No. COA17-475 N.C. INDUSTRIAL COMMISSION

NORTH CAROLINA COURT OF APPEALS

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JAMIE FERNANDEZ MARTINEZ, Administrator of the Estate of Maria J. Fernandez Jimenez, EDUARDO FERNANDEZ JIMINEZ, and JAMIE FERNANDEZ MARTINEZ,	)	**From the North Carolina Industrial Commission**
Plaintiffs-Appellees,	)	I.C. File Nos. TA-24791, TA-24792, TA-24793
v.	)	
WAKE COUNTY BOARD OF EDUCATION,	)	
Defendant-Appellant.	)	

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BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE

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Defendant-Appellant.	)	

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BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE

****

ISSUE PRESENTED

IN LIGHT OF SETTLED LAW FROM THE NORTH CAROLINA SUPREME COURT AND THE DEFENDANT'S POSITION IN SIMILAR CASES, DID THE INDUSTRIAL COMMISSION PROPERLY DENY DEFENDANT'S MOTION TO DISMISS?

STATEMENT OF THE FACTS

Amicus curiae adopts the Statement of Facts set forth in Plaintiffs-Appellees' Brief.

ARGUMENT

I. DEFENDANT'S MOTION TO DISMISS WAS PROPERLY DENIED, AS THE INDUSTRIAL COMMISSION HAS JURISDICTION OVER PLAINTIFFS' NEGLIGENCE CLAIMS.

In its brief, Defendant Wake County Board of Education argues at length that North Carolina statutes and case law require the Industrial Commission to dismiss Plaintiffs' claims. Yet in a case involving nearly identical factual and legal allegations, Defendant recently successfully moved to dismiss the claims of an injured child filed in Wake County Civil Superior Court, making the exact opposite argument. Specifically, in *Burgess v. Tight, et al.*, 17 CVS 4571 (Wake Co. Super. Ct. filed April 3, 2017), Defendant represented to the Honorable Judge Andrew Heath that the Industrial Commission has sole jurisdiction over negligent school bus route and training claims. Defendant's Memorandum of Law, a copy of which is attached as **Exhibit A**, explained:

> This case clearly falls within the construction of N.C.G.S. § 143-300.1 that our courts have followed in *Newgent, Stein, Stacy,* and *Burns*. As in these cases, the facts here involve allegations of negligence in relation to the operation of a school bus, inseparably connected to events occurring at a time when the driver of the bus was driving the bus. In *Newgent* and *Burns* it was a bus stop that required a child to cross a road, just as is alleged in this case. In *Stacy,* it was another design issue – a dangerous path for students leaving school – which led to a collision with a bus. In *Stein,* it was failure to report an overheard conversation about the possibility of an assault committed by bus riders a week later, which is clearly

> more remote from the operation of a school bus than the facts here. Section 143-300.1 applies here and confers jurisdiction on the Industrial Commission.

Nor is it surprising that the Defendant took a position in *Burgess* so inconsistent with its representations to this Court in its *Brief.* Defendant is merely following the playbook North Carolina school boards routinely follow in cases such as this one. They play a shell game where their description of jurisdiction changes based upon which of the two tribunals they are appearing before. The only consistency in the approach of the school boards is that they will move to dismiss for improper jurisdiction no matter where the child's representative files a claim.

The school boards' consistently inconsistent approach has created an environment of chaos and confusion. Even though the existing law is clear that the Industrial Commission has jurisdiction over claims for negligent school bus route design, the Attorney General's Office has continued filing motions to dismiss in the Industrial Commission. As a result, counsel for these injured or killed children have been required to file complaints in both the Industrial Commission and superior court and to face motions to dismiss in each forum based on diametrically opposed arguments. This confusion generates unnecessary cost and delay – both for plaintiffs and for school boards funded by North Carolina taxpayers. This case presents an opportunity for this Court to put this issue to rest and confirm that children who have been injured or killed as a proximate result of negligence by school officials in designing bus routes have a remedy in the Industrial Commission.

The path forward is clear. The North Carolina Supreme Court and this Court have repeatedly ruled that jurisdiction over claims of negligent school bus route design lies with the Industrial Commission. A fact pattern nearly identical to the one in this case was presented in *Newgent v. Buncombe County Board of Education*, 114 N.C. App. 407, 442 S.E.2d 158 (1994). While this Court's majority opinion in *Newgent* held that the plaintiff's claims were not properly before the Industrial Commission, the North Carolina Supreme Court reversed, and adopted the dissenting opinion of Judge Orr. *Newgent v. Buncombe County Board of Education*, 340 N.C. 100, 455 S.E.2d 157 (1995). At the outset of his dissenting opinion, Judge Orr made clear that "[he did] not believe that the Legislature intended for N.C. Gen. Stat. § 143-300.1 to preclude the Industrial Commission from hearing tort claims wherein certain alleged negligent acts or omissions arose out of, and were inseparably connected to, events occurring at the time a school bus driver was operating the bus in the course of her employment." *Newgent*, 114 N.C. App at 409, 442 S.E.2d at 159. This statement by Judge Orr is critical to a proper determination in this case, as its adoption by the North Carolina Supreme Court is the only indication from our highest court as to how broadly N.C. Gen. Stat. § 143-300.1 must be read. Following *Newgent*, jurisdiction is proper before the Industrial Commission whenever the alleged negligent act by a Board of Education employee

"arises out of" and is "inseparably connected to" events occurring at the time that a bus driver is operating a school bus in the course and scope of her employment.

With respect to the underlying facts presented in *Newgent*, Judge Orr wrote:

> These circumstances show that at the time Ms. Freeman was operating the bus in the course and scope of her employment, she saw the decedent, an elementary aged child, cross the busy road twice on his own, and she could allegedly see that the bus stop was in an area of limited visibility for a pedestrian. Further, while she was operating the bus in the course and scope of her employment, every morning Ms. Freeman would drive by Frisbee Road in a southerly direction. If Ms. Freeman had picked up decedent while she was traveling in a southerly direction instead of turning the bus around and picking him up while she was driving the bus in a northerly direction, decedent would not have had to cross the highway and thus be exposed to the danger of crossing the highway.

Id., 114 N.C. App. at 411 – 412, 442 S.E.2d at 160 – 161. In this case, plaintiffs have made similar claims that the responsible bus driver, Gloria Smith, should have reported the unsafe path that 14-year-old Maria J. Fernandez Jimenez ("Maria") had to walk to reach her bus stop. As in *Newgent*, the allegations regarding the bus driver's negligence provide a basis for jurisdiction in the Industrial Commission.

