

Jordan v. State, Dep't of Motor Vehicles, 121 Nev. Adv. Op. 7 (2005).¹

**CIVIL PROCEDURE —
RESTRICTION OF COURT-ACCESS TO PROPER PERSON
LITIGANTS WITH IN FORMA PAUPERIS STATUS**

Summary

Jordan v. State rules on two separate appeals that address the same issue of first impression regarding guidelines Nevada state courts must follow in order to restrict court access to in proper person litigants with in forma pauperis status. This case also reconfirms the process by which in forma applications are reviewed.

In the first case, respondent Officer Jimmie W. Jones arrested proper person appellant James Jacob Jordan for trespassing on state property² after Jordan did not heed Officer Jones's warning to leave the premises. After the trespass charge was dropped the following day, Jordan sued Officer Jones along with the Nevada State Department of Motor Vehicles and Public Safety for six different torts. Jordan filed this action with the First Judicial District Court, Carson City. After being granted leave to proceed in forma pauperis, Jordan filed various papers that the district court found incomprehensible and procedurally improper. For that reason, the court ordered that Jordan be prohibited from proceeding without a waiver of fees in any new actions unless he obtained leave of the court prior to filing any new action. A few months later, a joint case conference report regarding Jordan's cause of action was filed. The court granted the State's motion for summary judgment because the court was unable to interpret the meaning of Jordan's claims. Jordan timely appealed his suit.

In the second case, proper person appellant John Lockett sued respondent Edward Doumani, owner of respondent La Concha Motel, for various torts in connection with a financial scam that Lockett claimed Doumani conspired in. Lockett filed this action with the Eighth Judicial District Court, Las Vegas. After Lockett was granted leave to proceed in forma pauperis, Doumani served Lockett with a demand for security costs under Nevada Revised Statute 18.130, which requires an out-of-state plaintiff to post security for any future adverse award of costs and charges.³ Doumani also moved to dismiss for failure to state a claim. After the allotted time to pay the costs expired, the court notified Lockett that he had thirty days to pay or the case would be dismissed. The court then conducted a hearing on Doumani's motion to dismiss for failure to pay and declared its intent to issue a restrictive order calling Lockett a vexatious litigant. Lockett was then given three weeks to file an opposition before the next hearing. After Lockett failed to attend that hearing, the court declared Lockett a vexatious litigant and noted that he had a history of filing unmeritorious pleadings, of claiming in forma pauperis status, and of traveling and gambling—thereby undercutting his claim of indigence. Accordingly, the court granted Doumani's motion to dismiss for failure to post security for costs and barred Lockett from proceeding in his action against Doumani without paying

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² In violation of NEV. REV. STAT. 207.200(1)(b) (2003).

³ In accordance with NEV. REV. STAT. 18.130 (2003).

appropriate costs; the court also barred Lockett from filing any new litigation in Nevada state courts in forma pauperis unless he first obtains leave of the presiding judge in the court. Lockett timely appealed his suit.

In reviewing whether it was proper for the district courts to restrict Jordan's and Lockett's court access, respectively, the Nevada Supreme Court used an abuse of discretion standard and for the first time expressly adopted the United States Court of Appeals for the Ninth Circuit's four-part analysis for restricting court access,⁴ with some caveats.⁵

The Nevada Supreme Court found that the restrictive order levied against Jordan did not comply with the Ninth Circuit's guidelines and ordered it vacated. First, Jordan was not given proper notice or opportunity to respond before the court restricted his court access. Second, the district court did not include an adequate record of filings and rulings in similar cases that led the court to order the restriction. Third, even though Jordan's filings were difficult to understand, they were not without merit and should have at least warranted a preliminary evidentiary hearing as espoused by *Spears v. McCotter*.⁶ Finally, the restrictive order against Jordan was unconstitutionally broad and seemed to bar him from filing any new actions in forma pauperis, regardless of whether the future action concerns a fundamental right. (In addition, based on a de novo review, the Nevada Supreme Court overturned the district court's grant of summary judgment because two of Jordan's six tort claims were legally viable.)

