IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE 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

PLAINTIFFS-APPELLANTS

VS.

DIANNE BELK, ROBERT F. BELK, JR., RAINBOW CASINO-VICKSBURG PARTNERSHIP, L.P., BALLY TECHNOLOGIES, INC. and JOHN DOE DEFENDANTS (1) – (5).

DEFENDANTS-APPELLEES

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

ON APPEAL FROM THE FIRST JUDICIAL DISTRICT OF THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

Wilson H. Carroll (MB N[redacted]
ATTORNEY FOR PLAINTIFFS – APPELLANTS WW, INC. d/b/a WEIGHT WATCHERS OF GREATER MISSISSIPPI and BJM INC. d/b/a WEIGHT WATCHERS OF SOUTHERN ALABAMA AND FLORIDA PANHANDLE

OF COUNSEL:

WYATT, TARRANT & COMBS, LLP
4450 Old Canton Road, Ste. 210
Jackson, Mississippi 39211
(T) 601-987-5300
(F) 601-987-5353

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE 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 — PLAINTIFFS-APPELLANTS

VS.

DIANNE BELK, ROBERT F. BELK, JR., RAINBOW CASINO-VICKSBURG PARTNERSHIP, L.P., BALLY TECHNOLOGIES, INC. and JOHN DOE DEFENDANTS (1) – (5).

DEFENDANTS-APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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. WW, Inc. d/b/a Weight Watchers of Greater Mississippi, Plaintiff-Appellant;

2. BJM Inc. d/b/a Weight Watchers of Southern Alabama and Florida Panhandle, Plaintiff-Appellant;

3. Wilson H. Carroll
WYATT, TARRANT & COMBS, LLP;

Counsel for Plaintiffs-Appellants;

4. Dianne Belk, Defendant;

5. Robert Belk, Jr., Defendant;

6. Rainbow Casino-Vicksburg Partnership, L.P., Defendant-Appellee;

7. Bally Technologies, Inc., Defendant-Appellee;

8. William L. Smith
Quin H. Breland
BALCH & BINGHAM, LLP

Counsel for Defendants-Appellees

Wilson H. Carroll (MB No. [redacted])

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE 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 — PLAINTIFFS-APPELLANTS

VS.

DIANNE BELK, ROBERT F. BELK, JR., RAINBOW CASINO-VICKSBURG PARTNERSHIP, L.P., BALLY TECHNOLOGIES, INC. and JOHN DOE DEFENDANTS (1) – (5).

DEFENDANTS-APPELLEES

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Mississippi Rule of Appellate Procedure 34, Plaintiffs 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") respectfully submit that oral argument would assist the Court in determining the questions raised on this appeal.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE 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 — PLAINTIFFS-APPELLANTS

VS.

DIANNE BELK, ROBERT F. BELK, JR., RAINBOW CASINO-VICKSBURG PARTNERSHIP, L.P., BALLY TECHNOLOGIES, INC. and JOHN DOE DEFENDANTS (1) – (5). — DEFENDANTS-APPELLEES

STATEMENT OF THE ISSUES

On December 5, 2005 Weight Watchers[1] discovered that its bookkeeper, Dianne Belk, had embezzled over $921,000.00. Over the course of the next two years the company gathered more information regarding her *modus operandi,* leading to the discovery that Rainbow Casino had facilitated her criminal activity through money laundering – i.e., by providing her with tax documents (Form W2-G) suggesting that she had won the stolen funds by gambling at Rainbow. The W2-G forms were false.

Weight Watchers filed suit on January 9, 2009, less than three years after it discovered Rainbow's wrongful conduct. Nevertheless, Rainbow filed its motion for summary judgment on two grounds – expiration of the statute of limitations and holder in due course. The Circuit Court of the First Judicial District of Hinds County, Honorable Tomie Green, concluded Weight

[1] WW, Inc. and BJM, Inc. are affiliated companies which operate Weight Watchers franchises in Mississippi, Southern Alabama and the Florida Panhandle. They are jointly referenced herein as "Weight Watchers."

Watchers' lawsuit was barred by Mississippi's three-year statute of limitations and granted Rainbow's Motion for Summary Judgment.

The issues on appeal are:

1. Does the three-year statute of limitation set forth in Article 3 of the UCC (Miss. Code Ann. §75-3-118) bar Weight Watchers' lawsuit against Rainbow Casino and its general partner, Bally Technologies, Inc.?

2. Was the three-year statute of limitations tolled by Mississippi's fraudulent concealment statute (Miss. Code Ann. §15-1-67)?

3. Did the "continuing tort" doctrine toll the statute of limitations for wrongful acts occurring beyond the statute of limitations period, when those acts were part of a continuing and repeated injury such as those in this case?

4. Was summary judgment granted prematurely in light of Rainbow's failure to cooperate in discovery (as demonstrated by Weight Watchers' pending Motion to Compel)?

STATEMENT OF THE CASE

Between January 1, 2000 and December 5, 2005, Dianne Belk embezzled over $921,000.00 from Weight Watchers. Her *modus operandi* was to write bogus checks on the companies' accounts to herself, then record the checks in the company ledgers as payments to legitimate vendors. She cashed hundreds of these bogus checks at one place -- Rainbow Casino in Vicksburg, Mississippi.[2] Later, she would remove these checks from the bank statements and destroy them, so her employer would not see them.

