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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CESAR ENCISO,

Plaintiff and Appellant,

v.

CITY OF LOS ALTOS, et al.,

Defendants and Respondents.

H037770

(Santa Clara County

Super. Ct. No. 107CV077685)

On the afternoon of February 10, 2006, high school freshman Cesar Enciso was acting unusually during his sixth period English class at Los Altos High School (High School). He was questioned about his condition and evaluated by (1) his teacher (Lisa Bonanno); (2) a student conduct liaison officer, Ron Nelson, from the Mountain View-Los Altos High School District (School District); (3) the assistant principal (Kathleen Meagher); and (4) one or more members of the Los Altos Police Department (Police Department), including Officer Susan Anderson. Enciso was not responsive to many of their questions. Because of a concern for Enciso's well-being and a suspicion that he might be under the influence of drugs, the High School contacted his mother, Isabel Monteverde. Sometime later, after Monteverde and her son spoke privately, Enciso was arrested by Officer Anderson and was tested for drugs at the police station. The High School suspended Enciso for five days for being under the influence of drugs and for his

lack of cooperation during its investigation. The results of the drug test administered by the Police Department were negative. At the request of Enciso and his mother, the suspension was removed from Enciso's school discipline record.

In January 2007, Enciso brought suit against the School District, Meagher, the City of Los Altos (City), the Police Department, Officer Anderson, and others.<sup>1</sup> After some claims were disposed of by summary adjudication and demurrer, Enciso's remaining claims were tried by a jury, resulting in a defense verdict on all claims. Judgment was entered in favor of defendants on October 21, 2011.

On appeal, Enciso appears to challenge the court's summary adjudication and demurrer orders involving claims against the School District and Meagher. (Hereafter, we use the shorthand reference "the District" in referring to claims asserted against, motions brought by, and contentions made by the School District and Meagher.) Specifically, he appears to contend the court erred when it granted summary adjudication of three claims and sustained without leave to amend a demurrer to the third amended complaint as to a fourth claim. Enciso also (1) challenges certain evidentiary rulings made by the trial judge, (2) contends the court committed instructional error, and (3) claims juror misconduct.

We conclude the court properly granted the District's motion for summary adjudication of a claim for intentional infliction of emotional distress, a purported claim of negligent infliction of emotional distress,<sup>2</sup> and a cause of action for ethnic

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<sup>1</sup> The record reflects that in one or more of his four complaints, Enciso also named as defendants the High School, Bonanno, Nelson, and High School Principal Wynne Satterwhite. But the record shows that the case proceeded to trial and the judgment entered only involved the School District, Meagher, the City, the Police Department, and Officer Anderson.

<sup>2</sup> There is no cause of action for negligent infliction of emotional distress. It is in actuality a claim for emotional distress damages based upon the tort of negligence.

continued

discrimination. We conclude further that the District's demurrer to the negligence cause of action of the third amended complaint was properly sustained without leave to amend. And we conclude that Enciso has failed to establish that any of the rulings of the trial court constituted prejudicial error or that there was juror misconduct. Accordingly, we will affirm the judgment.

#### PROCEDURAL HISTORY

Enciso, through his mother, Isabel Monteverde, as guardian ad litem, filed suit on January 5, 2007. Enciso filed a first amended complaint on June 22, 2007, alleging seven causes of action. On March 18, 2009, the District filed a motion for summary judgment and an alternative motion for summary adjudication (hereafter, the summary judgment motion). On July 21, 2009, as we discuss, *post*, the court granted the District's motion for summary adjudication of four causes of action.<sup>3</sup> Enciso filed a second amended complaint on August 17, 2009. The District demurred, and on December 2, 2009, the court, among other things, sustained the demurrer without leave to amend as to the first cause of action for a constitutional tort and sustained the demurrer with leave to amend as to the second cause of action for negligence. In the same order, the court sustained without leave to amend a separate demurrer to the first cause of action brought by the City, Police Department, and Officer Anderson. (Hereafter, we use the shorthand reference "the City Defendants" in referring to claims asserted against, motions brought by, and contentions made by the City, Police Department, and Officer Anderson.) The

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(*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984.) Accordingly, we will refer to it herein as a "purported claim" or a "purported NIED claim."

<sup>3</sup> The court's order included a grant of summary adjudication as to a purported fifth cause of action for negligent infliction of emotional distress that had been asserted on behalf of Monteverde. That ruling is not challenged on appeal.

demurrer of the City Defendants is not part of the appellate record, and the court's ruling in this respect does not appear to be challenged by Enciso in this appeal.

The operative pleading is the unverified third amended complaint filed on December 28, 2009. In that pleading, Enciso alleged six causes of action: (1) negligence (against the District), (2) battery (against the City Defendants); (3) false arrest and imprisonment (against the City Defendants); (4) invasion of privacy (against all defendants); (5) intentional infliction of emotional distress (against the City Defendants); and (7) negligent infliction of emotional distress (against the City Defendants). The District filed a demurrer to the first cause of action (negligence) of the third amended complaint, which the court sustained without leave to amend on April 14, 2010.

The case proceeded to jury trial against the District and the City Defendants, commencing on or about August 30, 2011. On September 16, 2011, after eight days of testimony, a jury found in favor of defendants on all claims. Specifically, the jury found in favor of the District on the invasion of privacy claim, and in favor of the City Defendants on the claims for invasion of privacy, false arrest and imprisonment, battery, intentional infliction of emotional distress, and purported negligent infliction of emotional distress. Judgment was entered in favor of defendants on October 21, 2011.

## DISCUSSION

### *I. Enciso's Noncompliant Appellate Briefs*

Before addressing any substantive issues we have determined may have been raised by Enciso, we are compelled to identify the serious procedural deficiencies existing in his filings with this court. The opening brief is not compliant with the California Rules of Court.<sup>4</sup> The brief does not include a requisite summary of the

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<sup>4</sup> Further rule references are to the California Rules of Court.

relevant procedural history of the case, including a plain statement of “the nature of the action, the relief sought in the trial court, and the judgment or order appealed from,” all as required by rule 8.204(a)(2)(A). Additionally, Enciso fails either to clearly state each of his arguments with separate headings or subheadings summarizing the points made, or to develop such arguments in a coherent fashion that the court can readily identify and evaluate. (See *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1831, fn. 4.) In this respect, as discussed, *post*, Enciso has made difficult the court’s task of attempting to determine which trial court rulings he is challenging on appeal.

Enciso has taken the liberty of appending some 13 pages of documents, collectively, to his opening and reply briefs. This is another procedural violation of appellate practice, because it is unclear whether these documents are part of the record below. (Rule 8.204(d) [documents appended to appellate briefs must be exhibits or other materials from appellate record, or rules, regulations, or out-of-state statutes]; see *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1 [documents not presented to trial court generally may not be included in record on appeal].)<sup>5</sup> In addition, Enciso’s opening brief contains numerous references to materials that are either not part of the appellate record or that Enciso has not demonstrated by appropriate record citations to be part of the record, including (1) a statement made by a student, Krystal F. (Krystal), to Enciso’s former counsel; (2) over a dozen references to deposition testimony; (3) references to International Classification of Diseases Codes; (4) references to driver’s license and automobile registration information pertaining to his mother, Isabel Monteverde; (5) medical records; (6) a police report; (7) medical articles; and (8)

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<sup>5</sup> To complicate matters further, one of the documents appended to Enciso’s reply brief was a document attached to his motion to augment the record; that motion was *denied* by this court 13 months before the filing of Enciso’s reply brief.

other publications. We will disregard any factual assertions made by Enciso in his briefs that are not contained in the record, and we will also disregard any attachments to the briefs where we cannot determine that the documents were part of the record below. (See rule 8.204(a)(2)(C) [briefs shall “[p]rovide a summary of significant facts limited to matters in the record”]; *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 947; *Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 632.)

We acknowledge that Enciso is representing himself in connection with this appeal. However, the rules of civil procedure apply with equal force to self-represented litigants as they do to those represented by attorneys. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Thus, “[w]hen a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys.” (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638; see also *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

## II. *The Summary Adjudication Order*

### A. *Applicable Law and Standard of Review*

“The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*)). As such, the summary judgment statute, Code of Civil Procedure section 437c, “provides a particularly suitable means to test the sufficiency of the plaintiff’s prima facie case and/or of the defendant’s [defense].” (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) A summary judgment motion must demonstrate that “material facts” are undisputed. (Code Civ. Proc., § 437c, subd. (b)(1).) “The materiality of a disputed fact is measured by the pleadings.” (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250.)

A “motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c).) The moving party “bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) “A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.” (Code Civ. Proc., § 437c, subd. (f)(1).) Like summary judgment, the moving party’s burden on summary adjudication is to establish evidentiary facts sufficient to prove or disprove the elements of a claim or defense. (Code Civ. Proc., § 437c, subds. (c), (f).)

Since both summary judgment and summary adjudication motions involve pure questions of law, we review the granting of summary judgment or summary adjudication *de novo* to ascertain from the papers whether there is a triable issue of material fact. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142; *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) In doing so, we “consider[] all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.]” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

In our independent review of the granting of summary judgment or summary adjudication, we conduct the same three-step procedure employed by the trial court. First, “we identify the issues framed by the pleadings because the court’s sole function on a motion for summary judgment is to determine whether there is a ‘triable issue as to any material fact’ ([Code Civ. Proc.,] § 437c, subd. (c)), and to be ‘material’ a fact must relate to some claim or defense *in issue* under the pleadings. [Citation.]” (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 926, original italics.) Second, we examine the motion to

determine whether it establishes facts justifying judgment in the moving party's favor. (*Chavez v. Carpenter, supra*, 91 Cal.App.4th at p. 1438.) Third, we scrutinize the opposition—assuming movant has met its initial burden—to “decide whether the opposing party has demonstrated the existence of a triable, material fact issue [to defeat summary judgment or summary adjudication]. [Citation.]” (*Ibid.*; see also *Burroughs v. Precision Airmotive Corp.* (2000) 78 Cal.App.4th 681, 688.) Since the moving party here is the defendant, our de novo review tests whether defendant has “show[n] that the plaintiff cannot establish at least one element of the cause of action.” (*Aguilar, supra*, 25 Cal.4th at p. 853.) We need not defer to the trial court and are not bound by the reasons in its summary judgment ruling; we review the ruling of the trial court, not its rationale. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

#### B. Background and Contentions

The District filed a motion for summary judgment and an alternative motion for summary adjudication on March 18, 2009. At the time, the operative pleading was the first amended complaint. As it pertained to the District, Enciso alleged the following causes of action: negligence (first cause of action); intentional infliction of emotional distress (third cause of action; IIED); a purported claim for negligent infliction of emotional distress (fifth cause of action; NIED); invasion of privacy (sixth cause of action); and ethnic origin discrimination (seventh cause of action). The District argued it was entitled to summary judgment or summary adjudication as to each claim asserted against it. The District's motion included as evidence certain discovery responses from Enciso, excerpts of Enciso's deposition, and the declarations of Bonanno, Nelson, Meagher, and Satterwhite.

