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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

REBECCA SPIELMAN et al., Plaintiffs, Cross-defendants, and Appellants, v. EX'PRESSION CENTER FOR NEW MEDIA, Defendant, Cross-complainant, and Respondent.	A122357 (Alameda County Super. Ct. No. RG04174927)
LAWRENCE YU, YUKI IKEDA, DERON DELGADO, AND JASON HO, Plaintiffs, Cross-defendants, and Appellants, BRIAN CLARKE AND BRIAN TOOMAJIAN, Plaintiffs and Appellants; v. EX'PRESSION CENTER FOR NEW MEDIA, Defendant, Cross-complainant, and Respondent.	A123563 (Alameda County Super. Ct. No. RG04175490)

In these consolidated appeals, plaintiffs in consolidated actions against Ex'pression Center for New Media (Ex'pression) contend the trial court misinterpreted a portion of the Education Code, wrongly granted Ex'pression's demurrer on the theory that certain of their claims were barred by the statute of limitations, and wrongly denied their motions for a directed verdict. We agree the trial court misinterpreted Education Code former section 94877, subdivision (a), and shall remand for further proceedings. In all other respects, we shall affirm.

I. BACKGROUND

Ex'pression is a private postsecondary educational institution in Emeryville, California**,** which offers courses in sound arts, digital visual media, and Web design and development. In 1998, Ex'pression received temporary approval to operate from California's Bureau for Private Postsecondary and Vocational Education (the Bureau), a part of the Department of Consumer Affairs. The Bureau approved Ex'pression as a California private postsecondary degree-granting institution in January 2001, authorizing it to offer bachelor of applied science degrees in comprehensive sound, comprehensive digital visual media, and Web design and development; and diplomas in comprehensive sound arts, digital visual media, and Web design and development.

On September 13, 2004, Rebecca Spielman, Anna Navone, Christopher Friend, Amanda Instone, Jillian Meador, and Bobby Cochran (collectively the Spielman plaintiffs), all Ex'pression graduates, filed an action against Ex'pression and others (collectively Ex'pression) for violation of Education Code[1] former sections 94312, 94832, and 94875, as well as various other causes of action not relevant to this appeal. (*Spielman v. Ex'pression Center for New Media* (Super. Ct. Alameda County, 2008, No. RG04174927).) On the same date, Lawrence Yu, Brian Clarke, Brian Toomajian, Yuki Ikeda, Matthew Morales, Michael Elias, and Deron Delgado (collectively, along with Jason Ho, the Yu plaintiffs), all former students at Ex'pression, filed an action against Ex'pression. (*Yu v. Ex'pression Center for New Media* (Super. Ct. Alameda County, 2008, No. RG04175490.) Jason Ho was added to this action as a plaintiff in a first amended complaint filed December 1, 2004. The Yu plaintiffs' second amended complaint alleged a cause of action for violations of the Maxine Waters School Reform and Student Protection Act of 1989 (former §§ 94850-94882) (the Waters Act),[2] as well as other causes of action not at issue in this appeal.

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[1] All undesignated statutory references are to the Education Code.

[2] The Waters Act was encompassed within the Private Postsecondary and Vocational Education Reform Act of 1989 (former § 94700 et seq.) (the Reform Act). The Reform Act became inoperative as of July 1, 2007, and was repealed as of January 1,

The Spielman plaintiffs alleged that Ex'pression misrepresented to them that it would soon be nationally accredited, that they would graduate from Ex'pression with degrees from a nationally accredited institution, that their degrees and credits would be transferable to other accredited institutions, that Ex'pression had a " '100 percent' " job placement rate, that it was highly regarded by Bay Area employers and would provide meaningful career placement assistance, that its education would allow plaintiffs to obtain employment in their fields of study, that plaintiffs would be eligible for government student loans or that they could apply for such loans retroactively, and that when Ex'pression became accredited, plaintiffs' degrees would retroactively be deemed accredited. The Yu plaintiffs similarly alleged that before they enrolled, defendants made various false representations, including that Ex'pression was or soon would be fully accredited, that the Yu plaintiffs would receive valid associate of science or bachelor's degrees, and that the units earned at Ex'pression were legitimate and transferable.

Ex'pression demurred to the Yu plaintiffs' second amended complaint, contending, as pertinent here, that the cause of action for violations of the Waters Act was barred by the applicable statutes of limitations. Ex'pression argued that some of the plaintiffs (Toomajian, Morales, Elias, and Delgado) last attended Ex'pression on May 12, 2001, and that Ikeda last attended Ex'pression on July 20, 2001. According to Ex'pression, these plaintiffs were barred from pleading any claim with a three-year statute of limitations. The trial court sustained the demurrer to this cause of action without leave to amend as to Toomajian, Morales, Elias, Delgado, and Ikeda.[3]

Ex'pression cross-complained against the Spielman plaintiffs and Yu, Ho, Ikeda, Elias, and Delgado, alleging they had defaulted on their tuition loan payments and

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2008. (Former § 94999; Stats. 2004, ch. 740, § 7.) In the interest of clarity, we will not precede references to the now repealed provisions of the Reform Act with the word "former."

