165A21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

ROCKY DEWALT, ROBERT PARHAM, ANTHONY MCGEE, and SHAWN BONNETT, individually and on behalf of a class of similarly situated persons

Plaintiffs-Appellants,

v.

CASANDRA S. HOEKSTRA, in her official capacity as interim Secretary of the North Carolina Department of Public Safety, and the NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY,

Defendants-Appellees.

From Wake County
19 CVS 14089

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DEFENDANTS-APPELLEES' BRIEF

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ISSUES PRESENTED

This appeal presents the following issue:

I. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

Although the parties agree that the following issue is not necessary to disposition of this appeal, the parties' briefing also addresses:

II. WHETHER CONDITIONS-OF-CONFINEMENT CLAIMS SHOULD BE EVALUATED UNDER THE SAME STANDARD THAT APPLIES TO OTHER CLAIMS BROUGHT UNDER ARTICLE I, SECTION 27 OF THE NORTH CAROLINA CONSTITUTION.

INTRODUCTION

Plaintiffs are four individuals in the custody of the North Carolina Department of Public Safety ("the Department"). (R pp. 6-9) They have initiated a putative class action suit in Superior Court and allege that the Department's policies and practices governing five of its restrictive housing classifications amount to "solitary confinement" and, further, that the Department has violated their right to be free from "cruel or unusual punishment" as provided for in Article I, Section 27 of the North Carolina Constitution. (R pp. 4-43) In seeking relief based upon these allegations, Plaintiffs requested that the trial court certify a class of persons in the Department's custody who are, or will be, subjected to the above-referenced five restrictive housing classifications. (R pp. 4, 42, 92-398)

Concerning the relief Plaintiffs seek, they make clear, for first time, on appeal what was unclear in both their complaint and their motion for class certification. The relief and legal theory advanced in Plaintiffs' complaint and their motion for class certification, appeared to argue that restrictive housing is never constitutionally permissible. Instead, on appeal, Plaintiffs concede that they are not seeking to eliminate the practice of restrictive housing by the Department altogether, or to have the entirety of the Department's use of such confinement declared unconstitutional. In fact, neither the legal authority cited by Plaintiffs, nor any other, supports such relief.

Instead, Plaintiffs assert they are seeking equitable relief, which would require the Department to use restrictive housing only as a "last resort" and for the "shortest time possible." (Pls.' Br. p. 3) However, the vague parameters of Plaintiffs' desired relief further crystallizes the problem with classwide adjudication in this case. Injunctive relief that requires confinement as a "last resort" and for the "shortest time possible" will necessarily require an individualized, circumstances-specific analysis for every incarcerated person. In addition, the prospective nature of Plaintiffs' desired relief threatens to embroil the Court in day-to-day prison management indefinitely. Nonetheless, contrary to what the trial court found and concluded, Plaintiffs contend, that such a fact-intensive and person-specific question is amenable to classwide adjudication and relief. (Pls.' Br. p. 3)

As the trial court correctly found, however, each of the five challenged restrictive housing classifications, in which Plaintiffs' potential class members are or will be placed, serve different penological purposes, have various procedural safeguards, vary in duration of stay, and have differing attendant conditions of confinement. There are also wide variations in the reasons the Department places individuals in those restrictive housing settings. Moreover, the duration of an individuals' stay in restrictive housing can be affected by and vary greatly based upon his or her own individual actions. In fact, the duration of time the Department housed the named Plaintiffs in various types

of restrictive housing often exceeded the average stay in those settings, owing to those Plaintiffs' individual and varied behavior. Additionally, the named Plaintiffs are also a part of a small percentage of incarcerated persons who repeatedly cycle in and out of restrictive housing.

It follows from the trial court's findings that the point at which restrictive housing may become what Plaintiffs term a "last resort," and can be imposed only for the "shortest time" possible, will vary substantially from individual to individual and from classification to classification. Similarly, the period of time a person can spend in restrictive housing before it becomes "cruel or unusual punishment" may vary from one situation to another, depending on the duration and the attendant conditions of that confinement. These variations, along with others found by the trial court, and the atypical experiences of the named Plaintiffs, firmly defeated Plaintiffs' certification effort.

Stated differently, even if North Carolina's conditions of confinement were "cruel or unusual" for some members of the class—which they are not—but not for others, then the prerequisites for class certification are not satisfied. At the very least, a class action, particularly one brought by Plaintiffs' proposed class, is not a superior method of adjudication, a finding also made by the trial court. Accordingly, the trial court did not abuse the broad discretion our law grants it in denying class certification in this case.

Nor did the trial court err in deciding what standard applies to a conditions-of-confinement claim brought under the "cruel or unusual punishment" provision in Article I, section 27 of our state Constitution. Importantly, the trial court's determination in this regard was separate and apart from the bases upon which it denied certification, and this Court can and should address the merits of Plaintiffs' appeal from that order without reaching the merits of the trial court's finding on the applicable standard. However, if the Court does reach the issue of the standard, the standard that the trial court determined governed Plaintiffs' "cruel or unusual punishment" claims, the Eighth Amendment's deliberate indifference standard, is dictated by this Court's case law and the plain language of Section 27.

This Court should affirm the trial court's denial of certification, and in doing so, it need not decide what standard governs a condition of confinement claim brought under our state Constitution. However, if the Court chooses to make that determination and correctly concludes that the standard is indeed one of deliberate indifference, the evidence in this case even more firmly supports the conclusion that the trial court did not abuse its discretion in denying Plaintiffs' request for class action certification.

STATEMENT OF THE CASE

Plaintiffs Rocky Dewalt, Robert Parham, Anthony McGee, and Shawn Bonnett filed their putative class action complaint in Superior Court, Wake

County, on 16 October 2020, against Defendants, the Department and its Secretary.[1] (R pp. 4-43) Defendants filed their answer on 21 January 2021. (R pp. 44-84)

On 24 April 2021, then Chief Justice of this Court, the Honorable Cheri L. Beasley, ordered this case designated as an exceptional case under Rule 2.1 of the General Rules of Practice for the Superior and District Courts. (R p. 85) The Chief Justice also appointed the Honorable James Edward Hardin, Jr. as the presiding Superior Court judge. (R p. 85)

Plaintiffs moved for class certification on 24 April 2020. (R pp. 92-308) Thereafter, and pursuant to the Superior Court's initial case management order, Plaintiffs requested discovery related to their motion and submitted the resulting information in support of that motion. (R pp. 89-90, 399-425) Defendants filed their response to Plaintiffs' motion on 12 August 2020. (R pp. 594-972)

Following a 1 December 2021 hearing at which both parties presented arguments, the trial court denied Plaintiffs' motion for class certification in an order entered 22 February 2021. (R pp. 973-1008) Plaintiffs noticed a timely appeal of the trial court's order to this Court. (R pp. 1009-11)

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[1] At the time Plaintiffs filed their lawsuit, the Secretary of the Department was Erik Hooks, who has since retired. The current interim Secretary is Casandra S. Hoekstra, and her name has been substituted for Erik Hooks in the caption of this case. See N.C. App. P. 38(c).

Plaintiffs filed their brief in this Court on 2 July 2021. In addition, three groups, a collection of law professors and practitioners, the North Carolina NAACP, and a collection of professors and practitioners of psychiatry, psychology, and medicine, have filed amici briefs supporting Plaintiffs' position.[2]

STATEMENT OF FACTS

The majority of the facts relevant to this appeal are contained in the findings of fact made by the trial court and other evidence referenced by the court in its order denying class certification. (See R pp. 973-1008) Additional relevant facts are discussed in detail with citations to the Record in the Argument section below.

Briefly, as noted supra, Plaintiffs sought certification of a class including all current and future individuals assigned to one of five of the Department's restrictive housing classifications. (R p. 976 ¶ 8) Those five classifications are Restrictive Housing for Disciplinary Purposes ("RHDP"), Restrictive Housing for Administrative Purposes ("RHAP"), Restrictive Housing for Control Purposes (RHCP), High Security Maximum Control ("HCON"), and the first two phases of the Rehabilitative Diversion Unit ("RDU"). (R p. 976 ¶ 8)

[2] Any evidence which Amici rely upon to support their position that is not part of the Record is not properly before the Court for consideration and should be disregarded.

The totality of the record evidence presented below by the Department indicates that the decision to place a particular individual in any of the challenged restrictive housing settings is highly dependent on the particular circumstances and the specific person at issue. RHDP is exclusively employed as a disciplinary sanction, while RHAP is used as a short-term assignment for a variety of administrative reasons, none of which are disciplinary. (R pp. 654; 663-64; 717-19; 737; 776-79; 977 ¶ 14; 978 ¶ 16) RHCP is reserved for use as a manner to manage an incarcerated person who, through some type of behavior, has demonstrated a risk to the orderly operations of a facility. (R pp. 676-77; 800-04; 976 ¶ 9) HCON is used for incarcerated persons who pose the most serious threat to the safety of staff or other incarcerated persons or to the security and integrity of facilities and who require more security than can be afforded in other restrictive housing settings. (R pp. 690-91; 805-10; 977-78 ¶ 15) Lastly, RDU is a phased program specifically designed to move people out of long-term restrictive housing setting by providing structured programming intended to result in consistently improved behavior. (R pp. 811-913; 706-07)

The above-discussed restrictive housing assignments share some characteristics. However, as discussed below with citations to the Record provided, each of these housing assignments serves different penological purposes, has different procedural safeguards, and has varying maximum durations of stays. Additionally, the conditions of confinement, including

differences in visitation, recreation, and the ability to interact with other incarcerated individuals, vary among the restrictive housing assignments.

Additionally, the reason any particular person is placed in any of these five varying categories of restrictive housing is person and circumstance specific. To that end, there is also a wide variation in the average length individuals spend in each of the different restrictive housing settings. Between October 16, 2018 and October 1, 2019, for example, the 12-month period preceding the initiation of this lawsuit, the average length of stay in RHAP was 8 days (R p. 655 ¶ 16), in RHDP was 11 days (R p. 665 ¶ 20), in RHCP was 131 days (R p. 682 ¶ 40), in HCON was 181 days (R p. 696 ¶ 37), and in RDU was 12 to 14 months (R p. 715 ¶ 56).

Consistent with the person-specific nature of restrictive housing determinations, the named Plaintiffs are part of a small percentage of incarcerated persons who repeatedly cycle in and out of restrictive housing. (R pp. 930-31, 936-39, 943-45, 949-51, 955-56, 960-61, 965-66, 970) The duration of time the named Plaintiffs were housed in the various types of restrictive housing often exceeded the average stay in those settings. (See R pp. 655, 665, 682, 696, 715)

In 2015, the Department voluntarily partnered with the Vera Institute of Justice to assess the Department's restrictive housing practices, as they existed between May 2015 and 2016. (R p. 317) The report issued by the

institute, commonly referred to as the Vera Report, "outlined the findings of that assessment and provide[d] recommendations to the Department on how to safely reduce its use of restrictive housing." (R p. 317) The Department has since revised several of the policies and practices governing its restrictive housing classifications, some more than once. (R pp. 323-24, 735-60, 776-810) Only one month after Vera concluded its study, the Department's restrictive housing population was down by ten percent. (R p. 321) Vera "commend[ed the Department] on the steps it h[ad] already taken to reform its use of restrictive housing" and expressed it was "confident" that the Department would continue to reform its use. (R pp. 313, 314)

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED PLAINTIFFS' MOTION FOR CLASS CERTIFICATION.

Standard of Review

"[T]he touchstone for appellate review of a Rule 23 order . . . is to honor the 'broad discretion' allowed the trial court in all matters pertaining to class certification[.]" Frost v. Mazda Motor of Am., 353 N.C. 188, 198, 540 S.E.2d 324, 331 (2000) (citation omitted) (alteration in original). Consequently, this Court reviews orders denying class certification to determine if the trial court abused its discretion. Beroth Oil Co. v. N.C. Dep't of Trans., 367 N.C. 333, 337, 757 S.E.2d 466, 470 (2014). "[T]he test for abuse of discretion is whether a

decision is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." Id. at 338, 757 S.E.2d at 471 (cleaned up). The trial court's findings of fact are binding on appeal if they are supported by competent evidence. Id. The trial court's conclusions of law, however, are reviewed de novo. Id.

