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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOSEPH HILL, Plaintiff and Appellant, v. SULLIVAN AUTOMOTIVE GROUP, LLC et al., Defendants and Respondents.	B225186 (Los Angeles County Super. Ct. No. BC378222)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rita J. Miller, Judge. Affirmed.

Initiative Legal Group, Miriam L. Schimmel, Orlando J. Arellano and Sue J. Kim for Plaintiff and Appellant.

Chavos & Rau, Laurie D. Rau, Anthony G. Chavos; Greines, Martin, Stein & Richland, Robert A. Olson and Alana H. Rotter for Defendants and Respondents.

INTRODUCTION

Plaintiff Joseph Hill appeals from a summary judgment against him and putative class members and in favor of defendants Sullivan Motor Cars, LLC and Leprechaun, LLC. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Joseph Hill (Hill) filed a class action complaint against his former employers, Sullivan Motor Cars, LLC and its related entity, Leprechaun, LLC (defendants), in September 2007. The complaint alleged various causes of action related to his employment, including claims that the employers' wage statements did not comply with the content requirements of Labor Code section 226, subdivision (a) (seventh cause of action), and, accordingly, were also in violation of the prohibition against unlawful business practices under the Unfair Competition Law (Bus. & Prof. Code, § 17200) (eighth cause of action).[1] The trial court granted Hill's motion for certification of a class but only as to these two claims based upon the allegedly non-compliant wage statements. The court determined Hill was the class representative.

Labor Code section 226, subdivision (a), specifies nine items that an employer must provide on the wage statement given to each employee for each payment of wages, including the total hours worked. The wage statements issued by defendants to

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[1] In the seventh cause of action, Hill alleged violations of Labor Code section 226, subdivision (a), as follows: "Defendants have intentionally and willfully failed to provide employees with complete and accurate wage statements that include, among other things, the total actual number of hours worked by Plaintiff and the other class members, and the full and correct name of the legal entity that is the employer." The eighth cause of action alleged that the violations "constitute unlawful business acts and practices in violation of California Business & Professions Code §§ 17200, et seq."

employees showed the total regular hours and the total overtime hours worked, but did not list "total hours worked."

Defendants employed Hill as a salesperson. Defendants paid their salespersons according to the commissioned sales exemption to California overtime statutes (Lab. Code, §§ 510, 1198) which required an employer to pay such an employee at least 1.5 times minimum wage for total hours worked. If the salesperson's commission exceeded that amount, defendants paid the commission. According to Hill's declaration, none of his wage statements listed "total hours worked."

Defendants moved for summary judgment on Hill's complaint. At the hearing on the motion, defendants asserted that Hill never provided a declaration or other evidence that he was not paid any amount due him and, thus, had failed to show he suffered injury. Defendants argued that having the regular hours and the overtime hours worked on the wage statement was sufficient to comply with Labor Code section 226, subdivision (a)'s requirement to give the "total hours worked," in that an employee could determine the total by simple mathematics. Hill argued that having the regular and overtime hours worked did not comply with the statutory requirement and thus, the injury Hill suffered was the violation of his right to have a wage statement that complied with the statute.

The court granted summary judgment as to the class allegations on the ground that "[c]lass plaintiffs cannot establish the essential element of 'injury' for purposes of Labor Code section 226" and as a result, "their Business and Professions Code section 17200 claim fails as well . . . ."

At a mandatory settlement conference in March 2010, the parties informed the court they had reached an oral settlement agreement.[2] Defendants' counsel put the basic

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[2] Hill filed a motion to augment the record by adding the transcript of the March 19, 2010 settlement conference. (Cal. Rules of Court, rule 8.155.) Ruling on the motion was deferred to the panel. The transcript being a "certified transcript . . . of oral proceedings [in the trial court, but] not designated [by Hill] under rule 8.130," we have discretion to order the appellate record augmented by the transcript "[a]t any time." (*Id.*, rule 8.155(a)(1)(B); *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1672-1673.) Accordingly, we grant Hill's motion to augment the record with the transcript.

terms of the agreement on the record.[3] Counsel stated that the parties expressly excluded the class claims for wage statement violations under Labor Code section 226 and Business and Professions Code section 17200, and that Hill expressly reserved his right to appeal from the court's grant of defendants' motion for summary judgment.

