NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 1126

THERESA P. GRANIER AND LINDA PACE

VERSUS

NAVIGATOR SPECIALTY INSURANCE COMPANY AND ALVAREZ CONSTRUCTION COMPANY

Judgment Rendered: APR 26 2018

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C634264

The Honorable Todd Hernandez, Judge Presiding

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Allen M. Posey, Jr. **Baton Rouge, Louisiana**	**Counsel for Plaintiffs/Appellants** **Theresa P. Granier and Linda Pace**
Robert E. Kerrigan **Cassie E. Preston** **New Orleans, Louisiana**	**Counsel for Defendants/Appellees** **Navigators Specialty Insurance Company and Alvarez Construction Company**

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

McClendon, J. agrees in part and dissents in part and assigns reasons
Welch, J. concurs in result

THERIOT, J.

The appellants, Theresa P. Granier and Linda Pace, appeal the summary judgment of the Nineteenth Judicial District Court in favor of the appellees, Navigator Specialty Insurance Company (Navigator) and Alvarez Construction Company (Alvarez), dismissing the petitions of the appellants. Also before this Court is an *ex proprio motu* rule to show cause as to whether this appeal should be dismissed and a motion to strike the appellants' reply brief, filed by the appellees. For the following reasons, we maintain the appeal, grant the motion to strike, and affirm the summary judgment.

FACTS AND PROCEDURAL HISTORY

On November 14, 2013, the appellants were walking together on the sidewalk of Jamestown Boulevard in the Jamestown Subdivision of Baton Rouge, where they live. When they reached the end of the sidewalk, they turned left to cross the street. In doing so, they attempted to step over a storm drain attached to the curb of the street. Both appellants allegedly stepped into a wire frame covering the storm drain opening. The wire frame, also known as an inlet protector, allegedly tripped both appellants, causing them to fall into the street and sustain severe injuries.

On October 14, 2014, the appellants filed a petition for damages, alleging that Alvarez as the developer of the subdivision had placed the inlet protector over the storm drain, causing an unreasonable risk of injury to the public, and that Navigator was liable as the general liability insurer of Alvarez. The appellants claimed Alvarez was negligent in creating an undue risk of harm by placing the inlet protector over the storm drain, failing to

properly inspect the premises, and failing to remove or post warnings about the inlet protector.[1]

The appellees filed a motion for summary judgment on December 9, 2016, in which they claimed that Alvarez: did not have care, custody, or control over the storm drain; that the storm drain did not present an unreasonably dangerous or defective condition; and, in the event that the storm drain did present an unreasonably dangerous or defective condition, that Alvarez had no notice of it.

Following a hearing and introduction of exhibits, the trial court signed a judgment on April 12, 2017, granting the summary judgment in favor of the appellees and dismissing the appellants' claims against the appellees. In its written reasons for judgment, the trial court found no issue of material fact that Alvarez: did not have custody or control over the storm drain pursuant to La. C.C. 2317.1; that the inlet protector was not an unreasonably dangerous condition or defect; and that Alvarez had no knowledge of the defect. The trial court further found that the appellants, who lived in the subdivision, were familiar with the area where the storm drain was located, and that the storm drain's condition was open and obvious.

On June 9, 2017, the appellants filed the instant appeal, citing the judgment "signed on March 23, 2017," for which "notice of judgment was mailed on April 17, 2017." Subsequent to the appeal, this Court, *ex proprio motu*, issued a rule to show cause, ordering the appellants to clarify whether the "ruling" of March 23, 2017 or the judgment of April 12, 2017 was being appealed. Specifically, the trial court had signed the order of appeal, granting the appellants a devolutive appeal from the "Judgment rendered in

[1] The appellants had subsequently supplemented their petition for damages to include several other defendants. Those defendants filed motions for summary judgment, and the trial court granted those summary judgments, dismissing the appellants' claims against those defendants with prejudice. Those judgments are not being appealed in the instant case.

the above cause on March 23, 2017 and Notice of Judgment of which was mailed on April 17, 2017." It was therefore unclear to this Court whether the appellants were seeking an appeal of the "ruling" signed March 23, 2017 or the judgment signed on April 12, 2017. The appellants filed a response to the show cause order, stating that it was their intent to appeal the judgment signed on April 12, 2017, and the reference in the motion to the March 23, 2017 ruling was an error. The appellants also point out that the notice of appeal correctly referenced the April 12, 2017 judgment.