Discussion of Law

A party seeking to bring a class action must satisfy the requirements set forth in Rule 23 of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, R. Civ. P. 23(a) (2019). Foremost among those requirements, Plaintiffs "must establish the existence of a class."[3] Beroth Oil, 367 N.C. at 336, 757 S.E.2d at 470 (quoting Crow v. Citicorp Acceptance Co., 319 N.C. 274, 282, 354 S.E.2d 459, 465 (1987)). To show that a class exists, Plaintiffs must demonstrate that each member has "an interest in either the same issue of law or of fact, and that [the] issue predominates over issues affecting only individual class

[3] This Court has not yet clarified the standard that a plaintiff must satisfy in establishing the existence of a class. Below, the trial court applied a preponderance of the evidence standard, relying on a decision of the North Carolina Business Court. (R p. 989 ¶ 29, citing Hefner v. Mission Hosp., Inc., 2014 NCBC 64, 10 (2014)) Plaintiffs do not challenge the trial court's decision, and, in any event, a preponderance-of-the-evidence standard is the prevailing view in the federal courts. See, e.g., Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011); W. Rubenstein Newberg on Class Actions § 7:21 (5th ed. 2011, updated 2021) (indicating that preponderance of the evidence is the standard trending among the federal courts).

members." Crow, 319 N.C. at 277, 354 S.E.2d at 462. "'[However, a] common question is not enough when the answer may vary with each class member and is determinative of whether the member is properly part of the class.'" Blitz v. Agean, Inc., 227 N.C. App. 476, 479, 743 S.E.2d 247, 249 (citation omitted), disc. review denied, 367 N.C. 225, 747 S.E.2d 547 (2013).

In addition to showing the existence of a class, class action plaintiffs must also establish the following:

> (1) the named representatives must establish that they will fairly and adequately represent the interests of all members of the class; (2) there must be no conflict of interest between the named representatives and members of the class; (3) the named representatives must have a genuine personal interest, not a mere technical interest, in the outcome of the case; (4) class representatives within this jurisdiction will adequately represent members outside the state; (5) class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to all members of the class.

Faulkenbury v. Teachers' & State Emps.' Ret. Sys. of N.C., 345 N.C. 683, 697, 483 S.E.2d 422, 431 (1997).

This Court, moreover, has "caution[ed]" that these prerequisites are not to be considered "all-inclusive[.]" Crow, 319 N.C. at 282 n.2, 354 S.E.2d at 465 n.2; accord Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp., 369 N.C. 202, 212, 794 S.E.2d 699, 708 (2016). Thus, even if Plaintiffs can satisfy the above-noted criteria, that does not end the trial court's inquiry into whether to certify a class. In instances where plaintiffs do meet the above prerequisites,

"it is left to the trial court's discretion 'whether a class action is superior to other available methods for the adjudication of [a] controversy.'" Beroth Oil, 367 N.C. at 337, 757 S.E.2d at 470 (quoting Crow, 319 N.C. at 284, 354 S.E.2d at 466). Ultimately, "[t]he usefulness of the class action device must be balanced, [] against inefficiency or other drawbacks." Crow, 319 N.C. at 284, 354 S.E.2d at 466.

The trial court found that Plaintiffs' efforts to satisfy these requirements fell short. That holding was based on three independent determinations, any one of which was sufficient to bar Plaintiffs from proceeding as a class, and all three of which were well supported by competent record evidence.

First, the trial court found and concluded that Plaintiffs failed to demonstrate a predominating common issue, on two separate bases, as explained below. Second, the trial court found and concluded that the named Plaintiffs did not adequately represent the interests of the purported class. Third, the trial court, in its discretion, found and concluded that even if Plaintiffs had satisfied the statutory requirements for certification under Rule 23, a class action was not the superior method of adjudication. All of these conclusions were based on competent record evidence, and, thus, the trial court did not abuse its discretion in reaching them. Therefore, this Court should affirm the trial court's order denying Plaintiffs' motion for class certification.

A. The Record Evidence Below Supports the Trial Court's Determination That Plaintiffs Failed to Demonstrate the Existence of a Class Because They Did Not Establish a Predominating Common Issue.

Ignoring clear law that places the burden on Plaintiffs to establish that a class exists by presenting evidence of a common predominating issue, Plaintiffs appear to argue that class-wide issues naturally predominate in *any* case where a plaintiff seeks injunctive relief for the same type of harm. This argument is specious, and it explains why Plaintiffs cast the widest net possible, grouping all present and future restrictive housing inmates into one amorphous and overly broad category. As the trial court correctly recognized, in doing so, Plaintiffs "presented insufficient evidence connecting" the various challenged conditions to the alleged harm and "ignore[d] fundamental differences and other relevant factors[.]" (R p. 990 ¶ 30) Ultimately, the trial court found that Plaintiffs' effort to prove commonality failed in at least two discrete respects.

First, Plaintiffs' attempt to carry their burden of establishing a predominating common issue by relying on allegations of universal risk and seeking uniform injunctive relief are insufficient. Moreover, as the trial court found, Plaintiffs did not present any persuasive evidence to support their assertion that the specific challenged policies in North Carolina prisons created some universal risk to the purported class. Instead, Plaintiffs relied on

several articles and studies to support that assertion. The trial court correctly found these authorities unpersuasive to establish commonality, and so too should this Court.

Second, the record below demonstrates that Plaintiffs overlooked and discounted the wide variations among the challenged restrictive housing assignments, and their application to putative class members. These factors include the penological interests served by the various housing assignments, the procedural safeguards associated with each, the duration applicable to the various housing assignments, and the attendant conditions of each type of assignment. The trial court correctly determined that these significant differences across the challenged housing assignments undermined Plaintiffs' efforts to establish commonality.

1. Plaintiffs Did Not Present Sufficient Evidence of a Uniform Risk of Harm.

The trial court did not err or abuse its discretion in rejecting Plaintiffs' attempt to establish a predominating common issue by simply alleging the Department's system-wide policies and practices subject them to unconstitutional conditions of confinement.

Plaintiffs specifically challenge the trial court's finding that they "failed to provide sufficient evidence connecting the Department's practices and policies to the alleged similar harm or risks of harm." (Pls.' Br. p. 41, quoting

R p. 993 ¶ 32) Plaintiffs argue that such a finding is inappropriate at the class certification stage because Rule 23 does not require the trial court determine whether they can prevail on their claims. This argument misrepresents the trial court's analysis.

As the trial court pointed out, "[t]o satisfy the requirement of a predominating common issue, Plaintiffs focus on the alleged risk of harm, arguing that 'Defendants' statewide policies and practices put all class members at risks of similar harm, regardless of class members' individual circumstances.'" (R p. 992 ¶ 32, quoting Pls.' Class Cert. Br. p. 24) Thus, in context, the trial court's finding was made in support of the court's conclusion that Plaintiffs had not established a predominating common issue. (R p. 993 ¶ 32) Accordingly, the trial court correctly concluded that Plaintiffs' attempt failed in two respects: (1) Plaintiffs' systemic allegations and a request for uniform injunctive relief, alone, are insufficient to establish a common issue; and (2) Plaintiffs presented no evidence even tending to suggest that Defendants' challenged practices caused the alleged harm to the purported class.

a. Plaintiffs' System-Wide Allegations and Uniform Request for Relief Cannot, On Their Own, Establish Commonality.

Plaintiffs contend that the trial court committed error because it "failed to acknowledge that institutionalized plaintiffs may seek broad systemic relief

when faced with systemic risks of harm." (Pls.' Br. p. 3) Plaintiffs' position is that to show entitlement for class certification, putative class members need only allege a broadly defined constitutional violation, characterize that alleged violation as being system-wide, and seek amorphous system-wide injunctive relief. This is incorrect.

As noted supra, this Court has long interpreted Rule 23 to require plaintiffs seeking class certification to establish the existence of a class, which necessarily requires plaintiffs to demonstrate that each member has "an interest in either the same issue of law or of fact, and that [the] issue predominates over issues affecting only individual class members." Crow, 319 N.C. at 277, 354 S.E.2d at 462 (emphasis added). Moreover, North Carolina law has long granted trial courts "broad discretion" to deny class action certification, even if plaintiffs meet all prerequisites, where a class action is not "superior to other available methods for the adjudication of [a] controversy." Crow, 319 N.C. at 284, 354 S.E.2d at 466. No exceptions to these requirements exist in North Carolina's Rule 23 or this Court's case law.

i. Plaintiffs' Reliance on Dukes is Misplaced.

Plaintiffs rely on the U.S. Supreme Court's decision in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) to support their contention that "[p]redominance and superiority are self-evident[,]" because the purported class seeks "indivisible relief from statewide policies, which will benefit the

entire class at once." (Pls.' Br. p. 23, citing Dukes, 564 U.S. at 362-63). This argument misunderstands Dukes.

As a starting point, the portion of Dukes upon which Plaintiffs rely concerned the requirements for a very specific type of class action authorized by a part of federal Rule of Civil Procedure 23, which our legislature has not included in the state analog. Federal Rule 23(b)(2) exempts plaintiffs from establishing predominance of their common issue and superiority of the class action mechanism, where they seek certification of a class in which "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). Neither North Carolina Rule 23 nor this Court's case law authorizes such an exception to the predominance and superiority requirements.

Even if North Carolina recognized an exception similar to the one in federal Rule 23(b)(2), Plaintiffs' certification effort would still fall short. To satisfy Rule 23(b)(2), a plaintiff must show that "a single injunction or declaratory judgment would provide relief to each member of the class," meaning the conduct the plaintiff seeks to enjoin or have declared unlawful can actually be "'enjoined or declared unlawful only as to all of the class members or as to none of them.'" Dukes, 564 U.S. at 360 (quoting Richard A. Nagareda, Class Certification in the Age of Aggregate Proof, 84 N. Y. U. L. Rev.

97, 132 (2009)); see also Jennings v. Rodriguez, 138 S. Ct. 830, 851-52 (2018). This is because federal Rule 23(b)(2) "does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant." Dukes, 564 U.S. at 360.

As the U.S. Supreme Court has recognized, the requirement that plaintiffs present a common question of law or fact for certification, is "easy" to misinterpret, since '[a]ny competently crafted class complaint literally raises common questions'." Id. at 349 (citation omitted). In Dukes, the Court explained, "the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once." Id. at 350. Indeed, "precedent [on the issue of commonality under federal rule 23] does not hold that utterly threadbare allegations that a group is exposed to illegal policies and practices are enough to confer commonality." Parsons v. Ryan, 754 F.3d 657, 683 (9th Cir. 2014). On the topic, the Fifth Circuit cautioned that "mere allegations of systemic violations of the law . . . will not automatically satisfy Rule 23(a)'s commonality requirement[.]" M.D. v. Perry, 675 F.3d 832, 844 (5th Cir. 2012) (citations omitted) (alteration in original).

ii. The Other Cases Cited by Plaintiffs Do Not Support their Position Regarding System-Wide Challenges.

Plaintiffs cite other federal class action cases in their brief, including cases where plaintiffs challenged solitary confinement, in which federal courts dismissed the relevance of individual inquiries in granting class action certification. Contrary to Plaintiffs' contentions, these decisions lend no support to their argument that the trial court erred in failing to recognize the "vital distinction between system-wide suits seeking injunctive relief and individual suits." (Pls.' Br. p. 26)

The decision in Wilburn v. Nelson, 329 F.R.D. 190, 193 (N.D. Ind. 2018), concerned the certification of classes which, unlike the potential class here, consisted of a very distinct and discrete group of incarcerated persons, that group being "detainees under the age of 18 years old who have been held or will be held in any form of solitary confinement."

In Parsons v. Ryan, 754 F.3d 657, a three-judge panel of the Ninth Circuit did conclude there was no abuse of discretion in the district court's certification of a subclass of prisoners under Rule 23(b)(2) subjected to, or who will be subjected to, isolation in certain housing units in the Arizona Department of Corrections ("ADC") for twenty-two or more hours a day. This subclass was certified within a primary class, which consisted of "[a]ll prisoners who are now, or will in the future be, subjected to the medical, mental

health, and dental care policies and practices of the ADC." Parsons, 754 F.3d at 672 (alteration in original). The Ninth Circuit found that commonality was satisfied based solely upon the alleged exposure to harm that resulted from the same "specified statewide ADC policies and practices." Id. at 678.