Dianne Belk was close personal friends with two key members of Rainbow's management, one the Executive V.I.P. Host (Dottie Smith) and the other the Assistant General Manager and Director of Finance (Vivian Piskovitz).[3] These two Rainbow employees collaborated with Dianne to make sure she cashed as many stolen checks at Rainbow as possible. Rainbow profited handsomely from the arrangement, and Dottie Smith actually received a portion of the stolen funds from Dianne Belk. R. 129-30.

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 to verify that the checks were legitimate. Rainbow cashed the checks under procedures reserved for payroll checks, (Supp. R. 117) despite the fact that Belk regularly presented multiple checks in a single week, and on many occasions multiple checks in a single *day* (R. 562).[4] Moreover,

---

[2] Rainbow Casino is owned and operated by Rainbow Casino-Vicksburg Partnership, L.P., of which Bally Technologies, Inc. is the general partner. For simplicity's sake, Plaintiffs will refer to both of these entities herein collectively as "Rainbow" or "Rainbow Casino."

[3] Ms. Piskovitz has since been promoted to the position of General Manager. Dottie Smith was fired by Rainbow for spurious reasons approximately ten days after this lawsuit was filed, after over ten years of loyal employment.

[4] Rainbow's Motion for Summary Judgment was supported by the affidavit of Vivian Piskovitz, falsely denying that Diane Belk ever cashed more than one check in a 24-hour period. Plaintiffs refuted this

Rainbow affirmatively facilitated Mrs. Belk's criminal activity by issuing tax documents (W2-G's) suggesting she won the stolen money at the casino – money laundering in its purest and simplest form. R. 494-495.

Under federal law casinos have an affirmative obligation to detect and prevent money laundering. Specifically, the Federal Bank Secrecy Act imposes special rules on casinos, requiring them to implement strict anti-money-laundering compliance programs. *See* 31 C.F.R. §103.64 (R. 57, 64-65). At a minimum, this compliance program must include:

(i) A system of internal controls to assure ongoing compliance;

(ii) Internal and/or external independent testing for compliance;

(iii) Training of casino personnel including training in the identification of unusual or suspicious activities;

(iv) A designated individual or individuals to assure day-to-day compliance;

(v) Procedures for using all available information to determine . . . [t]he occurrence of any transactions required to be reported . . . .

(vi) For casinos that have automated data processing systems, the use of automated programs to aid in assuring compliance.

31 C.F.R. §103.64. After the events giving rise to this lawsuit, the Internal Revenue Service conducted an audit of Rainbow's anti-money laundering programs and determined that Rainbow was guilty of *eight* different violations of these regulations. R. 212-216.

Weight Watchers produced the affidavit of a casino industry expert addressing the implications of Rainbow's failure to comply with federal anti-money laundering regulations and failure to meet minimum industry standards in this regard. R. 559-561. This expert noted that,

---

falsehood in their Supplemental Response to Motion for Summary Judgment by attaching copies of multiple checks cashed on single days and calendars reflecting the frequency of this practice. R. 562-581

> An embezzler seeking to create the appearance that stolen money was obtained legally could do so by cashing stolen checks at the casino, gambling on the premises, and then obtaining payment from the casino which would then be categorized as "gaming win" for income tax purposes. Because this would constitute money laundering, casinos have an affirmative duty to take reasonable steps to detect and prevent such activity.

R. 559. The expert noted numerous circumstances which should have triggered suspicion on Rainbow's part, including (1) the fact that Dianne Belk was cashing "payroll checks" at irregular intervals,[5] (2) the fact that Dianne Belk was cashing "payroll checks" in inconsistent amounts, and (3) the total value of "payroll checks" cashed by Dianne Belk greatly exceeded her reasonable compensation as a bookkeeper. R. 560. He noted that Rainbow's Internal Controls never required the casino to take the simple, rudimentary step of contacting either the bank or the employer to confirm a check's authenticity, *"no matter what degree of suspicious circumstances might exist."* R. 560. He concluded that Rainbow's failure to either call the bank or call Weight Watchers directly, under the circumstances listed above, "did not meet minimum casino industry standards for check cashing and prevention of money laundering." R. 561.

Rainbow profited handsomely from the arrangement, though. Mrs. Belk was a gambling addict and, according to her testimony as well as Rainbow's own player tracking reports, she ultimately lost the vast majority of the stolen money gambling at Rainbow. R. 450.

Weight Watchers discovered Mrs. Belk's embezzlement on December 5, 2005, during an audit of the company books by an independent auditor. The auditors reviewed copies of the forged checks and determined that Mrs. Belk had cashed many of them at Rainbow, as well as at Trustmark National Bank and other places. R. 545. There was nothing on the face of the checks

[5] A review of the checks cashed by Dianne Belk at Rainbow reveals multiple occasions where Mrs. Belk actually cashed multiple "payroll checks" at Rainbow *in a single day*. R. 562.

which might lead Weight Watchers, or any reasonable person, to suspect any further involvement by Rainbow.

