ORAL ARGUMENT – 09/18/02
01-0825
WINGFOOT ENTERPRISES V. ALVARADO

SNYDER: I am here on behalf of my client asking that the court afford the protection that we believe that the Texas legislature intended Tandem Staffing to have, and frankly that we believe that Tandem Staffing thought it had when it purchased worker's compensation insurance coverage, which afforded both income and medical benefits to Ms. Alvarado.

This court as well as other courts in this state have long recognized that Texas has a legitimate public policy interest in establishing a system that protects employees and provides them a means by which they may promptly and timely receive income and medical benefits for injuries that they received in the course of their employment.

That public policy interest was recognized by our legislature when it enacted the current and former versions of our worker's compensation laws. To encourage employers to participate in this system and purchase worker's compensation coverage for their employees, our worker's compensation laws afforded the employers protection except in limited instances from common law tort claims that employees might otherwise pursue against their employers if they are injured in the course of their employment.

Ms. Alvarado would have this court affirm a policy, which is known as the right to control test, which in our judgment defeats the public policy interest that the legislature...

HANKINSON: Didn't we just confirm that that's the controlling doctrine in the Dell opinion? How would you have us deal with that recent statement?

SNYDER: I think that what the court was asked to examine in that case, and I will concede that the court did make reference to that test in its opinion...

HANKINSON: We just flat said that's the test under the common law, as I recall.

SNYDER: If indeed that that is the test that applies, we still believe that nevertheless that Tandem Staffing and other companies that are similarly situated should also enjoy the protection of the worker's compensation bar.

HANKINSON: Help me understand how we would deal with the Dell decision if we were to agree with your position in the lawsuit. Would we have to overrule that, or do we have to disapprove the language in Dell? In other words, put yourself in our shoes having to write the opinion with Dell being out there as precedent that we're obligated to follow.

SNYDER: The court may very well have to disavow that part of the Dell opinion if that is indeed what the court was saying. My reading of the Dell case though seemed to indicate to me that it was limited to the specific inquiry in that case, which was whether Dell was obligated to pay for premiums for worker's comp. insurance coverage that was not afforded by the staffing company

who under the Staff Leasing Services Act had the right to elect or elect not to have worker's comp insurance coverage for its employees.

HANKINSON: If we disagree with you and believe that the right to control test does apply, then wouldn't you be required to rely upon the election of remedies doctrine as an affirmative defense in order for your position to prevail?

SNYDER: I don't think so. And the reason is, the worker's comp laws generally provide that worker's comp benefits are the exclusive remedy of an employee who is injured in the course of his/her employment. An election of remedies suggest that there is more than one option that an employee has but, yet, the general rule of the worker's comp law says that is your exclusive remedy. That is your one and only remedy.

Now indeed employees do have the option to opt out of the worker's comp scheme. But there are certain specific steps that they must take, and in effect, must timely take in order to do so and preserve their common law tort rights against their employer.

So I would submit that the election of remedies is more less subsumed in the exclusive remedy defense afforded by the...

HANKINSON: But if the right to control test is the applicable law, then don't you lose on your exclusivity issue?

SNYDER: No. I don't. Because I think by having pled, which we did and we did raise in our motions for summary judgment, the exclusive remedy provision we invoked the general worker's comp law that says that that is the employee's exclusive remedy, the recovery of worker's comp benefits. And I would suggest that if the employee has made an election that it is indeed at that time when they either elected or didn't go through those steps to opt out of the worker's comp scheme, that that's when the election was made, not when the injury occurred, or when they applied for and received comp benefits.

HANKINSON: Who made an election at that point in time?

SNYDER: I would submit that Ms. Alvarado by not having taken the steps of notifying her employer, Tandem Staffing, that she did not wish to be covered by their worker's comp insurance coverage, and wished to preserve her common law tort rights against Tandem Staffing in the event that she was injured in the course of her employment, that at that time the election was made.

I guess what I am saying is, we are entitled to assert the general rule as a defense. If they are relying on the opt out provision as an exception to that, then I would respectfully suggest that it was incumbent upon them to raise that as an exception to the general rule of the worker's comp laws, which says that worker's comp coverage is the employees exclusive remedy.