Enciso opposed the motion. His evidence included the declaration of an expert, Felix D'Amico, and excerpts from the depositions of Bonanno, Nelson, Officer Anderson, Meagher, and Krystal.

In an order filed July 21, 2009, the court denied summary judgment and granted in part and denied in part the District's alternative summary adjudication motion. Specifically, the court (1) treated the summary adjudication motion as a motion for judgment on the pleadings as to the first cause of action for negligence, and granted judgment on the pleadings with leave to amend; (2) granted summary adjudication of the third cause of action for IIED, finding that the District's conduct was not extreme and outrageous; (3) granted summary adjudication of the purported fifth cause of action for NIED; (4) denied summary adjudication of the sixth cause of action for invasion of privacy; and (5) granted summary adjudication of the seventh cause of action for ethnic origin discrimination.

Although Enciso fails to specifically refer to the court's summary adjudication order in his opening brief, he indicates that he is appealing "from the School District's demurrer to causes of action, sustained by the Superior Court [record citations] . . ." One of Enciso's record citations is to the summary adjudication order. And in his opening brief, he argues the merits of his claims against the District for IIED, purported NIED, and ethnic origin discrimination. Therefore, notwithstanding Enciso's failure to comply with the California Rules of Court as discussed, *ante*, we will consider him to have effectively challenged the summary adjudication order and will discuss that challenge below.

In Enciso's appellate briefs, apparently in support of his position that summary adjudication of the three claims was improper, he cites to evidence that was adduced at trial and, in some instances, evidence that is not part of the appellate record (such as statistical information concerning his alleged discrimination claim). "It is well settled that in reviewing a summary judgment, 'the appellate court must consider only those facts before the trial court, disregarding any new allegations on appeal. [Citation.] Thus, possible theories that were not fully developed or factually presented to the trial court

cannot create a ‘triable issue’ on appeal. [Citations.]” ’ [Citation.]” (*Havstad v. Fidelity National Title Ins. Co.* (1997) 58 Cal.App.4th 654, 661.) Therefore, to the extent Enciso’s argument is based upon evidence not presented in connection with the summary judgment motion, we will not consider it.

C. Facts Relevant to Summary Judgment Motion

1. *Evidence Presented by District*

During the afternoon of February 10, 2006, Enciso was attending a sixth period survey English class taught by Lisa Bonanno. Bonanno noticed within the last 15 minutes of class that it appeared there was “something wrong” with Enciso, and she asked him how he was doing. Enciso would not tell Bonanno what was wrong or whether he was in pain, “and there was no indication that he was ill in any way.” Rather, he was not responsive, his eyes were not reacting normally, and he would not make eye contact with Bonanno. He was speaking in fragments and he confused light and dark. Bonanno asked him to stay after class for seventh period study hall and he agreed.

After class recessed, Bonanno asked Krystal, one of Enciso’s classmates who was attending study hall, for information about Enciso. She was initially reluctant to say anything but later told Bonanno that during a physical education class, she had overheard Enciso talking about using drugs or smoking marijuana. At the time, Bonanno had thought it was possible Enciso was under the influence of an intoxicant, but she had not reached that conclusion. Bonanno decided to call the administration office to have someone assess Enciso’s condition.

Enciso testified in his deposition that he did not recall Bonanno speaking to him during class. He recalled putting his head down on his desk; “experiencing like a black out for several minutes.” He “was sleeping and his headache was getting worse.” He was short of breath, nauseated, and dizzy. He stood up and Bonanno asked what was wrong with him. He “told her that [he] wasn’t feeling well, that [he] was hungry, and

that's it." Enciso testified that Krystal, "out of nowhere, started saying, <sup>[c]</sup>You're high, you're high.<sup>[b]</sup>" She said this "very loud[ly] and repeatedly." Enciso testified he was not high. Enciso "didn't have the strength to argue with [Bonanno] or make explanations, because [he] was feeling really bad." Bonanno gave Enciso money to buy food from a vending machine, and "she called the security guard." Bonanno continued to ask Enciso how he was doing and told him that his pupils were dilated.

In response to Bonanno's call, Ron Nelson, the District's student conduct liaison officer, came to the classroom. Bonanno spoke to Nelson outside the classroom, indicating that she did not know what was wrong with Enciso, but that he was exhibiting poor motor skills, "he seemed incoherent and . . . was simply acting unusually." She told Nelson that Enciso might be sick, disoriented because he had not eaten anything, or might be under the influence.

Nelson—who had been trained as an emergency medical technician—observed Enciso get off of his seat and approach him. He appeared to Nelson to be slightly lethargic and did not walk in a straight line. Nelson asked Enciso if he was all right and if he had any medical issues; Enciso responded that nothing was wrong and he was fine. Enciso "did not seem to understand all of [Nelson's] questions and did not focus on [Nelson] when [Nelson] spoke to him." Nelson checked Enciso's forehead and he did not have a fever. Nelson thought that Enciso might be under the influence, but his "behavior did not match up with any specific drug." Because "something was not right about [Enciso] but [Nelson] did not know what it was," Nelson felt that Enciso needed to be further evaluated. Nelson accompanied Enciso to Assistant Principal Kathleen Meagher's office to be evaluated. Enciso had difficulty walking in a straight line to the office and frequently got his backpack tangled in his hand and had trouble placing the pack (which was not heavy) on his shoulder.

According to Enciso's testimony, Nelson "tried to establish a conversation, but [Enciso] did not really return his conversation. [Enciso] didn't really answer him." He recalled that Nelson first asked "how are you doing or what's up . . . [and Enciso] just gave him a one-word response, and that was pretty much it." Enciso did not recall what his one-word response was. Enciso testified that he "stumbled a little" on the way to the office and his backpack got tangled around his finger one time when he tried to get it over his shoulder.

As Enciso waited outside Meagher's office, she observed that "his head kept falling forward and he nearly fell out of the chair." Meagher noticed that Enciso was unable to keep his eyes open. Enciso's voice was clear but he did not respond to many of Meagher's questions. She asked him "what was wrong but he would not explain what was causing his condition." He told Meagher that he had earlier told Bonanno that he had not eaten all day, but it was later determined that he had eaten most of a chicken sandwich before Bonanno's class. Enciso appeared to Nelson to be "not focused at all." Nelson felt that Enciso's "demeanor was such that [Nelson] would not allow somebody in his condition to drive, be by themselves, or to go home unless s/he was in the presence of a parent or adult."

Enciso testified that Meagher "started asking [him] with suspicion what [he] was doing." He recalled that she asked him how he was doing; he said he was not feeling well and needed to rest. She asked whether he had been using drugs; he responded that he had not. Meagher asked more questions, but Enciso did not recall anything else. Enciso testified that he did not ask to see a doctor.

In his separate statement in opposition to the summary judgment motion, Enciso indicated that he disputed the fact presented by the District that "[a]t no time prior to his arrest did Enciso request medical attention." He indicated that he had "testified that he 'repeatedly' told Kathleen Meagher that he was sick and to call a paramedic." The

passage from his deposition cited by him in support of this statement consisted of Enciso's testimony that "[Meagher] never took into consideration the fact that [Enciso] had repeatedly said [he] was sick or call paramedics." The statement "or call paramedics" is ambiguous in that it could be construed as meaning that Meagher did not call the paramedics in response to Enciso's telling her he was sick, as opposed to Enciso's expressly asking that she call paramedics. Enciso's deposition testimony that he never "ask[ed] to see a doctor," coupled with his sworn written admissions that he never requested a medical evaluation or medical treatment, causes us to conclude that Enciso could not dispute the District's undisputed fact that "[a]t no time prior to his arrest did Enciso request medical attention." (See *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22 [court should disregard summary judgment opponent's self-serving declarations when they contradict credible discovery admissions and purport to impeach that party's own prior sworn testimony].)

As time went by, Enciso, according to Meagher, "became increasingly frustrated at having to stay in [her] office. He insisted that he was fine and demanded to go home." Meagher would not permit him to go home because of his condition. The High School's policy was that if there was an issue regarding a child's welfare, the school would contact the child's parents to have the child picked up. Because of Meagher's concern about Enciso's condition, she arranged to have Enciso's mother, Isabel Monteverde, contacted. Monteverde said she did not have transportation, so Principal Wynne Satterwhite offered to transport her.

Meagher then called in Student Resource Officer Susan Anderson (with the City's Police Department) to evaluate Enciso. Meagher did not believe at the time that calling a paramedic was necessary because, "[w]hile his behavior was strange, [Enciso] did not appear to be in immediate medical danger [and he] . . . never once expressed any need for help and repeatedly insisted that he was 'fine.'" Enciso was cooperative as Officer

Anderson performed several field sobriety tests, such as having him stand with his eyes closed to determine if he could keep his balance. Officer Anderson and Nelson agreed that Enciso appeared to be impaired.

Enciso testified that Officer Anderson questioned him at length. She was “pressuring [him] to admit to a crime.” Enciso told Officer Anderson that he was “not on anything” and was “not into any of this drug stuff,” but she was contradicting him to “convince [him] that [he] was doing something wrong.” He also testified that he believed the High School was “struggling to get in touch with [his] mom.” He overheard Principal Satterwhite tell Meagher that if Enciso’s mother would not come in to the office, Satterwhite would have to surrender Enciso to the police.

When Monteverde arrived at the school, Satterwhite and Meagher spoke to her briefly and explained that they were concerned about Enciso’s unusual, unexplained behavior, and that they were concerned he might have been under the influence of drugs but, alternatively, he might have been having some type of allergic reaction. Monteverde asked to speak privately with her son, and Meagher and Satterwhite accommodated her. Although Monteverde and Enciso met privately in Meagher’s office while the others waited outside, Meagher was able to hear there was a heated conversation in which, at one point, Enciso began “screaming loudly and pounding his fist on the table.”

Enciso testified that he told his mother that he was innocent and that he did not “know why these people [were] treating [him] this way.” He was “getting furious” and his mother could see that his face was very red. He testified he pounded the table twice “for emphasis.”

According to Meagher, Enciso requested that a drug test be performed on him. She declared that “[w]e explained” to Enciso that the High School did not conduct drug tests and that in order for Enciso to receive one, he would need to be arrested by the

police. Enciso and Monteverde agreed that Enciso would be arrested for the purpose of being tested for drug use.

Enciso testified that after he met with his mother, Officer Anderson said to Monteverde, "We're going to have to arrest him." Officer Anderson then had Enciso "stand up, did the patting thing, when she was behind [him] and then kicked [him] on the leg," causing him to almost fall down, and then handcuffed him. Before she kicked him, she asked Enciso to spread his legs to be searched. Enciso claims he sustained a bruise on his ankle from being kicked; it lasted "a couple of days at most," and he did not seek medical attention for it.