The further question raised by Defendant appears to be whether the claims arising out of the negligence of other employees or agents of the Wake County Board of Education must be allowed to proceed in the Industrial Commission. This Court has already affirmed that they must, as Defendant has admitted, indicating in the attached **Exhibit A** that "[s]ince the Supreme Court adopted Judge Orr's dissent in *Newgent*, the North Carolina Court of Appeals has consistently followed its broad view of Industrial Commission jurisdiction in school bus cases."

One recent example is *Burns v. Union Cnty. Bd. of Educ.*, No. COA13-616, 2014 WL 220681 (N.C. App. Jan. 21, 2014), a case like this one where a young child had to cross a "55 mile per hour highway in pre-dawn hours." In *Burns*, the plaintiff made allegations of bus driver negligence, as well as claims of negligence against Ed Davis, Superintendent of the Union County Board of Education, Denise Patterson, Assistant Superintendent of the Union County Board of Education, and "other unknown employees responsible for the safe transportation of students." *Id.* This Court, relying on Judge Orr's dissent in *Newgent* adopted by the Supreme Court, allowed the entire action to proceed forward in the Industrial Commission, asserting that "plaintiff's alleged claims arose out of and were connected to events at the time of the accident." *Id.* As in *Burns*, this case includes allegations both as to a failure in the initial design of the route and training of the bus driver, as well as the bus driver's failure to subsequently bring the danger to the attention of her supervisors. These claims – indistinguishable from those in *Burns* – arise out of and are inseparably connected to an event occurring during the operation of the school bus by Gloria Smith – the crash in which 14-year-old Maria was killed.

In *Stacy v. Merrill*, 191 N.C. App. 131, 664 S.E.2d 565 (2008), this Court reaffirmed the Supreme Court's instruction in *Newgent* that N.C. Gen. Stat. § 143-300.1 is to be given a broad interpretation. The *Stacy* Court held that the Industrial Commission had exclusive jurisdiction over claims on behalf of a child killed when

he lost control of his bicycle and fell into the path of a school bus. The complaint filed in superior court included allegations that the school board: 1) failed to design a safe exit from school grounds for students, 2) failed to properly instruct students, 3) failed to properly train bus drivers of potential dangers, and 4) otherwise committed negligence other than negligent operation of a school bus. *Id.* 191 N.C. App. at 133, 664 S.E.2d at 566. The chief difference between *Stacy* and the present posture of this case is that the *Stacy* plaintiff filed the negligent route and training claims in superior court only, rather than also in the Industrial Commission, and the action was dismissed because it belonged in the Industrial Commission. The *Stacy* court followed *Newgent* in finding that the above allegations were not precluded by N.C. Gen. Stat. § 143-300.1:

> The legislative intent for N.C. Gen. Stat. § 143-300.1 was to allow the Industrial Commission to hear "tort claims wherein certain alleged negligent acts or omissions arose out of, and were inseparably connected to, events occurring at the time a school bus driver was operating the bus in the course of her employment." Citing *Newgent*, supra.
>
> . . .
>
> **Under the facts alleged in their amended complaint, plaintiffs' claims are "inseparably connected to[] events occurring at the time a school bus driver was operating the bus in the course of [his] employment[,]" and thus fall within the scope of N.C. Gen. Stat. § 143-300.1.** See *Newgent* at 409, 442 S.E.2d at 159. We hold that the Industrial Commission had exclusive jurisdiction over plaintiffs' claims, and the trial court did not err in dismissing plaintiffs' claims. This argument is without merit.

Stacy v. Merrill, 191 N.C. App. at 135 – 136, 664 S.E.2d at 567 – 568 (emphasis added). The holding in *Stacy* makes clear that there can be no concurrent jurisdiction.

Even though the superior court complaint was based upon non-driver negligence issues such as improper route design and lack of training and supervision, the Court of Appeals dismissed those claims as properly being before the Industrial Commission, along with the claims against the bus driver.

In *Stein v. Asheville City Bd. of Educ.*, 168 N.C. App. 243, 608 S.E.2d 80 (2005) reversed on other grounds, 360 N.C. 321, 626 S.E.2d 263 (2006), this Court again broadly interpreted the jurisdiction of the Industrial Commission under N.C. Gen. Stat. § 143-300.1. Similar to some of the claims in *Newgent*, *Burns*, and this case, the alleged negligent acts in *Stein* did not occur when the bus was in motion. The Court of Appeals held that the Industrial Commission had exclusive jurisdiction over claims that a bus driver and monitor were negligent in failing to report hearing two bus riders planning an assault that they later committed.

The most recent case in which this Court has addressed N.C. Gen Stat. § 143-300.1 was *Wesley v. Winston-Salem/Forsyth Board of Education*, No. COA15-648 [N.C. App. Apr. 19, 2016]. *Wesley* was largely a negligent route design and negligent training/supervision case in which plaintiff's counsel attempted to file negligence and state constitutional claims against the local board of education in superior court. This Court made clear that the Industrial Commission had exclusive jurisdiction over the negligence claims:

> [W]e note that by dismissing plaintiff's constitutional claim, plaintiff's remaining causes of action for negligence and negligent hiring, supervision, and employee retention are causes of action against a county board of education brought in Forsyth County Superior Court. **Standing alone, these causes of action against a county board of education are properly heard within the jurisdiction of the North Carolina Industrial Commission . . . Thus, with plaintiff's constitutional claim dismissed, Forsyth County Superior Court is without jurisdiction to hear plaintiff's remaining negligence claims, as jurisdiction to hear those causes of action resides exclusively with the North Carolina Industrial Commission.** Therefore, it appears that plaintiff's constitutional claim was filed in the Superior Court in an effort to defeat the exclusive jurisdiction of the Industrial Commission. [Internal Citations Omitted, Emphasis Added]

As shown by these cases, this Court has consistently done what Defendant admitted in its *Burgess* Memorandum: it has repeatedly held that the Industrial Commission has jurisdiction over the type of claims filed by Plaintiffs in this case. This Court should decline Defendant's invitation to depart from its precedents.