[3] The trial court also disposed of other claims. We shall discuss only the claims relevant to the issues raised on appeal.

asserting causes of action for breach of contract, open book account, account stated, money had and received, and quantum meruit.

The Yu and Spielman actions were consolidated. During trial, Ikeda and all the Spielman plaintiffs except Instone moved for a directed verdict on Ex'pression's cross-complaints on the ground that their tuition had been paid to Ex'pression by a third party, EJW, which was not a party to the consolidated actions, and that there was no evidence EJW had assigned to Ex'pression its right to collect on the loan amounts due to EJW. The trial court denied the motion.

The jury returned separate special verdicts as to each plaintiff.[4] We here summarize the special verdicts to the extent they are relevant to the issues on appeal.

On plaintiff's claims under section 94877, subdivision (a),[5] the jury was asked to make several findings.

Question No. 9(a): The jury was asked whether, in connection with an agreement for a course of instruction, Ex'pression had presented to plaintiffs "information that was false or misleading relating to the school, to employment opportunities, or to enrollment opportunities in institutions of higher learning after entering into or completing courses offered by the school." The jury answered "[y]es" to this question as to Meador. It answered "[n]o" as to Cochran, Friend, Instone, Navone, Spielman, Clarke, Ho, and Yu.[6]

Question No. 9(b): The jury was asked whether Ex'pression had "[m]ade or caused to be made any statement to [plaintiffs] that was in any manner untrue or misleading, either by actual statement, omission, or intimation." The jury answered

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[4] It appears that Morales and Elias were dismissed before trial; neither is a party to this appeal.

[5] Section 94877, subdivision (a) provided: "If an institution violates this article or Section 94832 or commits an act as set forth in Section 94830 in connection with an agreement for a course of instruction, that agreement shall be unenforceable, and the institution shall refund all consideration paid by or on behalf of the student."

[6] Ikeda asserted a defense under the Education Code to Ex'pression's claim for breach of contract; on this defense, the jury found Ex'pression made an untrue or misleading statement, but that it did not relate to a fact that was important to him.

"[y]es" to this question as to Cochran, Friend, Instone, Meador, Navone, Spielman, Clarke, Ho, and Yu.

Question No. 9(c): The jury was asked whether Ex'pression had "[e]ngaged in any false, deceptive, misleading, or unfair act with [plaintiffs] in connection with any matter, including Ex'pression's advertising and promotion, the recruitment of students for enrollment in Ex'pression, the offer or sale of a program of instruction, course length, course credits, the withholding of loan or grant funds from a student, training and instruction, the collection of payments, or job placement." The jury answered "[y]es" to this question as to Cochran, Friend, Instone, Meador, Spielman, Clarke, and Ho. It answered "[n]o" as to Navone and Yu.

Question No. 10: The jury was asked whether "any of the acts that [it had] found to have occurred in [its] response to Question No. 9 related to an important fact to [plaintiffs]." The jury answered "[y]es" to this question as to Meador. It answered "[n]o" as to Cochran, Friend, Instone, Navone, Spielman, Clarke, Ho, and Yu, and did not go on to answer the remaining questions.

Question No. 11: The jury was asked whether plaintiffs "actually rel[ied] on any of the act[s] that [it had] found to have occurred in [its] response to Question No. 9." It answered "[y]es" as to Meador.

Question No. 12: The jury was asked whether plaintiffs' "reliance on any of the acts that [it had] found to have occurred in [its] response to Question No. 9 [was] a substantial factor in causing [them] to enroll at, or remain enrolled in, Ex'pression." The jury answered "[n]o" as to Meador.

Ex'pression's Cross-Complaints: On Ex'pression's cross-complaints, the jury found the following plaintiffs had breached their contracts with Ex'pression and that Ex'pression had suffered damages: Cochran (damages of $29,143.24); Friend (damages of $45,273.57); Instone (damages of $32,331.40); Meador (damages of $40,370.41); Navone (damages of $45,382.09); Spielman (damages of $47,381.95); Ho (damages of $41,642.35); Ikeda (damages of $38,857.38); and Yu (damages of $35,929.47).

Plaintiffs took nothing by their complaints, and the trial court awarded damages to Ex'pression as found by the jury.

II. DISCUSSION

A. Abatement of Claims

We first consider Ex'pression's contention that plaintiff's claims have been abated by the repeal of the Reform Act, including section 94877, effective January 1, 2008. (§ 94999; Stats. 2004, ch. 740, § 7.)

The general rule is that " ' "[t]he unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. *The reviewing court must dispose of the case under the law in force when its decision is rendered*." ' [Citations.]" (*People v. Bradley* (1998) 64 Cal.App.4th 386, 397.) However, in 2009, the Legislature enacted section 94809.6 providing that, notwithstanding the repeal of the Reform Act, "any claim or cause of action in any manner based on the act that was commenced on or before June 30, 2007, whether or not reduced to a final judgment, shall be preserved, and any remedy that was or could have been ordered to redress a violation of the act on or before June 30, 2007, may be ordered or maintained thereafter." (§ 94809.6, subd. (a).) Moreover, "[t]he rights, obligations, claims, causes of action, and remedies described in subdivision (a) shall be determined by the provisions of the former Private Postsecondary and Vocational Education Reform Act of 1989 in effect on or before June 30, 2007, notwithstanding the inoperative status or repeal of the former [Reform Act]." (*Id.*, subd. (b).) This language is unambiguous. It is clear that the Legislature intended to allow parties who, like plaintiffs here, initiated claims under the Reform Act before June 30, 2007, to continue to maintain those actions.

