IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00361

WW, INC. d/b/a WEIGHT WATCHERS OF GREATER MISSISSIPPI and BJM, INC. d/b/a WEIGHT WATCHERS OF SOUTHERN ALABAMA AND FLORIDA PANHANDLE

Appellants

VERSUS

RAINBOW CASINO-VICKSBURG PARTNERSHIP, L.P. and BALLY TECHNOLOGIES, INC.

Appellees

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT, IN CIVIL ACTION NO. 251-09-46 CIV

BRIEF OF APPELLEES RAINBOW CASINO-VICKSBURG PARTNERSHIP, L.P. AND BALLY TECHNOLOGIES, INC.

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ORAL ARGUMENT NOT REQUESTED

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WW, INC. d/b/a WEIGHT WATCHERS OF GREATER MISSISSIPPI and BJM, INC. d/b/a WEIGHT WATCHERS OF SOUTHERN ALABAMA AND FLORIDA PANHANDLE — **APPELLANTS**

v.

RAINBOW CASINO-VICKSBURG PARTNERSHIP, L.P. AND BALLY TECHNOLOGIES, INC. — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Rainbow Casino-Vicksburg Partnership, L.P., Appellee;
2. Bally Technologies, Inc., Appellee/General Partner;
3. WW, Inc. d/b/a Weight Watchers of Greater Mississippi, Appellant;
4. BJM Inc. d/b/a Weight Watchers of Southern Alabama and Florida Panhandle, Appellant;
5. Quin H. Breland, BALCH & BINGHAM LLP, attorney for Appellees;
6. William L. Smith, BALCH & BINGHAM LLP, attorney for Appellees;
7. Wilson H. Carroll, WYATT, TARRANT & COMBS, LLP, attorney for Appellants; and
8. The Honorable Tomie T. Green, Hinds County Circuit Court Judge.

QUIN H. BRELAND, IV
ATTORNEY OF RECORD FOR APPELLEES

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STATEMENT OF THE ISSUES

As noted in Appellants' Statement of the Issues, on December 5, 2005, WW, Inc. d/b/a Weight Watchers of Greater Mississippi and BJM Inc. d/b/a Weight Watchers of Southern Alabama and Florida Panhandle (collectively, "Weight Watchers") discovered that its bookkeeper, Dianne Belk, had embezzled over $921,000, but did not file suit until January 9, 2009, more than three years later. The issues on appeal are:

1. **Weight Watchers Filed Suit Over Three Years After Discovering Their Injury. Does the Discovery Rule Toll the Statute of Limitations for Its Claims?**

2. **Did Rainbow Casino and/or Bally Technologies Fraudulently Conceal a Cause of Action, Even Though the Unauthorized Checks Cashed at Rainbow Casino Were Immediately Drawn on Weight Watchers' Bank Accounts?**

3. **Does the Continuing Tort Doctrine Toll the Statute of Limitations, Even Though the Funds Were Removed from Weight Watchers' Bank Accounts Each Time an Unauthorized Check was Cashed?**

4. **Is Weight Watchers Entitled to More Time for Discovery, Even Though It Is the Only Party That Can Provide Evidence of Fraudulent Concealment and Even Though It Did Not File a Rule 56(f) Affidavit?**

STATEMENT OF THE CASE

1. Nature of the Case, Course of Proceedings and Disposition Below

As set forth in Weight Watchers' Statement of the Case, for nearly six years, Dianne Belk embezzled a large sum of money from her employer, Weight Watchers, by writing unauthorized checks to herself on the companies' accounts.[1] It is undisputed that Weight Watchers discovered her embezzlement on December 5, 2005.[2] On January 9, 2009, Weight Watchers filed suit against Dianne Belk, her husband Robert F. Belk, Jr., Rainbow Casino-Vicksburg Partnership, L.P. and Bally Technologies, Inc.[3] The Complaint alleged claims of fraud and misappropriation, unjust enrichment, conversion, and negligence against Rainbow Casino and Bally Technologies.[4] As Weight Watchers filed suit over three years after discovering Belk's embezzlement, Rainbow and Bally Technologies filed a Motion for Summary Judgment based on the statute of limitations.[5]

After extensive briefing and a hearing, the Circuit Court of Hinds County issued its Order Granting Defendants' Motion for Summary Judgment and Judgment of Dismissal.[6] The court found that Weight Watchers filed suit "more than three years after Belk cashed her last embezzled check at Rainbow," that the "January 9, 2009 filing date was also more than three years after WW discovered [or] should have discovered Belk's embezzlement," and "the January

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[1] Brief of Appellants, p. 4.

[2] R. 590. The Appellants also admit this in the first sentence of their brief. Brief of Appellants, p. 2.

[3] Rainbow Casino-Vicksburg Partnership, L.P. and Bally Technologies, Inc. are hereinafter collectively referred to as "Rainbow" or "Rainbow Casino."

[4] R. 4-9. Weight Watchers never made any allegations that it was injured by "money laundering" until the hearing on Rainbow's Motion for Summary Judgment.

[5] R. 50-52, Supp. R. 8-118. Rainbow's Motion for Summary Judgment addressed both the Uniform Commercial Code's statute of limitations regarding negotiable instruments (Miss. Code Ann. § 75-3-118) and Mississippi's catch-all statute of limitations (Miss. Code Ann. § 15-1-49).

[6] R. 586-592.

9, 2009 [filing] was more than three (3) years after WW discovered or should have discovered that Belk had cashed a number of checks at Defendants' casinos."[7] The court further found that Weight Watchers failed to prove fraudulent concealment, as it could not point to any affirmative act designed to prevent discovery of its injury, and could not prove that it acted with due diligence in attempting to discover the injury.[8] Finally, the trial court refused to create a new cause of action that holds businesses liable when a thief spends embezzled funds at that business.[9] Therefore, the court granted summary judgment and dismissed Rainbow. This appeal followed.

2. Statement of the Facts

Weight Watchers hired Dianne Belk as a bookkeeper in Fall 1999.[10] Her only supervisor was Robert S. Jacobs ("Jacobs"), the owner and manager of WW, Inc. and BJM, Inc.[11] Belk began writing unauthorized checks to herself on the WW, Inc. and BJM, Inc. accounts and cashing them at, among other places, Rainbow Casino, in early 2000.[12] She did this for almost *six years*, until her unlawful activities were finally discovered by Weight Watchers on December 5, 2005.[13] In total, she wrote approximately 554 unauthorized checks on Weight Watchers' bank accounts. Belk eventually pled guilty to embezzling over $900,000 from Weight Watchers and is currently incarcerated.

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[7] R. 588.

[8] R. 591.

[9] R. 589.

[10] Supp. R. 40.

[11] Supp. R. 87 ("A: That would be Bobby Jacobs. It's a small business. There were only four people in the office that are on staff, and Bobby would be the manager in that capacity.").

[12] Supp. R. 89-90.

[13] Supp. R. 90; Supp. R. 100.

A. Dianne Belk's Embezzlement Lasted Nearly Six Years Because Weight Watchers Had No Financial Controls and Did Nothing to Discover It.

