No. 436PA13-6 JUDICIAL DISTRICT 27A

SUPREME COURT OF NORTH CAROLINA

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I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, THE ESTATE OF JAMES D. WILSON, BENJAMIN E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, and JEAN C. NARRON, and all others similarly situated,

Plaintiffs-Appellees,

v.

STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, a corporation, formerly Known as the North Carolina Teachers and State Employees' Comprehensive Major Medical Plan, TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a corporation, BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, a body politic and corporate, DALE R. FOLWELL, in his official capacity as Treasurer of the State of North Carolina, and the STATE OF NORTH CAROLINA,

Defendants-Appellants.

FROM
GASTON COUNTY
[12-CVS-1547]

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PLAINTIFFS'-APPELLEES' MOTION TO DISMISS APPEAL

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Pursuant to North Carolina Rule of Appellate Procedure 37, Plaintiffs respectfully move this Court to dismiss the appeal of Defendants, which seeks direct review by this Court of a trial court order denying a motion by the Defendants to decertify the Plaintiff class (the "Decertification Order"),[1] and then, by virtue of pendent jurisdiction, two allegedly "intertwined" orders denying Defendants' motion in limine as to Plaintiffs' expert (the "Motion in Limine Order") and denying Defendants' second summary judgment motion (the "Summary Judgment Order").

Defendants' appeal, filed on the eve of trial, is jurisdictionally improper and, unfortunately the most recent in a long line of maneuvers to avoid the State's contractual obligations to the Plaintiffs, which was previously decided by this Court on 11 March 2022. While arguing that the basis for their latest appeal arose from this Court's March 2022 Opinion, they waited until one month before a long-scheduled trial to raise, for the first time, alleged issues about the 2016 class certification. Defendants' latest attempts to avoid trial fail for the reasons set forth herein.

As detailed below, Defendants do not have a direct right of appeal to this Court pursuant to N.C.G.S. § 7A-27(a)(4) of the Decertification Order and, therefore, that order and any other orders that Defendants purport to "bootstrap" to the Decertification Order must be dismissed (R pp 234-236). *See Dogwood Dev. & Mgmt.*

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[1] Defendants purport to appeal an original order denying the Defendant's Motion to Rescind the Class Certification Order and then also the amended order of denial. R pp 222-223 (Original Order); R pp 234-236 (Am. Order). For purposes of this motion, "Decertification Order" refers to both trial court orders.

Co., LLC v. White Oak Transp. Co., 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) ("A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal). Alternatively, even if the Decertification Order was properly before this Court (which it is not), the Defendants do not have a right to appeal the Motion in Limine Order or Summary Judgment Order because (i) a motion in limine is not an appealable order; (ii) this Court has never recognized pendent appellate jurisdiction; and (iii) even if this Court were to recognize some limited pendent appellate jurisdiction, the Motion in Limine Order and Summary Judgment Order are not sufficiently "intertwined" with the Decertification Order. Furthermore, even if immediately appealable, the Summary Judgment and Motion in Limine Orders would only be appealable to the Court of Appeals not this Court.

In support of this motion, Plaintiffs show the Court the following[2]:

FACTUAL BACKGROUND

In 1982, the State established a "Comprehensive Major Medical Plan" which offered the benefits directly from the State to all employees and retirees. Act of June 23, 1982, ch. 1398, § 6, 1981 N.C. Sess. Laws (Reg. Sess. 1982) 288, 289-311 (Establishing Act). Coverage was provided under the Plan to all employees and retirees "on a noncontributory basis." *Id.* at 295.

In 1985, the State amended the plan to require retired employees to have been employed with the State for at least five years before becoming eligible for benefits

[2] Pursuant to Rule 37(c), Plaintiffs' counsel conferred with Defendants' counsel who do not consent to this Motion to Dismiss and intend to file a response.

under the Major Medical Plan. *See* Act of Aug. 14, 1987, ch. 857, § 9, 1987 N.C. Sess. Laws 2098, 2101. The State amended these vesting requirements again in 2006, changing the years of service requirement from five years to twenty years. *See* S.L. 2006-174, § 1, 2005 N.C. Sess. Laws (Reg. Sess. 2006) 630, 630. The twenty-year and five-year service requirements were applied prospectively, so that employees that were hired prior to 2005 only needed five rather than twenty years of service to be eligible for the plan. *See id.* Employees or retirees that had reached the service requirements were considered "vested." *Lake v. State Health Plan for Teachers & State Emps.*, 380 N.C. 502, 524-26 869 S.E.2d 292, 310 (2022). All members of the class met these eligibility requirements and vested into the plan.

