IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

[redacted] *Plaintiff*, v. MARTIN-ROBBINS FENCE COMPANY; ARCADIS U.S., INC.; GEORGIA DEPARTMENT OF TRANSPORTATION; and JOHN DOES 1-10, *Defendants.*	Civil Action No.: [redacted]

PLAINTIFF'S RESPONSE IN OPPOSITION TO ARCADIS U.S., INC.'S MOTION TO DISMISS

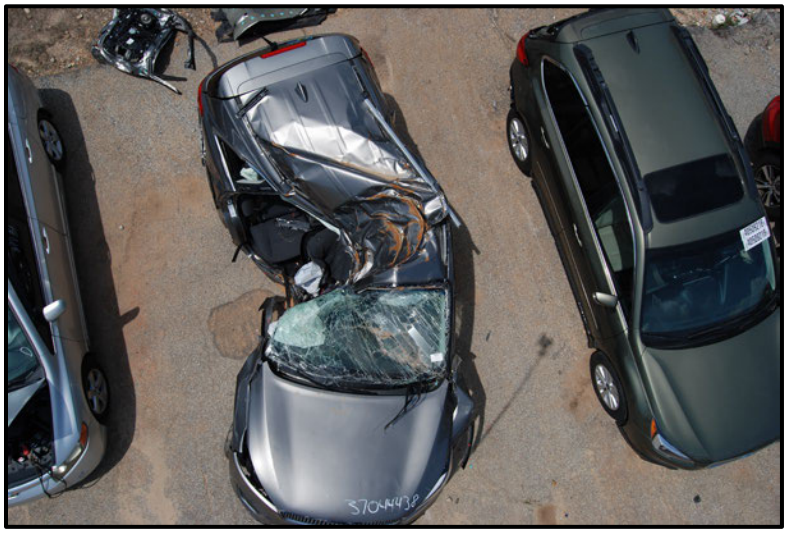
On June 3, 2018 on I-85 south, the Kia SUV in which [redacted] was a passenger was struck by another vehicle and started sliding toward the edge of the road. The Kia slid toward a camera pole, a reinforced concrete cylinder about two feet in diameter that held a GDOT traffic camera far above the highway. The camera pole was about eight feet from the edge of the roadway, and what separated the sliding Kia from that unyielding pole was a guardrail.

Maintaining guardrail is the responsibility of GDOT and its contractors. O.C.G.A. § 32-2-2(a)(1); *see also Georgia Dep't of Transp. v. Delor*, 351 Ga. App. 414, 418 (2019) (holding that contractor can be held liable for negligence, but "the presence of contractors performing services on behalf of [GDOT] does not relieve [GDOT] from potential liability for its own actions."). In this instance, GDOT had contracted with Defendant Arcadis to help it monitor guardrails within this district, and had contracted with Defendant Martin-Robbins to keep the

guardrails in good repair. Specifically, Arcadis was supposed to identify and report damaged guardrail, and Martin-Robbins was supposed to go out and fix it. Neither company had done its job.

The guardrail between the sliding Kia and the camera pole was already damaged. It had been damaged for at least nine months. Arcadis had failed to timely report the damage. When Arcadis finally did report it, Martin-Robbins failed to repair the guardrail within the time period specified by its contract with GDOT. So this guardrail stood, bent and detached from its posts, in a condition that the parties have conceded was "non-functional," for nine months or more.

When guardrail is in good shape and does its job, it redirects vehicles and keeps them in the roadway. That is not what happened here. Because the guardrail in front of the camera pole was damaged, it did not redirect the Kia or keep the Kia in the roadway. Instead, the Kia 'tripped' over the damaged guardrail and vaulted into the air. The Kia rotated as it flew. [redacted]'s side of the Kia slammed into the camera pole. The car bent around the pole. The pole ripped through the occupant area. Ms. [redacted]'s seating area was demolished. She was killed.