ENOCH: As I understand the argument that Wingfoot kind of puts forward that the right to control test is really not appropriate in this comp scheme because right to control test is a common

law notion that sort of implicates fault. And this is a no fault scheme. And so a different analysis should be used and it ought to be a contract analysis. The party that agrees to carry the comp should be considered the employer for the purposes of the claim. The insurance premium that's paid by the employer is based on the experience factor. So the premiums that are charged with a compensation coverage are themselves somewhat fault based. It's not based on fault. It's just the experience factor. If the court adopts the policy you say where you have a staff leasing company that is not in the business of the manufacturing, but simply leases employees to the manufacturer to do that, I'm wondering if that doesn't affect the experience factor. Does a leasing company that may have thousands and thousands of employees and therefore an injury factor making 5% have a different premium schedule than say the employer who has a 25% injury experience factor but all their employees are leased? And so does Web have less of a economic incentive to have a safe place to work by leasing the employees from this leasing company because they get a break on their premium?

SNYDER: No, I don't believe that they do, because as I understand Web's operation, they also have their own employees who are involved in similar type work.

ENOCH: Well would the argument be that the only people they cover will be the office staff who would have a lower instance of injuries, and not the manufacturing staff that have a higher percentage?

SNYDER: They very well may. And if indeed that is the case then, they would not have any coverage for workers like Ms. Alvarado, and conceivably under that type of scenario, Ms. Alvarado if she's injured in the course of her employment is out in the cold because if Tandem Staffing is not going to get the protection which we believe it was afforded by the worker's comp laws, then in effect...

ENOCH: I was accepting your argument that because Tandem is carrying the compensation coverage it should be viewed from a negligence lawsuit at least by Ms. Alvarado. Under the scheme of how compensation works, we should not apply the control test because that's a common law fault based test. We ought to provide sort of a contract test. My question was, if the premiums charged for compensation are based on one's experience and injury in a place isn't it possible that under your scenario the manufacturer who has a high instance of injuries can save on the premium by using leased employees and therefore not have the economic incentive to have a safer place to work?

SNYDER: That may very well be the result. But I think for those like Tandem staffing, they do have people that would go out to these workplaces, such as Web's workplace. They are there on occasion. They do walk around. They do observe the activities that are going on. I would submit that Tandem and other companies similarly situated might endeavor to take even further precautions to ensure that their employees were going to work at a place that was relatively safe for them to work. And indeed if experience proved that injuries were occurring with more frequency at places like the Web relative than the workplaces of other clients, that may be reflected in our charge that Web would have to pay Tandem Staffing relative to what Tandem Staffing might charge other customers or other clients who have a lower risk of injury or incidence at their workplace.

O'NEILL: I'm a little bit confused about what happened to the rug. I understand that Web's liability went to the jury, and the jury found that Ms. Alvarado was the borrowed servant of Web. And that therefore - did she - will she have received worker's comp benefits from Web? Is she now covered by Web's worker's comp having been found to be an employee?

SNYDER: I do not know. I can only tell you that as far as my client's worker's comp insurer is concerned, she is still entitled to receive benefits under that policy for any future medical or income benefits to which she might be entitled. Quite frankly, although I understand that they had a worker's comp policy, I don't know whether that policy would have covered Ms. Alvarado, whether it would have excluded borrowed or leased employees.

O'NEILL: Didn't the TC find that her common law remedy against Web was barred by the exclusivity provision? Doesn't that necessarily mean that she can get comp under Web's worker's comp policy?

SNYDER: That would certainly seem to be the inference that one would made.

O'NEILL: And if that is the case, and Web's carrier is paying her benefits, can't your carrier then go against Web's carrier and get subrogation?

SNYDER: That puts us back into a situation that the Dallas court addressed several years ago in the Hartford case. In that case, the court ultimately conclude that since that was essentially a right of subrogation that Hartford made that it was subject to equitable principles and concerns. And as I understand that opinion the court reasoned since Hartford had been aware of similar situations having occurred in the past that therefore it was entitled under those facts to be reimbursed for the benefits from the other carriers that it had previously paid to that employee.

O'NEILL: And if that were the case here, then the right of control test would work exactly as it should wouldn't it?