The process by which Weight Watchers discovered Rainbow's wrongdoing took place over an extended period of time. Nearly five weeks after Weight Watchers discovered Mrs. Belk's embezzlement (at the very earliest on January 13, 2006, within the three year statute of limitations) she provided them with copies of her federal income tax returns for only a few of the years during which the embezzlement occurred. R. 223-259. According to her deposition testimony, Mrs. Belk filed her final tax return incorporating the bogus W2-G's in late 2006, but she never provided Weight Watchers with a copy of this return. R. 496. The returns did not include copies of W2's, W2-G's or any other supporting documents, and only included vague references to "gambling losses" and "Form W2-G" (R. 225, 228, 231, 236, 240, 243, 252). There was only a single vague reference to winning $1,000.00 at Rainbow in 2003. R. 252.

Although none of the documents available to Weight Watchers in December 2005 or early January 2006 suggested a direct link between Rainbow and Dianne Belk's wrongful acts, one of Dianne Belk's co-employees (Patricia Honeycutt) was aware of Dianne's close relationship with a key Rainbow employee, Executive V.I.P. Host Dottie Smith. This employee personally witnessed Dottie and Dianne interacting at parties and other social events, including trips to Rainbow where Dottie introduced her to Dianne. This information suggested, at best, a claim against Rainbow based on its vicarious liability for the wrongful acts of its employee. Weight Watchers had no idea at all of Rainbow's role in laundering the stolen funds, or of Dianne Belk's relationship to Rainbow's Assistant General Manager and Director of Finance, until Mrs. Belk testified about this relationship during her deposition.

Weight Watchers filed its lawsuit in Hinds County Circuit Court against Dianne Belk, her husband (who received a portion of the stolen funds), Rainbow Casino-Vicksburg Partnership,

L.P. and Bally Technologies, Inc. on January 9, 2009. The Complaint alleged, *inter alia*, that the Defendants colluded to defraud Weight Watchers and misappropriate funds belonging to them; were unjustly enriched at Weight Watchers' expense; and committed negligence and/or gross negligence. R. 7-8.

Throughout the course of the litigation Rainbow refused to produce relevant documents and refused to allow the deposition of a crucial witness. Weight Watchers propounded multiple sets of interrogatories and requests for production to Rainbow seeking, among other things, copies of all of the W2-G's issued by Rainbow to Dianne Belk (R. 296-302), documents which would demonstrate Rainbow's failure to comply with federal anti-money laundering laws (R. 332-334) and documents which would demonstrate Rainbow's knowledge of similar criminal activity on its premises (R. 344-347). Weight Watchers also sought to depose Vivian Piskovitz, who was Dianne Belk's close personal friend and is clearly the most knowledgeable person with regard to Rainbow's compliance, or lack thereof, with federal anti-money laundering laws. (R. 360-361). Rainbow steadfastly refused to provide any of the documents requested and refused to allow Weight Watchers to depose Ms. Piskovitz, despite the fact that Weight Watchers noticed her deposition and no protective order was ever obtained. Consequently, on September 25, 2009, Weight Watchers filed its motion to compel. R. 282-368.

Rainbow's refusal to allow the deposition of Vivian Piskovitz deprived Weight Watchers of the opportunity to obtain crucial testimony directly relevant to the issues of discovery and tolling. At a very minimum a deposition could have established the falsehood of key statements in her affidavit. For example, she stated in her affidavit that "Dianne Belk never cashed more than one check in a 24 hour period," (Supp. R. 117) but an examination of Mrs. Belk's check-cashing history proves this is flatly untrue. (R. 562-580). Mrs. Piskovitz stated in her affidavit that "Rainbow handled the embezzled Weight Watchers checks in the same manner it handles all

employer-issued checks," (Supp. R. 117), but fails to identify any part of Rainbow's Internal Controls which would have authorized the cashing of multiple payroll checks from a single individual in a single day. Most important, Mrs. Piskovitz utterly failed to address Rainbow's practice of facilitating money-laundering through the issuance of bogus tax documents to embezzlers like Dianne Belk.

On August 18, 2009, Rainbow filed a Motion for Summary Judgment, seeking dismissal of Weight Watchers' lawsuit on two grounds, (1) expiration of the three-year statute of limitations, and (2) Rainbow's status as a "holder in due course" under Mississippi's version of the U.C.C. R. 50-52.[6] Weight Watchers filed its Response on September 14, 2009, and then, after deposing Dianne Belk in prison and obtaining the affidavit of an expert in casino cage management and financial controls, filed a Supplemental Response on December 10, 2009.

