STATE OF MICHIGAN

COURT OF APPEALS

DONALD FLAKE,

Plaintiff-Appellant,

v

CITY OF DETROIT, WILLIAM L. HART, MICHAEL FALVO, DERRICK ROYAL, BETH PETERSON, MARTIN MITTON, ALDO CIBRARIO, DANIEL CARR, and HAROLD GUREWITZ,

Defendants-Appellees.

UNPUBLISHED
December 5, 1997

No. 202443
Wayne Circuit Court
LC No. 93-315698-CZ

ON REMAND

Before: Griffin, P.J., and Taylor and White, JJ.

PER CURIAM.

Plaintiff appeals the circuit court's order granting summary disposition in favor of defendants. On plaintiff's initial appeal, this Court affirmed on statute of limitations grounds. *Flake v City of Detroit*, unpublished opinion per curiam, issued December 19, 1995 (Docket No. 169492). In lieu of granting leave to appeal, the Supreme Court vacated and remanded to this Court for consideration of the remaining issues plaintiff raised.[1] *Flake v City of Detroit*, 454 Mich 889 (1997). We now reverse.

The facts viewed in a light most favorable to plaintiff are that in 1988 the Detroit Police Department (DPD) implemented mandatory drug-testing for police officers. On August 2, 1989 plaintiff, a Detroit police officer, was ordered to and did submit to a drug test which included a strip-search. Plaintiff tested negative. On May 2, 1990 plaintiff was given notice to submit to a second drug test. Plaintiff reported to the test site, was strip-searched, and produced a urine sample, which was sealed by a technician. However, plaintiff refused to hand over the sample because he believed that the strip-search violated his constitutional rights. Plaintiff was suspended that evening,[2] and discharged on June 6, 1990, for refusing to complete the drug-screening procedures. After plaintiff exhausted internal appeals, the Board of Police Commissioners upheld his dismissal in April 1992.

In the interim, in July 1989 a class action lawsuit was filed against the City of Detroit challenging the constitutionality of the strip-searches.[3] In May 1991, the circuit court in the class action case ruled from the bench that the DPD's strip-searches were unconstitutional. In June 1991, the class was certified. The class was composed of all sworn members of the DPD subjected to urinalysis drug-testing between 1988 and 1991, approximately 4800 officers. Notices to the class were distributed in late 1991.[4] Following settlement negotiations, the parties reached a tentative agreement, which was placed on the record on December 10, 1992.

In March 1993, plaintiff received notice of the class action for the first time, in the form of a memo stating that officers could appear at an April 7, 1993 settlement conference to state their support or opposition to the terms of the settlement.[5] Plaintiff appeared without counsel at the April 7, 1993 conference, at which time the circuit court heard from several police officers and heard the motion to grant the consent judgment. The transcript of that hearing reveals that the circuit court told plaintiff that reinstatement is "not dealt with in this case" and "if you want to try to be reinstated . . . you need to opt out." Further, defendant's counsel stated at the hearing that plaintiff's request for reinstatement "is a whole different ball game". The circuit court later repeated that reinstatement "is not dealt with in this lawsuit." Plaintiff did not state that he decided not to opt out.[6] The colloquy that took place between plaintiff and the court regarding opting out was hypothetical and plaintiff emphasized above all that he wanted to pursue a claim for reinstatement.[7] The circuit court stated at the conclusion of the hearing:

> THE COURT: The first ruling that seems somewhat clear to me is that anybody who claims a defective notice in terms of the class certification that occurred during the last six months of June [sic] of '91 either has to try to opt out and use the procedures available for that, and that's filing an appropriate motion, or if they still wish to try to seek their fair share of the settlement, they can no longer seek to opt out.

The circuit court did not, as the dissent states, rule that plaintiff could not seek the remedy of reinstatement without opting out of the suit. While the issue was discussed between the court and the attorneys, the court made no ruling.[8] The court entered the consent judgment on the same date the hearing was held, April 7, 1993.

On June 3, 1993 plaintiff filed the instant case in propria persona,[9] alleging that his dismissal in June 1990 for refusing to cooperate with an unconstitutional drug test and drug-testing procedures violated his rights to engage in symbolic speech, denied him due process and equal protection, and deprived him of his property interest in his employment. Plaintiff's complaint alleged that defendant terminated his employment without legal basis or justification, and requested reinstatement, among other things.

