

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS C. SIMMONS,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY, TREASURER,
CIVIL SERVICE COMMISSION, and
DEFERRED COMPENSATION PLAN,

Defendants-Appellants.

UNPUBLISHED

January 18, 2002

No. 221657

Court of Claims

LC No. 97-016817-CM

THOMAS C. SIMMONS,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY, TREASURER,
CIVIL SERVICE COMMISSION, and
DEFERRED COMPENSATION PLAN,

Defendants-Appellees.

No. 226121

Court of Claims

LC No. 97-016817-CM

Before: O'Connell, P.J., and White and Smolenski, JJ.

PER CURIAM.

In Docket No. 221657, defendants appeal by leave granted from the Court of Claims' denial of their motion to decertify this class action. In Docket No. 226121, plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendants. We affirm in both cases.

I. Docket No. 221657

In Docket No. 221657, defendants raise three issues concerning the certification of the plaintiff class. This Court reviews a trial court's ruling on class certification under the clearly erroneous standard. *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

Defendants first argue that plaintiffs failed to demonstrate sufficient commonality, because there were not sufficient “questions of law or fact common to the members of the class that predominate over questions affecting only individual members.” MCR 3.501(A)(1)(b). The commonality factor requires that “the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.” *Zine, supra* at 289, quoting *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989).¹ The commonality requirement does not mandate that *all* questions raised in the litigation need be common to all class members; the requirement is met if there is only *one* question of law or fact in common to all class members. *Lozada v Dale Baker Oldsmobile, Inc.*, 197 FRD 321, 329 (WD Mich, 2000). Plaintiff Simmons and the plaintiff class pleaded identical causes of action, based on defendants’ undisputed single course of conduct against the entire class. Thus, we conclude that the commonality requirement is satisfied. *Id.*; see also *Sterling v Velsicol Chemical Corp.*, 855 F2d 1188, 1197 (CA 6, 1988).

Defendants next argue that plaintiffs failed to demonstrate sufficient typicality, because the claims of plaintiff Simmons, as the representative plaintiff, were not “typical of the claims or defenses of the class.” MCR 3.501(A)(1)(c).

Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the unchallenged conduct. In other words, when such a relationship is shown, a plaintiff’s injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. [*Rugumbwa v Betten Motor Sales*, 200 FRD 358, 363 (WD Mich, 2001).]

Again, plaintiff Simmons alleged the same legal theories as the plaintiff class, and defendants committed the same undisputed single course of conduct against the entire class of plaintiffs. Therefore, we conclude that plaintiff Simmons’ injury arises from or is directly related to the wrong allegedly done by defendants to the plaintiff class, and the typicality requirement is satisfied.

Finally, defendants argue that plaintiffs failed to demonstrate sufficient superiority of the class action method, because the maintenance of this action as a class action was not “superior to other available methods of adjudication in promoting the convenient administration of justice.” MCL 3.501(A)(1)(c). Defendants contend that the damages allegedly suffered by members of the plaintiff class will differ as to each member, given the retirement elections made by the member, as well as the member’s decision whether to pursue mutual fund investments once that option became available. We conclude that the trial court properly handled defendants’ argument by ordering a bifurcated trial, a common method to alleviate disparate damage claims

¹ Given the paucity of Michigan case law interpreting MCR 3.501, we look for guidance to federal case law construing the analogous federal court rule, FR Civ P 23. *Zine, supra* at 287, n 12.

in class actions. *Maenner v St Paul Fire & Marine Ins Co*, 127 FRD 488, 490-491 (WD Mich, 1989).

Therefore, in Docket No. 221657, we affirm the trial court's denial of defendants' motion to decertify the class action.

II. Docket No. 226121

In Docket No. 226121, plaintiff Simmons appeals from the trial court's grant of summary disposition in favor of defendants. As an initial matter, we note that defendants' motion for summary disposition challenged only Simmons' individual claims, not those of the plaintiff class.² More importantly, all action with respect to the plaintiff class was stayed pending our consideration of defendants' decertification challenge. *Simmons v Dep't of Treasury*, unpublished order of the Court of Appeals, entered October 26, 1999 (Docket No. 221657). Consequently, we presume that the trial court intended to grant summary disposition only with respect to plaintiff Simmons' *individual* claims, and not with respect to the claims of the plaintiff class.³ Because the class action has been stayed, the trial court's grant of summary disposition regarding plaintiff Simmons' individual claims is not appealable as of right, as a final order disposing of the claims of all parties has not yet been entered. MCR 7.202(7)(a)(i); MCR 7.203(A). Defendants have not challenged this procedural irregularity – indeed, it appears that defendants drafted the problematic summary disposition order. Under the circumstances and in the interests of judicial economy, we choose to accept plaintiff's pleadings as an application for leave to appeal, hereby grant the same, and address the issues on their merits. *Guzowski v Detroit Racing Ass'n, Inc*, 130 Mich App 322, 326; 343 NW2d 536 (1983).