In 2011, the State began charging premiums to the 80/20 PPO Plan which had taken the place of the Major Medical Plan. *See* S.L. 2011-85, § 1.2(a), 2011 N.C. Sess. Laws 119, 120 (the 2011 Act). "[R]etirees who had previously been enrolled in the premium-free 80/20 PPO Plan were required to either pay a premium to remain in their same plan or choose a different premium-free plan containing different terms and . . . offering a less valuable benefit." *Lake v. State Health Plan for Teachers & State Emps.*, 380 N.C. 502, 507, 869 S.E.2d 292, 299 (2022).

PROCEDURAL BACKGROUND

In response to the unilateral diminution of their vested retirement health benefits, vested retirees filed this suit over twelve years ago on 20 April 2012 on behalf of themselves and other similarly situated retirees. R p 3.

On 23 July 2012, the Defendants filed a motion to dismiss based on the Defendants' alleged sovereign immunity. *See Lake v. State Health Plan for Tchrs. & State Emps.*, 234 N.C. App. 368, 760 S.E.2d 268 (2014). The trial court denied Defendants' motion, and they appealed (for the first time). R p 96. The Court of Appeals affirmed the trial court. *Id*. Defendants then filed a petition for discretionary review and writ of certiorari to the North Carolina Supreme Court, which were both denied. *Lake v. State Health Plan for Tchrs. & State Emps.*, 234 N.C. 806, 766 S.E.2d 840 (2014).

On remand from the Court of Appeals, the parties conducted substantial discovery, and, on 31 May 2016, Plaintiffs moved to certify the class. R p 79. Plaintiffs' motion was granted on October 6, 2016, and the Court certified a class composed of:

> All members (or their Estates or personal representatives if they have deceased since July 1, 2009) of the N.C. Teachers' and State Employees' Retirement System ("TSERS") who retired before January 1, 1988; (2) TSERS members (or their Estates or personal representatives if they have deceased since July 1, 2009) who retired on or after January 1, 1988, were hired before October 1, 2006 and have 5 or more years of contributory service with the State and (3) surviving spouses (or their Estates or personal representatives if they have deceased since July 1, 2009) of (i) deceased retired employees, provided the death of the former plan member occurred prior to October 1, 1986; and (ii) deceased teachers, State employees, and members of the General Assembly who are receiving a survivor's alternate benefit under any of the State-supported retirement programs, provided the death of the former plan member occurred prior to October 1, 1986.

R pp 92-93. The trial court concluded that each member of the class had met the eligibility requirements to receive the retirement health benefit, and that "an issue of fact and/or law common to all Plaintiffs is whether they had employment contracts with the State as they allege and whether the State breached those contracts." R p 90. The trial court also found that there are at least 220,000 retirees in the class and that "due to the numerous members of the class, it would be impractical to join all members of the class." R p 91.

In the fall of 2016, Plaintiffs filed a motion for partial summary judgment, and Defendants filed their motion for summary judgment. R pp 82, 85. On 19 May 2017, the trial court entered its Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendants' Motion for Summary Judgement as to Liability. R pp 95-103. Defendants appealed that decision. R p 105. Defendants did not—and never did—appeal the Court's 2016 Order Granting Class Certification.

In connection with Defendants' appeal of the summary judgment order, Plaintiffs and Defendants jointly requested that this Court allow immediate discretionary review or, in the alternative, issue a writ of certiorari to review the summary judgment order. That petition was granted, but, on 9 October 2018, this Court issued an "administrative statement" that the Court lacked a quorum to hear the appeal and deferred the matter to the Court of Appeals.

The Court of Appeals issued its opinion on 25 March 2019, reversing the trial court and remanding for entry of summary judgment in favor of the State. *See Lake v. State Health Plan for Tchrs. & State Emps.*, 264 N.C. App. 174, 825 S.E.2d 645

(2019). Plaintiffs then petitioned this Court for discretionary review and in the alternative a writ of certiorari. *Lake,* 380 N.C. 502, 512, 869 S.E. 2d 292, 302 (2022). This Court granted Plaintiffs' Petition for Discretionary Review on 26 February 2020. Doc. Ex. 1151.

On March 11, 2022, following briefing and hearing, this Court reversed the Court of Appeals and held that the retirement health benefit constituted a vested, contractual right that could not be impaired or breached:

> Today we hold that the Retirees who satisfied the eligibility requirements existing at the time they were hired obtained a vested right in remaining eligible to enroll in a noncontributory health insurance plan for life. These Retirees reasonably relied on the promise of this benefit in choosing to accept employment with the State. They are entitled to the benefit of their bargain, which includes eligibility to enroll in a premium-free plan offering the same or greater coverage value as the one available to them when their rights vested

Lake v. State Health Plan for Teachers & State Emps., 380 N.C. 502, 532, 869 S.E.2d 292, 315 (2022). Finding the case fact-intensive, this Court remanded the case to the trial court for trial to determine if the contract was substantially impaired and if that impairment was reasonably necessary. *Id.* at 533. It was the intent of this Court to narrow the issues and move this case toward a "just resolution." *Id.* at 532, 315. ("Although our decision in this case does not end this controversy, it narrows the issues and, hopefully, moves the parties closer to a just resolution.").