Ex'pression contends, however, that this result conflicts with Government Code section 9607, which provides: "(a) Except as provided in subdivision (b), no statute or part of a statute, repealed by another statute, is revived by the repeal of the repealing statute without express words reviving such repealed statute or part of a statute. [¶] (b) If

a later enacted statute that deletes or extends the date of termination or repeal of a previously enacted law is *chaptered before such date of termination or repeal*, the terminated or repealed law is revived when the later enacted statute becomes operative." (Italics added.) Ex'pression argues that Education Code section 94809.6 is inconsistent with the italicized portion of Government Code section 9607, subdivision (b) because it was enacted after the effective date of the repeal of the Reform Act. We reject this contention. Education Code section 94809.6 did not "revive[]" the Reform Act; rather, the Legislature "preserved" those *claims* under the Reform Act that were pending on or before June 30, 2007. Accordingly, we will consider plaintiffs' appeal on the merits.[7]

B. Elements of Cause of Action Under Section 94877, Subdivision (a)

Before trial, Ex'pression filed a motion seeking a legal interpretation of the elements necessary to establish plaintiffs' Education Code claims, arguing that in enacting section 94877 the Legislature intended to incorporate the common law of misrepresentation. For purposes of this appeal, the relevant portion of section 94877 is subdivision (a), which provided: "If an institution violates this article [the Waters Act] or Section 94832 or commits an act as set forth in Section 94830 in connection with an agreement for a course of instruction, that agreement shall be unenforceable, and the institution shall refund all consideration paid by or on behalf of the student."

Section 94832, among other things, prohibited private postsecondary educational institutions from making or causing to be made untrue or misleading statements, either by actual statement, omission, or intimation; and from engaging in false, deceptive, misleading, or unfair acts in connection with any matter. (§ 94832, subds. (a) & (b); see also § 94730.) Section 94830 authorized the Bureau to refuse to issue or renew, or to revoke, an institution's approval to operate if the institution had, among other things, presented false or misleading statements to prospective students about the school,

[7] On August 20, 2009, Ex'pression moved to dismiss these appeals on the ground they had been abated by the repeal of the Reform Act. By separate order, we deny Ex'pression's motion to dismiss these appeals.

employment opportunities, or enrollment opportunities in institutions of higher learning. (§ 94830, subd. (h); see also § 94724.)

The trial court agreed with Ex'pression and, as reflected in the special verdict forms, required plaintiffs to show not only that Ex'pression had made the requisite false or misleading statements, presented false or misleading information, or engaged in false, deceptive, misleading or unfair acts, but also that the acts related to an important fact, and that plaintiffs relied on the acts and were induced by them to enroll or remain enrolled at Ex'pression, in order to prevail on their causes of action under section 94877, subdivision (a). Plaintiffs contend on appeal that the trial court erred in requiring them to show materiality, reliance, and causation in connection with their claims and defenses under section 94877, subdivision (a).

We begin with the fundamental rules of statutory interpretation. "To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning. [Citations.] When ' "statutory language is . . . clear and unambiguous there is no need for construction, and courts should not indulge in it." ' [Citations.] The plain meaning of words in a statute may be disregarded only when that meaning is ' "repugnant to the general purview of the act," or for some other compelling reason . . . .' [Citations.]" (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 (*DaFonte*).)

Ex'pression asks us to infuse into the provisions of section 94877, subdivision (a), all of the elements of the common law cause of action for misrepresentation: that is, the elements of materiality, reliance, and causation. But these elements are not included in the plain language of the statute, which is clear and unambiguous: if an institution commits any of the acts in question, the agreement for a course of instruction is unenforceable and the institution must refund all consideration paid "by or on behalf of the student." (§ 94877, subd. (a).) Accordingly, we cannot, absent some compelling reason, add to the statute additional requirements.

This conclusion is bolstered by *Goehring v. Chapman University* (2004) 121 Cal.App.4th 353 (*Goehring*). As relevant here, the court in *Goehring* considered

whether a private right of action under Business and Professions Code section 6061 was governed by the one-year statute of limitations for "an 'action upon a statute for a penalty or forfeiture' " (Code Civ. Proc., § 340, subd. (a)), or the three-year period for "an 'action upon a liability created by statute, other than a penalty or forfeiture' " (*id.*, § 338, subd. (a)). (*Goehring*, at p. 374.) Business and Professions Code section 6061 required any unaccredited law school to provide a disclosure statement containing certain information and provided: "The disclosure statement required by this section shall be signed by each student, who shall receive as a receipt a copy of his or her signed disclosure statement. If any school does not comply with these requirements, it shall make a full refund of all fees paid by students." (Bus. & Prof. Code, § 6061, 10th ¶.) The Court of Appeal noted that a penalty is " ' " ' "any law compelling a defendant to pay a plaintiff other than what is necessary to compensate him [or her] for a legal damage done him [or her] by the former" ' " ' [citations]" (*Goehring*, at p. 386), and concluded the purpose of the refund provision of Business and Professions Code section 6061 was "penal in nature, as *actual damage is not an element of the claim*. *Rather, to obtain a refund of tuition a plaintiff need only show the law school did not timely comply with disclosure requirements*" (*Goehring*, at p. 387, italics added).