Enciso testified further that before he was handcuffed, Meagher prepared a notice indicating that he was being suspended and "said that [Enciso] was found guilty of being under the influence of stimulants." Enciso did not hear anyone from the High School say anything specifically to encourage the police to arrest him, but he felt school officials "just let [Officer Anderson] do her thing . . . [and] in a way . . . they[] sort of sponsor[ed] her activities."

The High School has strict written policies concerning the use of drugs and alcohol. The High School's policy is to suspend students who are under the influence of drugs or alcohol for three to five days. Based upon this policy and the fact that Enciso was defiant and unwilling to provide school officials with any information to help determine what was causing his condition, the High School suspended Enciso for five days (three days for being under the influence and two days for acting surly and defiant). Meagher was later advised that Enciso's drug tests were negative. Enciso and Monteverde requested that Enciso's suspension be removed from his record. After they met with Satterwhite and provided her with a copy of the drug test, she agreed to and did remove the suspension from Enciso's disciplinary record.

Enciso testified that he and his mother tried repeatedly to clear the suspension from his record, but Meagher continually refused the request. He said the High School had not notified him that the suspension had been expunged; rather, he and Monteverde had found that out at the end of his sophomore year while talking to his college and career counselor.

Bonanno and Nelson declared that the actions they took on February 10, 2006, were taken only out of concern for Enciso's well-being, and were not as a result of his being Latino or from Peru. Likewise, Meagher and Satterwhite each declared that they did not take any action against Enciso and he did not receive a more severe suspension because he was from Peru or South America or because of any other improper reason, and that the actions they took were motivated by a concern for his personal welfare.

Concerning his claim of discrimination, Enciso testified that he was aware of an instance when he was a sophomore in which a Caucasian male student was suspended by the school for three days for possession of marijuana. Enciso felt he had been treated unfairly because he had received a five-day suspension for a mere suspicion of being under the influence of drugs. He also testified that he believed that his suspension was unfair because he understood from the High School's website that its policy was to suspend a student for three days for being under the influence or in possession of drugs.

## 2. *Evidence Presented by Enciso*

The principal new evidence submitted by Enciso in opposition to the summary judgment motion consisted of (1) the declaration of Felix D'Amico, a drug recognition expert; (2) the declaration of Enciso's mother, Monteverde; and (3) the transcript of Krystal's deposition.

Based upon his review of Bonanno's deposition testimony, D'Amico opined in his declaration that Bonanno (1) had received no formal training in the detection of symptoms indicating a person was under the influence of drugs or alcohol; (2) did not

make any observations of Enciso involving clinical signs of being under the influence, as opposed to observations of his behavior; and (3) had performed no tests on Enciso to determine whether he was under the influence. D'Amico declared further that "none of the observations that Mr. Nelson reported concerning [Enciso] are clinical signs of being under the influence of a drug or alcohol." D'Amico was of the opinion that (1) Officer Anderson's observations of Enciso's eye movements were "unreliable"; (2) she "did not observe the symptoms set forth in her report"; and (3) "it [was] possible that [Officer] Anderson observed some symptoms, but the smorgasbord of symptoms makes no sense." With respect to Bonanno and Nelson, D'Amico concluded that neither of them had a reasonable suspicion that Enciso was under the influence of a controlled substance.

Monteverde declared that when she arrived at the High School on February 10, 2006, Officer Anderson told her in the parking lot that Enciso was under the influence of drugs. She told Monteverde that she based that conclusion on the fact that Enciso's pupils were dilated, his movements were uncoordinated, he was staggering, and he had trouble handling his backpack. Monteverde declared that she "informed Officer Anderson had bee [*sic*] sick the previous week and had severe diarrhea." Later after Monteverde went to Meagher's office, Monteverde told Meagher that her son had "had flu-like symptoms the previous week and had gone to the doctor." Monteverde claimed that Meagher ignored her, and later said that Enciso "was a 'drug consumer' and was under the influence of a drug called ecstasy." Officer Anderson handed Monteverde a citation indicating that Enciso was under the influence and, at the same time, Meagher gave Monteverde a notice indicating Enciso was suspended for five days for being under the influence. Officer Anderson told Monteverde that she could meet with her son alone.

Monteverde declared that she met with Enciso, who denied having taken drugs or having drunk anything. She said she told Officer Anderson that Enciso was innocent, but the police then continued to interrogate him. "Officer Anderson announced that because

[Enciso] would not confess, she would have to arrest him and blood taken [sic].” Officer Anderson then directed Enciso to stand up, went behind him and kicked him, and placed him in handcuffs. Monteverde never requested or agreed for her son to be tested for being under the influence.

Enciso also submitted the entire deposition transcript of Krystal.<sup>6</sup> On an afternoon when she was attending study hall with Enciso in Bonanno’s classroom, Krystal “remembered just sitting there staring at [Enciso] like going what is going on?” Enciso had his head down on the desk with his arms folded. The lights had been turned on and he asked, “[W]ho turned off the lights[?] And he was making very random comments.” Enciso also asked Bonanno to give him her food. Krystal made the comment to Enciso, “[S]top being high.” Bonanno took Krystal aside and asked her about her comment. Bonanno asked Krystal what she (Bonanno) should do, and if Krystal “believe[d] that he really was on anything.” Krystal replied that she did not know what Bonanno should do, did not know if Enciso was under the influence, and that she did not know him very well. Krystal did not think at the time that Enciso was sick. Enciso did not say that he had a headache. After a security guard was called, Bonanno told Krystal that she did not think it was safe for Enciso to leave by himself.

#### D. IIED Claim

##### 1. Allegations

Because “the pleadings set the boundaries of the issues to be resolved at summary judgment” (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648 (*Oakland Raiders*)), we review the allegations in support of Enciso’s IIED claim

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<sup>6</sup> The transcript submitted by Enciso was designated as a “rough transcript” of Krystal’s deposition. The record does not reflect there was any objection lodged to this evidence.

made in the third cause of action of the first amended complaint. Enciso incorporated by reference all prior allegations of his pleading. He alleged, among other things, that defendants “exploited [his] immaturity and abused [their] positions of authority” by “wrongfully and recklessly accus[ing him] of being under the influence of drugs, and interrogat[ing] and arrest[ing him] for an alleged violation of Health and Safety Code Section 11550, while disregarding [his] obvious emergency medical needs.” Enciso alleged that on February 10, 2006, he was called into Assistant Principal Meagher’s office and was accused of being under the influence of an illegal drug, Ecstasy. At the time, Enciso “was exhibiting significant symptoms related to his asthma and viral infection.” He alleged further that Officer Anderson negligently performed tests on him “despite [his] weakened physical condition and his obvious need for emergency medical aid”; defendants demanded that he “confess to being under the influence of drugs and threatened to transfer [him]” from the High School and “commit [him] to a Juvenile facility if he did not confess.”

Enciso alleged that thereafter, the High School’s principal met with Enciso’s mother at her home and informed her that Enciso “was on drugs.” He alleged further that after he had been detained at the High School for two hours, he was handcuffed and arrested in front of his mother, and that Anderson “roughly pulled him out of the office and outside the building by using the handcuffs as a form of leash for the purpose of humiliating [him].” He also alleged that he was interrogated at the police station and was forced to give a blood sample to be tested for drugs. He was placed under house arrest for five days and was suspended from school for the same time period. The drug test confirmed that he had not been under the influence of drugs. Enciso alleged that the High School refused to clear his suspension from his academic record or to “take any step to publicize [his] innocence.” He also alleged that defendants’ actions “were intentional,

extreme, outrageous, and were intended to cause [him] severe and extreme emotional distress and to subject [him] to ridicule.”

## 2. *Summary Adjudication of IIED Claim Was Proper*

Enciso contends on appeal that he adequately presented an IIED claim. He argues that if he established that District employees “acted with malice or were deliberately indifferent to [him],” he could establish an IIED claim against the District.

To maintain an IIED claim, the plaintiff must show “ ‘(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.’ ” (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903; see also CACI No. 1602.) “Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. [Citations.]” (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209 (*Davidson*); see also *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498 (*Alcorn*) [recovery for IIED available where only emotional injuries are suffered “in cases involving extreme and outrageous intentional invasions of one’s mental and emotional tranquility”].) The outrageous conduct must be perpetrated with the intent “to inflict injury or engaged in with the realization that injury will result.” (*Davidson*, at p. 210; see also *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050-1051 (*Hughes*)). The plaintiff’s burden of establishing severe emotional distress is “a high bar. ‘Severe emotional distress means “ ‘emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.’ ” [Citation.]” (*Hughes*, at p. 1051.)

It is established that “[o]rdinarily mere insulting language, without more, does not constitute outrageous conduct.” (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 155, fn. 7.) Liability under an IIED claim “ ‘does not extend to mere

insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’ [Citation.]” (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1122, overruled on another ground in *Aguilar, supra*, 25 Cal.4th at p. 854, fn. 19; see also *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 617.) “Whether a defendant’s conduct can reasonably be found to be outrageous is a question of law that must initially be determined by the court; if reasonable persons may differ, it is for the jury to determine whether the conduct was, in fact, outrageous. [Citation.]” (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 534, citing *Alcorn, supra*, 2 Cal.3d at p. 499.)

Here, the evidence showed that on the afternoon of February 10, 2006, Enciso’s teacher, Bonanno, thought there was “something wrong” with Enciso. He was not responsive, his pupils were not reacting normally, and he would not make eye contact. Both Bonanno and a student (Krystal) observed that Enciso had confused light from dark. The student conduct liaison officer, Nelson, also observed that Enciso had difficulty understanding his questions; did not focus on Nelson when they spoke; had difficulty walking in a straight line; and had significant trouble with his backpack. Nelson was concerned about Enciso’s condition and would not allow him to go home without being accompanied by a parent or other adult. Similarly, Assistant Principal Meagher observed that Enciso’s head kept falling forward while sitting and he almost fell out of his chair; he was unresponsive to many of her questions; he was not focusing on her at all; and his condition was of a nature that she did not deem it safe for him to be released to go home by himself. Bonanno and Nelson had concerns that Enciso’s unexplained behavior might be due to his being under the influence. Because of concerns about Enciso’s condition, Meagher contacted Enciso’s mother, Isabel Monteverde, to have her come to the High School. When she arrived, Meagher permitted Monteverde to speak privately with her son, which resulted in a heated conversation in which Enciso repeatedly pounded his fist on the table.

There was some conflict in the evidence as to whether Enciso told anyone at the High School he was not feeling well. According to the District's evidence, despite repeated inquiries, Enciso did not tell Bonanno, Nelson, or Meagher that he was ill or otherwise explain that there was something wrong with him. According to Nelson, Enciso told him that nothing was wrong and that he was fine. According to Meagher, Enciso "never once expressed any need for help and repeatedly insisted that he was 'fine.'" Enciso testified that, in response to her inquiry, he told Bonanno "that [he] wasn't feeling well, that [he] was hungry, and that's it." Enciso testified that in response to multiple questions by Nelson, he "just gave him a one-word response, and that was pretty much it"; Enciso did not recall what his one-word response to Nelson was. And Enciso testified that he told Meagher he was not feeling well and needed to rest. But he testified that he did not ask to see a doctor, and admitted in responses to requests for admissions that he never requested medical treatment or a medical evaluation. Additionally, Monteverde declared that she told Officer Anderson and Meagher that Enciso had been ill the week prior.

