No. 294684

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

Christine Ringering, Injured Minor
and Anita Ringering and Brent
Ringering, Parents,

Respondents

v.

HyMark Wood Products (only
Defendant on Appeal),

Petitioner

RINGERING RESPONSE BRIEF

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I. IDENTITY OF RESPONDENTS

Plaintiff-Respondents -- Christie Ringering, and her parents Brent and Anita Ringering -- herein respond to HyMark's opening brief.

II. SUMMARY OF ARGUMENT

The Respondent Ringerings' position is that the Respondents have created genuine issues of material fact: (1) that HyMark "intentionally harmed" Ms. Ringering under *Birklid*, (2) that HyMark assumed a "dual persona" (a "second persona"), as defined by *Folsom*, as an educator under the terms of its lease with Upper Columbia Academy and by HyMark's pattern of behavior, and (3) that as an educational persona, the *Travis* case applies to create liability for HyMark as a matter of law, and certainly the trial court's denial of HyMark's CR 56 motion should be sustained on appeal.

III. LEGAL DOCTRINES TO BE APPLIED ARE AGREED: *BIRKLID* AND *FOLSOM*

Both sides agree that the Ringerings have sought to find HyMark liable for "intentional" harm to Christie Ringering, as defined by the *Birklid* line of case law (see below). And both sides agree that the Ringerings have sought to find "second persona" liability for HyMark for its breach of its duties as a "second persona" of an educator under the *Folsom* line of cases (see below).

There is no disagreement on guiding cases or on the governing legal doctrine. There are only disagreements about the applications of the law to the facts.

A. Intentional Harm as Defined in *Birklid*: Both sides agree that the trial court found that the Ringerings established an issue of fact that HyMark had actual knowledge that the exposed, slow-rotating shaft at the HyMark factory was dangerous to Christie Ringering, and that HyMark willfully ignored this knowledge, causing Christie Ringering grievous harm, and HyMark was thus liable for "intentional" harm under the *Birklid* doctrine. *Birklid v. Boeing Co.,* 127 Wn.2d 853, 904 P.2d 278 (1995) (held that "deliberate intention" under RCW 51.24.020 is not limited to physical assaults, but includes incidents where it can be proven the employer *has actual knowledge that injury is certain to occur and willfully disregards that knowledge*).

In this case, HyMark knew of an identical injury occurring to a student only weeks before Christie's injury, and willfully disregarded that information. The parties in this case agree upon the applicable legal doctrine, and only dispute the application of the law to the facts.
The trial court's decision can be found at *CP: 346-50 and Verbatim Report of Proceedings, 29-36.*

B. "Second Persona" Exists Where "Distinct Obligations" are Created – The Obligations of an "Educator" in this Case – The *Folsom* Doctrine Applies: Both sides agree that the *Folsom* doctrine applies, and both sides agree that the trial court found that the Ringerings had established genuine issues of material fact that HyMark had assumed an "educational persona" when it agreed to (a) employ the students of Upper Columbia Academy (UCA), under the terms of a lease which also required HyMark to (b) enforce the behavioral code of UCA, (c) enforce the dress code of UCA, (d) and coordinate hiring, work, and schedules with UCA, and as further creation of an "educational persona," HyMark (e) provided grades for the work at the factory, that was (f) transcripted on the UCA transcript for credit, and where HyMark (g) appeared at registration for UCA students, and (h) it was interchangeable whether a UCA or HyMark employee called students after registration to tell them they had been selected for employment at HyMark, as well as (i) other educational functions and obligations undertaken by HyMark. *CP: 346-50 and VRP.*

The *Folsom* standard for "second persona," or "dual persona," is clearly stated (emphasis added) in that case:

> The "dual persona" theory is explained:
>
> An employer may become a third person, vulnerable to tort suit by an employee, if-and only if-he possesses a second persona so completely independent from and unrelated to his status as

> employer that by established standards the law recognizes it as a separate legal person.
>
> 2A Arthur Larson, *The Law of Workmen's Compensation* § 72.81 (1984). Plaintiffs must establish that the second function generates obligations distinct from those related to the employment activity. *Corr v. Willamette Indus., Inc.,* 105 Wash.2d 217, 220-21, 713 P.2d 92 (1986).

Folsom v. Burger King, 135 Wash.2d 658, 668, 958 P.2d 301 (1998).

The parties agree that *Folsom* legal doctrine applies to this case, and the only disagreements are disagreements of fact – namely, whether HyMark assumed "distinct obligations" sufficient to create the "second persona." *CP: 346-50 and Verbatim Report of Proceedings: 25-36* .

C. Conclusion: No Question of Law Needs to Be Resolved – Only Questions of Fact: Christie Ringering's Facts Earn Her a Trial: In sum: (1) HyMark has liability under these facts as a "second persona" (the educational persona) under *Folsom.* And (2) HyMark has *Birklid* liability for having actual knowledge of the harm that would befall Christie Ringering, and for willfully ignoring that actual knowledge.

These legal doctrines to be applied at trial are acknowledged by both parties, and HyMark's summary judgment motion should be denied as genuine issues of material fact remain under those legal theories, and trial must develop the full applications of the facts to those legal rules.