SNYDER: I don't know that it would because...

O'NEILL: Well you would be reimbursed what you paid in comp and the one found to be the actual employer would be the one paying the comp benefits.

SNYDER: True. But that assumes that our client does indeed have comp insurance and it further assumes that that worker's comp insurance policy covers a temporary or borrowed employee.

O'NEILL: Assume Web did not have worker's comp, and a common law claim was brought and it was found to be that Web was the employer, and common law damages are _____. Can't Tandem then go against Web and seek reimbursement under the judgment?

SNYDER: For the comp benefits that they have paid? Yes they can.

O'NEILL: Either way Tandem can be made whole.

SNYDER: Actually the right of subrogation would belong to Tandem's worker's comp insurance carrier. But indeed they could do that.

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RESPONDENT

GOMEZ: As this court just recently mentioned Dell Industrial has decided the very issue that we are here on. It said, a right of control test exist to determine who the employer is for purposes of worker's comp under Texas common law.

O'NEILL: Can you tell me why the legislature would have used the Staff Leasing Services Act to cover staff leasing companies but not temporary employment agencies?

GOMEZ: The reason, I cannot tell you. But I can tell you that was done and it was done on purpose, and the system is working exactly as the way you were just mentioning. We have a situation where in 1995 they enacted the Staff Leasing Services Act. That gave staff leasing companies a little bit of a better privilege than other companies. The statute recognized that these people would be viewed as co-employers for purpose of the statute that that would supersede the common law which is what this very court...

O'NEILL: Why shouldn't temporary employment agencies be afforded the same consideration? I realize the statute doesn't say that, but tell me why.

GOMEZ: I don't have a reason for that. I don't know what the legislature was thinking. I can only tell you that they purposely did that. And implicitly that means that they were leaving all other kinds of employers since it's temporary health providers, which is what Tandem Staffing is, temporary common worker employers which is the very next statute. Chapter 91 deals with Staff Leasing Services Act in the later code. The very next statute is ch. 92, Texas Common Worker Employers, which is dealing with similar situations of companies who are leasing people out. And the legislature implicitly and purposefully left out that language to give them the bar under the worker's comp.

O'NEILL: You can't think of any reason why? In fact there was one that's more compelling to apply these same principles in this context as it would for staff leasing companies wouldn't it? I can't find a distinction.

GOMEZ: I think the distinction is that there are a lot of companies out there that aren't license holders such as Tandem Staffing. No one is supervising them from a state agency, looking at them to make sure that they are doing things that they are supposed to be doing. For example, like what may be going on and having inspection sites and making sure that they are sending people not to some really dangerous spot. Why? Because the client company has every incentive to run a dangerous operation if they are leasing these employees from leasing companies. And if no one is evaluating this, and that's what the statute was trying to enact, they said hey you have to be a license

holder. If you're a license holder then someone is watching over you. And we're going to give you the benefit of the worker's comp bar. But if you don't do that, we're not going to give you that benefit. And that's exactly what we have here. They chose not to become a license holder under the Staff Leasing Services Act.

RODRIGUEZ: Where in the record is the evidence to establish that Tandem was aware that Ms. Alvarado was operating a staking machine?

GOMEZ: It's in the deposition of Richard Armaho, and in the deposition of Tandem Staffing's president, Tom Landry. Richard Armaho indicates that he was aware that they were on these machines.

RODRIGUEZ: Where is Tandem aware that Ms. Alvarado was working on these machines when she was initially assigned by Tandem to be an assembler and not assigned to this machine?

GOMEZ: I don't have the answer to that question.

RODRIGUEZ: It's my understanding that Tandem was not on the site, so it didn't have actual control of the machines is that correct?

GOMEZ: That is correct. They did not have the actual control over the machines. What they did is they would report to the site. If Web assembly asked for 40 people, they made sure 40 people got there. They would check them in and then they would walk around and make sure that the 40 people were placed. And that's where Richard Armaho, the service coordinator for that particular job site, is aware. And he indicates in his deposition that he saw individuals working and knew that Ms. Alvarado was on this machine.

RODRIGUEZ: With regard to the staking machine malfunction, where in the record is the evidence to establish that Ms. Alvarado was _____ Tandem for the malfunction for them to have an opportunity to _____.