Ex'pression tries to distinguish *Goehring* on the ground that the jury there found the law school had knowingly and recklessly made false representations with the intent to defraud the plaintiff students, and that the plaintiffs had justifiably relied on the misrepresentations. (*Goehring, supra*, 121 Cal.App.4th at p. 362.) These findings, however, were made in connection with the plaintiffs' fraud claims, rather than their statutory cause of action for refund of tuition and fees. (*Ibid*.) They did not form part of the Court of Appeal's reasoning concluding that Business and Professions Code section 6061 was penal in nature and that to obtain a refund, the student need only show that the school did not comply with the disclosure requirements. (*Goehring*, at pp. 386-387.)

Ex'pression also contends—and the trial court agreed—that the provisions of section 94877, subdivision (a) are less clearly penal in nature than those of Business and

Professions Code section 6061. According to Ex'pression: "[W]hile both statutes involve tuition refunds, [Business and Professions Code s]ection 6061 directly links violation of the statute to the refund. . . . In contrast, [Education Code s]ection 94877(a) ties violation of the referenced Reform Act provisions to the unenforceability of the enrollment agreement, with the refund as the remedy." We find this distinction unpersuasive. Both statutes require the school to refund tuition if it violates the statutory provisions. Section 94877, subdivision (a)'s additional provision that an agreement for a course of instruction is unenforceable if the institution commits the violations does not change that fact.

Ex'pression relies on *Prudential Home Mortgage Co. v. Superior Court* (1998) 66 Cal.App.4th 1236 to argue that section 94877, subdivision (a) does not provide for a penalty; but *Prudential* is inapposite. The court in *Prudential* looked to three factors to determine whether sums imposed under a statute constituted a penalty or forfeiture governed by the one-year-state of limitations or were remedial in nature and governed by a longer limitations period. These factors were (1) whether the statute's language characterizes the sums as a penalty or forfeiture, (2) whether the legislative history refers to the sums as a penalty or forfeiture, and (3) whether the sums are imposed without reference to the actual damage sustained by the plaintiff. (*Prudential*, at pp. 1242-1243.) The question before us, however, is not whether to apply the statute of limitations for a penal provision or for a remedial provision; it is whether the Legislature incorporated within section 94877, subdivision (a) a requirement that the plaintiff show the elements of a cause of action for misrepresentation.

Ex'pression also cites authority for the proposition that, as a general rule, statutes should be interpreted in light of common law rules, unless their language clearly shows an intention to depart from those rules. (See *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 (*Health Facilities*).) Under this rule, " '[t]here is a presumption that a statute does not, by implication, repeal the common law.' " (*Ibid*.; see also *Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1407.) This unexceptionable principle does not, however, lead to

a conclusion that the Legislature intended to incorporate within section 94877, subdivision (a) the elements of a cause of action for common law fraud. We acknowledge the Legislature's stated intent that one of the purposes of the Waters Act was to prevent harm to students because of the fraudulent, deceptive practices of institutions, and the Legislature's concern for students who have been induced to enroll through misrepresentations. (§ 94850, subds. (b), (c), & (d).)[8] But this expression of legislative intent does not change the fact that the statute the Legislature actually adopted—section 94877, subdivision (a)—by its terms *does not* require a plaintiff to prove the elements of a cause of action for misrepresentation. We note, further, that the money to be paid under this provision is limited to a refund of tuition paid; the statute does not supplant or implicitly repeal the common law of fraud, which allows for consequential damages, but only adds an additional statutory protection for students. (§ 94877, subd. (d).)

Finally, Ex'pression contends that any interpretation of section 94877, subdivision (a) that does not require a showing of materiality, reliance, and causation

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[8] In section 94850, subdivision (b), the Legislature declared that "students have been substantially harmed and the public perception of reputable institutions has been damaged because of the fraudulent, deceptive, and unfair conduct of some institutions that offer courses of instruction for a term of two years or less that are supposed to prepare students for employment in various occupations. Students have been induced to enroll in these schools through various misrepresentations including misrepresentations related to the quality of education, the availability and quality of equipment and materials, the language of instruction and employment and salary opportunities. . . ." The Legislature also found that "[s]tudents who leave schools before the completion of instruction, often because of misrepresentations and inadequate instruction, do not receive adequate refunds of tuition for the instruction not received. . . ." (*Id.*, subd. (c).) The Legislature declared: "(d) It is the intent and purpose of this article to protect students and reputable institutions, ensure appropriate state control of business and operational standards, ensure minimum standards for educational quality, prohibit misrepresentations, require full disclosures, prohibit unfair dealing, and protect student rights. It is the intent and purpose of this article to save millions of dollars of taxpayer's funds from being misused to underwrite the activities of institutions that depart from the standards of fair dealing and the requirements of this article. [¶] (e) *This article shall be liberally construed to effectuate its intent and achieve its purposes*." (*Id.*, italics added.)

