Alcon was represented by [Eric G. Lasker](#) of **Hollingsworth LLP** in Washington, D.C.

Steven Kallal alleged that he experienced serious eye problems after being using CIBA's O2 Optix lenses as prescribed by his optician. Shortly after Mr. Kallal had begun using the lenses, CIBA Vision had voluntarily recalled 11 million O2 Optix lenses because it had discovered that a large number of the lenses had poor ion permeability. Mr. Kallal claimed that he had used the recalled lenses and that the poor ion permeability had prevented oxygen from reaching the cornea in his eyes, leading to his injury.

CIBA Vision established through discovery that none of the contact lenses shipped to Mr. Kallal's optician in his prescription strength were part of the recall. Mr. Kallal argued, nonetheless, that the recall was so large that the company could not possibly have known which lenses were defective, and he noted that some of the lenses he wore were manufactured at the same plant that had also manufactured the recalled lenses. The Seventh Circuit concluded, however, that this "wisp of circumstantial evidence" was insufficient to support the final necessary showing that Mr. Kallal had used defective lenses: "Kallal has not demonstrated what defect his O2 lenses had. Instead, he presents an argument that sounds like *res ipsa loquitur*: a substantial percentage of lenses from the Batam plant were defective; Kallal wore lenses made at that plant, *ergo*, Kallal's lenses were defective. To defeat summary judgment, however, he needed more."

The Seventh Circuit likewise rejected Mr. Kallal's reliance on two expert witnesses, noting that these witnesses had testified only that Mr. Kallal's injuries were of a type that could have been caused by defective lenses but "shed [. . .] no light on the question whether Kallal's lenses were defective." The court concluded that "the mere fact that a person suffers pain when using a product does not, by itself, prove that the product is defective."

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