On January 26, 2010, the Circuit Court of Hinds County issued its Order Granting Defendants' Motion for Summary Judgment and Judgment of Dismissal. R. 586-592. The Trial Court ignored Weight Watchers' pending Motion to Compel and based its decision entirely on the three-year statute of limitations set forth under Miss. Code Ann. §75-3-118, holding specifically that "there is no applicable discovery rule or continuing tort doctrine" which would toll the statute. R. 590. The Trial Court reached a factual conclusion properly reserved for the jury, declaring "we do not find that [Weight Watchers] proved that the Rainbow Defendants engaged in some act or conduct of an affirmative nature designed to prevent and did prevent [sic] discovery of Weight Watchers' claim . . ." Finally, the Trial Court held that Weight Watchers' "arguments that Defendant Rainbow was involved in 'money laundering' with Dianne Belk, and

[6] The Trial Court's Order did not address Rainbow's holder-in-due-course argument, although both sides fully briefed the issue.

that 'money laundering' was, by definition, fraudulent concealment, has no merit in fact or under Mississippi law." R. 591.

Weight Watchers timely appealed.

SUMMARY OF THE ARGUMENT

The "discovery rule" tolled the statute of limitations in this case, which clearly involves both a latent injury (Weight Watchers was precluded from discovering the harm because of the secretive nature of the wrongdoing in question) and allegations of negligence and gross negligence on the part of Rainbow Casino. The Circuit Court was manifestly wrong in concluding otherwise. The fact that Weight Watchers discovered Dianne Belk's wrongdoing at an earlier date did not trigger the statute of limitations on Rainbow's wrongful acts, which were only discovered later.

The statute of limitations was also tolled by Mississippi's fraudulent concealment statute (Miss. Code Ann. §15-1-67), which requires "some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim." *Stephens v. Equitable Life Assurance Society,* 850 So.2d 78, 83-84 (Miss. 2003). The affirmative acts undertaken by Dianne Belk and Rainbow Casino to prevent discovery of their wrongful acts occurred at three distinct stages; (1) the embezzlement and concomitant "cooking of the books" by Dianne Belk, (2) the issuance of fraudulent tax documents by Rainbow Casino falsely suggesting that Dianne Belk won the stolen funds on its premises, and (3) the filing of fraudulent federal income tax returns incorporating the bogus Rainbow W2-G's. Rainbow Casino and Dianne Belk were clearly in privity, and each one of these stages constituted an "affirmative act of concealment" sufficient to trigger the tolling provisions of Miss. Code Ann. §15-1-67.

To the extent many of the bogus checks were written long before the Defendants' embezzlement and money laundering scheme was uncovered, the "continuing tort" doctrine acts

to toll the statute of limitations for those earlier wrongful acts. At a minimum, there are conflicting arguments about when Weight Watchers should have discovered their injury, leaving that factual question open for trial.

Additionally, summary judgment was premature due to Rainbow's failure to cooperate in discovery. The Circuit Court expressly incorporated factual findings (such as its determination that Rainbow engaged in "no act or conduct of an affirmative nature designed to prevent . . . discovery of Weight Watchers' claim") which could have been refuted through additional discovery. In fact, this need for additional discovery was precisely at issue in Weight Watchers' pending Motion to Compel, which the Circuit Court simply ignored.

ARGUMENT

I. THE DISCOVERY RULE OPERATES TO TOLL THE STATUTE OF LIMITATIONS AGAINST RAINBOW CASINO.

The "discovery rule" operates to toll the statute of limitations until "a plaintiff should have reasonably known of some negligent conduct, even if the plaintiff does not know with absolute certainty that the conduct was legally negligent." *Peavey Electronics Corp. v. Baan U.S.A., Inc.* 10 So.3d 945, 950 (Miss.App. 2009), citing *Boyles v. Schlumberger Tech. Corp.*, 832 So.2d 503, 506 (Miss. 2002); *Sarris v. Smith,* 782 So.2d 721, 725 (Miss. 2001). The statute of limitations begins to run "when the [plaintiff] can reasonably be held to have knowledge of the injury itself, the cause of the injury, and the causative relationship between the injury and the conduct of the [defendant]." *Sarris,* 782 So.2d at 723 (quoting *Smith v. Sanders,* 485 So.2d 1051, 1052 (Miss.1986)).

The discovery rule's application has been greatly expanded over time. *See Barnes v. Singing River Hosp. Sys.,* 733 So.2d 199 (Miss.1999) (Mississippi Tort Claims Act); *Georgia Pacific Corp. v. Taplin,* 586 So.2d 823 (Miss.1991) (workers compensation); *Staheli v. Smith,* 548 So.2d 1299 (Miss.1989) (defamation). "At issue in all cases however, is when the plaintiff

discovers their injury or disease." *Sweeney v. Preston,* 642 So.2d 332, 334 (Miss.1994). In making this determination the *Sweeney* Court noted,

> [K]nowledge that there exists a causal relationship between the negligent act and the injury or disease complained of *is essential* because it is well-established that prescription does not run against one who has neither actual nor constructive notice of the facts that would entitle him to bring an action.

Id. (emphasis added). Whether the plaintiff knew about the injury has typically been reserved as a jury question. *Barnes,* 733 So.2d at 205; *Owens-Illinois, Inc. v. Edwards,* 573 So.2d 704, 709 (Miss. 1990); *PPG Architectural Finishes, Inc. v. Lowery,* 909 So.2d 47, 50 (Miss.2005).