The Kia, Pl.'s FAC, ¶ 43

Arcadis' Motion to Dismiss fails for three reasons. *First*, because Plaintiff's claims against Arcadis are for ordinary negligence, not professional negligence, no expert affidavit was required. *See* O.C.G.A. § 9-11-9.1. *Second*, because Arcadis attached evidence to its Motion, the Motion is actually an untimely motion for summary judgment that must be denied as premature. O.C.G.A. § 9-11-56(f). *Finally*, even assuming that an expert affidavit was required (it was not), Plaintiff has amended her expert affidavit to track the language of her First Amended Complaint ("FAC").

Arcadis' Motion should be denied and Plaintiff should be allowed to conduct discovery .

1. Facts

1.1. The non-functional guardrail did not do its job.

This case is about a fatal impact with a camera pole that would not have occurred if the guardrail had been in good repair. Unfortunately for [redacted] the guardrail was "non-functional." On June 3, 2018, [redacted] was the passenger of a Kia Sorrento traveling on I-85 South. Pl.'s FAC, ¶ 21. The car struck a portion of non-functional guardrail along the left shoulder of I-85. *Id.* at ¶¶ 22, 24, 26. Because the non-functional guardrail was in a state of disrepair, it failed to keep the car in the roadway. *Id.* at ¶ 38. Instead, the guardrail "'tripped' the Kia, causing the Kia to flip *over* the guardrail toward the camera pole that stood close behind the guardrail." *Id.* at ¶ 40 (emphasis in original).

The impact with the pole completely crushed the passenger side of the Kia, and it killed [redacted] *Id.* at ¶¶ 43-45.

1.2. Defendants knew the guardrail was non-functional long before the collision.

GDOT is responsible for maintaining the state highway system, including the guardrail at issue. Pl.'s FAC, ¶¶ 15-16, 20. GDOT hired Arcadis and Martin Robbins to help with its maintenance duties. *Id.* at ¶¶ 17-19. Specifically, Arcadis was responsible for identifying damaged guardrail and telling GDOT and Martin Robbins about it. *Id.* at ¶ 19. Martin Robbins was then responsible for inspecting and reparing the guardrail, among other things. *Id.* at ¶¶ 17-18. Defendants *knew* the guardrail at issue was non-functional *long before* it caused [redacted]'s death, but they failed to do anything about it. *Id.* at ¶¶ 27-30.

1.3. Arcadis' liability is based on its failure to promptly notify GDOT and Martin Robbins.

Arcadis is liable because it failed to give prompt notice of the non-functional guardrail to GDOT and Martin Robbins. Pl.'s FAC, ¶ 49. That is, Arcardis *knew* the guardrail at issue was non-funcitonal, but, nonetheless, failed to tell anyone in a timely manner. *Id.* Importantly, Plaintiff does *not* allege that Arcadis negligently designed or built anything. Nor does Plaintiff allege that that Arcadis was negligent in designating the subject guardrail as "non-functional." Plaintiff makes no allegation about *any* decision requiring professional engineering skill or judgment by Arcadis. Plaintiff simply alleges that Arcadis failed to timely notice the damage, and failed to timely tell GDOT and Martin Robbins about it.

In other words, Plaintiff does not challenge Arcadis's *design*, *construction*, or *analysis* of anything. Instead, Plaintiff alleges that Arcadis failed to timely *notice* the damaged guardrail and failed to timely *tell* Martin-Robbins or GDOT what it saw. Neither *noticing* damaged guardrail nor *telling* someone about it requires an engineering degree.

