

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

DALLAS COBBS, #164276,

Plaintiff,

vs.

GEORGE J. PRAMSTALLER, *et al.*,

Defendants.

File No. 07-CV-14644

Hon. Anna Diggs Taylor

Mag. Judge Charles E. Binder

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**PLAINTIFF'S BRIEF IN OPPOSITION TO
MDOC DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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STATEMENT OF ISSUES PRESENTED

- I. Does the MDOC defendants' denial of Mr. Cobbs' cataract surgery from 2004 to 2008 constitute deliberate indifference to his serious medical needs in violation of his Eighth Amendment rights?

The plaintiff says yes.

- II. Does the MDOC defendants' violation of Mr. Cobbs' clearly established Eighth Amendment rights preclude the defense of qualified immunity?

The plaintiff says yes.

The Legal Standard and Controlling Authority

For summary judgment to be granted, the defendants must show that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Horton v. Potter*, 369 F.3d 906, 909 (6th Cir. 2004). The evidence and all reasonable inferences must be construed in the light most favorable to the plaintiff. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Muhammad v. Close*, 379 F.3d 413, 416 (6th Cir. 2004).

To prove an Eighth Amendment claim, the plaintiff must show that the defendants were deliberately indifferent to his serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). A serious medical need is a medical need “that has been diagnosed by a physician as mandating treatment.” *Perez v. Oakland County*, 466 F.3d 416, 423 (6th Cir. 2006).

Qualified immunity is not a defense if, taking the facts in the light most favorable to the plaintiff, the defendants violated a clearly established constitutional right that would have been understood by a reasonable person, and the defendants’ conduct was objectively unreasonable in light of the clearly established right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir. 2002).

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Introduction

Plaintiff Dallas Cobbs filed this § 1983 lawsuit *in pro per* in October 2007. He named as defendants Michigan Department of Corrections (MDOC) medical director George Pramstaller, the MDOC Bureau of Health Care Services, the MDOC Medical Services Advisory Committee, and various unknown John Doe defendants. Mr. Cobbs sought damages and injunctive relief for the defendants' failure to approve cataract surgery that his MDOC doctors, as well as consulting eye specialists, had been requesting for more than three years, since the late summer of 2004.

Statement of Facts¹

Mr. Cobbs was and is incarcerated at the Ryan Correctional Facility in Detroit, Michigan. In 2004, Mr. Cobbs had vision problems due to cataracts. On June 22, 2004, the MDOC's Medical Services Advisory Committee (MSAC) issued a memorandum approving cataract surgery for Mr. Cobbs based on his lifer status (and rescinding an earlier denial of ophthalmology specialty services). *See* Exhibit C, Medical Records, at 1, attached. Mr. Cobbs' primary care physician at Ryan, Dr. Piper, noted the MSAC approval in Mr. Cobbs' medical chart. (Exh. C, at 2, 7/2/04 notes of Dr. Piper.)

On July 27, 2004, Mr. Cobbs had a consultation with ophthalmologist Dr. Ghulam Dastgir. Dr. Dastgir recommended cataract surgery and lens implants in *both* eyes, and scheduled Mr. Cobbs for scans of both eyes in preparation for the surgery. (Exh. C, at 3-4.) Dr. Piper sent an authorization request for Dr. Dastgir's treatment plan to Correctional Medical Services (CMS), the MDOC's contract medical provider, and CMS issued a form authorizing cataract removal surgery and a lens implant for the left eye.² (Exh. C, at 5-6.)

¹ For a complete recitation of the facts, *see* R. 38, Plaintiff's Amended Complaint, ¶¶ 18-86 (6/4/08), and Cobbs Declaration, attached as Exhibit A. Only the most pertinent facts will be highlighted here.

² CMS apparently also approved the right-eye surgery, which was performed on 8/30/04. (Exh. C, at 8.)