On May 4, 2010, the trial court entered its order granting defendants' motion for summary judgment "on the grounds that there is no triable issue of any material fact as to the class allegations because: [¶] 1. Class plaintiffs cannot establish the essential element of 'injury' for purposes of Labor Code § 226 Claims; [¶] 2. Class plaintiffs' Business and Professions Code § 17200 claims fail as well, because class plaintiffs cannot establish the essential element of 'injury' for purposes of Labor Code § 226 on which the § 17200 claims are predicated." On the same day, the trial court entered judgment against "Plaintiff Joseph Hill, individually and as representative of the class on all class claims."

Notice of entry of the order granting summary judgment was served on May 19, 2010. No notice of entry of judgment appears in the record.

On June 3, 2010, at Hill's request, the entire action as to all parties and all causes of action was dismissed with prejudice. Thereafter, on June 18, Hill filed a notice of appeal.[4]

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[3] When Hill filed his Appellant's Reply Brief, he also filed an Appellant's Reply Appendix. It consisted of a purported written settlement agreement between the parties, dated May 4, 2010, the same date the trial court entered judgment. Defendants oppose the addition of the document to the record on appeal, in that the written agreement was never lodged or filed in the trial court. On appeal, our review is limited to the record which was before the trial court, subject to limited exceptions not applicable here. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.) Accordingly, we order that the document shall not be added to the record on appeal or be considered a part of the record on appeal for any purpose.

[4] Defendants (as part of their motion for judicial notice and dismissal for lack of appellant) and counsel for Hill and the class (as part of a motion for substitution of a new class representative) have both submitted documents showing that Hill died on

DISCUSSION

A. *Jurisdiction*

Prior to our discussion on the merits of the trial court's grant of summary judgment against Hill, we address defendants' contentions that we are without jurisdiction of this appeal and, therefore, must dismiss it. The first contention is that, prior to filing the notice of appeal, but after the trial court entered judgment, Hill requested, and the court clerk entered, a dismissal with prejudice of the entire case as to all causes of action and all parties. The dismissal did not specify any exception or any other information from which an inference could be drawn that Hill excepted from the dismissal the class claims based upon allegedly non-compliant wage statements.

"'A wilful dismissal terminates the action for all time and affords the appellate court no jurisdiction to review rulings on . . . motions made prior to the dismissal.' [Citation.] Besides, a plaintiff 'obviously [can] not appeal [his] own voluntary dismissal . . . .' [Citation.]" (*Yancey v. Fink* (1991) 226 Cal.App.3d 1334, 1343.) Thus, according to the *Yancey* court, the dismissing party leaves the appellate court no

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December 16, 2010, while this appeal was pending. We take judicial notice of this fact. (Evid. Code, §§ 452, subdivision (h), 459.)

After a class is certified, as in the instant case, the class counsel and the class representative "owe absent class members a fiduciary duty to protect the absentee [class members'] interests throughout the litigation." (*Barboza v. West Coast Digital GSM, Inc.* (2009) 179 Cal.App.4th 540, 546.) Consistent with such duty, counsel for the class filed a motion for substitution of another member of the class, Adel Rabbani, in place of Hill, in that counsel had been unable to identify any personal representative or next of kin for Hill. When a party dies while his appeal is pending, we may order the substitution of another person in his place in response to a motion to do so. (Code Civ. Proc., § 377.33; Cal. Rules of Court, rule 8.36(a); see *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 313, fn. 2.)