II. NEGLIGENT SCHOOL BUS ROUTE DESIGN IS A PUBLIC SAFETY HAZARD THAT DEMANDS PUBLIC ACCOUNTABILITY.

This Court's opinion will have a profound impact on public safety. If North Carolina school boards are held accountable for their negligence in designing a bus route that needlessly exposes a child to danger, they will have an incentive to demand that designs give proper weight to the safety of children. On the other hand, if cases of negligent school bus route design are subject to dismissal in the Industrial Commission for lack of jurisdiction, and subject to dismissal in superior court on immunity grounds, then other concerns, such as cost and time savings, may weigh more heavily than safety.

The risk of allowing school boards to act with impunity in designing bus routes should not be underestimated. Nationally, from 2006 through 2015, an average of 131 fatalities per year occurred that were classified as school-transportation-related and nearly 20% of those were non-occupants such as Maria. National Center for Statistics and Analysis. National Highway Traffic Safety Administration, *School-transportation-related crashes: 2006-2015 data* (Traffic Safety Facts Report No. DOT HS 812 366) (August 2017), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812366. A study from a national loading and unloading survey showed that over a 15-year span, North Carolina had "the third highest number of bus stop fatalities in the country." *'It's just dangerous': Wake parents share bus stop safety concerns,* WRAL (Feb. 18, 2015), http://www.wral.com/-it-s-just-dangerous-wake-parents-share-bus-stop-safety-concerns/14455817.

Following a series of highly publicized collisions involving children being hit while crossing the street to their school bus, including this case, a local news station, WNCN, initiated a public service announcement program known as "BRAKE4BUSES." The BRAKE4BUSES program, as its name implies, was designed to bring attention to the problem of drivers not stopping for school buses displaying their flashing red lights and Stop arm. The problem was pervasive. In 2015, it was estimated that "3,000 drivers illegally pass stopped school busses each

day in North Carolina." *Id.* References to the BRAKE4BUSES program can be found on many websites operated by state entities, including a website operated in conjunction with the Governor's Highway Safety Program. *See* NORTH CAROLINA SCHOOL BUS SAFETY WEB, http://www.ncbussafety.org (last visited Sep. 25 2017).

While public school boards cannot control the behavior of every driver on the road, they can design bus routes in a manner that maximizes safety for students and does not needlessly expose children to dangerous drivers. Standards and guidelines can assist school boards in minimizing this hazard. *See, e.g.,* University of North Carolina Highway Safety Research Center, *Selecting School Bus Stop Locations: A Guide for School Transportation Professionals* (July 2010), http://www.putneytrans.com/SelectingSchoolBusStopLocations.pdf. What many of the incidents that led to the BRAKE4BUSES campaign have in common is that the path required to be taken by the injured child was needlessly dangerous. This case is a prime example. As in *Burns*, Maria had to cross a 55 mile per hour highway in the dark when, instead, her school bus could have picked her up on the side of the road where her house was located when it came back later in its route. This simple adjustment would have prevented Maria from exposure to traffic as she crossed the highway.

Similarly, in the case of Michael Burgess, Jr. referenced in the attached **Exhibit A**, Michael, age 11, never should have had to cross the highway. At the time of the crash that fractured his skull in two places, he was crossing a 45 mile per hour road early in the morning in dark, foggy conditions. A car driven by an inexperienced 16–year- old slammed into his body. Just a year before, Michael's Wake County school bus would pull into his mobile home community to allow him and other elementary aged children to board in safety. Instead of continuing that route, the Wake County Board of Education chose a route that required him and even younger children to be exposed to dangerous or inexperienced drivers.

What all of these cases have in common is that they were preventable – and not just by the negligent driver. While our school boards will never be able to eliminate every danger to school children, they can certainly minimize the risks by designing safe routes that conform to known standards. School boards are less likely to be concerned about conforming to known standards if they cannot be held accountable for negligence that contributes to a child's injury or death. If this Court determines that the Industrial Commission has no jurisdiction over these claims, the families of children such as Maria – frequently barred from bringing suit in superior court by governmental immunity – will have no recourse.

CONCLUSION

For the safety of public school children all across North Carolina, the Court should affirm the order of the North Carolina Industrial Commission upholding its jurisdiction over Plaintiffs' claims.

Respectfully submitted, this the 25TH day of September, 2017.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing **BRIEF OF *AMICUS CURIAE* NORTH CAROLINA ADVOCATES FOR JUSTICE** was duly served upon all other parties to this cause by U.S. Mail, postage paid, addressed to the parties as follows:

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This the 25TH day of September, 2017.

T. SHAWN HOWARD

EXHIBIT A

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO 17 CVS 004571

MICHAEL BURGESS, JR., a minor appearing by and through his Guardian ad Litem, ANDREW P. CIOFFI, and MICHAEL BURGESS,

Plaintiffs,

v.

LINDSEY M. TIGHT; NICOLA A. TIGHT; DOROTHY McCALL, in her official and individual capacities; WAKE COUNTY BOARD OF EDUCATION; JAMES MERRILL, Superintendent of the Wake County Board of Education, in his official capacity; DELL EDWARDS, Principal, West Lake Middle School, in her official capacity; ROBERT SNIDEMILLER, JR., Senior Director of Transportation Operations & Finance for the Wake County Public School System, in his official and individual capacities; ALVIN McNEILL, Director of Field Operations, in his official and individual capacities; JEFFREY TSAI, Director of Operations, Logistics, and Systems, in his official and individual capacities; and, SCOTT MOONEYHAM Director of Transportation, in his official and individual capacities,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Defendants Dorothy McCall, in her official and individual capacities; Wake County Board of Education; James Merrill, in his official capacity; Dell Edwards, in her official capacity; Robert Snidemiller, Jr., in his official and individual capacities; Alvin McNeill, in his official and individual capacities; Jeffrey Tsai, in his official and individual capacities; and Scott

Mooneyham, in his official and individual capacities (collectively, the "School Defendants"), by and through counsel, and pursuant to Rules 5, 7, 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, submit this Memorandum of Law in Support of their motion to dismiss all claims against them for lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted. In support of this motion, the Defendants respectfully show the Court the following:

FACTS AS ALLEGED BY PLAINTIFFS

Plaintiffs initially filed this negligence action on April 3, 2017 against Defendants. Plaintiffs alleged that Plaintiff Michael Burgess, Jr., a middle school student enrolled at West Lake Middle School in Wake County, was struck and injured by a car while crossing the street to board a school bus. The Complaint alleges:

> As Defendant McCall approached the Bus Stop and prior to bringing the School Bus to a complete stop, Defendant McCall failed to activate and turn-on the amber warning lights equipped on the School Bus at any time within 300 feet of the Bus Stop.
>
> The amber warning lights equipped on the School Bus are designed to give other motorists operating in the vicinity of the School Bus maximum warning that it is preparing to stop and children will be attempting to board the School Bus.
>
> Upon arriving at the Bus Stop and bringing the bus to a stop, Defendant McCall observed the Tight Vehicle in close proximity to the Bus Stop proceeding towards her in the southbound lane of Johnson Pond Road and failing to slow. Despite having observed the Tight Vehicle, Defendant McCall, proceeded to activate the red lights and the mechanical Stop arm and opened the bus doors, signaling Michael to cross southbound Johnson Pond Road from the Bus Stop to board the School Bus.
>
> Observing the stopped bus, the flashing red lights, and the extended stop arm, Michael began to cross southbound Johnson Pond Road to board the School Bus as he did every morning.
>
> As Defendant L. Tight drove southbound on Johnson Pond Road and approached the stopped School Bus in the northbound lane of Johnson Pond

> Road and Michael crossing the southbound lane of Johnson Pond Road, she failed to reduce her speed and stop, striking Michael's person as he was lawfully walking across southbound Johnson Pond Road, first catching his foot and ankle underneath the Tight Family Vehicle and then propelling him in the air into a drainage ditch adjacent to Johnson Pond Road (hereafter referred to as the "Crash").
>
> Prior to the Crash, Defendant L. Tight did not sound her horn or otherwise take any action to warn Michael that she was about to strike him.
>
> As a result of the Crash, Michael sustained immediate, apparent, and possibly permanent physical and psychological injuries, including, but not limited to: a right orbital bone fracture, a right frontal bone fracture, multiple right ankle fractures, multiple abrasions, a concussion and closed head injury, injuries to his left knee, left wrist, and back, and posttraumatic stress disorder.
>
> Complaint, ¶¶66-72.

The Complaint alleges claims of negligence against the high school student driver of the car that struck the plaintiff (L. Tight), the school bus driver (McCall), the Board, the Superintendent, the Middle School Principal, the Senior Director of Transportation Operations and Finance, the Director of Field Operations for the Transportation Department, the Director of Central Operations, Logistics and Systems for the Transportation Department, and the Director of EC Transportation, Bus Driver Recruitment and Retention / Magnet Transportation. (Complaint, ¶¶89-102; 105-122; 125-132; 135-142; 145-153.

The Complaint alleges that McCall was employed by WCPSS as a bus driver, was acting in the course and scope of her employment and "at all times relevant hereto," Defendant McCall was operating a school bus owned by Defendant Board for the purpose of transporting children in Wake County to a Wake County Public School. (¶¶9-11). The Complaint alleges the Board owned and operated the school bus involved in the incident. (¶11), and that each of the Defendants was, at all relevant times, employed by the Wake County Board of Education and acting in the course and scope of each one's employment with the Defendant Board of Education.

(Complaint, ¶9 (McCall); ¶21 (Merrill); ¶27 (Edwards); ¶30 (Snidemiller); ¶35 (McNeill); ¶40 (Tsai); ¶45 (Mooneyham).

Defendants filed their Motion to Dismiss Complaint on June 9, 2017, pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) for lack of subject matter jurisdiction, lack of personal jurisdiction, insufficiency of process and service of process,[1] and failure to state a claim. The Court lacks subject matter and personal jurisdiction over Plaintiff's claims because they are school bus claims within the exclusive jurisdiction of the North Carolina Industrial Commission under N.C. Gen. Stat. §§143-300.1 and 115C-42. Defendants supported their motion with the Affidavits of Snidemiller, McNeill, Mooneyham, and Tsai, which clarified that the claims against them are also barred by public official immunity.

On May 25, 2017, Plaintiff filed two State Tort Claims Act Claims at the North Carolina Industrial Commission, TA-26280 and TA-26281, stating claims virtually identical to the claims asserted in this action. Copies of the claims filed in the North Carolina Industrial Commission were attached as Exhibits 5 and 6 to the School Defendants' Motion to Dismiss.

I. THE COMPLAINT ALLEGES SCHOOLBUS CLAIMS, WHICH MUST BE DISMISSED AS OUTSIDE THIS COURT'S JURISDICTION AND WITHIN THE EXCLUSIVE JURISDICTION OF THE NORTH CAROLINA INDUSTRIAL COMMISSION UNDER THE STATE TORT CLAIMS ACT.

The Complaint filed in this court on April 3, 2017, alleges that plaintiff, a middle school student at West Lake Middle School, was injured when he was struck by a car while crossing Johnson Pond Road to get to a school bus stop.

In addition to the claims against the student driver whose vehicle struck the plaintiff, the Complaint alleges: (1) claims of negligence against the bus driver and other School Defendants;

[1] Defendants withdraw their motion only to the extent it was based on insufficiency of process and service of process.

(2) that each of the School Defendants was at all relevant times employed by the Wake County Board of Education; (See above) (3) that the Board owned and operated the school bus involved in the incident; and (4) that each of the Defendants was, at all relevant times, acting in the course and scope of each one's employment with the Defendant Board of Education. Because the Plaintiffs' claims are school bus claims, they must be dismissed as they are outside the Court's jurisdiction. N.C. Gen. Stat. §115C-42, in addition to stating the exclusive method by which school boards may waive immunity, explicitly directs that boards of education may *not* waive sovereign immunity for damages arising from school bus claims — even if insurance purportedly exists to cover such claims. Section 115C-42 initially describes how school boards may waive immunity, but concludes with the following provision:

> Provided, that this section shall not apply to claims for damages caused by the negligent acts or torts of public school bus, or school transportation service vehicle drivers, while driving school buses and school transportation service vehicles when the operation of such school buses and service vehicles is paid from the State Public School Fund.
>
> N.C. Gen. Stat. §115C-42.

Section 115C-42, the waiver of immunity statute, by its own terms, does not apply to school bus claims, which are instead covered under N.C. Gen. Stat. §143-300.1, the School Bus Statute in the State Tort Claims Act. *Smith v. McDowell County Board of Educ.*, 68 N.C. App. 541, 543, n.1, 316 S.E.2d 108, 110, n.1 (1984). Under these statutes, if a plaintiff's claim against the School Defendants falls within the scope of N.C. Gen. Stat. §143-300.1, then N.C. Gen. Stat. §115C-42 excludes the claims from the waiver of immunity, and the North Carolina Industrial Commission has exclusive jurisdiction.