On August 23, 2004, Dr. Dastgir performed scans on Mr. Cobbs' left and right eyes, and had him sign a consent form for cataract extraction with lens implants in both eyes. (Exh. C, at 7.) Dr. Dastgir noted that Mr. Cobbs would undergo the operations "in the very near future." *Id.*

On August 30, 2004, Dr. Dastgir performed the cataract surgery on Mr. Cobbs' right eye at the Blake Woods Surgery Center. (Exh. C, at 8.) Dr. Dastgir saw Mr. Cobbs again the next day and told him that the left eye surgery would be scheduled shortly. (Exh. C, at 9.) Dr. Dastgir noted in his clinic consultation report that Mr. Cobbs was to return for the left eye surgery. *Id.* Dr. Piper also noted on Mr. Cobbs' medical chart that he was to have cataract surgery on his left eye. (Exh. C, at 10, 8/31/04 notes of Dr. Piper.)

On September 7, 2004, Mr. Cobbs was told that the surgery on his left eye needed to be re-scheduled because it had been inadvertently set for the Labor Day holiday.³ *See* Exhibit E, Grievance Documents, at 1, attached. When six weeks passed without Mr. Cobbs hearing anything about the surgery, he sent an inquiry to health services. *See* Exhibit D, Health Care Requests, at 1, attached. On October 7, 2004, Dr. Piper examined Mr. Cobbs at Ryan, and sent an ophthalmology request to CMS, citing Dr. Dastgir's treatment plan that Mr. Cobbs was to have the second operation. (Exh. C, at 11.)

Despite Dr. Dastgir's treatment order, and despite the MSAC's previous approval of the left eye surgery, the MSAC denied Dr. Piper's request on October 26, 2004, in a memorandum signed by defendant George Pramstaller. (Exh. C, at 13.) Dr. Pramstaller was the MDOC's chief medical officer. He chaired the MSAC, which had the final say on medical utilization decisions.

On November 29, 2004, Mr. Cobbs sent another health care request asking if his surgery

³ Mr. Cobbs' memory has differed as to exactly when the left eye surgery was to occur, but plainly it was to be relatively soon after the first surgery was completed on August 31, 2004. *Compare* Exh. A, Cobbs Declaration, ¶ 6 (about six weeks later) *and* Exh. E, Grievance, at 1 (about one week later).

had been scheduled. (Exh. D, at 1.) When he was told that the MSAC had denied approval for his surgery, he filed a grievance, citing Dr. Dastgir's orders and asking for an explanation or clarification. (Exh. E, at 1.) Mr. Cobbs' grievance was rejected and he exhausted the two appeals available to him. The last denial acknowledged that the MSAC had previously approved the left eye surgery, but had rescinded that approval. (Exh. E, at 5.)

As a result of the surgery on his right eye and the worsening vision in his left eye, Mr. Cobbs requested new glasses in March 2005. (Exh. D, at 2.) He had an optometry exam at Ryan on May 10, 2005. (Exh. C, at 14.) The optometrist said that he could not issue Mr. Cobbs a new prescription until the cataract was removed. (Exh. D, at 3.) The optometrist also requested a specialist's evaluation so that the surgery could be officially requested again. (Exh. C, at 14.) The optometrist's request was denied by CMS based on the denial the MSAC had issued in October 2004, eight months earlier, despite the fact that Mr. Cobbs' vision was "getting worse by the day." (Exh. C, at 16; Exh. E, at 3.) Mr. Cobbs filed a grievance on June 24, 2005, explaining his dilemma: he couldn't see without glasses, but he couldn't get glasses until he had the surgery. (Exh. E, at 6.) He received a grievance response on July 14 stating that the surgery was not approved and that the optometrist he saw in May had recommended that he be re-evaluated in 6-12 months. *Id.* It appears that the optometrist had in fact recommended an immediate "cataract eval and possible surgery." (Exh. C, at 14.)⁴

In December 2005, Mr. Cobbs had another optometry exam performed at Ryan. (Exh. C, at 17.) The examining doctor stated that cataract surgery was needed. *Id.* The cataract had become so thick that it was no longer possible for the doctor to view the retina in the left eye. *Id.*

⁴ Mr. Cobbs had numerous eye exams throughout 2005, 2006, and 2007. Doctors' requests and/or appeals were sent on 5/10/2005, 12/14/2005, 1/11/2006, 3/6/2006, 7/27/2006, 12/13/2006, 6/8/2007, and 7/18/2007. After every exam, the examining doctor or consulting specialist sent a request for approval of the left eye surgery. All were denied.

