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JUN 08 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 294684-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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

Respondents,

v.

HY MARK WOOD PRODUCTS,

Petitioner

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Discretionary Review from the Superior Court of Spokane County

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PETITIONER'S REPLY BRIEF

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**I. RESPONDENTS HAVE IGNORED BOTH THE APPLICABLE STANDARD OF REVIEW AND THE LEGAL BASIS FOR GRANTING SUMMARY JUDGMENT.**

This Court reviews the denial of summary judgment under a *de novo* analysis, based upon the material considered by the trial court. *TranAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 825, 142 P.3d 209 (2006). Accordingly, the Ringerings cannot rely -- as they do at pp. 3, 6, 15, and 35 of their brief -- on the trial court's own finding of issues of material fact. Hy Mark's summary judgment motion was premised upon the Ringerings inability to produce any facts sufficient to create liability. "A defendant who can point out to the trial court that the plaintiff lacks competent evidence to support an essential element of the plaintiff's case is entitled to summary judgment because a complete failure of proof concerning an element necessarily renders all other facts immaterial." *Boyce v. West*, 71 Wn. App. 657, 665, 862 P.2d 592 (1993). The evidence proffered by respondents does not support the application of either the deliberate intent or dual persona doctrines in the instant case, and therefore summary judgment must be granted.

Although plaintiffs repeatedly assert in their response brief the existence of "genuine issues of material fact," see, e.g. pp. 1, 4, 13, 23, 29, 31, 34, and 36, nowhere in their brief do they identify a single fact in

dispute. This is not surprising, because in reality the material facts are not uncontroverted. The Ringerings have had more than ample opportunity to discover facts that would support their legal theories to defeat employer immunity, as the trial court granted plaintiffs multiple continuances in order to respond to Hy Mark's summary judgment motion. CP 74-80, 120, 121.

Finally, it must be noted that plaintiffs have intentionally put in front of this Court material that the trial court struck from the record based on Hy Mark's motion. CP 295-96. Despite Judge Plese's ruling that she would not consider the Department of Labor and Industries investigatory file, CP 234-240, in deciding the summary judgment motion, RP 28-29; plaintiffs have repeatedly referenced the L&I investigator's findings and citation in their response brief at pp. 16, 17, 24-25, 28-29. While the Ringerings admit at page 16 that the evidence was excluded by the trial court, they make the disingenuous argument that the L&I information should be considered because it was also referenced by their counsel in the deposition of a witness.

**II. THE FACT THAT ANOTHER EMPLOYEE EXPERIENCED A SIMILAR ACCIDENT IS INSUFFICIENT AS A MATTER OF LAW TO INVOKE THE DELIBERATE INTENT DOCTRINE.**

The Ringerings cannot point to any evidence other than a prior incident involving Nate Chapman to support their theory that Hy Mark deliberately intended to injure Christine Ringering. In their response brief, plaintiffs display a complete misunderstanding of the *Birklid* exception when they make the following assertions to support deliberate intent.

“Hy Mark had actual knowledge that the exposed, slow rotating shaft at the Hy Mark factory was dangerous, and that Hy Mark willfully ignored this knowledge.” Response Brief at 1 (emphasis deleted).

“Hy Mark knew of an identical injury occurring to a student only weeks before Christie’s injury, and willfully disregarded that information.” Response Brief at 2.

“Two weeks before Christie’s injury, a co-worker, Nate Chapman, had a nearly identical accident, which provided Hy Mark with actual knowledge of the danger.” Response Brief at 15 (emphasis deleted)

Hy Mark’s knowledge of a dangerous condition that previously injured a single other employee 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 has not claimed that Hy Mark directed her to place her hand on the rotating shaft

or otherwise intended that she be injured. All that plaintiffs have shown 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).

Plaintiffs' attempt to distinguish the cases relied upon by Hy Mark is unpersuasive at best. The *Nielson* and *Higley* decisions were discussed in the *Birklid* opinion as examples of what did not constitute deliberate intent, and neither decision was overruled by *Birklid*. Furthermore, the four post-*Birklid* cases relied upon by Hy Mark conclusively show why the Ringerings cannot state a cause of action in this case. By citing a passage in *Valencia* out of context, plaintiffs falsely assert that Division III did not reach the "*Birklid* issue" in that case, when in fact the court did apply *Birklid* in holding that summary judgment was properly awarded to the employer.

"We assume Mr. Valencia's version of the risk manager's statements is true. And we assume that the District had knowledge of these statements [that the manlift was dangerous and was going to cause harm to someone]. The showing still would not support a finding that the District had "actual knowledge" that "an injury was certain to occur to Mr. Valencia . . . ."