IV. FACTUAL SUMMARY

Upper Columbia Academy is a boarding school, located in Spangle, Washington. Upper Columbia Academy (UCA) is licensed in Washington State as an Association, and is overseen by Seventh Day Adventist organizations, most proximately by the Upper Columbia Conference (UCC), especially by the UCC Education Department. *CP: 7.* Upper Columbia Academy's policies encouraged students to work, and required financial aid students to work. *CP: 7-13, and see CP: 154.* Christie Ringering worked at the on-campus employer, HyMark Wood Products, a for-profit corporation, which remitted pay directly to Upper Columbia Academy for tuition, room, and board. *Id.* The lease between the entities, and the ongoing behaviors, patterns and practices, gave UCA a duty to supervise HyMark; furthermore, HyMark had undertaken an educational persona, and had cultivated special relationships and special duties with the students and parents in this relationship between UCA and HyMark. *CP: 7-13, CP: 124-167, and VRP: 25-36.*

HyMark's manufacturing line had exposed-slow-rotating shafts, in violation of L&I standards, upon which another student, Nate Chapman, had identically caught his glove, dislocating is finger, only a few weeks before Christine Ringering was mangled via the same means, method, and apparatus. *CP: 7-13, 255-58.* After Nate Chapman's injury, HyMark admits

undertaking little to no investigation. *CP: 7-13, 205.* Only after Christie Ringering's de-gloving and amputation did HyMark investigate the dangerous mixture of sticky gloves and illegally exposed shafts. *CP: 7-13, 205 -206.*

Had HyMark acted upon its actual knowledge of Nate Chapman's injury and investigated this danger, Christine Ringering's injury would not have occurred. *CP: 7-13, 205 -206.* HyMark's conduct, in ignoring actual knowledge of danger, was the proximate and legal cause of Christie Ringering's injury.

Both sides brought summary judgment motions in the trial court, and Judge Plese denied both party's motions. HyMark then appealed the determination of Judge Plese that there were facts sufficient to proceed against HyMark on both the *Folsom* and *Birklid* doctrines. Because of the uniqueness of the issues, Judge Plese certified the questions to Division III. *CP: 346-50, and VRP: 25-36.*

A. Facts in Support of Educational Persona.

Lease: The HyMark facility was located on school land, which HyMark leased from UCA/UCC. The "Landlords" in the lease are designated as Upper Columbia Academy and Upper Columbia Corporation, and HyMark, owned by Dale and Richard Bartsch, is the "Tenant" in the lease. *CP: 196-254: Especially, see Lease between UCC/UCA and HyMark, as attached at*

Exhibit #1 to the Deposition of Richard Bartsch at CP: 210-231. The following references are to pages and sections of the Lease at *CP: 210-31.*

The lease provides no net rent to UCA/UCC. The rent for an industrial facility is only $500.00 per month. (*CP: 213* – page 2, sec.2.a. of Lease). The Landlord agrees to only use the rent to fix up the facility. (*CP: 213*, page 2, sec.2.c.) This would be a strangely generous lease, effectively "zero net rent," except that UCA/UCC intended for HyMark to perform educational and tuition-funding functions, to which HyMark agreed. Thus, the lease thereby subsidized HyMark as a co-educator with UCA. *See also CP: 151-156, esp. 155 indicating perhaps no rent was ever paid.*

Section 27, on page 17 of the lease (*CP: 228*), indicates HyMark's agreement to employ UCA student labor. If HyMark does not meet its obligation under this section of the lease to hire students, then rent will be adjusted to compensate UCA for this failure to hire students. (In the lease, page 2, sec.2.b. – the section on student labor is misstated on page 2 as sec. 25, but it is sec. 27.) UCA also agreed to supply enough students that HyMark could meet its obligation to hire UCA students as workers. (Page 18, sec.27.b. at *CP: 229.*)

HyMark was to supply to UCA the "reasonable qualifications" that student workers were to have. (Page 18, sec.27.b. at *CP: 229.*) UCA was to provide a "Student Labor Coordinator" who was responsible for making sure

UCA students reported to work on time, and who would notify HyMark in the event of sickness or absence. (Page 18, sec.27.b.) UCA and HyMark agreed to cooperate in scheduling students, and HyMark agreed to make reasonable attempts to "accommodate" student work schedules with school activities. *CP: 229.*

HyMark agreed to "maintain standards of dress and behavior" for its officers and employees "similar to those maintained by Upper Columbia Academy." (Page 18, sec.28, at *CP: 229.*) *See also CP: 161 & 162-67.*

HyMark agreed to "comply with all governmental laws, ordinances, and regulations applicable to the use of the Premises." (Page 3, sec.3, at *CP: 214.*) Section 10 granted UCA/UCC the right to inspect the premises, and Section 13 was a provision which indemnified UCA/UCC for injuries occurring on the premises. *CP: 217 and 219, respectively.*

HyMark Submitted Grades for Academic Credit: HyMark would submit grades on student labor to UCA, which would then, depending upon these HyMark grades, either grant, or refuse to grant, up to 2.5 academic credits per year on the students' UCA transcripts. The person submitting the grades was usually Cindy Perez, a HyMark employee. *See, e.g., Deposition of Richard Barsh, pp. 38-39 (CP: 207), Deposition of Cindy Williams, pp. 16-19 (CP: 129-132), Deposition of Cindy Perez, pp. 15-16 (CP: 127-29 and 132-33), compiled in Compilation Plaintiff's Evidence #1, CP: 124-167.*

HyMark Collected Tuition, Room and Board Debts for UCA: The UCA students who worked at HyMark got none of their wages, only UCA got the wages. *See Deposition of Cindy Williams at p. 19. CP: 133.*

HyMark Was Integrated into Upper Columbia Academy Registration: Cindy Williams, the UCA Student Labor Coordinator, explained that the HyMark representative (usually Cindy Perez) would set up a table at UCA registration, and Cindy Williams would refer students to two employers set up with her, ADRA (a clothing charity) and HyMark. *CP: 133-35.* Cindy Williams would handle all the on-campus jobs. After HyMark selected its employees, either Cindy (Cindy Williams of UCA or Cindy Perez of HyMark) would interchangeably call the students to tell them that they had been hired. *See Deposition of Cindy Williams at pp. 33-34. CP: 133-35.*

HyMark Undertook "Second Persona" Duties (Educational Roles) Regarding UCA Students: From the foregoing, it is clear that HyMark was more than some "off campus employer." HyMark was an on-campus employer, subsidized with essentially a free facility from UCA/UCC, to provide labor for students as part of the UCA/UCC education; HyMark employees graded UCA students for academic credit, and HyMark provided the direct payment of student wages to UCA.