This report also documents Mr. Cobbs' decreasing vision – his difficulty with depth-perception was causing him to walk into objects on his left side. *Id.* Again, CMS denied the doctor's request based on the extant MSAC denial. (Exh. C, at 18.)

On March 6, 2006, Mr. Cobbs had another eye exam at Ryan. (Exh. C, at 19.) The doctor warned that the growing density of the cataract increased Mr. Cobbs' risk of glaucoma. *Id.* The surgery request emphasized the density of the cataract and Mr. Cobbs' worsening vision. *Id.* When CMS denied the March 6 request on March 15, the doctor appealed on March 29 to the MSAC, stating, "surgery advised to prevent secondary glaucoma... *no view* of left retina possible." (Exh. C, at 20, *emphasis in original.*) The MSAC nevertheless again denied the surgery on Mr. Cobbs' left eye, on April 25, 2006. (Exh. C, at 22.)

By the spring or early summer of 2006, Mr. Cobbs' vision was bad enough in his left eye that he started wearing an eye patch all the time. (Exh. A, ¶ 69.) On May, 27, 2006, Mr. Cobbs sent a health care request stating that he could no longer see out of his left eye. (Exh. D, at 5.) Later that summer, Mr. Cobbs' father tried to intervene by writing directly to Dr. Pramstaller. Although we don't have a copy of that letter, we have a copy of the response, dated September 13, 2006. The administrator of the Bureau of Health Care Services wrote:

Your recent correspondence to Dr. Pramstaller regarding your son Dallas Cobbs #164276 has been referred to me for response. You have asked for Dr. Pramstaller's intervention to approve and schedule surgery for [your son's] cataract
Review of your son's medical records indicates that he is being monitored closely. Multiple physicians have reviewed his case and all agree with the current treatment plan.⁵

(Exh. C, at 26.) Mr. Cobbs had another eye exam in December 2006, and again, the examining doctor recommended that Mr. Cobbs receive the surgery. (Exh. C, at 27.) In March 2007, CMS

⁵ The letter shows that again in the late summer of 2006, Dr. Pramstaller and senior MDOC health officials were fully aware of Mr. Cobbs' case. Moreover, what they reported to Mr. Cobbs' father was false. In fact, *all* of the physicians who had *examined* Mr. Cobbs *disagreed* with the defendants' "current treatment plan" – which was to deny surgery.

denied the request for surgery “based on 20/20 vision in the right eye.” (Exh. C, at 29.)

In addition to his examining doctors’ requests, as noted Mr. Cobbs himself sought help by filing numerous health care request forms, grievances, and appeals.⁶ See Amended Complaint, ¶¶ 18-86, and Exh. A, ¶¶ 9-60. His 2005 requests documented his worsening eyesight. (Exh. D, at 2, 3.) By November 2005, his requests began to describe the side effects he was experiencing, including headaches, dizziness, blurry or double vision in his right eye, pain in his right eye, loss of balance, and loss of depth perception and peripheral vision in the right eye. (Exh. D, at 4, 6.) As a result of these side effects, Mr. Cobbs sometimes had difficulty performing everyday tasks like walking, reading, and going up and down stairs. (Exh. A, ¶ 69.) Mr. Cobbs’ requests increased in urgency as his side effects worsened. He repeatedly conveyed his fear that if he did not have the surgery soon, he would permanently lose vision in his left eye. (Exh. E, at 7, 8, and 10.)

Mr. Cobbs had another eye exam in June 2007. (Exh. C, at 30.) The examining doctor noted a decreased in vision due to the dense cataract in the left eye and requested a follow-up specialist exam, which was denied. (Exh. C, at 30, 32.) Mr. Cobbs sent a health care request in October 2007, noting that he still hadn’t been given anything for pain and needed medication. (Exh. D, at 7.) He was examined by nurses at Ryan three times in October and November 2007 for severe headaches. (Exh. C, at 33-37.) But all of Mr. Cobbs’ requests for the prescribed surgery were denied, based on the MSAC’s and Dr. Pramstaller’s previous blanket denials.

