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COURT OF APPEALS

06 NOV 17 AM 9:48

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NO. 34409-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

GLEN E. THOMAS,

Appellant,

v.

DEPARTMENT OF CORRECTIONS et al.,

Respondents.

ANSWERING BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR1

II. STATEMENT OF THE CASE2

III. ARGUMENT5

A. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON PLAINTIFF’S CLAIM THAT HE WAS UNLAWFULLY DENIED EMERGENCY ACCESS TO HIS PRISON SAVINGS ACCOUNT.5

B. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON PLAINTIFF’S CLAIM THAT DEFENDANTS UNLAWFULLY FAILED TO PAY HIM INTEREST ON HIS INMATE SAVINGS ACCOUNT.9

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDUCTING THE HEARING ON THE PARTIES’ SUMMARY JUDGMENT MOTIONS.15

IV. CONCLUSION17

TABLE OF AUTHORITIES

Cases

<u>Abdullah v. Gunter</u> , 949 F.2d 1032 (8th Cir. 1991)	7
<u>BBG Group LLC v. City of Monroe</u> , 96 Wn. App. 517, 982 P.2d 1176 (1999).....	8
<u>Board of Regents v. Roth</u> , 408 U.S. 564, 92 S. Ct. 2701 (1972).....	11
<u>Burton v. Lehman</u> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	6
<u>Campbell v. Miller</u> , 787 F.2d 217 (7th Cir. 1986)	7
<u>Dean v. Lehman</u> , 143 Wn.2d 12, 18 P.3d 523 (2001).....	14, 15
<u>Gunnier v. Yakima Heart Ctr. Inc.</u> , 134 Wn.2d 854 953 P.2d 1162 (1998).....	1
<u>Mahers v. Hartford</u> , 76 F.3d 951 (8th Cir. 1996)	7
<u>McIntyre v. Bayer</u> , 339 F.3d 1097 (9th Cir. 2003)	10
<u>Schneider v. California Dept. of Corrections</u> , 151 F.3d 1194 (9th Cir. 1998)	10, 11, 12
<u>Schneider v. California Dept. of Corrections</u> , 345 F.3d 716 (9th Cir. 2003)	10
<u>Skagit Surveyors v. Friends</u> , 135 Wn.2d 542, 958 P.2d 962 (1998).....	14

<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995).....	8
<u>Storseth v. Spellman</u> , 654 F.2d 1349 (9th Cir. 1981)	16
<u>Tellis v. Godinez</u> , 5 F.3d 1314 (9th Cir. 1993)	10, 11
<u>Webb’s Fabulous Pharmacies, Inc. v. Beckwith</u> , 449 U.S. 155, 101 S. Ct. 446 (1980).....	9, 10

Statutes

RCW 72.02.045	13
RCW 72.09.111	6, 7, 8, 12
RCW 72.09.480	6
RCW 72.11.020	13

Other Authorities

Laws of 1999, ch. 325, § 4.....	13
U.S. Const. amend. V.....	9
Webster’s II New Riverside University Dictionary, 427 (2nd ed. 1988).....	6, 13

Rules

Civil Rule 7.....	1
Civil Rule 56.....	1
RAP 10.3.....	1

I. ASSIGNMENTS OF ERROR

Plaintiff/Appellant has adequately set forth his three assignments of error in his opening brief. However, Plaintiff has not complied with the requirement in RAP 10.3(a)(3) that “Each issue should include a concise statement of the applicable standards of review”.

The standard of review for Appellant’s assignments of error Nos. 1 and 2 is de novo review as the trial court dismissed the claims raised in these assignments of error on Defendants’ motion for summary judgment. The dismissal of claims on a summary judgment motion is appropriate only if viewing the evidence in the light most favorable to the non-moving party, the court concludes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Civil Rule 56; Gunnier v. Yakima Heart Ctr. Inc., 134 Wn.2d 854, 858, 953 P.2d 1162 (1998). An appellate court reviews a grant of summary judgment de novo, engaging in the same inquiry as the trial court. Id.

Plaintiff’s assignment of error No. 3 concerns the trial court’s alleged error of not allowing Plaintiff to have assistance from another inmate at the telephonic oral argument on the parties’ summary judgment motions, and the trial court’s alleged error of not ensuring that Plaintiff had a better telephone connection for the hearing. The standard of review applicable to these alleged errors is abuse of discretion. Civil Rule 7(b)(5)

(Trial Court has discretion to hear oral arguments on civil motions by telephone).

