Response to Lawsuit, File No. 10-6062-CZ, Baraga County, MI

The lawsuit challenging 2009 PA 188 wrongly assumes, without citing evidence or law, that smoking is "a legal activity." This allegation is quadruply wrong. Tobacco smoking conduct, due to hazardous ingredients therein and emissions produced, is not "a legal activity," pursuant to, e.g.,

a. Michigan consumer protection law MCL § 750.27, MSA § 28.216, which bans deleterious cigarettes, details at http://medicolegal.tripod.com/milaw1909.htm

b. The federal Occupational Safety and Health Act, 29 USC §§ 651 - 678, which bans safety hazards including emissions. Tobacco emissions notoriously exceed OSHA TLV limits, see, e.g., the Department of Health, Education and Welfare (DHEW), *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service*, PHS Pub 1103, Chapter 6, Table 4, p 60 (1964).

c. constitutional rights against nuisances, against causing death without due process of law, and for the historic common law right to put out fires, details at http://medicolegal.tripod.com/pureaircases.htm

d. laws and precedents against poisoning and murder, details at http://medicolegal.tripod.com/tobaccomurder.htm

When premises are wrong, here quadruply so, conclusion are wrong.

The lawsuit wrongly assumes that there is a local "right to decide." Not so, the foregoing laws and legal doctrines have already made the decision. The choice for Post 444 is only to obey or disobey, not "to decide" the matter in a legal vacuum, apart from already extant law. Same establish the absence of constitutional or other legal right to smoke, especially when others may be present, details at http://no-smoking.org/march01/03-05-01-2.html

This is so regardless of whether or not others are present, as there is no right to consent to significant self-harm. "Consent" is based on the person having attained the legal age of contracts, typically age 18. Consent has a condition precedent, a prerequisite. It "supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers . . . unclouded by fraud, duress, or sometimes even mistake." See *Black's Law Dictionary*, 6th ed (St. Paul: West Pub Co, 1990), p 305. In criminal law context, "consent of victim" "is generally no defense to a crime." See, e.g., *State* v *Fransua*, 85 NM 173; 510 P2d 106; 58 ALR3d 656 (NM App, 1973); "Assault and Battery: Consent as Defense to Criminal Charge," 58 ALR3d 662 (1974). And see "Assault and Battery: Secondary Smoke As Battery," 46 ALR5th 813 (1997). The Kevorkian case, involving an identical toxic chemical as is notoriously in tobacco smoke, carbon monoxide, makes clear the unlawfulness involved, *People* v *Kevorkian*, 447 Mich 436; 527 NW2d 714 (1994) (consent not a defense).

"Consent" is especially invalid here as the behavior or conduct at issue, smoking, notoriously leads to brain damage (also known as "addiction"), details at http://medicolegal.tripod.com/preventbraindamage.htm, and is a long recognized mental disorder, see the *International Classification of Disease*, 9th ed. (ICD-9), p 233, and the *Diagnostic and Statistical Manual of Mental Disorders*, 3rd ed. (DSM-III), pp 159-160 and 176-178. The latter cites that tobacco-caused mental disorder is "obviously widespread," i.e., "approximately 50 percent of smokers." This disorder involves smokers who try but fail to stop smoking; have a "serious physical disorder" known to be "exacerbated by tobacco use"; or are developing "tobacco withdrawal." See also their successor editions, e.g., the 6th edition (2004) of the *International Classification of Disease*, p 245; and the subsequent DSM-III-R (1987), pp 150-151, and 181-182, the DSM-IV (4th ed.) (1994), pp 242-247; and the DSM-IV-TR (2000), pp 264-269; and *The ICD-10 Classification of Mental and Behavioural Disorders* (World Health Organization, 1993), pp 8 (F17.), 55 (F17.0) and 61 (F17.3), referencing pp 48 (F1x.0), 49, and 58 (F1x.3).