Weight Watchers discovered that Dianne Belk had been embezzling funds on December 5, 2005, when it retained an independent auditor to review its books. It discovered that Mrs. Belk had written hundreds of checks to herself on the company bank accounts and then made fraudulent entries in the company ledgers reflecting payments to legitimate vendors. When the monthly statements were received from the bank, Mrs. Belk would remove the copies of the fraudulent checks which she wrote to herself and proceed to "balance" the books.

Once the scheme was uncovered Weight Watchers obtained additional copies of the fraudulent checks from their bank. By reviewing these copies it learned that Mrs. Belk had been cashing them at numerous places, including both Trustmark Bank and Rainbow Casino. However, that is all it could determine at that point in time from a review of the checks. Weight Watchers had absolutely no way of knowing anything more about Rainbow's involvement in facilitating Mrs. Belk's criminal activities. As far as Weight Watchers could tell from a review of the checks, Rainbow did nothing more than Trustmark Bank, i.e., it provided Mrs. Belk with the requisite funds after she properly identified herself. There was absolutely nothing on the face of the checks which could provide Weight Watchers with knowledge of any causal relationship between any negligent or wrongful act of Rainbow and the injury which they had sustained.

Weight Watchers only obtained incomplete copies of Dianne Belk's income tax returns on January 13, 2006, and even then there was nothing on the face of these documents which any reasonable person would take as evidence of Rainbow's integral role in her embezzlement scheme. These documents did not include any copies of W2-G's which Rainbow provided to Dianne, or any other information which would indicate that Rainbow Casino had helped Mrs. Belk launder the stolen money. Nothing in the evidence discovered by the independent auditors, or anything contained in the incomplete tax returns, gave Weight Watchers notice of any facts, actual or constructive, which would entitle it to bring an action against Rainbow.

Check cashing and laundering money are two very different things – Trustmark Bank cashed the forged checks during the same time frame in which Rainbow did, but Trustmark Bank did nothing more than that to actually facilitate the embezzlement scheme. Rainbow, on the other hand, went much further by providing Mrs. Belk with a seemingly legitimate, but totally fraudulent, explanation for where she obtained such large sums of money. At the end of the day, because Mrs. Belk became an addictive gambler, Rainbow ended up with most of the stolen money in its own coffers.

The discovery rule generally only applies in cases involving both negligence and latent injury. *Peavey* at 951. Among other things, Weight Watchers specifically alleges that Rainbow was both negligent and grossly negligent, so the first prong of this test has been met. A latent injury is defined as one where the "plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question ... [or] when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." *PPG Architectural Finishes, Inc. v. Lowery*, 909 So.2d 47, 50 (Miss., 2005) (citing *Donald v. Amoco Prod. Co.*, 735 So.2d 161, 168 (Miss.1999); *Staheli*, 548 So.2d at 1303; *Smith v. Sneed*, 638 So.2d 1252, 1257 (Miss.1994)).

To be latent, an injury must be "undiscoverable by reasonable methods." *Lowery* at 51. "[T]o claim benefit of the discovery rule, a plaintiff must be reasonably diligent in investigating the circumstances surrounding the injury. The focus is on the time that the [plaintiff] discovers, or should have discovered by the exercise of reasonable diligence, that he probably has an actionable injury." *Wayne Gen. Hosp. v. Hayes,* 868 So.2d 997, 1001 (Miss. 2004).

Prior to obtaining copies of Dianne Belk's tax returns there were no "reasonable methods" by which Weight Watchers could have learned that Rainbow Casino contributed to its loss by helping Dianne Belk launder its stolen money. Without the tax returns, as far as Weight Watchers knew Rainbow Casino and Trustmark Bank stood in exactly the same shoes, and there was no basis for alleging wrongdoing by either party. Weight Watchers 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. *Peavey* at 950. There is no dispute that Weight Watchers obtained these tax returns at the very earliest on January 13, 2006, and filed their lawsuit against Rainbow on January 9, 2009, less than three years later. Even though Weight Watchers discovered Dianne Belk's embezzlement on December 5, 2005, the discovery rule tolled the statute of limitations on their claim against Rainbow until at least January 13, 2006.

II. THE STATUTE OF LIMITATIONS IS TOLLED BY MISSISSIPPI'S FRAUDULENT CONCEALMENT STATUTE (MISS. CODE ANN. §15-1-67(1995).

The Mississippi Fraudulent Concealment Statute reads as follows:

> 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 (1995). This Court has held that fraudulent concealment requires "some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim." *Stephens v. Equitable Life Assurance Soc'y,* 850 So.2d 78, 83-84 (Miss.2003) (quoting *Reich v. Jesco, Inc.,* 526 So.2d 550, 552 (Miss.1988)). To toll the statute of limitations, a plaintiff must demonstrate: "(1) that [the defendant] engaged in affirmative acts of concealment, and (2) despite investigating with due diligence, [the plaintiff] was unable to discover the claim." *Nygaard v. Getty Oil Co.,* 918 So.2d 1237, 1242 (Miss. 2005).