During her nearly six year period of embezzlement, Belk freely spent funds out of Weight Watchers' accounts. She wrote checks made payable to herself;[14] she deposited funds in her personal bank accounts at BancorpSouth and Trustmark Bank;[15] she paid a car note with Weight Watchers' checks;[16] she financed her daughter's store with Weight Watchers funds;[17] and she gave her sister-in-law, the Weight Watchers janitor, a one hundred percent (100%) raise with Weight Watchers monies.[18] She gambled at several different casinos and lost money at each.[19] Although Jacobs was Belk's supervisor and owned the business, he took a "hands off" management style and did not have any financial controls in place to monitor his bank accounts, and therefore did not notice any of the illicit spending.

In November 2005, Jacobs finally became suspicious of Belk's activities.[20] As Jacobs was acquainted with the principals of the Grantham Poole accounting firm, he enlisted their aid to perform an audit of his companies.[21] *Within hours*, the auditors realized Belk had embezzled funds.[22] The auditors informed Jacobs that Belk had embezzled hundreds of thousands of dollars[23] and that Belk had been cashing some of the unauthorized checks at Rainbow Casino.[24]

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[14] R. 455-56.

[15] R. 459.

[16] Supp. R. 60-62 (Jacobs did not notice payments to GMAC even though he always paid cash for auto expenses).

[17] Supp. R. 59-60 (Belk wrote checks totaling around $11,000 for her daughter's store).

[18] Supp. R. 79.

[19] R. 450.

[20] Supp. R. 79-80.

[21] Supp. R. 45, 52-53.

[22] *Id.*

[23] Supp. R. 46.

[24] Supp. R. 77-78, 100, 114 ("Q: You knew that Dianne was cashing -- cashing or converting into play, embezzled checks at Rainbow Casino in December 2005, correct? A: Yes.").

Weight Watchers eventually filed two insurance claims through their business theft insurance carriers and was paid a total of over $220,000.[25] The insurance claims listed the date of loss as December 5, 2005, and the proof of loss was a set of embezzled checks and a letter from Grantham Poole detailing its investigation.[26]

Belk's embezzlement went on for nearly six years because Jacobs did not make the slightest effort to discover it. Despite the fact that the Grantham Poole auditors discovered Belk's embezzlement within hours of beginning their audit, Jacobs did not catch the embezzlement for the previous six years because he did nothing:

- Jacobs never had any type of audit conducted during Belk's employment (other than the audit that caught Belk's embezzlement).[27]
- Jacobs never reconciled expenses and receipts,[28] as he considered such basic financial controls to be too expensive.[29]
- Jacobs used a solo certified public accountant, Veronica Strickland, because she was inexpensive, and did not install basic financial controls like audits or reconciling the books because, according to Jacobs, those controls were simply not worth the cost.[30]
- Jacobs never asked his CPA to conduct an audit[31] and never asked her to reconcile his companies' books.[32]

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[25] Supp. R. 48, 105-107.

[26] Supp. R. 48.

[27] Supp. R. 44, 57, 102, 103.

[28] Supp. R. 64 ("Q: So you never went through and matched expenses with receipts? A: No.").

[29] Supp. R. 54-55 (A: ...we had never really gone through any expense of anything, because I was – you know, we had as few of employees as we could, and we just sort of kept everything at bare bones...").

[30] Supp. R. 41 ("Veronica was...relatively inexpensive for the job she was doing."), 44 ("We couldn't afford somebody to come back in and check over some work that somebody else did."), 51-52 ("Q: And you liked her because she was cheap? A: That was the major reason we had used her."), 54-55 ("But I did want to bring Grantham Poole in just to – to look and see and see if they had any idea, because we – we had never really gone through any expense of anything, because I was – you know, we had as few of employees as we could, and we just sort of kept everything at bare bones...").

[31] Supp. R. 56-57.

[32] Supp. R. 64.

- Not only did Jacobs not notice all the checks Belk was writing to herself, he did not catch other unauthorized payments, such as unauthorized payments to GMAC,[33] unauthorized payments to Belk's daughter's store,[34] or an unauthorized 100% raise for their janitor.[35]

Even though Belk cashed multiple unauthorized checks at Rainbow Casino, Weight Watchers *never* gave Rainbow any indication that Belk's checks were invalid or that she was embezzling money. Neither Weight Watchers nor anyone else ever told Rainbow that the checks Belk cashed were unauthorized.[36] Weight Watchers was an approved employer for cashing payroll checks in the Central Credit System to which Rainbow Casino subscribes, and Belk's Weight Watchers check was verified in the system prior to cashing.[37] Belk had the authority to write and cash Weight Watchers' checks.[38] The face of the unauthorized checks looked like any other check issued by Weight Watchers.[39] The checks were valid checks that showed no sign of alteration or irregularity.[40] The only difference was that the font used to print Belk's name and address was slightly different than a normal Weight Watchers check, because it was typed on a typewriter rather than printed on a computer.[41] Jacobs' valid signature was on each check.[42] Weight Watchers' own bank (Trustmark National Bank) always honored the checks and never

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[33] Supp. R. 60-62.

[34] Supp. R. 60.

[35] Supp. R. 79-80.

[36] Supp. R. 68, 96-97.

[37] R. 418 ("A: ...the first time is when they said they had to check and see if it was in the system."); Supp. R. 116.

[38] Supp. R. 98 ("Q: Now, Dianne Belk had check writing authority, correct? A: She had check writing authority.").

[39] Supp. R. 67 ("Q: Is there anything that would raise a red flag to a person who had no idea? A: No.").

[40] Supp. R. 91-92.

[41] Supp. R. 91.

[42] Supp. R. 66, 91-92.

noticed any issues with the checks.[43] Despite the fact that Belk cashed checks and spent embezzled funds all over town, Weight Watchers only sued Rainbow, even though Trustmark Bank actually allowed each and every embezzled check to be negotiated. Weight Watchers never asked Trustmark to stop payment or otherwise dishonor any of the checks.[44] In other words, nothing put Rainbow on notice that the checks were unauthorized.

B. Rainbow Was Not Involved in a Conspiracy With Dianne Belk and All Allegations of Criminal Conduct Are False.

Rainbow must also briefly address the outrageous and baseless allegations of criminal conduct made by Weight Watchers in its Statement of the Case. Weight Watchers claims that Rainbow assisted Dianne Belk in laundering her stolen funds and that it failed to comply with federal anti-money laundering regulations.[45] Essentially, Weight Watchers argues that Rainbow was involved in a scheme to help Dianne Belk launder hundreds of thousands of dollars in return for her losing that money at Rainbow Casino.[46] These allegations are irrelevant and frivolous, and have no basis in fact. For example, many of Weight Watchers' allegations have absolutely no support in the record.

Statement in Brief	Citation to Record
"These two Rainbow employees collaborated with Dianne to make sure she cashed as many stolen checks at Rainbow as possible."[47]	None
"Even though Rainbow had ample reason to suspect something was wrong with the checks, it cashed every single check Mrs. Belk presented without once calling Weight Watchers	None

[43] Supp. R. 67-68, 91-92, 96-97.

[44] *Id.*

[45] It should be noted that these allegations do not appear in Weight Watchers' Complaint.