Dissatisfied with this Court's opinion, Defendants Petitioned the Supreme Court of the United States for issuance of a writ of certiorari on 9 June 2022. R pp 108-145. The United States Supreme Court denied Defendants' Petition. R p 146.

Still undeterred, Defendants then filed a Petition for a writ of prohibition with this Court, seeking to have this Court overturn its previous orders and opinion and prohibit the upcoming trial. R pp 152-189. This Court denied that Petition on 18 October 2023. R p 190. The Defendants did not raise any issues related to class certification in their prior petitions to this Court or the United States Supreme Court.

Following additional expert and fact discovery, and working through several logistical hurdles, trial was set by agreement of the parties for 10 March 2025. R pp 198-199. On the eve of trial, 5 February 2025, Defendants filed a slew of motions: (i) a motion to rescind the class certification order or, alternatively, to create subclasses (R pp 210-212); (ii) a motion in limine filed 23 January 2025 to exclude the opinions and testimony of Plaintiffs' Expert Edward Pudlowski (R pp 202-209); and (iii) a second motion for summary judgment (R pp 213-216). Defendants' Motion to Rescind the Class Certification Order was the first time the Defendants had sought to "undo" or modify class certification in the over eight-year period following the trial court's 2016 class certification order. The Defendants' purported basis of this decertification motion was this Court's 2022 Opinion from nearly three years prior.[3]

Each of those motions were denied by the trial court. R pp 234-236 (Decertification Order); R pp 226-229 (Motion in Limine Order); R pp 224-225

[3] Devoid of reality, Defendants contend that this Court, in issuing an opinion in favor of the *class* and finding that a contractual obligation was owed to the *class*, actually created a legal landscape dictating that the class be destroyed. R pp 210-212; Doc. Ex. 1702-1708 (defining "Retirees" as the "class of more than 220,000 former State employees" and ruling in favor of the Retirees). This Court's opinion of course does nothing of the sort and throughout refers and relies upon the already established class.

(Summary Judgment Order). In a last-ditch effort to avoid trial, Defendants now appeal directly to this Court under N.C. Gen. Stat. § 7A-27(a)(4)'s provision for direct appeal for decisions regarding "class action certification under G.S. 1A-1, Rule 23," marking the third time this case has been appealed from the trial court. R p 238-241. In addition to the denial of the Decertification Order, Defendants seek this Court's review of the Motion in Limine Order and the Summary Judgment Order, claiming that such interlocutory orders "address issues inextricably intertwined with the [Decertification Order]" and this Court should therefore exercise "pendent appellate jurisdiction" to consider those interlocutory orders on direct appeal as well. R pp 239-240.

After Defendants informed the trial court they would be filing an immediate appeal of any rulings on the decertification motion, the trial court cancelled the trial pending appellate review. Here, they succeeded where their writ of prohibition failed, by effectively putting a halt to the mutually agreed-upon trial setting. In addition to the ill-sought writ of prohibition by the Defendants and their attempt to have the United States Supreme Court review this Court's 2022 decision, this appeal marks the third appeal made to this Court in this case, which began over thirteen years ago and was a mere month from trial before this latest effort of the Defendants to avoid a "just resolution." *See Lake v. State Health Plan for Teachers & State Emps.*, 380 N.C. 502, 532, 869 S.E. 2d 292, 315 (2022).

ARGUMENT

A. The Appeal Should Be Dismissed Because Defendants Have No Direct Right of Appeal to this Court under N.C.G.S. § 7A-27(a)(4) of a Decertification Order and said Order is Not a Final Order

The propriety of Defendants' appeal first hinges on their assertion of having a direct right of appeal to this Court of the Decertification Order pursuant to N.C.G.S. § 7A-27(a)(4), a provision added by the legislature in 2017. R p 238. That statute provides for a direct right of appeal to this Court of "[a]ny trial court's decision regarding class action *certification* under G.S. 1A-1, Rule 23." (emphasis added). The practical effect of the addition of subsection (a)(4) was to allow defendants to appeal the grant of a class action *certification* motion, which was not previously appealable as a matter of right (unlike denials of class certification motions). *See e.g. Frost v. Mazda Motor of Am.*, 353 N.C. 188, 193 (2000) ("The denial of class certification has been held to affect a substantial right . . . . [H]owever, no order allowing class certification has been held to similarly affect a substantial right such that interlocutory appeal would be permitted.").