1.4. Plaintiff filed her complaint with an expert affidavit out of an abundance of caution.

Plaintiff's Original Complaint made claims for ordinary negligence against Martin Robbins and GDOT. *See generally* Compl. However, in an abundance of caution, Plaintiff included an expert affidavit of Herman Hill, P.E., P.T.O.E. to comply with O.C.G.A. § 9-11-9.1, in case the Court found that it applied. *See* Compl. (Ex. 3). On September 30, 2020, Plaintiff filed her FAC, which added Arcadis as a party and made claims for ordinary negligence against Arcadis. *See* Pl.'s FAC, ¶ 49. Plaintiff's FAC explicitly incorporated Mr. Hill's affidavit. Pl.' FAC, ¶ 14 (incorporating affidavit into FAC). Critically, although Mr. Hill's original affidavit did not specifically name Arcadis, it "set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim" against both Martin Robbins and GDOT. O.C.G.A. § 9-11-9.1. As stated herein and alleged in the FAC, Arcadis was a contractor for GDOT, so GDOT's duties under O.C.G.A. § 33-2-2(a)(1) flowed to Arcadis.

As noted above, no expert affidavit is required for any of Plaintiff's claims because this is an ordinary negligence case. Nonetheless, in an abundance of caution, Plaintiff has now submitted a Supplemental Affidavit of Herman Hill to track the allegations of ordinary negligence in the FAC and support each claim against Arcadis.

2. <u>Applicable Legal Standards.</u>

2.1. Georgia is a notice pleading state.

Under Georgia law, a complaint must only include "[a] short and plain statement of the claims showing that the pleader is entitled to relief." O.C.G.A. § 9-11-8 (a)(2)(A); *see also Atlanta Women's Specialists, LLC v. Trabue*, 2020 WL 6385866, at *2 (Ga. Nov. 2, 2020). "Pleadings serve only the purpose of giving notice to the opposing party of the general nature of

the contentions of the pleader, and thus general allegations are sufficient to support a plaintiff's claim for relief." *Wright v. Waterberg Big Game Hunting Lodge Otjahewita (PTY), Ltd.*, 330 Ga. App. 508, 510 (2014); *see also Osprey Cove Real Estate, LLC v. Towerview Constr., LLC*, 343 Ga. App. 436, 437 (2017) (holding that the touchstone of Georgia pleading is "fair notice" to the defendant).

A motion to dismiss for the failure to state a claim should *not* be granted unless the movant shows:

> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.

Austin v. Clark, 294 Ga. 773, 774–75 (2014). Stated differently, a motion to dismiss should only be granted if "it would be impossible for [Plaintiff] to come forward with evidence within the framework of the amended complaint that would support" her claims. *TMX Fin., LLC v. Goldsmith*, 352 Ga. App. 190, 214 (2019).

"In deciding a motion to dismiss, all pleadings are to be construed most favorably to the [plaintiff], and all doubts regarding such pleadings must be resolved in the [plaintiff's] favor." *Lyle v. Fulcrum Loan Holdings, LLC*, __ Ga. App. __, 841 S.E.2d 182, 185 (Ga. Ct. App. 2020). "[T]he discovery process bears the burden of filling in details." *Trabue*, 2020 WL 6385866, at *3 (Ga. Nov. 2, 2020) (quoting *Dillingham v. Doctors Clinic, P.A.*, 236 Ga. 302, 303 (1976)).

2.2. Code Section 9-11-9.1 is a "pleading" standard.

Code Section 9-11-9.1 only requires an expert affidavit for professional negligence cases. O.C.G.A. § 9-11-9.1. In a case involving allegations of ordinary negligence, Code Section 9-11-9.1 is inapplicable and no expert affidavit is required. *See Georgia Dep't of Transp. v. Delor*,

351 Ga. App. 414, 420 (2019); *Petree v. Dep't of Transportation*, 340 Ga. App. 694, 700 (2017); *Bray v. Dep't of Transp.*, 324 Ga. App. 315, 318 (2013); *Drawdy v. Dep't of Transp.*, 228 Ga. App. 338, 339 (1997); *Adams v. Coweta Cty.*, 208 Ga. App. 334, 336 (1993).

The statute states, in pertinent part, that "the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim." O.C.G.A. § 9-11-9.1(a). Even though it was not required, Plaintiff included such an affidavit in her Original Complaint and incorporated that affidavit into her FAC.