[46] Brief of Appellants, p. 6.

[47] *Id.*

to verify that the checks were legitimate."[48]	
"There was nothing on the face of the checks which might lead Weight Watchers, or any reasonable person, to suspect any involvement by Rainbow."[49]	None
The entire second paragraph of Page Seven.[50]	None

Likewise, contrary to Weight Watchers' assertions, Belk never gave her friend, casino hostess Dottie Smith, an embezzled check, and further testified that Smith did not know about her embezzlement.[51] Belk never paid any employee of Rainbow Casino to cash her checks.[52] No Rainbow employee knew that she was embezzling money.[53] Weight Watchers' theory of collusion between Belk and Rainbow simply has no basis in fact, as Belk herself admitted.

> Q: Okay. If you won money at Rainbow, did you ever take that money and go gamble it at a different casino?
>
> A: I'm sure I probably did, yes, sir.
>
> Q: Would you cash personal checks at other casinos?
>
> A: Yes, sir.
>
> Q: And then gamble that money at those casinos?
>
> A: Yes, sir.

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[48] *Id.*

[49] *Id.* at pp. 6-7.

[50] *Id.* at p. 7.

[51] R. 460-61 ("A: ...if Dottie cashed a check for me, it would have been a personal check, or it would have been one of my payroll checks. Q: Legitimate payroll checks? A: A legitimate payroll check. I can't remember ever giving Dottie a -- one of the bogus checks because Dottie is pretty smart, and she would probably have realized what I was doing. Q: So Dottie didn't know what you were doing? A: No, sir.").

[52] R. 463 ("Q: Did you ever pay any employee of Rainbow Casino to cash your checks? A: No, sir. Q: Did you ever give any Rainbow Casino employee a cut of what you were embezzling? A: No, sir.").

[53] R. 463 ("Q: To your knowledge, did any Rainbow Casino employee know that you were embezzling money? A: No, sir.").

Q: Okay. Did you ever tell Dottie Smith that you were embezzling money?

A: No, sir.

Q: Did you ever tell VV Pitsowich [sic]?

A: No, sir.

Q: Did you try to hide it from them?

A: Yes, sir.

Q: Did VV help you cash checks at Rainbow?

A: Help me cash checks?

Q: Yes.

A: No, sir.

Q: Did she ever receive any funds from you?

A: No, sir.

Q: She didn't have anything to do with the embezzlement, did she?

A: No, sir.

Q: And neither did Dottie?

A: No, sir.[54]

Weight Watchers also presents a grand conspiracy theory, but like most conspiracy theories, it lacks a basis in reality. For example, it claims that Rainbow issued false W2-G's "suggesting she won the stolen money at the casino."[55] W2-G's are administrative reporting requirements imposed on casinos by the Internal Revenue Service ("IRS").[56] If a player wins a

[54] R. 472-73.

[55] Brief of Appellants, p. 5.

[56] http://www.irs.gov/pub/irs-pdf/fw2g.pdf

jackpot over a certain amount, that jackpot must be reported to the IRS.[57] Rainbow issued W2-G's when Belk hit a jackpot.[58] However, the W2-G's have nothing to do with the "net win" or amount a player walks out with at the end of the day.[59] For example, Belk testified that after she hit a jackpot, she would keep playing and usually lose the money.

> Q: After you hit that jackpot, would you cash out or would you keep playing?
>
> A: Kept playing.
>
> Q: Just because you got a W-2-G doesn't mean you walked out of the casino with that amount?
>
> A: Not necessarily. Sometimes I would walk out with more but not very often.[60]

Likewise, Belk testified that no Rainbow employee told her to declare a net gaming win on her federal income tax returns and that no Rainbow employee helped her launder money.[61] Moreover, Weight Watchers' money laundering argument clearly has nothing to do with whether Weight Watchers should have filed suit within three years of discovering Belk's embezzlement. Because of that, the trial court properly granted summary judgment.

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[57] R. 442 ("A: That was simply the money that I had to more or less claim on my income tax because Weight Watchers [sic] gave me the W-2 form. Q: The W-2-G came from the casino. A: Yes, sir.").

[58] R. 466-67.

[59] For example, many players who hit a jackpot keep gambling with those winnings. The player could later lose the jackpot amount, but the W2-G would have been issued anyway for the jackpot win.

[60] R. 467.

[61] R. 470-71 ("Q: So it is not like a Rainbow Casino employee told you to declare a net gaming win on your taxes or anything like that, is it? A: No, sir. Q: Okay. Did any Rainbow Casino employee help you launder money? A: No, sir. Q: I say that because Mr. Jacobs has alleged that Rainbow Casino helped you launder money. A: Oh, no, sir. ... Q: Do you know what money laundering means? A: It means to take dirty money and make it clean. Q: Were you engaged in that in cahoots with Rainbow Casino? A: No, sir.").

SUMMARY OF THE ARGUMENT

Weight Watchers discovered its injury – the conversion of funds by Dianne Belk – in December 2005, but did not file suit against either Rainbow or Belk herself until January 2009. Those facts are undisputed. While Weight Watchers claims that the statute of limitations should be tolled until it discovered the *cause* of its injury, the statute of limitations actually begins to run upon discovery of the *injury* itself – not discovery of the *cause* of the injury. *Angle v. Koppers, Inc.*, 42 So. 3d 1, 2 (Miss. 2010). Therefore, Weight Watchers' claims are facially time-barred by Mississippi's three-year statute of limitations.

Further, the statute of limitations was not tolled by the discovery rule or the continuing tort doctrine. The discovery rule does not apply to claims of conversion of negotiable instruments, which is the only claim Weight Watchers can state. *Smith v. Franklin Custodian Funds, Inc.*, 726 So. 2d 144, 148 (Miss. 1998). Each time Belk cashed an unauthorized check at Rainbow Casino, the funds were drawn on Weight Watchers' bank accounts. The act of conversion was complete each time the funds were taken out of those accounts. For the same reasons, the continuing tort doctrine does not toll the statute of limitations. *Smith*, 726 So. 2d at 148-49. The funds were gone from Weight Watchers' bank accounts each time the embezzled checks were cashed.

Rainbow did nothing to fraudulently conceal Belk's embezzlement. Had Weight Watchers checked on its bank accounts at any point during the nearly six- year period of Belk's embezzlement, it would have easily noticed that unauthorized checks were being cashed at Rainbow Casino. However, it failed to take even the most basic steps of diligence that would have alerted it to Belk's theft. It did not even file suit against Belk to recover the stolen funds within the three year period provided by the statute of limitations. Therefore, Weight Watchers cannot claim that Rainbow fraudulently concealed a cause of action from it. It is undisputed that

Rainbow did nothing to hide its cashing of Belk's checks and did nothing to hide that the funds were drawn on Weight Watchers' bank accounts. Without proof of an affirmative act of concealment by Rainbow and proof that Weight Watchers used reasonable diligence to discover Belk's conversion of funds, the fraudulent concealment statute cannot toll the statute of limitations. The period for filing suit on checks cashed in 2000 expired in 2003. Similarly, the period for filing suit on checks cashed in 2005 expired in 2008. All of which are well outside the three-year limitations period.