Defendant filed a motion for summary disposition in lieu of an answer on June 25, 1993. Plaintiff had, in the interim,[10] filed a motion to opt out in the class action case. In the instant case, defendant's motion was dismissed pending decision on plaintiff's motion to opt out. Plaintiff's motion to opt out was denied by order dated August 24, 1993 and his motion for reconsideration was denied on September 8, 1993. Defendant then renewed its motion for summary disposition in the instant case, arguing that res judicata barred plaintiff's claims. In response to defendant's motion, plaintiff argued that

he was in a unique class of one, in that he was the only officer discharged who had not been found to have used illegal drugs, and was the only officer who refused to turn over a urine sample he had produced based on his belief in the unconstitutionality of the procedure. Plaintiff also filed a motion for a declaratory judgment that he was not covered by the consent judgment. The circuit court entered an order granting defendant's motion for summary disposition and denying plaintiff's motion for a declaratory judgment on October 4, 1993. This appeal ensued.

II

The sole issue is whether res judicata bars plaintiff's claims. We conclude that plaintiff cannot, in this proceeding, collaterally attack the decision made in the class action that plaintiff was a class member. The question remains, however, whether res judicata bars plaintiff's individual claim for reinstatement. We conclude that that claim is not barred.

Res judicata bars both claims actually litigated in a prior action and those claims arising out of the same transaction which plaintiff could have brought, but did not. *Schwartz v City of Flint*, 187 Mich App 191, 194; 466 NW2d 357 (1991). The doctrine applies to consent judgments as well as to judgments derived from contested trials. *Id.*

The prior class action was a facial challenge to the constitutionality of the City of Detroit's mandatory random drug-testing program, which included strip-searching. The class action sought injunctive relief to end the City's policy of testing police officers and to recover damages on behalf of the approximately 4800 officers, sergeants and lieutenants who were required to submit to random drug-testing. As part of the consent judgment, the City was enjoined from conducting strip-searches as part of any random drug-testing program unless it had reasonable individualized suspicion of wrongdoing. The City also agreed to pay $975,000 to cover all claims for damages, interest, attorney fees and costs. The monetary relief was deemed final, non-appealable and binding on all class members except those who had opted out.

Plaintiff's individual suit requested reinstatement. Plaintiff argues, and defendants do not dispute, that the class action complaint did not seek as relief reinstatement for any class member.[11] The consent judgment in the class action did not mention reinstatement. Nor does defendant dispute plaintiff's assertion that he was the only officer terminated whose drug test results were negative. Defendant argues that plaintiff could have raised his reinstatement claim in the class action. We cannot agree. As observed by Judge Caprathe in his dissent in this Court's initial decision in this case, *Flake, supra*, plaintiff did not receive notice of the class action until March of 1993.

Res judicata bars claims arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not. *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995). In the instant case, plaintiff raised his claim at the first opportunity, i.e., the April 7, 1993 hearing, given that he received notice of the class action in March 1993. The circuit court did not allow plaintiff to inject his claim for reinstatement at that time and entered the consent judgment on that date. We conclude that plaintiff could not have brought his claim for reinstatement earlier and exercised reasonable diligence.[12]

Nor has defendant shown that plaintiff's reinstatement claim was actually litigated. In *Cooper v Federal Reserve Bank of Richmond*, 467 US 867, 880-881; 81 L Ed 2d 718; 104 S Ct 2794 (1984), the United States Supreme Court held that a judgment in a class action determining that an employer did not engage in a general pattern or practice of racial discrimination against the certified class of employees did not preclude a class member from maintaining a subsequent civil action alleging an individual claim of racial discrimination against the employer, where the district court in the class action had not decided the individual claims of the petitioners at issue.[13] See also, *Cameron v Tomes*, 990 F2d 14, 17-18 (CA 1, 1993)(relying on *Cooper*, *supra*, in affirming the district court's determination that a prior class action brought by prisoners regarding conditions of prison confinement did not bar the plaintiff's individual claims, noting that the issues peculiar to the plaintiff were not litigated in the prior class action.)[14]

The cases the dissent cites are distinguishable from the instant case. In *King v South Central Bell Telephone & Telegraph*, 790 F2d 524 (CA 6, 1986), the plaintiff brought suit against her employer and her union, the Communication Workers of America (CWA), alleging that her reinstatement to a lower paying job when she returned to work after a maternity leave violated Title VII, 42 USC 2000e *et seq*. The district court granted the defendants' motions for summary judgment, concluding that the plaintiff's action was barred by the settlement of a prior class action the CWA had brought against the defendant employer, which alleged that the employer's policies and practices with respect to maternity benefits discriminated against its female employees, in contravention of Title VII. The district court held that the employer violated Title VII by denying guaranteed reinstatement to former or equal positions to its female employees on maternity leave, and a settlement agreement was reached settling all claims against the employer relating to maternity leave of absence policies subject to the class action. *Id.* at 525-526.