The North Carolina Industrial Commission has exclusive jurisdiction over all

"[t]ort claims against any county board of education, which claims arise . . . as a result of any alleged negligent act or omission of the driver, transportation safety assistant, or monitor of a public school bus . . .." N.C. Gen. Stat. §143-300.1(a)(2008); *Stacy v. Merrill,* 191 N.C. App. 131, 136, 664 S.E.2d 565, 567 (N.C. App. 2008)(unpublished disposition). The legislative intent of the State Tort Claims Act, N.C. Gen. Stat. §143-291 *et seq.*, and specifically N.C. Gen. Stat. 143-300.1, was **to allow the Industrial Commission to hear "tort claims wherein certain alleged negligent acts or omissions arose out of, and were inseparably connected to, events occurring at the time a school bus driver was operating the bus in the course of her employment."** *Stacy* at 135, *quoting Newgent v. Buncombe County Board of Education* 114 N.C. App. 407, 409, 442 S.E.2d 158, 159 (1994) (Orr, J. dissenting), *reversed per curium,* 340 N.C. 100, 455 S.E. 2d 157 (1995)(adopting dissent of Orr, J.). In *Stacy,* the Board was sued for negligence in the design of a pedestrian, bicycle and vehicular traffic plan, and for failure to provide a safe exit route for students. The court held that the Industrial Commission had exclusive jurisdiction over plaintiff's claims.

Section 143-300.1 has been applied broadly by the courts. In *Newgent*, a minor student was struck and killed by an automobile when attempting to cross a highway in order to await the arrival of his school bus that was not present at the accident scene. *Newgent* v. *Buncombe County Bd. Of Educ.,* 114 N.C. App. 407, 442 S.E.2d 158 (1994), *reversed per curiam,* 340 N.C. 100, 455 S.E.2d 157 (1995) (adopting dissent of Orr, J.). Plaintiff asserted negligence claims that the bus stop was in a limited area of visibility, that the school bus driver failed to inform the principal that she could pick up the student where he would not have to cross, and that the driver knew that he would have to cross the highway by himself without supervision. *Id.,* at 409, 442 S.E. 2d at 159. The Commission concluded it did not have jurisdiction because, under the

language of the statute, the driver "was not operating a public school bus in the course of her employment" at the time of the alleged negligence, and the Court of Appeals affirmed. *Id.*

The North Carolina Supreme Court, adopting Judge Orr's dissent in the North Carolina Court of Appeals, reversed, holding that *this was a school bus case* within the jurisdiction of the North Carolina Industrial Commission. *Id.* Judge Orr's dissent in *Newgent,* which has been consistently followed since, further defined the Industrial Commission's jurisdiction in school bus cases:

> I do not believe that the Legislature intended for N.C.G.S. § 143-300.1 to preclude the Industrial Commission from hearing tort claims wherein certain alleged negligent acts or omissions arose out of, and were inseparably connected to, events occurring at the time a school bus driver was operating the bus in the course of her employment.
>
> 114 N.C. App. 407, 409, 442 S.E. 2d 158, 159.

The facts and allegations of the *Newgent* case, the seminal case setting out the exclusive jurisdiction of the North Carolina Industrial Commission over school bus cases, are virtually identical to the facts and allegations in the Complaint. Here, as in *Newgent*, the student was struck by another vehicle on his way to the school bus stop, crossing a road just in front of the other vehicle traveling in the opposite direction from the school bus. Compare Complaint, ¶¶66-72 to *Newgent* at 114 N.C. App. 407-08, and 410. Here, as in *Newgent*, plaintiff alleged the bus driver failed to inform others that the area had limited visibility and she could pick up the student in a safer location. Compare Complaint, ¶¶96-98 to *Newgent*, 114 N.C. App. 407, 407-408. Under the North Carolina Supreme Court's ruling in *Newgent*, this case falls squarely within the exclusive jurisdiction of the North Carolina Industrial Commission.

Nor do plaintiffs' allegations of misplacement of the bus stop or negligent design of the bus stop or bus route somehow defeat the exclusive jurisdiction of the Industrial Commission

over the case under the School Bus Statute. In *Newgent*, as here, plaintiff alleged the bus stop was misplaced and a safer stop could have been made on the side of the street where the student lived. Compare Complaint, ¶¶96 and 97 to *Newgent* at 410. Similarly, as held in the *Stacy* case, where a bus struck a student who fell off his bicycle into the path of a school bus at the school, and plaintiff alleged negligent design of a pedestrian, bicycle and vehicular traffic plan and failing to provide a safe exit route for students, such cases likewise fall within the exclusive jurisdiction of the North Carolina Industrial Commission. *Stacy* v. *Merrill,* 191 N.C. App. 131,664 S.E.2d 565 (2008). Following *Newgent,* the Court of Appeals concluded that **"[u]nder the facts alleged in their amended complaint, plaintiffs' claims are 'inseparably connected to[] events occurring at the time a school bus driver was operating the bus in the course of [his] employment,' and thus fall within the scope of N.C. Gen. Stat. § 143-300.1."** *Id.,* at 136, 664 S.E.2d at 568, *quoting Newgent,* at 409, 442 S.E. 2d at 159.

Since the Supreme Court adopted Judge Orr's dissent in *Newgent,* the North Carolina Court of Appeals has consistently followed its broad view of Industrial Commission jurisdiction in school bus cases. In *Stein v. Asheville City Bd of Educ.,* 168 N.C. App. 243, 608 S.E.2d 80 (2005) *reversed on other grounds,* 360 N.C. 321, 626 S.E.2d 263 (2006), the Court of Appeals held that the Industrial Commission had exclusive jurisdiction over claims that a bus driver and monitor were negligent in failing to report hearing two school bus riders' plan an assault that they committed a week later. *Id.* at 245. The more recent Court of Appeals decision in *Burns v. Union County Board of Education* likewise held a case alleging negligent design of a school bus route was within the exclusive jurisdiction of the Industrial Commission under the School Bus Statute in the State Tort Claims Act. *Burns v. Union Co. Bd. of Educ.,* 2014 WL 220681 at *3 (unpublished)(copy attached) (2014).