That is not what the Defendants attempt to do here. Instead, Defendants filed a motion to decertify or, alternatively, modify the class, over eight years after the class was certified pursuant to Rule 23. Importantly, neither the Decertification Order nor the underlying motion arise under Rule 23. Further, the words "trial court's decision regarding class action certification" have only ever been utilized by North Carolina appellate courts to mean the trial court's initial and actual decision

on whether to grant or deny a motion to certify a class – not to decertify or modify an existing class.

North Carolina courts have consistently held that, in contrast to Federal Rule of Civil Procedure 23,[4] the North Carolina Rule 23 does not authorize a trial court to review and modify a class certification decision (including motions to decertify the class). *See, e.g.*, *Dublin v. UCR, Inc.*, 115 N.C. App. 209, 219, 444 S.E.2d 455, 461 (1994) (citing *Nobles v. First Carolina Communications*, 108 N.C. App. 127, 423 S.E.2d 312 (1992)) ("Clearly, the federal rule contemplates continuing review of the class certification status of an action. [The North Carolina rule] contains no such provision . . . and we will not judicially legislate one."); *Nobles*, 108 N.C. App. at 423 S.E.2d 312 ("[O]ur research reveals no instance where our courts have determined whether there is any continuing review of [class certification]. Contrary to its counterpart in the federal rules . . . Rule 23 contains no provision providing for continuing or subsequent review of this determination."). In *Dublin*, the trial court had ruled that it had "inherent discretionary authority under Rule 23 . . . to review and change, modify, or overrule a prior order on class certification." *Dublin*, 115 N.C. App. at 218, 444 S.E.2d at 460. The Court of Appeals disagreed, based on the language of North Carolina Rule 23, and held that "the trial court was not authorized by our Rule 23 to review and modify" the class action certification order. *Id.* at 219,

[4] Federal Rule of Civil Procedure 23 specifically states: "An order that grants or denies class certification may be altered or amended before final judgment." F.R.C.P. 23(c)(1)(C). North Carolina contains no equivalent language in its Rule 23. *See* N.C.G.S. § 1A-1, Rule 23.

444 S.E.2d at 461. Thus, while a decision to grant or deny certification falls under the authority of Rule 23 and would be subject to direct appeal to this Court, Judge Wilson's decision declining to modify or amend his 2016 class action decision was not a "decision . . . under Rule 23" and is not subject to direct appeal to this Court.

This result is further supported by other plain language in the statute. Specifically, the language "trial court's decision regarding class certification" has been used by North Carolina appellate courts, both before and after the passage of the amended version of § 7A-27, to mean the trial court's decision whether to grant or deny class certification, rather than some panoply of decisions having any relationship to the class action or certification thereof. *See Zander v. Orange Cty.*, 376 N.C. 513, 514, 851 S.E.2d 883, 885 (2020) (referring to the "trial court's decision regarding class certification" to mean the trial court's decision allowing class certification under Rule 23); *Nobles*, 108 N.C. App. at 131, 423 S.E.2d at 315 (same). It does not appear that N.C.G.S. § 7A-27(a)(4) has ever been utilized by a defendant to immediately appeal an order declining to <u>*de*</u>certify a class.

Federal Courts that have considered this issue have determined that denied motions to decertify an existing class are not immediately appealable under the separate federal standards that allow both continuing review and allow for immediate class certification appeals.

> We recognize that Rule 23(c)(1)(C) permits the district court to alter or amend a certification decision. And parties may suggest such changes as the factual record and legal theories develop. All we are saying is that there can be no Rule 23(f) appeal from the denial of such a suggestion. An order that leaves class-action status unchanged from what was

> determined by a prior order is not an order "granting or denying class action certification."

Carpenter v. Boeing Co., 456 F.3d 1183, 1191 (10th Cir. 2006) (gathering and analyzing cases across Federal Circuits). Noting that a party could use decertification motions for unwarranted delay and disruption of existing class litigation and similar to the facts in this case, the Second Circuit in *Carpenter* noted that "[i]f the decision whether or not to certify the class was truly outcome determinative, one would not expect the losing party to continue the litigation for months before launching a new challenge to the ruling. Any value in permitting a belated interlocutory appeal is overridden by the desirability of the district court's proceeding expeditiously." *Id.* at 1191.

Furthermore, Rule 10 of the North Carolina Rules of Appellate Procedure provides that "[i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C. R. App. P. 10(a)(1). Here, in the "Amended Order on Defendants' Motion to Rescind the Class Certification Order or, in the alternative, to Create Subclasses" from which Defendants now seek an appeal, the trial court stated that "[a]t a later date, including at any part of trial, the Court may create subclasses." R pp 222-223. By the language of the order, it is clear that Judge Wilson declined to enter a ruling as to the issue of subclasses and intended to leave it open for further development at trial. Thus, the issue of subclasses is not properly before this Court as Defendants have not obtained a final ruling.