Accordingly, we order the substitution of Adel Rabbani as class representative to take the place of Hill. For clarity and convenience, however, we will continue to use Hill's name to refer to the plaintiff and class representative. Having granted the substitution motion by class counsel, we have rendered moot defendants' motion for dismissal of the appeal for lack of an appellant and, hence, we deny the motion.

alternative but to dismiss his appeal. (*Ibid.*) Defendants claim that, accordingly, we have no jurisdiction to review the trial court's grant of summary judgment.

Hill argues that the parties did not intend for the dismissal to bar the appeal of the class claims. Hill asserts that defendants are aware that in their settlement agreement he expressly reserved the right to bring this appeal as to all other claims and defendants' counsel took the lead in making the reservation of right to appeal a part of the record at the March 19, 2010 mandatory settlement conference. He relies on *Stewart v. Colonial Western Agency, Inc.* (2001) 87 Cal.App.4th 1006, where the court held that an appealable order existed even though the defendant voluntarily dismissed the action with prejudice, "[s]ince the parties [were] in agreement that the dismissal was entered with the stipulation that appeal from the trial court's order . . . was to follow." (*Id.* at p. 1012.) The court explained that "appellate courts treat a voluntary dismissal with prejudice as an appealable order if it was entered after an adverse ruling by the trial court in order to expedite an appeal of the ruling." (*Ibid.*)

In *Stewart*, at oral argument, counsel for both parties stated that a settlement had been reached and a request for voluntary dismissal entered with a stipulation that the order in question would be appealed. In the instant case, the parties are not in agreement regarding the effect of the voluntary dismissal. Nevertheless, the record includes a transcript in which both parties acknowledge to the trial court their agreement that the class claims issues were expressly excluded from the settlement they had reached with respect to all other claims and in which the trial court expressly retained jurisdiction to enforce the settlement terms. We would have preferred that the express reservation of the right to appeal would have been stated in the voluntary dismissal with prejudice. Given the unequivocal reservation of the right to bring this appeal orally represented to the trial court by counsel for all parties, however, we conclude that this appeal is not barred by Hill's voluntary dismissal with prejudice. (*Stewart v. Colonial Western Agency, Inc.*, *supra*, 87 Cal.App.4th at p. 1012.)

Defendants' second contention is that we lack jurisdiction, in that Hill did not file his notice of appeal by the deadline required by law. Defendants claim that the class

claims became appealable, and the time period within which to file an appeal began, when the clerk served notice of entry of the minute order granting defendants' motion for summary judgment on September 30, 2009. Under the so-called "death knell" doctrine applicable to class actions, an order is immediately appealable if it has the effect of dismissing a class action or otherwise preventing further proceedings as a class action, but permits individual claims to continue. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 754; see *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 699; *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 485, fn. 9 [trial court's order sustaining the defendant's demurrer without leave to amend claims for which class certification was being sought was immediately appealable].) A final judgment is not a prerequisite to appealing the order. (*Daar v. Yellow Cab Co.*, *supra*, at p. 699; *Arce v. Kaiser Foundation Health Plan, Inc.*, *supra*, at p. 485, fn. 9.) When an order terminates both class and individual claims, however, the "death knell" exception to the one final judgment rule does not apply. (*In re Baycol Cases I & II*, *supra*, at p. 754.)

In the instant case, the "death knell" exception did not apply; no individual claims survived the trial court's grant of defendants' motion for summary judgment. (*In re Baycol Cases I & II*, *supra*, 51 Cal.4th at p. 754.) The time period for filing the appeal began running at the usual time. Thus, pursuant to California Rules of Court, rule 8.104(a), Hill was required to file his notice of appeal on or before the earliest of (1) 60 days after the superior court clerk served the appellant with a notice of entry of judgment or a file-stamped copy of the judgment, with a proof of service showing the date the document was served, (2) 60 days after the appellant served or was served by a party with either of the documents and a proof of service, or (3) 180 days after entry of judgment. The record on appeal does not contain a notice of entry of judgment or a proof of service for such a notice or for a file-stamped copy of the judgment. The judgment was entered on May 4, 2010; Hill filed the notice of appeal on June 18. Even assuming a notice of entry of judgment or a file-stamped copy of the judgment was served on May 4, the June 18 filing date was well within any of the applicable deadlines. Hence, Hill's notice of appeal was timely filed and presents no bar to our jurisdiction over the appeal.

