

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3238

(Summary Calendar)

HYPOLITE BODIN,

Plaintiff-Appellant,

versus

CHRISTOPHER MARINOVICH and
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
CA 92 1022 D

August 12, 1993

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:*

Hypolite Bodin appeals summary judgment of his negligence action against Christopher Marinovich and Marinovich's insurance company, State Farm Mutual Automobile Insurance Company

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

(collectively referred to as the "defendants").¹ Finding no error, we affirm.

It is uncontested that Marinovich intended to make a left-hand turn from the far left westbound lane of U.S. Highway 61 onto an intersecting street and that his vehicle collided with Bodin's vehicle traveling in the far left eastbound lane. The collision occurred after Marinovich's vehicle was struck in the rear by a vehicle driven by Gregory Lestelle. At the scene of the accident, U.S. Highway 61 is a multi-lane divided highway without dedicated left turn lanes and with a small median between opposing lanes of traffic.

¹ Bodin in his notice of appeal states that he is appealing the district court's order of March 4, 1993, granting summary judgment for the defendants. See Record Excerpts for Bodin at 1. The March 4 order, however, was an order denying Bodin's motion for reconsideration of the district court's ruling granting summary judgment. The order granting summary judgment was entered on December 30, 1992. Under Fed. R. App. P. 3(c), a notice of appeal "shall designate the judgment, order, or part thereof appealed from." However, notices of appeal are liberally construed where "the intent to appeal an unmentioned or *mislabeled* ruling is apparent and there is no prejudice to the adverse party." *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir.), *cert. denied*, 454 U.S. 1125, 102 S. Ct. 974, 71 L. Ed. 2d 112 (1981). Accordingly, we have held that "[f]ailure to properly designate the order appealed from is not a jurisdictional defect, and may be cured by an indication of intent in the briefs or otherwise." *United States v. Rochester*, 898 F.2d 971, 976 n.1 (5th Cir. 1990). Bodin in his brief argues only that the district court erred in granting summary judgment. See Brief for Bodin at 5-6. In addition, the defendants' brief indicates that the defendants believed that Bodin was appealing the district court's order granting summary judgment, and not the order denying the motion for reconsideration. See Brief for Defendants at 6. Consequently, we treat Bodin's notice of appeal as an appeal from the district court's December 30 order, which granted summary judgment for the defendants.

Bodin brought suit against the defendants, seeking damages for bodily injury and property damage allegedly resulting from the accident. Bodin claimed that Marinovich negligently caused his vehicle to enter the eastbound lanes of traffic. The defendants moved for summary judgment. Finding no genuine issue of material fact, the district court entered summary judgment for the defendants. Bodin filed a timely notice of appeal.

We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Central R.R.*, 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986). Once the movant carries its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Id.* at 324-25, 106 S. Ct. at 2553-54. While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986). Although we recognize that summary judgment is often inappropriate in negligence cases, see *Lavespere v. Niagara Mach. Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990) (citing cases), we have nevertheless upheld summary judgment where the plaintiff has failed to produce evidence which would tend to establish an essential element of the plaintiff's negligence claim. See, e.g., *Washington v. Armstrong World Industries, Inc.*, 839 F.2d 1121, 1123 (5th Cir. 1988) (affirming summary judgment where plaintiff failed to produce evidence regarding causation element of negligence claim); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1192 (5th Cir. 1986) (same).

Bodin's argument on appeal is that there are genuine issues of material fact as to whether Marinovich was negligent. Bodin alleges that Marinovich's vehicle was improperly positioned before the collision. Bodin also alleges that Marinovich failed to maintain reasonable and proper control of his vehicle before and after being struck from the rear and that Marinovich did not brake properly before and after being hit from the rear. Bodin claims that absent Marinovich's negligence, Marinovich's vehicle would have been forced directly forward in the westbound lanes of traffic and would have never entered the opposing lanes of traffic. Marinovich submitted an affidavit with his motion for summary judgment, which stated:

[Marinovich] . . . gradually slowed his vehicle and lawfully stopped in the left lane of [Hwy. 61], waiting for traffic in the eastbound lanes to pass him;

That after being completely stopped . . . he was . . . struck from the rear by a [vehicle driven] by Gregory Lestelle; that the single impact to his rear forced his

vehicle forward and to the left, directly into . . . [Bodin's vehicle] which was travelling in the left, east-bound lane of [Hwy. 61].

Record Excerpts, tab 5, at 1. Lestelle confirmed this information during his deposition which was also submitted as evidence to support the defendants' motion for summary judgment. See Record on Appeal at 48-52. Lestelle added that he was also in a stationary position about five feet behind Marinovich when he was struck from behind by another vehicle which caused the subsequent collisions. See *id.* at 49-50.

Bodin did not respond to the defendants' motion for summary judgment. Record on Appeal at 24. Furthermore, Bodin failed to present any evidence by affidavit, deposition or otherwise that the accident did not occur as alleged by Marinovich and Lestelle. Nor did Bodin present any evidence that Marinovich was negligent before or after his vehicle was struck in the rear. Bodin merely rested upon his allegations and pleadings, and did not produce evidence which would tend to establish causation, an essential element of his negligence claim. See *Washington*, 839 F.2d at 1123 (holding that where plaintiff "never actually demonstrates causation and never states that he could produce evidence of causation at trial, [plaintiff] has failed to carry his burden of proof on an essential element"). We therefore hold that Bodin has not demonstrated a genuine issue of material fact.

Accordingly, we **AFFIRM** the district court's summary judgment.