GOMEZ: That is not in the record. She informed the Web center.

JEFFERSON: Does it make sense to you under our worker's comp system that an employer could both be or his carrier liable for benefits paid and also liable potentially for negligence at the same time?

GOMEZ: The way the statute is set up, I believe that's exactly what we're alleging. However, with the slight - they had an opportunity to do the subrogation. What happened here is we went to trial against Web Assembly. The jury determined that they had the right to control. Thus, we were barred from making any common law allegations against them. Now that they are the employer, they are on the hook. And Tandem Staffing's insurance carrier could subrogate from their worker's comp insurance carrier and take care of that. So Ms. Alvarado's common law claims against Tandem would be valid and there would not be a situation where Tandem's Staffing and their insurance carrier would be on the hook for both claims.

ENOCH: It seems to me that Ms. Alvarado's claim against Tandem is failure to provide a safe workplace, and that's a duty of the employer to an employee but Tandem is not the employer. One of the difficulties it seems to me is there's a lot of going in circles here. Doesn't she have to establish that Tandem somehow has the right to control the activities on this site so that she can recover on any sort of common law claim against Tandem for having breached that duty, but she just had a finding that it was Web that controlled her duty? At most it seems to me from all of your briefing you've got a co-employer deal don't you?

GOMEZ: Yes that is the exact argument, that you can be viewed as an employer for other purposes other than the worker's comp act. That's what we are here alleging that.

ENOCH: How can Tandem even under the rights to control test not be an employer for the comp injury, but be an employer for having a negligent work site that caused the injury and, therefore, not be protected from the negligence claim for being the employer?

GOMEZ: Because under the industry standards for staffing companies, and it's in the transcript at 335 and 336, you will see that there's a Texas Association of Staffing, and that there is an American Staffing Association of which Tandem was a member. This is dealing with companies just like Tandem Staffing saying, hey, if you're sending these people out here, you've got a responsibility to these people. And the responsibility says that you will inspect the work sites to make sure that they are safe, and more importantly for this case it says, you will make sure that they will receive any safety training that may be necessary or required.

RODRIGUEZ: In this case, Tandem was sending her out to be an assembler correct?

GOMEZ: That's what Tandem's Staffing says.

RODRIGUEZ: There's nothing in the record to establish otherwise is there?

GOMEZ: I believe Mr. Armaho's(?) deposition says he was aware that they actually had her on staking machines rather than manual assembly.

RODRIGUEZ: They, being Web, had her on a staking machine?

GOMEZ: Correct.

RODRIGUEZ: So going back then to your duty to train then, if any, Tandem had a duty to train her and make sure that she was working properly as an assembler correct?

GOMEZ: If that's what they sent her out for and they knew that's what she was doing, correct. But that's not the situation at hand here. They knew that they were taking all of their workers and that they were putting them on the staking machines. And now they turn their head and act like they don't know, and their service coordinator was aware of that. He doesn't bother to tell the president and say, hey they are using our people in a manner that we didn't send them out there.

RODRIGUEZ: Is there anything in the record to establish that the supervisor on the site knew that Ms. Alvarado was working on a staking machine?

GOMEZ: I don't believe there is other than he knew they were taking all their employees and placing them on the machines.

RODRIGUEZ: Some of those employees were working forklift positions, some were working assembly positions, some were working staking machine positions. Correct?

GOMEZ: Are you referring to the people that were leased out by Tandem, too? Yes. They had their Tandem leased employees were in various positions.

RODRIGUEZ: So it's your contention then the general broad(?) proposition that the supervisor was aware that some employees were working sufficient to establish that Tandem knew Ms. Alvarado was working a staking machine?

GOMEZ: Yes. If they knew that some were on there, that now captures their duty according to the staffing association code of ethics in Texas and the National...

ENOCH: Let's assume they have a duty. Then can't they purchase compensation coverage for their staff? Let's assume that they had this duty for a work safe place, they had this duty for proper training, they had all these duties, then can't Tandem take out worker's comp coverage in the event that any of their employees are injured on the job site for any of these causes? Can't Tandem get worker's comp because they've got these duties to their employees?

