

STATE OF INDIANA )  
 ) SS:  
ST. JOSEPH COUNTY )

IN ST. JOSEPH SUPERIOR COURT NO. 6  
CAUSE NO. 71D06 2201 CT 000031

ELIZA GARCIA, AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF  
JUAN GARCIA, AND IN HER INDIVIDUAL  
CAPACITY, JOVANA GARCIA,  
ROSA CALDERON, AND RITA GARCIA,

Plaintiffs,

v.

VERNADO MALONE, SR.  
AND ALFORD'S MORTUARY,

Defendants.

**FILED**

August 31, 2023

ST. JOSEPH CIRCUIT & SUPERIOR COURT  
MH

STATE OF INDIANA )  
 ) SS:  
ST. JOSEPH COUNTY )

IN ST. JOSEPH SUPERIOR COURT NO. 5  
CAUSE NO. 71D05 2201 CT 000032

VICKY SANTANA, AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF  
COURTNEY WRIGHT, AND IN HER INDIVIDUAL  
CAPACITY, MICHAEL WRIGHT, GRACE ADAMS,  
DEZERA ROSE, ALISHA HEFLIN, ADRIENNE HILL,  
AUDREY WRIGHT, AND BRANDON WRIGHT

Plaintiffs,

v.

VERNANDO MARLONE, SR.  
AND ALFORD'S MORTUARY, INC.,

Defendants.

**ORDER DENYING MOTION TO APPOINT COUNSEL DUE TO ADA**

On April 25, 2023, Defendant, Vernado Malone, a self-represented litigant, filed a  
“Motion to Appoint Counsel due to ADA”. The court allowed the parties to more fully brief the

Motion. On August 24, 2023, hearing was held on the Defendant's Motion. At the conclusion of the hearing, the court took the Defendant's Motion under advisement. After careful consideration of the parties' written filings, the arguments submitted at the hearing, and applicable law, the court now DENIES Mr. Malone's Motion to Appoint Counsel.

As an initial matter, the court is aware that self-represented litigants face challenges when litigating matters in the courts of the State of Indiana. Under Indiana law, self-represented litigants are held to the same standard as attorneys. While that is the standard, trial courts should be deferential and accommodating to self-represented litigants. In the matter at bar, the court has been accommodating to Mr. Malone and his requests for continuances and to participate remotely due to events in Mr. Malone's life. (See, Orders of December 27, 2022, April 11, 2023, and June 23, 2023).

Even though trial courts should be deferential and accommodating to self-represented litigants, there are limits found in law. One of these limits is the appointment of legal counsel in civil matters. After review of the applicable law, it is clear that the Americans with Disabilities Act ("ADA") confers no right to appointed counsel for disabled persons:

Congress has abrogated states' sovereign immunity for cases that arise under Title II of the ADA if they implicate the "fundamental right of access to the courts." *Tennessee v. Lane*, 541 U.S. 509, 533-534, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). But not all rights associated with the court system fall in this category; the fundamental right of access to the courts refers to those constitutional rights that protect a litigant's ability to get into court and to receive a judgment. *King v. Marion Circuit Court*, 868 F.3d 589, 592 (7th Cir. 2017), cert. denied, 138 S. Ct. 1582, 200 L. Ed. 2d 768 (2018); see, e.g., *Lane*, 541 U.S. at 515 (physical exclusion of wheelchair-bound litigants from second-floor courtroom is denial of access). Indeed, "there is no constitutional problem with ... requiring litigants to pay for their own lawyers in civil cases, although those expenses may make litigation impractical if not impossible for some persons." *King*, 868 F.3d at 592.

*Reed v. Illinois*, 798 Fed. Appx. 932, 934, 2020 U.S. App. LEXIS 563 (7<sup>th</sup> Cir. 2020).