This case clearly falls within the construction of N.C.G.S. § 143-300.1 that our courts have followed in *Newgent, Stein, Stacy, and Burns.* As in these cases, the facts here involve allegations of negligence in relation to the operation of a school bus, inseparably connected to events occurring at a time when the driver of the bus was driving the bus. In *Newgent* and *Burns* it was a bus stop that required a child to cross a road, just as is alleged in this case. In *Stacy,* it was another design issue — a dangerous path for students leaving school — which led to a collision with a bus. In *Stein,* it was failure to report an overheard conversation about the possibility of an assault committed by bus riders a week later, which is clearly more remote from the operation of a school bus than the facts here. Section 143-300.1 applies here and confers jurisdiction on the Industrial Commission.

The Industrial Commission has recently affirmed its jurisdiction over these cases in two Full Commission decisions. In the *Burns v. Union County Board of Education* case, TA-22902 and 23608 (copy attached), the Full Commission highlighted the fact that its earlier dismissal of a similar case for lack of jurisdiction had already been reversed by the North Carolina Court of Appeals and remanded to the Commission for hearing:

> With regard to whether the Industrial Commission had jurisdiction over Plaintiff's action pursuant to N.C. Gen. Stat. § 143-300.1, the Court of Appeals stated as follows: "In interpreting the scope of N.C. Gen. Stat. § 143-300.1, this Court, in a dissent adopted *per curiam* by our Supreme Court, see *Newgent v. Buncombe Bd. of Ed.*, 340 N.C. 100, 455 S.E.2d 157 (1995), held that the Legislature did not intend for N.C. Gen. Stat. § 143-300.1 "to preclude the Industrial Commission from hearing tort claims wherein certain alleged negligent acts or omissions arose out of, and were inseparably connected to, events occurring at the time a school bus driver was operating the bus in the course of her employment." *Burns*, 2014 N.C. App. LEXIS 79 at *7 (citing *Newgent*, 114 N.C. App. at 409, 442 S.E.2d at 159).

The Full Commission noted that the *Burns* court summarized the allegations of Plaintiff's Affidavit, concluded that "plaintiff's alleged claims arose out of and were connected to events at

the time of the accident," and held "that the record contained evidence that would support the Industrial Commission's exercise of jurisdiction over the action, and the Industrial Commission erred in granting defendant's motion to dismiss for lack of jurisdiction." *Id.* When the Full Commission was presented a second time with the lack of jurisdiction argument, the Commission was adamant it would not make the same error twice: "The North Carolina Court of Appeals has already considered and rejected the same arguments Defendant raises now. The Court did not remand for consideration of further partial motions to dismiss; rather, it held that 'the record contained evidence that would support the Industrial Commission's exercise of jurisdiction over the action,' and that the Commission erred when it dismissed for lack of jurisdiction." *Burns,* I.C. Nos. TA 22902 & TA 23608, Jan. 19, 2017, (copy attached), *quoting Burns*, 2014 N.C. App. LEXIS 79 at *9 (unpublished) (copy attached).

The following day, the Full Commission issued a similar ruling in *Ferenandez/Martinez v. Wake County Board of Education*, I.C. Nos. TA-24791, -24792, & -24793, Jan. 20, 2017 (copy attached). Again citing the *Newgent* decision and Affidavits naming the bus driver, Superintendent, Principal and transportation department employees, the Commission held that the statements in the Affidavits sufficiently aver to alleged negligent acts or omissions of the named employees **which arose out of, and were inseparably connected to the events occurring on the date of the accident when the school bus driver was driving the bus in the course of her employment.** *Id.*

Thus, the Supreme Court's decision in *Newgent* and its progeny, including *Stacy, Stein* and *Burns,* together with the Full Commission's recent rulings following *Newgent* and recognizing its own reversal on appeal in the *Burns* case, establish the breadth of the exclusive jurisdiction of the North Carolina Industrial Commission in school bus cases under N. C. Gen.

Stat. § 143-300.1. In a 2016 case involving a student struck by a car trying to reach a school bus stop, the North Carolina Court of Appeals reiterated that such actions, including those alleging negligent hiring, supervision and employee retention against a county board of education, are properly within the exclusive jurisdiction of the North Carolina Industrial Commission. *Wesley v. Winston-Salem/Forsyth County Bd. of Educ.*, 2016 WL 1565877 at *6 (2016) (unpublished) (copy attached), quoting and citing *Stacy* and *Burns*.

The allegations in the Amended Complaint fall squarely within the School Bus Statute of the State Tort Claims Act. Accordingly, exclusive jurisdiction lies with the Industrial Commission and the Amended Complaint should be dismissed. Plaintiffs have recognized this, having filed claims in the North Carolina Industrial Commission.

II. THE DOCTRINE OF PUBLIC OFFICIAL IMMUNITY BARS INDIVIDUAL CAPACITY CLAIMS AGAINST SENIOR DIRECTOR OF TRANSPORTATION OPERATIONS AND FINANCE SNIDEMILLER, DIRECTOR OF E.C. TRANSPORTATION, MCNEILL, DIRECTOR OF CENTRAL OPERATIONS, LOGISTICS AND SYSTEMS, TSAI, AND DIRECTOR OF FIELD OPERATIONS MOONEYHAM.

"It is settled law in [North Carolina] that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto." *Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997) (citation omitted). "The rule in such cases is that an official may not be held liable unless it be alleged and proved that his act, or failure to act was corrupt or malicious, . . . or that he acted outside of and beyond the scope of his duties." *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952) (citations omitted). A school superintendent is a "public official." *Gunter v. Anders*, 114 N.C. App. 61 (1994); *see generally Meyer*, 347 N.C. at 113, 489 S.E.2d at 889. Defendants Snidemiller, McNeill, Tsai and Mooneyham are entitled to

public official immunity and the claims brought against them in their individual capacities must be dismissed.

Plaintiffs apparently concede this point with respect to Defendants Merrill and Edwards because each is alleged to be a "public official," sued in his "official capacity" only. Complaint, ¶22 (Merrill) and ¶25 (Edwards). Plaintiff alleges all the School Defendants acted in the course and scope of their employment at all times and makes no allegations seeking to deny Defendants Merrill or Edwards their public official immunity. Given that the only claims against Defendants Merrill and Edwards are official capacity claims, which are by law duplicative of the claims against the Board, Defendants Merrill and Edwards must be dismissed from this action.