There are several facts that distinguish Parsons, including that, unlike in Parsons, Defendants here did not take the position that Eighth Amendment claims, or similar state constitutional claims, can never be the subject of a class action. See id. at 675-76. Also, unlike Plaintiffs in the present case, the plaintiffs in Parsons presented a wealth of evidence, specific to the ADC, to support their request for class certification, including expert reports. Id. at 669. In addition, Parsons was an extreme case, where the subclass challenging the prison system's use of solitary confinement arose in the context of wider litigation regarding the medical, mental health, and dental care the prison system provided.[4]

More importantly, while the federal district courts have certainly certified other system-wide class actions, the position the Ninth Circuit took in Parsons appears to be somewhat unique in its approval of such a sweeping,

[4] As Plaintiffs note, the United States Supreme Court recently denied a petition for certiorari review in Faust v. B. K. ex rel. Tinsley, 140 S. Ct. 2509 (2020), in which the petitioner was seeking to reverse the Ninth Circuit's class action jurisprudence based in Parsons. This denial of certiorari, however, "imports no expression of opinion upon the merits of the case." United States v. Carver, 260 U.S. 482, 490 (1923).

system-wide Eighth Amendment class action challenge. Cf. Parsons v. Ryan, 784 F.3d at 573-78 (Ikuta, J., dissenting from denial of reh'g en banc joined by five other judges) (detailing why the dissent from denial of rehearing en banc concluded Parsons was wrongfully decided, including that, contrary to what the Parsons panel concluded, "exposure alone does not give rise to an Eighth Amendment claim").

Federal courts outside the Ninth Circuit have rejected arguments based on or akin to the reasoning in Parsons, and have refused to adopt the opinion's reasoning as a model for class certification or to certify a class where similar circumstances existed. For example, citing the dissent from rehearing en banc in Parsons, a federal district court in Michigan denied class certification in an Eighth Amendment challenge to the provision of prison dental services, "[g]iven that a class of 19,000 prisoners likely encompasses prisoners whose risk of sustaining serious dental harm is very low and prisoners whose risk of sustaining serious dental harm is very high[.]" Dearduff v. Washington, 330 F.R.D. 452, 467 (E.D. Mich. 2019).

Of particular note is the recent decision of the federal district court in Sabata v. Neb. Dep't of Corr. Servs., 337 F.R.D. 215 (D. Neb. 2020). In that case, plaintiffs from different Nebraska correctional facilities brought a class action alleging, among other things, that the state's correctional department's provision of healthcare services violated the Eighth Amendment. Id. at 223.

The district court in Sabata denied the plaintiffs' motion for certification of a class and two subclasses. In so doing, the court rejected the plaintiffs' reliance on Parsons concluding the plaintiffs had not established commonality. Id. at 265-66. According to the district court, "the Eighth Circuit has never interpreted Rule 23(a) as broadly as the Ninth Circuit did in Parsons." Id. at 266.

The district court in Sabata disagreed with Parsons that it was unnecessary to examine the application of prison policy "to individual inmates and the effect it has on them," believing instead that to do so was the only way to determine, for instance, "whether a risk of harm is substantial." Id. The district court found that "it would be impossible to determine the effect of a policy or practice in a vacuum devoid of actual inmates with real medical needs[,] and that "[u]nder the Ninth Circuit's logic [in Parsons], almost any disparate group of plaintiffs could be certified as a class by reducing the relevant inquiry to an oversimplified question of 'legality' and ignoring the pesky facts and details that might differentiate class members." Id.

That is the exact logic of the position taken by the "disparate group of plaintiffs" in the present case concerning the "pesky facts" here. Id. And, like the district court in Sabata, the trial court below properly rejected Plaintiffs' logic. This is because "[g]eneralized policy and practice allegations," like the ones Plaintiffs relied upon, "do not substitute for the kind of specific legal and

factual showings required by Rule 23." Stevens v. Harper, 213 F.R.D. 358, 378 & 379 (E.D. Cal. 2002).

Plaintiffs rely heavily on a federal magistrate judge's recent decision to certify a class action challenging solitary confinement in Davis v. Baldwin, No. 3:16-CV-600-MAB, 2021 U.S. Dist. LEXIS 110558 (S.D. Ill. June 14, 2021). That case, however, is distinguishable on three significant grounds.

First and foremost, the class certified in Davis was a federal Rule 23(b)(2) class, and therefore, the plaintiffs did not have to show predominance or superiority. Second, to establish commonality and the other prerequisites for certification, the plaintiffs in Davis, unlike Plaintiffs in this case, presented a wealth of evidence in support of their motion for certification, including a report from two experts who had conducted site visits at state correctional facilities and who spoke with several incarcerated individuals. Id. at *7-*47. Lastly, in Davis, the magistrate judge concluded that many of the differences cited by the defendant in an effort to defeat commonality did not themselves flow from the corrections department's policies and practices. Id. at *62-*63. Moreover, the differences identified by the defendants in Davis were superficial and collateral, not fundamental. See id. In contrast, the differences found by the trial court here, such as penological interests, procedural safeguards, duration of stay, and attendant conditions, like visitation, all flow

from the Department's policies and practices and are anything but collateral. (R pp. 994-96)

In sum, contrary to what Plaintiffs contend, simply alleging system-wide unconstitutional conditions of confinement does not, alone, establish commonality sufficient for class certification. Plaintiffs assert that federal courts regularly certify class actions in which plaintiffs seek injunctive relief from system-wide policies and practices irrespective of class members' individual characteristics. To support this argument, Plaintiffs primarily rely on the U.S. Supreme Court decisions in Brown v. Plata, 563 U.S. 493 (2011) and Hutto v. Finney, 437 U.S. 678 (1978). A careful examination of these cases, however, provides no support for the type of system-wide and overly broad conditions-of-confinement class action Plaintiffs wish to pursue here.

Even if Plata and Hutto can be read to sanction system-wide class-action suits, neither case supports Plaintiffs' argument. This is because neither concerned plaintiffs' burden in seeking class certification, nor did they in any way relieve plaintiffs of that burden. Rather, in both Plata and Hutto, the U.S. Supreme Court was concerned only with the validity of the remedy imposed. Indeed, the portion of Plata upon which Plaintiffs rely in their brief discussing system-wide conditions-of-confinement suits is mere dicta. 563 U.S. at 505 n.3. As such, in neither Plata nor Hutto, did the U.S. Supreme Court authorize certification of "institutional reform Eighth Amendment claim[s]" where

plaintiffs otherwise cannot establish the requirements for class certification. Parsons v. Ryan, 784 F.3d at 578 (Ikuta, J., dissenting from denial of reh'g en banc joined by five other judges).

b. Plaintiffs Did Not Develop Sufficient Evidence to Support Their Assertion of Systemic Risk.

The trial court further concluded that Plaintiffs had failed to "present[] sufficient evidence connecting the challenged practices and policies to actual harm or risks of harm." (R pp. 990 ¶ 30, 991 ¶ 32, 9993 ¶ 36, 1004 ¶ 57) Instead, Plaintiffs relied upon four studies. (R pp. 170-269, 309-98, 991) Two of these studies did not concern the Department's restrictive housing practices, but rather those of other correctional systems. They were, accordingly, properly discounted by the trial court. (R pp. 181-269, 991 ¶32, 992 ¶ 35) The other two studies offer no support for the assertion that the Department's policies and practices somehow cause or expose all members of the purported class to a risk of harm. (R pp. 170-180, 309-398) They, too, were appropriately discounted by the trial court.

i. A Correlational Study Was Insufficient to Establish Universal Risk of Harm.

One of the two documents that does relate to North Carolina prisons does not actually analyze any particular policy or practice of the Department. (R pp. 170-180) Instead, it is merely a correlational analysis – as is made evident by the title of the article: "*Association* of Restrictive Housing During Incarceration

with Mortality After Release." (R p.170 (emphasis added)) The article "suggests that exposure to restrictive housing is *associated* with an increased risk of death during community reentry." (R p.170 (emphasis added)) Importantly, as the authors of the article themselves point out, the study had limitations, and other factors, such as health conditions, the cause of restrictive housing, and more, "may increase risk of mortality" following release from incarceration. (R pp. 177-78) Because this article was limited to observational data, it could not form conclusions of causation. Simply put, correlation is not causation. Accordingly, this report could provide only tenuous support for the notion that restrictive housing causes (or even contributes to) an increase in the risk of post-release mortality. For that reason, it was properly rejected by the trial court.

ii. The Vera Report Was Insufficient Evidence of Universal Risk of Harm.

The only other document offered by Plaintiffs that relates to North Carolina prisons was the report issued by the Vera Institute of Justice ("Vera Report"). (R pp. 309-98) As the trial court rightly recognized, the Vera Report is not a repudiation of the Department's restrictive housing policies and practices. In fact, the Vera Report "commend[s the Department] on the steps it has already taken to reform its use of restrictive housing and offer[ing] recommendations that will further its efforts to safely reduce that use." (R

p.313) The report continues: "[a]s the North Carolina Department of Public Safety continues implementation of current and future reforms, Vera is confident that the department will capitalize on its strengths, learn from the experience of others in the field, and use this report to facilitate continued reforms to the use of restrictive housing[.]" (R p. 314) Thus, the Vera Report itself undercuts Plaintiffs' attempt to use it as evidence of unconstitutional policies and practices. For that reason, as the trial court rightly found, the report cannot lend any support to Plaintiffs' assertion that the Department's restrictive housing policies create some universal risk of harm.

Additionally, the Vera Report is an assessment of the Department's restrictive housing practices, as they existed between May 2015 and 2016. The Vera Report analyzed data from June 2014 to June 2015 and reviewed five[5] polices, all but one of which have since been revised, some more than once. (R p. 321) Accordingly, the trial court's finding that the Vera Report was insufficient to support Plaintiffs' assertion of universal risk is well supported by the record evidence.

More significantly, the Department's decision to request that the Vera Institute evaluate its restrictive housing policies and practices and its recognized efforts to modify its restrictive housing programs based on that

[5] The Vera Report actually reviewed seven policies but two were rescinded by the time of publishing which is reflected in the report. (R pp. 309-98)

evaluation run contrary to Plaintiff's foundational assertion that the Department has been deliberately indifferent to potential risks posed by restrictive housing.

* * *

Aside from these two documents, Plaintiffs presented no evidence, such as expert witness affidavits or reports, purporting to evaluate the Department's policies and practices and then opining that those policies and practices create some universal risk of harm to all persons housed in all of the challenged restrictive housing settings. In fact, aside from the affidavits of the three named Plaintiffs and the other affiants, Plaintiffs did not submit or reference *any* sources to support their motion for class certification, outside of the same sources they used to support the allegations in their complaint. This, despite the fact that Plaintiffs had the opportunity to pursue discovery prior to filing their motion for class action certification.

This stark lack of evidentiary support is all the more striking in comparison to the wealth of evidence presented by the plaintiffs in many of the federal cases that Plaintiffs cite to support their commonality argument. See, e.g., Parsons, 754 F3d at 669; Braggs v. Dunn, 257 F. Supp. 3d 1171, 1236 (M.D. Ala. 2017); Davis, 2021 U.S. Dist. LEXIS 110558, at *7-*47.

Given Plaintiffs utter failure to put forward any compelling evidence specific to the Department's solitary-confinement practices, the trial court did

not abuse its discretion in concluding that Plaintiffs failed to establish that the potential members' claims actually share a common issue capable of being resolved "in one stroke." (R p. 999 ¶ 49, citing Dukes, 564 U.S. at 350)

2. The Variations in the Challenged Restrictive Housing Settings, Among Other Factors, Precludes a Finding That There Is a Predominating Common Issue.

According to Plaintiffs, because all incarcerated persons in restrictive housing are subject to certain shared conditions, the particulars of the Department's various restrictive housing policies and practices are irrelevant. Plaintiffs, therefore, argue that certification of their broad and disparate class is appropriate. Thus, Plaintiffs contend that the trial court erred by considering several factors specific to the challenged settings and variations among those factors at the class certification stage. This argument is incorrect.