could lead to absurd results, for example by requiring a refund even if the only violation were the failure to use a 12-point font type for certain required language in the preenrollment disclosure statement. (§ 94871, subd. (a)(9).) Whether or not a minor deviation from this requirement would support a claim that the institution had not substantially complied, the misrepresentations found to have been made here are not mere technical lapses. (See *Goehring, supra*, 121 Cal.App.4th at pp. 384-386.) Moreover, the law provides a limited remedy—a refund of consideration paid by the student—and only if the improper acts were committed in connection with an agreement for a course of instruction. (§ 94877, subd. (a).)[9] In light of this limited remedy, and the statutory purpose of requiring full disclosure and fair dealing (§ 94850, subd. (d)), our interpretation is neither absurd nor " ' "repugnant to the general purview of the act" ' " (*DaFonte, supra*, 2 Cal.4th at p. 601).

Our conclusion in this case is also buttressed by the fact that there are similar statutes containing heightened consumer protections which have been found not to include the elements of common law fraud unless those elements are made express in the law. For example, state laws require that securities sales be "qualified" prior to being offered (Corp. Code, §§ 25110, 25120, 25130) and provide that purchasers of securities that have not been qualified may sue for return of the consideration paid, less any income received, or for damages if the purchaser no longer owns the security (*id.*, § 25503). "[These statutes] create liability affording the immediate purchaser several specific

[9] A broader remedy was provided by section 94877, subdivision (b), under which "a student may bring an action for a violation of this article or Section 94832 or an institution's failure to perform its legal obligations and, upon prevailing, shall be entitled to the recovery of damages, equitable relief, and any other relief authorized by this article, and reasonable attorney's fees and costs." As to the claims of the plaintiffs who asserted a cause of action under this provision, the jury was asked whether Ex'pression had committed the predicate acts (including making false and misleading statements); whether the acts related to an important fact; whether the plaintiffs actually relied on the acts; whether they were harmed; and whether their reliance was a substantial factor in causing the harm. There is no contention that in order to show *damages* under section 94877, subdivision (b), plaintiffs were not required to show materiality, reliance, and causation.

remedies. None of the above sections require scienter, negligence, or plaintiff's reliance. [Citation]." (*Bowden v. Robinson* (1977) 67 Cal.App.3d 705, 712; and see *id.* at p. 714 ["[Corporations Code s]ections 25400, subdivision (d), and 25500 establish a statutory cause of action for fraud, however, conspicuously avoiding the requirement of 'actual reliance.' [Citation.] The Legislature is again expressing its intention to afford the victims of securities fraud with a remedy without the formidable task of proving common law fraud."].)

The Legislature is fully capable of expressing in the statutory language those elements required to be proven in order to secure the statutory remedy. (See, e.g., Corp. Code, § 25401 [making unlawful an offer to sell or buy a security by means of a communication that includes "an untrue statement of a *material* fact" (italics added)].) Perhaps the most salient example of this is found in the recent amendment to the unfair competition law (Bus. & Prof. Code, § 17200 et seq.) (UCL). "Before the November 2004 General Election, when the voters approved Proposition 64, California courts consistently held that liability for restitution under the UCL could be imposed against a defendant without any individualized proof of causation or injury; the plaintiff needed only to show that the defendant engaged in a practice that was unlawful, unfair, or fraudulent and that the defendant may have acquired money or property by means of that practice. [Citations.] Proposition 64 changed this. It amended the UCL to provide that a private action for relief may be maintained only if the person bringing the action 'has suffered injury in fact and has lost money or property as a result of the unfair competition.' (Bus. & Prof. Code, § 17204.)" (*Steroid Hormone Product Cases* (2010) 181 Cal.App.4th 145, 154.)

In sum, whether or not we are comfortable with the result, we can find nothing in the statutes under consideration that would invite or countenance the addition of elements that are not contained in the plain language, particularly where the law expressly states

that "[t]he remedies provided . . . supplement, but do not supplant, the remedies provided under other provisions of law." (§ 94877, subd. (d).)[10]

The question of the remedy remains. Plaintiffs Clarke, Ho, Ikeda, and Yu ask us to direct the trial court to enter judgment in their favor on their claims under section 94877, subdivision (a). As to Clarke, Ho, and Yu, however, the jury found against each of these plaintiffs on the question of materiality. It therefore had no occasion to reach the factual issues related to whether their causes of action were barred by the applicable statute of limitations, under which an action must be brought "within three years of the discovery of the facts constituting grounds for commencing the action." (§ 94877, subd. (e).)[11] Accordingly, rather than directing the trial court to enter judgment on the remaining causes of action for violation of section 94877, subdivision (a), we shall remand to the trial court for appropriate further proceedings.