GOMEZ: They can, but that's not enough according to Dell Industry and according to the statutes of the Staff Leasing Services act. Because the statute recognizes that there is a possibility that someone who has worker's comp and that pays for it is not going to get the benefit. And how do I know that? Because they enacted the Staff Leasing Services Act and said, hey we're going to look at these types of companies and say you're statutory co-employers. For other companies, we're not going to give you that benefit.

ENOCH: Well let's go to the public policy argument that Tandem makes here. If as your argument is that there are certain duties for which an employer will be liable for worker's comp, and there will be certain duties that a different employer will be liable for for not compensation, wouldn't we inevitably be in any circumstance arguing over who had the duty of control of the particular function the employee was doing at the time of their injury? Shouldn't we allow the parties to contract. We've got this multiple function that these employees perform. There is one group that is going to be responsible for some of the functions and another group responsible for the others, why shouldn't we allow the parties to contract on who is going to be the compensation carrier?

GOMEZ: You should be allowed to contract, and that's what occurred in Brown v. Aztec out of Houston CA. What did they say there? They said, hey if you're going to do this you have to have a written contract between the staffing company and the client company. And what do

you say then? You say, hey we are going to be viewed as...

O'NEILL: They didn't say you have to have a written contract. They acknowledged that there was one.

GOMEZ: They acknowledged that there was one. The way they look at that case is there was a written contract between the client company and the staffing company. There was an additional written contract between the employee and them indicating that he was aware that these two companies were going to be viewed as his co-employer, and that that was going to take away some of his common law rights. So everyone up front is aware of what's going on. Tandem Staffing neither had a written contract with the client company. They just had this oral contract that's very _____ to what they agreed to. No mention of right of control. No mention of co-employers. No mention of joint employers. And in fact there's serious evidence in the record from Web Assembly's HR manager in his deposition, page 246-249, where he says, once inside of the Web's facility Ms. Alvarado was under the direction, control and supervision of Web, not Tandem.

So there's a lot of evidence where he even goes further to say that they were the only ones - Web was the only one that had the right to control Ms. Alvarado with regard to her work. More evidence indicating that Tandem did not have the right to control. And if they didn't have the right to control at that point, that means that they couldn't be joint employers, they couldn't be co-employers or anything like that.

HECHT: Even if they had a written agreement.

GOMEZ: No. If they did have a written agreement, I think the written agreement would supersede that because contractually I think you would be allowed to contract for that as long as the employee also agrees.

HECHT: Why wouldn't you argue still though that regardless of the contract, the superintendent on the job site was actually in control? Didn't you argue that?

GOMEZ: I don't believe you could argue that if the employee signed off on that agreement. If he knowingly waives his rights and he says I'm going to waive these rights in deference to getting these benefits and I understand that these two will be viewed as my co-employers, and I can't maintain any claims against them, I think that would be fair. We don't have that in this situation.

OWEN: Let me ask you about the comp claim against Web. Is that time barred since you didn't proceed on that theory?

GOMEZ: I'm not a worker's comp attorney. I don't know. What I do know is that her worker's comp benefits have stopped, the ones that she received from Tandem.

OWEN: The jury found that she was in fact Web's employee. Web had coverage for its own employees, not the Tandem employees. Is the TC's finding binding on Web's comp carrier?

GOMEZ: I don't believe that issue has ever been presented.

OWEN: And you haven't made a claim for comp against Web?

GOMEZ: Her comp benefits are stopped. I know that they got their designated doctor to say that she was okay and she could work...

OWEN: How does Tandem have _____ rights of reimbursement from Web's carrier if Web's carrier isn't liable?

GOMEZ: If they were liable and we were allowed to maintain a common law right of action claim against Tandem, then I think that the two carriers - and that would be a claim between them, not Ms. Alvarado. She wouldn't have to be a party to that. That would be Tandem saying, you have to subrogate us or we have to subrogate from you guys because you guys have been found to be the employer, and we're not the employer. Unless they had a contract where they say that we understand that these are a bunch of possibilities, but we're going to contract knowing my carrier is going to be pay regardless of who says what. We're going to be as co-employers and my carrier is going to pay. And if they do that, then that's what their contract pays for. If they don't do that, then I think it's fair game to allege what you're saying that Tandem's insurance carrier could then try to subrogate back from Web's insurance carrier and say, hey the jury has already found that your guys had the right to control, thus, you get the protection of the worker's comp bar, thus it's your insurance that should be on the hook.