The merits of an underlying claim are relevant to "the extent necessary to determine whether the requirements of Rule 23 have been met." Beroth Oil, 367 N.C. at 342, 757 S.E.2d at 474 n.5. Plaintiffs purport to assert conditions of confinement claims on behalf of all persons who are or will be subject to all of the challenged housing assignments. Accordingly, the nature of confinement and whether, and under what circumstances, a particular condition of confinement is constitutional is central to whether Plaintiffs have or can establish a predominating common issue. Thus, the trial court appropriately

considered the circumstances of confinement which varied across the challenged restrictive housing settings.

As the trial court found, the record evidence demonstrates that rather than challenging a single unified system, as Plaintiffs contend, their claim really challenges five complex and very different restrictive housing settings, as applied to many past and future incarcerated persons. (R p. 994 ¶ 39) Moreover, as the trial court found, the record evidence showed that each of the challenged housing assignments serve different penological purposes, have different procedural safeguards, vary in duration, and have different attendant conditions of confinement. (R p. 994 ¶ 39) Each of these factors are relevant to Plaintiffs' claim that the conditions of their confinement are unconstitutional, and the trial court properly analyzed these factors in ruling on Plaintiffs' motion for certification. Therefore, based on the competent record evidence, as the trial court found, these factors and their variation across the challenged settings, firmly support its determination that Plaintiffs failed to establish a predominating common issue. (R pp. 994-998 ¶¶ 39-46) The trial court properly denied certification on that basis.

a. The Record Evidence Supports the Trial Court's Finding that the Challenged Housing Assignments Serve Different Penological Purposes.

The trial court did not abuse its discretion in finding that the differing penological interests served by the various challenged settings—and as applied

to individual putative class members—precluded a finding that Plaintiffs established a predominating factor. The lack of a "legitimate penological justification" is important in analyzing a conditions of confinement claim, regardless of whether it relates to the subjective or objective prong of such a claim. See Porter v. Clarke, 923 F.3d 348, 362-63 (4th Cir. 2019). In Porter, the Fourth Circuit acknowledged the importance of assessing penological purposes and procedural safeguards in conditions-of-confinement claims. Id. at 362. In that case, the Fourth Circuit held that solitary confinement of individuals for twenty-three-to-twenty-four hours per day in a cell half the size of a parking space violated the Eighth Amendment.

However, unlike the potential class members in the present litigation, the plaintiffs in Porter were held in solitary confinement indefinitely, with no review of their confinement assignment, and based solely upon their sentence of death. Id. Importantly, in Porter, the Fourth Circuit concluded that the district court erred in rejecting the state defendants' argument that the plaintiffs' confinement to solitary was justified by penological purposes. Id. at 362-63. The Fourth Circuit noted that it may be reasonable for prison officials to conclude "prolonged solitary detention of the inmate is necessary to protect

the well-being of prison employees, inmates, and the public or to serve some other legitimate penological objective."[6] Id. at 363.

In attacking the trial court's consideration of the varying penological interests, Plaintiffs argue that it is "dubious" whether potential defenses can be considered in determining whether a common issue predominates in North Carolina. (Pls.' Br. p. 39) This argument lacks merit. First, the trial court's determination that the varying penological interests precludes a predominating common issue was based on its reference to case law indicating that the lack of a penological interest is an element of a conditions of confinement claim not a defense to such a claim. (See R p 994 ¶ 40) In any event, this Court has not decided whether defenses can be considered at the class certification stage. See Pitts v. Am. Sec. Ins. Co., 144 N.C. App. 1, 12, 550 S.E.2d 179, 188 (2001) (determining potential defenses cannot be considered at the class certification stage), aff'd by an equally divided court, 356 N.C. 292, 569 S.E.2d 647 (2002) (meaning the Court of Appeals' decision has no precedential value). Moreover, if this Court were to conclude that trial courts cannot consider defenses at the class certification stage, that conclusion would be contrary to the position taken by the majority of the federal circuit courts

[6] The Fourth Circuit did not further address the district court's error, because the state defendants waived it for appellate review. Id. at 362-63.

that have addressed the issue. Newberg on Class Actions, § 4:55 (collecting cases)

The trial court's finding that the penological interests served by the five challenged settings varies is supported by competent record evidence. (R p. 994 ¶ 40) RHDP is a housing assignment that may be imposed against an incarcerated person following conviction on one or more disciplinary offenses and is exclusively used for disciplinary purposes. (R pp. 663, 781-82)

RHAP serves several administrative purposes, including initial processing of an incarcerated person into the Department's custody, protection from staff or other incarcerated persons, minimizing the risk of escape, preservation of order where other methods of management have failed, or pending investigation. (R pp. 654, 718)

RHCP serves a singular and different purpose than either RHAP or RHDP. RHCP is reserved for use as a manner to manage an incarcerated person who, through some type of behavior, has demonstrated a risk to the orderly operations of a facility. (R pp. 676, 801)

HCON serves different purposes than the other challenged housing assignments. HCON is used for incarcerated persons who pose the most serious threat to the safety of staff or other incarcerated persons or to the security and integrity of facilities and who require more security than can be afforded in other restrictive housing settings. (R pp. 690, 806)

Lastly, RDU serves a radically different purpose than any of the other challenged housing assignments. RDU is a program designed to offer an alternative to incarcerated persons who are assigned to RHCP and allows these persons to work toward a custody and management status that is more akin to a general population status. (R p. 706)

Because the penological interest are relevant to a conditions of confinement claim, and because Plaintiffs' challenge to these several and distinct housing assignments casts such a wide net, the variations of the penological interests across the challenged settings affects Plaintiffs' ability to establish a predominating common factor. On this record evidence, the trial court reasonably found that each of the challenged restrictive housing settings serves a different purpose. Accordingly, the trial court's finding that the varying penological interests served by the challenged settings precluded a finding that Plaintiffs established a common predominating issue was not an abuse of its discretion. (R pp. 994-95 ¶ 39-40, 996 ¶ 44, 1004 ¶ 57)

More significantly, the significant degree of variation among the five distinct housing settings with respect to penological justification is dwarfed by the even greater variation in the penological justifications that may, and do, support the placement of any one person in any of the five restrictive housing settings at issue. The record evidence demonstrates that the factors, including penological justification, which inform the placement of an individual into any

of the challenged restrictive housing assignments, turn on considerations specific to that individual and situation. One person may be placed in a particular restrictive housing setting because he assaulted, or even murdered, a correctional officer or fellow inmate and therefore poses an unacceptable risk to prison staff and other incarcerated persons. By contrast, another person may be placed in short-term restrictive housing because she disobeyed an order.

If the trial court had accepted Plaintiffs' argument in favor of certification, it would have been required to either ignore the myriad of reasons that a person is placed in one of several types of restrictive housing assignments or assume that *all* such assignments are unconstitutional regardless of the basis for the assignment. In other words, the trial court would have to find that an assignment to RHAP pending an investigation, or for a person's own protection, is unconstitutional just as an assignment to HCON following multiple violent assaults on correctional staff. Plaintiffs have offered no legal support for such a proposition.

b. The Record Evidence Supports the Trial Court's Finding that the Challenged Housing Assignments Have Different Procedural Safeguards.

The trial court also did not abuse its discretion in finding that the variations across the challenged settings in the procedure by which an incarcerated person is assigned to one of the challenged housing assignments precluded a finding that Plaintiffs established a predominating factor. As

noted above, an assessment of the relevant procedural safeguards in conditions-of-confinement claims is important. See Porter, 923 F.3d at 362-63. In Porter, the plaintiffs were placed in solitary confinement based solely upon being sentenced to death and were provided no mechanism for removal. Porter, 923 F.3d at 359. The Fourth Circuit's decision in Porter suggested that the outcome might have been different if, like the State's policies at issue in the present case, the defendants in Porter had not placed incarcerated persons in solitary confinement based solely on their criminal sentence and had provided a mechanism for removal.

The trial court's finding that the procedural safeguards that apply to each challenged setting vary is supported by competent record evidence. (R p. 996 ¶ 43) An initial RHAP assignment can be made by an Officer-in-Charge, with no hearing or opportunity to challenge the assignment, and unless extended beyond 15 days, the placement is not subject to any kind of committee scrutiny. (R pp. 654, 718) Unlike with RHAP, an incarcerated person may be assigned to RHDP only after the conclusion of a well-defined disciplinary process, which includes a hearing. (R pp. 663, 665-67, 786-98)

An assignment to RHCP is different from an assignment to either RHAP or RHDP. It comes at the end of a multiple step process that involves reviews by at least two different committees comprised of staff from specific employee classifications. (R pp. 677, 679, 802) Further still, a referral for assignment to

HCON involves a series of reviews by specific upper-level staff, a hearing, and approval from only a handful of individuals. (R pp. 691-95, 726-27, 806-07, 810) Assignment to RDU does not involve any hearing, and is the result of a screening and selection process for the program based on a list of eligibility factors. (R pp. 706-07)

Plaintiffs' challenge to the Department's several and distinct housing assignments fails to account for the variations above-noted procedural safeguards. Those safeguards are, however, relevant to a conditions-of-confinement claim. As such, the variations in those procedural safeguards affect Plaintiffs' ability to establish a predominating common factor. On the above-detailed record evidence, the trial court's finding that the varying procedural safeguards precluded a finding that Plaintiffs established a common predominating issue was not an abuse of its discretion or error. (R pp. 994 ¶ 39, 996 ¶ 43)

If the trial court had accepted Plaintiffs' argument in favor of certification, it would have been required to either ignore the variations in the procedural safeguards applicable to each of the challenged settings or assume that *all* such settings are unconstitutional regardless of the safeguards, a proposition for which Plaintiffs have offered no legal support.

c. The Record Evidence Supports the Trial Court's Finding that the Challenged Housing Assignments Vary in Duration.

The trial court did not abuse its discretion in finding that the variations of the period of time spent in the challenged settings precluded a finding that Plaintiffs established a predominating factor. The duration of confinement in a challenged condition is also central to a conditions-of-confinement claim. The U.S. Supreme Court has long held that "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." Hutto, 437 U.S. at 686. More recently, the Seventh Circuit Court of Appeals cited duration of confinement as one factor in determining whether a stay in administrative segregation constituted cruel and unusual punishment. Rice v. Corr. Med. Servs., 675 F.3d 650, 666 (7th Cir. 2012). Indeed, the Fifth Circuit noted that its "sister circuits have considered the severity of the restrictive conditions and their duration as key factors in analyzing whether those conditions constitute an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" Wilkerson v. Goodwin, 774 F.3d 845, 854 (5th Cir. 2014) (citations omitted).

The trial court's finding that "[t]he restrictive housing settings challenged by Plaintiffs have a wide variation in the average length inmates spend in each of the different restrictive housing settings" was supported by competent evidence in the record. (R pp. 995 ¶ 41) Initial placements in RHAP

can last no more than 72 hours and can be extended up to 15 days (including the first 72 hours), with further extensions beyond 60 days requiring approval from a specific committee. (R pp. 654-55, 718-19) In the 12-month period preceding the filing of Plaintiffs' complaint this action, the average length of stay in RHAP was 8 days. (R p. 655) The maximum assignment to RHDP is 30 days. (R pp. 664, 782) In the year preceding the filing of this action, the average length of stay in RHDP was 11 days. (R p. 665)

In contrast, assignments to RHCP are reviewed at regular intervals—every 6 months for most cases, and every 12 months for persons assigned to RHCP who assaulted and injured a staff member. (R pp. 681, 803) Between October 16, 2018 and October 1, 2019, the year preceding the filing of this action, the average length of stay in RHCP was 131 days. (R p. 681) Similarly, assignments to HCON are also reviewed at regular intervals—again, every 6 months for most cases, and every 12 months for persons who assaulted and injured a staff member. (R pp. 696, 808) In the year preceding the filing of this action, the average length of stay in HCON was 154 days. (R p. 696) On average, people in RDU stay there between 12 and 14 months. (R p. 714)

The trial court's finding that the duration spent in restrictive housing varies across the challenged settings was firmly supported by the record. Accordingly, the trial court's finding that, among other factors, the varying lengths of stay precluded a finding that Plaintiffs established a common

predominating issue was not an abuse of its discretion. (R pp. 995 ¶ 41, 998 ¶ 46)

Because the duration of confinement is relevant to a conditions-of-confinement claim, and because Plaintiffs' challenge to these several and distinct housing assignments failed to account for the variations of duration of confinement across the challenged settings, Plaintiffs never established a predominating common factor. On this record evidence, the trial court's reasonably found that duration of confinement varies across each of the challenged restrictive housing settings serves a different purpose. Accordingly, the trial court's finding that the variations in the duration of confinement precluded a finding that Plaintiffs established a common predominating issue was not an abuse of its discretion.

