

No. 294684-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

COURT OF APPEALS
SECTION 3A.01.010
APR 11 2011

CHRISTINE RINGERING, Injured Minor, and ANITA RINGERING and BRENT
RINGERING, Parents

Respondents,

v.

HY MARK WOOD PRODUCTS,

Petitioner

Discretionary Review from the Superior Court of Spokane County

BRIEF OF PETITIONER

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Attorney for Petitioner Hy Mark Wood Products
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STATE OF WASHINGTON
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I. INTRODUCTION

This action arises out of a workplace injury suffered by plaintiff Christine Ringering while she was employed by defendant Hy Mark Wood Manufacturing, Inc. (incorrectly denominated by plaintiffs as “Hy Mark Wood Products”). Ms. Ringering and her parents have also sued the private high school that she was attending at the time of her injury and the religious organization that oversees the school. Following her injury, Ms. Ringering applied for and received industrial insurance benefits based on her status as a Hy Mark employee. Now in an effort to circumvent the employer immunity provision of the Washington Industrial Insurance Act, plaintiffs have alleged in their complaint that Hy Mark intentionally injured Ms. Ringering and possessed a “second persona” that owed Ms. Ringering duties different from those owed by an employer to its employees.

II. ASSIGNMENT OF ERROR

The trial court erred in entering an order on September 28, 2010 denying defendant Hy Mark’s motion for summary judgment of dismissal based on the employer immunity provided under the Washington Industrial Insurance Act.

Issues Pertaining to Assignment of Error

1. Was error committed by not dismissing the plaintiffs’ workplace injury claim against the employer pursuant to RCW 51.04.010

where there is no evidence of a deliberate intent by Hy Mark to injure Ms. Ringering?

2. Where the “dual capacity” theory has been rejected in Washington, and the facts in this case do not support the application of the “dual persona” doctrine, did the trial court err in denying Hy Mark’s motion for summary judgment of dismissal?

III. STATEMENT OF THE CASE

Hy Mark is a family owned Washington corporation that has been in the business of producing cedar lumber products in Spangle, Washington since 2002. (CP 199). Hy Mark’s only legal relationship with Upper Columbia Academy consists of a lease agreement through which Hy Mark leases its manufacturing facility from Upper Columbia Academy, which is a private Christian boarding school located in Spangle. (CP 200). The lease provided that Hy Mark would use the premises solely as a manufacturing facility (CP 236), and would employ UCA students to furnish part-time labor to supplement Hy Mark’s regular, full time workforce. (CP 250-51).

On November 29, 2006, while stacking boards coming off a conveyer belt, plaintiff inexplicably placed her gloved hand on a slowly turning metal shaft underneath the conveyer belt. (CP 205). There was no reason for her to grab the shaft while performing her job. (CP 288).

Plaintiff was unable to release her grip from the shaft, resulting in a serious injury to her hand. (CP 205).

Several weeks prior to plaintiff's accident, another Hy Mark employee had a similar experience with a turning shaft on another machine but was not seriously injured. Hy Mark did not know what caused that incident. There had been no other similar injuries since the facility opened in 2002. (CP 205).

IV. ARGUMENT

1. Because Ms. Ringering was injured while performing her regular duties as an employee of Hy Mark, she is statutorily barred from pursuing a civil action for personal injury against her employer.

RCW Title 51, commonly known as the Industrial Insurance Act (IIA), provides the exclusive remedy for workers who are injured in the workplace. *Kingery v. Department of Labor & Industries*, 132 Wn.2d 162, 168-69, 937 P.2d 565 (1997). RCW 51.04.010 provides in pertinent part as follows:

The state of Washington ...declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdictions of the courts of the state over such causes are hereby abolished, except as in this title provided. (Emphasis added).

The exclusive remedy provision in the IIA reflects “a compromise between workers and employers, under which workers injured in their work are entitled to speedy and sure relief, while employers are immunized from common law responsibility.” *Flanigan v. Department of Labor and Industries*, 123 Wn.2d 418, 422, 869 P.2d 14 (1994). “In exchange for such relief, the employee forfeits certain rights to pursue alternative tort or other remedies.” *Milton v. Ralston Purina Co.*, 146 Wn.2d 385, 390, 47 P.3d 556 (2002).