On October 27, 2017, the appellees filed a motion to strike the appellants' reply brief, alleging that the reply brief was not confined to the rebuttal points on the appellees' original brief and went beyond the scope of what is permitted in a reply brief pursuant to the Uniform Rules—Courts of Appeal, Rule 2-12.6.

RULE TO SHOW CAUSE

The "ruling" that was issued by the trial court on March 23, 2017 can be analogized to reasons for judgment. It also provided that the appellees' motion for summary judgment was granted and the appellants' claims were dismissed. However, the "ruling" clearly contemplated a subsequent written judgment, as it provided that a judgment would be submitted to the trial court consistent with the reasons set forth therein. Thereafter, on April 12, 2017, the trial court signed the judgment, which provided that the appellees' motion for summary judgment was granted and the appellants' claims against the appellees were dismissed. Notice of that judgment was sent on April 17, 2017. The appellants' petition and order for devolutive appeal provided:

> On March 6, 2017, the parties argued a Motion for Summary Judgment filed on behalf of [the appellees]. On March 23, 2017, this [c]ourt rendered judgment in favor of [the

> appellees] granting their Motion for Summary Judgment. A Judgment was signed on March 23, 2017, and notice of judgment was mailed on April 17, 2017.
>
> [The appellants] desire to appeal devolutively from the final judgment rendered in this action on March 23, 2017.
>
> WHEREFORE, [the appellants] respectfully pray that they be granted a devolutive appeal from the aforesaid judgment rendered in the above cause of action, returnable to the Court of Appeal, First Circuit, State of Louisiana.

The trial court signed the order of appeal, which provided:

> Considering the above and foregoing Petition for Devolutive Appeal, [the appellants] are granted a devolutive appeal from the foregoing Judgment rendered in the above cause on March 23, 2017 and Notice of Judgment of which was mailed on April 17, 2017, returnable to the Court of Appeal, First Circuit, State of Louisiana as provided by law.

The notice of appeal issued by the trial court stated that an "order of appeal was entered granting a DEVOLUTIVE appeal from the judgment of APRIL 12, 2017."

The motion and order are ambiguous, as they referenced the notice of judgment signed by the trial court on April 12, 2017, but referenced the "ruling" issued by the trial court on March 23, 2017. However, the notice of appeal provided that an appeal was granted from the April 12, 2017 judgment. As stated, the appellants filed a response stating that the reference to March 23, 2017 as the date of judgment was a typographical error. The brief filed by the appellants specifically provides that they were appealing the April 12, 2017 judgment.

Louisiana Code of Civil Procedure article 2161 provides, in part, that an appeal shall not be dismissed because of an irregularity, error or defect unless it is imputable to the appellant. Although this error is imputable to the appellant, this Court has consistently recognized that appeals are favored in the law, and the jurisprudence has held that a clerical error in a motion for

appeal is insufficient for dismissal of an appeal. See *Dickerson v. Krogers, Inc.*, 504 So.2d 1008 (La. App. 1 Cir. 1987); see also *Byrd v. Pulmonary Care Specialists, Inc.*, 2016-0485 (La. App. 1 Cir. 12/22/16), 209 So.3d 192, 195 (an error in appealing from a judgment denying a motion for new trial, rather than the judgment itself is insufficient to result in the dismissal of an appeal); see also *Phi Iota Alpha Fraternity, Inc. v. Schedler*, 2014-1620 (La. App. 1 Cir. 9/21/15), 182 So.3d 998, 1001 (appeal maintained despite a misstatement or error in the date of the judgment intended to be appealed). For the above reasons, we maintain this appeal.

MOTION TO STRIKE

The appellees have filed a motion to strike the reply brief filed by the appellants, arguing it goes beyond the scope of a reply brief and cites different assignments of error. The appellants have filed an opposition to this motion, arguing that the main thrust of the appellees' brief was that the appellants could not prove that Alvarez installed the inlet protector at issue. The appellants argue that the reply brief was dedicated to showing that strong circumstantial evidence indicated that Alvarez more likely than not placed the inlet protector at the location at issue.