If this Court were to interpret N.C.G.S. § 7A-27(a)(4) to allow immediate appeal of every denied class decertification motion, not only would that lead to abuse,

delay, and fragmented appeals, but also expand the general jurisprudence of the scope of permissible interlocutory appeals, and be a misinterpretation of the plain and clear language set forth in N.C.G.S. § 7A-27(a)(4), which is expressly limited to certification orders. Class certification motions typically proceed only once in a case, are either granted or denied, and under N.C.G.S. § 7A-27(a)(4) can then be immediately appealed before further litigation. Motions for class decertification, on the other hand, are not limited in timing or frequency and as discussed supra are not even allowed under North Carolina law. Allowing a defendant to, at any time, file a class decertification motion and then immediately appeal that ruling to this Court, effectively allows one party to unilaterally disrupt and interminably delay the course of complex litigation. *See e.g. Fleischman v. Albany Med. Ctr.*, 639 F.3d 28, 31 (2d Cir. 2011) (where the Second Circuit Court of Appeals declined to extend FRCP 23 to allow an appeal from denial of a motion to amend class certification sought more than eighteen months after the original certification decision, reasoning that "[c]onstruing the Rule as petitioners urge would be contrary to Rule 23(f)'s aim of providing an opportunity for interlocutory appeal, but confining that opportunity within narrow limits, so as to avoid disruption and delay to the proceedings below. If denial of amendment to an order granting class certification were sufficient to reset the clock for appeal, a litigant could easily circumvent Rule 23(f)'s deadline by filing a motion to amend or decertify the class at any time after the district court's original order, then petitioning for leave to appeal within fourteen days from the denial of that motion."). A defendant could file serial decertification motions, file appeals to this

Court upon denials, and indefinitely avoid a trial. This is precisely what has occurred in this case where the Defendants filed a motion to decertify the class on the eve of a long-scheduled trial and were able to avoid trial by appealing the decertification to this Court. While there are sound policy reasons for allowing both the grant and denial of initial class certification motions to be immediately appealed to this Court, the same policy reasons do not apply to decertification.

Beyond class certification cases, allowing decertification motions to be immediately appealed despite their interlocutory status erodes this Court's considerable jurisprudence in opposition to interlocutory and fragmentary appeals. For example, while appeal of a denial of a motion to dismiss based on sovereign immunity is immediately appealable, should a motion to reconsider that prior order be immediately appealable? A class decertification motion is effectively a motion to reconsider the prior grant of certification. Allowing decertification motions to be immediately appealed in the same way as the original certification motion provides imprimatur for further hijinks in other areas of interlocutory appellate jurisprudence.

The Court should dismiss this appeal in its entirety because a class decertification or modification motion is not immediately appealable and the remainder of Defendants' appeal relies on this incorrect premise.

B. The Appeal of the Summary Judgment and Expert Limine Motion Orders, if Appealable, would be Appealable to the Court of Appeals – not the Supreme Court

Without an avenue by virtue of N.C.G.S. § 7A-27(a)(4), the Defendants have no right of appeal to this Court, including as to the other orders that Defendants attempt

to bootstrap to their decertification appeal. Those other orders are plainly interlocutory, and, even if a "substantial right" could be shown, the appeal of those orders would lie with the Court of Appeals, not the Supreme Court.[5] *See* N.C.G.S. § 7A-27(b)(3) (stating that the appeal from interlocutory orders of a trial court, if appealable at all, lies to the Court of Appeals); *Bailey v. Gooding*, 301 N.C. 205, 209 (1980) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."); *Hyatt v. Town of Lake Lure*, 191 N.C. App. 386, 387 (2008) ("Appeal of an interlocutory order that fails to dispose of all claims against all parties is premature and must be dismissed."); *see also Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 246 N.C. App. 237 (2016) (dismissing the appeal for lack of jurisdiction where the appellant filed their appeal to the Court of Appeals and N.C.G. S. § 7A-27(a)(2) required that appeals from mandatory complex business cases must be appealed directly to the Supreme Court). Defendants' appeal to this Court of the Motion in Limine Order and Summary Judgment Order should be dismissed.