In the instant case, plaintiffs seek to avoid the exclusive remedy provision of the IIA by alleging 1) a statutory exception found in RCW 51.24.020 for an employer’s deliberate injury to an employee, and, 2) a common law theory known as “second persona.” As discussed below, neither of these legal theories are applicable to the facts of this case. The standard of review on summary judgment is *de novo*, with the court engaging in the same inquiry as the trial court. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 825, 142 P.3d 209 (2006). Summary judgment is proper if the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

2. Hy Mark did not willfully disregard actual knowledge that plaintiff was certain to be injured.

In order to bring a deliberate intent cause of action against an employer pursuant to RCW 51.24.020 of the IIA, a plaintiff must show that the employer willfully disregarded prior knowledge that an injury to a specific employee was certain to occur. This standard was formulated by the Washington Supreme Court in *Birklid v. Boeing*, 127 Wn.2d 853, 904 P.2d 278 (1995). Significantly, the only reported cases in which an employee has survived summary judgment under a *Birklid* analysis have involved willful exposure of employees to toxic chemicals that are certain to cause injury.

In every other type of workplace injury case in Washington after *Birklid*, our appellate courts have consistently ruled that an employer's conduct in either failing to make a known dangerous condition safe or ignoring prior injuries due to unsafe conditions does not amount to "deliberate intent" under the *Birklid* test. The rule in Washington is clear: it is insufficient that an employer knew the plaintiff's injury was substantially certain to happen; rather, a plaintiff's claim of deliberate intent fails under the *Birklid* analysis absent a showing that the employer willfully disregarded actual knowledge that injury was certain to occur to that specific employee.

The following cases, which are legally indistinguishable from the present case, illustrate this rule. In *Goad v. Hambridge*, 85 Wn. App. 98, 931 P.2d 200 (1997), a sawmill employee was injured when he reached

into a planer to remove a loose piece of wood. He sued his employer, alleging in part that the failure to supply machine guards and warning signs constituted a deliberate intent by his employer to cause the injury. The plaintiff produced evidence that the manufacturer of the planer had sent letters to the employer before the accident advising of the need for safety meetings, guards, and warning signs to protect workers from dangerous pinch points on the machine. Division III affirmed the trial court's dismissal of the action. The court concluded that "At best, [the employer] knew of the potential of an injury similar to [the plaintiff's] which is not enough to satisfy the *Birklid* standard." 85 Wn. App. at 104 (emphasis added). Plaintiff's allegation in the instant case – that Hy Mark was on notice of the injury causing danger -- is identical to that in *Goad*.

Likewise, in *Nielson v. Wolfkill Corp.*, 47 Wn. App. 352, 734 P.2d 961 (1987), the court of appeals rejected as legally insufficient an injured employee's allegation that the employer had knowingly violated state safety regulations by allowing an auger to remain uncovered for years prior to the accident. And in *Higley v. Weyerhaeuser Co.*, 13 Wn. App. 269, 534 P.2d 596 (1975), the court as a matter of law found no deliberate intent where the employee was injured by a rotating saw head with a known propensity to break apart.

In *Schuchman v. Hoehn*, 119 Wn. App. 61, 79 P.3d 6 (2003), even where the employer knew that its worker would eventually be injured

using an unguarded ice crusher, the appeals court affirmed dismissal on summary judgment.

“Although [the employer] reportedly admitted that she and her husband ‘knew this was going to happen’ but just did not know when, this admission does not show actual knowledge that [plaintiff] was certain to be the injured party.... As noted above, an employer acting with even a substantial certainty that injury will occur to the employee does not have the requisite specific intent to injure that triggers the RCW 51.24.020 exception to employer immunity.”