As in the instant case, the plaintiff in *King* first became aware of the class action when she received documents relating to the proposed class settlement. However, unlike the instant case, the plaintiff did not contest that she was a class member, participated in the class action, and received money pursuant to its settlement. The issue in *King*, unlike the instant case, was whether the plaintiff could assert claims she failed to bring in the class action in a subsequent individual action. Included in the documents the plaintiff had received was a claim application, which the plaintiff completed and pursuant to which she received money under the consent judgment. The plaintiff's claim application referred only to the eight-day delay between her request to return to work and the date on which the employer actually returned her, and did not claim lost wages as a result of being returned to the lower-paying job, although she did mention the lost wages claim and loss of seniority in a letter of objection to the court. *Id.* at 527. On appeal from the district court's grant of summary judgment for the defendant, the plaintiff argued that her action should not have been barred on res judicata grounds because the notice she received was constitutionally deficient and she was inadequately represented by the class representative. The United States Court of Appeals for the Sixth Circuit rejected both arguments, noting:

> The 'Important Notice' [included in the packet of documents the plaintiff received relating to the proposed class settlement] unambiguously states that 'if you were . . .

> delayed in reinstatement to your job when you requested to return to work form your maternity leave, you may be owed a settlement from the company.' King's claim that Bell failed to reinstate her to her former job as frame attendant clearly falls within this language. Moreover, the notices and proposed settlement agreement are replete with warnings that failure to file a claim may result in the loss of a right of action. Even if it can be argued that the notice was somewhat ambiguous, King could not opt out because the action did not include that privilege. The most she could do was object to the decree and she did.
>
> King understood the notice to the extent that she took advantage of the opportunity to file objections, in the form of a letter to the court. Proof that the trial court considered King's letter is the fact that the proposed settlement agreement was revised to include the seniority claim that King, along with other class members, brought to the court's attention by way of objections.
>
> We, therefore, conclude that the notice King received regarding the proposed class action settlement was not constitutionally deficient. It certainly advised her of her rights and comported with due process requirements. [*Id.* at 530.]

In contrast, in the instant case, plaintiff sought a remedy, reinstatement, which was not part of the class action.

Manji v New York Life Ins Co, 945 F Supp 919 (D SC, 1996), is also distinguishable. In that case, the defendants in their motion for summary judgment argued that res judicata barred the plaintiffs from pursuing the instant class action in federal court, separate from a nationwide class action in New York state court (the *Willson* action) against the defendant by three million current and former New York Life policy owners. The defendants argued that the plaintiffs were given several opportunities to opt out of *Willson* but failed to do so.

Unlike the instant case, the plaintiffs in *Manji* received "all required notices of the class action pending in New York prior to August 30, 1995," which "fully described how the plaintiffs could opt-out of the class action and the consequences of failing to do so by October 31, 1995." The plaintiffs forwarded these notices to their attorney, who advised counsel in the class action that a separate action had been filed before receipt of notice of the class action. Counsel in the class action responded and asked whether the letter "constitutes your clients' decision to opt-out" of the class action settlement. *Id.* at 921. The plaintiffs' counsel then sent another letter stating that the plaintiffs' decision to opt-out is "dependent on which relief will be granted in that settlement," and asked to be advised in that regard. Counsel in the class action responded that he could offer no advice regarding the relief that would be afforded. Neither the plaintiffs nor their counsel contacted New York Life regarding opting-out of *Willson* after this letter. *Id.*

Unlike the instant case, the plaintiffs in *Manji* received notice of the class action and received notice that in order to not be bound by the class action settlement they had to opt-out, at least several months before the opt-out deadline date. The plaintiffs failed to opt-out. In the instant case, plaintiff

appeared in court at the first opportunity he could do so, on April 7, 1993, given that he had received his first notice of the class action in March 1993. At that time, he sought to inject the issue of reinstatement and the court expressly held that reinstatement was, and would not be, an issue in the case.