The simple fact is that Weight Watchers waited too long to pursue its claims. Even if its conspiracy theory were true, which Rainbow denies, Weight Watchers still filed suit over three years after Belk cashed her final embezzled check at Rainbow and over three years after Weight Watchers discovered that she was doing so. It could have discovered Belk's embezzlement at any time through an audit or a simple phone call to its bank, but did not have any financial controls in place and conducted no due diligence that would have alerted it to Belk's acitivties. Rainbow certainly did nothing to conceal Belk's embezzlement from Weight Watchers. Therefore, the trial court properly ruled that Weight Watchers' claims were time-barred, and its judgment should be affirmed.

ARGUMENT

I. Standard of Review

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Garlock Sealing Techs., LLC v. Pittman*, 2010 Miss. LEXIS 539 (Miss. Oct. 14, 2010) (citing Miss. R. Civ. P. 56(c)). Moreover, summary judgment "is appropriate when the non-moving party has failed to make a showing sufficient to establish the existence of an

element essential to the party's case, and on which that party will bear the burden of proof at trial." *Buckel v. Chaney*, 2010 Miss. LEXIS 578 (Miss. Nov. 4, 2010) (quoting *Watson Quality Ford, Inc. v. Casanova*, 999 So. 2d 830, 832 (Miss. 2008)). The moving party "bears the burden of persuading the trial judge that: (1) no genuine issue of material fact exists, and (2) on the basis of the facts established, he is entitled to judgment as a matter of law." *Angle,* 42 So. 3d at 4 (quoting *Palmer v. Biloxi Reg'l Med. Ctr., Inc.*, 564 So. 2d 1346, 1355 (Miss. 1990)). "[T]he nonmoving party cannot survive a motion for summary judgment by relying on a mere allegation or denial of material fact." *Id.* (quoting *Palmer,* 564 So. 2d at 1356). In other words, "the plaintiff may not rely solely upon unsworn allegations in the pleadings, or arguments and assertions in briefs or legal memoranda." *Id.*

II. The Discovery Rule Does Not Apply To Conversion Claims, and the Statute of Limitations Begins to Run on Discovery of the Injury.

As Weight Watchers admits, it is undisputed that it filed suit more than three years after Belk's embezzlement was discovered.[62] Nevertheless, Weight Watchers' first argument is that the statute of limitations was tolled by the discovery rule.[63] However, the discovery rule does not apply to conversion claims, and, even if it did, Weight Watchers' "injury" occurred the moment each embezzled check was cashed and the funds were taken from their bank accounts. Therefore, as Weight Watchers filed suit more than three years after the last embezzled check was cashed at Rainbow Casino, summary judgment was properly granted. They simply waited too long to file suit.

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[62] *See, e.g.*, Brief of Appellants, p. 6 ("Weight Watchers discovered Mrs. Belk's embezzlement on December 5, 2005, during an audit of the company books by an independent auditor.").

[63] Brief of Appellants, p. 11.

A. The Discovery Rule Does Not Apply to Claims Involving Conversion of Negotiable Instruments.

As the trial court stated, "[t]here is no disagreement among the parties that the Statute of Limitations governing this action is three (3) years, under Mississippi law."[64] Article 3 of Mississippi's adoption of the Uniform Commercial Code sets forth the applicable statute of limitations for the conversion of a negotiable instrument.

> (g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this chapter and not governed by this section must be commenced within three (3) years after the cause of action accrues.

MISS. CODE ANN. § 75-3-118. Weight Watchers sued Rainbow for conversion of negotiable instruments.[65] Therefore, the UCC's three-year statute of limitations applies, although the standard is equally applicable under Mississippi's catch-all statute of limitations, MISS. CODE ANN. § 15-1-49. *See Rankin v. Am. Gen. Fin., Inc.*, 912 So. 2d 725 (Miss. 2005) (claims of breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, negligent misrepresentation, fraudulent misrepresentation, and negligence are subject to a three-year statute of limitations pursuant to Miss. Code Ann. § 15-1-49).

The discovery rule does not apply to actions involving conversion of negotiable instruments. *See Smith,* 726 So. 2d at 148 ("We therefore hold that the discovery rule is inapplicable in actions involving conversion of negotiable instruments unless the defendant

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[64] R. 589.

[65] The only injury that Weight Watchers can point to is the conversion of funds by Dianne Belk by cashing checks at Rainbow Casino. Therefore, regardless of what terms Weight Watchers uses, "the Code governs here over common law forms of action. Once the checks were presented [] for deposit, the 'rights and responsibilities of the parties are determined by reference to the Mississippi Uniform Commercial Code.'" *Hancock Bank v. Ensenat*, 819 So. 2d 3, 9 (Miss. Ct. App. 2001); *see also Gallagher v. Santa Fe Federal Employees Federal Credit Union*, 52 P.3d 412 (N.M. Ct. App. 2002) (holding that the UCC's statute of limitations applicable to conversion claims also applied to claims for negligence, breach of fiduciary duty, money had and received, and in implied contract).

asserting the statute of limitations is involved in the fraudulent concealment."). That conclusion is logical – an owner is charged with knowledge of his property, and, by its nature, converting funds means that the funds are gone from the owner's account. *See Yarbro, Ltd. v. Missoula Federal Credit Union*, 50 P.3d 158, 162 (Mont. 2002) ("Two reasons often cited for rejecting the application of the discovery doctrine in conversion cases are the need for finality in transactions involving negotiable instruments, and the presumption that a property owner knows what and where his property is."). While the application of the rule may seem harsh, the responsibility for keeping track of accounts lies with the owner of that property, not a third party.

> Further, **the public would be poorly served by a rule that effectively shifts the responsibility for careful bookkeeping and employee supervision away from those in the best position to monitor accounts and employees [i.e., the employer]**. The strict application of the three-year statute of limitations, while predictably harsh in some cases, best serves the goals advanced by the Uniform Commercial Code.

Id. at 163 (emphasis added). *See also New Jersey Lawyers' Fund for Client Protection v. Pace*, 863 A.2d 402, 407 (N.J. Super. 2005) (quoting same language without citation).

Despite the existence of controlling authority to the contrary,[66] Weight Watchers devotes approximately four pages of its brief to the argument that the discovery rule does apply to its claims.[67] However, in doing so, it ignores the basic, undisputed facts of this case. In its Complaint, Weight Watchers alleged claims of fraud and misappropriation, unjust enrichment, conversion, and negligence against Rainbow,[68] but the only injury that Weight Watchers can actually point to is the *conversion of funds* by Dianne Belk by cashing checks at Rainbow Casino. As the trial court stated,

> Under Mississippi law, when Belk endorsed and cashed each embezzled check at Rainbow Casino and Rainbow deposited the checks drawn on Weight Watchers'

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[66] *Smith*, 726 So. 2d at 148.

[67] Brief of Appellants, pp. 11-14 and Argument Heading I.

[68] Complaint, R. 4-9.

> accounts, the alleged tort was complete. The funds were gone from Weight Watchers' bank account.[69]

Therefore, regardless of the name given to Weight Watchers' injury, the injury is properly deemed to be conversion.