O'NEILL: Is that TC finding binding on the worker's comp carrier - Web's comp carrier

GOMEZ: I don't know the answer to that. I would think that it would be if Tandem Staffing made - their insurance carrier made an allegation and made a claim against Web. Why? Because there's no contract between Tandem Staffing and Web that says otherwise.

OWEN: Was Web's comp carrier a party to all of this?

GOMEZ: No. Tandem Staffing would have you look at a case out of Beaumont called Ammean, which says exactly what they've been saying here: Hey, we pay the comp. We should get the benefit.

HECHT: And the employee got the benefits.

GOMEZ: Correct.

HECHT: Just like here.

GOMEZ: Yes.

HANKINSON: Why wouldn't she at least be required to elect her remedies here, either at common law or comp benefits from Tandem's carrier? I mean, she's asking for both.

GOMEZ: First of all, an election of remedies as an affirmative defense has not been alleged...

HANKINSON: I understand. Let's assume it's been raised. You're here asking us to allow her to recover comp benefits as well as damages for common law negligence.

GOMEZ: I don't believe that I am here doing that, because I believe that Tandem's carrier can subrogate from Webs. Tandem's carrier gets made whole and she's just alleging a straight common law claim

HANKINSON: I understand that. The way the posture of the case is right now it's Tandem's carriers that have paid her comp benefits, and it was Tandem for whom she is trying to recover damages for common law negligence. Right?

GOMEZ: Not exactly. We sued both companies for that very issue to say, hey, one of these two companies gets the benefit of the comp and one of them doesn't. That's what the case law says. That's what the statute says.

HANKINSON: But you say that there's never been a claim made for benefits under the Web policy. And so now all we're left with and the TC has determined that she's barred by the exclusivity provision from recovering common law damages from Web, so that leaves Tandem and its carrier in the position of being liable for both. Right? Is that the current posture of the case?

GOMEZ: That's the current posture of the case. They would have to subrogate to.

HANKINSON: So you're saying now that Tandem's carrier would subrogate to Tandem to the extent that Tandem pays common law damages?

GOMEZ: I could only assume that they would try to get their money back.

HANKINSON: My question though is that why under those circumstances if she proceeds against Tandem, both for comp benefits under its policy as well as for damages, why isn't she assuming the defense had been raised in a position in which she's elected her remedy for comp benefits and, therefore, cannot proceed to recover damages at common law?

GOMEZ: Because of the Arkin case. In the Arkin case they said, that the mere subscription to or providing worker's comp benefit is irrelevant.

HANKINSON: But it's not the subscription to it. It's the fact that she's actually received the benefits that is my cause for concern. She chose to file claim for benefits. She's actually been paid those benefits and now she says, I also want damages.

GOMEZ: I think that the way the statute is set up allows that. It allows you still go after third parties and make claims for your common law rights. The way I understand the way the worker's comp was set up is to protect one employer. If you look at the labor code in the statute,

they only say employer. Singular.

HANKINSON: But she chose which one she thought was her employer. Why didn't she pursue claims against both comp carriers and let it get sorted out at that level?

GOMEZ: I would disagree with the court. She did not choose. Tandem Staffing took her to the hospital. She had surgery, and Tandem's Staffing insurance carrier automatically went in there and started paying. She never said, I'm going to choose Tandem Staffing over Webs. That was something that was done between Tandem Staffing and Web, and she made no election.

JEFFERSON: The bottom line is she would be under your argument entitled to a double recovery. She could get her benefits from Tandem and keep those, and then sue Tandem and recover damages on a negligence claim? She would get double recovery and you say public policy provides that that's fine.

GOMEZ: I think they clearly provides - if you want to phrase it as a double recovery that allows you to go get claims...

JEFFERSON: Well she gets more in damages than she's damaged. Apparently part of her claim has been covered by Tandem's worker's comp carrier. You're now suing Tandem in negligence. I don't suppose you're going to accept some sort of credit against a judgment in favor of Alvarado v. Tandem, so she would receive both the benefits and damages. And so she would be compensated more than she was damaged, and you say that's okay?