The Nevada Supreme Court found that the restrictive order levied against Lockett followed the Ninth Circuit's guidelines more closely and was warranted. First, Lockett was afforded notice and opportunity to be heard before the order was given. Second, the record substantiated the court's findings (however, some of the suits the court cited to were pending and therefore should not have been referenced). Third, the court made substantive findings as to the frivolity of Lockett's filings. Finally, the court narrowly drew the restrictive order that required Lockett to obtain a presiding judge's permission to make new filings. However, the court should have explicated 1) a standard against which the presiding judge should evaluate any new filings from Lockett, and 2) which specific jurisdiction the restrictive order applied to—in this case, only the Eighth Judicial District Court. Therefore, even though the Nevada Supreme Court found the restrictive order to be proper, it remanded the order for modification because it lacked a complaint-review standard and wrongly attempted to apply to all Nevada jurisdictions rather than just the Eighth Judicial District. In addition, the Nevada Supreme Court did find that the district court abused its discretion in dismissing Lockett's action based on his failure to post security because the record contains no order expressly vacating the in forma pauperis order and no order was entered at a time early enough in the proceedings to give

⁴ De Long v. Hennessey, 912 F.2d 1144, 1147-48 (9th Cir. 1990).

⁵ The Court explains that constitutional considerations preclude courts from completely banning filings by indigent proper person litigants if the ban thwarts such litigants from proceeding in criminal case and in original civil actions that involves fundamental rights. *See, e.g., Sullivan v. Dist. Court*, 111 Nev. 1367, 904 P.2d 1039 (1995). And although a judge should look to other cases in making a record supporting its decision to restrict court access, that judge should rely only on her own observations from cases she is assigned to and the documents from cases that have already been ruled on, not that are still pending. *See, e.g., Rohlfling v Dist. Court*, 106 Nev. 902, 803 P.2d 659 (1990) (recognizing that, generally, a district court judge lacks authority to review the orders of another judge).

⁶ *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

Luckett any opportunity to respond by posting security; instead, the Nevada Supreme Court affirmed the dismissal of Luckett's action for failure to state a claim.

Issues and Dispositions

Issues

May a Nevada district court restrict court access to a proper person litigant with in forma pauperis status?

Must a Nevada district court review an application for in forma pauperis prior to reviewing an attached complaint?

Dispositions

Yes. In deciding under what circumstances to restrict court access, the Nevada district court must follow the United States's Court of Appeals for the Ninth Circuit's guidelines, which serve to protect the litigant's constitutional rights.

Yes. A court must review the merits of an in forma pauperis application prior to an attached complaint. This disposition is despite the fact that Nevada largely follows the United States's Court of Appeals for the Fifth Circuit's case *Spears v. McCotter*, which allows for simultaneous review of an in forma pauperis application and the attached complaint.

Commentary

State of law before *Jordan*

Prior to *Jordan* and to this day, Nevada facilitates direct access to its state courts by permitting self-representation in all lower courts⁷ and allowing indigent people to seek in forma pauperis status, thereby relieving them of court costs and fees.⁸ The potential negative aspects of these measures is that the judicial remedies of professional discipline and monetary sanctions pose no deterrent effect to proper person litigants or in forma pauperis litigants, respectively, who pursue abusive litigation practices. Nevada Courts compensate for this by various proactive methods, two of which include restriction of court access and the pre-service complaint review.

Prior to *Jordan*, the Nevada Supreme Court had never addressed what approach courts should take when deciding whether a litigant's behavior warrants restricted access to courts. In order to combat abusive litigation, Nevada courts already had the power to impose sanctions on litigants,⁹ or in extreme cases, permanently restrict a litigant's right

⁷ NEV. SUP. CT. R. 44.

⁸ NEV. REV. STAT. 12.015 (2003).

⁹ NEV. R. CIV. P. 11(c)(2).

to access the courts.¹⁰ This is despite the fact that Nevada, unlike other states,¹¹ has no court rules or statutes authorizing a court to declare a litigant “vexatious” and to limit that individual’s access to the courts. *Jordan* gives Nevada courts a specific and multifaceted formula to follow for the purpose of ordering restricted court access to a litigant.

Prior to *Jordan*, the Nevada courts reviewed in forma pauperis applications prior to the attached complaint. This is termed the pre-service complaint review. When a litigant files an in forma pauperis application along with a complaint, the Nevada district court first rules on the merits of the application.¹² After the application is accepted, or the party, not deemed indigent, pays the appropriate costs, the court then allows the complaint to be filed and reviews it. If the complaint appears completely frivolous on its face, the court may hold a preliminary evidentiary hearing with the litigant to determine whether the action should proceed. If the complaint’s defects are at all curable, the court will permit the litigant to amend the complaint; only if the complaint is completely baseless may the court dismiss it.¹³ The purpose of this process is to help the litigant in crafting a more legally viable complaint, or in the alternative, to spare the litigant from pursuing irredeemably frivolous legal action. *Jordan* does not change this process, just merely reconfirms it.