B. *Summary Judgment*

Code of Civil Procedure section 437c, subdivision (c), provides that 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." We review de novo a judgment entered after the grant of a summary judgment motion brought by defendants, as is the case in this appeal. Thus, "we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action. [Citation.]" (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) In doing so, "we view the evidence in the light most favorable to plaintiffs." (*Ibid.*) Our task is to "liberally construe" plaintiff's evidence and "strictly scrutinize" evidence submitted by defendants, resolving "any evidentiary doubts or ambiguities in plaintiffs' favor." (*Ibid.*) We review the validity of the judgment and not the reasons given for it by the trial court. (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146.)

Initially, a moving defendant has "the burden of showing that a cause of action has no merit," such as by showing "that one or more elements of the causes of action . . . cannot be established." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849.) The defendant may make such a showing "by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.' [Citation.]" (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.) If the moving defendant meets that burden, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action . . . ." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 849.)

Hill claims that the summary judgment must be reversed, in that, contrary to the trial court's erroneous interpretation of Labor Code section 226, defendants' failure to list the grand total of regular and overtime hours worked was on his wage statement in violation of Labor Code section 226, subdivision (a), constitutes an "injury" required

under Labor Code section 226, subdivision (e), to recover damages and/or a penalty, costs and reasonable attorney fees for such a violation.[5] We disagree.

The recent opinion issued by this court in *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136 is dispositive as to the requisite injury. Price was a former employee of Starbucks Corporation. On behalf of himself and a putative class consisting of Starbucks employees, Price alleged that Starbucks's wage statements failed to comply with the requirements of section 226, subdivision (a). (*Price*, *supra*, at p. 1138.) One of the alleged deficiencies included failure of the wage statement to list a grand total for regular and overtime hours worked. That is, the total regular hours and the total overtime hours appeared on the statement, but the grand total of hours worked was absent. (*Id*. at pp. 1142-1143.) This is the same deficiency Hill claims with respect to his wage statement.[6] Similar to Hill, Price alleged he had suffered "injury," in that the absence of

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[5] Labor Code section 226, subdivision (a), provides: "Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees . . . an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, . . . (5) net wages earned, . . . (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. . . ."

Subdivision (e) of section 226 provides: "An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars ($50) for the initial pay period in which a violation occurs and one hundred dollars ($100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorney's fees."

Hereinafter, all statutory references shall be to the Labor Code unless otherwise identified.

[6] We agree with defendants that the record reveals that, on appeal, the sole basis for Hill's allegation of a section 226, subdivision (a), violation is the absence of the "total hours worked" from the wage statement. Hill does not dispute that the total regular hours worked and the total overtime hours worked appeared on the statement. During the

the grand total of hours caused confusion and the possible underpayment of wages forced Price and the putative class to attempt to reconstruct the missing data in order to verify they had been paid the proper amounts, and required Price and the putative class to file the lawsuit. (*Id.* at p. 1142.)

The *Price* court opined: "To recover damages under section 226, subdivision (e), an employee must suffer injury as a result of a knowing and intentional failure by an employer to comply with [section 226, subdivision (a)]. Price has not alleged a cognizable injury. [¶] The injury requirement in section 226, subdivision (e), cannot be satisfied simply if one of the nine itemized requirements in section 226, subdivision (a) is missing from a wage statement. [Citations.] By employing the term '"suffering injury,"' the statute requires that an employee may not recover for violations of section 226, subdivision (a) unless he or she demonstrates an injury arising from the missing information. [Citation.] Thus, the deprivation of that information, standing alone, is not