125 Wn. App. 348, 352. (Emphasis deleted).

The Ringerings also incorrectly assert that in *Goad* and *Schuchman* the respective employers did not have actual knowledge of the danger. In *Goad*, the plaintiff specifically relied on the employer's admitted prior knowledge of the danger posed by a machine, and the court held that this knowledge was insufficient as a matter of law to prove deliberate intent to injure. Contrary to the Ringerings' position, the fact that another employee had not been injured previously in some of the cases Hy Mark relies upon is of no significance to the analysis, because a evidence of a prior injury is just one way in which an employer can be placed on notice of a dangerous condition.

Lastly, the Ringerings cite to a sentence in the *Howland* decision in which the court noted that the employer had denied the existence of any prior, similar injuries at its workplace. In doing so, the Ringerings create the totally misleading perception that the *Howland* court did not consider evidence of prior injuries in ruling that deliberate intent was not proved. In fact, as is readily apparent from reading the decision, the court did consider prior accident reports involving two similar accidents involving the plaintiff and a co-worker that both occurred only six days before 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).

**III. THE FINDINGS BY THE LABOR AND INDUSTRIES INVESTIGATOR, WHICH WERE STRICKEN FROM THE RECORD BY THE TRIAL JUDGE, DID NOT INCLUDE USE OF THE TERM "BAD FAITH."**

As explained in Section I above, plaintiffs have improperly relied upon hearsay evidence, that the trial judge refused to consider, taken from a report prepared the L&I employee who investigated the Ringering accident. To compound the matter, plaintiffs have deliberately altered the terminology used in the L&I report to create a different connotation. In a section of his report titled "good faith," the investigator stated:

"The employer's overall attempts to implement safety and health in the workplace: poor faith is being given due to a previous incident of a similar nature and it was not immediately corrected."

CP at 240.

There is no explanation of what "poor faith" means in the context of an L&I investigation, and nowhere in the L&I report are the terms "bad faith" or "bad faith citation" used. Nonetheless, the Ringerings use those

terms in trying to support their *Birkliid* argument. This Court should disregard these references both because they are mischaracterizations and because the trial court correctly declined to consider the evidence in making its decision.

In analyzing Hy Mark's conduct in not correcting the danger posed by the shaft after the first incident, it is important to emphasize that 1) no other employee had been in such an accident in the nearly four years the plant had operated, 2) Christine Ringering was aware of Nate Chapman's accident, 3) it was not part of her job to touch the rotating shaft, 4) she had never touched it before, and 5) she knew it was not safe to put her hand there. CP at 284-292. See Appendix A.

**IV. PLAINTIFFS HAVE FAILED TO PRODUCE ANY EVIDENCE THAT HY MARK ASSUMED A SEPARATE LEGAL IDENTITY IN ORDER FOR THE DUAL PERSONA DOCTRINE TO APPLY.**

Although the Ringerings' response brief repeatedly identifies Hy Mark as a "school" and as having an "educational persona," nowhere are they able to identify the separate legal entity under which Hy Mark purportedly carried out these educational obligations. Under the case law previously cited in Hy Mark's opening brief, the employer must also have a separate identity distinct from the legal entity that employs the plaintiff. "The plaintiff is not permitted to split a single legal entity into separate

parts.” *Evans*, 124 Wn. 2d at 443. Absent a second entity, the dual persona doctrine cannot be applied to circumvent the exclusive remedy provision of the Industrial Insurance Act.

After failing to establish a legal basis for imposing dual persona liability on Hy Mark, plaintiffs make an equally unappealing assertion that Hy Mark should be held to the duty of a school in supervising students in off-campus activities. Citing *Travis v. Bohannon*, 128 Wn. App. 231, 115 P.3d 342 (2005), the Ringerings ask this Court to ignore the plain employment relationship between Hy Mark and Christine Ringering and instead find that Hy Mark is a school that was merely supervising her extra-curricular activities. While this might be a potential theory for establishing the liability of co-defendant Upper Columbia Academy, applying it to Hy Mark borders on frivolity.

Respectfully submitted this 3 day of June, 2011.