Other Jurisdictions — The Ninth Circuit’s Approach to restrictions of court access

To determine whether a litigant should be restricted access to court, the United States Court of Appeals for the Ninth Circuit follows a four-factored analysis:¹⁴

First, the litigant must be afforded due process vis-à-vis reasonable notice and an opportunity to oppose a restrictive order’s issuance.¹⁵

Second, the district court needs to create an adequate record for review, consisting of all the cases and/or documents and/or explanations of the reasons that persuaded the court to restrict the litigant’s court access.¹⁶

Third, the district court must find the litigant’s filings to be not only repetitive and abusive, but also devoid of an arguable factual or legal basis, or filed with the intent to harass.¹⁷

Fourth, the order to restrict court access must be drawn narrowly to address the specific problem encountered.¹⁸

¹⁰ This power comes from three sources: 1) The Nevada Constitution, which authorizes the state courts to issue all writs “proper and necessary to the complete exercise of their jurisdiction.” NEV. CONST. art. VI, § 6(1); 2) The Nevada Rules of Civil Procedure, which allow a district court to impose deterrent sanctions on a party pursuing frivolous litigation. NEV. R. CIV. P. 11; 3) And the Nevada courts’ inherent power of equity and control over the exercise of their jurisdiction. *See De Long v. Hennessey*, 912 F.2d 1144 (9th Cir. 1990)(recognizing that the federal courts’ inherent power to regulate abusive litigation activities includes enjoining a litigant’s right to access the courts under the All Writs Act, 28 U.S.C. § 1651.

¹¹ *See, e.g.*, CAL. CIV. PROC. CODE §§ 391-391.7 (West 2004); DEL. CODE ANN. tit. 10, § 8803(e) (1999); FLA. STAT. ANN. § 68.093 (West Supp. 2005); HAW. REV. STAT. ANN. § 634J (Michie 1993); TEX. CIV. PRAC. & REM. CODE ANN. § 11.051 (Vernon 2002).

¹² NEV. R. CIV. P. 11.

¹³ NEV. R. CIV. P. 11(c)(1)(B).

¹⁴ *De Long v. Hennessey*, 912 F.2d 1144, 1147-48 (9th Cir. 1990).

¹⁵ *Id.* at 1147.

¹⁶ *Id.*

¹⁷ *Id.* at 1147.

In *Jordan*, the Nevada Supreme Court adopts this standard for the first time with regard to in proper person litigants with in forma pauperis status.

Other Jurisdictions — The *Spears* Approach regarding pre-service complaint reviews

In order to determine how to handle potentially frivolous litigation filed in forma pauperis, some jurisdictions, including the Mississippi Supreme Court¹⁹ and the Georgia Court of Appeals,²⁰ follow the United States Court of Appeals for the Fifth Circuit decision, *Spears v. McCotter*.²¹ *Spears* found that, under the federal in forma pauperis statute,²² courts may hold preliminary evidentiary hearings to determine whether a complaint is frivolous without first determining the merit of an accompanying in forma pauperis application.

In *Jordan*, the Nevada Supreme Court reconfirms that Nevada largely follows *Spears* except that Nevada courts must rule on the in forma application first before they may review the complaint.²³

Effect of *Jordan* on Current Law

With regard to restriction of court access to in proper person litigants with in forma pauperis status, the Nevada Supreme Court now requires that district courts follow the Ninth Circuit's four-factor analysis in deciding how and under what conditions a restriction may be levied. This criterion breaks with the less rigid, more discretionary standard that the judges used when restricting *Jordan*'s and *Lockett*'s court access.

With regard to pre-service complaint reviews for in proper person litigants with in forma pauperis status, *Jordan* does not make new law but reconfirms that, as opposed to *Spears*, Nevada district courts must review the merits of the application before reviewing those of the attached complaint. The Nevada Supreme Court also emphasizes in *Jordan* that dismissal of a frivolous or incomprehensible complaint is a last resort, and that the litigant should be given the opportunity to amend it if the legal claims have merit.