"The purpose of OCGA § 9-11-9.1 is to guard against frivolous lawsuits, not to serve as a tactical tool for defense counsel." *Bonner v. Peterson*, 301 Ga. App. 443, 447 (2009). Plaintiff's lawsuit is clearly not frivolous. Not one Defendant has taken that position. Arcadis must not be permitted to use O.C.G.A. § 9-11-9.1 as a "tactical tool" to avoid responsibility for its negligence.

3. <u>The Court Should Deny Arcadis' Motion to Dismiss.</u>

3.1. Plaintiff's claim against Arcadis is for ordinary negligence.

3.1.1. The failure to timely report damaged guardrail does not involve professional engineering skill or judgment.

An expert affidavit is not required for a claim of ordinary negligence. *Georgia Dep't of Transp. v. Delor*, 351 Ga. App. 414, 420 (2019). Rather, an expert affidavit is *only* required where liability is based on error in professional skill or judgment by a professional. O.C.G.A. § 9-11-9.1; *see also Drawdy v. Dep't of Transp.*, 228 Ga. App. 338, 339 (1997) ("[T]he relevant inquiry is whether a particular claim is grounded upon professional malpractice, that is, an act or omission [which is a negligent deviation from a professional standard of care, established by

professional and expert testimony and not known by the ordinary layperson] which constitutes malpractice."). Plaintiff alleges ordinary negligence. Pl.'s FAC, ¶ 49. Even Arcadis admits that. *See* Def.'s Mot. Dismiss, 3 ("Although Plaintiffs cast their claims under the theory of ordinary negligence . . .").

The Georgia Court of Appeals has consistently found that no expert affidavit is required when liability is based on negligent maintenance or a failure to repair. *E.g.*, *Delor*, 351 Ga. App. at 420 (holding no expert affidavit required for negligent decision to reopen roadway after repairs); *Petree*, 340 Ga. App. 694, 700 (2017) (reversing dismissal of claim for ordinary negligence based on negligent maintenance); *Bray*, 324 Ga. App. 315, 318 (2013) (reversing dismissal of ordinary negligence claim); *Drawdy*, 228 Ga. App. at 339 (reversing summary judgment on negligent repair and maintenance claims); *Adams*, 208 Ga. App. at 336 (1993) (reversing dismissal of ordinary negligence claim). The Court of Appeals has distinguished negligent *maintenance* cases (which do not require an affidavit) from negligent *design* cases (which do). *Adams*, 208 Ga. App. at 336 (1993) (reversing dismissal of negligent repair and maintenance claims, but affirming dismissal of negligent design claims). Because this case is about negligent *maintenance*, not negligent *design*, no expert affidavit was required. *Id.*

Adams v. Coweta County is directly on point. 208 Ga. App. 334.[1] In *Adams*, the plaintiffs sued Coweta County after their truck struck a guardrail and one occupant was killed and two others were seriously injured. *Id*. at 334. The plaintiffs sued the county and others alleging that "the guardrails on the bridge were negligently designed, installed, maintained and repaired." *Id.* The defendants filed a motion to dismiss because the plaintiffs did not file an

[1] Negative treatment by *Minnix v. Dep't of Transp.*, 272 Ga. 566, 569 n. 17 (2000), on other grounds.

expert affidavit with their complaint. *Id.* The trial court granted the motion to dismiss, but the Court of Appeals reversed the dismissal of the claims for ordinary negligence. *Id.* at 336. The Court reasoned that even though "the design of a bridge or guardrail must necessarily involve professional (engineering) services, the ***installation, repair and maintenance*** of those structures would not necessarily require the exercise of professional skill and judgment." *Id.* (emphasis added).