There was also a conflict as to the circumstances resulting in Enciso's arrest and the later expungement of Enciso's suspension from his record. Meagher declared that after he met privately with his mother, Enciso asked to be tested for drugs. Then, after it was explained that the High School did not conduct drug tests and that Enciso would have to be arrested to receive one, he and his mother agreed that he could be arrested for the purpose of being drug-tested. But Enciso testified that after he met with his mother, Officer Anderson told Monteverde they would have to arrest her son. He was then instructed to stand up, and he was searched and handcuffed. Monteverde declared that after she met privately with her son and told Officer Anderson that Enciso was innocent, the police continued to interrogate Enciso, and then Officer Anderson said they would

have to arrest him and drug test him. Monteverde declared that she never agreed to have her son tested for drugs.

Meagher declared that at a later time, Enciso and Monteverde asked that Enciso's suspension be removed from his record, and that, after meeting with Principal Satterwhite and providing her with a copy of the drug test results, Satterwhite agreed to and did remove the suspension from Enciso's disciplinary record. Enciso testified that he and his mother tried repeatedly to clear the suspension from his record, but Meagher continually refused the request. He and his mother discovered that the suspension was not in his record only by the end of his sophomore year while talking to his college and career counselor.

Viewing the evidence most favorably to Enciso's position, Enciso exhibited signs that he was not functioning well at school on the afternoon of February 10, 2006; he was minimally responsive to inquiries of several school officials concerning what was the matter with him; both Bonanno and Nelson suspected that he could be under the influence; Enciso did not ask for a medical evaluation or medical treatment; and Nelson and Meagher were significantly concerned about Enciso's behavior to believe it imprudent to allow him to leave school by himself. Under these circumstances, regardless of whether Monteverde and Enciso consented to his arrest or the arrest was initiated by Officer Anderson, the District's conduct was not extreme and outrageous.<sup>7</sup>

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<sup>7</sup> Enciso alleged in the first amended complaint that he "was exhibiting significant symptoms related to his asthma and viral infection"; defendants "disregard[ed his] obvious emergency medical needs"; and defendants demanded that he "confess to being under the influence of drugs and threatened to transfer [him]" from the High School and "commit [him] to a Juvenile facility if he did not confess." Enciso did not submit evidence in connection with the summary judgment motion to support these allegations. As such, they cannot be considered in reviewing the propriety of the court's summary judgment/adjudication order. (See *College Hospital v. Superior Court* (1994))

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(See, e.g., *Bravo v. Hsu* (C.D.Cal. 2005) 404 F.Supp.2d 1195, 1204 [school’s search of eight-grade student’s person and backpack based upon suspicion she was carrying drugs, even though no drugs found, did not constitute extreme or outrageous behavior to support IIED claim]; *Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1108-1109 [independent contractor security guard’s statements to plaintiff while being detained for suspected shoplifting “that he needed to make a ‘collar,’ ” and later comments as plaintiff was being escorted out of store that “ ‘that’s what you get’ and ‘you’re not welcome to shop here anymore,’ ” insufficient for IIED claim]; *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal.App.4th 179, 194 [no IIED claim stated by employee who agreed in advance to be drug tested upon employer’s reasonable cause to believe employee under the influence, where employer demanded she take urinalysis test after two managers believed her to be intoxicated]; *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80 [acts of personnel management, even if allegedly discriminatory, insufficient to justify IIED claim against individual managers; remedy was discrimination suit against employer].) Moreover, there was little evidence presented concerning the nature and extent of emotional distress allegedly suffered by Enciso, and there was no evidence that it was “severe” in the sense that it was “ ‘ ‘ ‘of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.’ ” ’ [Citation.]” (*Hughes*, 46 Cal.4th at p. 1051.)

Here, even “liberally constru[ing] plaintiff’s evidentiary submissions and strictly scrutiniz[ing] defendant’s own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff’s favor” (*Johnson v. American Standard, Inc.* (2008)

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8 Cal.4th 704, 720, fn. 7 (*College Hospital*) [party may not rely on allegations of own pleadings to make or supplement its evidentiary showing in support of or opposition to summary judgment/adjudication motion].)

43 Cal.4th 56, 64), the evidence does not show that the District’s “[c]onduct [was] . . . so extreme as to exceed all bounds of that usually tolerated in a civilized community. [Citations.]” (*Davidson, supra*, 32 Cal.3d at p. 209.) The court therefore did not err in granting the District’s motion for summary adjudication of the IIED claim.

E. Purported NIED Claim

1. *Allegations*

We review the allegations of the fifth cause of action of the first amended complaint for purported NIED in assessing the propriety of the summary adjudication of that claim. (*Oakland Raiders, supra*, 131 Cal.App.4th at p. 648.) Enciso incorporated by reference all prior allegations of his pleading. (Thus, the specific allegations referenced above in our discussion of the IIED claim apply to the purported NIED claim.) He alleged further that defendants owed him a duty of care, breached that duty, and that as a proximate result of their conduct, he suffered damages, including severe and extreme emotional distress.

2. *Summary Adjudication of Purported NIED Claim Was Proper*

Enciso argues that the District as an entity may be held vicariously liable for emotional distress that was negligently inflicted upon him by the District’s employees. By this assertion, we understand him to be challenging the court’s summary adjudication of the purported NIED claim in the District’s favor. Enciso’s counsel below *may have* conceded that summary adjudication of this purported claim was appropriate. Counsel noted in the opposing memorandum that “Plaintiffs do not contest the . . . negligent infliction of emotional distress theories against the Los Altos Mountain View Union High School District.” But elsewhere in the opposition, Enciso’s counsel disputed material facts relevant to the purported NIED claim. In light of the ambiguity of the record, we will address Enciso’s appellate contention on the merits.

A purported claim for NIED is in actuality not a tort separate and apart from the tort of negligence. (*Potter v. Firestone Tire & Rubber Co.*, *supra*, 6 Cal.4th at p. 984.) “The tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. [Citations.] That duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship. [Citation.]” (*Id.* at pp. 984-985.) As the California Supreme Court explained: “[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant’s breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests. [Citations.]” (*Id.* at p. 985.) Thus, since Enciso’s purported NIED claim was merely “a species of negligence” (*Wooden v. Raveling* (1998) 61 Cal.App.4th 1035, 1046), the better question to ask in appraising his NIED allegations is: “What are the circumstances under which a plaintiff can recover damages for emotional distress as a matter of the *law of negligence*?” (*Lawson v. Management Activities, Inc.* (1999) 69 Cal.App.4th 652, 657, original italics (*Lawson*).) The purported claim, in other words, may more properly be called “damages for emotional distress under a negligence theory.” (*Id.* at p. 654.)

In *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916 (*Molien*), the California Supreme Court made it clear that to recover damages for emotional distress on a claim of negligence where there is no accompanying personal, physical injury, the plaintiff must show that the emotional distress was “serious.” (*Id.* at pp. 927-930; see also *Potter, supra*, 6 Cal.4th at p. 999; *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1073, fn. 6 (*Burgess*).) As this court has stated: “In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress.’ Indeed, given the meaning of both phrases, we can perceive no material

distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 (*Wong*).)

In this instance, Enciso failed to show the existence of emotional distress—allegedly caused negligently by the District—that was serious or severe. (*Molien, supra*, 27 Cal.3d at pp. 930-931; *Wong, supra*, 189 Cal.App.4th at p. 1378.) Indeed, there was no showing in opposition to the summary judgment motion that Enciso suffered psychological injuries, mental suffering or the like as a direct result of his February 10, 2006 encounter with High School officials and the police and his ultimate arrest. And he may not rely on the allegations in his first amended complaint that he suffered “severe and extreme emotional distress.” (*College Hospital, supra*, 8 Cal.4th at p. 720, fn. 7 [party may not rely on allegations of own pleadings to make or supplement its evidentiary showing in support of or opposition to summary judgment/adjudication motion].) Thus, without disregarding the stressful nature inherent in having been accused and arrested based upon a suspicion of being under the influence of drugs, Enciso’s failure to present evidence of serious or severe emotional distress bars his purported NIED claim. (See *Wong*, at p. 1378 [anti-SLAPP motion properly granted where plaintiff failed to show serious or severe emotional distress to support purported NIED claim].) Although duty and its breach are required for a claim based upon negligent causing of severe emotional distress (*Burgess, supra*, 2 Cal.4th at p. 1072), we need not address here whether Enciso satisfied these elements because of the absence of a showing of serious or severe emotional distress.

Accordingly, the court properly granted summary adjudication of Enciso’s purported NIED claim asserted in the fifth cause of action of the first amended complaint.

## F. Discrimination Claim

### 1. Allegations

We review the allegations in the seventh cause of action of the first amended complaint for ethnic origin discrimination in assessing the propriety of the summary adjudication of that claim. (*Oakland Raiders, supra*, 131 Cal.App.4th at p. 648.) Enciso again incorporated by reference all prior allegations of his pleading. (Thus, the specific allegations referenced above in our discussion of the IIED claim apply to the discrimination claim.) He alleged that the District's conduct was discriminatory based upon his Latin-American origin in violation of Education Code section 220. He claimed that his ethnicity was the District's "primary basis for suspending [him]" because he was suspended for five days for allegedly being under the influence of drugs, while the High's School's policy was that a three-day suspension was customary for a first infraction of that nature. He also alleged that the District failed to expunge his record after being informed that he "was not on drugs, but was seriously ill," and that the District "denied all claims against them [asserted by Enciso] and refused to correct [his] academic record due to [its] ethnic origin discriminatory practices."

### 2. Summary Adjudication of Discrimination Claim Was Proper

Enciso conceded below that summary adjudication of the discrimination claim below was appropriate. In his memorandum in opposition to the motion, his counsel stated: "Also, Plaintiffs do not contest summary judgment with respect to the discrimination claim." On appeal, however, he appears to renew the argument that his discrimination claim was viable. We conclude that Enciso has forfeited this appellate challenge. (See *Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 783.) Notwithstanding Enciso's express waiver of his appellate contention, even if we were to review the merits of his claim, summary adjudication was proper.

Education Code section 220 provides: “No person shall be subjected to discrimination on the basis of disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid.” Education Code section 262.3 and 262.4 authorize the enforcement of the antidiscrimination law set forth in Education Code section 220. (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 590-591 (*Donovan*)). Under Education Code section 262.3, a party enforcing the statute may seek “civil law remedies,” which has been construed to include monetary damages. (*Donovan*, at pp. 595-596.)

