

Nos. 1-13-3010

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NICK ZAGAROV and DIANA ZAGAROV,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Cook County
)	
v.)	No. 09 L 11929
)	
KRAFT FOODS GLOBAL, INC. and ASSOCIATED)	
MATERIAL HANDLING INDUSTRIES, INC.,)	Honorable
)	William E. Gomolinski,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justice Simon concurred in the judgment.
Justice Hyman dissented.

ORDER

¶ 1 *Held:* Appeal dismissed.

¶ 2 Plaintiffs, Nick Zagarov and Diana Zagarov, appeal from the dismissal of their claims against defendants, Kraft Foods Global, Inc. (Kraft) and Associated Material Handling Industries, Inc. (Associated) alleging that Kraft and Associated were liable for injuries Nick sustained while performing construction work at Kraft's warehouse facility at the direction of Kraft's general contractor, Associated. Ultimately, the circuit court dismissed all claims with

prejudice. Plaintiffs appeal the dismissal of the complaint arguing that the circuit court erred in granting summary judgment to defendants on their construction negligence and premises liability claim. For the following reasons, we dismiss the appeal.

¶ 3 Plaintiffs have alleged the following facts: In 2008, Kraft contracted with Associated for a project involving the demolition and removal of an old steel racking system in Kraft's cheese cooler used for storage. Associated hired Rack-It to complete the work. Nick worked for Rack-It at the Kraft plant in December 2008, removing the steel racking system and while he was performing his job duties, a steel beam fell during demolition of the racking system and bounced off of the ground, striking Nick in the leg. As a result, he suffered serious injury.

¶ 4 Plaintiffs filed a multi-count complaint against defendants, which was amended four times, alleging various theories of recovery, including construction negligence and premises liability. Plaintiffs' claim for construction negligence was dismissed on a 2-615 motion on December 10, 2012. Their claim for premises liability was dismissed by way of summary judgment on April 11, 2013.

¶ 5 Plaintiffs make two claims on appeal. First, they argue that the trial court erred in granting summary judgment for defendants because genuine issues of material fact exist as to whether Kraft and Associated retained and/or exercised control of the safety on the project. Second, they argue that the trial court erred in granting summary judgment on their premises liability claim because questions of fact exist. However, we will not reach the merits of either claim because plaintiffs have failed to comply with Illinois Supreme Court Rule 341.

¶ 6 Rule 341 governs the procedure concerning appellate briefs. This rule is compulsory. *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). The purpose of appellate rules is to require the

parties to present clear and orderly arguments to the appellate court, so that we can properly understand, evaluate and dispose of the issues involved. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7. The failure to comply with appellate rules may result in the dismissal of the appeal. *Epstein v. Galuska*, 362 Ill. App. 3d 36, 42 (2005).

¶ 7 Illinois Supreme Court Rule 341 requires that an appellant present a fully developed argument with adequate legal and factual support (*Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009)), cite to the record for all factual assertions made and cite to legal authority for the arguments advocated (*Soter v. Christoforacos*, 53 Ill. App. 2d 133, 137 (1964)). See generally Ill. Sup. Ct. Rule 341(h)(6), (7) (eff. Feb. 6, 2013).

¶ 8 Plaintiffs' brief here fails to comply with Rule 341. Plaintiffs have failed to present us with an organized or cohesive argument with respect to his construction negligence claim. The only "argument" that plaintiffs advance is:

"the trial court was mistaken by not finding that questions of fact exist as to retained [sic] some control over the safety of the work for this project, thereby being subject to vicarious liability under Comment a; or whether, by the right to enforce its extensive list of safety requirements, actively failed to use ordinary care in its supervisory capacity managing employer's method of fall protection, under Comment b."

¶ 9 Plaintiffs have not cited to any specific facts, testimony, etc., to support their conclusory allegations that the trial court erred when it failed to find questions of fact on their construction negligence claim. A plaintiff's failure to properly develop an argument does "not merit consideration on appeal and may be rejected for that reason alone." *Housing Authority*, 395 Ill. App. 3d at 1040. Furthermore, citations must be relevant and cannot merely consist of citations

to general propositions of law. *Robinson v. Point One Toyota, Evanston*, 2012 IL App (1st) 111889, ¶ 54. This court is not “a depository into which a party may dump the burden of research” and “[a] conclusory assertion, without supporting analysis, is not enough” to satisfy Rule 341. (Internal quotation marks omitted.) *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶¶ 38-40.

¶ 10 Although plaintiffs cite several cases and accurately outline the law of construction negligence, they have failed to explain how the case law relates to the issue they have brought before this court. Supreme Court Rule 341(h)(7) (Ill. S. Ct. Rule 341(h)(7) (eff. July 1, 2008)) requires, among other things, that an appellant present a fully developed argument with adequate legal and factual support (*Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009)) including citations to legal authority for all arguments advocated (*Soter v. Christoforacos*, 53 Ill. App. 2d 133, 137 (1964)). Plaintiffs make general “references to the several cases cited by Plaintiff and defendant below” and general statements like “[c]omparing the facts here, with the cases cited by defendant and discussed by the trial court, plaintiff respectfully submits that the trial court's error in granting summary judgment becomes clear.” Notwithstanding these comments, plaintiffs have failed to set forth any explanation as to how the case law cited supports their conclusions.