If the trial court had accepted Plaintiffs' argument in favor of certification, it would have been required to either ignore the length of stay or assume that *any* amount of time in any of the challenged settings is unconstitutional, a proposition for which Plaintiffs have offered no legal support.

d. The Record Evidence Supports the Trial Court's Finding that that the Attendant Conditions Vary Among the Challenged Housing Assignments.

The trial court did not abuse its discretion in finding that the variations in the conditions attendant each housing setting undermine Plaintiffs' effort to

prove commonality. The "inescapable accompaniments of segregated confinement, will not render [that] confinement unconstitutional absent other illegitimate deprivations[.]" Mickle v. Moore, 174 F.3d 464, 472 (4th Cir. 1999) (citation omitted), cert. denied 528 U.S. 874 (1999). Plaintiffs incorrectly assert that the Fourth Circuit has disclaimed Mickle, and, thus, imply that the trial court erred by relying on the same. In fact, rather than disclaiming Mickle, as Plaintiffs assert, the Court in Porter, expressly noted its decision did not "overrule Mickle." Porter, 923 F.3d at 359. It is true that in Porter, the Fourth Circuit concluded that Mickle was distinguishable because the plaintiffs therein did not present the wealth of evidence about the effects of solitary confinement that the Porter plaintiffs presented. Porter, 923 F.3d at 358-59. However, the Fourth Circuit found it "[e]qually significant" that the plaintiffs in Mickle were placed in segregation based upon "their in-prison conduct" and had an avenue to be removed from segregation. Porter, 923 F.3d at 359 (emphasis in original). Accordingly, the trial court did not err in citing Mickle and finding that the majority of the common conditions of confinement upon which plaintiffs relied to argue their action presented a predominating common issue were "inescapable accompaniments of segregated confinement." (R p. 993 ¶ 38 (citations omitted))

To support their position on commonality, Plaintiffs focus on the amount of time that a person spends in the cell, the size of the cell, and the opportunity

for interaction with others to support their assertion that the attendant conditions of the various housing assignments are not relevant when determining if a class exists. However, the record evidence below demonstrates that the conditions attendant to a particular housing assignment vary significantly and warrant careful, individualized consideration, thus militating against class certification.

The trial court found that the most significant variations across the challenged housing assignments occur in the frequency of visitation, the nature of recreation, and the quantity and quality of interactions with other incarcerated people. (R p. 995 ¶ 42) This finding was well supported by the evidentiary record.

The record evidence demonstrated that an individual's visitation rights vary greatly across the challenged settings, including in frequency and duration. (R pp. 659, 671, 685-86, 701, 711) The record also establishes that recreation varies among the housing assignments, including by location, manner (i.e. unrestrained, or in small groups), and frequency. (R pp. 658, 671, 685, 700) Additionally, the record evidence showed key differences in the extent to which incarcerated persons in the different housing settings can interact with other inmates, such as the ability to shower, shave, recreate, or eat in small groups. (R pp. 658, 670-71, 685, 700, 710-12) Moreover, all incarcerated persons in all of the challenged housing assignments have

varying access to different types of "cell study" or other programs, which are in-cell activities to help provide incarcerated persons with environmental stimulation. (R pp. 659, 672, 686, 702, 706-08, 897)

The importance of the housing conditions aligns with views expressed in one of the journal articles that Plaintiffs themselves rely upon, Stuart Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J. L. & Pol'y 325 (2006). (See R pp. 181-240). According to the article, a number of factors vary across settings, including the "amount and circumstances of visitation," and "the availability of reading material and television[.]" (R p. 203) The article then explains that variables among housing conditions "might explain differing outcomes." (R p. 203)

Because the conditions attendant to each of the challenged housing assignments are relevant to a conditions of confinement claim, and because Plaintiffs' challenge to these several and distinct housing assignments failed to account for the variations of these attendant conditions across the challenged settings, Plaintiffs never established a predominating common factor. On this record, the trial court's finding that the attendant conditions vary across the restrictive housing settings was well supported. Accordingly, the trial court's finding that varying attendant conditions precluded a finding that Plaintiffs established a common predominating issue was not an abuse of its discretion or error. (R pp. 995 ¶ 42, 998 ¶ 46)

3. This Court's Precedents Support the Trial Court's Decision.

Plaintiffs' effort to rely upon precedent from this Court to support their contention that they have established a predominating common issue is misplaced. To support their contention that they have established a common predominating issue, Plaintiffs cite this Court's decisions in Faulkenbury v. Teachers' & State Emps.' Ret. Sys., 345 N.C. 683, 483 S.E.2d 422, and Fisher v. Flue-Cured Tobacco Cooper. Stabilization Corp., 369 N.C. 202, 794 S.E.2d 699. A review of those cases, however, reveals that they lend no support to Plaintiffs' argument.

In Faulkenbury, the Court rejected the defendant's argument that the trial court erred in certifying a class because, among other reasons, the plaintiffs would recover differing amounts based upon several different factors unique to each plaintiff. Faulkenbury, 345 N.C. at 698, 483 S.E.2d at 431-32. This Court reasoned that the multiple issues that would cause each plaintiff to recovery differing amounts of damages were "collateral issues." Id. at 698, 483 S.E.2d at 432. Similarly, the Court rejected the defendant's contention in Fisher that the trial court abused its discretion in certifying a class because of multiple fact-intensive issues such as "that each class member's recovery will depend on different factors." Fisher. 369 N.C. at 213, 794 S.E.2d at 708 (emphasis added)).

Distinguishable here, the merits of each class members' conditions-of-confinement claim will depend greatly on the penological interests, the procedural safeguards, the duration, and the attendant conditions relative to each of the restrictive housing assignments, not merely a collateral issue as the amount of recovery in Faulkenbury and Fisher. In light of these differences, the trial court reasonably concluded that Plaintiffs "failed to establish that the potential members' claims actually share a common issue capable of being resolved 'in one stroke.'" (R p. 99 ¶ 49, citing Dukes, 564 U.S. at 350)) Ultimately, as the U.S. Supreme Court has stated, what matters in evaluating the propriety of certification "is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." Dukes, 564 U.S. at 350 (emphasis in original) (citation omitted). The vast differences across the five housing settings will not allow for a common answer in this case, and the trial court's conclusion to that effect should be upheld.

The existence of a variety of factors apt to drive the litigation of this case renders it most similar to the facts of another decision by this Court in which this Court concluded that the trial court did not abuse its discretion in denying the plaintiffs' motion for class certification. Beroth Oil Co. v. N.C. Dep't of Transp., 367 N.C. 333, 757 S.E.2d 466. In Beroth Oil, the potential class raised takings claims against the state Department of Transportation ("DOT") under

a common theory of harm. This Court agreed with the Court of Appeals that although DOT's "generalized actions may be common to all [the plaintiffs' properties,] "liability can be established only after extensive examination of circumstances surrounding each of the affected properties." Id. at 343, 757 S.E.2d at 474 (citation omitted). Also, according to the Court, the potential case was "of such breadth that, despite some overlapping issues, a trial on the merits would require far too many individualized, fact-intensive determinations for class certification to be proper." Id. at 346, 757 S.E.2d at 476. So too here.

In the instant case, the differences among the challenged housing assignments and the potential class members are not collateral. Instead, these differences are fundamental, as each factor can impact the merits of the underlying claim. As in Beroth Oil, these differences will require fact-intensive determinations, which could lead to differing outcomes. As the trial court found, "litigating this matter as a class would devolve into a series of mini trials on the particulars of each of the challenged restrictive housing settings and [a] myriad of [other] circumstances[.]" (R p. 99 ¶ 47) As such, the trial court did not abuse its discretion in denying class certification.

B. The Record Evidence Below Supports the Trial Court's Determination that the Named Plaintiffs Do Not Adequately Represent the Purported Class.

In addition to finding that Plaintiffs failed to present a common predominating issue, the trial court also separately concluded that Plaintiffs had not demonstrated that the named Plaintiffs[7] fairly and accurately represent the interest of all members of the class. (R pp. 1005-06) This conclusion is supported by two findings of fact and provides an independent basis for affirmance. First, the record below indicates that the named Plaintiffs do not represent the wide spectrum of incarcerated persons that would potentially be in the class. (R p. 1006 ¶ 61) Second, the record shows that the viability of the named Plaintiffs' individual claims may be compromised by their own actions. (R p. 1006 ¶ 62) Because the trial court did not abuse its discretion in finding that Plaintiffs cannot fairly and adequately represent the purported class, its denial of certification should be affirmed.

1. Plaintiffs Failed to Demonstrate that the Experiences of the Named Plaintiffs Are Representative of the Broader Class.

There is little case law from this Court on what factors can be considered in determining whether the named Plaintiffs can adequately represent the class. Plaintiffs argue that in determining whether named Plaintiffs can

[7] Plaintiffs are not seeking to have Rocky DeWalt serve as a class representative, but request that he remain a named Plaintiff.

adequately represent the class, the trial court is limited to considering the existence of factors like conflicts of interest and a plaintiff's personal stake in the litigation. This argument lacks merit.

There is nothing in this Court's case law dictating any such limitation. In fact, a review of Crow, 319 N.C. at 282, 354 S.E.2d at 465, Faulkenbury, 345 N.C. at 697, 483 S.E.2d at 431, and Beroth Oil, 367 N.C. at 337, 757 S.E.2d at 470, indicates that this Court considers adequacy of representation and conflicts of interest as two separate, albeit related, determinations.

More importantly, it is well established in this State that, as the Court announced in Crow, when determining whether to certify a class, a trial court "is not limited to consideration of matters expressly set forth in Rule 23 or in [the opinions of our appellate courts]." Crow, 319 N.C. at 284, 354 S.E.2d at 466. This Court in Crow even went so far as to "caution" litigants and trial courts that the prerequisites for class certification it has identified are not to "be viewed as all-inclusive." Id. at 282, 354 S.E.2d at 465 n.2. Accordingly, the trial court was within its discretion to consider the named Plaintiffs' histories when determining whether they would adequately represent the interests of the purported class.

The record evidence demonstrates that the named Plaintiffs are indeed outliers and are not representative of the purported class. This is true in two distinct but related ways. First, the duration of time the named Plaintiffs were

housed in various types of restrictive housing often exceeded the average stay in those settings. Second, the named Plaintiffs are part of a small percentage of incarcerated persons who repeatedly cycle in and out of restrictive housing.

As previously discussed, the duration of confinement under particular conditions is critical to a conditions of confinement claim. See Hutto, 437 U.S. at 686-87. The record below contains competent evidence that indisputably establishes that the duration of time that the named Plaintiffs spent in restrictive housing often exceeded the averages. (Compare R pp. 655, 665, 681, 696, 714 with 930-31, 936-39, 943-45, 949-51, 955-56, 960-61, 965-66)

Relatedly, the record evidence demonstrates that the named Plaintiffs (along with the other affiants) are part of a small fraction of the population who find themselves cycling in and out of restrictive housing assignments. The record evidence showed that the percentages of incarcerated persons who are assigned to some form of restrictive housing and who had previously been assigned to that same restrictive housing setting were low, ranging from 0.1% for HCON and 1.7% for RHCP. (R p. 655, 665, 681, 696) Accordingly, the vast majority of incarcerated persons who were then assigned to a given restrictive housing setting had not previously been so assigned. This stands in stark contrast to the named Plaintiffs (and the other affiants), who have a documented history of repeating and overlapping restrictive housing

assignments, thereby extending their stays far beyond the average. (R pp. 930-31, 936-39, 943-45, 949-51, 955-56, 960-61, 965-66)

2. Plaintiffs' Own Actions Compromise Their Individual Claims.

In considering adequacy of the named Plaintiffs' representation, the trial court was within its discretion to consider the reasons that the named Plaintiffs were placed in restrictive housing, and particularly whether and what extent their own actions may affect the viability of their individual claim.