Under Education Code section 262.3, subdivision (d), “a person who alleges that he or she is a victim of discrimination may not seek civil remedies pursuant to this section until at least 60 days have elapsed from the filing of an appeal to the State Department of Education pursuant to Chapter 5.1 (commencing with Section 4600) of Division 1 of Title 5 of the California Code of Regulations. The moratorium imposed by this subdivision does not apply to injunctive relief and is applicable only if the local educational agency has appropriately, and in a timely manner, apprised the complainant of his or her right to file a complaint.” In other words, there is “a 60–day ‘cooling off period’ before civil remedies may be pursued by private enforcement.” (*Donovan, supra*, 167 Cal.App.4th at p. 593.) As explained in *Donovan*: “A complaint of discrimination *must be filed* with the local educational agency ‘not later than six months from the date the alleged discrimination occurred, or the date the complainant first obtained knowledge of the facts of the alleged discrimination.’ (Cal. Code Regs., tit. 5, § 4630, subd. (b).) With certain exceptions, within 60 days from the date of the receipt of the complaint<sup>[5]</sup> the local agency shall ‘conduct and complete an investigation’ of the complaint, and prepare

a written ‘[a]gency [d]ecision.’ (Cal. Code Regs., tit. 5, § 4631, subd. (a).) The agency decision should include: (1) findings of fact; (2) conclusions of law; (3) disposition of the complaint; (4) the rationale for such disposition; (5) corrective actions, if warranted; (6) notice of the complainant’s right to appeal the local agency’s decision to the Department of Education; and (7) the procedures to be followed to initiate such an appeal. (Cal. Code Regs., tit. 5, § 4631, subd. (e).)” (*Donovan*, at p. 604, italics added.)

The court in *Donovan* explained that while the Legislature authorized private enforcement of anti-discrimination laws, it provided administrative safeguards to minimize the amount of litigation the public school system would face: “Although it authorized a private right of action for a[n Education Code] section 220 violation, we thus conclude the Legislature also sought to accomplish the policy objectives underlying the antidiscrimination in education law through administrative enforcement, to avoid ‘throwing [public] schools into immediate litigation’ [citation] and to give schools an opportunity to resolve informally as many cases as possible. [Citation.]” (*Donovan*, *supra*, 167 Cal.App.4th at pp. 607-608, fn. omitted.)

Here, the undisputed evidence, according to Principal Satterwhite’s declaration, was that (1) the “High School has strict policies against discrimination of any form”; (2) the “High School’s programs and activities are provided free from discrimination . . . with respect to . . . ancestry [and] national origin”; (3) the “District has procedures to investigate claims of discrimination”; (4) those procedures include instructions and procedures “on how to file a complaint for discrimination [that] are mailed to all parents of Los Altos High School students at the beginning of each school year”; and (5) neither Enciso nor his mother filed a discrimination complaint. Enciso’s discrimination claim is therefore barred because he failed to exhaust his administrative remedies as required under the Education Code section 262.3. (*Donovan*, *supra*, 167 Cal.App.4th at p. 604; see, e.g., *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 284-288

[property owner's suit challenging approval of neighbor's coastal development project barred for failure to pursue pending appeal to Coastal Commission to completion]; *Bockover v. Perko* (1994) 28 Cal.App.4th 479, 491 [suit by state university employee placed on leave without pay barred for failure to exhaust university's administrative grievance procedure].)

Moreover, notwithstanding Enciso's express waiver of the appellate claim and his failure to exhaust the requisite administrative remedies, the summary judgment motion demonstrated that Enciso's discrimination claim was without merit. His claim was that he suffered ethnic origin discrimination because he was suspended for five days for being under the influence of drugs, while the High School's policy provided for a three-day suspension. But the undisputed evidence, from the declarations of Principal Satterwhite and Assistant Principal Meagher, was that Enciso was suspended for a total of five days that was comprised of three days for being under the influence and two additional days for being surly and defiant.

Enciso's discrimination claim is also based upon the allegation that the High School "refused to correct [his] academic record due to [its] ethnic origin discriminatory practices." But the undisputed evidence was that Enciso's suspension was removed from his disciplinary record after Enciso and Monteverde met with Satterwhite. Moreover, the District presented affirmative evidence that the High School has "strict rules against discrimination of any form," and that the actions of Bonanno, Nelson, Meagher, and Satterwhite were taken out of a concern for Enciso's well-being and were not related to his being Latino or from Peru. Enciso presented no evidence that any actions toward him by representatives of the High School were in any way based upon his ethnic origin. (See *Epileptic Foundation v. City and County of Maui* (D.Hawaii 2003) 300 F.Supp.2d 1003, 1013 [federal Title VII discrimination claim requires showing that plaintiff was treated differently and that defendants acted with discriminatory intent].) Enciso's anecdotal,

hearsay evidence that he was aware that the High School had suspended a Caucasian student the next year for three days for possession of marijuana is insufficient to support his claim of ethnic origin discrimination.

Enciso expressly waived any challenge to the summary adjudication of the seventh cause of action of the first amended complaint for ethnic origin discrimination.

Irrespective of this express waiver, summary adjudication of this claim was proper because Enciso failed to exhaust his administrative remedies, and because the claim was without merit.

### *III. Demurrer to Negligence Claim in Third Amended Complaint*

#### *A. Standard of Review*

We perform an independent review of a ruling on a demurrer and decide de novo whether the challenged pleading states facts sufficient to constitute a cause of action. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 42; *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.) “In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. ‘We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.’ [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; see also *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, 1075; *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

“It is not the ordinary function of a demurrer to test the truth of the plaintiff’s allegations or the accuracy with which he describes the defendant’s conduct. A demurrer

tests only the legal sufficiency of the pleading.” (*Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213.) Thus, as noted, “the facts alleged in the pleading are deemed to be true, however improbable they may be. [Citation.]” (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; see also *Alcorn, supra*, 2 Cal.3d at p. 496 [court reviewing propriety of ruling on demurrer is not concerned with the “plaintiff’s ability to prove . . . allegations, or the possible difficulty in making such proof”].)

On appeal, we will affirm a “trial court’s decision to sustain the demurrer [if it] was correct on any theory. [Citation.]” (*Kennedy v. Baxter Healthcare Corp.* (1996) 43 Cal.App.4th 799, 808, fn. omitted.) Thus, “we do not review the validity of the trial court’s reasoning but only the propriety of the ruling itself. [Citations.]” (*Orange Unified School Dist. v. Rancho Santiago Community College Dist.* (1997) 54 Cal.App.4th 750, 757.)

An appellate court reviews the denial of leave to amend after the sustaining of a demurrer under an abuse of discretion standard. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) When a demurrer is sustained without leave to amend, the reviewing court must determine whether there is a reasonable probability that the complaint could have been amended to cure the defect; if so, it will conclude that the trial court abused its discretion by denying the plaintiff leave to amend. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 39; *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal.App.4th 708, 719.) “ ‘[W]here the nature of the plaintiff’s claim is clear, and under substantive law no liability exists, a court should deny leave to amend because no amendment could change the result.’ ” (*Buchanan v. Maxfield Enterprises, Inc.* (2005) 130 Cal.App.4th 418, 421 (*Buchanan*).) The plaintiff bears the burden of establishing that it could have amended the complaint to cure the defect. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 320 (*Campbell*).)

## B. Procedural Background Concerning Negligence Claim

On June 22, 2007, Enciso filed a first amended complaint that included a claim for negligence against all defendants. He alleged that the School District, the City, and the Police Department were negligent in their selection, hiring, training, and supervision of Meagher and Officer Anderson, and that the entities knew or should have known that they were unfit and incapable of providing, among other things, emergency medical care to Enciso, thereby causing him damages. As noted above, the District sought summary adjudication of this claim, and the court treated the motion as a motion for judgment on the pleadings and granted the motion with leave to amend. The court reasoned that because under the Government Tort Claims Act, all governmental liability must be based on statute, the first amended complaint was defective because it failed to allege the statutory basis upon which negligence liability against the District was based.

Enciso filed a second amended complaint on August 17, 2009. In that pleading, he alleged a number of claims, including a first cause of action against the District and other defendants captioned as one for “constitutional tort—unreasonable search and seizure” (capitalization omitted), and a second cause of action against the District for negligence. In the first cause of action, Enciso alleged that defendants had no reasonable suspicion that he was under the influence of drugs or alcohol; his arrest violated his rights under the Fourth Amendment of the United States Constitution and under Article I, section 19 of the California Constitution; and he was injured as a result of defendants’ conduct. He also alleged in the negligence claim that the School District had a policy that included the training of school personnel to identify the symptoms of drug and alcohol use; it had a duty to properly train its personnel pursuant to this policy; it breached this duty by the High School’s failure to have a formalized training program; and Enciso sustained damages as a result of that breach of duty because proper training of personnel would have prevented Enciso’s arrest.

The District's demurrer to the second amended complaint was based, among other things, on the theory that Enciso had alleged "an invalid constitutional tort [first] cause of action and a breach of mandatory duty [second cause of action] styled as 'negligence.'" On December 2, 2009, the court sustained *without* leave to amend the District's demurrer to the first cause of action for a constitutional tort, and it sustained *with* leave to amend the demurrer to the second cause of action for negligence.

On December 28, 2009, Enciso filed a third amended complaint that included a claim for negligence against the District (first cause of action). He alleged that the District undertook the supervision, guidance, and education of Enciso, and that Meagher was responsible for training and execution of the High School's drug detection policies. Enciso alleged further that (1) defendants, without probable cause, accused him of being under the influence of drugs or alcohol; (2) California Constitution, article I, section 13 prohibits unreasonable searches and seizures; (3) California Constitution, article I, section 13 imposed upon the District a duty to search students only where probable cause existed, and imposed a corollary duty to train personnel in the detection of drug and alcohol use; (4) the District breached those duties to Enciso by searching and seizing him without probable cause and by the High School's failure to train its personnel concerning the detection of drug and alcohol use; and (5) Enciso was damaged as a result of this breach of duty.

The District filed a demurrer to the negligence cause of action. It asserted the claim failed to state a cause of action because the court had ruled previously that Enciso could not allege a claim for a constitutional tort; and article I, section 13 of the California Constitution did not impose a mandatory duty as required under Government Code section 815.6 upon the District to train school personnel concerning drug and alcohol use

which would thereby support a claim of negligence.<sup>8</sup> On April 14, 2010, the court sustained the District's demurrer to the negligence cause of action without leave to amend.

### C. Scope of Appellate Review of Demurrer Order

Enciso appears to challenge the court's order sustaining the District's demurrer to the third amended complaint. We glean this from (1) the fact that Enciso cited to the court's order of April 14, 2010, sustaining the District's demurrer to the third amended complaint in his statement of appealability;(2) his recitation of the standard of appellate review for rulings on demurrer; and (3) his argument that followed in which he asserted the District was liable for the alleged negligence and negligent supervision of District personnel.