C. Demurrer Based on Statute of Limitations

Ex'pression demurred to the Yu plaintiffs' second amended complaint. As relevant here, it contended the first cause of action for violation of the Waters Act was

[10] This provision also negates Ex'pression's contention that the Education Code provisions must incorporate the common law elements of fraud because statutes " 'should be construed to avoid conflict with common law rules' " (*Health Facilities, supra*, 16 Cal.4th at p. 297), or because "[t]here is a presumption that a statute does not, by implication, repeal the common law" (*People v. Zikorus* (1983) 150 Cal.App.3d 324, 330). Obviously, subdivision (d) of section 94877 makes clear that the remedy provided neither conflicts with nor repeals remedies available under any common law causes of action.

[11] As to Ikeda, the procedural posture is different. The trial court had sustained without leave to amend Ex'pression's demurrer as to his cause of action for violation of section 94877, subdivision (a). The jury was asked to decide whether Ex'pression had violated this statute as to Ikeda, but only in order to decide his affirmative defense to Ex'pression's cause of action for breach of contract. As we are remanding for further proceedings in connection with the other plaintiffs' claims under section 94877, subdivision (a), we will likewise remand as to Ikeda for further proceedings consistent with the views expressed in this opinion.

barred by the statute of limitations. The trial court sustained the demurrer as to Toomajian, Ikeda, and Delgado (the demurrer plaintiffs) without leave to amend.[12]

" 'In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred. [Citation.]' [Citation.]" (*Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1155.)

Section 94877, subdivision (e) provided: "An action brought under this section shall be commenced within three years of the discovery of the facts constituting grounds for commencing the action." The Yu plaintiffs filed their action on September 13, 2004. Their second amended complaint alleged Toomajian and Delgado were students at Ex'pression from January 25, 2000, to May 12, 2001; Ikeda from May 30, 2000, to July 20, 2001; and Morales and Elias from March 2000, to May 12, 2001. In their general allegations, the Yu plaintiffs alleged they applied for admission to Ex'pression in early 2000, and before they agreed to pay tuition and begin and continue a course of study, Ex'pression made various statements and promises, including that Ex'pression was or soon would be accredited; that plaintiffs would receive a valid associate of science or bachelor's degree; and that Ex'pression's units were transferable. They also alleged that Ex'pression had made various other false representations: in 1999, Ex'pression representatives promised internships and other job opportunities and promised that leading industry professionals would teach all courses; during 1999 and 2000, Ex'pression promised the Yu plaintiffs they would have access to laboratory hours at any time and told them they would be eligible for legitimate financial aid after accreditation, and Ex'pression's catalog compared Ex'pression to a four-year college degree program; at town hall meetings during 1999 through 2001, Ex'pression's chief executive officer assured the Yu plaintiffs they were "on course to getting legitimate degrees and that accreditation was imminent," and told them Ex'pression would offer classes if they did

[12] The trial court also sustained the demurrer as to Morales and Elias, who are not parties to this appeal.

not have enough college credits to obtain a legitimate four-year undergraduate degree; during the same time period, Ex'pression promised the Yu plaintiffs there would be a garage studio at the school; and during town hall meetings at an unspecified time, the chief executive officer and an admissions representative told them they would receive legitimate degrees after they finished their internships. According to the second amended complaint, the Yu plaintiffs learned that these statements and misrepresentations were false during 2003 and 2004, when they learned, either directly or indirectly, that an attorney for other former Ex'pression students was pursuing legal action against Ex'pression.

In their first cause of action, for violation of the Education Code, the Yu plaintiffs alleged Ex'pression had violated the relevant statutes by presenting false and misleading information to prospective students; making false promises or guarantees of employment and representations of job availability; advertising or indicating in promotional materials that Ex'pression was accredited; making false or misleading statements, including implying that Ex'pression granted degrees and that students would obtain financial assistance; engaging in false, deceptive, and misleading acts in connection with advertising, promotion, and recruiting students for enrollment; failing to provide the promised education, training, skill, and experience; and failing to provide sufficient instruction, materials, laboratory hours, and equipment.

In sustaining Ex'pression's demurrer to plaintiffs' first cause of action, the trial court stated the claim was "based in part on the following allegations: (1) Plaintiffs were promised by Defendant that there would be a garage studio at the school; (2) Defendant promised Plaintiffs that they would have access to appropriate laboratory hours any time they wanted; and (3) that after accreditation, they would be eligible for legitimate financial aid. [Citation.] The statute of limitations began to run when the Plaintiffs had information, which would put a reasonable person on inquiry. [Citation.] Plaintiffs should have known upon graduation that the promised resources and financial aid had not been provided. In addition, the Court finds that such knowledge put them on inquiry as to the other allegations regarding the school's accreditation and value of Plaintiffs'

education." The court also noted the rule that "it is the occurrence of some cognizable event rather than the knowledge of its legal significance that starts the running of the statute of limitations. [Citation.]"

