

STATE OF MICHIGAN
COURT OF APPEALS

JOYCE KAUFMAN and MICHAEL KAUFMAN,

Plaintiffs-Appellants,

v

THOMAS JAMES SCHAEGLER,

Defendant-Appellee.

UNPUBLISHED

October 12, 2004

No. 249173

Hillsdale Circuit Court

LC No. 02-000210-NO

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

In this negligence action, plaintiffs appeal as of right from an order of the trial court granting defendant's motion for summary disposition under MCR 2.116(C)(8) and (10) and holding that the assumption of risk provision of the snowmobile section of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.82126(6), as it existed before the amendment of April 22, 2003, both applied to and precluded plaintiffs' claims against defendant. We affirm.

Plaintiff Joyce Kaufman¹ alleges that on December 29, 2000, she was driving a snowmobile on the Trout Lake Snowmobile Trail and that defendant was driving a snowmobile in the opposite direction coming towards plaintiff. Plaintiff alleges that she moved her snowmobile to the right so that defendant could get through the narrow path, and that defendant did not reciprocate the gesture or slow down. According to plaintiff, defendant's snowmobile hit plaintiff's person, causing severe injuries. Plaintiffs filed this action for negligence and loss of consortium against defendant.²

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10) arguing that a provision of the NREPA, MCL 324.28126(6), precludes liability for the negligent operation of a snowmobile. In response, plaintiffs argued that the provision had been amended to expressly

¹ Plaintiff Michael Kaufman's claim is a derivative one for loss of consortium. Therefore, whenever "plaintiff" is used singularly in this opinion, it will refer to plaintiff Joyce Kaufman.

² Originally, plaintiffs named two defendants, Thomas Schaedler and Kraig Moore. Plaintiffs stipulated to the dismissal of Moore and he is no longer a party to this action.

provide for liability and that this amended version was controlling. The court held that the version in effect at the time of the accident controlled, and under that version, plaintiffs' claims were precluded. We agree with the holding of the trial court.

We review de novo grants or denials of summary disposition. *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496; 591 NW2d 364 (1998). Likewise, the question of whether amended provisions of a statute should be applied retroactively presents a question of law that we review de novo. *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001).

At the time the accident occurred, MCL 324.82126(6) read:

Each person who participates in the sport of snowmobiling accepts the risks associated with that sport insofar as the dangers are obvious and inherent. Those risks include, but are not limited to, injuries to persons or property that can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; or collisions with signs, fences, or other snowmobiles or snow-grooming equipment. When a snowmobile is operated in the vicinity of a railroad right-of-way, each person who participates in the sport of snowmobiling additionally assumes risks including, but not limited to, entanglement with tracks, switches, and ties and collisions with trains and other equipment and facilities.

The Legislature amended MCL 324.82126(6), effective April 22, 2003,³ by inserting after the second sentence of the section: "Those risks do not include injuries to persons or property that can result from the use of a snowmobile by another person in a careless or negligent manner likely to endanger person or property." Plaintiffs claim that this version of the statute should be applied retroactively. We disagree.

In determining whether a statute should be applied retroactively or prospectively only, "[t]he primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle." *Franks v White Pine Copper Div*, 422 Mich 636, 670; 375 NW2d 715 (1985). "Amendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." *Tobin v Providence Hosp*, 244 Mich App 626, 661; 624 NW2d 548 (2001). Generally, when a statute is amended, the pertinent date for determining whether to apply the amended statute is the date the cause of action arose. *Hill v Gen Motors Acceptance Corp*, 207 Mich App 504, 513-514; 525 NW2d 905 (1994).

Here, the Legislature has not expressed a clear intent that the statute should be applied retroactively. The language is devoid of any language instructing on when it should be applied. In *Frank W Lynch & Co, supra*, our Supreme Court took the absence of such express intent as a signal that a statute should be applied prospectively only. The Court explained that its

³ 2003 PA 2.

conclusion was based on the observation that the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively. *Id.* at 584, citing as examples, MCL 141.1157 (“This act shall be applied retroactively . . .”); MCL 324.21301a (“The changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application”).

Plaintiffs, while recognizing the presumption of prospective application, argue that an exception applies requiring retroactive application if the statute is remedial in nature and provided it does not abrogate a vested right, citing *Selk v Detroit Plastic Products*, 419 Mich 1, 9; 345 NW2d 184 (1984). In applying this exception, our Supreme Court has given a narrow definition to the term “remedial” statute. The Court has suggested that the focus should rather be on whether a statute affects substantive rights. Specifically, it stated, “[W]e have rejected the notion that a statute significantly affecting a party’s substantive rights should be applied retroactively merely because it can also be characterized in a sense as ‘remedial.’” *Frank W Lynch & Co, supra* at 585. “[T]he term ‘remedial’ in this context should only be employed to describe legislation that does not affect substantive rights.” *Id.*

Here, the amendments have an effect on substantive rights. Quite simply, plaintiffs have no cause of action under the old statute, but do under the amended statute. Because we conclude that this amended statute affects substantive rights, absent a clear contrary legislative intent, which we find lacking, we are precluded from applying the amended provision of MCL 324.82126(6) retroactively.