II. STATEMENT OF THE CASE

Plaintiff/Appellant (Plaintiff) is a Washington State inmate who filed a civil action against the Department of Corrections (DOC) and two DOC officials, former DOC secretary Joseph Lehman and former prison superintendent Gary Fleming. Clerk's Papers (CP) 4-7. Plaintiff alleged that his rights were violated when Mr. Fleming denied Plaintiff's request to use a portion of his inmate savings account to pay an attorney to represent him at a parolability hearing conducted by the Indeterminate Sentence Review Board (ISRB). Plaintiff also alleged that his rights were violated when DOC failed to credit his savings account with interest. Plaintiff seeks damages as well as declaratory and injunctive relief.

All parties moved for summary judgment and filed extensive briefing on Plaintiff's claims. The trial court heard oral argument from the parties on the summary judgment motions on November 18, 2005; counsel for defendants appeared in court in person and Plaintiff appeared in court telephonically. Verbatim Report of Proceedings (VRP) (11/18/05) 2-3. The trial court ruled from the bench, granting Defendants' summary judgment motion and denying Plaintiff's summary judgment motion. VRP (11/18/05) 11-15. The trial court advised counsel for Defendants

that he should serve a proposed order reflecting the court's judgment on Plaintiff and that the parties should again appear before the court after Plaintiff had an opportunity to review Defendants' proposed order. VRP (11/18/05) 15-16. The parties appeared before the trial court again on January 20, 2006, with Plaintiff again appearing in court telephonically. VRP (1/20/06) 1-3. After hearing from the parties, the court signed Defendants' proposed order granting them summary judgment and dismissing Plaintiff's action. In its order granting Defendants' motion for summary judgment, the Court recited all the documents and evidence it had reviewed and considered in reaching its decision. CP 101-103. The court found that "the undisputed factual record" established the following facts:

1. Plaintiff is an inmate at the Twin Rivers Unit of the Monroe Correctional Complex.
2. In June 2004, Plaintiff requested to be allowed to send \$2000 from his prison savings account to an attorney for representation at a future parolability hearing before the ISRB.
3. Defendant Fleming denied Plaintiff's request for access to his savings account because "not part of transition or emergent".
4. Plaintiff has substantial funds available to him outside of prison which he used to pay an attorney to represent him before the ISRB.
5. Plaintiff has over \$8000 in his prison savings account.

6. Plaintiff is not receiving interest on his prison savings account.
7. The DOC submitted a report to the legislature in 1999 in which DOC concluded that it was not economically feasible to pay inmates interest on their savings accounts.
8. The DOC has not placed inmate funds, including savings accounts, in interest-bearing accounts since 1997 or 1998.
9. The Department of Corrections does not use inmate funds for any purpose and does not commingle inmate funds with state funds.
10. Inmates are provided free banking services by DOC, including free checking.

CP 102-103.

The court found the foregoing facts based on the evidence presented by Plaintiff, on excerpts from Plaintiff's deposition (CP 116-123), the Declaration of DOC's Trust Accounting Manager, Victoria Barshaw (CP 124-125), and the report attached to Ms. Barshaw's declaration (CP 126-136).

The transcript of the November 18, 2005 hearing demonstrates that Plaintiff fully participated in the hearing and that he stated to the court that he heard most of the argument of counsel for Defendants. VRP (11/18/05) 1-17. Plaintiff was allowed to present his entire argument, and concluded by stating: "That is all I have got to say over it. That is all. I don't know what else to say, your honor." VRP (11/18/05) 11. Plaintiff also fully

participated in the January 20, 2006 hearing and the transcript of this hearing demonstrates that Plaintiff was able to hear the proceeding and was allowed to make his arguments concerning Defendants' proposed order granting defendants' summary judgment motion. VRP (1/20/06) 3-6.

Plaintiff filed a timely Notice of Appeal of the trial Court's January 20, 2006 order granting summary judgment to Defendants. Plaintiff has filed his opening brief, but has not included in his brief a recitation of the evidence presented to the trial court and has not disputed any fact found by the trial court in its January 20, 2006 Order which was based on the "undisputed factual record". CP 101-103.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON PLAINTIFF'S CLAIM THAT HE WAS UNLAWFULLY DENIED EMERGENCY ACCESS TO HIS PRISON SAVINGS ACCOUNT.

Plaintiff argues that DOC's refusal to allow him to use some of his savings account to pay for legal representation at a parolability hearing violated his rights under the Takings Clause and his right to due process. Plaintiff's claims concerning the use of his savings account are meritless and were properly dismissed by the trial court.