Even after Mr. Cobbs filed this lawsuit in October 2007, no one came forward to say that the defendants had made a mistake, and that Mr. Cobbs’ second eye surgery should have been approved long ago. Instead the defendants sought to dismiss the case. Not until February or

⁶ Between November 2004 and November 2007, Mr. Cobbs made *c.* 21 requests for medical assistance about his left eye, in the form of official health care requests, formal grievances and appeals, and letters.

March 2008 did the defendants finally approve the surgery, (Exh. C, at 38), and then only after Mr. Cobbs had produced the documents linking Dr. Pramstaller and the MSAC to the denials, and after the defendants were notified that Mr. Cobbs had retained counsel to represent him.

Mr. Cobbs' second cataract surgery was finally performed in April 2008, three years and eight months after the original surgery was scheduled to occur, in September 2004. Mr. Cobbs seeks damages for the denial of care from 2004 to 2008.

Proceedings to Date

As noted, Mr. Cobbs filed suit *in pro per* in October 2007. In response, defendant Pramstaller filed a motion to dismiss in January 2008. The motion alleged that Pramstaller had nothing to do with the decision to deny the surgery and could not be held liable on a theory of *respondeat superior*. See R. 12, Defendant's Motion for Summary Judgment. Mr. Cobbs' responded by filing a motion to stay Pramstaller's summary judgment motion so that he could get limited discovery to prepare a response brief and identify the other members of the MSAC who had denied his surgery. See R. 17, Cobbs Motion for Stay. Mr. Cobbs attached some of the documents cited above, showing that Pramstaller and the MSAC had reviewed his doctors' repeated requests for the second cataract surgery, and had voted to deny them. *Id.*

In February 2008 the undersigned counsel agreed to represent Mr. Cobbs, and so notified the defendants' counsel. Shortly thereafter, Mr. Cobbs was informed that his cataract surgery had been approved. In April 2008, following a status conference, the Court issued a series of orders. Defendant Pramstaller's pending motion to dismiss was withdrawn, and motions filed by the *pro se* plaintiff were also withdrawn. See R. 29 and 34. On June 4, 2008, the Court granted leave for Mr. Cobbs to file an amended complaint and to conduct limited discovery. See R. 37 Order.

In June 2008, now by the undersigned counsel, Mr. Cobbs filed his amended complaint. *See* R. 38. He dropped the Bureau of Health Care Services and the MSAC as separately named defendants, while adding the individual members of the committee, as well as the contract medical provider Correctional Medical Services, Inc., (CMS) and its state medical director Dr. Craig Hutchinson.

In August 2008, the MDOC defendants (at least those who had been served by that time) filed an answer to the amended complaint. *See* R. 53. In September 2008, the MDOC defendants filed this motion for summary judgment under Fed. R. Civ. P. 56. *See* R. 66. The MDOC defendants argue that they are entitled to summary judgment for three reasons, namely (1) that Mr. Cobbs failed to establish an Eighth Amendment violation; (2) that the defendants are entitled to qualified immunity; and (3) that any claims for injunctive relief are moot. Mr. Cobbs agrees that his claims for injunctive relief are now moot, and he therefore withdraws them.⁷ The other two arguments are addressed below.

ARGUMENT

I. THE PLAINTIFF HAS PLED AN EIGHTH AMENDMENT VIOLATION.

To prove an Eighth Amendment claim, the plaintiff must show that the defendants were deliberately indifferent to his serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989). The plaintiff must demonstrate two components, one objective and one subjective, to establish deliberate indifference. *Blackmore v. Kalamazoo County*, 390 F.3d 890, 895 (6th Cir. 2004) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). The objective component is a “serious medical need.” *Id.* A serious medical need

⁷ When Mr. Cobbs filed his amended complaint in June 2008, he had not yet fully recovered from his eye surgery, and he did not know whether or not he might need follow-up surgery or other medical care to restore his vision. He has now fully recovered and his vision is restored. Accordingly, he does not object to the dismissal of his claims for injunctive relief because they are moot.

is a medical need “that has been diagnosed by a physician as mandating treatment.” *Perez v. Oakland County*, 466 F.3d 416, 423 (6th Cir. 2006). The subjective component is a showing that the defendants had “a sufficiently culpable state of mind in denying medical care.” *Farmer*, 511 U.S. at 834. To satisfy the subjective component, the defendants must be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and they must draw such an inference. *Id.*, at 837.