Plaintiffs next argue that even if the prior version of the statute applies, it does not preclude their claim for damages. We disagree.

Plaintiffs cite *Van Guilder v Collier*, 248 Mich App 633; 650 NW2d 340 (2001), for their proposition that coparticipants in motorized recreational vehicle sports are held to a simple negligence standard as opposed to a higher standard applicable to some recreational activities. See, e.g., *Ritchie-Gamester v Berkley*, 461 Mich 73; 597 NW2d 517 (1999) (coparticipants in ice skating owe each other a duty not to act recklessly). While plaintiffs’ characterization of that case is correct, it is distinguishable in that the parties there were using off-road vehicles as opposed to snowmobiles. Therefore, the statute which applies here to preclude liability did not apply in *Van Guilder* and, therefore, that case is not controlling.

Plaintiffs also argue that the prior version of MCL 324.82126(6) does not preclude liability. We disagree. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998). If the plain and ordinary meaning of statutory language is clear and unambiguous, judicial construction is precluded. *Id.*

MCL 324.82126(6) states, in no uncertain terms, “Each person who participates in the sport of snowmobiling accepts the risks associated with that sport insofar as the dangers are obvious and inherent. Those risks include, but are not limited to . . . collisions with . . . other snowmobiles or snow-grooming equipment.” We find that the language of the statute is clear in its mandate that a snowmobiler accepts the risks of obvious and inherent dangers associated with snowmobiling, including collision with another snowmobile. Accordingly, we hold that this statute precludes liability here.

A panel of this Court came to the same conclusion when interpreting the Ski Area Safety Act (SASA), MCL 408.321 *et seq.*, in *McCormick v Go Forward Operating Ltd Partnership*, 235 Mich App 551; 599 NW2d 513 (1999). There, a skier coming down from a chair lift twisted her ankle when trying to avoid another skier who had fallen from the lift. *Id.* at 553. The defendant ski facility argued that it was immune from tort liability under the SASA, which contained a provision strikingly similar to the provision at issue here, which read:

Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions, bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment. [MCL 408.342(2).]

The panel concluded that this statute provides immunity from liability and held that because the plaintiff's injuries resulted from a collision with another skier, the defendant was immune under the statute and it was unnecessary that plaintiff show that any danger was obvious and necessary as the statute includes collisions within that category. *Id.* at 555. We find that the substantially similar language used in the NREPA requires the same conclusion as reached by this Court in *McCormick*.

Additionally, because the language of this statute is clear and unambiguous, we reject plaintiffs' invitation to consider legislative history. As our Supreme Court has instructed, "legislative history in any form is proper *only* where a genuine ambiguity exists in the statute." *In re Certified Question*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003) (emphasis in the original).

Plaintiffs finally argue that even if the previous version of the statute applies and precludes their negligence claim, they still have a cause of action under the civil liability act of the motor vehicle code, MCL 257.401(1), which provides in part, "The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by law." Plaintiffs' theory is that while the NREPA may preclude defendant's liability for negligent operation of a snowmobile, the civil liability act expressly allows liability for ownership of a motor vehicle which was operated negligently.⁴ We disagree.

It is a well understood rule of statutory construction that "[w]hen two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails." *Livonia Hotel, LLC v City of Livonia*, 259 Mich App 116, 131; 673 NW2d 763 (2003). Our Supreme Court has addressed the applicability of the civil liability act in light of application of the governmental immunity provisions of MCL

⁴ It is not disputed here that a snowmobile is a motor vehicle under the motor vehicle code. *Montgomery v Dep't of Natural Resources*, 172 Mich App 718, 722; 432 NW2d 414 (1988).

691.1407(2)(c) (providing immunity to a governmental employee or volunteer acting with the course of his or her duty and not grossly negligent). *Alex v Wildfong*, 460 Mich 10; 594 NW2d 469 (1999). In *Alex*, the defendant was a volunteer firefighter on his way to a fire, driving a vehicle which he owned, when he collided with another car driven by the plaintiff's decedent. *Id.* at 11. Finding no gross negligence, the trial court dismissed the case. The plaintiffs argued on appeal that the defendant could still be liable under a simple negligence standard by way of the civil liability act in his capacity as owner of the vehicle. Our Supreme Court disagreed. Instead, it applied the maxim that specific statutory provisions must apply over general ones and held that the governmental immunity provisions were more specific than the civil liability act precluding the plaintiff's claim. *Id.* at 21.

We arrive at the same conclusion here and find that the snowmobile assumption of risk provision of the NREPA, which specifically precludes liability for the negligent operation of snowmobiles, is more specific than the civil liability act, which only generally allows liability to be imputed on the owner of a motor vehicle. Accordingly, in light of the provision of the NREPA, MCL 324.82126(6), plaintiffs cannot state a cause of action under the civil liability act.

Affirmed.

/s/ Michael R. Smolenski

/s/ Bill Schuette

I concur in result only.

/s/ Janet T. Neff