The remaining cases cited by the majority do not involve situations where the court presiding over the class action expressly declined to include in the class action the claims raised by the plaintiff. See n 10, *supra*.

Under these circumstances, we agree with Judge Caprathe's dissent in the initial decision of this case that the prior adjudication should only have preclusive effect as to the issues actually litigated in the class action. We conclude that plaintiff's individual claim seeking reinstatement should not have been dismissed, and remand to allow plaintiff to pursue that claim.[15]

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Clifford W. Taylor
/s/ Helene N. White

[1] On remand, Judges Taylor and White were substituted for the former visiting judges. They did not participate in this Court's previous decision.

[2] The following day he took his sealed urine sample for testing to an independent laboratory, which refused to test that sample but tested a sample plaintiff produced. The results were negative. Apparently, plaintiff submitted an affidavit that stated that he was drug free on May 21, 1990, he was not a drug user and was not concerned that he would fail the drug test, and that the reason he went to the independent drug-testing facility was to establish that he was drug free. [The affidavit is not in the lower court record, but is referred to in plaintiff's brief in opposition to defendant's motion for summary disposition, filed July 22, 1993.]

[3] *Brown v City of Detroit*, Wayne Circuit Court No. 89-917823 CL.

[4] Officers received notice with their November 27, 1991 paychecks; retired officers received notice with their December 2, 1991 pension checks; notices were posted in police precincts and other department areas in December 1991; and former employees were sent notices at their last known addresses by first class mail.

[5] As noted in the dissenting opinion to this Court's initial decision, plaintiff took and passed a polygraph exam regarding when he first received notice of the action.

[6] We thus cannot agree with the dissent's statement to the contrary.

[7] When plaintiff addressed the court, the following exchange occurred:

> MR. FLAKE: Well, Your Honor, as you can see there, I have several pieces of documentation. The first piece that you're examining now is the results of the drug test that I took approximately 13 hours after my dismissal from the department. I realize that my actions to refuse to comply with that order, which I deemed Unconstitutional, because I deemed the procedure in which the samples were taken unconstitutionally, I would be questioned and that I will be suspected of a drug user. So, therefore, I got that test run. And as you can, the results there are negative.
>
> Now, at the time of my suspension, I clearly stated that by reasons for refusing to complete or comply with the testing procedure, was based on constitutionality. I received a letter in the month of March stating that there was a class action suit on my behalf concerning this issue. I was very surprised, to say the least, to learn about this class action suit, since I was not notified by the attorney's office prior to March of this issue. I was not notified by my union who represent me and I fail –
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> THE COURT: I'm sorry. You're saying that your first notice of this was the notice of this proceeding.
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> MR. FLAKE: Yes. In March of '92 – I mean '93, sir.
>
> THE COURT: Okay. Go ahead.
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> MR. FLAKE: And I fail – as I read the letter, it stated that the procedure itself, which I was dismissed from the department for not completing, was, in fact, unconstitutional.
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> THE COURT: Let me ask you this, sir. I assume Mr. Brewer for the plaintiff and Mr. Ashworth for the defendant is going to show me what notice was given to the class members initially and that it was proper. If you had received the notice that went out, that notice would have told you that you have the right to either opt in or opt out of this litigation. By opting – to opt out, you would have to do something affirmatively. To opt in, you would have to do nothing. At this – and my question's going to be, what would you have opted to do, and I'll tell you what the ramifications of your decision is before you make this decision.
>
> If you chose to opt out and I let you opt out at this time, I'm not sure I'm going to, but if I did allow you to opt out at this time, the result would be that you would not share in the recovery in this case in any way and you would have the right, if you wanted, to file your own lawsuit and go through all the proceedings that would be required with respect to that. I can tell you, this is as very complicated case and I don't know

whether you would find a lawyer based upon the damages you may have suffered to take it, but you would have the right to do that.

On the other hand, even though you may not have gotten notice, at least you say you didn't get notice initially, you did get notice of this hearing and you still have a full right, if you opt in, to ask that you receive a greater share of the money available than others based upon your peculiar circumstances.

So do you understand what I'm saying about opting in or opting out?

MR. FLAKE: I believe, Your Honor.