In addition to the decision in *Reed*, the case of *King v. Marion Circuit Court* is also useful here. In *King*, the court found:

The Constitution does not guarantee a freestanding "fundamental right of access to the courts". Thus there is no constitutional problem with filing fees or requiring litigants to pay for their own lawyers in civil cases, although those expenses may make litigation impractical if not impossible for some persons. See, e.g., *United States v. Kras*, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973). *Lane* used the phrase "fundamental right of access to the courts" to denote a cluster of constitutional rights, such as due process of law, that are valid grounds on which Congress might abrogate state sovereign immunity. 541 U.S. at 522-23. What those rights have in common is that they affect the adjudicatory process itself; they safeguard people's ability to get into court and receive a judicial decision. *Ibid*.

*King v. Marion Circuit Court*, 868 F.3d 589, 592, 2017 U.S. App. LEXIS 15697, \*5, 2017 WL 3574813 (7<sup>th</sup> Cir. 2017).

In the case at hand, Mr. Malone has access to the court. When he has needed a continuance or opportunity to participate remotely, it has been allowed. Mr. Malone has been, and will be able to, get into court and receive a judgment.

It is also important to note that in separate litigation Mr. Malone has provided documentation to the court which suggests that sometime around 2013 he was underwent an evaluation of his cognitive abilities as part of a federal criminal proceeding. The documentation states that Mr. Malone "may have difficulty comprehending information related to the process of criminal adjudication, particularly if that information is overly abstract or complex in nature." The matter at issue in the litigation in this court is not overly abstract or complex. In the case at bar, it is alleged that Mr. Malone took photographs of deceased individuals and shared them. This case simply does not involve abstract or complex issues.

While not necessarily applicable here because Mr. Malone's basis for the appointment of counsel is made under the ADA, Mr. Malone did make statements in a motion for continuance filed on December 27, 2022 that he was "homeless". In deference to Mr. Malone, even though

not set forth in his Motion to Appoint Counsel, the court provides this analysis under I.C. § 34-10-1-2 which allows a court to appoint counsel to an indigent person.

Mr. Malone has provided no evidence that he actually is indigent. It is however undisputed that Mr. Malone has the ability to travel to Indianapolis, out of state to Louisiana, and to, admirably, provide health care for a family member. There is simply no showing of indigency. “The Constitution does not guarantee a freestanding ‘fundamental right of access to the courts’. Thus there is no constitutional problem with filing fees or requiring litigants to pay for their own lawyers in civil cases, although those expenses may make litigation impractical if not impossible for some persons.” *King at Id.*

Additionally, even assuming that Mr. Malone is indigent, the court declines to appoint counsel in this civil matter. I.C. § 34-10-1-2 provides that:

**(c)** The factors that a court may consider under subsection (b)(2) include the following:

**(1)** The likelihood of the applicant prevailing on the merits of the applicant’s claim or defense.

**(2)** The applicant’s ability to investigate and present the applicant’s claims or defenses without an attorney, given the type and complexity of the facts and legal issues in the action.

**(d)** The court shall deny an application made under section 1 of this chapter if the court determines any of the following:

**(1)** The applicant failed to make a diligent effort to obtain an attorney before filing the application.

**(2)** applicant is unlikely to prevail on the applicant’s claim or defense.

The case at hand involves claims that Mr. Malone took and shared photographs of deceased individuals. This is not a complex matter. Mr. Malone’s ability to investigate and present his defenses, given the facts and legal issues in this matter, will not be greatly hindered.

Indeed, it is alleged that it was Mr. Malone who undertook the actions. If Mr. Malone did engage in the actions, then it creates a significant question as to whether Mr. Malone will prevail on the merits in this case. Accordingly, even if indigency is being alleged by Mr. Malone, his Motion is Denied. The court is only making this review based upon the pleadings and only in the context of this narrow statutory analysis.

The Motion to Appoint Counsel Due to ADA filed by Mr. Malone is DENIED.

So Ordered this 31<sup>st</sup> day of August, 2023

  
Jamie C. Woods, Judge  
St. Joseph Superior Court



SEAL  
INDIANA  
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CC: Parties