By the terms of the lease, *supra*, HyMark agreed to enforce UCA standards of dress and behavior. *CP: 124-167, esp. 161-67.* Additionally,

HyMark adopted a student-specific policy that prohibited relationships between normal co-workers and students, while allowing normal co-workers to have relationships. *CP: 135-48.* (Obviously, by definition, students were not normal co-workers, and HyMark had distinct obligations toward these student-workers, versus normal co-workers.)

HyMark Student Relationship Policy: The HyMark Student Relationship Policy prohibited relationships between UCA students and HyMark employees, even though HyMark did not prohibit its non-student employees from having relationships with each other. *See, e.g., Deposition of Cindy Williams at pp. 30-31, CP: 136-38,* which included this quote as to why they had the policy (emphasis added):

30

17 Q And age of consent in Washington is 16. So do you know
18 why Hy-Mark was concerned to prevent these otherwise legal
19 relationships?
20 A Other than what I already said in that -- that we just
21 felt that as a school that it's not appropriate for adults
22 to have other than professional relationships with their
23 students.

The *Deposition of Cindy Williams* is quoted more extensively in the *Compilation of Plaintiff's Evidence #1*, but the point remains that HyMark is

considered a "school" in Cindy Williams' quote, and HyMark clearly did assume the duties of a school toward the UCA students who worked in it. The policy is discussed in the *Deposition of Cindy Perez, at pp. 17-18, CP: 138-39,* and Ms. Perez acknowledges that students were treated differently from the non-student workers. *See also, Deposition of Richard Bartsch at 45-46, CP: 139-140, and Deposition of Dale Bartsch at 23-29, CP: 140-45, and Deposition of John Bovee, 18-21, 46-47, CP: 162-67.*

At p. 29 (*CP: 145*) of his deposition, Richard Bartsch explicitly acknowledges that HyMark owed a uniquely higher and distinct duty to its student employees. In response to a question about HyMark's process for creating policies, Richard Bartsch stated (emphasis added):

13 A. You mean, this policy specifically would have been
14 adopted because we had never been in a situation where we
15 have hired students. And it seemed to make some sense that
16 these types of things be done to ensure the well-being of
17 everybody.

UCC Director, Wayne Searson stated that the purpose of the Student Relationship policy was "protecting students" and had probably been proposed for the Lease by UCC/UCA, which would therefore have been an obligation assumed by HyMark under the terms of the lease. *See Deposition*

of Wayne Searson at pp. 20-23, CP 145-48. See also Deposition of Cindy Williams at pp. 22-23, CP: 149-51.

By adopting uniquely educational policies and functions, and by assuming duties to "protect students," HyMark assumed an educator persona as a matter of law, distinct from an employer-employee relationship.

Lease Between HyMark and UCA/UCC on Behavioral Standards: The Lease imposed paternal duties upon HyMark, and HyMark assumed these additional duties. For example, Section 28 of the Lease required that "Tenant agrees that at all times while present at the Premises, its officers and employees shall maintain standards of dress and behavior similar to those maintained by Upper Columbia Academy for its student and faculty." Mr. Searson stated this was proposed by the academy. *Deposition of Wayne Searson at p. 37, CP: 148-49.* This makes logical sense, since it is an obligation being imposed upon the Tenant (HyMark), to which HyMark contracted. *See also Deposition of Cindy Williams at pp. 22-23, CP: 149-51.*

From Wayne Searson's statement that the "Standards of Behavior" provision probably came from UCA/UCC, and from Cindy William's statement, it is ***clear that HyMark contracted to supervise students in a paternal and educational capacity that went above and beyond a "mere employer" relationship***. *CP: 148-51.* These are fresh legal duties, creating a fresh legal persona.

There can be no reasonable debate about HyMark adopting this educational persona. Summary judgment on liability in favor of Christie Ringering would be reasonable, but, at the least, genuine issues of material fact exist and their resolution leans in her favor. Dismissal on summary judgment in favor of HyMark would be inappropriate.

Another example of HyMark assuming an educational persona, occurred in the persons of its owners, the Bartsch brothers. This example was provided by Max Torkelson, former President of the Upper Columbia Conference, who stated that he could trust the Bartsch brothers with UCA students because the Bartsch brothers had shared the mission of educating UCA youth. *CP: 151-53.*

This testimony began with Mr. Mason questioning Mr. Torkelson about the provision of the lease in which HyMark had promised to apply UCA standards of dress and behavior to the HyMark workplace (emphasis added):

58

19 Q. Does the lease require the tenant to enforce
20 the standards of dress and behavior similar to those
21 maintained on the campus?
22 A [Torkelson]. It makes provisions of that, but I can tell
23 you people didn't go over there every day to check on

24 the dress and behavior. It was a trust relationship

25 between people.

59

1 Q. And what do you mean exactly by trust?

2 A. We were dealing with owners of a company who

3 cared about Adventist Christian education, who cared

4 about the students, who cared about providing an

5 opportunity for them to work as part of their

6 education as well as a way to pay for their education,

7 and they were cooperating with people who have the

8 same kind of vision at the academy.

9 The church puts millions of dollars into

10 Christian education because we believe there are

11 various reasons why it is the best way to educate

12 young people. So we had a similar vision.

July 29, 2010 Deposition of Max Torkelson at pp. 58-9, quoted in Compilation of Plaintiff's Evidence #1, pages 28-30. CP: 148-49

Additional factual support for the Ringerings' positions can be found in a separate filing, *Compilation of Plaintiffs' Evidence #1, CP: 124-67.* However, just from the foregoing, it is clear that dismissing HyMark from this suit is inappropriate under CR 56.

The Ringering family reasonably expected this shared vision between HyMark and UCA. *CP: 274-280, 257-65, 299-302, 266-69.*

Judge Plese was correct that genuine issues of material fact exist upon all theories of HyMark's liability.