119 Wn. App. at 72.

In *Valencia v. Reardon-Edwall School Dist.*, 125 Wn. App. 348, 104 P.3d 734 (2005), a risk manager for the plaintiff’s employer had “condemned” a man lift device prior to the employer making it available to plaintiff. Division III, in affirming summary judgment for the employer, assumed for purposes of the summary judgment motion that the employer knew the man lift was dangerous and would cause harm to someone. Nonetheless, the court held that “[s]imply exposing employees to unsafe conditions is not enough.” 125 Wn. App. at 350.

Howland v. Grout, 123 Wn. App. 6, 94 P.3d 332 (2004), is perhaps most factually similar to the case at bar. In *Howland*, the plaintiff was injured when she stepped in a hole in the floor at her employer’s business. Both plaintiff and another employee had been injured in the same manner earlier that week and had notified the employer of the hazardous condition. The court of appeals affirmed the granting of summary

judgment to the employer despite the evidence of prior injuries from a known condition.

The *Howland* court specifically considered reports made to the employer documenting the two previous accidents occurring within a week of the subject accident. 123 Wn. App. at 8. Even with that evidence, the court of appeals held:

At best, these [accident reports] demonstrate that Old Cannery may have been negligent in not repairing the floor *after Howland's initial injury*. . . .

[I]t was 'arguably foreseeable, or maybe even substantially certain,' *based on prior accidents* and the floor's condition that Howland might injure herself. . . . This is insufficient, however, to prove that Old Cannery had actual knowledge as required by *Birklid*.

123 Wn. App. at 12. (Emphasis supplied; citation omitted). The court held that while the employer may have been negligent in not repairing the floor after the initial injuries, based on *Birklid* the evidence was insufficient to prove that the employer had actual knowledge that certain injury would occur to plaintiff.

The legal insignificance of prior accidents in applying the *Birklid* analysis is well illustrated in *Brame v. Western State Hospital*, 136 Wn. App. 740, 150 P.3d 637 (2007), where the court responded as follows to the plaintiffs' attempt to show deliberate intent to injure through evidence of prior incidents:

[Plaintiffs] point to the history of patient assaults on staff as proof that the Hospital knew with certainty that patients would assault staff in the future. . . .

Even taking the facts in the light most favorable to the Employees, they cannot meet the stringent requirements of the *Birkliid* test. The Employees do not contend that the Hospital knew that any specific assault would occur. They rely instead on the history of patient-to-staff assaults. But past patient-to-staff assaults demonstrate, at the most, that such assaults are foreseeable, not that they are certain. Foreseeability is not sufficient to establish deliberate intent to injure an employee. *Vallandigham*, 154 Wash.2d at 33, 109 P.3d 805. In *Vallandigham*, 96 prior assaults by one student were not sufficient to predict with absolute certainty any particular future assault. *Vallandigham*, 154 Wash.2d at 33, 109 P.3d 805. Similarly, here the past assaults of hospital patients on hospital staff are not sufficient to create a certainty that any individual patient will assault any individual staff member.

136 Wn. App. at 749.

The fact that some of the cases Hy Mark relies upon do not involve prior accidents does not provide a basis for distinguishing those holdings, because the existence of a prior injury is just one way in which an employer may be placed on notice of a dangerous condition. For example, in *Schuchman*, the defendant employer admitted to having such notice by exclaiming shortly after the plaintiff's injury that "We knew this was going to happen, we just didn't know when." 119 Wn. App. At 72. Such a statement is certainly as compelling, if not more so, than the fact that another employee had previously suffered a similar injury. Nonetheless, Division III affirmed the trial court's dismissal of *Schuchman* on summary judgment.

Similarly, in *Folsom v. Burger King*, 135 Wn. 2d 658, 958 P.2d 301 (1998), our state supreme court reversed the trial court's denial of summary judgment in a case despite evidence that the owner of a fast food restaurant knew its actions placed employees at risk of being murdered in the course of a robbery. The supreme court held that:

“[h]owever negligent these acts might be, the statutory exception in *Birklid* requires more. No factual allegations are made and plaintiffs cannot establish that Hatter, Inc. had actual knowledge injury was certain to occur or that Hatter, Inc. intended the murders of its employees to result from the brutal act of another.”