It is conceivable that Enciso may also be attempting to contest rulings by the trial court with respect to the District's challenges to earlier pleadings by Enciso. In the statement of appealability at the beginning of his opening brief, Enciso indicates that the appeal is "a Judgment in favor of Defendants and against Plaintiff, Cesar Enciso . . . , and from the School District's demurrer to causes of action, sustained by the Superior Court, [citations]." The record citations supplied by Enciso are to the court's (1) order on the District's summary judgment motion, (2) order on the District's demurrer to the second amended complaint, and (3) order on the District's demurrer to the third amended complaint.

To the extent Enciso purports to appeal from the portion of the summary judgment order in which the court deemed the District's motion a motion for judgment on the pleadings with respect to the first cause of action (negligence) of the first amended

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<sup>8</sup> Further statutory references are to the Government Code unless otherwise stated.

complaint, we may not consider that challenge. The court granted the motion for judgment on the pleadings with leave to amend, and Enciso elected to file an amended pleading (i.e., the second amended complaint) to once again assert a cause of action for negligence. An appeal will generally not lie to contest an order sustaining a demurrer with leave to amend where the plaintiff elects to amend the challenged pleading. (See *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 312 (*County of Santa Clara*) [intermediate ruling on demurrer not subject to challenge on appeal; “where the plaintiff chooses to amend, any error in the sustaining of the demurrer is ordinarily waived”]; *Singhania v. Uttarwar* (2006) 136 Cal.App.4th 416, 425 (*Singhania*) [“sufficiency of an entirely superseded pleading . . . is not considered on review”].) Likewise, we may not address Enciso’s purported challenge to the court’s order sustaining with leave to amend the District’s demurrer to the second cause of action (negligence) of the second amended complaint. Enciso elected to amend again this negligence cause of action by filing the third amended complaint; we will not review the sufficiency of the superseded pleading as to this negligence claim. (*County of Santa Clara*, at p. 312; *Singhania*, at p. 425.)

Finally, we will not review any purported challenge to the court’s order sustaining without leave to amend the first cause of action (constitutional tort) of the second amended complaint. Enciso has presented no argument on this issue, and accordingly, he has abandoned any challenge to this aspect of the court’s December 2, 2009 order. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [arguments made at trial level not asserted on appeal are treated as abandoned]; see also *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 [appellate courts “need not consider an argument for which no authority is furnished”].)

Accordingly, notwithstanding Enciso’s blanket citation (without related accompanying argument) to three trial court orders involving demurrers or a judgment on

the pleadings, we will address only his challenge to the order sustaining without leave to amend the negligence cause of action alleged in the third amended complaint. In doing so, we will disregard any argument contained in his briefs that may not pertain to that ruling, including argument that may relate to prior court rulings on the District's summary judgment motion or demurrer as to negligence claims in superseded pleadings. Thus, for example, we will disregard Enciso's argument concerning a negligent training and supervision theory of liability that was alleged in his first amended complaint. Further, to the extent Enciso relies on materials beyond the scope of the District's demurrer to the third amended complaint—including evidence submitted in connection with the summary judgment motion and the trial—we will disregard those materials. Extrinsic evidence, other than matters for which judicial notice may be taken, may not be considered in connection with a demurrer. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶7:8, p. 7(1)-8.)

#### D. Demurrer to Third Amended Complaint Was Properly Sustained

Enciso attempted to plead negligence against the District by asserting that article I, section 13 of this state's Constitution imposed (1) a mandatory duty upon the District to search students only where probable cause exists, and (2) "a corollary duty to train staff in the detection of the use of drugs and alcohol in the student body." He alleged a breach of that duty, and that he had sustained damages as a result thereof. Enciso alleged further that the School District and the High School were liable pursuant to section 815.2, under which the doctrine of respondeat superior is made applicable to public employers.

The trial court sustained without leave to amend the District's demurrer to that cause of action. It concluded Enciso had failed to state a cause of action against the District because (1) there was no viable claim against the School District for breach of a mandatory duty under section 815.6; (2) there was no "cognizable duty of care" as to Meagher and there was thus no cause of action for negligence alleged against her; and (3)

“[i]t necessarily follow[ed] that no liability [could] exist against the School District under the doctrine of respondeat superior.”

Section 815.6 provides: “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” An “enactment” under the statute establishing a mandatory duty may consist of “a constitutional provision, statute, charter provision, ordinance, or regulation.” (§ 810.6.) A contract is not an “enactment” giving rise to potential liability pursuant to a mandatory duty under section 815.6. (*Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372, 1395, fn. 22.) Likewise, an administrative policy typically does not constitute an “enactment” under section 815.6. (See, e.g., *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 643 [statement of policy goals in Department of Social Services manual not an “enactment”]; *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 982 [employee manual of county children’s center not an “enactment”].) In a claim against a governmental entity under section 815.6, the particular enactment creating a mandatory duty must be specifically pleaded. (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1349.)

As explained by the California Supreme Court, assuming the existence of an “enactment” upon which the claim of duty is based, there are two elements that must be established for a claim of breach of mandatory duty under section 815.6. First, “the enactment at issue [must] be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken. [Citation.] It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. [Citation.]” (*Haggis v.*

*City of Los Angeles* (2000) 22 Cal.4th 490, 498 (*Haggis*), original italics.) Second, “the mandatory duty [must] be ‘designed’ to protect against the particular kind of injury the plaintiff suffered.” (*Id.* at p. 499; see also *Nunn v. State of California* (1984) 35 Cal.3d 616, 626 [fact that enactment “confers some benefit” that is “incidental” on class to which plaintiff belongs is insufficient].)

The section of the California Constitution upon which Enciso relies in claiming a mandatory duty under section 815.6 provides: “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.” (Cal. Const., art. I, § 13.) The parties have cited no authority—nor are we aware of any—that supports the position that article 1, section 13 of the California Constitution creates a mandatory duty upon public agencies and officials (such as the School District, the High School, and Meagher) that would support Enciso’s negligence claim here. “A statute is deemed to impose a mandatory duty on a public official only if the statute affirmatively imposes the duty and provides implementing guidelines.” (*O’Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 510 (*O’Toole*).)

Here, the purported enactment does neither. Article I, section 13 of the California Constitution merely declares that all persons have the right to be secure from unreasonable searches and seizures, and that a search warrant shall not issue absent a showing of probable cause through oath or affirmation that describes with particularity the place to be searched and the people and property to be seized. Contrary to the allegation in the third amended complaint, it does not impose a specific affirmative duty upon the School District, the High School or their employees “to search and seize students only upon probable cause.” Further, to the extent Enciso contends (as alleged in his third amended complaint) that school officials have the right to “search and seize

students only upon probable cause,” he is mistaken. The standard governing public school officials’ search of students is reasonable suspicion, not the more stringent probable cause standard. “[S]earches of students by public school officials must be based on a reasonable suspicion that the student or students to be searched have engaged, or are engaging, in a proscribed activity (that is, a violation of a school rule or regulation, or a criminal statute).” (*In re William G.* (1985) 40 Cal.3d 550, 564; see also *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 341 [“the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search”].) Nor does article I, section 13 “impose[] upon Defendants a corollary duty to train staff in the detection of the use of drugs and alcohol in the student body,” as Enciso alleged. And there are no implementing guidelines presented in support of such a purported mandatory duty. (*O’Toole*, at p. 510.)

*Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224 (*Clausing*) is instructive. There, the plaintiffs, representatives of a student, sued the San Francisco Unified School District and others for alleged physical, emotional, and psychological abuse to which the student was allegedly subjected. (*Id.* at pp. 1229-1230.) Included among the plaintiffs’ claims was one for negligence arising out of the breach of an alleged mandatory duty under section 815.6. Plaintiffs asserted that the mandatory duty arose out of California Constitution, article I, sections 1 and 28. (*Clausing*, at pp. 1234-1235.) The court concluded the demurrer to the negligence claim was properly sustained without leave to amend because no mandatory duty giving rise to a cause of action was created under either section of the Constitution. With regard to article I, section 28 (c)—under which “[a]ll students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful”—the court concluded it was “mandatory . . . [in the sense that] all agencies of government are required to comply with it, and are prohibited from

taking official actions which violate it or contravene its provisions. [¶] However, it is an entirely different matter to conclude that [article I,] section 28, subdivision (c), is self-executing in the sense that it establishes an affirmative duty to act on the part of school districts, provides remedies for its violation, or creates a private cause of action for damages.” (*Clausing*, at p. 1236, fn. omitted.) The appellate court concluded it was not self-executing, and it did not provide for an independent ground to bring a private action for damages or impose a mandatory duty upon a government agency to guarantee school safety. (*Id.* at pp. 1237-1238.) Likewise, the appellate court rejected the plaintiffs’ claim that article I, section 1 of the California Constitution—protecting a person’s right to privacy (among other protections)—imposed a mandatory duty upon any government agency that would furnish a basis for a claim for damages under section 815.6. (*Clausing*, at p. 1238.)

Enciso similarly failed to state a cause of action for negligence against the District, because California Constitution, article I, section 13 was not an enactment that imposed mandatory duties owed by the District to Enciso under section 815.6. Accordingly, the court properly sustained the demurrer to the first cause of action of the third amended complaint (negligence).

This was the fourth instance in which Enciso had attempted unsuccessfully to plead a negligence cause of action. (*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 967 [plaintiff had “numerous opportunities to amend her complaint and yet remained unable to successfully state a cause of action”].) Further, he made no showing below or on appeal as to how he could have amended the pleading to state a viable cause of action. (*Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1483.) We discern no reasonable likelihood that Enciso could have stated a viable claim for negligence against the District. (See *Buchanan*, *supra*, 130 Cal.App.4th at p. 421.) Accordingly, Enciso did

not sustain his burden of showing that the court abused its discretion in sustaining the demurrer without leave to amend. (*Campbell, supra*, 35 Cal.4th at p. 320.)

#### IV. *Challenged Rulings at Trial*

##### A. Contentions

Enciso also asserts that the court below erred with respect to seven rulings made at trial. First, he contends the court committed error in limiting the trial testimony of his expert witness, a psychiatrist, Dr. David Arredondo. Second, he argues the court erred by admitting evidence that constituted nothing more than speculation that he was under the influence of an unknown drug. Third, he contends the court erred by excluding evidence of the results of a subsequent drug test that he took, which indicated the absence of evidence of any drugs in his system. Fourth, he asserts the court improperly permitted the City to impeach him with evidence of his having previously received a citation. Fifth, he argues the court improperly limited the testimony of his mother, Isabel Monteverde. Sixth, he contends the court erred by giving two instructions (CACI Nos. 1302, 3960) and by refusing to give five instructions (CACI Nos. 218, 402, 412, 1303, 3600). And seventh, he contends there was juror bias and misconduct. We address each of these claims below.