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hearing on the summary judgment motion, Hill's counsel reiterated that the only section 226, subdivision (a), violation at issue was the absence of the total hours worked. In response to the trial court's request for clarification of the wage statement deficiencies that allegedly constituted the violation at issue, Hill's counsel responded: "We maintain that quite simply the 10 [total hours worked] should be on there. Yes, the 8 [regular hours worked] is there, yes 2 [overtime hours worked] is there. The 10 should be there . . . . We think the statute insists – demand[s] of employers they put that piece of information on there." In his statement of facts and argument in his opening brief, the only violation of section 226, subdivision (a), which Hill identifies is the absence of the total hours worked. The record reflects that wage statements issued to employees paid on a commission basis consisted of one paper showing the basic components in the calculation of the dollar-amount of the employee's paycheck and a second paper showing the regular hours and overtime hours worked.

Hill mentions other alleged violations. In his seventh cause of action, Hill alleges the absence of the full and correct name of the legal entity that is the employer. In a footnote in his opening brief, Hill asserts that his wage statements also did not state the hourly rate. In his memorandum of points and authorities in support of his motion for class certification, Hill also cites the absence of his full social security number as a violation. In his appellate briefs, however, Hill does not include argument on these violations and, therefore, we deem any claim on these violations waived. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

a cognizable injury. [Citation.]" (*Price v. Starbucks Corp.*, *supra,* 192 Cal.App.4th at pp. 1142-1143, fns. & italics omitted.)

The *Price* court explained, "Price alleged a 'mathematical injury,' that required him to add up his overtime and regular hours and to ensure his overtime rate of pay is correct, but the allegedly missing information from Price's wage statement is not the type of mathematical injury that requires '"computations to analyze whether the wages paid in fact compensated [him] for all hours worked,"'" but rather was a matter of "simple math." (*Price v. Starbucks Corp.*, *supra*, 192 Cal.App.4th at p. 1143.) The only statutorily required information that Hill alleged was missing was the total hours worked. Like Price, for Hill, determining the total hours worked from the other information that appeared on the wage statement was a matter of simple math and did not constitute a cognizable injury required under section 226, subdivision (e).

Contrary to Hill's claim, the *Price* court correctly construed the case law in *Jaimez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286 and the case relied upon therein, *Wang v. Chinese Daily News, Inc.* (C.D.Cal. 2006) 435 F.Supp.2d 1042, as requiring an employee to establish cognizable injury by demonstrating more than just the absence of statutorily required information from a wage statement. In both *Jaimez* and *Wang*, the wage statements were missing several categories of required information, i.e., the number of regular hours worked and the number of overtime hours worked, as well as the hourly wage rate, all of which were necessary for an employee to determine the accuracy of his or her compensation. (*Jaimez*, *supra*, at pp. 1305-1306.) The purpose of the *Jaimez* court's discussion of *Wang* (and another federal case) was limited to identifying factors that *may be evidence* of the injury an employee has suffered. (*Id.* at p. 1306.) While, as Hill points out, the *Jaimez* court stated that "a very modest showing [of injury] will suffice," the court did not determine whether the alleged wage statement deficiencies constituted actionable violations of section 226, subdivision (a). (*Jaimez*, *supra*, at pp. 1306, 1307.)

We disagree with Hill's claim that two California Supreme Court cases support his assertion that the absence of an item of information required by section 226,

subdivision (a), is a violation of a "legal right" and, thus, such an absence constitutes the requisite injury for section 226, subdivision (e). In the first case, *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, the Supreme Court explained that the term "injury" is a lower threshold than "actual damages" and requires only "the invasion of a legal right," to satisfy certain standing requirements under the Uniform Commercial Code. (*Id*. at pp. 322-324.) The case did not involve the Labor Code injury requirement at issue here. Similarly, in the second case, *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, the court concluded that deprivation of a legal right, whether or not any pecuniary loss occurs, constitutes the requisite injury to prove discrimination under the Unruh Civil Rights Act. (*Id.* at pp. 174-175.) The opinion did not address the Labor Code issue in the instant case.