The trial court's reasons supporting its conclusion that named Plaintiffs were inadequate representatives were grounded in facts that many courts have concluded are fundamental to conditions-of-confinement claims. Among these, courts validly consider the basis for placing people in restrictive housing and why their stays may be extended. (R p. 996 ¶ 43); see., e.g., Bass v. Perrin, 170 F.3d 1312, 1316 (11th Cir. 1999); Isby v. Brown, 856 F.3d 508, 523 (7th Cir. 2017).

Moreover, these reasons in large part are related to potential arguments that assuredly can defeat the named Plaintiffs' claims. Many federal courts have held that potential defenses against named plaintiffs can raise questions regarding the adequacy of their representation. See Baffa v. Donaldson, 222 F.3d 52, 61 (2d Cir. 2000) ("'While it is settled that the mere existence of individualized factual questions with respect to the class representative's

claim will not bar class certification, class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." (citation omitted)); see also Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992); Holden v. Triangle Capital Corp., No. 5:18-CV-10-FL, 2018 U.S. Dist. LEXIS 39842, at *9 (E.D.N.C. Mar. 12, 2018).

This Court has not squarely determined if trial courts can consider potential defenses applicable to the named plaintiffs in deciding whether those plaintiffs are adequate representatives. However, it did not hold such defenses are improper considerations in the adequacy-of-representation analysis when presented with an opportunity to do so. In Faulkenbury, the defendants asserted that two of the named Plaintiffs were inadequate representatives because their claims were possibly subject to a statute of limitations defense. Faulkenbury, 345 N.C. at 698, 483 S.E.2d at 431. This Court rejected the defendant's argument, not because it concluded it was improper for the trial court to consider potential defenses in assessing the adequacy of representation, but because the Court determined the statute of limitations did not apply to them. Id. This point is significant because, as noted above, the potential for defenses applicable to the named Plaintiffs was central to the trial court's conclusion here that the named Plaintiffs were inadequate representatives. Accordingly, the trial court was within its discretion to take

the impact of the named Plaintiffs' own actions on the viability of the individual claims, when determining whether they would adequately represent the interests of the purported class.

As the trial court found, "the record demonstrates that the named Plaintiffs are not representative of the purported class because their own actions may compromise the viability of their own claims." (R p. 1006 ¶ 62) As mentioned above, the record evidence demonstrated that the duration of time the named Plaintiffs spent in these restrictive housing settings often exceeded the average and was the result of their continued disciplinary infractions and other behaviors. (R pp. 930-31, 936-39, 943-45, 949-51, 955-56, 960-61, 965-66)

The named Plaintiffs and the other four incarcerated persons identified by them all have extensive restrictive housing histories, all of which invariably began with disciplinary infractions. (R pp. 930, 936, 943, 949, 955, 960, 965, 970) Additionally, all of the named Plaintiffs have assaulted staff and other incarcerated persons, at least once, and some on multiple occasions. (R pp. 931-32, 939, 951, 956, 966)

Moreover, each of the named Plaintiffs have *at least* one instance of a restrictive housing assignment that was extended because of their own actions while on that assignment. (R pp. 930-31, 936-38, 949-50, 956, 960, 965-66, 970) Mr. McGee's assignment history serves as a good example. After his initial stay in RHDP following a conviction of attempting to introduce illegal contraband

into a facility, Mr. McGee requested Protective Control.[8] (R p. 943) When Mr. McGee's request was denied, he made a second request to be assigned to Protective Control, which prompted another stay in RHAP while the request was investigated. (R pp. 943-44) After his second request for Protective Control was denied, in January 2018, Mr. McGee refused to leave restrictive housing. (R p. 944) This began a series of instances where Mr. McGee refused to leave restrictive housing resulting in disciplinary sanctions for failing to obey orders and extended assignments in RHAP, RHDP, and RHCP, lasting over one year. (R pp. 944-45) Then, following a conviction of a disciplinary offense related to gang activity, Mr. McGee was again assigned to RHDP and then RHCP, which was again extended due to his refusal to leave restrictive housing. (R p. 945)

The record below demonstrated that, almost without fail, each of the named Plaintiffs (and the other incarcerated persons they identify), found themselves placed in restrictive housing early in their sentence. (R pp. 930, 936, 943, 949, 955, 960, 965, 970) Thereafter, through repeated disciplinary infractions, and in Mr. McGee's case, the outright refusal to leave restrictive housing, these individuals were either repeatedly assigned to restrictive housing or had their assignments extended. (R pp. 930-931, 936-939, 943-945,

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[8] Protective Control is the reassignment of an incarcerated person from the general population to confinement in a secure area to protect the incarcerated person from self-injury or the threat of harm by others. (R p. 924) Plaintiffs have not challenged Protective Control.

949-951, 955-956, 960-961, 965-966, 970) Plaintiffs did not present any evidence that these same attributes would be present for the majority, or even any sizable portion, of the purported class. In fact, the record below regarding the average stay and low percentages of persons that cycle in and out of the challenged conditions suggests otherwise. (See R pp. 655, 665, 682, 696, 715)

The trial court "is not limited to consideration of matters expressly set forth in Rule 23 or in [relevant case law]" Crow, 319 N.C. at 284, 354 S.E.2d at 466. Thus, the trial court was within its discretion to consider the individual circumstances related to the named Plaintiffs' restrictive housing history, in determining whether they could adequately represent the purported class. The record contains competent evidence demonstrating that the named Plaintiffs' experiences are not representative of the broader potential class. Thus, the court did not abuse its discretion in finding that the named Plaintiffs were not adequate representatives. Therefore, this Court should affirm the trial courts order denying Plaintiffs' motion for class certification.

C. The Record Evidence Below Supports the Trial Court's Determination that Class Litigation is Not the Superior Method of Adjudication.

As a third independent basis for denying class certification, the trial court found that, in its sound and informed discretion, class litigation was not a superior method of adjudicating this case. That holding was not an abuse of

discretion, and it provides a third, independent reason to affirm the decision below.

Relying on the U.S. Supreme Court decision in Dukes, Plaintiffs incorrectly assert that they did not need to establish that class litigation is a superior method for adjudicating their cases. Law to the contrary is already well established. See Beroth Oil, 367 N.C. at 337, 757 S.E.2d at 470, and discussion supra. It was incumbent upon Plaintiffs to show class litigation was the superior method.

Plaintiffs' argument also fails to recognize that a trial court has "broad discretion" in determining whether a class action is the superior means of adjudicating a claim. Crow, 319 N.C. at 284, 354 S.E.2d at 466. Plaintiffs make absolutely no argument that the trial court abused its discretion—and it did not. In concluding that a class action was not the superior method for adjudicating Plaintiffs' claims, the trial court found that such litigation would "devolve into a series of mini trials" regarding "each of the challenged restrictive housing assignments," and "the myriad of other relevant considerations and defenses that undoubtedly would not apply uniformly to all potential class members." (R p. 1005 ¶ 59) Equally important, as the trial court also correctly found, North Carolina's incarcerated "can challenge their conditions of confinement in the North Carolina Industrial Commission and/or Federal District Court in a manner that allows for a much more efficient

inquiry into the particular circumstances of the challenged conditions." (R p. 1005 ¶ 59)

In response, Plaintiffs cite cases indicating that certain claims for relief are limited to certain forums and argue that the judiciary should not "shrink" from its obligation to enforce the rights of all persons. (Pls.' Br. p. 47) However, Plaintiffs do not cite any case law indicating that these general principles of law, none of which are contrary to the trial court's above-noted finding, restricts the trial court's broad discretion to determine whether class litigation is a superior method of adjudication. Most importantly, the trial court's denial of Plaintiffs' motion for class certification does not, in any way, close the state courthouse doors or prohibit individuals from bringing suit under the state constitution, as Plaintiffs contend.

Plaintiffs also argue that the trial court's error in concluding there was no superiority in the use of a class action here was "compounded" because it declined "to oversee a significant portion of the operation of North Carolina's prisons." (Pls.' Br. p. 47, citing R p. 1002 ¶ 55 (citation omitted)) Plaintiffs again fail to recognize that determining whether a class action is a superior method is a discretionary decision and in determining whether to certify a class, a trial court "is not limited to consideration of matters expressly set forth in Rule 23 or in [the opinions of our appellate courts]." Crow, 319 N.C. at 284, 354 S.E.2d at 466. Thus, the trial court was within its discretion to consider the

amorphous and vague nature of the relief requested by Plaintiffs, and the role of the judiciary in implementing such relief. Indeed, there is support for declining to certify an expansive class where, as here, the plaintiffs' request for relief includes judicial management of institutional policy, which has the potential to last for years. See Sabata, 337 F.R.D. at 224 (declining to certify a class and two proposed subclasses in part because it likely would have led to the court "overseeing a significant portion of the operation of Nebraska's prisons").

The trial court certainly did not abuse its discretion here. This is especially true given the nature of Plaintiffs' request. Plaintiffs asked the trial court to oversee the operation of the Department's restrictive housing program indefinitely, but they provided the court with what can at best be described as vague and ambiguous directions as to how it should proceed. As the trial court noted, "federal case law informs that the overly broad nature of the proposed class and lack of commonality are, at the very least, underscored where plaintiffs' request for relief is vague and ambiguous." (R p. 1002 ¶54); see, e.g., Sabata, 337 F.R.D. at 271 n.14 ("The overbreadth of the proposed class is also illustrated by the ambiguity of the relief Plaintiffs seek.").

Plaintiffs argue on appeal that requiring them to be more specific in their request for relief would violate notice-pleading rules governing complaints and would place too heavy a burden on Plaintiffs in requesting relief. This

argument is based on a flawed premise. The trial court was not deciding whether the relief Plaintiffs requested in their complaint was sufficient to sustain their suit. It was deciding whether to certify a class. As noted above, the standard for assessing whether to certify a class is not "a mere pleading standard." Dukes, 564 U.S. at 350. Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with" the rules governing the class certification determination. Id.

In this case, Plaintiffs failed to point the trial court to any specific measures, whatsoever, to remedy the alleged violation. Plaintiffs' vague and ambiguous request for relief in their complaint represented the sum total of what they presented to the trial court with regards to the relief they were seeking. (See R p. 40) They provided no additional details in their motion for class certification, in their brief filed in support of the motion, or at the hearing on the motion.

Plaintiffs point out that in their complaint, they stated that "prison administrators should use solitary confinement only as a last resort, and for the shortest duration possible, to address an imminent safety threat."[9] (Pls.'

[9] In their brief, Plaintiffs state they "seek declaratory and injunctive relief that would require Defendants to use solitary confinement as a last resort and for the shortest time possible." (Pls.' Br p. 3) The vagueness of this statement aside, Plaintiffs never specifically asserted below that this was the relief they were seeking.

Br. p. 46, quoting R p. 16) Plaintiffs further point out that in their complaint, they also noted examples of prison systems in other states that have limited the use of solitary confinement by making policy changes, including limiting the consecutive days a person can be held in solitary confinement. However, the section of the complaint Plaintiffs reference contained a detailed narrative about the use of, history regarding, and reforms to solitary confinement. (R pp. 16-20) That section of the complaint also contained myriad footnotes citing other materials. (R pp. 16-20) Nothing in Rule 23 or this Court's case law requires a trial court to wade through a complaint, and pages upon pages of other materials referenced therein, to essentially guess at and cobble together what the putative class Plaintiffs envision as relief. Therefore, that the trial court did not do so in determining whether class certification is proper and, in assessing its role in fashioning relief for the potential class, is not error, and is certainly not an abuse of discretion.

Even if Plaintiffs had foreshadowed their requested relief—that the court enter an order ensuring that restrictive housing is used as a last resort and for the shortest duration possible—in any filing with the trial court, that requested relief only serves to reinforce the correctness of the trial court's denial of class certification. Whether, for any one putative class member, restrictive housing was imposed as a last resort and for the shortest duration

possible will necessarily be a highly person and circumstance specific inquiry not amenable to classwide determination.