Rainbow affirmatively aided in the concealment of Dianne Belk's criminal activity by helping her launder the stolen money. In its Supplemental Response to Rainbow's Motion for Summary Judgment Weight Watchers provided the affidavit of Mr. Steve Warner, a 30-year casino industry veteran and expert in the area of casino cage and financial management. R. 558-561. Among other things, Mr. Warner described the process of money laundering in casinos:

> The industry practices and commercial standards followed by casinos in cashing checks and preventing money laundering are based on Title 31 of the Federal Bank Secrecy Act and the regulations adopted pursuant thereto. Title 31 requires casinos to take affirmative steps to identify suspicious transactions which might be related to money laundering. *An embezzler seeking to create the appearance that stolen money was obtained legally could do so by cashing stolen checks at the casino, gambling on the premises, and then obtaining payment from the casino which would be categorized as a "gaming win" for income tax purposes. Because this would constitute money laundering, casinos have an affirmative duty to take reasonable steps to detect and prevent such activity.*

R. 559 (emphasis added). This, of course, is precisely what Dianne Belk did, and if Rainbow Casino had followed minimum regulatory and industry standards it could have detected her criminal activity and stopped it much sooner. Instead, Rainbow did the exact opposite – it failed to comply with federal law and issued Mrs. Belk with bogus W2-G's falsely stating she won the stolen money at the casino.

This Court has previously applied the fraudulent concealment statute to toll the statute of limitations in a case governed by Mississippi's Uniform Commercial Code. In *Smith v. Franklin Custodian Funds, Inc.* 726 So.2d 144, 147 (Miss., 1998) this Court considered a case where a son (a stockbroker) defrauded his parents by forging their signatures to instructions provided to their mutual fund and then forging their endorsements on the back of a check issued to them by the mutual fund pursuant to the fraudulent instructions. The son concealed his fraud in succeeding years by issuing them monthly income checks which they believed to be income produced by their mutual fund. The parents sued both the son and the mutual fund when they discovered the fraud some six years later, and the mutual fund asserted the statute of limitations.

This Court held that the statute of limitations was tolled against the mutual fund by Mississippi's fraudulent concealment statute. In that case, there was no allegation that the mutual fund committed the fraud. However, the Court noted that this statute of limitations was tolled in cases where "the defendant *or any person in privity with a defendant* fraudulently concealed" the cause of action. *Smith*, 726 So.2d at 147 (emphasis added) The Court determined that a fact question existed on this point, necessitating a trial on the merits. *Id.*

Individuals are "in privity" with one another if they act "in concert" with one another or conspire with one another. *Smith v. Malouf*, 826 So. 2d 1256, 1260 (Miss. 2002) (parents who allegedly conspired with daughter to deprive Plaintiff of his parental rights were "in privity" with daughter by virtue of conspiracy, and therefore could claim preclusive effect of court order to same extent as daughter; order applied to daughter "and all who acted in concert with her"). Privity also exists between "those who stand in mutual or successive relationship to the same rights of property, as heir and ancestor, . . . donor and donee." *Lipscomb v. Postell*, 38 Miss. 476, 476 (1860); *Burton v. John Hancock Mutual Life Ins. Co.*, 171 Miss. 596, 157 So. 525, 527 (1934).

There can be no dispute that Dianne Belk fraudulently concealed her wrongful activity by making false entries in the company ledgers throughout the course of her embezzlement. Nor can there be any dispute that Rainbow helped her conceal her wrongful conduct by laundering the stolen funds (*i.e.*, supplying her with bogus W2-G's stating she won the stolen money playing at the casino). Both Belk and Rainbow committed affirmative acts to conceal the wrongful conduct in issue. Applying the definition cited above, Rainbow was clearly in privity with Dianne Belk – Belk's fraudulent acts are therefore attributable to Rainbow, and Rainbow's fraudulent acts are equally attributable to Belk. The Complaint specifically alleges that they colluded with one another to misappropriate Plaintiffs' funds. According to Dianne's sworn deposition Rainbow ultimately ended up with most, if not all, of the stolen money. R. 450. Rainbow's own records indicate they retained over $500,000.00 of the stolen money. R. 262. The movement of stolen funds from Weight Watchers' bank accounts, to Dianne Belk, to Rainbow, was direct and swift. Mrs. Belk would fraudulently issue a check on Weight Watchers' account, payable to herself, take the check to Rainbow Casino and cash it. She then gambled at Rainbow and lost the money. Rainbow stood in a "mutual and successive relationship" with Belk to the stolen funds.

III. TO THE EXTENT CERTAIN WRONGFUL ACTS OCCURRED OUTSIDE THE THREE-YEAR STATUTE OF LIMITATIONS, THE CONTINUING TORT DOCTRINE TOLLS THE STATUTE.

Mississippi recognizes the "continuing tort" doctrine, which tolls the statute of limitations in cases involving repeated wrongful acts occurring over a span of time:

> [W]here a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious acts cease. Where the tortious act has been completed, or the tortious acts have ceased, the period of limitations will not be extended on the ground of a continuing wrong.

> A "continuing tort" is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation.