A plaintiff can establish deliberate indifference when prison officials intentionally deny or delay access to medical care, or when prison doctors fail to respond appropriately to the prisoner’s needs. *Cook v. Martin*, 148 Fed. Appx. 327, 336 (6th Cir. 2005) (*unpublished*) (attached as Exh. G.) Deliberate indifference can include both the failure to provide care, and unreasonable delay in providing care. *Blackmore*, 390 F.3d at 899-900.

The defendants cannot deny that Mr. Cobbs’ left eye cataract was diagnosed in the late summer of 2004, and that the consulting ophthalmologist wanted to remove it then. By early 2005, Mr. Cobbs was having trouble seeing and needed new glasses. As his eyesight worsened, every general practitioner and every specialist who saw him concurred in Dr. Dastgir’s original treatment plan: that the cataract should be removed in order to preserve or to restore his eyesight. By late 2005, Mr. Cobbs was already suffering side effects in addition to diminished vision; by mid-2006 he was effectively blind in his left eye. It is undisputed that he had a “hypermaturation” cataract. (Exh. C, at 19.) His doctors barraged the defendants with surgery requests for more than three-and-a-half years, despite the repeated denials.

The defendants cannot deny that Mr. Cobbs had a serious medical need. The diagnosis and prescribed course of treatment for cataract removal meets the standard for a serious medical need, satisfying the objective component of an Eighth Amendment claim. As the plaintiff’s ex-

pert says, but for Mr. Cobbs' incarceration, any medical provider would have done the surgery immediately, back in 2004. *See* Sugar Declaration, Exh. B, ¶ 5.

Mr. Cobbs' claim also satisfies the subjective component. In light of the treating doctors' and specialists' persistent detailed requests, this is not a case where the defendants were unaware of Mr. Cobbs' condition, or his suffering, or the ongoing risks to his health. The clinic reports sent by his doctors, and the requests for medical help sent by Mr. Cobbs himself, meant that the defendants did not have to "infer" anything. They had direct notice that his vision was impaired, that he was suffering from headaches and other serious side effects like loss of balance and depth perception, that he was at risk of glaucoma and long-term loss of eyesight, and that he was functionally blind in one eye. The defendants didn't need to draw an inference – all they had to do was read the reports they were sent. A reasonable jury could find that the defendants *knew* from the medical facts not just that Mr. Cobbs was *at risk* of serious harm, but that he was *already suffering* serious harm. At the very least, the defendants could draw that inference.

Mr. Cobbs' case therefore satisfies both the objective and subjective component of an Eighth Amendment claim of deliberate indifference to serious medical needs.

The defendants correctly point out that an inmate may not establish an Eighth Amendment violation merely because of a disagreement over the treatment provided. *Napier v. Madison County*, 238 F.3d 739, 742 (6th Cir. 2001). But Mr. Cobbs is not arguing that he should have been prescribed a different course of treatment. He is arguing that he should have been *provided* the very course of treatment he *was prescribed*, first by Dr. Dastgir and subsequently by the many different doctors and nurses and specialists who observed his condition and implored the defendants to approve the second cataract surgery on his left eye.

The facts here are similar to those in *Titlow v. Corrections Medical Services*, 2008 WL 907450 (E.D. Mich. No. 07-CV-12083, 3/31/08) (attached as Exh. I), another Eighth Amendment case involving the denial of medically necessary surgery. The plaintiff in *Titlow* was denied mastectomy surgery while she suffered from pain and likely infection due to leaking silicone breast implants. *Id.* at *1. Her treating doctors repeatedly recommended that she undergo a mastectomy, but the defendants rejected these recommendations as not medically necessary. The court denied the defendants' motion for summary judgment on the surgery claim and rejected the idea that the case was about a disagreement over treatment choice, pointing out that denials of prescribed treatment are *not* medical treatment decisions because there is no treatment. *Id.* at *7 (*emphasis added*). Because every doctor who had actually examined and treated the plaintiff recommended the surgery, the court held that the defendants' denials "had nothing to do with the appropriate treatment of the plaintiff's individual condition." *Id.* The denials were "based on generalities having nothing to do with the actual ... condition of the plaintiff." *Id.*