Also, Plaintiffs suggest that, instead of declining to certify their potential class, the trial court could have subdivided it into subclasses or contemplated the appointment of a special master. Here again, Plaintiffs fail to recognize that such measures fall within the trial court's broad discretion, and without a motion from Plaintiffs, there can be no abuse of discretion for not employing those measures. See generally Huyer v. Njema, 847 F.3d 934, 938 (8th Cir. 2017) (providing that appellate court reviews denial of motion to create a subclass for abuse of discretion); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 434 n.15 (5th Cir. 1998) (same). At the very least, Plaintiffs have waived this argument because they never requested or even suggested these measures below. See N.C. R. App. P. 10(a)(1).

D. The Trial Court Correctly Noted That Plaintiffs Did Not Identify Any Decisions Holding That Restrictive Housing in All Cases Constitutes Cruel or Unusual Punishment.

As the trial court noted, Plaintiffs did not point to any cases holding that solitary confinement, regardless of individual application or duration, and at

the highest level of generality, is in all cases cruel or unusual punishment.[10] (R pp. 1002-03 ¶ 56) The trial court was also correct in concluding the weight of authority was to the contrary. (R pp. 1002-03 ¶ 56 (collecting cases)). As the trial court's analysis correctly indicated, the other authority Plaintiffs cite supporting their position that solitary confinement is unconstitutional concern circumstances that are wholly distinguishable from those existing in this case.

Plaintiffs' reference to a U.S. Supreme Court case from 1890, In re Medley, 134 U.S. 160 (1890), is misplaced. In the portion of Medley Plaintiffs cite, the Court was detailing the history of solitary confinement, relaying some of the effects of the practice as it stood in the late 1700's, and noting that the practice had, in "a great variety of instances," since been "somewhat modified." Id. at 168. The conditions the U.S. Supreme Court commented on in Medley do not remotely resemble any of the challenged conditions in this case. Also, neither Medley nor any other U.S. Supreme Court case has declared solitary confinement to be cruel and unusual punishment.

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[10] Although Plaintiffs' position is not entirely clear, it does not appear, from their appellate brief at least, that they are arguing all usages of restrictive housing is unconstitutional. (See, e.g., Pls. Br. p. 26 ("Plaintiffs seek statewide equitable relief that will benefit the entire class at once by requiring defendants to use solitary confinement as a last resort for the least amount of time possible.")

Many of the cases cited by Plaintiffs are also factually distinguishable. In Williams v. Sec'y Pa. Dep't of Corr., 848 F.3d 549, 553 n.8 & 567 (3d Cir. 2017), cert. denied, 138 S. Ct. 357 (2017), and McClary v. Kelly, 4 F. Supp. 2d 195, 208 & 209 n.9 (W.D.N.Y. 1998), the federal courts addressed Due Process, not Eighth Amendment, challenges to conditions of confinement, which require a different analysis.

Plaintiffs also cite to the concurrence in Grissom v. Roberts, 902 F.3d 1162, 1176–77 (10th Cir. 2018) (Lucero, J., concurring), in which the concurring judge discussed scientific literature on solitary confinement. However, the majority in that case did not address the plaintiff's underlying Eighth Amendment claim or the scientific literature upon which the plaintiff relied. Instead, the court found that the defendants were properly granted qualified immunity because there was, as late as 2018, no clearly established law that an Eighth Amendment violation occurred when a state holds a person in solitary confinement, as the state had in that case, for nearly twenty years based solely upon an in-prison drug trafficking violation.[11] Id. at 1173-74. Notably, similar to the Fourth Circuit in Porter, the concurring judge in Grissom acknowledged, "[a]t base, then, the question is whether the extreme nature of [the prisoner's] confinement is justified by legitimate penological

[11] None of the circumstances of Plaintiffs' conditions of confinement are similar here.

interests." Grissom, 902 F.3d at 1178 (Lucero, J., concurring). That inquiry is necessarily person-and-circumstances-specific and therefore not amenable to classwide adjudication.

* * *

On this record and based on the law discussed above, the trial court did not abuse its discretion in denying Plaintiffs' motion for class certification. The record below supports the trial court's decision that Plaintiffs failed to demonstrate a predominating common issue because they presented insufficient evidence connecting the challenged practices and policies to the actual harm or risks of harm, and they ignored fundamental differences across the challenged housing settings and each of the persons placed in those housing settings. The record below also supports the trial court's conclusion that the named Plaintiffs do not adequately represent the wide spectrum of the purported class members because their own actions may compromise the viability of their own claims. Lastly, the record supports the trial court's conclusion that, even if Plaintiffs could satisfy the requirements for certification, class litigation was not the superior method of adjudication. This is because such litigation would devolve into a series of mini trials on each of the challenged restrictive housing assignments, as applied to each of the putative class members, and on the myriad of other relevant considerations

and defenses, which undoubtedly would not apply uniformly to all potential class members.

Each of these bases independently, and certainly in combination, support the trial court's decision to deny Plaintiffs' motion for class certification. Accordingly, the trial court did not abuse its decision in denying Plaintiffs' motion for class certification. Therefore, this Court should find no error and affirm the trial court's denial of Plaintiffs' motion for class certification.

II. THE TRIAL COURT CORRECTLY RULED THAT THE DELIBERATE INDIFFERENCE STANDARD APPLIES TO CONDITIONS-OF-CONFINEMENT CLAIMS BROUGHT UNDER ARTICLE I, SECTION 27 OF THE NORTH CAROLINA CONSTITUTION.

The trial court's denial of Plaintiffs' motion for class certification was not dependent on its determination of the applicable constitutional standard. Thus, when deciding whether the trial court abused its discretion in denying Plaintiffs' motion for class certification, this Court need not address the issue of what standard applies to conditions-of-confinement claims brought under Article I, Section 27 of the North Carolina Constitution. In that regard, Defendants agree with Plaintiffs, to the extent that they contend that this Court need not address the issue of the appropriate legal standard. Accordingly, Defendants urge this Court to affirm the trial court's denial of Plaintiffs' motion for class certification without addressing the issue of the applicable legal standard.

However, if the Court does reach the question of what legal standard applies to conditions-of-confinement claims brought under Section 27, it should affirm the trial court's ruling that the Eighth Amendment's deliberate indifference standard applies to such claims.

A. Standard of Review.

"According to well-established North Carolina law, this Court reviews constitutional questions using a de novo standard of review." Cooper v. Berger, 376 N.C. 22, 33, 852 S.E.2d 46, 56 (2020).

B. The Trial Court's Disagreement with Plaintiffs Regarding What Standard Applies to Their Claim Had No Bearing on Its Decision to Deny Certification.

Plaintiffs argue the trial court erred by conflating the Rule 23 analysis with identifying the constitutional standard for their claims. More specifically, Plaintiffs contend that by disagreeing with them regarding what standard applies, the trial court "appeared to believe that a class could not exist." (Pls.' Br. p. 51)

Contrary to Plaintiffs' contention, in its order denying Plaintiffs' motion for class certification, the trial court methodically addressed each of the requisite elements of certification, and did so without relying on its position regarding the applicable standard. It is notable that Plaintiffs do not point to any specific portion of the trial court's order from which it can be concluded that the court relied upon its disagreement with Plaintiffs' proposed standard

in denying certification. Indeed, review of that order reveals the opposite conclusion.

As discussed in Section I above, the trial court's denial of Plaintiffs' motion was based upon three independent conclusions, all of which are supported by competent evidence. The trial court's analysis on each of these points did not turn in any way on its disagreement with Plaintiffs about the applicable constitutional standard. Instead, the factors and circumstances the trial court analyzed in denying class certification were factors and circumstances fundamental to assessing the nature of a potential class raising any condition-of-confinement claim. Accordingly, the trial court's disagreement with Plaintiffs concerning the applicable standard was not the basis for its decision to deny certification.

C. Plaintiffs' Proposed Standard is Contrary to Established Law.

Plaintiffs contend that Section 27, unlike the Eighth Amendment, dictates that a purely objective legal standard, akin to the standard for negligence, should govern their state constitution conditions-of-confinement claim. As such, Plaintiffs argue, the trial court should have concluded that they need only establish the Department's policies and practices "expos[ed]" them to "an objectively substantial risk of serious harm." (Pls.' Br. pp. 5, 61) As the trial court correctly concluded, Plaintiffs' argument is incorrect.

1. Plaintiffs' Proposed Standard is Contrary to Precedent from the U.S. Supreme Court interpreting the Eighth Amendment.

The U.S. Supreme Court's case law dictates that to establish a conditions-of-confinement claim under the Eighth Amendment to the United States Constitution, an inmate must prove both that the condition creates a "substantial risk of serious harm," referred to as the objective component of the claim, and that prison officials were deliberately indifferent to that risk, referred to as the subjective component. Farmer v. Brennan, 511 U.S. 825, 834 & 837 (1994). Deliberate indifference is roughly equivalent to "subjective recklessness as used in [] criminal law[.]" Id. at 840. Thus, a prison official will not be held liable unless he "knows of and disregards an excessive risk to inmate health or safety." Id. at 837.

The U.S. Supreme Court's decision to include this subjective component in the deliberate indifference standard was based upon the plain meaning of the word "punishment," which the Court has clarified does not encompass negligent actions. Wilson v. Seiter, 501 U.S. 294, 300 (1991). It follows that deliberate indifference is, without question, "a very high standard" and, thus, that "a showing of mere negligence will not meet it." Grayson v. Peed,195 F.3d 692, 695 (4th Cir. 1999).

Plaintiffs argue that the trial court should have concluded they need only establish the Department's policies and practices "expos[ed]" individuals to "an

objectively substantial risk of serious harm." (Pls.' Br. pp. 5, 61) Plaintiffs essentially argue that their claim should be governed by only the first part of the two-part deliberate indifference standard established by Farmer, 511 U.S. at 837. As the U.S. Supreme Court's decision in Wilson, 501 U.S. 294, indicated, that part of the deliberate indifference standard sounds in negligence. Id. at 305-06. Thus, by advocating a standard[12] which only accounts for an exposure to some objective risk of harm, Plaintiffs advance a theory of constitutional liability that is akin to negligence and is thus contrary to the U.S. Supreme court's cases interpreting the Eighth Amendment.

Defendants acknowledge that the U.S. Supreme Court's case law does not bind this Court's interpretation of our state constitution. And of course, this Court is "free to interpret our state Constitution differently than the United States Supreme Court interprets even identical provisions of the federal Constitution." State v. Jackson, 348 N.C. 644, 653, 503 S.E.2d 101, 107 (1998).

[12] The standard advanced by Plaintiffs is unworkable in practice because it would pose an unacceptable safety risk. Such a standard would preclude the placement of someone in restrictive housing because doing so may pose some risk of harm to that individual, regardless of the safety risk that person may present. The deliberate indifference standard accounts for this by accounting for a legitimate penological objective.

Nonetheless, this Court has acknowledged that the U.S. Supreme Court's analysis of constitutional claims in its case law can provide "[a] framework under which plaintiffs' claims should be decided," even when that claim is based upon the state constitution. Blankenship v. Bartlett, 363 N.C. 518, 524, 681 S.E.2d 759, 764 (2009). Furthermore, it has held that in construing terms in our state constitution which are identical to terms in the United States Constitution, the interpretation of the terms by the United States Supreme Court are "highly persuasive." Id. at 522, 681 S.E.2d at 762.

2. Plaintiffs' Proposed Standard is Contrary to Precedent from this Court.

To support adoption of their proposed standard, Plaintiffs cite the slight textual difference between Article I, Section 27 of the North Carolina Constitution and the Eighth Amendment of the U.S. Constitution. Article 27 uses the disjunctive "cruel or unusual punishments," whereas the Eighth Amendment uses the conjunctive "cruel and unusual punishment." (Emphasis added.) This minor textual discrepancy should have no bearing on the relevant legal standard, as this Court's analysis in State v. Green, 348 N.C. 588, 502 S.E.2d 819 (1998), cert. denied, 525 U.S. 1111 (1999), makes clear.

In Green, this Court "analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions." Green, 348 N.C. at 603, 502 S.E.2d at 828; see also State v.