Plaintiffs purport to allege both individual and official capacity claims against Snidemiller, McNeill, Tsai and Mooneyham labeling them as "public employees" ¶ 31 (Snidemiller); ¶36 (McNeill); ¶41 (Tsai); and ¶46 (Mooneyham) rather than public officials. Defendants Snidemiller, McNeill, Tsai and Mooneyham, however, are instead public officials entitled to the same public official immunity applicable to the other public official defendants. The distinction between public officials and public employees is explained below, making manifest that Snidemiller, McNeill, Tsai and Mooneyham are public officials.

Defendant Snidemiller is identified in the Complaint as Senior Director of Transportation Operations and Finance for the WCPSS. (¶37) Director-level employees have specifically been held to be public officials entitled to public official immunity. *Gunter v. Anders,* 114 N.C. App. 61, 68, 441 S.E.2d 167, 171 (1994); *Farrell v. Transylvania County Bd. of Educ.,* 175 N.C. App. 689, 690, 625 S.E.2d 128, 130 (2006)(*Farrell I*). Snidemiller's position as "Senior *Director* of Transportation Operations and Finance" exceeds that standard and his duties and responsibilities describe the exercise of discretion that is emblematic of public officials. His position is the most

senior in the Transportation Department with a budget of some $72 million and approximately 1300 employees. Snidemiller Affidavit, ¶¶3-4. McNeill's position as *Director* of EC Transportation likewise meets the public official criteria of a senior official performing statutorily mandated functions transporting some 2800 EC students daily under a budget of $14 million. McNeill Affidavit, ¶¶8-12. Tsai's position as *Director* of Central Operations, Logistics and Systems is also a senior official position in the Transportation Department, with broad discretion and authority. Tsai Affidavit, ¶¶38-42. Mooneyham's position as *Director* of Field Operations is similarly a senior official position with broad supervisory authority, statutory reporting requirements, development and oversight of a $20 million budget, and broad discretion in the performance of duties. Mooneyham Affidavit, ¶¶43-47. Accordingly, Defendants Snidemiller, McNeill, Tsai and Mooneyham, like Defendants Merrill and Edwards are public officials entitled to public official immunity and any individual claims against them must be dismissed with prejudice.

"Our courts have recognized several basic distinctions between a public official and a public employee, including (1) a public officer is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while a public employee performs ministerial duties." *Farrell v. Transylvania County Bd. of Educ.*, 199 N.C. App. 173, 177, 682 S.E.2d 224, 228 (2009). School superintendents, director-level employees and principals are public officers who exercise discretion in the performance of their jobs and, therefore, are entitled to public officer immunity. *Gunter v. Anders,* 114 N.C. App. 61, 68, 441 S.E.2d 167, 171 (1994); *Farrell v. Transylvania County Bd. of Educ.*, 175 N.C. App. 689, 690, 625 S.E.2d 128, 130 (2006)(*Farrell I*)(Section 115C-287.1(a)(3) creates the position of "school administrator," which includes principals,

assistant principals, supervisors and directors and holding that director of federal programs for county school system was public official who qualified for public official immunity as school administrator). "'School administrator[s]' include principals, assistant principals, supervisors, and directors "whose major function includes the direct or indirect supervision of teaching or of any other part of the instructional program.'" *Id.*

The Complaint alleges that Defendant Snidemiller was employed as the Senior Director of Transportation Operations and Finance for the WCPSS, was responsible for the development, design, establishment, and implementation of school bus routes and stops for the transportation of students to and from Wake County Public Schools, including West Lake Middle School and that he was a public employee being sued in both his official and individual capacities. ¶¶28-32. As public officers in the Senior Director and Director-level positions described in their Affidavits and job descriptions, Snidemiller, McNeill, Tsai and Mooneyham are immune from tort liability when carrying out governmental duties unless they act maliciously or corruptly.

The general rule of official immunity is that a public officer who exercises his judgment and discretion within the scope of his official authority, without malice or corruption, is protected from liability. *McCarn v. Beach,* 128 N.C. App. 435, 437, 496 S.E.2d 402, 404 (1998), *citing Golden Rule Ins. Co. v. Long,* 113 N.C. App. 187, 194, 439 S.E. 2d 599, 603, *appeal dismissed and disc. review denied,* 335 N.C. 555, 439 S.E.2d 145 (1993). In order to hold an officer personally liable in his individual capacity, a plaintiff must make a prima facie showing that the officer's conduct is malicious, corrupt, or outside the scope of his official authority. *Epps v. Duke University, Inc.,* 122 N.C. App. 198, 205, 468 S.E. 2d 846, 852, *disc. review denied,* 344 N.C. 436, 476 S.E.2d 115 (1996); *Mabrey v. Smith,* 548 S.E.2d 183, 186 (N.C. Ct. App. 2001); *Hunter v. Transylvania Cnty. Dept. of Soc. Servs.*, 701 S.E.2d 344, 346 (N.C. Ct.

App. 2010). "As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability." *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412 (1976). *Accord Gunter v. Anders,* 114 N.C. App. 61, 441 S.E. 2d (1994). In *Gunter v. Anders*, the court held that "[b]ecause plaintiffs failed to plead that [the school principal's] . . . acts or failure to act were corrupt, malicious, in bad faith or outside the scope of his authority, plaintiffs' claim as to [the principal] . . . was properly dismissed." 114 N.C. App. at 68, 441 S.E. 2d at 171. In this case, Plaintiffs have failed to sufficiently allege that Defendants Snidemiller, McNeill, Tsai and Mooneyham acted maliciously. The claims against Defendants Snidemiller, McNeill, Tsai and Mooneyham in their individual capacities, therefore, must be dismissed.

To maintain a claim against Defendants Snidemiller, McNeill, Tsai and Mooneyham, public officials, Plaintiffs must allege and forecast *evidence* showing they acted with malice.

> [A] conclusory allegation that a public official acted willfully and wantonly should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss. The facts alleged in the complaint must support such a conclusion.

Meyer v. Walls, 347 N.C. 97, 114 (1997). Thus, to overcome the presumption of good faith in favor of a public official, the burden is on the plaintiff to offer a sufficient forecast of evidence to establish a prima facie showing that the public official's actions were malicious, corrupt, or outside the official's scope of authority. *Epps v. Duke Univ.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 851-52 (1996). To show legal malice sufficient to overcome the presumption of public official immunity, plaintiffs are required to produce at least some evidence that the defendant intended to cause plaintiff's injuries. *In re Grad v. Kaasa*, 312 N. C. 310, 313, 321 S.E.2d 888, 890 (1984); see *Hawkins v. State of North Carolina*, 117 N.C. App. 615, 630, 453

S.E.2d 233, 242 (1995)("'Malice' is defined as '[t]he *intentional* doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply and evil intent.'") (citation omitted and emphasis added).