B. Facts in Support of *Birklid* Liability for HyMark

The foregoing facts show HyMark's "educational obligations" and "dual persona." On all significant matters, the facts about the accident and damages remain consistent with *Birklid*, as well, and HyMark should have to answer under the *Birklid* doctrines at trial.

Two weeks before Christie's injury, a co-worker, Nate Chapman, had a nearly identical accident, which provided HyMark with actual knowledge of the danger. *CP: 255-56, 344-45, 12, 205-06, and 258.* Mr. Chapman's glove caught on a wrongfully exposed open shaft, and his finger was dislocated as his hand came to be pulled around the shaft. *Id.* No shut-off switch was anywhere near Nate Chapman, and this unusually agile male worker was able to keep somersaulting around the shaft to keep up with its rotating until a co-worker responded to his shouts by shutting off the assembly line. *Id.* Nate's glove and middle finger were wrapping around the shaft, but due to his agility and the speed of co-workers in getting to the shut-off switch, his middle finger was only dislocated, instead of torn off, by the illegal, exposed, slow-rotating shaft, which was starting to wrap his hand

around that shaft. *Id.* The defendants had actual notice of this specific danger from this incident, and defendants knew Christie Ringering would be located near the exposed and open rotating shafts, for which HyMark later received a bad faith citation. *See CP: 255-56, 344-345, 12, 205-06, and 258.* (Note to Division III – the trial court excluded the Dept. of Labor citation itself, in response to HyMark's motion to strike, while admitting the factual testimony about the incident and citation. Given that Mr. Bartsch identified the citation and detailed his reaction to the citation, *CP: 205-06,* Ms. Ringering would ask the court to consider the citation itself, as well.)

Christine Ringering suffered the same process of injury as had Nate Chapman, from the same illegal apparatus, with more disastrous damages: Christie's glove got caught on the slow-rotating shaft, then her middle finger was wrapped around the shaft, breaking it and pulling her entire hand around the shaft, then breaking her wrist, and tearing off her finger. Christine's skin was stripped from her hand ("de-gloved"), her finger lost, her wrist broken, and permanent damage to her entire upper extremity ensued, with foreseeable lifetime consequences for a young woman, age 16, to suffer. *CP: 12-13.*

Hy Mark wishes to invoke RCW 51.04.010 immunity, and has refused to recognize any liability outside of the Labor and Industries immunity of that statute. However, this specific *Birklid* damage was certain

to happen to Christine Ringering, which is why the L&I inspector found the lack of required coverings on the shaft ends to be a *bad faith violation* of WAC. *CP: 12-13, and 205-06.* Hy Mark's harm of Christine Ringering was intentional under the *Birklid* case law of Washington interpreting RCW 51.24.020, and therefore is not precluded by RCW 51.04.010.

This specific harm was certain to happen to this specific person, and the actual knowledge of that certain danger was ignored by HyMark. HyMark is liable under *Birklid* construing the facts in favor of Ms. Ringering. Even if HyMark is not liable as a matter of law, there is certainly a basis for proceeding to trial.

V. PETITIONER'S INAPT CITATIONS TO PRE-*BIRKLID* CASES: *BIRKLID* EXPLICITLY SUPERSEDED PRIOR CASE LAW AS "UNJUSTIFIABLY RESTRICTIVE."

HyMark tries to distract the court from the fact that *Birklid* was a conscious and deliberate superseding of prior case law. In *Birklid*, employees were exposed to a chemical known to cause injury, and yet prior case law had only allowed suit under RCW 51.24.020 for assault and battery. The *Birklid* court reasoned that the prior case law had been too narrow, or the legislature would have only limited RCW 51.24.020 to assault and battery. The *Birklid* court wrote (emphasis added):

> Under all court interpretations *to date*, RCW 51.24.020 has provided an exception only for a case of assault and battery by the employer or its agents on the employee. If physical assault were the perimeter of the exception the Legislature intended, however, it could have said so directly rather than using the words "deliberate intention **863* ... to produce such injury." The statutory words must, therefore, *mean something more* than assault and battery. The facts in the case at bar serve to illuminate the meaning of the statute.

Birklid v. Boeing Co., 127 Wash.2d 853, 862-63, 904 P.2d 278 (1995).

After rejecting some very expansive interpretations from other states, the *Birklid* court defined "deliberate intention" under RCW 51.24.020:

> We hold the phrase "deliberate intention" in RCW 51.24.020 means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

Birklid v. Boeing Co., 127 Wash.2d at 865.

Despite this clear decision superseding prior case law, HyMark cites to the court pre-*Birklid* cases. For example, HyMark cites *Flanigan v. Department of Labor and Industries*, 123 Wn.2d 418, 422, 869 P.2d 14 (1994), *Neilson v. Wolfkill Corp.*, 47 Wn.App. 352, 734 P.2d 961 (1987), *Higley v. Weyerhaeser Co.*, 13 Wn.App. 269, 534 P.2d 596 (1975), *Kimball v. Millet*, 52 Wn.App. 98, 762 P.2d 10 (1988). *See Brief of Appellant at pp. 4, 6, 6, and 12, respectively.*

Obviously, all four of these cases are pre-*Birklid*, which was decided in 1995, and HyMark's pre-*Birklid* authority should be ignored

by the court as superseded. *Birklid v. Boeing Co.*, 127 Wash.2d 853, 862-63, 904 P.2d 278 (1995). Another pre-*Birklid* case that is inaptly cited by HyMark is *Spencer v. City of Seattle*, 104 Wn.2d 30, 700 P.2d. 742 (1985), cited by HyMark at *Brief, p. 13*, in which a city worker tried to sue the city as a general citizen for his on-the-job accident.

Birklid articulated the applicable standard, and clearly superseded prior case law. *Birklid v. Boeing Co.*, 127 Wash.2d 853, 862-63, 904 P.2d 278 (1995).

The *Goad* court explicitly recognized in 1997 that pre-*Birklid* cases had been superseded as "unjustifiably restrictive":

> As the Supreme Court demonstrated in *Birklid* (after the first summary judgment order in this case), prior case law interpreting RCW 51.24.020 has been unjustifiably restrictive. *Birklid,* 127 Wash.2d at 862-66, 904 P.2d 278.