Injuring people via toxic substances has been unlawful since at least the time of the facts and precedents underlying Michigan's first anti-toxic substance case, *People* v *Carmichael*, 5 Mich 10; 71 Am Dec 769 (1858). "It is obvious that the law does not encourage tampering with such matters [Thus], we [the Supreme Court] are not disposed to resort to . . . subtilities to defeat a law which, if severe, is to the public benignant and humane in its severity." "The greater susceptibility of some persons over others, to be affected by it, renders it [poison] still more dangerous," p 19/775. The poison, a mind-altering drug, acts to "take away the power of resistance," p 20/775, thus causing "the most deplorable effect . . . the dethronement of reason from its governing power." Tobacco is notoriously such a dangerous substance, notoriously addictive i.e., brain-damaging, thus produces such effects. Accordingly, mental disorder due to tobacco is judicially recognized, see, e.g., *Nat'l Org. for Reform of Marijuana Laws* v *Bell*, 488 F Supp 123, 138 (D DC, 1980) (referencing tobacco as a drug) and *Caprin* v *Harris*, 511 F Supp 589, 590 n 3 (D ND NY, 1981) (referencing the aforesaid *DSM-III*.

In *Caprin*, the court was dealing with a similar smoker as here, a smoker with the symptom of "refusal to cease smoking." The Court took judicial notice of the above-cited *ICD-9*, and its listing of "tobacco use disorder" in the mental disorders section, and of the *DSM-III* and its listing of "tobacco dependence." The court noted that, "There is considerable support in recent medical literature for the proposition that smoking under some circumstances is a 'disease' similar to 'alcoholism.'" These words are apt in view of the behavior of the smokers initiating the lawsuit at bar, smokers refusing to cease smoking.

Veterans in particular should be aware of military awareness of tobacco dangers. "It is a part of the history of the organization of the volunteer army in the United States during the present year [1898, the Spanish American War] that large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and that among the applicants

who were addicted to the use of cigarettes more were rejected by examining physicians on account of disabilities thus caused than for any other, and perhaps every other, reason." *Austin* v. *Tennessee*, 101 Tenn 563; 48 SW 305; 70 Am St Rep 703 (1898) aff'd 179 US 343; 21 S Ct 132; 45 L Ed 224 (1900), http://medicolegal.tripod.com/austinvtenn.htm

The fact that Post 444 is on an Indian Reservation is irrelevant. Indian law itself has pertinent legal principles comparable to the foregoing, including precluding poisoning people, just as does US law, referenced above at http://medicolegal.tripod.com/tobaccomurder.htm

Post 444 is chartered by an American non-profit entity, the American Legion, but seeks to circumvent its duties under American law, hence, its objection to the Health Department action against its food preparation and sales action is without basis. Post 444 wants it both ways, adherence to out-of-context portions of Constitutional Rights and law, while disregarding its duties under same. A litigant cannot have the benefit of provisions favorable to his side, while ignoring its conditions which he is to perform, obey, or enforce. No court should aid such a litigant, *BTC* v *Norton CMC*, 25 F Supp 968, 969 (1938); and *Buckman* v *HMA*, 190 Or 154; 223 P2d 172, 175 (1950).

However, on one point, the lawsuit is correct that by excluding "three Detroit casinos" from coverage, the law (2009 PA 188) is unconstitutional. The exclusion constitutes "checkerboarding" Michigan (some areas safe, others not safe). "Checkerboarding" lacks scientific, thus legal, validity, see, e.g., *Opinions of Attorney General 1987-1988*, No. 6460, pp 167-171; 1987 *Michigan Register* 366 (25 Aug 1987), details at http://medicolegal.tripod.com/partialbans.htm . Compare with *Alford* v *City of Newport News*, 220 Va 584; 260 SE2d 241 (1979).

The solution is not to strike down the portion of the law that enforces the above laws and legal principles, but to strike down the exclusion portion re the "three Detroit casinos," and with respect to the litigant smokers refusing "to cease smoking," to remand the case to the appropriate court, with instructions to refer them for psychiatric evaluation.