Weight Watchers goes to great lengths to attempt to show that Rainbow helped Belk "launder" the stolen money, but not only is there no evidence of such, Weight Watchers *was not harmed* by any alleged "money laundering." The only *harm* or *injury* claimed by Weight Watchers is the fact that it no longer has funds stolen by Dianne Belk and cashed in the form of checks at Rainbow Casino. Therefore, regardless of what terms Weight Watchers uses, the only claim Weight Watchers can even begin to state against Rainbow is for conversion of negotiable instruments. *See Hancock Bank*, 819 So. 2d at 8 (holding that breach of contract, bad faith breach of contract, negligence, gross negligence and reckless disregard claims were properly treated as conversion claims, despite plaintiff's arguments to the contrary). And because the Mississippi Supreme Court has explicitly held that there is no discovery rule for claims involving the conversion of negotiable instruments, Weight Watchers' claims are time-barred because they filed suit over three years after discovering Belk's embezzlement.[70] *Smith*, 726 So. 2d at 148.

B. The Statute of Limitations Begins to Run Upon Discovery of the Injury, not Discovery of its Cause.

Not only does Weight Watchers ignore *Smith*, it also makes the argument that it had no way of knowing that it was injured by Rainbow, and therefore the statute of limitations should be tolled until it discovered the *cause* of its injury.[71] That position is contrary to the law. A recent Mississippi Supreme Court decision confirms that the statute of limitations begins to run on discovery of the *injury* itself – not discovery of the *cause* of the injury. In *Angle,* a toxic tort

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[69] R. 590.

[70] *See, e.g.*, Brief of Appellants, p. 12 ("Weight Watchers discovered that Dianne Belk had been embezzling funds on December 5, 2005, when it retained an independent auditor to review its books.")

case, the plaintiff filed suit over three years after her injury was discovered, but argued that her claims were not time-barred because the statute of limitations did not run until she discovered the cause of her injury. 42 So. 3d at 2. The defendants moved for summary judgment, arguing that all of the plaintiff's illnesses were diagnosed no later than 2001, approximately five years before she filed her complaint. *Id.* at 3. The Supreme Court agreed, holding that the statute of limitations begins to run when the injury is discovered.

> We find that the plain language of the statute supports Defendants' argument that the cause of action accrued upon discovery of the injury, *not discovery of the injury and its cause*. While not always a model of consistency, our caselaw supports this plain reading of the statute.

Id. at 5 (emphasis in original). In an analogous case, the Fifth Circuit Court of Appeals also held that the statute of limitations focuses on discovery of an injury, not discovery of its cause. *See Barnes ex rel. Barnes v. Koppers, Inc.*, 534 F. 3d 357, 360 (5th Cir. 2008).

Therefore, even if the discovery rule did apply to Weight Watchers' claims, it is of no help. Weight Watchers' injury – the funds being stolen from them – was discovered by December 2005 at the latest, and suit was not filed until January 2009.[72] In fact, Weight Watchers had every opportunity to discover the embezzlement prior to December 2005, but made the conscious decision to control costs and forgo audits or bank account reconciliations.[73] They did, however, discover the embezzlement in December 2005, and discovered that Belk had been cashing checks at Rainbow Casino in December 2005.[74] The fact that Weight Watchers waited three years to file suit against Dianne Belk herself offers further proof that Weight Watchers failed to timely pursue its claims. It had knowledge of the loss itself and knowledge of

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[71] *Id.* (emphasis added).

[72] R. 587-88.

[73] Supp. R. 54-55, 64, 103.

[74] Supp. R. 114 ("Q: You knew that Dianne was cashing -- cashing or converting into play, embezzled checks at Rainbow Casino in December 2005, correct? A: Yes.").

the cause of the loss. Applying the law to these facts, it is clear that the statute of limitations period has run and Weight Watchers is time-barred from pursuing its claims. *See Mitchell v. Progressive Ins. Co.*, 965 So. 2d 679, 683 (Miss. 2007) ("The primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time...[t]hese statutes are founded upon the general experience of society that valid claims will be promptly pursued and not allowed to remain neglected.").

Weight Watchers claims that it "had no knowledge, and absolutely no way of knowing through the exercise of reasonable diligence, about the causative relationship between the injury and the conduct of Rainbow."[75] But Weight Watchers misstates the law. "The focus is on the time that the [party] discovers, or should have discovered by the exercise of reasonable diligence, *that he probably has an actionable injury*." *Peavey Elecs. Corp. v. Baan U.S.A., Inc.*, 10 So. 3d 945, 951 (Miss. Ct. App. 2009) (quoting *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997, 1001 (Miss. 2004)) (emphasis added). The actionable injury was the theft of funds, and that injury occurred over three years prior to suit being filed. *See Angle*, 42 So. 3d at 7 ("No provision of Section 15-1-49 provides that a plaintiff must have knowledge of the cause of the injury before the cause of action accrues, initiating the running of the statute of limitations.").

Moreover, there is nothing latent about Weight Watchers' injury. Once Belk cashed the embezzled checks, the injury was complete. As Weight Watchers' own corporate representative and accountant testified, Rainbow certainly did nothing to hide the fact that it was depositing checks drawn on Weight Watchers' accounts.[76] Belk's embezzlement could have easily been discovered by reasonable methods, such as examining bank accounts or making a simple phone call to their banking representative. Weight Watchers chose not to do any investigation for

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[75] Brief of Appellants, p. 14.

[76] Supp. R. 98 ("Q: Okay. Now, you don't allege Rainbow did anything to conceal its own depositing or negotiating of the checks, do you? A: No.").

nearly six years. Its inaction has consequences, and that is why Weight Watchers is precluded by the statute of limitations from pursing these claims.

III. Weight Watchers Failed to Prove Fraudulent Concealment Because Rainbow Did Not Conceal Belk's Embezzlement and Weight Watchers Did Not Act With Reasonable Diligence in Discovering Its Injury.

Weight Watchers' second argument is that Rainbow "affirmatively aided in the concealment of Dianne Belk's criminal activity by helping her launder the stolen money."[77] In other words, Weight Watchers argues that it somehow could not discover Belk's embezzlement because of the actions of Rainbow. That argument is absurd, and the trial court properly rejected it.[78] Rainbow's timely presenting checks to Trustmark Bank for payment is hardly fraudulent concealment. Mississippi's fraudulent concealment statute states:

> If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

MISS. CODE ANN. § 15-1-67. An allegation of fraudulent concealment "requires proof of two elements: subsequent affirmative acts of concealment and due diligence." *Andrus v. Ellis*, 887 So. 2d 175, 181 (Miss. 2004). "That is, there must be some subsequent affirmative act by the defendant which was designed to prevent and which did prevent discovery of the claim...[p]roof of this act must also be coupled with proof that despite his or her due diligence, the plaintiff was unable to discover the claim." *Id.* (finding that the plaintiff failed to satisfy the elements of a fraudulent concealment claim).

First, Weight Watchers did not prove any affirmative act of concealment designed to prevent and which did prevent discovery of its claims. How did Rainbow prevent Weight

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[77] Brief of Appellants, p. 15.