Goad v. Hambridge, 85 Wn.App. 98, 105, 931 P.2d 200 (1997).

VI. HYMARK'S POST-*BIRKLID* LEGAL AUTHORITY IS FACTUALLY DISTINCT FROM *RINGERING v. HYMARK*

HyMark's other legal authority can be factually distinguished. Those major post-*Birklid* cases are: *Valencia, Goad, Schuchman, Minton, Vallandigham and Howland* (all analyzed below). *See HyMark's Brief at pp. 7, 5&6, 6&9, 4&12, 9, and 7&8, respectively.*

A. *Valencia v. Reardan-Edwall School Dist. No. 1*, 125 Wn.App. 348, 104 P.3d 734 (2005) – Court Never Reached *Birklid.*

The *Valencia* trial court never reached the *Birklid* issue (emphasis added):

> The court concluded that the risk manager was an independent contractor and there was no showing that his concerns about the device were ever communicated to the District. Significantly for this appeal, the judge did not, then, have to pass upon whether Mr. Valencia had made an adequate showing to avoid the immunity afforded by Washington's Industrial Insurance Act (Title 51 RCW)-the "so-called" *Birklid*[FN1] issue.
>
> FN1. *Birklid v. Boeing Co.,* 127 Wash.2d 853, 862-66, 904 P.2d 278 (1995) (discussing the court's broadened interpretation of the statutory phrase "deliberate intention" found in RCW 51.24.020).

Valencia, 125 Wn.App. at 350.

Given that the issue in the present case was never addressed in *Valencia*, any reliance upon *Valencia* would be reliance upon an advisory opinion.

B. *Goad v. Hambridge*, 85 Wn.App. 98, 931 P.2d 200 (1997) – Distinct Facts: No One Had Ever Suffered a Similar Injury.

Goad is distinct, too. No employee in *Goad* had ever suffered a similar injury. The employer in *Goad* said that he knew the machine was dangerous, but there was no evidence that anyone had suffered a similar injury. The planer that harmed Mr. Goad is more obviously dangerous to an employee, as well; and, most importantly, there had been no prior

similar injury in the *Goad* situation, unlike the Nate Chapman incident in the present case.

Christie Ringering's facts are very different from those in *Goad*, and Ms. Ringering should not be limited by an overly restrictive reading of RCW 51.24.020 (emphasis added):

> As the Supreme Court demonstrated in *Birklid* (after the first summary judgment order in this case), prior case law interpreting RCW 51.24.020 has been unjustifiably restrictive. *Birklid,* 127 Wash.2d at 862-66, 904 P.2d 278.

Goad v. Hambridge, 85 Wn.App. at 105.

Goad was decided in a very different factual context, as the *Goad* employer did not have actual knowledge, ***but*** HyMark did have actual knowledge. HyMark is likely liable as a matter of law; and, certainly, genuine issues of material fact have been created for the Ringerings to proceed to trial.

C. *Minton v. Ralston Purina*, 146 Wn.2d 385 – Court Declined to Pierce the Corporate Veil of Parent Company.

In *Minton*, a company called Continental, a subsidiary of Ralston, had, in 1985, designed and built the dangerous machinery at issue. In 1995, Interstate Bakery had purchased Continental, and fully merged with it as Interstate the sole remaining entity, owned by the parent company, Ralston Purina. In 1998 that machinery injured an employee of Interstate

Bakery. *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 388, 47 P.3d 556 (2002).

The trial court had denied Defendant's summary judgment motion, but the Court of Appeals extended L&I immunity to the parent company.

Minton does not apply to *Ringering v. HyMark.* First distinction: In *Minton*, there was no *Birklid* knowledge that the *Minton* machinery was dangerous, unlike in the present case. Second distinction: HyMark actively assumed an educational persona, with distinct obligations, under a unique lease with unique benefits and burdens, and HyMark induced the reasonable reliance of parents and students of Upper Columbia Academy that HyMark would perform these educational duties.

D. *Schuchman v. Hoehn*, 119 Wn.App. 61, 79 P.3d 6 (2003) – Rejected Federal Equal Protection Challenge to L&I Immunity, and the Machine at Issue Had <u>Never Previously Injured Others</u>.

Ms. Schuchman brought an apparently vague constitutional challenge to RCW 51.24.020, and the court decided to only hear the federal equal protection aspect of her argument:

> Preliminarily, we note that Ms. Schuchman articulates no clear basis for her constitutional argument beyond asserting that RCW 51.24.020 violates equal protection and that strict or heightened scrutiny of the statute is required. She also fails to designate whether she bases her argument on the federal or the state constitutions. Consequently, we address only the federal equal protection analysis.

Schuchman v. Hoehn, 119 Wn.App. at 67.

After rejecting variations of equal protection challenges to L&I immunity, the court cites the key fact which distinguishes *Schuchman* from Christie Ringering's facts. The *Schuchman* court noted (emphasis added):

> Nothing in the record indicates that the machine had injured anyone else.

Schuchman v. Hoehn, 119 Wn.App. at 72.

Nate Chapman had provided that actual knowledge to HyMark only weeks before Christie was injured.

(In *Schuchman*, Judge Kato, at pp.73-74, articulated an impassioned dissent that <u>even without a prior injury by the machine, *Birklid* had been met</u>. *Schuchman* was not appealed, and so the Washington State Supreme Court did not have an opportunity to apply *Birklid* to the *Schuchman* facts).

Nate Chapman had suffered an identical process of injury that Christine Ringering suffered, providing <u>HyMark with actual knowledge</u> of the danger of the apparatus, and <u>HyMark deliberately disregarded this knowledge</u>.

HyMark is liable as a matter of law, or, at the least, genuine issues of material fact remain.