Adams governs. Exactly like in *Adams*, Plaintiff alleges Arcadis was negligent in its maintenance of the guardrail. Specifically, Plaintiff challenges Arcadis' failure to timely *notice* the damage and *tell* GDOT and Martin Robbins about it. Pl.'s FAC, ¶ 49. Plaintiff does *not* challenge Arcadis' determination that the subject guardrail was "non-functional" (although even that would not require professional engineering judgment under *Adams*). Neither *noticing* damaged guardrail nor *telling* someone else about it requires an engineering degree or professional skill or judgment. Therefore, under *Adams*, and the other cases cited above, the Court should deny Arcadis' Motion to Dismiss because no expert affidavit is required for claims of ordinary negligence.

Arcardis' reliance on *Kneip v. Southern Engineering Company* is inapposite for several reasons. 260 Ga. 409 (1990). *First*, the *Kneip* case was decided under the first version of O.C.G.A. § 9-11-9.1, which has since been amended multiple times. In 1990, when *Kneip* was decided, it was unclear whether the expert affidavit requirement even applied to engineering firms. The *Kneip* decision found it did. Since *Kneip*, and the amendments that have followed, Georgia appellate courts have repeatedly found that routine maintenance functions, such as locating and notifying others of damaged guardrail, does not require an expert affidavit. *See*

Adams, 208 Ga. App. at 336; *see also Petree*, 340 Ga. App. at 700; *Bray*, 324 Ga. App. at 318; *Drawdy*, 228 Ga. App. at 339.

Second, unlike the present case, the motion to dismiss in *Kneip* was filed *after* the parties had the opportunity to conduct some written discovery. 260 Ga. at 410. The third-party plaintiff in that case "stated in its responses to discovery that it expect[ed] to call expert witnesses at trial who w[ould] testify that Southern's inspection of the pole should have revealed the pole was so deteriorated that it ought to have been replaced." *Id.* That is important because the motion to dismiss in *Kneip* was prompted by sworn discovery responses indicating that the third-party plaintiff intended to introduce expert testimony that the defendant was negligent in its inspection of a utility pole, *i.e.*, a challenge to the manner of an inspection. Here, Plaintiff does not challenge the manner in which Arcadis inspected the guardrail, *i.e.*, its designation of the guardrail as "non-functional." Rather, Plaintiff challenges Arcadis' failure to look at the guardrail and tell GDOT or Martin Robbins what it saw with reasonable promptness. Pl.'s FAC, ¶ 49.

Third, the conduct at issue in *Kneip* involved more professional judgment than looking at a guardrail to see whether it is bent. In *Kneip*, the inspector at issue had to inspect a power pole and assess possible "deterioration of the pole." *Kneip*, 260 Ga. At 410. The inspector had to determine, and the parties argued about, whether the pole was in a "state of decay" at the time of the inspection. *Central Georgia Elec. v. Southern Engineering*, Br. of Respondent at 10 (April 5, 1990).[2] Because determining whether a wooden power pole is rotten on the inside requires

[2] Because the *Kniep* opinion does not go into detail about the facts, the undersigned located this brief. (The brief comes from the *Kneip* case although it bears a different name because there were two petitioners in that case.) The brief was filed in the Supreme Court of Georgia on behalf of Southern Engineering Company by Mr. Kent Stair, Esq., who is now counsel for Defendant Arcadis in this case. The brief is available on Westlaw, but if it is outside of the Court's

professional knowledge and expertise, the parties in *Kneip* agreed upon "the necessity of expert opinion to establish the proper procedure for the inspection of utility poles." *Id.* at 10-11. At issue in *Kneip* was "the appropriate standard of care for the inspection of utility poles." *Id.* at 11. Further, the challenged inspection of the power pole in *Kneip* "took place *eight years* before the pole fell" and allegedly caused the accident at issue. *Id.* at 3-4 (emphasis in original).

