IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4364
Summary Calendar

RANDALL FRIOU,

Plaintiff-Appellant,

VERSUS

PHILLIPS PETROLEUM COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(89-0806 c/w 89-2814)

(November 19, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Randall Friou, a rigger injured while using a vise, appeals the judgment as a matter of law granted to Phillips Petroleum Co. ("Phillips") after a jury verdict in Friou's favor. Viewing the evidence in the light most favorable to Friou, we conclude that

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[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Phillips did not violate any duty it may have owed, contractual or otherwise. Accordingly, we affirm.

I.

Friou was an employee of Gulf Inland Contractors ("GIC"), a company contracted by Phillips to install a compressor package on its fixed offshore platform. Under the contract, GIC furnished all equipment necessary for the work, including two tripod clamps used for holding and breaking pipes.

Friou used a Phillips vise on the site and alleged that the condition of the vise was poor because the teeth were worn and the vise was rusty. As a result of this worn condition, a "cheater" pipe was used to tighten the vise. But the vise handle previously had been bent by another GIC worker using the cheater pipe. Consequently, as Friou applied the cheater pipe, the pipe slipped and Friou fell forward.

The impact with the vise injured Friou's nose, and when he fell to the ground, Friou injured his spine. It is undisputed that Friou knew, prior to the accident, that the cheater pipe was bent.

II.

Friou brought an action against Phillips under LA. CIV. CODE arts. 2315, 2316, 2317, and 2322, under theories of strict liability and negligence. Friou claimed that the use of the vise constituted a modification of the contract, creating a contractual

duty for Phillips to provide a safe vise. The district court granted Phillips's motion for summary judgment on all claims.

This court affirmed on the issue of strict liability but reversed on the negligence claims under arts. 2315 and 2316, reasoning that a factfinder could decide that the conduct of the parties in allowing GIC to use the Phillips vise had modified the contract. See Friou v. Phillips Petroleum Co., 948 F.2d 972 (5th Cir. 1991). Although Phillips had no contractual duty to supply the vise, its having voluntarily supplied the vise constituted a modification of the contract, creating a duty to provide a safe vise. Since a genuine issue of material fact existed, the case was remanded for trial.

On remand, Friou added a claim under LA. CIV. CODE art. 2909, claiming that the loan of the vise was gratuitous. The negligence and gratuitous loan claims were tried before a jury. At the close of the plaintiff's case, Phillips moved for judgment as a matter of law under FED. R. CIV. P. 50, which motion was taken under advisement. The jury returned a verdict of $240,000 for Friou, assigning 10% of the fault to Friou, 40% to Phillips, and 50% to GIC. Phillips renewed its rule 50 motion, which the district court granted.

III.

The motion for judgment as a matter of law is reviewed de novo, Charles E. Beard, Inc. v. McDonnell Douglas Corp., 939 F.2d 280, 282 (5th Cir. 1991), and will be granted only if, under the

governing law, there can be but one reasonable conclusion as to the verdict. As in the case of a motion for summary judgment, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); McKethan v. Texas Farm Bureau, 996 F.2d 734, 740 (5th Cir. 1993). Furthermore, the inferences are to be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Barnett v. IRS, 988 F.2d 1449, 1453 (5th Cir. 1993), petition for cert. filed, 62 U.S.L.W. 3204 (U.S. Aug. 30, 1993) (No. 93-336).

The district court granted judgment as a matter of law based in part upon a pretrial stipulation by Friou that the loan of the vise was gratuitous. The court reasoned that adding the gratuitous loan claim constituted an admission by Friou that the loan of the vise was gratuitous. Such an admission precluded his contract modification claims, and under LA. CIV. CODE art. 2898 dealing with gratuitous loans, Phillips was not liable to Friou, as the vise was being used in a manner other than that for which it was designed (i.e., a cheater was used).

Friou presents two issues on appeal: first, that the district court erred in treating his art. 2909 claim as an admission that the loan of the vise was gratuitous; and second, that the court erred in interpreting art. 2909 as precluding liability under a modification-of-contract theory. With regard to the first

contention, Friou specifically admitted in his Memorandum in Support of Plaintiff's Requested Jury Charges that "[t]he only reasonable conclusion that can be drawn from those facts is that there was a gratuitous loan for use." Although Friou correctly points out that the Federal Rules of Civil Procedure allow a party to plead as many separate claims as he has, regardless of consistency, see Fredonia Broadcasting Corp. v. RCA Corp., 481 F.2d 781, 801 (5th Cir. 1973), that rule applies only to the pleadings. A judgment cannot be supported by inconsistent theories. Id. We conclude that Friou admitted that the loan was gratuitous.

Despite this admission, the district court considered Friou's contract claims under arts. 2315 and 2316. Therefore, Friou's second contention is meritless.

We agree with the district court that Phillips violated no duty to GIC or Friou. The evidence indicates that the vise worked properly when Phillips loaned it to GIC. The rust was minor, and the pipe jaws were optional equipment. A GIC employee bent the handle after GIC borrowed the vise.

Therefore, we conclude that the accident was a direct result of Friou's improper use of the vise and GIC's failure to repair it. As a gratuitous lender, Phillips's only "legal duty of care was that provided by article 2909, viz., to warn of known defects . . . that might injure . . . ." Mudd v. Travelers Indem. Co., 309 So. 2d 297, 301-02 (La. 1975). Accordingly, Phillips did not violate any duty it may have had under the contract, as a gratuitous lender or otherwise. See LA. CIV. CODE art. 2898; Lincoln Big

Three, Inc. v. Daniels Welding Elec. & Constr. Co., 446 So. 2d 935, 938 (La. App. 3d Cir. 1984).

The evidence does not support the jury's verdict. Accordingly, judgment as a matter of law was appropriate.

AFFIRMED.