

Home > Entertainment > Theater theater

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Smoking can't play into works on stage

A Denver district judge refuses to exempt theater companies from Colorado's smoking ban.

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After a hearing that was at times as theatrical as any play, a Denver District judge refused Monday to exempt Colorado's theater companies from the statewide smoking ban.

But Judge Michael A. Martinez's ruling in favor of the Colorado Department of Health could open the door for a larger battle over what constitutes freedom of expression.

"It sounds to me like we could be back here for a constitutional argument," said retired Colorado Shakespeare artistic director Richard Devin, who testified in the case brought by the Curious, Paragon and Theatre 13 companies.

Martinez ruled the act of smoking, even in performance, "is not inherently an expressive behavior," and therefore does not qualify for free-speech protections under the U.S. constitution.

The plaintiffs had argued that any action performed on a stage - from a gesture to body language to smoking - communicates a meaningful artistic expression that must be protected.

"I think the judge has just opened the door to a lot of confusion about what parts of artistic expression are - and are not - covered under the First Amendment," said Curious Theatre artistic director Chip Walton.

State Deputy Attorney General Renny Fagan praised the ruling, saying, "We're pleased the judge ... found that the law serves a public health purpose," and noted that the legislature considered an exception for theater performances and declined to write one into the law.

The theater companies were not asking for the right to smoke tobacco - they generally have smoked herbal or tea cigarettes for years - but Martinez said the plaintiffs offered no evidence that smoking non-tobacco substances poses any less of a threat to actors and audiences.

First Assistant Attorney General Tom Douglas often stole the thespians' thunder with his own theatrics. At one point he chided Walton on cross-examination, "Do you believe that your actors should die for their art?" To which Walton responded dryly: "I think that's the actor's decision."

Things grew equally dramatic when the plaintiffs chose to demonstrate for the judge the inadequacy of fake cigarette alternatives. But this strategy backfired when Theatre 13's Judson Webb puffed into a simulated plastic cigarette, shooting a brief blue burst of talcum into the air. Webb said such devices lack believability, in part because the devices cannot depict a continual burn, and create a "massive distraction" for audiences.

Yet in his ruling, Martinez said Webb's simulated act looked real enough for him.

Devin said the effects of Monday's ruling, should it stand, could be "chilling." Paragon Theatre co-founder Michael Stricker predicted that many plays that include smoking, including classics of the theatrical canon, simply won't get done locally. Various witnesses cited "The Skin of Our Teeth," "Paragon's upcoming 'Who's Afraid of Virginia Wolff,'" and others in which smoking is intrinsic to plot or character development.

"This will greatly affect play selection," Stricker said. "If the ban holds, we are simply not going to pick a play if there is smoking depicted in it."

Webb calls that not only censorship, but the most insidious form of it because it will have to be involuntarily exercised by the theaters themselves.

"If the director has to by law remove or change something because of cigarette smoke, doesn't that just smack of censorship?" Webb said. "That's exactly what the First Amendment supposedly stands directly in opposition to."

The loss was a setback for Bruce Jones of Holland & Hart, who argued the case for the plaintiffs. In 1996, Jones successfully lobbied the city of Boulder to adopt an exception to its municipal smoking ban in a case that garnered international attention.

Holland & Hart chose to take up the cause again in part because partner Steve Choquette also serves as Curious' board president. The suit was brought now because Curious this week opens its world premiere staging of "tempOdyssey," a play in which one character who smokes does not realize he is dead until he is no longer capable of blowing smoke.

"I'd love to be able to not break the law and still express my artistic vision," Walton said. "But now I've got a play that opens in two days and I don't know what I'm going to do." Walton added: "We're planning on pursuing an appeal, and currently exploring our best options for that appeal."

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