C. A Motion in Limine is not an Appealable Order

"The granting or denying of a motion in limine is not appealable." *Gregory v. Kilbride*, 150 N.C. App. 601, 611, 565 S.E.2d 685, 693 (2002); *see also Kaminsky v. Sebile*, 140 N.C. App. 71, 74, 535 S.E.2d 109, 111 (2000) (citing cases) ("Our appellate courts repeatedly have held that motions in limine are not

[5] As of the date of this filing, Defendants have not filed a petition for writ of certiorari.

appealable.").[6] This is because "[a] trial court's ruling on a motion in limine is preliminary and is subject to change depending on the actual evidence offered at trial." *State v. Hill*, 347 N.C. 275, 293, 493 S.E.2d 264, 274 (1997) (quoting *T&T Dev. Co. v. Southern Nat'l Bank of S.C.*, 125 N.C. App. 600, 602, 481 S.E.2d 347, 348-49 (1997)); *see also Gregory*, 150 N.C. App. at 611, 565 S.E.2d at 693 (stating same). In order for the evidentiary issue to become appealable:

> A party objecting to an order granting or denying a motion *in limine* . . . is required to object to the evidence at the time it is offered at the trial (where the motion was denied) or attempt to introduce the evidence at the trial (where the motion was granted).

Hill, 347 N.C. at 293, 493 S.E.2d at 274 (quoting T&*T Dev. Co.*, 125 N.C. App. at 602, 481 S.E.2d at 348-49 (1997)); *see also Martin v. Benson*, 348 N.C. 684, 685, 500 S.E.2d 664, 665 (1998) ("[A] motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the [movant] fails to further object to that evidence at the time it is offered at trial") (quoting *State v. Conaway*, 339 N.C. 487, 521, 453 S.E.2d 824, 845-46 (1995) (internal quotation marks omitted); *Evans v. Family Inns of Am., Inc.*, 141 N.C. App. 520, 523-524 (2000) (ruling that the evidentiary issues were not properly before the Court of Appeals and would not be addressed because the case was dismissed through summary judgment and the parties never had the opportunity to introduce evidence at trial). The non-appealability of a motion in limine is not affected by the timing of the appeal – i.e.,

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[6] "A motion *in limine* seeks 'pretrial determination of the admissibility of evidence proposed to be introduced at trial,' and is recognized in both civil and criminal trials." *Heatherly v. Industrial Health Council*, 130 N.C. App. 616, 619, 504 S.E.2d 102, 105 (1998) (citing *State v. Tate*, 44 N.C. App. 567, 569, 261 S.E.2d 506, 508 (1980)).

whether post-trial or where the party has sought review immediately from the motion in limine order. *See DOT v. Olinger*, 172 N.C. App. 848, 850–52, 616 S.E.2d 672, 674–75 (2005) (dismissing, as an appeal "from a non-appealable interlocutory order," a pre-trial appeal of an order granting a motion in limine that had been certified pursuant 54(b) by the trial court).

Defendants' motion to exclude Plaintiffs' expert's testimony and report is a motion in limine. *See State v. Tate*, 300 N.C. 180, 182 (1980) (internal citations and quotations omitted) ("A motion in limine is, by definition, a motion made on or at the threshold; at the very beginning; preliminarily. In other words, a motion in limine is a preliminary or pretrial motion."); *see also State v. McGrady*, 368 N.C. 880, 892 (2016) ("Whether expert witness testimony is admissible under Rule 702(a) is a preliminary question that a trial judge decides . . . ."); *Barrett v. Hyldburg*, 127 N.C. App. 95, 101 (1997) (ruling that the trial court's order purporting to exclude certain expert testimony was a motion in limine decision that could be changed once evidence was offered at trial and thus further ruling and a final judgment were required before the matter could be heard by the Court of Appeals.). Thus, the attempted appeal of the Motion in Limine Order is an appeal of the denial of a motion in limine, which is not appealable. Defendants' appeal as to the Motion in Limine Order should therefore be independently dismissed on that basis. Moreover, the primary basis for the Defendants' second motion for summary judgment was that the trial court allegedly should have granted summary judgment on all claims "upon the granting" of Defendants' motion to exclude. R p 214. Thus, at least as to that aspect of the

summary judgment motion, this Court could not consider an appeal of the Summary Judgment Order – notwithstanding the other jurisdictional failings of an appeal of that order – without considering the non-appealable Motion in Limine Order. Defendants' appeal of the Summary Judgment Order should then likewise be dismissed.

D. The Denial of Summary Judgment is Not Immediately Appealable

It is well established that the denial of a motion for summary judgment is interlocutory and not immediately appealable, except in limited circumstances not present in this appeal.[7] *Brown v. Thompson*, 264 N.C. App. 137, 138 (2019). The Defendants seek to appeal the denial of their latest motion for summary judgment and none of the established exceptions apply.[8] Furthermore, as otherwise stated in this motion, this Court in its prior Opinion already ruled upon summary judgment – finding that there is a contract, but that there are genuine issues of material fact as

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[7] North Carolina courts recognize two exceptions to the rule against interlocutory appeals, these include: "first, a party may appeal from an interlocutory order when the order is final as to some claims or parties and the trial court has certified pursuant to Rule 54(b) of the Rules of Civil Procedure there is no just reason to delay the appeal . . . . Second, a party may appeal from an interlocutory order when the order deprives the appellant of a substantial right that would be lost in the absence of an immediate appeal." *Parmley v. Barrow*, 253 N.C. App. 741, 746 (2017). In this matter, the trial court has not issued a Rule 54(b) certification and the issues before this Court on appeal do not affect any substantial rights.