The same reasoning applies to Mr. Cobbs' case. His treating doctors made numerous requests for him to have surgery on his left eye. They noted the decline in Mr. Cobbs' health and well-being due to the side effects. They noted the increased risk of glaucoma. The defendants did not and could not have provided Mr. Cobbs with an alternative treatment because surgery was needed to remove the cataract. Thus, this case does not center on a disagreement over the prescribed course of care. The defendants' denial of a surgery that Mr. Cobbs' doctors said was medically necessary constitutes deliberate indifference to his serious medical needs.

The defendants also incorrectly argue that a delay in receiving care cannot constitute an Eighth Amendment violation unless it causes permanent injury.⁸ Delay in providing necessary

⁸ The three-and-a-half-year denial only became a "delay" because the defendants reversed their position and approved the surgery in 2008. The defendants claim their reversal was due to "changing circum-

medical treatment can establish deliberate indifference. *Scicluna v Wells*, 345 F.3d 441, 446-447 (6th Cir. 2003) (denying summary judgment to a doctor based on a three-week delay in performing an urgent medical evaluation). Furthermore, where a plaintiff's claims arise from an injury or illness so obvious that even a layperson would easily recognize the necessity for a doctor's intervention, the plaintiff does not need to show that – even after receiving the delayed necessary treatment – his medical condition worsened or deteriorated. *Blackmore v. Kalamazoo County*, 390 F.3d 890, 899-900 (6th Cir. 2004). Mr. Cobbs' condition was obvious to anyone who saw him: as his doctors noted, the cataract in his left eye grew so dense his pupil was no longer visible. Thus, he does not need to prove a permanent injury resulting from the delay. The injuries he suffered from 2004 to 2008 while he was denied the surgery are sufficient to sustain his Eighth Amendment claim.

A reasonable jury could find that the defendants acted with deliberate indifference by denying Mr. Cobbs' second surgery on his left eye. Accordingly, the Court should deny the MDOC defendants' motion for summary judgment on the plaintiff's Eighth Amendment claim.

II. THE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

The MDOC defendants incorrectly assert that they are entitled to summary judgment based on qualified immunity because the plaintiff has not established a violation of his constitutional rights. Summary judgment is not proper on the grounds of qualified immunity because Mr. Cobbs has alleged facts which, construed most favorably to him, show that the MDOC defendants unreasonably violated his clearly established Eighth Amendment rights by showing

stances,” but those circumstances cannot be attributed to any change in Mr. Cobbs' health. From early 2005 the cataract was advanced enough to interfere with his vision and to put him at risk of all the symptoms he eventually suffered. The medical reports show no substantive changes that would justify the surgery in 2008 but not justify it in the previous years, calling into question how the MDOC defendants can base their previous denials on the lack of “medical necessity.” *See* Defendants' Brief, at 7. Plaintiff's expert states that there was no change in Mr. Cobbs' medical condition that would have made the left eye surgery appropriate in February 2008 but inappropriate before that date. (Exh. B, ¶ 7.)

deliberate indifference to his serious medical needs.

To determine whether a party is entitled to the defense of qualified immunity, a court should apply a three-pronged test:

(1) Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?

(2) Did the official claiming immunity violate a clearly established right that would have been understood by a reasonable person?

(3) Has the plaintiff presented sufficient facts, supported by evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established right?

Saucier v. Katz, 533 U.S. 194, 201 (2001); *Higgason v. Stephens*, 288 F.3d 868, 876 (6th Cir. 2002). If the plaintiff can establish these three prongs, defendants are not entitled to qualified immunity. *Id.*

Mr. Cobbs satisfies the first prong because, as discussed in Part I, *supra*, he has alleged facts which, taken as true, establish that the defendants violated his Eighth Amendment rights through deliberate indifference to his serious medical needs.