LAW OFFICES OF RAYMOND W. SCHUTTS

By: Edward G. Johnson  
Edward G. Johnson, WSBA No. 9481  
Attorney for Petitioner

APPENDIX

A. Excerpts of C. Ringering's Deposition Transcript

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF SPOKANE

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

vs. )

Case No. 09200154-0

HY MARK WOOD PRODUCTS, UPPER )  
COLUMBIA CORPORATION OF SEVENTH )  
DAY ADVENTISTS (dba Spangle Wood )  
Products), UPPER COLUMBIA )  
ACADEMY, and UPPER COLUMBIA )  
CORPORATION ACADEMY FOUNDATION, )  
UPPER COLUMBIA CONFERENCE OF )  
SEVENTH-DAY ADVENTISTS (entity )  
name)/Seventh-Day Adventist )  
Church Upper Columbia Conference )  
(firm name), NORTH PACIFIC UNION )  
OF SEVENTH DAY ADVENTISTS, and )  
WASHINGTON CONFERENCE OF SEVENTH )  
DAY ADVENTISTS, )  
 )  
Defendant. )

Taken at 141 Ninth Street, Lower Level  
Lewiston, Idaho  
Thursday, February 11, 2010 - 1:00 p.m.

D E P O S I T I O N

OF

CHRISTINE "CHRISTIE" RINGERING

1 metal --

2 A. Nothing.

3 Q. -- turning? They didn't say anything about that?

4 A. Nope.

5 Q. All right. Did anybody have an incident similar to  
6 yours, but didn't get hurt, before you got hurt?

7 A. Yes.

8 Q. When -- were you there when that happened?

9 A. I was. I was in the other end of building, so I  
10 wasn't right there when it happened.

11 Q. Okay. What was your -- tell me what you remember of  
12 that accident -- that incident?

13 A. I just remember hearing that he had gotten his hand  
14 caught on the shaft, and it was turning, and he was on the end,  
15 so he could kind of turn with it a little bit until they turned  
16 it off.

17 Q. Okay. Did you know about it that day?

18 A. Yes.

19 Q. Could you hear the commotion?

20 A. No. But they stopped everything.

21 Q. Okay. All the equipment in the whole place?

22 A. Yes. To the best of my --

23 Q. All right. And what did they say about it when they  
24 stopped everything -- why they were stopping everything?

25 A. They didn't really say anything. We all kind of went

1 over to see what was going on.

2 Q. What did you see?

3 A. Nate was taking his glove off of his hand.

4 Q. Did he say what had happened?

5 A. Yes.

6 Q. What did he tell you?

7 A. He said that he got his hand stuck to the bar.

8 Q. And that would be this turning thing that's in

9 Picture No. 1, correct?

10 A. Yes.

11 Q. Turning metal device?

12 A. (Witness nods head.)

13 Q. And did he say how his hand managed to come in

14 contact with the turning bar?

15 A. No.

16 Q. Well, it was pretty easy to figure out, right?

17 A. (No response made.)

18 Q. I mean, what did you think? How did you think his

19 hand got in contact with the turning bar?

20 A. I had no idea. I don't know.

21 Q. Okay. So, were there any Hy Mark employees around,  
22 other than the students, when this -- after this happened with

23 Nate?

24 A. His accident?

25 Q. Yeah.

1 A. No.

2 Q. Okay. Did you realize that your hand wouldn't get  
3 caught if you kept your hand away from the turning bar?

4 A. I didn't think about it. I didn't know how his hand  
5 had gotten stuck to it.

6 Q. Okay. But you did know that, as long as you kept  
7 your hand away from the turning bar, your hand wouldn't get  
8 stuck to it, correct?

9 A. Yes.

10 Q. And so, when this incident happened with Nate, did  
11 you think to yourself, it would be a good idea to make sure to  
12 keep your hand away from the turning bar?

13 A. I don't remember exactly what was running through my  
14 head that day.

15 Q. All right. Well, either that day or some other day  
16 before your accident, after you found out what had happened  
17 with Nate, did it -- did you -- did it occur to you that it  
18 would be a good idea, for your own safety, to kept your hand  
19 away from the turning bar?

20 A. Well, yes.

21 Q. Okay. So, on the day of your -- the day of your  
22 accident, how did it happen? How did your accident happen?

23 A. I really don't remember how it all went down. I just  
24 remember taking wood off with Allen, and the next thing I  
25 remember, because it all happened so fast, is just that my arm

1 Q. Okay. Why don't you put his initials there.

2 A. (Witness complies.)

3 Q. Okay. And the machine, write machine where -- or  
4 where it was.

5 A. (Witness complies.)

6 Q. Okay. And then whereabouts was the conveyor or  
7 machine where you were hurt?

8 A. It was by the machine over here (indicating).

9 Q. And then where you would have been standing  
10 approximately.

11 A. So, I would have been probably like right here  
12 (indicating).

13 Q. Okay. Put your initials there.

14 A. (Witness complies.)

15 Q. Okay, that helps. Thank you. I'm going to try not  
16 to ask any of the questions that Mr. Freise asked you, but I  
17 may overlap a little bit.