¶ 11 We note that in their reply brief plaintiffs make an attempt to explain that Laley's deposition “is one of several, that standing alone *** is sufficient to deny summary judgment.” This position is not developed or mentioned in the initial appellate brief. An appellant's reply brief cannot be used as an “end run” around the Supreme Court Rules requiring a cohesive and well developed argument supported by case law in the initial appellant brief. See *Sakellariadis v.*

Campbell, 391 Ill. App. 3d 795, 804 (2009) (failure to assert a well-reasoned argument supported by legal authority is a violation of Rule 341(h)(7); see also *Forest Preserve District of Du Page County v. First National Bank of Franklin Park*, 401 Ill. App. 3d 966, 976 (2010) (an argument raised for the first time in a reply brief is waived). Therefore we find plaintiffs waived review of this contention.

¶ 12 We also note that plaintiffs' premises liability claim suffers from the same Rule 341 shortcomings. In support of their contention that the trial court erred in granting summary judgment, plaintiffs give a lengthy summary of John Verhalen's deposition testimony but fail to make any argument whatsoever regarding how Verhalen's deposition testimony relates to their claim. Plaintiffs have failed to provide any commentary to support their conclusory allegations of error. This is a clear violation of Rule 341.

¶ 13 Similar to their first claim of error here, plaintiffs correctly cite case law but fail to explain how the case law supports their position that the trial court erred in granting summary judgment as required by Rule 341. Plaintiffs' attempt to recover from the inadequacy of their initial brief by advancing new theories in their reply brief also fails. *Sadellariadis*, 391 Ill. App. 3d 804. We therefore cannot consider plaintiffs' claim of error.

¶ 14 CONCLUSION

¶ 15 In short, plaintiffs have not complied with Rule 341. This rule exists to assist us in understanding and properly considering the legal and factual issues the plaintiff believes merit our attention. Given the Rule 341 violations, we cannot conduct a meaningful review of this appeal and therefore must dismiss the appeal. *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8; *Zadrozny v. City Colleges of Chicago*, 220 Ill. App. 3d 290, 292-93 (1991).

¶ 16 Appeal dismissed.

¶ 17 JUSTICE HYMAN, dissenting.

¶ 18 I disagree with the majority's decision to *sua sponte* dismiss this appeal based on the failure of plaintiffs' brief to sufficiently adhere to the requirements of Illinois Supreme Court Rule 341 (eff. Feb. 6, 2013). While I agree with the majority that briefs should present clear and orderly arguments because doing so better enables us to consider and dispose of the issues on the merits (see *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 7), I disagree that plaintiff's brief flouts this requirement. But even if I were to agree that plaintiff's brief technically violates Supreme Court Rule 341, *sua sponte* dismissal should be a rare occurrence reserved for the most flagrant and massive violations. If the majority believes the plaintiff's brief to be deficient, then, after pointing that out, they should have imposed a less stinging alternative, if any.

¶ 19 Apparently defendants had no problem with the quality of plaintiff's brief because they thoroughly addressed the issues head on. Likewise, none of the majority's perceived deficiencies would prohibit us from passing on the merits. Thus, I respectfully dissent.

¶ 20 Adherence to Supreme Court Rules 341 is not an inconsequential matter. Where an appellant's brief fails to comply with the rules, this court has inherent authority to dismiss the appeal. *Lindenmier v. City of Rockford*, 156 Ill. App. 3d 76, 79 (1987). Violation of the rules, however, does not divest us of jurisdiction, but rather serves as an admonishment to the parties. *Brown v. Brown*, 62 Ill. App. 3d 328, 332 (1978). We retain the discretion to consider the merits of the appeal, where (i) an appellant's brief sufficiently apprises us of the arguments (see *Young v. City of Centreville*, 169 Ill. App. 3d 166, 169 (1988)), (ii) the facts necessary to understand the

issue are relatively simple (*In re Marriage of Burke*, 185 Ill. App. 3d 253, 255 (1989)), and (iii) the interest of judicial economy are best served thereby. See *Zadrozny v. City Colleges of Chicago*, 220 Ill. App. 3d 290, 293 (1991).

¶ 21 The facts are fairly straightforward. Plaintiffs claim Nicholas Zagarov was injured while removing shelving in a refrigerated unit at Kraft's warehouse under the direction of Associated, Kraft's general contractor. Plaintiffs sued Kraft and Advanced raising several claims, including negligence and premises liability. Plaintiffs appeal the trial court's order granting summary judgment on their negligence and premises liability claims. Plaintiffs argue that questions of fact remain as to whether Associated and Kraft had a duty to Zagarov based on its control of the premises and whether they breached that duty directly or vicariously by failing to provide a safe working environment.