The plaintiff satisfies the second prong because the right to medical treatment is a clearly established right. A right is considered to be "clearly established" if a reasonable official would understand that his actions violate the right. *Scicluna v. Wells*, 345 F3d 441, 446 (6th Cir. 2003) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). MDOC policy can provide evidence of clearly established prisoner rights. *Scicluna, supra*, at 445. MDOC policy says that "prisoners shall be provided with unimpeded access to a continuum of health care services that is timely." (Exh. F, at 2.) Corrective or reconstructive surgery is surgery the primary purpose of which is to "restore function." (Exh. F, at 8.) Under the MDOC's own definition, cataract removal surgery on the left eye was "presently medically necessary." See Exh. B, ¶ 6, and Exh. F, at 1.

In their motion for summary judgment, the defendants state that they have found no cases holding that a delay in providing cataract surgery can constitute deliberate indifference, implying that therefore Mr. Cobbs' case does not implicate a clearly established right. Defendants' Brief, at 9. However, under *Anderson v. Creighton*, a right may be clearly established even if there is no previous legal case with identical facts. 483 U.S. at 640. A right is clearly established if a reasonable official would deem an action unlawful in light of established precedent. Mr. Cobbs' serious medical need was obvious: a reasonable health care official would have realized that denying the surgery violated his constitutional rights (as well as MDOC policy). All of Mr. Cobbs' treating doctors realized that he needed the surgery.

Furthermore, federal courts have recognized that a delay in providing medically necessary eye surgery to an inmate can constitute deliberate indifference. *See e.g., Castillo v. Dashiell*, 2007 WL 609858, at 7 (E.D.Cal., No. CV S-04-0737, Feb. 27, 2007) (*unpublished*) (adopted at 2007 WL 933790 (E.D. Cal., Mar 27, 2007)) (denying summary judgment on Eighth Amendment claim where surgery was not performed until 10 months after inmate lost vision in one eye and noting that providing some medical treatment will not preclude an Eighth Amendment violation unless it is "competent treatment") (attached as Exh. H). *See also Taghipour v. Chastine*, 43 F.3d 669 (5th Cir. 1994) (vacating dismissal to defendants on prisoner's Eighth Amendment claim based on delay in providing proper medical treatment after prisoner sustained an eye injury). Mr. Cobbs satisfies the second prong of the qualified immunity test because he was denied a clearly established right.

The third and final prong of the qualified immunity test is satisfied because the facts show that the defendants' actions were objectively unreasonable in light of the plaintiff's clearly established right. It is hard to imagine how Mr. Cobbs or his treating doctors could have under-

scored the need for the surgery any further. Objective medical evidence accompanied and supported their requests.

Mr. Cobbs has met all three prongs of the qualified immunity test. The defendants knew that Mr. Cobbs had a serious medical condition requiring treatment. A reasonable health official, knowing that the cataract surgery had been prescribed and that Mr. Cobbs' condition was worsening, would have approved the surgery (or would not have waited until the patient brought a lawsuit to take action). On the facts presented, the denial of care from 2004 to 2008 was objectively unreasonable in light of Mr. Cobbs' clearly established right. In this case a reasonable jury could find that the defendants not only acted with deliberate indifference, but that they knowingly and willfully violated Mr. Cobbs' Eighth Amendment rights. The defendants are not entitled to qualified immunity.

Conclusion

For the above reasons, the plaintiff respectfully requests that the MDOC defendants' motion for summary judgment be denied.

Respectfully submitted,

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s/ Jolene Meiring
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Dated: October 17, 2008

Index of Exhibits

- Exhibit A: Declaration of Dallas Cobbs
- Exhibit B: Declaration of Dr. Alan Sugar
- Exhibit C: Medical Records
- Exhibit D: Dallas Cobbs' Health Care Requests
- Exhibit E: Dallas Cobbs' Grievances and Responses
- Exhibit F: MDOC Policy Statements
- Exhibit G: *Cook v. Martin* (6th Cir. 2005)
- Exhibit H: *Castillo v. Dashiell* (E.D.Cal., Feb. 27, 2007)
- Exhibit I: *Titlow v. Corrections Medical Services*
(E.D. Mich., Mar. 31, 2008)

Proof of Service

The plaintiff's brief in response to the MDOC defendants' motion for summary judgment, together with exhibits and this proof of service, were filed using the Court's ECF system, which will provide same-day e-mail service upon all counsel of record.

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Dated: October 17, 2008