[78] R. 590-91 ("Under the circumstances before the court, we do not find that WW proved that the Rainbow Defendants engaged in some act or conduct of an affirmative nature designed to prevent and did

Watchers from finding out that Belk was cashing embezzled Weight Watchers checks at its casino? Weight Watchers cannot seriously assert that Rainbow fraudulently concealed the fact that the embezzled checks were being negotiated at the casino.[79] In fact, Weight Watchers admitted that the checks negotiated at Rainbow were consistently honored by Trustmark Bank.[80] The fact that Weight Watchers did not make any minimal effort to manage its finances does not mean that Rainbow was fraudulently concealing the existence or negotiation of the checks. The law requires that Weight Watchers show that Rainbow prevented Weight Watchers, through some affirmative act, from discovering its cause of action. Instead, it has presented nothing but immaterial, conclusory, and unsupported allegations, and that is not enough to prove fraudulent concealment. *See Sanderson Farms, Inc. (Prod. Div.) v. Ballard*, 917 So. 2d 783, 790 (Miss. 2005) ("Merely alleging that the other side fraudulently concealed information simply will not suffice.").

Second, Weight Watchers has not proven that it used reasonable diligence in discovering the cause of action. In fact, the opposite is true. For the nearly six-year period that Dianne Belk embezzled funds, Weight Watchers failed to take <u>any</u> action that could have uncovered the embezzlement. Weight Watchers' owner, Robert Jacobs, never matched expenses and receipts or reconciled any accounts, and never asked his independent accountant to do so either.

> Q. So you never went through and matched expenses with receipts?
> A. No.

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prevent discovery of Plaintiffs' claim, nor that Plaintiffs acted with due diligence in attempting to discover the claim and was unable to do so.").

[79] R. 473 ("Q: You didn't get with any Rainbow Casino employee to try and conceal the fact that you were cashing these embezzled checks, did you? A: No, sir."); Supp. R. 98 ("Q: Okay. Now, you don't allege Rainbow did anything to conceal its own depositing or negotiating of the checks, do you? A: No.").

[80] Supp. R. 96-97.

Q. Did Veronica Strickland ever do that?
A. No.

Q. Did you ever ask her to?
A. No.[81]

The only financial controls in place at Weight Watchers were Jacobs' eyes; Jacobs' occasionally looked over the check register and occasionally looked over bank account statements.[82] A simple phone call, visit, or letter to Trustmark Bank would have shown Weight Watchers that Belk was cashing company checks at Rainbow. A review of its monthly bank statements would have revealed that Dianne Belk was writing checks to herself. Even fraudulent checks that were not made payable to Dianne Belk, such as checks payable to GMAC, Freddie Belk, Harry Douglas, and Julie Coleman, were not caught by Jacobs.[83] In fact, Weight Watchers discovered the embezzlement because of an external audit,[84] and such an audit would have uncovered the embezzlement at any time, had Weight Watchers actually conducted one during Belk's tenure. It only took the auditors a couple of hours to discover Belk's embezzlement.[85] Trustmark had records that company checks were being cashed at Rainbow Casino.[86] So did Weight Watchers, in the form of its monthly bank statements. Weight Watchers' auditors quickly discovered the embezzlement, and Rainbow did nothing to prevent Weight Watchers from performing an audit at any time. However, Weight Watchers never took even the most basic step of due diligence.

Tellingly, Weight Watchers does not even address the second prong of the fraudulent concealment test. It cannot argue that it used reasonable diligence in discovering Belk's

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[81] Supp. R. 64.

[82] Supp. R. 86, 108-109.

[83] Supp. R. 43 ("I never did see anything unusual with her name on it. I never saw anything that would be a red flag for me to – to say anything.").

[84] *See, e.g.*, Brief of Appellants, p. 6.

[85] Supp. R. 64.

[86] Supp. R. 98 ("Q: Do you allege that your banks did anything to conceal the fact that the funds were being drawn on your account? A: No.").

embezzlement or discovering that she was cashing embezzled checks at Rainbow Casino because it did *nothing* for nearly six years, just as it sat on its hands for over three years in allowing the statute of limitations to expire. After all, the burden to discover embezzlement from a checking account is not on the party giving value for the check. It is on the account holder – Weight Watchers. *See Yarbro, Ltd.*, 50 P.3d at 162.

Simply put, Weight Watchers has not presented any evidence of affirmative acts by Rainbow designed to conceal a cause of action. But even if there were evidence of such an affirmative act, Weight Watchers still could have "discovered" a cause of action by simple due diligence – reviewing its bank statements, calling the bank, having an independent audit, etc. well prior to December 5, 2005. They did none of these.

> While they do make allegations of fraudulent and negligent acts committed by [defendants], the plaintiffs make *no offering of any affirmative act* designed to conceal a cause of action. Even if there had been an allegation of an affirmative act designed to conceal the cause of action, it would make no difference because *the question would still be whether the alleged negligence was "discovered" for the purposes of the discovery rule.* The plaintiffs' claim of fraudulent concealment to toll the statute of limitations is without merit.

Channel v. Loyacono, 954 So. 2d 415, 423-24 (Miss. 2007) (emphasis added). Weight Watchers cannot prove that Rainbow undertook any affirmative act of concealment and cannot prove that it performed due diligence in investigating its losses. Therefore, as Weight Watchers is unable to prove fraudulent concealment, the three-year statute of limitations has run and its claims are time-barred.

IV. The Continuing Tort Doctrine Does Not Apply Because the Stolen Funds Were Gone From Weight Watchers' Accounts Each Time a Check was Cashed.

Weight Watchers' third argument is that even though the funds were gone from its bank accounts each time Dianne Belk cashed her embezzled checks, the "continuing tort" doctrine

tolled the statute of limitations.[87] However, as the trial court properly held, the continuing tort doctrine does not apply because each allegedly unauthorized check cashed at Rainbow constituted a separate act of conversion, as the funds were removed from Weight Watchers' accounts at the time the checks were cashed.[88]

The continuing tort doctrine does not apply to conversion actions. *Smith*, 726 So. 2d at 148-49 (the statute of limitations is not tolled "when harm reverberates from one wrongful act or omission."). The West Virginia Supreme Court stated it best: "[A] cause of action for the conversion of a negotiable instrument accrues at the time the check is negotiated." *Copier Word Processing Supply, Inc. v. WesBanco Bank, Inc.*, 640 S.E.2d 102, 111 (W.Va. 2006) (expressly holding that the equitable tolling theory of continuing torts does not apply to the conversion of multiple, separate negotiable instruments).

As stated above, the case law boils down to one simple concept: the statute of limitations began to run each time Belk cashed an embezzled check. For example, the period for filing suit on checks cashed in 2000 expired in 2003. Similarly, the period for filing suit on checks cashed in 2005 expired in 2008. She cashed her last check sometime prior to December 5, 2005.[89] Weight Watchers filed suit on January 9, 2009.[90] Therefore, as a matter of law, it is barred from recovering from Rainbow because the three-year limitations period expired in December 2008. Even if Weight Watchers had a claim against Rainbow, which Rainbow denies, that claim expired three years after each unauthorized check was cashed.