¶ 22 Defendants neither moved nor argued for dismissal due to deficiencies in plaintiffs' brief. Instead, they respond by arguing that summary judgment was warranted because Kraft and Associated are not directly or vicariously liable to Zagarov. Defendants contend Kraft had no duty to Zagarov because it did not retain contractual, supervisory, or operational control over the project and that Associated had no duty because they did not exercise control over Zagarov's employer in completing the project.

¶ 23 Dismissal of an appeal for Supreme Court Rule violations should be the last resort in extreme situations and where meaningful review of the issues is impossible. This is hardly the case with plaintiffs' opening brief. Plaintiffs discuss the facts at length with requisite citation to the record and set forth viable legal arguments supported by citation to 21 cases as well as other authority. Plaintiffs' arguments primarily focus on premises liability under section 343 of the

Restatement (Second) of Torts and defendants' control of the property where the injury occurred and employer liability under section 414 of the Restatement (Second) of Torts. They cite to the restatement provisions, as well as supporting and distinguishing case law. Like many briefs filed with this court, plaintiffs' brief could have been more thoughtfully drafted, but nothing precluded defendants from fully responding to each of plaintiffs' arguments. Thus, even if I agreed that plaintiffs' brief falls short of exact harmony with Rule 341 (h)(7), I believe all the issues can be fully resolved.

¶ 24 An appellate court with jurisdiction should, if at all possible, resolve cases on their merit. Whether on a motion by a party or *sua sponte*, dismissing an appeal for non-compliance with any requirement of Supreme Court Rule 341 defeats this fundamental objective. Generally, appellate courts have five options when handling violations of Rule 341: (i) ignore the deficiencies; (ii) note the deficiencies (*Stewart v. Jones*, 318 Ill. App. 3d 552, 557 (2001) (noting parties' failure to comply with Supreme Court Rule 341(e)(7) made review more laborious but opting not to find waiver or dismiss the appeal); (iii) issue a warning regarding the deficiencies (*In re Marriage of Cerven*, 317 Ill. App. 3d 895, 900 (2000) (warning petitioner's counsel to adhere to Rule 341(e)(7) in the future)); (iv) strike portions of the brief (*People v. Barwig*, 334 Ill. App. 3d 738, 748 (2002) (striking parts of defendant's brief that refer to extrajudicial facts and fail to supply appropriate citation to authority or the record)); or (v) dismiss the appeal (*Epstein v. Galuska*, 362 Ill. App. 3d 36, 42 (2005) (dismissing appeal for failing to comply with several rules governing appeals; but see *Narzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, ¶ 12 ("A reviewing court has the choice to review the merits, even in light of multiple Rule 341 mistakes.")).

¶ 25 Procedural fairness dictates that courts impose the least restrictive alternative, depending on the severity of the violations and the ability of the court to decide the issues irrespective of the violations. See, e.g., *Sherman Hospital v. Wingren*, 169 Ill. App. 3d 161, 163 (1988) (court "reluctant" to impose sanctions for statement of facts containing both argument and comment in violation of Supreme Court Rule 341 (e)(6), giving a warning instead); *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 149 Ill. App. 3d 53, 59 (1986) ("The courts of this State have been reluctant to impose the sanction of striking portions a brief, even in cases of blatant violations."). See also *McCann v. Dart*, 2015 IL (1st) 141291, ¶ 20 ("we seldom enter an order dismissing an appeal for failure to comply with supreme court rules.").

¶ 26 It is more usual for this court to note the violations, and then decide the appeal on the merits, often in a Rule 23 Order. See *The People of the State of Illinois ex rel Lisa Madigan v. John C. Justice d/b/a Mircocosm*, 2014 IL App (1st) 131720-U (appellate court considered merits of appeal where defendant's brief "failed to articulate an organized and cohesive legal argument sufficient to allow meaningful review of his claims;"); see also, *Community Bank of Plano v. Otto*, 324 Ill. App. 3d 471, 473 (2001) (addressing merits after stating that defendants' lack of compliance with rules should be inexcusable because failure to follow supreme court rules was brought to defendants' attention in earlier appeal arising out of same litigation).

¶ 27 Usually, in addition to noting the violation, the court will advise the offending party that future violations may result in striking the brief. *Equity Lenders LLC v. Sbarboro*, 2013 IL App 2d) 120547-U, ¶ 9 (noting that court did not strike defendant's' brief for failure to comply with Rule 341 in two prior cases but "strongly admonish[ed him] to follow the applicable rules should he file a brief with this court in the future."). The harshest sanction—dismissal—should be

1-13-3010

reserved for the most egregious situations in which it would be irresponsible for us to render a decision on the merits. *Id.* ¶ 10 (court *sua sponte* struck defendant's brief and dismissed appeal after he had been advised on several occasions to consult rules to ensure compliance).

¶ 28 The deficiencies here, if indeed they rise to deficiencies, should not have denied the parties and the trial court of a ruling on the merits.