The Complaint alleges perfunctorily that responsibility for any alleged acts on the school bus may impose individual liability upon any person occupying a position in the employment chain from the School Bus Driver to the Superintendent. These generalized allegations based solely upon the position occupied by the employee in the employment chain are not sufficient to overcome public official immunity. Accordingly, the claims against Defendants Snidemiller, McNeill, Tsai and Mooneyham in their individual capacities must be dismissed.

"If the defendant fails to advance any allegations in his or her complaint other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity, and instead, is treated as a claim against defendant in his official capacity. *McCarn, supra* at 438, *citing Trantham v. Lane*, 127 N.C. App. 304, 307, 488 S.E.2d 625, 628 (1997)(citations omitted). In *McCarn*, the court found that the allegations in the complaint focused on defendants' negligence only in their official duties as law enforcement officers, pointing out: "Plaintiffs even allege in their complaint that at all times defendants were acting within the scope of their employment." The court held that because all claims alleged against the defendants are in their official capacities, they were protected from liability by their official immunity. *McCarn* at 438.

The Complaint alleges that all acts of all Defendants were performed within the scope of their employment, with no allegations of malice or corruption. Plaintiffs have alleged no facts that would tend to show that Defendants acted in a "corrupt," "malicious," or *ultra vires* manner, and their negligence claims against them are therefore subject to dismissal. Plaintiffs have

pleaded no specific facts to support a claim of malice against Defendants Snidemiller, McNeill, Tsai or Mooneyham.

The allegations against the School Defendants in the Complaint are conclusory. They do not allege specific facts regarding any specific acts, but are proffered mechanically to sidestep public official immunity. Snidemiller, McNeill, Tsai and Mooneyham are public officials and the allegations do not suggest that any acts of any of the School Defendants were outside the scope of their employment, but that all were acting within the course and scope of said employment." ¶30 (Snidemiller); ¶35 (McNeill); ¶40 (Tsai); ¶45 (Mooneyham).

The crux of Plaintiffs' allegations is negligence, insufficient to meet the high threshold necessary to pierce public official immunity. "A plaintiff may not satisfy her burden of proving that an official's acts were malicious through allegations and evidence of mere reckless indifference. Rather . . . the plaintiff must show at least that the officer's actions were '*so wreckless or so manifestly indifferent to the consequences* . . . as to justify a finding of [willfulness] and wantonness *equivalent in spirit to an actual intent.*'" *Wilcox v. City of Asheville,* 222 N.C. App. 285, 292, 730 S.E.2d, 226, 232 (2012), quoting *Foster v. Hyman,* 197 N.C. 189, 192, 148 S.E. 36, 38 (1929) (emphasis added in *Wilcox).* Vague allegations of negligence in the performance of job duties are not allegations of conduct outside the scope of each Defendants' employment, nor are they allegations of malice or corruption sufficient to overcome public official immunity. Where the plaintiff fails to advance allegations of conduct outside the scope of employment, or other than those relating to a defendant's official duties, the complaint does not state a claim against a defendant in his or her individual capacity, and instead is treated as a claim against defendant in his official capacity. *McCain v. Beach,* 128 N.C. App. 435, 438, 496 S.E. 2d 402, 404-05 (1998)." *Wilcox, supra.*

III. PLAINTIFFS' OFFICIAL-CAPACITY CLAIMS ARE DUPLICATIVE OF THEIR CLAIMS AGAINST THE BOARD AND ARE THEREFORE SUBJECT TO DISMISSAL.

An official capacity claim "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent," and is not a suit against the official himself. *Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 3105 (1985). Accordingly, Plaintiffs' claims against the School Defendants in their official capacities should be dismissed as duplicative of his claims against the Board. *Cf. Love-Lane v. Martin*, 355 F.3d 766, 783 (4th Cir. 2004) (affirming dismissal of First Amendment retaliation claim against superintendent in his official capacity as duplicative), *cert. denied*, 543 U.S. 813, 125 S. Ct. 68, 160 L. Ed. 2d 18.

Plaintiffs have sued the School Defendants in their official capacities. Courts have repeatedly held that official-capacity suits are redundant because they are simply another way of pleading an action against a governmental entity. *See e.g., Kentucky v. Graham,* 493 U.S. 159, 165-66 (1985); *Monell v. Dept. of Soc. Svs.*, 436 U.S. 658, 690 n.55 (1978); *Mullis v. Sechrest,* 346 N.C. 356, 366, 481 S.E.2d 14, 21 (1997). Because official capacity suits are merely another way of pleading an action against the body of which an officer is an agent, such suits may be dismissed when the government entity has also been sued. *See, e.g., May v. City of Durham,* 136 N.C. App. 578, 584, 525 S.E.2d 223, 229, (2001). Accordingly, all claims against the School Defendants in their official capacities should be dismissed. Consequently, the face of the Complaint warrants dismissal of School Defendants Merrill and Edwards as they are sued only in their official capacities. Because School Defendants Snidemiller, McNeill, Tsai and Mooneyham are public officials with public official immunity as well, any individual claims against them must be dismissed in the first instance, leaving only official capacity claims which likewise warrant dismissal as those claims are duplicative of the claims against the Board.

Accordingly, Defendants Merrill, Edwards, Snidemiller, McNeill, Tsai and Mooneyham must be dismissed from this action with prejudice.

CONCLUSION

The Complaint must be dismissed because it alleges school bus claims that are outside the court's jurisdiction and within the exclusive jurisdiction of the North Carolina Industrial Commission. To the extent the complaint alleges individual claims against public officials, those claims are barred by public official immunity. To the extent the complaint alleges official claims against individuals, those claims must be dismissed as duplicative of claims against the Board.

Respectfully submitted, this the 11th day of August, 2017.

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CERTFICATE OF SERVICE

I certify that a copy of the attached *Memorandum of Law in Support of Motion to Dismiss* was served upon the following by E-Mail and United States mail, postage prepaid, addressed to:

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This the 11th day of August, 2017.

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