The DOC is required to maintain savings accounts for inmates to assist them in transitioning back into the community upon their release from incarceration. RCW 72.09.111(1); RCW 72.09.480(2). Inmate savings accounts “shall only be available to an inmate at the time of his or her release from confinement” unless the Secretary of DOC determines that an “emergency” exists for the inmate, at which time funds can be made available “in an amount determined by the Secretary.” RCW 72.09.111(3). The Legislature has not defined the term “emergency” for purposes of RCW 72.09.111(3). Under any reasonable definition of “emergency,” Plaintiff was not improperly denied access to his savings account to pay an attorney to represent him at a .100 parolability hearing before the ISRB.

It is appropriate for the Court to resort to the common meaning of a word in a statute when the statute does not define the word. Burton v. Lehman, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005). If the undefined word is not technical, courts may refer to the dictionary to establish the meaning of the word. Id. The term “emergency” means “an unexpected, serious occurrence or situation urgently requiring prompt attention.” See Webster’s II New Riverside University Dictionary, 427 (2nd ed. 1988). Plaintiff’s request to be given access to his savings accounts to pay an attorney to represent him at a future ISRB

parolability hearing did not constitute an emergency as his hearing was neither an unexpected, serious occurrence, nor did it require prompt attention. RCW 72.09.111(3) grants DOC broad discretion to grant or deny requests for emergency access to savings accounts and DOC officials clearly did not abuse their discretion in denying Plaintiff's request for access in this case.

Plaintiffs' Takings Clause and due process claims fail because Plaintiff was not deprived of any funds in his savings account. See Section B, *infra*. Additionally, Plaintiff has not established that he has a constitutionally protected property interest in using his mandatory savings to pay an attorney. Inmates are not entitled to complete control over their money in prison. Mahers v. Hartford, 76 F.3d 951 (8th Cir. 1996). In Mahers, the court held that inmates are not entitled to complete control over their money while in prison and upheld the deduction of 20% of all incoming funds to pay restitution obligations. The Seventh Circuit has also found no constitutionally protected property interest for an inmate to spend or disburse funds in his or her account. Campbell v. Miller, 787 F.2d 217, 222 (7th Cir. 1986). In Abdullah v. Gunter, 949 F.2d 1032 (8th Cir. 1991) the court held that the inmate did not have a protected interest in sending \$2.00 from his prison account to a religious organization. Plaintiff's Taking Clause and due process claims fail as a matter of law

because Plaintiff was not deprived of a constitutionally protected property interest. State law clearly gives Plaintiff no legitimate expectation that he may use his savings account to pay for legal representation and only gives him a legitimate expectation to receive his savings account upon his release from prison. RCW 72.09.111(1).

Even if Plaintiff could show an abuse of the considerable discretion granted to DOC concerning inmates' emergency access to savings accounts, Plaintiff failed to establish that he was entitled to any relief on this claim. Plaintiff failed to demonstrate that he has any recognized cause of action for damages as a result of Defendant Fleming's denial. Moreover, Plaintiff suffered no damage as a result of Mr. Fleming's denial because Plaintiff arranged to pay an attorney to represent him at his .100 parolability hearing from the more than \$25,000.00 Plaintiff had at his disposal outside the institution. CP 118-123. Plaintiff's payment to an attorney to represent him at his .100 hearing also rendered moot Plaintiff's request for an injunctive relief. State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995); BBG Group LLC v. City of Monroe, 96 Wn. App. 517, 521, 982 P.2d 1176 (1999).

The trial court did not err in granting summary judgment to Defendants on Plaintiff's claim that Defendant Fleming unlawfully denied Plaintiff's request for emergency access to his prison savings account.

B. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON PLAINTIFF'S CLAIM THAT DEFENDANTS UNLAWFULLY FAILED TO PAY HIM INTEREST ON HIS INMATE SAVINGS ACCOUNT.

Plaintiff argues that his federal constitutional and state law rights were violated when the Washington DOC failed to pay him interest on his mandatory savings account. Plaintiff asserts that the failure to pay interest on his savings account is a "taking" under the Fifth Amendment, and is a deprivation of property without due process. Plaintiff's claims are meritless and were properly dismissed by the trial court.

Plaintiff, like all other inmates, was not credited with interest on his savings account because inmate funds are not placed in interest-bearing accounts pursuant to DOC policy which has been in place since 1997. CP 124-125. Moreover, DOC has not used inmate funds for state purposes, but has negotiated with financial institutions to provide inmates with free checking and other banking services. *Id.* DOC has not violated Plaintiff's rights under the Takings Clause or his right to due process.