E. *Howland v. Grout*, 123 Wn.App. 6, 94 P.3d 332 (2004) – No One Had Ever Suffered a Similar Injury.

Howland is inapt to apply to the facts of Christie Ringering's case. As the *Howland* court made clear, there had been no similar injuries that would have provided the business in *Howland* with actual knowledge (emphasis added):

> Old Cannery submitted seven affidavits that no one had ever been injured on the flooring near the front counter.

Howland v. Grout, 123 Wn.App. at 11.

Nate Chapman's injury immediately prior to Christie Ringering being mangled provided HyMark with actual knowledge, and, as a matter of law, HyMark willfully disregarded that knowledge, in violation of the rule announced in *Birklid v. Boeing Co.,* 127 Wn.2d 853, 904 P.2d 278 (1995). If HyMark is not liable as a matter of law, at the very least, genuine issues of material fact remain regarding those issues.

1. HyMark Admitted Receiving Actual Knowledge and Admitted Deliberately Disregarding Actual Knowledge.

Richard Bartsch has stated as his sworn testimony that he had actual knowledge, and that he essentially disregarded that actual knowledge. When reviewing the Labor and Industries citation (Exhibit No. 2 to the deposition of Richard Bartsch, quoted below, *CP: 205-06*), Richard Bartsch, owner of HyMark, acknowledged that the incident had

occurred, and that HyMark did not bother to learn anything from it (emphasis added):

29

18 (Exhibit No. 2 marked for identification)

19 Q (By Mr. Mason) Do you recognize this?

20 A I can't say that I do. Oh, this is the -- okay. Yes,

21 I do.

22 Q Okay. And what is this document?

23 A This was a Labor and Industry inspection after the

24 accident of Christine.

25 Q All right. Thank you. And if you look at Page 7 of

30

1 7, the last page there. Under the section that says Good

2 Faith, the second paragraph says (as read), The employer's

3 overall attempts to implement safety and health in the

4 workplace: Poor faith being given to a previous incident of

5 a similar nature, and it was not immediately corrected. The

6 ER should have taken action to guard all keyed shafts when

7 Nate Chapman got caught in a similar shaft while stacking

8 lumbar from another conveyor table that was feed - their

9 word - by another resaw. The ER, Richard Bartsch, did not

10 see what happened, but he was in the near vicinity and went

11 right over asking if he was okay. Mr. Chapman said he did

12 not tell Mr. Bartsch that he dislocated his finger, because

13 it has happened many times before from an old boxing injury,

14 and he simply pops it back into place.

15 Do you remember that Nate Chapman incident?

16 A Yes.

17 Q And what happened, in your words, as opposed to this

18 report?

19 A No. 1, it wasn't a keyed shaft.

20 Q What was it?

21 A It was a straight, smooth shaft.

22 Q Okay. And what else happened? How did he --

23 A I didn't see it happen.

24 Q What did you learn about it?

25 A Absolutely nothing.

31

1 Q So you learned it was a straight shaft?

2 A Yeah.

3 Q And anything --

4 A Other than when he told us about it. We, we couldn't
5 figure out what he, what he was doing.
6 Q And what -- explain that just a little more, because I
7 don't know the setting. So, you know, give me a little more
8 detail on what you mean by you couldn't figure it out.
9 A Well, when he said he got caught on, he got caught on
10 a shaft, we couldn't understand how he could have gotten
11 caught on the shaft. And that's really, that's really it.
12 I don't know, I don't know anything more than that.
13 Q How do gloves get caught on these shafts?
14 A What we think with, after Christine Ringering's
15 accident is that when she did that, when she grabbed that
16 shaft, that the rubber gloves caught on the shafting, and
17 that pulled them over. And since that time, what we did
18 learn after that is not allow any more students to wear
19 those kind of gloves. They have to wear leather gloves now.
20 Q Okay. After Nate's accident was anything said to the
21 other workers about that?
22 MR. JOHNSON: Object to the form.
23 Q (By Mr. Mason) Did you discuss Nate's accident with
24 the other workers?

25 A I really don't remember if we did or not.

32

1 Q And this is a fairly similar question. But was there
2 any kind of safety meeting held regarding Nate's accident?
3 A I don't remember if, if we did over, specifically over
4 that.
5 Q Okay. Did Hy Mark contact any parents after Nate's
6 accident?
7 A No.
8 Q Did Hy Mark inform Upper Columbia Academy about Nate's
9 accident?
10 A Well, first of all, there was no -- there was no --
11 there was no injury.
12 Q And then did Hy Mark inform Upper Columbia Academy
13 about the incident then?
14 A No.
15 MR. MASON: All right. This will be Exhibit 3.
16 (Exhibit No. 3 marked for identification)
17 Q (By Mr. Mason) Exhibit No. 3 is entitled Citation and
18 Notice of Assessment. And attached to that is another
19 document, Division Occupational Safety and Health Citation

20 Invoice. Do you recognize these two documents?

21 A Yep.

22 Q They noted a serious violation and a fine of $3,300?

23 A Yes.

24 Q Did you post these documents at the workplace?

25 A Oh, yes.

March 26, 2010 Deposition of Richard Bartsch at pp. 29-32, CP: 205-06.

2. HyMark Violated the *Birklid* Standard

HyMark is liable under *Birklid.*

Actual Knowledge: Richard Bartsch concedes that HyMark had "actual knowledge" that gloves could be caught on the slow-rotating shafts.

Deliberately Disregarded That Knowledge: Richard Bartsch's testimony shows that if the Bartsches had fully investigated Nate Chapman's injury, or had brought in someone competent to evaluate Nate Chapman's injury, that HyMark would have learned earlier to not have workers, including Christie Ringering, wear those sticky rubber gloves, and Christie Ringering's injury would not have occurred.

As a matter of law, HyMark is liable under *Birklid* for Christie Ringering's injuries. Certainly, genuine issues of material fact have been created that would preclude dismissal on summary judgment.

F. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16 (2005) – Independent Will of an Intervening Third Party Makes Causation Too Uncertain Under *Birklid.*

In *Vallandigham*, the court rejected the *Birklid* argument of two teachers hurt by a disabled special education student on the grounds that causation was too uncertain. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005).

Vallandigham is too factually distinct to apply to the present case. Christie Ringering does not claim that the HyMark machine which similarly injured Nate Chapman weeks before her own injury had a "mind of its own." Thus, *Vallandigham* does not get HyMark out from under its *Birklid* liability.

Under "second persona" doctrine, certainly HyMark had a "mind of its own" when it contracted with Upper Columbia Academy to assume educational duties, and when it held itself out as such to students and to parents. HyMark is liable for the second persona it willingly created.

G. *Brame v. Western State Hosp.*, 136 Wn.App. 740 (2007) – Another Independent Intervening Third Party Case and An "Egregious Conduct" Standard is Articulated.

The facts in *Brame* had to do with a dangerous inmate at Western State Hospital. Liability was rejected on grounds identical to

Vallandigham, *supra*, of the difficulty of predicting human behavior. *Brame v. Western State Hosp.*, 136 Wn.App. 740, 150 P.3d 637 (2007).

The same analysis as Ms. Ringering presented regarding *Vallandigham, supra*, serves to distinguish *Brame*. Here HyMark willingly assumed a second persona, and no one argues that the machinery of an exposed-slow-rotating shaft had a "will of its own." However, Christie Ringering does argue that Nate Chapman's injury provided actual knowledge of the danger to HyMark, which HyMark then ignored.

Public policy is best served by holding liable companies which ignore actual knowledge of dangerous machinery.

The *Brame* case also articulates an "egregious conduct" standard as the court describes the *Birklid* exception (emphasis added):

> This exception prevents employers who engage in egregious conduct from burdening the industrial insurance risk pool. *Birklid,* 127 Wash.2d at 859, 904 P.2d 278.

Brame v. Western State Hosp., 136 Wn.App. at 746.

Christie Ringering has certainly created a genuine issue of material fact as to whether or not HyMark has engaged in "egregious conduct." Construing the facts in favor of Ms. Ringering, summary judgment against her would be inappropriate under the existing case law.

For additional legal argument in favor of the Respondent's position, please *see CP: 81-119, 168-95, 310-12, 325-35, 336-43.*

VII. *TRAVIS v. BOHANNON,* 128 Wn.App. 231 (2005): DUTIES OF EDUCATORS

Once HyMark assumed the duties of an educator, both as a legal actor under the lease with Upper Columbia Academy, and as an equitable actor inducing the reliance of the students and parents of UCA, then HyMark owed Christie Ringering the duties of an educator articulated in *Travis v. Bohannon,* 128 Wn.App. 231, 115 P.3d 342 (2005). As this law was not appealed by HyMark, the law is summarized, below, and detailed analysis will await another day.

In *Travis*, a student lost fingers during an off-campus, extra curricular activity, for which her parents had signed consent. The trial court took the signing of consent to be a superceding act, and Division III reversed. The following extensive quote definitively establishes the rules for the liability of educators (emphasis added):

> A school district is liable for the tortious acts or omissions of its officers, agents, or servants, according to the normal rules of tort law. RCW 4.08.120; *Briscoe v. Sch. Dist. No. 123, Grays Harbor County,* 32 Wash.2d 353, 361, 201 P.2d 697 (1949).
>
> The general rule is that schools have a duty to protect students in their custody from reasonably foreseeable harm. **346 *McLeod v. Grant County Sch. Dist. No. 128,* 42 Wash.2d 316, 320, 255 P.2d 360 (1953). A school district is not an insurer of the safety of its pupils. *Peck v. Siau,* 65 Wash.App. 285, 293, 827 P.2d 1108 (1992). But it will be held liable for injuries arising from the foreseeable wrongful acts of a third party. *Id.* (citing *McLeod,* 42 Wash.2d at 320-21, 255 P.2d 360). Harm is foreseeable if the

risk from which it results was known or in the exercise of reasonable care should have been known. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 320, cmt. d (1965); RESTATEMENT (SECOND) OF AGENCY § 213, cmt. d (1958)).

Actual custody or compulsory attendance on the premises is not required; liability may attach when a school supervises and exercises control over extracurricular activities. *Rhea,* 39 Wash.App. at 560, 694 P.2d 666. Schools are expected to anticipate dangers that may reasonably be anticipated and to take reasonable precautions. *McLeod,* 42 Wash.2d at 320, 255 P.2d 360. Two factors determine the scope of a school's legal duty: the student-school relationship, and the general nature of the risk. *Id.* at 319, 255 P.2d 360. In *McLeod,* the school was liable when a girl was raped in an unlocked room under the playing field bleachers while the students were not supervised by an adult. *Id.* at 318, 255 P.2d 360.

The usual relationship between student and school is that the child must attend school and obey school rules. *Id.* at 319, 255 P.2d 360. Students under the control and protection of the school are thus not able to protect themselves. *239 *Hutchins,* 116 Wash.2d at 228, 802 P.2d 1360. The protective custody of teachers is substituted for that of the parents. *McLeod,* 42 Wash.2d at 319, 255 P.2d 360. The supervisory duty of a school extends to off-campus extra-curricular activities under the supervision of district employees such as athletic coaches, band directors, and debate coaches. *Carabba v. Anacortes Sch. Dist. No. 103,* 72 Wash.2d 939, 956, 435 P.2d 936 (1967).

A school may be liable for harm caused by the intervening acts of third persons. "If, under the assumed facts, such intervening force is reasonably foreseeable, a finding of negligence may be predicated thereon." *McLeod,* 42 Wash.2d at 320, 255 P.2d 360 (citing *Berglund v. Spokane County,* 4 Wash.2d 309, 103 P.2d 355 (1940); PROSSER ON TORTS § 49, at 354). The negligence of third parties is generally considered foreseeable. The occurrence is not foreseeable only when it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod,* 42 Wash.2d at 323, 255 P.2d 360.