As we previously concluded, the absence of a grand total of hours worked on Hill's wage statement "is not a cognizable injury" entitling Hill to damages or penalty payments, costs or reasonable attorney fees under Labor Code section 226, subdivision (e). (*Price v. Starbucks Corp.*, *supra*, 192 Cal.App.4th at p. 1143, fn. omitted.) Without the ability to prove cognizable injury, Hill cannot establish an essential element necessary to prevail on his seventh and eighth causes of action for violation of section 226, subdivision (a), and, as a result, for any associated liability for unfair business practices under Business and Professions Code section 17200 et seq. (§ 226, subd. (e).) This is a sufficient basis for granting defendants' motion for summary judgment. (Code Civ. Proc., § 437c, subds. (a), (c), (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.)

As defendants argue, there is another basis for concluding that summary judgment was warranted in the instant case. We considered a similar factual situation in *Morgan v. United Retail, Inc.* (2010) 186 Cal.App.4th 1136 where the employee alleged violation of section 226, subdivision (a). As in the instant case, the employee's wage statements set forth the actual number of regular hours and the total number of overtime hours worked during the pay period. We determined that, under the facts of the case, from these two categories of hours and knowledge of her hourly rate, an employee could readily add

them together to obtain the sum of the "total hours worked" referenced in section 226, subdivision (a)(2). (*Morgan*, *supra*, at p. 1148.) We affirmed the trial court's grant of summary adjudication on the basis of our conclusion that the "wage statements complied with the statutory requirements of section 226 by 'showing . . . total hours worked.'" (*Id.* at pp. 1139, 1149.)

Hill claims that *Morgan* does not apply because our holding was not based upon the interpretation of "injury" in section 226, subdivision (e), which is the sole ground upon which the trial court based its grant of defendants' summary judgment motion in the instant case. As noted previously, however, we review the validity of the judgment and not the reasons given for it by the trial court. (*Byars v. SCME Mortgage Bankers, Inc.*, *supra*, 109 Cal.App.4th at p. 1146.) Applying the same analysis as in *Morgan*, we can conclude that Hill's seventh and eighth causes of action were without merit, in that they did not allege facts that constituted a violation of section 226, subdivision (a). Thus, summary judgment would be warranted under the holding in *Morgan*.

In sum, whether we conclude that the element of the causes of action that cannot be proved is the existence of a violation (*Morgan v. United Retail, Inc.*, *supra*, 186 Cal.App.4th at pp. 1139, 1149) or that it is the existence of a "cognizable injury" required to recover for such a violation (*Price v. Starbucks Corp.*, *supra*, 192 Cal.App.4th at pp. 1142-1143), the result is that the causes of action are without merit and there is no triable issue of material fact as to either of them. We affirm the summary judgment.[7]

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[7] Hill raises additional issues which lack merit and do not warrant any change in our decision. Primarily, he contends that the trial court erred by not permitting him to amend his complaint and substitute a new class representative rather than enter summary judgment against the entire class. Hill provides no citation to the record, however, showing he took any action in the trial court proceedings to obtain leave to amend the complaint or substitute a new class representative, and our review of the record reveals no such action. Hill also claimed for the first time on appeal that notice was required to be given to absent class members prior to the court entering summary judgment against them. Having not raised the issues in the trial court, Hill waived their consideration on appeal. (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.) Lastly, the record does not support Hill's claim that the trial court improperly granted summary judgment against the

(Code Civ. Proc., § 437c, subds. (c), (*o*), & (p)(2); *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 849.)

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.

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entire class, rather than him only, in that defendants brought the motion against him only. Review of the record reveals that defendants stated in their notice of motion that they would move for summary judgment "against Plaintiff, individually and on behalf of the class claims" and used similar phrasing in the motion.