[8] It is important to note that "avoidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal." *Blackwelder v. State Dep't of Human Resources*, 60 N.C. App. 331, 335 (1983). Moreover, "if an appellant's rights may be fully and adequately protected by an exception to the order that could then be assigned as error on appeal after final judgment, there is no right to immediate appellate review." *Yang v. Three Springs Inc.*, 142 N.C. App. 328, 330 (2001) (internal citation omitted).

to whether there was a substantial impairment of that contract or whether the impairment was reasonable and necessary. *Lake v. State Health Plan for Teachers & State Emps.*, 380 N.C. 502, 505 (2022). Given that this Court has already held there are genuine issues of material fact and the current appeal of the summary judgment is from a denial of summary judgment based on this Court's prior Opinion, the appeal of the summary judgment order must be dismissed as it is plainly interlocutory. *See Johnson v. Lucas*, 168 N.C. App. 515, 518-19 (2005) (dismissing the appeal from a partial summary judgment as interlocutory because the Court found that by failing to state any grounds for appellate review and failing to discuss how a substantial right would be affected if the appeal was not heard, the appellant did not meet their burden of proof of showing the Court that the appeal was proper.)

E. The Motion in Limine Appeal and Summary Judgment Appeal Should be Dismissed Because this Court Has Not Recognized Pendent Appellate Jurisdiction and Even if Recognized, Defendants Have Not Met the Requirements for Such Jurisdiction

While Defendants purport to request that this Court invoke "pendent appellate jurisdiction" to hear an appeal of the interlocutory Motion in Limine Order and the interlocutory Summary Judgment Order, this Court has never recognized such jurisdiction, and the Court of Appeals has held that "[o]ur jurisdictional doctrine does not recognize pendent appellate jurisdiction." *State v. Carver*, 277 N.C. App. 89, 857 S.E.2d 539 (2021) ("So, for example, if a trial court denies the State's motion to dismiss based on sovereign immunity—a ruling that is immediately appealable—the State ordinarily cannot appeal the denial of its motion to dismiss on other grounds, even if those other rulings are contained in the same order."). Indeed, in in one of the

few cases invoking N.C.G.S. § 7A-27(a)(4), *Zander v. Orange Cty.*, 376 N.C. 513, 851 S.E.2d 883 (2020), this Court declined to consider the appeal of an interlocutory discovery order that was part of the order granting class certification. *See id.* at 523-524, 851 S.E.2d at 890-891 ("We agree with plaintiffs' position in their motion that defendants' effort to appeal the discovery ruling of the trial court contained in [the class certification] Order is, at this stage in the litigation of the case, premature and hence must be dismissed for lack of appellate jurisdiction."). Here, even if the Court were to determine that the Decertification Order appeal was proper, the Motion in Limine Order and Summary Judgment Order are separate orders altogether, which are clearly interlocutory (and non-appealable). There is no "pendent appellate jurisdiction" to consider such orders.

Further, even if the Court were to entertain invoking some limited version of pendent appellate jurisdiction based on Defendant's assertions that the Motion in Limine Order and the Summary Judgment Order are "inextricably intertwined" with the Decertification Order, Defendants cannot demonstrate that such orders are actually intertwined. The Court of Appeals has, on *occasion*, evaluated whether issues not immediately appealable were "inextricably intertwined" with an issue for which there was an immediate right of appeal in deciding whether or not to consider an appeal of such other interlocutory issues. *See, e.g.*, *Carver*, 277 N.C. App. at 94-96, 857 S.E.2d at 543-44 (considering whether issues were inextricably intertwined and dismissing appeal on issue that was not immediately appealable). Recently, the Court of Appeals has held that the issues that are not immediately appealable must

be outcome determinative on the issues that are appealable as a matter of right in order to be "inextricably intertwined". *See ZP No. 335, LLC v. W. Carolina Univ.*, 917 S.E.2d 517 (N.C. Ct. App., July 16, 2025) (unpublished) (distinguishing a prior appellate case because, there, the determination of whether there was a valid contract was outcome determinative on the immediately appealable issue of sovereign immunity and holding that "because defendants' sovereign immunity defense is not so linked to the other issues in the present case as to affect the outcome, we confine our review to what is properly before us").