##### B. Standards of Review

###### 1. *Evidentiary Rulings*

Evidence Code section 353 provides: “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in

a miscarriage of justice.” A failure to make an objection on specific grounds to the evidence at the time of trial will result in the forfeiture of the appellate claim. (*Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 749 (*Faigin*).

Evidence Code section 354 provides: “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination.” As has been explained by the California Supreme Court: “[A] judgment may not be reversed for the erroneous exclusion of evidence unless ‘the substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means.’ [Citations.]” (*People v. Anderson* (2001) 25 Cal.4th 543, 580 (*Anderson*), quoting Evid. Code, § 354, subd. (a).) “This rule is necessary because, among other things, the reviewing court must know the substance of the excluded evidence in order to assess prejudice. [Citations.]” (*Anderson*, at p. 580.)

It is the appellant’s burden of affirmatively showing error in connection with a trial court’s evidentiary rulings. (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 119.) This requires appellant to present an adequate record indicating that he or she made an offer of proof to the trial court identifying the ground(s) upon which it was asserted the evidence was admissible. (See also *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282-283 (*Shaw*) [appellate challenge concerning exclusion of evidence forfeited where appellant, at trial, failed to make offer of proof or to assert basis

for its admissibility]; *Magic Kitchen LLC v. Good Things Internat. Ltd.* (2007) 153 Cal.App.4th 1144, 1165 [same].) And it is axiomatic that an appellate challenge to the exclusion of evidence requires that the appellant point to an actual ruling made by the trial court.

Rulings by the trial court concerning the admissibility of evidence are generally reviewed under an abuse of discretion standard. (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1476; *Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1111.) “[A] reviewing court should not disturb the exercise of a trial court’s discretion unless it appears that there has been a miscarriage of justice. . . . ‘Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice[,] a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.’ [Citations.]” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; see also *Shaw, supra*, 170 Cal.App.4th at p. 281.)

## 2. *Jury Instructions*

The propriety of a jury instruction is a question of law that is reviewed de novo. (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82, citing *People v. Cole* (2004) 33 Cal.4th 1158, 1206.) Likewise, the substance of a special verdict form is subject to de novo review. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 325.) But a judgment in a civil case will not be reversed based upon instructional error “ ‘unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’ [Citation.]” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

### C. Limiting Testimony of Dr. Arredondo

Enciso contends the trial court erred by limiting the testimony of his expert witness, Dr. Arredondo. He contends that because “Dr. Arredondo was offered to validate” Enciso’s claims of negligence, IIED, and purported NEID against the City Defendants, “the Trial Court’s restrictions on his Expert Testimony[] prevented [Enciso] from making his case to the Jury.” Enciso asserts the court precluded Dr. Arredondo from “testify[ing] as to the physiological stress responses of a juvenile,” an issue apparently connected with the “prolonged detention and interrogation with three Police Officers” that he claims he endured. He argues in conclusory fashion that he was unable to present his case to the jury and the matter should be reversed to permit him “to include expert Medical Testimony critical of [Officer Anderson’s] methods in dealing with both adolescent illnesses and potential drug overdoses in a school setting.”

The City Defendants filed a motion in limine to preclude or limit the testimony of Dr. Arredondo. The City Defendants argued that when he was deposed, Dr. Arredondo was inadequately prepared because he had not, among other things, reviewed the transcripts of Enciso’s and Monteverde’s depositions. The court ordered that defendants be allowed to take a further deposition of Dr. Arredondo at Enciso’s expense. Prior to Dr. Arredondo being called as a witness, the court ruled that he would be allowed to testify concerning the symptoms consistent with being under the influence of stimulants, but he could not testify regarding police procedures. The court noted: “He is not an authority on police practices. He is not an expert in that area. He may not give opinions in that area.” After the court announced its intended ruling, Enciso’s counsel did not (1) argue he was entitled to present such expert testimony concerning police practices; (2) assert that Dr. Arredondo was, in fact, an expert in that field; or (3) make an offer of proof concerning Dr. Arredondo’s proposed testimony that counsel felt should be allowed. In his argument of error on appeal, Enciso’s only citations to the record are to

the ruling by the court that Dr. Arredondo would be precluded from offering testimony concerning police procedures.<sup>9</sup>

Enciso's claim of error fails. The court indeed ruled that Dr. Arredondo could not testify to any opinions concerning police practices. This was undoubtedly a correct ruling. During cross-examination, Dr. Arredondo himself agreed that he was not an expert in the field of police practices.

In any event, any challenge to this ruling cannot be considered because Enciso's counsel did not present argument or make an offer of proof in an effort to persuade the trial court that such testimony was proper. "As a condition precedent to challenging the exclusion of proffered testimony, Evidence Code section 354, subdivision (a), requires the proponent make known to the court the 'substance, purpose, and relevance of the excluded evidence. . . .'" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1178.) The claim is thus forfeited because Enciso failed to make the required record below. (*People v. Morrison* (2004) 34 Cal.4th 698, 711-712 (*Morrison*); *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 344 (*Heiner*).

#### D. Admission of Evidence Re Unidentified Drugs

Enciso argues the trial court committed error by allowing the introduction of evidence concerning the City Defendants' "morbidly speculative" [*sic*] assertion that Enciso was under the influence of an unknown drug that was not tested by the Santa Clara County Crime Laboratory. He asserts that Officer Anderson could not testify concerning the drugs the laboratory "doesn't test for." Enciso does not identify any specific testimony presented at trial that was objectionable. Indeed his argument on this

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<sup>9</sup> Prior to Dr. Arredondo's being called as a witness, the court also excluded any testimony by Dr. Arredondo concerning his belief that "the only thing that's going to help [Enciso] get better is if he wins at trial or gets [an] apology from defendants." Enciso does not challenge that ruling in this appeal.

point is without any citation to the reporter's transcript regarding any objectionable trial testimony. His only references are to two pages of the clerk's transcript containing excerpts of Officer Anderson's deposition, and there is no indication that this deposition testimony was introduced at trial.

Enciso has failed to comply with rule 8.204(a)(1)(C), which requires that a party in his or her brief "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." As the Third District Court of Appeal has aptly explained: " 'We are a busy court which "cannot be expected to search through a voluminous record to discover evidence on a point raised by [a party] when his brief makes no reference to the pages where the evidence on the point can be found in the record." ' [Citations.]" (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 745 (*Myers*); see also *In re Marriage of Fink* (1979) 25 Cal.3d 877, 888: "It is neither practical nor appropriate for us to comb the record on [the appellant's] behalf.") Here, Enciso's failure to cite to the record in support of his claim that the court erroneously allowed certain testimony implicitly suggests that this court should search on his behalf a 13-volume, 1806-page record in an attempt to locate any passages that could support his claim. We will not conduct such an undertaking. Enciso, as appellant, had the burden of affirmatively showing that the court erred in connection the evidentiary rulings. (*Truong v. Glasser, supra*, 181 Cal.App.4th at p.119.) He has failed to meet that burden.

#### E. Exclusion of Subsequent Drug Test

Enciso contends the trial court erred by excluding the results of a drug test he took based upon a urine sample. The test was apparently performed by a Kaiser Permanente facility almost three weeks after February 10, 2006. Enciso provides no specifics regarding this test, and his opening brief contains no citations to the record regarding the trial court's purported decision to exclude this evidence. Enciso's opening brief indicates

“(see attached)” after its reference to the test. Although there is no attachment to the brief, a Kaiser Permanente report dated March 6, 2006, appears before the introduction to the brief. Enciso does not cite to any portion of the appellate record where this document may be found. Nor does he cite to the appellate record where the document may have been discussed.

Enciso, as appellant, has failed to meet his burden of affirmatively showing error. (*Truong v. Glasser, supra*, 181 Cal.App.4th at p. 119.) In failing to include appropriate references to the appellate record, he has again failed to comply with rule 8.204(a)(1)(C). We will not undertake to cull through the voluminous record in an effort to find support for his contention. (*Myers, supra*, 178 Cal.App.4th at p. 745.) Enciso’s failure to cite to the record in support of his claim that the court erroneously excluded a drug test results in his forfeiture of the contention. (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 800-801 (*Dietz*).

Notwithstanding Enciso’s failure to demonstrate error and noncompliance with appellate procedures, his claim is in any event without merit. The City Defendants filed a formal motion in limine to exclude the introduction of Enciso’s “post incident urine test.” The record does not disclose that Enciso filed written opposition to the motion. After hearing the motion on August 30, 2011, the court ruled that Enciso would not be allowed “to introduce evidence of a subsequent urine test taken 18 days after February 10, 2006<sub>[,]</sub> without a prior [Evidence Code section] 402 hearing in which the Plaintiff establishes both the foundation and relevancy of the test results by competent expert testimony.” The court reiterated its ruling during a conference on September 6, 2011. There is no suggestion that Enciso’s counsel ever (1) made an offer of proof regarding the admissibility of the test; or (2) requested an Evidence Code section 402 hearing in compliance with the court’s ruling. Given the length of time that elapsed from the incident to the taking of the test, it was incumbent upon Enciso to have made an offer of

proof concerning the foundation and relevance of the test in compliance with the court's ruling in order to preserve a claim of error. (*Morrison, supra*, 34 Cal.4th at pp. 711-712; *Heiner, supra*, 84 Cal.App.4th at p. 344.)

F. Admission of Evidence to Impeach Enciso

Enciso argues that the City Defendants were permitted by the trial court to use improper impeachment evidence against him. Specifically, he contends the court erred by permitting the City Defendants to introduce evidence that sometime before attending the High School, he had received a citation. He argues that the evidence "severely discredited [Enciso] and, because it did not give any specifics about the reasons of this citation, gave the wrong impression about [him], as a potential second time drug offender, to the jury." Enciso cites to a single page of the reporter's transcript. There, the court indicated to the jury: "[T]he state of the record is that Cesar received a citation. That's it. There is nothing more. And we're not going to spend more time about what happened in middle school because that's not what this case is about." Enciso does not include any further citations to the record concerning the admission of this evidence.

The record shows that immediately before the court advised the jury that Enciso had received a citation and that there was "nothing more," Monteverde was being cross-examined by the City Defendants' counsel. During that examination, Monteverde was asked whether her son had a distrust of police officers before the February 10, 2006 incident. She responded: "I have no knowledge that Cesar has any reaction against police officers before that incident." Counsel asked whether Monteverde recalled an incident—apparently occurring in May 2005—when Enciso was in the eighth grade in which there was a fight, Enciso tried to fight back to protect himself, and he sustained facial fractures. She confirmed the incident had occurred. She was then asked whether she recalled that, during an interview at the Police Department in July 2006, she told Sergeant Kay Iida that "[Enciso] already did not like or he did not trust law enforcement"

before the February 10, 2006 incident. Monteverde testified she did not recall making that remark to Sergeant Iida. The City Defendants' counsel asked Monteverde additional questions about the May 2005 incident, including whether Enciso was "very angry" after the police did not do anything in response to her reporting of the prior incident. Enciso's counsel did not object to any of these questions.