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[87] Brief of Appellants, p. 17.

[88] R. 590 ("The Court is of the opinion that there is no applicable discovery rule or continuing tort doctrine regarding the embezzlement committed by Dianne Belk.").

[89] Supp. R. 115.

[90] R. 4-9.

Weight Watchers attempts to confuse the issues by claiming that it was somehow injured when Rainbow issued allegedly bogus W2-G's to Dianne Belk, and that Belk and Rainbow "collusively participated" in concealing her activities when she filed her federal income tax returns.[91] That is absurd and has no support in the record. As stated above, even if Weight Watchers could prove that Rainbow was helping Belk launder her stolen money, which it cannot, it is not even possible for Rainbow to conceal the transfer of funds drawn on Weight Watchers' bank accounts. Every time Belk cashed an embezzled check at Rainbow Casino, the funds were drawn on Weight Watchers' accounts and were gone.

Weight Watchers had three years after it discovered the embezzlement to file suit. It chose to wait longer. Rainbow did nothing to conceal the fact that it negotiated the checks cashed at its casino.[92] Weight Watchers was represented by counsel for the entire three-year period.[93] It cannot be rewarded for waiting so long.

V. No Additional Discovery is Warranted Because Only Weight Watchers Could Prove Fraudulent Concealment, and It Cannot Do So.

Weight Watchers wants more time to take depositions and conduct discovery to try and create fact issues to defeat summary judgment. Unfortunately for it, no amount of further discovery can change the fact that the statute of limitations bars its claims. Mississippi courts often refuse to allow additional discovery where a dispositive motion has been filed. *See, e.g., Lewis v. Progressive Gulf Ins. Co., Inc.*, 7 So. 3d 955 n. 2 (Miss. Ct. App. 2009) (granting summary judgment and rejecting argument that plaintiffs needed more time to conduct discovery where law was clearly decisive on the outcome of the case); *Powe v. Roy Anderson Constr. Co.*,

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[91] Brief of Appellants, p. 18.

[92] Supp. R. 98.

[93] Supp. R. 47 (Jacobs retained Robert Drinkwater of the law firm of Brunini, Grantham, Grower & Hewes, PLLC shortly after the discovery of the embezzlement. He subsequently retained Scott Newton of the law firm Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, and then retained his present counsel).

910 So. 2d 1197, 1205 (Miss. Ct. App. 2005) (stating that summary judgment was not premature, even though the appellants claimed that they "did not yet have sufficient time to conduct discovery on outstanding fact issues" when law was clearly decisive on the outcome of the case); *Morton v. City of Shelby*, 984 So. 2d 323 (Miss. Ct. App. 2007) (granting summary judgment before ruling on plaintiff's motion to compel discovery where plaintiff provided no explanation as to what new information would be gleaned from deposition or how such information would bear on the issue of whether summary judgment was appropriate); *Johnston v. Palmer*, 963 So. 2d 586, 596 (Miss. Ct. App. 2007) (affirming summary judgment where plaintiff did not utilize Rule 56(f) to request additional time for discovery and only relied on vague assertions that discovery would produce needed, but unspecified, facts).[94]

In *Smith v. First Family Financial Services, Inc.*, 436 F. Supp. 2d 836 (S.D. Miss. 2006) (applying Mississippi law in a diversity case), a case very similar to the case at bar, the court held that the statute of limitations was not tolled by fraudulent concealment and that the plaintiffs were not entitled to a stay of summary judgment to conduct additional discovery. The plaintiffs alleged various tortious acts in connection with specific loan transactions. *Id.* at 840. In an effort to get around the statute of limitations, the plaintiffs argued fraudulent concealment, but the court found that the plaintiffs failed to identify any affirmative act of concealment by the defendants and found the plaintiffs failed to conduct due diligence in identifying the cause of action. *Id.* at 841. Further, in responding to the defendants' motion for summary judgment, the

[94] Other courts have also declined to grant more time to conduct discovery where either the discovery would be pointless or the plaintiff already had ample to conduct it. *See Hobgood v. Koch Pipeline Southeast, Inc.*, 769 So. 2d 838 (Miss. Ct. App. 2000) (affirming grant of summary judgment where motion filed two months after filing of complaint, and declining to extend time for discovery where plaintiff only made speculative allegations about what discovery might uncover); *Partin v. North Miss. Medical Center, Inc.*, 929 So. 2d 924 (Miss. Ct. App. 2005) (denying additional time for discovery before facing motions for summary judgment because plaintiff had five to six months to exercise the required diligence and failed to do so); *McQueen v. Williams*, 587 So. 2d 918 (Miss. 1991) (upholding grant of summary judgment and protective order staying discovery until dispositive motion ruled on).

plaintiffs requested the court delay ruling on the motion until plaintiffs had an opportunity to depose each of the defendants' corporate representatives. *Id.* Declining to grant a stay, the court held that the plaintiffs had not shown how the depositions could create a genuine issue of material fact, as the two prongs for fraudulent concealment *can only be proved by the plaintiffs.*

> Plaintiffs here have made no effort to meet the requirements of the rule; they have merely pointed out that each of them has been deposed and argued that in fairness, they should be allowed to depose defendants' corporate representatives. They do not explain, and it is not otherwise apparent, how the testimony of defendants' representatives could create a genuine issue of fact on the limitations issue where the issue comes down to whether plaintiffs could establish fraudulent concealment. *Only the plaintiffs themselves know whether any defendant did anything subsequent to the transaction that could qualify as affirmative concealment, and whether plaintiffs exercised the requisite diligence to discover their claims involves evaluation of plaintiffs own conduct and not of anything defendants may or may not have done.*

Id. at 842 (emphasis added). Weight Watchers is basically arguing that this Court should allow more time to conduct discovery to wait and "see" if something might develop later. That argument has been soundly rejected. *See Kerr-McGee Corp. v. Maranatha Faith Center, Inc.*, 873 So. 2d 103, 108 (Miss. 2004) ("Any desire by Kerr-McGee to withhold or reverse summary judgment because it 'might' show something at trial has previously been rejected by the courts.").

Applying the law to the facts of this case, it is clear from *Smith* and the other Mississippi cases cited above that Weight Watchers cannot prove fraudulent concealment and therefore a stay to conduct more discovery is unwarranted. Weight Watchers' corporate representatives admitted in their depositions that Rainbow did nothing to conceal the fact that Belk was cashing embezzled company checks at its casino,[95] and Weight Watchers' inadequate financial controls and lack of independent audits allowed Belk to get away with the embezzlement over a six-year period. Further, Weight Watchers never filed a Rule 56(f) affidavit.

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[95] Supp. R. 98.

Discovery regarding the unfounded allegations of "money laundering" is equally pointless. Weight Watchers filed suit for conversion of the funds embezzled by Belk, not money laundering.[96] No Mississippi case authorizes a civil action for money laundering, and the trial court explicitly rejected the "money laundering" theory.[97] Further, Weight Watchers alleges that Belk "lost at least $240,000 over the time period in question [at Rainbow Casino]"[98] and that Rainbow Casino "in fact received a significant portion of the funds stolen from the Plaintiffs,"[99] yet now Weight Watchers claims that Rainbow facilitated Belk's laundering of the money. Weight Watchers cannot have it both ways -- either Rainbow converted the money, or they laundered it and Belk kept it. The two theories are mutually exclusive. Either way, the statute of limitations has run, and no further amount of discovery can change that fact.