THE COURT: Based on what you know now, is it your desire to opt in or opt out?

MR. FLAKE: Based on the statements that you just made, I would probably opt in because I – for the reasons that I have no representation.

THE COURT: Is your concern here that the total amount of the settlement is not enough or that your share should be more than the average of all the members because of your peculiar circumstances?

MR. FLAKE: My concern is that I wish to have my position restored. I wish to have my record exonerated.

THE COURT: That's not dealt with in this case, Mr. Brewer?

MR. BREWER: No, Your Honor.

MR. FLAKE: The reason why I'm saying this, Your Honor –

THE COURT: No, I understand what you're saying. I'm only saying that if you opt in, the only benefit you'll get from this case personally is to what extent you receive money as the result of your claim in this case. If the injunctive relief agreed to is only future orientated, it deals nothing with the past, and, therefore, if you want to try to be reinstated based on this, you need to opt out. Would you disagree with that, Mr. Brewer?

MR. BREWER: No, Your Honor, I think that that's the correct procedure. If the people want to pursue individual damages actions, they should or need to opt out.

THE COURT: Can he opt in but still file a lawsuit for reinstatement based on this?

MR. BREWER: I believe so, Your Honor. This case was and is a facial challenge to the drug testing and strip searching that occurred, it was brought as that and it was litigated as that –

THE COURT: Yeah, but doesn't the granting of monetary relief deal with all damages and that you could have, in this case, asked for individual injunctive relief with respect to getting jobs back if you had wanted to.

MR. BREWER: That's possible. And also too, the City, I expect frankly, will argue that when consent judgment is entered that should be Res Judicata as the law claims.

THE COURT: And I suspect Mr. Ashworth would probably argue that I should not allow you to opt out at this time.

MR. ASHWORTH: Well, that's true. And this is a whole different ball game that's he raising with this issue.

THE COURT: Okay. What else would you like to tell me, sir?

MR. FLAKE: Well, basically from my understanding of the letter that I received, there is a constitutional issue here, whether the procedure was constitutionally legal. Now the City claims that the procedure was constitutional and legal and took it to court; they lost that court case. I fail to understand why I particularly, during this litigation process, was dismissed from the department for simply standing up for my constitutional rights.

THE COURT: I hear what you're saying and I guess all I can say in response is this. That at this late stage, the file in this case, on its face, shows that all class members were given adequate notice of the certification of the class and there was a time limit to opt out. Six of the – only six people chose to opt out.

If, in fact, you can prove that you didn't receive the notice you – that the file says you got, you could probably get an attorney and file a case and try to say that you should not be bound by this result because you didn't get notice. [Defendant,in fact, followed this course.] And it's a tricky matter because you'd have to not share in this, because once you share in any part of this, it would, I think, be an implied admission that you're willing to be bound by the law with respect to the resolution of this case.

I hear what you're saying and anything else you want to say you can, but its really up to you and any counsel you get from your attorney how you proceed with the main issue you have here, which is reinstatement, which is not dealt with in this lawsuit.

MR. FLAKE: Okay. As far as an attorney, I do not have one, I cannot afford one, that's why I'm appearing myself before this Counsel.

I would like to ask the individuals in charge of notification what notification did they state that I received earlier.

> THE COURT: After everybody else – after all the class members have a chance to talk, I'm going to require that the attorneys tell me exactly what notices were given and how it complied with the law. So that will occur.
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> MR. FLAKE: Okay. I would also like to point out the fact that I served the department and my record was distinctive. I believe in the justice system, I believe in the word "justice," and that's why when I felt my constitutional rights were being violated, I was obligated to defend those constitutional rights and that's what I was doing when I refused to comply the drug testing procedure.
>
> THE COURT: Okay. Thank you, sir, your statement is part of the record and certainly will be considered by me before I make any final decision.

[8] See note 7.

[9] This case was assigned to the judge to whom the class action was originally assigned. The class action had been reassigned to the Chief Judge during its pendency and before the April 7, 1993 hearing.

[10] The precise date plaintiff filed his motion to opt out of the class action suit is unclear, as the record of the class action is not before us. However, plaintiff's answer to defendant's summary disposition motion, filed on July 22, 1993, argued that plaintiff's motion to opt out was pending.