Unanswered Questions

In requiring Nevada district courts to follow the Ninth Circuit's analysis when restricting court access, the Nevada Supreme Court raises this question: How should district courts carry out the individual steps?

The first requirement, that the litigant must be afforded due process,²⁴ is vague as to what constitutes proper due process. In addition, because restriction to court access is

¹⁸ *Id.* at 1148.

¹⁹ *Blanks v. State*, 594 So. 2d 25, 28 (Miss. 1992), abrogated in part by *Bilbo v. Thigpen*, 647 So. 2d 678 (Miss. 1994).

²⁰ *Brown v. Diaz*, 361 S.E.2d 490 (Ga. Ct. App. 1987).

²¹ 766 F.2d 179 (5th Cir. 1985), abrogated in part by *Neitzke v. Williams*, 490 U.S. 319, 323 (1989), modified in part by statute as recognized in *Christiansen v. Clarke*, 147 F.3d 655 (8th Cir. 1998).

²² 28 U.S.C. § 1915(e)(2).

²³ In accordance with NEV. REV. STAT. 12.015 (2003).

²⁴ *De Long v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990).

a serious sanction, perhaps in proper person litigants with in forma pauperis status should be given a longer notice period; this would be especially important to a proper person litigant who would like to seek pro-bono services and needs extra time to do so.

The second requirement, which requires the district court create an adequate record for review,²⁵ is vague as to the amount of cases, etc. that is necessary to create an adequate record. Perhaps there should be a required number of cases and a certain level of description required to help guide the district courts.

The third requirement, that the district court must find the litigant's filings to be repetitive and abusive,²⁶ does not define what constitutes repetitive and abusive. Perhaps courts should consider litigation repetitive if it surpasses a certain number.

And the last requirement, that the order to restrict court access must be drawn narrowly to address the specific problem encountered,²⁷ may result in orders that are drawn too narrow to be effective. Narrow orders may allow restricted litigants to find a way to gain court access by disingenuously veiling an unmeritorious complaint as a fundamental rights issue.

In addition, although the Ninth Circuit analysis is spelled out in a case brought by a litigant with in forma pauperis status,²⁸ nowhere in the opinion does the court say that the four-part analysis applies just to in forma pauperis litigants who abuse the system; furthermore, nowhere in that case does the court say that the litigant was in proper person. Yet *Jordan*'s holding that Nevada district courts have "the authority to limit the court access of a litigant proceeding in proper person with in forma pauperis status"²⁹ seems to exclude vexatious litigants who have legal representation and money to pay court costs. It seems that the Ninth Circuit's analysis should apply to all litigants, especially if they are unbowed by monetary sanctions or professional discipline. But whether the Nevada Supreme Court agrees is unclear in *Jordan*.

Conclusion

Jordan defines the contours of how restriction to court access and the pre-service complaint review may be used while still protecting the constitutional rights of a proper person litigant with in forma pauperis status.

The Ninth Circuit's method for ordering restricted court access, which requires courts to undergo a detailed and multi-faceted analysis, puts a heavy burden on the court to find that restricted access is necessary. By presuming litigants to be viable until proven vexatious, courts protect the litigants' interests and rights up until the point their actions warrant remedial measures. *Jordan* illustrates that while district courts retain the power to dismiss frivolous complaints and restrain court access, they must follow procedural safeguards to minimize the chance of litigants being denied due process.

Meanwhile, by the Nevada district courts reviewing in forma pauperis applications prior to the complaint, the litigant is informed of her status prior to the

²⁵ *Id.*

²⁶ *Id.* at 1147.

²⁷ *Id.* at 1148.

²⁸ *Id.* at 1147.

²⁹ *Jordan v. State*, 121 Nev. Adv. Op. 7 (2005).

complaint being reviewed and can proceed accordingly with no fear that a valid complaint will be dismissed for financial reasons rather than its legal merit. In addition, the court is relieved from reviewing complaints if the litigant fails to prove in forma pauperis status and then fails to pay the appropriate fees. If the case does proceed to the point where the court does review a complaint but finds it incomprehensible, courts must allow litigants to amend complaints if they have merit and may only dismiss complaints as a last resort. *Jordan* reconfirms that pre-service complaint reviews helps both the litigant and the court to be more effective and efficient.

Certainly, future cases brought before Nevada courts will further define the contours of the Ninth Circuit's formula and will give both judges and litigants a clearer vision of what warrants restricted court access and who is eligible for such restrictions.