The trial court granted Rainbow's Motion for Summary Judgment, finding that the statute of limitations barred Weight Watchers claims.[100] The depositions requested by Weight Watchers *cannot* have any bearing on the fact that Belk's embezzlement could have been discovered at any time prior to December 5, 2005. Absolutely nothing in Rainbow's testimony could change those facts. Weight Watchers will always bear the burden of proving fraudulent concealment, and it has failed to do so. Therefore, conducting additional discovery and depositions is an exercise in futility and only serves to needlessly run up costs and expenses, and is prohibited by the Mississippi cases cited above.

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[96] *See*, generally, Complaint, R. 4-9.

[97] R. 591.

[98] R. 6 ¶ 10.

[99] R. 6, ¶ 11.

[100] R. 591.

CONCLUSION

Regardless of the arguments made and conspiracies alleged by Weight Watchers, three things are both undisputed and dispositive. Weight Watchers discovered Dianne Belk's embezzlement in December 2005; Weight Watchers filed suit over three years later, in January 2009; and Rainbow did nothing to conceal the fact that Belk was cashing checks at its casino. Under those facts, there is no doubt that the statute of limitations bars Weight Watchers' claims. Further, as the discovery rule and continuing tort doctrine do not apply to claims for the conversion of negotiable instruments, each check constituted a separate tort, and each check had its own three-year limitations period. Therefore, at the very latest, the limitations period expired in December 2008, and, as a matter of law, Weight Watchers is barred from asserting its claims against Rainbow.

Belk was able to steal from her employer for nearly six years because Weight Watchers did not make the slightest effort to discover her theft. Grantham Poole auditors discovered Belk's embezzlement within hours of beginning their audit, but Weight Watchers turned a blind eye for six years. Weight Watchers' owner, Robert Jacobs, never matched expenses and receipts or reconciled any accounts, and never asked his independent accountant to do so either. An audit would have uncovered the embezzlement at any time, but Weight Watchers never conducted one during Belk's tenure. A simple phone call, visit, or letter to Trustmark Bank would have likewise discovered Belk's embezzlement, but Weight Watchers never took even the most basic step of due diligence. The blame for not catching Belk's theft lies squarely with Weight Watchers, not Rainbow Casino.

Based on the foregoing, Rainbow Casino-Vicksburg Partership, L.P. and Bally Technologies, Inc. urge this Honorable Court to affirm the Hinds County Circuit Court's grant of summary judgment.

This the 24th day of November, 2010.

RAINBOW CASINO-VICKSBURG PARTNERSHIP, L.P. and BALLY TECHNOLOGIES, INC.

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MISSISSIPPI STATUTES CITED

Pursuant to Miss. R. App. P. 28(f), Appellees rely on the following Mississippi statutes in support of their brief and have attached said statutes to their brief:

MISS. CODE ANN. § 75-3-118

MISS. CODE ANN. § 15-1-49

MISS. CODE ANN. § 15-1-67

1 of 1 DOCUMENT

MISSISSIPPI CODE of 1972 ANNOTATED

*** Current through the 2010 2nd Extraordinary Session ***
*** State Court Annotations current through April 15, 2010 ***

TITLE 75. REGULATION OF TRADE, COMMERCE AND INVESTMENTS
CHAPTER 3. UNIFORM COMMERCIAL CODE -- NEGOTIABLE INSTRUMENTS
PART 1. GENERAL PROVISIONS AND DEFINITIONS

GO TO MISSISSIPPI STATUTES ARCHIVE DIRECTORY

Miss. Code Ann. § 75-3-118 (2010)

§ 75-3-118. Statute of limitations

(a) Except as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the note or, if a due date is accelerated, within six (6) years after the accelerated due date.

(b) Except as provided in subsection (d) or (e), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six (6) years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten (10) years.

(c) Except as provided in subsection (d), an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three (3) years after dishonor of the draft or ten (10) years after the date of the draft, whichever period expires first.

(d) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within three (3) years after demand for payment is made to the acceptor or issuer, as the case may be.

(e) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six (6) years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.

(f) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (i) within six (6) years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or (ii) within six (6) years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this chapter and not governed by this section must be commenced within three (3) years after the cause of action accrues.

HISTORY: SOURCES: Former § 75-3-118: Codes, 1942, § 41A:3-118; Laws, 1966, ch. 316, § 3-118; Laws, 1992, ch. 420, § 18, eff from and after January 1, 1993.

1 of 1 DOCUMENT

MISSISSIPPI CODE of 1972 ANNOTATED

*** Current through the 2010 2nd Extraordinary Session ***
*** State Court Annotations current through April 15, 2010 ***

TITLE 15. LIMITATIONS OF ACTIONS AND PREVENTION OF FRAUDS
CHAPTER 1. LIMITATION OF ACTIONS

GO TO MISSISSIPPI STATUTES ARCHIVE DIRECTORY

Miss. Code Ann. § 15-1-49 (2010)

§ 15-1-49. Limitations applicable to actions not otherwise specifically provided for

(1) All actions for which no other period of limitation is prescribed shall be commenced within three (3) years next after the cause of such action accrued, and not after.

(2) In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.

(3) The provisions of subsection (2) of this section shall apply to all pending and subsequently filed actions.

HISTORY: SOURCES: Codes, 1880, § 2669; 1892, § 2737; 1906, § 3097; Hemingway's 1917, § 2461; 1930, § 2292; 1942, § 722; Laws, 1989, ch. 311, § 3; Laws, 1990, ch. 348, § 1, eff from and after passage (approved March 12, 1990).

1 of 1 DOCUMENT

MISSISSIPPI CODE of 1972 ANNOTATED

*** Current through the 2010 2nd Extraordinary Session ***
*** State Court Annotations current through April 15, 2010 ***

TITLE 15. LIMITATIONS OF ACTIONS AND PREVENTION OF FRAUDS
CHAPTER 1. LIMITATION OF ACTIONS

GO TO MISSISSIPPI STATUTES ARCHIVE DIRECTORY

Miss. Code Ann. § 15-1-67 (2010)

§ 15-1-67. Effect of fraudulent concealment of cause of action

If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.

HISTORY: SOURCES: Codes, 1857, ch. 57, art. 14; 1871, § 2158; 1880, § 2679; 1892, § 2749; 1906, § 3109; Hemingway's 1917, § 2473; 1930, § 2312; 1942, § 742.

CERTIFICATE OF SERVICE

I, undersigned counsel, attorney for Appellees, certify that I have this day filed via hand delivery, an original and three (3) copies of this Brief of the Appellee with the Mississippi Supreme Court Clerk and have served a copy of same by United States mail, with postage prepaid, on the following persons at the following:

The Honorable Tomie T. Green
Hinds County Circuit Court
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This the 24th day of November, 2010.

Quin H. Breland, IV