Filed 11/28/05

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

ROBIN J. SAVILLE, Plaintiff and Appellant, v. SIERRA COLLEGE et al., Defendants and Respondents.	C047923 (Super. Ct. No. SCV15102) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on October 26, 2005, and the modified opinion filed herein on October 31, 2005, be modified as follows:

1. In the first full paragraph on page 17, after the phrase "[probation officer injured while learning restraining methods in a training class barred from recovering])," insert the following:

training for a noncompetitive activity (*Aaris v. Las Virgenes Unified School Dist., supra,* 64 Cal.App.4th at pp. 1117-1118

[student cheerleader injured while practicing cheerleading routine barred from recovering against school district],

2. Delete the full paragraph which begins at the bottom of page 21 with "Plaintiff's complaint pled facts . . ." and the first full paragraph on page 22 which begins with "Deciding under general principles . . ." and insert in place of the deleted paragraphs the following text:

Plaintiff's complaint pled facts accusing the College of negligence in its role as the class's sponsor. The College's motion for summary judgment did not attack those allegations. It argued only against plaintiff's allegations of the College's role as the class instructor. In his defense against the motion, however, plaintiff responded to the College's attack *without* arguing whether the College could also be liable in its role as the sponsor. He raises the argument for the first time before us.

Deciding under general principles of forfeiture and theory of the trial, we decline to consider the argument here. "Ordinarily the failure to preserve a point below constitutes a waiver of the point. [Citation.] This rule is rooted in the fundamental nature of our adversarial system: The parties must call the court's attention to issues they deem relevant. '"In the hurry of the trial many things may be, and are, overlooked which could readily have been rectified had attention been called to them. The law casts upon the party the duty of

looking after his legal rights and of calling the judge's attention to any infringement of them."' [Citation.] . . . .

"The same policy underlies the principles of 'theory of the trial.' 'A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing party.' [Citation.] The principles of 'theory of the trial' apply to motions [citation], including summary judgment motions. [Citation.] . . . . It would be manifestly unjust to the opposing parties, unfair to the trial court, and contrary to judicial economy to permit a change of theory on appeal." (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29 [alternate basis of liability not raised by appellant in opposing summary judgment motion below will not be considered on appeal].)

Here, the College argued primary assumption of risk barred all recovery under plaintiff's complaint. The parties' arguments addressed only that theory, and the action was resolved exclusively on that theory. Plaintiff's duty was to direct the court's attention to any different factual basis of liability on which he could rely. Plaintiff failed to do this, and forfeiture is appropriate. Indeed, if this were permitted procedure, parties opposing and losing summary judgment motions could attempt to embed grounds for reversal on appeal into every case by their silence.

Plaintiff argues we can reach the issue because it is one of law presented on undisputed facts. However, there are

insufficient facts on which we could find liability. Plaintiff argues the College was negligent because it did not warn potential students in the course catalog of the risk of injury involved with the class. As discussed above, the undisputed facts demonstrate plaintiff was on sufficient notice of the risk of injury from the catalog's class description, information provided by the instructors, and from observing and participating in the activity prior to being injured. The language of the course description does not establish by itself the College in sponsoring the class negligently failed to warn plaintiff of the risk of injury inherent in learning the takedown maneuvers.

Plaintiff complains the College was negligent in not considering whether the takedown maneuvers were a necessary component of the class. He cites to no facts supporting the assertion. Indeed, the College had no discretion to exclude the maneuvers. They were a required component of the class under POST regulations.

Finally, plaintiff argues the College was negligent for not ensuring the instructors were properly trained. Again, plaintiff cites to no facts supporting this assertion.

In short, plaintiff has given us insufficient facts by which we could determine either the College violated its duty as a matter of law or that material factual issues exist foreclosing us from reaching the issue. Under this record, forfeiture is the appropriate result.

This modification does not change the order.

The petition for rehearing is denied. (*CERTIFIED FOR PUBLICATION*.)

THE COURT:

DAVIS, Acting P.J.

NICHOLSON, J.

HULL, J.