A cause of action accrues, and the statute of limitations begins to run, "from the time conduct becomes actionable. ' "[W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefore, the statute of limitations attaches at once. *It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date . . . .*" (Italics added.)' [Citations.]" (*Spellis v. Lawn* (1988) 200 Cal.App.3d 1075, 1080-1081.) Here, the statute of limitations began to run when the demurrer plaintiffs discovered "the facts constituting grounds for commencing the action." (§ 94877, subd. (e).) Those facts included the alleged lack of the promised laboratory time, a garage studio, federally funded student loans after Ex'pression was accredited, and instruction by leading industry professionals. The trial court correctly concluded that these plaintiffs were necessarily aware of any alleged falsity of Ex'pression's statements about these matters while they were still students at Ex'pression—that is, more than three years before they filed their action. At that point, their cause of action under section 94877 accrued, and the statute of limitations began to run.

The demurrer plaintiffs contend in their reply brief, however, that we should apply the continuing tort doctrine. This doctrine has been applied to extend the statute of limitations in limited circumstances, such as where an employer had committed ongoing harassment, had a long-standing corporate policy of employment discrimination, or persistently failed to accommodate a disability (see *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 817, 823; *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 368-369); where a defendant debt collection agency repeatedly harassed the plaintiff (*Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal.App.4th 324, 343-345); and where the defendant was alleged to have committed continual domestic abuse (*Pugliese v. Superior Court* (2007) 146 Cal.App.4th 1444, 1451-1454). Where this doctrine is applicable, the

statute of limitations "does not begin to run until the date of the last injury or when the tortious acts cease." (*Id*. at p. 1452.) We decline to apply the continuing tort doctrine here. First, we ordinarily will not consider points raised for the first time in an appellant's reply brief. (*Moran v. Endres* (2006) 135 Cal.App.4th 952, 956 (*Moran*).) In any case, the Legislature has made clear here that the statute of limitations begins to run when the plaintiff discovers facts constituting grounds for commencing the action. (§ 94877, subd. (e).) The trial court correctly concluded that that event occurred more than three years before the demurrer plaintiffs filed their complaint.

We recognize the demurrer plaintiffs alleged they did not learn Ex'pression's statements and representations were false until 2003 or 2004, based on what they learned through an attorney representing former Ex'pression students in a separate action. The issue here, however, is not when plaintiffs learned there might be a legal basis for an action against Ex'pression; it is when they learned the *facts* constituting grounds for such an action. (See *McGee v. Weinberg* (1979) 97 Cal.App.3d 798, 803-804 (*McGee*).)

Delgado and Ikeda also contend the statute of limitations on their cause of action for refund of their tuition could not begin to run until after they finished paying their tuition, and they continued to make payments within three years of commencing their action. This point was first raised in their reply brief, and we need not consider it. (*Moran, supra*, 135 Cal.App.4th at p. 956.) In any case, we would reject it. The Legislature made clear that a cause of action under section 94877 must be brought within three years of the discovery of the pertinent facts, not within three years of making the final tuition payment. (§ 94877, subd. (e).)

The demurrer plaintiffs contend section 94877's statute of limitations is triggered only when they had *actual* knowledge of the facts constituting the grounds for their action, not when they should reasonably have known of those facts. However, in causes of action based on fraud, where a statute provides that the limitations period begins to run when the aggrieved party discovers the relevant facts, courts have read into the statute a duty to exercise diligence to discover the facts. (See *Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 873, 875; *Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1374-1375;

Bedolla v. Logan & Frazer (1975) 52 Cal.App.3d 118, 131; 3 Witkin, Cal Procedure (5th ed. 2008) Actions, § 659, pp. 870-872.) It is reasonable to apply the same rule here. The trial court correctly concluded that, having learned the facts indicating some of Ex'pression's statements were untrue, the demurrer plaintiffs were on inquiry notice that other statements might be likewise untrue.

The demurrer plaintiffs also argue their cause of action is not barred by the statute of limitations because they did not finish their studies at Ex'pression until after they had finished a required internship, which was to take place after they completed their classroom work. This point was first raised in the reply brief, and we need not consider it. (*Moran, supra*, 135 Cal.App.4th at p. 956.) In any case, a demurrer tests the sufficiency of the complaint (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459; see also *McGee, supra*, 97 Cal.App.3d at p. 802), and the demurrer plaintiffs' second amended complaint does not allege that their internships extended past the time they were students at Ex'pression.

Accordingly, we conclude the trial court properly sustained the demurrer to the first cause of action of the second amended complaint as to the demurrer plaintiffs.

D. Denial of Motion for Directed Verdict

As we have noted, during trial, Ikeda and all the Spielman plaintiffs except Instone (collectively the directed verdict plaintiffs) moved for a directed verdict on Ex'pression's cross-complaints on the ground that their tuition had been paid to Ex'pression by a third party, EJW, and that there was no evidence that EJW had assigned to Ex'pression its right to collect on the loan amounts due to EJW. The trial court denied the motion. The directed verdict plaintiffs contend the trial court erred in denying their motion.

1. Background

The enrollment agreements and retail installment contracts were between Ex'pression and the directed verdict plaintiffs. In the installment contracts, these plaintiffs agreed to pay Ex'pression tuition and finance charges on a monthly schedule. Jacobus Laanen, the chief executive officer of Ex'pression from February 1999 until June 2005, testified that one of the founders of Ex'pression, Eckhart Wintzen, financed

some loans, apparently through EJW and a loan administrator known as TFC, and paid the tuition to Ex'pression. As a result, Ex'pression's records showed the account balances of the directed verdict plaintiffs as "0.00" in 2000, based on "Private Funding."