18 Had you ever put your hand on that -- what I'll call  
19 a shaft prior to the time of your injury?

20 A. No.

21 Q. Was there any reason why you needed to put your hand  
22 on that shaft in order to do your job?

23 A. No.

24 Q. Do you know why you happened to put your hand on the  
25 shaft when you got hurt?

1       A.    I don't know that I happened -- I mean, I don't -- it  
2 all happened fast. I don't remember. My hand could have  
3 bumped it, and it was the suction on the hand. It wouldn't  
4 have taken much.

5       Q.    Right.

6       A.    Just bump it and I don't....

7       Q.    No, I understand. But you don't think you had ever  
8 put your hand on there?

9       A.    Not intentionally, no.

10      Q.    Even unintentionally, do you remember having ever --

11      A.    No.

12      Q.    -- had your hand on there?

13      A.    (Witness shakes head.)

14      Q.    Let's see....

15           MR. JOHNSON: If you need to take a break, just let  
16 me know, and we can take a minute, okay?

17      Q.    (BY MR. JOHNSON) Earlier you made some X's on  
18 Exhibit No. 2, indicating where you were and where -- is it  
19 Allen?

20      A.    Uh-huh.

21      Q.    -- was. Why were you in the position that you  
22 indicated, rather than in one of the positions that are shown  
23 by the two --

24      A.    They didn't have us --

25      Q.    -- young men?

1 grip the wood.

2 Q. Okay. And I assume so that you wouldn't get  
3 splinters in your hands?

4 A. Yeah.

5 Q. This -- these sanders, are you talking about some  
6 type of a handheld sander?

7 A. Yes.

8 Q. And it was the metal on that sander that  
9 would --

10 A. No, the table. Like what the wood would sit on that  
11 you would sand the wood on.

12 Q. Right.

13 A. Yeah.

14 Q. Okay. Had you ever asked to be given different kinds  
15 of gloves, other than the ones that you were using?

16 A. Never thought to ask. Those were the ones they  
17 provided, so....

18 Q. Okay. Had you ever complained to Richard or any  
19 other supervisor at Hy Mark about any condition in the plant  
20 that you thought was unsafe? I'm talking about before your  
21 accident.

22 A. No.

23 Q. Were you aware of any condition in the plant that you  
24 thought was unsafe, prior to your accident?

25 A. No. I was a sixteen-year-old girl that -- you don't

1 go walking around. It's not your job to see how not safe it  
2 is. That's not -- you don't think of that.

3 Q. Sure. And I'm -- I'm just asking the questions. I'm  
4 not trying to tell you what -- what I want to hear.

5 Let me ask you this, did anyone -- any employee of Hy  
6 Mark ever ask you to do something in your job that you thought  
7 was unsafe?

8 A. No. We were stacking wood. I never -- no.

9 Q. Okay. I believe you were in the room when your mom  
10 testified that she obtained a statement from Nate.

11 A. Uh-huh.

12 Q. Were you present when your mom got the statement from  
13 Nate?

14 A. I got the statement from Nate.

15 Q. Okay. You -- and this is a written statement?

16 A. Yes.

17 Q. And when did you get that from him?

18 A. I think not long after we got in contact with Connie  
19 -- Connie Powell.

20 Q. Okay. Your --

21 A. My lawyer.

22 Q. Your attorney's office?

23 A. Yeah.

24 Q. Okay. And did you tell Nate why you were getting a  
25 statement from him?

1 A. -- by anybody.

2 Q. Okay. Did you feel unsafe at any time walking to and  
3 from the campus to Hy Mark?

4 A. No.

5 Q. Did you ever ask for an escort?

6 A. No.

7 Q. Did Hy Mark allow students to have prayer meetings on  
8 the job site?

9 A. I don't know.

10 Q. You don't know one way or the other?

11 A. Yeah. I don't know either way.

12 Q. Okay. You never saw prayer meetings being led by an  
13 employee -- a regular employee of --

14 A. No.

15 Q. -- Hy Mark?

16 A. No.

17 Q. Do you have any information that would lead you to  
18 think that any employee at Hy Mark intended for you to be hurt  
19 there?

20 A. I don't think they intended it. I just think that  
21 they didn't take the precautions that they should have to make  
22 sure everything was safe. I don't think they were like, Oh,  
23 let's leave it uncovered so somebody can get hurt. Like I  
24 don't --

25 Q. Okay. And I take it one of the precautions would

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 3<sup>rd</sup> day of June, 2011, I sent for delivery a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF by the method indicated below, and addressed to the following:

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Connie L. Powell &  
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<input checked="" type="checkbox"/>	U.S. MAIL
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Debi R. Vocca