The City Defendants' counsel then asked Monteverde whether her son had been arrested as a result of the May 2005 incident. She responded in the affirmative. But Enciso's counsel moved to strike the response, and the court granted the motion. During a reported discussion between counsel outside the presence of the jury that followed, counsel indicated a disagreement over whether Enciso had been arrested as a result of the May 2005 incident, and there was an indication that the juvenile court records were sealed so there was no direct information concerning a possible arrest. The court concluded that since the record was unclear as to whether there was an arrest, it would use the word "citation" and would not allow further evidence on the subject. It was the City Defendants' counsel who objected to this approach, indicating that the giving of a citation "sounds like a parking ticket."

Enciso's claim of error has no merit. There is no evidence that Enciso's counsel objected to the court's statement summarizing the evidence as Enciso having received "a citation" and that there was "nothing more." Enciso therefore has forfeited any claim of error because of his noncompliance with Evidence Code section 353, subdivision (a). (*Faigin, supra*, 211 Cal.App.4th at p. 749.)

#### G. Monteverde Testimony

Enciso contends the trial court committed error by improperly limiting the testimony of his mother, Isabel Monteverde. He asserts that the City Defendants' counsel had indicated to the court that Monteverde was a person of " 'unsound mind' ": 'who does not does not [sic] transmit any useful information, and "had nothing to say." ' ' "

(Original italics, original quotation marks.) We have reviewed the three citations to the reporter’s transcript given by Enciso after this quotation. The reporter’s transcript does not reflect that any such statement was made by the City Defendants’ counsel (or by anyone else). Furthermore, Enciso cites to no specific rulings by the trial court in which it limited Monteverde’s testimony in any way. Nor does he identify the particulars of any testimony that Monteverde would have given had she not been allegedly precluded from so doing, beyond stating that Monteverde, as a medical doctor with “years of educational background in pharmacology in her native Peru . . . , can testify as to the facts and particulars of all the lab tests of [Enciso].” (*Sic.*)

We reject this claim of error. Enciso has failed to specify any ruling by the trial court—and include with it a proper citation to the record as required by rule 8.204(a)(1)(C)—to support his claim that Monteverde’s trial testimony was erroneously restricted. He has thus failed to meet his burden of affirmatively showing error. (*Truong v. Glasser, supra*, 181 Cal.App.4th at p. 119.)

Further, to the extent his complaint is that the court—by some unspecified ruling—precluded Monteverde from testifying as an expert, the claim is without merit. It was *Enciso himself*, through counsel, who filed a motion in limine concerning Monteverde’s testimony. In that motion, Enciso indicated that Monteverde was not qualified to render “medical advice and psychiatric advice and opinions” as she had done during her deposition. Enciso thus sought to limit the scope of Monteverde’s testimony only to that “relating to her as a percipient witness to the events of February 10, 2006.” The City Defendants opposed the motion. While they agreed that Monteverde was a percipient witness only, the City Defendants argued that her testimony should not be restricted to the events of February 10, 2006, as requested by Enciso. At the hearing on the motion, Enciso’s counsel indicated that Monteverde was a percipient witness, not an expert witness, and he sought to limit her testimony to that of a percipient witness. The

court denied Enciso's motion in limine. But in its ruling, the court indicated that while Monteverde could testify as a percipient witness, it intended to "specifically give a limiting instruction to the jury that while [Monteverde] received her medical training in Peru, she is not licensed in the United States and is therefore not qualified to give expert medical opinions in court."

As explained by the California Supreme Court: "The 'doctrine of invited error' is an 'application of the estoppel principle': 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal. [Citation.] . . . At bottom, the doctrine rests on the purpose of the principle, which prevents a party from misleading the trial court and then profiting therefrom in the appellate court. [Citations.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 (*Norgart*)). Enciso has not demonstrated the trial court made a ruling that excluded testimony from Monteverde as an expert, nor has he shown that such a purported ruling was error, even if such an erroneous ruling had been made. In any event, Enciso is barred from asserting this claim of error because he invited the error by advising the trial court that Monteverde was strictly a percipient witness. (*Ibid.*)

#### H. Instructional Error

##### 1. CACI Nos. 218 and 402

Enciso contends the court erred by failing to give two specific instructions, CACI No. 218 and CACI No. 402. The court in fact gave these two instructions, so there can be no error as claimed by Enciso.

##### 2. CACI No. 412

Enciso also asserts the trial court should have given CACI No. 412, claiming that it, along with CACI No. 402, are instructions "essential to establish negligence." But he offers no citation to the record indicating he requested that CACI No. 412 be given. Nor have we located such a request from our search of the record. Indeed, when the court

inquired of counsel which instructions should be given from the CACI 400 series, Enciso's counsel stated that only CACI Nos. 401 and 430 needed to be given. "Generally, 'in a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his [or her] theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion.' [Citations.]" (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1067 (*Pool*); see also *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.) "In order to complain of failure to instruct on a particular issue the aggrieved party must request the specific proper instructions. [Citations.]" (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 335 (*Hyatt*); see also *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535.) Enciso has thus waived any claim of error based upon the court's failure to give CACI No. 412 because he never requested that instruction. (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1010.)

### 3. CACI Nos. 1302, 1303

Enciso also contends the court erred in giving CACI No. 1302. He (apparently) asserts that CACI No. 1303 should have been given. He argues: "The consent agreement [*sic*] was bitterly fought by all parties. The testimony of [Officer Anderson], however, reveals that she arrested [Enciso] out of her own accord. Certainly, it would be irrational for a 14[-]year old minor to ask for an arrest." Enciso includes no record citations in support of his position, and we may therefore treat his contention as being forfeited. (*Dietz, supra*, 177 Cal.App.4th at pp. 800-801.)

In any event, there is no record that Enciso's counsel objected to the court's giving CACI No. 1302. When the court raised the subject of giving CACI Nos. 1300, 1302, and 1305, which had been requested by the City Defendants, Enciso's attorney initially questioned the inclusion of the latter two instructions, saying that it seemed the instructions "were inconsistent with the testimony that there was consent." After the

court indicated that the instructions seemed appropriate since there was some evidence of consent, Enciso's counsel agreed: "I guess—yeah. That's fine." Enciso therefore waived any claim of error. (*Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1555 (*Bisno*) [plaintiff waived appellate challenge to instruction by failing to object below].) Moreover, Enciso's argument must be rejected because he has failed to develop it in this appeal beyond a conclusory statement. (*Howard v. American Nat. Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 533 (*Howard*): "Conclusory assertions of error are ineffective in raising issues on appeal.")

With respect to CACI No. 1303, there is no record that Enciso requested the court give that instruction. Therefore, Enciso's appellate contention regarding this instruction is likewise waived. (*Pool, supra*, 42 Cal.3d at p. 1067; *Hyatt, supra*, 79 Cal.App.3d at p. 335.)

#### 4. CACI No. 3600

Enciso contends the trial court committed error by failing to give CACI No. 3600 concerning civil conspiracy. He argues that Meagher and Satterwhite "deliberately chose not to follow their protocol and much of their testimony looks rehearsed."

Enciso's argument that a conspiracy instruction should have been given is wholly conclusory and devoid of reference to any evidence from the trial (including citations to the record) to support it. The argument is therefore forfeited because of the absence of any record citation to support it (*Dietz, supra*, 177 Cal.App.4th at pp. 800-801), and because it is insufficiently developed (*Howard, supra*, 187 Cal.App.4th at p. 533; see also *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 ["absence of cogent legal argument or citation to authority allows this court to treat the contention as waived"]).

In any event, as noted by the City Defendants, there was significant evidence that negated any conspiracy between the codefendants. This included: (1) Meagher and

Satterwhite both testifying that they had viewed it as their job, independently of the police, to find out what was wrong with Enciso; (2) Satterwhite's testimony that she had been surprised and upset that the police arrested Enciso; (3) Meagher's testimony that she had been "shocked" when Enciso had told Officer Anderson that he consented to being arrested; (4) Meagher's testimony that she "had nothing to do with the arrest"; (5) Meagher's testimony that she had not encouraged the police to arrest him; (6) Officer Anderson's testimony that she had been aware of the High School's policy that an under-the-influence student would be suspended and released to the parents, but she had disregarded that policy; and (7) Officer Anderson's testimony that she had made her own decision to arrest Enciso because she was "separate from the school." Thus, notwithstanding Enciso's forfeiture of the contention because of the absence of cogent argument or appropriate citation to the record, it is apparent the court was justified in refusing to give CACI No. 3600.

5. *CACI No. 3960*

Enciso also asserts that the court should not have given CACI No. 3960. He argues "there is no evidence that Plaintiff, being a minor, or his mother, with her limited proficiency in English, were [*sic*] negligent. Minors, as a matter of law, are not held to the same standards as adults."

Here again, Enciso's argument that CACI No. 3960 should not have been given is wholly conclusory and devoid of reference to any evidence from the trial (including citations to the record) to support it. The argument is therefore forfeited. (See *Howard, supra*, 187 Cal.App.4th at p. 533; *Dietz, supra*, 177 Cal.App.4th at pp. 800-801.) Moreover, the record shows that when the court and counsel met to discuss proposed jury instructions, CACI No. 3960 was proposed by the City Defendants and the District. The court indicated it would give the instruction with a modification, and Enciso's counsel

did not object to it. Enciso has therefore waived any objection to the court's having given the instruction. (*Bisno, supra*, 174 Cal.App.4th at p. 1555.)

#### I. Juror Misconduct

Lastly, Enciso argues there was evidence “that some of the jurors were biased or engaged in inappropriate behavior.” He cites to an attachment—his declaration that appears before the introduction of his opening brief. In it, he states that (1) he overheard one juror asking the court deputy how much education was required to become a police officer, and (2) the same juror did not disclose that he had a brother who was interested in becoming a police officer. Enciso requests that the matter be reversed because the triers of fact were “biased.”

A party claiming juror misconduct is required to promptly raise the issue before the trial court. (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 103 (*Weathers*)). If that misconduct appears during the trial, the objecting party must bring it to the court's attention promptly or he or she will waive that objection as a basis for a motion for new trial. (*Ibid.*)

There is no evidence that Enciso's declaration was submitted before the trial court or was part of the appellate record. Nor could it have been, since it is dated October 26, 2012, more than one year after entry of the judgment. Generally, documents that are not presented to the trial court may not be included in the record on appeal. (*Doers v. Golden Gate Bridge etc. Dist., supra*, 23 Cal.3d at p. 184, fn. 1.) Since the sole source cited in support of the claim of juror misconduct is Enciso's postjudgment declaration, which “cannot be considered on appeal” (*Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 882), we reject this appellate claim. Moreover, since the matters stated in Enciso's declaration were ones available to him while the trial was in progress, his failure to object at the trial court resulted in a waiver of any claimed error. (*Weathers, supra*, 5 Cal.3d at p. 103.)

## DISPOSITION

The judgment is affirmed.

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Márquez, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Grover, J.