135 Wn. 2d at 667.

As the above cited cases demonstrate, Hy Mark's alleged knowledge of a potentially dangerous condition does not rise to the level of a deliberate intent to injure under *Birklid*. The “actual knowledge” requirement does not pertain to the existence of a dangerous condition, but rather to the certainty of injury to the plaintiff. *Birklid*, 127 Wn. 2d at 865. Unlike in *Birklid*, where the employer knew that employees *would* become ill from working in the presence of a toxic chemical, Christine Ringering concedes that Hy Mark did not intend that she be injured (CP 292). Moreover, she has admitted that there was no reason for her to touch the shaft (CP 288), and that she knew it was not safe to do so. (CP 287). All that can be inferred from the evidence is that the injury was foreseeable, probable, or at most, reasonably certain to happen. However, none of

those scenarios is sufficient as a matter of law to invoke the *Birklid* exception. See *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn. 2d 16, 27, 109 P.3d 805 (2005).

In denying Hy Mark's summary judgment motion, the trial court specifically relied upon the fact that another worker weeks earlier had placed his hand on a different rotating shaft and dislocated his finger before the machine was shut off. (RP 27-28). Even if it is inferred that this earlier incident put Hy Mark on notice that the rotating shaft posed an unreasonable hazard to its employees, the fact that many employees had worked in the presence of the turning shafts for years without being injured precludes a finding that the injury to plaintiff was certain to occur. Unlike the situation in *Birklid*, where every employee exposed to the dangerous chemical was certain to become ill, here there was only a possibility of plaintiff being injured. As noted above, even a substantial certainty of injury, which has not been shown here, would be insufficient as a matter of law.

3. Hy Mark did not assume a "dual persona" that would subject it to a tort action by its employee for an injury sustained in the workplace.

While the "dual persona" doctrine" has been addressed by Washington courts as a theoretical means by which an employee might avoid the exclusive remedy provision of the IIA, "as a practical matter no

reported Washington case has found a plaintiff who could satisfy the elements necessary for the doctrine to apply.” 16 Wash. Prac., Tort Law and Practice § 11.9 (3d ed. 2010). The dual persona exception is based on the notion that an injured worker may sue the employer for injuries sustained in the workplace if the employer possesses a second persona so completely independent from and unrelated to its status as employer that by established standards the law recognizes it as a *separate legal person*. *Milton v. Ralston Purina Co.*, 146 Wn.2d 385, 391, 47 P.3d 556 (2002); 2A A. Larson, The Law of Workmen’s Compensation § 72.80 and .81 at 14 – 229-31 (Supp. 1990) (The doctrine is premised on the literal language of most worker compensation statutes that authorize suits only against “a *person* other than the employer”); 82 Am. Jur. 2d, Workers’ Compensation S 56 (2011) (“The clearest example of a separate legal identity for purposes of the dual-persona rule is that of a separate corporation”).

RCW 51.24.030(1) provides the underpinning for the dual persona doctrine by permitting an injured worker to bring a civil action against “a third *person*, not in a worker's same employ, [who] is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title” *See Kimball v. Millet*, 52 Wn. App. 512, 762 P.2d 10 (1988). Professor Arthur Larson, who first enunciated the dual persona doctrine, explains in his treatise that

the clear language of statutes such as RCW 51.24.030(1) must be given deference by only applying the doctrine to situations “in which the law has already clearly recognized duality of legal persons, so that it may be realistically assumed that [the] legislature would have intended that duality to be respected.” 2A A. Larson, *The Law of Workmen’s Compensation* § 72.81 at 14 – 231-32 (Supp. 1990).

An employee cannot prevail by merely showing that the employer acted in a second capacity that imposed obligations different from those owed in its capacity as an employer. *Corr v. Willamette Industries, Inc.*, 105 Wn. 2d 217, 219, 713 P.2d 92 (1986) (plaintiff could not rely on separate capacity of employer as a product manufacturer to avoid immunity); *Spencer v. City of Seattle*, 104 Wn. 2d 30, 700 P.2d 742 (1985) (city employee run over on the job in a negligently designed city crosswalk unable to sue city for breach of duty owed to him as a citizen). In both *Corr* and *Spencer*, the supreme court rejected this so-called “dual capacity” theory, which unlike the dual persona doctrine does not require the employer to possess separate legal identities.