[11] While the record in the class action case is not before us, it appears that reinstatement was not sought in that case because the class representatives were officers who submitted to the test and so were not discharged, and had no need for reinstatement and back pay, or officers who were discharged for failing the test and did not seek reinstatement. Plaintiff asserts that he was discharged for refusing to take the test on constitutional grounds, and that he submitted his urine for testing elsewhere, and tested negative.

[12] Under these circumstances, we cannot agree with the dissenting opinion to the extent that it implies that plaintiff knew of the class action before March 1993, decided on the record not to opt out, and did not file a timely motion to opt out before the consent judgment was entered on April 7, 1993. In fact, plaintiff first appeared before the court on April 7, 1993, at the hearing on the motion to grant the consent judgment. This was plaintiff's first opportunity to appear, i.e., the notice he had received of the class action in March 1993 stated that officers could appear at the April 7, 1993 settlement conference to state their support or opposition to the terms of the settlement At the hearing, plaintiff informed the court that he had only received notice of the class action in March 1993. The circuit court entered the consent judgment on that same date, April 7, 1993. It thus would have been impossible for plaintiff to file a motion to opt out before the consent judgment was entered, as the dissent states.

Clearly, plaintiff was not permitted to bring his reinstatement claim as part of the class action.

[13] The Supreme Court noted:

> It is also suggested that the District Court had a duty to decide the merits of the individual claims of class members, at least insofar as the individual claimants became witnesses in the joint proceeding and subjected their individual employment histories to scrutiny at trial. Unless these claims are decided in the main proceeding, the Bank argues that the duplicative litigation that Rule 23 was designed to avoid will be encouraged, and that defendants will be subjected to the risks of liability without the offsetting benefit of a favorable termination of exposure through a final judgment.
>
> This argument fails to differentiate between what the District Court might have done and what it actually did. The District Court . . . pointedly refused to decide the individual claims of the Baxter petitioners. [467 US at 881.]

Similarly, in the instant case, the circuit court pointedly refused to decide the reinstatement claim.

[14] The *Cameron* court noted:

> We agree with the district court that the state has made no showing that Cameron's claim is barred by *res judicata.* Cases on *res judicata*, ample in many areas, are fairly sparse where preclusion of distinctive individual claims is urged based upon an earlier class action judgment. But in *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 880, 104 S.Ct. 2794, 2801-02, 81 L.Ed.2d 718 (1984), the Supreme Court confirmed what common sense would suggest: **a class action judgment—there, in a discrimination case—binds the class members as to matters actually litigated but does not resolve any claim based on individual circumstances that was not addressed in the class action**. *Id.* at 880-82, 104 S.Ct. 2801-02.
>
> Under *Cooper*, we think that *res judicata* plainly does not apply in this instance. The several law suits and years of proceedings embraced by *Langton* . . . were concerned with fairly general issues (*e.g.*, physical plant, sequestration, equality of treatment) and with specific claims of individuals other than Cameron. . . .
>
> This case, by contrast, rests primarily on Cameron's claims that his unusual situation requires special accommodations: specifically, that his physical disability affects his need for outside medical visits, freer movement within the Treatment Center, and separate bunking arrangements adapted to his handicap . . . . **There is no suggestion by the state that these issues peculiar to Cameron were actually litigated in the *Langton* case.**
>
> Thus, the state's claim reduces itself to the argument that Cameron *had* to litigate those issues in the earlier cases or forever hold his peace. To describe this claim is to refute it: class action institutional litigation often addresses general circumstances, not the distinctive plight of someone claiming special needs or status. To the extent individual

> concerns were addressed in *Langton*, Cameron is not even mentioned in the district court decision. . . . In theory, claim preclusion is possible where an earlier class action claim is essentially the same as a later action for individual relief, and issue preclusion is possible where a fact resolved in the class action proves important in the later action. *See Cooper*, 467 U.S. at 880-82, 104 S.Ct. at 2800-02. No such overlap has been shown here. [990 F2d at 17-18. Italics in original. Emphasis added.]

[15] We note in response to the dissent's argument under *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 163-164; 458 NW2d 56 (1990), that the record does not support the assertion that plaintiff received settlement monies. Further defendant does not claim that plaintiff violated the tender-back rule. In fact, if plaintiff received money, it would have been after this case was filed and his motion to opt out of the class action was denied. Thus, it was impossible for plaintiff to have tendered consideration, if any, prior to filing suit.