This case is different. Determining whether the interior of a wooden telephone pole is in a "state of decay" requires professional judgment because it is not obvious from a cursory visual inspection—in other words, you cannot tell whether the inside of a pole is rotten just by looking at it. Figuring out whether a guardrail has been damaged is much simpler. You just look at it, usually from a moving car. The guardrail is either bent or it is not, and anybody with eyes can tell the difference. *Adams*, 208 Ga. App. at 336 (holding that "the installation, repair and maintenance of [guardrails] would not necessarily require the exercise of professional skill and judgment."). Here, unlike in *Kneip*, there is no need for any expert to "establish the proper procedure for the inspection of" guardrails—all a person has to do is look at the guardrail. Here, unlike in *Kneip*, there is no dispute about "the appropriate standard of care for the inspection of" guardrails—inspecting a guardrail for damage only requires looking at it. In sum, while determining whether a power pole is decayed or rotten inside requires some professional expertise, determining whether guardrail is bent does not. *Kneip* is inapposite.

Plaintiff gave Arcadis fair notice of her claims for ordinary negligence, and no expert affidavit was required. Accordingly, Arcardis' Motion to Dismiss must be denied.

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subscription, it is also available upon request from Plaintiff's counsel (and probably from Arcadis's counsel).

3.2. The Court should deny Arcadis' Motion based on the improper inclusion of evidence.

In its effort to get Plaintiff's case dismissed, Arcadis attempts to twist Plaintiff's claims for ordinary negligence into claims for professional negligence. To do that, Arcadis attaches and relies on the affidavit of its own engineer. For two reasons, that tactic does not work.

3.1.2. Arcadis cannot convert an action for ordinary negligence into one for professional negligence.

A defendant "cannot convert an action for ordinary negligence into an action for professional malpractice that would be controlled by OCGA § 9-11-9.1 by the presentation of an affidavit of an expert stating that the plaintiff's claims were caused by professional malpractice." *Drawdy v. Dep't of Transp.*, 228 Ga. App. 338, 339 (1997). That is *exactly* what Arcadis has done here.

Georgia's appellate courts prohibit defendants from twisting claims of ordinary negligence into claims for professional negligence because "[i]f such a procedure was allowed, a jury issue would *always* remain as to whether the cause of the accident was one of professional malpractice or ordinary negligence, as the weight and credibility of the expert's testimony would be for jury determination." *Id.* (emphasis added). For that reason, the trial court (not the defendant or the affiant) must decide whether the plaintiff alleges ordinary negligence or professional malpractice. *Id.*

Along with its Motion, Arcardis filed the affidavit of a professional engineer testifying that Plaintiff's allegations are for professional malpractice. As discussed below, the filing of an affidavit converts Arcadis' Motion to one for summary judgment, and it directly contravenes the rule established by *Drawdy*. Under *Drawdy*, the affidavit cannot, and does not, convert Plaintiff's claims for ordinary negligence into claims for professional negligence. Therefore, the Court should deny Arcadis' Motion to Dismiss.

3.2.1. Arcadis' inclusion of evidence converts its Motion to Dismiss to a motion for summary judgment, which must be denied as premature.

If a motion to dismiss raises matters outside the pleadings, the motion shall be treated as one for summary judgment. *Cox Enterprises, Inc. v. Nix*, 273 Ga. 152, 153 (2000); *see also Petree v. Dep't of Transportation*, 340 Ga. App. 694, 699 (2017).

Petree v. Department of Transportation is directly on point and requires the denial of Arcadis' Motion. 340 Ga. App. 694 (2017). In *Petree*, the plaintiff alleged claims for negligence, trespass, and nuisance. *Id.* at 694. Just like in this case, the defendant in *Petree* relied on an engineer's affidavit in support of its motion to dismiss. *Id.* at 697. The trial court considered the affidavit and granted the defendant's motion to dismiss. *Id.* at 698. The Court of Appeals reversed, holding that "the trial court committed reversible error when it relied on evidence outside the pleadings to dismiss [the plaintiff's] claims against the County." *Id.* at 700.