None of the directed verdict plaintiffs made the full payments for tuition and interest. In 2004, Ex'pression's records reflected a "Buy Back" from EJW, apparently of the outstanding amounts owed, and the Ex'pression's ledger thereafter showed the directed verdict plaintiffs owed the money to the school. Laanen testified that Ex'pression ultimately became the holder of the loans; in 2004, Ex'pression's board decided to "clear the accounts"; and as of 2004, those amounts were owed to Ex'pression. A forensic accountant who testified on behalf of Ex'pression, Jeffrey Redman, testified that Ex'pression's board had decided to "take those loans back from EJW," and that action was reflected on the ledger cards, that buying a loan meant acquiring the right to receive the payments on the loan, that the outstanding loans ultimately showed up on Ex'pression's books, and that the outstanding amounts were owed to Ex'pression. He did not confirm that Ex'pression actually paid EJW when it acquired the loans.

2. Analysis

"Like a motion for nonsuit, a motion for a directed verdict is in the nature of a demurrer to the evidence. [Citations.] In determining such a motion, the trial court has no power to weigh the evidence, and may not consider the credibility of witnesses. It may not grant a directed verdict when there is *any* substantial conflict in the evidence. [Citation.] A directed verdict may be granted only when, disregarding conflicting evidence, giving the evidence of the party against whom the motion is directed all the value to which it is legally entitled, and indulging every legitimate inference from such evidence in favor of that party, the court nonetheless determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party. [Citations.]" (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 629-630 (*Howard*).) Where a trial court denies a plaintiff's motion for a directed verdict and the jury subsequently finds in the defendant's favor, a challenge to the denial of the motion "is therefore functionally equivalent to contending there was

insufficient evidence to support the jury verdict against [the plaintiff]. Only if there was *no* substantial evidence in support of the verdict could it have been error for the trial court earlier to have denied [the plaintiff's] motion for directed verdict. [Citation.]" (*Id*. at p. 630.) Thus, we do not weigh conflicts in the evidence, but only determine whether the record contains any substantial evidence, contradicted or uncontradicted, to support the judgment. (*Id*. at pp. 630-631.)

Here, after the trial court denied the motion for directed verdict, the jury found in Ex'pression's favor on these claims. Accordingly, we may not reverse if there is any substantial evidence in support of the verdict. (*Howard, supra*, 72 Cal.App.4th at pp. 630-631.) We conclude there is sufficient evidence to support a conclusion that the directed verdict plaintiffs owed the disputed amounts to Ex'pression. As we have explained, their installment agreements were with Ex'pression, not with EJW. They admittedly did not pay the amounts due, to Ex'pression or anyone else. There is also evidence that Ex'pression acquired from EJW the right to receive those payments. This record is sufficient to support the judgment.[13]

III. DISPOSITION

The judgment is reversed as to the claims and defenses of Cochran, Friend, Instone, Meador, Spielman, Clarke, Ho, Navone, and Yu under section 94877, subdivision (a), and as to Ikeda's defense to the cross-complaint under section 94877,

[13] Nothing we say here is intended to preclude the trial court from making appropriate rulings regarding the effect of our decision on any defenses asserted to Ex'pression's cross-claims under section 94877, subdivision (a).

subdivision (a). In all other respects, the judgment is affirmed. The matter is remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal.

_____
RIVERA, J.

We concur:

_____
RUVOLO, P.J.

_____
SEPULVEDA, J.

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

REBECCA SPIELMAN et al., Plaintiffs, Cross-defendants, and Appellants, v. EX'PRESSION CENTER FOR NEW MEDIA, Defendant, Cross-complainant, and Respondent.	A122357 (Alameda County Super. Ct. No. RG04174927)
LAWRENCE YU, YUKI IKEDA, DERON DELGADO, AND JASON HO, Plaintiffs, Cross-defendants, and Appellants, BRIAN CLARKE AND BRIAN TOOMAJIAN, Plaintiffs and Appellants, v. EX'PRESSION CENTER FOR NEW MEDIA, Defendant, Cross-complainant, and Respondent.	A123563 (Alameda County Super. Ct. No. RG04175490)

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.C. and II.D.

THE COURT:

The opinion filed December 2, 2010, is ordered partially published.

The opinion is ordered modified to add the following footnote on page 1 at the end of the first paragraph: "In the unpublished portion of this opinion, we reject plaintiffs' contentions regarding the statute of limitations and the denial of their motions for directed verdict."

There is no change in the judgment.

Trial Court:	Superior Court of Alameda County
Trial Judge: Honorable Steven Brick	Honorable Ronni MacLaren
Attorney for Spielman Appellants: Grout Law Firm	Daniel A. Grout
Attorney for Yu Appellants: Jeffrey A. Koncius Lange & Koncius, LLP	Joseph J.M. Lange
Attorney for Respondent: Eric J. Sinrod Paul J. Killion Michael J. Dickman Duane Morris LLP	Keith Zakarin