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.; Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160, 101 S. Ct. 446, 450 (1980). The provisions of the Fifth Amendment

apply to the states through the Fourteenth Amendment. Id. In order to state a claim under the Takings Clause of the Fifth Amendment, a plaintiff must demonstrate that the government has taken a private property interest that is constitutionally protected, that the taking is for a public use, and that the government did not provide the plaintiff just compensation. Schneider v. California Dept. of Corrections, 151 F.3d 1194, 1198 (9th Cir. 1998). The taking of interest earned on inmates' accounts may constitute an unlawful taking under the Takings Clause. Tellis v. Godinez, 5 F.3d 1314 (9th Cir. 1993). However, the taking of interest earned on a particular inmate's account or funds constitutes an unlawful taking only to the extent the interest taken exceeds the inmate's share of the government's costs of administering inmates' funds and accounts. McIntyre v. Bayer, 339 F.3d 1097, 1101-02 (9th Cir. 2003); Schneider v. California Dept. of Corrections, 345 F.3d 716 (9th Cir. 2003).

Appellant fails to clear the first hurdle of his Takings Clause claim because he cannot demonstrate that any interest was earned on his inmate savings account. It is unrefuted that since 1997 inmate funds have not been placed in interest-bearing accounts pursuant to DOC policy. CP 124-125. Plaintiff also cannot rely upon the "constructive interest" doctrine to establish his Takings Clause claim. Under the

“constructive interest” doctrine, if the government uses private funds to conduct government business instead of borrowing money, the savings to the government of not having to borrow money is deemed as “constructive interest” on the private funds used. Schneider, 151 F.3d at 1197. There is no constructive interest for DOC to take in this case as inmate funds are not commingled with other state funds and are not used for any state purpose. CP 124-125. Plaintiff’s Taking Clause claim is meritless as a matter of law as the state has not taken any interest from Plaintiff’s savings account. Defendants were properly granted summary judgment on this claim.

Plaintiff also asserts that the failure to pay him interest constitutes a deprivation of property without due process in violation of the Fourteenth Amendment. In order to establish a due process claim, Plaintiff must demonstrate that the government has deprived him of a constitutionally protected property interest. Tellis v. Godinez, 5 F.3d 1314, 1316 (9th Cir. 1993). Protected property interests are “created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972). Interest actually earned on an

inmate's funds is a constitutionally protected property interest in spite of state laws or regulations that may indicate otherwise. Schneider, 151 F.3d at 1201.

Plaintiff's due process claim fails for the same reason his Taking Clause claim fails. The state has not deprived Plaintiff of interest earned on his savings account because no such interest has been earned since 1997. Plaintiff also cannot demonstrate any entitlement under state law or the U.S. Constitution to have his mandatory savings account placed in an interest-bearing account.

RCW 72.09.111 establishes inmate savings accounts and states that inmates shall have access to their savings accounts "together with any accrued interest" at the time of their release from confinement. RCW 72.09.111 does not require DOC to place inmate funds in interest-bearing accounts or otherwise require DOC to pay inmates interest. In 1999 the Legislature enacted legislation requiring DOC to submit a plan to the Legislature and the Governor for depositing inmate savings account funds into an interest bearing account:

The Secretary of corrections shall prepare a plan for depositing inmate savings account funds into an interest bearing account. The plan shall assume that the funds shall be deposited into a commingled account for all inmates and that the interest shall be paid in a manner pro rata to the inmate's share of the total deposits. The Secretary shall present the plan to the Governor and the

Legislature not later than December 1, 1999. The plan shall minimize the costs of administering the account and the inmates shall receive interest at a rate not less than the passbook savings rate.

Laws of 1999, ch. 325, § 4.

DOC submitted a report to the Legislature in 1999 in which DOC concluded that DOC would have to heavily subsidize any plan to pay inmates interest on their savings account. CP 126-136, 1999 Report to the Legislature. This legislation did not require DOC to place inmate savings account funds in interest bearing accounts or to pay inmates interest, but only required DOC to submit a “plan” for paying interest. A “plan” is a “proposed or tentative project or purpose: Intention.” Webster’s II New Riverside University Dictionary, 898 (2nd ed. 1988). The Legislature has not acted upon DOC’s 1999 report concerning interest on inmate savings accounts by either requiring DOC to pay interest or by providing the necessary funding to establish and subsidize the payment of interest to inmates. Absent express statutory authority, DOC is neither required nor allowed to pay inmates interest on their mandatory savings accounts.