This case is *exactly* the same. In support of its Motion to Dismiss, Arcadis filed (and repeatedly relied upon) the Affidavit of Tony Hendon, P.E. Since Plaintiff did not rely on or attach Mr. Hendon's affidavit to her Complaint, any consideration of the affidavit or motion would necessarily convert the Motion to Dismiss to a motion for summary judgment because it would require the Court to consider evidence outside of the four corners of the FAC. *Petree*, 340 Ga. App. at 699 ("When a trial court considers evidence outside the pleadings, including documents attached to and/or offered in support of a defendant's motion to dismiss for failure to state a claim, it converts the motion to dismiss into a motion for summary judgment."). A motion for summary judgment must be denied as premature because discovery as to Arcadis has not even begun.

Summary judgment should "*only* be decided upon an adequate record" and "should not be granted until the party opposing the motion has had an adequate opportunity for discovery."

Snook v. Tr. Co. of Georgia Bank of Savannah, 859 F.2d 865, 870 (11th Cir. 1988) (citations omitted). "A premature decision on summary judgment impermissibly 'deprive[s] the plaintiffs[ ] of their right to utilize the discovery process to discover the facts necessary to justify their opposition to the motion.'" *Vining v. Runyon*, 99 F.3d 1056, 1058 (11th Cir. 1996) (quoting *Snook*, 859 F.2d at 871).

Georgia's appellate courts have repeatedly held that granting motions for summary judgment before the discovery period has ended constitutes reversible error. *See Chandler v. Liberty Mut. Fire Ins. Co.,* 333 Ga. App. 595, 599-600 (2015) (reversing summary judgment for defendant as premature where discovery sought by plaintiffs had been improperly denied); *Dodson v. Sykes Indus. Holdings, LLC,* 324 Ga. App. 871, 876-77 (2013) (vacating summary judgment for defendant where motion to compel relevant discovery remained pending at time defendant's motion granted); *Erickson v. Hodges,* 257 Ga. App. 144, 146 (2002) (holding summary judgment prematurely granted where party had not been able to obtain discovery); *Parks v. Hyundai Motor Am., Inc.,* 258 Ga. App. 876,880 (2002) ("We find that [plaintiffs] raised discovery issues that required judicial scrutiny, and that the trial court's consideration of [defendant's] summary judgment motion .. . was premature."); *Shipley v. Handicaps Mobility Sys., Inc.,* 222 Ga. App. 101, 103 (1996) (holding summary judgment prematurely granted where plaintiff had been unable to depose "witnesses [who] gave affidavits in support of defendant's motion for summary judgment").

Arcadis was just added as a party to this case. Plaintiff has not had any opportunity to obtain written discovery from Arcadis or to depose Arcadis personnel. Without the opportunity to conduct discovery, a grant of summary judgment would "impermissibly 'deprive[] [Plaintiff] of [her] right to utilize the discovery process to discover the facts necessary to justify their

opposition to the motion.'" *Vining*, 99 F.2d at 1058 (quoting *Snook*, 859 F.2d at 871). Accordingly, to the extent the considers Mr. Hendon's affidavit or any part of Arcadis' motion that relies upon the affidavit, it must convert the motion to dismiss to one for summary judgment and deny the motion to allow for discovery.

3.3. Arcadis' Motion to Dismiss is Moot because Plaintiff Filed an Amended Expert Affidavit.

As noted above, Plaintiff does not need an expert affidavit because her claims against Arcadis are for ordinary negligence. However, out of an abundance of caution, Plaintiff has supplemented her expert's affidavit to track the allegations against Arcadis in the FAC. In other words, even if an expert affidavit were required as to Defendant Arcadis (it is not), the supplmental affidavit would preclude dismissal.