Rule 2-12.6 of the Uniform Rules of the Louisiana Courts of Appeal states that a reply brief shall be strictly confined to rebuttal of points urged in the appellee's brief. To the extent a reply brief goes beyond the rebuttal authorized in Rule 2-12.6 and attempts to raise new legal arguments, such issues are not properly before an appellate court and should be stricken. See *McGregor v. Hospice Care of Louisiana in Baton Rouge L.L.C.*, 2009-1355, (La. App. 1 Cir. 2/12/10), 36 So.3d 281, 287, n. 2, writ denied, 2010-0832 (La. 5/28/10), 36 So.3d 258.

In their reply brief, the appellants introduce a new assignment of error that is different in substance from the assignments of error in their original brief. In the original brief, the appellants make several assignments of error with respect to the issue of the inlet protector. Those assignments of error deal with Alvarez's "care, custody, and/or control" of the inlet protector, whether the inlet protector was unreasonably dangerous, whether the inlet protector was open and obvious, and whether the appellants were aware of the inlet protector's existence.

In the appellants' reply brief, there is a new assignment of error concerning whether "Alvarez placed the inlet protector at the location where [the appellants] fell." We find this to be a factual finding separate from those found in the original brief, which would raise a new issue before this Court. While the appellees do state in in the argument of their brief that the appellants cannot prove that Alvarez installed the inlet protector, the statement is part of the rebuttal to the appellants' claim that Alvarez had custody and control over the inlet protector. It does not allow the appellants to raise a new issue in a new assignment of error. See *Price v. Erbe USA, Inc.*, 2009-1076, (La. App. 3 Cir. 6/9/10), 42 So.3d 985 n. 2, writ denied, 2010-1628 (La. 10/8/10), 46 So.3d 1271. As such, we grant the appellee's motion to strike and will not consider the appellants' assignment of error located in their reply brief.

ASSIGNMENTS OF ERROR

The appellants raise five assignments of error:

1. The trial court erred in granting the motion for summary judgment of the appellees, dismissing the appellants' claims.[2]

[2] The appellants state in this assignment of error that their claims were dismissed with prejudice; however, the judgment simply states that their claims were dismissed. When a judgment is silent as to whether it is being dismissed with or without prejudice, the dismissal must be without prejudice. *Quality Environmental Processes, Inc. v. IP Petroleum Company, Inc.*, 2016-0230 (La. App. 1 Cir. 4/12/17), 219 So.3d 349, 379, writ denied, 2017-0915 (La. 10/9/17), 227 So.3d 833.

2. The trial court erred by evaluating this case under the provisions of La. C.C. art. 2317.1 instead of La. C.C. art. 2315.

   a. The trial court erred in ruling that the appellants had to prove, pursuant to La. C.C. art. 2317.1, that Alvarez had the care, custody, and/or control over the subject inlet protector.

   b. The trial court erred in ruling that the appellants had to prove, pursuant to La. C.C. art. 2317.1, that Alvarez had notice of the alleged defect.

3. The trial court erred in finding that the inlet protector was not unreasonably dangerous.

4. The trial court erred in finding that any danger created by the inlet protector was open and obvious.

5. The trial court erred in finding that the evidence presented established that the appellants were very familiar with the area in question, that the appellants saw the inlet protector, and rather than walking around it they chose to step over it.

STANDARD OF REVIEW

This Court applies a *de novo* standard of review in considering lower court rulings on summary judgment motions. Thus, we use the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. A court must grant a motion for summary judgment if the pleadings, memoranda, and supporting documents show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law, pursuant to La. C.C.P. art. 966(A)(3). See *Bufkin v. Felipe's Louisiana, LLC*, 2014-0288 (La. 10/15/14), 171 So.3d 851, 854.

The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce

factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art 966(D)(1).