Here, these are separate orders involving separate issues. There is no common issue or thread between them. For example, Defendants' motion in limine has nothing to do with the Defendants' decertification motion. Defendants may argue that both rely on this Court's 2022 decision instructing the trial court to analyze each vesting year, but, even if that were the case, they involve different issues. The motion in limine deals with whether to include certain items (e.g., premiums) pursuant to this Court's 2022 decision in evaluating substantial impairment and Plaintiffs' expert's methodology (including whether actuarial valuation is appropriate). Doc. Ex. 1625-1626. The decertification motion, on the other hand, simply asserts that because the 2022 Opinion determined that as a matter of fact the class members vested into plans in place from year to year (and those plans had certain differences) then there is no "common class" or that there should be subclasses for each year. Whether Plaintiffs' expert is allowed to testify and to what extent will not be outcome determinative on whether a class exists. There is no issue to be decided in either the

motion in limine and the summary judgment motion that is outcome determinative for a determination of the decertification motion. Rather, Defendants have concocted this attenuated connection for the true purpose of stopping the trial and rehearing of their interlocutory summary judgment motion at this Court. Such an effort greatly exceeds the scope and intent of N.C.G.S. § 7A—27(a)(4). Thus, if this Court were to determine that the Defendants have a direct right of appeal of the Decertification Order, this Court should nevertheless decline to consider the Motion in Limine Order and Summary Judgment Order.

F. The Defendants Have Waived their Right to Challenge Class Certification

The crux of the Defendants' argument is that this Court's Opinion in March of 2022 created changes to the legal foundation of this case, forming the basis for their Motions to Decertify or Modify the Class. R p 211. Nonetheless, they did not file their motions until February of 2025. *Id.* If at all, these motions should have been filed in 2022. Instead, for nearly three years Defendants continued to engage in discovery, agreed to a trial date and held themselves out as ready for trial up until a one month before trial was scheduled to begin. *See* Doc. Ex. 1301 (wherein Defendants maintain they could not agree to an extension of time due to a "strong[] desire to maintain the trial date of November 11, 2024, which has been set since at least May of 2023."). Defendants cannot offer any valid reason for waiting nearly three years to bring this motion and their efforts in seeking this appeal are clearly an attempt to forestall the inevitable trial and further delay a case that has been ongoing for over thirteen years. Defendants should not be allowed to delay Plaintiffs' day in court any longer and this

case should be resolved on its merits as instructed by this Court in 2022. *See Lake*, 380 N.C. 502, 869 S.E.2d 292 (2022); *see also Veazey v. Durham*, 231 N.C. 357, 364 (1950) ("[A] litigant cannot deprive the Superior Court of jurisdiction to try and determine a case on its merits by taking an appeal to the Supreme Court from a non-appealable interlocutory order of the Superior Court. A contrary decision would necessarily require an acceptance of the paradoxical paralogism that a party to an action can paralyze the administration of justice in the Superior Court by the simple expedient of doing what the law does not allow him to do, i.e., taking an appeal from an order which is not appealable.").

This Court has repeatedly held that the "rules of this Court, governing appeals, are mandatory and not directory." *Reep v. Beck*, 360 N.C. 34, 38 (2005) (quoting *State v. Fennell*, 307 N.C. 258, 263 (1982)). Thus, by blatantly ignoring the rules of appellate procedure, Defendants have effectively waived their right to have these issues heard in this appeal. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp*. Co., 362 N.C. 191, 197 (2008)(internal citations omitted) ("The appellant's compliance with the jurisdictional rules governing the taking of an appeal is the linchpin that connects the appellate division with the trial division and confers upon the appellate court the authority to act in a particular case. . . . A jurisdictional default, therefore, precludes the appellate court from acting in any manner other than to dismiss the appeal."); *see also Veazey*, 231 N.C. at 364 ("an appeal to the Supreme Court from a non-appealable order of the Superior Court confers no power on the Supreme Court to decide the appeal, and that the Supreme Court must dismiss

the appeal because it cannot properly exercise a jurisdiction which it does not possess."). While the Defendants have delayed this trial interminably through their procedural antics, the members of the retiree class are dying at an ever-increasing rate such that many members of the class will never see the benefit of their bargain as promised by the State and upheld by this Court in the 2022 Opinion. By waiting nine years to raise issues with the class certification, Defendants have waived the right to now appeal such matter and this appeal should be dismissed in its entirety.

CONCLUSION

For all the foregoing reasons, this Court should dismiss the Defendants' appeal in its entirety and return this matter to the trial court for the long-awaited trial on the merits as it already did on 11 March 2022.

This the 23rd day of December 2025.

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CERTIFICATE OF SERVICE

I hereby certify that the Plaintiffs-Appellees' Motion to Dismiss Appeal has been served on counsel for Defendants-Appellants by email and by sending it first-class mail as follows:

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