Code Section 9-11-9.1 allows a plaintiff to cure an allegedly defective expert affidavit upon a motion to dismiss. O.C.G.A. § 9-11-9.1(e); *see also Bonner v. Peterson*, 301 Ga. App. 443, 446-447 ("[S]ubsection (e) allows a plaintiff to amend an allegedly defective expert affidavit to 'present[ ] additional evidence of deviation from the standard of care against defendants sued in the original complaint in order to meet the requirement that the affidavit set forth at least one claimed negligent act or omission by each defendant.'"). Specifically, an expert's affidavit "may be amended to track the language of the complaint." *Trabue*, 349 Ga. App. at 229. This rule "affirms the legislative intent that a plaintiff ha[s] a broad right to cure by amendment an allegedly defective affidavit accompanying a charge of professional malpractice." *Porquez v. Washington*, 268 Ga. 649, 652 (1997).

Plaintiff filed the expert affidavit of Herman Hill, P.E., P.T.O.E. with her Original Complaint. Compl., ¶ 11, Ex. 3 thereto. Plaintiff incorporated Mr. Hill's affidavit in her FAC.[3] Pl.'s FAC, ¶ 14. On November 13, 2020, Plaintiff filed Mr. Hill's supplemental affidavit, which "track[s] the language of the complaint" as to Arcadis as the Georgia Court of Appeals specifically authorized in *Trabue*. 349 Ga. App. at 229. To the extent the Court deems such an affidavit necessary, Mr. Hill's Supplemental Affidavit precludes dismissal of Plaintiff's claims against Arcadis.

5. <u>Conclusion.</u>

Plaintiff's FAC alleges claims for ordinary negligence against Arcardis. *Adams v. Coweta Cty.*, 208 Ga. App. 334, 336 (1993) (holding claims for negligent maintenance of guardrails are claims for ordinary negligence). Arcadis admits Plaintiff pleaded claims for ordinary negligence against it. *See* Def.'s Mot. Dismiss, 3 (" . . . Plaintiffs cast their claims under the theory of ordinary negligence . . ."). For that reason, Plaintiff was not required to file an expert affidavit. The analysis should end there and the Court should deny Arcadis' Motion to Dismiss.

Should the Court go further, Arcadis' attempt to twist this case into one for engineering malpractice by filing an affidavit of its own engineer fails for two reasons. *First*, the Court of Appeals has expressly prohibited defendants from converting ordinary negligence claims to

[3] Incorporating expert testimony by reference is permissible in the context of O.C.G.A. § 9-11-9.1. *Trabue v. Atlanta Women's Specialists, LLC*, 349 Ga. App. 223, 229 (2019), *aff'd*, 2020 WL 6385866 (Ga. Nov. 2, 2020) ("This Court has 'allowed an expert's deposition from an original malpractice action to be incorporated into the complaint of the renewed action because this 'complied with the spirit, if not the letter, of OCGA § 9-11-9.1.'"") (internal citations omitted).

professional malpractice claims with an affidavit. *Drawdy v. Dep't of Transp.*, 228 Ga. App. 338, 339 (1997). *Second*, Arcadis' reliance on an engineer's affidavit converted its Motion to Dismiss to a motion for summary judgment. *Petree v. Dep't of Transportation*, 340 Ga. App. 694, 699 (2017). A motion for summary judgment must be denied as premature under O.C.G.A. § 9-11-56(f).

Finally, Plaintiff has submitted a Supplement Affidavit of her expert to track the FAC's allegations against Arcadis. Mr. Hill's Supplemental Affidavit precludes dismissal of Plaintiff's claims against Arcadis.

For these reasons, Plaintiff respectfully requests that the Court deny Arcadis' Motion to Dismiss.

Respectfully submitted this 13th day of November 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned has this day electronically filed the within and foregoing ***PLAINTIFF'S RESPONSE IN OPPOSITION TO ARCADIS' MOTION TO DISMISS*** with the Clerk of Court using the Odyssey e-filing system which will send e-mail notification of such filing to the following counsel of record:

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This 13th day of November 2020.

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