Our supreme court more recently reaffirmed that a plaintiff cannot overcome IIA immunity by showing that the employer was obligated to its employees in ways separate from the employment relationship. In *Folsom v. Burger King*, 135 Wn. 2d 658, 958 P.2d 301 (1998), two fast food workers were killed during an armed robbery. *Id.* at 661. The estates of

deceased employees asserted that the employer's immunity under the IIA was forfeited because the corporate employer "owed a duty to the employees in its persona as a lessee and occupier of land," and that the independent duty was "distinct from that owed as an employer." *Id.* at 667-68. The court, noting that a "plaintiff is not permitted to split a single legal entity into separate parts," held that the absence of a second entity barred the application of the dual persona doctrine. *Id.* 668-69.

Thus, in order to prevail under the dual persona doctrine, the Ringerings must prove that Hy Mark possessed a separate legal identity that is completely independent from and unrelated to its status as an employer. They cannot merely show that Hy Mark operated in a different capacity that conferred on it additional obligations towards Christine Ringering. The dual persona doctrine cannot be applied under the facts of this case because, simply put, there is no evidence that Hy Mark or its owners operated as a separate legal entity independent of its role as an employer.

Plaintiffs have alleged in their complaint that Hy Mark acquired a second persona with respect to its role as a "supervisory, paternalistic, and educational" caretaker of Plaintiff Ringering. (CP 6). The trial court focused on evidence supporting these allegations in denying Hy Mark summary judgment. (RP 25-26). But it is not enough to show Hy Mark assumed separate duties as a parent, supervisor, or teacher that extended

beyond a typical employer-employee relationship. Plaintiffs have neither alleged nor proved that Hy Mark was operating as a separate third party entity. The injury to Christine Ringering occurred in the regular course of Hy Mark's business as a lumber producer. Moreover, plaintiff was injured while she was performing her usual job stacking wood along side other employees at the Hy Mark facility.

Finally, Christine Ringering has not alleged that at the time and place of the accident Hy Mark was acting in the role of an educator, parent, or supervisor. Nor was her injury causally related to the alleged educational or paternalistic activities – such as routing student paychecks to the school, enforcing a school dress code, grading students' work performance, or prohibiting student employees from fraternizing with regular employees – that plaintiffs rely upon for their dual persona argument.

These various obligations that plaintiffs rely upon are all associated with the employment relationship. Accordingly, the dual persona doctrine is inapplicable because Hy Mark's alleged supervisory, educational, and paternal functions are all closely intertwined with its functions as an employer, rather than being separate and distinct as required under the dual persona doctrine. Conversely, the duties plaintiffs allege Hy Mark breached in causing plaintiff's injury, such as failing to guard the rotating shafts and warn of the dangers, are obligations specific to an employer,

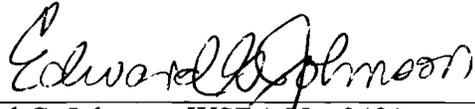
rather than obligations that would typically be undertaken in an educational or paternalistic relationship.

V. CONCLUSION

The deliberate intent exception imposes an extremely high burden on plaintiffs that cannot be satisfied in the present case as a matter of law. Likewise, plaintiffs' novel attempt to apply the dual persona doctrine to the facts presented is not supported by the law. Both of these issues should be expeditiously resolved by this Court in order to afford Hy Mark the statutory immunity to which it is entitled. Accordingly, Petitioner requests that this Court reverse the trial court's decision and remand the case for entry of judgment dismissing Hy Mark from the lawsuit with prejudice.

Respectfully submitted this 28 day of February, 2011

LAW OFFICES OF RAYMOND W. SCHUTTS

By: 
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 2011 I caused to be served a true and correct copy of the foregoing BRIEF OF PETITIONER by the method indicated below, and addressed to the following:

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Connie L. Powell & Associates, P.S.
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