Smith v. Franklin Custodian Funds, Inc. 726 So.2d 144, 148 (Miss. 1998); citing *Stevens v. Lake,* 615 So.2d 1177, 1183 (Miss. 1993). Each time Rainbow issued a W2-G to Dianne Belk, it falsely propagated the lie that she had won her ill-gotten gains in the casino, rather than stole them from Weight Watchers. Each new issuance of a bogus W2-G constituted a "continuing and repeated injury" and created a new cause of action covering *all* of the preceding wrongful acts. All of these actions were "part of one continuing act" which were incorporated into, and covered by the statute of limitation applicable to, the final wrongful act. *See also, Hendrix v. City of Yazoo City, Miss.* 911 F.2d 1102, 1103 (C.A.5 (Miss.), 1990) (where original violation occurred outside the statute of limitations, but is closely related to other violations that are not time-barred, recovery may be had for all violations on the theory that they are part of one, continuing violation.)

Furthermore, each time Dianne Belk filed a new federal income tax return incorporating the fraudulent W2-G's issued to her by Rainbow, she and they collusively participated in a new wrongful act of concealment which enabled them to continue their wrongful activities. According to Dianne Belk's sworn deposition testimony, she did not file her tax return for 2005 until "late in the year" of 2006 (R. 496) which, under the continuing tort doctrine, means that the statute of limitations was tolled for all the prior wrongful acts until that time.

In *McCorkle v. McCorkle*, 811 So.2d 258 (Miss. Ct. App. 2001) the Court applied the continuing tort doctrine in a lawsuit filed by a father against a son who made repeated attempts to have the father committed, the first in 1994 and the second in 1997. After defeating his son's commitment efforts the father filed suit in 1998 alleging a variety of torts, including invasion of

privacy and intentional infliction of emotional stress. In concluding that the statute of limitations did not bar recovery for the wrongful acts occurring in 1994 this Court stated:

> A continuing tort involves a repeated injury and the cause of action begins to run from the date of the last injury, tolling the statute of limitations. . . Though the first commitment hearing and its related subsequent events occurred outside the limitations period, the violation is closely related to the violations occurring within the limitations period and recovery is permitted on the theory that all violations are part of one continuing act.

Id. at 264.

IV. SUMMARY JUDGMENT WAS GRANTED PREMATURELY.

Due to Rainbow's intransigent refusal to cooperate in discovery, the Circuit Court should have denied Rainbow's Motion for Summary Judgment, granted Weight Watchers' Motion to Compel and allowed Weight Watchers to gather the evidence they needed to prosecute their case. When Rainbow asserted the statute of limitations as a defense, Weight Watchers responded that Rainbow had helped Dianne Belk fraudulently conceal her criminal scheme, tolling the statute of limitations, citing *Smith v Franklin Custodial Funds, Inc.*, 726 So.2d 144, 148 (Miss. 1998) (discovery rule inapplicable in actions involving conversion of negotiable instruments unless the defendant asserting the statute of limitations is involved in fraudulent concealment).

At a minimum, this created an issue of fact precluding summary judgment. But equally important, it heightened the necessity of Weight Watchers' efforts to obtain full and complete responses to its multiple discovery requests – responses which would have enabled Weight Watchers to prove Rainbow's role in the fraudulent concealment. For example, Weight Watchers repeatedly requested Rainbow to produce complete copies of the W2-G's which it provided to Mrs. Belk, and Rainbow steadfastly refused to do so. R. 283-285. Bally Technologies refused to produce documents which would establish their failure to utilize their player-tracking computer systems to combat money laundering. R. 285-286. Rainbow refused

to produce documents which would prove it had prior knowledge of similar criminal behavior by another embezzler who was also a close friend and associate of its Assistant General Manager and Director of Finance. R. 286-288. And most fundamentally of all, Rainbow refused to allow Weight Watchers to depose perhaps the single most important witness in the case, Vivian Piskowitz -- the former Assistant General Manager, later promoted to General Manager, who was personal friends with Dianne Belk, who fired Dottie Smith less than ten days after this lawsuit was filed, and who drafted the wildly misleading affidavit attached to Rainbow's Motion for Summary Judgment. R. 288-290.

Any one of these pending discovery requests, or the deposition of Vivian Piskowitz, could have provided proof establishing Rainbow's culpability in fraudulently concealing Dianne Belk's embezzlement. Weight Watchers attempted in good faith to resolve the discovery disputes through the issuance of multiple good-faith letters (R. 309-368) and, when Rainbow still refused to cooperate, Weight Watchers filed its Motion to Compel (R. 282-368). The trial court simply ignored this Motion when it granted Rainbow's Motion for Summary Judgment.

In *Griffin v. Delta Democrat Times Publishing Company*, 815 So.2d 1246 (Ct. App. Miss. 2002) the Court considered a similar case where summary judgment was granted despite the fact that the moving party had refused to respond to interrogatories and or to allow the deposition of key witnesses. At issue in *Griffin* was the question whether the defendant had made a defamatory statement with actual malice (the plaintiff was a public figure). With regard to the defendant's refusal to cooperate in discovery, the Appellate Court noted that "if the plaintiff were denied discovery it would be difficult to provide knowing or reckless falsity with 'convincing clarity.'" *Id.* at 1250. Accordingly, the Court held that the trial judge "abused his discretion and prematurely granted the motion for summary judgment . . ." *Id.* at 1251.