Peek, 313 N.C. 266, 276, 328 S.E.2d 249, 256 (1985); State v. Fulcher, 294 N.C. 503, 525, 243 S.E.2d 338, 352 (1978). Citing the U.S. Supreme Court's analysis of the phrase "cruel and unusual punishment," this Court recognized, like the U.S. Supreme Court, that "[w]hether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear." Green, 348 N.C. at 603, 502 S.E.2d at 828 (quoting Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (plurality)). Also like the U.S. Supreme Court, this Court in Green focused on the type of "punishment" imposed. Id. Doing so, the Court "simply examin[ed] the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual." Id. (quoting Trop, 356 U.S. at 10 n.32). Thus, this Court's decision in Green does not indicate that there is any meaningful difference between the use of the word "or" in the state constitution and the use of the word "and" in the U.S. Constitution.[13]

[13] By continuing to interpret Article 27 to provide the same level of protection as the Eighth Amendment, North Carolina's jurisprudence would remain in line with the overwhelming majority of other states whose constitutions prohibit "cruel or unusual punishment." See William W. Berry, III Article: Cruel State Punishments, 98 N.C.L. Rev. 1201, 1227-32, 1233-34 (Sept. 2020) (indicating that all but three of the fourteen states whose constitutions prohibit "cruel or unusual punishment" find no meaningful distinction created by the use of the word "or" and, thus, interpret their constitutions consistent with the Eighth Amendment).

Plaintiffs correctly note that the decision in Green concerns a criminal defendant's sentence, not the conditions of an incarcerated person's confinement. But this difference is immaterial. Both litigants are challenging the same thing: punishment. There is no language in Green or any cases cited by Plaintiffs to indicate that this Court would interpret Section 27 differently depending on the nature of the action. In short, this Court's rationale for interpreting the two constitutional provisions identically in Green applies equally in this, a conditions-of-confinement case.

Finally, this Court's interpretation of Section 27 in Green, concluding it was consistent with the U.S. Supreme Court's interpretation of the Eighth Amendment, is in harmony with the history behind our State's initial adoption of the clause that is now Section 27. This is because the two provisions are drawn from the same source, the English Bill of Rights of 1686, a provision of which the Eighth Amendment "repeats almost verbatim." John V. Orth & Paul Martin Newby, The North Carolina State Constitution 84 (2d ed. 2013).

3. A Subjective Standard is Consistent with the Text of Section 27.

Plaintiffs argue that that the subjective, deliberate indifference standard is unsupported by the language of Section 27. In so doing, plaintiffs point out that: (1) there is no implicit subjective component to the word "punishment," (2) the text of Section 27 itself does not focus on what a state official knows or

thinks about a prohibited act, and (3) its language does not impute an intent requirement.[14] Plaintiffs' argument is unpersuasive.

All of these same points could equally apply to the text of the Eighth Amendment. Nevertheless, the U.S. Supreme Court has imposed a deliberate indifference standard for claims alleging that a condition of confinement constitutes cruel and unusual punishment. The Court did so because, as the trial court also correctly acknowledged, by its plain meaning, the word "punishment" does not encompass negligent actions. (R p. 14, ¶ 24); Wilson, 501 U.S. at 300. As the U.S. Supreme Court has recognized,

> "if the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." . . . "The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . . "If [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985."

Wilson, 501 U.S. at 300 (emphasis and all but the first alteration in original) (citations omitted). In other words, the Eighth Amendment "mandate[s] inquiry into a prison official's state of mind" because the word "punishment" in the amendment implies "[an] intent requirement." Id. at 299-300.

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[14] Plaintiffs support their argument in this regard with concurring opinions from the U.S. Supreme Court, the content of which is contrary to what the Court held in Wilson. (Pls.' Br. pp. 62-63)

"Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.'" State ex rel. Martin v. Preston, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (citation omitted). "In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." Id. As the trial court correctly concluded, since, like the Eighth Amendment, Section 27 prohibits "punishment," and considering the plain meaning of that word as noted by the U.S. Supreme Court, the deliberate indifference standard is supported by the text of our state constitution and should still apply to claims brought thereunder. (R p. 14, ¶ 24) This is true regardless of whether "cruel or unusual" has a meaning distinct from the "cruel and unusual" language in the Eighth Amendment. (Id.) Such an interpretation of Section 27, focusing on the meaning of the word "punishment," is consistent with this Court's reasoning and focus on punishment in Green. See Green, 348 N.C. at 603, 502 S.E.2d at 828.

Plaintiffs argue that the U.S. Supreme Court itself erred by "graft[ing] an intent requirement onto Eighth Amendment claims for injunctive relief from dangerous prison conditions." (Pls.' Br pp. 63-64) For this Court to accept Plaintiffs' proposition as correct, it would have to: (1) ignore the obvious differences between conduct that is intended to punish and conduct that is

merely negligent, (2) ignore the U.S. Supreme Court's sustained use of the deliberate indifference standard for conditions-of-confinement case for thirty years, (3) accept that a correct view of the Eighth Amendment (and Section 27) supports two distinct standards for conditions-of-confinement and inadequate-medical-care cases, and (4) conclude that, although brought under the same constitutional amendments, a different standard applies to individual suits for damages and class action suits seeking only injunctive relief. Plaintiffs' argument is unsupported and untenable, and if adopted by the Court, will lead to an unworkable interpretation of Section 27.[15]

4. The Cases Cited by Plaintiffs Are Inapplicable and Readily Distinguishable.

Plaintiffs rely on several cases to support their argument that Section 27 should be read more expansively than the Eighth Amendment, and that this Court should therefore adopt their suggested objective conditions-of-confinement standard. Plaintiffs' reliance on these case is misplaced.

As indicated above, this Court could interpret Section 27 more broadly, but it simply has not done so, as reflected in this court's opinion in Green. There is nothing in Medley v. N.C. Dep't of Corr., 330 N.C. 837, 412 S.E.2d 654 (1992),

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[15] The U.S. Supreme Court has rejected a piece-meal approach to Eighth Amendment conditions-of-confinement litigation, noting that it "perceived neither a logical nor a practical basis" for making distinctions similar to the ones Plaintiffs are asking this Court to make here. See Wilson, 501 U.S. at 299-300 & 299 n.1.

that justifies reading Article 27 as Plaintiffs suggest. The opinion in Green itself rejected that part of Medley upon which Plaintiffs primarily rely, the opinion of the concurring judge. More specifically, when addressing the "lone" concurring judge's assertion in Medley that the textual difference in the Section 27 suggested a different interpretation, this Court in Green concluded that "research reveals neither subsequent movement toward such a position by either this Court or the Court of Appeals nor any compelling reason to adopt such a position." Green, 348 N.C. at 603 n.1, 502 S.E.2d at 828 n.1 (emphasis added).

None of the other cases that Plaintiffs cite stand for the proposition that each and every provision of the North Carolina Constitution should be interpreted to provide greater rights than the federal Constitution. This Court has undoubtedly interpreted certain provisions in the North Carolina Constitution to provide greater rights than the commensurate provisions under the U.S. Constitution's Bill of Rights. See, e.g., State v. Allman, 369 N.C. 292, 293 n.1, 794 S.E.2d 301, 303 n.1 (2016) (providing that the North Carolina Supreme Court had "declined to adopt a good faith exception to the state constitution's exclusionary rule").

Rather, this Court has done so on a section-by-section or provision-by-provision basis. In fact, in many instances, this Court has settled on an interpretation of a portion of our state Constitution which is consist with the

U.S. Supreme Court's interpretation of the federal Constitution analogue. See, e.g., Blankenship, 363 N.C. at 522, 681 S.E.2d at 762 ("This Court's analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause"); State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (providing that "both the federal and state constitutional ex post facto provisions are evaluated under the same definition"), cert. denied, 537 U.S. 1117 (2003); cf. Deminski v. State Bd. of Educ., 377 N.C. 406, 2021-NCSC-58, ¶ 20 (concluding the plaintiff had a colorable claim under a section of our state constitution guaranteeing a right to education, where plaintiff alleged school officials were "deliberately indifferent to conduct that prevented plaintiff-students from accessing their constitutionally guaranteed right to a sound basic education," reflecting the same deliberate indifference standard adopted by the U.S. Supreme Court for claims brought under Title IX). And, as noted above, this Court has indeed interpreted the language in Section 27 in the same manner that the U.S. Supreme Court has interpreted the language in the Eighth Amendment.

Plaintiffs rely heavily on this Court's recent decision in Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 376 N.C. 558, 2021-NCSC-6 (2021), to support their argument that "textual differences between the state and federal constitutions provide compelling reason to construe the documents

differently." (Pls.' Br. pp. 64) The circumstances in Forest are, however, materially distinguishable from the circumstances presented by the instant case.

The issue before this Court in Forest was whether, under the state constitution, a plaintiff is required to show an "injury in fact" to satisfy the requirement that he has standing. Id. at ¶¶ 57-72. In Forest, this Court held that, unlike the federal constitution, our state constitution did not require plaintiffs to show an injury in fact. Id. at ¶ 72. The Court did not base its decision on a slight difference in wording between the standing requirements in the state and federal constitutions. Rather, the Court interpreted our state constitution's standing requirements differently because in our state constitution, there was a complete absence of the "case-or-controversy requirement" appearing in the federal constitution, "upon which the federal injury-in-fact requirement is based." Id. at ¶¶ 58 & 73.

* * *

This Court's case law and the language of Article 27 itself dictate the adoption of the subjective, deliberate indifference standard, while the cases cited by Plaintiffs do not. Accordingly, if this Court is inclined to resolve the issue of which standard applies to conditions-of-confinement claims under our state Constitution, it should adopt the deliberate indifference standard adopted by the U.S. Supreme Court. And, despite Plaintiffs' contentions to the

contrary, the trial court's determination concluding the deliberate indifference standard applies in their claims was not in error.

D. Adoption of the Subjective, Deliberate Indifference Standard Provides an Additional Basis to Affirm the Trial Court's Denial of Certification.

Defendants reiterate that this Court need not resolve whether Article 27 dictates the adoption of an objective or subjective standard for conditions-of-confinement claims in affirming the trial court's order denying certification in the present case. As discussed in Section I supra, the record evidence supports the trial court's conclusion that Plaintiffs failed to establish there was a predominating common issue in this case. In turn, that conclusion, along with others by the trial court, fully supports the court's decision to deny certification, regardless of whether an objective or subjective standard applies.

Nonetheless, as detailed above, if this Court is inclined to clarify the applicable standard, Article 27 and North Carolina case law dictate that the Court should adopt the subjective, deliberate indifference standard. And, if it does so, application of the subjective standard will provide an additional basis to affirm the trial court's denial of certification.

Requiring plaintiffs to establish, as they must under the subjective standard, that prison officials were deliberately indifferent to the risk they allege, would undoubtedly further undermine commonality in this class. Not only does the proposed class here consist of a diverse group of potential

plaintiffs, there is a wide variation in the conditions of confinement and other circumstances in each restrictive housing classification. In this situation, the subjective intent may well be different for every single claim. Thus, the possibility that a classwide proceeding in this case will devolve into a series of mini trials is even greater than when the standard is not considered. More importantly, such a proceeding would be incapable of "generat[ing] common answers apt to drive the resolution of the litigation," thus defeating commonality altogether. Dukes, 564 U.S. at 350.

It follows that adoption of the subjective, deliberate indifference standard would provide an additional basis to affirm the trial court's denial of certification in this case.

CONCLUSION

The trial court denied Plaintiffs' motion for certification on three independent grounds, all of which were supported by competent evidence, any one of which was sufficient to support its order denying class certification. First, the trial court found and concluded that Plaintiffs failed to demonstrate a predominating common issue. Second, the trial court found and concluded that the named Plaintiffs did not adequately represent the interests of the purported class. Third, the trial court, in its discretion, found and concluded that even if Plaintiffs had satisfied the statutory requirements for certification under Rule 23, a class action was not the superior method of adjudication.

For these and other reasons discussed in this brief, the trial court did not abuse its discretion in denying Plaintiffs' motion for class certification. Therefore, this Court should affirm the trial court's order denying Plaintiffs' motion for class certification.

This the 22nd day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that, on this day, I have served the foregoing **DEFENDANTS-APPELLEES' BRIEF** upon counsel for the PLAINTIFFS-APPELLANTS and the other attorneys listed below by electronic mail as follows:

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