DOC is the custodian of inmate funds and holds such funds in trust for inmates. RCW 72.02.045; RCW 72.11.020. However, this statutorily created trust relationship does not require DOC to invest inmate funds or

place them in interest bearing accounts. As a state agency, DOC does not have inherent or common-law powers and may exercise only those powers conferred by statute, either expressly or by necessary implication. Skagit Surveyors v. Friends, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). DOC has not been statutorily authorized or required to place inmate funds in interest bearing accounts or to pay inmates interest, especially when paying such interest would entail a significant expenditure of public funds. CP 124-136.

The Washington Supreme Court has recognized that prison officials may place inmates' funds in noninterest bearing accounts and that inmates do not have a viable claim for interest if interest has not been earned. Dean v. Lehman, 143 Wn.2d 12, 18 P.3d 523 (2001). In Dean, the plaintiffs claimed a right to interest that was actually earned on inmates' pooled funds. The Supreme Court held that inmates are entitled to any interest that is actually earned on their inmate funds. Id. Dean recognized that DOC had stopped placing inmate funds in interest-bearing accounts:

In response to the Peterson decision, on February 27, 1997, the DOC began placing inmate savings in noninterest bearing accounts.

Id., 143 Wn.2d at 34.

///

The court also recognized that DOC was liable for interest only if interest is earned on inmates' funds:

In Schneider v. California Department of Corrections, 151 F.3d 1194 (9th Cir. 1998), the Tellis rule was broadened to include "all" interest that is earned on inmate bank accounts,

Of course, nothing in Schneider precluded the California Department of Corrections from placing inmate funds in noninterest bearing accounts.

Id., 143 Wn.2d at 35-36.

The trial court did not err in granting summary judgment to Defendants on Plaintiff's claim for interest on his inmate savings account.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONDUCTING THE HEARING ON THE PARTIES' SUMMARY JUDGMENT MOTIONS.

Plaintiff argues that the trial court erred in not granting his motion to have assistance from another inmate at the hearing on the parties' cross-motions for summary judgment and in not ensuring that Plaintiff had a good telephone connection for the hearing. The trial court did not err in conducting the hearing on the parties' summary judgment motions.

The trial court did not decide Plaintiff's motion to have assistance from another inmate at the hearing because this motion was not properly before the trial court. Plaintiff's motion for inmate assistance was filed on November 15, 2005, three days before the November 18, 2005, hearing.

CP 88-93. The record in this case contains no evidence that Plaintiff noted this motion for hearing. The trial court did not err in not deciding this motion because Plaintiff did not timely file his motion and did not note his motion for hearing. Moreover, Plaintiff's motion for inmate assistance was meritless as inmates are not entitled to be assisted or represented by other inmates in litigation. Storseth v. Spellman, 654 F.2d 1349 (9th Cir. 1981). The trial court did not abuse its discretion in not providing Plaintiff the assistance of another inmate at the hearing on the parties' summary judgment motions.¹

Plaintiff's issue concerning a poor phone connection is equally meritless. While the phone connection for the hearings on the parties' summary judgment motions may not have been ideal, it was clearly not as poor as asserted by Plaintiff. The transcripts of the November 18, 2005, and January 20, 2006, hearings show that Plaintiff was able to hear both the court and counsel and was fully able to make his arguments to the court. These transcripts also demonstrate that Plaintiff did not request a continuance of the hearing. The imperfect phone connection was not the fault of the court or the parties, did not alter the trial court's considered judgment in this case, and provides no basis to overturn such judgment.

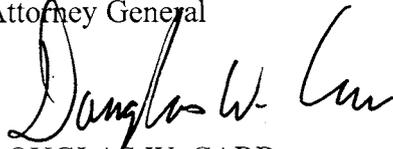
¹ Plaintiff has not established that DOC would allow another inmate to assist him in the telephonic hearings.

IV. CONCLUSION

For the foregoing reasons, Defendants/Respondents request that the judgment of the trial court dismissing Plaintiff/Appellant's action with prejudice be affirmed.

RESPECTFULLY SUBMITTED this 16th day of November, 2006.

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CERTIFICATE OF SERVICE

I certify that I served a copy of **ANSWERING BRIEF OF RESPONDENTS** on all parties or their counsel of record on the 16th day of November, 2006 as follows:

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I certify under penalty of perjury that the foregoing is true and correct.

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Cherrie Kollmer
CHERRIE KOLLMER