Precisely the same reasoning applies in this case. Because Weight Watchers was denied the opportunity to engage in meaningful discovery, its ability to demonstrate Rainbow's role in the fraudulent concealment was severely hampered. Proof on this point would have tolled the statute of limitations and precluded summary judgment, but Weight Watchers were denied the opportunity to obtain that proof.

To compound its error, the trial court went even a step further, explicitly declaring that "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 which did prevent discovery of Plaintiffs' claim, nor that Plaintiffs acted with due diligence in attempting to discover the claim and was unable to do so." R. 591. This was a disputed issue of fact which should have been left for the jury to decide.

In *Erby v. North Mississippi Medical Center,* 654 So. 2d 495 (Miss. 1995), the Mississippi Supreme Court held that the trial court erred in refusing to allow the plaintiff additional time to take depositions that might have provided evidence relevant to a pending motion for summary judgment. After a hearing on the defendant's motion for summary judgment, the plaintiff sought leave to take additional depositions and to submit additional affidavits "in support of a newly discovered claim of negligence." *Id.* at 498. The trial court denied that request and granted summary judgment for the defendant. On appeal, the Mississippi Supreme Court stated,

> [T]he non-moving party in opposing summary judgment must be given a fair opportunity to be diligent. As this Court noted in *Smith,* Rule 56 "contemplates that completion of discovery . . . is desirable and necessary before a court can determine that there are no genuine issues as to material fact."
>
> . . . . Under the circumstances, principles of fairness dictate a decision in favor of allowing these additional depositions which would not have unnecessarily prolonged the proceedings.

Erby, 654 So. 2d at 502-03.

CONCLUSION

The trial court committed manifest error in granting summary judgment. The statute of limitations did not begin to run on Weight Watchers' claims against Rainbow until Weight Watchers reasonably should have discovered Rainbow's wrongful acts. Rainbow has not pointed to a single document, statement or other evidence which would have raised the suspicion of any reasonable person before January 9, 2006, and this lawsuit was filed on January 9, 2009.

Additionally, Rainbow collaborated with Dianne Belk to fraudulently conceal the embezzlement by laundering the stolen money. Rainbow and Dianne Belk were in privity with each other – its affirmative acts of fraudulent concealment were attributable to her, and her affirmative acts were likewise attributable to Rainbow. To the extent this fraudulent concealment prevented Weight Watchers from discovering its claims against Rainbow (which it obviously did), the statute of limitations was tolled.

The pattern of wrongful behavior by both Dianne Belk and Rainbow Casino constituted a "continuing or repeated injury," and therefore under the continuing tort doctrine the statute did not begin to run on any of those acts until the date of the last wrongful act.

Finally, summary judgment should not have been granted until Weight Watchers was given a reasonable opportunity to complete discovery and obtain responses to the discovery requests which they propounded in a timely manner. The trial court should have granted Weight Watchers' pending motion to compel and allowed Weight Watchers additional time to develop their case before even considering Rainbow's motion for summary judgment.

RESPECTFULLY SUBMITTED, this the 27 day of October, 2010.

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

By: Wilson H. Carroll
Plaintiffs' Attorney

Wilson H. Carroll (MSB#[redacted]
WYATT, TARRANT, & COMBS, LLP
Post Office Box 16089 - 39236-6089
4450 Old Canton Road, Suite 210
Jackson, Mississippi 39211
Tel: 601/987-5300
Fax: 601/987-5353

CERTIFICATE OF SERVICE

I, WILSON H. CARROLL, do hereby certify that I have this date served by U.S. Mail a true and correct copy of the above and foregoing Brief of Appellants WW, Inc. d/b/a Weight Watchers of Greater Mississippi and BJM Inc. d/b/a Weight Watchers of Southern Florida and Florida Panhandle, to the following:

William L. Smith, Esq.
Quin H. Breland, Esq.
Balch & Bingham
Post Office Box 22587
Jackson, MS 39225

James W. Nobles, Jr., Esq.
Attorney at Law
201 Clinton Parkway
Clinton, MS 39056

Travis T. Vance, Jr., Esq.
Attorney at Law
914 Grove St.
Vicksburg, MS 39183

This the 27 day of October, 2010.

Wilson H. Carroll

35160866.2

CERTIFICATE OF SERVICE

I, WILSON H. CARROLL, do hereby certify that I have this date served by U.S. Mail a true and correct copy of the above and foregoing Brief of Appellants WW, Inc. d/b/a Weight Watchers of Greater Mississippi and BJM Inc. d/b/a Weight Watchers of Southern Florida and Florida Panhandle, to the following:

Honorable Tomie T. Green
Hinds County Circuit Court
Post Office Box 327
Jackson , MS 39205-0327

William L. Smith, Esq.
Quin H. Breland, Esq.
Balch & Bingham
Post Office Box 22587
Jackson, MS 39225

James W. Nobles, Jr., Esq.
Attorney at Law
201 Clinton Parkway
Clinton, MS 39056

Travis T. Vance, Jr., Esq.
Attorney at Law
914 Grove St.
Vicksburg, MS 39183

This the 27 day of October, 2010.

Wilson H. Carroll

35160866.3