GOMEZ: In every case where you make a third party claim. If you receive worker's comp benefits and then you make a claim against a third party...

JEFFERSON: Well the carrier's entitled to the first monies in that context. But you're saying here, the carrier can get it from Web's carrier. But I'm asking, does the plaintiff here would she recover both? She would get the benefits plus damages...

GOMEZ: I don't think so. If they proved up the amount that they had previously paid out, I think they would have to get a credit for that. That would only be fair. We've not alleged that she would be entitled to the worker's comp benefits from Tandem's carrier and then entitled to the common law rights. Whatever they paid out they would get a credit for. Whether they subrogated from Web and then Web got the credit, or whether Tandem didn't subrogate and they would get the credit. Either way there would be a credit there.

JEFFERSON: Against plaintiff's recovery?

GOMEZ: Against any recovery that plaintiff would have at common law.

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REBUTTAL

SNYDER: This may seem like a relatively simple case because of the relatively few issues that were raised in this field. However, at least I feel from the questions that have been raised by this court every time you answer one question three or four others seem to pop up.

I can only say two things. That is, if indeed the court affirms that right to control is the test for determining which of these two entities is entitled to protection of the comp bar, then I would suggest that Tandem had no duty to provide a safe workplace for Ms. Alvarado under the circumstances of this case. If we had no right to control her activities as the human resources director of Web suggests, once she arrives on their property then how indeed can we fulfill any duty or obligation that we have to provide her with a safe place to work.

HANKINSON: Just because Web had a duty does not mean that Tandem as well would not owe her a duty. Correct?

SNYDER: That again assumes I believe that both are considered employers.

HANKINSON: No. The duty could arise under other circumstances. My point is that more than one person could owe her a duty in the workplace. Do you agree with that?

SNYDER: I do agree with that under certain circumstances. I think you may be alluding to the fact that Tandem might assume a duty that it might not otherwise have had under those circumstances.

HANKINSON: That's my point is is that there's not a matter of the duty being exclusively assigned to one person. In fact, more than one could owe a duty based on different facts that would give rise to the duty.

SNYDER: That is true. But I would likewise suggest that under the circumstances and facts of this particular case, there is no evidence that Tandem assumes...

JEFFERSON: Well Mr. Gomez says there is. He says that there is the Texas Association of Staffing. And he cited us to transcript pages that says that Tandem had an obligation to inspect their work site to ensure that employees that are going to Web are receiving safety training. Is that true or is not true?

SNYDER: I believe that is true. And I think that the record does reflect that Ms. Alvarado did receive general safety training before she was asked to go to Web's premises to work there. But it was not training that was specific to working or using the staking machine, I don't believe that Tandem contemplated that she would be doing when they sent her there.

HANKINSON: Well that might go to the question of whether or not there was a breach of the duty. If Web didn't something else with her when she got there, it may very well be then that Tandem did not breach its duty to her. But the fundamental question that we've got to decide is whether or not they owed a duty in the first place.

O'NEILL: But if they owed a duty, they owed a duty as what? As an employer.

SNYDER: If they owed a duty, then I would suggest then they owed the duty as an employer. And if deed they are the employer, then it seems to me to be somewhat of a contradiction to say that okay, Tandem you're not the employer, but yet you still have certain obligations and duties as an employer.

O'NEILL: It seems to me that we don't really need to do any damage to the right of control test to go your way. It strikes me that if they both owed duties to Ms. Alvarado, it is as an employer, and that just because you're a borrowed servant doesn't mean you're not still the servant of the original one that you're borrowed from. And so I guess where I keep focusing back on is the no employer doctrine. Can you help that analysis a little more? That's not inconsistent with the right of control test. In fact it is in tandem with the test.

SNYDER: No it is not inconsistent with it. The court in Brown v. Aztec Brig Equipment recognized that under certain circumstances a co-employer/joint employer status could exist. It's been alluded to in some other cases, although that issue was never specifically decided. But we would submit that it's certainly not inconsistent with the right of control test. And it's not inconsistent with the proposition that Tandem should likewise enjoy the protection of the worker's comp act.