

STATE OF MICHIGAN  
COURT OF APPEALS

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JANE DOE and JOAN ROE, on behalf of  
themselves and all others similarly situated,

Plaintiffs-Appellants,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

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FOR PUBLICATION  
December 28, 2001  
9:00 a.m.

No. 200810  
Ingham Circuit Court  
LC No. 90-066580-CZ

ON REMAND  
Updated Copy  
March 15, 2002

Before: Hoekstra, P.J., and Doctoroff, Murphy, Markey, Smolenski, Whitbeck, and Talbot, JJ.

HOEKSTRA, P.J. (*concurring*).

I agree with the majority's conclusion that § 301 is prospective in application and join in its reasoning in all but part III C of its opinion. I write separately to express my opinion on the application of the "first rule" from *In re Certified Questions (Karl v Bryant Air Conditioning Co)*, 416 Mich 558, 570-571; 331 NW2d 456 (1982).

The first rule poses the following query: "is there specific language in the new act which states that it should be given retrospective or prospective application." *Id.* at 570. In considering the promulgating language of 1999 PA 201, I look for guidance in our Supreme Court's recent opinion in *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578; 624 NW2d 180 (2001). There, our Supreme Court strove to "reemphasize the strong presumption against the retroactive application of statutes in the absence of a clear expression by the Legislature that the act be so applied." *Id.* at 588.

As examples of the requisite "clear expression by the Legislature," the Court highlighted two statutes containing specific language on retroactive application. The Court cited MCL 141.1157, which provides that "[t]his act shall be applied retroactively," and MCL 324.21301a, which provides that "[t]he changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application." *Lynch, supra* at 584. These statutes leave no doubt about the Legislature's intentions for the application of these specific statutes or about the Legislature's general ability to make clear its intention regarding the

prospective or retroactive application of a statute. Consequently, I find it significant in this case that the Legislature omitted the word "retroactive" in 1999 PA 201.<sup>1</sup>

Unlike the majority, I am not persuaded that inclusion of the word "curative" and the phrase "original intent of the legislature" in the promulgating language sufficiently evidences an intent by the Legislature to make the act retroactive. This language does not necessarily indicate that the Legislature intended to cure *retroactively* but may merely indicate an intent to cure from this point forward. See, e.g., *Rivers v Roadway Express, Inc*, 511 US 298, 306-308; 114 S Ct 1510; 128 L Ed 2d 274 (1994). Retroactivity raises special policy concerns, making the choice to enact a statute that responds to a judicial decision quite distinct from the choice to make the responding statute retroactive. *Id.*

In my opinion, 1999 PA 201 does not contain language that specifically tells this Court that the intent of the Legislature was for the act to be applied retroactively. Had the Legislature intended for the amendment to have retroactive effect, it easily could have inserted the word "retroactive" in the act as it has on previous occasions in other acts.

/s/ Joel P. Hoekstra

Doctoroff and Markey, JJ., concurred.

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<sup>1</sup> Applying *Lynch, supra*, this Court in *Travis v Preston*, 247 Mich App 190, 197-198; 635 NW2d 362 (2001), also found it significant that there was an absence of a "clear expression" by the Legislature in amending the Right to Farm Act and therefore rejected the defendants' argument that the amended language should be retroactively applied.