DISCUSSION

The appellants' second assignment of error essentially deals with a purported misapplication of law. The appellants, in their petition for damages, claimed that Alvarez was negligent, while the appellees raised the argument that they were not liable under La. C.C. art. 2317.1.[3] The trial court, in its written reasons, reached its conclusion partly based on La. C.C. art. 2317.1. The appellants raise as error the trial court's evaluating the case under La. C.C. art. 2317.1, which the appellants never raised in their petition for damages. However, the judgment itself makes no mention of any Louisiana Civil Code article. Oral or written reasons for judgment form no part of the judgment, and appellate courts review judgments, not reasons for judgment. *Wooley v. Lucksinger*, 2009-0571 (La. 4/1/11), 61 So.3d 507, 572.

Furthermore, we are not obligated here to determine whether the trial court misapplied the law since we are reviewing the summary judgment *de novo*, which means we try the matter anew, as though it had not been heard before and as if no decision had been previously rendered. See *Home Depot v. State Workers' Comp. Second Injury Bd.*, 2005-0674 (La. App. 1 Cir. 3/29/06), 934 So.2d 125, 127. Therefore we pretermit discussion of the appellants' second assignment of error.

[3] Louisiana Civil Code article 2317.1 states, in pertinent part:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.

The appellants raise the claim of negligence against Alvarez, which is the theory of liability contemplated by La. C.C. art. 2315(A): "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." See *Farr v. Montgomery Ward and Co., Inc.*, 430 So.2d 1141, 1143 (La. App. 1 Cir. 1983), writ denied, 435 So.2d 429 (La. 1983). We will therefore review the remainder of the appellants' assignments of error using the standard negligence analysis employed in determining whether to impose liability under La. C.C. art. 2315, the duty-risk analysis. See *Roberts v. Benoit*, 605 So.2d 1032, 1041 (La. 1991); see also *Bellanger v. Webre*, 2010-0720 (La. App. 1 Cir. 5/6/11), 65 So.3d 201, 211 (Gaidry, J., dissenting).

The appellants dispute the trial court's finding that the inlet protector was an open and obvious hazard. If the complained-of condition is open and obvious to all, then it may not be unreasonably dangerous. In order to be open and obvious, the risk of harm should be apparent to all who encounter the dangerous condition. *Broussard v. State ex rel. Office of State Bldgs.*, 2012-1236 (La. 4/5/13), 113 So.3d 175, 188. Defendants generally have no duty to protect against an open and obvious hazard. *Id.* at 184; *Bufkin*, 171 So.3d at 860 (Guidry, J., concurring). If the facts of a particular case show the complained-of condition should be obvious to all, the condition may not be unreasonably dangerous and the defendant may owe no duty to the plaintiff. *Pryor v. Iberia Parish School Bd.*, 2010-1683 (La. 3/15/11), 60 So.3d 594, 596.

The photographs presented in evidence show the inlet protector from various angles, including the perspective the appellants should have had right before they crossed over the storm drain. In all photographs, the wire framework of the inlet protector is clearly visible. As the appellants attest

that the photographs admitted into evidence accurately depict the construction sites as they were on November 18, 2013, we find that the inlet protector was of an open and obvious nature, which would impose no duty upon Alvarez to protect the public against it. Therefore, there is no issue of material fact as to whether Alvarez owed a duty to protect the public from the inlet protector.

DECREE

The instant appeal is hereby maintained. The motion to strike the appellants' reply brief filed by the appellees is granted. The summary judgment of the Nineteenth Judicial District Court in favor of the appellees, Navigator Specialty Insurance Company and Alvarez Construction Company, is affirmed. All costs of this appeal are assessed to Theresa P. Granier and Linda Pace.

APPEAL MAINTAINED. MOTION TO STRIKE GRANTED. SUMMARY JUDGMENT AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1126

THERESA P. GRANIER AND LINDA PACE

VERSUS

NAVIGATOR SPECIALTY INSURANCE COMPANY AND ALVAREZ CONSTRUCTION COMPANY

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McClendon, J., agrees in part and dissents in part.

I agree that the judgment at issue is appealable. However, I would deny Alvarez Construction Company's motion to strike plaintiffs' reply brief. Further, I find that the evidence introduced in opposition to Alvarez Construction Company's motion for summary judgment does not indicate that the inlet protector was open and obvious. Additionally, I find that genuine issues of material fact remain regarding whether Alvarez Construction Company placed the inlet protector over the catch basin. Accordingly, I would reverse the trial court's grant of summary judgment in favor of Alvarez Construction Company.