> 19 We ask whether the harm that occurred is of a sort that was within a "general field of danger" that should have been anticipated. *Id.* at 321, 255 P.2d 360 (citing *Berglund,* 4 Wash.2d 309, 103 P.2d 355; HARPER, LAW OF TORTS § 7, at 14; 2 RESTATEMENT OF TORTS § 435, at 1173). In *McLeod,* for example, the question was not whether the school should have anticipated forcible rape by 12-year-olds, but whether a "darkened room under the bleachers might be utilized during periods of unsupervised play for acts of indecency between school boys and girls." *McLeod,* 42 Wash.2d at 322, 255 P.2d 360. Safeguarding the children from the general danger would have protected the rape victim from the particular harm. *Id.*
>
> 20 A school district then has a duty to "exercise such care as an ordinarily reasonable and prudent person would exercise under the same or similar circumstances." *Briscoe,* 32 Wash.2d at 362, 201 P.2d 697. And here we conclude that the students were in the District's custody and the District owed them a duty of reasonable care.

Travis v. Bohannon, 128 Wn.App. at 238-39.

VIII. CONCLUSION: *BIRKLID* AND *FOLSOM* DUTIES WERE BREACHED BY HYMARK

RCW 51.24.020 allows for employer liability within the L&I scheme for intentional acts, and the *Birklid* standard defines "intentional" acts under this statute as meaning that the employer had actual knowledge of likely harm, and of ignoring that actual knowledge of that likely harm.

Christie Ringering has made out genuine issues of material fact that HyMark had actual knowledge and ignored that actual knowledge. HyMark's failure to investigate, after Nate Chapman's injury, how the

students' gloves caused the injuries, should also be tested at trial under the egregious conduct standard.

Both parties agree that the applicable case law is *Birklid,* and the Ringerings ask this court to uphold Judge Plese's determination that genuine issues of material fact preclude summary judgment in favor of HyMark.

As to "dual persona" doctrine, both parties agree that the *Folsom* case applies.

The Ringerings are certain that HyMark did assume the sufficiently "distinct obligations" of an "educational persona," as to create that legally cognizable educational persona (a) under the Lease with UCA, (b) through HyMark's patterns of behavior in grading, enforcing behavior, etc, and (c) through inducing the reliance of students and their parents by the commingling of the manufacturer identity with the educator identity. The Ringerings have made out enough of a case to survive summary judgment on this theory, and would ask Division III to uphold Judge Plese on proceeding to trial under this "educator persona" theory, as well.

As the trial court transcript reads on p. 28 of the *VRP*:

> So at this time the Court after reading all these cases, this being a very specific fact pattern, that there are some serious genuine issues of material fact, and the Court cannot grant Summary Judgment to either side on this. This is a question for the trier of fact.

This case should proceed to trial to resolve genuine issues of material fact on the basis of well-established legal doctrine.

HyMark's request to reverse the trial court should be denied.

Respectfully Submitted, 4/17/11

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Attorney for the Ringerings (Respondents)

Guide to Clerk's papers: Some of the Clerk's papers have exhibits within exhibits, and the following guide is meant to assist Division III in assimilating the documents:

***CP: 196-254**: Deposition of Richard Bartsch including Exhibits: Lease as Ex.1, L&I Citation as Ex. 2 (excluded by trial court), L&I Citation Mr. Bartsch testified he posted at HyMark as Ex. 3, and Student Relationship Policy as Ex. 4.*

***CP: 124-167:** Compilation Plaintiff's Evidence #1, includes the following:*
CP: 128-32: *pp. 5-9, Richard Bartsch on duties of Cindy Perez vis-à-vis UCA.*
CP: 132-33: *pp. 9-10, Cindy Perez Deposition pages 15-16, on HyMark grading UCA students.*
CP: 133: *p. 10, Cindy Williams Deposition page 19, on HyMark sending wages straight to UCA.*
CP: 133-35: pp. *10-12, Cindy Williams Deposition pages 33-34, on HyMark's participation in UCA registration.*
CP: 135-38: *pp. 13-15, Cindy Williams Deposition pages 30-31, on HyMark's Student Relationship Policy and educator role.*
CP: 138-39: *pp. 15-16, Cindy Perez Deposition pages 17-18, on HyMark's Student Relationship Policy.*
CP: 139-40: *pp. 16-17, Richard Bartsch Deposition pages 45-46, on HyMark's Student Relationship Policy.*

CP: 140-45: *pp. 17-22, Dale Bartsch Deposition pages 23-29, on HyMark's Student Relationship Policy and other educational duties.*
CP: 145-48: *pp. 22-25, Wayne Searson Deposition pages 20-23, on HyMark's Student Relationship Policy and other policies adopted to protect students.*
CP: 148-49: *pp. 25-26, Wayne Searson Deposition page 37, on HyMark's agreement to enforce UCA standards of dress and behavior.*
CP: 149-51: *pp. 26-28, Cindy Williams Deposition pages 22-23, on HyMark's enforcement of the UCA standards of dress and behavior.*
CP: 151- 53: *pp. 28-30, Max Torkelson Deposition pages 59-60 and 55-56, on HyMark sharing the Adventist vision.*
CP: 153-54: *pp. 30-31, Max Torkelson Deposition pages 7-8, on work as part of Adventist education.*
CP: 154-56: *pp. 31-33, Max Torkelson Deposition pages 44-45, on HyMark not paying rent because it served educational functions.*
CP: 156-57: *pp. 33-34, Max Torkelson Deposition page 30 on duties to students.*
CP: 157-59: *pp. 34-36, Max Torkelson Deposition pages 33-34, on delegating student safety at HyMark to L&I.*
CP: 159-62: *pp. 36-39, Max Torkelson Deposition pages 15-17, on HyMark's obligations to enforce UCA standards of behavior and dress.*
CP: 162-67: *pp. 39-44, Jeff Bovee Deposition (principal of UCA)*