Plaintiff's complaint alleged two tort causes of action: gross negligence and breach of fiduciary duty. Before the trial court, in his response brief to defendants' motion for summary disposition, plaintiff conceded that his gross negligence claim against the state agency defendants was barred by governmental immunity. Although defendant maintained below that his gross negligence claim against individual state officers was not barred by that doctrine, the trial court ruled otherwise. On appeal, plaintiff does not contest the trial court's ruling regarding governmental immunity. Furthermore, during oral arguments before this Court, plaintiff conceded that he could not prevail on his gross negligence claim against the state agency defendants and conceded that he was not contesting dismissal of all claims against the individual defendants. Because plaintiff Simmons has waived review of this issue, we affirm the trial court's grant of summary disposition to defendants on plaintiff's gross negligence claim.

Plaintiff Simmons' only remaining claim against defendants is a claim for breach of

² Furthermore, both plaintiff's and defendants' appeal briefs state that the appeal in Docket No. 226121 relates to plaintiff Simmons only.

³ The trial court's summary disposition order states, "This is a final order which disposes of the last pending claim and closes the case." Therefore, on its face, the trial court's order appears to dismiss both Simmons' individual action and the class action. Such a result would be impermissible, given this Court's order staying further proceedings with respect to the plaintiff class.

fiduciary duty. On appeal, defendants argue that the breach of fiduciary duty claim is also barred by the doctrine of governmental immunity. Although defendant raised this issue below, the trial court did not expressly rule on the issue.⁴ “When this Court concludes that a trial court has reached the correct result, this Court will affirm even if it does so under alternative reasoning.” *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998). In the present case, we affirm the trial court’s decision because it reached the correct result, albeit for the wrong reason. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 190; 600 NW2d 129 (1999).

The Legislature has provided that all governmental agencies are immune from tort liability in all cases wherein the governmental agency is “engaged in the exercise or discharge of a governmental function.” MCL 691.1407(1). A “governmental function” is defined as “an activity that is expressly or impliedly mandated or authorized by constitution, statute, or other law.” MCL 691.1401(f); *Coleman v Kootsillas*, 456 Mich 615, 619; 575 NW2d 527 (1998); *Harrison v Director of Dep’t of Corrections*, 194 Mich App 446, 450; 487 NW2d 799 (1992). In the present case, it is clear that the actions of the state agency defendants, taken in furtherance of administering and investing the deferred compensation plan on behalf of state employees, were specifically authorized by statute. MCL 38.1151. Thus, we conclude that the state agency defendants were engaged in a governmental function and are entitled to governmental immunity regarding plaintiff’s breach of fiduciary claim.⁵

Before the lower court, plaintiff did not argue that the state agency defendants were not engaged in a governmental function. Rather, plaintiff argued that governmental immunity did not apply to his breach of fiduciary claim because that claim was essentially a “contract claim.” However, a breach of fiduciary claim sounds in tort, not in contract. *Riverview Co-Op, Inc v First Nat’l Bank & Trust Co of Michigan*, 417 Mich 307, 321; 337 NW2d 225 (1983); *Miller v Magline, Inc*, 76 Mich App 284, 313; 256 NW2d 761 (1977). Therefore, plaintiff’s argument is without merit, and the doctrine of governmental immunity bars plaintiff’s breach of fiduciary claim against the state agency defendants.⁶

The essence of plaintiff’s argument on appeal is that governmental immunity does not apply because he has a valid contract claim. However, plaintiff has not pleaded a contract claim. Plaintiff additionally argues that he should be permitted to amend his complaint to make clear that his fiduciary claim is, in fact, a contract claim. We disagree. Plaintiff stated an intent to seek leave to amend the complaint to add a contract claim, but never did so. Because plaintiff did not seek this relief from the circuit court, we will not grant it on appeal.

⁴ Instead, the trial court ruled that plaintiff’s breach of fiduciary duty claim failed because, as a matter of law, defendants owed plaintiff no fiduciary duty.

⁵ As set forth above, during oral argument before this Court, plaintiff conceded that he was not contesting summary disposition of all claims against the individual state officers.

⁶ Given our resolution of the governmental immunity doctrine, we need not address whether defendants owed plaintiff a fiduciary duty regarding administration of the retirement plan.

Therefore, in Docket No. 226121, we affirm the trial court's grant of defendants' motion for summary disposition regarding plaintiff Simmons' individual claims.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Michael R. Smolenski